



# Exploring new frontiers in the updated OECD Guidelines

Global multi-stakeholder perspectives on progress, strengths and weaknesses



BUSINESS,  
HUMAN RIGHTS AND  
THE ENVIRONMENT





In October and November 2023, OECD Watch and NOVA BHRE co-organised a blog symposium intended to facilitate a platform for knowledge exchange and discussion on the updated Guidelines and its connection to – and coherence with – legislative initiatives focused on corporate accountability across the globe. This compendium includes all blogs published for the symposium.

**The following key issues were explored:**

- Analysis of the updated OECD Guidelines, including any improved or notable new text.
- Interaction and alignment between the updated OECD Guidelines and the European Union’s Corporate Sustainability Due Diligence Directive (EU CSDDD).
- Interaction and alignment between the updated OECD Guidelines and other corporate accountability (due diligence) initiatives across the globe, including gaps in the OECD Guidelines and/or CSDDD compared to these initiatives.
- The role, function, and strengths and weaknesses of NCPs.

**Organisers**

The blog symposium was co-organised by OECD Watch and NOVA BHRE under the coordination of Katharine Booth and Laura Íñigo Álvarez.

This booklet was edited by Joana Mendes de Sousa and Laura Rincón.

**OECD Watch** is a global network comprising of more than 130 civil society organisations in over 50 countries. OECD Watch works towards the implementation and effectiveness of the OECD Guidelines through strengthened global coordination, advocacy with OECD member states and international institutions, and by providing case support and capacity building to civil society.

**NOVA Knowledge Centre for Business, Human Rights and the Environment (NOVA BHRE)** is a multidisciplinary academic centre within NOVA School of Law. The centre has made significant interdisciplinary research contributions regarding business and human rights initiatives, which aims to cultivate conscientious business practices that prioritise the protection of human rights, decent work and environmental integrity across worldwide value chains.



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# BACKGROUND

2023 was a momentous year in the corporate accountability world. In June, not only did the OECD adopt key revisions to the newly renamed 'OECD Guidelines for Multinational Enterprises on Responsible Business Conduct' (OECD Guidelines), but in December the European Parliament and the Council of the European Union reached an agreement on a directive on corporate sustainability due diligence ('CSDDD'). In recognition of these important events, OECD Watch and NOVA BHRE co-hosted a blog symposium focused on the updated OECD Guidelines in the context of the current corporate accountability landscape.

## **Adoption of the updated OECD Guidelines**

On 8 June 2023, the revised OECD Guidelines were published. In many areas, the updates reinforce and therefore bolster Responsible Business Conduct (RBC) standards for enterprises, and on some topics the updated Guidelines advance normative standards.

Key updates in the standards for companies relate to climate change, biodiversity, animal welfare, and other environmental impacts; just (digital) transition; meaningful stakeholder engagement, in particular with marginalised and vulnerable groups and human rights defenders; and respect for all value chain workers' rights. Several aspects of due diligence have also been clarified, including the need for enterprises to conduct due diligence on impacts linked to technology and digitalisation, and the need for due diligence over impacts up - and downstream throughout value chains. While the updates provided additional recommendations and guidance for National Contact Points (NCPs), these additions remain largely optional for OECD states and NCPs.

## **European Union's Corporate Sustainability Due Diligence Directive**

On 1 June 2023, the European Parliament agreed on its position on the CSDDD, and the EU subsequently entered the 'trilogue' phase, during which the EU institutions negotiated and ultimately agreed on the final directive text to be adopted. Almost six months later, on 14 December 2023, the European Parliament and the Council of the European Union reached an agreement for the CSDDD, which when implemented will require large companies operating in Europe to conduct human rights and environmental due diligence over harms in their value chains. The revised OECD Guidelines, which significantly strengthen RBC standards for companies, were used as a reference point for the adoption of the CSDDD strongest and most effective directive.

These developments also presented an opportunity to compare and contrast other RBC initiatives and laws across the globe against the Guidelines. This not only fostered discussion on the strengths and weaknesses of these initiatives, but also contributed to discussion on corporate accountability initiatives across the globe.

# RESETTING THE EMPLOYMENT AND INDUSTRIAL RELATIONS STANDARDS IN THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES ON RESPONSIBLE BUSINESS CONDUCT



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Since the OECD Guidelines for Multinational Enterprises (“Guidelines”) were first recommended by the OECD in 1976, trade unions understood the employment and industrial relations standards to be consistent with ILO Conventions 87 and 98,[1] applying to all workers in an enterprise’s supply chain. As enterprises increased the use of subcontracting to fragment employment relationships in their supply chains, trade unions sought to clarify the language to ensure the Guidelines remain responsive to workers’ reality.

In the 2023 updated Guidelines, fifty-one governments approved deleting the 2011 text “employed by the multinational enterprise.” The 2023 Guidelines unambiguously enable all enterprises to promote positive industrial relations to all workers in a value chain no matter how fragmented or informal the work becomes. (Guidelines V.1a and V.1b)

If an enterprise is the employer, its obligations are to implement the updated employment chapter in its entirety. The enterprise must avoid actions or statements that interfere in workers’ right to form and join trade unions. Such an enterprise would be the counterparty in collective bargaining negotiations with workers’ chosen representative.

When an enterprise relies on work performed through a business relationship, an enterprise should apply the due diligence recommendations contained in Chapter II and use business contracts and investments to leverage observance of Chapter V in all their business relationships.

The updates are sure to generate questions for workers, businesses and governments. I can think of seven.

# RESETTING THE EMPLOYMENT AND INDUSTRIAL RELATIONS STANDARDS IN THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES ON RESPONSIBLE BUSINESS CONDUCT

## 1. What was updated?

Enterprises should notice a clarification about respecting workers' choice of representation. The Guidelines now state that enterprises should "avoid[...] interfering with workers' choice to establish or join a trade union or representative organisation of their own choosing." (V1a) Enterprise interference in workers' representational decisions are a significant reason for the declines in collective bargaining in OECD countries.[2] Enterprises violate the Guidelines if they or businesses in their supply chain interfere with workers' decision about representation. This update has the potential to restore workers' confidence in building trade unions.

The provision for "highest possible wages and working conditions" (V.4) can now be applied to both developed and developing markets where an enterprise operates. This can facilitate higher wages and better conditions throughout an enterprise's supply chain, at home and abroad.

Updated provisions on workplace health and safety (V.1f and V.4) mean an enterprise will be expected to provide (not just promote) the highest standards for safe and healthy workplaces throughout their operations.

And finally, meaningful due diligence obligations are specifically applied to the employment and industrial relations chapter. This is an important update that can cover even the most fragmented and informal working arrangements. The update aligns with previous OECD due diligence recommendations that prioritise trade unions for meaningful due diligence.

