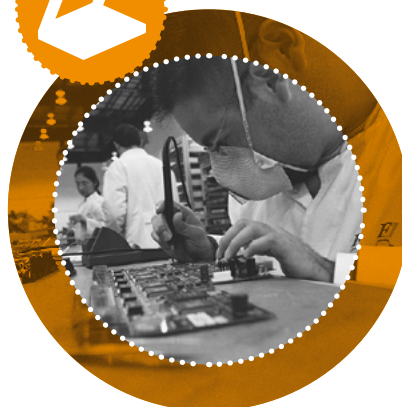




Calling for Corporate Accountability:

A Guide to the 2011 OECD Guidelines
for Multinational Enterprises





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Colophon

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Acronyms

BIAC	Business and Industry Advisory Committee
CAO	Compliance Advisor/Ombudsman
DRC	Democratic Republic of Congo
ECCHR	European Centre for Constitutional and Human Rights
ECGD	Export Credits Guarantee Department
EIA	Environmental Impact Assessment
IFC	International Finance Corporation
MIGA	Multilateral Investment Guarantee Agency
MNE	Multinational Enterprise
NHRI	National Human Rights Institution
NCP	National Contact Point
NGO	Non-governmental organisation
OECD	Organisation for Economic Co-operation and Development
RSPO	Roundtable on Sustainable Palm Oil
TUAC	Trade Union Advisory Committee
UNDRIP	UN Declaration on the Rights of Indigenous Peoples

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Introduction

The OECD Guidelines for Multinational Enterprises (hereinafter referred to as ‘the Guidelines’) are a unique, government-backed international corporate accountability mechanism aimed at encouraging responsible business behaviour around the world. They define standards for socially and environmentally responsible corporate behaviour and proscribe procedures for resolving disputes between corporations and the communities or individuals negatively affected by corporate activities. In May 2011, the OECD and non-OECD adhering governments updated the Guidelines, introducing substantial new provisions in areas such as human rights, due diligence and supply chain responsibility.

This OECD Watch ‘Guide to the Guidelines’ is designed to help individuals, communities, non-governmental organisations (NGOs) and trade unions that have been negatively affected by corporate behaviour and that wish to address the alleged misconduct on their own behalf, or on behalf of another affected party. The dispute resolution mechanism – which is a key feature of the Guidelines – is an instrument that stakeholders can use to address harmful corporate practices that have affected them and to seek remedy. After reading OECD Watch’s guide, you should have a better understanding of the key provisions in the Guidelines and their relevance to corporate behaviour and your possibilities for confronting negative effects of corporate misconduct. The guide is intended to help you understand how the dispute resolution mechanism (also referred to as the complaint process) works, including the function of National Contact Points (NCPs) – the government offices responsible for promoting adherence to the Guidelines and dealing with complaints regarding corporate misconduct. Additionally, OECD Watch’s guide will help you use the OECD Guidelines in your work and equip you with practical suggestions and examples of how to write a complaint yourself.

Structure of this OECD Watch ‘Guide to the Guidelines’

This guide is structured to help you familiarise yourself with the Guidelines and the associated dispute resolution mechanism to address and improve corporate behaviour.

- **Section 2** outlines the concepts, principles and scope of the Guidelines. This section highlights key aspects of the Guidelines that reflect civil society’s priorities in addressing corporate misconduct.

- **Section 3** explains what NCPs do and how the Guidelines’ dispute resolution process works. This section contains information about how different NCPs are structured and gives examples of good and bad NCP practices.
- **Section 4** provides practical advice and tips for developing a complete and persuasive complaint. A template is provided to help you write a complaint.

All cases that are referred to in this OECD Watch guide can be found in more detail in the OECD Watch case database (www.oecdwatch.org/cases). At the end of the guide you will find a list of resources for further guidance when considering filing an OECD Guidelines complaint.

About OECD Watch

OECD Watch is a global network, with more than 100 members in 45 countries. Membership consists of a diverse range of civil society organisations that are united in their commitment to ensuring that business activity contributes to sustainable development and poverty eradication, and that corporations are held accountable for their impacts around the globe.

Policy & advocacy: As a recognised “key stakeholder” at the OECD, OECD Watch acts as a conduit for bringing the perspectives and interests of civil society and disadvantaged communities into policy discussions at the OECD Investment Committee. In addition to monitoring and advocating for improved NCP performance and implementation of the Guidelines, OECD Watch develops policy advice on a wide range of social, environmental and economic topics related to corporate accountability. The network advocates for these policies and positions in its interactions with policymakers, businesses and trade unions.

Capacity building & support: OECD Watch supports civil society organisations and communities by holding capacity building seminars, providing detailed advice on the Guidelines’ complaints process to those considering and involved in a case, developing and disseminating guidance on how to interpret and use the Guidelines, and providing small grants to NGOs that are in need and whose work contributes to the overall aims of the network.

Research & analysis: OECD Watch researches and analyses various aspects of the implementation, effectiveness and impact of the OECD Guidelines. The network maintains an online database of all Guidelines cases filed by NGOs and publishes regular case updates, including developments in and analysis of cases.

Other corporate accountability instruments: Beyond the OECD Guidelines, OECD Watch contributes to other advocacy efforts to strengthen corporate accountability frameworks around the world.





Understanding the OECD Guidelines for Multinational Enterprises

This section introduces and briefly explains each of the 11 chapters of the OECD Guidelines. Key paragraphs are highlighted and examples are provided to help you understand how the Guidelines can be used to address (and hopefully improve) irresponsible corporate behaviour.

About the OECD Guidelines

The OECD Guidelines set out principles and standards for responsible business conduct. They are recommendations from governments to multinational enterprises operating in or from countries that are signatory to the Declaration on International Investment and Multinational Enterprises including the Guidelines. They provide guidance for responsible business conduct in areas such as: labour rights, human rights, environment, information disclosure, combating bribery, consumer interests, competition, taxation, and intellectual property rights. While they are not legally binding on companies, OECD and signatory governments are required to ensure that they are implemented and observed. What distinguishes the OECD Guidelines from other corporate responsibility instruments and mechanisms is their international nature, the fact that they are government-backed standards and that they have a dispute resolution mechanism for resolving conflicts regarding alleged corporate misconduct.

BOX 1

What is the Organisation for Economic Co-operation and Development (OECD)?

The Organisation for Economic Co-operation and Development (OECD) was established in 1961. Today, the OECD is a forum of 34 industrialised countries that develops and promotes economic and social policies. Its mission is to “‘build strong economies in its member countries, improve efficiency, home market systems, expand free trade, and contribute to development in

industrialised as well as developing countries”’. Simply stated, the OECD acts on behalf of and in collaboration with its member governments to promote free market policies and trade. In addition to the 34 OECD member states, 11 non-member countries have signed up to implement the OECD Guidelines (see Box 3 for a list of the countries).

Governments that adhere to the Guidelines must establish an NCP to promote the Guidelines and handle complaints against companies that have allegedly failed to adhere to Guidelines’ standards. The ‘specific instance’ procedure – as the Guidelines’ complaint process is officially called – is focused on resolving disputes – primarily through mediation and conciliation, but also through other means – and can be used by anyone who can demonstrate an ‘interest’ (broadly defined) in the alleged violation. NGOs and trade unions from around the world have used the complaint process to address adverse social and environmental impacts caused by corporate misconduct. NGOs have also used the complaint process to raise awareness about the fact that enterprises are expected to uphold internationally recognised standards, contribute to sustainable development and, at a very minimum, ‘do no harm’ wherever they operate.

How the Guidelines are structured

The Guidelines begin with a foreword that introduces the Guidelines and the major changes that were adopted in the 2011 update. Following the foreword is the ‘Declaration on International Investment and Multinational Enterprises’, which is the policy commitment by adhering (signatory) governments that established the Guidelines.

‘Part I: OECD Guidelines for Multinational Enterprises: Recommendations for responsible business conduct in a global context’ is referred to as the ‘official text’ of the Guidelines, and is made up of a preface and the 11 chapters listed below. Each chapter spells out a series of recommendations and is followed by a ‘Commentary’ section that further explains and elaborates on the official text. The chapters in Part I include:

- Preface**
- Chapter I.** Concepts and Principles
- Chapter II.** General Policies
- Chapter III.** Disclosure
- Chapter IV.** Human Rights
- Chapter V.** Employment and Industrial Relations
- Chapter VI.** Environment
- Chapter VII.** Combating Bribery, Bribe Solicitation and Extortion
- Chapter VIII.** Consumer Interests
- Chapter IX.** Science and Technology
- Chapter X.** Competition
- Chapter XI.** Taxation

‘Part II: Implementation Procedures of the OECD Guidelines for Multinational Enterprises’ prescribes what adhering governments should do to promote and further the implementation of the Guidelines, including setting up an NCP and handling complaints. These procedures are further explained in section 3 of this OECD Watch guide.

QUICK VIEW

A ‘quick-view’ box is provided for each chapter of the Guidelines to help you identify whether the chapter is relevant for your situation. Note that the quick-view boxes and the key provisions highlighted in this OECD Watch guide do not represent a full reproduction of the official text of the Guidelines. OECD Watch strongly advises those interested in filing a complaint to read the full official text and commentary, which are available for download in different languages on the OECD website. ¹

1. <http://mneguidelines.oecd.org/guidelines/>



Preface

The Preface explains what the OECD Guidelines are, what their purpose is and why they were developed. The unique nature of the Guidelines is established in § 1 of the Preface, which states that countries adhering to the Guidelines make a binding commitment to implement them. The Preface also explains that, although the Guidelines are voluntary for multinational enterprises, OECD governments have committed to implementing the OECD Council's decision. The Guidelines are thus not voluntary for governments that adhere to them.

The Preface makes it clear that the Guidelines apply not only to large corporations, but also to small- and medium-sized companies. This is important given the role that these enterprises play in international business and production networks.

Finally, there is commentary on the positive contribution that all enterprises can make to economic, social and environmental progress and the role governments must play in promoting and implementing internationally recognised standards.

Since 2000
NGOs can file
complaints under the
OECD Guidelines' specific
instance procedure. As of
October 2017 more than
250 complaints have
been filed by
NGOs.



Chapter I. Concepts and Principles

Chapter I. identifies the Guidelines as principles and standards of good corporate practice consistent with applicable laws and internationally recognised standards. These apply worldwide to enterprises’ operations in or from OECD and other non-OECD adhering countries, as well as equally to multinational and domestic enterprises. Most of the provisions in this chapter focus on what governments should do.

§ 2 states that enterprises must, at a very minimum, **obey the domestic laws** of the countries in which they operate. Thus, if a company is violating local laws, it is also in breach of the Guidelines. This provision has been widely used in OECD Guidelines complaints. In some cases, however, it may be more effective to address the problem within the domestic legal system. Nevertheless, filing a Guidelines complaint can be an effective option if the domestic legal system is deemed to be biased or inaccessible for complainants. The paragraph further notes that companies should not only obey domestic laws, but should also abide by the Guidelines in cases where these represent a higher standard, even if this is not legally required.

§ 4 confirms the Guidelines **apply to all sectors of the economy**, thus including the financial sector and financial institutions. This implies that banks, pension funds and other financial institutions have a responsibility to seek to prevent and mitigate negative impacts through their investments, loans, asset management and other financial products and services. An example of the Guidelines’ applicability to the financial sector would be a bank providing financing to a company that is violating human rights. A complaint could be filed against the bank for failing to adhere to the Guidelines’ provisions on human rights and due diligence for impacts caused by business relations.



CASE EXAMPLE

Investment in project risking human rights abuses

In 2012 a complaint was filed against POSCO for its failure to seek to prevent human rights abuses related to its proposed mine and steel plant in Odisha, India. Complainants also called on Dutch and Norwegian pension funds to seek to prevent abuses directly linked to their operations through their investment in POSCO. The Dutch NCP issued a statement confirming that the Guidelines are applicable to financial institutions and to

investors, including minority shareholders. After a series of meetings between the Dutch pension fund ABP and the Dutch complainants an agreement was reached on the steps to be taken by the pension fund to exercise its leverage over POSCO to ensure operations are in line with international standards. Further agreement was reached on a terms of reference for a local independent review and assessment mission.

QUICK VIEW

Chapter I. Concepts and Principles

- The Guidelines are government-backed principles and standards for good business practice, §1.
- Enterprises must obey domestic laws; the Guidelines’ principles and standards may go beyond domestic law, §2.
- Enterprises should seek ways to honour the Guidelines, even when they go beyond domestic laws and regulations, provided doing so does not violate domestic laws, §2.
- The Guidelines apply to the operations of enterprises in or from OECD and other adhering countries, §3.
- The Guidelines apply globally and enterprises are expected to observe them wherever they operate, §3.
- The Guidelines do not provide a precise definition of ‘multinational enterprise’. They reflect good practice for all companies operating domestically and abroad, §4.
- The Guidelines apply to all entities and all activities of a multinational enterprise and to all sectors of the economy, §4.
- Governments should not use the Guidelines for protectionist purposes or in a way that calls into question another country’s comparative advantage, §7.
- Governments are encouraged to make a good faith effort to resolve any conflicting requirements that enterprises may encounter, §8.
- Governments that adhere to the Guidelines will treat enterprises equitably and in keeping with international law and their contractual obligations, §9.
- The use of international dispute settlement mechanisms, including arbitration, is encouraged to resolve legal problems between governments and enterprises, §10.
- Governments will create National Contact Points that promote the Guidelines and serve as a forum to discuss all matters relating to them, including the handling of conflicts and cases, §11.

Chapter II. General Policies

Chapter II. outlines common fundamental principles of the Guidelines that are valid for all the specific chapter recommendations and details a range of important obligations for enterprises, including respecting internationally recognised human rights standards, upholding and applying good corporate governance principles and practices, and cooperating with efforts to promote Internet freedom. Chapter II. confirms enterprises should refrain from discriminating against whistle-blowers and from improper involvement in political activities. Enterprises should furthermore promote employee awareness of the Guidelines and their company's policy of adhering to them and engage stakeholders in a meaningful way.



§ A.1 outlines a broadly defined provision that enterprises should **contribute** to economic, environmental and social progress with a view to achieving **sustainable development**. This provision has been frequently cited by NGOs in Guidelines complaints against companies.

§ A.5 states that **enterprises should not seek or accept exemptions** from regulatory requirements concerning human rights, environmental, health, safety, labour, taxation, financial incentives, or other issues. § A.15 also states that companies should abstain from any improper involvement in local political activities.

CASE EXAMPLE

Seeking exemptions to human rights and other regulations in the South Caucasus General Policies Chapter, § 5

In April 2003, five complaints were submitted to the British, French, German, Italian and US NCPs claiming that BP and its consortium partners had negotiated Host Government Agreements that exempted them from environmental, human rights, health, safety, labour,

taxation and other laws that might adversely affect the financial return of the Baku-Tbilisi-Ceyhan oil pipeline running through the South Caucasus. Soon after the complaints were filed, the BP-led consortium amended the agreements to retract the regulatory exemptions.



