Advocacy brief: Arguments for updating the OECD Guidelines to improve business standards on climate change and the environment

Outcome sought: Update of the OECD Guidelines for Multinational Enterprises (Guidelines) to better specify expectations for multinational enterprises (MNEs) on climate change and the environment.

Problem: The OECD Guidelines do not set adequate and explicit expectations for MNEs on avoiding contribution to climate change and harmful impacts to the environment
Climate change is acknowledged as one of the leading – if not the greatest – challenges of our time. Climate change has caused devastating biodiversity loss, killing two thirds of the global wildlife population over the last 50 years.[1] It has also already begun profoundly disrupting the food, transportation, migration, health, and other systems that sustain human life. In connection, climate change is threatening the effective enjoyment of numerous human rights, including the rights to life, water and sanitation, food, health, housing, self-determination, culture, and development – as well as civil and political rights.[2] Climate change is also a "threat multiplier" in the sense that it increases the intensity and frequency of existing problems such as floods, heat waves, wildfires, and other natural disasters.

The 2015 Paris Agreement set a goal of limiting global warming to 1.5 degrees Celsius, but according to the UN Environment Programme's Emissions Gap Report 2021, we are heading towards a global temperature rise of 2.7 degrees by the end of the century.[3] Given this reality, our climate change response must involve two primary focus points: *greenhouse gas (GHG) emissions mitigation*, to prevent more GHG being emitted into the Earth's atmosphere; but also *climate change adaptation*, to adapt to the climate impacts we are too late to avoid. Scientists have called for governments to enact transformative policy to meet the Paris targets and avoid the real threat of over 1 million more species becoming extinct in coming decades.[4]

MNEs are major contributors to climate change and environmental destruction. By very conservative estimates, MNEs – especially in the pollution-intensive agriculture, extractive, infrastructure, manufacturing, transport, and apparel sectors – are recognised as responsible for approximately a fifth of GHG emissions,[5] while other estimates suggest that just 100 companies have been responsible for 71% of global emissions since 1988.[61] Given MNEs' role in GHG emissions and environmental degradation, the transformative changes demanded by scientists must focus on MNEs, too.

Yet despite the importance of addressing business impacts on climate and the environment, the OECD Guidelines – the preeminent standard on responsible business conduct (RBC) for MNEs – are far behind current expectations on GHG emissions mitigation and climate adaptation. The outdated Environment chapter (Chapter VI) doesn't even use the term "climate change," nor reference the Paris Climate Agreement or call on MNEs including in the financial sector to set and achieve measurable climate targets. Unlike the later-drafted Human Rights chapter (Chapter IV), the Environment chapter does not as clearly establish expectations for MNEs to undertake due diligence to prevent, mitigate, and, critically, remedy adverse impacts to the environment. Instead, it generally calls in more positive terms for MNEs to implement environmental management processes and continually improve their environmental performance. While language in Chapter II on due diligence over RBC impacts applies to Chapter VI, because Chapter VI hardly lists environmental impacts, the two chapters do not pair together easily, making it difficult to hold MNEs to account for their impacts

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and failures to address them. Clarification is needed in Chapter VI as to the range of environmental impacts MNEs should identify, cease, prevent, mitigate, and remedy. The Environment chapter also does not explicitly call on MNEs to avoid political lobbying aimed at lowering environmental standards and regulations, a serious problem in the past decade.[7] It does not underscore the reciprocal relationship between respecting the environment and respecting human rights: taking care of the environment helps assure human rights to health and livelihood; and respecting rights to free speech and assembly, as well as Indigenous peoples' rights to FPIC, culture, and self-determination, all help preserve the environment and prevent climate change. Also absent in the Guidelines is a clear mandate for MNEs to avoid causing or being complicit in harms to environmental defenders.

Impact of the problem: Lack of clear standards for MNEs on avoiding contribution to climate change and respecting the environment, and lack of remedy for impacted rightsholders
The gaps in the OECD Guidelines on the environment have two main consequences:

1) A lack of clarity in expectations for MNEs[8] that RBC entails avoiding harm to the environment, reducing GHG emissions, and implementing business practices that reflect and enable adaptation to climate change;
2) Diminished grounds on which to seek remedy via the National Contact Point (NCP) grievance mechanism and less predictability of complaint outcomes.
    a. OECD Watch's experience with NCP complaints shows that it is difficult to apply the current Guidelines' text to seek accountability for MNEs' failures to prevent, mitigate, and remediate environmental impacts. Many environment and climate change-related cases demonstrate that there is a lack of clarity regarding exactly how environmental/climate standards and expectations apply to MNEs, what the disclosure requirements are for MNEs' total GHG emissions, and what information must be provided to consumers to enable informed decision-making based on MNEs' environment/climate impacts.
    b. NCP complaints concerning MNEs' contributions to climate change are increasing. Since 2017, seven complaints have sought to clarify MNEs' responsibilities to report accurately on and reduce their GHG emissions. The increase shows greater need for standards and accountability on the issue and does not confirm that all NCPs would accept claims related to climate change.

