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# Targeted update of the OECD Guidelines for Multinational Enterprises

Public consultation | 10 January 2023 - 10 February 2023

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## Submissions

March 2023

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OECD Centre for Responsible Business Conduct,  
Organisation for Economic Co-operation and Development  
Paris, France



## Background

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The OECD Guidelines for Multinational Enterprises (the Guidelines) set out recommendations from governments to businesses for ensuring responsible business conduct in all areas where business interacts with society, including human rights, labour rights, environment, bribery, consumer interests, as well as disclosure, science and technology, competition, and taxation. The OECD Guidelines are complemented by Implementation Procedures, which set out the role and functions of the National Contact Points for Responsible Business Conduct.

Between 10 January - 10 February 2023, the OECD invited interested stakeholders to comment on a consultation draft of potential updates to the Guidelines. The public consultation was open to all interested stakeholders from all countries, including businesses, industry groups, civil society organisations, trade unions, as well as academia, interested citizens, international organisations and governmental experts (including from non-Adherent countries).

## Third party content disclaimer

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# Public consultation: Targeted update of the OECD Guidelines for Multinational Enterprises

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(This question is mandatory)

Name of submitting organisation or individual

Arisa

Sandra Claassen, director

(This question is mandatory)

Please identify the organisation type of the submitting party

Choose one of the following answers

Please choose... organisation	Business or business association <b>Civil society organisation</b>	Trade union or worker International
organisation	Academia or research organisation	Other:            Other:

## General comments

Arisa – Advocating Rights in South Asia – works to improve working conditions in supply chains in South Asia. Arisa promotes responsible business conduct and sound application of human rights due diligence. We work directly with businesses (e.g. in multistakeholder initiatives) as well as through advocacy with governments and directly supporting partner organisations in South Asia in improving the situation of workers in supply chains. You can read more on Arisa [here](#).

Arisa urges the OECD to revise the 2011 Guidelines as we experience that the Guidelines are out of date on several aspects. In the consultation draft some changes in the texts are adequate in our view, while other issues are not addressed yet.

An example of the first is '**meaningful stakeholder engagement**'. The additions on this topic in various chapters and the specific text in chapter 2, commentary 28 are an improvement that definitely needs to be implemented.

Nevertheless on the issue of **human rights defenders** the revised texts doesn't reflect the current state of the debate, nor it is what is needed in the practice of RBC.

Human rights defenders speaking up against business-related impacts on the rights of communities and workers continue to experience an increase in risks to their safety and security. Data collected by various organizations indicate that the number of defenders who have been killed, physically harmed or threatened is on the rise already for years. This fact has been flagged by, among others, several UN organisations. The situation of human rights defenders is closely connected with another tendency, shrinking civic space.

This has led so far to broad recognition that it is not only the duty of business **to refrain** from violating the rights of others, but also that they have a **positive obligation to support a safe and enabling environment for human rights defenders** in the countries in which they are operating. The UN Council on Human Rights, adopted a [Guidance on ensuring respect for human rights defenders](#) in 2021. This was developed in the UN working group on business and human rights that prioritized the topic due to the alarming developments worldwide. Besides recommendations for governments, this guidance includes specific guidance for businesses. Along the same lines as the 'pillars' in the UNGP's itself, the UN recognizes that not only governments bare responsibility but businesses also have a role to play in engaging with, and safeguarding the rights of, human rights defenders.

Furthermore strengthening protection of human rights defenders is mentioned as a key priority for the working group in the next decade of the business and human rights agenda, so more development of guidance, good practices and attention on the subject can be expected. There are also other initiatives of guidance for business on the protection of human rights defenders. For example this [Investor Briefing](#) by the Business & Human Rights Resource Centre and a business initiative, the [Business Network on Civic Freedoms and Human Rights Defenders](#).

The OECD itself is doing important [work on civic space](#), such as the December 2022 report [The Protection and Promotion of Civic Space](#). This report recognizes the importance of the promotion and protection of civic space. Although this work focusses on OECD members, and on obligations for states in the protection of civic space, it seems a logical step to connect this work with responsible business conduct, the Guidelines and specific responsibilities for enterprises.

Another issue important for Arisa is discrimination, specifically **caste-discrimination**.

In South Asia hundreds of millions of people - not just in India - are affected by caste-discrimination. Caste systems divide people into unequal and hierarchical social groups. Those at the bottom of hierarchy (Dalits) are considered lesser human beings.

In the business and work-sphere caste-discrimination affects workers. Many violations of human and labour rights like forced labour, payment below minimum wage, dangerous and unhealthy working conditions without adequate protection, child labour, gender discrimination and sexual harassment on the work floor are closely interrelated with caste-discrimination. This is especially the case in the agriculture, leather, garments, carpet weaving, natural stone, mineral processing, and construction sectors, as well as industrial sectors like the IT sector. Therefore business operation of MNE's sourcing in South Asia are most likely linked with caste-discrimination. Nevertheless caste-discrimination is hardly recognised as a salient risk that should be prioritised. Even if MNE's are aware of adverse impacts in their supply chain and implement human rights due diligence following OECD guidance for responsible business conduct, they might not be able to cease, prevent or mitigate these impacts because the underlying root cause (caste-discrimination) is overlooked.

Caste-discrimination is often the root cause of other adverse impacts and violations of labour rights and human rights. As caste-discrimination may be deeply embedded in the culture, it is often overlooked and not recognised by local actors and suppliers. Therefore it poses specific challenges to the due diligence practice of MNE's sourcing in South Asia. Mentioning caste-discrimination and Dalits explicitly in the OECD-guidelines is an important first step towards more recognition of caste-discrimination as a major RBC issue.

Several international standards already include caste in their documentation, such as [the ILO Convention concerning Discrimination in Respect of Employment and Occupation, C111](#); the [draft UN Principles and Guidelines for the Effective Elimination of Discrimination based on Work and Descent](#) and the CESCR General Comment No. 20 on non-discrimination.

## Chapter 1: Concepts and Principles

Please include any comments you wish to make on this specific chapter of the consultation draft (max. 2000 characters)

## Chapter II: General Policies

### On human rights defenders

#### Guideline 10.

Compared to the UN guidance on human rights defenders, mentioned above under General Comments, this text only gives 1 element of what should be a broad package, including positive obligations.

Suggested new text:

**An enterprise should be required to continually assess, address and mitigate risks to HRDs in their investments, operations and value chains, including by integrating accessible, safe and respectful engagement with local stakeholders and HRDs into their entire due diligence process.**

### On discrimination

#### Commentary 18 and/or to commentary # 19

Both could be complemented by a sentence about the need to pay adequate attention to prioritization. In case there are more adverse impacts at the same time, they may be intertwined and – more importantly perpetuated by an underlying problem. A thorough analysis is needed and the underlying problem should be prioritized. This is the case in caste and descent based discrimination.

#### Commentary 28

Suggested addition:

... and remove potential barriers to engaging with stakeholders in positions of vulnerability or marginalisation **including in cases of caste and descent based discrimination.**

## Chapter III: Disclosure

Please include any comments you wish to make on this specific chapter of the consultation draft (max. 2000 characters)

## Chapter IV: Human Rights

### On discrimination

#### Commentary 40

Suggested addition:

... persons belonging to national or ethnic, religious and linguistic minorities; **Dalits**; women; children; persons with disabilities; and migrant workers and their families.

### On human rights defenders

An additional commentary is needed, for example between 45 and 46, that states that **the human rights due diligence process includes the protection of human rights defenders: an enterprise should continually assess, address and mitigate risks to HRDs in their investments, operations and value chains, including by integrating accessible, safe and respectful engagement with local stakeholders and HRDs into their entire due diligence process.**

Preferably this new text refers for further guidance to the [UN guidance on ensuring respect for human rights defenders](#).

## Chapter V: Employment and Industrial Relations

### **On discrimination**

#### Principle 1.e.

Suggested addition:

*Be guided throughout their operations by the principle of equality of opportunity and treatment in employment and not discriminate against their workers with respect to employment or occupation on such grounds as race, **caste**, colour, sex, age, religion, political opinion, national extraction or social origin, persons with disabilities or other status, unless selectivity concerning worker characteristics furthers established governmental policies which specifically promote greater equality of employment opportunity or relates to the inherent requirements of a job.*

#### Commentary 58

Suggested addition:

*enterprises are also encouraged to invest, to the greatest extent practicable, in training and lifelong learning while ensuring equal opportunities to training for women and other vulnerable groups, such as youth, low-skilled people, people with disabilities, migrants, older workers, **Dalits** and Indigenous Peoples*

## Chapter VI: Environment

Please include any comments you wish to make on this specific chapter of the consultation draft (max. 2000 characters)

## Chapter VII: Combatting Bribery, Bribe Solicitation and Extortion

Please include any comments you wish to make on this specific chapter of the consultation draft (max. 2000 characters)

## Chapter VIII: Consumer Interests

Please include any comments you wish to make on this specific chapter of the consultation draft (max. 2000 characters)

## Chapter IX: Science, Technology and Innovation

Please include any comments you wish to make on this specific chapter of the consultation draft (max. 2000 characters)

## Chapter X: Competition

Please include any comments you wish to make on this specific chapter of the consultation draft (max. 2000 characters)

## Chapter XI: Taxation

Please include any comments you wish to make on this specific chapter of the consultation draft (max. 2000 characters)

### Implementation procedures

Please include any comments you wish to make on this specific part of the consultation draft (max. 4000 characters)

| February 17, 2023

# Consultation Draft: Targeted update of the OECD Guidelines for Multinational Enterprises and their Implementation Procedures

## Article One Comments

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We at Article One, a specialized strategy and management consultancy with expertise in human rights, responsible innovation, and sustainability, welcome and appreciate the opportunity to provide comments on the Organisation for Economic Co-operation and Development (OECD) Consultation Draft: *Targeted update of the OECD Guidelines for Multinational Enterprises and their Implementation Procedures*.

### General Comments

We appreciate the proposed updates to the Guidelines chapters and to their implementation procedures. Many of the proposed updates will help to more fully align the Guidelines with the risk-based approach to human rights due diligence across the value chain taken by the [United Nations Guiding Principles on Business and Human rights](#) as well as emerging regulatory expectations for mandatory human rights due diligence.

All references below refer to new additions in the Consultation Draft.

### Chapter II: General Policies

#### Section A.

A.5 We welcome the addition, in A.5., of increased transparency and integrity in lobbying activities. The proposal to expand transparency of lobbying activities is important for broader alignment with substantive priorities across the Guidelines.

A.10 We also appreciate the introduction of this new paragraph, focused on retaliation and reprisals. The specific mention to refrain from undue pressure or reprisals for all Submitters of Specific Instances including press is welcome. An emphasis on human rights and environmental defenders is a welcome and important addition that communicates their vulnerability, critical role, and importance for responsible business conduct.

#### ABOUT ARTICLE ONE

Article One is a specialized strategy and management consultancy with expertise in human rights, responsible innovation, and social impact. We partner with the world's leading companies to drive transformative change that places people at the center of business.



A.14 We welcome the addition of paragraph 14, to provide for remediation, including the specific mention of legitimate processes.

A.15 In paragraph 15, we consider an important addition to include investee companies, clients, buyers, and joint venture partners. Additionally, clarification to the concept of ‘business relationships’.

A.16 Paragraph 16 is improved by the needed addition of ‘meaningful’ stakeholder engagement, in conjunction with the appropriate wider reference to ‘activities’, and removal of ‘planning [...]’.

A.17 We welcome the additions.

## **Section B.**

We welcome that ‘supply chain management’ is replaced with ‘business conduct’.

## **Commentary**

2. We welcome the addition of parties potentially affected by activities, as well as the inclusion of in consultation of social partners and other stakeholders.

6. We welcome this clarification and reference.

12. We consider the commentary here much needed, as standard setting and guidance on the credibility and transparency which is required within self-regulatory practices and MSIs. It is an important addition to specify that that enterprises remain individually responsible for ensuring that their due diligence is carried out effectively, notwithstanding other collaborations at industry or MSI levels.

14. The introduction of the importance of civic space, including freedom of expression, association and assembly, is significant and welcome. We welcome the recognition of the crucial role played by those who highlight behavior which is contrary to responsible business conduct, and that freedom of expression, assembly and association enable a shared civic space. We recognise that the use of SLAPP suits is a consistent practice, and welcome its mention within pressure, amongst others.

15. We welcome the inclusion of the six steps of the OECD Due Diligence framework, in addition to highlighting the role of related OECD sectoral due diligence guidance.

16. We welcome the recognition that due diligence is a continuous process, that an enterprise's relationship to an adverse impact is not static, and its contribution to a harm may shift in relation to context and developments. The clarification of 'business relationships' is welcome, to include investee companies, clients, and joint venture partners. Similarly, the clarification of supply chain to include entities in the supply chain which supply products or services that contribute to the enterprise's own operations, products or services or receive products or services from the enterprise, as well as State and non-State entities directly linked to its business operations, products, or services.

17. We welcome the addition of adverse impacts associated with enterprise operations, products, or services. We welcome also reference to, throughout due diligence, read in line with A11-13 and related commentary.

19. We welcome the addition of other business relationships.

20. We welcome the inclusion of 'financing'. Additionally, we consider it is an important addition that business relationships include relationships beyond contractual relationships, such as sub-suppliers and buyers. It is beneficial to include that business relationships may or may not be operating in or from countries adhering to the Declaration.

21. We welcome the removal of 'in the context of its supply chain'.

24. We consider these positive clarifications in relation to opportunities to exercise leverage, when to do so, as well as support via training, collaboration, capacity building, and linking incentives with responsible business conduct. We consider that positive engagement on responsible business conduct with policy makers, and communicating on responsible disengagement as important additions.

25. We welcome the removal of 'with a supplier'. We welcome the specification of responsible disengagement as a last resort. Reference to engagement with potentially affected parties in a timely manner is needed and welcome. We welcome the addition of efforts to mitigate the effects of measures to mitigate adverse impacts related to disengagement.

26. We welcome the deletions and additions.

27. We welcome the deletions and additions.

28. We welcome and consider crucial the additions on meaningful stakeholder engagement, specifications of what that is, and inclusion of practical supports and guidance. We welcome

the addition of references to cultural ties to natural resources, recognizing this issue regularly arises.

### Chapter III: Disclosure

We consider the additions consistent with trends, including regulatory trends, with regard to accurate disclosure, including relating to due diligence and governance.

1. We welcome additions regarding disclosure.
2. We welcome the addition of beneficial owners, particularly given the ability to structure. We welcome the addition in 2d) concerning the composition of the Board, as well as the inclusion of how governance measures are implemented in 2h).
3. We welcome the additions regarding disclosure of due diligence, and all related additions of specifications of what responsible business conduct information includes within a) to g).
4. We welcome the additions regarding publication of inaccurate or misleading information, as well as the reference to assurance of such information.

### Commentary on Disclosure

28. We welcome the additions supporting the purpose of and value of transparency and accountability.
29. We welcome the specification of 'material information', and additional reference to 'other stakeholders'.
30. We welcome the additions and deletions.
31. We welcome the additions and deletions.
32. We welcome the addition of this paragraph.
33. We welcome the addition of this paragraph.
35. We welcome the addition of the reference to disclosure in accordance with international standards, and due diligence as a support to enhancing credibility, reliability, and comparability.

36. We welcome the inclusion of references to international standards, and to climate change.

37. We welcome the additions, including reference to SASB.

38. We welcome the additions, particularly for enterprises to proactively communicate RBC information. Additionally, we appreciate the consideration for accessibility, including access for remote or impoverished directly affected communities.

39. We welcome the addition of this paragraph, supporting credibility, reliability, and comparability.

## Chapter IV: Human Rights

We welcome the additions to the Human Rights Chapter.

4. The introduction of “publicly available” in paragraph 4 as well as commentary paragraph 44 is an important addition that aligns with evolving industry practice.

We would welcome additions relating to gender responsive design within due diligence, gender responsive implementation and gender sensitive remedy.

### Commentary

40. We welcome the inclusion of additional steps to assess and address impacts on individuals at heightened risk, including indigenous peoples, and the reference to UNDRIP. Additionally, we welcome the reference to respecting international humanitarian law in situations of conflict.

We would welcome the inclusion of heightened expectations of responsible business conduct and due diligence in conflict affected and high risk areas, including contexts of repression.

45. We welcome the recognition of intersectionality within due diligence.

46. We welcome and consider important additions relating to provide for or cooperate in their remediation through legitimate processes, and related deletions. We interpret as reference to the related standards also within the UNGPs.

## Chapter V: Employment and Industrial Relations

1.a) We welcome the recognition of the right of workers to join a trade union or representative organisation of their choosing.

1.c) We note the deletion of the ‘prohibition’, which is found in new related legislation, such as the German Supply Chains Due Diligence Act

1.d) We welcome the additions and deletions.

1.e) We welcome the additions. We consider the recognition of gender identity and expression and related would be welcome.

1.f) We welcome this important addition relating to ILO Standards on work related health and safety and work related accidents and hazards. We note the inclusion of a prohibition to disregard occupational health and safety in particular relating to accidents and hazards which is found in new related legislation, such as the German Supply Chains Due Diligence Act

## Commentary

52. We welcome these additions. We note that consultation with survivors or forced and child labour could reference to protections, including protection from revictimization.

We welcome the other proposed changes across the chapter, and in the Commentary.

## Chapter VI: Environment

We recognise the crucial role of the OECD Guidelines in standard setting with regard to Environment, particularly as environment is not specific within other international frameworks such as the UNGPs. We note also environmental principles, such as prevention, precaution and polluter pays.

We welcome the very important additions relating to risk based due diligence relating to environmental impacts, and a) to h).

1. We welcome the additions. We would welcome the inclusion of ‘time bound’ in relation to targets in 2 b) and 2 c). We welcome the addition of 2 d). We would welcome consideration of measures to halt harms to environment, cross-referenced to the additions in 6.
2. We welcome the additions, and in particular reference to ‘just transition’.
3. b) We welcome the addition. In relation to ‘timely’ engagement, we note that environmental harm or damage may not become apparent for some years, and it is

important to consider the moment at which that harm becomes apparent to those who are potentially or actually affected.

4. We welcome the addition particularly of 'known or reasonably foreseeable' environmental health and safety impacts, as well as 'enhancing positive effects'.
5. We welcome the addition of 'irreversible'.
8. We welcome all the changes, and note the cross reference to environmental impacts listed in para 1
9. We welcome the additions.
10. We welcome the additions.

### Commentary Environment

60. We welcome these very important statements regarding environment. We welcome the inclusion of references, *inter alia*, UN FCCC, Paris Agreement, and 'relevant regional environmental agreements'.

61. We welcome these additions, and note "environmental management" should be interpreted in line with Paragraph 1 and include carrying out risk based due diligence in line with the recommendations articulated in Chapter II. Environmental management. We particularly welcome the inclusion of 'workers' as well as 'communities and societies'. We note the important reference to 'In this context, the VGGTs call for investments that do no harm, and safeguard against dispossession of legitimate tenure right holders and environmental damage.'

62. We welcome the inclusion of what are 'adverse environmental impacts'.

63. We welcome, and note that environmental harm can have significant related negative impacts on the livelihoods of individuals and communities, with related negative effects on the realisation and enjoyment of other rights.

67. We welcome the important recognition of public disclosure and environmental standards, which are also fast evolving. Additionally, we welcome the inclusion of meaningful engagement with 'local communities, vulnerable or marginalized groups, persons possessing special rights or legitimate tenure rights, and Indigenous Peoples, *and with the public-at-large* is important where they are or may be affected by such impacts (*italics added*).

We welcome particularly the addition of new paragraphs 74 to 78 inclusive, and 82.

### Chapter VII: Combatting Bribery and Other Forms of Corruption

We welcome the changes proposed. In particular we welcome in the references, in 2, to internal controls, ethics and compliance programmes or measures for preventing and detecting all forms of corruption should also include carrying out risk-based due diligence as described in Chapter II.

## **Commentary**

74. We welcome the addition of this paragraph.

75. We welcome the addition recognizing that corruption can enable human rights abuses. Additionally, recognizing that Corruption disproportionately affects those belonging to marginalized or vulnerable groups or populations and can exacerbate gender inequalities. We note the important inclusion of sexual orientation amongst other factors.

79. We welcome the additions for meaningful and wider stakeholder engagement.

## **Chapter VIII: Consumer Interests**

We welcome recognition in these changes of the development of new technologies which have transformed digital and financial services.

We welcome including recognition of improper use or misuse in 1. We welcome the important addition of relevant disclosures regarding privacy in 2, and references to crucial protections of consumer privacy in 6.

## **Commentary**

86. We welcome addition that Enterprises should also assure the accuracy of any claim regarding environmental or social performance.

## **Chapter IX: Science, Technology, and Innovation**

We very much welcome and appreciate the proposed updates to Chapter IX. These updates offer important clarifications around the responsibility for risk-based due diligence that extends from technology development and financing to the sale and end use of technology.

1. New paragraph 1 helpfully and succinctly describes the scope of due diligence.

## **Commentary**

100. This paragraph helpfully spells out steps the technology sector should take when selling, licensing, or exporting technology. The important proposed updates across this Chapter would more fully align the Guidelines with the risk-based approach to human rights due diligence across the value chain taken by the [United Nations Guiding Principles on Business and Human rights](#) as well as emerging regulatory expectations for mandatory human rights due diligence.



## **CEMSOJ's submission for the targeted update of the OECD Guidelines for Multinational Enterprises**

[Community Empowerment and Social Justice Network \(CEMSOJ\)](#) welcomes the consultation draft for targeted update of the OECD Guidelines for Multinational Enterprises (MNEs) and their Implementation Procedures as well as the public consultation process undertaken on the draft. We strongly urge the OECD to revise the 2011 Guidelines as they are out of date and incomplete and acknowledge that the consultation draft reflects some progress on the 2011 Guidelines.

However, serious concerns remain in the consultation draft and many issues still need to be addressed. At the same time, the consultation process should have been carried out more effectively, including through in-person consultations with targeted stakeholders and groups, such as Indigenous Peoples' representatives, human rights and environmental defenders, and women's rights organizations, among others, engaged in promoting Responsible Business Conduct (RBC). The consultations should have been carried out over a longer period of time and in different regions/countries with targeted outreach to representatives of communities and groups affected by operations of MNEs and their support groups. Such consultations should be carried out in culturally appropriate manner and with provision of interpretation in local languages understood by the representatives. The consultations further should have been undertaken in phases so that those consulted could see if their comments have been addressed in the revised drafts before finalizing the updated Guidelines.

In particular, CEMSOJ welcomes the additions on Indigenous Peoples' rights under the chapter of "Human Rights" of the consultation draft. However, the changes made are minor and inadequate given the serious impacts on the rights of Indigenous Peoples, including to their lands, resources and life with dignity, due to business operations. We thus call on the OECD to modify the draft to explicitly note that

1. Indigenous Peoples have rights to their lands, territories and resources and to self-determination, among other rights as guaranteed in the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) that MNEs should respect regardless of the protections provided, or lack thereof, in national laws and policies in the countries they operate.
2. MNEs must undertake human rights due diligence (HRDD) as described in the UN Guiding Principles on Business and Human Rights. Such HRDD measures must include, among other things, human rights impact assessments carried out at the outset of the business operation to determine the viability of the operation through meaningful consultation with affected individuals or communities, and other relevant stakeholders while giving special attention to those facing heightened risks of business related human rights abuses, such as women and Indigenous Peoples, among others. MNEs must respect the findings of such assessment and refrain from undertaking any business operation with serious human rights impacts.

If Indigenous Peoples will be affected by any business operation of MNEs, the HRDD measures must include consultations at the outset of the operation to obtain their free, prior and informed consent (FPIC). MNEs must then respect that the concerned Indigenous Peoples have the right to provide or withhold their consent for such operation or provide consent with conditions, and accordingly cancel, suspend or proceed with their operation. HRDD measures to obtain FPIC of the affected Indigenous Peoples must be undertaken throughout the operation, including when there is any change in the operation that may affect the Indigenous Peoples, and must include effective remedy for harms caused by the business operation determined in conjunction with the concerned Indigenous Peoples with respect to their laws and customs.

3. MNEs must carry legal liability for human rights abuses that may arise from their own business activities or from their business relationships in line with international human rights standards as determined by UN human rights mechanisms, regardless of national legal and policy framework in the countries they operate in. States must ensure that their domestic law provides for or establishes effective, proportionate, and dissuasive criminal, civil and/or administrative penalties for human rights abuses of MNEs, including through suspension of or sanctions from public funding or procurement, blacklisting from public stock markets and/or cancellation of registration and defaulting such MNEs as per the gravity of the abuse. In particular, criminal offences against human rights and environmental defenders by persons associated with MNEs, including through business relationships, must carry serious criminal penalties against the MNEs, including their leadership.

Further, CEMSOJ welcomes the improvements towards strengthening the Implementation procedures in the consultation draft. However, the National Contact Points (NCPs) with critical implementation role of the Guidelines need significant change in mandate and authority for effective implementation of the Guidelines. The NCPs must be provided with quasi-judicial powers so that they can make effective determinations on the complaints submitted to them on violations of the Guidelines. At the same time, they should be provided with powers to impose temporary suspensions and sanctions as mentioned above on the MNE against which credible complaint of human rights abuse or other violation of the Guidelines has been registered. The NCPs should also have stronger role in ensuring that the individuals or communities harmed by business operation of MNEs against the Guidelines are provided effective remedy through the MNE or other responsible authorities, such as the concerned government entities within their jurisdiction.

10 February 2023

Ms. Christine Kaufman  
Chair of the Working Party on Responsible Business Conduct  
Organisation for Economic Co-operation and Development (OECD)

Mr. Allan Jorgensen  
Head of the Responsible Business Conduct Unit  
OECD

Dear Ms. Kaufman and Mr. Jorgensen:

We send you this letter on behalf of 31 civil society organizations and human rights experts worldwide urging you to include **strong protections for human rights defenders in the updated OECD Guidelines for Multinational Enterprises**. We are pleased that the OECD has identified human rights defenders as a priority issue for the update but are deeply concerned that the current draft would undermine an emerging international consensus on the expectations for enterprises regarding human rights defenders. We believe that the OECD should adopt a stronger standard than what is proposed in the consultation draft.

Since the OECD Guidelines were last updated over a decade ago, civic space has closed dramatically and acts of retaliation against human rights defenders have grown in number and complexity. Many of these attacks link to business activities and range from outright physical and gender-based violence to arbitrary arrests, strategic lawsuits against public participation (SLAPPs) and other forms of judicial harassment, acts of intimidation, illegal surveillance, threats, and smear campaigns. Retaliation rarely happens in isolation; often, the killing of a human rights defender occurs within a broader, escalating atmosphere of threats, criminalization, discrimination, and harassment, both online and offline. Each act of retaliation can have a profound chilling effect on civic space, discouraging others from speaking up about issues of public concern.

Civil society, international organizations, and some governments have scaled up their efforts to respond to this crisis. The private sector has lagged behind but is beginning to take action. Fortunately, best practices have emerged through a decade of experience, case study research, and multi-stakeholder dialogue. There is now a general understanding that businesses have a responsibility to adopt and implement a policy of zero tolerance for retaliation against human rights defenders. Best practices for protecting human rights defenders are reflected in numerous emerging international standards, including recommendations made by the UN Working Group

on Business and Human Rights,<sup>1</sup> the UN Special Rapporteur on Human Rights Defenders,<sup>2</sup> the UN Committee on Economic, Social and Cultural Rights,<sup>3</sup> the International Finance Corporation and IDB Invest,<sup>4</sup> the Voluntary Principles on Security and Human Rights,<sup>5</sup> the Shared Space Under Pressure project,<sup>6</sup> investors,<sup>7</sup> and companies themselves.<sup>8</sup>

As the OECD updates its Guidelines, it is essential that its human rights defenders approach remains coherent with and reinforces, rather than contradicts or undermines, the efforts that are already underway. By aligning with emerging best practices, the OECD could play a significant role in encouraging wider uptake of these standards.

We urge the OECD to adopt updated language that reinforces existing standard setting initiatives, ensures responsible business conduct, and empowers civil society to continue playing its critical role of holding businesses to account. To do this, we recommend that the OECD:

1. **Develop the human rights defenders language in the next draft of the OECD Guidelines through a robust consultative process.** This includes direct engagement with key experts, including human rights defenders who have experienced business-related attacks firsthand, Indigenous rights advocates, rural and peasant defenders,<sup>9</sup> whistleblowers, journalists, civil society organizations that support human rights defenders and Indigenous Peoples, the UN Special Rapporteur on Human Rights Defenders, the UN Working Group on Business and Human Rights, and the individuals who are working to develop the private sector standards referenced above.

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<sup>1</sup> UN Working Group on Business and Human Rights, Guidance on Ensuring Respect for Human Rights Defenders (2021).

<sup>2</sup> UN Special Rapporteur on Human Rights Defenders, Doc. A/72/170 (2017).

<sup>3</sup> In addition to a wide range of country-specific recommendations, or ‘Concluding Observations’, see UN CESCR, General Comment No. 24 on State Obligations in the context of Business Activities (2017) and General Comment No. 26 on Land and Economic, Social and Cultural Rights (2022).

<sup>4</sup> IFC, Position Statement on Retaliation Against Civil Society and Project Stakeholders (2018); IFC and IDB Invest, Good Practice Note for the Private Sector: Addressing the Risks of Retaliation Against Project Stakeholders (2021).

<sup>5</sup> The secretariat of the Voluntary Principles on Security and Human Rights will issue forthcoming guidance on human rights defenders in early 2023.

<sup>6</sup> Bennett Freeman et al., Business and Human Rights Resource Centre and International Service for Human Rights, Shared Space Under Pressure: Business Support for Civic Freedoms and Human Rights Defenders - Guidance for Companies (2018).

<sup>7</sup> Investor Alliance for Human Rights, Business and Human Rights Resource Centre, and International Service for Human Rights, Safeguarding Human Rights Defenders: Practical Guidance for Investors (2020).

<sup>8</sup> Business Network on Civic Freedoms and Human Rights Defenders, “Supporting Civic Freedoms, Human Rights Defenders and the Rule of Law” (2018). The OECD stocktaking report and the Shared Space Under Pressure report both mention specific companies that have adopted human rights defenders policies.

<sup>9</sup> UN Office of the High Commissioner for Human Rights, “UN Declaration on the Rights of Peasants: UN experts call for action ahead of anniversary,” 16 Dec. 2022.

2. **Include framing language that businesses everywhere have a baseline responsibility to “do no harm” to human rights defenders and civic freedoms.** This includes ensuring that businesses do not:
  - Cause an adverse impact on human rights defenders through their own actions or failure to act;
  - Contribute to an adverse impact on human rights defenders, either *in parallel with* external public or private entities (such as governments or security forces) or *through* external entities (such as suppliers, users, or customers);
  - Directly link their products, services, or operations to an adverse impact on human rights defenders through a business relationship.<sup>10</sup>
  
3. **Ensure that the language in the updated OECD Guidelines reflects emerging best practices by encouraging businesses to adopt zero tolerance policies that are designed in consultation with human rights defenders themselves, integrated into the business’s human rights due diligence, and include the following elements:**
  - High level commitment from company leadership to zero tolerance for retaliation against human rights defenders;
  - Awareness raising on the substance of the policy to the enterprise’s employees, business partners, contractors, and local stakeholders, including the procedures the company will follow when issues or allegations arise.
  - Operational clarity on who is considered a human rights defender, consistent with the UN Declaration on Human Rights Defenders;
  - Planning both for risk mitigation (before acts of retaliation occur) and incident response (after these acts occur);
  - Extra measures for vulnerable subgroups of human rights defenders, such as environmental defenders, Indigenous communities, rural and peasant defenders, LGBTQ advocates, and others who might face discrimination or marginalization;
  - Access to secure, effective, accessible, and non-retaliatory grievance processes; and
  - An open-door approach that welcomes ongoing engagement with civil society and human rights defenders on issues of concern.
  
4. **Incorporate the following technical revisions into the next draft of the Guidelines:**
  - “Undue pressure” standard: The OECD proposes to use a standard of “refraining from applying undue pressure” on human rights defenders and other stakeholders.<sup>11</sup> We strongly oppose use of the term “undue pressure,” which does not align with international standards on human rights defenders, does not take a

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<sup>10</sup> See Investor Alliance for Human Rights et al., *Safeguarding Human Rights Defenders*, note 7.

<sup>11</sup> In the draft OECD Guidelines, see chapter 2, paragraphs 9 and 10; chapter 2, commentary 14; page 60, paragraph 8; and page 70, paragraph 26.

rights-based approach, and suggests that “due” pressure is acceptable. Rather, we encourage the OECD to use the approach described above: that enterprises should refrain from causing, contributing, or directly linking their products, services, or operations to acts of retaliation against human rights defenders. We recommend using the term “act of retaliation” or another term decided in coordination with the UN Special Rapporteur on Human Rights Defenders and the UN Working Group on Business and Human Rights.

- Scope of human rights defenders’ activities that are covered: The OECD proposes to cover a very narrow range of activities within the scope of its standard. According to the current draft, only two kinds of activities would be covered: “monitoring” and “reporting.” Additionally, these activities would only be covered to the extent that they are alleging that the enterprise’s activities are “illegal” or “inconsistent with the Guidelines.”<sup>12</sup> We would like to emphasize that human rights defenders engage in a wide range of activities in response to business-related human rights abuses. This might include, for example, protests, demonstration, community mobilizing, awareness raising, advocacy or lobbying, civil disobedience, raising complaints to judicial or non-judicial bodies, among many others. Additionally, enterprises can still cause or contribute to human rights violations even when their actions are “legal” or otherwise sanctioned by the host government – this is why there is a strong correlation between corruption, discrimination, and retaliation against human rights defenders. Furthermore, it is unreasonable to require human rights defenders to raise their concerns using the language of the OECD Guidelines. We encourage the OECD to work with the UN Special Rapporteur on Human Rights Defenders and the UN Working Group on Business and Human Rights to determine a more appropriate scope for this policy.
- Recognition of gender-based retaliation: We also encourage the OECD to include references to gender-based violence and harassment as examples of the types of retaliation that human rights defenders can experience.
- Recognition of the links to racial, ethnic, and gender discrimination: Shrinking civic space and retaliation against human rights defenders disproportionately impact those speaking up about the rights of Indigenous Peoples, women, the LGBTQI community, and others who face discrimination and marginalization in the societies where they live. Accordingly, we urge the OECD to call on enterprises to take an intersectional approach that accounts for these linkages in their human rights defenders policies.

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<sup>12</sup> In the draft OECD Guidelines, see chapter 2, paragraph 10; and chapter 2, commentary 14.

- Clarification on the definition of SLAPP: We appreciate the reference to SLAPPs, which we have found to be a prevalent form of attacks against human rights defenders. For example, the Business and Human Rights Resource Centre documented 615 alleged acts of retaliation against human rights defenders advocating on business-related issues in 2021, three-fifths of which were SLAPPs and other forms of judicial harassment.<sup>13</sup> However, we also caution that some confusion has arisen over the definition of SLAPP, especially in the United States where state anti-SLAPP laws have been expanded in scope to cover a wide range of activities that go well beyond the original understanding of the term.<sup>14</sup> Accordingly, we encourage the OECD to coordinate with the UN Working Group on Business and Human Rights and the UN Special Rapporteur on Human Rights Defenders to determine a definition of SLAPP for purposes of the Guidelines.<sup>15</sup>
- Strengthened guidance for National Contact Points (NCPs) in preventing and addressing retaliation: We appreciate that the OECD’s consultation draft includes expectations for NCPs to respond to retaliation against human rights defenders. However, the text seems to convey that NCPs should only address acts of retaliation that occur as a direct result of the filing of complaints and that only affect individuals, while working only with governments to address these issues. In practice, retaliation rarely occurs in a bubble and is often part of a longer term, escalating situation that threatens broader communities. Accordingly, we urge the OECD NCPs to work on a multi-stakeholder basis to respond to acts of retaliation that link to the underlying concerns raised in the complaint, including situations that begin before the complaint is filed. In some cases, this might involve collective risks to broader communities. To minimize the risk of retaliation related to the filing of complaints, NCPs should also set conditions for safe engagement, for example by protecting communications and making clear to all parties to the dispute that the NCP has a zero tolerance policy.

This year marks the 25th anniversary of the United Nations Declaration on Human Rights Defenders and the 75th anniversary of the Universal Declaration of Human Rights. We urge the OECD to work closely with civil society, the United Nations, and other human rights experts so

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<sup>13</sup> Business and Human Rights Resource Centre, Human rights defenders & business in 2021: Protecting the rights of people driving a just transition (2022).

<sup>14</sup> For example, under many of U.S. anti-SLAPP laws, even the world’s largest enterprises can claim to be the victim of a SLAPP in lawsuits filed by citizen groups and small nonprofit organizations, simply because the plaintiffs’ claims did not survive on the merits and happened to trigger free speech issues.

<sup>15</sup> UN Office of the High Commissioner for Human Rights, Press Release: “Critical part of the UNGPs 10+ Roadmap: Increasing the protection of human rights defenders in the face of strategic lawsuits against public participation,” 4 Feb. 2022.

that we can collectively make significant progress this year in strengthening protections for human rights defenders.

Sincerely,

African Law Foundation (AFRILAW)

Agency for Turkana Development Initiatives (Atudis)

BankTrack

Bennett Freeman, Former U.S. Deputy Assistant Secretary of State for Democracy, Human Rights and Labor, and Lead Author, *Shared Space Under Pressure*<sup>16</sup>

Business and Human Rights Resource Centre

Community Empowerment and Social Justice Network (CEMSOJ)

EarthRights International

Front Line Defenders

Global Witness

Greenpeace

Inclusive Development International

International Service for Human Rights (ISHR)

Just Finance International

Just Ground

Lawyers' Association for Human Rights of Nepalese Indigenous Peoples (LAHURNIP)

London Mining Network

NGO Forum on ADB

OECD Watch

Oxfam International

Polish Institute for Human Rights and Business

Project HEARD

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<sup>16</sup> Bennett Freeman et al., *Shared Space Under Pressure: Business Support for Civic Freedoms and Human Rights Defenders*, note 6.



Project on Organizing, Development, Education, and Research (PODER)

Protection International (PI)

Proyecto de Derechos Económicos, Sociales y Culturales (ProDESC)

Sierra Leone Land Alliance

SOMO (Centre for Research on Multinational Corporations)

Star Kampuchea

Südwind, Austria

Swedish Society for Nature Conservation

Swedwatch

Worthy Association for Tackling Environment Ruins



## **EarthRights International - Comments on Draft OECD Guidelines**

February 2023

EarthRights International is a nonprofit human rights and environmental organization with offices in the United States, the Amazon region of Latin America, and the Mekong region of Southeast Asia. Our work focuses on corporate accountability, protection of environmental defenders, and climate justice. We appreciate the opportunity to provide comments to the OECD on the draft of its updated Guidelines for Multinational Enterprises (Guidelines) and offer the following recommendations.

### **GENERAL COMMENTS**

We encourage the OECD to follow a more robust consultation process for the remainder of the update process. As a global standard setter for multinational enterprises, the OECD should “practice what it preaches” and engage in the same sorts of meaningful consultations that it asks multinational enterprises to undertake. Subsequent consultation processes should include the following elements:

- Translations of the consultation draft into multiple languages. We could not find the current consultation draft in any language other than English.
- Engagement with directly affected local stakeholders, especially Indigenous Peoples.
- Sufficient time frame to enable local stakeholders to participate.
- Proactive outreach to civil society and other stakeholders from the Global South.

### **CHAPTER I - CONCEPTS AND PRINCIPLES**

#### **RELATIONSHIP BETWEEN OECD GUIDELINES AND DOMESTIC LAW**

**Relevant provision:** Chapter I, para. 2

**Comment:** Paragraph 2 describes the relationship between the OECD Guidelines and domestic law. The OECD emphasizes that the Guidelines do not override domestic law and regulation. However, the current draft does the private sector a disservice by focusing exclusively on domestic legal compliance without acknowledging the broader business case for adhering to the Guidelines. Even when multinational enterprises comply with

domestic law, they can still face reputational risks, project delays, loss of customers and business opportunities, and other adverse effects that harm their bottom line if they fail to fulfill their international human rights and environmental responsibilities, regardless of what is included in domestic law. Accordingly, enterprises have an interest in striving both to comply with domestic law and meet the standards in the OECD Guidelines.

**Recommendation:** Add language to this paragraph describing the business case for adhering to the Guidelines and the wider range of risks that enterprises can face regardless of whether they comply with domestic law.

## **CHAPTER II - GENERAL POLICIES**

### **CLIMATE CHANGE AS A TOP PRIORITY**

**Relevant provision:** Chapter II, para. 1

**Comment:** Paragraph 1 references the importance of sustainable development but should also acknowledge the climate crisis that has grown in severity over the past decade. The urgency of this crisis merits a mention in the first paragraph.

**Recommendation:** Paragraph 1 should reference climate change and the need for the private sector to contribute to a rapid, just transition to a low carbon economy.

### **HUMAN RIGHTS DEFENDERS**

**Relevant provisions:** Chapter II, para. 10 and commentary para. 14

**Comment:** We welcome the OECD's increased attention to the widespread retaliation against human rights defenders (including environmental defenders) who are advocating on business-related issues. Rather than using the term "undue pressure" and asking enterprises to decide on their own what types of pressure are "due" or "undue," however, the OECD should take a rights-based approach. The OECD should use the language of human rights due diligence and encourage enterprises to adopt a zero-tolerance policy and refrain from causing, contributing to, or directly linking their activities to acts of retaliation against human rights defenders, members of the press, workers, and whistleblowers. Enterprises should also take extra precautions with vulnerable subgroups of human rights defenders, such as environmental defenders and Indigenous Peoples, as described in more detail below.

**Recommendation:** Adopt the recommendations submitted in a joint civil society letter on human rights defenders which EarthRights has endorsed.

## ACCESS TO REMEDIES

**Relevant provisions:** Chapter II, para. 14; Chapter IV, para. 6 and commentary para. 46

**Comment:** Studies by the United Nations and others have shown that access to remedies remains one of the most poorly implemented aspects of international business and human rights standards, including the OECD Guidelines and the UN Guiding Principles on Business and Human Rights. Access to remedies is a core ingredient in what makes a “human right” a right.

The current draft of the Guidelines does not appear to encourage stronger uptake of access to remedies than has occurred over the past decade. We recommend strengthening the Guidelines to help ensure that those whose rights by the activities of enterprises have been violated are able to access judicial and non-judicial mechanisms.

The current draft implies that enterprises should only participate in remediation processes where they have admitted to causing or contributing to the impacts – which few enterprises will do in practice. This language undermines the Access to Remedies pillar of the UN Guiding Principles by encouraging enterprises only to participate when they admit guilt. Rather, the standard should be that enterprises participate in good faith in remediation processes where they are alleged to have caused or contributed to adverse human rights or environmental impacts.

Likewise, the draft does not appear to build upon the challenges and lessons learned from a decade of reliance on company-controlled, operational-level grievance mechanisms. In our experience, even when operational-level grievance mechanism are in place, they are often ineffective for two reasons: (1) they are not perceived as legitimate because the local communities were not provided an opportunity to participate in the design of the process, and (2) lack of enforcement of the enterprise’s environmental and social commitments leaves local communities without leverage to demand compliance, creating a power imbalance between the enterprise and local stakeholders that grievance mechanisms are unable to correct. Just as enterprises enter binding, enforceable contracts with each other when doing business, they should also enter binding, enforceable “community-based agreements” with local stakeholders. Enterprises should treat communities as deserving of the same access to remedy that they assure for themselves.

## **Recommendations:**

- Revise Chapter II, para. 14, Chapter IV, para. 6, and associated language in the commentary to the following: “Provide for or co-operate through legitimate processes in the remediation of adverse impacts where *there are allegations that* an enterprise has caused or contributed to these impacts.”
- Add a sentence to the section on operational-level grievance mechanisms in Chapter IV, commentary para. 46: “Enterprises can enhance the legitimacy of operational-level grievance mechanisms by involving local stakeholders in their design.”
- Add a sentence on community-based agreements into Chapter IV, commentary para. 46 to: “To build legitimacy and facilitate access to remedies, enterprises should enter into enforceable community-based agreements that describe their environmental and social commitments to local stakeholders, similar to how enterprises enter binding, enforceable agreements with each other.”