§ A.6 states that enterprises should **uphold good corporate governance principles and practices** throughout the entire multinational enterprise. The Commentary for this principle also includes guidance on the importance of recognising the rights and interests of stakeholders, and not just shareholders exclusively.

§ A.9 outlines that enterprises should **protect whistle-blowers** and not take discriminatory or disciplinary action against workers who report unethical or illegal practices.

§ A.14 states that enterprises should **engage in meaningful stakeholder consultation** with local communities, workers and other relevant stakeholders, so their views are taken into account in project planning, decision-making or other activities that may significantly impact them. The corresponding Commentary explains that companies can do this through, for example, meetings, hearings, sharing of project information (including impact assessments) or consultation proceedings. Effective stakeholder engagement is characterised by two-way communication. This engagement is particularly needed in the planning and decision-making of projects or other activities involving, for example, the intensive use of land or water, which could significantly affect local communities.



CASE EXAMPLE

Failing to consult with Indigenous People and honouring the Guidelines in the Philippines
Concepts and Principles Chapter, § 2, General Policies Chapter, § A.14

A 2009 complaint alleged that Intex Resources’ planned nickel mine and factory in the Philippines would harm nearby rivers and agricultural fields. The complaint also alleged that Intex’s prospecting agreement overlapped land owned by the Mangyan indigenous people, who had not given their consent for the project. One of the

conclusions in the Norwegian NCP’s final statement was that Intex had failed to undertake a systematic assessment of affected indigenous groups and had also failed to consult with them. The NCP made several recommendations to improve community consultation, disclosure, transparency and Intex’s grievance mechanism.

QUICK VIEW

Chapter II. General Policies

Enterprises should:

- Contribute to economic, environmental and social progress with a view to achieving sustainable development, §A.1.
- Respect the human rights of those affected by their activities, §A.2.
- Encourage local capacity building through close cooperation with the local community, §A.3.
- Encourage ‘human capital formation’, particularly by creating employment opportunities and facilitating training opportunities for employees, §A.4.
- Refrain from seeking or accepting exemptions to regulatory requirements concerning human rights, environment, taxation or other issues, §A.5.
- Uphold and apply good corporate governance principles and practices, §A.6.
- Develop and adopt self-regulatory practices and management systems that foster trust within the societies in which they operate, §A.7.
- Promote workers’ awareness of and compliance with company policies, including through training programmes, §A.8.
- Refrain from discriminating against or disciplining workers who make legitimate reports to management or public authorities about violations, §A.9.
- Conduct risk-based due diligence to identify, prevent and mitigate actual and potential negative impacts, and account for how these impacts are addressed, §A.10.
- Avoid causing or contributing to adverse impacts in their own activities and addressing them when they do occur, §A.11.
- Seek to prevent or mitigate adverse impacts it has not directly caused, but is associated with through business relationships, §A.12.
- Encourage business partners, including suppliers and sub-contractors, to apply similar principles of responsible business conduct, §A.13.
- Engage in meaningful consultation with local communities, workers and other relevant stakeholders, §A.14.
- Abstain from improper involvement in local political activities, §A.15.
- Cooperate with efforts to promote Internet Freedom, §B.1.
- Support efforts to promote responsible supply chain management, §B.2.

BOX 2

Under the Guidelines, enterprises are expected to carry out **due diligence** to **avoid and address adverse impacts** related to the matters covered by the Guidelines. The Guidelines are the benchmark for carrying out the due diligence – to measure whether the enterprise is having adverse impacts.

“Due diligence” combines both the notion of “**due**” – i.e. that it is commensurate with the risks to be covered and “**diligence**” – i.e. acting with prudence and perseverance to address risks in light of the circumstances. The due diligence process comprises steps that enable enterprises to **identify, prevent, mitigate** and **account** for how they address their actual and potential adverse impacts covered by the Guidelines.

Crucially, the Guidelines are clear that enterprises should conduct due diligence to address **not only the adverse impacts they themselves cause** or contribute to, but they should also identify and seek to prevent or mitigate **adverse impacts that are directly linked to their operations**, products or services by a business relationship, i.e. throughout their entire value chain including suppliers, (sub-)contractors, and even government entities (see Box 11 for more on causing, contributing and directly linked).

What is “risk-based” due diligence?

Under the Guidelines, companies are expected to carry out due diligence that is “risk-based”. While many enterprises have traditionally interpreted the term “risk” to mean risks to the enterprise – financial risk, operational risk, reputational risk, etc. – the Guidelines refer to **risks created by enterprises** (and the consequences for society and the environment if those risks materialize into impacts) – so it is an outward facing approach.

References to due diligence in the Guidelines

Several OECD Guidelines chapters refer to the



expectation of enterprises to conduct due diligence to prevent and mitigate adverse impacts. These include:

Chapter II. (General Policies) § A.10 states that enterprises should conduct **risk-based due diligence** for their own operations – as well as throughout their supply chains and other business relationships – to identify, prevent and mitigate actual and potential impacts for matters covered by the Guidelines. This provision applies to all enterprises in all situations.

Chapter II. (General Policies) § A.11 and § A.12 state that enterprises should **avoid causing or contributing**

EXAMPLES

- Examples of **addressing actual impacts** through remedy include: 1) raising wages and benefits to ensure that they meet the basic needs of workers and their families; 2) providing adequate financial compensation to communities that are adversely affected by mining and resettlement.
- Examples of **addressing potential negative impacts** through prevention include: 1) establishing policies to prohibit racial discrimination; 2) installing adequate safety equipment to prevent factory workers' exposure to hazardous conditions
- Examples of **preventing human rights impacts by suppliers and other business relationships** include: 1) stipulating in purchase contracts that suppliers are expected to respect human rights and that they will be subject to independent unannounced inspections of their factories; 2) ensuring that purchasing practices (delivery deadlines and prices) enable suppliers to meet buyer demands without violating labour rights.
- Examples of **mitigating human rights impacts by suppliers and other business relationships** include: 1) implementing corrective action plans with suppliers to bring their operations in line with internationally recognised standards; 2) working collaboratively in multi-stakeholder initiatives and with other enterprises that have relationships with the entity to promote improvements.

► **to adverse impacts** throughout the enterprise or in the supply chain or other business relationships. Enterprises should **address impacts when they occur** and seek to **prevent or mitigate adverse impacts** even where the enterprise itself has not contributed to the impact.

Chapter III. (Disclosure) § 3d states that enterprises are encouraged to **communicate information on their internal audit, risk management and legal compliance systems**. Because due diligence is an integral part of risk management, enterprises should disclose due diligence processes and findings.

Chapter IV. (Human Rights) § 2 and 3 states that enterprises should **avoid causing or contributing to negative human rights impacts**. Even if they do not contribute to those impacts, enterprises should seek to prevent or mitigate any adverse impacts that they are linked to through their supply chains or other business relationships.

Chapter IV. (Human Rights) § 5 is specifically dedicated to the notion that enterprises should conduct **human rights due diligence**.

Chapter VI. (Environment) § 3 stipulates that enterprises should **mitigate the foreseeable environmental, health and safety-related impacts** associated with their processes, goods and services over their full life cycle. This provision takes on additional importance when read with the General Policies (Chapter II.) due diligence and meaningful stakeholder consultation provisions.

Chapter VII. (Combating Bribery) § 4 states that, in order to minimise bribery risks, enterprises must exercise and document **due diligence when hiring and overseeing agents**. Disclosure of all payments to governments and individuals including taxes, royalties, subsidies and facilitation payments to assist with business operations on a project-by-project basis is recommended to prevent or at least minimise bribery.

Complaints can be filed with NCPs against companies if they fail to conduct due diligence.



CASE EXAMPLE

Failing to conduct human rights due diligence in Argentina
General Policies Chapter, § A.10; Human Rights Chapter, § 5

A June 2011 complaint to the Dutch NCP called on Nidera to implement a company-wide human rights policy that includes due diligence procedures consistent with the UN’s “Protect, Respect and Remedy” Framework. The complaint was filed by NGOs following high-profile government investigations that exposed the company’s

abusive treatment of temporary workers in its corn detasseling operations in Argentina. After a constructive dialogue, Nidera strengthened its human rights policy, formalised due diligence procedures for temporary rural workers and allowed the NGOs to monitor its Argentine corn seed operations through field visits.



Chapter III. Disclosure

The chapter on disclosure stipulates that enterprises should be transparent in their operations and responsive to the public's increasingly sophisticated demands for information. Enterprises should disclose material information on financial and operating results, objectives, ownership, enterprise structure, board members and their remuneration, foreseeable risk factors, and governance structures and policies.

The disclosure provisions in the Guidelines are weaker than today's international best practices, but do include some aspects that reflect NGO priorities when it comes to the disclosure practices of MNEs.



CASE EXAMPLE



Disclosing false, misleading and incomplete information about oil spills in Nigeria **Disclosure Chapter, § 1, 2 f-g and 4**

Shell's disclosure practices are the subject of a January 2011 complaint filed with the Dutch NCP that alleges the company has made false, misleading and incomplete statements about incidents of sabotage to its Niger Delta operations. By blaming criminal gangs for the high proportion of oil spills, the complaint asserts that Shell avoids liability and having to pay compensation for harming people and their livelihoods.

The Dutch NCP found that Shell's statements on the oil spills were based on flawed investigations and disputed evidence. Complainants nevertheless regret that the NCP did not comment on whether Shell's failures constituted a breach of the Guidelines nor made a full assessment of the evidence provided or an investigation whether Shell's statements were indeed misleading.

§ 2 stipulates that enterprises should have clear **policies to disclose material information** regarding financial results, ownership and voting rights, structure of the enterprise and related groups of enterprises, foreseeable risk factors, issues regarding workers and stakeholders, and governance structures. The Commentary notes that material information can be defined as information that could influence decision-making by users of that information.

§ 3 encourages enterprises to **disclose statements of business conduct**; codes of conduct and related performance; information on internal audit, risk management and legal compliance systems; relationships with stakeholders such as workers, suppliers, subcontractors and other business relations; and information on greenhouse gas emissions.

§ 4 states that enterprises should **apply high-quality standards for financial as well as non-financial disclosure**, including environmental and social reporting. Current examples of best practice environmental and social reporting standards are the ‘Disclosure Standards’ of the World Bank International Finance Corporation (IFC) and the Global Reporting Initiative’s sustainability reporting guidelines.



CASE EXAMPLE

Failing to disclose information to authorities in the UK Disclosure Chapter, § 4

In April 2005, a complaint against BAE Systems, Rolls Royce and Airbus was filed with the UK NCP, because these companies refused to provide the names of their agents when applying for support from the UK’s export credit agency, Export Credits Guarantee Department (ECGD). When the UK NCP concluded the case in November 2010, it noted the companies would have indeed breached the Guidelines if they applied for

financial support, but then refused to disclose the names of their agents. However, the NCP said it could not determine whether the three companies actually breached the Guidelines, because ECGD did not keep sufficient records. The NCP’s final statement also reaffirmed that companies cannot refuse to supply the names of their agents by citing commercial confidentiality when competent authorities request this information.

QUICK VIEW

Chapter III. Disclosure

- Enterprises should disclose timely and accurate information on all material matters concerning their activities, structure, financial situation and performance, §1.
- Enterprises’ disclosure policies should include the following material information, §2:
 - Financial and operating results;
 - Enterprise objectives;
 - Major share ownership and voting rights, including the structure of a group of enterprises and intra-group relations, as well as control enhancing mechanisms;
 - Remuneration policy for board members and key executives, and information about board members, including their qualifications, selection process, and independence;
 - Related party transactions;
 - Foreseeable risk factors;
 - Issues regarding workers and other stakeholders;
 - Governance structures and policies, in particular, the content of any corporate governance code or policy and its implementation process.
- Enterprises are encouraged to communicate additional information such as, §3:
 - Value statements or statements of business conduct, including policies relating to matters covered by the Guidelines.
 - What policies and codes of conduct it has subscribed to, the date of adoption and the entities to which such statements apply.
- Enterprises should have high-quality standards for accounting, financial and non-financial disclosure, §4.
- The standards and policies that are used to compile this information should be disclosed, §4.
- An independent, annual audit should be conducted, §4.

Chapter IV. Human Rights

The human rights chapter is an important addition to the Guidelines that resulted from the 2011 update. In the past, almost half of the cases filed by NGOs cited the single paragraph on human rights in the 2000 version of the Guidelines. The inclusion of this chapter is a major achievement that aligns the OECD Guidelines with the United Nations Guiding Principles and the 'Protect, Respect, Remedy' Framework on Business and Human Rights.

§ 1 states that enterprises should **respect all human rights** wherever they operate and regardless of whether governments are fulfilling their obligations. In doing so the corresponding Commentary outlines that enterprises should be guided by the internationally recognised rights expressed in the following human rights instruments:

- The UN Universal Declaration of Human Rights
- The UN International Covenant on Civil and Political Rights
- The UN International Covenant on Economic, Social and Cultural Rights
- The International Labour Organization (ILO) Declaration on Fundamental Principles and Rights at Work.

The above list should be seen as a minimum. Enterprises need to consider additional standards for specific circumstances such as in a situation of armed conflict, or when impacting on the rights of individuals belonging to specific groups or populations that require particular attention. The Commentary also confirms that enterprises are expected to observe the UN Declaration on the Rights of Indigenous Peoples even though this instrument is not specifically referenced.

CASE EXAMPLE

Failure to respect Indigenous Peoples' rights in India Human Rights Chapter, § 1, 2, 3 and 5

A 2008 complaint against Vedanta Resources alleged its aluminium refinery and planned bauxite mine on Niyam Dongar Mountain in Orissa, India would violate the Dongria Kondh tribe's rights. The Niyam Dongar is a sacred mountain to the Dongria Kondh peoples, one of the most isolated tribes in India. The tribes' culture, identity and livelihood are inextricably bound to the mountain.

Though Vedanta's engagement in the complaint process was insincere, according to the complainants, the UK NCP's final statement upheld the complainants' allegations that Vedanta acted in violation of the OECD Guidelines. The NCP furthermore recommended the company conduct a human rights impact assessment and take concrete action to implement any self-regulatory practices it adopts.



§ 2, 3 and 5 relate to the fact that the enterprises should **carry out human rights due diligence** to assess, prevent and address actual and potential human rights impacts, including impacts they do not actually contribute towards but to which they are linked through their business relationships (see Box 2 on due diligence).

§ 4 states that enterprises should have a **policy commitment to respect human rights**. According to the Commentary, this policy commitment should be:

- approved at the most senior level of the enterprise;
- informed by relevant internal and/or external expertise;
- specific about the expectations of personnel, business partners and other parties directly linked to its operations, products or services;
- publicly available and communicated internally and externally to all personnel, business partners and other relevant parties; and
- reflected in operational policies and procedures necessary to embed it throughout the enterprise.

