

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

Introduction

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

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

This submission identifies, from the perspective of civil society:

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

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

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

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

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

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

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

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

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

II. Gaps in the Guidelines

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

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

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

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

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

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

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

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



instance process as a means to encourage MNE engagement. The Procedural Guidance does not require follow-up monitoring after completion of complaints to help MNEs fulfil their RBC commitments. It also does not set expectations and guidance to help NCPs anticipate and respond to retaliation against human rights defenders associated with complaints, and mitigate potential barriers to women and other disadvantaged groups using the mechanism.

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

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

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

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

- **Marginalised groups:** It is increasingly clear that business impacts are felt most strongly by the most marginalised and disadvantaged members of society, including women, Indigenous Peoples, people of low caste, children, and others. The Guidelines do not identify all key rights of these groups – such as Indigenous Peoples’ right to free, prior, and informed consent (FPIC) over use of their territories – nor the different ways these people can be adversely impacted by business conduct – for example, not only as employees but as community members – nor the specialised due diligence needed to consult these groups and identify and address impacts to them.
- **Human rights defenders:** In a context of shrinking civil society space, the WPRBC and many OECD states are taking action to advance protections for civil rights and human rights defenders. Yet the Guidelines include no provisions explaining how MNEs should avoid impacts to defenders – including by causing impacts directly or condoning impacts by a business partner or state – and respect and facilitate defenders’ right to advocate and right to remedy.
- **Climate change and environmental degradation:** Countering the effects of climate change is broadly acknowledged as the most vital need of our time. Environmental destruction and climate change have caused devastating effects including biodiversity loss, with a recent report finding that the global wildlife population has been reduced by two-thirds over the last 50 years.⁴ MNEs are recognised as responsible for almost a fifth of climate-changing carbon emissions,⁵ particularly those operating in the pollution-intensive agriculture, transport, extractive, manufacturing and apparel sectors. But the Guidelines do not even mention the term “climate

change,” nor clearly call upon MNEs to set and achieve emission targets and actually avoid environmental impacts including deforestation, pollution, and biodiversity loss.

- **Land rights:** Land security underpins numerous human rights and helps forestall climate change. While global standards like the 2012 Voluntary Guidelines for the Responsible Governance of Tenure assert the responsibility of MNEs to respect legitimate tenure rights,⁶ the OECD Guidelines say next to nothing on land, failing to guide MNEs in assuring the right to FPIC, respecting non-documented tenure rights of women and communal owners, and respecting land rights even where states fail their own duty to protect land rights.
- **Labour rights:** Unionisation and workers rights are under threat, yet the Guidelines fail adequately to set important labour rights standards for MNEs, such as on ensuring responsible disengagement, avoiding business models that intentionally escape responsibility for worker well-being, paying a living wage, and respecting rights of workers in P2P platforms and the digital economy.
- **Taxation:** According to 2020 data, corporate tax avoidance is estimated to cause a global loss of \$245 billion each year, while MNEs annually shift a full \$1.38 trillion from the countries in which they make their profits to tax havens to avoid tax payments.⁷ Broad public consensus now holds that corporate tax avoidance should stop, and international and regional organizations including the OECD are developing innovative new tax policies to tackle the problem. Unfortunately, the Guidelines are even out of alignment with the OECD: they do not even name tax avoidance let alone discourage it, nor call for the disclosures needed to identify and prevent it moving forward.
- **Digitalisation:** Over the past ten years, the rapidly increasing digitalisation of the global economy is altering and exacerbating the potential for all MNEs – not merely technology companies – to adversely impact human rights, jeopardize democracies and democratic values, and harm the environment. The OECD Investment Committee has itself identified a need for a comprehensive standard to address the many challenges, but the Guidelines say nothing on this modern issue.
- **Disclosure:** ESG reporting, sustainability reporting, or integrated reporting are on the rise globally as countries increasingly require MNEs to disclose not merely their financial but their non-financial data to support efficient market functioning, corporate contribution to the UN Sustainable Development Goals, and public monitoring of outcomes. Against this growing tide, the OECD Guidelines’ Disclosure chapter is seriously outdated, setting standards not much stronger than the minimum legal requirements on financial reporting, and inadequately synchronizing with the Guidelines’ own due diligence communication expectations added in 2011.
- **Corruption:** The Guidelines currently address only bribery and extortion and do not set expectations regarding all forms of corporate corruption, nor highlight the relationship between avoiding corruption and meeting standards across the other chapters in the Guidelines.
- **Animal welfare:** More and more OECD states recognise animal sentience and the link between irresponsible MNE conduct on animals and adverse impacts to animals, people, and the planet. Yet the Guidelines do not reflect growing legal protections, international standards, and MNE policies on animals, whose well-being is widely understood as tied to public health (seen with COVID-19) and environmental protection.

- **Scope of application of the Guidelines:** The WPRBC is focused on policy coherence, yet the Concepts and Principles chapter of the OECD Guidelines does not adequately clarify the applicability of the Guidelines to non-traditional MNEs including states operating as economic actors.
- **General Policies:** The General Policies chapter of the Guidelines does not explain the fundamental principle of due diligence adequately, reflect the key expectations made in all (not just some) of the subsequent chapters, or set a proper tone for the overall document.

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

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

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

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

NCPs are a vital voice to include in the identification of gaps, but NCPs are neither the primary users nor targeted audience of the Guidelines. It is equally important that civil society, union, and business perspectives on gaps be reflected and analysed in the report. To resolve this problem, OECD Watch asks that the institutional stakeholders' views be made integral in the report through their inclusion in each of the substantive sections, not merely in the annex. Each chapter should identify successes and challenges holistically from the perspective of NCPs *and stakeholders*, not merely NCPs.

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

The first draft of the stocktaking report provides case examples illustrating topics covered by the Guidelines' chapters. While there is great value in identifying cases related to topics under each chapter, the report should not imply, as it does inconsistently in a few instances, that these cases

were correctly handled, or provided useful interpretation on, the issues identified. Some paragraphs (for example 68 or 72) mention simply that cases have *involved* issues contemplated by the Guidelines, whereas others (such as paragraph 83) asserts that “specific instances have served to further elaborate good practice and expectations” on certain issues. Many civil society complainants object to their complaint being presented as one in which an NCP elaborated good practice or expectations on a key rights issue. At a minimum, this positive framing should be removed, or the OECD should first consult all parties to each complaint to verify whether all agree that the NCPS’ handling and analysis was positive.

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

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

Conclusion

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

About OECD Watch

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

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

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

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

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

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

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

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

ANNEX

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