## **MEANINGFUL STAKEHOLDER ENGAGEMENT**

**Relevant provisions:** Chapter II, para. 16 and commentary para. 28

**Comment:** According to the OECD stocktaking report: “The understanding of meaningful stakeholder engagement has evolved and some NCPs have noted that further clarity on stakeholder engagement would be useful.” The private sector continues to struggle with how to undertake stakeholder engagement effectively and would benefit from clearer guidance and oversight. One of the key challenges that enterprises face is determining the threshold of when the impacts are “significant” enough for meaningful stakeholder engagement to take place. The OECD’s current approach creates a risk that enterprises and local communities will have different views of which impacts are “significant,” thus laying the foundation for conflict. By taking a rights-based approach to stakeholder engagement, the OECD will help enterprises and communities to use a common language on which to base their dialogue and minimize the risk of conflict.

## **Recommendations:**

- Revise Chapter II, Para. 16 to use a rights-based approach: “Engage meaningfully with relevant stakeholders to provide opportunities for their views to be taken into account with respect to activities that may impact their rights.” Note: This also helps ensure that enterprises use human rights due diligence to identify relevant stakeholders, rather than conducting a separate process in which they decide on an ad hoc basis which impacts are “significant.”

- Revise the commentary in Chapter II, commentary para. 28 to provide clearer and more robust guidance on how enterprises should conduct meaningful stakeholder engagement. This includes:
  - “Meaningful stakeholder engagement is a critical component of the human rights and environmental due diligence processes.”
  - “At its core, meaningful engagement is about creating strong relationships between an enterprise and its stakeholders and opening the door for good faith discussions on difficult issues.”
  - “Meaningful engagement not only ensures that business activities are designed to minimize harm and maximize benefits for stakeholders, but in many cases can improve the quality of the enterprise’s operations, activities, products, and services.”
  - “Stakeholder engagement is a part of an enterprise’s responsibility to respect the rights to public participation, access to information, and access to remedies that are enshrined in domestic and international law.”
  - “The process involves ongoing engagement with stakeholders that is based on two-way communication, conducted in good faith by the participants on both sides, and responsive to stakeholders’ views. The process begins in the earliest stages of project planning and continues throughout the project’s life cycle.”
  - “Engagement is meaningful when stakeholders are provided with access to information in accessible formats and local languages prior to being asked to make decisions or commitments; when stakeholders are able to provide input before key decisions are made; when the enterprise and the host government take these views into account in their decision making; and when stakeholders are able to participate and offer critical views without fear of retaliation.”
  - “Relevant stakeholders include, at minimum, those whose rights are or could be affected by the enterprise’s operations, activities, products, or services. In many cases, stakeholders include rights holders and their representatives, human rights defenders, civil society organizations, and local communities.”
  - “When conducting stakeholder engagement, enterprises should be sure to account for the potentially differentiated rights and interests of women, youths, marginalized groups, and persons possessing special rights, including indigenous peoples. It is important to identify and remove potential barriers to participation by stakeholders in positions of vulnerability or marginalization.”
  - “Meaningful stakeholder engagement is particularly important in the planning and decision-making concerning projects or other activities

involving the intensive use of land, forests, or water, which could affect the rights of local communities, including groups with traditional ties to or dependence on specific bodies of land, forests, or water.”

- “The OECD Due Diligence Guidance for Responsible Business Conduct and relevant OECD sector specific guidance includes practical support for enterprises on carrying out stakeholder engagement including as part of an enterprise’s due diligence process.”

### HOW COMPANIES ASSESS THEIR “LEVERAGE”

**Relevant provision:** Chapter II, commentary para. 24; Chapter IV, para. 42

**Comment:** Leverage is an important building block in the enterprise’s calculation on how to respond to human rights allegations. We appreciate that the updated OECD draft includes more extensive commentary of leverage. However, the OECD’s text seems to take as a starting point that enterprises *do not* have leverage. The OECD also does not provide comprehensive guidance on the ways that enterprises can use their existing leverage, nor does it encourage enterprises to proactively increase their leverage for purposes of improving the effectiveness of their human rights and environmental risk management.

**Recommendation:** Building on the work of the United Nations Office of the High Commission for Human Rights<sup>1</sup> and the *Shared Space Under Pressure* project,<sup>2</sup> we strongly urge the OECD to revise Chapter II, commentary paragraph 24 to include the following elements:

- Delete the first sentence that starts from the assumption that enterprises do not have leverage.
- Add: “Leverage is considered to exist where the enterprise has the ability to effect change in the practices of an entity that cause adverse human rights or environmental impacts.” (mirroring the language in Chapter IV, commentary para. 42)
- Add a more comprehensive list of sources of leverage: “Sources of an enterprise’s leverage include: the size and weight of economic and commercial presence—operations and sourcing relationships (including employment and tax contributions); the level of access and degree of potential influence with the host country government; the level of access to relevant audiences through traditional

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<sup>1</sup> <https://www.ohchr.org/sites/default/files/Documents/Issues/Business/ohchr-recommendations-to-ec-on-mhrdd.pdf>

<sup>2</sup> [https://ishr.ch/wp-content/uploads/2021/07/shared\\_space\\_under\\_pressure\\_-\\_business\\_support\\_for\\_civic\\_freedom\\_and\\_human\\_rights\\_defenders\\_1.pdf](https://ishr.ch/wp-content/uploads/2021/07/shared_space_under_pressure_-_business_support_for_civic_freedom_and_human_rights_defenders_1.pdf)

media and social media outlets; support of the home country government and that government's influence with host country governments; and the quality of global and local stakeholder relationships.”

- Encourage enterprises to build their leverage as part of the process of making their risk management more effective: “Where an enterprise does not have sufficient leverage, it should take steps to build additional leverage. Ways to increase or build leverage include: acting together with other enterprises or via multi-stakeholder initiatives; and reinforcing leverage by working in conjunction with home country governments.”
- Encourage enterprises to exercise caution when they lack leverage: “An enterprise should exercise heightened due diligence when operating in situations where the human rights risks are high and the enterprise lacks leverage to respond.”

### RESPONSIBLE DISENGAGEMENT

**Relevant provision:** Chapter II, commentary para. 25

**Comment:** We welcome the OECD's references to the importance of responsible disengagement. We encourage the OECD to include further details to describe what makes disengagement responsible. In our experience, the current Guidelines are not sufficiently clear to allow local stakeholders to hold enterprises accountable to a responsible disengagement process.

**Recommendation:** Add language to Chapter II, commentary paragraph 25 that provides more detailed guidance on responsible disengagement: “Disengagement is responsible when the enterprise remediates or contributes to the remediation of adverse impacts that the enterprise caused or contributed to while it was operating; conducts due diligence to identify any potential adverse impacts resulting from the disengagement itself; takes steps to avoid, mitigate, or remediate the adverse impacts identified through due diligence; and conducts meaningful engagement with stakeholders, especially impacted rights holders, throughout the process.”

### LINKING ENVIRONMENTAL AND HUMAN RIGHTS DUE DILIGENCE

**Relevant provisions:** Chapter II, commentary para. 16; Chapter IV, commentary para. 45; Chapter VI, commentary para. 63

Recommendations: See “Chapter VI” section below.



## **CHAPTER IV - HUMAN RIGHTS**

### **HUMAN RIGHTS POLICY COMMITMENT**

**Relevant provision:** Chapter IV, para. 4 and commentary para. 44

**Comment:** Chapter IV, paragraph 4 calls for enterprises to “have a publicly available policy commitment to respect human rights.” We are concerned that this language is ambiguous and contradicts the more robust guidance provided in commentary para. 44. Paragraph 44 focuses on the adoption of a “publicly available statement of policy” that is adopted and implemented by the enterprise. In contrast, the focus in paragraph 4 on a “policy commitment” implies that enterprises can meet this standard by publishing an empty promise (a “commitment”) on their website to respect human rights. Additionally, this paragraph provides an important opportunity to encourage enterprises to integrate a zero-tolerance policy for retaliation against human rights defenders into their overall human rights policy.

**Recommendation:** Revise Chapter IV, paragraph IV to read: “develop and implement a human rights policy that includes zero tolerance for retaliation against human rights defenders, members of the press, and whistleblowers.”

### **ENDING THE PRACTICE OF DEFLECTING RESPONSIBILITY**

**Relevant provisions:** Chapter IV, commentary para. 42 and 43

**Comment:** During the past decade, we have observed a repeated phenomenon where enterprises decline to help ensure that victims of their human rights abuses and environmental harm receive access to remedies, and instead deflect responsibility for allegations by claiming that the responsibility lies elsewhere – with the host government or another enterprise. The Guidelines are silent on this issue. This loophole is significant enough to undermine the next decade’s implementation of the Guidelines. It has prevented access to remedies in numerous cases and has also reduced the willingness of contractors, consulting companies, financial institutions, law firms, and other actors to apply the Guidelines, because it is much easier for them to deflect responsibility to another actor.

**Recommendation:** We recommend adding language that clarifies enterprises’ responsibilities in scenarios where the host government and/or multiple companies are also involved in a business activity, including explicitly addressing the role of consulting companies, law firms, financial institutions, and other actors who often play an essential but secondary role in business activities. This includes:

- In paragraph 42, add language that clarifies: “Contributing to adverse human rights impacts’ includes the enterprise’s contributions to larger economic projects, even if it is not the primary proponent of that project, and even if the enterprise is providing consulting or advisory services. Multiple enterprises and the host government can simultaneously share responsibility for adverse human rights impacts, and an enterprise has a responsibility to respect human rights regardless of whether it is the primary or a secondary actor in an economic activity.”
- In paragraph 42, add language on cumulative impacts: “Cumulative impacts can also occur, especially in situations where several business activities are underway in close proximity, such as in industrial parks and special economic zones. In such situations, each enterprise continues to have human rights and environmental responsibilities and is expected to use its leverage to avoid and mitigate cumulative impacts on local stakeholders.”
- Add a new paragraph after paragraph 42 that focuses on complicity. Currently, the Guidelines do not provide sufficient detail on complicity to be of practical use to enterprises, civil society, or other stakeholders. We recommend drawing on the work of Professor John Ruggie<sup>3</sup> and including language such as: “There is no bright line rule for what level of contributions should be avoided. An enterprise can be found to be complicit in an adverse impact if it makes any kind of contribution. However, the more substantial the business’s contribution, the more likely it is to face legal, reputational, or other consequences. To be complicit, an enterprise must generally possess a degree of knowledge that its actions will potentially contribute to adverse impacts.”

### INTERNATIONAL STANDARDS FOR HUMAN RIGHTS DEFENDERS

**Relevant provision:** Chapter IV, commentary para. 39

**Comment:** We welcome the OECD’s efforts to link the Guidelines to international standards. We encourage the OECD to include the UN Declaration on Human Rights Defenders as one of the international standards that is referenced. This year marks the 25th anniversary of the UN Declaration on Human Rights Defenders. Yet decades after UN members first recognized this challenge, attacks are on the rise against human rights defenders, in large part due to the role of the private sector in contributing to these attacks. Adding this reference into the OECD Guidelines could play an important role in elevating this as a priority issue for the private sector and could catalyze significant, positive reforms.

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<https://undocs.org/Home/Mobile?FinalSymbol=A%2FHRC%2F8%2F16&Language=E&DeviceType=Desktop&LangRequested=False>

**Recommendation:** Add a reference to the UN Declaration on Human Rights Defenders in Chapter IV, paragraph 39.

### COLLECTIVE RIGHTS

**Relevant provision:** Chapter IV, commentary para. 40

**Comment:** In many cases, people do not just assert their rights individually but as collective groups. It is important for the Guidelines to recognize that stakeholders have a right to organize themselves when asserting their rights, regardless of identity. In EarthRights' work, we see this arise in cases involving Indigenous Peoples, workers, and communities who choose to organize themselves collectively into groups.

The OECD has taken an important step by referencing the UN Declaration on the Rights of Indigenous Peoples in the Guidelines. However, to effectively implement the principles in this declaration, it is important for the OECD and the private sector to recognize the importance of both individual and collective rights. Chapter IV, commentary 40 makes references only to the rights of individuals, which omits the right of people to organize in defense of their rights, as well as the important collective rights to land, water, natural resources, and livelihoods that exist in many traditional communities.

**Recommendation:** Add language in Chapter IV, commentary paragraph 40 to recognize both individual and collective rights, including rights to organize collectively as well as collective rights to natural resources and other assets: "Enterprises should also recognize that groups such as Indigenous Peoples, workers, and communities may assert their rights collectively, such as when organizing in defense of their rights, and may share collective rights to land, water, and natural resources."

### ACCESS TO REMEDIES

**Relevant provisions:** Chapter II, para. 14; Chapter IV, para. 6 and commentary para. 46

**Recommendations:** See "Chapter II" section above.

### HOW COMPANIES ASSESS THEIR "LEVERAGE"

**Relevant provision:** Chapter II, commentary para. 24; Chapter IV, para. 42

**Recommendations:** See "Chapter II" section above.

## LINKING ENVIRONMENTAL AND HUMAN RIGHTS DUE DILIGENCE

**Relevant provisions:** Chapter II, commentary para. 16; Chapter IV, commentary para. 45; Chapter VI, commentary para. 63

Recommendations: See “Chapter VI” section below.

## CHAPTER VI - ENVIRONMENT

### ENVIRONMENTAL DEFENDERS

**Relevant provision:** Chapter VI, para. 3

**Comment:** In addition to strengthening language on human rights defenders overall, we strongly encourage the OECD to include stronger language on the importance of respecting and protecting environmental defenders (or “environmental human rights defenders”). This issue is identified in the Stocktaking report yet is mentioned only in passing in Chapter II, paragraph 10. Over the past decade, environmental defenders – including Indigenous rights defenders – have consistently experienced the highest levels of violence and criminalization among all categories of human rights defenders. The overwhelming majority of these attacks link to business activities.

We appreciate the reference to environmental defenders in Chapter II but urge the OECD to reference this issue within the environment chapter, as well. Many enterprises do not realize that people speaking up on environmental and land issues are also human rights defenders. Environmental issues are often human rights issues, especially when they affect people’s health, livelihoods, and way of life; environmental defenders also rely on their rights to freedom of expression, assembly, and association to raise concerns about environmental issues. It is important to make this link explicit in the Guidelines. Throughout the environmental due diligence process and the life cycle of a business activity, it is important for enterprises to recognize and legitimize the role of environmental defenders and avoid causing or contributing to retaliation against these individuals and groups, including those who criticize the enterprise’s activities.

As a baseline, enterprises should follow the measures described in Chapter II and Chapter IV for avoiding or contributing to reprisals against human rights defenders in general. Additionally, because environmental defenders often represent Indigenous peoples and other traditionally marginalized communities, and are often based in remote and rural areas, enterprises should undertake heightened precautions to ensure their legitimacy and safety.

**Recommendation:** Revise Chapter VI, paragraph 3 to say: “Assess and seek to address potential or actual adverse environmental impacts to workers, communities, and consumers as a result of their business activities, including through a policy of zero tolerance for retaliation against environmental defenders.”

#### INTERNATIONAL STANDARDS FOR ENVIRONMENTAL DEFENDERS

**Relevant provision:** Chapter VI, commentary para. 60

**Comment:** We appreciate that the OECD links Chapter VI environmental provisions to international agreements, as listed in commentary paragraph 60. However, we also encourage the OECD to reference relevant regional agreements in this paragraph, especially the Escazu Agreement in Latin America, whose provisions reinforce many elements of the OECD Guidelines.

**Recommendation:** In Chapter VI, commentary paragraph 60, add a reference to the Escazu Agreement (the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean).

#### LINKING ENVIRONMENTAL AND HUMAN RIGHTS DUE DILIGENCE

**Relevant provisions:** Chapter II, commentary para. 16; Chapter IV, commentary para. 45; Chapter VI, commentary para. 63

**Comment:** We observe that the OECD Guidelines are internally inconsistent and incoherent on the question of how enterprises’ human rights due diligence and environmental due diligence relate. These processes are closely interlinked. As discussed above, stakeholders who experience adverse environmental impacts are likely also experiencing adverse human rights impacts.

Furthermore, several elements of human rights due diligence are relevant to environmental due diligence. This includes, for example, the identification of rights holders and duty holders; the disaggregation of data to account for differential impacts on women, youths, marginalized groups, and other subgroups within a community; and the importance of providing effective access to remedies when adverse impacts occur. Likewise, a human rights-based approach to environmental due diligence recognizes the many ways that local communities’ livelihoods, health, and well-being can depend on ecosystem services – which is often not captured in the traditional form of environmental due diligence that attempts to compensate communities only for lost assets that can be monetized.

In our experience, many conflicts and problems arising out of multinational enterprises' activities occur when the enterprise takes away or detracts from other stakeholders' access to land, natural resources, and other ecosystem services.

**Recommendation:** Enterprises should conduct their environmental due diligence alongside their human rights due diligence, rather than in separate siloes. The OECD should include robust language in Chapters II, IV, and VI to establish clear linkages between human rights due diligence and environmental due diligence. This includes ensuring that environmental due diligence takes a rights-based approach.

#### DEFINITION OF “ADVERSE ENVIRONMENTAL IMPACTS”

**Relevant provision:** Chapter VI, para. 1; Chapter VI, commentary para. 62

**Comment:** The draft Guidelines define “adverse environmental impacts” as “known or reasonably foreseeable changes in the physical environment or biota, resulting from an enterprise’s activities, which have significant deleterious effects on the composition, resilience, or productivity of natural and managed ecosystems, or on the operation of socio-economic systems or on human health and welfare.” We are concerned that this definition is too narrow and ambiguous to harmonize effectively with Chapters II and IV of the Guidelines.

First, the definition of “known” is unclear – especially which actors might make this determination. It is important that enterprises respond to a variety of credible allegations of adverse environmental impacts, including those coming from the enterprise’s own scientists, from government regulators, from citizen-science initiatives conducted by the communities themselves, from civil society, and from independent scientific studies.

Second, the Guidelines define the term only in relation to impacts “resulting from an enterprise’s activities.” Again, this creates ambiguity. In many cases, an enterprise might contribute to the adverse impact but might not be the only cause. For example, it is often the case that multiple enterprises contribute to a river’s pollution. We are concerned that the current language allows enterprises to deflect responsibility in cases where they are not the sole cause of the problem.

Third, the Guidelines do not establish a clear and consistent link between adverse environmental impacts and the impact on people’s health, safety, and livelihoods. Paragraph 1 of Chapter VI references environmental, health, and safety impacts, but does not acknowledge the effects on local communities’ livelihoods. Likewise, the definition of “adverse environmental impacts” in commentary paragraph 62 makes links

to human well-being but does not acknowledge the ways in which local communities' health, safety, and livelihoods can depend on surrounding ecosystem services.

**Recommendations:**

- Revise Chp. VI, para. 1 to say: "...by carrying out risk-based due diligence for adverse environmental impacts on health, safety, and livelihoods." (Similar changes are needed in commentary para. 70.)
- Revise the definition of "adverse environmental impacts" in Chp. VI, commentary para. 62 to: "known or reasonably foreseeable changes in the physical environment or biota, to which the enterprise is alleged to have contributed, which have significant deleterious effects on the composition, resilience, or productivity of natural or managed ecosystems; on local stakeholders' access to ecosystem services or the operation of socio-economic systems; or on human health and welfare."
- Add a sentence in Chp. VI, commentary para. 62: "Changes in the physical environment or biota are known when the enterprise is presented with evidence by the enterprise's own personnel, government regulators, local communities, civil society organizations, or independent scientists."

**Endorsement of indigenous peoples' organizations and networks *preliminary* comments on the OECD "Consultation Draft: Targeted update of the OECD Guidelines for Multinational Enterprises and their Implementation Procedures"**

The European Network on Indigenous Peoples ([ENIP](#)), a network of European Organizations which collectively strive to ensure that all European actors fulfil, respect and protect the rights of indigenous peoples globally, fully endorses the [preliminary comments](#) submitted jointly by 64 indigenous peoples organizations and networks on the OECD 'Consultation Draft: Targeted update of the OECD Guidelines for Multinational Enterprises and their Implementation Procedures'.

We hereby echo the critical issues raised in the indigenous rights-holders' submission in relation to: 1) the Guidelines revision/update process, 2) the contents of the current draft, and 3) the implementation of the Guidelines, that must be addressed if the Guidelines are to realize their function of ensuring responsible business conduct and respect for international human rights law.

The first issue relates to the process of updating the Guidelines. We echo indigenous peoples call for direct consultations with them on their revision. This is an essential requirement for all standards addressing activities that have a significant impact on their rights and well-being. As their submission highlights, and as is abundantly evident from existing complaints to national and international bodies, indigenous peoples are disproportionately and at times profoundly impacted -even to the point of threatening their cultural and physical survival- by the activities of MNEs, including those from OECD countries. This direct impact on their rights should trigger the duty of the OECD to consult with indigenous peoples in order to ensure that their rights are adequately recognized and protected under its Guidelines. Doing so would be in keeping with the guidance issued to the OECD in 2011 by the UN Special Rapporteur on the rights of indigenous peoples and with human rights law more generally on the obligations of international organizations.<sup>1</sup> It would also be consistent with the practice of other international organizations that have all consulted directly with indigenous peoples when developing or revising their safeguard policies, including the IFC (2012), World Bank (2016), Green Climate Fund (GCF) (on-going), and, as in the case of the GCF, have established formal advisory bodies to ensure indigenous peoples can not only input into such policy development processes but can subsequently continue to provide input on their implementation.

The second issue raised in the submission is the need for indigenous peoples' collective rights to be explicitly addressed in the Guidelines. We echo the submission's point that while a reference to the UN Declaration on the Rights of Indigenous Peoples is necessary and welcome, it is not sufficient to provide guidance to OECD MNEs whose operations impact on indigenous peoples. The UN Special Rapporteur on the rights of indigenous peoples explained to the OECD that in the case of indigenous peoples "human rights 'due diligence' requires an assessment of land title – which will not be self-evident to companies in many cases". Likewise, ensuring free prior and informed consent (FPIC) is obtained through indigenous peoples' representative institutions<sup>2</sup> should be a requirement under the

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<sup>1</sup> For the 2011 comments of the UN Special Rapporteur see <http://unsr.jamesanaya.org/?p=435>. See also CESCR General comment No. 26 (2022) on land and economic, social and cultural right E/C.12/GC/26 (2023) paras 41-7.

<sup>2</sup> Where indigenous peoples have developed FPIC protocols and laws these must also be respected, see [FPIC.pdf \(enip.eu\)](#).



Guidelines for projects impacting on indigenous peoples' territories, way of life and rights, including their right to a health environment. Since the last revision of the OECD MNE Guidelines in 2011, these and other basic human rights protections have been incorporated into the safeguards policies of all organizations who seek to uphold their reputations on the international stage. We therefore concur that it is imperative for this OECD Guideline revision process to explicitly "include indigenous peoples' rights within the human rights that businesses have responsibility for, and need to conform to". Likewise, we reiterate the need for specific consideration for the characteristics of indigenous rights' defenders and the collective dimension of harm caused, including rendering good faith consultations and FPIC impossible, when they are persecuted, criminalized or killed. Direct consultation with indigenous peoples is the appropriate and indeed only means to identify and agree on text that ensures OECD MNEs respect their self-determination based territorial, self-governance, cultural and environmental rights and that effective protections are in place for indigenous rights defenders.

Finally, the indigenous peoples' submission addresses a matter that is fundamental to the credibility and relevance of the OECD MNE Guidelines in the coming decade and beyond, namely ensuring that the standards it affirms are effectively implemented in practice. There is widespread acknowledgement, including by the OECD itself, that this is not currently the case. To address this deficiency, indigenous peoples have put forward a constructive proposal to link the implementation of the OECD Guidelines with specific national legislation, including due diligence legislation. ENIP supports this suggestion for a second level of implementation in cases where mediation fails or NCP recommendations are not implemented in a satisfactory manner, as absent this type of meaningful follow-up in such scenarios NCPs will be increasingly regarded as ineffective grievance mechanisms.

We therefore strongly urge the OECD to consult directly with indigenous peoples in good faith and address the critical issues detailed in their submission to ensure that the Guidelines and their implementation procedures are fit for purpose, are consistent with developments in international human rights and environmental law, and genuinely promote responsible business conduct.

This endorsement of the indigenous peoples' submission to the OECD is made by [ENIP](#) on behalf of its member organizations: the Grupo de Trabajo Intercultural [Almáciga](#), the International Work Group for Indigenous Affairs ([IWGIA](#)), the Forest Peoples Programme ([FPP](#)), and the Institut für Ökologie und Aktions-Ethnologie e.V. ([infoe](#)).





9 February 2023

Organisation for Economic Co-operation and Development (OECD)  
Directorate for Financial and Enterprise Affairs  
Centre for Responsible Business Conduct  
[rbc@oecd.com](mailto:rbc@oecd.com)

**Subject: GRI's response to the consultation on the targeted update of the OECD Guidelines for Multinational Enterprises 2023**

Dear Responsible Business Conduct team,

The Global Reporting Initiative (GRI) would like to express support for the targeted update of the OECD Guidelines for Multinational Enterprises.

The GRI Universal Standards were updated, with your support, in 2021 to closely align with the expectations for responsible business conduct set out in the OECD Guidelines for Multinational Enterprises and the OECD Due Diligence Guidance for Responsible Business Conduct and other authoritative intergovernmental instruments. In turn, we truly appreciate the opportunity given through this public consultation to comment on the proposed changes to the Guidelines and maintain the coherence achieved.

We support the updates to the Chapter I. Concepts and Principles; Chapter IX. Science, Technology and Innovation; and 'Implementation procedures' without further comments. For other chapters we have included our comments for your consideration. Our input is based on GRI's body of knowledge in sustainability reporting and responsible business conduct and reflects the evolving global debate on sustainability information needs of a broad set of stakeholders.

We remain committed to continue exchanging views and we look forward to further engagements with the Centre for Responsible Business Conduct of the OECD.

Sincerely,

Peter Paul van de Wijs, Chief Policy Officer

Global Reporting Initiative



## General comments

Most important areas from the point of view of GRI:

- Chapter II. General Policies:  
Coherence across international standards related to responsible business conduct: some of our comments are aimed at maintaining **consistent definitions** in line with the UN Guiding Principles on Business and Human Rights (UNGPs) and the OECD Due Diligence Guidance for Responsible Business Conduct (for example, the commentary concern the terms 'stakeholder' and 'business relationship', which have been updated accordingly in the revised GRI Universal Standards 2021).
- Chapter III. Disclosure:  
**Materiality:** we strongly recommend that the OECD adopts its definition of materiality to encompass, on equal footing, both 'financial materiality' (sustainability-related matters that financially affect the reporting entity) and 'impact materiality' (external impacts of the company and its value chain).

## Chapter II. General Policies

- We welcome the reference to the **OECD Due Diligence Guidance for Responsible Business Conduct** and the OECD sector due diligence guidance.
- We welcome the addition of paragraph 14. (New paragraph) on **remediation**.
- We welcome the additional recommendations on the **protection from reprisals** of worker representatives, whistleblowers, human rights defenders and others in paragraphs 9 and 10. (new paragraph).

For consideration:

- Paragraph 16 (Originally paragraph A.14). We believe the reference to '**significantly**' may inadvertently limit the situations in which enterprises should engage meaningfully with stakeholders (i.e., that meaningful stakeholder engagement is only necessary in situations of high likelihood and high severity adverse impacts).
- Paragraph 16. We recommend aligning the **definition of 'business relationships'** more closely with the definition in the UN Guiding Principles on Business and Human Rights and accompanying interpretative guide, in order to avoid inconsistent interpretation of this term: 'Business relationships refer to those relationships a business enterprise has with business partners, entities in its value chain and any other non-State or State entity directly linked to its business operations, products or services. They include indirect business relationships in its value chain, beyond the first tier, and minority as well as majority shareholding positions in joint ventures.'
- Paragraph 17 (Originally part of paragraph 14). We propose to clarify why the expectation of due diligence is not applicable to the chapters of **taxation and competition** – and to clarify whether enterprises should exercise due diligence or not in cases where adverse impacts on the economy, environment and people arise from such practices.
- Paragraph 18 (Originally paragraph 15). We welcome the additional recommendations on how to prioritize adverse impacts for action based on severity and likelihood. We recommend adding that in the case of **prioritizing risks to human rights**, the severity of a potential adverse impact should take precedence over the likelihood, in line with the UN Guiding Principles on Business and Human Rights.
- We welcome the **broader focus on business relationships** throughout this chapter compared to the narrower focus on suppliers of the previous text. This reflects more accurately the scope of responsibilities of enterprises. However, a few paragraphs still narrowly focus on suppliers and could be amended to focus on the value chain (upstream and downstream) or business relationships more broadly. For example, in the first sentence of paragraph 20 (Originally paragraph 17), we recommend making reference to the value chain, rather than the supply chain (To avoid causing or contributing to adverse impacts on matters covered by the Guidelines through their own activities includes their activities in the value chain), as the

remainder of paragraph 20 also addresses entities downstream in the value chain, in addition to suppliers.

- Paragraph 28 (Originally paragraph 25). We propose aligning the **definition of ‘stakeholder’** more closely with the definition in the OECD Due Diligence Guidance for Responsible Business Conduct (page 48) – ‘Stakeholders are persons or groups who have interests that are or could be impacted by an enterprise’s activities’. In particular the notion of ‘interest’ and the fact that not all interests are of equal importance and do not all need to be treated equally. The GRI Standards were revised in 2021 to align with the definition of stakeholder and supporting guidance included in the OECD Due Diligence Guidance.
- We recommend clarifying that the Guidelines take an **outward-facing approach to risk**, in line with the explanation in Box 1, page 15, of the OECD Due Diligence Guidance for Responsible Business Conduct.

## Chapter III. Disclosure

- Paragraph 2c. We welcome the inclusion of information on **beneficial owners**.
- Paragraph 4. We welcome the reference to seeking **external assurance** or audit of responsible business conduct information.
- Paragraph 32. We welcome the inclusion of paragraph 32, which highlights that **sustainability risks** that may not seem to be financially material but that are relevant to society may reasonably be expected to become financially material for a company at some point.
- Paragraph 37. We welcome the recognition that **GRI** has incorporated responsible business conduct information into its Universal Standards.

For consideration:

- Paragraph 3. We welcome the alignment with the recommendations in step 5 of the OECD Due Diligence Guidance for Responsible Business Conduct (page 33). However, an explicit mention of disclosure of ‘measures to **track implementation** and results’ should be added in line with the OECD Due Diligence Guidance.
- We strongly recommend that the OECD adopts a definition of **materiality** that would regard the two sets of information (**financially material** and **impact material**) on an equal footing, grounded with a core set of common terminology.

Paragraph 31, the reference to paragraph 3 could lead to the wrong interpretation that the information on responsible business conduct and due diligence required under paragraph 3 is only to be reported to the extent that this influences an investor’s assessment of a company’s value, investment or voting decisions (i.e., based on financial materiality). The information covered by paragraph 3 is relevant to a broader set of information users – beyond investors – as acknowledged in paragraph 30 (‘and which also may be relevant for a broader set of stakeholders, including, workers, worker representatives, local communities and civil society, among others’). Moreover, as the global debate on materiality has progressed, focusing solely on the investor perspective of materiality, as it is in its current form, is too limiting. Therefore, we propose adding a new sentence at the end of paragraph 31 to clarify that different materiality considerations apply to reporting the information listed under paragraph 3 as compared to paragraph 2, because the objective of paragraph 3 is to shed light on an enterprise’s most significant impacts on the economy, environment and people and how the enterprise seeks to comply with international standards of responsible business conduct, to a broad set of information users.

Notably, the draft European Sustainability Reporting Standards (ESRS) have adopted such approach, referring to it as ‘double materiality’: “Impact materiality and financial materiality assessments are intertwined and the interdependencies between the two dimensions should be considered in these assessments”<sup>1</sup>.

- Paragraph 37. Accordingly, we recommend **clarifying the materiality perspective** that each of the standards referenced address: ‘(for example, the International Sustainability Standards

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<sup>1</sup> See also <https://www.unpri.org/download?ac=17536> “We support the principle of double materiality in the provisionally agreed CSRD and its incorporation in the draft ESRS. “

Board addressing financial materiality, and the Global Reporting Initiative addressing impact materiality and which has incorporated responsible business conduct information into its Universal Standards).

## Chapter IV. Human Rights

- Paragraph 44. We welcome the changes, which now indicate that policy commitments to respect human rights should be made **public**.

For consideration:

- We recommend making stronger connections between the topics included in the Chapter VI Environment and this Chapter. The United Nations General Assembly and United Nations Human Rights Council both recognized that human rights include **the right to a clean, healthy, and sustainable environment** (Resolution A/76/L.75). Similar development are being gradually reflected in the national legislations and judicial decisions (Brazil Supreme Court decision recognizing the Paris Agreement as human rights treaty, German Supply Chain Legislation, Finnish Legislative Review, etc). We recommend clarifying whether this right would be covered by paragraph 39.
- Paragraph 43. We recommend aligning the **definition of ‘business relationships’** more closely with the definition in the UN Guiding Principles on Business and Human Rights (i.e., ‘value chain’ instead of ‘supply chain’): ‘Business relationships refer to those relationships a business enterprise has with business partners, entities in its value chain and any other non-State or State entity directly linked to its business operations, products or services.’

## Chapter V. Employment and Industrial Relations

For consideration:

- Paragraphs 1(a) and 1(b). We recommend adding commentary and referring to key ILO Conventions such as C87, C98, C135 and C154.
- Paragraph 1(f). We recommend adding commentary for 1(f) considering it is a new addition to the Guidelines. In reference to this, we suggest taking the content under para. 57 (from “the reference to occupational health and safety implies that [...] ISH-OSH 2001”) and using it for a commentary on occupational health and safety.
- Paragraph 1(e). We recommend adding **workers with family responsibilities** as a category to align with paragraph 54.
- Paragraph 4c. We suggest deleting the paragraph 4c on **occupational safety and health** given that it is now included under 1f. In this case, we suggest deleting the commentary related to 4c under paragraph 57 as well.
- Paragraph 4, we suggest adding content related to **recruitment fees**, in line with the ILO Convention – C181: ‘employment agencies shall not charge directly or indirectly, in whole or in part, any fees or costs to workers’.
- Paragraph 57. The commentary stipulates that employment and industrial relations are understood to include compensation and working-time arrangements. We recommend considering the use of the term ‘**remuneration**’ or ‘**wages and benefits**’ instead of ‘compensation’, which may be understood as a lump sum, payable in certain cases such as occupational injury (see the ILO MNE Declaration). If used, it would be helpful to explain what the term ‘compensation’ entails. Further, it would be beneficial to briefly explain the term ‘working-time arrangements’ and what it entails and refer to relevant ILO Conventions on the topic.
- Paragraph 57. The commentary refers to only employment and industrial relations but does not refer to **contractual arrangements** that have been added to the revised text under 4a. We suggest referring to R198 of the ILO and add content that stipulates that an employment relationship should be effectively established where the distinction between employed and self-

employed workers is understood, and contractual arrangements should not hide the true legal status of an employee.

- Paragraph 49. In the sentence ‘This is especially relevant in sectors where informality, short-term working arrangements, decent work deficits and **digital transformation** are common.’, digital transformation is common to most sectors, we suggest clarifying if this means sectors where ‘digital labour platforms are common’ or ‘digital work is common’.

## Chapter VI. Environment

For consideration:

- Paragraph 8b. We suggest making reference to the **durability** of products and making reference to the 9r framework of circular economy, for example by requesting organization to create products that reduce the amount of natural resources used, create products that can be repurposed and enable reparability of products.
- Paragraph 70. We suggest making references to other **circularity measures** (for example, see the definition of ‘circular economy’ by the EU where it is defined as ‘model of production and consumption, which involves sharing, leasing, reusing, repairing, refurbishing and recycling existing materials and products as long as possible. In this way, the life cycle of products is extended.’ The references to ‘durability and reparability of products’ made in paragraph 85 with a reference to consumers’ interest in this information and paragraph 8c with a reference to promoting higher levels of awareness among customers, to paragraph 70.
- Paragraph 78. (new paragraph) refers to the three objectives of the Convention on Biological Diversity. The first objective in paragraph 78 ‘conservation of biological diversity, habitats and ecosystems’ is not aligned with the Convention on Biological Diversity ‘conservation of biological diversity’. We propose removing ‘**habitats and ecosystems**’ from paragraph 78 to align it with the Convention on Biological Diversity.
- Paragraph 78. (new paragraph) refers to ‘marine, freshwater, land and forest degradation, including deforestation’. This implies that deforestation is a form of **degradation**. In the exposure draft of the revised GRI Biodiversity Topic Standard, deforestation is considered a type of natural ecosystem conversion and ecosystem conversion can include severe degradation – it does not include all degradation. The definition of ‘natural ecosystem conversion’ used in the exposure draft of the revised GRI Biodiversity Topic Standard is based on the Accountability Framework. We propose clarifying the link between ecosystem conversion, deforestation, and degradation. We also propose changing ‘marine, freshwater, land and forest’ to ‘land, marine and freshwater ecosystems’ to align with chapeau paragraph (d).
- Paragraph 78. (new paragraph) refers to ‘the avoidance of adverse impacts on biodiversity and **ecosystems**’. We propose removing ‘and ecosystems’, as biodiversity includes ecosystems.
- Paragraph 78. (new paragraph) refers to ‘UNESCO World Heritage sites’. The exposure draft of the revised GRI Biodiversity Topic Standard refers to ‘UNESCO Natural World Heritage Sites’. We propose changing ‘UNESCO World Heritage sites’ to ‘UNESCO Natural World Heritage Sites’ to clarify that it does not refer to all World Heritage sites, but only to those that are a **natural site**.
- Paragraph 78. (new paragraph) refers to the biodiversity mitigation hierarchy to prevent or mitigate adverse impacts on biodiversity. We propose adding a reference to **remediation**, as the mitigation hierarchy also includes steps to remediate actual adverse impacts.
- Paragraph 78. (new paragraph) refers to the steps of the biodiversity **mitigation hierarchy**, ‘which recommends first seeking to avoid damage to biodiversity, reducing or minimising it where avoidance is not possible, and using offsets as a last resort for adverse impacts that cannot be avoided, mitigated or reduced’. The exposure draft of the revised GRI Biodiversity Topic Standard also refers to the mitigation hierarchy but includes the following steps: avoidance, minimization, restoration, and offset. We propose clarifying whether ‘reducing or

minimising' refer to the same step in the mitigation hierarchy or not and where the restoration step is included.

## Chapter VII. Combating Bribery, Bribe Solicitation and Extortion

For consideration:

- We recommend introducing the term '**politically exposed persons**' (PEP) – an individual entrusted with a prominent public function – to align with the Financial Action Task Force (FATF), Extractive Industries Transparency Initiative (EITI) and other international initiatives and governments who operate this terminology. GRI has introduced PEP in the GRI 11: Oil and Gas 2021.
- Paragraph 2. After mentioning the risk-based assessment, we recommend linking back to beneficial ownership: "any politically exposed persons holding ownership rights must be identified". In some national jurisdictions, this expectation also applies to customers and asks for **risk-based procedures** to identify whether an individual customer or beneficial owner is a politically exposed person before engaging into a business relationship.

## Chapter VIII. Consumer Interests

- Paragraph 9. We welcome the changes, expanding responsible business conduct expectations relating to the **collection and use of consumer data**.

For consideration:

- We recommend clarifying the different use of terminology in the article 8c and the Chapter VIII: the term '**customer**' is used in paragraphs 8c, 67 etc. and '**consumer**' in the Chapter VIII.

## Chapter X. Competition

For consideration:

- Paragraph 2. It may be useful to add a reference to the responsibility of an enterprise to determine when it has a **dominant position** in a market. While holding a dominant position is not illegal, many jurisdictions specify a responsibility to ensure that the conduct of an enterprise when it has a dominant position must not distort competition.

## Chapter XI. Taxation

For consideration:

- Paragraph 1. We recommend deleting the sentence 'It does not require an enterprise to make payment in excess of the amount legally required pursuant to such an interpretation.'. If this sentence cannot be deleted, we suggest adding at the end of the third sentence: 'and end tax avoidance'. We also suggest including the [OECD's definition of tax avoidance](#) to prevent readers from confusing tax avoidance and tax evasion.
- Paragraph 1. We recommend replacing the last sentence about tax compliance with 'Tax compliance means compliance with the enterprise's tax strategy, applicable hard laws and relevant soft laws.'. This will provide enterprises with **guidance** on what the enterprise should take into account to be tax compliant.

- Paragraph 2. At the end of section 2 we recommend adding: ‘Enterprises should implement procedures that contain minimum safeguards to ensure alignment with this chapter and that are in line with the principle ‘**do no significant harm**’.
- Paragraph 104. The commentary only mentions risks and not **impacts** an enterprise has on the economy, environment and society. We recommend adding the following to the last sentence: ‘...and to effectively manage impacts related to tax planning and tax payments and to prevent and mitigate negative impacts on the economy, environment and society.’.
- Paragraph 105. We noticed that no reference was made to **voluntary publishing of tax payments** and other relevant tax information. We therefore recommend adding the following to the end: ‘Besides these actions, enterprises are in a position to increase tax transparency and support tax integrity themselves by voluntarily publishing tax information per tax jurisdiction.’ For this, the reporting requirements and reporting recommendations of Disclosure 207-4, Country-by-country reporting, of the GRI 207: Tax 2019 can be used.





# ICGN

International Corporate Governance Network  
*Inspiring good governance & stewardship*

Mr. Mathias Cormann, Secretary-General  
Organisation for Economic Co-operation and Development  
2, rue André Pascal  
75016 Paris

Emailed to: [rbc@oecd.org](mailto:rbc@oecd.org)

9 February 2023

Dear Secretary-General Cormann,

## **Re: Consultation Draft: Targeted update of the OECD Guidelines for Multinational Enterprises and their Implementation Procedures**

The International Corporate Governance Network (ICGN) welcomes the substantive draft edits as described in the *Targeted update of the OECD Guidelines for Multinational Enterprises and their Implementation Procedures published in 2011*. The draft amendments appropriately refer to significant developments in responsible business conduct over the past few years, including those relating to human rights, the environment, bribery and corruption, consumer interests, science and technology, competition, and taxation.<sup>1</sup>

Established in 1995, ICGN's purpose is to convene capital market participants to develop, promote and embed high standards of corporate governance and investor stewardship worldwide to preserve and enhance long-term value, contributing to sustainable economies, societies, and the environment. ICGN Members, many of whom are investors responsible for assets of around \$70 trillion, are based in over 40 countries - largely in Europe and North America, with growing representation in Asia. For more information visit [www.icgn.org](http://www.icgn.org).

ICGN supports the draft amendments as presented in the '*Targeted update of the OECD Guidelines for Multinational Enterprises and their Implementation Procedures*' and offer the following points for further consideration:

- 1. ICGN endorses the OECD draft text which seeks to align responsible business conduct with sustainable development objectives and recommend that this be strengthened by referencing the United Nations Sustainable Development Goals (UNSDGs).** This features prominently in the ICGN Global Governance Principles<sup>2</sup> which are used by many ICGN Members in their voting policies, company engagements and investments. The ICGN Principles were updated substantially in 2021 recognising the mounting challenges of our society, such as climate change, biodiversity loss, wealth inequality and poverty, and the ways in which these issues present risks to investors, businesses, and the economy. Additionally, in 2022, ICGN launched the revised Model Mandate in partnership with UN-supported Global Investors for Sustainable Development Alliance. The revised Model Mandate sets out example contract terms for asset owners to consider in investment management agreements based on the UNSDGs<sup>3</sup> to demonstrate how investors should contribute to long term sustainable value creation relative to the SDGs.