§ 6 states enterprises should have processes established to **enable remediation** – for example, compensation – in the event that human rights impacts occur. It is OECD Watch's view that, in some circumstances, it may be useful and appropriate to seek financial or other types of compensation through an OECD Guidelines case. It should be noted that in some cases, particularly those related to grave human rights abuses, a mediated outcome and compensation may not be appropriate or sufficient, and criminal charges should be pursued.



CASE EXAMPLE



Failure to stop human rights abuses in Argentina Human Rights Chapter, § 2

In June 2011, NGOs filed a complaint against Nidera for allegedly abusing the human rights of temporary workers at its corn detasseling operations in Argentina. Based largely on official government reports, the complaint describes the workers' poor living conditions, which one local doctor compared to 'concentration camps'. Other alleged violations of the workers' rights include not being told where and how long they would be working or any

information about wages during their recruitment. Nidera was also accused of not providing toilets, running water or adequate clothing and equipment for workers to carry out their tasks. A number of positive outcomes came from the successful mediation, including Nidera strengthening its policies on human rights, implementing due diligence procedures and agreeing to NGO field visits to monitor its operations.

QUICK VIEW

Chapter IV. Human Rights

Enterprises should:

- Respect human rights, §1.
- Avoid causing or contributing to impacts and address them when they occur, §2.
- Prevent or mitigate impacts linked to their business operations, products or services by a business relationship, including suppliers, §3.
- Have a policy commitment to respect human rights, §4.
- Conduct human rights due diligence, §5.
- Cooperate with remediation when they have caused adverse human rights impacts, §6.

Chapter V. Employment and Industrial Relations

Chapter V. covers fundamental labour rights provisions, including freedom of association and right to collective bargaining, the effective abolition of child labour, the elimination of all forms of forced or compulsory labour and non-discrimination in employment and occupation. This chapter also prescribes how enterprises should handle issues such as training, working conditions and industrial relations. The chapter reflects the same fundamental labour rights contained in the ILO 1998 Declaration on Fundamental Principles and Rights at Work and the ILO Tripartite Declaration Concerning Multinational Enterprises and Social Policy from 2006.

In the 2011 update of the Guidelines, the term ‘employees’ was replaced with ‘**workers**’. Now enterprises have the same obligations to outsourced or informal workers as they do to their direct employees. This includes, for example, workers who have been hired by recruitment agencies. This important change brought the Guidelines in line with the *ILO Tripartite Declaration Concerning Multinational Enterprises and Social Policy* and reflects the changing diversity and nature of employment relationships workers have with enterprises.



The employment chapter is the most cited chapter in OECD Guidelines complaints filed.

CASE EXAMPLE

Failing to stop the use of child labourers in Uzbekistan Employment and Industrial Relations Chapter, § 1c

In 2010, seven cotton dealers from France, Germany, Switzerland and the UK were accused of knowingly profiting from forced child labour in the Uzbek cotton industry. Although the efficiency of the procedures conducted by the NCPs differed fundamentally, cases were concluded with joint agreements / final statements whereby the companies acknowledged responsibility for their supply chains and promised to take steps to improve the human rights situation in Uzbekistan.

While Otto Stadtlander maintained it does not receive cotton directly from Uzbek sellers, the company still agreed in discussions led by the German NCP to take steps to avoid forced child labour and to report back after one year. ECOM Agroindustrial agreed in the Swiss NCP-led discussions to allow the European Centre for Constitutional and Human Rights (ECCHR) to regularly evaluate steps taken by the company. Louis Dreyfus

agreed to further dialogue with ECCHR if consultations between the cotton traders and the Uzbek government fail to produce results. The ICT Cotton and Cargill Cotton cases handled by the UK NCP included an agreement to a follow-up after one year to evaluate their progress. The French NCP, which handled the case against Devcot, S.A., could not establish if Devcot had breached the Guidelines but held trade in goods produced from forced child labour to be a flagrant violation of the Guidelines.

Although the complainants note the commitment of the cotton traders to end forced labour in the Uzbek cotton supply industry decreased after the complaints had been concluded, the complaints have triggered positive responses from a number of leading investment banks, which now monitor the Uzbek forced labour situation with updates from the complainants.



§ 1c requires enterprises to take immediate and effective action to eliminate the worst forms of **child labour**. In addition, § 1d requires enterprises to take steps to ensure that **compulsory labour** does not exist in their operations.

§ 4 declares that employers should observe **standards that are not less favourable**, thus at least equal to standards observed by comparable employers in the host country. In case there are no comparable employers, companies should in any case provide wages, benefits, and conditions of work that **satisfy the basic needs of workers and their families**. In many developing countries, the minimum wage level is not enough to cover the basic needs of workers and their families. However, under § 4b, enterprises can now be held to account if they do not provide wages, benefits and conditions of work that satisfy these basic needs, even if they are complying with the law.

§ 6 outlines that, when enterprises consider changes in their operations that have major effects on workers – for example, when a company decides to close a factory or outsource a large part of its operations – it should communicate these changes to workers’ representatives and, where appropriate, governmental authorities reasonably in advance, preferably before the final decision is taken. Moreover, the company should cooperate with these representatives and authorities in a meaningful way to minimise the negative effects for workers.

CASE EXAMPLE



Failing to provide notice of major changes that will impact workers’ livelihoods in Mexico Employment and Industrial Relations Chapter, § 6

A complaint was filed in 2002 after Continental's subsidiary Euzkadle closed its factory in Mexico without proper notification to employees and trade unions. The German NCP transferred the case to the Mexican NCP where it was never resolved. However, after the workers’ successful three-year strike against the illegal closure, the

factory was reopened and the workers received 50% of the tyre factory's shares. The settlement was presided over by then-President Vicente Fox in 2005. While the complaint against Continental AG did not result in an NCP-led resolution, the complainants believe their case helped to generate international pressure.

QUICK VIEW

Chapter V. Employment and Industrial Relations

Enterprises should:

- Respect workers’ right to create or join a trade union, §1a.
- Recognise trade unions of workers’ choosing for the purpose of collective bargaining and engage in constructive negotiations to reach agreement on terms and conditions of employment, §1b.
- Contribute to the abolition of child labour, §1c.
- Contribute to the elimination of all forms of forced or compulsory labour in general and in their operations, §1d.
- Not discriminate based on race, colour, sex, religion, political opinion, national extraction or social origin or other status including trade union activity, §1e.
- Provide facilities to workers to assist in the development of effective collective agreements, §2a.
- Provide information to workers needed for meaningful negotiations, §2b.
- Provide true and fair information to workers and their representatives on company performance, §2c.
- Promote consultation and cooperation among employers and workers, §3.
- Observe labour standards not less favourable than those observed in the host country by comparable employers and which at least satisfy the basic needs of the workers and their families, §4a, b.
- Take adequate steps to ensure occupational health and safety in their operations, §4c.
- Employ local workers and provide training with a view to improving skill levels as much as possible, §5.
- Provide reasonable notice of major changes such as facility closure or large-scale dismissals, cooperate with workers’ representatives to mitigate adverse effects and give appropriate notice prior to the final decision being taken, §6.
- Not threaten to transfer whole or part of an operating unit when workers are organising, or during negotiations, §7.
- Enable workers’ representatives to negotiate and allow them to consult with those who are authorised to take decisions on collective bargaining and labour issues, §8.

Chapter VI. Environment

In the past, almost 50% of all cases filed by NGOs included allegations of environmental breaches. Not surprisingly, many cases dealt with environmental issues in the extractive industries. The chapter on environment covers many key issues of importance to NGOs. This includes: the need for enterprises to conduct environmental impact assessments, to prevent or minimise environmental damage, to protect public health and safety and to contribute to the wider goal of sustainable development. While the entire chapter is a priority for many NGOs, the aspects below have been highlighted because they have often been cited in cases raised to date, or because they reflect changes in the 2011 update.

§ 1 states that enterprises should have **environmental management systems** to assess environmental, health and safety impacts of activities; establish measurable objectives and targets for improved environmental performance and resource utilisation; and monitor and verify progress toward environmental, health, and safety objectives.

§ 2 states that enterprises should provide the public and workers with **information on potential environmental, health and safety impacts**, including for their suppliers. Enterprises should communicate this information in a **timely manner and consult** with communities, employees and other stakeholders directly affected by the environmental, health and safety policies and practices of the enterprise.

§ 4 outlines the **precautionary principle**, which means that – in cases where there are threats of damage to the environment, human health or safety – companies should not postpone measures to prevent or minimise damage, even if there is not full scientific certainty that these risks will occur.

§ 6 states that enterprises should continually try to **improve environmental performance** (including throughout their supply chain) even when not formally required to do so. Enterprises should do this by encouraging a number of activities, including developing and providing products and services that **reduce greenhouse gas** emissions and using natural resources efficiently. Enterprises should further **promote customer awareness** of the environmental impacts of their products and services, for example, on greenhouse gas emissions, biodiversity or other environmental issues. Moreover, enterprises ought to explore how they can improve their environmental performance in the long term, through for example developing strategies for emission reduction, efficient resource use and recycling, substitution or reduction of the use of toxic substances, or strategies on biodiversity.

CASE EXAMPLE



Failing to protect world heritage site in the Democratic Republic of Congo Environment Chapter, § 2a and 2b

In 2013 WWF filed a complaint against SOCO, alleging that its oil exploration activities in Virunga National Park in the Democratic Republic of Congo are incompatible with the park's World Heritage Site status and do not contribute to sustainable development. To bring SOCO's operations into line with the Guidelines, WWF demanded immediate cessation of the company's activities in and around the national park. The mediation facilitated by the UK NCP resulted in an agreement and joint statement by the parties. SOCO agreed to cease its operations and

not to undertake any exploratory or other drilling within Virunga National Park. The company further committed never again to jeopardize the value of any other World Heritage Site and to undertake environmental impact assessments and human rights due diligence that complies with international norms and standards and industry best practice. The WWF-SOCO agreement represents the first time an OECD Guidelines case has led to the halting of a damaging extractives project.



NGOs have used the environment chapter to address issues such as pollution, failure to conduct and disclose EIAs, impact of projects on biodiversity, destruction of glaciers, and corporations' contribution to climate change.



CASE EXAMPLE

Failing to take precautions against environmental harm in Chile and Canada Environment Chapter, § 6

A 2009 complaint against Cermaq ASA alleged multiple breaches of the Guidelines, including environmentally harmful salmon farming practices that spread disease to wild salmon stocks in Chile and Canada. The successful Norwegian NCP-led mediation resulted in a joint statement where Cermaq acknowledged it had not taken a precautionary approach in meeting social and

environmental challenges and accepted responsibility for its subsidiaries' activities. Cermaq also recognised principles for responsible aquaculture and implemented procedures to prevent the spread of fish disease. Nevertheless, a post-case evaluation revealed that the local impact of the agreement was not as positive as was hoped at the end of mediation.

QUICK VIEW

Chapter VI. Environment

Enterprises should:

- Maintain an environmental management system that includes monitoring, evaluating and verifying environmental, health and safety impacts of activities and objectives, §1a, b, c.
- Provide the public and workers with adequate, measureable, and verifiable information on potential impacts, §2a, b.
- Engage in adequate and timely communication and consultation with the communities directly affected by the enterprises' environmental, health and safety policies, §3.
- Assess, prevent or mitigate foreseeable environmental, health and safety-related impacts associated with the processes, goods and services of the enterprise over their full life cycle, §3.
- Prepare an Environmental Impact Assessment (EIA) when impacts may be significant and when subject to a decision by a competent authority, §3.
- Not use the lack of full scientific certainty as a reason for postponing cost-effective measures to prevent or minimise environmental damage, §4.
- Maintain contingency plans for preventing, mitigating and controlling serious environmental and health damage from their operations and mechanisms for immediate reporting to the competent authorities, §5.
- Continually seek to improve corporate environmental performance at the level of the enterprise and its supply chain, §6.
- Provide adequate education and training to workers in environmental health and safety matters, §7.
- Contribute to the development of environmentally meaningful and economically efficient public policy, §8.

Chapter VII. Combating Bribery, Bribe Solicitation and Extortion

This chapter outlines the recommended standards that companies should observe and act upon to effectively combat bribery, bribe solicitation and extortion. These include: recommendations regarding internal controls and compliance programmes; maintenance of transparent, accurate financial and accounting records; management's public commitment to combating bribery and ensuring employee awareness of and compliance with company policies; and prescribed practices to eliminate corruptive, unethical behaviour.

§ 1 states that companies should **not offer bribes** to or request and accept inducements from public officials or employees of business partners in monetary or any other form. Companies should furthermore not use third parties to channel bribes or other advantages to public officials or to employees of business partners, relatives or business associates.

§ 2 states that enterprises should develop and adopt **internal controls, ethics and compliance programmes**, or measures for preventing and detecting bribery. These internal controls should be based on a risk assessment, particularly one that assesses bribery risks arising from the geographical location or industrial sector of the enterprise. There should also be appropriate financial and accounting procedures to ensure that financial reporting methods cannot be used for hiding bribery. All internal control systems should be regularly monitored and adjusted if necessary to ensure they continue to be effective.

§ 5 calls on enterprises to be more **transparent in their efforts to combat bribery**. This could include disclosing management systems and internal controls, ethics and compliance programmes or measures adopted by enterprises in order to prevent bribery, bribe solicitation and extortion.

CASE EXAMPLE

Acting on bribe solicitation in Liberia

Combating Bribery, Bribe Solicitation and Extortion Chapter, § 1

A January 2011 complaint against ArcelorMittal alleges a number of breaches to the Guidelines by its Liberian subsidiary, including acting on bribe solicitations. ArcelorMittal had previously acknowledged that, in direct response to an appeal by President Johnson Sirleaf, it donated 100 pick-up trucks for agricultural purposes in rural areas. However, according to the complaint, members of the Liberian Parliament are using them. The complainants argue that, given the level of

corruption in Liberia, the company should have known the donated trucks would be misappropriated. The case was submitted to the Dutch NCP, but then forwarded to the Luxembourg NCP. After two fact-finding missions and multiple mediation meetings, the NCP concluded the case with a final statement and a proposal for improving the County Social Development Fund that was supported by both parties.



CASE EXAMPLE

Bribing public officials to maintain business in Argentina

Combating Bribery, Bribe Solicitation and Extortion Chapter, § 1, 2, 4, 5 and 7

A 2007 complaint was filed against French-owned Accor Service after it was discovered a company agent offered a US\$20 million bribe to an Argentine government official to delay and change legislation that would have negatively affected the company's lunch voucher business. The

successful Argentine NCP-led mediation concluded with Accor making a financial contribution to an Argentinean NGO to support its transparency and anti-corruption programme. Accor also agreed to assist employees who are negatively impacted by the lunch voucher law.





