

To: OECD Working Party on Responsible Business Conduct (WPRBC)
From: OECD Watch
Re: Ensuring a comprehensive and inclusive stocktaking of gaps in the OECD Guidelines for Multinational Enterprises (Guidelines)
Date: 20 May 2021

Introduction

Civil society welcomes the decision of the WPRBC to undertake a stocktaking of the OECD Guidelines to assess whether they remain fit for purpose. We appreciate the stocktaking as a signal of OECD member and adherent states' commitment to ensuring the Guidelines and their associated complaint mechanism remain current and responsive to the needs of civil society and multinational enterprises (MNEs) alike.

OECD Watch also welcomes the opportunity to provide input on the stocktaking report. From 2019 to 2021, OECD Watch has held a range of consultations with civil society from around the world to identify gaps in both the Guidelines' standards for MNEs and expectations for states' establishment of National Contact Point (NCP) complaint mechanisms. This submission represents views of well over 250 civil society organisations and consolidates input we have already provided to the OECD secretariat and adherent states to inform the report's zero and first drafts.

This submission identifies, from the perspective of civil society:

- I. The purposes of the Guidelines and an explanation of why the Guidelines are not fulfilling their purposes;
- II. Thirteen key gaps in the Guidelines, which relate to both
 - a. Responsible business conduct (RBC) standards for MNEs in Part I of the Guidelines, and
 - b. Expectations for NCPs and the OECD Investment Committee in Part II of the Guidelines;
- III. Concerns and asks regarding the stocktaking process and presentation of gaps in the stocktaking report;
- IV. Concerns regarding the presentation of cases in the stocktaking report; and
- V. An ask on ensuring an effective public consultation on the first draft of the report.

Further, in annex, this submission provides detailed briefs on each of the 13 key gap areas.

I. Purposes of the Guidelines and their current failure to fulfil their purposes

The Guidelines are a set of recommendations from governments to businesses on RBC. From the perspective of civil society, the Guidelines serve three purposes:

- To provide and promote a comprehensive and practical set of standards on RBC for MNEs;
- To help facilitate access to remedy for victims of adverse business impacts via the NCP complaint mechanisms; and
- To signal the OECD's commitment and leadership in advancing responsible business practices, not merely investment and development, around the world.

The Guidelines were originally drafted in 1976, but since then, OECD states have revised them several times to ensure they remain fit for purpose. In 2000, an important revision of the OECD Guidelines gave NCPs the mandate to serve as non-judicial complaint mechanisms handling claims of corporate non-adherence with the Guidelines' standards. In 2011, the most recent revision of the Guidelines made other critical additions to the text, notably adding a chapter on human rights in line

with the UN Guiding Principles, and language calling on companies to undertake supply chain due diligence to address risks and impacts to rightsholders.

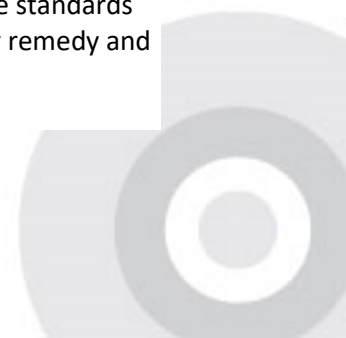
Unfortunately, in the ten years that have passed since the 2011 revision, two types of gaps in the Guidelines have become apparent that are preventing the Guidelines from fulfilling their three purposes:

- First, the RBC standards for MNEs in Part I of the Guidelines are increasingly out of synch with new challenges in the sphere of business and human rights, new expectations for responsible corporate conduct, and new standards and guidelines on RBC. Gaps in the standards on critical emerging challenges – such as how to respect human rights in the context of digitalisation – make them incomplete and insufficient as a guide for MNEs. Meanwhile, their outdated text on other areas on which popular expectations for corporate conduct have evolved – such as on fair taxation and non-financial disclosure – render the Guidelines obsolete on such issues. Finally, as other standards are being developed on these business and human rights issues, the Guidelines are losing their relevance. In all, the gaps on standards for MNEs are rendering the Guidelines *no longer fit for purpose* to guide MNEs in implementing comprehensive and effective responsible business practices regarding all the modern challenges they face.
- Second, the baseline expectations for NCPs in Part II of the Guidelines (the “Procedural Guidance”) are inadequate to help victims of adverse business impacts achieve remedy. While the Guidelines appropriately allow flexibility to states in designing a grievance mechanism suited to the national context, flexibility with too few baseline expectations has led to significant differences in the structures and promotional and complaint-handling practices of NCPs. These, in turn, have led to serious disparities in the effectiveness of the various NCPs and the system as a whole. The inadequate – or complete lack – of minimum expectations in the Procedural Guidance for NCPs forces each of them to struggle individually with common challenges such as determining a standard to evaluate claims, addressing conflicts of interest, and coaxing companies to engage in the voluntary dispute resolution process. Raising the bar for the expectations, practices, and authorities of NCPs would make it easier for them to function effectively as an impartial and accountable path to remedy for impacted communities. As is, the gaps on expectations for NCPs are rendering the Guidelines *still not fit for purpose* to facilitate access to remedy.

Together, these gaps in standards for MNE and expectations for NCPs are causing the Guidelines to fail in fulfilling their third purpose of signaling the OECD’s commitment and leadership in advancing RBC globally. Unless the OECD takes steps to address the gaps identified, it is signalling through the outdated RBC standards and ineffective complaint mechanism a harmful lack of interest and commitment to promoting better business conduct and protection of rightsholders.

II. Gaps in the Guidelines

The OECD Guidelines are falling seriously behind emerging challenges and improved RBC norms that have arisen over the past decade. The gaps in the text of the 2011 Guidelines cause two practical problems. First, they create a lack of clarity and coherence in international standards on RBC, contributing to MNEs’ failures to undertake business responsibly. Second, the gaps in the standards as well as in the guidance for states’ establishment of NCPs diminish victims’ chances for remedy and accountability via the OECD complaint system.



This section briefly identifies 13 primary gaps. The annex to this report provides more detail on each, offering background on the challenge or issue, identifying related gaps in the Guidelines and impacts of those gaps, and suggesting parallel laws and standards worth considering in relation to the issue.

a. First concern: insufficient guidance in the Procedural Guidance to help states establish effective NCPs that are functionally equivalent to each other

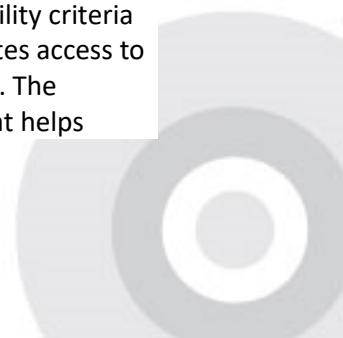
Civil society is first and foremost concerned that the Procedural Guidance does not give states the foundation they need to establish NCPs equipped to implement the Guidelines effectively and in a manner equivalent to each other.

NCPs are the lynchpin of the OECD Guidelines system. They ensure both awareness of the Guidelines among their own and other governments, MNEs, and other stakeholders, and accountability of MNEs through facilitating resolution of Guidelines-based disputes. The Guidelines expect NCPs to function according to core criteria of *visibility*, *accessibility*, *transparency*, and *accountability* as well as with complaint handling principles of *impartiality*, *predictability*, *equitability*, and *compatibility with the Guidelines*. At present, the Procedural Guidance allows states to set up their NCP in any way they choose, so long as it operates in a manner “functionally equivalent” to the other NCPs.

Unfortunately, research undertaken by OECD Watch over the past decades,¹ including its recent project to evaluate each NCP against a set of key performance indicators,² has shown wide variance in the structures and practices of NCPs that negatively impact their visibility and ability to complete their core tasks of promotion and dispute resolution. Meanwhile, the OECD RBC Unit has also studied both successes and challenges facing NCPs over the past twenty years,³ identifying numerous areas where progress can be made.

OECD Watch believes the shortcomings in NCP performance *originate* in the lack of adequate minimum expectations provided in the Procedural Guidance for states’ establishment of NCPs:

- **Institutional Arrangements:** The Procedural Guidance does not set minimum expectations for the resourcing of NCPs, nor adequate guidance on locating the NCP within government and choosing an organisational structure that helps promote NCPs’ independence and expertise in handling the broad range of issues common in complaints. The Procedural Guidance also does not set minimum requirements for ensuring stakeholder (including civil society) involvement in NCP activities including dispute resolution, ideally in the NCP structure itself or through an oversight or advisory body. Further, the Procedural Guidance does not clarify how states should avoid conflicts of interest arising in relation to their NCPs’ dispute resolution activities.
- **Information and Promotion:** The Procedural Guidance gives little guidance to states to clarify how NCPs can best promote the OECD Guidelines to governments and stakeholders and achieve the core criteria of transparency, such as by sharing prospective promotional plans targeting outreach to all stakeholder groups, maintaining a public complaint database, and publishing complaints when received and initial assessments and final statements when drafted.
- **Implementation in Specific Instances:** The Procedural Guidance does not set adequate threshold expectations for the complaint-handling procedures of NCPs to help promote agreements in disputes and minimize variation in complaint proceedings across NCPs. The admissibility criteria in the Guidance are unwieldy and difficult for NCPs to apply in a manner that facilitates access to dispute resolution; as a result, accessibility of NCPs’ good offices remains far too low. The Guidance does not clarify how NCPs can maintain transparency in a practical way that helps






protect persons using the system while righting the power imbalance between MNEs and civil society notifiers. The Procedural Guidance does not encourage determinations on MNE adherence and non-adherence to the Guidelines as a means to teach MNEs what adherence entails, nor suggest consequences for MNEs that refuse to participate in good faith in the specific instance process as a means to encourage MNE engagement. The Procedural Guidance does not require follow-up monitoring after completion of complaints to help MNEs fulfil their RBC commitments. It also does not set expectations and guidance to help NCPs anticipate and respond to retaliation against human rights defenders associated with complaints, and mitigate potential barriers to women and other disadvantaged groups using the mechanism.

The Procedural Guidance also includes language on the role of the Investment Committee, but here too, the Guidance does not go as far as it should in clarifying the responsibilities of the Investment committee to help secure wider promotion of the Guidelines and actual functional equivalence among NCPs. These gaps in the Procedural Guidance help generate an overall low rate of acceptance of complaints, an even lower rate of agreement in disputes, and serious disparities in the actual and perceived effectiveness of various NCPs that encourage notifiers to prioritize complaints based on NCP performance.

b. Second concern: incomplete or absent standards for MNEs across a range of issues

The second concern of civil society relates to the extensive gaps in the standards provided for MNEs in Part I of the text. Ten years of implementation of the current text of the Guidelines have revealed numerous shortcomings in issues already addressed in the text. Meanwhile, the past decade has witnessed numerous developments in RBC standards that are not yet reflected in the Guidelines at all. Together, these gaps are already making the Guidelines less useful as a tool for MNEs and civil society alike, and threaten to make the Guidelines obsolete altogether.

Several of the gaps fall in areas where significant developments have been made in international norms, public opinion, and global policy-making over the past ten years. The Guidelines are deeply out of synch with developments on the following issues:

-  **Marginalised groups:** It is increasingly clear that business impacts are felt most strongly by the most marginalised and disadvantaged members of society, including women, Indigenous Peoples, people of low caste, children, and others. The Guidelines do not identify all key rights of these groups – such as Indigenous Peoples’ right to free, prior, and informed consent (FPIC) over use of their territories – nor the different ways these people can be adversely impacted by business conduct – for example, not only as employees but as community members – nor the specialised due diligence needed to consult these groups and identify and address impacts to them.
-  **Human rights defenders:** In a context of shrinking civil society space, the WPRBC and many OECD states are taking action to advance protections for civil rights and human rights defenders. Yet the Guidelines include no provisions explaining how MNEs should avoid impacts to defenders – including by causing impacts directly or condoning impacts by a business partner or state – and respect and facilitate defenders’ right to advocate and right to remedy.
-  **Climate change and environmental degradation:** Countering the effects of climate change is broadly acknowledged as the most vital need of our time. Environmental destruction and climate change have caused devastating effects including biodiversity loss, with a recent report finding



that the global wildlife population has been reduced by two-thirds over the last 50 years.⁴ MNEs are recognised as responsible for almost a fifth of climate-changing carbon emissions,⁵ particularly those operating in the pollution-intensive agriculture, transport, extractive, manufacturing and apparel sectors. But the Guidelines do not even mention the term “climate change,” nor clearly call upon MNEs to set and achieve emission targets and actually avoid environmental impacts including deforestation, pollution, and biodiversity loss.

- **Land rights:** Land security underpins numerous human rights and helps forestall climate change. While global standards like the 2012 Voluntary Guidelines for the Responsible Governance of Tenure assert the responsibility of MNEs to respect legitimate tenure rights,⁶ the OECD Guidelines say next to nothing on land, failing to guide MNEs in assuring the right to FPIC, respecting non-documented tenure rights of women and communal owners, and respecting land rights even where states fail their own duty to protect land rights.
- **Labour rights:** Unionisation and workers rights are under threat, yet the Guidelines fail adequately to set important labour rights standards for MNEs, such as on ensuring responsible disengagement, avoiding business models that intentionally escape responsibility for worker well-being, paying a living wage, and respecting rights of workers in P2P platforms and the digital economy.
- **Taxation:** According to 2020 data, corporate tax avoidance is estimated to cause a global loss of \$245 billion each year, while MNEs annually shift a full \$1.38 trillion from the countries in which they make their profits to tax havens to avoid tax payments.⁷ Broad public consensus now holds that corporate tax avoidance should stop, and international and regional organizations including the OECD are developing innovative new tax policies to tackle the problem. Unfortunately, the Guidelines are even out of alignment with the OECD: they do not even name tax avoidance let alone discourage it, nor call for the disclosures needed to identify and prevent it moving forward.
- **Digitalisation:** Over the past ten years, the rapidly increasing digitalisation of the global economy is altering and exacerbating the potential for all MNEs – not merely technology companies – to adversely impact human rights, jeopardize democracies and democratic values, and harm the environment. The OECD Investment Committee has itself identified a need for a comprehensive standard to address the many challenges, but the Guidelines say nothing on this modern issue.
- **Disclosure:** ESG reporting, sustainability reporting, or integrated reporting are on the rise globally as countries increasingly require MNEs to disclose not merely their financial but their non-financial data to support efficient market functioning, corporate contribution to the UN Sustainable Development Goals, and public monitoring of outcomes. Against this growing tide, the OECD Guidelines’ Disclosure chapter is seriously outdated, setting standards not much stronger than the minimum legal requirements on financial reporting, and inadequately synchronizing with the Guidelines’ own due diligence communication expectations added in 2011.
- **Corruption:** The Guidelines currently address only bribery and extortion and do not set expectations regarding all forms of corporate corruption, nor highlight the relationship between avoiding corruption and meeting standards across the other chapters in the Guidelines.



- **Animal welfare:** More and more OECD states recognise animal sentience and the link between irresponsible MNE conduct on animals and adverse impacts to animals, people, and the planet. Yet the Guidelines do not reflect growing legal protections, international standards, and MNE policies on animals, whose well-being is widely understood as tied to public health (seen with COVID-19) and environmental protection.
- **Scope of application of the Guidelines:** The WPRBC is focused on policy coherence, yet the Concepts and Principles chapter of the OECD Guidelines does not adequately clarify the applicability of the Guidelines to non-traditional MNEs including states operating as economic actors.
- **General Policies:** The General Policies chapter of the Guidelines does not explain the fundamental principle of due diligence adequately, reflect the key expectations made in all (not just some) of the subsequent chapters, or set a proper tone for the overall document.

III. Concerns and asks regarding the stocktaking process and presentation of gaps in the stocktaking report

OECD Watch is concerned that the timing of when NCPs provided perspective on gaps in the Guidelines, vis-à-vis when they were given the three institutional stakeholders' views on gaps in the Guidelines, did not allow NCPs to consider stakeholders' views in a meaningful way before contributing their input to the stocktaking report. Relatedly and concerningly, the first draft of the report, like the zero draft before it, appears to present gaps and challenges only from the perspective of (incompletely informed) NCPs, not stakeholders.

NCPs filled out a questionnaire in January/February 2021 identifying successes and challenges with the Guidelines over the last ten years. The OECD secretariat used the survey responses to create, in the zero draft of the stocktaking report, a segment for each chapter of the Guidelines listing successes and challenges *as identified by NCPs*. Meanwhile, institutional stakeholders were invited to provide their own perspective on gaps in the Guidelines in annex to the zero draft, presented to states in early March 2021. This disjoint in timing meant that NCPs did not have the benefit of stakeholders' views until after they were surveyed on gaps in the Guidelines.

This disjoint in timing would not be problematic if NCPs were asked to reevaluate successes and challenges with the Guidelines after reading stakeholders' input, or if the secretariat itself incorporated stakeholders' input on the zero draft into the subsequent first draft of the report. However, the first draft continues to identify gaps solely from the perspective of NCPs, and it is not clear whether and how stakeholders' views have been incorporated into the draft analysis, other than in annex. OECD Watch appreciates a framing that shows that NCPs also see gaps in the text; however, if not supplemented by a section showing gaps identified by the stakeholders, then any challenge not identified by an NCP cannot appear in the report, even if one or more stakeholder groups considers it a serious gap in the Guidelines. This is concerning particularly where NCPs are asked to be their own judge in identifying gaps in the Procedural Guidance relating to the expectations set for NCPs.

NCPs are a vital voice to include in the identification of gaps, but NCPs are neither the primary users nor targeted audience of the Guidelines. It is equally important that civil society, union, and business perspectives on gaps be reflected and analysed in the report. To resolve this problem, OECD Watch asks that the institutional stakeholders' views be made integral in the report through their inclusion

in each of the substantive sections, not merely in the annex. Each chapter should identify successes and challenges holistically from the perspective of NCPs *and stakeholders*, not merely NCPs.

IV. Concerns regarding the presentation of cases in the stocktaking report

The first draft of the stocktaking report provides case examples illustrating topics covered by the Guidelines' chapters. While there is great value in identifying cases related to topics under each chapter, the report should not imply, as it does inconsistently in a few instances, that these cases were correctly handled, or provided useful interpretation on, the issues identified. Some paragraphs (for example 68 or 72) mention simply that cases have *involved* issues contemplated by the Guidelines, whereas others (such as paragraph 83) asserts that "specific instances have served to further elaborate good practice and expectations" on certain issues. Many civil society complainants object to their complaint being presented as one in which an NCP elaborated good practice or expectations on a key rights issue. At a minimum, this positive framing should be removed, or the OECD should first consult all parties to each complaint to verify whether all agree that the NCPS' handling and analysis was positive.