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<sup>1</sup>G20/OECD, 2023 [Consultation draft - Public consultation: Targeted update of the OECD Guidelines for MNEs](#)

<sup>2</sup> [ICGN Global Governance Principles 2021](#)

<sup>3</sup> [ICGN - GISD Alliance Model Mandate Guidance | ICGN, 2022](#)

2. **ICGN endorses the draft text which suggests governments should retain flexibility on identifying which companies may fall under the auspices of OECD Guidelines for Responsible Business Conduct (“RBC Guidelines”).** The Guidelines should apply to companies listed on public stock exchanges and also private companies. This will help ensure that companies that have de-listed from stock exchanges maintain a high level of appropriate transparency. The RBC Guidelines should be widely applied, recognising that smaller companies with fewer resources should be provided opportunities to work towards implementation over a reasonable period.
3. **ICGN supports new text specifying that companies should “ensure transparency and integrity in lobbying”** supplementing previous text stating that companies should “refrain from seeking or accepting exemptions not contemplated in the statutory or regulatory framework related to human rights, environmental, health, safety, labour, taxation, financial incentives, or other issues.” We recommend that this could be supplemented by adopting text from Principle 4 of the ICGN Global Governance Principles as follows:

*The board should have a policy on political engagement, covering lobbying and donations to political causes or candidates to the extent permitted by law, and ensure that the benefits and risks of the approach taken are understood, monitored, transparent and regularly reviewed. Boards should address instances where there are significant inconsistencies between a company’s publicly stated policy positions and potentially conflicting views of trade associations of which the company may be a member.<sup>4</sup>*

ICGN members have noted several instances whereby company positions on significant environmental or social issues differ substantially from the trade associations they support. This inconsistency should be resolved in a direction that leads to more transparent disclosures and outcomes consistent with sustainability.<sup>5</sup>

4. **ICGN supports the draft text that specifies that companies must “Refrain from applying undue pressure or reprisals against any persons or groups who monitor or report practices of the enterprise or entities with which it has a business relationship that contravene the law, or are inconsistent with the RBC Guidelines, or the enterprise’s policies, including but not limited to submitters of Specific Instances, members of the press, whistleblowers, and human rights defenders, and those working on environmental matters referred to as environmental defenders.”** This provision is consistent with ICGN’s position on whistleblowing and to support activists for protections around human rights and the environment, many of whom are intimidated by entities seeking to advance projects and business activities that are inconsistent with the principles of sustainability.<sup>6</sup>
5. **ICGN supports the draft text which supplements previous wording on improper political activities specifying that companies must refrain from “engaging in acts of corruption or attempting to influence the design, implementation, execution and evaluation of public policies and regulations administered by public officials, by providing**

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<sup>4</sup> [ICGN Global Governance Principles 2021](#), Principle 4, Corporate culture, p. 18.

<sup>5</sup> [ICGN Guidance on Political Lobbying and Donations](#)

<sup>6</sup> [ICGN Global Governance Principles 2021](#), Principle 4.2 Whistleblowing, p. 18.

*covert, deceptive or misleading evidence or data.*” This is consistent with the ICGN *Guidance on Anti-Corruption Practices (2020)*.<sup>7</sup>

6. **ICGN supports the draft text specifying that there is increased recognition of the need for stakeholder consultation.** For example, in paragraph 28 of the general commentary, the OECD states: *“Relevant stakeholders are persons or groups, or their legitimate representatives, who are or could be adversely impacted by the enterprise’s operations, activities, products, or services. Meaningful stakeholder engagement refers to ongoing engagement with stakeholders that is two-way, conducted in good faith by the participants on both sides and responsive to stakeholders’ views. To ensure stakeholder engagement is meaningful and effective, it is important to identify and remove potential barriers to engaging with stakeholders in positions of vulnerability or marginalisation.”*

This is consistent with Principle 1.4 of the ICGN Global Governance Principles as follows:

*The board, particularly the chair, lead (or senior) independent director and committee chairs, should constructively engage with shareholders and relevant stakeholders (particularly the workforce) for meaningful dialogue. This infers two-way communication between companies and shareholders/ stakeholders and not a unilateral presentation from just one party. Such dialogue should encompass all matters of material relevance to a company’s governance, strategy, innovation, risk management and performance as well as environmental and social policies and practices.*<sup>8</sup>

In particular, ICGN supports the references to the rights of Indigenous People and the UN Declaration on the Rights of Indigenous Peoples. In this context, we recommend that the OECD acknowledge the status of Indigenous Peoples as rights-holders rather than as stakeholders.

7. **ICGN supports new draft text regarding materiality stating:** *“Information under paragraph 2, including related to RBC issues and due diligence, should be considered material if it can reasonably be expected to influence an investor’s assessment of a company’s value, investment or voting decisions. The determination of which information is material may vary over time, and according to the local context, company specific circumstances and jurisdictional requirements. Some jurisdictions may also require or recommend disclosing sustainability matters critical to a company’s key stakeholders or a company’s influence on non-diversifiable risks.”*

ICGN also supports the OECD’s recognition of dynamic materiality as noted in the text *“...sustainability risks that may not seem to be financially material but that are relevant to society may reasonably be expected to become financially material for a company at some point.”*

We also note growing acceptance among companies and investors for the concept of double materiality as referenced in Principle 7.7 of the ICGN Global Governance Principles as follows:

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<sup>7</sup> [ICGN Anticorruption Guidance 2020](#)

<sup>8</sup> [ICGN Global Governance Principles 2021](#), p. 10.

*Sustainability disclosures should focus on materially relevant factors, with many environmental and social factors being sector specific, linked to the company's management of its natural and human capital. Where possible, sustainability related reporting should also seek to address "double materiality", for reporting on the company's external impacts on society and the environment, as well as internal impacts on the company's own financial performance. Moreover, boards should build an awareness of "dynamic materiality", recognising that materiality evolves over time alongside factors including emerging technology, product innovation and regulatory developments.<sup>9</sup>*

8. **ICGN supports the focus on human rights due diligence** in the draft text including direct references to the UN Guiding Principles on Business and Human Rights. We also support the OECD's recognition of forced labour in the global economy and the need for responsible businesses to undertake efforts to address this. We suggest inclusion of reference to modern slavery and refer you to Principle 4.7 of the ICGN Global Governance Principles as follows:

*The Board should ensure that it is sufficiently informed of how human rights and modern slavery issues may present material business and reputational risks or might compromise a company's own values and standards of behaviour. The Board should establish appropriate due diligence processes, strategy, disclosure, engagement, accountability, and other measures to deal with human rights issues which may materialise in connection with the company's workforce and operations.<sup>10</sup>*

We also refer you to ICGN letters to the governments of New Zealand and Australia, both of whom have joined the United Kingdom in establishing legislation to address modern slavery practices.<sup>11</sup>

9. **ICGN supports the new draft text on climate change.** The draft is broadly in line with letters ICGN sent to the Canadian Securities Administrators<sup>12</sup>, the Securities and Exchange Commission<sup>13</sup>, and the International Sustainability Standards Board.<sup>14</sup> In particular, we support the disclosure of Scope 3 emissions and observe the following:

- Carbon Trust reports that Scope 3 emissions can represent as much as 90% of all company emissions — information critical for managing climate risks and setting strategy. In addition, TCFD analysis shows that of the 2,500 companies in the MSCI All Country World Index, from 2017-2019 disclosure of Scope 3 emissions increased from 28% to 34%. Increasingly, companies are moving in the direction of Scope 3 disclosure even in the absence of mandatory regulations or standards.
- The Scope 3 GHG Protocol was first published in 2011. Since this time, companies and consultants have built considerable expertise in measuring Scope 3 emissions. Data and methodologies have matured

<sup>9</sup> [ICGN Global Governance Principles 2021](#), p. 28.

<sup>10</sup> [ICGN Global Governance Principles 2021](#), p. 19.

<sup>11</sup> [Modern Slavery Act Review](#)

<sup>12</sup> [Canada - CSA Climate Disclosure Letter Ontario, Jan 2022](#)

<sup>13</sup> [ICGN SEC CRD, June 2022](#)

<sup>14</sup> [Climate Related Disclosures ISSB](#), July 2022

sufficiently such that disclosure of relevant, material categories of Scope 3 emissions is now possible for companies operating in most sectors.

- Many investors demand complete disclosure of greenhouse gas emissions, including a declaration of net zero emission targets by 2050. This goal is supported by a proliferation of initiatives. As such an increasing number of corporations and investors are developing transition plans with near, medium, and long-term performance benchmarks to reach this goal.<sup>15</sup>

10. **ICGN supports the expanded draft text on biodiversity.** While many investors are just now beginning to recognise the risks of biodiversity loss and the complex relationship to climate change, there has been a proliferation of interest, energy, and initiatives. Most recently, ICGN published a *Viewpoint on Biodiversity and Systemic Risk* and identified 10 recommendations for boards of directors and investment stewards to acknowledge and/or deploy.<sup>16</sup> This is consistent with the July 2022, UN General Assembly adoption of a historic resolution recognising that a clean, healthy, and sustainable environment is a universal human right. The UN expects the resolution will help reduce environmental injustices, close protection gaps, and empower people, especially those in vulnerable situations, including environmental human rights defenders, children, youth, women, and indigenous peoples.<sup>17</sup> Given the OECD's appropriate multiple references to UN instruments, OECD should make specific reference to this new declaration to acknowledge this development and further strengthen the connection between responsible business conduct and the environment.<sup>18</sup>

In conclusion, ICGN expresses our appreciation for the opportunity to respond to this consultation. We congratulate the OECD on the new draft text and the significant changes it embodies. Should you have any questions around our letter, please contact me or Robert Walker, [rwalker@icgn.org](mailto:rwalker@icgn.org) or Carol Nolan Drake, [carol.nolandrake@icgn.org](mailto:carol.nolandrake@icgn.org).

Yours faithfully,



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<sup>15</sup>[Climate Related Disclosures ISSB](#), July 2022

<sup>16</sup>[Biodiversity as Systemic Risk Viewpoint](#), Jan 2023

<sup>17</sup>[UN General Assembly declares access to clean and healthy environment a universal human right | UN News](#), July 2022

<sup>18</sup>[Biodiversity as Systemic Risk Viewpoint](#), Jan 2023

## **INPUTS TO THE CONSULTATION DRAFT OF THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES AND THEIR IMPLEMENTATION PROCEDURES**

We, the undersigned indigenous peoples' organizations, and networks, submit these *preliminary* comments on the OECD 'Consultation Draft: Targeted update of the OECD Guidelines for Multinational Enterprises and their Implementation Procedures' ("Consultation Draft"), as part of the public consultation (13 January – 10 February 2023). This submission is also endorsed by attached list of civil society organizations.

We stress at the outset that Indigenous Peoples are disproportionately affected by the operations of Multinational Enterprises ("MNE"), including MNEs based in OECD countries, which often have negative and severe impacts on our rights, lives, and well-being, and even on our survival as peoples. These impacts include involuntary displacements and evictions; destruction of our environment, our livelihoods and sacred sites; disrespect for our indigenous governance systems; conflicts; violence against women; and criminalization of our indigenous leaders and communities when we assert and defend our rights, among other things. Further, these impacts are the result of systemic violations of our collective rights to our lands, territories, and resources; our right to self-determination and to our cultural integrity, and the requirement to obtain our free, prior and informed consent ("FPIC") in the exercise of our collective rights, which are affirmed by international human rights law.

These serious adverse impacts are widely acknowledged by United Nations and other human rights mechanisms and procedures, and the consensus is that intensified and meticulous attention to our rights is required by states and MNEs.<sup>i</sup> The Inter-American Court of Human Rights, for instance, explains that "businesses must respect the human rights of ... indigenous and tribal peoples, and pay special attention when such rights are violated."<sup>ii</sup> Therefore, the extent to which the process of updating the OECD Guidelines and their Implementation Procedures guarantees respect for our rights is an issue of great importance and interest to indigenous peoples.

### **Direct Consultation with Indigenous Peoples is Needed**

We are deeply concerned that there appears to be no plan to directly consult with indigenous peoples about updating the OECD Guidelines. We recall that the former UN Special Rapporteur on the Rights of Indigenous Peoples, Professor James Anaya, also recommended that direct consultations take place in 2011, the last time the Guidelines were updated. He explained that "... multinational enterprises are affecting the lives of indigenous peoples in very significant ways, across the world, on a daily basis. ... Proper consultation with indigenous peoples in this process needs to be undertaken."<sup>iii</sup>

We concur and reiterate this recommendation now, specifically calling on the OECD to directly consult with indigenous peoples on the updating process for the Guidelines as well as subsequently in relation to their implementation in structured and mutually acceptable ways.<sup>iv</sup> We also recommend that the Decision of the Council on the OECD Guidelines be amended to explicitly provide for direct and ongoing engagement with indigenous peoples (see Consultation Draft, Part II), especially in connection with implementation of the mandates and functions of National Contact Points ("NCP"). The OECD would learn about indigenous peoples' rights and realities through this direct engagement, which would greatly enhance the competences and capacities of the NCPs and the effectiveness of the Guidelines and their implementation.

The purpose of consultations with Indigenous Peoples is to safeguard our internationally recognized human rights. The limited opportunity to make this submission on the draft of potential updates to the Guidelines in no way constitutes adequate consultation with indigenous peoples. We also highlight that the members of the OECD would be obligated to undertake direct consultations with indigenous peoples if these matters were to be discussed at the national level and the same obligation should also apply to international cooperation measures,<sup>v</sup> such as updating the Guidelines and the NCPs that oversee them.<sup>vi</sup>

### **Indigenous Peoples' Rights must be better Reflected in the Guidelines**

We are gravely concerned that the requisite intensified attention to Indigenous Peoples' rights is, at best, opaque and, at worst, inadequate or lacking in the Consultation Draft. In this vein, various points raised by Professor Anaya in 2011 continue to be pertinent and we hereby incorporate his prior comments into this submission, especially the need for a more extensive treatment of the human rights of indigenous peoples and the need to provide specific guidance on those rights in the Guidelines. He rightly observed that "companies will make significant missteps if they do not engage adequately with indigenous peoples' rights standards and issues." It is imperative that MNEs and NCPs have a firm grasp of the obligations and responsibilities that arise in relation to indigenous peoples' rights, and this is not adequately addressed by the bare assertion that those rights exist. Further and more detailed elaboration and guidance is required in the Guidelines as well as in the Implementation Procedures.

We acknowledge that the Consultation Draft states that "some human rights may be at greater risk than others in particular industries or contexts, and therefore will be the focus of heightened attention."<sup>vii</sup> It further explains that MNE's "may need to consider additional standards" in such instances.<sup>viii</sup> Indigenous peoples are correctly identified as requiring increased attention. Also, noting that "the United Nations has elaborated further on the rights of indigenous peoples," the UN Declaration on the Rights of Indigenous Peoples ("UNDRIP") is *proposed* to be an 'additional standard'.<sup>ix</sup> We fully endorse this proposal and add the following comments.

UNDRIP was overwhelmingly endorsed by the international community and by all OECD members. It declares that the "rights recognized [t]herein constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world" (art. 43). Thus, international action and cooperation should not fall below these minimum standards without substantial justification. There is none in the present context; on the contrary, the evidence firmly supports a critical need to meet or exceed these minimum standards given the disproportionate impact of MNEs on indigenous peoples and our rights. This is particularly pressing considering the Guidelines' silence on those rights and the NCPs' inability to protect them, despite their recognition under international human rights law.

Indigenous peoples' rights are guaranteed under all the universal and regional human rights treaties, not only in those that have the term 'indigenous' in their titles, and these rights are prominent in the jurisprudence of the various supervisory bodies.<sup>x</sup> These bodies consistently stress the applicability of the UNDRIP when interpreting the rights in the various treaties,<sup>xi</sup> and the same is also sometimes true in judicial proceedings at the national level.<sup>xii</sup> They are also increasingly elaborating norms in relation to MNEs,<sup>xiii</sup> including on the extra-territorial obligations of state parties,<sup>xiv</sup> that must be taken into account as part of assessing the overall human rights framework, which is not limited to or by the UN Guiding Principles on Business and Human Rights.<sup>xv</sup>

Notwithstanding, the UN Guiding Principles and the UN Working Group on Business and Human Rights also specify the responsibilities of MNEs to respect indigenous peoples' human rights and the obligation to provide access to remedies when these rights are violated. To ensure that the UN Guiding Principles are implemented in accordance with our rights, the UN Working Group on Business and Human Rights has repeatedly urged States to "fully implement the [UNDRIP], in particular ... home States of transnational corporations operating in territories used or inhabited by indigenous peoples".<sup>xvi</sup> It has clarified that this necessitates that home states "[r]equire companies to conduct human rights due diligence to ensure respect for indigenous peoples' ... rights in their supply chains" and to "[a]dopt and enforce regulations in relation to the human rights impacts overseas of companies domiciled in home States".<sup>xvii</sup> It has also stressed the need for the NCPs of home states to have sufficient knowledge of indigenous peoples' rights in order to be competent to address our complaints.<sup>xviii</sup>

The UNDRIP is thus part and parcel of understanding the binding standards set out in the various human rights treaties and formal interpretations thereof in relation to indigenous peoples. It is critically important that this body of interconnected human rights law is explicitly recognized in the updated Guidelines, and that it is the primary reference point in connection with states' duty to protect and MNEs' responsibility to respect human rights. This applies to all aspects of the six points presently set out in Ch. V, para. 35 of the Consultation Draft. Moreover, such recognition is a minimum condition to foster confidence that the OECD Guidelines would be responsive to the massive violations of indigenous peoples' rights that are caused by MNE operations all over the world. As discussed below, ensuring that these standards are applied as part of the implementation of the Guidelines is another crucial aspect of fostering confidence.

It is also important to emphasize certain rights. Specific human rights that are vitally important to indigenous peoples' survival, dignity and well-being must be highlighted in the Guidelines and not, as is the case now, left to a general statement (as in, e.g., IFC Performance Standard 7, which identifies rights that are especially relevant or require special considerations). These include the interconnected set of rights that coalesces around indigenous peoples' multifaceted relations to our traditionally owned lands, territories and resources.<sup>xix</sup> Likewise, indigenous peoples have a right to devolved authority over our internal affairs<sup>xx</sup> and to effective participation in external decision-making that may affect our rights,<sup>xxi</sup> which also requires compliance with the principle of FPIC.<sup>xxii</sup> The updated Guidelines also need to be clear that indigenous peoples have internationally recognized and applicable rights, irrespective of legal recognition by their national governments.<sup>xxiii</sup> We also have the right to a healthy environment.<sup>xxiv</sup>

The Consultation Draft presently proposes that "meaningful engagement with [affected] stakeholders," such as indigenous peoples, "is important." However, this language is inadequate and may be interpreted in a way that is incompatible with extant human rights guarantees. In common with other international authorities, the African Court of Human and Peoples' Rights, for instance, has ruled that indigenous property rights entail "the right to control access to indigenous lands," and "the right to give or withhold their [FPIC]..."<sup>xxv</sup> To support clear understanding, specificity on this and other issues is necessary, yet presently lacking.

These issues can be further discussed in a dedicated consultation process with indigenous peoples and, where agreed, via specific collaborative processes between the OECD and indigenous peoples.



## Effective Implementation is Fundamental

We are cognizant that the Guidelines are voluntary and recommendatory only and that NCPs engage in mediation solely when agreed to by both the complainant and the respondent MNEs. For this and other reasons, invoking the Guidelines, in our view, has not produced many positive results, more so considering the scale and seriousness of violations that frequently affect indigenous peoples and the discernable lack of will on the part of some MNEs to address the same. This is a disincentive for indigenous peoples when considering whether to engage with the process governed by the Guidelines. Additionally, where indigenous peoples complain or protest, there is considerable evidence that persecution, criminalization and even killings characterize some of these situations.<sup>xxvi</sup>

We recommend that both issues are addressed as part of updating the Guidelines and/or otherwise with respect to states' obligations to regulate the conduct of MNEs, at home and extra-territorially, and to provide effective remedies to affected persons, communities and peoples. MNEs do not have meaningful "responsibilities" if they are not held responsible for their acts and omissions, and NCPs are not effective grievance mechanisms if engagement with them does not lead to meaningful outcomes and protections for victims of rights violations.

With respect to the first issue, it is very important that OECD members link implementation of the Guidelines to specific domestic laws and procedures regarding, among other things, MNE due diligence responsibilities, providing a common second level of implementation where mediation has been rejected or exhausted (e.g., where it has not produced an agreed outcome). This second level of implementation would apply in cases where recommendations in final statements are not implemented in a satisfactory manner for the concerned indigenous peoples. This would provide greater confidence that the process could be viable and effective. On the second point above, the Guidelines should clarify that such actions, where attributable to MNEs, are aggravating factors that should trigger some form of formal investigation and, where warranted, referral to the proposed second level of implementation. Also, while there are now general principles that address human rights defenders (e.g., Consultation Draft, Ch.II.A.10), there should also be specific attention in the Guidelines to the characteristics of indigenous rights' defenders, especially the collective dimensions and harm, and the disproportionate impacts on these defenders and their communities.<sup>xxvii</sup>

To conclude, we reiterate our strong recommendation for the OECD to hold direct and meaningful consultations with indigenous peoples and ensure the inclusion of specific and appropriate language on respect and protection of indigenous peoples' rights in the OECD Guidelines for Multinational Enterprises and their Implementation Procedures. Towards this end, we extend our full cooperation for any effort towards strengthening respect for indigenous peoples' rights.

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<sup>i</sup> See e.g., *General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities*, E/C.12/GC/24 (2017), para. 8 ("Among the groups that are often disproportionately affected by the adverse impact of business activities are ... indigenous peoples, particularly in relation to the development, utilization or exploitation of lands and natural resources..."); *Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises*, A/68/279 (2013), para. 1 (recalling that it has been "documented that indigenous peoples are among the groups most severely affected by the activities of the extractive, agro-industrial and energy sectors"); *Business and Human Rights: Inter American standards*, OEA/Ser.L/V/II (2019), para. 340 (where the Inter-American Commission on Human Rights explains that its first report on business and human rights focused on indigenous peoples because

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- of “the extensive information and complaints concerning the differentiated and significant impact that this sector generates regarding these populations in the region.... [These] ... impacts are multiple, complex, and intertwined with other situations of violations of rights...”).
- ii *Kaliña and Lokono Peoples v. Suriname*, Ser C No. 309 (2015), para. 224-5 (citing UN Guiding Principles on Business and Human Rights, Principle 1, and A/HRC/17/31, para. 18). *See also Buzos Miskitos Divers v. Honduras*, Ser C No. 432 (2021), para. 42 *et seq.*
  - iii For a summary of his prior inputs see [http://unsr.jamesanaya.org/wp-content/uploads/2011/01/2011\\_01\\_oecd-guidelines-hr-expert-meeting-summary-anaya.pdf](http://unsr.jamesanaya.org/wp-content/uploads/2011/01/2011_01_oecd-guidelines-hr-expert-meeting-summary-anaya.pdf).
  - iv *See e.g., Decision of the Council on the OECD Guidelines for Multinational Enterprises*, (as amended 24/05/2011), Decides, II.2 (stating that “The Committee shall periodically invite ... (the ‘advisory bodies’), OECD Watch, as well as other international partners to express their views on matters covered by the Guidelines. In addition, exchanges of views with them on these matters may be held at their request”).
  - v *See e.g., General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities*, E/C.12/GC/24 (2017), para. 12 (“States parties and businesses should respect the principle of [FPIC] of indigenous peoples in relation to all matters that could affect their rights, including their lands, territories and resources that they have traditionally owned, occupied or otherwise used or acquired”); and para. 24 (The “obligation [to fulfil] also requires directing the efforts of business entities towards the fulfilment of Covenant rights”); *General comment No. 16 (2013) on State obligations regarding the impact of the business sector on children’s rights*, CRC/C/GC/16, para. 41 (“States have obligations to engage in international cooperation for the realization of children’s rights beyond their territorial boundaries.” In connection with, e.g., *CRC/C/CRI/CO/5-6 (2020)*, para. 44, recommending that the state “ensure that indigenous ... children are included in processes to seek [FPIC] of indigenous ... peoples, in connection with measures affecting their lives, and ensure that development projects, hydroelectric projects, business activities, and the implementation of legislative or administrative measures, such as the establishment of protected areas, are subject to consultations and adhere to the [UNDRIP]”).
  - vi *See e.g., General comment No. 26 (2022) on Land and Economic, Social and Cultural Rights*, E/C.12/GC/26, para. 45 (States should take steps through international assistance and cooperation aimed at progressively achieving rights relating to land. “Adequate safeguard policies shall be in place, and persons and groups affected by measures of international cooperation and assistance shall have access to independent complaint mechanisms”).
  - vii Consultation Draft, Ch. V, p. 22, para. 40.
  - viii *Id.*
  - ix ‘Additional standards’ in this context are those beyond those listed in Ch. V, para. 39 (e.g., the international bill of rights), as framed by those listed in Ch. V., para. 36 (Guiding Principles on Business and Human Rights and the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy). This list is incomplete and, to avoid doubt, reference is also required to all relevant and in force UN and regional human rights instruments, e.g., the Convention on the Rights of the Child, the Convention on the Elimination of all form of Racial Discrimination and the Convention on the Eradication of Discrimination against Women.
  - x *See e.g., General Comment No. 11 (2009) on Indigenous children and their rights under the Convention*, CRC/C/GC/11 (2009); decision of the Human Rights Committee; judgments of the Inter-American Court of Human Rights; and decisions of the African Commission on Human and Peoples’ Rights and judgments of the African Court of Human and Peoples’ Rights.
  - xi *See e.g., General recommendation No.39 (2022) on the rights of Indigenous Women and Girls*, CEDAW/C/GC/39, para. 13 (“The Committee considers UNDRIP an authoritative framework to interpret state party and core obligations under CEDAW”) and para. 16 (The prohibition of discrimination in articles 1 and 2 of the Convention applies to all rights of Indigenous Women and Girls under the Convention, including, by extension, those set out in UNDRIP, which is of fundamental importance to interpretation of the Convention...”); *General Comment No. 11 (2009) on Indigenous children and their rights under the Convention*, CRC/C/GC/11 (2009), para. 10 (the UNDRIP “provides important guidance on the rights of indigenous peoples, including specific reference to the rights of indigenous children in a number of areas”); *Lars-Anders Ågren et al. vs. Sweden*, CERD/C/102/D/54/2013 (2020), para. 1.5 (“... recalling that article 26(2) of the [UNDRIP] establishes the right for Indigenous Peoples to own, use, develop and control lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, and recalling that this definition has been endorsed by the Committee in its general

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- recommendation No. 23 (1997)...”); and *Tiina Sanila-Aikio vs. Finland*, CCPR/C/124/D/2668/2015 (2019), para. 6.8 (ICCPR, art. 27, “interpreted in light of the UN Declaration and article 1 of the Covenant, enshrines an inalienable right of indigenous peoples to ‘freely determine their political status and freely pursue their economic, social and cultural development’”). Further information on these points can be provided if requested.
- xii See e.g., *Xanharu Digest. Upholding Indigenous Peoples' Rights in Legislation and Jurisprudence: Global, Regional, and National Developments*, <https://www.iprights.org/index.php/en/en-resources/digest>.
- xiii See e.g., *General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities*, E/C.12/GC/24 (2017).
- xiv See e.g., *General comment No. 26 (2022) on Land and Economic, Social and Cultural Rights*, E/C.12/GC/26, para. 42 (stating that states shall establish “regulatory mechanisms to ensure that business entities ... and other non-State actors that they are in a position to regulate, do not impair the enjoyment of Covenant rights in land-related contexts in other countries. Thus, States parties shall take the necessary steps to prevent human rights violations abroad in land-related contexts by non-State actors over which they can exercise influence...”).
- xv The preface to the Consultation Draft states that “The political, economic, environmental, social, physical and technological environment for international business has experienced is undergoing far-reaching structural and rapid change” (Preface, p. 5). The same can also be said to some extent in relation to the applicable human rights norms, which have evolved and strengthened since the last updating in 2011.
- xvi *Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises: “Business-related impacts on the rights of indigenous peoples”* A/68/279 (2013), para 55.
- xvii *Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises: “Addressing the human rights impacts of agro-industrial operations on indigenous and local communities: State duties and responsibilities of business enterprises”* A/71/291 (2016), para 115.
- xviii *Id.*
- xix See e.g., *Benito Oliveira Pereira and Lucio Guillermo Sosa Benega and the Indigenous Community of Campo Agua’ẽ, of the Ava Guaraní People v. Paraguay*, CCPR/C/132/D/2552/2015 (2021), para. 8.6 (ruling that “Article 27 [of the ICCPR], interpreted in the light of the [UNDRIP], establishes the inalienable right of indigenous peoples to enjoy the territories and natural resources that they have traditionally used for their subsistence, food and cultural identity”); and *General comment No. 26 (2022) on Land and Economic, Social and Cultural Rights*, E/C.12/GC/26, para. 26-7 (the “obligation to protect requires States parties to adopt measures to prevent any person or entity from interfering with the Covenant rights related to land, including the access to, use of and control of land.” This includes protecting “collective rights of access to, use of and control over lands, territories, and resources ... traditionally owned, occupied or otherwise used or acquired,” especially where material and spiritual relationships with traditional lands are “indispensable to their existence, well-being and full development” (cf. UNDRIP, Arts. 25 and 26)).
- xx See e.g., *Indigenous Communities of the Lhaka Honhat Association v. Argentina*, Ser C No. 400 (2020), para. 153 (“the adequate guarantee of communal property does not entail merely its nominal recognition, but includes observance and respect for the autonomy and self-determination of the indigenous communities over their territory”); *General comment No. 26 (2022) on Land and Economic, Social and Cultural Rights*, E/C.12/GC/26, para. 11 (“land is also closely linked to the right to self-determination”) and para. 35 (states are required to “recognize the social, cultural, spiritual, economic, environmental, and political value of land for communities with customary tenure systems and shall respect existing forms of self-governance of land”); *Klemetti Käkkäljärvi et al. v. Finland*, CCPR/C/124/D/2950/2017 (2019), para. 9.8 (ICCPR, art. 27, “interpreted in light of the UN Declaration and article 1 of the Covenant, enshrines an inalienable right of indigenous peoples to ‘freely determine their political status and freely pursue their economic, social and cultural development’”); *Yaku Pérez Guartambel v. Ecuador*, CERD/C/106/D/61/2017 (2022), para. 4.6 (citing UNDRIP, arts. 3, 4, 5, 11, 33, and 34, and explaining that these rights correspond to “legal pluralism,” where the indigenous and non-indigenous state jurisdictions coexist and operate through different authorities), and para. 4.12 (referring to the “the necessary cooperation and coordination that should be at the core of the relationship between the [non-indigenous state] system and the indigenous system — the latter emanating ... also from the right of indigenous peoples to autonomy and self-government”).
- xxi See e.g., *Poma Poma v. Peru*, CCPR/C/95/D/1457/2006 (2009), para. 7.6 (“... the admissibility of measures which substantially compromise or interfere with the culturally significant economic activities of a minority or

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indigenous community depends on whether the members of the community in question have had the opportunity to participate in the decision-making process in relation to these measures and whether they will continue to benefit from their traditional economy. The Committee considers that participation in the decision-making process must be effective, which requires not mere consultation but the free, prior and informed consent of the members of the community”).

<sup>xxii</sup> See e.g., *Lars-Anders Ågren et al. vs. Sweden*, CERD/C/102/D/54/2013 (2020), para. 6.16 (explaining that the Committee “adheres to the human rights-based approach of [FPIC] as a norm stemming from the prohibition of racial discrimination...” ); *Benito Oliveira Pereira and Lucio Guillermo Sosa Benega and the Indigenous Community of Campo Agua’ë, of the Ava Guaraní People v. Paraguay*, CCPR/C/132/D/2552/2015 (2021), para 8.7 (ruling that “it is of fundamental importance that measures that compromise or interfere with the economic activities of cultural value of an indigenous community have been subjected to the [FPIC] of the members of the community...”); *General recommendation No.39 (2022) on the rights of Indigenous Women and Girls*, CEDAW/C/GC/39, para. 18 (“The failure to protect the rights to self-determination, collective security of tenure over ancestral lands and resources, and the effective participation and consent of Indigenous Women in all matters affecting them constitutes discrimination against them and their communities”).

<sup>xxiii</sup> See e.g., *Access to justice in the promotion and protection of the rights of indigenous peoples*, A/HRC/24/50, para. 23 (explaining that “To address instances of non-recognition, reference should be made to jurisprudence at all levels where there has been recognition of the collective legal personality of indigenous peoples and their communities”); and *Matson et al v. Canada*, CEDAW/C/81/D/68/2014 (2022), para. 18.4 (quoting and citing UNDRIP, arts. 8 and 9: “...indigenous peoples do have the fundamental right to be recognized as such, as a consequence of the fundamental self-identification criterion established in international law. ... [A]ccording to the Inter-American Court of Human Rights, the identification of an indigenous community, from its name to its membership, is a social and historical fact that is part of its autonomy, and therefore States must restrict themselves to respecting the corresponding decision made by the community, i.e., the way in which it identifies itself”).

<sup>xxiv</sup> See e.g., *Indigenous Communities of the Lhaka Honhat Association v. Argentina*, Ser C No. 400 (2020), para 207 (“... it should be pointed out that States not only have the obligation to respect [the right to a healthy environment]... This obligation extends to the “private sphere” in order to avoid ‘third parties violating the protected rights’”).

<sup>xxv</sup> *African Commission on Human and Peoples' Rights (Mau Ogiek) v. Kenya, Reparations* (2022), para. 6-8. See also *Saramaka People v. Suriname*, Ser C No. 172 (2007) and *Benito Oliveira Pereira and Lucio Guillermo Sosa Benega and the Indigenous Community of Campo Agua’ë, of the Ava Guaraní People v. Paraguay*, CCPR/C/132/D/2552/2015 (2021).

<sup>xxvi</sup> See e.g., *Report of the Special Rapporteur on the rights of indigenous peoples*, A/HRC/39/17 (discussing attacks against and criminalization of indigenous peoples defending their rights) and *Report of the Special Rapporteur on Human Rights Defenders*, A/71/281.

<sup>xxvii</sup> See e.g., *Chitay Nech et al. v. Guatemala*, Ser C No. 212 (2010), para. 115 (observing that its jurisprudence confirms that indigenous peoples have a right to direct participation in decisions that may affect their rights and development, the Inter-American Court of Human Rights explains that indigenous leaders “exercise their charge by mandate or designation and in representation of a community. This duality is both the right of the individual to exercise the mandate or designation (direct participation) as well as the right of the community to be represented”).

#### LIST OF SIGNATORIES:

##### Indigenous Peoples Organizations and Networks: 64

###### AFRICA

1. Action Batwa pour le Développement Intégral et l'Assistance aux Vulnérables (ABDIAV) - (Burundi)
2. Association pour l'Intégration et le Développement Durable au Burundi, AIDB (Indigenous Forum in the UN ECOSOC) - (Burundi)

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3. Indigenous Peoples Global Forum for Sustainable Development, IPGFForSD (International Indigenous Platform) - (Burundi)
  4. Initiative de Promotion de l'éducation des Batwa pour le Développement durable(IPREBAD) - (Burundi)
  5. African Indigenous Women Organisation Central African Network - (Cameroon)
  6. Alliance Nationale d'Appui et de Promotion des Aires et Territoires du Patrimoine Autochtone et Communautaire (ANAPAC RDC) - (Democratic Republic of the Congo)
  7. Ligue Nationale des Associations Autochtones Pygmées du Congo - (Democratic Republic of the Congo)
  8. Programme d'Intégration et Développement (PIDP) - (Democratic Republic of the Congo)
  9. El Pueblo Indígena Bubi de la Isla de Bioko - (Equatorial Guinea)
  10. Foundation for Indigenous Peoples Culture and Knowledge Systems - (Kenya)
  11. Ogiek Peoples Development Program(OPDP) - (Kenya)
  12. ADJMOR, an organisation of indigenous communities from the northern regions of Mali - (Mali)
  13. Chari-Guriqua Tribe - (South Africa)
  14. Kruipers Bushman Kalahari Desert - (South Africa)
  15. West Coast Indigenous Council - (South Africa)

#### Asia and the Pacific

1. Indigenous Peoples' Organisation-Australia - (Australia)
2. Bangladesh Indigenous Peoples Forum - (Bangladesh)
3. Kapaeeng Foundation - (Bangladesh)
4. Cambodia Indigenous Peoples Alliance - (Cambodia)
5. Assam Sanmilita Mahasangha, the Indigenous peoples Confederation of Assam, India. - (India)
6. Centre for Research and Advocacy, Manipur - (India)
7. Indian Confederation of Indigenous and Tribal Peoples North East Zone - (India)
8. Indigenae Global Confederation - (India)
9. Inter State Adiwasi Women's Network - (India)
10. Indigenous Rights Advocacy Centre - (India)
11. Indigenous Women Empowerment Forum - (India)
12. Indigenous Women Forum's North East India. - (India)
13. Sundargargh Adivasi Manch, Odisha, India - (India)
14. Torang Trust - (India)
15. Pertubuhan Wanita Orang Asal Malaysia - (Malaysia)
16. Lawyers' Association for Human Rights of Nepalese Indigenous Peoples (LAHURNIP) - (Nepal)
17. Asia Indigenous Peoples Network on Extractive Industries and Energy (AIPNEE) - (Philippines)
18. Asia Indigenous Women's Network - (Philippines)
19. Indigenous Peoples Movement for Self-Determination and Liberation (IPMSDL) - (Philippines)
20. Indigenous Peoples Rights International Inc. - (Philippines)
21. Katribu Kalipunan ng Katutubong Mamamayan ng Pilipinas - (Philippines)
22. Panaghiusa Philippine Network to Uphold Indigenous Peoples Rights - (Philippines)
23. Philippine ICCA Consortium - (Philippines)
24. Right Energy Partnership with Indigenous Peoples (REP) - (Philippines)
25. Timuay Justice and Governance (TJG) - (Philippines)

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26. Asia Indigenous Peoples Pact - (Thailand)
  27. Inter-Mountain People's Education and Culture in Thailand Association - (Thailand)
  28. Center for Development Programs in the Cordillera - (Philippines)
  29. Community Empowerment and Social Justice Network (CEMSOJ) - (Nepal)
  30. Justice, Peace, and Integrity of Creation Kalimantan (JPIC Kalimantan) - (Indonesia)

#### Latin America and the Caribbean

1. Julian Cho Society and Toledo Alcaldes Association - (Belize)
2. National Garifuna Council - (Belize)
3. Instituto de Desenvolvimento Indígena - (Brazil)
4. Asociación de Autoridades Tradicionales Indígenas del Vichada y Orinoco- ORPIBO- - (Colombia)
5. Asociación Ipoulia de Urraichi - (Colombia)
6. Unidad Indígena del Pueblo Awá - UNIPA - (Colombia)
7. Coordinador Del Area De Los Pueblos Originarios Red Ongs America Latina - (El Salvador)
8. Payxail Yajaw Konob' - (Guatemala)
9. Api-nahu - (Mexico)
10. Frente de Resistencia Indígena Juxtlahuaca - (Mexico)
11. Ka' Kuxtal Much Meyaj (MAYA) - (Mexico)
12. International Indigenous Women's Forum - (Nicaragua)
13. Federación por la Autodeterminación de los Pueblos Indígenas (FAPI) - (Paraguay)
14. Coordinadora Andina De Organizaciones Indigenas - CAOI - (Peru)
15. Association of Saamaka Traditional Authorities - (Suriname)

#### North America

1. Nation Abénakise Msakkikkan (Sartigan) - (Canada)
2. Center for World Indigenous Studies - (United States)
3. International Indigenous Fund for Development and Solidarity "Batani" - (United States)
4. International Indian Treaty Council-IITC – (United States)

#### Civil Society Organizations (53)

##### Africa

1. Advocates for Community Alternatives - (Ghana)
2. African Law Foundation - (Nigeria)
3. Fanos Ethiopia - (Ethiopia)
4. Focus Droits et Accès - (Democratic Republic of the Congo)
5. Sierra Leone Land Alliance - (Sierra Leone)
6. The New Dawn Pacesetter - (Kenya)
7. Uganda Consortium on Corporate Accountability - (Uganda)
8. WASH-Net Sierra Leone - (Sierra Leone)
9. Youth Partnership for Peace and Development - (Sierra Leone)

##### Asia and Pacific

1. Al-Haq, Law in the Service of Mankind - (Palestine)
2. Bina Desa - (Indonesia)

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3. Centre for Environment, Human Rights and Development Forum - CEHRDF - (Bangladesh)
  4. Cultural Development Society - (Bangladesh)
  5. Circle of Imagine Society-CIS Timor-Indonesia Foundation - (Indonesia)
  6. Commission for Justice, Peace and Integrity of Creation of Ruteng Province of SVD Congregation - (Indonesia)
  7. Ilukim Sustainability Solomon Islands - (Solomon Islands)
  8. Legal Rights and Natural Resources Center - (Philippines)
  9. mines, mineral & People - (India)
  10. NGO Forum on ADB - (Philippines)
  11. Samagra Vikas - (India)
  12. South Vihar Welfare Society for Tribal - (India)
  13. Svay Rieng University - (Cambodia)
  14. Thy Kingdom Come Foundation - (India)
  15. Women Working Group (WWG) - (Indonesia)
  16. Yayasan Pengembangan Kemanusiaan Donders - (Indonesia)

#### Europe

1. BankTrack - (Netherlands)
2. Bureau européen du Docip - (Belgium)
3. Business & Human Rights Resource Centre - (United Kingdom)
4. European Coalition for Corporate Justice - (Belgium)
5. Forest Peoples Programme (FPP) - (United Kingdom)
6. Global Witness - (United Kingdom)
7. Grupo Intercultural Almaciga - (Spain)
8. International Service for Human Rights - (Switzerland)
9. International Work Group for Indigenous Affairs - IWGIA - (Denmark)
10. Just Finance International - (Denmark)
11. Protection International - PI - (Belgium)
12. Society for Threatened Peoples - (Germany)
13. Swedwatch - (Sweden)
14. The William Gomes Podcast - (United Kingdom)
15. Mija Ednam - (Sweden)
16. International Platform Against Impunity – (Switzerland)

#### Latin America

1. ANDHES (Abogados y Abogadas del Noroeste en Derechos Humanos y Estudios Sociales) - (Argentina)
2. Asociación Víctimas Semilla de Paz - (Colombia)
3. Campaña Guatemala sin Hambre - (Guatemala)
4. Centro Regional de Defensa de Derechos Humanos Jose Maria Morelos y Pavón - (Mexico)
5. Defensa y Conservación Ecológica de Intag - (Ecuador)
6. Diálogo y Movimiento, A.C - (Mexico)
7. Federal University of Rio de Janeiro - (Brazil)
8. Frente de Pueblos en Defensa de la Tierra Atenco Edo. De Mexico - (Mexico)
9. Foro para el Desarrollo Sustentable Asociación Civil - (Mexico)

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10. Fundación ASLA - (Nicaragua)
  11. Organización Venezolana de Jóvenes para las Naciones Unidas - (Venezuela)
  12. Pastoral de la Tierra, Diócesis de San Marcos - (Guatemala)
  13. Polifônicas Socioambiental - (Brazil)
  14. Project on Organizing, Development, Education, and Research (PODER) - (Mexico)
  15. Instituto Socioambiental - (Brazil)
  16. Protection International Mmesoamerica - (Guatemala)
  17. Proyecto de Derechos Economicos, Sociales y Culturales (ProDESC) - (Mexico)
  18. Universidad Autónoma de la Ciudad de México - (Mexico)

#### North America

1. Amazon Watch - (United States)
2. Inter Pares - (Canada)
3. Just Ground - (United States)
4. Land is Life - (United States)
5. Landesa (Rural Development Institute) - (United States)
6. MiningWatch Canada - (Canada)
7. Pueblo Development Commission NGO - (United States)
8. The Grail - (United States)
9. United for Equity and Ending Racism – UFER - (United States)

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OECD - Public Consultation | 13 January – 10 February 2023

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## Consultation Draft: Targeted update of the OECD Guidelines for Multinational Enterprises and their Implementation Procedures

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OECD Centre for Responsible Business Conduct,  
Organisation for Economic Co-operation and Development  
Paris, France



## Background

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The [OECD Guidelines for Multinational Enterprises](#) (the Guidelines) set out recommendations from governments to businesses for ensuring responsible business conduct in all areas where business interacts with society, including human rights, labour rights, environment, bribery, consumer interests, as well as disclosure, science and technology, competition, and taxation. The OECD Guidelines are complemented by Implementation Procedures, which set out the role and functions of the National Contact Points for Responsible Business Conduct.