QUICK VIEW

Chapter VII. Combating Bribery, Bribe Solicitation and Extortion

Enterprises should:

- Not offer bribes, directly or indirectly, to obtain or retain business or other undue advantage, §1.
- Resist solicitation of bribes and extortion, §1.
- Not offer, promise or give undue monetary or other advantages to public officials or the employees of business partners directly or through intermediaries, e.g. agents, consultants, suppliers, §1.
- Adopt adequate internal controls based on risk assessment and financial and accounting procedures to prevent bribery, §2.
- Regularly monitor and re-assess bribery risks and the respective internal controls designed for the enterprise's specific circumstances and adapt the respective controls when necessary to ensure their continued effectiveness, §2.
- Prohibit or discourage the use of facilitation payments, and, when they are made, accurately record them in financial records so they cannot be used for bribing or hiding bribery, §3.
- Ensure properly documented due diligence when hiring and overseeing agents, ensuring that their remuneration is for legitimate services only, §4.
- Enhance the transparency and effectiveness of anti-bribery activities by making management commitments to combating bribery public and disclosing the internal control systems designed to achieve the pronounced aims, §5.
- Foster openness and dialogue with the public to promote its cooperation with the fight against bribery, §5.
- Promote employee awareness and compliance with anti-bribery policies and internal controls, §6.
- Refrain from making illegal contributions to candidates for public office, political parties or other political organisations, §7.

Chapter VIII. Consumer Interests

This chapter on consumer interests states that enterprises should operate in accordance with fair business, marketing and advertising practices. They should not engage in any deceptive, misleading, fraudulent or unfair practices towards consumers. Enterprises should also ensure their goods and services meet agreed or legally required standards for consumer health and safety, including health warnings and safety information. Enterprises should provide consumers with a fair, easy-to-use and timely dispute resolution process, protect personal data and respect consumers' privacy.

§ 2 states that enterprises should provide accurate, verifiable and clear information that is sufficient to **enable consumers to make informed decisions**. This type of information includes information on prices, safe use, environmental sustainability, maintenance, storage and disposal of goods and services. Where feasible, this information should be provided in a manner that facilitates consumers' ability to compare products.



CASE EXAMPLE

Misleading consumers and investors about sources of pollution in the Niger Delta Consumer Interests Chapter, § 4

In January 2011, NGOs filed a complaint with the Dutch NCP against Shell for misleading consumers and investors. The NGOs allege that Shell's strategy of blaming criminal gangs for the high level of oil spill pollution is a way to deflect criticisms of the company's environmental and human rights impact and record in the Niger Delta. In addition, Shell has no financial liability when oil spills are classified as 'sabotage'. The Dutch

NCP found that Shell's general communication with stakeholders about the percentage of oil spills caused by sabotage was flawed. Complainants nevertheless regret that the NCP did not comment on whether Shell's failures constituted a breach of the Guidelines nor made a full assessment of the evidence provided or an investigation whether Shell's statements were indeed misleading.



§ 4 states that enterprises should not make representations or omissions, nor engage in any other practices, that are deceptive, misleading, fraudulent or unfair.

§ 5 outlines that enterprises should support efforts to **promote consumer education** in order to improve consumers’ ability to make informed decisions involving 1) complex goods, services and markets; and 2) the economic, environmental and social impact of their decisions; and 3) sustainable consumption.

§ 7 requires that enterprises should cooperate with ‘public authorities to prevent and **combat deceptive marketing practices** (including misleading advertising and commercial fraud) and to **diminish or prevent serious threats** to public health and safety or to the environment deriving from the consumption, use or disposal of their goods and services. The Commentary notes that, to do this, companies should consider the entire life cycle of their goods and services.



CASE EXAMPLE

Engaging in unethical marketing practices in multiple countries

Consumer Interests Chapter

A complaint against Ratiopharm, a German pharmaceuticals company and major producer of generic drugs, alleged it had engaged in unethical marketing practices in Germany, Canada, Spain, Estonia and Belgium. These practices, which included offering

illicit rebates to pharmacists, contradict standard governmental healthcare policies. While the German and Belgian NCPs rejected the case, the NGO complainants maintain their case should be the starting point of a wider public debate on the issue.

QUICK VIEW

Chapter VIII. Consumer Interests

Enterprises should:

- Act in accordance with fair business, marketing and advertising practices, Chapeau.
- Take all reasonable steps to ensure the quality and reliability of goods and services, Chapeau.
- Ensure goods and services meet agreed or legally required standards for consumer health and safety, including health warnings and safety information, §1.
- Provide accurate, verifiable and clear information so consumers can make informed decisions regarding goods and services, §2.
- Provide information in a manner that facilitates consumers’ ability to compare products, §2.
- Provide consumers with non-judicial dispute resolution and redress mechanisms that is fair, easy-to-use and timely, §3.
- Not engage in any deceptive, misleading, fraudulent or unfair practices, §4.
- Support efforts to promote consumer education to improve consumers’ ability to make informed decisions, better understand the impact of their decisions and support sustainable consumption, §5.
- Respect consumer privacy and protect personal data of consumers, §6.
- Cooperate with public authorities to prevent and combat deceptive marketing practices, §7.
- Cooperate with public authorities to diminish or prevent serious threats to public health and safety or threats to the environment from the consumption or use or disposal of goods and services, §7.
- Consider the needs of vulnerable and disadvantaged consumers, §8.
- Consider the specific challenges e-commerce may pose for consumers, §8.

Chapter IX. Science and Technology

Before the 2011 update of the Guidelines, the Science and Technology chapter had never been cited in complaints. Nonetheless, interesting provisions make reference to enterprises' responsibility to contribute to the development of local and national innovative capacity and adopt practices that permit the transfer and rapid diffusion of science and technology. Enterprises should also employ host country personnel and local science and technology capacity. In addition, enterprises should grant the use of intellectual property rights licenses on reasonable terms and in a manner that contributes to the long term sustainable development prospects of the host country.



QUICK VIEW

Chapter IX. Science and Technology

Enterprises should:

- Ensure that activities are compatible with the science and technology policies and plans of host countries, §1.
- Contribute to the development of local and national innovative capacity, §1.
- Adopt practices that permit the transfer and rapid diffusion of science and technology and know-how, with due regard to intellectual property rights, §2.
- Undertake science and technology development in host countries to address local market needs, §3.
- Employ and train host country personnel in science and technology capacities, §3.
- Contribute to the long-term sustainable development prospects of the host country when granting use of intellectual property rights or transferring technology, §4.
- Develop ties with local universities and public research institutions, and participate in co-operative research projects with local industry or industry associations, §5.

Chapter X. Competition

This chapter states that enterprises should follow competition laws and regulations and should not engage in activities that would have anti-competitive effects. Enterprises should cooperate with investigating authorities if there is a risk of anti-competitive behaviour. They should promote employee awareness of relevant competition laws and regulations through training, especially training senior management.



CASE EXAMPLE

Engaging in anti-competitive activities in the DRC

Competition Chapter, § 2

In October 2002, a United Nations Panel of Experts accused 85 OECD-based companies of violating the Guidelines for their direct or indirect roles in the illegal exploitation of natural resources in the Democratic Republic of Congo (DRC). In a complaint that was filed, Oryx was accused of engaging in illicit diamond trading. The Panel alleged a secret profit sharing agreement existed between Oryx and the Government of Zimbabwe whereby each took 40% of the net cash inflow from Sengamines, a rich diamond concession. The UK NCP disallowed the majority of issues raised in the complaint on the grounds that they had been ‘resolved’ by the UN Panel. The final statement was unsatisfactory for the complainants and did not incorporate any of its recommendations.



QUICK VIEW

Chapter X. Competition

Enterprises should:

- Operate in accordance with competition laws and regulations, §1.
- Refrain from entering into anti-competitive agreements with competitors by e.g. fixing prices, making rigged bids, establishing output restrictions or dividing up markets, §2.
- Cooperate effectively and efficiently with investigating authorities by, among other things, responding promptly and completely to requests for information, §3.
- Promote employee awareness of and compliance with all applicable competition laws and regulations, §4.

Chapter XI. Taxation

Even though there are only two taxation provisions in the Guidelines, the issues covered are critically important, particularly with respect to advancing social and economic progress. First and foremost, enterprises should meet their tax obligations by making timely tax payments and providing authorities with information for the correct determination of taxes, including transfer.

§ 1 states that enterprises must comply not only with the letter of the law, but also the ‘spirit’ of the law. In other words, enterprises should take steps to understand the intent of the host country’s legislation, and ensure they are meeting tax obligations accordingly. The Commentary suggests not just statutes but also legislative history should be used, so one could consider that parliamentary speeches accompanying laws could be used to determine the spirit of the law.

Companies should cooperate with authorities in providing all information legitimately requested by the relevant authorities. This should be done in a timely and complete manner. Multinational enterprises in one country should provide information regarding their operations in other countries where requested by the authorities and where necessary to effectively tax the operations in that country. This means that companies have a duty to provide all the necessary information required to tax them effectively. Long delays or incomplete information can make it impossible to tax companies effectively and efficiently and can result in lost revenue.

Enterprises should also ensure their transfer pricing practices conform to the **Arm’s Length Principle**. The transfer price is the amount paid from one part of a multinational enterprise for goods or services provided by another, and the Arm’s Length Principle means the transfer price should be the same as if the two companies involved are two independent companies and not part of the same corporate structure. When transfer pricing is abused, it deprives states – particularly developing countries – of much-needed tax revenues.

§ 2 outlines that companies should adopt **tax risk management strategies** to ensure that the financial, regulatory and reputational risks associated with taxation are fully identified and evaluated.

While this provision is less prescriptive than the first, it does suggest that tax policy is an issue that companies should take seriously and gives a useful starting point for engaging with companies on their tax affairs, for example, through asking companies to explain their tax risk management strategies and their policies on tax governance and tax compliance.

CASE EXAMPLE



Tax evasion and failure to apply Arm’s Length Principle in Zambia

A case submitted in 2011 accused Glencore International AG’s Zambian subsidiary, Mopani Copper Mines Plc., of manipulating its financial accounts in order to evade paying taxes. A 2009 audit conducted by international accountants at the request of Zambian authorities concluded that Mopani Copper Mines employed various techniques, such as overestimation of operating costs,

underestimation of production volumes, transfer pricing manipulation, and breach of the Arm’s Length Principle. The Swiss NCP facilitated agreement between the parties confirming they will explore ways how to engage in further dialogue, but the complainants are disappointed with the actual commitments by the company after the case was concluded by the NCP.

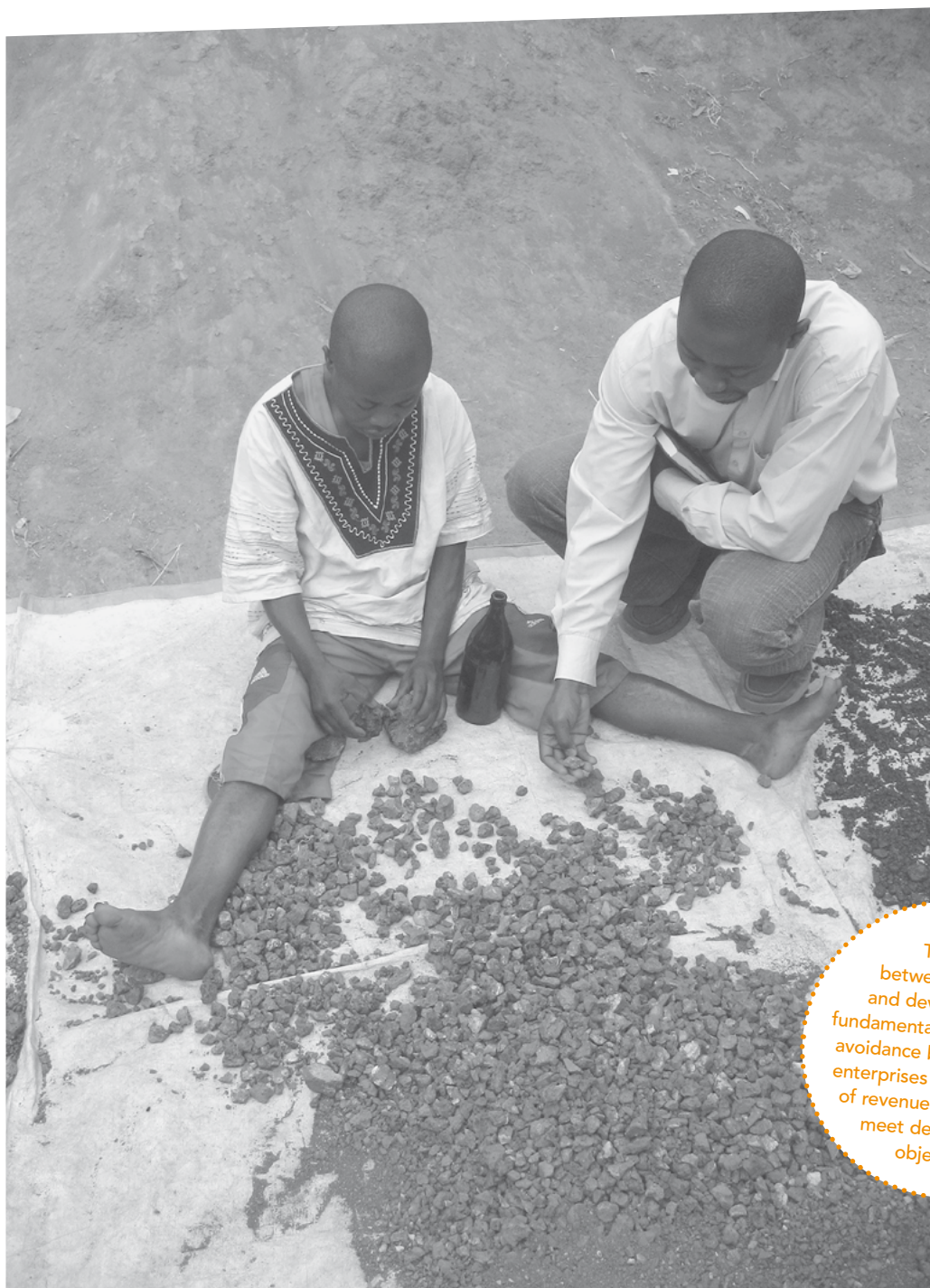
CASE EXAMPLE



Mineral trade and tax payments contributes to conflict and human rights abuses in the DRC

Global Witness’ complaint against Afrimex filed in 2007 alleged that the company’s trade in minerals contributed directly to the brutal conflict and large-scale human rights abuses in the DRC. The complaint described how Afrimex traded coltan and cassiterite (tin ore) and made tax payments to the RCD, an armed rebel group with a

well-documented record of carrying out grave human rights abuses, including massacres of civilians, torture and sexual violence. The UK NCP issued a strong final statement, concluding that Afrimex did not comply with several of the Guidelines cited in the complaint.