## 2. What kinds of actions or statements would "interfere with workers' choice to establish or join a trade union"?

Several examples of enterprise conduct routinely observed by trade unions would interfere with workers' choice, such as:

- Telling workers that they are a "team" or "family" and do not need representation or collective bargaining agreements.
- Disparaging the trade union seeking to represent workers for collective bargaining.
- Making any statement or taking any action that would lead a worker to think their work and income would change if they formed a trade union.
- Creating a perception that the OECD Guidelines do not apply to the enterprise, so workers would not gain anything seeking to implement them.
- Using judicial appeals to deny or delay workers' choice of a representative.[3]
- Relocating or sudden conversions of work to digital technology after workers demonstrate their choice for a representative.

## 3. Does an enterprise need to respect workers' rights to choose a representative for collective bargaining when it is not the employer?

Yes. Removing the condition of employment means the updated Guidelines expect all enterprises to promote collective bargaining in their value chains, even if the workers are employed by a subsidiary, subcontract, or other type of business. When the enterprise employs workers, it must collectively bargain with the workers' chosen representative. When the enterprise is not the employer but is connected to another business that is the employer, it should use its leverage, such as a contract, capital or debt covenants, to require its business relationship to bargain with the workers' chosen representative.

## RESETTING THE EMPLOYMENT AND INDUSTRIAL RELATIONS STANDARDS IN THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES ON RESPONSIBLE BUSINESS CONDUCT

### **4. Can a parent company use a subsidiary operation to relieve the parent's Guidelines obligations?**

No. The updated Guidelines apply to all workers, especially those within a company group. According to Chapter I.4, "The Guidelines are addressed to all the entities within a multinational enterprise (parent companies and/or local entities. According to the actual distribution of responsibilities among them, the different entities are expected to co-operate and to assist one another to facilitate observance of the Guidelines." Company groups need to take the same approach to the Guidelines, especially on employment and industrial relations issues.

### **5. Does the Employment and Industrial Relations Guidelines apply to work performed on a digital platform?**

Yes. Digital platform enterprises need to respect workers' right to choose a representative and collectively bargain with that representative, regardless of a workers' employment status in any jurisdiction.

### **6. Can an enterprise "avoid interfering in workers' choice to establish or join a trade union" if it hires a third party to communicate with workers' about their choice?**

No. Enterprises in some jurisdictions hire a third-party consultant to engage workers about the company's preference to remain union free. Hiring a consultant (which may itself be a multinational enterprise subject to the Guidelines) to engage workers about their right to choose representation is always interfering in workers' choice.

### **7. What types of contractual clauses would be considered effective implementation of Chapter V updates?**

Applications for the 2023 Guidelines Employment and Industrial Relations Chapter are available.

#### ***Contract provisions for an enterprise***

Enterprises can agree to provisions that demonstrates observance of the updated Guidelines into framework agreements with a national or global trade union, in agreements with works' councils, or as a provision appearing in a collective bargaining agreement.

#### ***Contract provisions for businesses in the enterprise's supply chain***

Enterprises can introduce a requirement for subcontracted businesses to guarantee compliance with Chapter V.

#### ***Conditions for investment mandates and financial transactions***

Investors and other financial service providers can secure commitments from investees and borrowers in the instruments used in their financial transactions. Investee enterprises can be asked to provide guarantees of Guidelines observance. For example, investees can be asked to guarantee strict adherence to Guidelines on employment and industrial relations to minimise the risk of a labour dispute disrupting the operations and maximise returns on investment. Similar examples are possible in lending and other financial transactions.

## RESETTING THE EMPLOYMENT AND INDUSTRIAL RELATIONS STANDARDS IN THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES ON RESPONSIBLE BUSINESS CONDUCT

### *Conditions for government investment, trade, procurement and contracts*

Governments are also able to secure commitments from enterprises when it forms business relationships through investments, trade agreements, and procurement activities. Governments can make the Guidelines part of eligibility criteria to protect the public interest. A government contracted Enterprise can provide evidence of a commitment to workers that it will not interfere in workers' choice to establish or join a trade union. Before executing the contract, the Government contracting authority can require evidence of Guidelines observance, in which the enterprise demonstrates it has an agreement with the workers' chosen trade union to provide the highest standards of safety and health, and wages benefits and conditions of work that are consistent with the Enterprise's global operations and are at least adequate to satisfy the basic needs of workers and their families.

### **Conclusion**

The updated Guidelines provide new support for workers' rights to form unions and bargain collectively. If implemented in the supply chain by enterprises and reinforced by government and investor activities, the updated Guidelines offer a course correction leading to positive industrial relations.

Change is hard and takes time. The OECD National Contact Points will be asked to do more to educate enterprises on how to implement Chapter V and be more demanding of enterprises in contributing to remediation of Chapter V issues. Anything less and the Guidelines will continue to be good intentions without meaningful impact.

### **References**

[1] C87 The Freedom of Association and Protection of the Right to Organise Convention, 1948. C98 Right to Organise and Collective Bargaining Convention, 1949  
[https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:C087](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C087)  
[https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:C098](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C098).

[2] TUAC 2021 [Briefing #1, Implementing the OECD Guidelines for Constructive Industrial Relations.](#)

[3] See [Turkish Metal Workers Union, Birlesik Metal IS and Systemair AB. Sweden NCP 2021-2022.](#)



# THREE KEYS THE EU CSDDD CAN TAKE FROM THE REVISED OECD GUIDELINES TO UNLOCK THE POTENTIAL OF EFFECTIVE DUE DILIGENCE LEGISLATION



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Deadlock on several key issues appears to be on the horizon in the tripartite negotiations, known as 'trialogues', currently being undertaken by the European Commission, Council, and Parliament to come to an agreement on a Corporate Sustainability Due Diligence Directive (CSDDD). A priority of many EU policymakers, businesses, and civil society has been to achieve impactful and workable due diligence while avoiding a proliferation of conflicting expectations for enterprises. The key to unlocking the potential of due diligence legislation in Europe, and avoiding that due diligence becomes a tick-the-box exercise, is ensuring coherence between existing authoritative international norms on due diligence and the proposed CSDDD.

The OECD Guidelines for Multinational Enterprises on Responsible Business Conduct ('the Guidelines'), which are, along with the UN Guiding Principles on Business and Human Rights (UNGPs), the leading international norm on due diligence, have recently been updated following a year-long, multi-stakeholder process. The process that was followed and the fact that the updated Guidelines were unanimously endorsed by the OECD Council on 8 June 2023, give the updated Guidelines a high degree of legitimacy and authoritativeness. As OECD Watch, and more recently Shift, have stated, it is crucial that the proposed CSDDD be aligned with the updated OECD Guidelines in order to avoid creating a double standard and sending mixed messages to business and stakeholders.