The OECD Guidelines were last revised in 2011 and the OECD Working Party on Responsible Business Conduct (WPRBC) is currently working towards a targeted update of the Guidelines and Implementation Procedures to advance their uptake and promotion, as well as to ensure they remain fit for purpose.

### PUBLIC CONSULTATION

The OECD is currently inviting interested stakeholders to comment on a consultation draft of potential updates. The public consultation is open to all interested stakeholders from all countries, including businesses, industry groups, civil society organisations, trade unions, as well as academia, interested citizens, international organisations and governmental experts (including from non-Adherent countries).

**The public consultation will remain open until 10 February 2023.**

### CONSULTATION DRAFT ON THE OECD MNE GUIDELINES AND THEIR IMPLEMENTATION PROCEDURES

The consultation draft outlines potential updates to the Guidelines chapters and to their implementation procedures. The potential updates reflect discussion by the WPRBC but do not constitute agreed text. As a working document, the draft is subject to change, including but not limited to changes to incorporate feedback received in the course of this public consultation.

The targeted update is guided by a set of parameters set out by the WPRBC:

- the update excludes a wholesale revision of the Guidelines or a full redrafting of existing chapters
- potential updates are based on issues raised in the preceding [stocktaking exercise](#) and current understanding and practice by Adherents
- the update is further guided by the criteria of (i) ensuring coherence with OECD priorities and standards; (ii) enhancing the OECD's leadership on RBC; (iii) building on achievements and strengths; and (iv) ensuring focus and proportionality.

Within these parameters, the consultation draft contains potential updates to all chapters of the Guidelines. However, the majority of potential updates occur in the chapter on Environment, the chapter on Science and Technology as well as in the Implementation Procedures concerning the National Contact Points for Responsible Business Conduct.

The consultation draft reproduces the OECD Guidelines for Multinational Enterprises [\[OECD/LEGAL/0144\]](#) and their Implementation Procedures and sets out annotated draft targeted updates to the text. Part I reproduces the chapters of the Guidelines and their Commentary. Part II reproduces the Implementation Procedures, namely the Council Decision and Procedural Guidance [\[OECD/LEGAL/0307\]](#) as well as the Commentary thereto. Throughout we use ***track changes*** in bold italics to indicate proposed additions. Text in strikethrough indicates proposed deletions. Text in *italics* only indicates text from the existing version of the Guidelines which has been moved to a different paragraph to improve readability.

Interested stakeholders are invited to submit comments through the [consultation website](#). Please note that **all written submissions will be made publicly available**. For any questions, please contact [RBC@oecd.org](mailto:RBC@oecd.org).

### YOUR DATA PROTECTION RIGHTS

Any personal data you provide as part of this consultation, including your name and responses, will be protected consistent with the [OECD Data Protection Rules](#). Please note that your submission will be made public indefinitely, as outlined above. Under the Rules, you have rights to access and rectify your personal data, as well as to object to its processing and request erasure in certain circumstances. To exercise these rights in connection with the consultation, please contact [RBC@oecd.org](mailto:RBC@oecd.org). If you have further queries or complaints related to the processing of your personal data, please

contact the [Data Protection Officer](#). If you need further assistance in resolving claims related to personal data protection you can contact the [Data Protection Commissioner](#).

Introduction and note on commentary status:

Draft updates to these have not been provided for consultation but from the current preface and chapter 1, paragraph 1, it is clear the Guidelines are intended, and therefore drafted, as a set of “non-binding principles and standards” that are “voluntary” and not “legally enforceable” in their own right.

However, there is a trend for the OECD Guidelines to be effectively incorporated into legal requirements, e.g. the EU Taxonomy Regulation minimum safeguards.

In that context, further clarity on, for example, the status and purpose of Guidelines commentary to support good faith efforts by enterprises to implement the principles and standards in the Guidelines should be considered.

# Part I: Targeted Updates to the OECD Guidelines for Multinational Enterprises

## Preface

1. The *OECD Guidelines for Multinational Enterprises* (the *Guidelines*) are recommendations addressed by governments to multinational enterprises. The common aim of the governments countries adhering to the Guidelines is to encourage the positive contributions enterprises can make to economic, environmental, and social progress and to minimise the adverse impacts that may result from their operations. The Guidelines encourage the alignment of positive contributions that multinational enterprises can make **business conduct with sustainable development objectives related** to economic, environmental and social progress and to minimise **outcomes in the areas covered by** the difficulties to which their various operations may give rise *Guidelines*. Responsible business conduct can enable the creation of a level playing field across global markets; foster a dynamic and well-functioning business sector, enhance the business contribution to sustainable development outcomes, including global solutions to address and respond to climate change. The *Guidelines* aim to ensure that the operations of enterprises are in harmony with government policies, to strengthen confidence between enterprises and the societies in which they operate, to help improve the investment climate and to enhance the contribution to sustainable development made by multinational enterprises.
2. The *Guidelines* are part of the *OECD Declaration on International Investment and Multinational Enterprises* [[OECD/LEGAL/0144](#)] ~~the other elements of which relate to national treatment, conflicting requirements on enterprises, and international investment incentives and disincentives.~~ The countries adhering to the *Guidelines* make a binding commitment to implement them take **certain actions to further their effectiveness** in accordance with the *Decision of the OECD Council on the OECD Guidelines for Multinational Enterprises* [[OECD/LEGAL/0307](#)]. For this purpose, National Contact Points for Responsible Business Conduct play a central role.
3. The *Guidelines* clarify the shared expectations for business conduct of the governments countries adhering to them and provide an authoritative point of reference for enterprises and for other stakeholders. ~~Thus~~ They recommend that enterprises undertake risk-based due diligence to identify, prevent, mitigate and account for how they address actual and potential adverse impacts on matters covered by the Guidelines. In this regard, the *Guidelines* both complement and reinforce private and public efforts to define and implement responsible business conduct.
4. The *Guidelines* provide voluntary principles and standards for responsible business conduct consistent with applicable laws and internationally recognised standards. Matters covered by the *Guidelines* may be the subject of national law and international commitments. Governments have an important role to play in supporting effective implementation of the Guidelines, including by creating an enabling policy environment to drive, support, and promote responsible business practices, including in their role as economic actors. Governments are increasingly adopting policies aimed at promoting responsible business practices, including by using OECD standards on responsible business conduct to support comprehensive and common approaches for due diligence, thereby addressing uneven levels of implementation of

Preface, para 1: for consistency with references to sustainable dev't objectives in the main chapters, para 1 on p 4 should be amended to: "...encourage business conduct THAT IS CONSISTENT with sustainable development objectives...ETC".

Para 3: Include governments here

**voluntary approaches. There is a continued demand for coherence across international standards on responsible business conduct and that governments co-operate with each other and with other actors to strengthen the international legal and policy framework in which business is conducted. The design of specific policies, legislation and other measures on responsible business conduct will be shaped by individual countries' political, administrative, and legal contexts.**

5. ~~International~~ **The political, economic, environmental, social, physical and technological environment for international** business has experienced **is undergoing** far-reaching structural **and rapid** change and the **The Guidelines** themselves have evolved to reflect these changes. With **In the past decades, international trade and finance has grown significantly as a share of** the rise of service and knowledge intensive industries and the expansion of the Internet **global** economy, service and technology enterprises are playing an increasingly important role in the international marketplace. Large enterprises still account for a major share of international **trade and** investment, **while cross-border trade** and there is a trend toward large scale international mergers. At the same time, foreign investment by small- and medium-sized enterprises has also increased and these enterprises now play a significant role in international markets. Multinational enterprises, like their domestic counterparts, have evolved to encompass a broader range of business arrangements and organisational forms. Technological developments as well as strategic alliances and closer relations with suppliers and contractors tend to blur the boundaries of the enterprise.
6. The rapid evolution in the structure of multinational enterprises is also reflected in their operations in the **emerging and** developing world, where foreign direct **economies, whose share of cross-border trade and** investment has grown **is growing**. In **emerging and** developing countries **economies**, multinational enterprises have diversified beyond primary production and extractive industries into manufacturing, assembly, domestic market development and services. Another key development is the emergence of multinational enterprises based in developing countries as major international investors.
7. The activities of multinational enterprises, through international trade and investment, have strengthened and deepened the ties that join the countries and regions of the world. These activities bring substantial benefits to home and host countries. These benefits accrue when multinational enterprises supply the products and services that **through creation of better jobs, lower cost of living for** consumers want to buy at competitive prices and when they provide fair, **and better** returns to suppliers of capital. **for investors**. Their trade and investment activities contribute to the efficient use of capital, technology and human and natural resources. They facilitate the **safe** transfer of technology among the regions of the world and the development of technologies that reflect local conditions. Through both formal training and on-the-job learning enterprises also promote the development of human capital and the creation of employment opportunities.
8. The nature, scope and speed of economic changes have presented new strategic challenges for enterprises and their stakeholders. Multinational enterprises have the opportunity to **increasingly** implement best practice policies for **business models that pursue** sustainable development that ~~seek to ensure~~ **and support** coherence between economic, environmental and social objectives. The ability of multinational enterprises to promote sustainable development is greatly enhanced when trade and investment are conducted in a context of open, competitive and appropriately regulated markets with rules of law and protection of civic space.
9. Many multinational enterprises have demonstrated that respect for high standards of business conduct can enhance growth. Competitive forces are intense and multinational enterprises face a variety of legal, social and regulatory settings. In this context, some enterprises may be tempted to neglect appropriate principles and standards of conduct in an attempt to gain undue competitive advantage. Such practices by the few may call into question the reputation of the many and may give rise to public concerns.
10. ~~Many enterprises have responded to these public concerns by developing internal programmes, guidance and management systems that underpin their commitment to good corporate citizenship, good practices and good business and employee conduct. Some of them have called upon consulting, auditing and certification services, contributing to the accumulation of expertise in these areas.~~

Clarify 'technologies that reflect local conditions'.

11. ***Many enterprises have responded by setting up due diligence processes to assess and address environmental, social and governance impacts of their operations underpinning their commitment to good corporate citizenship, good practices and good business and employee conduct.*** Enterprises have also promoted social dialogue on what constitutes responsible business conduct and have worked with stakeholders, including in the context of multi-stakeholder initiatives, to develop guidance for responsible business conduct.
12. The adoption of the OECD Guidelines in 1976, and their subsequent updates, reflect increased demand on business to follow principles and standards on responsible business conduct. The beginnings of this development can be dated to the work of the International Labour Organisation in the early twentieth century. The adoption by the United Nations in 1948 of the Universal Declaration of Human Rights was another landmark event. It was followed by the ongoing development of standards relevant for many areas of responsible business conduct ~~a process that continues to this day.~~ The OECD has contributed in important ways to this process through the development of standards covering such areas as the environment, the fight against corruption, consumer interests, corporate governance, ***science, technology and innovation*** and taxation.
13. The Guidelines remain the leading international instrument on responsible business conduct. The countries adhering the Guidelines are committed to co-operating with each other and with other countries to further their implementation in partnership with the many businesses, trade unions and other non-governmental organisations that are working in their own ways toward the same end. .. ~~Governments can help by providing effective domestic policy frameworks that include stable macroeconomic policy, non-discriminatory treatment of enterprises, appropriate regulation and prudential supervision, an impartial system of courts and law enforcement and efficient and honest public administration. Governments can also help by maintaining and promoting appropriate standards and policies in support of sustainable development and by engaging in ongoing reforms to ensure that public sector activity is efficient and effective. Governments adhering to the *Guidelines* are committed to continuous improvement of both domestic and international policies with a view to improving the welfare and living standards of all people.~~

Para 11: Add a reference to their contribution to the dev't of international standards that these guidelines align with?



# Chapter I. Concepts and Principles

## Targeted Updates to OECD Guidelines for Multinational Enterprises: Chapter I. Concepts and Principles

(text to illustrate potential edits is in bold and italics for new text and strike-out for deleted text)

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### Full edited text of Chapter I. Concepts and Principles

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1. The *Guidelines* are recommendations jointly addressed by governments to multinational enterprises. They provide principles and standards of good practice consistent with applicable laws and internationally recognised standards. Observance of the *Guidelines* by enterprises is voluntary and not legally enforceable. Nevertheless, some matters covered by the *Guidelines* may also be regulated by national law or international commitments.

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2. Obeying domestic laws is the first obligation of enterprises. The *Guidelines* are not a substitute for nor should they be considered to override domestic law and regulation. While the *Guidelines* extend beyond the law in many cases, they should not and are not intended to place an enterprise in situations where it faces conflicting requirements. However, in countries where domestic laws and regulations conflict with, ***or set lower expectations than*** the principles and standards of the *Guidelines*, enterprises should ~~seek ways to~~ honour such principles and standards to the fullest extent which does not place them in violation of domestic law.

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3. Since the operations of multinational enterprises extend throughout the world, international co-operation in this field should extend to all countries. Governments adhering to the *Guidelines* encourage the enterprises operating in or from their territories to observe the *Guidelines* wherever they operate, while taking into account the particular circumstances of each host country.

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4. A precise definition of multinational enterprises is not required for the purposes of the *Guidelines*. These enterprises operate in all sectors of the economy. They usually comprise companies or other entities established in more than one country and so linked that they may co-ordinate their operations in various ways ***or, companies or other entities conducting a significant amount of business in more than one country.*** While one or more of these entities may be able to exercise a significant influence over the activities of others ***entities in a group,*** their degree of autonomy within the ~~group enterprise~~ may vary widely from one multinational enterprise to another. Ownership may be private, State, or mixed. The *Guidelines* are addressed to all the entities within the multinational enterprise (parent companies and/or local entities). According to the actual distribution of responsibilities among them, the different entities are expected to co-operate and to assist one another to facilitate observance of the *Guidelines*. ***The Guidelines allow for a broad and flexible approach in identifying which entities may be considered multinational enterprises for the purposes of the Guidelines. The international nature of an enterprise's structure or activities and its commercial form, purpose, or activities are relevant considerations in this respect.***

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5. The *Guidelines* are not aimed at introducing differences of treatment between multinational and domestic enterprises; they reflect good practice for all. Accordingly, multinational and domestic enterprises are subject to the same expectations in respect of their conduct wherever the *Guidelines* are relevant to both.

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

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

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8. Governments have the right to prescribe the conditions under which multinational enterprises operate within their jurisdictions, subject to international law. The entities of a multinational enterprise located in various countries are subject to the laws applicable in these countries. When multinational enterprises are subject to conflicting requirements by adhering countries or third

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countries, the governments concerned are encouraged to co-operate in good faith with a view to resolving problems that may arise.

9. Governments adhering to the *Guidelines* set them forth with the understanding that they will fulfil their responsibilities to treat enterprises equitably and in accordance with international law and with their contractual obligations.
10. 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.

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11. 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*. The adhering Governments will also participate in appropriate review and consultation procedures to address **relevant concerns regarding** ~~concerning~~ interpretation **and implementation** of the *Guidelines* **and to maintain their continued relevance** in a changing world.
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# Chapter II. General Policies

## Targeted Updates to OECD Guidelines for Multinational Enterprises: Chapter II. General Policies

(text to illustrate potential edits is in bold and italics for new text and strike-out for deleted text)

### Full edited text of Chapter II. General Policies

Enterprises should take fully into account established policies in the countries in which they operate, and consider the views of other stakeholders. In this regard:

#### A. Enterprises should:

1. Contribute to economic, environmental and social progress with a view to achieving sustainable development.
2. Respect the internationally recognised human rights of those affected by their activities.
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.
4. Encourage human capital formation, in particular by creating employment opportunities and facilitating training opportunities for employees.
5. ***Ensure transparency and integrity in lobbying activities and*** refrain from seeking or accepting exemptions not contemplated in the statutory or regulatory framework related to human rights, environmental, health, safety, labour, taxation, financial incentives, or other issues.
6. Support and uphold good corporate governance principles and develop and apply good corporate governance practices, including throughout enterprise groups.
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.
8. 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 programmes.
9. Refrain from discriminatory or ***disciplinary action or applying undue pressure***, against workers, ***trade union representatives or other worker representatives*** 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.
10. (new paragraph) ***Refrain from applying undue pressure or reprisals against any persons or groups who monitor or report practices of the enterprise or entities with which it has a business relationship that contravene the law, or are inconsistent with the Guidelines, or the enterprise's policies, including but not limited to submitters of Specific Instances, members of the press, whistleblowers, and human rights defenders, and those working on environmental matters referred to as environmental defenders.***
11. (Originally paragraph A.10) 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.
12. (Originally paragraph A.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.
13. (Originally paragraph A.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.

Para 9: Suggest using 'retaliation' instead of 'disciplinary action'.

Para 10: 'Human rights defenders': at <https://www.ohchr.org/en/special-procedures/sr-human-rights-defenders/about-human-rights-defenders>, the UN explains the term 'human rights defenders'. Refer to the UN's explanation in this doc.

Para 10: 'Environmental defenders': at <https://www.unep.org/explore-topics/environmental-rights-and-governance/what-we-do/advancing-environmental-rights/who-the-un-explains-the-term-'environmental-defenders'>. Refer to the UN's explanation in this

Paras A12 (originally A11) & new recomm A14: please see detailed comments adjacent to para A14

<p>14. <b>(New paragraph) Provide for or co-operate through legitimate processes in the remediation of adverse impacts where an enterprise has caused or contributed to these impacts.</b></p>	<p>Para 15: The blue text is already addressed in A13, so remove it to simplify the para.</p>
<p>15. (Originally paragraph A.13) In addition to addressing adverse impacts in relation to matters covered by the <i>Guidelines</i>, encourage, where practicable, <b>entities with which an enterprise has a business relationship partners</b>, including suppliers and sub-contractors, <b>investee companies, clients, buyers, and joint venture partners</b> to apply principles of responsible business conduct compatible with the <i>Guidelines</i>.</p>	<p>Also, include verbs such as 'encourage and collaborate with' entities with which an entity has a relationship .</p>
<p>16. (Originally paragraph A.14) Engage <b>meaningfully</b> with relevant stakeholders in order to provide opportunities for their views to be taken into <b>account with respect to</b> in relation to planning and decision making for projects or other activities that may significantly impact <b>them</b> local communities.</p>	<p>Para 16: Regarding 'meaningful', please refer here to your helpful explanation of 'meaningful' on p 15.</p>
<p>17. Abstain from any improper involvement in local political activities, <b>such as engaging in acts of corruption or attempting to influence the design, implementation, execution and evaluation of public policies and regulations administered by public officials, by providing covert, deceptive or misleading evidence or data.</b></p>	
<p>B. Enterprises are encouraged to</p> <ol style="list-style-type: none"> <li>1. Support, as appropriate to their circumstances, cooperative efforts in the appropriate fora to promote Internet Freedom through respect of freedom of expression, assembly and association online.</li> <li>2. engage in or support, where appropriate, private or multi-stakeholder initiatives and social dialogue on responsible supply chain management <b>business conduct</b> while ensuring that these initiatives take due account of their social and economic effects on developing countries and of existing internationally recognised standards.</li> </ol>	<p>Para 17: could more positive text also be provided, such as 'providing accurate and transparent data'?</p>
<p>Commentary on General Policies</p>	
<p>1. The General Policies chapter of the <i>Guidelines</i> is the first to contain specific recommendations to enterprises. As such it is important for setting the tone and establishing common fundamental principles for the specific recommendations in subsequent chapters</p>	
<p>2. Enterprises are encouraged to co-operate with governments in the development and implementation of policies and laws. Considering the views of other stakeholders in society, which includes the local community <b>and those affected or potentially affected by their activities</b> as well as business interests, can enrich this process. It is also recognised that governments should be transparent in their dealings with enterprises, and consult with business on these same issues. Enterprises, <b>social partners and other stakeholders such as civil society organisations and trade unions</b> should be viewed as partners with government in the development and use of both voluntary and regulatory approaches (of which the <i>Guidelines</i> are one element) to policies affecting them.</p>	<p>Section B: If initiatives are multi-stakeholder, MNEs may not be in a position to 'ensure'.</p>
<p>3. There should not be any contradiction between the activity of multinational enterprises (MNEs) and sustainable development, and the <i>Guidelines</i> are meant to foster complementarities in this regard. Indeed, links among economic, social, and environmental progress are a key means for furthering the goal of sustainable development.<sup>4</sup></p>	
<p><sup>*4.</sup> One of the most broadly accepted definitions of sustainable development <b>from</b> the 1987 World Commission on Environment and Development (the Brundtland Commission) <b>is</b> "Development that meets the needs of the present without compromising the ability of future generations to meet their own needs". <b>The United Nations has set targets to eradicate global poverty, protect the planet, and ensure that all people enjoy peace and prosperity.</b></p>	<p>Para *4: Specify the doc where readers can find these. Explain that the targets are relevant to MNEs as well as to gov'ts &amp; other non-state actors.</p>
<p>4. Chapter IV elaborates on the general human rights recommendation in paragraph A.2.</p>	
<p>5. The <i>Guidelines</i> also acknowledge and encourage the contribution that MNEs can make to local capacity building as a result of their activities in local communities. Similarly, the recommendation on human capital formation is an explicit and forward-looking recognition of the contribution to</p>	

individual human development that MNEs can offer their employees, and encompasses not only hiring practices, but training and other employee development as well. Human capital formation also incorporates the notion of non-discrimination in hiring practices as well as promotion practices, life-long learning and other on-the-job training.

6. **Importantly, when engaging in public advocacy, enterprises should take due account of the OECD Recommendation of the Council on Principles for Transparency and Integrity in Lobbying [OECD/LEGAL/0379], while maintaining the ability to participate freely in public discourse. Enterprises should ensure that their lobbying activities are coherent with their commitments and goals on matters covered by the Guidelines.** The *Guidelines* also recommend that, in general, enterprises avoid making efforts to secure exemptions not contemplated in the statutory or regulatory framework related to human rights, environmental, health, safety, labour, taxation and financial incentives among other issues, without infringing on an enterprise's right to seek changes in the statutory or regulatory framework. The words "or accepting" also draw attention to the role of the State in offering these exemptions. While this sort of provision has been traditionally directed at governments, it is also of direct relevance to MNEs. Importantly, however, there are instances where specific exemptions from laws or other policies can be consistent with these laws for legitimate public policy reasons. The environment and competition policy chapters provide examples.
7. The *Guidelines* recommend that enterprises apply good corporate governance practices drawn from the **G20/OECD Principles of Corporate Governance [OECD/LEGAL/0413]**. The Principles call for the protection and facilitation of the exercise of shareholder rights, including the equitable treatment of shareholders. Enterprise should recognise the rights of stakeholders established by law or through mutual agreements and encourage active co-operation with stakeholders in creating wealth, jobs, and the sustainability of financially sound enterprises.
8. The Principles call on the board of the parent entity to ensure the strategic guidance of the enterprise, the effective monitoring of management and to be accountable to the enterprise and to the shareholders, while taking into account the interests of stakeholders. In undertaking these responsibilities, the board needs to ensure the integrity of the enterprise's accounting and financial reporting systems, including independent audit, appropriate control systems, in particular, risk management, and financial and operational control, and compliance with the law and relevant standards.
9. The Principles extend to enterprise groups, although boards of subsidiary enterprises might have obligations under the law of their jurisdiction of incorporation. Compliance and control systems should extend where possible to these subsidiaries. Furthermore, the board's monitoring of governance includes continuous review of internal structures to ensure clear lines of management accountability throughout the group.
10. State-owned multinational enterprises are subject to the same recommendations as privately-owned enterprises, but public scrutiny is often magnified when a State is the final owner. The *OECD Guidelines on Corporate Governance of State-Owned Enterprises* are a useful and specifically tailored guide for these enterprises and the recommendations they offer could significantly improve governance.
11. Although primary responsibility for improving the legal and institutional regulatory framework lies with governments, there is a strong business case for enterprises to implement good corporate governance.
12. An increasing network of non-governmental self-regulatory instruments and actions address aspects of corporate behaviour and the relationships between business and society. Interesting developments in this regard are being undertaken in the financial sector. Enterprises recognise that their activities often have social and environmental implications. The institution of self-regulatory practices and management systems **and participation in related multi-stakeholder initiatives** by enterprises sensitive to reaching these goals – thereby contributing to sustainable development – is an illustration of this. **Self-regulatory practices and multi-stakeholder initiatives should be credible and transparent. Where such initiatives are focused on responsible business conduct due diligence, alignment with relevant international standards such as the Guidelines can foster greater effectiveness while reducing complexity and cost for businesses engaged in such initiatives.** In turn, developing such practices can further constructive relationships between enterprises and the societies in which they operate. **Although enterprises can collaborate at an industry or multistakeholder level,**

Para 12: Very long para, and the key messages are not clear. Consider simplifying or splitting into separate paras for each key message.

Also, clarify what you mean by 'interesting developments' and the financial sector.

they always remain individually responsible for ensuring that their due diligence is carried out effectively.

13. Following from effective self-regulatory practices, as a matter of course, enterprises are expected to promote employee awareness of company policies. Safeguards to protect bona fide “whistle-blowing” activities are also recommended, including protection of employees who, in the absence of timely remedial action or in the face of reasonable risk of negative employment action, report practices that contravene the law to the competent public authorities. While of particular relevance to **internal controls, ethics and compliance programmes related to anti-bribery corruption, discussed in Chapter VII**, and environmental initiatives, such protection is also relevant to other recommendations in the *Guidelines*.
14. **(New paragraph) Business and civil society both depend on a shared civic space that includes freedom of expression, association and assembly, as well as the rule of law, which in turn create an enabling environment for the implementation of the Guidelines. In this respect, enterprises should refrain from applying undue pressure or reprisals against any persons or groups who monitor or report practices of the enterprise that contravene the law or are inconsistent with the Guidelines, including through developing appropriate safeguards. Pressure is undue when it is retaliatory or discriminatory or based solely on the act or content of reporting or monitoring. This includes threats, reputational smears, slurs, harassment, intimidation, surveillance, Strategic lawsuits against public participation (SLAPP suits) intended for the sole purpose of censoring, intimidating or silencing critics, criminalisation of lawful activities, physical attacks and death.**
15. **(Originally paragraph 14 of commentary) For the purposes of the Guidelines, due diligence is understood as the process through which enterprises can identify, prevent, mitigate and account for how they address their actual and potential adverse impacts as an integral part of business decision-making and risk management systems. To that end the OECD Due Diligence Guidance for Responsible Business Conduct sets out a due diligence framework adhering countries have approved and committed to actively support and monitor. It outlines the following measures: 1. embedding responsible business conduct into policies and management systems; 2. identifying and assessing actual and potential adverse impacts of the enterprise’s operations, products or services; 3. ceasing, preventing and mitigating adverse impacts; 4. tracking implementation and results; 5. communicating how impacts are addressed; and 6. providing for or cooperating in remediation when appropriate. It also suggests practical actions to implement these measures. Not every practical action mentioned in the due diligence guidance will be appropriate for every situation. The OECD due diligence and OECD sector due diligence guidance help companies to understand and implement due diligence as foreseen in the Guidelines. They also seek to promote a common understanding among governments and stakeholders on due diligence for RBC.**
16. Due diligence can be included within broader enterprise risk management systems, provided that it goes beyond simply identifying and managing material risks to the enterprise itself, to include the risks of adverse impacts related to matters covered by the *Guidelines*. Potential impacts are to be addressed through prevention or mitigation, while actual impacts are to be addressed through remediation. The *Guidelines* concern those adverse impacts that are either caused or contributed to by the enterprise, or are directly linked to their operations, products or services by a business relationship, as described in paragraphs A.11 and A.12. Due diligence can help enterprises avoid the risk of such adverse impacts. For the purposes of this recommendation, ‘contributing to’ an adverse impact should be interpreted as a substantial contribution, meaning an activity that causes, facilitates or incentivises another entity to cause an adverse impact and does not include minor or trivial contributions. **An enterprise’s relationship to adverse impact is not static. It may change, for example as situations evolve and depending upon the degree to which due diligence and steps taken to address identified risks and impacts decrease the risk of the impacts occurring.** The term ‘business relationship’ includes relationships with business partners, **investee companies, clients, and joint venture partners**, entities in the supply chain **which supply products or services that contribute to the enterprise’s own operations, products or services or receive products or services from the enterprise**, and any other non-State or State entities directly linked to its business operations, products or services.
17. **(Originally part of paragraph 14) The recommendation in paragraph A.11 applies to those matters covered by the Guidelines that are related to adverse impacts associated with an enterprise’s operations, products and services. The recommendation in paragraph A.11 does not apply to the chapters on Science and Technology, Competition and Taxation. Throughout**

Para 13 is long and complex. Simplify by splitting into key messages:

- 1) informing employees, and
- 2) protecting them from retaliation.

Avoid repeating content that is already present in earlier clauses.

Para 14:

- 1) Some repetition of content in earlier paras.
- 2) Civil society orgs also have responsibility not to issue threats, reputational smears etc.

Para 15: provide links to the guidance docs.

**the Guidelines recommendations related to due diligence and identifying, preventing, and mitigating adverse impacts and accounting for how such impacts are addressed should be read in line with A 11-13 and related commentary.**

18. **(Originally paragraph 15)** The nature and extent of due diligence, such as the specific steps to be taken, appropriate to a particular situation will be affected by factors such as the size of the enterprise, context of its operations, the specific recommendations in the *Guidelines*, and the severity of its adverse impacts. **In this respect the measures that an enterprise takes to conduct due diligence should be commensurate to the severity and likelihood of the adverse impact. Where it is not feasible to address all identified impacts at once, an enterprise should prioritise the order in which it takes action based on the severity and likelihood of the adverse impact. For the assessment of adverse impacts arising from downstream business relationships, prioritisation should be based on any known or foreseeable circumstance related to the use of the product or service provided in accordance with its intended purpose, or under conditions of reasonably foreseeable improper use or misuse, which may give rise to adverse impacts.** Specific recommendations for human rights due diligence **related to specific issues** are provided in Chapter IV-VIII.
19. **(Originally paragraph 16)** Where enterprises have large numbers of suppliers **and other business relationships**, they are encouraged to identify general areas where the risk of adverse impacts is most significant and, based on this risk assessment, prioritise suppliers **these areas for due diligence in line with the measures outlined in paragraph 17.**
20. **(Originally paragraph 17)** To avoid causing or contributing to adverse impacts on matters covered by the *Guidelines* through their own activities includes their activities in the supply chain. **Business relationships in the supply chain take a variety of forms including, for example, financing, supplying and buying, franchising, licensing or subcontracting. Business relationships may include relationships with entities beyond contractual relationships, such as sub-suppliers, as well as with buyers and users of products and services.** Entities **with which an enterprise has a business relationship may or may not** in the supply chain are often multinational enterprises themselves and, by virtue of this fact, those **be** operating in or from the countries adhering to the Declaration are covered by the *Guidelines*.
21. **(Originally paragraph 18)** 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.
22. **(Originally paragraph 19)** If the enterprise identifies a risk of contributing to an adverse impact, then it should take the necessary steps to cease or prevent its contribution and use its leverage to mitigate any remaining impacts to the greatest extent possible. Leverage is considered to exist where the enterprise has the ability to effect change in the wrongful practices of the entity that causes the harm.
23. **(Originally paragraph 20)** Meeting the expectation in paragraph A.13 would entail an enterprise, acting alone or in co-operation with other entities, as appropriate, to use its leverage to influence the entity causing the adverse impact to prevent or mitigate that impact.
24. **(Originally paragraph 21)** The *Guidelines* recognise that there are practical limitations on the ability of **degree of leverage** enterprises **have** to effect change in the behaviour of their **entities with which they have suppliers business relationships.** These are related to product **and/or service** characteristics, the number of suppliers **and other business relationships**, the structure and complexity of the supply chain, the position of the enterprise vis-à-vis **entities with which it has a suppliers business relationship** or other entities in the supply chain. **Where an enterprise does not have sufficient leverage, it should consider ways to enhance its leverage. For example, in the context of some business relationships once a transaction has been concluded, an enterprises' leverage may be significantly reduced and as such it is important that enterprises make efforts to exercise leverage before the conclusion of a transaction.** However, Enterprises can also influence suppliers **entities with which it has business relationships, for example, through contractual arrangements support, training and capacity building; engagement to urge them to prevent and/or mitigate impacts; building expectations around responsible business conduct and due diligence specifically into commercial contracts such as** management contracts, pre-qualification requirements for potential suppliers, voting trusts, and license or franchise agreements; **linking business incentives with performance on responsible business conduct; engagement with regulators and policymakers on responsible business conduct issues; communicating the possibility of responsible disengagement if expectations around responsible business**

Para 18:

- 1) Suggest deleting 'in this respect'.
- 2) This clause is complex: can you simplify the wording?
- 3) Put a definition of due diligence earlier in the doc?

Para 18: this text and the chapeau and paragraph 1 of Chapter 9 are inconsistent as to whether the Ch 2 due diligence expectations are intended to be relevant to Chapter 9. See also our note on Ch 9 chapeau & para 1.

Para 20: what is the key message here?

Para 24: long and complex. Consider simplifying and/or splitting the para into two. Also, the UNGPs address 'leverage' clearly. Wording here should be similar if possible.

conduct are not respected, collaborating with other enterprises (at sectoral, risk or country level) to pool leverage and implementing common standards of responsible business conduct. Other factors relevant to determining the appropriate response to the identified risks include the severity and probability of adverse impacts and how crucial that supplier is to the enterprise.

25. **(Originally paragraph 22)** Appropriate responses with regard to the business relationship may include continuation of the relationship with a supplier throughout the course of risk mitigation efforts; temporary suspension of the relationship while pursuing ongoing risk mitigation; or, as a last resort, **responsible** disengagement **from** with the supplier **a business relationship** either after failed attempts at mitigation, or where the enterprise deems mitigation not feasible, or because of the severity of the adverse impact. The enterprise should also take into account potential social and economic adverse impacts related to the decision to disengage **and consult with stakeholders in a timely manner. Enterprises should take reasonable and appropriate measures to mitigate adverse impacts related to disengagement.**
26. **(Originally paragraph 23)** Enterprises may also engage with suppliers and other **entities with which they have business relationships** ~~entities in the supply chain~~ to improve their performance, in co-operation with other stakeholders, including through personnel training and other forms of capacity building and, to support the integration of principles of responsible business conduct compatible with the *Guidelines* into their business practices. **Where entities with which an enterprise has a business relationship** ~~suppliers have multiple customers and are potentially exposed to conflicting requirements imposed,~~ **for example** by different buyers, **or service providers**, enterprises are encouraged, with due regard to anti-competitive concerns, to participate in industry-wide collaborative efforts with other enterprises ~~with which they share common suppliers~~ to coordinate **due diligence** ~~supply chain~~ policies and risk management strategies, including through information-sharing.
27. **(Originally paragraph 24)** Enterprises are also encouraged to participate in private or multi-stakeholder initiatives and social dialogue on **responsible business conduct**, responsible supply chain management, such as those undertaken as part of the proactive agenda pursuant to the Decision of the OECD Council on the *OECD Guidelines for Multinational Enterprises* and the attached Procedural Guidance.
28. **(Originally paragraph 25)** **Meaningful stakeholder engagement is a key component of the due diligence process. In some cases stakeholder engagement may also be a right in and of itself.** Stakeholder engagement involves interactive processes of engagement with relevant stakeholders, through, for example, meetings, hearings or consultation proceedings. **Relevant stakeholders are persons or groups, or their legitimate representatives, who are or could be adversely impacted by the enterprise's operations, activities, products, or services. Meaningful stakeholder engagement refers to ongoing engagement with stakeholders that is two-way, conducted in good faith by the participants on both sides and responsive to stakeholders' views. To ensure stakeholder engagement is meaningful and effective, it is important to identify and remove potential barriers to engaging with stakeholders in positions of vulnerability or marginalisation. The OECD Due Diligence Guidance for Responsible Business Conduct and relevant OECD sector specific guidance includes practical support for enterprises on carrying out stakeholder engagement including as part of an enterprise's due diligence process.** ~~Effective stakeholder engagement is characterised by two-way communication and depends on the good faith of the participants on both sides. This engagement is can be particularly helpful~~ **important** in the planning and decision-making concerning projects or other activities involving, for example, the intensive use of land or water, which could significantly affect local communities, **including groups with traditional ties to particular lands and waters.**
29. Paragraph B.1 acknowledges an important emerging issue. It does not create new standards, nor does it presume the development of new standards. It recognises that enterprises have interests which will be affected and that their participation along with other stakeholders in discussion of the issues involved can contribute to their ability and that of others to understand the issues and make a positive contribution. It recognises that the issues may have a number of dimensions and emphasises that co-operation should be pursued through appropriate fora. It is without prejudice to positions held by governments in the area of electronic commerce at the World Trade Organisation (WTO). It is not intended to disregard other important public-policy interests which may relate to the use of the internet which would need to be taken into account.<sup>5</sup> Finally, as is the case with the *Guidelines* in general, it is not intended to create conflicting requirements for enterprises consistent with paragraphs 2 and 8 of the Concepts and Principles Chapter of the *Guidelines*.

Para 28: When you use this term elsewhere in the document, refer readers to the helpful explanation in this para, so that they understand the term.

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~~\*5. Some countries have referred to the 2005 Tunis Agenda for the Information Society in this regard.~~

30. **(Originally paragraph 27)** Finally, it is important to note that self-regulation and other initiatives in a similar vein, including the *Guidelines*, should not unlawfully restrict competition, nor should they be considered a substitute for effective law and regulation by governments. It is understood that MNEs should avoid potential trade or investment distorting effects of codes and self-regulatory practices when they are being developed.
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# Chapter III. Disclosure

## Targeted Updates to OECD Guidelines for Multinational Enterprises: Chapter III. Disclosure

(text to illustrate potential edits is in bold and italics for new text and strike-out for deleted text)

### Full edited text of Chapter IV. Disclosure\*

\*Disclaimer: the review of this Chapter is subject to alignment with the G20/OECD Principles of Corporate Governance which are currently under review.

1. ***Enterprises should take fully into account established disclosure policies in the countries in which they operate, and consider the views and informational requirements of shareholders and other relevant stakeholders.*** Enterprises should ensure that timely and accurate information is disclosed on all material matters regarding their activities, structure, financial situation, performance, ownership and governance. This information should be disclosed for the enterprise as a whole, and, where appropriate, along business lines or geographic areas. Disclosure policies of enterprises should be tailored to the nature, size and location of the enterprise, with due regard taken of costs, business confidentiality and other competitive concerns.
2. Disclosure policies of enterprises should include, but not be limited to, material information on:
  - a) the financial and operating results of the enterprise;
  - b) enterprise objectives;
  - c) major share ownership and voting rights, including ***beneficial owners***, the structure of a group of enterprises and intra-group relations, as well as control enhancing mechanisms;
  - d) remuneration policy for members of the board and key executives, ***as well as remuneration levels or amounts***, and information about ***the composition of the board and its*** members, including qualifications, the selection process, other enterprise directorships and whether each board member is regarded as independent by the board;
  - e) related party transactions;
  - f) foreseeable risk factors;
  - g) issues regarding workers and other stakeholders;
  - h) governance structures and policies, in particular, the ***extent of compliance with national content of any corporate governance codes or policies and its the process by which they are implemented*** implementation process;
  - i) ***debt contracts, including the risk of non-compliance with covenants.***
3. ~~Enterprises are encouraged to communicate additional information that could include:~~ ***It is also important that enterprises communicate responsible business conduct information including as part of their responsibility to carry out due diligence. Some of this information may also be material under paragraph 2. Responsible business conduct information includes:***
  - a) value statements or statements of business conduct intended for public disclosure including, depending on its relevance for the enterprise's activities, ~~information on the enterprise's~~ ***policies on responsible business conduct issues that articulate the enterprise's commitments to the principles and standards contained in the*** relating to matters covered by the Guidelines, ***and its plans for implementing due diligence;***
  - b) policies and other codes of conduct to which the enterprise subscribes, their date of adoption and the countries and entities to which such statements apply, ***and information on measures taken to embed policies on RBC issues into the enterprise's management and oversight bodies;***
  - c) ***the enterprise's identified areas of significant impacts or risks, the adverse impacts or risks identified, prioritised and assessed, as well as the prioritisation criteria;***

Para 1: the sentence in bold would read better if it came at the end of this clause.

Para b: put the highlighted phrase into clause a) above.

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- d) its performance in relation to these the statements and codes in paragraph 3(a) and the codes in paragraph (b) including the actions taken to prevent or mitigate risks or impacts identified in paragraph 3(c), including where possible estimated timelines and benchmarks for improvement and their outcomes, including the enterprise's provision of or co-operation in any remediation;
  - e) information on internal audit, risk management and legal compliance systems;
  - f) information on relationships with workers and other stakeholders;
  - g) Additional information in line with disclosure recommendations on RBC information is provided in Chapters IV and VI.
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For simplicity and clarity, would it be better to include this info in paras 3b and 3c above?

- 4. Enterprises should apply high quality standards for accounting, and financial as well as environmental and social reporting where they exist, and refrain from publication of inaccurate or misleading information. The standards or policies under which information is compiled and published should be reported. An annual audit should be conducted by an independent, competent and qualified auditor in order to provide an external and objective assurance to the board and shareholders that all reported financial information fairly represents the financial position and performance of the enterprise in all material respects. In order to enhance the credibility of responsible business conduct information, enterprises may seek external assurance or audit of such information.
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#### Commentary on Disclosure

- 28. The purpose of this Chapter is to help build an environment of transparency and accountability around the operations of multinational enterprises, thereby supporting financial stability, business integrity, and sustainable and inclusive economic growth. encourage improved understanding of the operations of multinational enterprises. In order to help build such an environment, clear and complete information on enterprises is important to a variety of users ranging from shareholders and the financial community to other constituencies such as workers, local communities, special interest groups, governments and society at large. To improve public understanding of enterprises and their interaction with society and the environment, enterprises should be transparent in their operations and responsive to the public's increasingly sophisticated demands for information.
  - 29. ~~The information highlighted in this chapter addresses disclosure in two areas.~~ The first set of disclosure recommendations is identical to disclosure items outlined in the G20/OECD Principles of Corporate Governance [OECD/LEGAL/0413]. Their related annotations provide further guidance and the recommendations in the Guidelines should be construed in relation to them. The first set of disclosure recommendations focus mainly on publicly traded enterprises ~~may be supplemented by a second set of disclosure recommendations which enterprises are encouraged to follow~~ and information which is considered material if it can reasonably be expected to influence an investor's assessment of a company's value, investment or voting decision. To the extent that they are deemed applicable in light of the nature, size and location of enterprises they should also be a useful tool to improve corporate governance in non- traded enterprises; for example, privately held or State-owned enterprises. ~~This first set of disclosure recommendations calls for timely and accurate disclosure on all material matters regarding the corporation, including the financial situation, performance, ownership and governance of the company. Companies are also expected to disclose sufficient information on the remuneration of board members and key executives (either individually or in the aggregate) for investors and, where relevant, other stakeholders to properly assess the costs and benefits of remuneration plans and the contribution of incentive schemes, such as stock option schemes, to performance. Related party transactions and material foreseeable risk factors are additional relevant information that should be disclosed, as well as material issues regarding workers and other stakeholders.~~
  - 30. The Guidelines include a second set of disclosure recommendations on responsible business conduct information including the enterprise's actual or potential adverse impacts on people, the environment and society, and related due diligence processes, which may be material to
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**an investor's decision making and which also may be relevant for a broader set of stakeholders, including, workers, worker representatives, local communities and civil society, among others. Several jurisdictions allow or require the consideration of stakeholder interests and many enterprises provide information on a broader set of topics than financial performance, and consider disclosure of such information a method by through which they can demonstrate a commitment to and performance on sustainable business practices more generally, socially acceptable practices. In some cases, This second type of disclosure – or communication with the public and with other parties directly affected by the enterprise's activities or business relationships – may pertain to entities that extend beyond those covered in the enterprise's financial accounts. For example, it may also cover information on the activities of subcontractors and suppliers or of joint venture partners.** Disclosure recommendations are not expected to place unreasonable administrative or cost burdens on enterprises. Nor are enterprises expected to disclose information that may endanger their competitive position unless disclosure is necessary to fully inform the investment decision and to avoid misleading the investor. In order to determine what information should be disclosed at a minimum, the Guidelines use the concept of materiality. Material information can be defined as information whose omission or misstatement could influence the economic decisions taken by users of information.