V. Ensuring an effective public consultation on the first draft of the report

OECD Watch welcomes the decision of the WPRBC to hold an open public consultation on the first draft of the stocktaking report. This is a great step to ensure all stakeholder groups and other experts in the field of business and human rights have an opportunity to evaluate whether the Guidelines remain fit for purpose and how and in what ways they might be strengthened. It is essential that the next draft of the report meaningfully reflect on the comments received. It is not enough for the WPRBC simply to receive comments and make them public. Instead, we urge that the report itself or an annex to it 1) describes the range of topics commented on and the general gist of suggestions made per topic, 2) identify which general suggestions were accepted into the second draft of the stocktaking report and which were not, 3) ensure public display of the comments.

Conclusion

Civil society welcomes the current stocktaking of gaps in the Guidelines, the opportunity for stakeholder input, and the plans for a public consultation. We respectfully urge that OECD member and adherent states ensure a broad scope for the review, to include study of the gaps we identify here. We also urge that, to show accountability to stakeholders, states ensure that the final stocktaking report includes and analyses each of the stakeholders' stated concerns, as well as the input provided through the public consultation. We remain committed to sharing perspective of civil society throughout the stocktaking process, and to supporting OECD states as they consider next steps to address the gaps identified.

About OECD Watch

OECD Watch is a global network with over 130 member organisations in more than 50 countries. Founded in 2003, OECD Watch's primary aim is to help support CSO activities related to the OECD Guidelines and the work of the OECD's Investment Committee. Membership consists of a diverse range of civil society organisations – from human rights to environmental and development organisations, from grassroots groups to large, international NGOs – bound together by their commitment to ensuring that business activity contributes to sustainable development and poverty eradication, and that corporations are held accountable for their adverse impacts around the globe. For more information, please visit www.oecdwatch.org.



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¹ See, e.g., OECD Watch's *Remedy Remains Rare*, available at: <https://www.oecdwatch.org/remedy-remains-rare/>; OECD Watch's *Remedy Campaign Demands for Policymakers*, available at: <https://www.oecdwatch.org/effective-ncps-now-remedy-is-the-reason/>; OECD Watch's *4x10 plan for why and how to unlock the potential of the OECD Guidelines*, available at: <https://www.oecdwatch.org/a-4x10-plan-for-why-and-how-to-unlock-the-potential-of-the-oecd-guidelines-update/>; OECD Watch's annual State of Remedy reports, available at: <https://www.oecdwatch.org/?s=state+of+remedy>; and OECD Watch's "Use with caution: the role of the OECD National Contact Points in Protecting Defenders," (2019), available at: <https://www.oecdwatch.org/use-with-caution-the-role-of-the-oecd-national-contact-points-in-protecting-human-rights-defenders/>.

² OECD Watch, *NCP Evaluations*, available at: <https://www.oecdwatch.org/indicator/>.

³ See OECD, *Providing access to remedy: 20 years and the road ahead*, (2020), available at: <http://mneguidelines.oecd.org/ncps/ncps-at-20/>.

⁴ WWF, (2020), *Living Planet Report 2020 - Bending the curve of biodiversity loss*. Almond, R.E.A., Grooten M. and Petersen, T. (Eds). WWF, Gland, Switzerland.

⁵ Zhang, Z., Guan, D., Wang, R. *et al.* (2020), Embodied carbon emissions in the supply chains of multinational enterprises. *Nature Climate Change*, **10**, 1096–1101.

⁶ FAO, *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security*, provision 3.2 pg. 4, available at <http://www.fao.org/3/i2801e/i2801e.pdf>.

⁷ Tax Justice Network, "\$427bn lost to tax havens every year; landmark study reveals countries' losses and worst offenders," 20 November 2020, available at: <https://www.taxjustice.net/2020/11/20/427bn-lost-to-tax-havens-every-year-landmark-study-reveals-countries-losses-and-worst-offenders/>.

ANNEX

The following 13 briefs, compiled through civil society consultations with over 25 civil society organisations between 2019 and 2021, provide more detailed information on the gap analysis topics identified in the submission above.



Identified gap in the OECD Guidelines: marginalised and disadvantaged groups

Outcome sought: Broad and comprehensive stocktaking of the OECD Guidelines for Multinational Enterprises (Guidelines) that addresses gaps on marginalised and disadvantaged groups, to include women and LGBTQ+ people, Indigenous Peoples, people of low-caste, children, and other groups.

Problem: The OECD Guidelines do not adequately establish expectations for MNEs to identify and address their impacts on marginalised and disadvantaged groups, nor guidance for NCPs on how to minimize barriers to remedy for marginalised groups via the specific instance process.

This brief cannot do justice to all potentially marginalised and disadvantaged groups. Improved language in the Guidelines on discrimination and stakeholder engagement should benefit all potentially marginalised groups, including ones not specifically addressed in this brief.

Gender

Women and LGBTQ+ people typically suffer gender-specific impacts from business activity.¹ Women workers face high rates of gender-based discrimination, harassment, and violence at work with less stable contracts, lower pay and benefits, and reduced access to maternal health protections, training, and safety equipment. Women community members face gender-specific impacts from extractive and infrastructure projects such as greater displacement from land and natural resources, disrupted social status and educational access, and exposure to sexual violence, prostitution, and sexually-transmitted diseases.² LGBTQ+ people also suffer discrimination from MNEs and, along with women, face different and increased harms when they act as human rights defenders to defend their own or others' rights.³ Businesses also rarely take into account how women (and others) with intersecting identity traits subject to discrimination (e.g. race, caste, age, disability, etc.) may suffer impacts differently. Women and LGBTQ+ people also face unique barriers to accessing remedy via grievance mechanisms like NCPs.⁴

Indigenous Peoples

Indigenous Peoples remain among the world's most vulnerable, and they are disproportionately impacted by business activities on or near their territories.⁵ While Indigenous Peoples only form 5% of the world's population, they safeguard 80% of the earth's biodiversity and a great wealth of natural resources. Unfortunately, Indigenous Peoples territories are routinely exploited, sold, appropriated or polluted by companies that have not respected their rights to free, prior, and informed consent (FPIC), self-determination, culture, and other rights recognised under international law.⁶ Extractive industries such as minerals mining, oil and gas are often linked to degradation of Indigenous owned lands. The agriculture industry has also caused severe deforestation and destruction of Indigenous Peoples territories. Furthermore, Indigenous human rights defenders are at the frontline of advocacy to protest harmful development activities, and in their fight to protect their livelihoods and lands, many have been murdered or faced serious violence, intimidation, and denigration, adding to centuries of discrimination and marginalisation.⁵

Caste-based discrimination

Caste-based discrimination affects more than 260 million people worldwide, not only people in South Asia, but also in Africa, Asia, the Middle East, the Pacific, and in diaspora communities in countries such as the UK and US.⁷ Caste-discrimination affects workers in all sectors, including especially the agriculture, leather, garments, carpet weaving, natural stone, mineral processing, and construction sectors, as well as industrial sectors like the IT sector. Many MNEs discriminate against people of



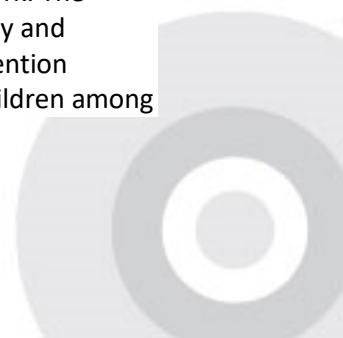
low-caste through their suppliers⁸ by engaging low-caste people as forced labourers or paying them less than minimum wage; not supporting low-caste workers to collectively organise or participate in trade unions; disproportionately tasking low-caste workers with more dangerous, dirty, and unhealthy tasks; failing to ensure equal representation of low-caste people in management; and tolerating caste-based harassment and bullying in the workplace while creating caste-segregated work stations, eating and drinking places, and hostel facilities.

Children

Children are among the most vulnerable members of society, and can be disproportionately impacted by the activities of MNEs. Child labour is one of the most harmful impacts of corporations on children that generates most attention. Child labour is often invisible, as children are obliged to work to help parents fulfil unreasonable quotas at plantations or factories, or make ends meet on small-scale farms. According to 2017 data of the ILO, 64 million girls work as child labourers, 71% in the agriculture sector.⁹ Meanwhile, in 2019 the ILO reported that 1 million children are engaged in child labour in mines and quarries.¹⁰ Yet beyond child labour, children's rights can also be impacted by MNEs in many other ways. For example, environmental damage from infrastructure, agriculture, or extractive projects can impact children's health differently and worse than the health of other communities members; sale of certain goods and services can be especially harmful to the well-being of child consumers; and children's development can be harmed indirectly through their dependence on adult workers whose own capacity for child-rearing – or maternal health (impinging foetal health) – is hindered by unfair or illegal labour practices.¹¹ Children are often more vulnerable to these impacts than adults, due both to the malleable state of their physical, mental, and emotional development, and to the longer time the impacts will affect them (for example, their futures are impacted even longer than adult futures from forced evictions after land acquisitions).¹² Children are also routinely left out of stakeholder engagement activities, meaning both that impacts they experience may be unaddressed, and that their perspectives are not considered in shaping more responsible business practices.

Guidelines gaps

Despite the different and disproportionate impacts MNEs have on **women and LGBTQ+ people**, the Guidelines do not use the word “gender” at all and only mention “women” three times. The scant and narrow coverage of women leave out many important considerations MNEs should take into account about how their activities can adversely impact women & LGBTQ+ people. Similarly, while the Guidelines mention that MNEs should respect the rights of **Indigenous Peoples** outlined in other international conventions, they do not specifically acknowledge key rights like the rights to self-determination and free, prior and informed consent, nor identify the special care MNEs must take in due diligence to identify particular impacts to Indigenous Peoples, avoid impacts, and ensure complete and appropriate remedy for impacts not avoided. In the same manner, the Guidelines do not specifically include¹³ **people of low-caste** among those disadvantaged or marginalised people with whom MNEs should take special care during due diligence. The lack of specific mention of “caste discrimination” contributes to the invisibility of this stigmatized issue and group. Meanwhile, while the Guidelines call on MNEs to contribute to abolishing **child** labour, they do not give meaningful guidance on how child labour may creep unsuspected into MNE supply chains and how MNEs should address this by changing practices that inadvertently cause children to be pulled in to work. The Guidelines also do not emphasize how children as community members may be adversely and differently impacted, even when they are not engaged in child labour. The Guidelines mention children's rights among other rights protected by UN instruments, but do not identify children among



vulnerable groups particularly critical to consult through stakeholder engagement. The Guidelines also highlight children as consumers, without underscoring the particular protections children may need from harmful products and services.

Impact of the problem: Lack of clear standards on addressing impacts on marginalised and disadvantaged groups for MNEs and limited access to remedy for impacted people.

The gaps in the OECD Guidelines text on impacts on marginalised and disadvantaged groups have two main consequences:

- 1) A lack of specificity and completeness in norms and expectations for MNEs regarding addressing impacts to these marginalised and disadvantaged groups;
 - a. Without clear global standards regarding the particular care needed to identify and address risks and impacts to disadvantaged and marginalised groups in MNE supply chains, at present, few MNE due diligence policies and practices address such impacts in particular; and
- 2) Diminished grounds on which to seek remedy via the National Contact Point (NCP) grievance mechanisms:
 - a. Gender: Women and LGBTQ+ people have to rely on catch-all provisions – primarily requiring MNEs to respect human rights in general – to raise complaints under the current provisions. This may limit the number and kind of NCP complaints that can be filed addressing gender issues. Just 13 NGO- or community-led complaints have specifically addressed impacts on women, while none have addressed impacts on LGBTQ+ people.¹⁴ Many of the 13 address labour rights, likely because the Guidelines more explicitly address women in the Employment and Industrial Relations Chapter.¹⁵ But as of 2020, a number of complaints are attempting to highlight impacts on women in communities;¹⁶ highlighting the need for more guidance there;
 - b. Indigenous peoples: At least a tenth of NGO- and community-led complaints concern impacts to Indigenous Peoples, 72% of which also address environmental impacts, underscoring the relation between Indigenous rights and environmental protection.¹⁷
 - c. Caste: One complaint has explicitly highlighted impacts on Dalit workers.¹⁸
 - d. Children: Children are a focus in 23% of complaints, indicating the need for clearer language on this issue in the Guidelines.

Parallel laws and standards

The OECD Guidelines are falling behind other laws and standards that recognise marginalised and disadvantaged groups more prominently. The stocktaking of gaps in the Guidelines could consider the following conventions, standards and guidelines in general:

- UN conventions such as the Universal Declaration of Human Rights and the Convention on the Elimination of All Forms of Racial Discrimination as well as conventions of the International Labour Organisation;
- The Sustainable Development Goals¹⁹ and the UN Guiding Principles;
- The OECD due diligence guidance, which in some cases better reflect discrimination challenges, as well as ways to address them;
- Regional-level guidance such as the European Parliament’s Annual Human Rights Report and the EU Human Rights Guidelines on Non-Discrimination in External Action;
- Industry standards such as the ISO 26000, which address discrimination on various issues, including on the basis of “descent, including caste;”²⁰



The stocktaking of gaps in the Guidelines could also consider the following conventions, standards and guidelines in relation to each marginalised or disadvantaged group discussed in this brief:

Women and LGBTQ+ people

- International conventions and declarations that explicitly address gender issues, such as the Convention on the Elimination of All Forms of Discrimination against Women,²¹ Women's Empowerment Principles,²² Voluntary Guidelines on the Responsible Governance of Tenure,²³ International Labour Organisation conventions, and various UN Resolutions on sexual orientation and gender identity;²⁴
- Several OECD due diligence guidance papers; for example, the OECD's multisector Due Diligence Guidance for Responsible Business Conduct, which includes general advice on applying a gender lens to due diligence, and the sector-level guidance, many of which provide more detailed explanation of the gendered impacts of business activities;²⁵ and
- The IFC Performance Standards, which include more provisions relating to women than do the OECD Guidelines, such as on good practice during consultation and resettlement.²⁶

Indigenous Peoples

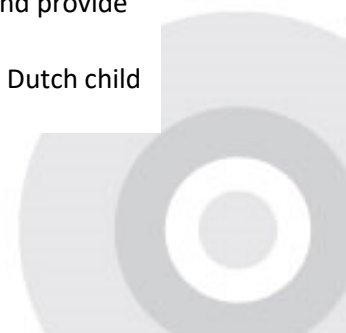
- The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)²⁷ and the United Nations Indigenous and Tribal Peoples Convention (No. 169);²⁸
- National and regional laws protecting the rights of Indigenous Peoples; and
- Guidance from various non-governmental organisations on the threats Indigenous Peoples face and the steps and processes needed from MNEs to respect their rights.

Caste discrimination

- International guides and statements on the subject of caste published by the UN Special Procedures and the UN Treaty bodies (including in relation to states' Universal Periodic Reviews), as well as the OHCHR's comprehensive 2017 "*Guidance Tool on Descent-Based Discrimination: Key Challenges and Strategic Approaches to Combat Caste-Based and Analogous Forms of Discrimination.*"²⁹ The tool is meant to support UN country teams, agencies and other stakeholders in combatting caste-based discrimination;
- Principles and guidance from civil society, such as the *Ambedkar Principles: Principles and Guidelines to Address Caste Discrimination in the Private Sector*³⁰ published by the International Dalit Solidarity Network (IDSN), and *The Dalit Discrimination Check* created by the Danish Institute for Human Rights and IDSN;³¹ and
- Industry and multistakeholder initiatives including *ETI's Base Code guidance on Caste in Global Supply Chains*;³² the *Amfori BSCI code of conduct*,³³ and the *Rainforest Alliance Guidance*,³⁴ which all address caste specifically.

Children

- The United Nations Convention on the Rights of the Child, which sets out the civil, political, economic, social and cultural rights of every child, regardless of their race, religion or abilities;³⁵
- The Children's Rights and Business Principles (CRBPs) that are based on the UNGPs and provide an operational framework for businesses to respect children's rights;³⁶ and
- National laws addressing due diligence over child labour in supply chains, such as the Dutch child labour due diligence law.³⁷



Why ensuring a comprehensive stocktaking on gaps is important

The OECD Guidelines, originally drafted in 1976, have not been revised since 2011 and are out of date in many ways. Ten years of implementation of the current text of the Guidelines have revealed numerous gaps in the text that cause both a serious lack of clarity and coherence in international norms on key elements of responsible business conduct, and diminish victims' chances for remedy and accountability via the NCPs. Meanwhile, recent developments in RBC standards made beyond the OECD Investment Committee are threatening to make the OECD Guidelines comparatively less useful or even obsolete. The OECD Investment Committee's Working Party on Responsible Business Conduct (WPRBC), responsible for the OECD Guidelines, has begun a stocktaking to identify what gaps exist in the Guidelines and assess whether steps are needed to address them. A comprehensive stocktaking that addresses all the gaps identified by civil society and other stakeholders is essential to evaluate whether the Guidelines are still fit for purpose.

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OECD Watch urges governments to show commitment to keeping the OECD Guidelines up to date with evolving issues in the field of business and human rights – and acknowledge civil society's concerns regarding the current limitations in the Guidelines' standards and the NCP complaint system – by ensuring that the stocktaking studies all the issues of concern to civil society. OECD Watch also urges that states ensure the final stocktaking report responds to each concern raised by civil society. OECD Watch welcomes the stocktaking and stands ready to support the review process and any further steps taken to address gaps identified.

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¹ UNEPFI Human Rights Guidance Tool for the Financial Sector, Oil and Gas Tab, available at <https://www.unepfi.org/humanrightstoolkit/oil.php> (last accessed 14th November 2020).



² See, e.g., The Danish Institute for Human Rights, 2019, “Towards gender responsive implementation of extractive industry practices”, https://www.humanrights.dk/sites/humanrights.dk/files/media/dokumenter/udgivelser/hrb_2019/gender_and_extractives_report_sept2019.pdf (September 2019).

³ For further on particular harms women defenders face, see, e.g. OHCHR, Information series on sexual and reproductive health and rights, “Women Human Rights Defenders,” Updated 2020, available at: https://www.ohchr.org/documents/issues/women/wrgs/sexualhealth/info_whrd_web.pdf.

⁴ See, e.g. UN Committee on Elimination of All Forms of Discrimination Against Women, “General recommendations on women’s access to justice,” CEDAW/C/GC/33, 23 July 2015, available at: https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/CEDAW_C_GC_33_7767_E.pdf.

