

# Get Fit

**Closing gaps in the OECD Guidelines  
to make them fit for purpose**

## Colophon

Get Fit. Closing gaps in the OECD Guidelines to make them fit for purpose  
June 2021

**Authors** Marian Ingrams, Joseph Wilde-Ramsing, Janna Fleuren  
**Graphic design** JUSTAR graphic design  
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**Publisher** OECD Watch, [www.oecdwatch.org](http://www.oecdwatch.org)

**Acknowledgements** This report is the result of a collaborative effort. OECD Watch would like to thank the hundreds of organisations and individuals both within and beyond the OECD Watch network that participated in consultations, particularly between November 2020 and February 2021, to identify the gaps in the Guidelines of most concern to civil society. The authors would also like to thank TUAC for its advice on labour issues and the OECD secretariat for its cooperation in the process.

OECD Watch would further like to thank Tom Mason, Katharine Booth, Maisie Biggs, and Suzan van der Meij for great help developing earlier versions of the material in this report.

This document has been produced with financial support from the National Endowment for Democracy and the Netherlands Ministry of Foreign Affairs.

Published by **OECD Watch**

OECD Watch Secretariat  
(c/o SOMO)  
Sarphatistraat 30  
1018 GL Amsterdam  
The Netherlands  
Tel: + 31 (20) 6391291  
Fax: + 31 (20) 6391321  
E-mail: [info@oecdwatch.org](mailto:info@oecdwatch.org)  
Website: [www.oecdwatch.org](http://www.oecdwatch.org)

OECD Watch is a global network with more than 140 members in over 50 countries. Membership consists of a diverse range of civil society organisations bound together by their commitment to ensuring that victims of corporate misconduct have access to remedy, that business activity contributes to sustainable development and poverty eradication, and that corporations are held accountable for their actions around the globe.



# Contents

Executive Summary .....	4
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<b>1</b> Introduction .....	6
1.1 Gaps in the Guidelines: a tale of two cases.....	6
1.2 Unfit for purpose.....	8
1.3 Objectives of this report .....	11
1.4 Report structure and methodology .....	15

## GAPS IN THE OECD GUIDELINES

<b>2</b> Gaps in expectations for NCPs.....	18
<b>3</b> Gaps in standards for MNEs.....	33
3.1 Marginalised/disadvantaged groups.....	34
3.2 Human rights defenders.....	40
3.3 Climate change and environmental degradation.....	44
3.4 Land rights .....	48
3.5 Labour rights .....	52
3.6 Taxation .....	56
3.7 Digitalisation.....	60
3.8 Disclosure.....	64
3.9 Corruption.....	68
3.10 Animal welfare.....	72
3.11 Non-traditional MNEs including states engaged in commercial activities.....	76

<b>4</b> Conclusion and recommendations.....	80
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# Executive Summary

The OECD Guidelines are currently not fit for purpose.

Drafted in 1976 and long considered the leading standard on responsible business conduct (RBC), the OECD Guidelines for Multinational Enterprises (Guidelines) have enormous potential to advance RBC globally. Broad in scope covering companies and their value chains across all sectors and geographies, setting standards on an array of environmental and social issues, and backed by state-supported grievance mechanisms, the Guidelines should be a key tool to promote better business models and facilitate access to remedy for victims of adverse corporate impacts.

But the Guidelines are failing these purposes.

The standards they set for multinational enterprises (MNEs) are outdated and incomplete, missing major and pressing societal issues such as climate change, digitalization, tax avoidance, land rights, and security for human rights defenders.

And the expectations they set for their implementation via the OECD National Contact Points (NCPs) are completely inadequate, yielding NCPs that are widely divergent in their structures, promotional activities, and complaint-handling procedures - and thus their accountability, impartiality, and effectiveness in facilitating remedy and encouraging good business conduct.

The Guidelines - and the governments that adhere to them - stand now at a critical juncture. A decade has passed since the Guidelines were last updated, and in that time significant advances have been made in business and human rights norms ostensibly addressed by the text. While in 2011, states had just barely acknowledged the responsibility of MNEs to respect human rights, by 2021, they are increasingly codifying that responsibility into law - and relying on the outdated Guidelines to do so. Will states take the opportunity now afforded them to update the Guidelines for the modern era, advancing a progressive vision for business and human rights for the next ten years? Or will they allow the Guidelines to stagnate while myriad overlapping and conflicting standards fill their place?

This paper has three objectives:

- To demonstrate why the Guidelines are not fit for purpose - because gaps in the standards and expectations they set for MNEs and NCPs render them outdated and ineffective.
- To explain why a revision of the Guidelines is needed to close the gaps.
- And to offer practical recommendations on the targeted, simple edits necessary to bring the Guidelines up to date.

Drawing on insight from global civil society groups and OECD Watch's database of NCP complaints and evaluations of NCPs, this paper discusses leading challenges in the field of business and human rights, identifies gaps in the Guidelines rendering them unable to address those challenges, and suggests practical revisions that will ensure the Guidelines remain fit for purpose as the leading, consolidated global standard on RBC.

The governments adhering to the Guidelines - like all states - have a duty to ensure accountability for adverse corporate impacts, and they have committed through the Guidelines to promote RBC. The stocktaking on gaps in the Guidelines currently being undertaken by the OECD Working Party on Responsible Business Conduct (WPRBC) represents the first step in fulfilling that duty. Revising the Guidelines is the next.

# Introduction

## 1.1 Gaps in the Guidelines: a tale of two cases

Let us begin with a tale of two cases.

In early 2009, Indigenous communities in the Philippines supported by an NGO filed a complaint<sup>1</sup> to the Norwegian NCP against Norwegian mining company Intex Resources. The Philippines government had given Intex a prospecting permit to explore nickel mining operations on 9,720 hectares of land on the Mindoro island, home to several tribes of the Mangyan Indigenous peoples. The permit, the complaint asserted, had been approved through a flawed process of free, prior, and informed consent (FPIC) by the Philippine government: two of the tribes that would be impacted had not been consulted or given consent as required under Philippine law and were not present when the agreement allowing mining exploration was thumb-printed. Further, the complaint alleged, Intex had also failed to respect the communities' right to FPIC in its own legally required stakeholder consultations: Intex provided communities incomplete information on the project and its likely impacts; busied tribes supportive of the development while not inviting tribes opposed to it; and failed to provide a list of elders and leaders who had attended its consultations. Through both its own actions and failure to address the governments' errors, the complaint argued, Intex had breached several provisions of the OECD Guidelines.

The Norwegian NCP's handling of the complaint remains one of the strongest on the issue of FPIC. The NCP accepted the complaint despite the company's defence of its operations. To better evaluate the facts on the ground, the NCP hired external investigators to undertake an extensive on-site visit. In a publicly available report, the experts concluded that while Intex was operating in line with national legislation, it was "not compliant" with the Guidelines in regard to several issues, including stakeholder engagement, environmental impact assessments, disclosure, and transparency. After a process of dialogue with both parties, the NCP issued a final statement in 2011 confirming that Intex had failed to systematically and comprehensively consult and secure consent from all the impacted communities. Specifically, Intex had not identified and consulted two tribes who do not live on the land, yet still have rights and relation to it; Intex had not consulted appropriate and legitimate representatives of the people; and finally, in some cases Intex had obtained consent before the design of the project was finished, thus not ensuring *informed* consent. The Norwegian NCP concluded with a clear recommendation and determination: "[t]he NCP expects Intex to engage in 'adequate and timely communication and consultation' with the affected communities on environmental risks. Failing to do so constitutes a breach of Chapter V [then the Environment chapter] of the OECD Guidelines."

The outcome gave the complainants a real measure of remedy: confirmation by a government that their rights had indeed been violated, and belief that a devastating destruction of their territories would not take place. The proceedings also gave civil society real hope in the potential of the Guidelines and their relatively new state-backed grievance mechanism: that through independent fact-finding and impartial application of international norms, the system might really help promote RBC and achieve accountability for harmful business impacts.

That hope was short-lived.

In 2013, several NGOs filed a complaint to the Canadian NCP against Corriente Resources and CRCC-Tongguan Investment (Canada) Co. Ltd., Canadian subsidiaries of the Chinese conglomerate CRCC-Tongguan.<sup>2</sup> The complaint alleged abuses at the planned Mirador open-pit copper mine in Ecuador very similar to those alleged or anticipated in the Philippines: forced displacement of Indigenous and campesino people, including in violation of Indigenous peoples' right to FPIC; lack of an adequate environmental impact assessment; inadequate disclosure and transparency; the company's fuelling of division between local populations over the planned development; and the company's complicity in violent state repression of protests against large-scale mining in the area.

The Canadian NCP's handling of the complaint was disappointing. The NCP rejected the complaint on two grounds. The first was that the companies refused to participate in the proceedings. This is now a recognised tactic of MNEs to squash complaints against them: because most NCPs will not proceed with an investigation if a company refuses to mediate, these NCPs effectively allow MNEs unilaterally to shut down the path to remedy. The

Canadian NCP's second ground for rejection was that it deemed the complaint insufficiently substantiated. This is another major barrier to accessing NCP complaint mechanisms: NCPs often apply an unreasonable standard of proof at the initial assessment stage of the complaint, or even reject complaints they deem not conducive to resolution via their good offices. In support of its view, the NCP noted that the complaint "largely rests on human rights issues as they relate to property law, and with the obligation to consult with indigenous and non-indigenous peoples." But the NCP asserted that "The [2011] OECD Guidelines do not include a requirement for free, prior and informed consent."

**How could two similar complaints, filed under the same international standard to the same system of complaint mechanisms follow such different procedures and reach such different findings?**

The reason that question can be asked is the reason for this paper: because the Guidelines are failing to fulfil their purposes.

## 1.2 Unfit for purpose

From the perspective of civil society, the Guidelines have three simple purposes:

1. **To provide a comprehensive, up-to-date, and practical set of standards on RBC for MNEs;**
2. **To facilitate access to remedy for victims of adverse business impacts via the NCP complaint mechanism; and**
3. **Through providing progressive norms for MNEs and a meaningful path to remedy for victims, to signal to the world the importance of advancing responsible business practices.**

The two cases above help illustrate how the Guidelines are failing these purposes.

### GAPS IN STANDARDS FOR MNEs

The Canadian NCP was right - *technically* - that the Guidelines do not include a requirement of free, prior, and informed consent. Though one might be surprised to learn it, **the Guidelines do not actually address "land rights" at all**, let alone the specific and vital right to FPIC for Indigenous peoples or other marginalised and disadvantaged groups whose territories are threatened by corporate activity. This is so despite the fact that one fifth of community-led complaints are about land rights violations - and the fact that defenders of land rights are now among those most at risk of being killed for standing up for their rights.<sup>3</sup> The Guidelines say nothing about other land issues, too: legitimate tenure rights and the importance of respecting land rights even when states fail to protect them; the validity of tenure even where paper title is lacking; the importance of addressing past land legacy issues and disputes before engaging in investment; and the particular vulnerability of certain tenure rights

such as those of women, customary, and communal tenure holders.

But land rights are not the only issue "under-addressed" in the Guidelines.

**The Guidelines also say nothing about several of the other issues** explicitly covered in those two cases.

- Increasing **deforestation** and the major threat it poses to biodiversity on the planet? The Guidelines do not mention the word.
- **Corporate participation in the repression of human rights defenders?** The Guidelines say nothing about shrinking civic space, the rising threats to human rights defenders protesting harmful business activity, and the role businesses are playing both actively and passively in silencing civil opposition.
- **Lack of transparency over MNEs' adverse social and environmental impacts?** Despite significant developments in the past ten years around non-financial reporting, the outdated Disclosure chapter does not call for much more than basic financial data.

And let's not stop there. Take any number of major challenges facing the world community right now:

- **Climate change?** Doesn't appear in the text.
- **Tax avoidance?** Neither mentioned nor discouraged, despite ground-breaking policymaking at the OECD itself to fight corporate strategies to minimize their tax burdens.
- **Digitalisation and its nexus with human and environmental impacts?** Simply not addressed, even as we watch digital technologies and social platform monopolies used to spy on citizens, fuel disinformation, and very nearly topple some of the democracies that make up the OECD membership.

### GAPS IN EXPECTATIONS FOR NCPS

The Canadian NCP was even "right" in its complaint handling. That it is to say, while we wish the complaint process outlined in the Procedural Guidance (part II) of the Guidelines required NCPs to proceed to consider and investigate all plausible claims *regardless* of MNEs' efforts to thwart them, it does not. **In general, the Guidelines do not call on NCPs to use the tools available to them** (which a few NCPs do use) to encourage MNEs to join mediation in good faith: such as **ensuring transparency** over plausible claims made in order to raise public awareness and reputational stakes for a company's refusal to engage; committing to investigate and publish any findings of breach (**determinations**) if companies refuse to participate in mediation; and committing to request penalties (**consequences**) for companies that refuse to participate or implement recommendations given and agreements reached.

In fact, **the Guidelines says precious little about a great number of important issues impacting the legitimacy and accountability of the NCP remedial mechanisms**. The Procedural Guidance sets no *floor* for the

organisational structures, promotional activities, and complaint-handling procedures NCPs must adopt to be impartial and representative, visible, and effective in fulfilling their dual mandate to promote the Guidelines and facilitate access to remedy. The Guidelines don't even clarify that NCPs are, indeed, a mechanism for facilitating remedy - leading to dispute among NCPs over this issue. All the Guidelines do is call vaguely for NCPs to be "accountable" and "transparent" and "impartial," etc., without giving any meaningful baseline expectations or guidance for states on how to ensure those lofty goals are met. States must simply ensure that their NCPs "function equivalently" to each other.

Needless to say, they do not. So is there any wonder that complainants are wising up and starting to target complaints to the NCPs even half-decent at handling them?

➔ *OECD grievance system at a tipping point: The OECD continues to accept new adherents to the Guidelines. Each one is required to establish an NCP, but because of the low expectations, many NCPs do not exist at all or function in a meaningful way. If more and more NCPs are allowed to join the grievance system with sub-par structures and procedures, the less functional NCPs will increasingly outnumber the more functional ones, and it will be increasingly difficult to generate the political will needed to raise expectations overall. The OECD Investment Committee must act now to raise the bar and the guidance for existing and future NCPs, or lose the legitimacy of the whole grievance system.*

This is how these two complaints could come out so differently. The Norwegian NCP, voluntarily adopting a stronger structure and rules of procedure than that required in the Guidelines, relied on the international law obligations of the Philippines and Norway regarding FPIC to find a Norwegian mining company in breach of the Guidelines. In another case involving two countries with weaker obligations on FPIC (and, it is worth noting, a less politically charged investment...<sup>4</sup>), the limited language in the Guidelines might not have facilitated such a clear holding on FPIC. Meanwhile, the Canadian NCP, following its own procedures and struggling, perhaps understandably, to encourage subsidiaries of a Chinese conglomerate to engage with the Canadian dispute mechanism - read the Guidelines literally as not covering the right to FPIC, and dismissed the complaint.

This is why we are where we are today: the Guidelines are not fit for purpose. The standards are incomplete. The thresholds for NCP complaint mechanisms are inadequate. And justice is not being served.

## 1.3 Objectives of this report

### Aims and Objectives

The ultimate aim of this report is to encourage the states adhering to the Guidelines to take the opportunity before them to update the Guidelines to ensure they maintain their role in advancing RBC and access to remedy globally.

In furtherance of that goal, the paper has three specific objectives:

- To demonstrate why the Guidelines are not fit for purpose - because gaps in the standards and expectations they set for MNEs and NCPs render them outdated and ineffective.
- To explain why a revision of the Guidelines is needed to close the gaps.
- And to offer practical recommendations on the targeted, simple edits needed to make the Guidelines fit for purpose.

### #1 The first aim of this report is to document why, and in what ways, the Guidelines are not fit for purpose, namely because:

- The standards they set for MNEs are incomplete and out of date, and
- The expectations they give for the NCP complaint mechanism are too low, leading to an ineffective, unpredictable system for remediating corporate impacts,
- Which, together, convey a poor message on governments' commitment to advancing RBC.