Para 30:  
1) it is very long. Can it be simplified?  
2) Is it possible to provide links to relevant international reporting standards, and/or to para 35?

Para 31: the word 'material' is used many times in this document. Should this useful explanation of 'materiality' therefore appear earlier in the document?

Para 32:  
Would it be simpler to include this in, or closer to, para 2?

31. **The two sets of disclosures in paragraph 2 and paragraph 3 are interrelated and some information may be relevant for both.** In order to determine what information should be disclosed at a minimum **under paragraph 2,** the Guidelines use the concept of materiality. **Information under paragraph 2, including related to RBC issues and due diligence, should be considered material if it can reasonably be expected to influence an investor's assessment of a company's value, investment or voting decisions. The determination of which information is material may vary over time, and according to the local context, company specific circumstances and jurisdictional requirements. Some jurisdictions may also require or recommend disclosing sustainability matters critical to a company's key stakeholders or a company's influence on non-diversifiable risks.** The Guidelines also generally note that information should be prepared and disclosed in accordance with high quality standards of accounting and financial and non-financial disclosure. This significantly improves the ability of investors to monitor the enterprise by providing increased reliability and comparability of reporting, and improved insight into its performance. The annual independent audit recommended by the Guidelines should contribute to an improved control and compliance by the enterprise.
32. **In relation to information disclosed under paragraph 2, sustainability risks that may not seem to be financially material but that are relevant to society may reasonably be expected to become financially material for a company at some point.**
33. **Users of financial information and market participants need information on material risks that may include: risks that are specific to the industry or the geographical areas in which the company operates; dependence on commodities and value chains; financial market risks including interest rate or currency risk; risks related to derivatives and off-balance sheet transactions; business conduct risks; digital security risks; compliance risks; and responsible business conduct risks, notably climate-related risks.**

Paras 32 and 33: these appear to describe a view on materiality of certain risks, whereas the rest of this chapter appears to be taking care NOT to provide guidelines on materiality.

Without disputing the statements themselves, is it the role of these Guidelines to give such a steer on potential materiality as applicable to ALL enterprises?

33. The Guidelines also encourage a second set of disclosure or communication practices in areas where reporting standards are still evolving such as, for example, social, environmental and risk reporting. This is particularly the case with greenhouse gas emissions, as the scope of their monitoring is expanding to cover direct and indirect, current and future, corporate and product emissions; biodiversity is another example. Many enterprises provide information on a broader set of topics than financial performance and consider disclosure of such information a method by which they can demonstrate a commitment to socially acceptable practices. In some cases, this second type of disclosure – or communication with the public and with other parties directly affected by the enterprise's activities – may pertain to entities that extend beyond those covered in the enterprise's financial accounts. For example, it may also cover information on the activities of subcontractors and suppliers or of joint venture partners. This is particularly appropriate to monitor the transfer of environmentally harmful activities to partners.

34. Disclosure recommendations are not expected to **should not** place unreasonable administrative or cost burdens on enterprises. Nor are **should** enterprises **be** expected to disclose information that

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may endanger their competitive position unless disclosure is necessary to fully inform **an investor's** decisions and to avoid misleading the investor.

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35. The Guidelines also generally note that information should be prepared and disclosed in accordance with **internationally recognised standards** ~~high quality standards~~ **related to** accounting and financial and non-financial disclosure. This significantly improves the ability of investors to monitor the enterprise by providing increased reliability and comparability of reporting, and improved insight into its performance. The annual independent audit recommended by the Guidelines should contribute to an improved control and compliance by the enterprise. **In the context of disclosure, due diligence processes, as outlined in paragraph 3, can be a useful means by which enterprises can ensure they are effectively identifying and communicating relevant RBC information in a consistent and credible manner, including information which may be material. In this way due diligence can support enterprises in identifying material risks and impacts, and enhance the relevance, quality and comparability of disclosures under both paragraphs 2 and 3. Furthermore, due diligence processes can be a means of ensuring credible reporting against enterprise goals and commitments for which clearly identifiable or measurable targets may not exist.**
36. Many enterprises have adopted measures designed to help them comply with the law and standards of business conduct, and to enhance the transparency of their operations. A growing number of firms have issued voluntary codes of corporate conduct, which are expressions of commitments to **international standards or ethical values** in such areas as environment, **including climate change**, human rights, labour standards, consumer protection, or taxation. Specialised management systems have been or are being developed and continue to evolve with the aim of helping them respect these commitments – these involve information systems, operating procedures and training requirements.
37. **Enterprises may be required to report against broader disclosure standards mandated by regulatory or listing authorities and, where consistent with a jurisdiction's legal and disclosure requirements, should seek to adopt and align with emerging global best practice and evolving disclosure standards, for example on climate and emissions.** Enterprises are cooperating with NGOs and intergovernmental organisations in developing reporting standards that enhance enterprises' ability to communicate how their activities influence sustainable development outcomes (for example, **the International Sustainability Standards Board, and the Global Reporting Initiative which has incorporated responsible business conduct information into its Universal Standards**).
38. Enterprises are encouraged to **proactively communicate relevant RBC information, to provide easy and economical access to published information and to consider making use of information technologies to meet this goal.** Information that is made available to users in home markets should also be available to all interested users **with consideration for accessibility.** Enterprises **should seek to ensure information is presented appropriately for different target audiences and may take special steps to make information available to communities that do not have access to online or printed media** (for example, ~~poor~~ **remote or impoverished** communities that are directly affected by the enterprise's activities).
39. **Review of responsible business conduct information by an independent, competent and qualified entity in accordance with internationally recognized assurance standards can substantiate and enhance confidence in the information disclosed and contribute to higher quality and more comparable reporting.**
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Para 35: Would the bold text be more relevant in para 30 above?

Para 37:  
1) Put paras 35 and 37 adjacent to each other.  
2) Eliminate repetition /overlap between the two paras.

# Chapter IV. Human Rights

## Targeted Updates to OECD Guidelines for Multinational Enterprises: Chapter IV. Human Rights

(text to illustrate potential edits is in bold and italics for new text and strike-out for deleted text)

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### Full edited text of Chapter IV. Human Rights

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States have the duty to protect human rights. Enterprises should, within the framework of internationally recognised human rights, the international human rights obligations of the countries in which they operate as well as relevant domestic laws and regulations:

1. Respect human rights, which means they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.
2. Within the context of their own activities, avoid causing or contributing to adverse human rights impacts and address such impacts when they occur.
3. Seek ways to prevent or mitigate adverse human rights impacts that are directly linked to their business operations, products or services by a business relationship, even if they do not contribute to those impacts.
4. Have a ***publicly available*** policy commitment to respect human rights.
5. 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.
6. Provide for or co-operate through legitimate processes in the remediation of adverse human rights impacts where they identify that they have caused or contributed to these impacts.

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### Commentary on Human Rights

36. This chapter opens with a chapeau that sets out the framework for the specific recommendations concerning enterprises' respect for human rights. It draws upon the United Nations Framework for Business and Human Rights 'Protect, Respect and Remedy' and is in line with ***its implementing document*** the Guiding Principles ***on Business and Human Rights*** for its implementation ***as well as the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy.***
  37. The chapeau and the first paragraph recognise that States have the duty to protect human rights, and that enterprises, regardless of their size, sector, operational context, ownership and structure, should respect human rights wherever they operate. Respect for human rights is the global standard of expected conduct for enterprises independently of States' abilities and/or willingness to fulfil their human rights obligations, and does not diminish those obligations.
  38. A State's failure either to enforce relevant domestic laws, or to implement international human rights obligations or the fact that it may act contrary to such laws or international obligations does not diminish the expectation that enterprises respect human rights. In countries where domestic laws and regulations conflict with internationally recognised human rights, enterprises should seek ways to honour them to the fullest extent which does not place them in violation of domestic law, consistent with paragraph 2 of the Chapter on Concepts and Principles.
  39. In all cases and irrespective of the country or specific context of enterprises' operations, reference should be made at a minimum to the internationally recognised human rights expressed in the International Bill of Human Rights, consisting of the Universal 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
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the principles concerning fundamental rights set out in the ~~1998~~ International Labour Organisation Declaration on Fundamental Principles and Rights at Work.

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40. Enterprises can have an impact on virtually the entire spectrum of internationally recognised human rights. In practice, some human rights may be at greater risk than others in particular industries or contexts, and therefore will be the focus of heightened attention. However, situations may change, so all rights should be the subject of periodic review. Depending on circumstances, enterprises may need to consider additional standards. For instance, enterprises should respect the human rights of individuals belonging to specific groups or populations that require particular attention, where they may have adverse human rights impacts on them. **As needed, enterprises should take additional steps to assess and address adverse impacts on individuals who may be at heightened risk due to their membership in marginalised or vulnerable groups or populations, including Indigenous Peoples.** In this regard connection, United Nations instruments have the United Nations has elaborated further on the rights of indigenous peoples; **(UN Declaration on the Rights of Indigenous Peoples)**, persons belonging to national or ethnic, religious and linguistic minorities; women; children; persons with disabilities; and migrant workers and their families. Moreover, in situations of armed conflict enterprises should respect the standards of international humanitarian law, which can help enterprises avoid the risks of causing or contributing to adverse impacts when operating in such difficult environments.
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Para 40: suggest deleting 'heightened', as the reasons are already given later in the sentence.

41. In paragraph 1, addressing actual and potential adverse human rights impacts consists of taking adequate measures for their identification, prevention, where possible, and mitigation of potential human rights impacts, remediation of actual impacts, and accounting for how the adverse human rights impacts are addressed. The term 'infringing' refers to adverse impacts that an enterprise may have on the human rights of individuals.
42. Paragraph 2 recommends that enterprises avoid causing or contributing to adverse human rights impacts through their own activities and address such impacts when they occur. 'Activities' can include both actions and omissions. Where an enterprise causes or may cause an adverse human rights impact, it should take the necessary steps to cease or prevent the impact. Where an enterprise contributes or may contribute to such an impact, it should take the necessary steps to cease or prevent its contribution and use its leverage to mitigate any remaining impact to the greatest extent possible. Leverage is considered to exist where the enterprise has the ability to effect change in the practices of an entity that cause adverse human rights impacts.
43. Paragraph 3 addresses more complex situations where an enterprise has not contributed to an adverse human rights impact, but that impact is nevertheless directly linked to its operations, products or services by its business relationship with another entity. Paragraph 3 is not intended to shift responsibility from the entity causing an adverse human rights impact to the enterprise with which it has a business relationship. Meeting the expectation in paragraph 3 would entail an enterprise, acting alone or in co-operation with other entities, as appropriate, to use its leverage to influence the entity causing the adverse human rights impact to prevent or mitigate that impact. 'Business relationships' include relationships with business partners, entities in its supply chain, and any other non-State or State entity directly linked to its business operations, products or services. Among the factors that will enter into the determination of the appropriate action in such situations are the enterprise's leverage over the entity concerned, how crucial the relationship is to the enterprise, the severity of the impact, and whether terminating the relationship with the entity itself would have adverse human rights impacts.
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44. Paragraph 4 recommends that enterprises express their commitment to respect human rights through a **publicly available** statement of policy that: (i) is approved at the most senior level of
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the enterprise; (ii) is informed by relevant internal and/or external expertise; (iii) stipulate the enterprise's human rights expectations of personnel, business partners and other parties directly linked to its operations, products or services; (iv) is publicly available and communicated internally and externally to all personnel, business partners and other relevant parties; (v) is reflected in operational policies and procedures necessary to embed it throughout the enterprise.

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45. Paragraph 5 recommends that enterprises carry out human rights due diligence. The process entails assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses as well as communicating how impacts are addressed. Human rights due diligence can be included within broader enterprise risk management systems provided that it goes beyond simply identifying and managing material risks to the enterprise itself to include the risks to rights-holders. It is an on-going exercise, recognising that human rights risks may change over time as the enterprise's operations and operating context evolve. Complementary guidance on due diligence, including in relation to supply chains, and appropriate responses to risks arising in supply chains are provided under paragraphs A.10 to A.12 of the Chapter on General Policies and their Commentaries. **In addition, further guidance has been developed for specific sectors and risk issues as well as at a cross-sectoral level through the OECD Due Diligence Guidance on Responsible Business Conduct. Conducting human rights due diligence may involve considering distinct and intersecting risks including those related to individual characteristics or belonging to vulnerable or marginalized groups. Considering ways to maximise sustainable development outcomes for such groups may also be relevant in this regard.**
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46. When enterprises identify through their human rights due diligence process or other means that they have caused or contributed to an adverse impact, the *Guidelines* recommend that enterprises **provide for or cooperate in their remediation through legitimate processes. Enterprises should establish or participate in** have processes in place to enable remediation. Some situations require co-operation with judicial or State-based non-judicial mechanisms. In others, operational-level grievance mechanisms for those potentially impacted by enterprises' activities can be an effective means of providing for such processes when they meet the core criteria of: legitimacy, accessibility, predictability, equitability, compatibility with the *Guidelines* and transparency, and are based on dialogue and engagement with a view to seeking agreed solutions. Such mechanisms can be administered by an enterprise alone or in collaboration with other stakeholders and can be a source of continuous learning. Operational-level grievance mechanisms should not be used to undermine the role of trade unions in addressing labour-related disputes, nor should such mechanisms preclude access to judicial or non-judicial grievance mechanisms, including the National Contact Points under the *Guidelines*.
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Para 46: Are we correct to assume that in this para, 'legitimate' has the same meaning as in the UNGPs? If so, please make this explicit.

# Chapter V. Employment and Industrial Relations

## Targeted Updates to OECD Guidelines for Multinational Enterprises: Chapter V. Employment and Industrial Relations

(text to illustrate potential edits is in bold and italics for new text and strike-out for deleted text)

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### Full edited text of Chapter V. Employment and Industrial Relations

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Enterprises should within the framework of applicable law, regulations and prevailing labour relations and employment practices and applicable international labour standards, ***avoiding any unlawful employment and industrial relations practices, and in line with due diligence expectations described in Chapter II and IV:***

1.

- a) Respect the right of workers ~~employed by the multinational enterprise~~ to establish or join trade unions and representative organisations of their own choosing, including by avoiding ***interfering with workers' choice to establish or join a trade union or representative organisation of their own choosing.***
- b) Respect the right of workers ~~employed by the multinational enterprise~~ to have trade unions and representative organisations of their own choosing recognised for the purpose of collective bargaining, and engage in constructive negotiations, either individually or through employers' associations, with such representatives with a view to reaching agreements on terms and conditions of employment.
- c) Contribute to the effective abolition of child labour, and take immediate and effective measures to secure the ~~prohibition and~~ elimination of the worst forms of child labour as a matter of urgency.
- d) Contribute to the elimination of all forms of forced or compulsory labour and take ~~adequate steps~~ ***immediate and effective measures to seek to secure the elimination of*** forced or compulsory labour ***as a matter of urgency.*** ~~not exist in their operations~~
- e) Be guided throughout their operations by the principle of equality of opportunity and treatment in employment and not discriminate against their workers with respect to employment or occupation on such grounds as race, colour, sex, ***age***, religion, political opinion, national extraction or social origin, ***persons with disabilities*** or other status, unless selectivity concerning worker characteristics furthers established governmental policies which specifically promote greater equality of employment opportunity or relates to the inherent requirements of a job.
- f) ***Provide a safe and healthy working environment, recognising occupational safety and health as an ILO Fundamental Principle and Right at Work, including by preventing accidents and injury to health arising out of, linked with or occurring in the course of work, by minimising, so far as is reasonably practicable, the causes of hazards inherent in the working environment.***

Para 1 d: clarify that MNEs should do this within their own spheres of control and influence.

Para 1f: This para and para 4c below set two DIFFERENTLY WORDED guideline standards for health & safety measure. Is it necessary to have both?

2.

- a) Provide such facilities to workers' representatives as may be necessary to assist in the development of effective collective agreements.
  - b) Provide information ***in a timely manner*** to workers' representatives which is needed for meaningful negotiations on conditions of employment.
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c) Provide information to workers and their representatives which enables them to obtain a true and fair view of the performance of the entity or, where appropriate, the enterprise as a whole.	Para 3: No problem with
3. Promote consultation and co-operation between employers and workers and their representatives <b><u>through legitimate processes, structures or mechanisms</u></b> on matters of mutual concern	using 'legitimate'... Is there an explanation of 'legitimate' to help your readers?
4. a) Observe standards of employment, <b><u>contractual arrangements</u></b> and industrial relations not less favourable than those observed by comparable employers in the host country.  b) When multinational enterprises operate in developing countries, where comparable employers may not exist, provide the best possible wages, benefits and conditions of work, within the framework of government policies <b><u>and applicable international standards</u></b> . These should be related to the economic position of the enterprise, but should be at least adequate to satisfy the basic needs of the workers and their families.  c) <del>Take adequate steps to ensure occupational health and safety in their operations</del> <b><u>Maintain highest standards of safety and health at work.</u></b>	Para 4 a: Some matters, such as pay rates, cannot be exactly the same in all countries - eg the cost of living and average wages vary from country to country.
5. In their operations, to the greatest extent practicable, employ local workers and provide training with a view to improving skill levels, in co-operation with worker representatives and, where appropriate, relevant governmental authorities.	Para 4c: see comment on para 1f above.
6. In considering changes in their operations which would have major employment effects, in particular in the case of the closure of an entity involving collective lay-offs or dismissals, provide reasonable notice of such changes to representatives of the workers in their employment and their organisations, and, where appropriate, to the relevant governmental authorities, and co-operate with the worker representatives and appropriate governmental authorities so as to mitigate to the maximum extent practicable adverse effects <b><u>of such changes</u></b> . In light of the specific circumstances of each case, it would be appropriate if management were able to give such notice prior to the final decision being taken. Other means may also be employed to provide meaningful co-operation to mitigate the effects of such decisions.	
7. In the context of bona fide negotiations with workers' representatives on conditions of employment, or while workers are exercising a right to organise, not threaten to transfer the whole or part of an operating unit from the country concerned nor transfer workers from the enterprise's component entities in other countries in order to influence unfairly those negotiations or to hinder the exercise of a right to organize <b><u>or bargain collectively</u></b> .	
8. Enable authorised representatives of the workers in their employment to negotiate on collective bargaining or labour-management relations issues and allow the parties to consult on matters of mutual concern with representatives of management who are authorised to take decisions on these matters.	

#### *Commentary on Employment and Industrial Relations*

47. This chapter opens with a chapeau that includes a reference to "applicable" law and regulations, which is meant to acknowledge the fact that multinational enterprises, while operating within the jurisdiction of particular countries, may be subject to national and international levels of regulation of employment and industrial relations matters. The terms "prevailing labour relations" and "employment practices" are sufficiently broad to permit a variety of interpretations in light of different national circumstances – for example, different bargaining options provided for workers under national laws and regulations.
48. The International Labour Organisation (ILO) is the competent body to set and deal with international labour standards, and to promote fundamental rights at work as recognised in its 1998 Declaration on Fundamental Principles and Rights at Work. The *Guidelines*, as a non-binding instrument, have a role to play in promoting observance of these standards and principles among multinational enterprises. The provisions of the *Guidelines* chapter echo relevant provisions of the 1998 Declaration, as well as the 1977 ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, last revised in 2006 (the ILO MNE Declaration). The ILO MNE Declaration sets out principles in the fields of employment, training, working conditions, and industrial relations, while the OECD *Guidelines* cover all major aspects of corporate behaviour. The

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OECD *Guidelines* and the ILO MNE Declaration refer to the behaviour expected from enterprises and are intended to parallel and not conflict with each other. The ILO MNE Declaration can therefore be of use in understanding the *Guidelines* to the extent that it is of a greater degree of elaboration. However, the responsibilities for the follow-up procedures under the ILO MNE Declaration and the *Guidelines* are institutionally separate.

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49. The terminology used in Chapter V is consistent with that used in the ILO MNE Declaration. *It is recognised that in the absence of an employment relationship, enterprises are nevertheless expected to act in accordance with the risk-based due diligence and supply chain recommendations in paragraphs A.10 to A.13 of Chapter II on General Policies. **This is especially relevant in sectors where informality, short-term working arrangements, decent work deficits and digital transformation are common.*** The use of the terms “workers employed by a multinational enterprise” and “workers in their employment” is intended to have the same meaning as in the ILO MNE Declaration. These terms refer to workers who are “in an employment relationship with the multinational enterprise”. Enterprises wishing to understand the scope of their responsibility under Chapter V will find useful guidance for determining the existence of an employment relationship in the context of the *Guidelines* in the non-exhaustive list of indicators set forth in ILO Recommendation 198 of 2006, paragraphs 13 (a) and (b). In addition, it is recognised that working arrangements change and develop over time and that enterprises are expected to structure their relationships with workers so as to avoid supporting, encouraging or participating in disguised employment practices. A disguised employment relationship occurs when an employer treats an individual as other than an employee in a manner that hides his or her true legal status.
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50. These recommendations do not interfere with true civil and commercial relationships, but rather seek to ensure that individuals in an employment relationship have the protection that is due to them in the context of the *Guidelines*. ~~It is recognised that in the absence of an employment relationship, enterprises are nevertheless expected to act in accordance with the risk-based due diligence and supply chain recommendations in paragraphs A.10 to A.13 of Chapter II on General Policies.~~
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51. Paragraph 1 of this chapter is designed to echo all five fundamental principles and rights at work which are contained in the ILO’s 1998 Declaration ***ILO Declaration on Fundamental Principles and Rights at Work***, namely the freedom of association and right to collective bargaining, the effective abolition of child labour, the elimination of all forms of forced or compulsory labour, non-discrimination in employment and occupation, ***and a safe and healthy working environment***. These principles and rights have been developed in the form of specific rights and obligations in ILO Conventions recognised as fundamental.
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52. Paragraph 1c) recommends that multinational enterprises contribute to the effective abolition of child labour in the sense of the ILO 1998 Declaration ***on Fundamental Principles and Rights at Work*** and ILO Convention 182 concerning the worst forms of child labour. Long-standing ILO instruments on child labour are Convention 138 and Recommendation 146 (both adopted in 1973), concerning minimum ages for employment, ***and ILO Convention 182 and Recommendation 190 concerning the worst forms of child labour***. Through their labour management practices, their creation of high-quality, well-paid, ***decent jobs work*** and their contribution to economic growth, multinational enterprises can play a positive role in helping to address the root causes of poverty in general and of child labour in particular. It is important to acknowledge and encourage the role of multinational enterprises in contributing to the search for a lasting solution to the problem of child labour. In this regard, raising the standards of education of children living in host countries is especially noteworthy. ***As a best practice, enterprises can seek input from survivors of forced and child labor, for example as experts and consultants, in their efforts to prevent forced and child labor.***
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53. Paragraph 1d) recommends that enterprises contribute to the elimination of all forms of forced and compulsory labour, another principle derived from the 1998 ILO Declaration ***ILO Declaration on Fundamental Principles and Rights at Work***, ***and recognised as the human right to be free from forced and compulsory labor in the International Covenant on Civil and Political Rights (ICCPR)***. The reference to this core labour right is based on the ILO Conventions 29 of 1930 ***and its Protocol of 2014*** and ***Convention 105 of 1957***. Convention 29 requests that ***calls on*** governments ***to*** “suppress the use of forced or compulsory labour in all its forms within the shortest possible period”, while Convention 105 requests of them ***calls on governments*** to “suppress and not to make use of any form of forced or compulsory labour” for certain enumerated purposes (for example, as a means of political coercion or labour discipline), and “to take effective measures to secure [its] immediate and complete abolition”. At the same time, it is understood that the ILO is the competent body to deal with the difficult issue of prison labour, in particular when it comes to the hiring-out of prisoners to (or their placing at
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the disposal of) private individuals, companies or associations. **Enterprises should take the necessary steps to prevent human trafficking, including forced labour, and address coercive means, including debt bondage. Enterprises should respond to indicators set out in the ILO Indicators of Forced Labour and bolster transparency around actions taken to address risks of forced labor associated with their operations, products and services.**

Para 53: amend to 'contribute to the prevention of human trafficking'.

54. The reference to the principle of non-discrimination with respect to employment and occupation in paragraph 1e is considered to apply to such terms and conditions as hiring, job assignment, discharge, pay and benefits, promotion, transfer or relocation, termination, training and retirement. The list of non-permissible grounds for discrimination which is taken from ILO Convention 111 of 1958 **ILO Discrimination (Employment and Occupation) Convention 111 of 1958, ILO Convention 100 of 1951** the Maternity Protection Convention 183 of 2000, Employment (Disabled Persons) Convention 159 of 1983, the Older Workers Recommendation 162 of 1980 and the HIV and AIDS at Work Recommendation 200 of 2010, considers that any distinction, exclusion or preference on these grounds is in violation of the Conventions, Recommendations and Codes. The term "other status" for the purposes of the *Guidelines* refers to trade union activity and personal characteristics such as age, disability, pregnancy, marital status, sexual orientation, or HIV status. Consistent with the provisions in paragraph 1e, enterprises are expected to promote equal opportunities for ~~women and men~~ **all** with special emphasis on equal criteria for selection, remuneration, and promotion, and equal application of those criteria, and prevent discrimination or dismissals on the grounds of marriage, pregnancy or **of those workers with family responsibilities** parenthood.
55. In paragraph 2c) of this chapter, information provided by companies to their workers and their representatives is expected to provide a "true and fair view" of performance. It relates to the following: the structure of the enterprise, its economic and financial situation and prospects, **its adverse environmental health and safety impacts**, employment trends, and expected substantial changes in operations, taking into account legitimate requirements of business confidentiality. Considerations of business confidentiality may mean that information on certain points may not be provided, or may not be provided without safeguards.
56. The reference to consultative forms of worker participation in paragraph 3 of the Chapter is taken from ILO Recommendation 94 of 1952 concerning Consultation and Co-operation between Employers and Workers at the Level of the Undertaking. It also conforms to a provision contained in the ILO MNE Declaration. Such consultative arrangements should not substitute for workers' right to bargain over terms and conditions of employment. A recommendation on consultative arrangements with respect to working arrangements is also part of paragraph 8.
57. In paragraph 4, employment and industrial relations standards are understood to include compensation and working-time arrangements. The reference to occupational health and safety implies that multinational enterprises are expected to follow prevailing regulatory standards and industry norms to minimise the risk of accidents and injury to health arising out of, linked with, or occurring in, the course of employment. This encourages enterprises to work to raise the level of performance with respect to occupational health and safety in all parts of their operation even where this may not be formally required by existing regulations in countries in which they operate. It also encourages enterprises to respect workers' ability to remove themselves from a work situation when there is reasonable justification to believe that it presents an imminent and serious risk to health or safety. Reflecting their importance and complementarities among related recommendations, health and safety concerns are echoed elsewhere in the *Guidelines*, most notably in chapters on Consumer Interests and the Environment. The ~~ILO Recommendation No. 194 of 2002~~ **ILO List of Occupational Diseases Recommendation (No. 194)** provides an indicative list of occupational diseases as well as codes of practice and guides which can be taken into account by enterprises for implementing this recommendation of the *Guidelines*. **Further guidance for enterprises on occupational health and safety is available in Part IV (Action at the level of the undertakings) of ILO Convention 155 (Occupational Safety and Health) and the Guidelines on occupational safety and health management systems, ILO-OSH 2001.**
58. The recommendation in paragraph 5 of the chapter encourages MNEs to recruit an adequate workforce share locally, including managerial personnel, and to provide training to them. **Training for up-skilling and re-skilling should anticipate future changes in operations and employer needs, including those responding to societal, environmental technological changes, risks and opportunities linked to automation, digitalization, just transition and sustainable development.** Language in this paragraph on training and skill levels complements the text in paragraph A.4 of the General Policies chapter on encouraging human capital formation. The reference to local workers complements the text encouraging local capacity building in paragraph A.3 of the General Policies chapter. In accordance with the ILO Human Resources Development Recommendation 195 of 2004, enterprises are also

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encouraged to invest, to the greatest extent practicable, in training and lifelong learning while ensuring equal opportunities to training for women and other vulnerable groups, such as youth, low-skilled people, people with disabilities, migrants, older workers, and indigenous peoples **Indigenous Peoples**.

59. **Enterprises have an important role to play in promotion and creating decent work.** Paragraph 6 recommends that enterprises provide reasonable notice to the representatives of workers and relevant government authorities, of changes in their operations which would have major effects upon the livelihood of their workers, in particular the closure of an entity **or moves towards automation** involving collective **or large scale** layoffs or dismissals. As stated therein, the purpose of this provision is to afford an opportunity for co-operation to mitigate the effects of such changes. This is an important principle that is widely reflected in the industrial relations laws and practices of adhering countries, although the approaches taken to ensuring an opportunity for meaningful co-operation are not identical in all adhering countries. The paragraph also notes that it would be appropriate if, in light of specific circumstances, management were able to give such notice prior to the final decision. Indeed, notice prior to the final decision is a feature of industrial relations laws and practices in a number of adhering countries. However, it is not the only means to ensure an opportunity for meaningful co-operation to mitigate the effects of such decisions, and the laws and practices of other adhering countries provide for other means such as defined periods during which consultations must be undertaken before decisions may be implemented.

Para 59:  
1) this statement is in a curious place. Logically it should appear higher up in the guidance, not in the para dealing specifically with layoffs.  
2) it should say 'promoting', not 'promotion'.

# Chapter VI. Environment

General comment on ch 6: please see comments box by yellow highlight.

## Targeted Updates to OECD Guidelines for Multinational Enterprises: **Chapter VI. Environment**

(text to illustrate potential edits is in bold and italics for new text and strike-out for deleted text)

### Full edited text of Chapter VI. Environment

***Enterprises can play a key role in advancing sustainable economies, and they should contribute to delivering an effective and progressive response to global, regional and local environmental challenges.*** ~~Enterprises should~~ ***within the framework of laws, regulations and administrative practices in the countries in which they operate, and in consideration of relevant international agreements, principles, objectives, and standards, enterprises should carry out risk-based due diligence as described in Chapter II, to identify, prevent and mitigate the adverse environmental, health and safety impacts of their operations, products and services, while*** ~~take due account of the need to protect the environment, public health and safety, and generally to conduct their activities in a manner contributing to the wider-goal of sustainable development.~~ ***Such impacts can include, among others:***

Intro:  
add 'adverse'  
before 'impacts'.

- a) climate change;***
- b) biodiversity loss;***
- c) air, water and soil pollution;***
- d) degradation of land, marine and freshwater ecosystems;***
- e) deforestation;***
- f) overconsumption of material, water, energy and other natural resources;***
- g) harmful generation and mismanagement of waste, including hazardous substances;***
- h) harm to animal welfare.***

In particular, enterprises should:

1. Establish and maintain a system of environmental management appropriate to the enterprise, including ***by carrying out risk-based due diligence for adverse environmental, health and safety impacts.***
2. ***(Originally part of paragraph 1) As part of their management of adverse environmental, health and safety impacts, enterprises should:***
  - a) ~~collection and evaluate in~~ ~~of~~ ~~adequate and timely information regarding the environmental, health, and safety impacts of their~~ ***operations, products and services*** activities.
  - b) ~~establishment of measurable objectives, and, where appropriate, targets~~ ***and strategies*** for ***addressing known and reasonably foreseeable adverse impacts and strategies for*** ~~improving~~ ~~ed~~ ~~environmental performance, and resource utilisation, including periodically reviewing the continuing relevance of these objectives; where appropriate, t~~ ~~Targets should be~~ ***science-based, informed by best practice and*** consistent with relevant national policies and international ~~environmental~~ ~~commitments~~ ***and goals;*** ~~and periodically review the continuing relevance of these objectives, targets and plans.~~
  - c) regularly ***verify the effectiveness and*** ~~monitoring and verification of progress toward environmental, health, and safety objectives~~ ***and*** ~~or~~ ~~targets;~~
  - d) ***contribute to environmental remediation as necessary to address adverse environmental impacts the enterprise has caused or contributed to or use leverage to influence the entity causing the adverse impact to remediate it.***
3. ***Assess and seek to address potential or actual adverse impacts to workers, communities, or consumers resulting from their environmental management activities, including in support of a just transition.***

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4. **(Originally paragraph 2)** Taking into account concerns about cost and administrative burden, business confidentiality, and the protection of intellectual property rights:
- provide the public and workers with adequate, measurable and verifiable (where applicable) and timely information on the **actual and potential environmental, health and safety impacts of the activities of the enterprise based on best available information**, which could include **ing** reporting on progress in improving environmental performance; and
  - engage in adequate and timely communication and **meaningful engagement** consultation with the communities **as well as other stakeholders** directly-affected **and potentially affected** by the environmental, health and safety **impacts and** policies of the enterprise and by their implementation.
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5. **(Originally paragraph 3)** Assess, and address in decision-making, the **known or reasonably foreseeable environmental, health, and safety impacts associated with of the processes, goods operations, products** and services of the enterprise over their full life cycle with a view to:
- avoiding or, when unavoidable, mitigating **and where applicable, remediating** them;
  - enhancing positive effects, and;**
  - advancing sustainable production and consumption patterns notably including by pursuing resource efficiency and contributing to a more circular economy among other approaches.**

Where these proposed activities may have significant adverse environment, health, or safety impacts, and where they are subject to a decision of a competent authority, prepare an appropriate environmental impact assessment.

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6. **(Originally paragraph 4)** Consistent with the scientific and technical understanding of the risks, where there are threats of serious **or irreversible** damage to the environment, taking also into account human health and safety, **not use the lack of full scientific certainty or pathways as a reason for postponing cost-effective measures to prevent or minimise such damage.**
- 
7. **(Originally paragraph 5)** Maintain contingency plans for preventing, mitigating, and controlling serious environmental and health damage from their operations, including accidents and emergencies; and mechanisms for immediate reporting to the competent authorities.
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8. **(Originally paragraph 6)** **As part of environmental management**, ~~G~~continually seek to improve corporate environmental performance, at the level of the enterprise and, where appropriate, of its supply chain **entities with which it has a business relationship including** by encouraging such activities as:
- Adopting ~~ion of~~ **and using improved** technologies and operating procedures in all parts of an enterprise that reflect standards of concerning **in terms of** environmental performance **and where feasible best available technology** in the best performing part of the enterprise;
  - Developing ~~ment and providing~~ **ion of** products or services that have no undue environmental impacts; are safe in their intended use; reduce **pollution, greenhouse gas emissions and generation of waste, in particular hazardous waste; are produced in a way that uses natural resources sustainably and minimises as far as possible the necessary energy and material input;** are efficient in their consumption of nature resources; can be reused, recycled, or disposed of safely **and in an environmentally sound manner;**
  - promoting higher levels of awareness among customers of the environmental implications of using the products and services of the enterprise, including, by providing **relevant and** accurate information on their **environmental, health and safety impacts** products (for example, on greenhouse gas emissions, biodiversity, resource efficiency, **reparability and recyclability of products** or other environmental issues); and
  - exploring and assessing ways of improving the environmental performance of the enterprise over the longer term, for instance by developing strategies for emission reduction, efficient resource utilisation and recycling, substitution or reduction of use of toxic substances, or strategies on biodiversity **in relation to the adverse environmental impacts enumerated in paragraph 1;**
  - providing support, including capacity building on environmental management, to suppliers and other business relationships, particularly SMEs, where appropriate and feasible.**
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9. **(Originally paragraph 7)** Provide adequate education and training to workers in environmental, health and safety matters, including the handling **on the management** of hazardous **and non-hazardous** materials **and waste well as** the prevention of environmental accidents, as well as more general environmental management areas, such as environmental impact assessment procedures, public relations, and environmental technologies.
10. **(originally paragraph 8)** Contribute to the development of environmentally **responsible** meaningful and economically efficient public policy, for example, by means of partnerships or initiatives that will enhance environmental awareness and protection.
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Commentary on Environment:

60. **Governments, business and consumers are jointly responsible for achieving environmental objectives. The Guidelines set out expectations on how enterprises should manage actual and potential adverse environmental, health and safety impacts. This is based on the Guidelines' overall intention to contribute to responses to environmental challenges and international environmental commitments and goals, including in relation to climate change mitigation and adaptation; the conservation restoration, and sustainable use of biodiversity including ecosystems; the sustainable and efficient and lawful use of land, resources and energy; sustainable consumption and production including through promotion of circular economy approaches, and pollution prevention, reduction and control. International commitments, multilateral agreements and other regulatory frameworks represent an important benchmark for understanding environmental issues and expectations. The chapeau paragraph of this chapter clarifies the link with Chapter II and specifies a non-exhaustive list of adverse environmental, health and safety impacts that may be associated with business activities. Carrying out risk-based due diligence within the scope of the recommendations in this chapter can help businesses identify and prioritise their most significant adverse environmental impacts and also understand their relationship with other adverse impacts and objectives covered by these Guidelines.** The text of the Environment Chapter broadly reflects the principles and objectives contained in the Rio Declaration on Environment and Development, in Agenda 21 (within the Rio Declaration) **and the United Nations 2030 Agenda for Sustainable Development.** It **is** also taken into account **consistent with the UN Framework Convention on Climate Change (UNFCCC), the Paris Agreement, the Convention on Biological Diversity, Kunming-Montreal Global Biodiversity Framework, (Aarhus) Convention on Access to Information, Public Participation in Decision-making, and Access to Justice in Environmental Matters, the UN Convention to Combat Desertification, relevant regional environmental agreements,** and reflects standards contained in such instruments as the ISO Standard on Environmental Management Systems **and OECD Strategic Approach to International Chemicals Management (SAICM).**
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61. **In the context of these Guidelines, "environmental management" should be interpreted in its broadest sense, embodying activities aimed at understanding environmental impacts and risks, controlling known and reasonably foreseeable environmental impacts related to an enterprise's operations, products and services as well as taking into consideration the enterprise's share of cumulative impacts and continually seeking to improve an enterprise's environmental performance.** Sound Environmental management is an important part of sustainable development. **Moreover, in the context of these Guidelines, "environmental management" should be interpreted in line with Paragraph 1 and include carrying out risk based due diligence in line with the recommendations articulated in Chapter II. Environmental management** and is increasingly being seen as-is both a business responsibility and a business opportunity. Multinational enterprises have a role to play in both respects. Managers of these enterprises should therefore give appropriate attention to environmental issues within their business strategies. Improving environmental performance requires a commitment to a systematic approach and to continual improvement of the system. An environmental management system provides the internal framework necessary to integrate environmental considerations into business operations. Having such a system in place should help to assure shareholders, **workers**, employees and the community **and other relevant stakeholders** that the enterprise is actively working to protect the environment, **communities and society** from the impact of its activities. **Environmental management can be linked with the responsible governance of tenure of land, forests, and fisheries. As noted in the Voluntary Guidelines on the Responsible Governance of Tenure, of Land, Fisheries and Forests in the Context of National Food Security (VGGTs), (2012) the responsible governance of tenure of lands, forests and fisheries can play a role in supporting**
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sustainable use of the environment. In this context, the VGGTs call for investments that do no harm, and safeguard against dispossession of legitimate tenure right holders and environmental damage.

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62. (new paragraph) The Guidelines recognise that many activities can entail impacts on the environment. For the purposes of the Guidelines adverse environmental impacts are known or reasonably foreseeable changes in the physical environment or biota, resulting from an enterprise's activities, which have significant deleterious effects on the composition, resilience, or productivity of natural and managed ecosystems, or on the operation of socio-economic systems or on human health and welfare. Adverse environmental impacts should be assessed in light of best available science and benchmarks or standards established in: national and sub-national environmental regulatory frameworks; relevant multilateral agreements; international environmental commitments or goals, such as those listed in paragraph 60 of this commentary; and, where applicable, standards of environmental management such as ISO environmental management standards, and further informed by best practice. Adverse environmental impacts may be localised or transboundary in nature. They can also be cumulative and interlinked. Most international environmental agreements generally reflect commitments by States at a whole-of-economy level rather than specific standards for individual or business and sectors. As such, it may be complex to identify and define to what extent an enterprise may be causing, contributing to or directly linked to some adverse environmental impacts. In such situations, whether an enterprise is causing, contributing to or directly linked to an adverse environmental impact may be assessed on the basis of the quality of its environmental management practices, including its due diligence in addition to its compliance with regulatory standards.

End of para 62:  
Please see comment box at the top of the blue section.

63. (new paragraph) Adverse environmental impacts, and associated environmental management, can be closely interlinked with other matters covered by the Guidelines. Notably the Paris Agreement preamble takes into account the imperatives of a just transition and of the workforce and the creation of decent work and quality jobs in accordance with nationally defined development priorities and acknowledges that when taking action to address climate change Parties should respect, promote and consider their respective obligations on human rights. Enterprises can contribute to a just transition by understanding and responding to impacts on people associated with their environmental management activities and objectives.

64. (originally paragraph 62) In addition to improving environmental performance, instituting an environmental management system can provide economic benefits to companies through reduced operating and insurance costs, improved energy and resource conservation, reduced compliance and liability charges, **increased sustainability and resilience**, improved access to capital and skills, improved customer satisfaction, and improved community and public relations

65. In the context of these *Guidelines*, "sound environmental management" should be interpreted in its broadest sense, embodying activities aimed at controlling both direct and indirect environmental impacts of enterprise activities over the long term, and involving both pollution control and resource management elements.

66. In most enterprises, an internal control system is needed to manage the enterprise's activities. The environmental part of this system may include such elements as targets for improved performance and regular monitoring of progress towards these targets.

67. (originally paragraph 65) Information **Public disclosure regarding** the activities of enterprises and about their relationships, with sub-contractors and their suppliers associated environmental, **health and safety** impacts is an important vehicle for building confidence with the public. This vehicle is most effective when information is provided in a transparent manner **a component of due diligence** and when it encourages active consultation **may also be**
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**required by local law. Furthermore, meaningful engagement** with stakeholders such as employees, customers, investors, suppliers, contractors, local communities, **vulnerable or marginalised groups, persons possessing special rights or legitimate tenure rights, and Indigenous Peoples**, and with the public-at-large **is important where they are or may be affected by such impacts**, so as to promote a climate of long-term trust and understanding on environmental issues of mutual interest. Reporting and communication are particularly appropriate where scarce or at-risk environmental assets are at stake either in a regional, national or international context; reporting standards such as the Global Reporting Initiative **and other environmental reporting standards** provide useful references. **[See also Chapter III on Disclosure]**

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68. ~~In providing accurate information on their products, enterprises have several options such as voluntary labelling or certification schemes. In using these instruments enterprises should take due account of their social and economic effects on developing countries and of existing internationally recognised standards.~~

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69. ***(originally paragraph 67)*** Normal business activity can involve the *ex ante* assessment of the potential environmental impacts associated with the enterprise's activities. Enterprises often carry out appropriate environmental impact assessments, even if they are not required by law. Environmental assessments made by the enterprise may contain a broad and forward-looking view of the potential **adverse environmental, health and safety** impacts and of activities of sub-contractors and suppliers **and** addressing relevant impacts and examining alternatives and mitigation measures to avoid or redress adverse impacts. The *Guidelines* also recognise that multinational enterprises have certain responsibilities in other parts of the product life cycle.

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70. ***(New paragraph)*** **Enterprises are encouraged to promote sustainable consumption and production patterns, including, through resource efficiency, the circular economy and other sustainable economic models. Through such practices enterprises can significantly reduce their adverse environmental impacts. Resource efficiency promotes more efficient and more effective use of resources and materials, including through environmentally sound raw material supply; the preferential use of renewable and high quality secondary raw material. Further, circular economy approaches could be promoted, as appropriate, as one of the means available to achieve sustainable development, according to national priorities and circumstances. As per resolution 2019 UNEP/EA.4/L.2 of the United Nations Environment Assembly, a more circular economy can contribute significantly to sustainable consumption and production. The resolution defines circular economy as a model in which products and materials are designed so that they can be reused, remanufactured, recycled or recovered and therefore maintained in the economy for as long as possible, along with the resources they are made of, and the generation of waste, especially hazardous waste, is avoided or minimised, and greenhouse gas emissions are prevented and reduced.**

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71. ~~(originally paragraph 68) Several instruments already adopted by countries adhering to the Guidelines, including Principle 15 of the Rio Declaration on Environment and Development, enunciate a "precautionary approach". None of these instruments is explicitly addressed to enterprises, although enterprise contributions are implicit in all of them.~~

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72. ***(originally paragraph 69)*** The basic premise of the *Guidelines* is that enterprises should act as soon as possible, and in a proactive way, to avoid for instance, ~~serious or irreversible~~ **adverse** environmental, ~~damages resulting from their activities~~ **health and safety impacts**. However, the fact that the *Guidelines* are addressed to enterprises means that no existing instrument is completely adequate for expressing this recommendation. The *Guidelines* therefore draw upon, but do not completely mirror, any existing instrument.

