

Advocacy Brief: Arguments for updating the OECD Guidelines to improve business standards and NCP procedures on human rights defenders and reprisals

Outcome sought: Update of the OECD Guidelines for Multinational Enterprises to specify expectations for multinational enterprises (MNEs) and National Contact Points (NCPs) on prevention and mitigation of harm to human rights defenders, including during the specific instance process.

Problem: The OECD Guidelines do not set standards for business on avoiding and addressing harm to human rights defenders, nor guidance for NCPs on how to respond to threats to defenders connected to the specific instance process

Human rights defenders (defenders) – any person or group peacefully working to promote and protect human rights, including journalists and whistle-blowers inside MNEs – contribute greatly to safeguarding human rights. Unfortunately, since 2015 more than 2,200 killings, beatings, threats, strategic lawsuits against public participation (SLAPPs), stigmatization, suspension of fundamental freedoms, legal restrictions and other attacks intended to obstruct defenders' actions have been tracked.¹ The number of attacks has increased in recent years, demonstrating heightened risk to defenders in a context of shrinking civil society space.

Many of these attacks are made against defenders working to protect human rights from MNE misconduct. Sometimes businesses do not solicit attacks but are connected to them by remaining silent when economic or government partners harm or denigrate defenders in the name of development. Businesses also cause or contribute to harm to defenders directly, such as by firing workers for protesting, bringing SLAPP suits against activists, hiring abusive security firms to intimidate communities, detaining or attacking journalists reporting on MNE conduct, abusing digital surveillance to harm defenders, cancelling the financial accounts of defenders or their affiliates, or requesting unnecessary armed protection from state forces.²

Defenders fighting the harmful impacts of business activity often rely on non-judicial grievance mechanisms such as NCPs as an avenue to seek justice. Unfortunately, OECD Watch research shows great risk of reprisal for defenders who engage with the specific instance process. A full 25% of complaints filed to NCPs by communities and NGOs involve harms against defenders, either harms highlighted in the complaint text itself, happening alongside the complaint, or even occurring as a result of the complaint.³ The risk is greatest for marginalized or isolated defenders such as indigenous people, women, LGBTQ+ members, and those who are rural and remotely located.

Despite the importance of the work of defenders and their vulnerability to threats from businesses, including during NCP complaints, the OECD Guidelines – the preeminent standard for businesses in all sectors on responsible business conduct (RBC) – do not mention the issue. Neither Chapter IV on human rights nor any other chapter addresses the rise in harm to defenders and the nexus with activism against harmful business activity. Critically, the Guidelines set no expectations for MNEs on how to prevent, mitigate, and remedy impacts to defenders, including impacts directly linked to their supply chains and impacts MNEs cause or contribute to. The OECD Guidelines also do not provide guidance to NCPs on the steps they should take to discourage and respond to allegations or occurrence of reprisals in connection with specific instances. Without guidance in the Guidelines, almost no NCPs have a policy to address reprisal risks for complainants and their affiliates. In OECD Watch's experience, NCPs generally do not know how to respond and are indeed hesitant to respond at all for fear of worsening the situation.

Impact of the problem: Lack of clear standards for MNEs on respecting the rights of human rights defenders, and lack of guidance for NCPs on addressing defender harms, resulting in a less secure path to remedy for complainants

The total lack of standards for MNEs in the Guidelines on human rights defenders and guidance for NCPs on addressing risks to defenders connected to the specific instance process generates two impacts:

- 1) Lack of understanding by MNEs on expectations for them to prevent, mitigate, and remedy impacts to defenders resulting from their own or business partners' (including states') actions or omissions; and
- 2) A more dangerous path for remedy for defenders seeking justice via the OECD specific instance process.
 - a. A large number of recent NCP complaints exhibit the heightened risk for defenders who engage with the specific instance process, sometimes involving deaths,⁴ threats or intimidation,⁵ SLAPP suits,⁶ or unfair dismissal.⁷

Solution to the problem: Update the OECD Guidelines to include (1) standards for business on respecting rights of human rights defenders and (2) guidance for NCPs in addressing threats to defenders connected to specific instances