⁵ Indigenous Peoples Indigenous Voices fact sheet. Available at: https://www.un.org/esa/socdev/unpfii/documents/PFII8_FS3.pdf

⁶ Amnesty International, Indigenous Peoples. Available at: <https://www.amnesty.org/en/what-we-do/indigenous-peoples/#:~:text=There%20are%20370%20million%20Indigenous,5%25%20of%20the%20world's%20population.>

⁷ See, e.g., Nitasha Tiku, THE WASHINGTON POST, “India’s engineers have thrived in Silicon Valley. So has its caste system,” 28 October 2020, available at: <https://www.washingtonpost.com/technology/2020/10/27/indian-caste-bias-silicon-valley/>.

⁸ See Mind the Gap, ‘Outsourcing recruitment and employment’ (2020) available at: <https://www.mindthegap.ngo/harmful-strategies/constructing-deniability/outsourcing-recruitment-and-employment/>

⁹ ILO, *Global Estimates of Child Labour*, 2017, available at:

https://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/documents/publication/wcms_575499.pdf.

¹⁰ ILO, *Child labour in mining and global supply chains*, May 2019, available at: https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---ilo-manila/documents/publication/wcms_720743.pdf.

¹¹ Children’s Rights and Business Atlas. Available at: <https://www.childrensrightsatlas.org/about/>

¹² Bail, Juliette (2020), Humanium. <https://www.humanium.org/en/where-do-childrens-rights-stand-in-the-business-world/>

¹³ While the OECD Guidelines mention the term “social origin,” which can cover caste, the lack of explicit mention of caste perpetuates the lack of visibility of this form of discrimination.

¹⁴ Only 12 complaints in OECD Watch’s complaint database reflect claims about unique adverse business impacts to women, see https://complaints.oecdwatch.org/@search?b_start:int=0&SearchableText=women.

¹⁵ See, e.g., *ECCHR vs. TÜV Rheinland AG*, available at https://complaints.oecdwatch.org/cases/Case_509.

¹⁶ See, e.g., *Public Eye et al. vs. Syngenta*, available at: https://complaints.oecdwatch.org/cases/Case_574, *RAID et al. vs. Glencore UK*, available at: https://complaints.oecdwatch.org/cases/Case_571, *Indigenous Women and Divest, Invest, Protect vs. Credit Suisse*, available at: https://complaints.oecdwatch.org/cases/Case_565, and *LSD et al. vs. Tosyali Holding Ltd*, available at: https://complaints.oecdwatch.org/cases/Case_573.

¹⁷ OECD Watch complaint database, Indigenous Peoples complaints, available at: https://www.oecdwatch.org/complaints-database/?fwp_search_complaints=indigenous.

¹⁸ CCFD et al. vs. Michelin, available at: <https://www.oecdwatch.org/complaint/ccfd-et-al-vs-michelin/>.

¹⁹ Sustainable Development Goals (2015), para.3, para 74(e); Goal 5, Goal 10.

²⁰ ISO 26000, 2010, available at: https://lastradainternational.org/lisdocs/3078-ISO%2026000_2010.pdf.

²¹ Convention on the Elimination of All Forms of Discrimination Against Women (1981), General Recommendation No. 28(2010), para 19; No. 34(2016), para. 11.

²² UN Global Compact and UN Women, *Women’s Empowerment Principles*, available at: <https://www.weeps.org/>.

²³ Food and Agriculture Organisation, *The Voluntary Guidelines on the Responsible Governance of Tenure* (2011), available at: <http://www.fao.org/policy-support/mechanisms/mechanisms-details/en/c/448858/>.

²⁴ OHCHR, United Nations Resolutions – Sexual orientation and gender identity, available at: <https://www.ohchr.org/en/issues/discrimination/pages/lgbtunresolutions.aspx>.

²⁵ OECD 2018 Multisector Due Diligence Guidance (pp 17, 41, 51); OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector (pg 47-48, 100-102); OECD-FAO Guidance for Responsible Agricultural Supply Chains (Ch 2-3); OECD Due Diligence for Responsible Supply Chains in the Garment and Footwear Sector (s2).

²⁶ IFC Performance Standards 1-2.

²⁷ United Nations Declaration on the Rights of Indigenous Peoples, available at:

https://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf

²⁸ UN Indigenous and Tribal Peoples Convention No. 169, available at: https://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.16_Indigenous%20and%20Tribal%20Peoples%20Convention.pdf.

²⁹ UN Guidance Tool on Descent Based Discrimination, available at: <https://idsn.org/un-2/un-guidance-tool-descent-based-discrimination/>.

³⁰ International Dalit Solidarity Network, Ambedkar Principles, available at: <https://idsn.org/key-issues/caste-business/ambedkar-principles/>.

³¹ International Dalit Solidarity Network, Dalit Discrimination Check, available at: https://idsn.org/uploads/media/Dalit_Discrimination_Check.pdf.

³² Ethical Trading Initiative, Base Code Guidance: Caste in global supply chains, available at: <https://www.ethicaltrade.org/resources/base-code-guidance-caste-global-supply-chains>.

³³ Amfori BSCI, Code of Conduct, available at: <https://www.amfori.org/content/bsci-code-conduct>.

³⁴ Rainforest Alliance, Annex 6 Draft Guidance Assess and Address Approach, available at: <https://www.rainforest-alliance.org/>.

³⁵ United Nations Convention on the Rights of the Child, available at: <https://www.savethechildren.org.uk/what-we-do/childrens-rights/united-nations-convention-of-the-rights-of-the-child>.

³⁶ The Children’s Rights and Business Principles, available at: <https://childrenandbusiness.org/>.

³⁷ See MVO Platform, “Frequently asked questions about the new Dutch Child Labour Due Diligence Law,” available at: <https://www.mvoplatform.nl/en/frequently-asked-questions-about-the-new-dutch-child-labour-due-diligence-law/>.

Identified gap in the OECD Guidelines: human rights defenders and reprisals

Outcome sought: Broad and comprehensive stocktaking of the OECD Guidelines for Multinational Enterprises (Guidelines) that addresses gaps on prevention and mitigation of harm to human rights defenders, including during the specific instance process.

Problem: The OECD Guidelines do not set standards for business on avoidance of harm to human rights defenders, nor guidance for NCPs on how to respond to reprisal risks connected to the specific instance process

Human rights defenders (defenders) – any person or group peacefully working to promote and protect human rights, including journalists and whistle-blowers inside MNEs – contribute greatly to safeguarding human rights. Unfortunately, since 2015 more than 2,200 killings, beatings, threats, strategic lawsuits against public participation (SLAPPs), stigmatization, suspension of fundamental freedoms, legal restrictions and other attacks intended to obstruct defenders’ actions have been tracked.¹ The number of attacks has increased in recent years, demonstrating heightened risk to defenders in a context of shrinking civil society space.

Many of these attacks are made against defenders working to protect human rights from MNE misconduct. Sometimes businesses do not solicit attacks but are connected to them by remaining silent when economic or government partners harm or denigrate defenders in the name of development. Businesses also cause or contribute to harm to defenders directly, such as by firing workers for protesting, bringing SLAPP suits against activists, hiring abusive security firms to intimidate communities, detaining or attacking journalists reporting on MNE conduct, abusing digital surveillance to harm defenders, cancelling the financial accounts of defenders or their affiliates, or requesting unnecessary armed protection from state forces.²

Defenders fighting the harmful impacts of business activity often rely on non-judicial grievance mechanisms such as NCPs as an avenue to seek justice. Unfortunately, OECD Watch research shows great risk of reprisal for defenders who engage with the specific instance process. A full 25% of complaints filed to NCPs by communities and NGOs involve harms against defenders, either harms highlighted in the complaint text itself, happening alongside the complaint, or even occurring as a result of the complaint.³ The risk is greatest for marginalized or isolated defenders such as indigenous peoples, women, LGBTQ+ members, and those who are rural and remotely located.

Despite the importance of the work of defenders and their vulnerability to threats from businesses, including during NCP complaints, the OECD Guidelines – the preeminent standard for businesses in all sectors on responsible business conduct (RBC) – do not mention the issue. Regarding setting standards for businesses, neither Chapter II on General Policies, nor Chapter IV on Human Rights, nor any other chapter defines a “human rights defender” and addresses the growing threat to defenders and the nexus with activism against harmful business activity. Critically, the Guidelines set no expectations for MNEs to prevent, mitigate, and remedy impacts to defenders, including impacts directly linked to them through business relationships, and impacts MNEs cause or contribute to. The Guidelines do not call for MNEs to avoid and use leverage to discourage and try to prevent attacks being carried out for the benefit of MNEs by business partners including states. They also do not clarify that fulfilling their responsibility to respect human rights means respecting (making space for) defenders’ right to free speech against the business activity.



The OECD Guidelines also do not provide guidance to NCPs on the steps they should take to discourage and respond to allegations or occurrence of reprisals in connection with specific instances. While other non-judicial grievance mechanisms are adopting steps to prevent reprisals, without guidance in the Guidelines, almost no NCPs have a policy to address reprisal risks for complainants and their affiliates. OECD Watch's experience shows that while threats to defenders have been raised implicitly or explicitly in a quarter of all community-led complaints, NCPs generally do not know how to respond effectively, and are indeed hesitant to respond at all for fear of worsening the situation.

Impact of the problem: Lack of clear standards for MNEs on respecting the rights of human rights defenders, and lack of guidance for NCPs on addressing defender harms, resulting in a less secure path to remedy for complainants

The total lack of standards for MNEs in the Guidelines on human rights defenders and guidance for NCPs on addressing risks to defenders connected to the specific instance process generates two impacts:

- 1) Lack of understanding by MNEs on expectations for them to prevent, mitigate, and remedy impacts to defenders resulting from their own or business partners' (including states') actions; and
- 2) A more dangerous path for remedy for defenders seeking justice via the OECD specific instance process.
 - a. A large number of recent NCP complaints exhibit the heightened risk for defenders who engage with the specific instance process, sometimes involving deaths,⁴ threats or intimidation,⁵ SLAPP suits,⁶ or unfair dismissal.⁷

Parallel laws and standards

Analysis of gaps related to human rights defenders in Part I of OECD Guidelines could consider parallel language in various other international agreements, national laws, industry standards, and civil society guidance such as:

- International standards and declarations, including the UN Declaration on Human Rights Defenders established by the Special Rapporteur on defenders⁸ that promotes for defenders rights existing in the ICCPR and the UDHR, and the ILO standards;⁹
- Regional standards, including the EU Declarations and Guidelines on Human Rights Defenders and OSCE's Guidelines on the Protection of Human Rights Defenders¹⁰;
- National laws and guidance, including of Norway¹¹ and Canada;¹² and
- Civil society guidance and support, including from the Business & Human Rights Resource Centre's Guidance for Companies,¹³ the 2018 Human Rights Defenders World Summit's Action Plan,¹⁴ and guidance from organisations such as ProtectDefendersEU, the FIDH Observatory for the Protection of Human Rights Defenders, Frontline Defenders, and AfricanDefenders.

Analysis of gaps related to human rights defenders in Part II of OECD Guidelines could consider good practices employed by other grievance mechanisms, such as:

- The UN Human Rights Office, which has developed a system-wide approach to reprisals, including those against defenders filing complaints to the UN treaty bodies and other mechanisms;¹⁵
- The Independent Accountability Mechanisms for the development finance institutions, several of which (such as the mechanism of the Inter-American Development Bank¹⁶ and the mechanism of



the International Finance Corporation¹⁷) have developed and implemented practical internal guidance on responding to reprisals against complainants or their affiliates.

Why ensuring a comprehensive stocktaking on gaps is important

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¹ Investor Alliance for Human Rights, BHRRC & ISHR, 2020, Safeguarding Human Rights Defenders, Practical Guidance for Investors (2020), [https://media.business-](https://media.business-humanrights.org/media/documents/files/Safeguarding_Human_Rights_Defenders_Practical_Guidance_for_Investors_FINAL.pdf)

[humanrights.org/media/documents/files/Safeguarding_Human_Rights_Defenders_Practical_Guidance_for_Investors_FINAL.pdf](https://media.business-humanrights.org/media/documents/files/Safeguarding_Human_Rights_Defenders_Practical_Guidance_for_Investors_FINAL.pdf)

² For further on company strategies to undermine and silence human rights defenders, see Mind the Gap, “Undermining defenders and communities,” available at: <https://www.mindthegap.ngo/harmful-strategies/undermining-defenders-communities/>.

³ OECD Watch, “Use with Caution: The role of the OECD National Contact Points in protecting human rights defenders,” (June 2019), available at: <https://www.oecdwatch.org/wp-content/uploads/sites/8/2019/06/Reprisals-NCP-system.pdf>.

⁴ See, for example *FIDH et al vs. CRCC Tongguan Investment* at https://complaints.oecdwatch.org/cases/Case_301 and *Leaders of Paguyuban UKPWR vs. ITOCHU* at https://complaints.oecdwatch.org/cases/Case_210.

⁵ See, for example, *Society for Threatened Peoples vs. Credit Suisse* at https://complaints.oecdwatch.org/cases/Case_475 and *Adimed vs. Pharmaking, S.A.* at https://complaints.oecdwatch.org/cases/Case_538.

⁶ See, for example, *Bruno Manser Fund vs. Sakto* at https://complaints.oecdwatch.org/cases/Case_471 and *CCC and ICN vs. G-Star* at https://complaints.oecdwatch.org/cases/Case_109.

⁷ See, for example, *Swedwatch vs. Electrolux* at https://complaints.oecdwatch.org/cases/Case_289 and *Swedwatch vs. Mölnlycke* at https://complaints.oecdwatch.org/cases/Case_290.

⁸ OHCHR, General Assembly Resolution A/RES/53/144, 8th March, 1999. Available at: <https://www.ohchr.org/Documents/Issues/Defenders/Declaration/declaration.pdf>

⁹ See, for example. ILO Convention No. 87, Art 10; No 1.35, Art 1.

¹⁰ Organisation for Security and Co-operation in Europe, “Guidelines on the Protection of Human Rights Defenders,” available at: <https://www.osce.org/odihr/guidelines-on-the-protection-of-human-rights-defenders>.

¹¹ Norwegian Government, Human Rights Defenders, October 2020, https://www.regjeringen.no/en/topics/foreign-affairs/human-rights/nv-struktur/rights_defenders/id2339808/

¹² Canadian Government, Voices at Risk, Canada’s Guidelines on Supporting Human Rights Defenders, https://www.international.gc.ca/world-monde/issues_development-enjeux_developpement/human_rights-droits_homme/rights_defenders_guide_defenseurs_droits.aspx?lang=eng

¹³ BHRRC & ISHR, Shared Space Under Pressure: Business Support for Civil Freedoms and Human Rights Defenders, (August 2018), available at: <https://media.business-humanrights.org/media/documents/fdfe07e3d812cfcfed4235fbbf820a3d77599b13.pdf>

¹⁴ HRD World Summit 2018 Action Plan, Available at: https://hrdworldsummit.org/wp-content/uploads/2018/12/EN_Action-Plan-2.pdf

¹⁵ OHCHR, *Training Manual on Human Rights Monitoring* (New York and Geneva, 2001); OHCHR (2015), *Commissions of Inquiry and Fact-finding Missions on International Human Rights and Humanitarian Law: Guidance and Practice* (New York and Geneva, 2015), pp. 74–78.

¹⁶ Independent Consultant and Investigation Mechanism, Guide for Independent Accountability Mechanisms on Measures to Address the Risk of Reprisals in Complaint Management: A practical Toolkit, Inter-American Development Bank, January 2019,

¹⁷ International Finance Corporation Compliance Advisor Ombudsman, CAO Approach to Responding to Concerns of Threats and Incidents of Reprisals in CAO Operations (n.d.) Available at: <http://www.cao-ombudsman.org/documents/CAO-Reprisals-web.pdf>

Identified gap in the OECD Guidelines: environment & climate change

Outcome sought: Broad and comprehensive stocktaking of the OECD Guidelines for Multinational Enterprises (Guidelines) that addresses gaps on the environment and climate change.

Problem: The OECD Guidelines do not set adequate expectations for MNEs on avoiding harmful impacts to the environment and contribution to climate change

Environmental destruction and climate change have caused devastating effects including significant biodiversity loss, with a recent report finding that the global wildlife population has reduced by two-thirds over the last 50 years.¹ Climate change and environmental destruction also threaten the effective enjoyment of numerous human rights, including the rights to life, water and sanitation, food, health, housing, self-determination, culture, and development.² MNEs are responsible for almost a fifth of climate-changing carbon emissions,³ particularly those operating in the pollution-intensive agriculture, transport, extractive, manufacturing, and apparel sectors. Scientists have called on society to enact transformative policy to meet the 1.5 degree global warming target set in the Paris Climate Agreement and avoid the real threat of over 1 million more species becoming extinct in coming decades.⁴ Given the recognition of MNEs damaging impacts on climate and environmental degradation, it is widely acknowledged that such transformative changes must affect MNEs, too.

Despite the importance of the environment and its vulnerability to harmful business impacts, the OECD Guidelines – the pre-eminent standard for businesses in all sectors on responsible business conduct (RBC) – do not adequately clarify expectations for MNEs around avoidance of adverse environmental harm. Unlike the Human Rights chapter (IV), the Environment chapter (VI) does not impose clear expectations on MNEs to prevent, mitigate, and remedy harm to the environment and protect biodiversity in all its forms. The chapter does not identify the leading types of harmful environmental impacts MNEs should avoid, including: contribution to climate change; deforestation including especially of native forests; destruction of biodiversity; pollution of water, land, and air; harmful use of pesticides and fertilizers; overuse of water; destruction of UNESCO World Heritage sites and other protected areas; development of genetically modified foods; impacts from fossil fuel extraction; and others. Instead, it calls in positive terms for MNEs to implement environmental management processes, continually improve their environmental performance, and train workers, etc. The current framing makes it difficult to hold MNEs accountable for their actual adverse environmental impacts. The Environment chapter also no longer reflects current expectations for MNEs to reduce GHG emissions under the Paris Agreement, and it does not clarify how responsibility might be attributed to the financial and investment sectors for funding projects that have significant climate impacts. Chapter VI does not reflect the close nexus between avoidance of environmental impacts and respect for human rights by MNEs. The chapter does not call on MNEs to avoid political lobbying aimed at lowering environmental standards and regulations. Also absent in the Guidelines is a clear mandate for MNEs to avoid causing or being complicit in harms to environmental defenders.