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73. *(originally paragraph 70)* The *Guidelines* are not intended to reinterpret any existing instruments or to create new commitments or precedents on the part of governments – they are intended only to recommend how the precautionary approach should be implemented at the level of enterprises. Given the early stage of this process, it is ***It is*** recognised that some flexibility is needed in ***the*** its application of ***this approach***, based on the specific context in which it is carried out. It is also recognised that governments determine the basic framework in this field ***in light of their capabilities***, and have the responsibility to consult periodically with stakeholders on the most appropriate ways forward, ***ensuring transparency and a science-based approach***.
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74. *(new paragraph)* **Although addressed to governments, the Paris Agreement and UNFCCC are important references for enterprises in their efforts to contribute to climate mitigation and adaptation. Enterprises play an important role in achieving the internationally agreed goal of limiting global temperature rises to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to no more than 1.5°C above pre-industrial levels. For the purposes of these Guidelines, in the context of climate change, adverse impacts are understood as 1) emission of greenhouse gases or damage to carbon sinks in a manner that is not consistent with internationally agreed global temperature goals based on best available science including as assessed by the Intergovernmental Panel on Climate Change (IPCC) or 2) undermining climate resilience. The concept of causing or contributing to adverse impacts associated with climate change under the Guidelines is distinct from the extent to which direct or indirect emissions of an individual enterprise have a causal link to global temperature increases.**
75. *(new paragraph)* **Environmental management systems should include practical actions to respond to the climate emergency. This includes the introduction and implementation of science-based policies and strategies on climate change mitigation and adaptation such as transition or decarbonisation plans. In this respect enterprises should adopt, implement, monitor and report on short, medium and long-term mitigation targets. These should be, based on best available science including as assessed by IPCC, and take into account scope 1, 2, and, to the extent possible based on best available information, scope 3 GHG emissions. It will be important to report against, review and update targets regularly in relation to their adequacy and relevance, based on the latest available scientific evidence and as different national or industry specific transition pathways are developed and updated. Enterprises should follow a mitigation hierarchy that prioritizes eliminating or reducing sources of emissions over offsetting, compensation, or neutralization measures. Carbon credits, or offsets may be considered as a means to address unabated emissions as a last resort. They should not draw attention away from the need to reduce emissions or lock-in greenhouse gas intensive processes and infrastructures. Enterprises should report publicly any use of any carbon credits or offsets, including the purpose of use. Such reporting should be distinct from and complementary to reporting on emissions reduction.**
76. *(new paragraph)* **The use of leverage and provision of technology on mutually acceptable terms, technical assistance and funding to suppliers and other business relationships for climate mitigation and adaptation efforts will be crucial for meeting targets and addressing impacts. The incorporation of responsibility for climate objectives across all relevant corporate functions including the highest governance level of an enterprise will also be important.**
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77. *(new paragraph)* **Enterprises should avoid activities which undermine climate resilience and can in turn adversely impact health and livelihoods of communities, workers and ecosystems.**
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Paras 74 and 77: these two paras mention "undermining climate resilience", but there is no substantive commentary providing further explanation. Please add this to the text

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78. **(new paragraph) The conservation of biodiversity and sustainable management and use of natural resources and ecosystems, including, for example, forests, oceans, peatlands and wetlands, is highly important to human health and livelihoods, species survival as well as managing climate change. Enterprises should contribute to the conservation of biological diversity, habitats and ecosystems, the sustainable use of their components, and the fair and equitable sharing of the benefits arising out of the utilisation of genetic resources. Enterprises should also avoid and address marine, freshwater, land and forest degradation, including deforestation, in line with objectives of UN SDGs, notably 15.2, the UN Strategic Plan for Forests 2017–2030 and the 2021 Glasgow Leaders' Declaration on Forests and Land Use which seek to halt and reverse forest loss and land degradation by 2030. Efforts should include the avoidance of adverse impacts on biodiversity and ecosystems in national parks, reserves and other protected areas, including UNESCO World Heritage sites, areas protected in fulfilment of the Convention on Biological Diversity, and as defined in domestic law, as well as on protected species. Where appropriate, and according to their own capacities and domestic laws where they operate, enterprises should also contribute to sustainable land and forest management, including restoration, afforestation, reforestation and the reduction of marine, freshwater and land degradation. Enterprises' efforts to prevent or mitigate adverse impacts on biodiversity should be guided by the biodiversity mitigation hierarchy, which recommends first seeking to avoid damage to biodiversity, reducing or minimising it where avoidance is not possible, and using offsets as a last resort for adverse impacts that cannot be avoided, mitigated or reduced.**
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79. **(originally paragraph 71)** The *Guidelines* also encourage enterprises to work to raise the level of environmental performance in all parts of their operations, even where this may not be formally required by existing practice in the countries in which they operate. In this regard, enterprises should take due account of their social and economic effects on developing countries.
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80. **(originally paragraph 72)** For example, multinational enterprises often have access to existing and innovative technologies or operating procedures which could, if applied, help raise environmental performance overall. Multinational enterprises are frequently regarded as leaders in their respective fields, so the potential for a “demonstration effect” on other enterprises should not be overlooked. Ensuring that the environment of the countries in which multinational enterprises operate also benefit from available and innovative technologies and practices is an important way of building support for international investment activities more generally.
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81. **(originally paragraph 73)** Enterprises have an important role to play in the training and education of their employees **and other stakeholders** with regard to environmental **management** matters. They are encouraged to discharge this responsibility in as broad a manner as possible, especially in areas directly related to human health and safety. **Enterprises should also communicate their policies, requirements and standards in a clear and accessible way to their suppliers and other business relationships.**
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82. **(new paragraph) Enterprises should respect domestic laws and regulations pertaining to animal welfare and animal welfare standards that are generally consistent with the World Organisation for Animal Health (WOAH) Terrestrial Code where their activities involve the handling of animals. Good animal welfare requires disease prevention and appropriate veterinary treatment, shelter, management and nutrition, humane handling including transport and humane slaughter or killing.**
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# Chapter VII. Combating Bribery and Other Forms of Corruption

## Targeted Updates to OECD Guidelines for Multinational Enterprises: Chapter VII. Combating Bribery, Bribe Solicitation and Extortion

(text to illustrate potential edits is in bold, italics for new text and strike-out for deleted text)

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### Full edited text of Chapter VII. Combating Bribery, Bribe Solicitation and Extortion

#### Chapter VII. Combating Bribery, ~~Bribe Solicitation and~~ other forms of ~~Extortion~~ Corruption

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Enterprises should not ***engage in any act of bribery or other forms of corruption. Enterprises should not, for example,*** directly or indirectly, offer, promise, give, or demand a bribe or other undue advantage to obtain or retain business or other improper advantage. Enterprises should also resist the solicitation of bribes and extortion. ***Enterprises should carry out risk-based due diligence as described in Chapter II and in accordance with applicable laws to identify, prevent, and mitigate actual and potential adverse impacts related to corruption and account for how these impacts are addressed.*** In particular, enterprises should:

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1. Not ***engage in any act of corruption, including the offering, promising or giving of any*** undue pecuniary or other advantage to public officials or the employees of ***persons or entities with which an enterprise has a business relationship partners or to their relatives or associates.*** Likewise, enterprises should not request, agree to or accept ***any*** undue pecuniary or other advantage from public officials or the employees of ***persons or entities with which an enterprise has a business relationship partners.*** Enterprises should not use third parties ***or other intermediaries, including, inter alia,*** agents and other intermediaries, consultants, representatives, distributors, consortia, contractors and suppliers and joint venture partners for channelling undue pecuniary or other advantages to public officials, or to employees of their ***persons or entities with which an enterprise has a business relationship partners*** or to their relatives or business associates.

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  2. Develop and adopt adequate internal controls, ethics and compliance programmes or measures for preventing and detecting bribery ***and other forms of corruption,*** developed on the basis of a risk-based assessment addressing the individual circumstances of an enterprise, in particular the bribery risks facing the enterprise ***risk factors related to bribery and other forms of corruption (including, inter alia,*** its geographical and industrial sector of operation, ***other responsible business conduct issues, the regulatory environment, the type of business relationships, transactions with foreign governments, and use of third parties).*** These internal controls, ethics and compliance programmes or measures should include a system of financial and accounting procedures, including a system of internal controls, reasonably designed to ensure the maintenance of fair and accurate books, ***conflict of interest registers,*** records, and accounts, to ensure that they cannot be used for the purpose of ***engaging in*** bribing or hiding bribery ***or other acts of corruption.*** Such individual circumstances and bribery risks should be regularly monitored and re-assessed as necessary ***to determine the allocation of compliance resources and*** to ensure the enterprise's internal controls, ethics and compliance programme or measures are adapted and continue to be effective, and to mitigate the risk of enterprises becoming ***involved*** ~~complicit~~ in bribery, ~~bribe solicitation and extortion~~ ***or all other forms of corruption. These internal controls, ethics and compliance programmes or measures for preventing and detecting all forms of corruption should also include carrying out risk-based due diligence as described in Chapter II.***

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  3. Prohibit or discourage, in internal company controls, ethics and compliance programmes or measures, the use of small facilitation payments, which are generally illegal in the countries where they are made, and, when such payments are made, accurately record these in books and financial records.

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4. Ensure, taking into account the particular bribery risks facing the enterprise **related to bribery and other forms of corruption**, properly documented due diligence pertaining to the hiring, as well as the appropriate and regular oversight of agents, and that remuneration of agents is appropriate and for legitimate services only. Where relevant, **an updated** list of agents engaged in connection with transactions with public bodies and State-owned enterprises should be kept and made available to competent authorities, in accordance with applicable public disclosure requirements.
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5. Enhance the transparency of their activities in the fight against bribery **and other forms of corruption and foster a culture of integrity**, ~~bribe solicitation and extortion~~. Measures could include **(i) strong, explicit and visible support and commitment from the board of directors or equivalent governing body and senior management to the enterprise's internal controls, ethics and compliance programmes**, ~~making public commitments against~~ **(ii) a clearly articulated and visible corporate policy prohibiting bribery and other forms of corruption, easily accessible to all employees and relevant third parties, including, inter alia, foreign subsidiaries, agents, and other intermediaries** ~~bribery, bribe solicitation and extortion~~, and **(iii) disclosing the management systems and the internal controls, ethics and compliance programmes or measures adopted by enterprises in order to honour these commitments**. Enterprises should also foster openness and dialogue with the public so as to promote its awareness of and cooperation with ~~in~~ **the fight against bribery, bribe solicitation and extortion other forms of corruption. Enterprises are encouraged to disclose, without prejudice to national laws and requirements, any misconduct related to bribery and other forms of corruption, as well as the measures adopted to address cases of suspected bribery and other forms of corruption. These measures may include, but are not limited to, processes for identifying, investigating, and reporting the misconduct and genuinely and proactively engaging with law enforcement authorities.**
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6. Promote employee awareness of and compliance with company ~~company~~ **enterprise** policies and internal controls, ethics and compliance programmes or measures against bribery **and other forms of corruption**, ~~bribe solicitation and extortion~~ **among employees and persons or entities linked by business relationships, including suppliers and sub-contractors**, through appropriate dissemination of such policies, programmes or measures and through training programmes and disciplinary procedures.
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7. Not make illegal contributions to candidates for public office or to political parties or to other ~~political~~ **organisations linked to political parties or political candidates**. Political contributions should fully comply with **national laws including** public disclosure requirements and should be reported to senior management. **This includes not obliquing nor providing any incentives to workers to support a political candidate or a political organisation.**
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Commentary on Combating Bribery and Other Forms of Corruption

74. **Where corruption occurs, adverse social, ecological, and economic impacts often ensue, and vice versa, such adverse impacts are often concealed through means of corruption. As such, an enterprise's implementation of effective anticorruption measures is an important contribution to the avoidance of adverse impacts covered by the Guidelines.**
75. **Corruption includes, but is not limited to, the bribery of public officials or the employees of persons or entities linked by business relationships. It may also encompass trading in influence, embezzlement and misuse of sponsorships and charitable donations.** Bribery and Corruption ~~is~~ **are** damaging to democratic institutions and the governance of corporations. They ~~discourages~~ **discourage** investment and distort international competitive conditions. **Beyond the economic impact, corruption can have harmful effects, including, inter alia, enabling human rights abuses, lack of enforcement of environmental standards and labour rights, or provision of sub-standard goods.** In particular, the diversion of funds through corrupt practices undermines attempts by citizens to achieve higher levels of economic, social and environmental welfare ~~and it~~ **impedes** efforts to reduce poverty. **Corruption disproportionately affects those belonging to marginalised or vulnerable groups or populations and can exacerbate gender inequalities.** Enterprises have an important role to play in combating these practices **by taking into account overlapping forms of structural discrimination related to ethnicity, race, sex, and sexual**
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**orientation, among other factors, when setting up controls, ethics and compliance programmes.**

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76. Propriety, integrity and transparency in both the public and private domains are key concepts in the fight against bribery **and other forms of corruption**, ~~bribe solicitation and extortion~~. The business community, non-governmental organisations, governments and inter-governmental organisations have **should** all co-operated to strengthen public support for anticorruption measures and to enhance transparency and public awareness of the problems of corruption and bribery, **including by promoting a culture of whistleblowing when misconduct occurs**. The adoption of appropriate corporate governance practices is also an essential element in fostering a culture of ethics within enterprises.
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77. The Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the **OECD Anti-Bribery Convention**) entered into force on 15 February 1999. The **OECD Anti-Bribery Convention**, along with the ~~2009 Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions (the 2009 Anti-Bribery Recommendation)~~, the ~~2009 Recommendation on Tax Measures for Further Combating Bribery of Foreign Public Officials in International Business Transactions, and the 2006 Recommendation on Bribery and Officially Supported Export Credits~~ **and the Recommendation on Guidelines on Anti-Corruption and Integrity in State-Owned Enterprises**, are the core OECD instruments which target governance and integrity in State-Owned Enterprises. They aim to eliminate the “supply” of bribes to foreign public officials, with each country taking responsibility for the activities of its enterprises and what happens within its own jurisdiction. A programme of rigorous and systematic monitoring of countries’ implementation of the **OECD Anti-Bribery Convention** has been established to promote the full implementation of these instruments.
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Footnote: For the purposes of the **OECD Anti-Bribery Convention**, **the offence of foreign bribery** a “bribe” is defined as the “...offer[ing], promis[ing], or giv[ing] of any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business”. The Commentaries to the **OECD Anti-Bribery Convention** (paragraph 9) clarify that “small ‘facilitation’ payments do not constitute payments made ‘to obtain or retain business or other improper advantage’ within the meaning of paragraph 1 and, accordingly, are also not an offence. Such payments, which, in some countries, are made to induce public officials to perform their functions, such as issuing licenses or permits, are generally illegal in the foreign country concerned. Other countries can and should address this corrosive phenomenon by such means as support for programmes of good governance. **The Anti-Bribery Recommendation (Section XIV.i) recommends that governments “undertake to periodically review their policies and approach on small facilitation payments in order to effectively combat the phenomenon”.**

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78. The ~~2009 Anti-Bribery Recommendation~~ recommends in particular that governments encourage their enterprises to develop and adopt adequate internal controls, ethics and compliance programmes or measures for the purpose of preventing and detecting foreign bribery, taking into account the Good Practice Guidance on Internal Controls, Ethics and Compliance, included as Annex II to the ~~2009 Anti-Bribery Recommendation~~. This Good Practice Guidance is addressed to enterprises, **including state-owned enterprises**, as well as business organisations and professional associations, and highlights good practices for ensuring the effectiveness of their internal controls, ethics and compliance programmes or measures to prevent and detect foreign bribery, **including protections for reporting persons. It is flexible, and is intended to be adapted by enterprises, in particular small and medium sized enterprises, according to their individual circumstances, including their size, type, legal structure, and geographical and industrial sector of operation, as well as the jurisdictional and other basic legal principles under which they operate. In addition, for the purposes of these Guidelines internal controls, ethics and compliance programmes or measures related to corruption should also include carrying out risk-based due diligence in line with the recommendations articulated in Chapter II.**
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79. **Collective action and meaningful engagement with local and international** ~~Private sector and civil society~~ **organisations, business, professional associations, and international organisations** initiatives also may help enterprises to **better** design and implement effective **enterprise** ~~anti-bribery~~ **corruption** policies.
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80. The United Nations Convention against Corruption (UNCAC), which entered into force on 14 December 2005, sets out a broad range of standards, measures and rules to fight corruption. Under the UNCAC, States Parties are required to prohibit their officials from receiving bribes and their enterprises from bribing domestic public officials, as well as foreign public officials and officials of public international organisations, and to consider disallowing private to private bribery. The UNCAC and the **OECD** Anti-Bribery Convention are mutually supporting and complementary.
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81. To address the demand side of bribery, good governance practices are important elements to prevent enterprises from being ~~asked~~ **solicited** to pay bribes. Enterprises can support collective action initiatives on resisting bribe solicitation and extortion. Both home and host governments should assist enterprises confronted with solicitation of bribes **or other forms of corruption** and with extortion, **raise awareness and provide training among relevant public officials, and, where appropriate, undertake coordinated actions to address the solicitation and acceptance of bribes.** The Good Practice Guidance on Specific Articles of the Convention in Annex II of the 2009 Anti-Bribery Recommendation states that the **OECD** Anti-Bribery Convention should be implemented in such a way that it does not provide a defence or exception where the foreign public official solicits a bribe. Furthermore, the UNCAC requires the criminalisation of bribe solicitation by domestic public officials.
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# Chapter VIII. Consumer Interests

## Targeted Updates to OECD Guidelines for Multinational Enterprises: Chapter VIII. Consumer Interests

(text to illustrate potential edits is in bold, italics for new text and strike-out for deleted text)

### Full edited text of Chapter VIII. Consumer Interests

#### Chapter VIII. Consumer Interests

When dealing with consumers, enterprises should act in accordance with fair business, marketing and advertising practices and should take all reasonable steps to ensure the quality and reliability of the goods and services that they provide. In particular, they should:

1. Ensure that the goods and services they provide meet all agreed or legally required standards for consumer health and safety, including those pertaining to health warnings and safety information, ***and do not pose an unreasonable risk to the health or safety of consumers in foreseeable use or foreseeable improper use or misuse.***
2. Provide accurate, verifiable and clear information that is sufficient to enable consumers to make informed decisions, including information on the prices and, where appropriate, content, safe use, environmental attributes, maintenance, storage, ~~and disposal of goods and services~~ ***and relevant ecommerce disclosures such as privacy issues; and information about available dispute resolution and redress options. The information should be presented in a comprehensible and easily accessible manner using plain language, while also regarding the needs of accessibility for consumers with disabilities.*** Where feasible this information should be provided in a manner that facilitates consumers' ability to compare products.
3. Provide consumers with access to fair, easy to use, timely and effective non-judicial dispute resolution and redress mechanisms, without unnecessary cost or burden.
4. Not make representations or omissions, nor engage in any other practices that are deceptive, misleading, fraudulent or unfair or ***that otherwise subvert consumer choice in ways that harm consumers or competition.***
5. Support efforts to promote consumer education in areas that relate to their business activities, with the aim of, *inter alia*, improving the ability of consumers to: *i*) make informed decisions involving complex goods, services and markets, *ii*) better understand the economic, environmental and social impact of their decisions and *iii*) support sustainable consumption.
6. ~~Respect~~ ***Protect*** consumer privacy ***by ensuring that enterprise practices relating to the collection and use of consumer data are lawful, transparent and fair, enable consumer participation and choice*** and take ~~all reasonable~~ ***necessary*** measures to ensure the security of personal data that they collect, store, process or disseminate.
7. Co-operate fully with public authorities to prevent and combat ***abusive or*** deceptive marketing practices (including misleading advertising, and commercial fraud) and to diminish or prevent serious threats to public health and safety or to the environment deriving from the consumption, use or disposal of their goods and services.
8. Take into consideration, in applying the above principles, ~~i) the needs of vulnerable and disadvantaged consumers~~ ***especially those who may be experiencing vulnerability or disadvantage*** and ~~ii) the specific challenges that e-commerce may pose for consumers.~~

Para 1: the new text at para 1, as drafted, sets an additive expectation for consumer goods & services that is not qualified by national legal standards or the provision of warnings or information to consumers to allow for informed use. The associated commentary (para 84 et seq) does not appear to have been updated in light of this change (albeit the new commentary para 100 in chapter 9, appears as though it may provide one possible context for this addition). What is the intended interaction in situations, e.g. for sale of many foods and beverages, where 'misuse' may be foreseeable – notwithstanding information and warnings provided and legal requirements being met – but withdrawing products or services impacts consumer choice?

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**Commentary**

81. The chapter on consumer interests of the OECD Guidelines for Multinational Enterprises draws on the work of the OECD Committee on Consumer Policy and the Committee on Financial Markets, ***OECD standards including the OECD Recommendation of the Council on High-Level Principles on Financial Consumer Protection [OECD/LEGAL/0394], the OECD Recommendation of the Council on Consumer Protection in the field of Consumer Credit [OECD/LEGAL/0453], the OECD Recommendation of the Council on Financial Literacy [OECD/LEGAL/0461], the OECD Recommendation of the Council on Consumer Protection in E-commerce [OECD/LEGAL/0422] and the OECD Recommendation of the Council on Consumer Product Safety [OECD/LEGAL/0459]***, as well as the work of other international organisations, including the International Chamber of Commerce, the International Organization for Standardization and the United Nations, ***including the UN Environment Programme*** (i.e., the UN Guidelines on Consumer Policy, as expanded in 1999) ***and relevant instruments, including the Advertising and Marketing Communications Code for global advertising and responsible marketing, International Chamber of Commerce (2018)***.
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82. The chapter recognises that consumer satisfaction and related interests constitute a fundamental basis for the successful operation of enterprises. It also recognises that consumer markets for goods and services have undergone major transformation over time. Regulatory reform, more open global markets, the development of new technologies ***which have transformed digital and financial services*** and the growth in consumer services have been key agents of change, providing consumers with greater choice and the other benefits which derive from more open competition. At the same time, the pace of change and increased complexity of many markets have generally made it more difficult for consumers to compare and assess goods and services. Moreover, consumer demographics have also changed over time. Children are becoming increasingly significant forces in the market, as are the growing number of older adults. While consumers are better educated overall, many still lack the arithmetic and literacy skills that are required in today's more complex, information-intensive marketplace. Further, many consumers are increasingly interested in knowing the position and activities of enterprises on a broad range of economic, social and environmental issues, and in taking these into account when choosing goods and services.
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83. The chapeau calls on enterprises to apply fair business, marketing and advertising practices and to ensure the quality and reliability of the products that they provide. These principles, it is noted, apply to both goods and services.
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84. Paragraph 1 underscores the importance for enterprises to adhere to required health and safety standards and the importance for them to provide consumers with adequate health and safety information on their products.
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85. Paragraph 2 concerns information disclosure. It calls for enterprises to provide information which is sufficient for consumers to make informed decisions. **The way information is provided in the online area should be tailored and adapted to the consumer's means of access.** This would include information on the financial risks associated with products, where relevant. Furthermore, in some instances enterprises are legally required to provide information in a manner that enables consumers to make direct comparisons of goods and services (for example, unit pricing). In the absence of direct legislation, enterprises are encouraged to present information, when dealing with consumers, in a way that facilitates comparisons of goods and services and enables consumers to easily determine what the total cost of a product will be. It should be noted that what is considered to be "sufficient" can change over time and enterprises should be responsive to these changes. Any product and environmental **or social** claims that enterprises make should be based on adequate evidence and, as applicable, proper tests **and verification.** **Claims may apply both to the way a product or service was produced and to the attributes of the product or service itself.** Given consumers' growing interest in environmental **and social** issues and sustainable consumption, information should be provided, as appropriate, on the environmental **or social** attributes of products **and services.** This could include information on the energy efficiency and the degree of recyclability, **durability, and reparability** of products **and, the sustainability attributes of financial products and services or, for example,** in the case of food products, information on agricultural practices **or nutritional attributes.**
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86. Business conduct is increasingly considered by consumers when making their purchasing decisions. Enterprises are therefore encouraged to make information available on initiatives they have taken to integrate social and environmental concerns into their business operations and to otherwise support sustainable consumption. Chapter III of the Guidelines on Disclosure is relevant in this regard. Enterprises are encouraged to communicate value statements or statements of business conduct to the public, including information on the social, ethical and environmental policies of the enterprise and other codes of conduct to which the company subscribes. Enterprises are encouraged to make this information available in plain language and in a format that is appealing to consumers. **Enterprises should also assure the accuracy of any claim regarding environmental or social performance.** Growth in the number of enterprises reporting in these areas and targeting information to consumers would be welcome.
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87. Paragraph 3 reflects language that is used in the 2007 Council Recommendation on Consumer Dispute Resolution and Redress. The Recommendation establishes a framework for developing effective approaches to address consumer complaints, including a series of actions that industry can take in this respect. It is noted that the mechanisms that many enterprises have established to resolve consumer disputes have helped increase consumer confidence and consumer satisfaction. These mechanisms can provide more practicable solutions to complaints than legal actions, which can be expensive, difficult and time consuming for all the parties involved. For these non-judicial mechanisms to be effective, however, consumers need to be made aware of their existence and would benefit from guidance on how to file complaints, especially when claims involve cross-border or multi-dimensional transactions.
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88. Paragraph 4 concerns deceptive, misleading, fraudulent and other unfair commercial practices. Such practices can distort markets, at the expense of both consumers and responsible enterprises and should be avoided.
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89. Paragraph 5 concerns consumer education, which has taken on greater importance with the growing complexity of many markets and products. Governments, consumer organisations and many enterprises have recognised that this is a shared responsibility and that they can play important roles in this regard. The difficulties that consumers have experienced in evaluating complex products in financial and other areas have underscored the importance for stakeholders to work together to promote education aimed at improving consumer decision-making.
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90. Paragraph 6 concerns personal data. The increasing collection and use of personal data by enterprises **can pose great risks to the privacy of consumers and their well-being**, fuelled in part by the Internet and technological advances, has highlighted the importance of protecting **The protection of personal data of consumers, including data security** against consumer privacy violations, including security breaches **is therefore of great importance**.
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91. Paragraph 7 underscores the importance of enterprises to work with public authorities to help prevent and combat deceptive marketing practices more effectively. Co-operation is also called for to diminish or prevent **threats risks** to public health and safety and to the environment. This includes **threats risks** associated with the disposal of goods, as well as their consumption and use. This reflects recognition of the importance of considering **the entire life cycle of products and managing risks to the safety of products throughout their lifetime, in particular at the design, manufacture, distribution, use and disposal stages**.
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92. Paragraph 8 calls on enterprises to take the situations of vulnerable and disadvantaged consumers into account when they market goods and services. Disadvantaged or vulnerable consumers refer to particular consumers or categories of consumers, who because of personal characteristics or circumstances (like age, mental or physical capacity, education, income, language or remote location) may meet particular difficulties in operating in today's information-intensive, globalised markets. The paragraph also highlights the growing importance of mobile and other forms of e-commerce in global markets. The benefits that such commerce provides are significant and growing. **But there are also risks for consumer harm**. Governments have spent considerable time examining ways to ensure that consumers are afforded transparent and effective protection that is not less in the case of e-commerce than the level of protection afforded in more traditional forms of commerce. **It is therefore important that enterprises take steps to reduce the risks of e-commerce so that the level of protection is not less than that provided in more traditional forms of commerce**.
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# Chapter IX. Science and, Technology and Innovation

The chapeau and para 1 of this ch, and the chapter 2 commentary (paragraph 18), are currently inconsistent in the draft as to whether the chapter 2 due diligence expectations are intended to be relevant to THIS CHAPTER.

## Targeted Updates to OECD Guidelines for Multinational Enterprises: Chapter IX. Science, Technology and Innovation

(text to illustrate potential edits is in bold, italics for new text and strike-out for deleted text)

### Full edited text of Chapter IX. Science and Technology

Enterprises should, *as appropriate, contribute to the development of local and national innovative capacity.* **Enterprises should carry out due diligence to ensure that the development, financing, sale, licensing, trade and use of technology, including gathering and using data, as well as scientific research and innovation, is done in a way that is consistent with the Guidelines as well as with applicable national laws and requirements, including privacy and data protection requirements and export control regulations. In particular, enterprises should:**

~~Enterprises should:-~~

~~1. Endeavour to ensure that their activities are compatible with the science and technology (S&T) policies and plans of the countries in which they operate and as appropriate contribute to the development of local and national innovative capacity.~~

1. **(New paragraph) Carry out risk-based due diligence, as described in Chapter II in the context of development, financing, licensing, sale, trade and/or use of technology, including with respect to gathering and using data, end-use, as well as in the context of scientific research and innovation.**
2. Adopt, where practicable in the course of their business activities, practices that ~~permit the~~ **enable the voluntary, safe, secure and efficient** transfer and rapid diffusion of technology and know-how **on mutually agreed terms, as well as enhance access to and sharing of data to foster scientific discovery and innovations** with due regard to the protection of intellectual property rights, **confidentiality obligations and privacy, personal data protection and non-discrimination principles.**
3. When appropriate, perform science and technology development ~~work~~ **activities** in host countries to address local market needs, as well as employ host country personnel in an ~~S&T capacity~~ **science and technology development activities**, and encourage their training, taking into account **integrity and** commercial needs.
4. When granting licenses for the use of intellectual property rights or when otherwise **voluntarily** transferring technology, do so on ~~reasonable~~ **mutually agreed** terms and conditions, **with appropriate safeguards to prevent and mitigate adverse impacts**, and in a manner that contributes to the long term sustainable development prospects of the host country **and respects export control regulations.**
5. Where relevant to commercial objectives, develop ties with local universities **higher education institutions**, public research institutions and participate in co-operative research projects with local industry or industry associations, **including SMEs and civil society organisations. Such cooperation should take into account effective risk management, ethical considerations, national security concerns, applicable laws and considerations of stakeholders, while**

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recognising the value of open science and safeguards to preserve academic freedom and research and scientific autonomy.

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6. (New paragraph) When collecting, sharing and using data, enhance transparency of data access and sharing arrangements, and encourage the adoption of responsible data governance practices throughout the data value cycle that meet technical, organisational, and legal standards and obligations that are applicable, recognised or widely accepted among governments adhering to the Guidelines, including codes of conduct, ethical principles, rules regarding manipulation and coercion of consumers, and privacy and data protection regulation.
  7. (New paragraph) Enterprises should support, as appropriate to their circumstances, cooperative efforts in the appropriate fora to promote Internet Freedom, including through respect of the freedoms of expression, peaceful assembly and association online, consistent with the matters covered by the Guidelines.
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Commentary on Science, Technology and Innovation

93. (New paragraph) The development, licensing, sale, trade and use of technology has a profound impact on the matters covered by the Guidelines, including sustainable development, human rights, economic participation, the quality of democracy, social cohesion, climate change, the global business and labour landscape and market dynamics. Scientific research and technological innovation has driven productivity in all sectors, as well as the ability of enterprises to conduct due diligence and contribute to sustainable development, but can also be associated with challenges and adverse impacts. The chapeau of this chapter extends expectations of the Guidelines to actual and potential adverse impacts related to science, technology and innovation.
  94. (New paragraph) Science is understood here as including, among other issues, research and exploration. Technology is understood here to include digital technology, non-digital technology, and digital services, as well as digital ecosystems that facilitate their development and use. Innovation is understood here as a new or improved product or process that has been made available to potential users or brought into use by the enterprise.
  95. (New paragraph) Given the evolving nature of this topic and the fact that it touches on many issues, the scope of this chapter is meant to be broad and inclusive to ensure its continued relevance in relation to risks associated with future science, technology and innovation developments.
  96. (Originally paragraph 93). In a knowledge-based and globalised economy where national borders matter less, even for small or domestically oriented enterprises, the ability to access and utilise technology, data and know-how is essential for improving enterprise performance. Such access is also important for the realisation of the economy-wide effects of technological progress, including productivity growth and job creation, within the context of sustainable development. Multinational enterprises are the main an important conduit of technology transfer across borders. They can contribute to the national innovative capacity of their host countries by generating, diffusing, and even enabling the use of new technologies by domestic enterprises and institutions. R&D activities of MNEs and investments in new technologies, when well connected to the national innovation system, can help enhance the economic and social progress in their host countries. In turn, the development of a dynamic innovation system in the host country expands commercial opportunities for MNEs.
  97. (Originally paragraph 94). The chapter thus aims to promote the diffusion by multinational enterprises of the fruits of research and development activities among the countries where they operate, contributing thereby to the innovative capacities of host countries, within the limits imposed by economic feasibility, competitiveness concerns, and in line with privacy, data protection, security, intellectual property protection and confidentiality obligations. In this regard, fostering technology diffusion can include the commercialisation of products and
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**services** which imbed new technologies, licensing of process innovations, hiring and training of S&T personnel and development of R&D co-operative ventures. The chapter thus aims to promote the diffusion by multinational enterprises of the fruits of research and development activities among the countries where they operate, contributing thereby to the innovative capacities of host countries, within the limits **imposed by** economic feasibility, competitiveness concerns, **and in line with privacy, data protection, security, intellectual property protection and confidentiality obligations**. In this regard, fostering technology diffusion can include the commercialisation of products **and services** which imbed new technologies, licensing of process innovations, hiring and training of S&T personnel and development of R&D co-operative ventures. When selling or licensing technologies, not only should the terms and conditions negotiated be **reasonable mutually agreed**, but MNEs **may want to should** consider the long-term developmental, environmental **and societal** impacts of **technology** for the home and host country. In their activities, multinational enterprises can establish and improve the innovative capacity of their international subsidiaries, **and subcontractors, and other entities with which they have business relationships**. In addition, MNEs can call attention to the importance of local scientific and technological infrastructure, both physical and institutional. In this regard, MNEs can usefully contribute to the formulation by host country governments of policy frameworks conducive to the development of dynamic innovation systems.

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98. **Data is understood here and in relevant OECD Recommendations to refer to recorded information in structured or unstructured formats, including text, images, sound, and video. Data-driven innovation and data-intensive science hold immense promise to address grand societal challenges. Open science initiatives and access to data has had far-reaching effects on the reproducibility of scientific results, diffusion of knowledge across society, cross-disciplinary co-operation, resource efficiency, productivity and competitiveness. Data flows across borders are critical to support international commerce, information and knowledge exchange to bridge digital divides and to support sustainable development. Paragraph 2 reinforces these benefits, but also acknowledges risks of data theft and privacy impacts. Enterprises in the data ecosystem, including data holders, data producers, and data intermediaries, as defined in the OECD Recommendation of the Council on Enhancing Access to and Sharing of Data [OECD/LEGAL/0463], are encouraged to consider recommendations on responsible data access, sharing and use as outlined in the said Recommendation, which seeks to ensure implementation of risk management measures throughout the data value cycle, including measures necessary to protect the confidentiality, integrity, security and availability of data, particularly in the context of managing biological data such as DNA, and when disclosing data to law enforcement and other government agencies.**
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99. **In paragraph 4, the expectations on enterprises are meant to be proportional to avoid terms and conditions which result in unintended consequences. Certain actors can also seek to benefit from technology transfer in order to misuse civilian technology.**
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100. **Due diligence in context of downstream business relationships in the technology sector is subject to relevant considerations outlined in Chapter II. Thus, when selling, licensing or exporting technology that presents known or foreseeable circumstance related to the use of the product or service provided in accordance with its intended purpose, or under conditions of reasonably foreseeable improper use or misuse, which may give rise to adverse impacts, enterprises should conduct risk-based due diligence in determining whether to proceed with the sale, with due regard for export control requirements, and seek to prevent and mitigate potential adverse impacts to the extent possible. Enterprises should also consider OECD Recommendations described in the following paragraphs that have been developed to mitigate against technology specific risks.**
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101. **Enterprises involved in the development of new technology or new applications of existing tools should anticipate to the extent feasible and, as appropriate, address ethical, legal and social challenges raised by novel technology while promoting responsible innovation and engaging in dialogue and information sharing with local regulatory authorities. In addition to and as support in the implementation of the recommendations of the Guidelines, enterprises are encouraged to consider available guidance on the innovation process, including but not limited to the OECD Recommendation of the Council on Artificial Intelligence [OECD/LEGAL/0449] and the OECD Recommendation of the Council on Responsible Innovation in Neurotechnology [OECD/LEGAL/0457].**
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102. In all activities concerning children and youth participation in, or engagement with the digital environment, enterprises should take into account, as appropriate, the child's best interests as a primary consideration and in their due diligence identify how the rights of children and youth can be respected and the well-being of children and youth can be protected in the digital environment, and take appropriate measures to do so consistent with the OECD Recommendation of the Council on Children in the Digital Environment [OECD/LEGAL/0389] and the OECD Guidelines for Digital Service Providers.

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103. Digital security is a shared responsibility across all stakeholders, including businesses, customers and governments. Digital security incidents, such as unauthorised access to systems or software, compromised accounts, loss or theft of data, or interference with IT resources, can harm businesses, governments and individuals by undermining the availability, integrity and/or confidentiality of their data, information systems and networks. Enterprises should conduct digital security risk management in a manner that is consistent with the other chapters of the Guidelines. Privacy-by-design principles, use of strong encryption, permission and access management protocols, and other best practices can reduce threats and mitigate harm. Enterprises should also take into account the guidance set out in the OECD Recommendation of the Council on Digital Security Risk Management for Economic and Social Prosperity [OECD/LEGAL/0415], the OECD Recommendation of the Council on Enhancing Access to and Sharing of Data [OECD/LEGAL/0463], and the OECD Recommendation of the Council concerning Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data [OECD/LEGAL/0188].

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104. Paragraph 7 is without prejudice to positions held by governments in the area of electronic commerce at the World Trade Organisation (WTO). It is not intended to disregard other important public policy interests which may relate to the use of the internet which would need to be taken into account.\*

\*Some countries have referred to the 2005 Tunis Agenda for the Information Society in this regard.

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# Chapter X. Competition

## Targeted Updates to OECD Guidelines for Multinational Enterprises: Chapter X. Competition

(text to illustrate potential edits is in bold, italics for new text and strike-out for deleted text)

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### Full edited text of Chapter X. Competition

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#### Chapter X. Competition

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Enterprises should:

1. Carry out their activities in a manner consistent with all applicable competition laws and regulations, taking into account the competition laws of all jurisdictions in which the activities may have anti-competitive effects.

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2. Refrain from entering into or carrying out anti-competitive agreements among competitors, including agreements to:
  - a) fix prices;
  - b) make rigged bids (collusive tenders);
  - c) establish output restrictions or quotas; or
  - d) share or divide markets by allocating customers, suppliers, territories or lines of commerce.

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3. Co-operate with investigating competition authorities by, among other things and subject to applicable law and appropriate safeguards, providing responses as promptly and completely as practicable to requests for information, and considering the use of available instruments, such as waivers of confidentiality where appropriate, to promote effective and efficient co-operation among investigating authorities.

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4. Regularly promote employee awareness of the importance of compliance with all applicable competition laws and regulations, and, in particular, train senior management of the enterprise in relation to competition issues.

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#### Commentary on Competition

95. These recommendations emphasise the importance of competition laws and regulations to the efficient operation of both domestic and international markets and reaffirm the importance of compliance with those laws and regulations by domestic and multinational enterprises. They also seek to ensure that all enterprises are aware of developments concerning the scope, remedies and sanctions of competition laws and the extent of co-operation among competition authorities. ***Enterprises should take into account applicable competition laws and regulations when engaging in collaborative initiatives related to RBC or due diligence.*** The term "competition" law is used to refer to laws, including both "antitrust" and "antimonopoly" laws, that variously prohibit: a) anti-competitive agreements; b) the abuse of market power or of dominance; c) the acquisition of market power or dominance by means other than efficient performance; or d) the substantial lessening of competition or the significant impeding of effective competition through mergers or acquisitions.

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96. In general, competition laws and policies prohibit: a) hard core cartels; b) other anti-competitive agreements; c) anti-competitive conduct that exploits or extends market dominance or market power; and d) anti-competitive mergers and acquisitions. Under the ~~1998~~ Recommendation of the OECD Council Concerning Effective Action Against Hard Core Cartels, [C\(98\)35/FINAL](#), the anticompetitive agreements referred to in sub a) constitute hard core cartels, but the Recommendation incorporates differences in member countries' laws, including differences in the laws' exemptions or provisions allowing for an exception or authorisation for activity that might otherwise be prohibited. The recommendations in these Guidelines do not suggest that enterprises should forego availing themselves of such legally available exemptions or provisions. The categories sub b) and c) are more general because the effects of other kinds of agreements and of

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unilateral conduct are more ambiguous, and there is less consensus on what should be considered anti-competitive.

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97. The goal of competition policy is to contribute to overall welfare and economic growth by promoting market conditions in which the nature, quality, and price of goods and services are determined by competitive market forces. In addition to benefiting consumers and a jurisdiction's economy as a whole, such a competitive environment rewards enterprises that respond efficiently to consumer demand. Enterprises can contribute to this process by providing information and advice when governments are considering laws and policies that might reduce efficiency or otherwise reduce the competitiveness of markets.
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98. Enterprises should be aware that competition laws continue to be enacted, and that it is increasingly common for those laws to prohibit anti-competitive activities that occur abroad if they have a harmful impact on domestic consumers. Moreover, cross-border trade and investment makes it more likely that anti-competitive conduct taking place in one jurisdiction will have harmful effects in other jurisdictions. Enterprises should therefore take into account both the law of the country in which they are operating and the laws of all countries in which the effects of their conduct are likely to be felt.
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99. Finally, enterprises should recognise that competition authorities are engaging in more and deeper co-operation in investigating and challenging anti-competitive activity. See generally: [OECD instruments on competition policy including the OECD Recommendation of the Council Concerning International Co-operation on Competition Investigations and Proceedings \[OECD/LEGAL/0408\]](#) and the [OECD Recommendation of the Council on Fighting Bid Rigging in Public Procurement \[OECD/LEGAL/0396\]](#). Recommendation of the Council Concerning Co-operation between Member Countries on Anticompetitive Practices Affecting International Trade, [C\(95\)130/FINAL](#); Recommendation of the Council on Merger Review, [C\(2005\)34](#). When the competition authorities of various jurisdictions are reviewing the same conduct, enterprises' facilitation of co-operation among the authorities promotes consistent and sound decision-making and competitive remedies while also permitting cost savings for governments and enterprises.
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100. **While in many cases enterprises can collaborate on RBC initiatives and due diligence efforts without breaching competition law, enterprises and the collaborative initiatives in which they are involved should take proactive steps to understand competition law issues in their jurisdiction and avoid activities which could represent a breach of competition law.**
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101. **Enterprises are subject to competition law when buying labour input from workers in a similar way as when buying other goods and services. Severe sanctions may be applied in the case of collusion between employers on salaries (wage-fixing) and hiring practices (such as no-poach and no-hiring agreements). Enterprises should therefore ensure they comply with competition law in their recruitment and employment policies, and when planning mergers and acquisitions.**
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# Chapter XI. Taxation

## Targeted Updates to OECD Guidelines for Multinational Enterprises: Chapter XI. Taxation

(text to illustrate potential edits is in bold, italics for new text and strike-out for deleted text)

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### Full edited text of Chapter XI. Taxation

#### Chapter XI. Taxation

1. It is important that enterprises contribute to the public finances of host countries by making timely payment of their tax liabilities. In particular, enterprises should comply with both the letter and spirit of the tax laws and regulations of the countries in which they operate. Complying with the spirit of the law means discerning and following the intention of the legislature. It does not require an enterprise to make payment in excess of the amount legally required pursuant to such an interpretation. Tax compliance includes such measures as providing to the relevant authorities timely information that is relevant or required by law for purposes of the correct determination of taxes to be assessed in connection with their operations and conforming transfer pricing practices to the arm's length principle.
2. Enterprises should treat tax governance and tax compliance as important elements of their oversight and broader risk management systems. In particular, corporate boards should adopt tax risk management strategies to ensure that the financial, regulatory and reputational risks associated with taxation are fully identified and evaluated.