## THREE KEYS THE EU CSDDD CAN TAKE FROM THE REVISED OECD GUIDELINES TO UNLOCK THE POTENTIAL OF EFFECTIVE DUE DILIGENCE LEGISLATION

If the CSDDD is to be effective at achieving its objective of addressing the harmful social and environmental impacts of business, European lawmakers would be wise to follow the updated OECD Guidelines, especially when it comes to the dynamic and multi-directional nature of due diligence, in which the obligation to seek to prevent harm flows both upstream as well as downstream from the enterprise. The updated OECD Guidelines expect companies to carry out due diligence to seek to prevent harm throughout the full value chain of the goods and services they provide. This includes harms found “upstream” from the company, such as at a mine or factory supplying the company, as well as “downstream” harms committed by “entities that receive, license, buy or use products or services [including financial services] from the company”. Adverse impacts from foreseeable misuse are included in this definition. In addition to these business to business relationships, the Guidelines also make clear that companies can contribute to, and should thus seek to prevent, adverse impacts caused by natural persons such as individual users and consumers.

In this regard, the updated OECD Guidelines provide three keys that EU lawmakers and negotiations can and should use to unlock the potential of the CSDDD:

1. Companies must be obligated to address **impacts that are downstream in their value chains**, and a little **downstream due diligence** goes a long way to prevent harm.
  2. Companies must be obligated to avoid contributing to (sometimes structural) harms in their supply chains through irresponsible **purchasing practices**.
  3. Multi-stakeholder initiatives (MSIs) and **industry auditing/certification schemes cannot be taken as substitute or a proxy** for a company’s own actions to address risks and impacts.
- Each of these three keys is elaborated on below.

### **A little downstream due diligence goes a long way (and is not hard to do)**

As SOMO, OECD Watch, and others recently highlighted in our paper Setting the record straight, the updated OECD Guidelines expect companies to take a risk-based approach to identifying and addressing risks throughout their business operations. This means that companies should focus where the risks are greatest, regardless of whether this is “upstream” (i.e. with suppliers) or “downstream” (i.e. with buyers) in their value chain. As explained by SOMO, OECD Watch and others in our recent paper A little downstream goes a long way, obligating companies to take account of downstream impacts makes enormous sense because of how severe downstream harms can be and how easy they are to prevent with a little downstream due diligence. OECD Watch’s case database contains a plethora of examples of business practices causing severe, yet easily preventable, downstream harm include the financing and provision of surveillance technology to authoritative regimes that use it to identify and detain political opponents, and the manufacture and supply of dangerous chemicals used in agriculture that poison the land, water, and people.

The Guidelines (Commentary on Chapter II, para 17) explicitly refer to downstream business relationships such as sub-contractors, franchisees, investee companies, clients, and joint venture partners as being types of relationships companies are expected to review prior to a sale, loan, or commencement of a business venture, in order to ascertain what the prospective business partner intends to do with the company’s product or service. Companies providing these products or services have a high degree of leverage and influence at this stage, as they can simply refuse to provide the product or service if there is a risk it may be used to commit harm. The same concepts that make due diligence feasible in an upstream context – including focusing on the most severe risks and on how a company’s own activities can heighten or reduce risks across value chains – also make it feasible in a downstream context. Companies across a diverse range of sectors, including the financial sector, have already been putting this risk-based approach into practice. Downstream due diligence is thus both immensely impactful and extremely practicable, making it a must if European due diligence legislation is to be effective.

## **THREE KEYS THE EU CSDDD CAN TAKE FROM THE REVISED OECD GUIDELINES TO UNLOCK THE POTENTIAL OF EFFECTIVE DUE DILIGENCE LEGISLATION**

### **Irresponsible purchasing practices can contribute to structural harms upstream in value chains**

Some companies, and sometimes entire industries, employ a business model that relies on aggressive and irresponsible purchasing practices that fuel structural human rights abuses at factories upstream in the value chain. Through practices such as insisting on unrealistic delivery times, placing late order confirmations, demanding low prices and post-hoc discounts, and insisting unfair payment terms, companies can contribute to pushing suppliers into a range of human rights and labour abuses, such as paying poverty wages, wage withholding and theft, overtime, unsafe factories, precarious contracts, and anti-union activity. As SOMO and many others have highlighted, the fast fashion industry has been notoriously characterised by these practices and impacts.

As is made clear in the OECD Due Diligence Guidance for Responsible Business Conduct, which provides detail on how to interpret and implement due diligence as conceived in the updated OECD Guidelines, companies are expected to identify and proactively address adverse impacts, including structural and root causes of impacts. The OECD Guidance explicitly identifies brands' purchasing practices such as short lead times, precarious contracts, and aggressively low pricing as the driver of some risks and adverse impacts in supply chains. The OECD Guidance flags purchasing practices as a "risk factor" that companies are expected to identify and prevent. In some instances, this may actually require the rethinking of an entire value chain or a whole business model, such as that of fast fashion, that is incompatible with due diligence.

Fortunately, the Guidelines provide European businesses and lawmakers with practical suggestions for avoiding upstream harm related to irresponsible purchasing practices. Companies should explore ways to simplify supply chains and strengthen a limited number of small supply chain relationships to minimize risk and to cease harmful purchasing practices. As part of legislating effective upstream due diligence, European lawmakers should prohibit unfair trading practices, notably on issues such as payment terms, unilateral discounts, and creating economic dependency.

### **MSIs and industry schemes: A piece, not a proxy**

Many companies rely heavily on the auditing and certification industry to identify and address their social and environmental risks. Yet, the standards and processes of auditor and certification companies frequently fail to live up to international standards. In particular, adverse impacts related to power relations (e.g., gender-based violence, the right to join or form a union, forced labour) are rarely detected, as these are impacts where remedial action is complex and expensive. Most problematically, social audits frequently neglect the role of the company that hired it in contributing to such risks and impacts. While certain industry schemes, MSIs, and third-party auditing can help companies to implement aspects of due diligence, SOMO has shown that these measures are insufficient when it comes to discharging an adequate and comprehensive due diligence process that is capable of consistently and effectively identifying risks and preventing harm. Given the notorious under-reporting, under-detecting and under-remediating of human rights risks and impacts, social audits and certification regimes are not suited to be the exclusive basis of (parts of) the due diligence strategy.