Impact of the problem: Lack of clear standards for MNEs on respecting the environment and lack of remedy for impacted rightsholders

The gaps in the OECD Guidelines on the environment have two main consequences:

- 1) A lack of clarity in norms and expectations for MNEs regarding respecting the environment and avoiding contribution to climate change; and
- 2) Diminished grounds on which to seek remedy via the National Contact Point (NCP) grievance mechanism and less predictability of complaint outcomes.

- a. OECD Watch's experience with NCP complaints shows that it is difficult to apply the current Guidelines' text to seek accountability for MNEs' failures to prevent, mitigate, and remediate environmental impacts. Many environment and climate change-related cases demonstrate that there is a lack of clarity regarding exactly how environmental/climate standards and expectations apply to MNEs, what the disclosure requirements are for MNEs' total GHG emissions, and what information must be provided to consumers to enable informed decision-making based on MNEs' environment/climate impacts.
- b. NCP complaints concerning MNEs' contributions to climate change are increasing. Since 2017, six complaints have sought to clarify MNEs' responsibilities to report on and reduce their GHG emissions. The increase shows greater need for standards and accountability on the issue and does not confirm that all NCPs would accept claims related to climate change.

Parallel laws and standards

The stocktaking on gaps in the OECD Guidelines on the environment and climate change could consider developments in the following standards and guidelines:

- International environmental agreements, including the Global Pact for the Environment (currently under negotiation), Paris Agreement, and Katowice Climate Package. The latter recognise the important role of the private sector in reducing GHG emissions.
- Draft international agreements, namely the Second Revised Draft of the Binding Treaty on the Activities of Transnational Corporations and Other Business Enterprises (2020, which includes environmental harms in the definition of 'human rights abuse', requires MNEs to undertake environmental and human rights due diligence, and requires reporting on environmental standards in MNEs' operations and business relationships.
- Several OECD due diligence guidance papers; for example, the OECD's multisector Due Diligence Guidance for Responsible Business Conduct, the OECD-FAO Guidance for Responsible Agricultural Supply Chains, and OECD Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector, which refer to measuring, reducing, and reporting of GHG emissions.
- Industry standards, including the Greenhouse Gas Protocol (an international standard for the corporate accounting and reporting of GHG emissions) and the International Finance Corporation's (IFC) Performance Standards (PS). IFC PS 1, 3 and 4 require companies to identify their environmental impacts and implement alternatives to reduce their GHG emissions.

Why ensuring a comprehensive stocktaking on gaps is important

The OECD Guidelines, originally drafted in 1976, have not been revised since 2011 and are out of date in many ways. Ten years of implementation of the current text of the Guidelines have revealed numerous gaps in the text that cause both a serious lack of clarity and coherence in international norms on key elements of responsible business conduct, and diminish victims' chances for remedy and accountability via the NCPs. Meanwhile, recent developments in RBC standards made beyond the OECD Investment Committee are threatening to make the OECD Guidelines comparatively less useful or even obsolete. The OECD Investment Committee's Working Party on Responsible Business Conduct (WPRBC), responsible for the OECD Guidelines, has begun a stocktaking to identify what gaps exist in the Guidelines and assess whether steps are needed to address them. A comprehensive stocktaking that addresses all the gaps identified by civil society and other stakeholders is essential to evaluate whether the Guidelines are still fit for purpose.

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OECD Watch urges governments to show commitment to keeping the OECD Guidelines up to date with evolving issues in the field of business and human rights – and acknowledge civil society’s concerns regarding the current limitations in the Guidelines’ standards and the NCP complaint system – by ensuring that the stocktaking studies all the issues of concern to civil society. OECD Watch also urges that states ensure the final stocktaking report responds to each concern raised by civil society. OECD Watch welcomes the stocktaking and stands ready to support the review process and any further steps taken to address gaps identified.

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¹ WWF, (2020), Living Planet Report 2020 - Bending the curve of biodiversity loss. Almond, R.E.A., Grooten M. and Petersen, T. (Eds). WWF, Gland, Switzerland.

² Office of the United Nations High Commissioner for Human Rights, ‘OHCHR and climate change’, available at: <https://www.ohchr.org/en/issues/hrandclimatechange/pages/hrclimatechangeindex.aspx#:~:text=States%20have%20a%20human%20rights,enjoy%20lives%20of%20human%20dignity>.

³ Zhang, Z., Guan, D., Wang, R. *et al.* (2020), Embodied carbon emissions in the supply chains of multinational enterprises. *Nature Climate Change*, **10**, 1096–1101.



⁴ Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services, (2019), Global Assessment Report on Biodiversity and Ecosystem Services, available at: <https://www.un.org/sustainabledevelopment/blog/2019/05/nature-decline-unprecedented-report/>



Identified gap in the OECD Guidelines: land rights

Outcome sought: Broad and comprehensive stocktaking of the OECD Guidelines for Multinational Enterprises (Guidelines) that addresses gaps on land rights.

Problem: The OECD Guidelines do not adequately establish expectations for MNEs to respect land rights, including as a prerequisite to respecting other human rights.

Land security and land rights – including free prior and informed consent (FPIC) for indigenous peoples, tenure rights for customary, communal, and collective tenure holders, and women’s land rights – are closely linked to the overall social and economic well-being of communities. Land security also underpins access to other internationally recognised human rights, such as rights to housing, food and freedom from hunger, health, and security of person.¹ Unfortunately, land rights are particularly vulnerable to violation by MNEs, given the high number of MNEs operating in the land-intensive agriculture, extractive, and infrastructure sectors. Defenders of land rights, including indigenous peoples in particular, are among the most at risk of adverse impacts for their human rights advocacy.²

Despite the importance of land rights and their vulnerability to harmful business impacts, the OECD Guidelines – the preeminent standard for businesses in all sectors on responsible business conduct (RBC) – do not adequately address land rights. The OECD Guidelines do not mention land *rights* at all. The word “land” is mentioned only once in commentary to Chapter II (General Policies), explaining the particular utility of stakeholder engagement for projects involving intensive use of land or water. The Guidelines make no specific mention of FPIC, and may just indirectly cover FPIC through a reference in commentary to Chapter IV (Human Rights) to UN instruments elaborating on rights of indigenous peoples. The Guidelines do not emphasize how land security underpins numerous human rights, making respect for land security of all stakeholders with interest in the land a key step in MNEs’ respect for human rights overall. The Guidelines do not underscore the link between protecting land rights, particularly of Indigenous peoples, and preventing climate change. The Guidelines make no mention at all of the vulnerability of land rights of women, customary, communal, and collective tenure holders. They also do not clarify how MNEs should handle common difficult land related issues, such as their responsibility to respect land rights even when a state has failed to meet its own duty to protect land rights, rather than exploit the failure to their own benefit;³ their responsibility to do due diligence to identify and address overlapping historic claims to land (land legacy issues); and their responsibility to respect the land rights of individuals or communities who lack paper title.

Impact of the problem: Lack of clear standards on land for MNEs and remedy for impacted parties

The gap in the OECD Guidelines text on land results in two consequences:

- 1) Lack of clarity in norms and expectations for MNEs regarding respect for land rights; and
- 2) Diminished grounds on which victims of land dispossession may seek remedy via the National Contact Point (NCP) grievance mechanism and less predictability of complaint outcomes.
 - a. OECD Watch’s analysis of NCP complaints shows that many land-related cases exemplify poor respect of land rights by MNEs, including in relation to the issues mentioned above such as when land rights are communal or non-documented; when consent to land use is not given by indigenous or non-indigenous communities; or when there are conflicting historic claims to the land. Perhaps because there is no clarifying language in the Guidelines on these common land-related issues, NCPs

have also typically been unable to clarify the responsibilities of MNEs regarding land. For example: one complaint broke down over lack of clarity over an MNE's responsibility to respect land rights when a state fails to protect land rights;⁴ many complaints do not resolve failure by MNE's to adequately consult non-indigenous tenure holders;⁵ others show lack of clarity regarding responsibilities for MNEs to identify and address past land conflicts;⁶ and still others show misunderstanding by MNEs and NCPs alike about the necessity of showing paper documentation for communally-held lands.⁷ Critically, while some NCPs interpret the Guidelines to cover FPIC for indigenous,⁸ at least one has asserted that the 2011 text of the Guidelines does not cover FPIC.⁹ The diversity of land-related problems companies and communities are facing, and the lack of coherent and effective application of the Guidelines by NCPs to address them, show that new text is needed to clarify expectations on land rights for MNEs.

Parallel laws and standards

Aspects of the following international standards or guides on land could be useful in studying gaps on land rights in the OECD Guidelines:

- The Voluntary Guidelines on the Responsible Governance of Tenure, addressing the rights of legitimate tenure holders;¹⁰
- Several of the OECD due diligence guidance papers, addressing the importance of respect for FPIC and land rights of women and other disadvantaged groups;¹¹
- International conventions and declarations setting out rights of indigenous peoples, including on FPIC, such as the International Labour Organization's Indigenous and Tribal Peoples Convention No. 169 and the UN Declaration on the Rights of Indigenous Peoples.¹²
- The IFC Performance Standards on land and indigenous rights.¹³
- Various industry-level standards, such as in the mining, agriculture, and forestry sectors, some of which recognise FPIC as a good practice in all projects, whether or not indigenous peoples are impacted.¹⁴
- Interpretation by some courts and commissions (including especially in Africa such as ECOWAS and the African Commission) that FPIC is owed to all local communities that will be impacted by projects, not just indigenous communities.¹⁵

Why ensuring a comprehensive stocktaking on gaps is important

The OECD Guidelines, originally drafted in 1976, have not been revised since 2011 and are out of date in many ways. Ten years of implementation of the current text of the Guidelines have revealed numerous gaps in the text that cause both a serious lack of clarity and coherence in international norms on key elements of responsible business conduct, and diminish victims' chances for remedy and accountability via the NCPs. Meanwhile, recent developments in RBC standards made beyond the OECD Investment Committee are threatening to make the OECD Guidelines comparatively less useful or even obsolete. The OECD Investment Committee's Working Party on Responsible Business Conduct (WPRBC), responsible for the OECD Guidelines, has begun a stocktaking to identify what gaps exist in the Guidelines and assess whether steps are needed to address them. A comprehensive stocktaking that addresses all the gaps identified by civil society and other stakeholders is essential to evaluate whether the Guidelines are still fit for purpose.

Who needs to act?



OECD Watch urges governments to show commitment to keeping the OECD Guidelines up to date with evolving issues in the field of business and human rights – and acknowledge civil society’s concerns regarding the current limitations in the Guidelines’ standards and the NCP complaint system – by ensuring that the stocktaking studies all the issues of concern to civil society. OECD Watch also urges that states ensure the final stocktaking report responds to each concern raised by civil society. OECD Watch welcomes the stocktaking and stands ready to support the review process and any further steps taken to address gaps identified.

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¹ International Covenant on Economic, Cultural and Social Rights, Arts. 11, 12; International Covenant on Civil and Political Rights, Art. 9

² Frontline Defenders, “304 killed in 2019 defending land, indigenous rights,” <https://www.frontlinedefenders.org/en/news/304-killed-2019-defending-land-indigenous-rights>

³ See Mind the Gap, ‘Aligning with suppressive State institutions’ (2020) available at: <https://www.mindthegap.ngo/harmful-strategies/utilising-state-power/aligning-with-suppressive-state-institutions/>

⁴ See, e.g. *Survival Int’l vs. WWF*, available at: https://complaints.oecdwatch.org/cases/Case_457.

⁵ See, e.g. *Siemenpuu et al vs Pöyry Group*, available at https://complaints.oecdwatch.org/cases/Case_259.

⁶ See, e.g. *FIAN and Wake Up and Fight for Your Rights vs NKG*, available at https://complaints.oecdwatch.org/cases/Case_167.

⁷ See, e.g. *Paracuta vs. Kinross Gold Corporation 1*, available at https://complaints.oecdwatch.org/cases/Case_348.

⁸ See, e.g. *Framtiden I våre hender vs. Intex Resources*, available at: https://complaints.oecdwatch.org/cases/Case_164.

⁹ See, e.g. *FIDH et al vs. CRCC Tongguan Investment (Canada) Co., Ltd.*, available at: https://complaints.oecdwatch.org/cases/Case_301.

¹⁰ FAO, Voluntary Guidelines on the Responsible Governance of Tenure, <http://www.fao.org/3/a-i2801e.pdf>.

¹¹ OECD Due Diligence Guidance for Responsible Business Conduct; OECD-FAO Guidance for Responsible Agricultural Supply Chains; OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector.

¹² ILO Convention 169, Indigenous and Tribal People’s Convention, available at:

https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169; UN Declaration on the

Rights of Indigenous Peoples (2007), available at https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf.

¹³ IFC, Performance Standard 5 (Land Resettlement), and 7 (Indigenous Peoples), available at https://www.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_Site/Sustainability-At-IFC/Policies-Standards/Performance-Standards.

¹⁴ See, e.g. Initiative for Responsible Mining Assurance, Forest Stewardship Council Principles and Criteria, Bonsucro Production Standards.

¹⁵ See, e.g. Emily Greenspan, "Free, Prior, and Informed Consent in Africa: An emerging standard for extractive industry projects," Oxfam America Research Backgrounder series (2014): [www.oxfamamerica.org/publications/fpic-in-africa].



Identified gap in the OECD Guidelines: labour rights

Outcome sought: Broad and comprehensive stocktaking of the OECD Guidelines for Multinational Enterprises (Guidelines) that addresses gaps on labour rights.

Problem: The OECD Guidelines do not set clearer expectations for MNEs to respect labour rights across their supply chains

Labour rights are at risk around the world in all sectors and supply chains. Unions are under threat and unionization in decline as workers have been deprived of their rights to form unions and collectively bargain. According to data of the Trade Union Advisory Committee of the OECD (TUAC), 424 million workers work without bargained workplace standards, and 18 million fewer workers are covered by collective bargaining agreements today than were covered in 2011.¹ MNEs frequently undermine freedom of association by firing or otherwise persecuting existing or potential union members and leaders, or by forming company-controlled unions. While it is already a labour rights abuse for MNEs to obstruct unionisation, this is also an observed strategy of MNEs to avoid the realisation of other labour rights.¹ Meanwhile, in 2020 the ILO documented² that two billion workers worldwide are informally employed, typically working in vulnerable positions with lower pay and scant access to social protections or rights at work. Over 630 million workers around the world live in extreme or moderate poverty, while a full 40 million people work in conditions of modern slavery and 152 million are in child labour.³ Severe wage and employment inequalities persist across geography, gender, and age lines, though the adverse impacts are felt more prominently by vulnerable groups such as workers in developing countries, women, and workers who are not unionized. Moreover, increased automation and digitalization of work, along with natural disasters such as climate change and the global Covid-19 pandemic, have exposed how systemically MNEs' unfair purchasing practices exacerbate impacts against already-strained workers, and show that guidance is needed to help MNEs anticipate and address impacts from such phenomena.

Chapter V of the OECD Guidelines on Employment and Industrial Relations seeks to protect the rights of workers by setting out expectations for MNEs to, for example, respect workers' rights and contribute to the elimination of child and forced labour. Chapter V presently sets a basic floor for labour rights, and a key priority of civil society and trade unions is to strengthen implementation of the chapter as it currently exists. Beyond implementation, however, the existing text also lacks focus on several key topics. The text does not adequately emphasize due diligence over labour rights impacts in MNE supply chains: currently, the term "supply chain" or, better, "value chain" does not appear in the principles of Chapter V, and several of the principles are directed too narrowly towards MNEs' "own operations" or conduct regarding their own employees. While language in Chapter II on supply chain due diligence applies to Chapter V, the lack of precise articulation between Chapters II and V creates confusion and a strategic gap. The Employment and Industrial Relations chapter does not discourage MNEs' mistaken reliance on auditors to fulfill a company's own due diligence requirements. The chapter does not mention a "living wage" and require support of collectively bargained wages that meet or exceed a liveable wage regardless of government policies or competitor practice, including by ensuring MNE purchasing practices allow them to pay a living wage. The chapter does not establish appropriate procedures for responsible disengagement/exit, including when exit results from economic and health crises such as global pandemics, from digitalisation and/or automation, and from business decisions or specific purchasing practices. The chapter does

¹ Mind the Gap, "[Undermining unionisation](https://www.mindthegap.ngo/harmful-strategies/undermining-defenders-communities/undermining-unionisation/)", 2020, available at <https://www.mindthegap.ngo/harmful-strategies/undermining-defenders-communities/undermining-unionisation/>

not highlight standards for RBC in relation to the rights of workers in P2P platforms and the digital economy. It also does not discourage the outsourcing of core business activities such as recruitment to uncontrolled external companies, an increasingly common tactic of MNEs to cut costs at the expense of worker welfare costs. The chapter does not adequately clarify the risks – and special due diligence needed – for disadvantaged or marginalised workers including women, homeworkers, people of low-caste, migrant workers, and others. Meanwhile, gaps in other chapters of the Guidelines, such as in Chapter I (Concepts and Principles) related to defining a broad scope of covered enterprises, Chapter IV (Human Rights) related to human and labour rights defenders, and Chapter III (Disclosure) related to disclosure of key information such as due diligence steps, wages paid, and identity of supply chain partners, also negatively impact the effectiveness of the Guidelines in advancing MNE respect for labour rights.

Impact of the problem: Lack of clear standards on labour rights for MNEs and remedy for impacted workers

The gaps in the OECD Guidelines text on labour rights have two main consequences:

- 1) A lack of specificity and completeness in norms and expectations for MNEs regarding respecting labour rights in the current global context; and
- 2) Diminished grounds on which to seek remedy via the National Contact Point (NCP) grievance mechanism and poor complaint outcomes.
 - a. According to TUAC's research, between 2011 and 2020, NCPs were 16% less effective than in the previous decade in helping parties reach agreement. Since 2011, only five freedom of association cases resulted in an agreement, while in 18 cases either the NCP (8) or the MNE (10) stymied the complaint by choosing not to proceed with mediation.⁴

Parallel laws and standards

Although the OECD Guidelines contain some language on labour rights, several other international instruments or standards address labour rights in greater specificity:

- The ILO Conventions, which have established modern standards on fundamental principles and rights at work;⁵
- The European Union Charter of Fundamental Rights,⁶ which establishes labour rights standards, as well directives such as Directive (2019/633) on unfair trading practices in the agricultural and food supply chain;⁷ and
- National standards and guidance, such as the Dutch Agreement on Sustainable Garments and Textile.⁸

Why ensuring a comprehensive stocktaking on gaps is important

The OECD Guidelines, originally drafted in 1976, have not been revised since 2011 and are out of date in many ways. Ten years of implementation of the current text of the Guidelines have revealed numerous gaps in the text that cause both a serious lack of clarity and coherence in international norms on key elements of responsible business conduct, and diminish victims' chances for remedy and accountability via the NCPs. Meanwhile, recent developments in RBC standards made beyond the OECD Investment Committee are threatening to make the OECD Guidelines comparatively less useful or even obsolete. The OECD Investment Committee's Working Party on Responsible Business Conduct (WPRBC), responsible for the OECD Guidelines, has begun a stocktaking to identify what gaps exist in the Guidelines and assess whether steps are needed to address them. A comprehensive



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¹ TUAC, “Reviewing the Guidelines for MNEs: Trade Union Key Messages, OECD Guidelines that Deliver,” December 2020, available at file:///Users/marianingrams/Downloads/2020_GuidelinesKeyMessages.pdf.