#### Commentary on Taxation

102. Corporate citizenship in the area of taxation implies that enterprises should comply with both the letter and the spirit of the tax laws and regulations in all countries in which they operate, co-operate with authorities and make information that is relevant or required by law available to them. An enterprise complies with the spirit of the tax laws and regulations if it takes reasonable steps to determine the intention of the legislature and interprets those tax rules consistent with that intention in light of the statutory language and relevant, contemporaneous legislative history. Transactions should not be structured in a way that will have tax results that are inconsistent with the underlying economic consequences of the transaction unless there exists specific legislation designed to give that result. In this case, the enterprise should reasonably believe that the transaction is structured in a way that gives a tax result for the enterprise which is not contrary to the intentions of the legislature.

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103. Tax compliance also entails co-operation with tax authorities and provision of the information they require to ensure an effective and equitable application of the tax laws. Such co-operation should include responding in a timely and complete manner to requests for information made by a competent authority pursuant to the provisions of a tax treaty or exchange of information agreement. However, this commitment to provide information is not without limitation. In particular, the *Guidelines* make a link between the information that should be provided and its relevance to the enforcement of applicable tax laws. This recognises the need to balance the burden on business in complying with applicable tax laws and the need for tax authorities to have the complete, timely and accurate information to enable them to enforce their tax laws.

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104. Enterprises' commitments to co-operation, transparency and tax compliance should be reflected in risk management systems, structures and policies. In the case of enterprises having a corporate legal form, corporate boards are in a position to oversee tax risk in a number of ways. For example, corporate boards should proactively develop appropriate tax policy principles, as well as establish internal tax control systems so that the actions of management are consistent with the views of the board with regard to tax risk. The board should be informed about all potentially material tax risks and responsibility should be assigned for performing internal tax control functions and reporting to the board. A comprehensive risk management strategy that includes tax will allow the enterprise to not only act as a good corporate citizen but also to effectively manage tax risk, which can serve to avoid major financial, regulatory and reputation risk for an enterprise.

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***105. Tax transparency supports the integrity of a country's tax system and is an important way of ensuring and demonstrating that enterprises comply with the letter and spirit of tax laws. A***

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member of a multinational enterprise group in one country may have extensive economic relationships with members of the same multinational enterprise group in other countries. Such relationships may affect the tax liability of each of the parties. Accordingly, tax authorities may need information from outside their jurisdiction in order to be able to evaluate those relationships and determine the tax liability of the member of the MNE group in their jurisdiction. Again, the information to be provided is limited to that which is relevant to or required by law for the proposed evaluation of those economic relationships for the purpose of determining the correct tax liability of the member of the MNE group. MNEs should co-operate in providing that information. **A number of actions of the OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting (BEPS) project are aimed at improving transparency, such as the preparation and exchange of Country-by-Country Reports (BEPS Action 13), the compulsory spontaneous exchange of relevant information on taxpayer-specific rulings (BEPS Action 5), and the mandatory disclosure rules regarding aggressive tax planning schemes (BEPS Action 12).**

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106. Transfer pricing is a particularly important issue for corporate citizenship and taxation. The dramatic increase in global trade and cross-border direct investment (and the important role played in such trade and investment by multinational enterprises) means that transfer pricing is a significant determinant of the tax liabilities of members of a multinational enterprise group because it materially influences the division of the tax base between countries in which the multinational enterprise operates. The arm's length principle which is included in both the OECD Model Tax Convention and the UN Model Double Taxation Convention between Developed and Developing Countries, is the internationally accepted standard for adjusting the profits between associated enterprises. Application of the arm's length principle avoids inappropriate shifting of profits or losses and minimises risks of double taxation. Its proper application requires multinational enterprises to co-operate with tax authorities and to furnish all information that is relevant or required by law regarding the selection of the transfer pricing method adopted for the international transactions undertaken by them and their related party. It is recognised that determining whether transfer pricing adequately reflects the arm's length standard (or principle) is often difficult both for multinational enterprises and for tax administrations and that its application is not an exact science.

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107. The Committee on Fiscal Affairs of the OECD undertakes ongoing work to develop recommendations for ensuring that transfer pricing reflects the arm's length principle. Its work resulted in the publication in 1995 of the *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (OECD Transfer Pricing Guidelines)* which was the subject of the Recommendation of the OECD Council on the Determination of Transfer Pricing between Associated Enterprises (members of an MNE group would normally fall within the definition of Associated Enterprises). The *OECD Transfer Pricing Guidelines* and that Council Recommendation are updated on an ongoing basis to reflect changes in the global economy and experiences of tax administrations and taxpayers dealing with transfer pricing. **Importantly, the Council Recommendation was revised in 2017 to reflect the endorsement by the Council of the BEPS package, to strengthen the impact and relevance of the Transfer Pricing Guidelines outside OECD Membership, and to provide greater clarity and legal certainty to governments and taxpayers on the status of future revisions to the Transfer Pricing Guidelines by supporting their timely implementation.** The arm's length principle as it applies to the attribution of profits of permanent establishments for the purposes of the determination of a host State's taxing rights under a tax treaty was the subject of an OECD Council Recommendation adopted in 2008.

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108. The *OECD Transfer Pricing Guidelines* focus on the application of the arm's length principle to evaluate the transfer pricing of associated enterprises. *The OECD Transfer Pricing Guidelines* aim to help tax administrations (of both OECD member countries and non-member countries) and multinational enterprises by indicating mutually satisfactory solutions to transfer pricing cases, thereby minimising conflict among tax administrations and between tax administrations and multinational enterprises and avoiding costly litigation. Multinational enterprises are encouraged to follow the guidance in the *OECD Transfer Pricing Guidelines*, as amended **revised** and supplemented<sup>7</sup>, in order to ensure that their transfer prices reflect the arm's length principle.

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**109. The coherence and consistency of the international tax architecture that applies to multinational enterprise groups was more broadly reinforced through the OECD/G20 BEPS Project. Notably the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting [OECD/LEGAL/0432] facilitates implementation of a number of measures to tackle tax avoidance and to improve the coherence of international tax rules, including minimum standards for the avoidance of treaty abuse and for the improvement of dispute resolution. The success of this system is premised on a network of positive relationships, co-operation and reciprocity.**

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Footnote 7:

One non-OECD adhering country, Brazil, does not apply the OECD *Transfer Pricing Guidelines* in its jurisdiction ~~and accordingly the use of the guidance in those *Guidelines* by multinational enterprises for~~ **the** purposes of determining taxable income from their **multinational enterprises**' operations in this country ~~does not apply~~ in the light of the tax obligations **currently** set out in the legislation of this country. One other non-OECD adhering country, Argentina, points out that the *OECD Transfer Pricing Guidelines* are not compulsory in its jurisdiction.

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# Part II. Targeted Updates to the Implementation Procedures of the OECD Guidelines for Multinational Enterprises

This section reproduces the Implementation Procedures, namely the Council Decision and Procedural Guidance [\[OECD/LEGAL/0307\]](#) as well as the Commentary thereto and sets out annotated draft targeted updates in manual ***track changes*** with proposed deleted text in strikethrough.

# Decision of the Council on the OECD Guidelines for Multinational Enterprises

[Preamble to be updated]

## I. [National Contact Points]

1. Adhering countries shall set up National Contact Points to further the effectiveness of the Guidelines ~~by undertaking promotional activities, handling enquiries and contributing to the resolution of issues that arise relating to the implementation of the Guidelines in specific instances, taking account of.~~ **National Contact Points shall have the following responsibilities:**

- a **Promote awareness and uptake of the Guidelines, including by responding to enquiries;**
- b **Contribute to the resolution of issues that arise in relation to the implementation of the Guidelines in specific instances.**

**In addition, where appropriate and in coordination with relevant government agencies, NCPs may also provide support to efforts by their government to develop, implement, and foster coherence, of policies to promote RBC.**

The business community, worker organisations, other non-governmental organisations and other interested parties shall be informed of the availability of such facilities **National Contact Points**.

2. National Contact Points in different countries shall co-operate, if such need arises, on any matter related to the Guidelines relevant to their activities. As a general procedure, discussions at the national level should be initiated before contacts with other National Contact Points are undertaken.

3. National Contact Points shall meet regularly to share experiences and report to the Investment Committee.

4. Adhering countries shall make available human and financial resources to their National Contact Points so that they can effectively fulfil their responsibilities, taking into account internal budget priorities **capacity** and practices.

**5. Adhering countries shall undertake periodic peer reviews of their NCPs, subject to modalities adopted by the WPRBC.**

## II. The Investment Committee **and the Working Party for Responsible Business Conduct**

1. The Investment Committee ("the Committee") **shall oversee the implementation of the Declaration on International Investment and Multinational Enterprises. The WPRBC shall assist the Committee in implementing section I of the Declaration with respect to its responsibilities in relation to the Guidelines.** ~~shall periodically or at the request of an adhering country hold exchanges of views on matters covered by the Guidelines and the experience gained in their application.~~

**2. The Committee shall periodically or at the request of an adhering country hold exchanges of views on matters covered by the Guidelines and the experience gained in their application.**

The Committee shall periodically invite the ~~Business and Industry Advisory Committee to the OECD~~ **(Business at OECD (BIAC), the Trade Union Advisory Committee to the OECD (TUAC)** (the "advisory bodies"), and OECD Watch, as well as other international partners to express their views on matters covered by the Guidelines. In addition, exchanges of views with them on these matters may be held at their request.

3. The Committee shall engage with non-adhering countries on matters covered by the Guidelines in order to promote responsible business conduct worldwide in accordance with the Guidelines and to create a level playing field. It shall also strive to co-operate with non-adhering countries that have a special interest in the Guidelines and in promoting their principles and standards.

4. The Committee shall be responsible for clarification of the *Guidelines*. Parties involved in a specific instance that gave rise to a request for clarification ~~will~~ **shall** be given the opportunity to express their views either orally or in writing. The Committee shall not reach conclusions on the conduct of individual enterprises.

5. The Committee shall hold exchanges of views on the activities of National Contact Points with a view to enhancing the effectiveness of the *Guidelines* and fostering functional equivalence of National Contact Points.

~~6. In fulfilling its responsibilities for the effective functioning of the *Guidelines*, the Committee shall take due account of the attached procedural guidance.~~

7. The Committee shall periodically report to the Council on matters covered by the *Guidelines*. In its reports, the Committee shall take account of reports by National Contact Points and the views expressed by the advisory bodies (***BIAC and TUAC***), OECD Watch, other international partners and non-adhering countries as appropriate.

8. The Committee shall, in co-operation with National Contact Points, ~~pursue a proactive agenda that~~ **proactively** promotes the effective observance by enterprises of the principles and standards contained in the *Guidelines*. It shall, in particular, seek opportunities to collaborate with the advisory bodies (***BIAC and TUAC***), OECD Watch, other international partners and other stakeholders in order to encourage the positive contributions that multinational enterprises can make, in the context of the *Guidelines*, to economic, environmental and social progress with a view to achieving sustainable development, and to help them identify and respond to risks of adverse impacts associated with particular products, regions, sectors or industries.

### III. **Implementation and Review of the Decision**

**1. The Procedures attached to this Decision set out expectations, recommendations and guidance applicable to adhering countries, NCPs, the Committee, and the WPRBC in the implementation of this decision.**

**2. This Decision shall be periodically reviewed. The Committee shall make proposals for this purpose, and the WPRBC may develop and submit such proposals to the Committee.**



# Procedural Guidance

## I. National Contact Points

The role of National Contact Points (NCPs) is to further the effectiveness of the *Guidelines*. NCPs will operate **in a manner that is:** accordance with core criteria of

- 1. visibility,**
- 2. accessibility,**
- 3. transparency, and**
- 4. accountability,**
- 5. impartial and equitable,**
- 6. predictable, and**
- 7. compatible with the Guidelines.**

**These principles together comprise the core effectiveness criteria of NCPs. NCPs, each in light of their particular circumstances, will pursue functional equivalence, meaning that all NCPs function with an equivalent degree of effectiveness, through achieving the core effectiveness criteria.** to further the objective of functional equivalence

### A. Institutional Arrangements

Consistent with the objective of functional equivalence and furthering the effectiveness of the *Guidelines* **and of NCPs**, adhering countries have flexibility in organising their NCPs **to meet the effectiveness criteria. In determining the institutional arrangements of their NCP, Governments will** seeking the active support of social partners, **and other stakeholders** including the business community, worker organisations, other non-governmental organisations, and other interested parties, **as well as other relevant Government agencies.**

Accordingly, the National Contact Points:

1. Will be composed, and organised **and sufficiently resourced** such that they provide an effective basis for dealing with the broad range of issues covered by the *Guidelines*, **have access to expertise on RBC,** and enable the NCP to operate in an impartial manner while **and** maintaining an adequate level of accountability to the adhering government.
2. Can use different forms of organisation to meet this objective **the core effectiveness criteria and pursue functional equivalence. For example, a** 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 **or inter-ministerial** body **composed of, or led by, senior officials; a body composed of representatives from the business community, worker organisations and other non-governmental organisations (multi-stakeholder), and/or** one that contains independent experts. Representatives of the business community, worker organisations and other non-governmental organisations may also be included.
3. Will develop and maintain **meaningful** relations **and engage** with **social partners, as well as** representatives of the business community, worker organisations, **non-governmental organisations,** and/or other interested parties that are able to contribute to the effectiveness of the *Guidelines*.

### B. Information and Promotion

The National Contact Point will:

1. Make the *Guidelines* known and available by appropriate means, including through on-line information, and in national languages. **NCPs should also promote related OECD due diligence guidance on Responsible Business Conduct. Relevant stakeholders, including prospective investors (inward and outward), should be informed about the Guidelines, as appropriate.**
2. Raise awareness of the Guidelines, and their implementation procedures, **and the NCP itself**, including through co-operation, as appropriate, with **relevant government agencies**, the business community, worker organisations, other non-governmental organisations, and the interested public.
3. Respond to enquiries about the Guidelines **and OECD due diligence guidance, as well as the National Contact Point itself, including** from:
  - a) other National Contact Points;
  - b) the business community, worker organisations, other non-governmental organisations and the public; and-
  - c) governments of non-adhering countries.

### **C. Implementation in Specific Instances**

The National Contact Point will, **servicing as a non-judicial grievance mechanism**, contribute to the resolution of issues that arise relating to the implementation of the Guidelines in specific instances in a manner that is **consistent with the core effectiveness criteria listed in Section I.A. above** impartial, predictable, equitable and compatible with the principles and standards of the Guidelines. **NCPs will publish their case-handling procedures, i.e. procedures they follow in handling specific instances, which will be consistent with these Procedures. NCPs are encouraged to consult their stakeholders in developing their case-handling procedures.** The NCP will offer a forum for discussion and **use its expertise on the Guidelines to** assist the business community, worker organisations, other non-governmental organisations, and other interested parties concerned to deal with **resolve** the issues raised in an efficient and timely manner and in accordance with applicable law **and the Guidelines. Depending on the characteristics of each case, this assistance may include supporting constructive dialogue, facilitating agreements between the parties and/or issuing recommendations. The aims of such assistance may include furthering the implementation of the Guidelines in the future and/or addressing adverse impacts, consistent with the Guidelines.**

In providing this assistance, the NCP will:

**1. Where other NCPs are concerned due to the characteristics of the Specific Instance, coordinate in good faith with them to choose the lead and supporting NCPs.**

**2. Consult the parties on the issues raised and make an initial assessment of whether these issues raised merit warrant further examination and respond to the parties involved.**

**3. Where, based on an initial assessment, the NCP decides that the issues raised merit warrant further examination, offer good offices to help the parties involved to resolve the issues. For this purpose, the NCP will consult with these parties and where relevant:**

a) seek advice from relevant authorities, and/or representatives of the business community, worker organisations, other non-governmental organisations, and relevant experts;

b) consult the NCP **or NCPs** in the **any** other country or countries concerned;

c) seek **information on similar specific instances from the Secretariat or** guidance from

the Committee **WPRBC** if it has doubt about the interpretation of the Guidelines in particular circumstances. **Such information and guidance is advisory, confidential and case-specific and does not amount to clarifications of the interpretation of the Guidelines, which remain the responsibility of the Committee as per Section II.2.c) below. Subject to available resources, it should be provided expeditiously to avoid delays in the handling of the case.**

d) offer and, with the agreement of the parties involved, facilitate access to consensual and non-adversarial means, such as conciliation or mediation **or conciliation**, to assist the parties in dealing with **resolving** the issues.

3. **4.** At the conclusion of the proceedings and after consultation with the parties involved, make the results of the proceedings publicly available, taking into account the need to protect sensitive business and other stakeholder information, by **publicly** issuing **a final statement**:

a) a statement when the NCP decides that the issues raised do not **warrant** merit further consideration **examination**. The statement should at a minimum describe the issues raised, **information on timelines and parties' engagement with the process**, and the reasons for the NCP's decision;

b) a report when the parties have reached agreement on the issues raised. The report **statement** should at a minimum describe the issues raised, the procedures the **steps taken by the** NCP initiated in assisting the parties, **including information on parties' engagement with the process**, and when agreement was reached. Information on the content of the agreement will only be included insofar as the parties involved agree thereto. **The NCP may also include recommendations on the implementation of the Guidelines in its statements when an agreement has been reached, as appropriate;**

c) a statement when no agreement is reached or when a party is unwilling to participate in the procedures. This statement should at a minimum describe the issues raised, the reasons why the NCP decided that the issues raised merit **warranted** further examination and the procedures **steps taken by** the NCP initiated in assisting the parties, **including information on parties' engagement with the process**. The NCP will **should also include** make recommendations on the implementation of the Guidelines **where relevant** as appropriate, which should be included in the statement. Where appropriate, the statement could also include the reasons that agreement could not be reached. **If allowed by applicable law and the NCP's case-handling procedures, the NCP may, at its own discretion, set out its views in its final statement on whether the enterprise observed the Guidelines.**

The NCP will notify the results of its specific instance procedures to the Committee **and/or the WPRBC** in a timely manner.

**5. Where relevant, engage in follow-up once the Specific Instance has closed. This may involve following up on the implementation of recommendations or, if any, the agreement reached by the parties, offering a further opportunity for good offices where appropriate, and publishing a follow up statement, as appropriate. Any follow-up that the NCP intends to undertake should also be referred to in the final statement.**

**4-6.** In order to **build trust among parties**, facilitate resolution of the issues raised, take appropriate steps to **act with transparency and make parties to a specific instance aware of all relevant facts and arguments brought to the NCP by other parties, in particular during the good offices phase. However, upon a reasonable request by a party, for example to protect sensitive business and other information and/or the interests of other stakeholders involved in the specific instance, and in the interest of resolving the issues, the NCP may keep certain information confidential from the other party.**

**7.** While the procedures under paragraph 2 are underway, confidentiality of the proceedings will be maintained. At the conclusion of the procedures, if the parties involved have not agreed on a

resolution of the issues raised, they are free to communicate about and discuss these issues. However, information and views provided **Inform the parties that they may not disclose publicly or to a third party, during or after the proceedings, facts and arguments shared by the other party (including where relevant an external mediator or conciliator)** during the proceedings by another party involved will, unless that other **sharing** party agrees to their disclosure, **such facts and arguments are already in the public domain**, or this **not disclosing** would be contrary to the provisions of national law.

5.8. If issues arise in non-adhering countries, take steps to develop an understanding of the issues involved, and follow these **Procedures where relevant and practicable**.

**Throughout the process, NCPs should take all appropriate steps within their capacities to address risks of undue pressure or reprisals against parties to a specific instance. If they become aware of an actual or potential instance of undue pressure or reprisal, NCPs should, to the extent possible, support the party at risk in avoiding and mitigating any harm, in consultation with the party at risk and, if accepted by that party, relevant authorities. Governments should also take relevant steps to protect the NCP and its members from undue pressure or reprisals.**

#### **[New heading] D. Support for policies to promote RBC**

**In furthering the effectiveness of the Guidelines, NCPs may, where appropriate and in coordination with relevant government agencies, support efforts by their government to develop, implement, and foster coherence of policies aimed at promoting RBC. Such support would notably only be appropriate where feasible in light of their capacity to fulfil their responsibilities under the Decision.**

#### **D. E. Reporting**

1. Each NCP will report annually to the Committee.
2. Reports should contain information on the nature and results of the activities of the NCP, including implementation activities in specific instances.

#### **[New heading] F. Peer reviews**

**Adhering countries will undertake periodic peer reviews of their NCP organised by the Secretariat, as a means to increase effective implementation of the Guidelines, share best practices, and foster NCP effectiveness and functional equivalence. Modalities for periodic peer reviews, including procedures for conducting peer reviews, the duration of the peer review cycle and funding arrangements, will be approved by the WPRBC and reviewed at the end of every cycle. The first cycle of periodic peer reviews will only be launched after such modalities have been approved.**

## **II. Investment Committee, WPRBC and the Secretariat**

1. The Committee, **the WPRBC and the Secretariat** will consider requests from NCPs for assistance in carrying out their activities, including in the event of doubt about the interpretation of the Guidelines in particular circumstances, **each in accordance with their respective responsibilities**.
2. The Committee, **with the assistance of the WPRBC**, will, with a view to enhancing the effectiveness of the Guidelines and to fostering the functional equivalence of NCPs:
  - a) consider the **annual** reports of NCPs **described in Section I.E. Based on such reports, the WPRBC will annually issue a public report analysing the activities of NCPs.**
  - b) consider a substantiated submission by an adhering country, an advisory body **(BIAC or**

TUAC) or OECD Watch on whether an NCP is fulfilling its responsibilities with regard to its handling of specific instances. **The Committee will approve the response by consensus. The adhering country whose NCP is the subject of a substantiated submission will participate in the process in good faith, and is expected not to block consensus except in exceptional circumstances;**

c) consider issuing a clarification **of the interpretation of the Guidelines** where **at the request of** an adhering country, an advisory body (**BIAC or TUAC**) or OECD Watch makes a substantiated submission. **Such request may concern** on whether an NCP has correctly interpreted the *Guidelines* in specific instances, **but in such cases, the Committee will not reach conclusions on the conduct of individual enterprises;**

d) make recommendations, as necessary, to improve the functioning of NCPs and the effective implementation of the *Guidelines*. **When, based on the last two annual reporting cycles and upon proposal by the WPRBC, the Committee determines that an NCP has, for an extended period of time and without legitimate reason, manifestly not been operating in a way consistent with these Procedures, it may make appropriate recommendations to the adherent country and invite it to report back within a set timeframe, and the Committee may do so repeatedly until it is satisfied that the issues have been addressed. The Committee and the WPRBC will reach decisions on these matters by consensus. The adhering country whose NCP is concerned will participate in the process in good faith, and is expected not to block consensus except in exceptional circumstances;**

e) co-operate with international partners;

f) engage with interested non-adhering countries on matters covered by the *Guidelines* and their implementation.

3. The Committee **and the WPRBC** may seek and consider advice from experts on any matters covered by the *Guidelines*. For this purpose, the Committee will decide on suitable procedures.

4. The Committee **and the WPRBC** will discharge its **their** responsibilities in an efficient and timely manner

5. In discharging its **their** responsibilities, the Committee and **the WPRBC** will be assisted by the Secretariat, which, under the overall guidance of the Investment Committee **and the WPRBC**, and subject to the Organisation's Programme of Work and Budget, will:

a) serve as a central point of information for NCPs that have questions on the promotion, **interpretation**, and implementation of the *Guidelines*;

b) collect and make publicly available – **including in supporting the WPRBC with the publication of the annual report analysing NCP activities under II. 2. A) above** – relevant information on recent trends and emerging practices with regard to the **NCPs' institutional arrangements**, promotional activities of NCPs and the implementation of the *Guidelines* in specific instances. The Secretariat will develop unified reporting formats to support the establishment and maintenance of an up-to-date database on specific instances and conduct regular analysis of these specific instances;

c) facilitate peer learning activities, including voluntary peer evaluations, as well as capacity building and training, in particular for NCPs of new adhering countries **and new NCP personnel**, on the implementation procedures of the *Guidelines* **and their Implementation Procedures** such as promotion and the facilitation of conciliation and mediation;

**d) organise periodic peer reviews of NCPs as indicated under Section I.F. of the Procedures;**

e) facilitate co-operation between NCPs where appropriate; and

e) promote the *Guidelines* in relevant international forums and meetings and provide support to NCPs and the Committee in their efforts to raise awareness of the *Guidelines* among non-adhering countries.

# Commentary on the Implementation Procedures of the OECD Guidelines for Multinational Enterprises

1. The Council Decision represents the commitment of adhering countries to further the implementation of the recommendations contained in the text of the *Guidelines*. Procedural guidance for both NCPs and the Investment Committee is are attached to the Council Decision **and outline expectations, recommendations, and other guidance for Governments, National Contact Points (NCPs) and, the Investment Committee, the WPRBC and the Secretariat, without giving rise to additional rights or obligations under international law. Expectations are signaled by the use of 'will'. Recommendations are signaled by 'should' or 'encourage'. Guidance is signaled by 'may' or 'can'.**

2. The Council Decision sets out key adhering country responsibilities for the *Guidelines* with respect to NCPs, summarised as follows:

- a. Setting up NCPs ~~(which will take account of the procedural guidance attached to the Decision)~~, and informing interested parties of the availability of *Guidelines*-related facilities.
- b. Making available necessary human and financial resources.
- c. Enabling NCPs in different countries to co-operate with each other as necessary.
- d. Enabling NCPs to meet regularly and report to the Committee.

3. The Council Decision also establishes the Committee's responsibilities for the *Guidelines*, including:

- Organising exchanges of views on matters relating to the *Guidelines*.
- Issuing clarifications as necessary.
- Holding exchanges of views on the activities of NCPs.
- Reporting to the OECD Council on the *Guidelines*.

4. The Investment Committee is the OECD body responsible for overseeing the functioning of the *Guidelines*. This responsibility applies not only to the *Guidelines*, but to all elements of the Declaration (National Treatment Instrument, and the instruments on International Investment Incentives and Disincentives, and Conflicting Requirements). The Committee seeks to ensure that each element in the Declaration is respected and understood, and that they all complement and operate in harmony with each other.

**5. The Working Party on Responsible Business Conduct (WPRBC) is a subsidiary body of the Committee with responsibilities in relation to the Guidelines and the Decision. The Procedures list a number of ways in which the WPRBC provides assistance to the Committee, including:**

- Developing modalities for periodic peer reviews of NCPs, overseeing the organisation of the peer reviews by the Secretariat, and approving peer review reports;
- Providing advisory guidance to NCPs who have questions regarding the interpretation of the Guidelines in particular circumstances;
- Preparing Committee responses on substantiated submissions and requests for clarification of the Guidelines;
- Advising the Committee on making recommendations to an adhering country whose NCP has become manifestly non-functioning for an extended period of time and without legitimate reason;
- Supporting the Committee with considering annual reports of NCPs and issuing an annual public report on NCP activity.

5.6. Reflecting the increasing relevance of responsible business conduct to countries outside the OECD, the Decision provides for engagement and co-operation with non-adhering countries on matters covered by the *Guidelines*. This provision allows the Committee to arrange special meetings with interested non-adhering countries to promote understanding of the standards and principles contained in the *Guidelines* and of their implementation procedures. Subject to relevant OECD procedures, the Committee may also associate them with special activities or projects on responsible business conduct, including by inviting them to its meetings and to the Corporate Responsibility Roundtables.

6.7. In its pursuit of a proactive agenda, ~~t~~ The Committee will co-operate with NCPs and seek opportunities to collaborate with the advisory bodies ***(BIAC and TUAC)***, OECD Watch, and other international partners ***with the objective of proactively promoting effective implementation of the Guidelines. In particular, as part of its work to oversee the implementation of the Declaration, the Committee, with the support of the WPRBC, will provide guidance on, and seek to enhance the capacity of business to implement, due diligence for RBC, including in specific sectors, geographies and risk areas. It will be conducted through, inter alia, multi-stakeholder engagement and taking into account the needs of small- and medium sized enterprises, in co-operation with the NCPs.*** Further guidance for NCPs in this respect is provided in paragraph ~~48~~**20**.

## **I. Commentary on the Procedural Guidance for NCPs**

7.8. National Contact Points have an important role in enhancing the profile and effectiveness of the Guidelines. While it is enterprises that are responsible for observing the Guidelines in their day-to-day behaviour, governments ***and their NCPs*** can contribute to improving the effectiveness of the implementation ***of the Guidelines*** procedures. To this end, they have agreed that better guidance ***direction*** for the conduct ***organisation*** and activities of NCPs is warranted, including through regular meetings and Committee oversight.

8.9. Many of the functions ***and activities*** in the ~~Procedural~~ Guidance of the Decision are not new, but reflect experience and recommendations developed over the years. By making them explicit, the expected functioning of the implementation mechanisms of the Guidelines is made more transparent. All functions are now outlined in ~~four~~ ***six*** parts of the ~~Procedural~~ Guidance pertaining to NCPs: institutional arrangements, information and promotion, implementation in specific instances, ***support for policies to promote RBC, and reporting, and peer reviews.***

9.10. These ~~four~~ ***six*** parts are preceded by an introductory paragraph that sets out the basic purpose of NCPs, together with the core ***effectiveness*** criteria and the objective of functional equivalence. Since ***While*** governments are accorded flexibility in the way they organise NCPs, NCPs should ***all*** function ***with an equivalent degree of effectiveness, defined as 'functional equivalence'*** in a visible, accessible,



transparent, and accountable manner. **Functional equivalence is crucial to ensure the effective contribution of the entire NCP network to the implementation of the Guidelines, in particular with regard to the involvement of all NCPs in the specific instance mechanism. All NCPs, each in light of their particular circumstances, will pursue functional equivalence through achieving these core effectiveness criteria described below will guide NCPs' activities in the delivery of their responsibilities, and which will also assist the Committee and the WPRBC in peer reviews and** in discussing the conduct of NCPs.

Core **Effectiveness** Criteria for Functional Equivalence in the Activities of NCPs:

**a. Visibility**

In conformity with the Decision, adhering governments commit to **set up** nominate **NCPs that are easily identifiable by stakeholders and relevant government agencies within and outside their country**, and also to inform the business community, worker organisations and other interested parties, including NGOs, about the availability of facilities associated with NCPs in the implementation of the Guidelines. **As a basic step in this respect, NCPs will have a comprehensive website or webpage.** Governments are expected to publish information about their NCPs, **such as its location in government, institutional arrangements and case-handling procedures**, and to take an active role in promoting the Guidelines, which could include **promotional events and materials** hosting seminars and meetings on the instrument. These events **or materials** could be arranged **prepared** in co-operation with business, labour, NGOs, and other interested parties, though not necessarily with all groups on each occasion.

**b. Accessibility**

Easy access to NCPs is important to their effective functioning. This includes facilitating access by business, labour, NGOs, and other members of the public. Electronic communications can also assist in this regard. NCPs **should** respond to all legitimate requests for information, and also undertake to deal with specific issues raised by parties concerned in an efficient and timely manner. **NCPs should ensure that requirements for submitting specific instances are clearly stated, easily accessible, and not unnecessarily burdensome. Where appropriate and commensurate with the NCP's time and budget capacity, NCPs may also provide impartial and equitable assistance to the parties involved. Such assistance may concern, for example, the use of languages and translations, guidance on presenting an admissible submission and engaging in mediation, allowing flexibility regarding deadlines, or providing affordable options for participation in the process, such as remote meeting facilities.**

**c. Transparency**

Transparency is an important criterion with respect to its contribution to the accountability of the NCP **other Core Effectiveness Criteria**, and in gaining the confidence of **stakeholders, parties to specific instances and** the general public. Thus, as a general principle **and subject to applicable law**, the activities of the NCP will be transparent. **For example, publishing the annual reports of NCPs to the OECD can demonstrate transparency.** Nonetheless when the NCP offers its "good offices" in implementing the Guidelines in specific instances, it will **can** be in the interests of their effectiveness to take appropriate steps to establish confidentiality of **certain aspects of** the proceedings, **such as outlined in Section I.C.6. of the Procedures and related Commentary.** Outcomes will be transparent unless preserving confidentiality is in the best interests of effective implementation of the Guidelines.

**d. Accountability**

**In light of their** A more active role with respect to enhancing the profile of the *Guidelines* – and their potential to aid in the management of difficult issues between enterprises and the societies in which they operate – **NCPs will account for** also put the **their** activities of NCPs in the public eye. Nationally, parliaments, **governments, advisory bodies of NCPs where they exist, as well as stakeholders,** could have a role to play **in providing feedback on the activities of NCPs with a view to continued learning and improvement.** Annual reports, and regular meetings of NCPs, **and peer reviews** will provide an opportunity to share experiences and encourage “best practices” with respect to NCPs. The Committee **and the WPRBC** will also hold exchanges of views, where experiences would be exchanged and the effectiveness of the activities of NCPs could be assessed.

**e. Impartial and equitable [moved from para. 22].**

**Being impartial and equitable are prerequisites for the continued confidence of stakeholders, parties to specific instances and the general public. Accordingly, governments will set up their NCPs in a way that allows them to act and be perceived as such.** NCPs should **will** ensure impartiality in the resolution of specific instances, **including by actively seeking to prevent and address potential or perceived conflicts of interests of any person playing a role on behalf of the NCP in assisting the parties with the resolution of issues raised in a specific instance.** NCPs should **also seek to** ensure, **notably through clear and accessible case-handling procedures,** that the parties can engage in the process on fair and equitable terms, for example by **seeking to ensure that power and resource imbalances do not prevent the parties from effectively engaging in the process, or by** providing reasonable access to sources of information relevant to the procedure.

**f. Predictable [moved from para. 22].**

NCPs’ operations should **will** ensure predictability by providing **clear and publicly available information on their role and the rules and procedures by which they operate, particularly** in the resolution of specific instances., **Areas where such information should be provided** include:

- the provision of good offices,
- the stages of the specific instance process including indicative timeframes **and criteria for initial assessment,**
- **expectations of good faith and confidentiality,**
- **the voluntary character of the process and its possible outcomes,**  
and
- the potential role **NCPs** they can play in monitoring the implementation of agreements reached between the parties **or recommendations by the NCP.**

**NCPs will publish case-handling procedures drafted in clear and accessible terms, and regularly inform parties to specific instances of the progress of the case, especially where indicative time frames set out in paras. 50 and 51 below need to be extended.**

**g. Compatible with the Guidelines [moved from para. 22].**

NCPs should **will** operate in **a way that is compatible** accordance with the principles and standards contained in the *Guidelines*. **When handling specific instances, this notably means working with parties to avoid any situation where agreements reached in the context of specific instances are contrary to the Guidelines.**

## ***Institutional Arrangements***

~~40.~~***11.*** NCP leadership *institutional arrangements will* should be such that *enable the NCP to meet the core effectiveness criteria,* retains *maintain* the *constructive engagement with, and the* confidence of, social partners, *civil society* and other stakeholders, *and* foster the public profile of the *Guidelines*. *The Decision and the Procedures afford adhering countries flexibility in deciding on their NCP's institutional arrangements, identifying some of the various possible options. They also list minimal features necessary to meet these expectations, such as having actively involved senior leadership, having sufficient human and financial resources, and having sufficient access to expertise on the issues covered by the Guidelines. To foster confidence in the NCP, governments should consult stakeholders regarding decisions that may significantly affect an NCP's institutional arrangements.*

*[Merged with 13. below]* ~~41.~~ Regardless of the structure adhering countries have chosen for their NCP, they can also establish advisory or oversight bodies to assist NCPs in their tasks.

***12. Adequate resources are essential for the effectiveness and authority of NCPs. The Decision requires adhering countries to provide their NCPs with the human and financial resources necessary for the NCP to effectively deliver on its responsibilities. In case of staff rotation, adhering countries should ensure continuity. This can include providing proper training to new personnel, as needed and with the support of the Secretariat, and preserving institutional memory.***

~~42.~~ ***13.*** NCPs, whatever their composition, are expected to *will* develop and maintain *meaningful* relations *and engage* with representatives of relevant government agencies, the business community, worker organisations, other non-governmental organisations, and other interested parties, *so as to gain the active support and confidence of stakeholders. To that effect, representative stakeholders may for example be equitably included in the NCP itself or in the nomination process of independent experts.* Regardless of the structure adhering countries have chosen for their NCP, they can also establish *and regularly convene representative multi-stakeholder and/or government-based* advisory or oversight bodies *or meetings* to assist NCPs in their tasks, *particularly if stakeholders or other government representatives are not otherwise included in their NCP's structure.*

## ***Information and Promotion***

~~43.~~***14.*** The NCP functions associated with information and promotion are fundamentally important to enhancing the profile *and awareness* of the *Guidelines with stakeholders and the general public and encouraging enterprises to act consistently with the Guidelines and OECD Due Diligence Guidance*.

~~44.~~***15.*** NCPs are required to make the *actively promote the* *Guidelines* better known, *and are encouraged to promote the OECD due diligence guidance where relevant, notably as recommended in the Council Recommendations on such guidance. Examples of promotion activities include the provision of materials for stakeholders, or the organisation or participation in events on RBC. Events related to RBC organised by the OECD, other NCPs or relevant actors could also be promoted. Promotion activities by the NCP and related information should be easily accessible,* and available online and by other appropriate means, including in national languages. English and French language versions will be available from the OECD, and website *Links to the Guidelines and OECD due diligence guidance on*

**RBC on the NCP website should be included** are encouraged. English and French language versions will be available from the OECD **Secretariat**.

**16.** As appropriate, NCPs will also **seek to offer the abovementioned activities and information in an equitable manner to a diverse and representative range of relevant stakeholders. The Procedures mention** provide prospective investors, both inward and outward, **as an example,** with information about the Guidelines. **NCPs are also encouraged to reach out to relevant government agencies and diplomatic networks, which can act as important amplifiers in to promoting the Guidelines and creating awareness of the NCP, including with stakeholders in other countries. Depending on an NCP's context and resources, stakeholder mappings and promotional plans may assist in increasing the reach and impact of an NCP's promotional efforts.**

**15-17.** NCPs should **also** provide information **about their responsibilities and activities in light of the core effectiveness criteria. NCPs should promote their role in specific instances to relevant stakeholders, including, where possible and appropriate, potential submitters of specific instances. This should include information** on the procedures that parties should follow when raising **submitting** or responding to a specific instance. It should include advice on the information that is necessary to raise **submit** a specific instance, the requirements for parties participating in specific instances, including confidentiality, and the processes and indicative timeframes that will be followed by the NCP.

**16-18.** In their efforts to raise awareness of the Guidelines, NCPs will co-operate with a wide variety of organisations and individuals, including, as appropriate, **relevant government agencies**, the business community, worker organisations, ~~other~~ nongovernmental organisations, and other interested parties. Such organisations have a strong stake in the promotion of the Guidelines and their institutional networks provide opportunities for promotion that, if used for this purpose, will greatly enhance the efforts of NCPs in this regard.

**17-19.** Another basic activity expected of NCPs is responding to legitimate enquiries. Three groups have been singled out for attention in this regard: *i)* other NCPs (reflecting a provision in the Decision); *ii)* the business community, worker organisations, other non-governmental organisations and the public; and *iii)* governments of non-adhering countries.

### **Proactive Agenda**

**18-20.** In accordance with the Investment Committee's proactive agenda **To support the Committee and the WPRBC in proactively promoting implementation of the Guidelines**, NCPs should maintain regular contact, including meetings, with social partners and other stakeholders in order to:

- a) consider new developments and emerging practices concerning responsible business conduct;
- b) support the positive contributions enterprises can make to economic, social and environmental progress;
- c) participate where appropriate in collaborative initiatives to identify and respond to risks of adverse impacts associated with particular products, regions, sectors or industries.

### **Peer Learning**

**19-21.** In addition to contributing to the Committee's **and the WPRBC's** work to enhance the effectiveness of the Guidelines, NCPs will engage in joint peer learning activities. In particular, they are encouraged to engage in horizontal, thematic peer reviews and voluntary NCP peer evaluations. Such peer learning can be carried out

through meetings at the OECD or through direct co-operation between NCPs.

### **[New sub-heading] Peer Reviews**

**22. Peer reviews are an important mechanism to increase effective implementation of the Guidelines, share best practices, and foster functional equivalence. As set out in the Decision, adhering countries commit to undertake periodic peer reviews of the NCPs. The Secretariat will organise such peer reviews under the oversight of the WPRBC. Peer reviews evaluate strengths and weaknesses of the NCP with regard to the delivery of its mandate and the effectiveness criteria defined in section I of the Procedures, and make recommendations for improvement as appropriate.**

**23. The modalities of the periodic peer reviews (process, duration of the review cycle and funding arrangements) will be defined in a 'Core Template for NCP Peer Reviews' to be approved by consensus by the WPRBC, and published on the OECD Website. The WPRBC will review the Core Template at the end of each cycle, in particular to ensure that NCPs are given enough lead time to prepare their peer reviews, and that peer reviews do not represent an unreasonable burden for governments, NCPs, the WPRBC or the Secretariat. The cycle of periodic peer reviews will not start until modalities have been approved by the WPRBC.**

### **Implementation in Specific Instances**

**20-24. [Sentence moved and adapted from below]** This section of the Procedural Guidance provides **expectations, recommendations and** guidance to NCPs on how to handle specific instances. When issues arise relating to implementation of the Guidelines in specific instances, the NCP is expected to **assist in** resolving them. **In doing so, the NCP serves as a non-judicial grievance mechanism. Under the Decision and the Procedures, participation by the parties in such mechanism is voluntary. In that context, NCPs will aim to facilitate dialogue and seek mutually agreeable and Guidelines-compatible solutions to the issues raised, but also actively inform such dialogue with their expertise on the Guidelines. NCPs should also draft final statements in such a way as to provide assistance to the parties in resolving the issues, and to the extent possible, information and guidance to third parties on the concrete application of the Guidelines in relation to the issues raised.** This section of the Procedural Guidance provides guidance to NCPs on how to handle specific instances. **Each NCP will publish clear and easily accessible case-handling procedures outlining its specific instance process consistent with these Procedures. NCP are encouraged to develop their case-handling procedures in consultation with stakeholders.**

### **[New sub-heading] Good faith engagement**

**24-25.** The effectiveness of the specific instances procedure depends on **the good faith engagement by** behaviour of all parties involved in the procedures **proceedings**. Good faith **engagement** behaviour in this context means responding in a timely fashion, **respecting transparency requirements and** maintaining confidentiality where appropriate **and consistent with the NCP's case-handling procedures**, refraining from misrepresenting the **issues and the process, notably in public communications**, and from threatening or taking reprisals against parties involved in the procedure, **or against the NCP itself**, and genuinely engaging in the procedures with a view to finding a **Guidelines-compatible** solution to the issues raised in accordance with the Guidelines.

**26. Should an NCP become aware of the threat of or existence of undue pressure or reprisals directed at a person involved in a specific instance, or towards the NCP or one of its members, it should take adequate steps within its capacities, and in consultation with other relevant government entities such as diplomatic missions, as appropriate, with the aim of ensuring that the person at risk has adequate protection and that the proceedings can continue in a safe, accessible, equitable and impartial manner. Before undertaking any action in this regard, the NCP will secure the consent of the party at risk. Reprisals or undue pressure may include threats to harm the individual, their family or other relations, inappropriate threats to terminate employment or benefits or inappropriate threats of legal action. Appropriate measures may include, for example, keeping the identity of the person at risk confidential, suggesting that the person at risk be represented by a trusted third party, documenting attempted reprisals in statements or assisting a person at risk in reaching out to relevant authorities.**

**27. Additionally, to preserve accessibility and impartiality, governments should take appropriate steps to protect the NCP and its members from undue pressure and reprisals, in line with domestic law and in consultation with competent government authorities. Governments should support measures taken by the NCP to protect itself and its members.**

### **Guiding Principles for Specific Instances**

22. Consistent with the core criteria for functional equivalence in their activities NCPs should deal with specific instances in a manner that is:

*Impartial.* NCPs should ensure impartiality in the resolution of specific instances.