Solution to the problem: update the OECD Guidelines to strengthen expectations for MNEs on identifying and addressing their climate change and environmental impacts
Important additions to a couple chapters of the OECD Guidelines would help clarify expectations for MNEs regarding their climate change and environmental impacts:

Chapter VI (Environment) should clearly call on MNEs to:

- Fulfill their responsibility to contribute to addressing climate change, including by:
    - Conducting due diligence regarding climate risks and impacts in their own operations and value chains, covering any associated risks or harms to local communities;
    - Disclosing both long-term and interim targets for lowering GHG emissions (up to and including scope 3 emissions) that support achievement of the goals of the Paris Agreement, serve as the basis for regular monitoring, and are revised in light of progress and adequacy;
    - Introducing concrete measures to progressively achieve their emissions targets, including through orderly decommissioning or retirement of high-emissions assets and product lines;
    - Promoting climate adaptation in their own and business partners' operations;

- Avoiding any publication of inaccurate or misleading information regarding climate risks and impacts across their operations and value chains; and
- Avoiding political lobbying aimed at lowering environmental standards and regulations or blocking climate action, particularly when such lower standards would cause states to fail their own climate targets.[9]

- Avoid causing or contributing to environmental impacts and seek ways to prevent or mitigate adverse environmental impacts directly linked to the MNE by a business relationship. Commentary to Chapter VI should indicate in a non-exhaustive list the most serious environmental impacts MNEs should avoid, including: deforestation especially of native forests; destruction of wetlands and coastal ecosystems, including mangroves and peat bogs; destruction of marine ecosystems; destruction of biodiversity; pollution of water, land, and air; harmful use of pesticides and fertilizers; overuse of water; destruction of UNESCO World Heritage sites and other protected areas; and others; and
- Provide or participate in remedying their contribution to climate change and any environmental impacts they cause or contribute to.

Chapter II (General Policies) should, in principles or commentary:

- Identify stewardship of the environment as a key part of RBC (and RBC due diligence) underpinning MNEs' fulfilment of the other standards in the Guidelines, particularly respect for human rights;
- Call for MNEs to avoid and address their impacts on climate change and the environment.

Commentary to Chapter III (Disclosure) could better reflect the expectation for MNEs to:

- Disclose their total environmental impacts, including their direct GHG emissions and emissions across their value chains (up to and including scope 3 emissions), their GHG emissions targets, and their plans to achieve those targets.

Commentary to Chapter IV (Human Rights) could better reflect expectations for MNEs to:

- Consider, in their human rights due diligence, human rights harms that may be associated with climate change and environmental impacts; and
- Avoid both actions (e.g. threats, intimidation, SLAPP suits, etc.) and omissions (e.g. failures to stop business partners including states from taking harmful actions for MNEs' benefit) against individuals protesting business activity (harmful to the environment). Commentary should also make clear the expectation for businesses to use leverage to encourage partners threatening or harming defenders to cease, and to respond responsibly when threats or harms occur.

Parallel laws and standards

Update of provisions of the OECD Guidelines on the environment could draw on the following standards and guidelines:

- International environmental agreements, including the Global Pact for the Environment (currently under negotiation), Paris Agreement, Glasgow Climate Pact, and Katowice Climate Package. The latter recognise the important role of the private sector in reducing GHG emissions. These agreements should be explicitly recognised in commentary to Chapter VI.
- The Escazu Agreement on access to (environmental) information, public participation and environmental justice issues in Latin America and the Caribbean.[10]
- Draft international agreements, namely the Second Revised Draft of the Binding Treaty on the Activities of Transnational Corporations and Other Business Enterprises (2020, which includes environmental harms in the definition of 'human rights abuse,' requires MNEs to undertake

environmental and human rights due diligence, and requires reporting on environmental standards in MNEs' operations and business relationships);