## **THREE KEYS THE EU CSDDD CAN TAKE FROM THE REVISED OECD GUIDELINES TO UNLOCK THE POTENTIAL OF EFFECTIVE DUE DILIGENCE LEGISLATION**

Indeed, the updated Guidelines suggest that while participation in industry schemes and MSIs can be one of the many tools companies can use in their due diligence, they should not be used as proxies for due diligence nor should they play a dominant role in the due diligence process. The Guidelines (Commentary on Chapter II, para 12) also clearly state that, “[a]lthough enterprises can collaborate at an industry or multistakeholder level, they remain individually responsible for ensuring that their due diligence is carried out effectively.” The Guidelines do not require companies to use audits, certification, or schemes, and companies remain responsible for addressing risks and impacts regardless of whether or not they use such tools. When companies do choose to use these tools, they should be complemented with the company’s own risk identification actions, such as interviews, workshops, grievance mechanisms, and engagement with civil society organizations and other stakeholders, including affected communities. Audit and certification information should be seen merely as one source of information, and should be integrated and triangulated with other assessments to ensure that companies grasp the actual and most salient impacts through their due diligence processes. Audits and certification, even if carried out through multi-stakeholder initiatives, should not be considered sufficient proof of human rights due diligence.

### **Three golden keys to unlock the potential of due diligence legislation**

Due diligence legislation such as the European CSDDD has enormous potential to improve the lives of workers and communities and prevent companies from harming the environment and human rights. However, there is also a serious risk that the legislation will become a paper tiger that results in ticking boxes rather than respecting rights. The updated OECD Guidelines provide EU policymakers with three golden keys to unlock the potential of the CSDDD: mandate downstream due diligence, obligate companies to avoid harm through irresponsible purchasing practices, and ensure that MSIs and industry schemes involving certification and auditing do not become a proxy for due diligence.



# MEANINGFUL STAKEHOLDER ENGAGEMENT 2.0.?: TRACING DEVELOPMENTS IN THE REVISED 2023 OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES



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## Introduction

12 years since the entry into force of the 2011 OECD Guidelines for Multinational Enterprises, (the 2011 Guidelines), a much-anticipated update has finally been implemented. At the 2023 meeting of the OECD council at ministerial level, the new OECD Guidelines for Multinational Enterprises on Responsible Business Conduct, (the 2023 Guidelines), were officially adopted. This significant development comes at a watershed moment when numerous comparable developments are concurrently taking place in the Business and Human Rights (BHR) sphere, including: progress towards an EU wide Corporate Sustainability Due Diligence Directive (CSDDD), as well as continuation of the drafting process of a UN treaty on BHR within the aegis of the Open-ended Intergovernmental Group on Business and Human Rights.

This contribution critically analyzes the 2023 Guidelines in order to unearth whether there have been any significant changes to the provisions on meaningful stakeholder engagement, especially as this relates to vulnerable stakeholders and those in marginalized positions.

## Something Old..

The 2011 Guidelines had a number of provisions on stakeholder engagement. To begin with, in the General Policies section, guideline 14 (sub-section A, page 20) provided that companies must '[e]ngage with relevant stakeholders in order to provide meaningful opportunities for their views to be taken into account in relation to planning and decision making for projects or other activities that may significantly impact local communities.' Commentary 25 elaborated that such engagement should involve interactive processes such as meetings, hearings or consultation proceedings and should be characterised by two-way communication in good faith.

While not directly dealing with the question of meaningful stakeholder engagement, section III on Disclosure in commentary 35 laid a useful foundation for such engagement by requiring companies to provide information, including to 'communities that do not have access to printed media (for example, poorer communities that are directly affected by the enterprise's activities).' Section IV on Human Rights did not have any explicit reference to meaningful engagement with stakeholders. However, commentary 46 stressed that operational level grievance mechanisms can be a useful mechanism for those impacted by the enterprises' activities and can be an effective means for remediation where they, inter alia, 'are based on dialogue and engagement with a view to seeking agreed solutions.' In section VI on the environment, guideline 2 (b) (page 42) recommended that the enterprise should 'engage in adequate and timely communication and consultation with the communities directly affected by the environmental, health and safety policies of the enterprise and by their implementation.'

## MEANINGFUL STAKEHOLDER ENGAGEMENT 2.0.?: TRACING DEVELOPMENTS IN THE REVISED 2023 OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES

The 2011 Guidelines did not make any references to engagement with vulnerable or marginalized stakeholders or require companies to put in place any special measures in this regard.

### Something New..

The 2023 Guidelines introduced a significant number of updates on how companies should engage with stakeholders (or their legitimate representatives), especially those in positions of vulnerability and marginalization. One key driver for these updates was to ensure that the 2023 Guidelines were more in line with both the OECD Due Diligence Guidance as well as the various OECD Sectoral Guidances, which contain considerable guidance to companies on how to meaningfully engage with stakeholders.

As regards the updates to the 2023 Guidelines, these will be highlighted in turn. The General Policies section provides in guideline 15 (sub-section A, page 15) that enterprises must '[e]ngage meaningfully with relevant stakeholders or their legitimate representatives as part of carrying out due diligence and in order to provide opportunities for their views to be taken into account with respect to activities that may significantly impact them related to matters covered by the Guidelines.' This new formulation is more in line with the one spelled out in principle 18 of the United Nations Guiding Principles on BHR (the UNGPs), and notably introduces the idea of legitimate representatives. Commentary 14 builds on this recommendation by requiring companies to create a safe space where concerns about adverse impacts can be safely expressed, and where individuals or groups who share concerns will not face reprisals. Building on commentary 25 of the 2011 Guidelines, commentary 28 of the 2023 Guidelines stresses that stakeholder engagement is a key component of the due diligence process, and that in some cases it may even be a right in and of itself. This is a much stronger formulation than the one in the 2011 Guidelines, and elevates meaningful engagement to a right (in some cases), rather than an act of benevolence done by the company in disregard of the autonomy and agency of rightsholders. In addition, commentary 28 defines relevant stakeholders or their legitimate representatives as persons or groups 'who have rights or interests related to the matters covered by the Guidelines that are or could be affected by adverse impacts associated with the enterprise's operations, products or services.' Given the realities of the difficulties inherent in stakeholder engagement where companies may have numerous diverse stakeholders, commentary 28 further specifies that companies 'can prioritise the most severely impacted or potentially impacted stakeholders for engagement' with the degree of impact on stakeholders informing the degree of engagement. A final noteworthy improvement introduced by this commentary is the elaboration of what companies can do to make stakeholder engagement meaningful and effective. This includes ensuring that engagement is timely, accessible, appropriate, and safe for stakeholders, and identifying and removing potential barriers to engaging with stakeholders in positions of vulnerability and marginalization.

