

Identified gap in the OECD Guidelines: marginalised and disadvantaged groups

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

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

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

Gender

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

Indigenous Peoples

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

Caste-based discrimination

Caste-based discrimination affects more than 260 million people worldwide, not only people in South Asia, but also in Africa, Asia, the Middle East, the Pacific, and in diaspora communities in countries such as the UK and US.⁷ Caste-discrimination affects workers in all sectors, including especially the agriculture, leather, garments, carpet weaving, natural stone, mineral processing, and construction sectors, as well as industrial sectors like the IT sector. Many MNEs discriminate against people of low-caste through their suppliers⁸ by engaging low-caste people as forced labourers or paying them



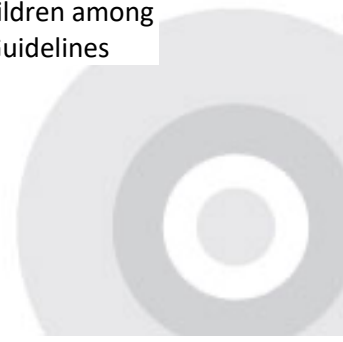
less than minimum wage; not supporting low-caste workers to collectively organise or participate in trade unions; disproportionately tasking low-caste workers with more dangerous, dirty, and unhealthy tasks; failing to ensure equal representation of low-caste people in management; and tolerating caste-based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

Children

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

Guidelines gaps

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



also highlight children as consumers, without underscoring the particular protections children may need from harmful products and services.

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

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

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

Parallel laws and standards

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

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



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

Women and LGBTQ+ people

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

Indigenous Peoples

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

Caste discrimination

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

Children

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

Why ensuring a comprehensive stocktaking on gaps is important



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

Who needs to act?

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

About OECD Watch

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.

OECD Watch Secretariat (c/o SOMO)

Sarphatistraat 30
1018 GL Amsterdam
The Netherlands
Ph: +31 20 6391291
info@oecdwatch.org, www.oecdwatch.org

Marian Ingrams, Esq., Coordinator & Researcher,
m.ingrams@oecdwatch.org

Dr. Joseph Wilde-Ramsing, Senior Researcher and
Coordinator, j.wilde@oecdwatch.org

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

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

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



⁴ See, e.g. UN Committee on Elimination of All Forms of Discrimination Against Women, “General recommendations on women’s access to justice,” CEDAW/C/GC/33, 23 July 2015, available at:

https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/CEDAW_C_GC_33_7767_E.pdf.

⁵ Indigenous Peoples Indigenous Voices fact sheet. Available at: https://www.un.org/esa/socdev/unpfii/documents/PFI18_FS3.pdf

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

²⁶ IFC Performance Standards 1-2.

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

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

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

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

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

³¹ International Dalit Solidarity Network, Dalit Discrimination Check, available at:

https://idsn.org/uploads/media/Dalit_Discrimination_Check.pdf.

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

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

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

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

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

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