The link between taxation and development is fundamental. Tax evasion or avoidance by multinational enterprises deprive a state of revenues necessary to meet development objectives.

QUICK VIEW

Chapter XI. Taxation

Enterprises should:

- Contribute to the finances of host countries by making timely tax payments, §1.
- Fully comply with the tax laws of host countries, §1.
- Understand that compliance means discerning and following the intention of the legislature, §1.
- Provide authorities with timely information that is relevant or required by law for purposes of the determination of taxes, §1.
- Conform to transfer pricing practices to the Arm's Length Principle, §1.
- Treat tax governance and compliance as important elements in their broader risk management systems, §2.
- Adopt tax risk management strategies to ensure that the financial, regulatory and reputational risks associated with taxation are fully identified and evaluated, §2.



National Contact Points and the Dispute Resolution Mechanism

Section 3 explains what National Contact Points (NCPs) do and how the Guidelines’ dispute resolution mechanism, also referred to as the specific instance process, works. NCPs are not structured uniformly, but have varying ‘institutional arrangements’. This section provides information on the different NCP structures and the implications of each type of institutional structure. The section also highlights concrete examples of good and bad NCP practice in past complaints.

The organisational structure of NCPs

All OECD member countries and non-OECD adhering countries are obliged to set up a functioning NCP. NCPs are government offices mandated to ‘further the effectiveness of the Guidelines’. Their core function is to promote adherence to the Guidelines by disseminating information about the Guidelines and the dispute resolution mechanism, and by handling ‘specific instances’ of alleged breaches of the Guidelines. A ‘specific instance’ is the OECD Guidelines’ official term for a case or complaint about a company’s alleged breach of the Guidelines. NCPs also have other obligations such as engaging in peer learning, and participating in the OECD Investment Committee’s work on the Guidelines and related topics.

BOX 3

Governments adhering to the Guidelines (as of October 2017)

35 OECD member countries:

Australia, Austria, Belgium, Canada, Chile, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea, Latvia, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, the United Kingdom and the United States.

13 Non-OECD Adhering Countries:

Argentina, Brazil, Colombia, Costa Rica, Egypt, Jordan, Kazakhstan, Latvia, Lithuania, Morocco, Peru, Romania, Tunisia and Ukraine.

For links to the individual NCPs’ websites, see:
<http://mneguidelines.oecd.org/ncps/>

Governments adhering to the Guidelines are given the flexibility to structure their NCP in a way that fits their domestic situation. Thus, although all NCPs are government offices, they are not structured or organized in the same way. Some are housed in a single agency or ministry, such as the ministry of economy or trade. Other NCPs are inter agency/ministry bodies. Though specific structures may vary, all NCPs should be organised in such a way that enables them to handle the broad range of issues covered by the Guidelines. Furthermore, all NCPs are required to **operate impartially** and be 'functionally equivalent' by fulfilling a number of core criteria (see Box 5). Ideally, the NCP has staff with seniority and authority. NCPs can also include or seek the assistance of independent experts as well as representatives from civil society and business in carrying out their functions. NCPs are expected to develop and maintain relationships with the business community, worker organisations, and other interested parties that are able to contribute to effective implementation of and adherence to the Guidelines.

Although all NCPs are expected to be impartial and functionally equivalent, the structure and location of an NCP can influence how it handles complaints. OECD Watch recommends that NCPs not be housed in a single government department to avoid conflicts of interest (real or perceived) with the goals of the Guidelines. NCPs should be independent in nature and have an oversight body such as an ombudsman, steering board or a multi-stakeholder group that can advise on issues raised in complaints or on proper procedures for handling complaints.

For more information on NCPs' institutional arrangements and the range of activities they should engage in, be sure to read the full Procedural Guidance and Commentary of the Guidelines.

BOX 4

Examples of NCP structures (as of October 2017)

- The Australian NCP is a so-called 'single-ministry' NCP. It is housed in the Treasury, and the responsible person holds a senior position in the Foreign Investment and Trade Policy Division.
- Canada's NCP is an interdepartmental committee housed at the Ministry of Foreign Affairs and International Trade.
- The Czech NCP is a quadripartite NCP composed of representatives from government, business, trade unions, and NGOs.
- The Netherlands' NCP is an independent body comprised of four independent members from various professional backgrounds and an advisory board of five representatives from different government ministries. The NCP's secretariat is hosted by the Ministry of Foreign Affairs.
- The UK's NCP is staffed by officials from the Department for Business, Innovation and Skills. The UK NCP has a Steering Board with representatives from five government departments and four external members from different stakeholder groups.

BOX 5

Key concept: 'Functional equivalence'

The concept of 'functional equivalence' means that, regardless of how an NCP is structured or where it is housed, all NCPs should work in a consistent way. NCPs should therefore operate in accordance with the following core criteria:

- **Visibility:** NCPs should inform the public about their role in promoting the Guidelines. This implies – as a minimum – having an accessible website. The NCP should also proactively promote the Guidelines by, for example, hosting and attending Guidelines-related events.
- **Accessibility:** The public should be able to easily access the NCP by e-mail, telephone and post. NCPs should respond to complaints and requests for information in a timely fashion.
- **Transparency:** NCPs must be transparent. This implies publishing their procedures for the dispute resolution process and providing information to the public on specific complaints they have received and the outcomes of cases they have handled.
- **Accountability:** NCPs should be accountable to their stakeholders. This implies holding annual meetings with stakeholders to discuss their performance, best practices and other issues related to the effective implementation of the Guidelines. NCPs are required to submit an annual report on their activities to the OECD Investment Committee and are encouraged to provide a similar public report to the national parliament or legislature.

Specific instances: the OECD Guidelines dispute resolution mechanism

NCPs are charged with handling complaints concerning alleged breaches of the Guidelines by an enterprise. NCPs do not usually take up cases on their own initiative, but handle cases when requested to do so by adversely-impacted stakeholders or civil society organizations. The Guidelines' complaint process is intended to resolve alleged breaches of the Guidelines through conciliation and mediation, in other words facilitating dialogue between the parties. NCPs can handle complaints regarding alleged breaches of the OECD Guidelines by a multinational enterprise that have taken place in their own country. NCPs can also handle complaints about companies from their country that are allegedly involved in breaches of the Guidelines overseas.

In the Procedural Guidance and Commentary of Guidelines, principles are outlined as to how NCPs should handle complaints. Although NCPs have some freedom to establish their own procedures, NCPs are expected to handle complaints in a predictable manner (see Box 6).

BOX 6

Guiding principles for handling specific instances

As outlined in the Commentary, all NCPs should conduct their activities and respond to complaints in a comparable way. NCPs should deal with specific instances in a manner that is:

- **Impartial:** NCPs should be unbiased and avoid conflicts of interest (real or perceived).
- **Predictable:** NCPs should ensure predictability by providing clear information to the public on their role in the resolution of specific instances. This includes information on the stages of the specific instance process (including indicative timeframes),

and the potential role they can play in monitoring the implementation of agreements reached between the parties.

- **Equitable:** NCPs should ensure that the parties can engage in the process on fair and equitable terms, for example, by providing reasonable access to sources of information relevant to the procedure.
- **Compatible with the Guidelines:** NCPs should operate in accordance with the principles and standards contained in the Guidelines.



There are three distinct phases in the complaint process:

Phase 1 (initial assessment) starts when a complaint is submitted to an NCP. At this stage the NCP must conduct an initial assessment to determine if the case merits further examination.

Phase 2 (mediation) starts when the NCP decides the case merits further examination. At this stage the NCP will try to bring the complainants and the company together to resolve the case through a process focused on mediation and conciliation.

Phase 3 (final statement) involves the NCP issuing a final statement about the complaint and mediation process. It should outline the alleged breaches and how the NCP dealt with the case. Final statements may include recommendations on the implementation of the Guidelines, as well as the NCP's determination as to whether a breach of the Guidelines has occurred. In cases where either of the parties refuses to participate in the mediation process, if the parties cannot agree on the terms for mediation, or if mediation fails, the NCP should still issue its own final statement and document these circumstances.

Each of these three phases in the complaint process is explained in more detail on page 36.

The who, what, when, where and why of filing a complaint

Who can file a complaint?

Any 'interested party' can file a complaint against a company for alleged breaches of the Guidelines. An 'interested party' can be a community (member), a group of workers or individuals impacted by the enterprise's activities, a trade union, or an NGO. You should be able to show your interest in the matter through, for example, your organisation's mission or issues you work on and have expertise in. Additionally, individuals and organisations with a broad interest in the company's activities – such as, for example, investors, consumers and consumer organisations – can also file a complaint. Although it is not required that complainants represent affected individual(s) or communities, OECD Watch recommends involving those harmed by the company in the complaint procedure as much as possible.

Against whom can you file a complaint?

You can file a complaint against a multinational company or companies from or operating in an OECD or adhering country. This means, for example, that you can file a complaint against a Brazilian company operating in Somalia, because Brazil adheres to the Guidelines. But you cannot file a complaint against a Chinese company operating in Ghana because neither China nor Ghana adheres to the Guidelines.

About what can you file a complaint?

You can file a complaint about an alleged breach – by a multinational enterprise – of one or more of the principles laid out in any of the OECD Guidelines' 11 substantive chapters. Complaints can be filed about past violations that have not been sufficiently addressed by the company, for violations currently occurring or for violations that may occur if a company goes ahead with planned activities.

Where to file a complaint?

In principle, a complaint should be filed at the NCP of the country where the alleged problems caused by the company are occurring (i.e. the host country). If the host country does not have an NCP (because it does not adhere to the Guidelines), the complaint should be submitted to the NCP in the country where the company has its headquarters (i.e. the home country). In some instances, the host and home countries both have NCPs. Consideration of where to submit the complaint then depends on a number of factors, such as the goal of the complaint and whether your preferred outcome is locally-focused or aims to affect change at the headquarters level. In circumstances where you think a company's headquarters is partially responsible for breaches made by a subsidiary company, OECD Watch advises filing the complaint at **both** home and host country NCPs. In such cases, NCPs are expected to collaborate in handling the case.

When to file a complaint?

As mentioned, complaints can be filed before, during or after alleged violations of the Guidelines have occurred or are occurring. If a Guidelines complaint is part of a larger campaign against a company, there may also be strategic and tactical considerations to take into account when deciding on the right moment to file the complaint. Section 4 of this guide provides additional guidance on considerations related to timing.

Why file a complaint?

OECD Guidelines complaints can (but are certainly not guaranteed to) bring about changes in corporate behaviour, raise public awareness and provide a mechanism for remedying grievances. More guidance regarding the strategy behind and potential benefits of filing complaints is provided in section 4 of this guide.

BOX 7

Retroactivity and the 2000 vs 2011 versions of the Guidelines

Complaints dealing with abuses that occurred prior to the May 2011 update of the OECD Guidelines should nonetheless use the 2011 version of the Guidelines. Previous versions of the Guidelines officially no longer exist, having been replaced and repealed by the 2011 Guidelines. Complainants should, however, recognize that a very few specific provisions of the 2011

Guidelines were not included in previous versions, making it illogical to accuse a company of having breached them prior to 25 May 2011. At the same time, the new (2011) provisions may be used if the company has not remedied a past transgression (in which case the company can be considered to be in breach of the 2011 Guidelines).

The dispute resolution process in detail

If you are considering using the OECD Guidelines to address adverse impacts of an enterprise, first identify the NCP with which you will be filing the complaint and check that NCP's website to see if it has its own published procedures regarding the submission of complaints and the process they follow when handling cases. The remainder of this section provides guidance on how the Guidelines' dispute resolution process generally proceeds and some examples of (good and poor) NCP practice in handling complaints.

Phase 1: Initial assessment

- During this phase, the NCP should evaluate whether the complaint 'merits further examination'.
- The NCP should acknowledge receipt of your complaint and then will usually forward your complaint to the company.
- During this phase, the NCP may ask for an initial response from the company or ask you to provide more information to clarify the alleged breach.
- Issues that the NCP will consider in this phase include the identity of the complainants, whether the issues raised are material and substantiated, and whether issues raised in the complaint are also the subject of parallel proceedings (such as a lawsuit).
- If the issues raised are the subject of parallel proceedings, the NCP should evaluate whether mediation could still make a positive contribution to the resolution of the issues (see Box 12).
- This phase concludes with the NCP making an assessment of whether the complaint 'merits further examination'.
- If the NCP determines the complaint does merit further examination, it will, in principle, try to bring the parties together for mediation, and the case will proceed to Phase 2.
- If the NCP determines the complaint does not merit further examination, it should issue a public statement that, at a minimum, describes the issues raised and the reasons for its decision. The NCP could decide to withhold the identity of the enterprise if it decides it would be unfair to publicly identify it in the statement.
- The NCP should always inform all parties about the outcome of the initial assessment.
- The recommended timeframe for the NCP to complete the initial assessment is three months.

Phase 2: Mediation

- Once the case has been accepted, the NCP will generally meet with the parties, either jointly or separately, to discuss the demands of the complainants, the views of the company, and the terms for mediation.
- During mediation, the NCP will facilitate a dialogue aimed at resolving the issues alleged in the complaint. Mediation can be done by the NCP or by an external mediator.
- During this phase, the NCP may ask both the complainants and the company (multiple times) to provide additional information to clarify or justify their position, or ask for a response on reactions/counter-evidence by the other party.

- The NCP may also seek information from other sources that are knowledgeable about the issue, such as external experts, local embassy officials, technical advisors, and other relevant government departments.
- The NCP may also gather additional information by conducting fact-finding missions and/or field visits.
- Once the parties agree to mediation, the Guidelines' confidentiality rule (see Box 8) should be followed and information exchanged during the process should not be shared publicly.
- NCPs should aim to complete Phase 2 within 12 months after of the complaint is filed.

Phase 3: Final statement

- After mediation has taken place or has been attempted, NCPs should move to Phase 3 and issue a final statement concluding the case.
- If mediation succeeds and results in an agreement, all parties should agree on the content of the NCP's statement, including what information about the process should be made public.
- If either party refuses the NCP's offer of mediation, if the parties cannot agree on the terms for mediation, or if mediation fails, the NCP should still issue a final statement.
- Final statements may include an assessment of whether the company has breached the Guidelines and recommendations to improve implementation.
- NCPs should inform other government agencies of their statements and reports when they are known to be relevant to a specific agency's policies and programmes.

Follow-up: Monitoring and clarification

- NCPs do not have a formal monitoring role. However, when mediation results in an agreement, the parties may also decide to seek the assistance of the NCP in monitoring and following-up on implementation of the agreement.
- In cases where no agreement is reached, the NCP can follow up on recommendations issued in its final statement.
- Complainants are encouraged to monitor the company's implementation of the agreement and/or recommendations and submit follow-up reports to the NCP.
- There is no formal appeals process. However, OECD Watch, TUAC, BIAC and all NCPs are able to request that the OECD Investment Committee provide clarification how the Guidelines have been interpreted by an NCP and whether an NCP appropriately handled a complaint.