Commentary 32 recommends that companies communicate responsible business conduct information '...which may be material to an investor's decision making and which also may be relevant for a broader set of stakeholders...' This is an important and necessary precursor to meaningful engagement, that allows stakeholders to be able to participate in these processes on a more informed basis, thus helping to address the power imbalances (informational asymmetry) between companies and stakeholders. Furthermore, unlike the 2011 Guidelines, and as a result of legislative developments in countries such as France and Germany, commentary 32 of the 2023 Guidelines specifically references the fact that '[s]everal jurisdictions allow or require the consideration of stakeholder's interests.' As per commentary 39 such information should be 'easily accessible, user friendly, timely, accurate, clear and complete.'

## MEANINGFUL STAKEHOLDER ENGAGEMENT 2.0.?: TRACING DEVELOPMENTS IN THE REVISED 2023 OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES

Commentary 45 requires the enterprise to pay special attention to certain categories of persons ‘for example human rights defenders, who may be at heightened risk due to marginalisation, vulnerability or other circumstances, individually or as members of certain groups or populations, including Indigenous Peoples.’ Commentary 50 goes on to recommend that companies should consider distinct and intersecting risks when carrying out due diligence, especially as this relates to ‘individual characteristics or to vulnerable or marginalised groups’, and stresses that ‘[m]eaningful stakeholder engagement is important in this regard.’ Commentary 50 also urges enterprises to dialogue and engage with a view to seeking agreed upon solutions within the context of remediation for adverse impacts.

In section VI on the Environment, guideline 1 (d) requires enterprises to provide stakeholders with ‘adequate, measurable, verifiable (where applicable) and timely information’ and guideline 2 elaborates upon the need for meaningful engagement with relevant stakeholders. Commentary 72 subsequently stresses that such meaningful stakeholder engagement and communication with stakeholders such as ‘employees, customers, investors, suppliers, contractors, local communities, individuals or groups in situations of vulnerability or marginalisation, persons possessing special rights or legitimate tenure rights, and Indigenous Peoples, and with the public-at-large’ is ‘a component of due diligence and may also be required by law.’

### The 2023 OECD Guidelines in the Shadow of the Draft EU CSDDD

As the above analysis shows, the 2023 Guidelines have significantly updated the provisions on stakeholder engagement, including by: introducing the idea of marginalized and vulnerable stakeholders; reiterating the need to avoid reprisals and to remove barriers to engagement; and setting out the criteria necessary to make such engagement meaningful and effective.

Some of these updates share similarities with a number of proposals in the various versions of the draft EU CSDDD, as captured primarily in the Lara Wolter’s draft and the Parliament draft. Whereas the Commission draft made no reference to the idea of vulnerable or marginalized stakeholders, the Parliament draft contains a number of proposals similar to the updates in the 2023 Guidelines. For instance, amendment 122 created a new Article 3 (1) (na) recognizing vulnerable rightsholders. Additionally, amendment 206 introduced a new Article 8 (d) titled ‘carrying out meaningful engagement with affected stakeholders’ outlining a number of requirements on how such engagement should be carried out. It should be ‘comprehensive, structural, effective, timely and culturally and gender sensitive.’ In addition, legitimate representatives of affected rightsholders should be involved where it is not possible to engage the latter. Notably, in order to redress the information asymmetry that is emblematic of the relationship between companies and stakeholders, covered companies are required to provide ‘comprehensive, targeted and relevant information to affected stakeholders.’ Companies are also required to identify and address barriers to engagement and ensure that participants are not subject to retaliation or retribution. The needs of vulnerable stakeholders must be given particular attention. In contrast, the council draft disregarded a number of important proposals in the Lara Wolter’s draft such as, inter alia, the concept of vulnerable stakeholders introduced in Amendment 79; the explanation of meaningful engagement in Amendment 80. On balance, the EU Parliament’s draft provides for a more robust meaningful engagement obligation than the Commission draft and the Council draft. However, any enthusiasm in this regard must necessarily be tempered as we await the final version of the directive that will be adopted at the completion of the trilogue process.

## **MEANINGFUL STAKEHOLDER ENGAGEMENT 2.0.?: TRACING DEVELOPMENTS IN THE REVISED 2023 OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES**

### **Conclusion**

The battle to enhance corporate accountability for violation of human rights and the environment is being fought on multiple fronts. Developments in both soft-law regimes such as the OECD framework as well as hard-law regimes such as the EU CSDDD and the UN draft BHR treaty are cause for cautious optimism. Meaningful engagement is a crucial component of any attempts to reduce the corporate accountability gap. The 2023 OECD guidelines have laid the seeds for a more robust meaningful engagement process by companies. Only time will tell how these seeds will grow.



# THE OECD GUIDELINES FOR MULTINATIONALS AND THE ESCAZÚ AGREEMENT: ENHANCING PROTECTION TO HUMAN RIGHTS DEFENDERS



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The OECD Guidelines for Multinationals have just been revised and the new text has been received with curiosity and expectation. Curiosity in view of the possibilities that the text presents to promote advancements around protection of rights; and expectation in view of the potential impact of guidelines that aim to raise the standard of businesses' conduct.

Twelve years on from the last revision of the text, the deepening of some challenges, changes in society and accumulated knowledge about ways of dealing with the difficulties faced by people and businesses have led to an urgent need for some changes. Based on a stocktaking exercise, the new features of this version are promising: it now addresses the fight against climate change and creates expectations that technology companies will also adopt due diligence processes, among other changes. From the point of view of those living in Latin America, there are two topics that have been included in the guidelines that are extremely relevant to the region: the recommendations for the protection of human rights defenders and for improving the transparency of responsible behaviour adopted by companies.

Considering the situation in Latin America, this contribution aims to point out relevant additions to the text of the Updated Guidelines (2023 OECD Guidelines) about the protection of human rights defenders and about disclosure, and how they relate to the regional agreement that tackles this very same issue, mentioned below. Latin America is the most dangerous region in the world for human rights defenders (including environmental defenders), accounting for 42% of cases worldwide. In 2021, there were 157 killings of environmental defenders in the region, out of a total of 200 worldwide. Brazil, Colombia and Mexico lead the table, with 113 deaths. The sectors most involved in these cases of violence are mining, extractivism and agriculture and for this reason, during the United Nations Conference on Sustainable Development (Rio+20), held in 2012 in Brazil, countries of the region committed themselves to building an international treaty that would promote the rights of access to information, participation and justice in environmental matters, with the aim of guaranteeing greater transparency of environmental information, access to justice mechanisms, greater social participation in the construction of policies and protection for environmental defenders. This is the history of the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean, better known as the Escazú Agreement, adopted on 4 March 2018, so far signed by 25 and ratified by 15 States. The Agreement proposes a new development model by, among other things, including 'those that have traditionally been underrepresented, excluded or marginalized and give a voice to the voiceless, leaving no one behind'. This contribution aims to call attention to the similitudes between the two documents, claiming that they are well harmonized. All information relates to provisions that were included on the OECD Guidelines in its updated version.