Small updates, primarily to Chapter II, would be beneficial in clarifying expectations for MNEs:

Chapter II (General Policies) and Chapter IV (Human Rights) could better reflect expectations for MNEs to:

- Respect the rights of all individuals – including community members, indigenous peoples, NGO staff, workers, human rights attorneys, journalists, and whistle-blowers within corporations – to peacefully protest the adverse impacts of business activities.¹
 - Commentary in Chapter II and/or Chapter IV (Human Rights) should clarify that MNEs should 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. Commentary should also make clear the expectation for businesses to use leverage to encourage partners harming defenders to cease, and to respond responsibly when threats or harms occur.
 - Commentary in Chapter II and/or in Chapter IV (Human Rights) should note particular vulnerabilities for defenders from marginalised and disadvantaged groups.

Given the prevalence of harms to labour rights defenders, environmental defenders, and whistle-blowers over corruption, expectations on respecting defenders' rights could be reflected in a cross-cutting fashion in Chapters V (Employment and Industrial Relations), VI (Environment), and VII (Combating Bribery).

Part II of the Guidelines (the Procedural Guidance) should also be updated to improve expectations for NCPs' handling of risks to human rights defenders associated with the subject matter of specific instances. Updates should call for NCPs to:

- Establish a zero-tolerance policy on reprisals;
- Undertake staff training on the topic of human rights defenders and reprisals to build expertise and capacity to handle complaints that may or actually do involve harms to defenders and reprisals;

¹ At present ,principle 9 of Chapter II calls too narrowly for MNEs to "refrain from discriminatory or disciplinary action against workers who make bona fide reports to management." This language should be expanded or replaced with the above-suggested amendment.

- Take steps to identify (including via proactive risk assessments) and help address potential and actual risks to notifiers or their affiliates before, during, and after the complaint process;
- Guarantee confidentiality of defenders' identities, including, if necessary, by keeping the identity of the notifier (individual and/or organisation) hidden from the company at issue;
- Monitor risks of harms to defenders during complaints, including by communicating with complainants about potential or actual risks, and taking preventative or responsive measures where appropriate;
- Follow up after complaint processes have ended to check defenders' safety and, where necessary, help establish a reprisal risk plan; and
- Teach businesses, during NCP promotional activities, about the ways MNEs can be connected to harms against defenders and what expectations the Guidelines set for them to identify, avoid, cease, mitigate, and remedy harm.

Updates to the Procedural Guidance could also call for the Investment Committee itself to:

- Support NCPs' capacity development by providing trainings and guidance on addressing harms to defender generally and reprisals more specifically; and
- Establish an in-house expert to guide MNEs and NCPs on risks of reprisal, including by providing spot-advice during complaints.

Parallel laws and standards

Updates to Part I of OECD Guidelines related to human rights defenders could draw on existing language in various other international agreements, national laws, industry standards, and civil society guidance such as:

- International standards and declarations, including the UN Declaration on Human Rights Defenders established by the Special Rapporteur on defenders⁸ that promotes for defenders rights existing in the ICCPR and the UDHR, and the ILO standards;⁹
- Regional standards, including the EU Declarations and Guidelines on Human Rights Defenders and OSCE's Guidelines on the Protection of Human Rights Defenders¹⁰;
- National laws and guidance, including of Norway¹¹ and Canada;¹² and
- Civil society guidance and support, including from the Business & Human Rights Resource Centre's Guidance for Companies,¹³ the 2018 Human Rights Defenders World Summit's Action Plan,¹⁴ and guidance from organisations such as ProtectDefendersEU, the FIDH Observatory for the Protection of Human Rights Defenders, Frontline Defenders, and AfricanDefenders.

Updates to Part II of the Guidelines could draw from good practices employed by other grievance mechanisms, such as:

- The UN Human Rights Office, which has developed a system-wide approach to reprisals, including those against defenders filing complaints to the UN treaty bodies and other mechanisms;¹⁵
- The Independent Accountability Mechanisms for the development finance institutions, several of which (such as the mechanism of the Inter-American Development Bank¹⁶ and the mechanism of the International Finance Corporation¹⁷) have developed and implemented practical internal guidance on responding to reprisals against complainants or their affiliates.