*Predictable.* NCPs should ensure predictability by providing clear and publicly available information on their role in the resolution of specific instances, including the provision of good offices, the stages of the specific instance process including indicative timeframes, and the potential role they can play in monitoring the implementation of agreements reached between the parties.

*Equitable.* NCPs should ensure that the parties can engage in the process on fair and equitable terms, for example by providing reasonable access to sources of information relevant to the procedure.

*Compatible with the Guidelines.* NCPs should operate in accordance with the principles and standards contained in the *Guidelines*.

### **Coordination between NCPs in Specific Instances**

23. Generally, issues will be dealt with by the NCP of the country in which the issues have arisen. Among adhering countries, such issues will first be discussed on the national level and, where appropriate, pursued at the bilateral level. The NCP of the host country should consult with the NCP of the home country in its efforts to assist the parties in resolving the issues. The NCP of the home country should strive to provide appropriate assistance in a timely manner when requested by the NCP of the host country.

**28. As the Guidelines are addressed by adhering countries to enterprises operating 'in or from' their territory, NCPs may receive specific instances regarding issues taking place in their country or alternatively regarding issues concerning enterprises established in their country. Accordingly, certain specific instances may concern the NCPs of several countries, such as:**

- **where a specific instance concerns different home and host adhering countries (e.g. concerning the activities of a company headquartered**

in one adherent country, carried out in another adherent country, or with different headquarters in multiple adherent countries).

- where the issues raised in a specific instance take place in several adhering countries, or concern several companies established in several adhering countries;
- where the same specific instance or related specific instances (such as specific instances involving different companies active on the same project or in the same supply chain) are submitted to several NCPs.

In such situations, NCP(s) having received the specific instance(s) will inform and coordinate with all other concerned NCPs at the outset with the goal of designating the lead and supporting NCPs and adopting coordination arrangements.

29. Generally, the NCP of the country in which the issues have arisen would be the lead NCP. However, other criteria may be applied in order to maximise the potential for contributing to the resolution of the issues raised. The parties should be kept informed with regard to coordination arrangements, and consulted on decisions to transfer the case to a different lead NCP than the NCP to which the case was submitted.

30. The lead NCP is responsible for all aspects of the specific instance process and its case-handling procedures will govern the process. Throughout the specific instance process, supporting NCPs will be kept informed of developments and may lend resources by for example reviewing statements/reports, providing translation services, supporting joint meetings with parties, and other practical assistance. Supporting NCPs will act in good faith to foster the resolution of the specific instance and all NCPs involved will ensure the confidentiality and appropriate use of information and materials received from other NCPs.

24-31. 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. The NCPs can seek assistance, **including proposals**, from the Chair of the Investment Committee **WPRBC** in arriving at such agreement: **when discussing the selection of lead and supporting NCPs and the coordination among them.** The lead NCP should consult with the other NCPs, which should provide appropriate assistance when requested by the lead NCP. If the parties **NCPs** fail to reach **consensus** an agreement, the lead NCP(s) **that received the Specific Instance(s)** should make a final decision in consultation with the other NCPs **concerned and keep them informed regularly of the progress of the case.**

### **Initial Assessment**

25-32. After having coordinated with other NCPs concerned where relevant, the NCP will ~~in~~ **consult the parties on the issues raised and** make an initial assessment of whether the issue raised merits **warrants** further examination, the NCP will need to determine whether the issue is *bona fide* and relevant to the implementation of the *Guidelines*. In this context, the NCP will take into account **the following criteria:**

- the identity of the party concerned and its interest in the matter.
- whether the issue is material and substantiated, **namely whether the issues raised are of significant relevance to the implementation of the Guidelines and whether they appear plausible based on information provided, which should go beyond the submitter's mere assertion and speculation.**

- whether there seems to be a link between the enterprise's activities and the issue raised in the specific instance.
- the relevance of applicable law and procedures, including court rulings, and how similar issues have been, or are being, treated in other domestic or international proceedings (including other specific instances).
- whether the consideration of the specific issue would contribute to the purposes and effectiveness of the *Guidelines*.

~~27-33.~~ **[Moved from previous paragraph 27.]** Following its initial assessment, the NCP will respond to the parties concerned. If the NCP decides that the issue does not merit warrant further examination consideration, it will inform the parties of the reasons for its decision. **A decision that a case warrants further examination does not mean that the issues raised have been given final consideration and does not imply any finding as to whether or not a company has acted in accordance with the Guidelines.**

### **[New sub-heading] Parallel proceedings**

~~26-34.~~ **The term “parallel proceedings” refers to judicial or non-judicial processes, which may be domestic or international in nature, involving the same or closely related issues and which could influence the ongoing specific instance. If parallel proceedings have been conducted, are under way or are available to the parties concerned, this does not preclude the NCP from offering good offices to the parties.** 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. NCPs should evaluate whether an offer of good offices could make a positive contribution to the resolution of the issues raised and/or the implementation of the OECD Guidelines going forward and would not create serious prejudice for either of the parties involved in these other proceedings or cause a contempt of court situation. In making such an evaluation, NCPs could take into account practice among other NCPs, **consider the possibility to partially accept the specific instance or to suspend its examination while the parallel proceedings are ongoing** and, where appropriate, consult with the institutions in which the parallel proceedings is are being or could be conducted. **NCPs will seek Pparties’ should also assistance** NCPs in their consideration of **considering** these matters by providing **requesting** relevant information **and views** on the parallel proceedings.

~~27.~~ Following its initial assessment, the NCP will respond to the parties concerned. If the NCP decides that the issue does not merit further consideration, it will inform the parties of the reasons for its decision.

### **Providing Assistance to the Parties Good offices**

~~28-35.~~ Where the issues raised merit warrant further examination consideration, the NCP would discuss the issue further with the parties involved and will offer “good offices” in an effort to contribute informally to the resolution of issues. Where relevant, NCPs will follow the procedures set out in paragraph C-2a) through C-2d). This could **As part of good offices, the NCP may** include seeking the advice of relevant authorities, as well as representatives of the business community, labour organisations, other non-governmental organisations, and experts, **consistent with the NCP's own case-handling procedures.** Consultations ing with NCPs in other countries, or seeking **information from the Secretariat or** guidance **from the WPRBC** on issues related to the interpretation of the Guidelines, may also help to resolve the issue.



**36. Through good offices, NCPs will offer a platform for dialogue between the parties to assist with the resolution of the issues raised. In line with the voluntary and non-judicial nature of the specific instance procedure, and subject to consent of the parties, the role of the NCP includes creating conditions for dialogue and agreement between the parties around a commitment by the enterprise to further the implementation of the Guidelines in the future and, where relevant, address, in accordance with the Guidelines, adverse impacts that may have occurred. While facilitating dialogue, the NCP should explain the provisions of OECD Guidelines relevant to the issues raised as a way to support parties in reaching an agreement compatible with the Guidelines. The NCP should assess whether the agreement negotiated during the good offices phase is in line with the Guidelines and, where relevant, engage with the parties to try and resolve any conflict.**

~~29-~~**37.** As part of making available good offices, and where relevant to the issues at hand, NCPs will offer, or facilitate access to, consensual and non-adversarial procedures, such as **mediation or conciliation or mediation**, to assist in dealing with the issues at hand. In common with accepted practices on conciliation and mediation procedures, these procedures would be used only upon agreement of the parties concerned and their commitment to participate in good faith during the procedure. **If mediation is the option chosen, NCPs may choose to carry out the mediation themselves or engage external mediators agreed by the parties to conduct or support mediation.**

~~30.~~ When offering their good offices, NCPs may take steps to protect the identity of the parties involved where there are strong reasons to believe that the disclosure of this information would be detrimental to one or more of the parties. This could include circumstances where there may be a need to withhold the identity of a party or parties from the enterprise involved.

### **Conclusion of the Procedures**

~~34-~~**38.** NCPs are expected to always make the results of a specific instance publicly available in accordance with paragraphs **LC-34**, and **LC-46**, of the Procedures and Guidance.

~~32-~~**39.** When the NCP, after having carried out its initial assessment, decides that the issues raised in the specific instance ~~do not merit~~ **do not warrant** further **examination** consideration, it will make a statement publicly available after consultations with the parties involved and taking into account the need to preserve the confidentiality of sensitive business and other information. If the NCP believes that, based on the results of its initial assessment, it would be unfair to publicly identify a party in a statement on its decision, it may draft the statement so as to protect the identity of the party.

~~33-~~**40.** The NCP may also make publicly available its decision that the issues raised merit **warrant** further examination and its offer of good offices to the parties involved.

~~34-~~**41.** If the parties involved reach agreement on the issues raised, the parties should address in their agreement how and to what extent the content of the agreement is to be made publicly available. The NCP, in consultation with the parties, will make publicly available a report **statement** with the results of the proceedings. **The NCP can make recommendations on the implementation of the Guidelines even if there is agreement or partial agreement between the parties.** The parties may also agree to seek the assistance of the NCP in following up on the implementation of the agreement and the NCP may do so on terms agreed between the parties and the NCP. ~~38.~~

~~35-~~**42.** If the parties involved fail to reach agreement on **all or some of** the issues raised, **if one or both of the parties withdraws from the procedure**, or if the NCP finds that one or more of the parties to the specific instance is unwilling to engage or to participate in good faith, the NCP will issue a statement, and make

recommendations as appropriate, on the implementation of the *Guidelines in relation to the issues raised*. This procedure makes it clear that an NCP will issue a statement, even when it feels that a specific recommendation is not called for. The statement should identify the parties concerned, the issues involved, the date on which the issues were raised with the NCP, any recommendations by the NCP, and any observations the NCP deems appropriate to include on the reasons why the proceedings did not produce an agreement.

**43. Where appropriate and relevant to the resolution of the issues, the NCP may also, at its own discretion, if allowed by applicable national law and its case-handling procedures, set out its views in its final statement on whether the enterprise observed the Guidelines.**

~~36-44.~~ The NCP should provide an opportunity for the parties to comment on a draft statement. However, the statement is that of the NCP and it is within the NCP's discretion to decide whether to change the draft statement in response to comments from the parties. ~~If the NCP makes recommendations to the parties, it may be appropriate under specific circumstances for the NCP to follow up with the parties on their response to these recommendations.~~

#### **[New sub-heading] Follow up**

**45. NCPs will carry out follow up on agreements they facilitate or recommendations they make where relevant. For example, follow up would not be conducted if it would not contribute to the implementation of the Guidelines.** If the NCP deems it appropriate to follow up on its recommendations, ~~the~~ <sup>the</sup> timeframe for doing so should be addressed in the statement of the NCP. **Follow up may involve, for example, requests for updates from the parties, or one or more meetings between the NCP and the parties (either separately, or together) to assess progress on the implementation of the commitments undertaken in the agreement, or on the NCP's recommendations. Where appropriate, the NCP should issue follow up statements after conducting its follow up. The NCP may also offer to resume good offices after follow up if further engagement by the NCP could help promote implementation of the Guidelines.**

~~37.~~ Statements and reports on the results of the proceedings made publicly available by the NCPs could be relevant to the administration of government programmes and policies. In order to foster policy coherence, NCPs are encouraged to inform these government agencies of their statements and reports when they are known by the NCP to be relevant to a specific agency's policies and programmes. This provision does not change the voluntary nature of the *Guidelines*.

#### **Transparency and Confidentiality**

~~38-46.~~ Transparency is recognised as a general principle for the conduct of NCPs in their dealings with the public (see paragraph 9 **10** in "Core **Effectiveness** Criteria" section, above). However, paragraph **I.C-46** of the ~~Procedural~~ <sup>Substantive</sup> Guidance recognises that there are specific circumstances where **maintaining confidentiality of certain facts and arguments brought forward by the parties** is important ~~and~~ <sup>is</sup> **justified**. ~~For example, the~~ <sup>For example, the</sup> NCP will take appropriate steps to protect sensitive business information. Equally, other information, such as the identity of individuals involved in the procedures, should be kept confidential, **for example if disclosing it places them or related persons at risk of retaliation**, in the interests of the effective implementation of the *Guidelines*. It is understood that proceedings include the facts and arguments brought forward by the parties. Nonetheless, it remains important to strike a balance between transparency and confidentiality in order to build confidence in the *Guidelines* procedures and to promote their effective implementation. **It is recognised that NCPs may be obligated to follow national laws on transparency and disclosure, regardless of these provisions.** ~~Thus, while paragraph C-4 broadly outlines that the proceedings associated with~~

implementation will normally be confidential, the results will normally be transparent.

**47. With respect to sharing information between parties, in the interest of an equitable process, the NCP should, in principle, make parties aware of all relevant facts and arguments brought forward to the NCP by the other parties during proceedings (in particular during the good offices phase). For example, if a party makes a reasonable request not to share a submission in full with the other party, notably to protect sensitive business information and the interests of other stakeholders, the NCP should work with the submitting party to redact any sensitive content in order to facilitate sharing. As much as possible, NCPs should avoid basing fundamental aspects of their decisions on information that is not available to both parties.**

**48. With respect to sharing information with the public or third parties, the specific instance proceedings will be confidential unless otherwise agreed by the parties. In particular, NCPs will inform parties at the outset of the process that they may not disclose at any time facts and arguments shared during the proceedings by the other party or by the NCP itself that is not already in the public domain without the other party's consent. In the interest of predictability, trust and confidence, NCPs may seek written assurances from the parties in this regard, and adopt provisions in their case-handling procedures that encourage compliance with their non-disclosure requests. The Procedures do not prevent the submitter from publishing its own initial submission, nor do they prevent the parties from communicating about the existence of the specific instance, or discussing information or documents shared by the other party with their advisors to the specific instance, provided these advisors do not themselves further disclose such information. In such cases, the NCP may also seek written assurances from the advisors.**

### **Issues Arising in Non-Adhering Countries**

~~39-49.~~ As noted in paragraph 2 of the Concepts and Principles chapter, enterprises are encouraged to observe the Guidelines wherever they operate, taking into account the particular circumstances of each host country.

- In the event that Guidelines-related issues arise in a non-adhering country, home NCPs will take steps to develop an understanding of the issues involved. While it may not always be practicable to obtain access to all pertinent information, or to bring all the parties involved together, the NCP may still be in a position to pursue enquiries and engage in other fact finding activities. Examples of such steps could include contacting the management of the enterprise in the home country, and, as appropriate, embassies and government officials in the non-adhering country.
- Conflicts with host country laws, regulations, rules and policies may make effective implementation of the Guidelines in specific instances more difficult than in adhering countries. As noted in the commentary to the General Policies chapter, while the Guidelines extend beyond the law in many cases, they should not and are not intended to place an enterprise in a situation where it faces conflicting requirements.
- The parties involved will have to be advised of the limitations inherent in implementing the Guidelines in non-adhering countries.
- Issues relating to the *Guidelines* in non-adhering countries could also be discussed at NCP meetings with a view to building expertise in handling issues arising in non-adhering countries.

### **Indicative Timeframe**

~~40-50.~~ The specific instance procedure comprises ~~three~~ **five** different stages:

**1. Coordination: Where relevant, coordinate with other relevant NCPs based on the characteristics of the Specific Instance received to determine the lead NCP. Initial coordination arrangements to identify the lead and supporting NCPs should be completed within two months.**

1- **2. Initial assessment and decision whether to offer good offices to assist the parties:** NCPs should seek to conclude an initial assessment within three months **after the identification of the lead and supporting NCPs**, although additional time might be needed in order to collect **or translate** information necessary for an informed decision.

2- **3. Assistance to the parties in their efforts to resolve the issues raised:** If an NCP decides to offer its good offices, it should strive to facilitate the resolution of the issues in a timely manner. Recognising that progress through good offices, including mediation and conciliation, ultimately depends upon the parties involved, the NCP should, after consultation with the parties, establish a reasonable timeframe for the discussion between the parties to resolve the issues raised. If they fail to reach an agreement within this timeframe, the NCP should consult with the parties on the value of continuing its assistance to the parties; if the NCP comes to the conclusion that the continuation of the procedure is not likely to be productive, it should conclude the process and proceed to prepare a statement.

3- **4. Conclusion of the procedures:** The NCP should **strive to** issue its statement ~~or report~~ within three months after the conclusion of the procedure.

**5. Follow up: The NCP may determine its own timetable for any follow-up in consultation with the parties.**

44-**51.** As a general principle, NCPs should strive to conclude the procedure within 12 months (**14 months if coordination to determine a lead NCP is needed**) from receipt of the specific instance **to its conclusion**. It is recognised that this timeframe may need to be extended if circumstances warrant it, such as when the issues arise in a non-adhering country, **when the Specific Instance involves multiple enterprises, multiple submitters and multiple NCPs, or when translations are necessary. Whenever delays are to be expected or experienced in the handling of a Specific Instance, the NCP should ensure the parties are kept informed in a timely manner and that the proceedings remain predictable. The NCP, within its case-handling procedures, may decide to issue public updates on the status of cases.**

### **Reporting to the WPRBC and the Investment Committee**

42**52.** Reporting ~~would be~~ **is** an important responsibility of NCPs that would also help to build up a knowledge base and core competencies in furthering the effectiveness of the Guidelines. In this light, NCPs will **submit their annual** report to the **WPRBC and the Investment Committee** in order to include in the Annual Report on the OECD Guidelines information on all specific instances that have been initiated by parties, ~~including those that are in the process of an initial assessment, those for which offers of good offices have been extended and discussions are in progress, and those in which the NCP has decided not to extend an offer of good offices after an initial assessment.~~ **The WPRBC will provide the Committee with an analysis of NCP annual reports to include in the Annual Report on the Guidelines. NCP annual reports should include Specific Instances in Coordination, Initial Assessment, Good offices, Conclusion or Follow-up.** In reporting on implementation activities in specific instances, NCPs will comply with transparency and confidentiality considerations as set out in paragraph **I.C-46 and in their case-handling procedures.**

**[New sub-heading] Support for policies to promote RBC**

**53. [moved from former 37.]** Statements and reports on the results of the proceedings made publicly available by the NCPs could be relevant **The Decision recognises the support NCPs can provide in to the development, administration and coherence of government policies and programmes that promote RBC and policies. In order to foster policy coherence, where appropriate and in agreement with relevant government agencies. In particular, NCPs can support the alignment of any such efforts with the Guidelines and contribute to maintaining their position as an international standard for RBC, as well as other OECD instruments and guidance deriving from the Guidelines, such as the OECD due diligence guidance.**

**54. There are various ways in which NCPs may support their government in its efforts to develop, implement and foster coherence of policies to promote RBC, depending on context. First, NCPs are encouraged to inform these relevant government agencies by sharing of their statements and reports, as well as other data, surveys and insights, when they are known by the NCP to be relevant to a specific agency's policies and programmes, such as trade advocacy, economic diplomacy, or other support and services to companies. Second, adhering countries have found it useful to involve their NCP in developing and implementing policies or programmes such as National Action Plans on RBC and/or Business and Human Rights.** This provision does not change the voluntary nature of the *Guidelines*, **and any support provided by the NCP should be commensurate with its capacities and priorities, and should not detract from its ability to fulfil its responsibilities under the Decision and the Procedural Annex.**

## **II. Commentary on the Procedural Guidance for the Investment Committee, the WPRBC and the Secretariat**

~~43-~~**55.** The ~~Procedural~~ ~~Guidance~~ to the Council Decision provides additional guidance to the Committee, **the WPRBC and the Secretariat** in carrying out its **their** responsibilities, including:

- Discharging its **their** responsibilities in an efficient and timely manner.
- Considering requests from NCPs for assistance, **including by providing clarifications, guidance and information on the interpretation of the Guidelines in specific instances.**
- Holding exchanges of views on the activities of NCPs.
- Providing for the possibility of seeking advice from international partners and experts.

~~44-~~**56.** The non-binding nature of the *Guidelines* precludes the Committee from acting as a judicial or quasi-judicial body. Nor should the findings and statements made by the NCP (other than interpretations of the *Guidelines*) be questioned by a referral to the Committee. The provision that the Committee shall not reach conclusions on the conduct of individual enterprises has been maintained in the Decision itself.

~~45-~~**57.** The **Secretariat and the WPRBC** Committee will consider requests from NCPs for assistance, including in the event of doubt about the interpretation of the *Guidelines* in **ongoing specific instances** particular circumstances. **In such situations, NCPs should first contact the Secretariat for information regarding interpretation of the Guidelines in similar cases. Where such information is not available or insufficient to assist the NCP, or the Secretariat is not in a position to assist the NCP, the NCP may seek the guidance of the WPRBC. Such requests will be handled confidentially and, subject to available resources, expeditiously. To expedite the treatment of requests for guidance, the WPRBC may organise ad hoc meetings or establish a sub-group to respond to such requests. In such case, the WPRBC will develop procedures to be followed by the sub-group. The information provided by the Secretariat and the guidance of the WPRBC are confidential, case-specific and advisory. The Secretariat will report regularly to the WPRBC, and the WPRBC will**

**report regularly to the Investment Committee, on issues that gave rise to requests for information and guidance, and on responses provided, with due regard for confidentiality. If the WPRBC considers that a question on which guidance is sought requires a clarification of the interpretation of the Guidelines, it will invite the NCP to seek a clarification from the Committee on the basis of Section II.2.c) of the Procedures.** This paragraph reflects paragraph C-2c) of the Procedural Guidance to the Council Decision pertaining to NCPs, where NCPs are invited to seek the guidance of the Committee if they have doubt about the interpretation of the Guidelines in these circumstances.

**58. [moved from former 48] Clarifications of the meaning *interpretation* of the Guidelines under Section II.2.c) of the Procedural Guidance, remain a key responsibility of the Committee to ensure that the meaning *interpretation* of the Guidelines would not vary from country to country. A substantiated submission *request for clarification may be filed* by an adhering country, an advisory body (*BIAC or TUAC*) or OECD Watch, *including* with respect to whether an NCP *has correctly interpreted* the Guidelines *or a previous* is consistent with Committee *clarification* interpretation will also be considered *in a closed specific instance. The Committee's clarification will be prepared by the WPRBC with the support of the Secretariat, in accordance with procedures to be defined by the Committee, and be made public on the OECD's website. The Investment Committee will not reach conclusions on the conduct of individual enterprises in issuing its clarification, and NCPs are not expected to re-open a specific instance as a result of a clarification.***

**46-59. When discussing NCP activities, the Committee may make recommendations, as necessary, to improve their functioning, including with respect to the effective implementation of the *Guidelines and to address any situation in which an NCP becomes non-functioning. In particular, the Investment Committee may determine, based on an NCP's last two annual reporting cycles and upon a proposal by the WPRBC, that an NCP has, for an extended period of time and without legitimate reason, manifestly not been operating in a way consistent with the Procedures. Such a finding may rest on, for example, the repeated failure to assign the resources required for the basic discharge of NCP responsibilities, demonstrably inadequate institutional arrangements, absence of any promotional activities, repeated and significant undue delays in the handling of specific instances, or lack of reporting. The Committee may then make recommendations to the country of the NCP and invite it to report on implementation within a specified timeframe and make further recommendations in case such reporting does not satisfy the Committee that the NCP is functioning in a way consistent with the Procedures. The Committee may request the Secretariat to assist the adhering country in the implementation of the recommendations. The adhering country whose NCP is concerned should participate in the process in good faith and is expected not to block consensus except in exceptional circumstances.***

**47-60. A substantiated submission by an adhering country, an advisory body or OECD Watch that an NCP was not fulfilling its procedural responsibilities in the implementation of the *Guidelines* in specific instances will also be considered by the Committee. *The Committee's response will be prepared by the WPRBC with the support of the Secretariat, in accordance with procedures defined by the Committee. It will be approved by consensus. The adhering country whose NCP is the subject of a substantiated submission should participate in the process in good faith and is expected not to block consensus except in exceptional circumstances. The Committee will give the adhering country in question the possibility to state its view on the substantiated submission prior to its decision, and the Committee may invite the adhering country to report on the implementation of any recommendations within twelve months of the response.***

~~49-~~**61.** In order to engage with non-adhering countries on matters covered by the *Guidelines*, the Committee may invite interested non-adhering countries to its meetings, annual Roundtables on Corporate Responsibility, and meetings relating to specific projects on responsible business conduct.

~~50-~~**61.** Finally, the Committee ***and the WPRBC*** may wish to call on experts to address and report on broader issues (for example, child labour or human rights) or individual issues, or to improve the effectiveness of procedures. For this purpose, the Committee could call on OECD in-house expertise, international organisations, the advisory bodies ***(BIAC and TUAC), OECD Watch,*** non-governmental organisations, academics and others. It is understood that this ~~will~~ ***may*** not become a panel to settle individual issues.



# **Submission to the consultation on the targeted update of the OECD Guidelines for Multinational Enterprises**

**FEBRUARY 2023**

The information set out in this submission is not intended as, and does not constitute, legal advice.

[pillar-two.com](https://pillar-two.com)



## About Pillar Two

Pillar Two is a specialist business and human rights advisory firm with extensive global experience supporting businesses and other organisations to identify, assess and develop effective responses to their human rights risks, and to meaningfully engage stakeholders around their human rights approaches. We take a principled, integrated and practical approach founded on international frameworks, national laws and policies, evolving stakeholder expectations, and leading practice.

Our team has deep human rights expertise and is based across Australia, the United Kingdom and Europe. Our CEO Vanessa Zimmerman was a member of the team that drafted the UN Guiding Principles on Business and Human Rights (UNGPs), and in that capacity also provided feedback on the 2011 update to the OECD Guidelines for Multinational Enterprises (Guidelines). Vanessa is on the Governance and Advisory Board for the Australian OECD National Contact Point (AusNCP). She is also Chair of Human Rights at the UN Global Compact Network Australia and is a member of the Australian Government's Modern Slavery Expert Advisory Group and the National Roundtable on Human Trafficking and Slavery amongst other advisory roles. Our team also includes former Australian Government and Australian Human Rights Commission representatives, including being closely involved in the development and implementation of the Modern Slavery Act.

Pillar Two has advised companies across multiple sectors, including mining, energy, technology and telecommunications, education, retail, food and beverage, tourism and transport, fashion, professional services, infrastructure, banking and property. This submission draws on our extensive experience working with Australian and global companies to support their human rights risk management in line with the expectations of the UNGPs and the Guidelines.

## Feedback on the updates to the Guidelines

This submission to the consultation on the updates to the Guidelines focuses primarily on the proposed updates to the Preface, Chapter I Concepts and Principles, Chapter II General Policies, Chapter IV Human Rights and the Implementation Procedures.

Pillar Two commends the current alignment of the updates with the UNGPs. We recommend this alignment is retained to the greatest extent possible to ensure coherence between these two authoritative instruments on responsible business conduct. This includes the application of the Guidelines to enterprises' full value chain, and ensuring the meaning of 'business relationship' includes all downstream actors in line with the UNGPs.

Continued alignment between the UNGPs and the Guidelines on the extent of their application to the full value chain is important to support and further bolster efforts by multiple stakeholder groups, including business, to address severe downstream business-related human rights and other risks. It is also consistent with a range of existing OECD due diligence guidance and decisions from a wide range of National Contact Points. We acknowledge that managing human rights risks across the entire value chain, especially for large conglomerates or companies working across countries or sectors, is challenging and that using leverage with downstream business partners may still be viewed as high risk from a commercial standpoint. However, through our work we have seen a growing trend in businesses from a variety of sectors engaging with their downstream partners, including in

supplier-customer relationships where it has been viewed in both parties' best interests to encourage responsible business conduct for long term success.

Key updates to the Guidelines that in our view provide useful guidance to enterprises on responsible conduct expectations include the additions to the text relating to:

- the meaning of a 'multinational enterprise';
- meaningful engagement with potentially affected stakeholders;
- increased transparency and integrity in lobbying;
- protecting human rights defenders and others from reprisals;
- the concept of leverage and how it is exercised in practice;
- the need to take additional steps to assess and address adverse impacts on marginalised or vulnerable groups, including Indigenous Peoples;
- the increased urgency around expectations that enterprises will take steps to eliminate forced labour;
- the need for due diligence in contexts of informality.

The updates to the Implementation Procedures, especially the consolidation and elaboration of the core effectiveness criteria for National Contact Points (NCPs), are also welcome. The increased clarity around NCP institutional arrangements, procedures and powers, together with the expectation of NCP functional equivalence, will help address some of the long term criticisms of NCPs' structure and capacity to facilitate the effective resolution of specific instances.

Finally, in our view the increased focus on climate change risk, mitigation and adaption in the updates to the Guidelines is essential for the ongoing relevance and impact of the Guidelines, including as they relate to human rights risk management.

We would be pleased to engage further with the OECD further as appropriate, including to discuss this submission.

**Vanessa Zimmerman**  
**CEO, Pillar Two**



## **OECD Public Consultation**

### **Consultation Draft: Targeted update of the OECD Guidelines for Multinational Enterprises and their Implementation Procedures**

#### **General comments**

**Please include any overall comments you wish to make on the consultation draft (max. 2000 characters)**

We welcome the draft and update of the Guidelines for current global context.

- It is important to add in the Preface point 3 and throughout the document that reparation of the damages caused by business activity is part of the due diligence process, as stated by the United Nations Guiding Principles on Business and Human Rights - one of the internationally recognized standards. Mitigation is not reparation. "Remediation" should be only used when reparation is not possible (i.e. the death of a person). This language should be carefully used along the document.
- The phrase "adverse impacts" should be accompanied by "and human rights abuses" throughout the entire document.
- The phrase "undue pressure" needs revision throughout the document. There is no correct or right pressure or reprisals against any persons or groups who monitor or report practices of the enterprise that contravene the law or are inconsistent with the Guidelines, and with human rights.
- A gender and intersectional perspective should be mainstreamed throughout the entire document. Impacts of business activities on women and sexual and gender minorities should be taken seriously in these Guidelines.
- Human Rights Council resolution 48/13 recognizes the human right to a clean, healthy and sustainable environment for all people. This should be embedded throughout the document, and specifically the due diligence processes and points, and the chapters on Human Rights and Environment.
- Provisions and safeguards needed for Indigenous Peoples in the context of business activities needs to be seriously addressed in these Guidelines. The definitions of the World Bank, UNESCO and OHCHR on the distinction of these groups are useful to understand this and include it throughout the Guidelines.
- Provisions and safeguards on the protection of human rights and environmental defenders, with attention to women human rights and environmental defenders should be carefully included and broken down more. Point 10 is a good reference.

#### **Chapter 1: Concepts and Principles**

**Please include any comments you wish to make on this specific chapter of the consultation draft (max. 2000 characters)**

A point should be added on the guidance for MNEs in the context of global crises such as climate change, water shortage, pandemics, and others. Business activities and operations should act as social actors and not act in detriment of human rights and environmental impacts.



## **Chapter II: General Policies**

**Please include any comments you wish to make on this specific chapter of the consultation draft (max. 2000 characters)**

Point 7. Add: Self-regulatory practices should not substitute national or international frameworks and regulations.

Point 9 should be changed to "applying any kind of pressure", as there is no pressure that doesn't violate freedom of expression, and labor rights, association and assembly rights, and ILO conventions.

Point 12. (Originally paragraph A.11)

It should include "...through their own activities and value chains"

Point 16 (Originally paragraph A.14) should say "Engage meaningfully with relevant stakeholders including rights holders", as a relevant stakeholder that could be significantly impacted is, for example, institutional investors. Other stakeholders could be added, but this point is about rights holders.

Commentary on General Policies - Point 2 says that the development and implementation of policies and laws should consider the views of other stakeholders in society..., which only clarifies that enterprises have more power and other stakeholders views are to be considered, when in democratic societies and sovereign governments policies and regulations are made for the needs of the society with these actors as the main beneficiary and co-developer with the government. This point could encourage corporate capture of the State and should be reformulated.

Governments should be transparent and disclose the public interest information regardless of enterprises agreeing or not, consulting them is not aligned with open government standards, disclosure and transparency standards to achieve the right of access to public information.

Point 13

Safeguards to whistleblowers should also exist when human rights are compromised or abused.

Point 15 talks about Due Diligence for RBC OECD Guidelines, but these MNE Guidelines should clarify its point 6 on providing for or cooperating in remediation when appropriate. It should clarify when is and is not appropriate to avoid vagueness and encourage not addressing negative impacts.

## **Chapter III: Disclosure**

**Please include any comments you wish to make on this specific chapter of the consultation draft (max. 2000 characters)**

"1. Enterprises should take fully into account established disclosure policies in the countries in which they operate, and consider the views and informational requirements of shareholders and other relevant stakeholders. Enterprises should ensure that timely and accurate information is disclosed on all material matters regarding their activities, structure, financial situation, performance, ownership and governance. This information should be disclosed for the enterprise as a whole, and, where appropriate, along business lines or geographic areas. Disclosure policies of enterprises should



be tailored to the nature, size and location of the enterprise, with due regard taken of costs, business confidentiality and other competitive concerns".

- This point and chapter should state that material matters are also environmental and human rights issues and risks;
- It should also clarify what "where appropriate means";
- And regardless to the nature, size, cost, and location, the potentially and actually impacted stakeholders should receive all the information needed that they consider it is a matter that could affect them. (Take as example the Escazú Agreement).

Commentary on disclosure

"28. The purpose of this Chapter is to help build an environment of transparency and accountability around the operations of multinational enterprises, thereby supporting financial stability, business integrity, and sustainable and inclusive economic growth..."

While the commentary is comprehensive overall, a revision should be made on building and environment for sustainable economic growth, as economic growth shouldn't be the main driver, but preserving the environment and life of all beings which is compromised by constantly pushing for unnecessary and harming economic growth. This favors negative impacts on climate and fights for common goods such as clean water.

#### **Chapter IV: Human Rights**

**Please include any comments you wish to make on this specific chapter of the consultation draft (max. 2000 characters)**

Point 3. Should add "and repair damages or adverse human rights impacts." Mitigation is not (integral and substantial) reparation.

Point 4. "Have a publicly available policy commitment to respect human rights." - and implement it. This implementation should be revised by relevant stakeholders including rights holders and actual and potential affected stakeholders providing them with the necessary means (language, materials, and information). The development of the policy commitment should also include these and other stakeholders as stated in the United Nations Guiding Principles on Business and Human Rights.

Point 40. should delete or clarify the phrase "as needed". This point should consider a different writing according to international standards.

"enterprises should take additional steps to assess and address adverse impacts on individuals who may be at heightened risk due to their membership in marginalised or vulnerable groups or populations, including Indigenous Peoples"

Suggestion: Enterprises should take additional steps to assess and address adverse impacts on individuals and groups or populations, including Indigenous Peoples, afrodescendants, rural communities, and peasants, who may be at heightened risk due to their marginalised or vulnerable condition. Additional steps should also be taken to identify and assess differentiated impacts on women and LGBT+ people, with gender mainstreaming.



Indigenous Peoples provisions should be broken down further and also in relation to ILO Convention 169.

Point 44 should also include rights holders, potentially and actually affected groups, and other relevant stakeholders such as NGOs, CSOs, and journalists for approval, information, and expertise in order to be legitimate. And they should also foresee and participate meaningfully in its evaluation of implementation.

Another point should be added related to point 46 on assurance for non-repetition of the damages or harms caused.

## **Chapter VI: Environment**

**Please include any comments you wish to make on this specific chapter of the consultation draft (max. 2000 characters)**

- Include two important impacts: i) land grabbing and dispossession of legitimate tenure right holders and j) forced displacement

Some comments on 2 a):

- Collection and evaluation is important before the operations start when new projects want to be developed;
- The collection and evaluation of information should be done and verified with the relevant stakeholders such as communities in the scope of operations and possible operations, consumers, expert human rights and environmental NGOs, among others;
- The information gathered and analysed should be shared with the rights holders that could be or are actually negatively impacted in a timely, culturally appropriate, and language appropriate manner.
- Points 2d and 3 should be kept.
- Potential or actual adverse impacts burden of proof should not rely on the affected or potentially affected stakeholders.

In general, Point 2 should also establish a due diligence process for environmental adverse impacts and to protect the right of a healthy, safe, and sustainable environment. Human rights due diligence process should also be put in place in this chapter.

Point 4 (Originally paragraph 2)

- The information provided to the public, communities, workers and others should be verifiable and transparent otherwise it is misleading, lacks accuracy, and could be false. Otherwise explain "where applicable".
- Most times there is not enough available information as it was not needed before wanting to develop a new business project or activity, before making a due diligence and human rights/environmental due diligence process. The information should be gathered (with rights holders as stated in 4b) and should be enough to be able to assess it and share it with transparency to other stakeholders.



Point 60 should also reflect the principles and objectives of the UN Declaration on the Rights of Peasants and Other People Working in Rural Areas, UN Declaration on the Rights of Indigenous Peoples, the UN Declaration on the Rights of the Child, the International Covenant on Economic, Social and Cultural Rights, the UN CESCR General comment No. 24 on State obligations in the context of business activities, and International Covenant on Civil and Political Rights.

## **Swedwatch's input on the proposed changes in the OECD Guidelines on Multinational Enterprises**

The Guidelines must include the full value chain of business relationships. This includes [downstream](#) entities and business relationships as well as upstream relationships. The point of HRDD is to prevent harm in a risk-based manner, wherever it occurs – not according to an arbitrary upstream-downstream or tier-restricted designation.

The Guidelines should use stronger language on the rights of human rights and environmental defenders (HREDs), [as expressed by various organizations](#). The expression “undue pressure”, used in several sections is highly problematic and should be replaced with “pressure” as using the word “undue” signals that there are other types of pressure that are “due”. We urge the OECD to clarify that all types of attacks, be they legal, physical and reputational, against HREDs are unacceptable, including so called SLAPP-lawsuits and sexual/gender-related harassment. The Guidelines should explicitly recognize the right of HREDs to protest any business activity, not only activity that is illegal or inconsistent with the Guidelines.

In comment 40, HRDD should be conflict-sensitive, identifying, preventing, and mitigating potential and actual impacts on conflict dynamics. In conflict-affected areas, companies should comply with international humanitarian law and engage in ongoing heightened HRDD.

In comment 45, we recommend further clarification on the understanding of HRDD as a continuous process that needs to take into account and continuously identify new risks caused by changes in business operations or operational environment. Particular attention should be paid to ensuring that communities' and workers' rights are respected in cases of permanent or temporary shutdowns of business activities or changes in ownership, including providing access to remedy. This is particularly important in land-related projects that might jeopardize communities' access to livelihoods and rights to food and water.

There is a need for a more extensive treatment of the human rights of indigenous peoples and specific guidance on those rights in the Guidelines as expressed by several [indigenous organizations](#). Indigenous peoples should be directly consulted on the updating process for the Guidelines and in relation to their implementation in structured and mutually acceptable ways, to safeguard their internationally recognized human rights.

The Guidelines should recognise that environmental impacts of business operations can affect a broad range of human rights. Lack of access to clean water or other natural resources could lead to a number of impacts not necessarily covered by the right to health and safety, including conflict amongst communities as well as between communities and companies or intimidation and violence by private or state security forces.

The wording “seek to” address environment-related impacts on workers and communities, is highly problematic since HRDD expectations on companies is to prevent, address and remediate impacts which they have caused or contributed to.

The Guidelines should state clearly that expectations are higher on State-owned or controlled businesses and companies linked to the State through e.g. public procurement, export credits or development finance.

Regarding the National Contact Points the admissibility criteria should set a low threshold to accepting plausible complaints. Language should prioritize transparency over confidentiality. We believe NCPs should always undertake follow-up unless not warranted for a particular case.



**PROFESSOR DR BRUNO SIMMA**  
*Judge at the Iran-United States Claims Tribunal*  
*Former Judge at the International Court of Justice*  
*Chair Hague Rules on Business and Human Rights Arbitration Project*  
*judgesimma@gmail.com*

The Hague, 9 February 2023

Dear Sirs,

Re: submission in Consultation on OECD Guidelines on Multinational Enterprises (OECD Guidelines), in particular in connection with the follow up of NCP specific instances mediation (cf. Consultation draft, Commentary on the Implementation Procedures, point 59, par. 5).

I am writing to you in my capacity as Chair of the International Working Group, which developed the Hague Rules on Business and Human Rights Arbitration, launched at the Peace Palace in the Hague on 12 December 2019 (The Hague Rules).

Mindful of the lack of international judicial remedies in the Business and Human Rights context in 2017 the Working Group, composed of experts, both academics and practitioners, in the field of international public and private law, international investment and international human rights law, corporate law, and international dispute resolution, engaged in the drafting, in a broad consultative set up with all relevant stakeholders, of the Hague Rules, offering a (private) judicial consensual remedy to the UNGP's remedy pillar's toolbox for corporations and human rights holders (allegedly) impacted by corporate action or inaction. Next to the Hague Rules' text details on the drafting process and Q&As are available at <https://www.cilc.nl/project/the-hague-rules-on-business-and-human-rights-arbitration/>.

For companies the Hague Rules can serve two purposes, first to resolve issues their own international conduct may raise in the BHR context (UNGP Pillar 3), and second to serve as dispute mechanism to resolve BHR issues occurring in their supply chains, which they could stipulate in their sourcing contracts (UNGP Pillar 2). The Hague Rules have been drafted with both purposes in mind and for the second option the WG has developed model clauses to be used in sourcing agreements.

Since their launch in 2019 the Hague Rules have inspired, as basic model, other, more specific, sectoral international BHR arbitration rules. These are the International Labor Arbitration and Conciliation Rules (ILAC Rules) of the Global Unions (<https://www.equaltimes.org/it-s-time-to-build-a-global?lang=en#.Y-P4ay-iFpR>), the Sport and Human Rights Dispute Resolution Mechanism developed by the Global Players Association section of the Global Unions ([https://uniglobalunion.org/wp-content/uploads/WPA-Access-to-Remedy\\_Essentials.pdf](https://uniglobalunion.org/wp-content/uploads/WPA-Access-to-Remedy_Essentials.pdf)) and the Arbitration Rules by the Human Rights at Sea charity, an initiative supported by top international law firms (<https://www.humanrightsatsea.org>). All three follow the Hague Rules, amended to serve the specifics of their sector. Through the said ILAC Rules the Hague Rules have indirectly

contributed to the dispute resolution mechanism in the International Accord for Health and Safety in the Textile and Garment Industry, a legally binding agreement between more than 180 garment brands/retailers, in which arbitration is the follow-on step to mediation, available to parties, if the mediation will not, in whole or in part, resolve the issue.

Turning to the current consultation, in relation to the Commentary on the Implementation Procedures, in particular to NCP handling of specific instances, point 59, par 5, the Working Group would like to point to the possible complementarity of the NCPs non judicial mediation process and arbitration as a tailor-made consensual follow-on private judicial remedy.

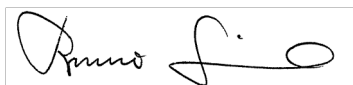
Although the voluntary character in principle of the OECD Guidelines is not in discussion in the current consultation, the stocktaking prepared for the update process noted the opportunity to consider the strategic role of NCPs as national authorities, agents of policy coherence, and as remedy mechanisms in the changing RBC landscape. The stocktaking also highlighted opportunities to leverage synergies with other remedy mechanisms including for example National Human Rights Institutions.

NCPs Specific Instances procedures leading to NCP-organised mediation may or may not result (in whole or in part) in the resolution sought. In the latter case The Hague Rules could be the next resort to resolve the (remaining part of) the issue. In this context it is also important to note the different but complementary aims of the NCP specific instances process and Hague Rules arbitration as a private judicial process. While the former is in principle future-oriented with the aim to improve and align the corporate conduct with the OECD Guidelines, the latter aims at (private) judicial restitution of human rights and other CSR impacts already occurred.

In this vein the Hague Rules Working Group herewith submits the idea for an NCP, adhered to in a specific instances procedure, to discuss with the parties the possibility of a two-tier process, including both the current NCP mediation route and as complementary follow-on mechanism consensual Hague Rules based arbitration.

The Working Group is at your disposition to address any questions you may have.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Bruno Simma', enclosed in a thin black rectangular border.

Bruno Simma