The paper documents gaps in a few ways. Each chapter in the segment on Gaps in the Guidelines lays out the global context for several leading issues of concern in the field of business and human rights, setting out the problem, its urgency in the world, and the role corporate (mis)conduct has in causing or exacerbating the problem. Next, each chapter identifies, from a straightforward read of the Guidelines' text, standards or concerns critical to that issue that are not covered in the text. Each chapter also highlights facts, trends, and specific examples of NCP practices and community-led complaints to help underscore the gaps in the text.

Cases are highlighted for a few different reasons:

- Sometimes, evidence of many, or increasing, complaint filings on a particular subject that is under-addressed in the standards helps show the need for clearer business standards on that issue: the complaints prove that harms are clearly happening on that subject, which points to the need for clearer expectations for businesses on those areas. This goes for complaints around several issues - climate change, tax avoidance, digitalisation, gender-specific impacts of businesses, and land rights, among others.

- ◉ Alternatively, sometimes a lack of complaints on an important RBC issue also underscores the need for standards on it. This is the case where standards are completely missing from the text, such as on forms of corruption other than bribery and extortion, and on animal welfare. Here, lack of complaints is not a sign of lack of problem, but rather of a problematic lack of grounds on which complainants can base their valid claims.
- ◉ Finally, in still other moments, complaints are referenced to showcase conflicting interpretations of the Guidelines' standards by NCPs. These complaints also help underscore that the standards themselves are vague and need clarifying.

Poor practices of NCPs are problems that largely speak for themselves and are drawn from OECD Watch research over the past two decades and from the OECD's own analysis and reporting on NCP performance.

## #2 The second aim of this report is to demonstrate the need for better RBC standards and improved thresholds for the NCP complaint mechanisms.

So the Guidelines are out of date and inadequate in facilitating remedy for victims of adverse business impacts. Why does that matter? Given the gaps already existing in the text, many in civil society justifiably question whether improving them is worth it. Why bother, they ask, when other more updated standards are proliferating among civil society and industry initiatives, and when binding laws provide a better tool anyway for holding corporations accountable?

Our view is that the Guidelines' various strengths, their widespread and ongoing use by all stakeholders as a leading RBC norm and vital path to remedy, and the fact that they are increasingly being adopted into national laws on corporate accountability, justify civil society and governments taking action to ensure they remain up-to-date and effective.

➡ *Some policymakers oppose revising the Guidelines because they believe visibility and implementation are more urgent priorities: too few MNEs know the Guidelines yet, they argue, so increasing awareness should be the first focus. In our view, the two goals are not mutually exclusive. Why promote an outdated text only to have to teach MNEs new standards later? States should strengthen the Guidelines now - a process that will itself raise business awareness - and move firmly into the next decade promoting the actual best standards on RBC.*

### THE GUIDELINES' STRENGTHS

The Guidelines have several innate strengths that make them unique as a tool for advancing RBC:

- ◉ **Government-backing:** The Guidelines are not just a wish-list of civil society; they are authored and backed by the 50 states adhering to the Guidelines who are bound to promote them to businesses and other stakeholders.
- ◉ **Broad sector coverage:** The Guidelines set out RBC standards for multinational enterprises (MNEs) in *all* sectors, not just a few.
- ◉ **Broad issue coverage:** The Guidelines' standards address a wide range of RBC issues, from human rights, environment, and employment, to taxation, disclosure, and consumer interests.
- ◉ **Broad territorial scope:** The Guidelines apply both to MNEs headquartered in the 50 states currently adhering to the Guidelines *wherever they operate in the world*, and also to MNEs *from any country* when operating in one of those 50 states. This means that, technically, any country and any MNE could, given the particular scenario, fall under the territorial scope of the Guidelines.
- ◉ **Coverage of all MNEs causing, contributing to, or directly linked to impacts:** Using framing from the UN Guiding Principles, the Guidelines apply not only to MNEs that directly cause adverse impacts to people or the planet, but also to MNEs that *contribute* or are *directly linked* to harms through their business relationships.
- ◉ **Coverage of MNEs value chains:** As a direct implication of the above, the Guidelines can be used to "pierce the corporate veil" to hold parent companies, and also brands, auditors, investors, lenders, buyers, and other business partners responsible for at least some level of connection to the harms occurring in their own value chains.
- ◉ **Built in grievance mechanism:** Finally, the Guidelines provide not just a set of RBC standards, but a path to remedy too: Part II of the Guidelines, called the Procedural Guidance, requires all adhering states to establish a grievance mechanism called a National Contact Point (NCP) to hear claims against companies alleged to have breached the standards and help victims achieve remedy.

### REASONS FOR UPDATING THE MNE STANDARDS

Ensuring the RBC standards remain up to date is important in its own right: together with the UN Guiding Principle (UNGPs), the Guidelines have been considered by policymakers, businesses, and civil society alike as the "norm setters" on RBC. The Guidelines are used themselves, in practice, by all these stakeholders to understand, implement, evaluate, or teach what conduct is expected of corporations vis-à-vis the environment, human rights, and other social issues.

But ensuring the standards remain up to date is also important because of the role the Guidelines are playing in shaping hard law on the subject of corporate accountability. There is a growing trend for governments and courts to enshrine the standards contained in the OECD Guidelines into national law. Consider the French Duty of Vigilance law<sup>5</sup>, for example, or the new Dutch law on child labour<sup>6</sup>, or the EU conflict minerals and reporting directives<sup>7</sup>. All have borrowed from the OECD Guidelines and associated due diligence guidance to frame

relevant issues or directed courts to do the same when applying the laws to cases. Or consider the recent holding by the Hague District Court in the Netherlands that cited the UNGPs and OECD Guidelines extensively as giving oil company Royal Dutch Shell an “unwritten standard of care” it must follow to account for and reduce CO<sub>2</sub> emissions in its own operations and value chain.<sup>8</sup> The Guidelines should be updated not only for their own sake, but because they are actively being used by legislatures and courts to turn the norms into binding regulation. If the norms fall behind, so do the laws based on them.

#### REASONS FOR UPDATING THE NCP EXPECTATIONS

Meanwhile, raising expectations for NCPs is also essential. For one, states have a duty under international law to ensure accountability and facilitate remedy for victims of adverse business impacts, including via non-judicial mechanisms. UNGP 27 explains that “states should provide effective and appropriate non-judicial grievance mechanisms, alongside judicial mechanisms, as part of a comprehensive State-based system for the remedy of business-related human rights abuse.”<sup>9</sup> The NCPs are perfectly positioned to fulfil this duty, and it is time states stop making excuses - some even denying whether NCPs are supposed to facilitate remedy - and use the NCP platform as one to help them fulfil their duty.

For another, until binding laws replace the Guidelines in the area of corporate accountability, then for better or worse, the NCPs will remain the most affordable - and often the only - complaint mechanism for many individuals harmed by corporate conduct. Closing gaps in the baseline thresholds for NCPs is essential now to ensure impacted individuals have a chance to realise their *right* to remedy.

### #3 Finally, the third aim of this report is to give policymakers practical recommendations on where revisions are needed to close the gaps.

Revision may seem daunting to many states, but it need to be the heavy lift imagined by some. Simple, targeted changes in just a few of the principles or commentary across several chapters would raise the bar to set the necessary expectations for MNEs. Meanwhile, accompanying statements, practice notes, or guidance notes from the OECD secretariat could clarify the additions in greater detail. The OECD’s stocktaking report already reveals many common views among the states and stakeholders about where the gaps are. All that is needed is the political will to close them.

States adhering to the OECD Guidelines have been leaders on the issue of RBC for a long time. The OECD Investment Committee’s WPRBC is undertaking in 2021 a stocktaking of successes and challenges in relation to the Guidelines to assess whether they are still “fit for purpose” and, if not, determine what steps are needed by the OECD to address gaps. We welcome the stocktaking the OECD has begun and the public consultation they are beginning. Following completion of the stocktaking, we urge governments to move ambitiously in the next year to update the Guidelines, as they have several times in the past, to advance global norms around RBC.

## 1.4 Report structure and methodology

### STRUCTURE

Following this introduction, the next two sections cover “Gaps in the Guidelines:”

Section 2 identifies gaps in the Guidelines’ Procedural Guidance, Part II of the Guidelines that sets out expectations for the structures, promotional activities, and complaint handling procedures of the NCPs. Following perspective on gaps and shortcomings of NCPs, this section closes with a few pages of data analysing at a general level the past two decades of complaints filed by communities and civil society to NCPs. These numbers are meant to convey the scope both of the Guidelines potential to facilitate access to remedy for victims, and of the limitations to date in achieving that goal.

Section 3 second part is divided into 12 sub-chapters that identify gaps on a range of important topics in Part I of the OECD Guidelines, which outlines the RBC standards for MNEs.

Each of these two sections on gaps in the Guidelines provides:

- **Global context** on the issue or problem discussed, for example gaps in remedy for rightsholders adversely impacted by business conduct, or corporate contribution to emissions and climate change;
- **Gaps in the Guidelines** with respect to that issue, for example, gaps in the expectations for NCPs that render them ineffective in facilitating access to remedy, or nonexistence of standards for MNEs on climate change;
- **Statistics and trends in NCP complaints or NCP structures and practices**, as well as **specific case examples**, that illustrate the need for higher standards and expectations in the Guidelines on that issue; and
- **Recommendations** on what steps, including revision of Guidelines’ text, are needed by the OECD to address the gaps.

Finally, section 4 of the report offers concluding thoughts and recommendations.

This report is based on information gathered through a variety of qualitative and quantitative research methods.

First, beginning in 2019 and continuing in parallel with the start of the OECD's own 2021 stocktaking process, OECD Watch held a series of in-person and virtual consultations with over 150 global civil society groups, as well as its membership, to discuss and identify challenges in pursuing NCP complaints. These discussions led to the identification of 14 "gap areas" in the Guidelines: 13 related to incomplete or missing standards for MNEs, and one focused on the organizational and operational weaknesses of NCPs. Together with civil society, OECD Watch prepared "Gap analyses" on these topics for the OECD's Working Party on Responsible Business Conduct, asking that these issues be included and addressed in their stocktaking on gaps in the OECD Guidelines. The gap analyses have been adapted to provide the material in sections 2 and 3 of this paper.

Second, OECD Watch analysed cases in its complaint database to prepare the statistics and case examples in this report that help illustrate the gaps in MNE standards and NCP performance. OECD Watch's database is limited to cases filed by communities and NGOs because OECD Watch is a network of NGOs, and because the next largest block of cases – those filed by labour unions – are supported by the Trade Union Advisory Committee (TUAC).

Third, OECD Watch used material from its NCP Evaluations project, an assessment of NCPs against a set of key performance indicators on NCP organizational arrangements, communications practices, and complaint handling procedures, to identify several of the statistics for the section of this report on gaps in relation to NCP structures and performance.

OECD Watch has also relied on publications and the complaint database of the OECD for some of the analysis and statistics in this report.

A draft of the report was sent to the secretariat of the OECD Working Party on Responsible Business Conduct for comments prior to publication.

All statistical figures are based on information gathered through the above research, unless otherwise noted. Because the agreements and recommendations produced in many of the concluded cases have not been followed-up upon by the NCPs nor the parties to the case, some of the information provided in the present report may be incomplete. Information on all the cases referenced in the report can be found in OECD Watch's case database, available at [www.oecdwatch.org/complaints-database](http://www.oecdwatch.org/complaints-database).

# 2

## Gaps in Expectations for NCPs

Civil society's first priority in relation to the Guidelines is closing gaps in expectations for NCPs. The NCPs implement the Guidelines, both by promoting them to businesses and other stakeholders and monitoring business uptake, and by facilitating access to remedy for victims. No matter how strong the Guidelines are on paper, they can only be as strong as their implementation. For this reason, we begin first with focus on the grievance mechanism.



### GLOBAL CONTEXT: ACCESS TO REMEDY AND THE NATIONAL CONTACT POINT GRIEVANCE MECHANISM

The UN Guiding Principles (UNGPs) make clear 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 wherever they have caused or contributed to impacts. 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.



Unfortunately, remedy has been called the “forgotten pillar” of the UNGPs.

As described earlier in this paper, NCPs are government-supported offices tasked with promoting the Guidelines and helping to resolve claims that MNEs have breached the Guidelines’ standards. 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 (called “specific instances”). As mentioned, Procedural Guidance (Part II of the Guidelines, which sets expectations for implementation of the Guidelines via the NCPs and the OECD Investment Committee) expects 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.

The NCPs *should be* the powerful state-backed non-judicial mechanism envisioned in UNGP 27.

**1 in 2**

Barely  
of NCPs have a structure that enables them access to  
broad expertise in complaint-handling.



## GAPS IN THE GUIDELINES

Unfortunately, gaps in the Guidelines' expectations for NCPs have prevented NCPs from fulfilling that role.

Research undertaken by OECD Watch over the past decades,<sup>10</sup> including its recent project to evaluate each NCP against a set of key performance indicators conceived by civil society and based in the Guidelines,<sup>11</sup> 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.

The wide variance is a result of the inadequate baseline expectations in the OECD Guidelines. The Procedural Guidance provides almost no minimum standards for states on practical and important matters related to their structure and institutional arrangements, communication practices, and complaint-handling procedures. For example, the Guidance does not clarify *which types of organisational structures* are needed to allow NCPs independence, authority, and breadth of expertise; *what communication practices* are necessary to elevate the visibility of NCPs; and *which practical rules of procedure for complaint handling* help encourage companies to engage in meaningful and agreement-oriented dialogue with complainants. Because of the lack of expectations for NCPs in the Guidance - and lack of effective monitoring and accountability for underperforming NCPs by the Investment Committee- significant disparities between NCPs have made the NCP system as a whole inconsistent and unpredictable. When viewed collectively, NCPs do not meet the Guidelines' core criteria and complaint handling principles, nor stakeholders' needs and expectations.

OECD Watch agrees that flexibility is critical for the establishment of NCPs: every grievance mechanism should be designed, bespoke, to reflect national cultures and the strengths and weaknesses of the government institutions that will support it. **But preserving flexibility does not mean setting no meaningful expectations for NCP structures and performance.** As is, partly because of these and other gaps in the Procedural Guidance, the NCP system as a whole does not function effectively and remedy is not the outcome in the vast majority of complaints.<sup>12</sup> Only 11% of complaints filed by communities and NGOs reach agreement.



### CORE CRITERIA: ACCESSIBILITY

The OECD Guidelines calls vaguely for complaints to be "material and substantiated" in order to be accepted by NCPs. These vague terms are not defined and thus often result in overly burdensome interpretations by NCPs, such as the Mexican NCP whose rules of procedure call for complaints to show a "proven relation between the activities of the MNE and the issues raised" and also requires that facts be "susceptible of being resolved through the specific instance."<sup>13</sup> The substantiation standard in the Procedural Guidance is intended to establish whether a complaint is bona fide rather than frivolous, and should only require that the factual allegations be plausible.



### CORE CRITERIA: VISIBILITY

Several NCPs are nearly invisible.<sup>14</sup> The NCPs of Jordan and Tunisia have no website, nor other relevant materials. The Egyptian and Romanian NCPs have websites, but no contact information or rules of procedure. In 2019, 11 or a fifth of NCPs engaged in no promotional activities at all.<sup>15</sup> Fewer than half of NCPs publish a complaint database.<sup>16</sup> The OECD itself recently wrote that "Such limited outreach and exposure reduces the public's knowledge of the specific instance mechanism. This, as a result, contributes to keeping the number of yearly cases filed relatively low."<sup>17</sup> Indeed, over the past 20 years, a paltry 575 complaints have been filed to NCPs. This is an average of about one complaint every two years at each NCP - but in reality, because of disparities in NCP performance, some NCPs handle the majority of NCP complaints, while many have had just one or two, or none.



### CORE CRITERIA: TRANSPARENCY

OECD Watch believes NCPs should keep only the following three types of information confidential: the personal identities of parties for security/privacy reasons, legitimately sensitive business information, and documents shared and discussions had during the mediation process. Unfortunately, according to OECD Watch's evaluation, just 13 NCPs meet that standard, while most set much broader restrictions on transparency.