² ILO, “World Employment and Social Outlook: Trends 2020,” 2020, available at: https://www.ilo.org/wcmsp5/groups/public/---dgreports/-dcomm/---publ/documents/publication/wcms_734455.pdf.

³ ILO, “40 million in modern slavery and 152 million child labour around the world,” 19 September 2017, available at: https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_574717/lang--en/index.htm?ssSourceSiteId=ipec.

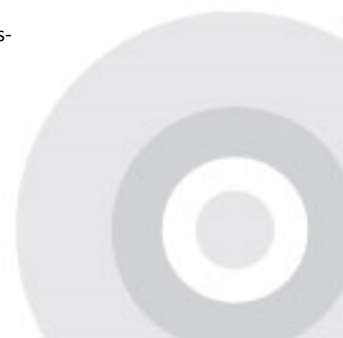
⁴ TUAC, “Reviewing the Guidelines for MNEs: Trade Union Key Messages, OECD Guidelines that Deliver.”

⁵ ILO Conventions, available at: <https://www.ilo.org/global/standards/lang--en/index.htm>

⁶ European Union, Charter of Fundamental Rights (2016/C 202/02), available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12016P%2FTXT>

⁷ Directive (EU) 2019/633 of the European Parliament and of the Council of 17 April 2019 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain, available at: <http://data.europa.eu/eli/dir/2019/633/oj>

⁸ The Dutch Agreement on Sustainable Garments and Textile, available at: <https://www.invoconvenanten.nl/en/garments-textile/agreement>



Identified gap in the OECD Guidelines: standards on tax compliance

Outcome sought: Broad and comprehensive stocktaking of the OECD Guidelines for Multinational Enterprises (Guidelines) that addresses gaps in standards for tax compliance.

Problem: The OECD Guidelines do not reflect new public attitudes and the OECD's own BEPS initiative on the importance of eschewing corporate tax avoidance

Tax avoidance – the *legal* avoidance or minimization of tax payments and capital flight, not to be confused with tax evasion, which is illegal – is a serious problem costing the world exorbitantly in lost tax revenues. Corporations avoid taxes through legal means by taking advantage of policy loopholes, legislative gaps, and tax havens. The Tax Justice Network estimated in 2020 that \$245 billion is lost annually as a direct result of corporate tax abuse by MNEs, and that MNEs annually shift a full \$1.38 trillion from the countries in which they make their profits to tax havens.¹ Tax avoidance directly reduces the revenues of states, limiting their ability to fund critical public services such as health care, education, and infrastructure that benefit citizens as well as corporations. Tax avoidance also unduly elevates the power of corporations vis-à-vis workers and governments. Until the 2008 financial crises, tax avoidance was considered unremarkable and accepted practice of MNEs to reduce their tax liability; by using artificial business structures and transactions (e.g. internal loans to wholly-owned letterbox companies) MNEs manipulate mismatched tax laws in different legal jurisdictions to spirit profits away from taxing countries into those with little to no corporate tax rate.

The financial crisis, followed by a series of financial scandals exposing the low tax burdens of well-known MNEs such as Starbucks and Amazon, prompted policy makers and the public to re-evaluate the double standard condoning MNEs' wilful avoidance of their tax obligations. Broad public consensus now holds that tax avoidance should stop, and international and regional organizations such as the G20, OECD, United Nations, and European Union have begun developing new tax norms to protect against corporate tax avoidance. In 2015 the OECD took the lead globally in developing a package of policy measures to combat tax avoidance through the OECD/G20 Inclusive Framework on BEPS ("Base Erosion and Profit Shifting"). This ground-breaking package contains 15 actions that governments can take to combat tax avoidance, on topics ranging from taxation of the digital economy to combating harmful tax practices and increasing transparency.² These policy measures have been implemented by governments across the globe and represent a major step forward in the fight against tax avoidance. The Framework presents clear and detailed language on what constitutes tax avoidance (base erosion and profit shifting) and what can be considered a harmful tax practice. The OECD is greatly remiss in not including or referencing the OECD BEPS project in its own OECD Guidelines.

The OECD Guidelines – the preeminent standard for MNEs in all sectors on responsible business conduct (RBC) – should reflect current norms against tax avoidance, but its outdated provisions fall far short. The extremely brief (with just two principles) Chapter on Taxation (XI) does not mention the term tax avoidance nor set an expectation that MNEs should eschew tax avoidance. The text currently only asks MNEs to obey the letter and spirit of tax law; unhelpful, because a company present in a tax haven is obeying the letter of the national law by not paying any tax, and potentially the "spirit" as well. The Guidelines should, but do not, simply clarify that MNEs should eschew tax avoidance. The chapter asserts that corporations need not pay more than that legally required of them, without identifying manipulation of conflicting legal requirements to minimize tax liability as irresponsible business conduct. The chapter also discourages "inappropriate" shifting of profits and

losses through transfer pricing, a positive step, but does not single out inappropriate shifting of profits and losses through other financial methods such as internal loans. The chapter also does not underscore the link between payment of taxes and fulfilment of other corporate responsibilities around respect for human rights. Critically, neither the Taxation chapter nor Disclosure chapter (III) specifically demands disclosure of country-by-country reporting, corporate structure, profits earned and tax payments made, and financial transactions that would facilitate identification of tax avoidance.

Impact of the problem: Lack of clear standards on tax avoidance for MNEs and limited ability for victims to seek remedy via the National Contact Point (NCP) grievance mechanisms.

The Guidelines' weak standards for MNEs on taxation and tax-related disclosure have two harmful impacts:

- 1) Lack of clear expectations for MNEs to eschew tax avoidance; and
- 2) Diminished ability of victims of tax avoidance to seek remedy by filing specific instances to NCPs.
 - a. In OECD Watch's experience, it is difficult to show evidence of tax avoidance in specific instances because transparency is so poor over the relevant MNE structures and transactions. Notifiers must rely on showing only clues that suggest a systematic effort to minimize tax payments. Further, while two specific instances have been filed by NGOs and unions directly alleging tax avoidance and arguing that the avoidance violates the spirit of a relevant law, neither has been accepted. The handling of these cases suggests both that NCPs cannot easily evaluate the low evidence of avoidance, nor easily interpret the Guidelines' text as discouraging tax avoidance.³

Parallel laws and standards

The stocktaking on gaps in the Guidelines related to taxation and tax avoidance should consider developments on these issues in various international initiatives, including:

- The OECD's "Inclusive Framework on Base Erosion and Profit Shifting" initiative and the corporate rules and regulations laid out in the 15 BEPS Actions;
- The Global Reporting Initiative (GRI)'s "GRI 207: Tax standard"⁴, a new development in voluntary sustainability reporting. The GRI standard is used by 75% of the world's 250 largest companies; and
- EU standards on tax avoidance.⁵

Why ensuring a comprehensive stocktaking on gaps is important

The OECD Guidelines, originally drafted in 1976, have not been revised since 2011 and are out of date in many ways. Ten years of implementation of the current text of the Guidelines have revealed numerous gaps in the text that cause both a serious lack of clarity and coherence in international norms on key elements of responsible business conduct, and diminish victims' chances for remedy and accountability via the NCPs. Meanwhile, recent developments in RBC standards made beyond the OECD Investment Committee are threatening to make the OECD Guidelines comparatively less useful or even obsolete. The OECD Investment Committee's Working Party on Responsible Business Conduct (WPRBC), responsible for the OECD Guidelines, has begun a stocktaking to identify what gaps exist in the Guidelines and assess whether steps are needed to address them. A comprehensive stocktaking that addresses all the gaps identified by civil society and other stakeholders is essential to evaluate whether the Guidelines are still fit for purpose.

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¹ Tax Justice Network, “\$427bn lost to tax havens every year; landmark study reveals countries’ losses and worst offenders,” 20 November 2020, available at: <https://www.taxjustice.net/2020/11/20/427bn-lost-to-tax-havens-every-year-landmark-study-reveals-countries-losses-and-worst-offenders/>.

² OECD/G20 Base Erosion and Profit Shifting Project – 2015 Final Report, Executive Summaries. OECD. <http://www.oecd.org/ctp/beps-reports-2015-executive-summaries.pdf>.

³ See *War on Want & Change to Win vs. Alliance Boots*, OECD Watch complaint database, available at: https://complaints.oecdwatch.org/cases/Case_314; and *FNV vs. Chevron*, available at: <https://www.somo.nl/first-ever-oecd-complaint-on-tax-avoidance-filed-against-chevrons-shell-companies/>.

⁴ GRI (2019), First global standard for tax transparency; <https://www.globalreporting.org/information/news-and-press-center/Pages/First-global-standard-for-tax-transparency.aspx>

⁵ EU Package contains a.o. measures to prevent aggressive tax planning and boost tax transparency
https://ec.europa.eu/taxation_customs/business/company-tax/anti-tax-avoidance-package_en



Identified gap in the OECD Guidelines: digitalisation and digital technology

Outcome sought: Broad and comprehensive stocktaking of the OECD Guidelines for Multinational Enterprises (Guidelines) that addresses gaps on digitalisation and digital technology.

Problem: The OECD Guidelines do not acknowledge the increasing digitalisation of the global economy, nor set standards for business on avoiding adverse human rights and environmental impacts linked to digitalisation

The digitalisation of the global economy is altering and often exacerbating the potential for all MNEs (not merely technology companies) to adversely impact human rights and the environment. Digital technologies may have positive impacts on human rights (such as enhancing freedom of expression and the right to information), but can also facilitate violations of the rights to non-discrimination, privacy, freedom of speech/political participation, life, liberty, security, and economic, social and cultural rights, among others. Digitalisation is therefore linked to numerous challenges for responsible business conduct (RBC). The following issues are of particular concern to civil society:

- The need for all MNEs operating in the digital economy – not just well-known, global tech companies – to recognise the potential harms they may be connected to as a result of the digitalisation of their activities, and the need for them to conduct human rights due diligence over those impacts;
- New types of entities such as social media and online service providers/platforms have changed the concept of the ‘MNE’, raising the problems of inadequate taxation of and stakeholder consultation by non-brick-and-mortar MNEs, and securing accountability for the harmful impacts of MNEs not clearly tied to any specific country and legal jurisdiction;
- The commercialisation of big data, as well as the growth of digital technologies such as AI, surveillance/telecommunications technologies, and online/social media platforms, have enabled violations of numerous human rights (affecting both average citizens and human rights defenders in particular). Biases built into the massive datasets used to train automated systems and large language models can result in privacy violations and discrimination at scale,¹ with systems ‘learning’ to discriminate along the lines of race, gender and income.² This disproportionately harms already at-risk and vulnerable groups, such as women, non-binary persons, racial and ethnic minorities, migrants and religious minorities, among others. Users of platforms can also use them to engage in discrimination that should be better addressed by platform owners. Further, ‘profiling’ of individuals based on their online activities may facilitate discrimination and privacy violations.³ These technologies have also increased capacity for facilitation of violence, manipulation of democratic values, rapid spread of mis- and disinformation, and human rights abuses by governments or average users;
- The need for MNEs to conduct human rights due diligence during the design/development stage of a technology rather than (as is common) immediately prior to its deployment, as well as conduct auditing of systems for algorithmic bias and subsequently mitigate issues found before the model is deployed;
- Many digital technologies are subject to “dual-use” authorisation and licensing, and while some dual-use processes take into account human rights, they are not necessarily aligned with the due diligence expectations of the OECD Guidelines;
- The sheer scale and market share across diverse types of goods held by certain platform MNEs, particularly surveillance capitalists, raise serious concerns about consumer wellbeing as well as competition and suppression of information and innovation;

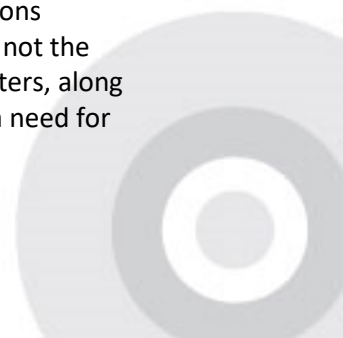
- Telecommunications companies' responsibility to enable access to technology and advance digital inclusion globally, on one hand, and to refrain from shutting down networks ('internet shutdowns') or transferring user data to governments, on the other hand;
- The environmental (from minerals mining to the massive and growing climate impact of data centres⁴), labour rights, and human rights impacts caused through the supply chains of technology hardware MNEs are too often overlooked. This problem is exacerbated by the extreme lack of transparency in the sector,⁵ particularly regarding MNEs' business relationships with (authoritarian) governments.⁶
- Increased digitalisation (and automation) in many industries has disrupted workplaces, causing serious and gendered impacts to the rights and wellbeing of workers. Low paid female workers are at much higher risk of bearing the brunt of displacement by automation compared to male workers.⁷ Women and girls are also less likely to benefit from digitalisation,⁸ evidence of a 'digital gender divide' which has been further exacerbated by the fallout from the COVID-19 pandemic.⁹

Despite the myriad adverse impacts of MNEs in the context of digitalisation, the OECD Guidelines do not adequately establish standards in this sphere. Chapter II (General Policies) minimally "encourages" enterprises to "promote Internet Freedom through respect of freedom of expression, assembly and association online." Additionally, Chapter IX (Science and Technology) focuses narrowly on protection of intellectual property, sharing of technological and scientific knowledge with host countries, and coordination of business activities with national science agendas and universities. The chapter says nothing about ways in which digitalisation can impact MNEs' potential to cause, contribute to, or be directly linked to adverse impacts, nor does it address the importance for MNEs of conducting supply chain due diligence over their digitalisation-related impacts. Critically, other chapters such as Disclosure (III), Human Rights (IV), Employment and Industrial Relations (V), Environment (VI), Consumer Protection (VIII) and Taxation (XI) do not include language reflecting the nexus between the issue covered in that chapter and RBC expectations for MNEs in the context of digitalisation.

Impact of the problem: Lack of clear standards for MNEs on RBC in the context of digitalisation and limited access to remedy for impacted parties.

The lack of expectations in the Guidelines for MNEs to act responsibly in the context of digitalisation has two primary consequences:

- 1) Lack of understanding by MNEs on expectations for them to prevent and mitigate the adverse effects of digitalisation; and
- 2) Diminished grounds on which to seek remedy via the National Contact Point (NCP) grievance mechanisms.
 - a. A handful of specific instances have sought remedy for harmful impacts linked to digitalisation.¹⁰ These complaints have addressed issues such as the sale of surveillance/telecommunications technologies to repressive governments (and the subsequent misuse of those technologies)¹¹ and the failure of online marketplaces to prohibit third-party sales of goods used for illegal and environmentally harmful purposes.¹² NCPs have reached widely divergent outcomes, even when addressing the same exact issue.¹³ Further, NCPs have rejected complaints by erroneously concluding that dual-use authorisation for surveillance/telecommunications technologies is sufficient for human rights due diligence, although this is not the case.¹⁴ The increasing number of specific instances on technological matters, along with the spotty acceptance and agreement rates at NCPs, demonstrate a need for



clearer expectations to both guide MNEs' conduct and help NCPs apply the Guidelines in complaints.

Parallel laws and standards

Analysis of gaps in the OECD Guidelines on digitalisation could draw on the following standards, initiatives, and guidelines:

- International standards and covenants including the OHCHR's B-Tech Project,¹⁵ the UN's Internet Governance Forum,¹⁶ the UN Secretary General's Roadmap for Digital Cooperation,¹⁷ the UN Strategy and Plan of Action on Hate Speech,¹⁸ UNESCO's ROAM principles,¹⁹ the WTO's Declaration on Global Electronic Commerce,²⁰ the ILO's Agenda for the Future of Work,²¹ and APEC's Roadmap on Internet and Digital Economy;²²
- The OECD due diligence guidance as well as the OECD Privacy Guidelines,²³ the Cancun Declaration,²⁴ and various OECD Recommendations such as those on Health Data Governance, Digital Security, Risk Management for Economic and Social Prosperity, Digital Security of Critical Activities, AI, Internet Policy Making, Facilitating International Technology Co-operation Involving Enterprises, Consumer Protection in E-commerce, and ICT and the Environment;
- Regional legislation and regulations such as the EU's General Data Protection Regulation (GDPR),²⁵ the Regulation on the free flow of non-personal data,²⁶ the Cybersecurity Act,²⁷ the Open Data Directive,²⁸ Ethics Guidelines for Trustworthy AI,²⁹ the EU Digital Services Act and the Digital Markets Act (currently under preparation),³⁰ and the Council of Europe's Convention 108+ for the protection of individuals with regard to the processing of personal data;³¹
- The European Commission's proposed initiative to align dual use technology authorisation with human rights due diligence standards;³²
- National guidance and laws, such as Australia's Sharing of Abhorrent Violent Material Act 2019,³³ Chile's National AI Policy,³⁴ and numerous countries' legislation and recommendations on AI, digital platforms, and social media;
- Multi-stakeholder initiatives such as The Christchurch Call³⁵ championed by New Zealand and France, the Partnership on AI,³⁶ the Global Network Initiative,³⁷ and the Santa Clara Principles which call for transparency by social media companies;³⁸
- Civil Society guidelines such as the Danish Institute for Human Rights' guidance on addressing digital technologies in National Action Plans on Business and Human Rights,³⁹ the Global Network initiative to develop a framework of principles and guidance for the ICT industry,⁴⁰ the Toronto Declaration,⁴¹ and Ranking Digital Rights⁴² which aim to trigger a 'race to the top' on digital rights;⁴³ and
- Industry standards, such as Google's 2018 AI principles.⁴⁴

Why ensuring a comprehensive stocktaking on gaps is important

The OECD Guidelines, originally drafted in 1976, have not been revised since 2011 and are out of date in many ways. Ten years of implementation of the current text of the Guidelines have revealed numerous gaps in the text that cause both a serious lack of clarity and coherence in international norms on key elements of responsible business conduct, and diminish victims' chances for remedy and accountability via the NCPs. Meanwhile, recent developments in RBC standards made beyond the OECD Investment Committee are threatening to make the OECD Guidelines comparatively less useful or even obsolete. The OECD Investment Committee's Working Party on Responsible Business Conduct (WPRBC), responsible for the OECD Guidelines, has begun a stocktaking to identify what gaps exist in the Guidelines and assess whether steps are needed to address them. A comprehensive

stocktaking that addresses all the gaps identified by civil society and other stakeholders is essential to evaluate whether the Guidelines are still fit for purpose.