- Several OECD due diligence guidance papers; for example, the OECD's multisector Due Diligence Guidance for Responsible Business Conduct, the OECD-FAO Guidance for Responsible Agricultural Supply Chains, and OECD Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector, which refer to measuring, reducing, and reporting of GHG emissions;
- The UN Guiding Principles and associated climate change-related work of the UN Working Group on Business and Human Rights;
- Climate change-related reports of relevant UN Special Rapporteurs, such as the special rapporteurs on human rights defenders, indigenous peoples rights, freedom of speech and assembly, the environment, and others. Relevant reports would include those on the "Exercise of the rights to freedom of peaceful assembly and of association as essential to advancing climate justice,"[11] the "Impacts of climate change and climate finance on indigenous peoples' rights,"[12] and the "Human rights obligations relating to the enjoyment of a safe, clean, healthy, and sustainable environment,"[13] among others.
- Industry standards, including the Greenhouse Gas Protocol (an international standard for corporate accounting and reporting of GHG emissions) and the International Finance Corporation's (IFC) Performance Standards (PS). IFC PS 1, 3, and 4 require companies to identify their environmental impacts and implement alternatives to reduce their GHG emissions.
- Guidance of non-governmental organisations, including of Transparency International's work addressing links between climate vulnerability and corruption.[14]

Why address this issue now?

The OECD Guidelines, originally drafted in 1976, have not been updated 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 and laws 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 completed a comprehensive stocktaking to identify what gaps exist in the Guidelines and assess whether an update is needed to close them. The stocktaking results show broad consensus among NCPs, stakeholders, and the public that the Guidelines are not adequately clear on this and other issues. The Investment Committee is now considering whether to update the Guidelines, as it has done every decade since 2001 and before that as well. Such an update would provide an opportunity for OECD governments to address the problems OECD Watch and others have identified. ***Wholescale update is not needed. Instead, smart, targeted edits to principles and/or commentary in key sections would go a long way in closing the gaps.***

Who needs to act?

OECD governments should 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 over limitations in the Guidelines' standards and complaint system, by improving the Guidelines through a textual update. Governments have a critical opportunity right now to close the gaps identified by NCPs and stakeholders. OECD Watch asks all states to support ongoing discussion on specific textual edits on the issues civil society is prioritizing and encourages those states that wish to champion various concerns of civil society to present proposals to resolve the gaps found. OECD

Watch stands ready to support individual states and the Committee during the anticipated update process.

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

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

[3] United Nations Environment Programme, "Emissions Gap Report 2021," 26 October 2021, available at: https://www.unep.org/resources/emissions-gap-report-2021.

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

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

[6] Tess Riley, The Guardian, "Just 100 companies responsible for 71% of global emissions, study says," 10 July 2017, available at: https://www.theguardian.com/sustainable-business/2017/jul/10/100-fossil-fuel-companies-investors-responsible-71-global-emissions-cdp-study-climate-change.

[7] For information on Carbon Majors lobbying against the goals of the Paris Agreement and to block climate change policies, see InfluenceMap, 'How the oil majors have spent $1Bn since Paris on narrative capture and lobbying on climate', available at: https://influencemap.org/report/How-BigOil-Continues-to-Oppose-the-Paris-Agreement-38212275958aa21196dae3b76220bddc. For an overview of InfluenceMap's report: Sandra Laville, 'Top oil firms spending millions lobbying to block climate change policies, says report', The Guardian, 22 March 2019, available at: https://www. theguardian.com/business/2019/mar/22/top-oil-firms-spending-millions-lobbying-to-block-climatechange-policies-says-report.

[8] There are also contradictory messages on the responsibilities of MNEs regarding climate change from the various international standards such as the OECD Guidelines, UN Guiding Principles, IFC performance standards, and others.

[9] For information on Carbon Majors lobbying against the goals of the Paris Agreement and to block climate change policies: InfluenceMap, 'How the oil majors have spent $1Bn since Paris on narrative capture and lobbying on climate', available at: https://influencemap.org/report/How-Big-Oil-Continues-to-Oppose-the-Paris-Agreement-38212275958aa21196dae3b76220bddc. For an overview of InfluenceMap's report: Sandra Laville, 'Top oil firms spending millions lobbying to block climate change policies, says report', The Guardian, 22 March 2019, available at: https://www.theguardian.com/business/2019/mar/22/top-oil-firms-spending-millions-lobbying-to-block-climate-change-policies-says-report.

[10] Escazu agreement, available at: https://repositorio.cepal.org/bitstream/handle/11362/43583/1/S1800428_en.pdf.

[11] United Nations, "Exercise of the rights to freedom of peaceful assembly and of association as essential to advancing climate justice," A/76/222, 23 July 2021, available at: https://undocs.org/A/76/222.

[12] United Nations, "Impacts of climate change and climate finance on indigenous peoples' rights," A/HRC/36/46, 1 November 2017, available at: https://undocs.org/A/HRC/36/46.

[13] United Nations, "Human rights obligations relating to the enjoyment of a safe, clean, healthy, and sustainable environment," A/74/161, 15 July 2019, available at: https://undocs.org/en/A/74/161.

[14] Transparency International, Climate Governance Integrity Programme, available at: https://www.transparency.org/en/projects/climate-governance-integrity-programme/publications-and-resources.