### CORE CRITERIA: IMPARTIALITY

Three quarters of NCPs are based in economic ministries, while three are even placed in export promotion agencies.<sup>18</sup> The placement of these NCPs in ministries focused on increasing economic development often causes civil society to doubt their impartiality and can expose them to greater risk of conflict of interest between the goals of the ministry and the requirement for non-biased handling of complaints. Other practices of most NCPs - such as their protection of confidentiality for MNEs and their unwillingness to proceed with complaints where companies refuse to participate, issue determinations of non-compliance with the Guidelines, and seek consequences for MNEs that do not engage in the complaint process or implement recommendations given - also are perceived by civil society as showing partiality towards the preferences of companies.

### LACK OF CLEAR EXPECTATIONS MAKES WORK OF NCPS HARDER

The lack of clarity in the Guidelines forces NCPs to struggle individually with common challenges - such as determining a standard on which 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 - and defend their procedures when corporations push back against them.

### RECOMMENDATIONS

After nearly two decades of analysis of NCPs and their complaint handling practices, OECD Watch has identified several practical solutions to address shortcomings in the Procedural Guidance to strengthen the effectiveness and functional equivalence of NCPs.

### Recommendations for NCP institutional arrangements:

An NCP's structure has significant bearing on its accountability and effectiveness, but the Procedural Guidance leaves too many gaps in this area.

- The Procedural Guidance should set specific minimum guidance for the resourcing of NCPs (in terms of budgets, staff levels, and limitation of staff turn-over).
- The Procedural Guidance should prohibit states from locating NCPs in export promotion agencies, encourage them to locate NCPs not in economic ministries, and require them to develop conflict of interest procedures to avoid conflict with individual complaints and with the mission of the host ministry.
- The Guidance should require states to choose from an array of organisational structures that promote NCPs' independence and access to broad expertise.
- The Procedural Guidance should require that NCPs involve stakeholders (including civil society) in NCP decision-making activities, ideally in the NCP structure itself, or through an oversight or advisory body.
- The Procedural Guidance should call for NCPs to undergo periodic public reviews to improve their structures and modes of operation.



Only **2** NCPs publicise their budget and spending streams on their website.

Only **half**

of NCPs promote the Guidelines to stakeholders beyond their country's own borders.



Only **1 in 4** NCPs have stakeholder advisory bodies that involve all three stakeholder groups and meet more than once per year.

### Recommendations for NCP information and promotion practices:

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.

- The Procedural Guidance should require states to maintain a public complaint database that publicizes in a timely fashion updates on the complaint status as well as the complaints themselves, initial assessments, and final statements.
- The Guidance should call on states to publicize and implement ambitious prospective promotional plans targeted towards all stakeholder groups, including civil society. NCPs should be expected to engage in several promotional activities, involving all stakeholder groups together and also each group independently, throughout the year.

**29%**

of complaints filed in 2015 are still under review without reaching a resolution, even though complaints are supposed to be completed in one year. The unreasonable delays in complaint-handling discourage victims from filing and stymie access to remedy.



### NCPS AND REMEDY

The Guidelines are voluntary for MNEs, but binding on states, because adhering states must create an NCP to promote the Guidelines and help resolve claims against companies alleged to have breached the Guidelines. NCPs do not and cannot replace good laws and well-functioning courts to sanction companies that violate the law. are not empowered to enforce penalties on MNEs. Nevertheless, NCPs can play an important role in helping victims secure remedy by:

- Acknowledging and helping raise awareness of MNE breaches of the Guidelines through issuing a "determination" when a company has not followed the standards;
- Providing recommendations to companies on how they can remediate their impacts and improve their policies moving forward;
- Encouraging companies, during mediation, to provide tangible remedy to rectify harms done; and
- Urging other government ministries to apply consequences (penalties) to MNE that engage in poor faith with the complaint process by refusing to join mediation or failing to implement recommendations given. Penalties can include exclusion from privileges such as public procurement contracts, export credit guarantees, private sector development aid, international trade, and investment services.

## Recommendations for NCPs' Specific Instance procedures:

Finally, the Procedural Guidance sets insufficient basic standards for complaint-handling.

- The Guidance sets inadequate standards to promote accessibility and predictability of NCPs:
  - The current six admissibility criteria prescribed by the Procedural Guidance are difficult for NCPs and notifiers alike to interpret. As a result, they often contribute to unpredictably long initial assessment reviews lasting well-beyond the designated three months, and cause NCPs to set too high a bar for evidence. A simpler admissibility criterion would enable easier access to the dispute resolution mechanism.
  - The Guidance should call for NCPs to help indigent notifiers participate in the process by, for example, advising them on gaps in a submission, providing mediation training support, and enabling participation in mediation through remote access technologies or satellite (e.g. embassy) offices.
  - The Guidance should call on NCPs to ensure practices are in place to mitigate potential language or cultural barriers to women or other marginalized groups filing complaints.
  - The Guidance should require NCPs to establish procedures and practices to anticipate and respond to risks to human rights defenders (see box below with recommendations on NCPs and retaliation against defenders).
  - The Guidance should encourage NCPs to engage and cooperate with other state-based and non-state-based grievance mechanisms, primarily for the sharing of good practices.
- The Procedural Guidance does not guide NCPs in balancing the power of companies over notifiers, and thus the partiality and equitability of NCPs is regularly in doubt:
  - The Guidance should set clear, universal expectations for transparency so that complaints are not hidden to protect companies' reputations.
  - The Guidance should require NCPs to continue evaluating plausible claims even if a company refuses to engage in mediation, to prevent companies from unilaterally stymying the process by refusing to participate.
  - The Guidance should require states to apply material consequences to companies that refuse to engage in good faith in the NCP process or fail to implement recommendations given and agreements reached.
  - As mentioned, the Guidance should require NCPs to develop conflict of interest procedures to avoid conflicts between NCP staff and parties involved in complaints.

Just **5**

NCPs seek consequences (penalties) for MNEs refusing good faith engagement in the specific instance process.

Fewer than a **quarter** of NCPs do in-country fact-finding.

Only **1 in 4** NCPs publish initial assessments.

- Finally, the Procedural Guidance does not set basic expectations that would help NCPs promote accountability of corporations, and thus be accountable to stakeholders.
- The Procedural Guidance should require NCPs to state plainly when companies have breached the Guidelines, a determination that would serve as a form of remedy for complainants and a teaching opportunity for MNEs.
- The Guidance should clarify NCPs' responsibility in facilitating access to remedy, including by opening conversation on remedy of past impacts, to ensure that rectification of past harms, rather than only future policy changes, remains a focus of discussion.
- The Guidance should require NCPs to undertake follow-up to monitor whether MNEs actually fulfil recommendations made or agreements reached in complaints.
- The Guidance should also call upon states to enable substantive or procedural reviews of complaints allegedly incorrectly handled by their NCP.

Only **7** NCPs

have made determinations of MNE non-compliance with the OECD Guidelines, even though determinations both help clarify for MNEs the correct application of the Guidelines in the specific instance, and offer acknowledgement, as a form of remedy, to victims.



**Most if not all of the Independent Accountability Mechanisms of the Development Finance Institutions offer complainants a choice of either dispute resolution or compliance review, or both. States adhering to the Guidelines could consider broadening the mandate of NCPs to either always give determinations of adherence or offer complainants a choice between dispute resolution and determination of adherence.**

The Procedural Guidance also sets out basic expectations for the role of the Investment Committee in supporting the work of NCPs.

## Recommendations for the expectations for the Investment Committee

The Procedural Guidance could strengthen 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 evaluative indicators to NCPs, creating a multi-year “path to effectiveness to guide states progressively towards improving their NCP, and appointing a centralised person or team to assist with each actual ongoing complaint or spot-check a certain number of complaints per year – could help ensure greater consistency in NCP structures, performance, and complaint outcomes. The Investment Committee could also be given a specific mandate, implemented via the WPRBC, to issue guidance interpreting the Guidelines for modern challenges

## PROTECTING HUMAN RIGHTS DEFENDERS ASSOCIATED WITH NCP COMPLAINTS

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.<sup>19</sup> This number is likely a very low estimate, as most reprisals are unreported. Filing an NCP case may deepen risk of reprisal by raising company and host-government awareness of defenders' identities and activities. The risk is greatest for marginalized or isolated defenders such as Indigenous Peoples, women, and those who are rural and remotely located.

OECD Watch's 2019 Factsheet "Use with caution: The role of the OECD National Contact Points in protecting human rights defenders" provides information on the incidence of reprisals in the NCP complaint system and offers recommendations to the OECD, states, and NCPs on addressing this challenge.

### Recommendations for the OECD:

Among other steps, the OECD should:

- Provide practical guidance to NCPs on the ways businesses can be linked to retaliation against defenders and good practice for grievance mechanisms in anticipating and responding to risks;
- Designate an OECD in-house expert on reprisals to help answer questions and coordinate response to potential and actual risks.

### Recommendations for NCPs and states:

Among other steps, NCPs should:

- Establish a no-tolerance statement regarding reprisals against defenders and practical measures to try to anticipate and respond to risks to defenders, for example in their rules of procedure;
- Ensure NCP staff are educated and trained to address potential and actual risks to complainants or their affiliates in complaint; and
- Proactively ask complainants about reprisal risks and protect personally identifying information, including by hiding the identities of complainants from companies, where appropriate;
- Consult complainants and experts on defender issues (such as certain UN bodies or NGOs) in the event of a reprisal situation; and
- Following up after complainants to check on defenders' ongoing security.

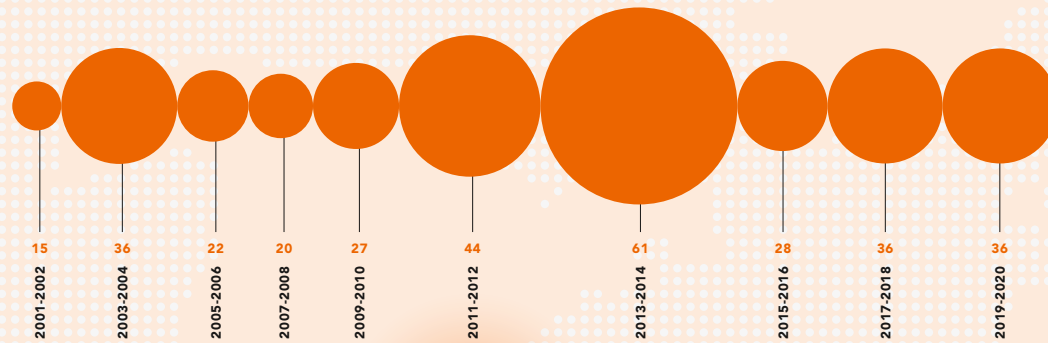


The number 25% is on a par with percentages of reprisals in complaints reported by other non-judicial grievance mechanisms.<sup>20</sup> Reprisals are not a sign a complaint mechanism is necessarily doing something wrong - but they are a sign the mechanism needs appropriate procedures in place to address risks to users.

The following pages of maps, graphs, and statistics demonstrate overall outcomes and trends in complaints filed by civil society and NGOs to NCPs. These help underscore gaps in expectations for NCPs and in standards for MNEs.

## COMPLAINTS OVER TIME

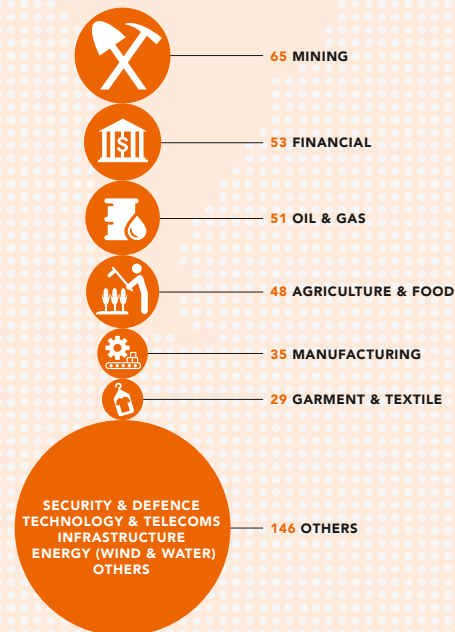
Total complaints filed per 2-year period since 2002



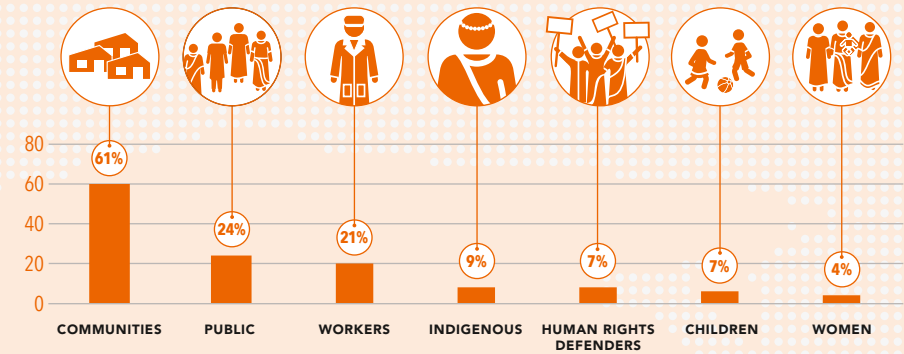
Civil society-led complaint-filing increased after the 2011 revision of the Guidelines, but has trailed off, likely due in part to disappointment with complaint outcomes over the past ten years.

## COMPLAINTS BY CONTENT

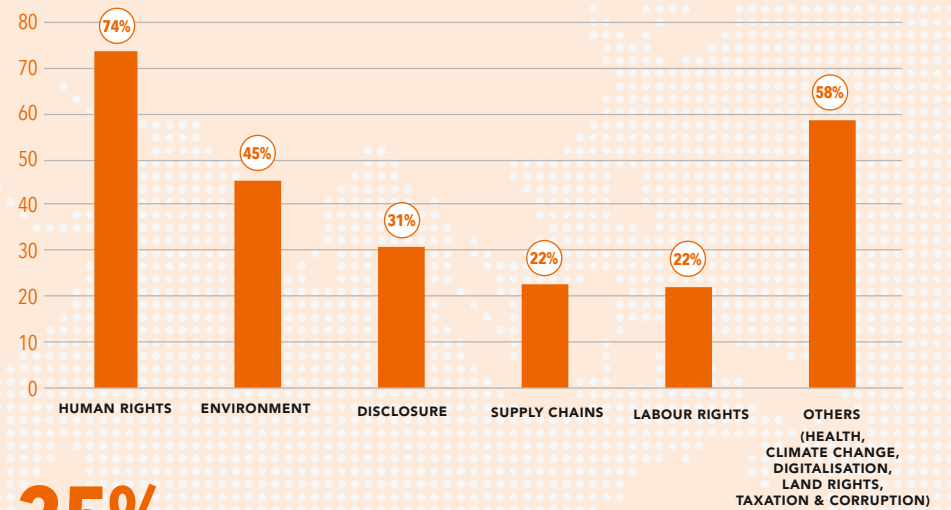
Most often encountered sectors in complaints



## Leading victim groups in complaints



## Most common issues raised in complaints

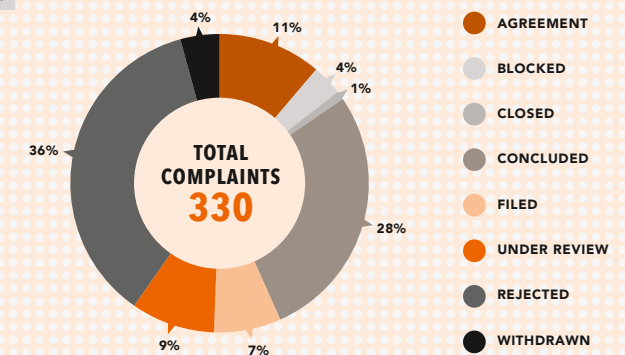


**35%** complaints concerning due diligence revisions of the Guidelines (CH 2, A10 & CH 4, A5).

The amount of cases addressing the financial sector have more than doubled in the last 20 years.