## **THE OECD GUIDELINES FOR MULTINATIONALS AND THE ESCAZÚ AGREEMENT: ENHANCING PROTECTION TO HUMAN RIGHTS DEFENDERS**

In response to the danger that the region represents to human rights and environmental defenders, and recognizing the special vulnerable situation of human rights defenders, the Escazú Agreement establishes that States must ensure a safe and enabling environment where these individuals can operate free from threats, restrictions and insecurity. This follows States duty to protect rights. In the case of human rights defenders, they are being chased and threatened also by non-State actors, and the State's duty to protect human rights means it must adopt any measures adequate to prevent other people from harming rights. It is a direct command for States to regulate non-State agents' conducts. The 2023 OECD Guidelines likewise recognizes, on Chapter IV, that States have the duty to protect human rights. And it also adds that businesses can have an impact on virtually the entire spectrum of internationally recognised human rights and, depending on circumstances, they need to consider additional standards as, for instance, the ones applicable to human rights defenders at heightened risk due to marginalisation, vulnerability or other circumstances. Both texts, therefore, reinforce State's duty to protect human rights defenders.

The Escazú Agreement also provides that States will take appropriate and effective measures to recognise, protect and promote all rights of human rights defenders in environmental matters, including their right to life, personal integrity, freedom of opinion and expression, right to peaceful assembly and association and right to freedom of movement, among others. The 2023 OECD Guidelines is in line with the recognition that all rights might be adversely affected by businesses activities, in a true example of conversion of regulation.

In the same way, as the Escazú Agreement provides that States must take appropriate and effective measures to protect and promote human rights defenders' ability to exercise access rights, the 2023 OECD Guidelines addresses this issue on chapter IV.6. Commentary 51 of this article establishes that when businesses provide for operational-level grievance mechanisms, they will not be used to preclude access to judicial or other non-judicial grievance mechanisms, in other words, the 2023 OECD Guidelines offer a concrete example of what conduct must not be taken by businesses, otherwise the ability to human rights defenders to access the right to justice would be impaired. It does feels, though, like such a provision could be inserted in the list of expected conducts from enterprises in the 2023 OECD Guideline, to make it more robust and to reinforce the behaviour expected of them. On Chapter IV.45 there is extensive language indicating that enterprises should respect the human rights of individuals belonging to specific groups or populations that require particular attention, where they may have adverse human rights impacts on them. It indicates that indigenous people and human rights defenders could be among these individuals and in order to clarify rights to be protected, the text mentions the UN Declaration on the Rights of Indigenous Peoples but does not mention the UN Declaration on Human Rights Defenders. This is a missed opportunity to encompass the specific rights that human rights defenders are entitled to. The mention to the UN Declaration of Human Rights Defenders would be relevant as the 2023 OECD Guidelines does not provide for a rights-language, instead, it does provide for the duties of corporations. The commentary (IV.45) that clarifies what conducts must not be taken by corporations would be more robust if it would refer to the corresponding rights at the UN Declaration on Human Rights Defenders.

Besides that, the General Policies (II.A.9) of the 2023 OECD Guidelines condemn corporate acts of reprisals against any persons or groups that may seek to or do investigate or raise concerns regarding actual or potential adverse impacts associated with the enterprise's operations, products or services. The text will be strengthened if it would expressly mention human rights defenders.

## THE OECD GUIDELINES FOR MULTINATIONALS AND THE ESCAZÚ AGREEMENT: ENHANCING PROTECTION TO HUMAN RIGHTS DEFENDERS

There is one provision in the Escazú Agreement that seems to not resonate with the same strength with the OECD Guidelines. Under the Escazú Agreement States need to take appropriate, effective and timely measures to prevent, investigate and punish attacks, threats or intimidation that environmental human rights defenders may suffer in the exercise of their rights. Such a strong language is not used in the OECD Guidelines. Still, Chapter IV.1 says that businesses should avoid infringing on human rights of others and address their adverse human rights impacts and this can be interpreted as the same protection provided by the Escazú Agreement.

The Agreement proposes that when implementing its provisions, each State should be guided also by the principle of transparency. In addition to appearing as a principle, transparency is mentioned in the Agreement to establish that a transparent procedure guarantees the right of access to justice and that an independent oversight mechanism should be put in place by States to promote transparency in access to environmental information. The fact that these are the only mentions to transparency should not obscure how relevant the principle is for the Agreement. In fact, as the Escazú Agreement does promote the rights of human rights defenders, it also shows concern with the feasibility of their work. As much of the information needed to adequately guarantee rights is in the hands of businesses, it is paramount to provide for their responsibility to hand relevant information, qualified by requirements that allow for any stakeholder to fully understand the information handed. It means that the Agreement is very much concerned with access to environmental information and the principle of maximum disclosure guides public access to it (art.5.1). Transparency is also tackled when the Agreement provides for the facilitation of access for groups in vulnerable situations (art.5.3). These provisions meet the first concern of the 2023 OECD Guidelines: that the disclosure policies need to consider the views and informational requirements of relevant stakeholders (III.1). Regarding the substance of the information, the Escazú Agreement states that competent authorities must generate, publicize and disseminate environmental information relevant to their functions, meaning that the information needs to be pertinent to the context of the organism delivering it (art.6.1). Likewise, the 2023 OECD Guidelines mention that disclosure policies must include sustainability-related information (III.2.b). The 2023 OECD Guidelines also reinforce the Escazú Agreement when it declares that businesses need to provide relevant stakeholders with adequate, measurable, verifiable (where applicable) and timely information on environmental impacts associated with their operations, products and services (VI.1.d) matching the Agreement provision that information must be disclosed by in a systematic, proactive, timely, regular, accessible and comprehensible manner (art.6.1).

The approximation of the two texts seems to be completed with the language, in the Agreement, that States need to 'take the necessary measures, through legal or administrative frameworks, among others, to promote access to environmental information in the possession of private entities, in particular information on their operations and the possible risks and effects on human health and the environment' (art.6.12). It does relate to the concern raised in the 2023 OECD Guidelines regarding environmental information that must be disclosed by businesses.

Within the possibilities that a text like the one produced by the OECD presents, it seems clear that the update concerning mentions of environmental defenders and transparency in the publication of information should be welcomed. The 2023 OECD Guidelines and the Escazú Agreement have similar and complementary provisions that are very relevant to strengthening the rights of human rights defenders and to facilitate their activist work. It is hoped that these texts can be combined to demand the rights they protect, representing progress that can be measured beyond the language they use, and that represent real and tangible positive impacts.

