

Advocacy brief: Arguments for updating the OECD Guidelines to improve business standards on land rights

Outcome sought: Update of the OECD Guidelines for Multinational Enterprises to specify expectations for multinational enterprises (MNEs) on respecting land rights.

Problem: The OECD Guidelines do not adequately establish expectations for MNEs to respect land rights, including as a prerequisite to respecting other human rights.

Land security and land rights – including free prior and informed consent (FPIC) for indigenous people, tenure rights for customary, communal, and collective tenure holders, and women’s land rights – are closely linked to the overall social and economic well-being of communities. Land security also underpins access to other internationally recognised human rights, such as rights to housing, food and freedom from hunger, health, and security of person.¹ Unfortunately, land rights are particularly vulnerable to violation by MNEs, given the high number of MNEs operating in the land-intensive agriculture, extractive, and infrastructure sectors. Defenders of land rights, including indigenous people in particular, are among the most at risk of adverse impacts for their human rights advocacy.²

Despite the importance of land rights and their vulnerability to harmful business impacts, the OECD Guidelines – the preeminent standard for businesses in all sectors on responsible business conduct (RBC) – do not adequately address land rights. The OECD Guidelines do not mention land *rights* at all. The word “land” is mentioned only once in commentary to Chapter II (General Policies), explaining narrowly the particular utility of stakeholder engagement for projects involving intensive use of land or water. The Guidelines make no specific mention of FPIC, though may indirectly cover FPIC through a reference in commentary to Chapter IV (Human Rights) to UN instruments elaborating on rights of indigenous people. The Guidelines make no mention at all of the vulnerability of land rights of women, customary, communal, and collective tenure holders. They also do not clarify how MNEs should handle common difficult land related issues, such as their responsibility to respect land rights even when a state has failed to meet its own duty to protect land rights, rather than exploit the failure to their own benefit;³ their responsibility to do due diligence to identify and address overlapping historic claims to land (land legacy issues); and their responsibility to respect the land rights of communities without paper title.

Impact of the problem: Lack of clear standards on land for MNEs and remedy for impacted parties

The gap in the OECD Guidelines text on land results in two consequences:

- 1) Lack of clarity in norms and expectations for MNEs regarding respect for land rights; and
- 2) Diminished grounds on which victims of land dispossession may seek remedy via the National Contact Point (NCP) grievance mechanism and less predictability of complaint outcomes.
 - a. OECD Watch’s analysis of NCP complaints shows that many land-related cases exemplify poor respect of land rights by MNEs, including in relation to the issues mentioned above such as when land rights are communal or non-documented; when consent to land use is not given by indigenous or non-indigenous communities; or when there are conflicting historic claims to the land. Perhaps because there is no clarifying language in the Guidelines on these common land-related issues, NCPs have also typically been unable to clarify the responsibilities of MNEs regarding land. For example: one complaint broke down over lack of clarity over an MNE’s responsibility to respect land rights when a state fails to protect land rights;⁴ many complaints do not resolve failure by MNE’s to adequately consult non-indigenous tenure holders;⁵ others show lack of clarity regarding responsibilities for MNEs to

identify and address past land conflicts;⁶ and still others show misunderstanding by MNEs and NCPs alike about the necessity of showing paper documentation for communally-held lands.⁷ Critically, while some NCPs interpret the Guidelines to cover FPIC for indigenous,⁸ at least one has asserted that the 2011 text of the Guidelines does not cover FPIC.⁹ The diversity of land-related problems companies and communities are facing, and the lack of coherent and effective application of the Guidelines by NCPs to address them, show that new text is needed to clarify expectations on land rights for MNEs.

Solution to the problem: update the OECD Guidelines to improve language on land rights

Simple, small additions to the Commentary of the Human Rights chapter (Chapter IV) in the Guidelines would help MNEs respect land rights as a step in fulfilling their overarching human rights and environmental responsibilities, and help NCPs interpret MNEs' land-related responsibilities in specific instances.