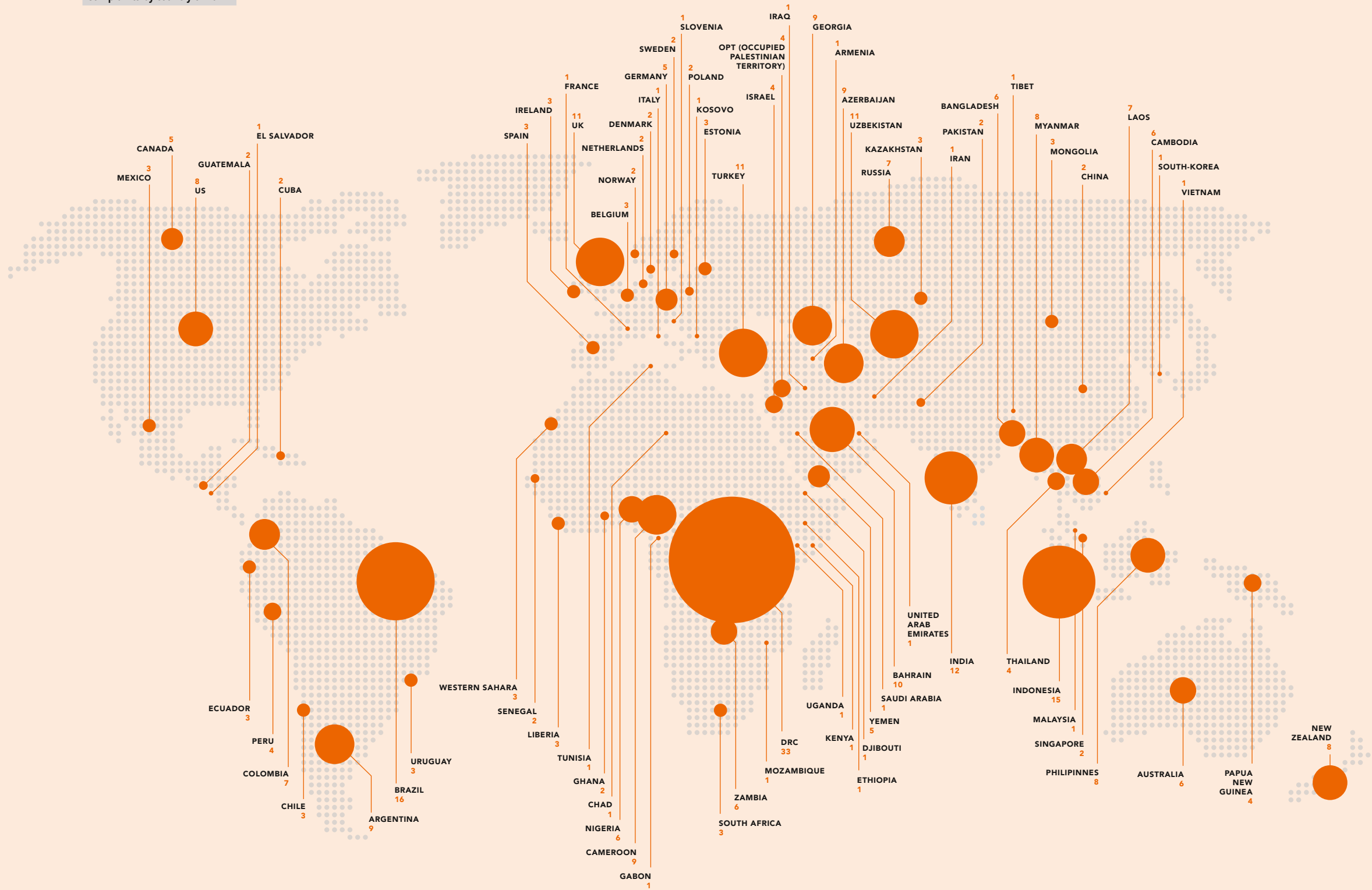
## COMPLAINTS BY OUTCOMES

Complaints by outcome

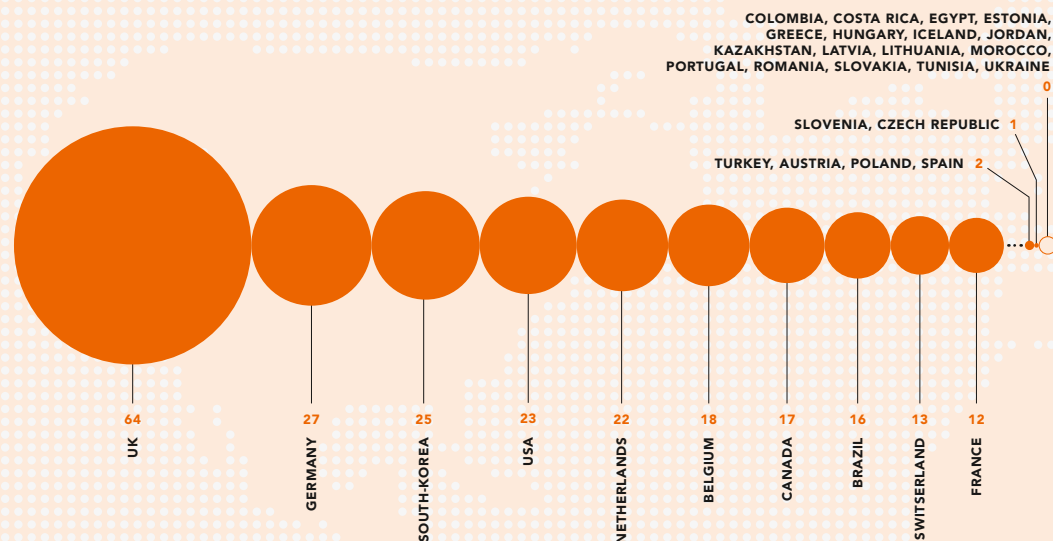


# COMPLAINTS BY GEOGRAPHY

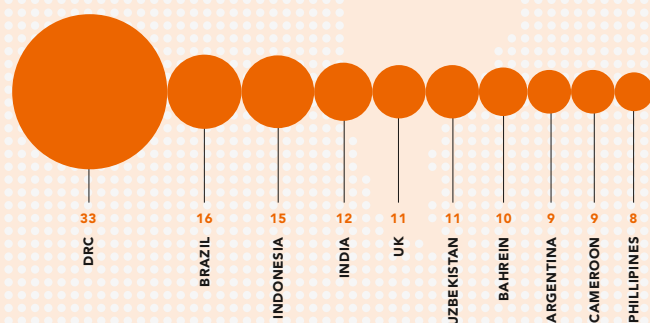
Complaints by country of harm



Complaints by NCP



Complaints by country of harm



## Gaps in standards for MNEs

Alongside updates to the expectations for the NCP complaint mechanism, civil society also seeks updates to the standards for MNEs. At present, the Guidelines standards for MNEs are seriously out of date and incomplete, unfit to guide businesses in addressing some of the leading challenges of our time. The following 12 subchapters identify these challenges as well as the gaps in the Guidelines that render them inadequate to address them, and offer recommendations of revisions needed to ensure the Guidelines are brought up to snuff.

## STANDARDS GAP

#1

# Marginalised/ disadvantaged groups

In the past ten years, practitioners have become increasingly aware of the fact that irresponsible business conduct can have particularly harmful impacts on marginalised or disadvantaged groups such as Indigenous Peoples, women, people of low caste, children, migrants, and others. Even within these groups, business conduct can affect group members differently because of intersecting aspects of their identity: for example, while all women may face increased risk of sexual harassment through business failure to safeguard them at the workplace, women of low-caste may experience it more often because of their dual vulnerable identity traits as female and low-caste.

The fact that harmful business conduct affects different groups differently is a problem the Guidelines should explicitly address. Two related challenges should also be drawn out:

- First, the marginalisation of these groups, which makes them more vulnerable to impacts, also makes the harms more invisible; and
- Second, the group's disadvantaged position also generates higher barriers for them in understanding their rights and seeking and achieving remedy.

The particular risks and barriers certain groups face should necessitate clear guidance for MNEs, in the OECD Guidelines, on why and how businesses can impact these groups differently, and the importance of adopting specialised due diligence to address the harms.



## GLOBAL CONTEXT: BUSINESS IMPACTS ON MARGINALISED AND DISADVANTAGED GROUPS

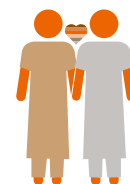
### INDIGENOUS PEOPLES



Indigenous Peoples are among the world's most vulnerable people and they are disproportionately impacted by business activities on or near their territories.<sup>21</sup> 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.<sup>22</sup> Unfortunately, Indigenous Peoples territories are routinely exploited, sold, appropriated, or polluted by companies that have not

respected their rights to FPIC, self-determination, culture, and others recognised under international law.<sup>23</sup> Extractive industries such as minerals mining and 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.<sup>24</sup>

### GENDER



0 complaints have focused on LGBTQ+ rights, perhaps in part because the Guidelines contain little relevant language on this issue.

13 Only 13 complaints have specifically addressed impacts on women.

Women and LGBTQ+ people typically suffer gender-specific impacts from business activity.<sup>25</sup> **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.<sup>26</sup> **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.<sup>27</sup> 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.<sup>28</sup>

Almost half of complaints concerning women specifically concern the Garments & Textile industry, while the other half highlights gender-specific impacts of environmental degradation.



### CASTE

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.<sup>29</sup> 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 suppliers<sup>30</sup> 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% of whom labour in the agriculture sector.<sup>31</sup> Meanwhile, in 2019 the ILO reported that 1 million children are engaged in child labour in mines and quarries.<sup>32</sup> **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/foetal health - is hindered by harmful

labour practices.<sup>33</sup> Children are often more vulnerable to these impacts than adults, due both to their malleable state of 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).<sup>34</sup> 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.

**23** complaints have specifically addressed corporate impacts on children, showing need for more and clearer standards for MNEs to avoid harm to children.



## GAPS IN THE GUIDELINES

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 language on women primarily appears in the Employment chapter, leaving out discussion of impacts on women as community members. The scant and narrow coverage of gender leaves 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 include **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 value chains and how MNEs should address this by changing practices that inadvertently cause children to be forced 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.



PUBLIC EYE ET AL.  
VS. SYNGENTA

### CASES INVOLVING GENDER

According to OECD Watch's research, just 13 NGO- or community-led complaints have specifically addressed impacts on women, while none have addressed impacts on LGBTQ+ people.<sup>36</sup> The low number of gender-focused filings could have occurred because civil society groups themselves neglect to highlight gender-specific impacts of MNEs. But it could also result from the fact that the Guidelines provide almost no language on gender to which to pin claims.



PUBLIC EYE ET AL.  
VS. SYNGENTA

Several of the 13 complaints address women workers, likely because the current Guidelines' text on women is strongest in the Employment and Industrial Relations Chapter.<sup>37</sup> But as of 2020, a number of complaints still unresolved are attempting to highlight impacts on women in communities.<sup>38</sup> For example, one complaint calls out a company for failing to anticipate and address impacts to Senegalese community women fish processors expected from the construction of a mining and steel complex on lands the women use.<sup>39</sup> Another highlights the particular health impacts women and children faced from a spill of waste water at an oil exploration site in Chad.<sup>40</sup> Another identifies health impacts on men and women from pesticide use in India, and also notes the additional home care burden that pesticide-related illness has placed on women agricultural workers..

The recent increase in complaints exposing specific harms to women community members underscores the need for clearer guidance for MNEs on how to identify and avoid such impacts and meaningfully engage such stakeholders.



#### CASES INVOLVING INDIGENOUS PEOPLES

Because the Guidelines do not explicitly mention the rights of Indigenous Peoples outlined in other international conventions, they unfortunately leave it up to NCPs to determine whether those rights are covered by the Guidelines. In some instances, NCPs have not ensured respect for Indigenous rights. As described in the Introduction, the case *FIDH et al v. Tongguan*<sup>41</sup> concerned the operations of a mining company in Ecuador that had Canadian and Chinese corporate ownership and alleged forced displacement of indigenous communities. In its Final Statement rejecting the complaint, the Canadian NCP asserted that "The [2011] OECD Guidelines do not include a requirement for free, prior and informed consent." Without clarification of this issue in the Guidelines, Indigenous Peoples can be denied their rights and companies allowed to avoid their responsibilities.

87%

of complaints concerning children address labour rights, while more than a third (also) addresses health impacts of business activities on children<sup>42</sup>.



72%

of complaints concerning indigenous peoples address environmental complaints. This underscores the close relation between respecting indigenous peoples' rights and protecting the environment.



FEDIQUEP, FECONACOR, OPIKAFPE, ACODECOSPAT ET AL. VS. PLUSPETROL

## Recommendations

A few targeted changes to the Guidelines would strengthen expectations for MNEs on respecting the rights of marginalised and disadvantaged groups. Meanwhile, accompanying statements or guidance documents from the OECD could further clarify application by MNEs in practice. For example,

- Chapter II on General Policies should better reflect all six steps of due diligence that have been clarified in the OECD's Due Diligence Guidance for Responsible Business Conduct. Critically, a principle and accompanying commentary should clarify the particular care needed during due diligence and stakeholder engagement to ensure that marginalised and disadvantaged peoples - including workers as well as community members - are meaningfully consulted to help identify impacts, develop steps to prevent or mitigate them, and propose remedies that will meet their needs as well as those of other impacted rightsholders.
- Chapter II on Disclosure should clarify that enterprises "should" (not merely "are encouraged to") disclose their potential and actual environmental and social impacts, as well as their due diligence steps to address those. The chapter should call for disclosure disaggregated to reflect particularly vulnerable groups, such as women, people of low-caste, and migrants.
- Chapter IV on Human Rights should explicitly identify the rights of marginalised and disadvantaged groups, such as Indigenous Peoples rights, that are particularly at risk to corporate misconduct.
- Chapter V on Industrial and Employment Relations should include more expanded reference to the due diligence needed to respect the rights of workers particularly vulnerable to harm, such as women and people of low caste.

## STANDARDS GAP



# Human rights defenders



### GLOBAL CONTEXT: BUSINESS IMPACTS ON HUMAN RIGHTS DEFENDERS

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 civil society has tracked more than 2,200 killings, beatings,

threats, strategic lawsuits against public participation (SLAPPs), stigmatizations, suspensions of fundamental freedoms, legal restrictions, and other attacks intended to obstruct defenders' actions.<sup>43</sup> The number of attacks has increased in recent years, demonstrating heightened risk to defenders in a context of shrinking civil society space.

**25%**

of NCP complaints filed by communities or NGOs involved reprisals against complainants or others working on the same situations of harmful business activity.

Many of these attacks are made against defenders fighting the harmful impacts of irresponsible business conduct. Companies, including MNEs, can be involved in harm against defenders in various ways. Sometimes companies do not actively solicit attacks but are connected to them - and can contribute to them - by

remaining silent when business or government partners harm or denigrate defenders in the name of development, such as by abusing digital surveillance technologies to monitor defenders, or attacking journalists and activists reporting on MNE conduct. In other cases, businesses cause or contribute to harm to defenders directly, such as by firing workers for protesting poor conditions, bringing SLAPP suits against activists protesting development projects, hiring abusive security firms or requesting unnecessary armed protection from state forces to intimidate communities, and complying with unwarranted requests to cancel the financial accounts of defenders and their affiliates.<sup>44</sup>

### DEFENDERS AND ACCESSING REMEDY

Defenders also face heightened risk of reprisal when they attempt to use grievance mechanisms to achieve remedy. Please see the chapter on Gaps in NCP structures and performance for analysis of gaps in expectations for NCPs on protecting defenders involved in NCP complaints.

## GAPS IN THE GUIDELINES

Despite the importance of the work of defenders and their vulnerability to threats from businesses, the OECD Guidelines hardly mention the issue. Regarding setting standards for MNEs, neither Chapter II on General Policies, Chapter IV on Human Rights, nor any other chapter defines a "human rights defender" nor highlights the growing threat to defenders for their activism against harmful business activity. The Guidelines do not explain to MNEs the ways they can be connected to adverse impacts on defenders through both their actions and omissions, via failing to discourage attacks from being

carried out for their benefit by business partners including states. Critically, the Guidelines do not clarify that for MNEs, fulfilling their responsibility to respect human rights means proactively making space for defenders' right to free speech against the business activity. As mentioned, according to OECD Watch's 2019 Factsheet "Use with caution: The role of the OECD National Contact Points in protecting human rights defenders," 25% of NCP complaints involve reprisals to human rights defenders or others involved with the same human rights or environmental incident. The fact that so many complaints involve reprisals is clear evidence that MNEs need better standards on avoiding harm to human rights defenders - and that the NCPs need guidance themselves on how to address such risks to users.