# PUTTING COMMITMENT TO ACTION FOR REAL CHANGES ON THE GROUND: IMPLEMENTING THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES ON RESPONSIBLE BUSINESS CONDUCT RELATING TO INDIGENOUS PEOPLES



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## Introduction

Indigenous Peoples across the globe have raised numerous complaints on the systemic violations of our rights by business operations of Multinational Enterprises (MNE) especially to our lands, territories and resources, and to the proper conduct of free prior and informed consent processes (FPIC). This outright disregard for our collective rights as Indigenous Peoples has resulted in massive displacements, forced evictions, loss of livelihoods, destruction of food systems, sacred sites and cultural heritage, pollution of our water bodies, soil and air, among other things.

In spite of the adverse and disproportionate impacts of MNE operations in Indigenous territories, the OECD Guidelines for Multinational Enterprises (the Guidelines) developed in 1976 and regularly updated, made minimal reference to Indigenous Peoples prior to this recent update in 2023. This huge and glaring gap pushed many civil society and Indigenous Peoples' organizations to demand the inclusion of Indigenous Peoples in the consultation process to update the OECD Guidelines. They also demanded the inclusion of human rights due diligence actions, improved measures for environment protection, and for increased transparency and accountability, as well as an explicit reference to respect for and protection of the individual and collective rights of Indigenous Peoples as part of the updated Guidelines. These demands resulted in improvements to the Guidelines, albeit with remaining serious gaps in ensuring robust and accountable business conduct of MNEs. This blog post will delve into the improvements and challenges, as well as critical actions needed to implement the updated OECD Guidelines in a way that respects Indigenous Peoples' rights and wellbeing.



## **PUTTING COMMITMENT TO ACTION FOR REAL CHANGES ON THE GROUND: IMPLEMENTING THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES ON RESPONSIBLE BUSINESS CONDUCT RELATING TO INDIGENOUS PEOPLES**

### **Acknowledging Progress**

It is important to commend the OECD for taking a step in the right direction. The updated Guidelines now contain direct references to the rights of Indigenous Peoples including for their free prior and informed consent (FPIC), drawing explicitly from the 2007 UN Declaration on the Rights of Indigenous Peoples (UNDRIP) and stating that MNEs should pay “special attention” to particular harms on Indigenous Peoples. This recognition is long overdue, considering the disproportionate and adverse impacts that MNE operations often have on Indigenous communities. Further, this inclusion is significant as it seeks to align the Guidelines with internationally accepted, minimum standards for Indigenous Peoples’ rights as provided by the UNDRIP. This is in fact fully acknowledged in the OECD Guide for National Contact Points on the Rights of Indigenous Peoples when handling Specific Cases issued in 2022 which mentions that:

“The Declaration is the most comprehensive instrument detailing the rights of indigenous peoples in international law and policy, containing minimum standards for the recognition, protection and promotion of these rights. ...[T]he Declaration regularly guides States and indigenous peoples in developing law and policy that have an impact on indigenous peoples, including in devising means to best address the claims made by indigenous peoples.”

### **The Omission of Collective Rights**

However, our deep regret lies in the seemingly contradictory omission of specific references to Indigenous Peoples’ collective rights, particularly the right to self-determination; to land, territories and resources and to our cultural integrity. These collective rights are internationally guaranteed as affirmed by the UNDRIP and others as vital for the survival and wellbeing of Indigenous Peoples as distinct, self-determining peoples and communities.

The concern is that the Guidelines appear to interpret Indigenous Peoples’ rights as vested solely in individuals or those at heightened risk due to marginalization. This interpretation would contradict established international law and jurisprudence, which recognize Indigenous Peoples as collective subjects of international law, and our rights are not mere aggregations of individual rights.[1].

### **UNDRIP as the Cornerstone**

It’s crucial to highlight that UNDRIP, now referenced in Chapter IV (Human Rights) of the Guidelines, sets the minimum standards for Indigenous Peoples’ survival, dignity, and well-being. It emphasizes that collective rights are indispensable to Indigenous Peoples’ existence and development. UN treaty bodies and Special Procedures consistently recognize UNDRIP as a framework to interpret state obligations and collective rights as do a growing number of national jurisdictions. For instance, citing UNDRIP and in the context of soy plantations, the UN Human Rights Committee highlighted in 2021 that “it is of fundamental importance that measures that compromise or interfere with the economic activities of cultural value to an indigenous community have been subjected to [FPIC]...”[2]. Likewise, the UN Committee on the Elimination of Racial Discrimination similarly ruled in a case concerning mining operations, explaining that “disregard for indigenous territorial rights” and “for their right to offer free, prior and informed consent ... constitutes a form of discrimination...”[3]. The Australian Federal Court has also revoked offshore oil permits for failure to secure Indigenous Peoples’ effective participation and for disregarding rights over those areas, including in relation to UNDRIP.[4].

## **PUTTING COMMITMENT TO ACTION FOR REAL CHANGES ON THE GROUND: IMPLEMENTING THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES ON RESPONSIBLE BUSINESS CONDUCT RELATING TO INDIGENOUS PEOPLES**

### **Free, Prior, and Informed Consent (FPIC)**

Another pivotal aspect of Indigenous Peoples' rights is FPIC, derived from the prohibition of racial discrimination and the right to self-determination of Indigenous Peoples, including as it relates to ownership, control and self-governance of our lands, territories and resources, which are often impacted by business operations.[5] The reference to FPIC in the Guidelines is certainly fundamental to respecting indigenous peoples rights but, crucially, it needs to be operationalized to generate a more responsible business conduct on the ground. This element is currently deficient.

### **Key Actions for Implementing the Updated OECD Guidelines**

#### 1 - Actions for MNEs

#### **Human Rights Due Diligence to include respect for Indigenous Peoples' Rights**

Human rights due diligence is a core element of responsible business conduct, as emphasized in the Guidelines. It requires companies to assess and address the actual and potential human rights impacts of their operations. When it comes to Indigenous Peoples, these impacts often extend beyond individual rights to encompass collective rights related to land, territories, and resources, including those that are not legally recognized by States. Failure to account for these collective rights can lead to incomplete risk assessments and the inability to prevent harm to Indigenous communities and our collective rights. It is thereby paramount for MNEs to commit to upholding the rights of indigenous peoples as outlined in UNDRIP in relation to the Guidelines.[6] In order to do this, it is necessary for MNEs to be aware of the UNDRIP, adopt specific guidelines and build their capacities, on how to engage with Indigenous Peoples in line with ensuring respect for our collective rights, including the incorporation of our perspectives into risk assessments.