Commentary in Chapter IV (Human Rights) should:

- Clarify that land security underpins many human rights, and therefore that, to respect human rights, MNEs are expected to consult all people with interest in land to secure their consent before commencing operations on that land¹;
 - Specifically explain the meaning of each of the four elements of the right to FPIC for indigenous people and call on MNEs to cooperate with self-identified indigenous' peoples own representative institutions and customary decision-making processes for seeking FPIC. Commentary should make clear that companies should not proceed until all four elements of FPIC have been satisfied, whether or not the state has identified the group as indigenous or implemented FPIC on its own²;
- Clarify MNEs' responsibility to respect land rights even in the face of common land rights-related challenges, such as in the context of a state's failure to fulfil its own duty to protect land rights, of overlapping historic claims to land, and of non-documented claims to land (including of women, communal, and customary landowners);
- Identify defenders of land and land rights as particularly vulnerable to threat/harm, warranting greater focus from MNEs during their due diligence processes;
- Explain the link between MNEs' respect for land rights and avoidance or mitigation of their climate impacts;
- Discourage land speculation.

Parallel laws and standards

Aspects of the following international standards or guides on land could be useful in addressing gaps on land rights in the OECD Guidelines:

- The Voluntary Guidelines on the Responsible Governance of Tenure, addressing the rights of legitimate tenure holders;¹⁰
- Several of the OECD due diligence guidance papers, addressing the importance of respect for FPIC and land rights of women and other disadvantaged groups;¹¹

¹ Many MNEs and industry standards are increasingly implementing FPIC as good practice towards all communities, not just indigenous communities, to ensure their human rights are met.

² If the OECD decides to adopt language regarding the right to FPIC, it should ensure indigenous groups are consulted in the drafting process and before any updates are adopted.

- International conventions and declarations setting out rights of indigenous people, including on FPIC, such as the International Labour Organization’s Indigenous and Tribal Peoples Convention No. 169 and the UN Declaration on the Rights of Indigenous Peoples.¹²
- The IFC Performance Standards on land and indigenous rights.¹³
- Various industry-level standards, such as in the mining, agriculture, and forestry sectors, some of which recognise FPIC as a good practice in all projects, whether or not indigenous people are impacted.¹⁴
- Interpretation by some courts and commissions (including especially in Africa such as ECOWAS and the African Commission) that FPIC is owed to all local communities that will be impacted by projects, not just indigenous communities.¹⁵

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 International Covenant on Economic, Cultural and Social Rights, Arts. 11, 12; International Covenant on Civil and Political Rights, Art. 9

² Frontline Defenders, “304 killed in 2019 defending land, indigenous rights,”
<https://www.frontlinedefenders.org/en/news/304-killed-2019-defending-land-indigenous-rights>

³ See Mind the Gap, ‘Aligning with suppressive State institutions’ (2020) available at:
<https://www.mindthegap.ngo/harmful-strategies/utilising-state-power/aligning-with-suppressive-state-institutions/>

⁴ See, e.g. *Survival Int’l vs. WWF*, available at: https://complaints.oecdwatch.org/cases/Case_457.

⁵ See, e.g. *Siemenpuu et al vs Pöyry Group*, available at https://complaints.oecdwatch.org/cases/Case_259.

⁶ See, e.g. *FIAN and Wake Up and Fight for Your Rights vs NKG*, available at
https://complaints.oecdwatch.org/cases/Case_167.

⁷ See, e.g. *Paracuta vs. Kinross Gold Corporation 1*, available at https://complaints.oecdwatch.org/cases/Case_348.

⁸ See, e.g. *Framtiden I våre hender vs. Intex Resources*, available at: https://complaints.oecdwatch.org/cases/Case_164.

⁹ See, e.g. *FIDH et al vs. CRCC Tongguan Investment (Canada) Co., Ltd.*, available at:
https://complaints.oecdwatch.org/cases/Case_301.

¹⁰ FAO, Voluntary Guidelines on the Responsible Governance of Tenure, <http://www.fao.org/3/a-i2801e.pdf>.

¹¹ OECD Due Diligence Guidance for Responsible Business Conduct; OECD-FAO Guidance for Responsible Agricultural Supply Chains; OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector.

¹² ILO Convention 169, Indigenous and Tribal People’s Convention, available at:
https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169; UN Declaration on the Rights of Indigenous Peoples (2007), available at https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf.

¹³ IFC, Performance Standard 5 (Land Resettlement), and 7 (Indigenous People), available at
https://www.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_Site/Sustainability-At-IFC/Policies-Standards/Performance-Standards.

¹⁴ See, e.g. Initiative for Responsible Mining Assurance, Forest Stewardship Council Principles and Criteria, Bonsucro Production Standards.

¹⁵ See, e.g. Emily Greenspan, “Free, Prior, and Informed Consent in Africa: An emerging standard for extractive industry projects,” Oxfam America Research Backgrounder series (2014): [www.oxfamamerica.org/publications/fpic-in-africa].