**69%**

of NCP cases with reprisals involve threats or intimidation.



**22%**

of reprisal cases involve violence.

**25%**

involve court cases by companies or governments against complainants who speak up to protest harmful business activity.





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#### CASES INVOLVING HARMS TO HUMAN RIGHTS DEFENDERS

Reprisals can arise at different moments in the trajectory of a complaint. For the sake of security, not all of these complaints are identified by name.

- Sometimes complaint filings themselves raise the issue of reprisals. For example, one complaint on the Indonesian garment industry specifically sought help addressing past reprisals, including the unlawful dismissal of workers who had advocated for better working conditions.<sup>45</sup> Meanwhile, another complaint on land grabbing in Cambodia explained that community members engaged in protest had been arbitrarily arrested and intimidated by security forces.<sup>46</sup>
- Sometimes reprisals occur once the complaint has already been filed. For example, in one complaint against an oil company's operations in the Democratic Republic of Congo, the chairman and deputy of an NGO that filed a specific instance both had to go into hiding after the deputy was jailed on trumped up charges and both leaders experienced intimidation by local authorities.<sup>47</sup> Meanwhile, in a Latin American country, staff of an NGO that filed a specific instance about land grabbing were threatened at gunpoint and told to drop the case.<sup>48</sup>
- Finally, reprisals can also occur after the specific instance is concluded: In Ecuador, after a complaint that mentioned reprisal risks was rejected, an indigenous activist became the fourth to be assassinated for protesting a large mining project.<sup>49</sup> And an NGO that filed a complaint against a real estate company was later sued for defamation.<sup>50</sup>



64%

of reprisals occur in land-intensive extractives and agriculture sectors (OW report 2019)



#### Recommendation

Small changes to the Guidelines would go a long way in helping MNEs avoid impacts to defenders and helping NCPs anticipate and respond to reprisals linked to complaints. Of note:

- Chapter II on General Policies, which currently too narrowly calls for MNEs to “refrain from discriminatory or disciplinary action against workers who make *bona fide* reports to management,” should be broadened to call on MNEs to respect the right of *all* individuals to peacefully protest adverse business activities. This should include community members including Indigenous Peoples, land rights and environmental defenders, NGO staff, workers, human rights attorneys, journalists, and whistle-blowers within corporations alleging human rights or environmental harm, tax avoidance/evasion, or corruption, and others.
- Principles or commentary in Chapter II and/or IV on Human rights should further clarify that MNEs should avoid both actions and omissions (e.g. failures to stop business partners and states acting for MNEs’ benefit) that can harm human rights defenders, and use leverage to encourage any partners harming defenders to cease. Commentary should note particular vulnerabilities for defenders from marginalised and disadvantaged groups such as women, Indigenous Peoples, and people of low caste. Enterprises should be encouraged to help enable defenders to protest business activity safely.

## STANDARDS GAP

#3

# Climate change and environmental degradation

## GLOBAL CONTEXT: BUSINESS IMPACTS ON CLIMATE CHANGE AND THE ENVIRONMENT

Climate change is recognized as one of the leading - if not the greatest - challenges of our time, causing devastating biodiversity loss that has killed two-thirds of the global wildlife population over the last 50 years<sup>51</sup> and threatening numerous human rights such as the rights to life, water and sanitation, food, health, housing, self-determination, culture, and development.<sup>52</sup> Research has shown that MNEs are responsible for almost a fifth of climate-changing carbon emissions,<sup>53</sup> particularly those operating in the pollution-intensive agriculture, transport, extractive, manufacturing, and apparel sectors. Given MNEs' damaging impacts on our climate, they must play a key role in adopting the transformative changes needed to meet the ambitious 1.5-degree global warming target set in the Paris Climate Agreement.<sup>54</sup>

## GAPS IN THE GUIDELINES

The Guidelines are far behind current expectations for MNEs around avoidance of adverse environmental impacts. The outdated Environment chapter doesn't even use the term "climate change," nor reference the Paris Climate Agreement or call on MNEs including in the financial sector to set and achieve measurable climate targets. Unlike the later-drafted Human Rights chapter, the Environment chapter does not as clearly establish expectations on MNEs to undertake due diligence to prevent, mitigate, and, critically, remedy adverse impacts to the environment. Instead, it generally calls in more positive terms for MNEs to implement environmental management processes and continually improve their environmental performance. This framing may contribute to the fact that the chapter fails to identify the leading harmful environmental impacts MNEs should avoid, such as 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

14%

of complaints addressing environmental damage directly impacted indigenous peoples.

protected areas; engagement in coal and fossil fuel extraction; and others. The Environment chapter does not call on MNEs to avoid political lobbying aimed at lowering environmental standards and regulations, a serious problem in the past decade.<sup>55</sup> It also does not underscore the reciprocal relationship between respecting the environment and respecting human rights: taking care of the environment helps assure human rights to health and livelihood, and respecting all peoples' rights to free speech and assembly to protest development activities, and respecting Indigenous Peoples' rights to FPIC, culture, and self-determination, all help preserve the environment and prevent climate change.



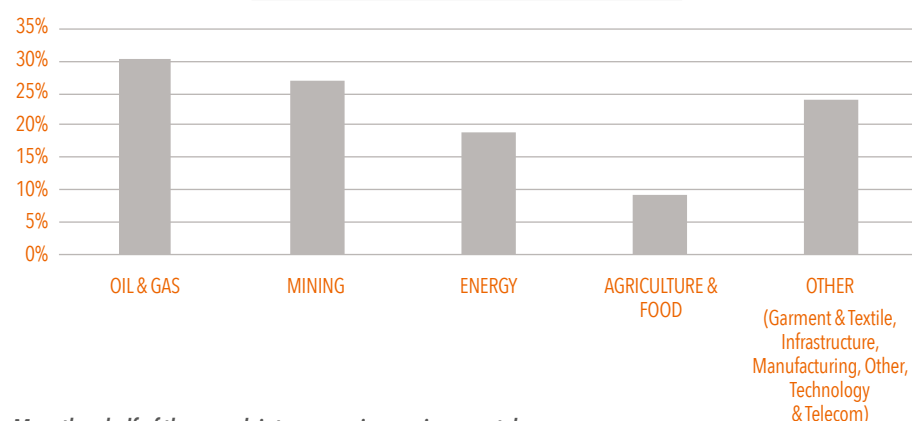
## CASES INVOLVING CLIMATE CHANGE

Since 2017, there has been a sharp increase in complaints seeking to clarify MNEs' responsibilities to report on and reduce their greenhouse gas emissions.<sup>56</sup> The rise in cases on this topic highlights failures by MNEs to achieve ambitious climate targets, and the need for stronger expectations in the Guidelines on this subject.

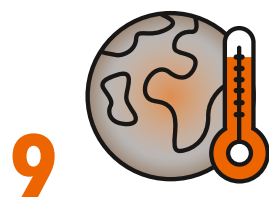
Among six recent complaints, five have targeted financial institutions, showing growing desire for corporate, specifically financial sector, accountability for climate change.<sup>57</sup> One successful complaint filed by Dutch NGOs against ING Bank alleged that ING failed to sufficiently commit and contribute to the targets set in the Paris 2015 Climate Agreement. Through the Dutch NCP's mediation, the parties reached an agreement in which ING agreed, among other things, to set and pursue targets to reduce its climate impact and commit to reduce its thermal coal exposure to close to zero by 2025 and refrain from financing new coal-fired power plants.

➔ The rise in climate complaints against financial institutions echoes the steady increase, since 2000, in complaints against financial institutions broadly on their responsibility for clients' direct impacts.<sup>58</sup> The outcome was positive, but it also highlights key risks and gaps in the Guidelines: first, while the Dutch NCP found that the Guidelines "demand" that banks set concrete climate targets in line with the Paris agreement, another NCP might not reach such a conclusion from a text that discusses neither climate change nor the Paris agreement. More critically, the cases underscore the need for better practice by MNEs, and the Guidelines are failing to provide MNEs the necessary guidance.

Top sectors implicated in environmental complaints



➔ More than half of the complaints concerning environmental damage involve the oil & gas and/or mining sectors.



9

complaints addressing climate change have been filed at NCPs, starting in 2007. Six of the nine were filed after 2016.

Of these complaints, **22%** involved investments by the financial sector in the industries causing the harm.

## Recommendations

A revision of the OECD Guidelines is needed to strengthen standards for MNEs regarding their environmental impacts.

- First and foremost, it is unacceptable that the leading RBC standard does not, in the year 2021, mention corporate responsibility to help address climate change. The term, and reference to relevant agreements such as the Paris agreement, must be added to the text.
- Further, like chapter IV on Human Rights, the Environment chapter should more clearly call on MNEs to avoid causing or contributing to impacts on the environment. The text should identify the full range of the most common and egregious corporate impacts such as deforestation and pollution and should clearly outline expectations for MNEs to remediate their environmental impacts.
- The chapter should call on MNEs to refrain from using political influence on lower environmental standards, particularly when such lower standards would cause states to fail their own climate targets.
- Meanwhile, the Disclosure chapter should ensure MNEs disclose their climate targets and environmental impacts and mitigation and prevention steps.

## STANDARDS GAP



# Land rights



### GLOBAL CONTEXT: BUSINESS IMPACTS ON LAND 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 intertwined with 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.<sup>59</sup> Respect for land rights is, in practice, an essential prerequisite for fulfilment of such other rights. 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 especially Indigenous Peoples, are among those most at risk of adverse impacts for their human rights advocacy.<sup>60</sup>

**18%**  
of all complaints  
address land rights  
issues: nearly 1 in 5.

## GAPS IN THE GUIDELINES

Despite the importance of land rights and their vulnerability to harmful business impacts, the OECD Guidelines barely address the issue. The Guidelines do not mention land *rights* at all and instead mention “land” only once in commentary explaining the utility of stakeholder engagement for projects involving intensive use of land or water.<sup>61</sup> The Guidelines make no specific mention of Indigenous Peoples’ right to FPIC, nor establish consent

as the only appropriate means to protect the land rights of all impacted stakeholders. Critically, the Guidelines do not explain that MNEs’ respect for the land security of all stakeholders is, in practice, a prerequisite to respecting their human rights overall, including rights to livelihood, housing, and health. Nor do the Guidelines underscore the link between protecting land rights, particularly of Indigenous Peoples, and preventing climate change. The Guidelines do not acknowledge the vulnerability of the land rights of women and customary, communal, and collective tenure holders. Further, neither the Guidelines nor accompanying guidance

guide MNEs on expectations existing for them to undertake due diligence to responsibly address common land challenges, such as respecting communities’ land claims even when a state has failed its own duty to protect

**0**  
is the amount of  
times “land rights”  
are mentioned in  
the OECD  
Guidelines.

them;<sup>62</sup> addressing overlapping historic land claims (land legacy issues); and respecting legitimate tenure rights of communities that lack paper title. Meanwhile, other guidance issued since the last revision of the OECD Guidelines, such as the Voluntary Guidelines on the Responsible Governance of Tenure, help clarify at least to a degree the scope of tenure rights and the responsibilities of MNEs to respect them.<sup>63</sup>



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### CASES INVOLVING LAND RIGHTS

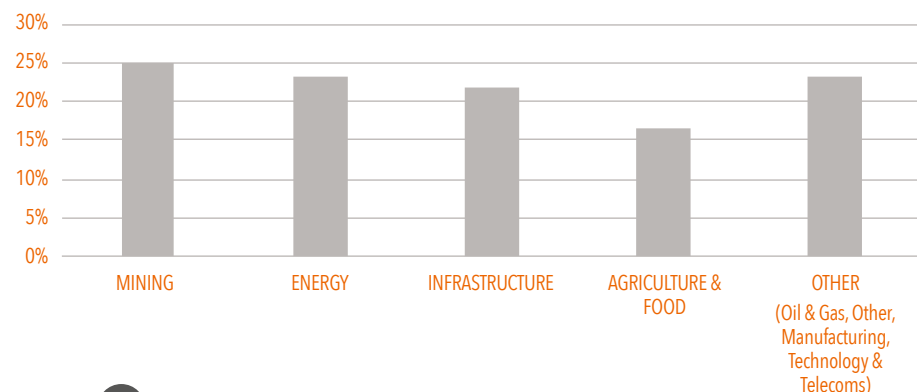
One fifth of all NGO- and community-led complaints allege violation of land rights. This is a huge number, not least given the fact that the Guidelines don't even mention land rights specifically. This number is a strong indication that stakeholders' land rights are at risk from corporate activity and that the Guidelines should establish expectations for MNEs on this important subject.

As described earlier in this paper, the Guidelines do not explicitly address the right to FPIC, and not all NCPs believe the Guidelines cover it. Meanwhile, the gaps on land rights in the Guidelines' text have confounded other complaints, including many on land rights unrelated to the issue of FPIC. For example, although many MNEs and industry standards recognise FPIC as good practice for all impacted communities, many complaints do not resolve failure by MNEs to adequately consult non-indigenous, but still marginalised, tenure holders.<sup>64</sup> Other complaints show lack of clarity regarding responsibilities for MNEs to identify and address past land conflicts.<sup>65</sup> Still others show misunderstanding by MNEs and NCPs alike about MNEs' responsibility to respect communally-held land rights when communities lack paper title.<sup>66</sup> Clarification of these issues would help MNEs avoid harms and NCPs better understand claims of breach.

Of these complaints, **15%** involved investments by the financial sectors in the sectors causing the harm.

**18** complaints about land explicitly allege failure to respect and ensure FPIC for indigenous communities. Other land-related complaints involve other types of marginalised groups.

Lead sectors in land rights complaints



➔ More than a third of complaints concerning land rights relate to the oil & gas, and mining sector



**1** is the amount of times the word "land" is used in the OECD Guidelines

## Recommendations

Simple but important additions to the Guidelines would help MNEs respect land rights as a step in fulfilling their overarching human rights and the environmental responsibilities, and help NCPs interpret MNEs' land-related responsibilities in specific instances.

- The Human Rights chapter should specifically call on MNEs to respect the right to FPIC, with commentary explaining the meaning of each element of FPIC and the expectation that MNEs will cooperate with Indigenous Peoples' own representative institutions and customary decision-making processes for seeking FPIC. In alignment with expectations clarified in OECD due diligence guidance<sup>67</sup>, commentary should make clear that where FPIC is due, companies should not proceed until all four elements of FPIC have been satisfied.
- If the OECD decides to adopt language regarding the right to FPIC, it must consult diverse Indigenous Peoples directly before any revisions are adopted.
- Commentary in the Human Rights chapter should also clarify that land security underpins many human rights, and therefore that, to respect human rights overall, MNEs (including primary developers as well as contractors, auditors, financiers, and other business relations) are expected to ensure consultation and consent of all people with interest in land before proceeding on the project. Commentary and accompanying guidance should further clarify the importance of stakeholder engagement, including towards marginalised and disadvantaged groups, regarding land intensive projects.
- Commentary or guidance should also clarify the expectations for MNEs regarding common land due diligence challenges, such as MNEs' responsibility to respect land rights regardless of the state's fulfilment of its own duty to protect land rights, their responsibility to identify and address overlapping historic claims to land, and their responsibility to respect legitimate land tenure (including of women, communal, and customary landowners) regardless of whether landowners have written title.

## STANDARDS GAP

#5

# Labour rights



### GLOBAL CONTEXT: BUSINESS IMPACTS ON LABOUR RIGHTS

Labour rights are at risk around the world in all sectors and value 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 an analysis of OECD data by 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.<sup>68</sup> Obstructing unionisation is a labour rights abuse in itself, but, because freedom of association and collective bargaining are so-called

20%

of community and NGO-led complaints concern labour rights.