Who needs to act?

OECD Watch urges governments to show commitment to keeping the OECD Guidelines up to date with evolving issues in the field of business and human rights – and acknowledge civil society’s concerns regarding the current limitations in the Guidelines’ standards and the NCP complaint system – by ensuring that the stocktaking studies all the issues of concern to civil society. OECD Watch also urges that states ensure the final stocktaking report responds to each concern raised by civil society. OECD Watch welcomes the stocktaking and stands ready to support the review process and any further steps taken to address gaps identified.

About OECD Watch

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¹ [Karen Hao](#), “We read the paper that forced Timnit Gebru out of Google. Here’s what it says”, MIT Technology Review 4 December 2020, available at: <https://www.technologyreview.com/2020/12/04/1013294/google-ai-ethics-research-paper-forced-out-timnit-gebru/>. The Cambridge Analytica scandal is perhaps the most well-known example of individuals’ data being harvested and used to build (voter) psychological profiles. See N. Confessore, “Cambridge Analytica and Facebook: The Scandal and the Fallout So Far,” The New York Times, 4 April 2018, available at: <https://www.nytimes.com/2018/04/04/us/politics/cambridge-analytica-scandal-fallout.html>.

² For more information see Karen Hao, “This is how AI bias really happens—and why it’s so hard to fix”, MIT Technology Review, 4 February 2019, available at: <https://www.technologyreview.com/2019/02/04/137602/this-is-how-ai-bias-really-happens-and-why-its-so-hard-to-fix/>.

³ The Cambridge Analytica scandal is perhaps the most well-known example of individuals’ data being harvested and used to build (voter) psychological profiles. See N. Confessore, “Cambridge Analytica and Facebook: The Scandal and the Fallout So Far,” The New York Times, 4 April 2018, <https://www.nytimes.com/2018/04/04/us/politics/cambridge-analytica-scandal-fallout.html>.

⁴ Emma Strubell, Ananya Ganesh and Andrew McCallum, “Energy and Policy Considerations for Deep Learning in NLP”, University of Massachusetts Amherst, 5 June 2019, available at: <https://arxiv.org/abs/1906.02243>.



⁵ The need to protect ‘trade secrets’ are used as a shield from scrutiny, see Mind the Gap, ‘CASE STUDY: Samsung’s nondisclosure of chemical usage’, 2020, available at: <https://www.mindthegap.ngo/harmful-strategies/constructing-deniability/refusing-to-disclose-information/example-samsungs-nondisclosure-of-chemical-usage/>.

⁶ See Mind the Gap, ‘Aligning with suppressive State institutions’, 2020, available at: <https://www.mindthegap.ngo/harmful-strategies/utilising-state-power/aligning-with-suppressive-state-institutions/>.

⁷ See Mariya Brussevich, Era Dabla-Norris, Salma Khalid, ‘Is Technology Widening the Gender Gap? Automation and the Future of Female Employment’, May 6, 2019, available at: <https://www.imf.org/en/Publications/WP/Issues/2019/05/06/Is-Technology-Widening-the-Gender-Gap-Automation-and-the-Future-of-Female-Employment-46684>; The impacts of rapid automation are already being seen in the Bangladesh apparel industry where female workers’ participation has declined: The Daily Star, ‘Women garment workers on the decline’, December 15, 2020, available at: <https://www.thedailystar.net/business/news/women-garment-workers-the-decline-2011601>.

⁸ See OECD (2018), ‘Bridging the Digital Gender Divide: Include, Upskill, Innovate’, available at: <http://www.oecd.org/digital/bridging-the-digital-gender-divide.pdf>.

⁹ Valentina Romei, ‘Pandemic boost to tech and digital industries worsens gender job divide’, Financial Times, 22 November 2020, available at: <https://www.ft.com/content/21ae50e1-56e6-43d4-acc2-d6fc45dba447>.

¹⁰ The Grupa OLX and AirBnB cases, available at: <https://mneguidelines.oecd.org/Digitalisation-and-responsible-business-conduct.pdf>.

¹¹ See, e.g., *Privacy Int’l et al. vs. Gamma International*, available at: https://complaints.oecdwatch.org/cases/Case_286.

¹² See *Frank Bold vs. Grupa OLX sp. z o.o.*, available at: https://complaints.oecdwatch.org/cases/Case_523.

¹³ Compare the British NCP’s consideration of the human rights impacts of company Trovicor’s sale of surveillance technology to Bahrain in *Privacy Int’l et al. vs. Trovicor*, available at: https://complaints.oecdwatch.org/cases/Case_287, with the German NCP’s rejection of the same claims against Gamma International in *Privacy Int’l et al. vs. Gamma International*, available at https://complaints.oecdwatch.org/cases/Case_286.

¹⁴ See, e.g., *FIDH, JFI and Redress vs. Italtel*, available at: https://complaints.oecdwatch.org/cases/Case_496.

¹⁵ OHCHR, B-Tech Project, available at: <https://www.ohchr.org/EN/Issues/Business/Pages/B-TechProject.aspx>.

¹⁶ Internet Governance Forum, available at: <https://www.intgovforum.org/multilingual/>.

¹⁷ United Nations General Assembly, Road map for digital cooperation: Implementation of the recommendations of the High-level Panel on Digital Cooperation, 29 May 2020, A/74/821, available at: <https://undocs.org/A/74/821>.

¹⁸ United Nations, United Nations Strategy and Plan of Action on Hate Speech, September 2020, available at: https://www.un.org/en/genocideprevention/documents/UN%20Strategy%20and%20PoA%20on%20Hate%20Speech_Guide%20on%20Addressing%20in%20field.pdf.

¹⁹ UNESCO ROAM-X Indicators, available at: <https://en.unesco.org/internet-universality-indicators/roamx-indicators>

²⁰ WTO *Work Programme on Electronic Commerce*, WT/L/274 (30 September 1998).

²¹ ILO Centenary Declaration for the Future of Work (2019), available at: https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_711674.pdf.

²² APEC Roadmap on Internet and Digital Economy, 2017, 2017/CSOM/006.

²³ OECD (2013), *The Guidelines on the Protection of Privacy and Transborder Flows of Personal Data*, available at: <http://www.oecd.org/digital/ieconomy/privacy-guidelines.htm>.

²⁴ OECD (2016), *Ministerial Declaration on the Digital Economy (Cancún Declaration)* available at: <http://www.oecd.org/digital/Digital-Economy-Ministerial-Declaration-2016.pdf>.

²⁵ European Parliament, *The General Data Protection Regulation, Regulation 2016/679*, available at: <http://data.europa.eu/eli/reg/2016/679/2016-05-04>.

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²⁷ European Parliament, *The EU Cybersecurity Act, Regulation 2019/881*, available at: <https://eur-lex.europa.eu/eli/reg/2019/881/oj>.

²⁸ European Parliament, *Open Data Directive, Directive 2019/1024*, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2019.172.01.0056.01.ENG.

²⁹ European Commission, (2018), *Ethics Guidelines for Trustworthy AI*, available at: <https://ec.europa.eu/futurium/en/ai-alliance-consultation>.

³⁰ European Commission, “The Digital Markets Act: ensuring fair and open digital markets”, available at: https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets_en.

³¹ Council of Europe, *Convention 108 +: Convention for the protection of individuals with regard to the processing of personal data*, June 2018, available at: <https://rm.coe.int/convention-108-convention-for-the-protection-of-individuals-with-regar/16808b36f1>.

³² European Commission, “Commission welcomes agreement on the modernization of EU export controls,” 9 November 2020, <https://trade.ec.europa.eu/doclib/press/index.cfm?id=5209>.

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- ³³ Criminal Code Amendment (Sharing of Abhorrent Violent Material) Act 2019, available at: <https://www.legislation.gov.au/Details/C2019A00038>.
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- ⁴¹ Amnesty International, (2018) The Toronto Declaration, available at: <https://www.torontodeclaration.org/>.
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- ⁴⁴ Google, (2018), Artificial Intelligence at Google: Our Principles, available at: <https://ai.google/principles/>.



Identified gap in the OECD Guidelines: disclosure

Outcome sought: Broad and comprehensive stocktaking of the OECD Guidelines for Multinational Enterprises (Guidelines) that addresses gaps on MNE disclosure.

Problem: The OECD Guidelines do not reflect important new developments and standards on reporting and do not refer to the interrelation of disclosure and MNEs' fulfilment of expectations under all other chapters of the Guidelines

Transparency is a crosscutting topic and of crucial importance for MNEs' full compliance with many of the other chapters of the OECD Guidelines and thus with responsible business conduct (RBC) itself. Transparency is also crucial for the effective mediation of disputes over corporate conduct (at a minimum essential between disputing parties), and thus for the successful working of grievance processes.

Since 2011, consensus has grown among governments, investors, and business and civil society stakeholders that traditional MNE annual reports are unable to provide enough relevant information on human rights, social, and environmental impacts. Whether it is called ESG reporting, sustainability reporting, or integrated reporting, there is a growing push for greater transparency from MNEs over not merely their financial but their non-financial data, to support efficient market functioning, promote corporate contribution to sustainable development goals, and enable civil society stakeholders to play their role in monitoring steps to achieve sustainable development. The latest (2020) report of the *Carrots and Sticks* project¹ shows that many OECD governments use more than 10 (up to 18 or 20 in countries such as the UK, Spain, Canada and the US) parallel mandatory and voluntary instruments that either require or encourage companies to report sustainability-related information. The number of instruments illustrates the number of issues where transparency is required. Currently, instruments used by governments particularly focus on environmental issues including in relation to climate impacts; social issues; human rights impacts including due diligence information; gender equality; corporate governance, and anti-corruption and bribery. In addition to such instruments used at national level, there are multiple developments on disclosure in multilateral settings as well.

The OECD Guidelines – the leading standard on RBC conduct for MNEs – include a chapter on Disclosure (Chapter III), but it presently falls far behind these latest developments. The chapter divides disclosures into two types: those on material matters about the corporation – essentially limited to common financial disclosures – and those related to “areas where reporting standards are still evolving, for example, social, environmental, and risk reporting.”² While the Guidelines assert that enterprises “should” disclose the former, they are merely “encouraged to” disclose the latter. To set trends in RBC, the Guidelines should instead call clearly (“should”) for companies to disclose ESG data, including setting and publicizing clear targets on greenhouse gas emissions and climate impacts, disclosing beneficial ownership and country-by-country reporting, and disclosing profits earned and taxes paid. Critically, the disclosure chapter should also reflect the new due diligence communications expectations created by the 2011 revision on due diligence, which in Chapters II (General Policies) and IV (Human Rights) expect companies to communicate at every one of the six steps of due diligence, namely by communicating their policies on RBC, their actions to identify actual and potential adverse impacts to people and the planet, their actions to address those risks or impacts, the outcomes of their actions to address those risks or impacts, and their efforts to remediate adverse impacts. Because Chapter III does not address disclosure as an important element

of all six steps of due diligence, it appears out of synch with the provisions in Chapters II and IV. In sum, these unambitious, vague, and muddled disclosure requirements risk making the Guidelines obsolete as a leading standard on RBC and disclosure.

Impact of the problem: Lack of consistency within the Guidelines, incomplete and inadequate standards on disclosure for MNEs, and limited ability for stakeholders to assess corporate adherence to the Guidelines and seek accountability via complaints

The Guidelines' weak standards for MNEs on disclosure have several harmful consequences:

- 1) Muddled messaging on the scope of disclosure in the Guidelines, weakening not only that chapter but the impact of the entire set of Guidelines;
- 2) Lowered transparency expectations for MNEs that actually conflict with many higher national reporting requirements and international reporting initiatives, creating a confusing double standard for MNEs;
- 3) Limited ability of communities, civil society, unions, shareholders, and policymakers to assess the social, environmental, and human rights impacts of companies' activities and hold companies to account.
- 4) Diminished access to remedy for victims of adverse corporate impacts who seek to use the NCP complaint system to request accountability, but are handicapped by having little access to data outlining corporate actions regarding their human rights and environmental footprint.
 - a. In OECD Watch's experience, many complaints break down because civil society cannot produce adequate evidence of what actions corporations took or didn't take to address their adverse impacts, in part because companies refuse to release much data critical to evaluating their human rights and environmental due diligence.

Parallel laws and standards

The stocktaking of gaps in the Guidelines could consider developments on MNE disclosure expectations in various international initiatives:

- The EUs' Non-Financial Reporting Directive (NFR Directive),³ which came into effect in all EU member states in 2018; all 28 countries have adapted the Directive into national law. The NFR Directive is currently being reviewed with the objective to improve disclosure of climate and environmental data by companies. The European Commission already published additional guidelines on reporting climate-related information, and additionally a new forthcoming Taxonomy Regulation will be integrated. The EUs' Taxonomy is part of the EUs' Green Deal and is a classification system for environmentally sustainable activities that will be mandatory in the reporting of larger companies;
- The Task Force on Climate-related Financial Disclosures (TCFD),⁴ an initiative of the Financial Stability Board (FSB) to develop consistent climate-related financial risk disclosures for use by companies, banks, and investors in providing information to stakeholders;
- The OECDs' BEPS initiative, in particular Action 13, which requires all MNEs to prepare a country-by-country report with aggregate data on the global allocation of income, profit, taxes paid, and economic activity among tax jurisdictions in which it operates. This standard is one of four minimum standards and all BEPS-adhering countries must implement it. The latest report informs that the coverage has increased quickly to 131 jurisdictions in 2020;⁵
- The UNGPs' reporting framework,⁶ created as the world's first guidance for companies to report on how they respect human rights;
- The Global Reporting Initiative, which is updating its guidance on Human Rights reporting;⁷

- The Corporate Human Rights Benchmark,⁸ which assesses the human rights disclosures, among other issues, of 230 global companies; and
- A rising number of mandatory human rights due diligence laws and proposals. A comparative legal analysis of these initiatives⁹ shows that several of them also include new reporting requirement on due diligence.

Why ensuring a comprehensive stocktaking on gaps is important

The OECD Guidelines, originally drafted in 1976, have not been revised since 2011 and are out of date in many ways. Ten years of implementation of the current text of the Guidelines have revealed numerous gaps in the text that cause both a serious lack of clarity and coherence in international norms on key elements of responsible business conduct, and diminish victims' chances for remedy and accountability via the NCPs. Meanwhile, recent developments in RBC standards made beyond the OECD Investment Committee are threatening to make the OECD Guidelines comparatively less useful or even obsolete. The OECD Investment Committee's Working Party on Responsible Business Conduct (WPRBC), responsible for the OECD Guidelines, has begun a stocktaking to identify what gaps exist in the Guidelines and assess whether steps are needed to address them. A comprehensive stocktaking that addresses all the gaps identified by civil society and other stakeholders is essential to evaluate whether the Guidelines are still fit for purpose.

Who needs to act?

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¹ Carrots and Sticks, available at: <https://www.carrotsandsticks.net/> (a stocktaking initiative of sustainability disclosure requirements world-wide, based on a global survey of corporate sustainability reporting by KPMG in collaboration with GRI and USB).

² OECD Guidelines, Commentary 33.

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Identified gap in the OECD Guidelines: anticorruption

Outcome sought: Broad and comprehensive stocktaking of the OECD Guidelines for Multinational Enterprises (Guidelines) that addresses gaps on anticorruption.

Problem: The OECD Guidelines do not set adequate expectations for enterprises to undertake to avoid corruption in all its forms, nor do they adequately connect the issue of corruption to other topics in the Guidelines such as human rights, disclosure, and supply chain due diligence.

Human rights violations, environmental degradation, and corruption are strongly interlinked: where corruption occurs, social, ecological, and economic damage go hand-in-hand.¹ This connection is supported by corruption indices, such as Transparency International's Corruption Perceptions Index,² that show a strong correlation between countries with high levels of corruption and those with widespread human rights abuses. Transparency International defines corruption as "the abuse of entrusted power for private gain."³ Corruption undermines the ability of people to access public goods such as education and health care, because the public budget is deprived of much needed financial resources. Corruption also results in discriminatory access to public services, perpetuating power imbalances, stymying competition, and exacerbating inequality. While it is difficult to quantify the global impact of corruption on human rights and sustainable development, the World Economic Forum estimates its annual cost at around 3.6 trillion \$USD, about 1 trillion of which is lost through bribery.⁴

MNEs are often at risk of engaging in corruption directly or being linked to it through business partners such as other businesses or states, including in their supply chains. While bribery is the primary example of corruption, the abuse can take several forms, including embezzlement and fraud, graft, favoritism or clientelism, extortion, and other activities that exploit compromised state institutions. Other corrupt MNE practices that underscore a link with the business and human rights agenda include opaque and illicit lobbying and/or campaign donations by businesses to pay reduced or no corporate taxes in countries of operation, skew public procurement practices towards unqualified firms, or influence legislative and regulatory processes,⁵ and use of a "revolving door" in employment between corporations and regulators to minimize regulation over businesses. These risks have only increased during the ongoing COVID-19 pandemic as governments circumvent competitive procurement processes in the name of a timely emergency response.⁶ Preventing corruption is essential in global supply chains to ensure that human rights, labour rights, and environmental and consumer standards are protected and not undermined.