BOX 8

Key concepts: Transparency and confidentiality

The Guidelines' Procedural Guidance stipulates that one of the core criteria with which NCPs must handle complaints is transparency. At the same time, NCPs should be aware of the need to protect sensitive business and other stakeholder information, such as the identity of individuals involved in the case. How to navigate the fine line between transparency and confidentiality can present a dilemma for NCPs and complainants. This box provides some guidance, structured according to the stage in the complaint process. More information and guidance on this issue, including whether, when and how to publicise a complaint, can be found at www.oecdwatch.org/transparency-and-confidentiality.

1 At the time of filing and during the initial assessment

The general rule for this stage is transparency. It is permissible for complainants to publicly announce the filing of the complaint and to communicate about the content of the complaint while the NCP is conducting the initial assessment. Some of the best-performing NCPs make the outcome of the initial assessment public on their website, and OECD Watch encourages complainants to do so if appropriate.

2 After the case has been accepted and while the case is pending

During this phase the general rule is transparency of process, but confidentiality of content. The Procedural

Guidance is clear that NCPs should seek to keep sensitive information confidential once the initial assessment has been concluded and the case has been accepted. During the entire time that the case is being handled by the NCP, complainants should not publicly disclose information, correspondence, documentation or opinions learned or exchanged during the process. It is acceptable for complainants to communicate publicly about purely procedural aspects/events in complaint processes. Procedural aspects that can be communicated (without revealing the content of responses or meetings) include: whether or not the company responds to the allegations; whether meetings between the parties are being organised or have taken place; and if mediation has begun/ended. As long as it does not conflict with the agreed need to protect information exchanged by the parties, transparency on these procedural elements of a case is crucial in order to maintain the legitimacy and effectiveness of the Guidelines.

3 After the case has been concluded

The general rule for this phase is transparency. At the conclusion of a case, the Procedural Guidance instructs NCPs to make the results of the process available in a public report or statement. Complainants are free to communicate about the outcome and process of the case, bearing in mind the need to respect the confidentiality of sensitive information exchanged during the process.

BOX 9

Examples of good and poor NCP practice in handling complaints

Experience has shown that NCPs' handling of cases varies significantly. Before you file a complaint, it is important to be aware of how the best- and worst-performing NCPs handle cases so you can make your expectations clear to the NCP involved in your case.

Good practice

- Several NCPs have succeeded in bringing parties together and have facilitated mediated outcomes that led to concrete improvements and, in some cases, compensation.
- A number of NCPs have assisted complainants by providing resources for translation, travel to participate in mediation meetings, or an external consultant in order to balance out the inequality of negotiating power between the parties.
- A number of NCPs have issued clear final statements that determine whether the Guidelines were breached and provided recommendations on how the enterprise can better implement and uphold them.
- Some NCPs have issued final statements that have been useful for resolving issues raised in the complaint even if mediation failed or was not possible.
- Some NCPs have undertaken fact-finding missions.
- A number of NCPs have included monitoring expecta-

tions in their final statements, and some have produced follow-up reports and/or held follow-up conferences.

Poor practice

- Some NCPs have simply ignored complaints.
- Some NCPs have accepted the enterprise's response without question, and issued a statement that the company had not violated the Guidelines.
- Many NCPs have taken an excessive amount of time to handle complaints.
- Many NCPs have employed an overly restrictive interpretation of the Guidelines' confidentiality requirements and have even threatened that publicising a complaint would lead the NCP to reject or end the case.
- Most NCPs are unwilling to assume a monitoring role after a case concludes.
- A troubling number of NCPs have not treated the parties equally. Bias in favour of the company has often resulted in cases being unjustifiably rejected.
- Some NCPs have based their decisions on information not made available to both parties.
- Some NCPs looking for "easy" cases will reject a complaint outright if it appears unlikely that a mediated resolution can be easily reached.

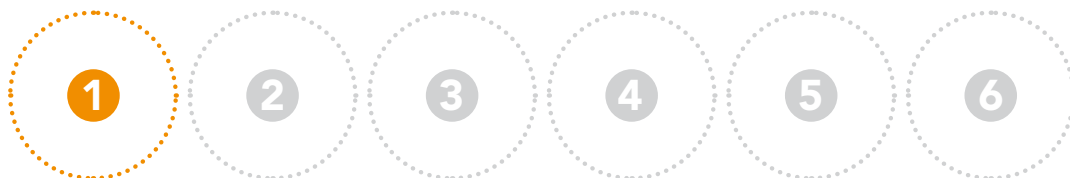


How to file a complaint

Section 4 details how you can develop a credible and persuasive complaint. Because the complaint procedure can be a long, complex and expensive process, it is important to do some strategic thinking, planning and research before starting with the complaint process. OECD Watch has broken the process down into six concrete steps to assist you in drafting a complaint, preparing yourself for mediation and following up after a complaint.

- Step 1** Consider the complaint in context
- Step 2** Assess the feasibility of the complaint
- Step 3** Identify the desired outcomes
- Step 4** Write the complaint
- Step 5** File the complaint and engage in the specific instance process
- Step 6** Final statement and follow-up

OECD Watch has also developed an online Case Check to assist potential complainants in deciding whether the OECD Guidelines can be used to address corporate misconduct: www.oecdwatch.org/oecd-watch-case-check.



Step 1 Consider the complaint in context

Evaluate the range of corporate accountability tools, mechanisms, strategies and resources available to you.

The OECD Guidelines' dispute resolution mechanism is one of a number of tools available to affected communities and individuals and civil society organisations for addressing harmful corporate practices. An OECD Guidelines complaint can be used instead of, or in addition to, other advocacy strategies

such as lawsuits, public and media campaigns and shareholder actions. Other institutional non-judicial grievance mechanisms or dispute resolution procedures may also be appropriate. Such mechanisms include those associated with the International Labour Organization, National Human Rights Institutions (NHRIs), the Compliance Advisor/Ombudsman (CAO) and Inspection Panel linked to the World Bank, regional mechanisms such as the African Commission on Human and Peoples' Rights, and sectoral mechanisms such as the Roundtable on Sustainable Palm Oil (RSPO) and the Fair Wear Foundation. You may also be able to use a company's own grievance mechanism, provided it is in line with a number of core criteria outlined in the United Nation's Guiding Principles for Business and Human Rights and is based on dialogue and meaningful engagement with a view to seeking mutually-acceptable solutions.

Ideal and realistic outcomes of an OECD Guidelines complaint

Before filing a complaint, you should ensure that you have a clear view of what outcome you hope to achieve, as well as what results are realistically possible and likely. Identifying desired outcomes is outlined as Step 3 below, but it is very important that you start giving thought to desired outcomes early in the preparation process. This will help you to choose the right mechanism and strategy.

For most OECD Guidelines complainants, the ideal outcome is to have the issue that prompted the complaint resolved through mediation. For example, a mediated outcome could result in some meaningful remedy for the victims of abuse, a behavioural or policy change within the enterprise, or improvements in the human rights, social and environmental conditions on the ground.

Even if you think a mediated outcome may be realistically difficult to achieve, the complaint process can have strategic benefits for resolving your issue with the company. If mediation fails, NCPs can still issue a strong statement that can be used to put pressure on the company using other venues. The complaint could also help raise public awareness of the issue and consequently, put pressure on the company to change its behaviour. Additionally, the complaint process can alert government officials and members of parliament to the alleged violations. Increasingly, investors and financial institutions monitor the social and environmental performance of the companies in which they invest. An OECD Guidelines case may result in a decision to divest from a company if it is unwilling to change irresponsible behaviour and is thus putting the financial institution at risk of being linked to abuses through their investments.

Simultaneous strategies

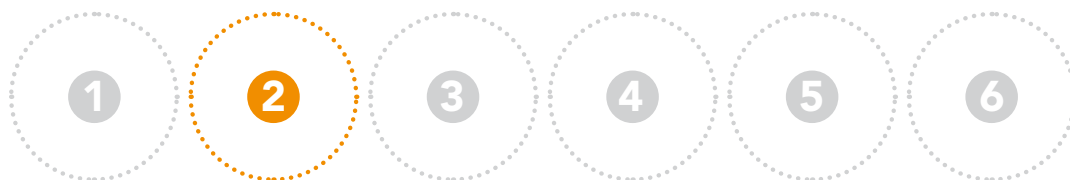
A Guidelines complaint can be one of several strategies pursued simultaneously. Keep in mind that the Guidelines' specific instance procedure is largely a mediation/conciliation-oriented process designed to get parties together to resolve disputes amicably. NCPs expect parties to engage with a view to finding a mutually-acceptable resolution to the issues. The nature and expectations of this process have to be weighed against other actions and instruments available to address the problem. A complaint should support, and not undermine, existing efforts if simultaneous strategies are pursued.

Time and resources

The Guidelines dispute resolution process is often a time and resource-intensive exercise. The Procedural Guidance recommends that NCPs should seek to complete complaints within one year, and some cases have been successfully concluded in less than six months. However, there are many more examples of cases that have taken several years to conclude.

The process may require you to spend significant resources, including on costs for personnel, translation, research and investigation, travel and consultant advice and support. If you are filing a joint complaint (with other impacted stakeholders or civil society organisations), remember it takes time and effort to coordinate with partner organisations locally and internationally. You may need to travel to participate in meetings with the NCP or company. Many complainants have also had to invest time to follow up and ensure the company is abiding by the agreement and/or recommendations resulting from the specific instance process.

Once you have decided that a Guidelines complaint could be helpful, and you have the commitment, time and resources, the remaining steps below will help you to determine whether the Guidelines are applicable and appropriate to your problems with the company.



Step 2 Assess the feasibility of the complaint

Before you spend too much time preparing your complaint, consider the following feasibility questions. These preparatory questions will help you identify potential roadblocks and pitfalls for your complaint that could save you significant time and resources. The feasibility questions are divided into four categories: eligibility, required information, cooperation and strategic considerations.

Eligibility of the complaint

- 1 ***Is the alleged violation of the Guidelines taking place in an adhering country, or has it been committed by an enterprise from an adhering country?***

The complaint procedure can only be used if an alleged violation is occurring, has occurred, or will occur in **an OECD country or one of the non-OECD countries that adhere** to the Guidelines, or if the Guidelines have been breached by a company that is **from one of those countries**. The complaint process cannot be used if neither the host nor the home country adheres to the Guidelines. See Box 3 for the list of adhering countries.

- 2 ***Have you identified the specific provision of the Guidelines that the enterprise is violating? Can you explain the who, how, what, why, when and where for each violation?***

You need to cite the specific chapters and paragraphs the company is allegedly violating in your complaint and explain in detail how the company is violating specific provisions. It is not sufficient to state an enterprise is violating the Guidelines without explaining who, how, what, why, when and where.

Who	Who (or what) is being harmed by the enterprise's violations?
How	How have the enterprise's activities harmed the complainants, community members, environment etc.?
What	What activities or behaviour is the enterprise engaging in that constitutes a violation of the Guidelines?
Why	Why are the activities a violation of the Guidelines?
When	When did the alleged violation(s) occur?
Where	Where did the alleged violation(s) occur?

- 3 ***Are you an 'interested party'?***

You should be able to show and explain your interest in the matter raised in the complaint (see section 3, page 35).

- 4 ***Are you willing to participate in 'good faith'?***

NCPs want to know whether they can trust you as an honest party in the Guidelines' complaint process. In general, participating in 'good faith' means you are willing to engage in a mediated dialogue with the company, respond to the NCP's requests within a reasonable timeframe and to respect the confidentiality of information exchanged during mediation. Note that willingness to engage in dialogue with a company does not mean you need to soften or moderate your demands to a company. Be aware that some NCPs consider complainants who use complaints as an advocacy platform as acting in bad faith. This does not mean that you cannot communicate publicly about (non-confidential) aspects of your complaint.

Information you need to have regarding the company and alleged violation(s)

5 **Do you have evidence of the violations committed by the company?**

The more substantial evidence and documentation you manage to gather, the better your position in the process will be. Potentially good sources of evidence include: research studies, media reports, soil or water samples, correspondence with the company, internal company documents, social and environmental impact assessments, and testimonies of workers or community members.

6 **Have you created profiles for all entities you intend to name in your complaint?**

It is important to know the company's structure and/or other business relations to demonstrate that you are filing the complaint against the right entity or entities. Relevant questions include:

- In which adhering country is the company based? Where is the enterprise headquartered?
- What is the enterprise type? For example, is the enterprise the parent company, local subsidiary, joint venture, end user, supplier/producer, sub-contractor, or financial institution?
- Is the enterprise listed on one or more stock exchanges or is it privately held?

BOX 10

Against which enterprise should you file?

Given the complex nature of business structures and relationships, it may not be easy to decide which enterprise(s) to name in a complaint. For example, you could decide to concentrate on the parent company, focus on the specific subsidiary that is most at fault for the adverse activities, address the complaint to various entities in the supply chain or emphasise the role of the financing institutions (such as banks or pension funds) linked to their activities. In many cases, there are numerous companies involved in the same problem. Deciding which entities to file a complaint against depends in part on the national origin and whether you have the capacity to engage with all companies during the complaint process. Another question to consider is which entity has the most leverage or potentially has the greatest impact. It is also worthwhile to discuss your case with OECD Watch or an organisation familiar with NCPs to find out if a particular NCP is likely to take the complaint more seriously and be fair and thorough in the investigation.



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7 **If more than one enterprise is involved, can you explain their structure and relationships and their relation/contribution to the harm?**

For example, is it a parent-subsidary or a buyer-supplier relationship? Or another type of relationship such as enterprise-bank where the bank provides financing to the enterprise? In the case of a joint-venture, what is the division of shares between the companies, and what are their different roles in the venture (one of the joint venture partners may be particularly responsible for the activities that cause the harm)? In the case of a buyer-supplier relationship, how significant is the buyer's business for the supplier? Is there a long-term contract between the enterprise and the supplier? Pinning down the exact nature and details of the supply chain may not be possible, as supply chain information (e.g. number of suppliers, volumes or influence) is often kept secret. This should not stop you from filing a complaint if you are reasonably certain that a company is contributing or directly linked to an alleged violation.

Company responsibility: the difference between causing, contributing to, or being directly linked to an adverse impact

The type of action that is required of a company to address a particular adverse impact depends on the company's relationship to the impact. Companies may cause, contribute or be directly linked to adverse impacts through their own activities or through their business relationships (such as suppliers).