“enabling rights”, failure to respect them also negatively impacts the realisation of many other labour rights.<sup>69</sup> Furthermore, in 2020 the ILO documented<sup>70</sup> 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 forced labour and 152 million children are in the workforce.<sup>71</sup> Serious wage and employment inequalities persist across geography, gender, and age lines, though

the adverse impacts are felt more prominently by vulnerable groups such as women, migrants, people of low caste, and non-unionized workers. Increased automation is displacing workers world-wide. Digitalization and the rise of new peer-to-peer work platforms are introducing new disadvantages for workers to access labour rights.<sup>72</sup> Meanwhile, natural disasters such as the global Covid-19 pandemic have also exposed how deeply the system is tilted towards protecting shareholders rights versus rights and well-being of workers.<sup>73</sup>

## GAPS IN THE GUIDELINES

Given the importance of freedom of association and collective bargaining to enable positive labour impacts, the Guidelines could provide stronger guiding standards on respecting these rights – as illustrated by a case below. Further, the Guidelines are lacking on several other important labour topics. The Guidelines do not discourage MNEs’ mistaken reliance on auditors to fulfil their own due diligence expectations, nor their adoption of purchasing and other practices that limit, in practice, their ability to pay a living wage and avoid unpaid and child labour. The Guidelines do not establish appropriate



28%

of community-led complaints about labour rights concern children.

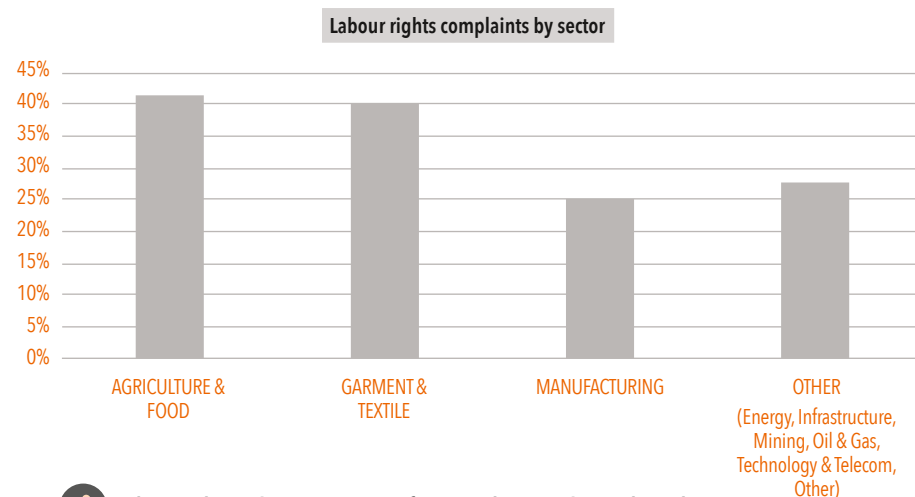
procedures for responsible disengagement/exit, including when exit results from economic and health crises such as global pandemics, from digitalisation and/or automation, and from business decisions. The Guidelines could further clarify the expectation that MNEs respect the rights of workers in peer-to-peer platforms and the digital economy. The Guidelines introduction of due diligence reporting inadvertently may encourage outsourcing of core business activities such as recruitment to uncontrolled external companies, a common tactic of MNEs to cut costs at the expense of worker welfare – and one that should be addressed. The Guidelines also don’t 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.



### CASES INVOLVING LABOUR RIGHTS

In 2016, the International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers’ Associations (IUF) and the Farm Labor Organizing Committee (FLOC) filed a complaint to the UK NCP alleging that British American Tobacco (BAT) was linked to abuses of migrant farmworkers in the United States and did not meet its obligations to help end these abuses. In particular, the unions were concerned that BAT was seeking to utilize an industry-led multistakeholder process to conduct its due diligence, instead of meaningfully including the union stakeholders. The UK NCP, reading the text of the Guidelines, found that BAT had met its obligations under the Guidelines even when avoiding NCP-assisted dialogue with the unions. Concerned with this finding, TUAC sought clarification by the Investment Committee. The Committee had to rely on the OECD’s due diligence guidance, published after the 2011 revision of the Guidelines, to clarify the Guidelines’ text and confirm TUAC’s view that “Companies should prioritise meaningful engagement with bona fide trade unions where these exist when conducting due diligence related to risks to employment and the human rights of workers.” Given the lack of clarity in the text that led to the UK NPC’s misinterpretation, new commentary should be added to the Guidelines to explain the Committee’s important clarification.

➔ According to TUAC's research, between 2011 and 2020, NCPs were 16% less effective than in the previous decade in helping unions reach agreement with companies. Since 2011, only five union-led freedom of association cases resulted in an agreement, while in 18 such cases either the NCP (8) or the MNE (10) stymied the complaint by choosing not to proceed with mediation.<sup>74</sup>



➔ Labour rights violations are most often raised in complaints about the Agriculture & Food, Garment & Textile, and Manufacturing sectors.



Of these complaints, **13%** also involved investments by the financial sectors in the companies causing or contributing to the harm.



**11%** of community-led complaints about labour rights concern women. This is much higher than the general average over all complaints (4%).

➔ Between 2006 and 2010, almost 40% of civil society-led complaints addressed labour rights. But between 2011 and 2020, that number dropped to half that amount. This occurred in part because complainants could use the new Human Rights chapter, added in 2011, to address some of the concerns they had previously addressed using the Employment and Industrial Relations chapter.

## Recommendations

Updates to the OECD Guidelines would help clarify implementation of MNEs' responsibility to respect labour rights.

- Chapter V on Employment and Industrial Relations could better reflect expectations for MNEs to demonstrate how they meaningfully promote labour rights and use their leverage to remediate violations over their whole value chain.
- Chapter V should call on MNEs to meet the *higher* of either a) practice that will ensure respect for human rights, or b) practice that will align with regulatory standards or industry norms. At present, the chapter is implemented by businesses to be a maximum when it should be a minimum.
  - For example, the chapter should discourage purchasing practices that prevent MNEs from paying a (collectively bargained) livable wage.
  - The chapter should also call on MNEs to demonstrate credible workplace health and safety standards that protect the rights to health and well-being.
- Chapter V should offer guidance on how MNEs can responsibly manage employment transitions when they sell, reduce or transfer business operations due to economic and health crises such as global pandemics, digitalisation and/or automation.
- The chapter should acknowledge newer vulnerabilities for growing numbers of workers in P2P platforms and the digital economy and inform relevant businesses of their Guidelines obligations to respect labour rights
- The chapter should also broaden reference to marginalised and disadvantaged workers, such as by specifically mentioning non-discrimination based on caste.

Meanwhile, the Disclosure chapter should seek disclosure of MNE value chain partners, wages paid and how those relate to a living wage, and information on business impacts and responsive actions disaggregated according to relevant groups, such as women.

## STANDARDS GAP



# Taxation



### GLOBAL CONTEXT: BUSINESS ENGAGEMENT IN TAX AVOIDANCE

Tax avoidance – the avoidance of tax burdens through legal means such as tax havens and the manipulation of legal loopholes and gaps between tax jurisdictions – is a serious problem costing the world exorbitantly in lost tax revenues. 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.<sup>75</sup> 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.

In the past ten years, the financial crisis and a series of financial scandals exposing the low tax burdens of well-known MNEs such as Starbucks, Google, and Amazon<sup>76</sup> have prompted the public and policy makers to re-evaluate the formerly-accepted double standard condoning MNEs' wilful avoidance of their tax obligations. The public and policy makers now widely believe 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 by developing the OECD/G20 Inclusive Framework on BEPS ("Base Erosion and Profit Shifting"), setting 15 ground-breaking policy measures for governments to combat tax avoidance through, for example, taxing the digital economy and increasing tax transparency.<sup>77</sup>

### THE OECD INCLUSIVE FRAMEWORK ON BEPS

The BEPS initiative includes 15 policy measures that seek to address the leading causes of tax avoidance. These include digitalisation, "hybrid mismatch arrangements" through which companies manipulate mismatch in jurisdictions' tax requirements, misuse of tax treaties, and improved disclosure and transparency around MNEs' aggressive tax planning.<sup>78</sup>

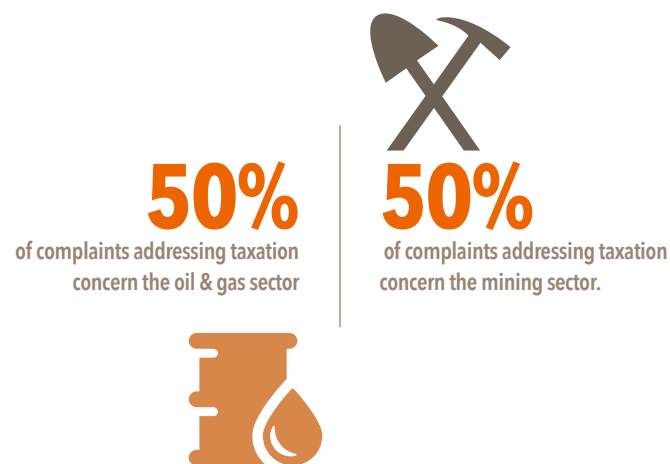
## GAPS IN THE GUIDELINES

In contrast with these positive developments in the world and at the OECD itself, the Guidelines are out-of-date. The 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 chapter asserts that corporations need not pay more than that legally required of them, without asserting that the legal manipulation of conflicting legal requirements to minimize tax liability is irresponsible and unsustainable, impinging MNEs' ability to fulfil their overarching human rights and environmental responsibilities. While the chapter does positively discourage "inappropriate" shifting of profits and losses through transfer pricing, it then fails to discourage inappropriate profit and loss shifting through other financial methods, such as internal loans. Critically, neither the Taxation chapter nor Disclosure chapter specifically demand disclosure of country-by-country reporting, corporate structure, profits earned and tax payments made, and financial transactions that would facilitate identification of tax avoidance.



*Tax payments and human rights: Paying fair taxes is a necessary part of fulfilling corporate responsibility to respect human rights: through avoiding taxes, corporations are infringing on the rights of people to health, education, housing, safety, and well-being.*





#### CASES INVOLVING TAX AVOIDANCE

The lack of clear expectations in the Guidelines on eschewing tax avoidance and disclosing tax-related information sets a weak standard for MNEs and makes it very difficult for complainants and NCPs to proceed with tax avoidance complaints. Because the Guidelines do not mention “tax avoidance,” complainants must try to argue that tax avoidance practices violate the “spirit of the law” at issue - difficult to argue when some laws are designed to facilitate tax avoidance. Further, because MNEs disclose so little of the structures and transactions they use to avoid tax burdens, complainants must rely on clues alone, rather than clear evidence, to suggest a systematic effort to minimize tax payments.

Two specific instances have been filed by NGOs alleging corporate tax avoidance in violation of the spirit of a relevant law, and thus the Guidelines. One was rejected<sup>79</sup>; for the other, acceptance was delayed by many months, and may have resulted in part because other issues than tax avoidance (e.g. environmental degradation) were also alleged.<sup>80</sup> A third complaint focusing solely on tax avoidance filed by unions to the Dutch NCP in 2018 is yet to be accepted.<sup>81</sup> The handling of these cases hints at the challenges complainants and NCPs both face in interpreting and applying the Guidelines’ limited text.



#### Recommendations

Simple but important updates are needed to the OECD Guidelines to bring them into alignment with the past decade’s developments in public opinion and policy guidance on tax avoidance.

- Chapter II on General Policies should identify fair payment of taxes as a key part of responsible business conduct.
- Chapter X on Taxation should specifically call on MNEs to eschew “tax avoidance” via all the relevant transactions (i.e. not only via transfer pricing but also internal loans, royalty payments for trademarks, and others).
- The Taxation chapter and chapter on Disclosure should also call for MNEs to disclose information relevant to governments and civil society in assessing MNEs’ tax payments, to include country-by-country reporting, beneficial ownership and corporate structure including all holding and other letterbox companies, profits earned, taxes paid per country and for what operations, and all tax-related financial vehicles used.

## STANDARDS GAP

#7

# Digitalisation



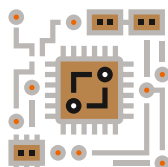
### GLOBAL CONTEXT: BUSINESS IMPACTS THROUGH DIGITALISATION

One of the most glaring gaps in the Guidelines is the lack of guidance for all MNEs – not just technology companies – on how digitalization can alter and exacerbate their potential for adverse impacts. The commercialisation of big data and growth of digital technologies like artificial intelligence,

telecommunications/surveillance technologies, and online/social media platforms, enable violations of numerous human rights including privacy and non-discrimination by governments or average users. These technologies have also increased capacity for facilitation of violence, manipulation of democratic values, and spread of mis- and disinformation. Social media and online platforms have changed the concept of the 'MNE,' raising taxation as well as stakeholder consultation challenges. The size and market share of certain platform MNEs, and the surveillance capitalist business model, raise concerns about consumer wellbeing, competition, and suppression of information and innovation. Further, the labour rights and environmental impacts (from minerals mining to the massive and growing climate impact of data centres<sup>82</sup>) of technology hardware value chains are regularly overlooked.

0

cases concerning digitalisation were filed before 2011.



## GAPS IN THE GUIDELINES

The Guidelines are out of date in addressing the modern human rights and environmental impacts of companies in the digital sphere. The Guidelines do not identify the ways in which digitalisation can impact MNEs' potential to cause, contribute to, or be directly linked to adverse impacts, nor do they address the importance for MNEs of conducting due diligence over digitalisation-related impacts in their value chains. The types of challenges and impacts cited above do not appear in the Guidelines text. Instead, the only mention of the digital sphere is an encouragement for enterprises to "promote Internet Freedom through respect of freedom of expression, assembly and association online." While the Guidelines include a chapter on Science and Technology, it is focused narrowly on protecting intellectual property, sharing of technological and scientific knowledge with host countries, and coordination of business

14

cases concerning digitalisation have been filed in the past ten years.

activities with national science agendas and universities. Critically, other chapters such as Disclosure (III), Human Rights (IV), Employment and Industrial Relations (V), Environment (VI), Consumer Interests (VIII) and Taxation (XI) also do not include language reflecting the nexus between the issue covered in that chapter and RBC expectations for MNEs in the context of digitalisation.



### CASES INVOLVING DIGITALISATION

Several complaints have recently targeted impacts linked to digitalization, and many of these reveal lack of clarity by MNEs and NCPs alike in applying the outdated Guidelines to this modern challenge.<sup>83</sup>

NCPs have reached widely divergent outcomes even when addressing the same issue: for example, the British NCP was willing to consider allegations against a British MNE, which had sold surveillance technology to Bahrain that the government later used to repress human rights defenders, regarding the MNE's responsibility through its value chain for Bahrain's rights violations.<sup>84</sup> Meanwhile, the German NCP, considering a related complaint against a German company, refused to consider a claim that the company was partially responsible, through its sale, for Bahrain's human rights violations.<sup>85</sup> NCPs have also rejected complaints by erroneously concluding that dual-use authorisation for surveillance/telecommunications technologies is sufficient for human rights due diligence, such as in one complaint recently handled by the Italian NCP.<sup>86</sup>

One interesting complaint handled by the Polish NCP concerned an online marketplace's failure to stop third party users from buying and selling furnaces used to illegally burn processed oil and discarded wooden railway clippers.<sup>87</sup> Both processed oil and wooden railway clippers constitute hazardous waste whose burning is prohibited in Poland due to its serious environmental harm. Through mediation of the Polish NCP, an agreement was reached between the complainant NGOs and the online company for it to improve its due diligence efforts to screen such environmentally harmful advertisements.



# ALL

(100%) of complaints concerning digitalisation also address human rights issues.



In many digitalisation-related complaints, the national government of the host country is involved in allegations of human rights abuse, including surveillance of opposition.

# 86%

of complaints addressing digitalisation, are related to the security & defence sectors.

## Recommendation

Given how central digital technology now is to business and society globally, and the visible impacts misuse of technology or data can have on citizens, consumers, and democracies alike, the OECD Guidelines should be updated to acknowledge this challenge and clarify how MNEs' impacts may be exacerbated in the digital sphere.