The OECD Guidelines – the preeminent standard on responsible business conduct (RBC) for MNEs – should set strong expectations for MNEs to avoid corruption across their supply chains, but unfortunately, they fall short in several ways. The chapter ostensibly focused on corruption in the Guidelines – Chapter VII on Combatting Bribery, Bribe Solicitation, and Extortion – focuses only on two types of corruption (bribery and extortion), presenting an overly narrow view of what corruption entails. Although greater transparency is essential to combatting corruption, the Combatting Bribery chapter seeks transparency only in terms of anti-bribery commitments and related internal control systems. Instead, both the Combatting Bribery chapter and the chapter on Disclosure (III) should call for country-by-country reporting to discourage MNEs from engaging in cross-border tax avoidance and corruption. These two chapters should also require disclosure by MNEs of their beneficial ownership: anonymous companies are typically vehicles for illicit practices, including money



laundering, bribery, and tax avoidance. Transparency International has found that only 1 out of 83 countries reviewed ensures broad and timely public access to their beneficial ownership and control of companies and other legal persons.⁷ Disclosing the ultimate beneficial owner of a company is crucial for effective law enforcement and sanctions, as well as in ensuring justice for corruption's victims. The Guidelines Human Rights chapter (IV) should highlight expectations around protecting human rights defenders, including whistleblowers exposing corrupt activities by corporations. The Consumer Interests chapter could reflect the growing preference among consumers for products from companies with more transparent and sustainable (corruption-free) supply chains. Meanwhile, because corruption is a cross-cutting issue, the chapters on Human Rights (IV), Employment and Industrial Relations (V), the Environment (VI), Consumer Interests (VIII), Science and Technology (IX), Competition (X), and General Policies (II) could all be modified to identify corruption as a key factor in a range of harmful corporate impacts.

Impact of the problem: Lack of clear standards on corruption for MNEs and limited ability for victims to seek remedy via the National Contact Point (NCP) grievance mechanisms

The gaps in the OECD Guidelines on corruption have two main consequences:

- 1) A lack of clarity in norms and expectations for MNEs regarding combatting corruption, yielding a lack of understanding by MNEs of corruption's links to human rights and environmental harm; and
- 2) Diminished grounds on which victims of corruption may seek remedy via the NCP grievance mechanisms.
 - a. Only eight out of 226 complaints filed by civil society groups or communities since 2011 have made a claim under Chapter VII, with only one making a clear reference to corruption.⁸ The low number of corruption-related complaints could result from the limited provisions in the Guidelines on which to base corruption claims, warranting expansion of those provisions.

Parallel laws and standards

The stocktaking of gaps regarding corruption in the Guidelines could consider international agreements, national laws, industry standards and initiatives, or civil society guidance, such as:

- Guidance from the OECD such as the OECD Anti-Bribery Convention,⁹ the OECD's Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions (addressing the need for periodic review of anti-corruption measures, among other things),¹⁰ and other standards and guidance of the OECD Working Group on Bribery;
- Guidance from international organizations including the United Nations Convention Against Corruption,¹¹ publications of the UN Working Group on Business and Human Rights connecting human right and corruption,¹² and other guidance of the UN Global Compact¹³, IMF, World Bank, and European Council;
- National laws such as the U.S. Foreign Corrupt Practices Act;¹⁴
- Business at OECD (BIAC)'s publication "Connecting the anti-corruption and human rights agendas: A guide for business and employers' organisations;"¹⁵
- Guidance from industry associations, chambers of commerce, banks and specialized service providers; and
- Guidance from NGOs such as Transparency International.



Why ensuring a comprehensive stocktaking on gaps is important

The OECD Guidelines, originally drafted in 1976, have not been revised since 2011 and are out of date in many ways. Ten years of implementation of the current text of the Guidelines have revealed numerous gaps in the text that cause both a serious lack of clarity and coherence in international norms on key elements of responsible business conduct, and diminish victims' chances for remedy and accountability via the NCPs. Meanwhile, recent developments in RBC standards made beyond the OECD Investment Committee are threatening to make the OECD Guidelines comparatively less useful or even obsolete. The OECD Investment Committee's Working Party on Responsible Business Conduct (WPRBC), responsible for the OECD Guidelines, has begun a stocktaking to identify what gaps exist in the Guidelines and assess whether steps are needed to address them. A comprehensive stocktaking that addresses all the gaps identified by civil society and other stakeholders is essential to evaluate whether the Guidelines are still fit for purpose.

Who needs to act?

OECD Watch urges governments to show commitment to keeping the OECD Guidelines up to date with evolving issues in the field of business and human rights – and acknowledge civil society's concerns regarding the current limitations in the Guidelines' standards and the NCP complaint system – by ensuring that the stocktaking studies all the issues of concern to civil society. OECD Watch also urges that states ensure the final stocktaking report responds to each concern raised by civil society. OECD Watch welcomes the stocktaking and stands ready to support the review process and any further steps taken to address gaps identified.

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¹ UN Human Rights Council, Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, "Connecting the business and human rights and the anticorruption agendas," 17 June 2020, available at: https://www.ohchr.org/Documents/Issues/Business/A_HRC_44_43_AdvanceEditedVersion.pdf.

² Transparency International, Corruption Perceptions Index, available at: <https://www.transparency.org/en/cpi/2019/index/nzl>.

³ Transparency International, 'What is Corruption?' (2020) <https://www.transparency.org/what-is-corruption#define>.



⁴ World Economic Forum, “3 ways to fight corruption and restore trust in leadership,” 1 December 2020, available at https://www.weforum.org/agenda/2020/12/anti-corruption-transparency-restore-trust-in-leadership/?utm_source=sfmc&utm_medium=email&utm_campaign=2737721_Agenda_weekly-4December2020&utm_term=&emailType=Newsletter.

⁵ For an example of this regulatory capture in Europe, see Mind the Gap, “CASE STUDY: The German car industry’s regulatory capture,” 2020, available at: www.mindthegap.ngo/harmful-strategies/utilising-state-power/avoiding-regulations-through-corporate-lobbying/example-the-german-car-industrys-regulatory-capture/.

⁶ Transparency International, ‘Written evidence submitted by Transparency International UK [1CGP0018]’, December 2020, available at: <https://committees.parliament.uk/writtenevidence/18733/pdf/>.

⁷ Transparency International, “Who is behind the wheel? Fixing the global standards on company ownership,” 12 September 2019, available at: https://images.transparencycdn.org/images/2019_Who_is_behind_the_wheel_EN.pdf.

⁸ *CED & RELUFA vs. SG Sustainable Oils Cameroon*, OECD Watch complaint database, https://complaints.oecdwatch.org/cases/Case_430.

⁹ OECD, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 1997, available at: <http://www.oecd.org/corruption-integrity/explore/oecd-standards/anti-bribery-convention/>.

¹⁰ OECD Working Group on Bribery in International Business Transactions, “Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions,” 2009, available at: <https://www.oecd.org/corruption/anti-bribery/OECD-Anti-Bribery-Recommendation-ENG.pdf>

¹¹ United Nations, Convention Against Corruption, 2004, available at: <https://www.unodc.org/unodc/en/treaties/CAC/>

¹² UN Human Rights Council, Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, “Connecting the business and human rights and the anticorruption agendas,” 17 June 2020, available at: https://www.ohchr.org/Documents/Issues/Business/A_HRC_44_43_AdvanceEditedVersion.pdf.

¹³ United Nations Global Compact, “Linking Human Rights & Anti-Corruption Compliance, 21 December 2016, available at: https://www.globalcompact.de/wAssets/docs/Korruptionspraevention/Publikationen/Human_Rights_and_Anti_Corruption_Compliance.pdf.

¹⁴ U.S. Department of Justice, Foreign Corrupt Practices Act, Overview, available at: <https://www.justice.gov/criminal-fraud/foreign-corrupt-practices-act>.

¹⁵ BIAC and IOE, “Connecting the anti-corruption and human rights agendas: A guide for business and employers’ organisations,” September 2020, available at: <https://www.ioe-emp.org/index.php?eID=dumpFile&t=f&f=147731&token=c0fecaf2120d7faf7e4214377a1754ab8170fd88>.



Identified gap in the OECD Guidelines: animal welfare

Outcome sought: Broad and comprehensive stocktaking of the OECD Guidelines for Multinational Enterprises (Guidelines) that addresses gaps on animal welfare.

Problem: The OECD Guidelines do not address animal welfare despite clear links between responsible business conduct on animal welfare and impacts to animals, people, and the planet

The OECD Guidelines do not make reference to animal welfare at all, despite the fact that animal welfare is increasingly acknowledged as an issue relevant to responsible business conduct (RBC) and a consumer concern. Low animal welfare not only generates significant impacts for animals as sentient beings that experience stress and pain, but also presents serious risks to humans and the environment. Each year, billions of animals are used in industries including farming, textiles, pharmacy and cosmetics, tourism and finance. Irresponsible business conduct by businesses in animal-based industries has led to serious impacts on animals, people and the environment, including (but not limited to) the following:

- **Negative public health and safety effects:** High-density animal keeping and increased interaction between animals and humans increases the risk of the emergence of zoonotic diseases (e.g. COVID-19, SARS, Ebola, Avian Flu), with severe impacts on human health, economic growth and social equity. Preventing the spill-over of pathogens to humans costs substantially less than responding to these pathogens once they emerge.¹ Low animal welfare and subsequent overuse of antibiotics is also driving up antimicrobial resistance, which is projected to kill 10 million people annually by 2050 unless action is taken to address it.²
- **Deforestation and loss of biodiversity:** Intensive livestock farming and the related production of feed for farm animals (e.g. soy) have had a massive impact on the degradation and destruction of key biomes such as the Amazon and Cerrado, resulting in a severe loss of habitats for flora and fauna, which in turn results in a disastrous loss of biodiversity.³
- **Environmental pollution:** Intensive livestock farming and the production of animal-derived materials are linked to soil, water, and air pollution due to the use of fertilizers, chemicals and pharmaceuticals, and the waste this industry generates.⁴ This pollution can threaten human health, biodiversity and the ecosystems that underpin our economies.
- **Climate change:** According to FAO, livestock contribute approximately 14.5% of the total annual anthropogenic GHG emissions globally.⁵ Livestock influence climate through land use change, feed production, animal production, manure, and processing and transport.⁶
- **Crime and labour exploitation:** (Il)legal wildlife trade involves major transnational organised crime, and legal and illegal trade routes are often intertwined. Wildlife crime groups operate as global networks, and are often linked to the drugs and weapons trade, human trafficking and money laundering.⁷ Unsustainable fishing has increased forced labour; the pressure to maintain and increase fish supplies at the same time as fishstocks are falling has resulted in endemic labour exploitation in an under-regulated industry.⁸

Impact of the problem: Lack of clear standards for MNEs and remedy for impacted parties

The total lack of reference to animal welfare in the OECD Guidelines has two consequences:

- 1) Lack of coherent, comprehensive RBC standards for MNEs on this important subject; and
- 2) Total lack of access to remedy via the National Contact Point (NCP) grievance mechanism for civil society and other interested parties seeking to address the corporate role in improving animal welfare and preventing the harmful impacts described above.

Parallel laws and standards



Outside the OECD, a proliferation of standards on animal welfare demonstrate the development of new social and business norms regarding animal welfare. The following could be useful guides in considering gaps in the OECD Guidelines:

- International standards, such as the FARMS Initiative Responsible Minimum Standards, which set specific criteria for how farm animals should be raised, transported, and slaughtered and are being used by global financial institutions;
- EU laws such as Directive 2010/63/EU covering the protection of animals used for scientific purposes;
- National laws and policies that increasingly acknowledge animal sentience and demand more humane treatment towards them;
- International guidance, such as the OECD-FAO Guidance for Responsible Agricultural Supply Chains, that calls upon enterprises to assess the likely impact on animal welfare when undertaking environmental, social, and human rights impact assessments;
- Frameworks such as the 'One Health, One Welfare' approach that promote key global objectives such as supporting food security, sustainability and agricultural productivity through a better understanding of the broader impacts of high animal welfare standards; and
- Guiding principles, such as the Five Domains model, that explore how an animal's nutrition, environment, health, and behaviour can all impact its mental state.

None of these laws, conventions, or standards cover the full range of animal species used for food, dairy, medicine, tourism, clothing production, labour, entertainment, companionship or environmental services. This has led to significant fragmentation in the understanding of animal welfare – and MNEs' responsibilities towards animal welfare – across regions and sectors. A consolidated standard is needed on animal welfare and RBC.

Why ensuring a comprehensive stocktaking on gaps is important

The OECD Guidelines, originally drafted in 1976, have not been revised since 2011 and are out of date in many ways. Ten years of implementation of the current text of the Guidelines have revealed numerous gaps in the text that cause both a serious lack of clarity and coherence in international norms on key elements of responsible business conduct, and diminish victims' chances for remedy and accountability via the NCPs. Meanwhile, recent developments in RBC standards made beyond the OECD Investment Committee are threatening to make the OECD Guidelines comparatively less useful or even obsolete. The OECD Investment Committee's Working Party on Responsible Business Conduct (WPRBC), responsible for the OECD Guidelines, has begun a stocktaking to identify what gaps exist in the Guidelines and assess whether steps are needed to address them. A comprehensive stocktaking that addresses all the gaps identified by civil society and other stakeholders is essential to evaluate whether the Guidelines are still fit for purpose.

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¹ A. P. Dobson, et al, "Ecology and economics for pandemic prevention", *Science*, 369(6502), 2020, p. 379-381.

² J. O'Neill, "Review on Antimicrobial Resistance," 2014, http://www.ipiamr.eu/wp-content/uploads/2014/12/AMR-Review-Paper-Tackling-a-crisis-for-the-health-and-wealth-of-nations_1-2.pdf.

³ Fair Finance Guide, "Funding destruction of the Amazon and the Cerrado savannah. A Fair Finance Guide Netherlands case study on deforestation risks in soy and beef supply chains", 27 August 2020, <https://fairfinanceguide.org/ff-international/case-studies/2020/funding-destruction-of-the-amazon-and-cerrado-savannah/>.

⁴ E. Muñoz, "Environmental Impact of Livestock Production," *Agricultural Research & Technology Open Access Journal*, 2017, <https://juniperpublishers.com/artoaj/pdf/ARTOAJ.MS.ID.555745.pdf>.

⁵ P.J. Gerber, et al, "Tackling climate change through livestock: A global assessment of emissions and mitigation opportunities," FAO (Rome, 2013). N.B. This figure doesn't include carbon sequestration in a scenario in which diets would be more plant-based (which would free up more land to reforest). Therefore, the true climate impact of livestock is even larger than this figure. See: <http://www.chompingclimatechange.org/publications/articles/>.

⁶ M. M. Rojas-Downing, et al, "Climate change and livestock: Impacts, adaptation, and mitigation," *Climate Risk Management*, 16, 2017, p. 145-163.

⁷ The London Illegal Wildlife Trade Conference (2018) Declaration, Art. 4, <https://www.gov.uk/government/publications/declaration-london-conference-on-the-illegal-wildlife-trade-2018/london-conference-on-the-illegal-wildlife-trade-october-2018-declaration>.

⁸ Tickler, D., Meeuwig, J.J., Bryant, K. *et al.* Modern slavery and the race to fish. *Nat Commun* 9, 4643 (2018), available at:

<https://doi.org/10.1038/s41467-018-07118-9>. See also: Global Slavery Index, 'Fishing' (2018) available at: <https://www.globalslaveryindex.org/2018/findings/importing-risk/fishing/#footnote:10>



Identified gap in the OECD Guidelines: definition of a multinational enterprise and scope of applicability of the Guidelines

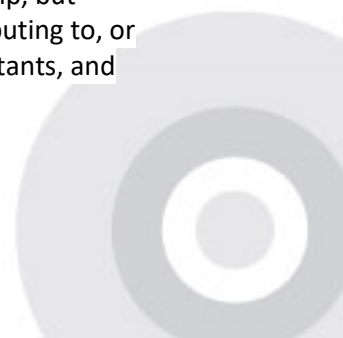
Outcome sought: Broad and comprehensive stocktaking of the OECD Guidelines for Multinational Enterprises (Guidelines) that addresses gaps on the definition of a multinational enterprise (MNE) and scope of applicability of the Guidelines.

Problem: The OECD Guidelines do not adequately clarify the broad range of types of organisations that may be MNEs and the applicability of the Guidelines to states acting as economic actors

A growing range of entities are operating in the commercial sphere and causing, contributing to, or being directly linked to adverse impacts on human rights and the environment. These include non-traditional MNEs such as non-profit sports federations linked to allegations of money-laundering, sex trafficking, and labour rights violations; non-profit multi-stakeholder or industry sustainability certification initiatives failing to investigate and address harmful impacts of corporations receiving their certifications; social auditing companies engaged to conduct due diligence for companies and failure to identify human rights abuses; holding companies holding shares in corporations causing various harmful impacts such as labour rights violations or tax avoidance; government pension funds investing in corporations causing environmental degradation; and export credit agencies facilitating investment in challenging regions or projects. Growing awareness of the adverse impacts caused by these entities has led to an increase of specific instances filed to OECD National Contact Points (NCPs) concerning the adverse impacts of them. This increase demonstrates both the need for clear standards on responsible business conduct for all entities undertaking or facilitating international commerce, and the lack of other avenues to remedy for victims of the harms identified.

In Chapter I (Concepts and Principles) of the OECD Guidelines, the Guidelines purposely do not set a specific definition for the MNE. They expressly state that the Guidelines do not seek to introduce differences in treatment between multinational and domestic enterprises, but reflect good practice for all. They also clarify that governments wish to encourage the widest possible observance of the Guidelines. Moreover, OECD States are increasingly interested in promoting policy coherence across the private sector and government entities.

Unfortunately, a number of the specific instances filed to NCPs against non-traditional MNEs – including most recently export credit agencies and a holding company – have been rejected on grounds that the entities are not MNEs covered by the Guidelines. These rejections suggest that the *lack of specificity in the Guidelines* regarding the breadth of the definition of MNE and nature of covered business relationships and nexus with commercial activity, and/or *the lack of commentary urging a broad interpretation of the term “MNE”* in order to facilitate promotion of the Guidelines and resolution of specific instances, is not helping governments reach their stated goal of encouraging the widest possible observance of the Guidelines and policy coherence across private and public sector economic actors. The Guidelines do not adequately clarify that they apply to all entities engaging in, pursuing, or facilitating commercial or business activity in the international or transnational sphere. Relatedly, the Guidelines’ focus on “supply” chain due diligence versus “value” chain due diligence in Chapter II (General Policies), does not help in clarifying that the Guidelines’ due diligence and other requirements do apply to MNEs that have no supplier relationship, but nevertheless a business relationship, that may place them in a position of causing, contributing to, or being directly linked to adverse impacts, to include financiers, lobbyists, auditors, consultants, and contractors.