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. ***Wholesale 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 Investor Alliance for Human Rights, BHRR & ISHR, 2020, Safeguarding Human Rights Defenders, Practical Guidance for Investors (2020), https://media.business-humanrights.org/media/documents/files/Safeguarding_Human_Rights_Defenders_Practical_Guidance_for_Investors_FINAL.pdf

² For further on company strategies to undermine and silence human rights defenders, see Mind the Gap, "Undermining defenders and communities," available at: <https://www.mindthegap.ngo/harmful-strategies/undermining-defenders-communities/>.

³ OECD Watch, "Use with Caution: The role of the OECD National Contact Points in protecting human rights defenders," (June 2019), available at: <https://www.oecdwatch.org/wp-content/uploads/sites/8/2019/06/Reprisals-NCP-system.pdf>.

⁴ See, for example *FIDH et al vs. CRCC Tonguan Investment* at https://complaints.oecdwatch.org/cases/Case_301 and *Leaders of Paguyuban UKPWR vs. ITOCHU* at https://complaints.oecdwatch.org/cases/Case_210.

⁵ See, for example, *Society for Threatened Peoples vs. Credit Suisse* at https://complaints.oecdwatch.org/cases/Case_475_and_Adimed_vs_Pharmakina_S.A.at https://complaints.oecdwatch.org/cases/Case_538.

⁶ See, for example, *Bruno Manser Fund vs. Sakto* at https://complaints.oecdwatch.org/cases/Case_471 and *CCC and ICN vs. G-Star* at https://complaints.oecdwatch.org/cases/Case_109.

⁷ See, for example, *Swedwatch vs. Electrolux* at https://complaints.oecdwatch.org/cases/Case_289 and *Swedwatch vs. Mölnlycke* at https://complaints.oecdwatch.org/cases/Case_290.

⁸ OHCHR, General Assembly Resolution A/RES/53/144, 8th March, 1999. Available at: <https://www.ohchr.org/Documents/Issues/Defenders/Declaration/declaration.pdf>.

⁹ See, for example. ILO Convention No. 87, Art 10; No 1.35, Art 1.

¹⁰ Organisation for Security and Co-operation in Europe, "Guidelines on the Protection of Human Rights Defenders," available at: <https://www.osce.org/odihr/guidelines-on-the-protection-of-human-rights-defenders>.

¹¹ Norwegian Government, Human Rights Defenders, October 2020, https://www.regjeringen.no/en/topics/foreign-affairs/human-rights/ny-struktur/rights_defenders/id2339808/

¹² Canadian Government, Voices at Risk, Canada's Guidelines on Supporting Human Rights Defenders, https://www.international.gc.ca/world-monde/issues_development-enjeux_developpement/human_rights-droits_homme/rights_defenders_guide_defenseurs_droits.aspx?lang=eng

¹³ BHRR & ISHR, Shared Space Under Pressure: Business Support for Civil Freedoms and Human Rights Defenders, (August 2018), available at: <https://media.business-humanrights.org/media/documents/fdfe07e3d812cfcfed4235fbbf820a3d77599b13.pdf>

¹⁴ HRD World Summit 2018 Action Plan, Available at: https://hrdworldsummit.org/wp-content/uploads/2018/12/EN_Action-Plan-2.pdf

¹⁵ OHCHR, *Training Manual on Human Rights Monitoring* (New York and Geneva, 2001); OHCHR (2015), *Commissions of Inquiry and Fact-finding Missions on International Human Rights and Humanitarian Law: Guidance and Practice* (New York and Geneva, 2015), pp. 74–78.

¹⁶ Independent Consultant and Investigation Mechanism, Guide for Independent Accountability Mechanisms on Measures to Address the Risk of Reprisals in Complaint Management: A practical Toolkit, Inter-American Development Bank, January 2019,

¹⁷ International Finance Corporation Compliance Advisor Ombudsman, CAO Approach to Responding to Concerns of Threats and Incidents of Reprisals in CAO Operations (n.d.) Available at: <http://www.cao-ombudsman.org/documents/CAO-Reprisals-web.pdf>