- In lieu of the current "encouragement" for MNEs' to respect Internet Freedom, the General Policies chapter should highlight digitalisation as a potential major negative influence on all MNEs' human rights and environmental impacts, and call on MNEs to appreciate digitalisation-related issues as an element within their due diligence processes.
- Meanwhile, principles or commentary in the Human Rights, Employment and Industrial Relations, Environment, Consumer Interests, Competition, and Taxation chapters should explain to MNEs how digitalisation may worsen their impacts with respect to each issue, including through actions they take directly or actions by business relations or third-party users.
- Commentary and parallel guidance issued by the OECD could suggest the types of steps needed from MNEs to identify, prevent or mitigate, and remedy digitalisation-linked impacts, including by related parties.

## STANDARDS GAP



# Disclosure



### GLOBAL CONTEXT: IMPORTANCE OF NON-FINANCIAL DISCLOSURE

Transparency is critical for MNEs' full compliance with RBC expectations. Since 2011, consensus has grown among governments, investors, civil society, and business stakeholders that traditional MNE annual reports are insufficient to provide enough relevant information on MNEs' structures, value chains, and human rights, social, and environmental impacts to assess their progress or failures in contributing to sustainable development. 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 the UN Sustainable Development Goals, and enable civil society stakeholders to play their role in monitoring corporate activity and state regulation. Many OECD governments are implementing a range of mandatory and voluntary initiatives to require or encourage companies to report sustainability-related information.



**1 in 3**  
complaints addressed  
disclosure breaches.

### IMPROVED DISCLOSURE MEASURES IN OECD STATES

The latest (2020) report of the Carrots and Sticks project 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.<sup>88</sup>

**28**

EU countries have adapted the EUs' Non-Financial Reporting Directive (NFR Directive) into national law. A revision of the Guidelines could draw on such new standards initiative.

The OECD has also identified communication as one of the six steps of due diligence. In 2018, the OECD's Due Diligence Guidance for Responsible Business Conduct clarified that due diligence involves communication at every one of the six steps of due diligence. This means MNEs should communicate not only about the existence of internal policies on human rights and RBC, but also their actions to identify actual and potential adverse impacts to people and the planet across their value chains including through consultation with stakeholders, their actions to address identified risks and impacts, the outcomes of those prevention and mitigation efforts, and their success in remediating adverse impacts.

## GAPS IN THE GUIDELINES

In contrast with these developments and standards, the Guidelines' Disclosure chapter is outdated. 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.”<sup>89</sup> While the Guidelines assert that enterprises “should” disclose the former, they are merely “encouraged to” disclose the latter. This lower expectation regarding environmental, social, and risk reporting seems contradictory to the newer due diligence communications expectations created by the 2011 revision on due diligence. The chapter also does not call for disclosures on key topics important in assessing an MNE's due diligence. In addition to impacts to rights holders, the chapter also fails to call for country-by-country reporting, disclosure of targets on greenhouse gas emissions and climate impacts, beneficial ownership and corporate structure, profits earned and taxes paid, value chain partners and wages paid, and employment and impact data disaggregated to reveal disparate impacts on relevant marginalised or disadvantaged people including women and people of low caste.

**51%**

of all complaints concerning the financial sector involve issues with disclosure.



**59%**

Meanwhile, of all complaints concerning the oil & gas sector involve issues with disclosure.



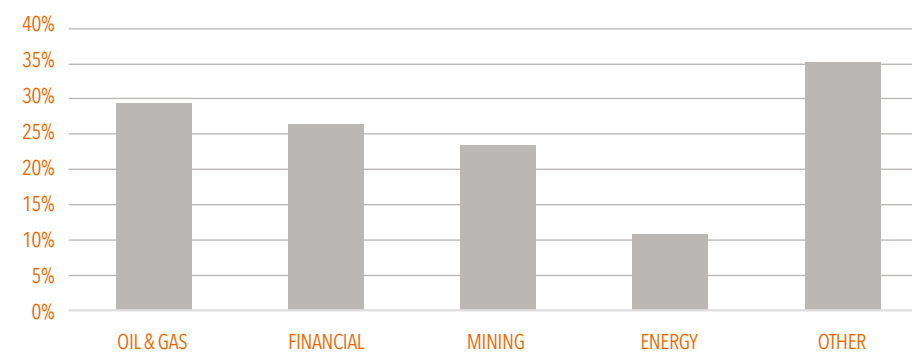
#### CASES INVOLVING DISCLOSURE

In OECD Watch's experience, disclosure is a challenge both in underlying cases - MNEs often refuse to disclose their expected environmental and social impacts to rightsholders - and in MNEs' participation in NCP complaint proceedings - many MNEs seek total confidentiality over the complaint and any documents they share.

A good example is the case of *Siemenpuu et al vs. Pöyry Group*, a complaint filed by an international coalition of 14 civil society groups to the Finnish NCP against a Finnish technical consultant advising construction of the controversial Laos Xayaburi hydroelectric dam. The dam's environmental impact assessment found that environmental and social impacts of the dam could be devastating and irreversible and recommended delaying construction for ten years. But as is too often the case, the assessment and related documents were not disclosed to the public until after stakeholder consultations were undertaken. The project became subject to a major diplomatic dispute as the other Mekong countries sought further evaluation of potential impacts. The Lao government hired Pöyry to conduct another study, which it undertook without consultation and with no new scientific research, advising that construction could begin. The complainants alleged numerous breaches of Pöyry's due diligence, particularly lending its own brand and credibility to a project that had failed adequately to consult and disclose material information to stakeholders.

Pöyry's disclosure failings continued during the specific instance process. Pöyry refused to share adequate information with the Finnish NCP to enable it to fully evaluate the company's due diligence breaches, and also insisted that its response to the complaint be kept confidential. Many NCPs reject such demands, but the Finnish NCP gave in to it. Then, having prevented the complainants from seeing and rebutting the company's response, the NCP proceeded to base part of its final statement on Pöyry's secret material.

Disclosure complaints per sector



➔ More than a quarter of disclosure-related complaints concern the oil & gas sector. The same is true for the financial sector.

#### Recommendations

To address the impacts above and ensure greater internal consistency, a few simple updates to the OECD Guidelines would strengthen MNE expectations on disclosure.

- The General Policies chapter should identify disclosure and transparency as an important element of RBC, a prerequisite for fulfilling expectations in the other chapters of the Guidelines, and a critical element of each of the six steps of the due diligence process.
- The Disclosure chapter should eliminate the current distinction between material MNEs "should" disclose (principles 1 and 2) and material that MNEs are merely "encouraged to" disclose (principle 3). The chapter should instead call clearly ("should") for companies to disclose environmental, social, and governance information, including their findings and actions at all steps of the due diligence process, country-by-country reporting, greenhouse gas emissions and climate targets, beneficial ownership and corporate structure, profits earned and taxes paid, value chain partners and wages paid, and employment and impact data disaggregated to reveal impacts on relevant marginalised or disadvantaged people including women and people of low caste.
- These reporting expectations could be cross-referenced in the other relevant chapters of the OECD Guidelines.

## STANDARDS GAP

#9

# Corruption

### GLOBAL CONTEXT: BUSINESS ENGAGEMENT IN CORRUPTION

Corruption is interlinked with human rights violations and environmental degradation.<sup>90</sup> For example, Transparency International's Corruption Perceptions Index<sup>91</sup> shows a strong correlation between countries with high levels of corruption and those with widespread human rights abuses. 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.<sup>92</sup>

MNEs are often at risk of engaging in corruption directly or being linked to it through business partners such as other companies or states, including in their value chains. Bribery is the primary example of corporate corruption, but corruption can take other forms too, including embezzlement and fraud, graft, favouritism or clientelism, extortion, opaque and inappropriate lobbying and/or campaign donations, and use of a "revolving door" in employment between corporations and regulators to minimize regulation over businesses, skew public procurement practices towards particular firms, or otherwise inappropriately influence legislative and regulatory processes.<sup>93</sup> Corruption has reportedly increased during the ongoing COVID-19 pandemic as governments circumvent competitive procurement processes in the name of a timely emergency response.<sup>94</sup>

**42%**  
of complaints addressing  
corruption relate to the  
mining sector.



## GAPS IN THE GUIDELINES

The OECD Guidelines fall short in several ways on the issue of corruption. First and foremost, Chapter VII on Combating Bribery, Bribe Solicitation, and Extortion focuses only on bribery and extortion, overlooking all the other ways MNEs are involved in corrupt practices. Transparency is essential to combating corruption, and because anonymous companies are typically vehicles for illicit practices like money laundering and bribery, the Guidelines should call for country-by-country reporting and disclosure of beneficial ownership. But the Combating Bribery chapter seeks transparency only in terms of anti-bribery commitments and related internal control systems.

Meanwhile, the Guidelines fail to underscore the link between corruption and other environmental and social standards covered in the text and call for protection of whistle-blowers exposing corrupt activities by corporations.



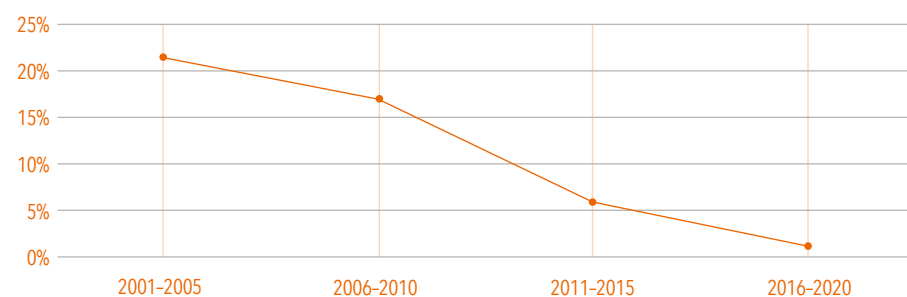
### CASES INVOLVING CORRUPTION

The Guidelines' lack of complete coverage of all forms of corporate corruption has caused problems in complaint-handling. Updated comprehensive standards on corruption would synchronize expectations for MNEs with other standards and help NCPs understand diverse corruption issues in specific instances.

Some of the NCP complaints on corruption have focused on bribery specifically. One complaint addressing bribery reached an agreement through handling of the US NCP: In *CED & RELUFA vs. SG Sustainable Oils Cameroon*, complainants alleged that a Cameroonian affiliate of a New York-based agriculture company had bribed community leaders, local government officials, and citizens to gain land to develop a palm oil plantation.<sup>95</sup> After mediation, the company agreed to investigate cases of past corruption and respond to the complainants in writing with its findings.

But other complaints have struggled to address broader issues of corruption using the narrow frame of bribery. A 2007 complaint by Global Witness followed up on a 2002 report of a United Nations panel of experts accusing 85 OECD member-based companies of violating the Guidelines through direct or indirect involvement in the illegal exploitation of natural resources in the DRC. The report alleged that "elite networks" of political, military, and business members fuelled the conflict in order to retain control over the country's resources.<sup>96</sup> Although the report asserted that companies engaged in a "variety of criminal activities including theft, embezzlement and diversion of "public" funds, undervaluation of goods, smuggling, false invoicing, non-payment of taxes, [and] kickbacks to public officials," the complainants were limited by the Guidelines to addressing bribery and extortion. They struggled to describe certain of the harmful acts as bribery,<sup>97</sup> and so while they were successful in seeing several other of their claims affirmed by the UK NCP, the bribery claims were denied.

Percentage of complaints addressing corruption



➔ Over time, there has been a notable decline in community- and NGO-led complaints addressing corruption. This could result from a corresponding increase in the passage of binding laws on corruption. Pursuing justice in court is generally a stronger choice for complainants than filing an NCP complaint, but where litigation is not available or feasible, an NCP mediation may generate practical solutions and remedies.

## Recommendations

Simple changes to the Guidelines would clarify its scope over all corporate acts of corruption, and corruption's relevance to other issues in the Guidelines.

- First and foremost, Chapter VII should be retitled to address corruption explicitly and be modified to cover corruption broadly, to include all the forms of corruption applicable to corporations
- Chapter VII and chapter II on General Policies should acknowledge corruption as a cross-cutting factor in human rights violations, environmental damage, and other adverse impacts, and chapter II should explicitly call for corporate due diligence activities to consider potential and actual corruption in MNE value chains.
- Improved expectations on disclosure in chapter III, such as regarding transparency around beneficial ownership, corporate structure, and country-by-country reporting, would help facilitate identification of corruption by MNEs, governments, and civil society.

## STANDARDS GAP



# Animal welfare

### GLOBAL CONTEXT: BUSINESS IMPACTS ON ANIMAL WELFARE

Animal welfare is increasingly recognised by governments and businesses alike as an RBC issue. Each year, billions of animals are used in industries including farming, textiles, pharmacy and cosmetics, and tourism, with support by the

financial sector. Irresponsible business conduct towards animals in such industries has led to serious impacts on animals, people, and the environment. Although many OECD member governments legally acknowledge animals' capacity to feel pain, many companies and/or their value chains involve animal testing, intensive confinement, and practices that are scientifically identified as causing severe pain and long-lasting frustration for the animals. High-density animal keeping and increased interaction between humans and animals has significant negative public health and

safety effects, including increasing the risk of the emergence of zoonotic diseases such as COVID-19, SARS, Ebola, and Avian Flu.<sup>98</sup> Meanwhile, low animal welfare and subsequent overuse of antibiotics is also driving up antimicrobial resistance among both animals and humans. Intensive livestock farming, with related high use of chemicals and fertilizers and the production of feed for farm animals, are key causes of deforestation, loss of biodiversity, and environmental pollution.<sup>99</sup> Livestock are also key contributors to the total

annual anthropogenic greenhouse gas emissions globally.<sup>100</sup>

A robust illegal wildlife trade, intertwined with the legal trade, involves major transnational organised crime with links to drugs and weapons trade, human trafficking, and money laundering.<sup>101</sup>

Further, poor animal welfare practices have been found to occur commonly alongside forced and child labour, such as in the seafood<sup>102</sup> and cattle production and beef processing<sup>103</sup> industries.

**0**  
is the amount of  
times animal welfare  
is mentioned in the  
OECD Guidelines.

  
**0**  
complaints address  
animal welfare.

## GAPS IN THE GUIDELINES

Although the OECD Guidelines are the leading international standard on RBC for MNEs, they are completely silent on the issue of animal welfare. They set no standards at all for RBC with respect to animals, despite the prevalence of animals across the sectors, regions, and enterprises covered by the Guidelines. In this regard, the OECD Guidelines are already far behind growing consumer concern for animal welfare, the legal frameworks of many

OECD member states a rising number of international, regional, and national models and principles on animal welfare,<sup>104</sup> and the internal policies of many MNEs. In fact, the proliferation of laws, standards, and corporate policies on animal welfare over the last decade underscore both the broad recognition of animal welfare as a responsible business issue, and the need for a single, unifying, comprehensive and future-proof standard applicable to the many sectors and jurisdictions implicated.

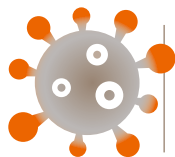
Although the Guidelines are silent on animal welfare, the OECD has a memorandum of understanding with the World Organisation for Animal Health to cooperate "in matters of common interest in the fields of animal health and welfare, ... economics of animal health, ... [and] development and effective implementation of high-quality international standards." The OECD should implement this MOU through including animal welfare standards in the Guidelines.



### CASES INVOLVING ANIMAL WELFARE

Unsurprisingly, there are no cases addressing animal welfare, because the Guidelines do not currently allow claims on animal welfare. Without clear RBC standards for MNEs on animal welfare, interested groups have no way to critique company misconduct towards animals using the OECD Guidelines and complaint system.





Antimicrobial resistance, driven in large part by overuse of antibiotics to counter poor animal welfare conditions, is projected to kill 10 million people annually by 2050 unless action is taken to address it.<sup>105</sup>

#### OECD STATES THAT RECOGNIZE ANIMAL SENTIENCE

- EU member countries
- Australia (at state level)
- Chile (proposal stage)
- Colombia
- Iceland
- Mexico (at state level)
- New Zealand

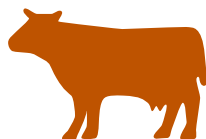


#### OECD STATES WITH RESTRICTIONS ON SOME ANIMAL USES OR PRACTICES

- EU member countries
- Chile (proposal stage)
- Colombia
- Iceland
- Mexico
- New Zealand
- Switzerland
- UK
- USA (at state level)

**14,5%**

of global annual anthropogenic greenhouse gas emissions originate from livestock, according to the FAO.<sup>106</sup>



## Recommendations

The OECD Guidelines should be revised to provide the consolidated RBC standard on animal welfare that is needed to guide MNEs towards responsible conduct and help animal, environmental, and human victims of irresponsible practices achieve remedy.