Impact of the problem: Lack of clear explanation in the Guidelines of the broad scope of covered MNEs and broad applicability of the Guidelines including to states acting as economic actors.

The lack of clarity and guiding commentary in the Guidelines as to breadth in the range of entities that may qualify as MNEs under the Guidelines has the following impacts:

- 1) A perceived lack of expectations on RBC for a diverse range of non-traditional MNEs, creating a double standard in conduct among different actors operating together in the sphere of international commerce; and
- 2) Low accountability and remedy for the harms of such enterprises;
 - a. As mentioned, several complaints against non-traditional MNEs have been rejected on grounds that the entities at issue are not covered by the OECD Guidelines.¹ These rejections generate the perception that the standards in the Guidelines do not apply to these entities despite the fact that they are undertaking or facilitating commercial activities in an international setting. The rejections also leave impacted workers and communities with little or no other avenue to remedy for the harmful impacts incurred through activities associated with these entities.

Parallel principles and standards

Analysis of gaps regarding the definition of MNE and the scope of applicability of the Guidelines could refer to the following:

- The United Nations Guiding Principles, which apply broadly “to all business enterprises, both transnational and others, regardless of their size, sector, location, ownership and structure;”²
- The OECD’s work (via the Working Party on Responsible Business Conduct and the Working Party of Leading Practitioners of Public Procurement) encouraging greater focus on RBC principles on public procurement practices;
- National, regional and international development agencies’ environmental and social governance requirements for private sector partners, demonstrating increased attention to their own impacts via their business relationships. For example, the Safeguard Policies of the World Bank,³ DFID’s Supply Partner Code of Conduct⁴ and USAID’s Private Sector Engagement Policy;⁵ and
- Specific guidance, such as the Danish Institute for Human Rights’ advocacy around protecting human rights through public procurement.⁶

Why ensuring a comprehensive stocktaking on gaps is important

The OECD Guidelines, originally drafted in 1976, have not been revised since 2011 and are out of date in many ways. Ten years of implementation of the current text of the Guidelines have revealed numerous gaps in the text that cause both a serious lack of clarity and coherence in international norms on key elements of responsible business conduct, and diminish victims’ chances for remedy and accountability via the NCPs. Meanwhile, recent developments in RBC standards made beyond the OECD Investment Committee are threatening to make the OECD Guidelines comparatively less useful or even obsolete. The OECD Investment Committee’s Working Party on Responsible Business Conduct (WPRBC), responsible for the OECD Guidelines, has begun a stocktaking to identify what gaps exist in the Guidelines and assess whether steps are needed to address them. A comprehensive stocktaking that addresses all the gaps identified by civil society and other stakeholders is essential to evaluate whether the Guidelines are still fit for purpose.

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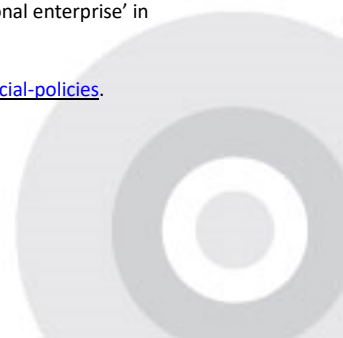
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¹ See, e.g., Responsible Business Conduct Centre, “Considering the purpose of the Guidelines and the notion of ‘multinational enterprise’ in the context of initial assessments,” DAF/INV/NCP(2020)54, 15 October 2020.

² United Nations Guiding Principles, General Principles, p. 1.

³ World Bank, Safeguard Policies, available at: <https://www.worldbank.org/en/projects-operations/environmental-and-social-policies>.



⁴ DFID, Supply Partner Code of Conduct, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/750988/Supply-Partner-Code-August-2018.pdf.

⁵ USAID, Private-Sector Engagement Policy, available at: <https://www.usaid.gov/work-usaid/private-sector-engagement>.

⁶ See, e.g. The Danish Institute for Human Rights, "Driving change through public procurement: A toolkit on human rights for policy makers and public buyers," 28 February 2020, available at: <https://www.humanrights.dk/publications/driving-change-through-public-procurement>.



Identified gap in the OECD Guidelines: general policies chapter

Outcome sought: Broad and comprehensive stocktaking of the OECD Guidelines for Multinational Enterprises (Guidelines) that addresses gaps in the general policies chapter.

Problem: Chapter II (General Policies) does not adequately establish fundamental principles and set the tone for the remainder of the OECD Guidelines

The Commentary to General Policies (Chapter II) of the Guidelines notes that the chapter is the first to contain specific recommendations to MNEs, and “As such it is important for setting the tone and establishing common fundamental principles for the specific recommendations in subsequent chapters.”¹ This intent is not fulfilled by the text of the chapter due to internal ambiguities and omissions.

The fundamental principle of due diligence is not outlined as directly as possible in Chapter II and could be more clearly aligned with the UN Guiding Principles. For example, the framing in Chapter II does not, as in Chapter IV (Human Rights) address the concept of remedy directly in principles as opposed to commentary. It also does not clarify (as again is clarified in Commentary 42 to the Human Rights chapter) that “activities” through which an MNE could be linked to harm can include actions *and omissions*. The terminology on “supply” chain due diligence in Chapter II and elsewhere in the Guidelines could be reframed as “value” chain due diligence to clarify the application of the Guidelines to all types of MNEs and to guide their due diligence over all of their business partners – not just their suppliers. Such a framing would better clarify the application of the Guidelines to MNEs such as financiers, lobbyists, auditors, consultants, and contractors. Further, as outlined further below and in other OECD Watch advocacy briefs, the due diligence provisions of Chapter II do not link smoothly with other chapters drafted before the supply chain due diligence language was added (such as the Employment and Industrial Relations chapter and the Environment Chapter). This disconnect has more than just facial consequences: because, for example, the Environment chapter is largely not framed around actual adverse environmental impacts, it is difficult for notifiers to apply Chapter II’s due diligence framing in provisions 10, 11, and 12, which focuses on adverse impacts, to address breaches of principles in Chapter VI. Further, reference to “own operations” in both the Environment and Employment and Industrial Relations chapters could cloud MNEs’ understanding of the scope of their due diligence expectations.

Regarding tone and internal harmony between chapters, a number of elements are problematic. First, the chapter’s chapeau introductory sentence states that “Enterprises should take fully into account established policies in the countries in which they operate.” The term “established policies” is unclear, as it could refer to established policies of the MNE itself, of other businesses operating in the country, or of the host country. More critically, since host country policies may contradict the Guidelines when they contain, for example, discriminatory language against certain groups or laws that facilitate tax avoidance, the sentence does not help set the tone that MNEs should implement the highest standard of RBC possible that does not place them in contradiction with domestic law, even if that means going beyond national-level requirements.² Second, the chapter unnecessarily makes a distinction between activities enterprises “should” undertake versus those they are only “encouraged to” undertake. Finally, the chapter does not ensure internal harmony with the rest of the Guidelines, because it fails to mention – and thereby underscore – several important policies that appear in the following chapters. For example, it fails to address disclosure, including in relation to the steps of the due diligence process. It also does not call for special attention in the due diligence



process towards marginalised or disadvantaged groups including women, children, Indigenous peoples, people of low caste, etc. The chapter's provisions do not call for avoidance of corruption and tax avoidance. Provision 9 rather narrowly discourages retaliation against workers, but not all human rights defenders. Provision B.1 also does not adequately address the importance of addressing impacts from digitalisation, instead only narrowly mentioning promotion of internet freedom. The incomplete coverages of topics in Chapter II does not set the right tone regarding the scope of general policies MNEs should adopt in order to act responsibly in accordance with the rest of the Guidelines.

Impact of the problem: Lack of clear standards for MNEs

Because Chapter II does not fully clarify the fundamental principle of due diligence and corresponding expectations for MNEs based on their relationship to the harm, nor emphasize the leading topics that will be addressed in the other chapters of the Guidelines, nor highlight several cross-cutting issues, the chapter misses an opportunity to set the tone by which MNEs should understand all the other expectations in the Guidelines.

Why ensuring a comprehensive stocktaking on gaps is important

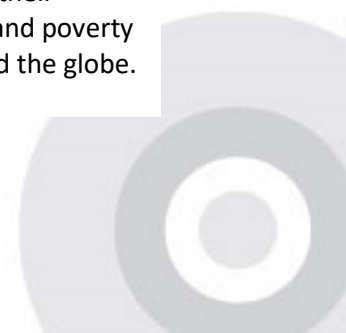
The OECD Guidelines, originally drafted in 1976, have not been revised since 2011 and are out of date in many ways. Ten years of implementation of the current text of the Guidelines have revealed numerous gaps in the text that cause both a serious lack of clarity and coherence in international norms on key elements of responsible business conduct, and diminish victims' chances for remedy and accountability via the NCPs. Meanwhile, recent developments in RBC standards made beyond the OECD Investment Committee are threatening to make the OECD Guidelines comparatively less useful or even obsolete. The OECD Investment Committee's Working Party on Responsible Business Conduct (WPRBC), responsible for the OECD Guidelines, has begun a stocktaking to identify what gaps exist in the Guidelines and assess whether steps are needed to address them. A comprehensive stocktaking that addresses all the gaps identified by civil society and other stakeholders is essential to evaluate whether the Guidelines are still fit for purpose.

Who needs to act?

OECD Watch urges governments to show commitment to keeping the OECD Guidelines up to date with evolving issues in the field of business and human rights – and acknowledge civil society's concerns regarding the current limitations in the Guidelines' standards and the NCP complaint system – by ensuring that the stocktaking studies all the issues of concern to civil society. OECD Watch also urges that states ensure the final stocktaking report responds to each concern raised by civil society. OECD Watch welcomes the stocktaking and stands ready to support the review process and any further steps taken to address gaps identified.

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¹ OECD Guidelines, Chapter II (General Policies), Commentary on General Policies, para 1.

² OECD Guidelines, Chapter I (Concepts & Principles), principle 2.



Identified gap in the OECD Guidelines: minimum expectations for the establishment of effective National Contact Points

Outcome sought: Broad and comprehensive stocktaking of the OECD Guidelines for Multinational Enterprises (Guidelines) that addresses gaps in the minimum expectations for the institutional arrangements, promotional activities, and complaint handling procedures of National Contact Points.

Problem: The OECD Guidelines do not set adequate baseline expectations for governments on how to establish National Contact Points (NCPs) that meet the core criteria and complaint handling principles laid out for them in the Guidelines, as well as stakeholders needs and expectations

The UN Guiding Principles (UNGPs) find that states have a duty to provide victims of business-related human rights abuse access to judicial and non-judicial grievance mechanisms, and also that multinational enterprises (MNEs) have a responsibility to provide or participate in remedy. Unfortunately, remedy is often considered the “forgotten pillar” of the UNGPs. Because access to remedy via judicial systems is still impossible or extremely difficult in many cases of irresponsible business conduct, impacted workers and communities often rely on non-judicial mechanisms to seek justice. The OECD Guidelines’ Procedural Guidance (Part II of the Guidelines) requires member and adherent states to establish such a mechanism in the form of an NCP, a government-supported entity tasked with promoting the Guidelines and helping to resolve claims that MNEs have breached the Guidelines’ standards. The OECD Guidelines call on member and adherent states to ensure their NCPs meet core criteria of *visibility, accessibility, transparency, and accountability* and are equipped to handle complaints in a manner that is *impartial, predictable, equitable, and compatible with the Guidelines*. The Procedural Guidance allows almost complete flexibility to governments to set up NCPs that meet these expectations, so long as they are “functionally-equivalent” to each other.

As long as obstacles to other remedial mechanisms persist, the NCPs represent a vital means through which victims of business-related human rights abuses may attempt to find remedy. Unfortunately, because the Guidelines’ Procedural Guidance does not set adequate minimum practical requirements for NCP performance, after 20 years of NCPs’ existence, the NCPs are not functionally equivalent. More specifically, when viewed collectively, they do not meet the Guidelines’ core criteria and complaint handling principles, nor stakeholders’ needs and expectations.

○ **Institutional Arrangements:** AN NCP’s structure has significant bearing on its effectiveness, and the Procedural Guidance does not set adequate minimum expectations for NCP institutional arrangements most conducive to success. The Procedural Guidance does not set adequate minimum requirements for the resourcing of NCPs. A functional NCP needs sufficient funding as well as high quality and quantity of staff. To this end, the Guidance should, but does not, call for a designated and public budget for each NCP, nor discourage high staff turn-over and recommend ensuring staff or external advisors have broad knowledge of the topics covered in the Guidelines. The Procedural Guidance does not guide states on the merits of locating the NCP outside export promotion agencies to isolate the NCP from conflict of mission with the host ministry. The Guidance also does guide states in choosing an organisational structure that helps promote NCPs’ independence and expertise and boost stakeholder confidence in its *impartiality* and effectiveness. The Procedural Guidelines also sets no minimum requirements for involvement of stakeholders (including civil society) in NCP decision-making activities, ideally in the NCP structure itself, or secondarily through an oversight or advisory body.

- **Information and Promotion:** States are called to ensure their NCP is *visible* and *transparent*, but the Procedural Guidance does not give adequate guidance to states on how to achieve this, such as by facilitating the NCPs engagement across government ministries and ensuring the NCP shares and implements an ambitious prospective promotional plan targeted towards *all* stakeholder groups, maintains a public complaint database, and publishes complaints when they are received and initial assessments and final statements when they are drafted.
- **Implementation in Specific Instances:** In general, there is too much variation in specific instance handling and outcomes. OECD Watch believes this variance results from the fact that the Procedural Guidance sets insufficient basic standards for complaint-handling. *Accessibility* of NCPs is low for a few reasons: the current six admissibility criteria are difficult for NCPs and notifiers alike to interpret and often result in too high a threshold to acceptance – and, likely, in *unpredictably* long initial assessment reviews lasting well-beyond the designated three months. A simpler admissibility standard, such as ones common at other non-judicial complaint mechanisms, would better enable access to good offices. The Procedural Guidance also does not encourage NCPs to promote accessibility through steps such as helping indigent notifiers draft effective complaints, gain mediation training support, and participate in mediation through remote access technologies (all steps employed by some NCPs). Nor does the Guidance encourage NCPs to take efforts to mitigate potential barriers to women filing complaints, and anticipate and respond to risks to human rights defenders. The *partiality* and *equitability* of NCPs is regularly in doubt because they adopt practices that elevate the power of companies over notifiers. For example, too many NCPs require overly broad confidentiality terms allowing companies to protect their reputations, simply dismiss complaints when companies refuse to engage, and adopt only forward-looking grounds for discussion rather than accepting discussions on past breach. To promote impartiality, the Procedural Guidance should instead propose methods to right power imbalance between parties, such as recommending that NCPs maintain transparency over complaints, assess past company actions, and carry-out independent investigations and seek material consequences when companies refuse to engage in the process (again, all steps employed by some NCPs). *Accountability* of NCPs is also low because the Procedural Guidance does not instruct NCPs to issue public determinations when companies have breached the Guidelines (thereby ensuring a form of remedy to complainants and a teaching moment for MNEs) and undertake follow-up to monitor fulfilment of recommendations made or agreements reached in complaints (again, all steps employed by some NCPs). The Procedural Guidance also does not advocate states' development of substantive or procedural reviews for their NCP complaint-handling. Finally, the Guidelines do not encourage NCPs to engage and cooperate with other state-based and non-state-based grievance mechanisms, primarily for the sharing of good practices.

Partly as a result of these and other problems at NCPs, effective remedy is not the outcome in the vast majority of NGO- or community-led complaints.¹

Further, the Procedural Guidance does not adequately clarify the role of the Investment Committee itself in measuring and monitoring the functional equivalence of NCPs. Various methods – such as developing and applying a set of indicators to NCPs, appointing a team to spot-check a certain number of complaint outcomes each year, or appointing a centralised person or team to assist with each actual ongoing complaint, could help ensure greater consistency in NCP performance and complaint outcomes. Additionally, the Guidance doesn't clarify the substantiated submission

procedure to ensure it is undertaken according to the same core criteria and principles that the Guidelines demand of NCPs in their complaint handling.

Impact of the problem: Lack of access to remedy for impacted parties and lack of clear expectations for MNEs.

Many victims of corporate impacts have no avenue to remedy except via the NCP complaint mechanisms, and therefore the collective failure of OECD states to establish a coherent and accountable NCP grievance system has two main consequences:

- 1) Diminished ability for impacted people to seek and secure remedy from NCPs for business-related impacts.²
- 2) Lack of clarity for MNEs on the meaning of responsible business conduct (particularly through NCPs' failure to follow-up on complaints, issue determinations of Guidelines breach, and seek consequences for lack of good faith engagement in the complaint process).

Guidance on remedy from public institutions and civil society and examples from other grievance mechanisms

The stocktaking of gaps in the Procedural Guidance should consider the findings of recent evaluations of the NCPs, recommendations that have been developed to achieve better implementation of the UNGPs, and examples of certain practices and policies of other non-judicial mechanisms, such as:

- Evaluations of the NCPs by OECD Watch and the OECD RBC Unit;³
- Recommendations of the UN (OHCHR)⁴ and the European Agency for Fundamental Rights⁵ on barriers to accessing remedy;
- Analysis of practices of the Independent Accountability Mechanisms (IAMs) of the development finance institutions, including a civil society Good Policy guide highlighting current good policies of the IAMs across ~70 key performance indicators;⁶ and
- (as useful) Analysis of procedures of certain multi-stakeholder initiative complaint mechanisms.

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¹ See OECD, *Providing access to remedy: 20 years and the road ahead*, (2020), available at: <http://mneguidelines.oecd.org/ncps/ncps-at-20/>.

² For examples of cases that have not reached remedy, see, e.g., OECD Watch's annual *State of Remedy* reports, available at <https://www.oecdwatch.org/?s=state-of-remedy>, and its *Remedy Remains Rare* report, available at: <https://www.oecdwatch.org/remedy-remains-rare/>.

³ See notes 1–3 as well as OECD Watch's *NCP Evaluations*, available at www.oecdwatch.org/indicator.

⁴ See, OHCHR, [Improving Accountability and Access to Remedy for Victims of Business-Related Human Rights Abuse through State-Based Non-Judicial Remedies](#)

⁵ See FRA, [Improving Accountability and Access to Remedy for Victims of Business-Related Human Rights Abuse through State-Based Non-Judicial Remedies](#)

⁶ Learn more about IAMs at the IAM Network (www.independentaccountabilitymechanism.net); the Good Policy guidance is in creation led by the NGO SOMO in the Netherlands (www.somo.nl).