Depending on the company's relationship to the impact, the OECD Guidelines dispute resolution mechanism could be used to request the company to prevent, mitigate or terminate an adverse impact; provide compensation or another form of remedy to the victims; or use its leverage (influence) to change the irresponsible practices of its business partners. The relationship between the company in question and the adverse impact can be roughly classified into one of three categories:

- **Causing:** A company is considered to be causing a (potential) adverse impact when its own actions or omissions directly result in an impact. If the adverse impact has not yet occurred, the company has a responsibility to prevent the impact. If the impact has already occurred, the company has a responsibility to cease the activity causing the impact, and to take steps to mitigate and remedy the impact.
- **Contributing to:** A company is considered to be contributing to a (potential) adverse impact if it is one of multiple parties causing an impact or if its actions or omissions enable, encourage, exacerbate or facilitate a third party to violate the OECD Guidelines. A company may be contributing to an adverse impact jointly with a business relationship (e.g. in a joint venture) or via business relationships in its value chain. The Guidelines

stipulate that the contribution (through actions or omissions) should be "significant" and not "trivial", but these terms are not precisely defined. If the adverse impact has not yet occurred, the company has a responsibility to prevent the impact. If the impact has already occurred, the company has a responsibility to cease its contribution to the impact, and to take steps to mitigate and remedy the impact. Additionally, the company has the responsibility to use its leverage to change the practices of any business relationships that are also contributing to the impact so they also prevent or mitigate the adverse impact.

- **Directly linked:** In some situations, a company may not cause or contribute to a (potential) adverse impact, but may still be directly linked to the (potential) impact through a business relationship such as a supplier, contractor or trading partner. The adverse impact could be, for example, multiple tears down a company's supply chain, but it does need to be directly linked to the company's products or services. In this case, the company has a responsibility to seek to prevent or mitigate the impact by using its leverage to persuade the company causing the (potential) impact to prevent, mitigate and/or remediate the impact. If the company causing the impact refuses to cease doing so, the company that is directly linked to the impact should consider terminating the business relationship. If the company decides not to terminate the relationship and continues the business relationship despite ongoing adverse impacts, the company could potentially be seen as contributing to (rather than just being directly linked to) the adverse impact.

8 **Is the enterprise breaching any other international standards such as those set forth by the United Nations, ILO or other relevant body?**

If you believe the enterprise is breaching other international standards, you should note these in the complaint. It could be helpful to provide an overview of the instrument and cite the relevant provisions. Remember, however, to keep your complaint focussed on the provisions and standards of the OECD Guidelines themselves. It could also be helpful to provide an overview about any (voluntary) codes of conduct to which the company claims it adheres. It could be helpful to provide an overview about any codes of conduct etc. and cite the relevant provisions to be able to demonstrate that the company is misbehaving on the basis of multiple standards.

Cooperation with partners and allies

9 **Are there partners that can support your efforts?**

NGOs and trade unions can support your efforts in a number of ways, such as providing advice on the complaint process, attending meetings on your behalf or helping to gather and verify information about the company. OECD Watch recommends that complaints be submitted by a coalition of groups or organisations, some of which are based in the host country and others of which are based in the home country. This will greatly improve your ability to engage in the process, particularly if resources are limited.

OECD Watch is willing and able to provide advice and assistance in drafting and filing complaints. Similarly, if your complaint is labour related, consider contacting TUAC and relevant local and international trade unions. TUAC can assist individuals, communities and NGOs in making contact with the relevant trade unions.

10 Are you working directly with affected workers / communities?

OECD Watch recommends to let affected workers / communities lead the complaint process themselves as much as possible. If you work with on or behalf of directly affected workers / communities ensure that they fully understand and support a complaint process and provide training if necessary. Mediation is most effective when the affected workers / community speak with one voice. Decide who will speak on behalf of the affected community during the complaint process; how decisions will be made; what the desired outcomes are; whether the dialogue could produce those outcomes and how; and which issues will take priority. Attempt to resolve any community divisions early on so that they do not undermine the complaint process.

11 Do all complainants fully understand the Guidelines and their involvement in the complaint procedure?

If you are part of a coalition submitting a joint complaint, have you agreed how to shape your collaboration and who will be the primary contact(s) for the NCP? For example, if mediation takes place in the home country, how will colleagues attending those meetings liaise with the affected individuals, workers or communities in the host country?

Strategic considerations

12 What other efforts have you or other actors taken to try to resolve the issues directly with the enterprise?

Have earlier attempts to resolve the dispute with the enterprise failed? OECD Watch strongly recommends keeping a log with information on key developments, copies of letters or e-mails received or sent, meetings (including participants and outcomes), etc. to demonstrate that you have already tried to solve the issue with the company directly. Note that it is not required to have attempted to resolve the issue in other ways prior to filing a Guidelines complaint.

13 If there are multiple breaches of the Guidelines, will you include all of them in your complaint?

Are certain issues more urgent and would it be more effective to keep the complaint focused to achieve a specific resolution? Would it be better to include some issues and use different approaches or mechanisms to address others? If you wish to demonstrate an enterprise's extensive failure to adhere to the Guidelines, then a comprehensive approach may be advisable. Consider the pros and cons of including each allegation (including its strength) in your complaint. One weak element in a complaint may potentially damage the impact of other (stronger) elements.

14 Have you decided where to file the complaint, including whether to file with more than one NCP?

In principle, a complaint should be submitted to the NCP in the host country. If the host country does not have an NCP, the complaint should be submitted to the home country NCP. In case the host and home countries both have NCPs, the decision where to file a complaint depends on a number of factors such as: the level of headquarter responsibility, the goal of the complaint, whether the remedy foreseen is locally focused or will require wider systemic change within the enterprise, or if the issue involves suppliers and other business relationships. It is also important to know how the NCP you plan to submit your complaint to has typically handled cases in the past. It is possible to file a complaint at multiple NCPs simultaneously. In such cases, NCPs are expected to work together and collaborate in handling the complaint.

15 Are you pursuing multiple strategies?

If you are pursuing other strategies such as media outreach, advocacy and campaigning, be prepared to explain why you consider these activities appropriate and why they will not conflict with or undermine the complaint process.

16 Are you aware of pending court cases or other parallel proceedings related to the issue?

If you are aware or involved in any such parallel proceeding, consider explaining why you believe the NCP should deal with the case despite the parallel proceedings. For example, the parties and/or issues

raised in your Guidelines complaint may be different from those in other proceedings. What added value will the Guidelines complaint process have for resolving the issues? See Box 10 for more guidance on how to deal with parallel proceedings.

BOX 12

Key concept: 'parallel proceedings'

OECD Guidelines complaints do not exist in a vacuum. Many address situations that have been the subject of legal actions before they are submitted to the NCP. But if there are other, 'parallel proceedings' ongoing in a court or tribunal, why would you want to file a complaint involving the same issues with the NCP? There are a number of reasons, including:

- The legal proceedings may be 'stuck' – i.e. indefinitely delayed or unreliable due to court corruption or incompetence – and therefore not a viable means of resolving the dispute.
- The Guidelines are in many ways broader than legal frameworks, and the complaint may seek to resolve aspects of a dispute that courts cannot deal with.
- The NCP may be able to function as a creative, collaborative facilitator of positive outcomes that are not available through legal action.
- In some cases, the mere filing of a specific instance can meet (some of) the goals of the complainant, like raising public awareness or solidarity among affected groups. Take care, however, if this is your goal. Some NCPs may consider complainants who use specific instances purely as an advocacy platform as acting in bad faith.

NCPs deal with parallel proceedings in different ways. Although the Procedural Guidance states that NCPs should not dismiss cases at the outset simply because of the existence of parallel proceedings, some NCPs may still do so as a matter of course. Other NCPs may take a considerably more progressive approach, starting from the assumption that parallel proceedings do not preclude consideration of a case and adopting a narrow definition of the types of parallel proceedings that could potentially lead to a case being dismissed. Progressive NCPs will actively seek ways to contribute productively to dispute resolution even in the face of a parallel proceeding. Some NCPs put the burden more on the complainant, noting that - while parallel proceedings do not automatically prompt dismissal - the NCP will generally require the complainant to show how further consideration of the specific instance would contribute to positive dispute resolution. For any NCP, the most critical consideration is whether consideration of a specific instance could create 'serious prejudice' to either of the parties to the parallel proceeding.

17 ***Is there any reason to believe information or documentation you disclose in the complaint process could harm or endanger an individual in any way?***

Information such as the names of individuals and sources of evidence or any documentation does not have to be disclosed in the complaint. In some cases, it may be important to keep the names of individuals confidential in order to avoid reprisals. In order to protect individuals, use anonymised or fictive names and note that the real names have been withheld to protect individuals at risk of reprisals.

18 ***Have you decided whether to publicise your complaint?***

Some NCPs claim that publicising a complaint undermines the mediation process. However, publicity has, in a number of cases, also contributed to positive outcomes. Although publicising and reporting on a complaint do not constitute breaches of confidentiality, you should consider whether publicising your complaint will help or hurt your chances of achieving your desired outcomes.

19 ***Have you determined when to file the complaint?***

Is there a particular time that might be more advantageous for influencing the company to improve its behaviour? For example, a complaint that is submitted during the company's annual meeting could result in more shareholder awareness of the problems.



Step 3 Identify the desired outcomes

You may already have identified a desired outcome before having linked the company's violations to specific provisions in the Guidelines. In this step, you should specifically outline what you want to achieve from the complaint process. You should be clear what issues are not negotiable for you and on what you are willing to compromise. Throughout the process, and particularly if your complaint goes to mediation, you should continually assess what an ideal outcome would be versus an acceptable or useful one.

For example, for a community affected by mining, a successful outcome may be that a mining company's expansion is stopped. Or you may want the company to admit wrongdoing and/or compensate those who have been adversely impacted. In other cases, complaints may want the company to improve its overall policies to avoid similar issues occurring in the future, or they may want a certain buyer to pressure its supplier to improve its behaviour. Another goal could be a strong NCP statement confirming that the company breached the Guidelines and providing recommendations to improve corporate behaviour.

Some issues may be more suitable for the OECD Guidelines' mediation-oriented process than others. For example, expecting a company to re-open a factory after closure may be unrealistic. Focusing your mediation aims on compensation for the affected workers or on guarantees of job security for other workers may meet with more success. Similarly, asking a company to stop sourcing a certain product is likely to get a defensive response from the company. However, negotiating a reasonable time for the company to find an alternative may eventually lead to an agreement.

Experience has shown that it is helpful to clearly explain your demands to the company in the initial complaint.

BOX 13

Examples of cases with positive outcomes

- A case filed against pharmaceutical company Mylan at the Dutch NCP related to one of the company's drugs being used in death penalty executions in the United States resulted in an agreement by the company not to sale the drug to customers who plan to use it for lethal injections.
- A case filed against Continental AG attracted sufficient media attention to eventually lead members of the German Parliament to help settle the case.
- In cases against Vedanta and Afrimex, the UK NCP issued final statements concluding that the companies violated the Guidelines. In doing so, the cases contributed to a better common understanding of how business is expected to behave. The Vedanta statement also raised the awareness of the company's investors and led some large, institutional shareholders to withdraw their investment.
- The Australian NCP mediated an agreement that led Global Solutions Ltd. to improve its performance on human rights issues in its detention centres and regarding the detention of children.
- The Argentine NCP facilitated an agreement with Accor Services that led the company to improve its performance on transparency, bribery and corruption issues.
- After a constructive dialogue facilitated by the Dutch NCP, Nidera strengthened its human rights policy, formalised due diligence procedures for temporary rural workers and allowed the complainants to monitor its Argentine corn seed operations through field visits.
- A successful Norwegian NCP-led mediation resulted in a joint statement between complainants and Cermaq, in which the company acknowledged it had not taken a precautionary approach in meeting social and environmental challenges and accepted responsibility for its subsidiaries' activities.
- The Dutch NCP mediated an agreement between complainants and ABP on the steps to be taken by the pension fund to exercise its leverage over POSCO to ensure operations are in line with international standards and issued a statement confirming that the Guidelines are applicable to financial institutions and to investors, including minority shareholders.
- Mediation facilitated by the UK NCP led oil company SOCO to agree to cease its operations in Virunga National Park and commit to never again explore for oil in a World Heritage Site.

After you have identified the desired outcomes, you should also consider how the NCP could help you achieve your goal. Your complaint should be clear about your requests to the NCP. Request that the NCP use its good offices to resolve the issues raised in the complaint. Additionally, you may want to request that the NCP arrange mediation, undertake a fact-finding mission, provide translation to enable local communities to follow the complaint process, and/or produce a final statement that includes a determination of whether the Guidelines have been violated and recommendations for improving corporate conduct.



Step 4 Write the complaint

Though the NCP and company/companies are the primary target audience of the complaint, it is important to realise there may be multiple audiences for your complaint besides the NCP. These may include members of the media or government officials who are not familiar with the Guidelines or the problems you are trying to remedy. The audience for the complaint also includes the affected individuals, workers or community members. Therefore it is important that the complaint is written clearly, concisely and persuasively. Try to avoid using too much jargon or too many acronyms. And if the allegations require a lot of explanation, write a more concise account for the complaint and include an annex with a more thorough description. The complaint will be most persuasive if it is backed up with substantial and credible evidence.

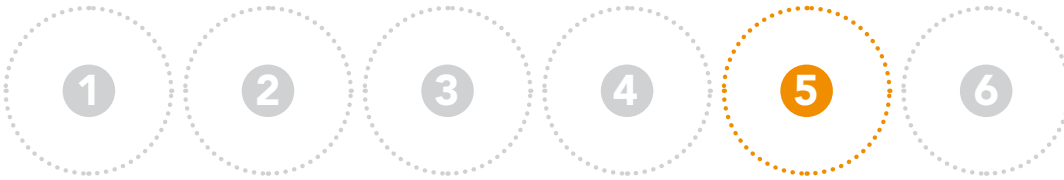
There is no required format or style for writing Guidelines complaints. The following template should help you to write a clear, concise and persuasive complaint. The template is based on a hypothetical case. All of the examples can be modified as appropriate. You do not need to follow this format exactly, but it is OECD Watch’s experience that a well-written complaint includes all the information described below. Some NCPs provide guidance as to what kind of information they expect to be included in a complaint, so be sure to check the website of the NCP to which you expect submit your complaint to see if this is the case. OECD Watch’s online case database (www.oecdwatch.org/cases) contains a wealth of past complaints you can use as examples.

Suggested complaint structure with hypothetical examples

Complaint Element Date	Description Date the complaint will be submitted to the NCP and any other recipients.	Hypothetical example 1 October 2017
Contact information of NCP receiving the complaint	This includes the full address of the NCP and, if known, the name of the chair or representative, email address and telephone number(s). If you are sending the complaint to other NCPs, the OECD, government officials, OECD Watch, TUAC, etc., you should also mention in this part of the letter here using ‘cc’.	NCP of <host country> <name contact person at NCP> <Address>, <E-mail>, <Telephone / Fax> cc: NCP of <company’s home country> <name contact person at NCP> <Address>, <E-mail>, <Telephone / Fax> cc: OECD Watch, info@oecdwatch.org
Subject line	OECD Watch recommends stating the name of the company, the issues raised, and the country where the problem is occurring.	Subject: Complaint against <company> concerning <e.g. violation of human rights and environmental pollution> by <name subsidiary> in <country>.
Introduction	List at a minimum: name of the complainant, company name, the problem and the location of the violations. You can also briefly state the main request to the NCP and the chapters that are breached.	We, <your organisation(s)>, the Complainant(s), hereby file a specific instance against <company> for operating in violation of the <i>OECD Guidelines for MNEs</i> in relation to <e.g. violation of human rights and environmental pollution resulting from gold mining in Australia>. We request the Norwegian NCP to address breaches to <...> Chapters resulting from <company> and <subsidiary’s> mining activities in <country>.