- Standards should call upon MNEs to adopt more holistic, ethical, and sustainable systems of keeping, producing and consuming animals, to include implementing less intensive farming systems, supporting higher animal welfare, and engaging in more monitoring of animal health and well-being.
- Standards should call for MNEs to undertake due diligence to identify, prevent or mitigate, and remedy RBC impacts arising from suboptimal animal welfare in international value chains.
- Standards should also call on MNEs to establish measurable objectives and, where appropriate, targets for improved animal welfare.
- Standards on animal welfare could appear in a new separate chapter on the subject, or be woven into existing chapters such as on General Policies, Human Rights, Environment, and Consumer Interests.
- New standards should build upon those already developed by countries, NGOs, multistakeholder initiatives, MNEs, and the OECD itself. For example, the OECD-FAO Guidance for Responsible Agricultural Supply Chains adopted in 2016 includes some recommendations around animal welfare that represent a positive start - although not the progressive and comprehensive standards needed on this issue.

## STANDARDS GAP

#11

# Non-traditional MNEs including state entities engaged in commercial activities

### GLOBAL CONTEXT: IMPACTS BY NON-TRADITIONAL MNEs

A wide range of entities are operating in the commercial sphere and impacting people and the environment in harmful ways. Recently, several NCPs have handled complaints against a range of non-traditional multinational enterprises, including multi-stakeholder and industry sustainability certification initiatives failing to investigate and address harmful impacts of corporations receiving their certifications;<sup>107</sup> holding<sup>108</sup> and letterbox<sup>109</sup> companies owning corporations that are causing labour rights, environmental abuse, and tax avoidance; a non-profit organisation accused of land rights violations,<sup>110</sup> and a non-profit sports federation linked to allegations of labour rights harms.<sup>111</sup>

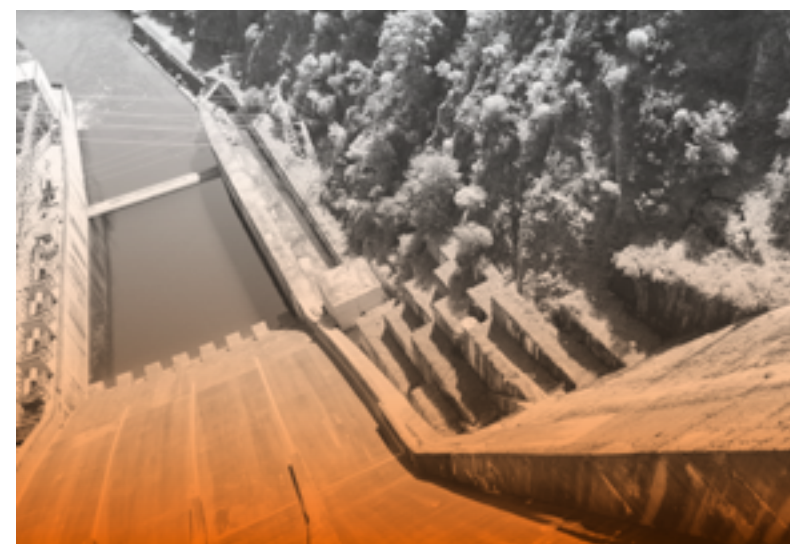
Just as all range of private entities engaged in commercial activity are expected to meet high human rights and environmental standards, state-owned enterprises as well as states engaging as economic actors - such export credit agencies, states procuring goods, etc. - should also be held to account for adverse RBC impacts. States adhering to the Guidelines in particular have been increasingly interested in promoting policy coherence across the private sector and government-related entities, taking into account states' licensing and permitting activities, procurement processes, government contracting practices, and others.

## GAPS IN THE GUIDELINES

The OECD Guidelines expressly do not set a specific definition for the MNE, but reflect good practice for all enterprises, regardless of whether they are owned or run privately or by a state. In general states are bound by the higher duty to protect human rights, but the Guidelines' applicability to states acting as economic actors should be clarified, beyond state owned enterprises (already addressed in the text), to include other economic or business-linked engagements of states in line with Principles 5 and 6 of the UNGPs. Development agencies and development finance institutions, export credit institutions, public procurement authorities, as well as intergovernmental organizations can be connected to adverse human rights

impacts through their business relationships. Recent OECD analysis has recommended governments to align frameworks on RBC in public procurement with international standards such as the Guidelines.<sup>112</sup>

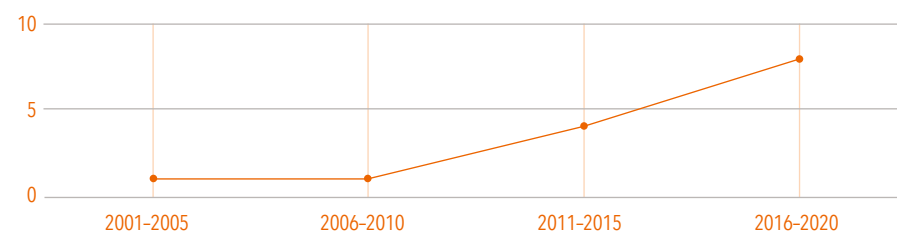
Although the broad scope of the Guidelines' application enables coverage of state entities acting as economic actors, a number of NCPs have rejected complaints against their own national export credit agency on grounds that the enterprises are not covered by the Guidelines. The lack of specificity in the Guidelines regarding the definition of covered MNEs or commercial activities is problematic, allowing governments to exempt themselves, when acting as economic actors, from the standards they apply to other multinationals. This is not leading by example. It also sets up an unlevel playing field between export credit agencies and other financial institutions, and between those ECAs whose governments do hold them accountable for abiding by the OECD Guidelines (such as the Netherlands), and those whose governments do not.



### CASES INVOLVING EXPORT CREDIT AGENCIES

Five complaints have been filed against export credit agencies. Among these, three were rejected at the initial assessment stage by the Finnish, Korean, and UK NCPs,<sup>113</sup> 1 accepted by the Dutch NCP,<sup>114</sup> and 1 initially accepted and then rejected by the Korean NCP after it received objections from the Korean export credit agency.<sup>115</sup> The rejections have resulted because the NCPs have determined - in various and sometimes conflicting ways - that the agency is not covered by the OECD Guidelines.<sup>116</sup> These rejections generate the perception that the standards in the Guidelines do not apply to state entities engaged in commercial, despite the fact that many ECAs are actually corporations legally and all are playing an essential role in 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 the projects supported by the ECAs.

Complaints filed against non-traditional MNEs



*Complaints against non-traditional MNEs are increasing.*

## Recommendation

To ensure fulfilment of the intent of states adhering to the Guidelines to ensure broad alignment with the OECD Guidelines, Chapter I of the OECD Guidelines should be revised to clarify that the Guidelines may apply to all entities engaging in, pursuing, or facilitating commercial activity in the international sphere. Entities that may have responsibilities under the Guidelines include those traditionally considered to be MNEs as well as non-traditional entities, public and private entities, for-profit and non-profit entities, and government or government-sponsored entities when they engage in commercial activities.



## Conclusion

The OECD Guidelines - long viewed as the leading global standard on RBC - have great potential to promote sustainable business practices and facilitate access to remedy for victims of adverse corporate impacts. But they have not been updated since 2011 and are now failing to fulfil their purposes.

The standards they set for multinational enterprises (MNEs) are outdated and incomplete. In the last decade, major developments have occurred in the field of business and human rights: new challenges have arisen, such as the growth of digitalisation and corresponding impacts on human rights and the environment. And norms have evolved, with policymakers and the public expecting more responsible business practices on issues such as disclosure, taxation, and climate impact mitigation.

The Guidelines' standards have not kept pace with these developments. While the RBC topics addressed in the text – such as on human rights, labour rights, environment, disclosure, and taxation – are still the right ones in general terms, the standards and guiding commentary under each are incomplete or outdated.

This paper has highlighted gaps in the MNE standards on a number of key issues:

- While climate change is widely recognised as the greatest challenge of our time, the term does not even appear in the Guidelines, nor do they mention the Paris agreement or other relevant international agreements on this issue. The Guidelines also do not address other important environmental challenges such as deforestation and increasing biodiversity loss.
- Despite a boom in digitalisation and heightened public awareness of the risks it poses to human rights, democracy, and the environment, neither the Science and Technology chapter, nor any other chapter, even mentions concepts around digitalisation, nor explains how the impacts of all companies - not just technology companies - may be altered and exacerbated in the digital sphere.
- The Guidelines give no specific guidance to MNEs on the particular care needed to respect the human rights of marginalized and disadvantaged groups such as women, Indigenous Peoples, children, and people of low caste. They also do not call out the rise in harms to human rights defenders, including via the actions or inactions of businesses.
- Despite a decade of evolution in expectations for corporate transparency, the disclosure chapter sets no meaningful expectations around non-financial reporting, nor even emphasizes the importance for MNEs of communicating due diligence steps and outcomes.
- Although global policy makers, including at the OECD itself, are taking steps to curtail corporate tax avoidance, the taxation chapter doesn't mention the term, nor link fair payment of taxes to respect for human rights.
- The Covid-19 pandemic has revealed many long-standing labour rights challenges - not least of them the need for responsible disengagement in times of emergency - that are not addressed in the text.
- Land rights, not mentioned in the Guidelines despite their critical role in enabling other human rights, are being repeatedly violated by corporations in the land intensive agriculture, infrastructure, and extractives sectors.
- Corporations are engaging in a range of acts of corruption beyond the two narrow types - bribery and extortion - mentioned in the text.
- Animal welfare - though recognised as an RBC issue key to animal, human, and planetary health - is not addressed at all in the Guidelines.
- And the Guidelines do not call for states to set an example for corporations by ensuring that state entities engaging in commercial activity also follow the Guidelines' expectations.

These gaps in standards are problematic in their own right within the nominal leading global standard on RBC. But they are even more concerning given the fact that the Guidelines are increasingly being used to underpin legislation on corporate accountability.

Further, the expectations the Guidelines set for their implementation via the OECD NCPs are inadequate. States have a duty to ensure victims of corporate impacts access to remedy via state-backed nonjudicial grievance mechanisms such as the NCPs, and many victims still rely on such out-of-court procedures to obtain remedy for the harms they have incurred. But the Procedural Guidance sets so low a bar for the establishment of NCPs that the mechanisms are now widely divergent in their structures, promotional activities, and complaint-handling procedures. Viewed on the whole, the OECD NCP complaint mechanisms are not functionally equivalent to each other, ineffective in helping victims secure remedy, and not accountable to stakeholders.

This paper has had three objectives:

- ◉ To demonstrate why the Guidelines are not fit for purpose - because gaps in the standards and expectations they set for MNEs and NCPs render them outdated and ineffective.
- ◉ To explain why a revision of the Guidelines is needed to close the gaps.
- ◉ And to offer practical recommendations on the targeted, simple edits necessary to make the Guidelines fit for purpose.

Although the Guidelines are becoming obsolete as a voluntary standard on RBC and tool for remedy for impacted people, simple revisions can bring them up to date.

## Recommendations

OECD Watch urges the states adhering to the Guidelines to take the opportunity afforded them to update the Guidelines for the modern era, ensuring they are fit for purpose as the leading, consolidated global standard on RBC advancing a progressive vision for business and human rights for the next decade.

Over the next months and next years, we call on governments to:  
*Ensure a robust and complete stocktaking of gaps in the Guidelines.*

- ◉ We ask the governments to incorporate into the stocktaking report the gaps identified by OECD Watch in this paper and its other submissions to the WPRBC. These recommendations represent insight from hundreds of civil society groups. Civil society, along with unions and businesses, are the primary users of the Guidelines. To be complete, the stocktaking report must reflect their views on where gaps appear in the text.
- ◉ We also urge the governments to ensure a meaningful public consultation on gaps in the Guidelines by allowing adequate time for stakeholder input, publicizing all comments received, and explaining, in connection with the final stocktaking report, which recommendations were adopted or not into the stocktaking report, and why.

*Following the stocktaking, undertake a comprehensive revision of the Guidelines to resolve the gaps identified by civil society.*

- ◉ At the conclusion of the stocktaking, we call upon the states adhering to the Guidelines to open the whole text of the Guidelines, not merely one or another section, to revisions that resolve the gaps OECD Watch has outlined.
  - ◉ The recommendations on revisions that OECD Watch has provided in this report, and the recommendations and suggestions of parallel advancements OECD Watch has given in its other submissions to the WPRBC, should be used to guide states in considering and framing the targeted edits needed.
- ◉ We also call on the governments to ensure that no textual edits are made that weaken standards for MNEs or expectations for the practices of NCPs. A revision of the Guidelines must not allow a backsliding in norms or access to remedy.

*Finally, where necessary, clarify the revised text through accompanying guidance notes.*

- ◉ Understanding that the Guidelines may not be able to contain all the information needed to explain expectations for corporations on covered RBC standards, we ask the governments to provide accompanying guidance notes wherever needed to explicate the text.

OECD Watch welcomes the ongoing stocktaking and stands ready to support the WPRBC, governments, and the OECD secretariat throughout the stocktaking and anticipated revision process.

## Endnotes

- 1 Framtiden I våre hender vs. Intex Resources, available at [https://complaints.oecdwatch.org/cases/Case\\_164](https://complaints.oecdwatch.org/cases/Case_164).
- 2 FIDH et al. vs. CRCC-Tongguan Investment (Canada) Co., Ltd., available at: <https://www.oecdwatch.org/complaint/fidh-et-al-vs-crc-c-tongguan-investment-canada-co-ltd/>.
- 3 Global Witness, "Global Witness records the highest number of land and environmental activists murdered in one year – with the link to accelerating climate change of increasing concern," 27 July 2020, available at: <https://www.globalwitness.org/en/press-releases/global-witness-records-the-highest-number-of-land-and-environmental-activists-murdered-in-one-year-with-the-link-to-accelerating-climate-change-of-increasing-concern/>
- 4 Local resistance to the Mindoro nickel mine project was strong among politicians, NGOs, the Catholic Church, and sections of the Indigenous peoples. Hunger strikes and protests by activists had led to the withdrawal of the company's Environmental Compliance certification in 2009, and the Norwegian ambassador had already visited the site and met with supporting and opposing groups before the NCP even began investigating the complaint.
- 5 French Duty of Vigilance law, 2017, available at <https://www.business-humanrights.org/en/latest-news/french-duty-of-vigilance-law-english-translation/>.
- 6 See, e.g. MVO Platform, "Frequently Asked Questions about the new Dutch Child Labour Due Diligence Law, 3 June 2019, available at: <https://www.mvplatform.nl/en/frequently-asked-questions-about-the-new-dutch-child-labour-due-diligence-law/>.
- 7 European Commission, Legal texts and documents on conflict minerals, available at: <https://ec.europa.eu/trade/policy/in-focus/conflict-minerals-regulation/legal-texts-and-documents/>.
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- 113 See CEDHA vs. Finnvera Plc, available at: <https://www.oecdwatch.org/complaint/cedha-vs-finnvera-plc/>; KTNC Watch et al. vs. KEXIM (Philippines 2018), available at: <https://www.oecdwatch.org/complaint/ktnc-watch-et-al-vs-kexim/>; and South Korean Civil Society Task Force Team vs. KEXIM (Laos 2019), available at: <https://www.oecdwatch.org/complaint/south-korean-civil-society-task-force-team-vs-kexim/>;
- 114 Forum Suape et al. vs. Atradius Dutch State Business, available at: <https://www.oecdwatch.org/complaint/forum-suape-et-al-vs-atradius-dutch-state-business/>.
- 115 See KTNC Watch et al. vs. KEXIM (Indonesia 2019), available at: <https://www.oecdwatch.org/complaint/ktnc-watch-et-al-vs-kexim-2/>.
- 116 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.