<p>Complaint Element</p> <p>► Explain your interest in the complaint / who you represent</p>	<p>Description</p> <p>For example, an NGO's interest could stem from its mission or work with the affected union members or community.</p>	<p>Example</p> <p><Your organisation(s)> is an NGO working on social and ecological issues related to mining activities in Asia-Pacific. Since 1990, <your organisation> has investigated the activities of MNEs and the consequences of their activities for local communities and the environment.</p>
<p>Enterprise contact details</p>	<p>Contact details for the enterprises, include full company names, addresses, and any other relevant details that are known, such as contact names, telephone numbers, email addresses and website addresses.</p>	<p><company> <name contact person company> <Address> <E-mail / Website> <Telephone / Fax></p> <p><company subsidiary> <name contact person company> <Address> <E-mail / Website> <Telephone / Fax></p>
<p>Structure of the company</p>	<p>If the case involves more than one company, describe their structure and relationships. For example, parent-subsidiary relationship, supply chain relationship, enterprise-bank relationship, etc.</p>	<p><Parent company>, is an MNE headquartered in <country> with operations across the world. <Local company> is a fully owned subsidiary of <parent enterprise> with headquarters in <country> and operations in Australia.</p>
<p>Context of the complaint</p>	<p>Include general information about the broader background, context or location of violations mentioned in the complaint before going into detail about the specific breaches.</p>	<p><company> operates in an environmentally sensitive area that is inhabited by different indigenous communities.</p>
<p>List the chapter and paragraphs you believe the company has breached</p>	<p>This information should include the who, how, what, when, where and why for each allegation. In addition, you should provide detailed evidence and information that supports the allegations. You can make this section as short or long as you see fit, but make sure your argumentation is clear. The documents can be annexed to the complaint, but they should be mentioned and referenced in the text.</p>	<p>We allege <company> is in violation of Chapter IV., Paragraph < ... > which states: <'.....'></p> <p>As documented in <evidence listed in annex> the activities <company> has carried out in <location> in <year / date of breach> have severely harmed <local communities surrounding the company's facilities> by endangering their livelihoods through <alleged violation>. The <activities> of the company constitute a breach of the OECD Guidelines because <company> has not <.....>.</p>
<p>Other relevant international standards the NCP should take into account when considering the complaint</p>	<p>If applicable, other instruments can be highlighted to show the severity of the problem. Complainants will have to decide the most effective way of presenting this information.</p>	<p>The Complainants maintain the <company> has furthermore breached the Human Rights Chapter, \$1 by not taking adequate consideration of Indigenous Peoples rights in Australia. Article 7 of the UN Declaration on the Rights of Indigenous People declares that 'States shall.... resources'.</p>
<p>Previous Attempts at Resolution</p>	<p>Explain whether you have sought to resolve the issues directly with the enterprise and</p>	<p>Over the past year, <company> has ignored our requests to start discussions to resolve the issue. Attached to this complaint are copies of the correspondence sent to</p> <p>►</p>

Complaint Element	Description if so, what was the enterprise's response?	Example <company> requesting a resolution to these issues. In light of the <company's> refusal to engage directly with us, we hope that the Guideline's specific instance procedure can help resolve our issues.
Recipient NCP and justification (if necessary)	In some instances, the host and home countries both have NCPs. The complaint can be submitted to both NCPs. However, an explanation on why the case is being submitted to both NCPs is recommended.	As the alleged violations of the OECD Guidelines takes place in <country>, we ask the <host country NCP> to consider the complaint. Additionally, we are submitting this request also to the <home country NCP>, because an MNE's headquarters is of vital importance to ensure responsible business conduct in a global context.
Complaint goals	If it makes strategic sense, explain your demands and/or what you think the company should do to resolve the problem.	We want <company> to adopt and implement a <company-wide human rights and environmental policy to end and prevent negative impacts on>
Request to the NCP	State what you expect from the NCP, e.g. mediation, a fact-finding mission, make a determination, etc.	We request the NCP to offer its good offices to facilitate mediation between the parties. Given the severe impacts the community is experiencing, we ask the NCP to carry out a fact-finding mission to verify the facts. We furthermore request the NCP make an assessment of the facts and circumstances and determine whether the OECD Guidelines have been breached.
Confidentiality request and justification (if necessary)	Indicate if the names of individuals, sources of evidence or any documentation have been anonymised, and why this is justified.	Please note that we do not reveal identities of whistle-blowers in Annex A to protect them from reprisals by <company or government>.
Statement of 'good faith' to engage in the complaint procedure	Acknowledge your good intentions to engage in the process and what you will do to facilitate this. You can also reference how you will respect confidentiality in case you are, for example, pursuing other strategies such as media outreach, advocacy and campaigning.	By submitting this specific instance, we commit to engaging in the specific instance process in 'good faith' in order to resolve the issues raised in this complaint. However, the NCP and company should note that we need to keep the community informed about the progress of the complaint and may also need to respond to unsolicited enquiries from the media. We will respect the confidentiality of the proceedings when doing so.
Closing	The closing should state that a written confirmation of receipt is expected.	We look forward to a written confirmation of receipt of this complaint and appreciate your assistance and leadership in resolving the issues presented in this complaint.
Signature	Add names and signatures of all of organisations who co-sign the complaint.	Kind regards, <name, organisation>
Attachments and/or Appendices	Provide a list of attachments and/or appendices to the complaint.	Annex A: Report of alleged violations Annex B: Supporting government statement Annex C: Witness statements



Step 5 File the complaint and engage in the specific instance process

After you have filed the case, the NCP will conduct an initial assessment to decide whether it will accept your complaint. Although NCPs should make such an assessment within three months, some NCPs take longer. If an NCP decides to accept your complaint, you should anticipate having to write responses to counter the company's written or verbal claims throughout the whole process. This can take a considerable amount of time and requires profound knowledge of the case. You may also be asked to provide more information about your complaint before the NCP makes a decision whether to accept your case or not.

If your case is accepted, the NCP will likely invite you to meetings, either with the company or separately, to discuss your demands, the views of the company, and the conditions under which both parties would be willing to enter into mediation. Mediation aims to produce commitments to take action, reflecting the shared and complementary interests of the parties involved. It is a voluntary and guided process in which a skilled mediator helps the parties to negotiate the settlement of a dispute. It is important that the mediator (which can be the NCP or an external mediator) is regarded as impartial by all parties. If your complaint comes to mediation, you should prepare yourself by deciding on what you are willing to compromise and which demands are non-negotiable for you. Before you agree to mediation, make sure that the terms of reference for mediation reflect your position and view on the process.

It is difficult to estimate how long the mediation process will take or how many meetings it may entail. During the mediation the NCP may also ask you to provide additional information or engage in fact-finding itself. The length of the process depends on the NCP as well as on the success of the mediation meetings in progressing towards an agreement. However, generally speaking, the whole complaint procedure should be concluded within twelve months.

The extent to which an agreement between the parties can be reached depends on the nature of your demands and your willingness to compromise, the willingness of the company to fulfil (parts of) those demands and abide by the Guidelines, and on the quality of the mediator. Mediation is most likely to be successful if there is some sense of mutual respect between the parties and understanding of each other's interests and concerns. Given that mediation may not always take place between all complainants involved or the affected individuals or communities they represent, it is important to have a clear understanding of your mandate and negotiation space before entering into a mediation meeting. As part of the negotiation process you may need to go back and forth to discuss proposals with your co-complainants and the affected individuals or groups. The result of a successful mediation process is an agreement on mutually satisfactory solutions to the problems addressed and a commitment to implement the actions agreed upon.

BOX 14

Elements of a good mediation process

Issues to consider in the mediation process:

● Mediation is a voluntary and guided process in which a skilled mediator helps the parties to negotiate the settlement of a dispute.

● Pre-mediation meetings may occur after the initial assessment to identify and clarify issues, identify necessary participants, and to select a mutually acceptable mediator.

● The parties must believe that the mediator will be impartial and fair. The NCP may select, with the agreement of the parties, an external professional mediator. If the NCP itself acts as mediator, all parties must accept the neutrality of the NCP.

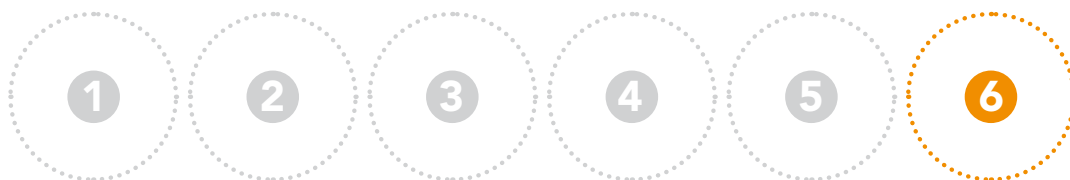
● If an NCP and the relevant parties decide to go forward with mediation, the NCP may conduct a stakeholder assessment to map all relevant stakeholders' perceptions and concerns.

● During the first meeting of the parties, the mediator should clarify the purpose of mediation as established in the terms of reference.

● Fact-finding by the NCP or an external expert can be useful in cases where there are conflicting opinions regarding some aspect of the dispute.

● The parties should work with the mediator to specify indicators that can be used to track whether parties are complying with the agreement.

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Step 6 Final statement and follow-up

At the end of a complaint process, an NCP should make a final statement. If mediation results in a successful agreement with the company, you and the company should both agree on the content of the NCP's statement, including what information should be made publicly available. If mediation has failed because the parties could not agree on the terms for mediation, one of the parties refused to enter into mediation, or the mediation did not result in an agreement, the NCP should still issue a final statement.

Before making the final statement public, the NCP should give you the opportunity to comment on the text. You should review the text carefully to ensure that your position is correctly and completely reflected in the statement. Not all NCPs make recommendations on the implementation of the Guidelines or a determination as to whether the company has breached them, but you should encourage the NCP to include both of these elements (i.e. determination and recommendations) in its statement.

Although NCPs do not have a formal monitoring role, the best-performing NCPs follow up on their final statements. NCPs can request that both parties provide a report on implementation within a certain period of time (e.g. three months or one year) after the agreement/statement. Based on these reports by the parties, the NCP can issue its own follow-up report. Some NCPs have organised follow-up meetings or conferences to discuss the outcomes and impact of the case. This does require an extra investment of time and resources after the complaint process has officially ended, but provides a good opportunity to keep pressure on the company to improve behaviour. Also if follow up is not proposed by an NCP, it is advisable to keep a close watch on the company and, if necessary, to follow up on your case by campaigning, filing another OECD Guidelines complaint, or using other grievance mechanisms.

BOX 15

Elements of good final statements

The NCP should publish a statement that is drafted in consultation with all parties. Complainants should request that NCPs issue a robust final statement that includes the following elements:

- The allegations of the complaint and the provisions of the Guidelines in question.
- Any fact-finding and information gathered by the NCP.
- Relevant information the NCP has been unable to obtain or the reason why it could not be obtained.
- The process followed by the NCP in handling the case, noting whether either party refused to cooperate in any way.
- If mediation was not possible or failed to result in agreement, the NCP's assessment of why this was the case.
- The NCP's view on the implementation of the OECD Guidelines in this specific instance, and a determination regarding whether the allegations in the complaint amount to a breach of the Guidelines.
- Clear, specific recommendations as to how the company should change its behaviour to come into line with the Guidelines.
- Procedures for follow-up, including timelines for reporting by the parties on implementation of the recommendations.

Further guidance and resources

OECD Watch secretariat

The OECD Watch secretariat advises and supports NGOs filing complaints against companies alleged to have breached the OECD Guidelines. If you have questions regarding (filing) a complaint you can contact the OECD Watch secretariat for advice.

OECD Watch
Sarphatistraat 30 +31 20 6391291
1019 GL Amsterdam info@oecdwatch.org
The Netherlands www.oecdwatch.org

Downloads and templates

This OECD Watch guide is available in multiple languages. All versions can be found on the OECD Watch website together with additional resources such as complaint templates and example complaints and letters.

www.oecdwatch.org/guide

OECD Watch case database

OECD Watch's online case database contains information on OECD Guidelines cases raised by civil society organisations at NCPs. The database contains relevant information about the cases, including the complaint, supporting documents, letters and statements you can use as examples. Information on pending cases is also published by OECD Watch in Quarterly Case Updates.

www.oecdwatch.org/cases

OECD Watch online tool

OECD Watch has developed an online Case Check to assist potential complainants in deciding whether the OECD Guidelines can be used to address corporate misconduct. This online Case Check will provide tailored for potential complainants who would like to know whether the OECD Guidelines apply to a specific case.

www.oecdwatch.org/oecd-watch-case-check

Previous NGO experience

Many OECD Watch members have experience with filing complaints. They may very well be able to advise and assist you if you want to file a complaint. On the OECD Watch website, you can find a list of members to contact if you are looking for a partner in the company's home or host country.

www.oecdwatch.org/about-us/members

Trade Union Advisory Committee (TUAC)

TUAC is the official voice of the labour movement at the OECD. TUAC coordinates trade input to policy-making on the Guidelines at the OECD, conducts training on the Guidelines and advises trade unions that want to file OECD Guidelines complaints. TUAC has published a useful guide to the OECD Guidelines to help trade unions to use the Guidelines in their workplaces and in their campaigns to defend workers' rights and improve living and working conditions. Like OECD Watch, TUAC also compiles information on trade union cases and has published this in a trade union case database.

www.tuac.org and <http://www.tuac.oecd.mn.guidelines.org>

Resources of the OECD

On the OECD website, you can find more background context and information about the OECD Guidelines and general work of the OECD. On the website you can also find key resources such as a list of NCPs and the complete official text and translations of the OECD Guidelines for Multinational Enterprises and the related Procedural Guidance and Commentaries.

<http://mneguidelines.oecd.org/>

Other Grievance Mechanisms

If the OECD Guidelines are not a suitable grievance mechanism to address your concern, you can consider other alternatives, for example: company level grievance mechanisms, the Compliance Advisor/Ombudsman (CAO) for the International Finance Corporation (IFC) and Multilateral Investment Guarantee Agency (MIGA), National Human Rights Institutions, or regional mechanisms provided by, for example, the Inter-American Commission on Human Rights or Independent Review Mechanism of the African Development Bank.

www.grievancemechanisms.org