#### 2 - Actions for the OECD

#### **Developing Guidelines for the conduct of FPIC**

FPIC is a cornerstone of Indigenous Peoples' rights and is closely tied to both human rights due diligence and environmental protection. The Guidelines' reference to FPIC requires further guidance on its operationalization in all stages of project development and implementation to prevent it from merely becoming a tick in the box tool. It is thereby imperative for the OECD to develop this guidance in cooperation with Indigenous Peoples as soon as possible. By doing so, OECD as a respected voice by companies will be able to set the standards with positive impacts on the ground in the operations of MNE. Our meaningful participation in developing this guidance will ensure a robust implementation of FPIC, ensuring substantive recognition and respect of Indigenous Peoples' rights, including in collective decision-making. As the UN Committee on Economic, Social and Cultural Rights has explained, FPIC "operates as a safeguard for the collective rights of Indigenous Peoples,"[7] and also requires compliance with any laws or protocols adopted by Indigenous Peoples that set out their expectations for the process to obtain FPIC and its outcomes.[8] Failure to ensure the meaningful participation of Indigenous Peoples in developing the FPIC guidance will inevitably deepen the mistrust of Indigenous Peoples towards MNEs and the OECD.

## **PUTTING COMMITMENT TO ACTION FOR REAL CHANGES ON THE GROUND: IMPLEMENTING THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES ON RESPONSIBLE BUSINESS CONDUCT RELATING TO INDIGENOUS PEOPLES**

### **The right to Participation**

In line with the commitment of OECD States to respect Indigenous Peoples' rights, including the right to participation as provided in the Guidelines, it is important for OECD itself to establish culturally appropriate mechanisms for meaningful and inclusive consultations in good faith with Indigenous Peoples' representatives regarding ensuring the proper implementation of the Guidelines affecting Indigenous Peoples. This will ensure proper guidance and understanding of the OECD on the concerns, aspirations, and perspectives of Indigenous Peoples in line with the respect of our rights and wellbeing. This participation should not be an afterthought but a fundamental aspect of responsible business conduct, including internally within the OECD and especially as it concerns National Contact Points (NCPs).

### **Environmental Protection**

The environment is intricately linked to the wellbeing of Indigenous Peoples. Many Indigenous communities depend on natural resources for their livelihoods and cultural practices. MNE often operate in or near Indigenous territories, which can result in environmental degradation and threats to Indigenous ways of life. Recognizing the environmental rights of Indigenous Peoples within expanded guidance from the OECD is essential. This recognition should encompass the right to a clean and healthy environment, as well as the right to effectively participate in decisions that affect their land and natural resources. Further, states and MNEs should ensure the security of indigenous land and environment defenders and should adopt a policy of zero tolerance on attacks and reprisals against these defenders in exercising their rights and undertaking legitimate actions.

### 3 - Actions for OECD States and their NCPs

#### **Building knowledge within NCPs**

Like MNEs, it is essential that NCPs also develop their own understanding of the UNDRIP and the right to FPIC, as well as how to effectively engage with Indigenous stakeholders. The OECD Guide for National Contact Points on the Rights of Indigenous Peoples when handling Specific Cases issued in 2022 has critical observations and findings especially in relation to the shortcomings in respecting the rights of indigenous peoples to our lands and resources, as well as on the implementation of FPIC. It is thereby necessary to further elaborate these key elements in line with the updated Guidelines.

#### **Capacity Building**

OECD governments should invest in capacity building for Indigenous communities, organizations and networks to enable us to engage effectively with MNE in using the Guidelines and relevant instruments and tools. They should also support training, education, and technical assistance that enhances our ability to participate in negotiations and decision-making processes to ensure the respect for our rights and entitlements. Capacity building should be integral to the work of all OECD States.

## **PUTTING COMMITMENT TO ACTION FOR REAL CHANGES ON THE GROUND: IMPLEMENTING THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES ON RESPONSIBLE BUSINESS CONDUCT RELATING TO INDIGENOUS PEOPLES**

### **Collaboration and Partnerships**

It would be strategic for the OECD itself to seek opportunities for collaboration with Indigenous organizations and OECD governments to co-create solutions that benefit both MNE and Indigenous communities in line with the implementation of the Guidelines that will fully respect Indigenous Peoples' rights and wellbeing. This will also lead to good practices and will contribute in the self-determined development of Indigenous Peoples as well as in responsible business conduct in relation to Indigenous Peoples.

### 4 - Positive Outcomes for implementing actions

Implementing all of the actions recommended above in line with the updated OECD Guidelines can yield several positive implications including in upholding social justice and non-discrimination for indigenous peoples. Taking concrete steps to respect Indigenous rights and wellbeing helps build trust and positive relationships with Indigenous communities. This can lead to mutually beneficial partnerships and conflict prevention. Likewise, by conducting thorough human rights due diligence and ensuring FPIC in respecting Indigenous Peoples' rights, MNE can reduce legal, reputational, and operational risks associated with their activities in Indigenous territories. It will also demonstrate a commitment to ethical and responsible business conduct, which will result to positive outcomes, as well as enhances reputation and positive image to socially conscious investors and consumers.

### **Conclusion**

The updated OECD Guidelines provide an important framework for responsible business conduct in the context of Indigenous Peoples' rights and wellbeing. However, true progress requires more than just commitments on paper; it necessitates tangible actions and meaningful engagement with Indigenous Peoples as rights holders. By implementing the recommended actions outlined above, the OECD and MNEs can make a real difference on the ground, fostering respectful relationships, and contributing to the empowerment and prosperity of Indigenous Peoples. Ultimately, the success of these efforts will be measured not only by adherence to the Guidelines but by the positive impact they create in the lives of those most affected.

### **References**

[1]. IA Court of Human Rights, Entitlement of legal entities to hold rights under the Inter-American Human Rights System, Series A No. 22 (2016), para. 75 ("international law on indigenous or tribal communities and peoples recognizes rights to the peoples as collective subjects of international law and not only as members of such communities or peoples," and, therefore, they "exercise some rights recognized by the Convention on a collective basis"). See also General comment No. 26 (2022) on Land and Economic, Social and Cultural Rights, E/C.12/GC/26, para. 16, note 29 (FPIC "operates as a safeguard for the collective rights of Indigenous Peoples..."); and para. 27 ("collective rights of access to, use of and control over lands, territories, and resources ... traditionally owned, occupied or otherwise used or acquired"); and Klemetti Käkkäläjärvi v. Finland, Communication No. 2950/2017, para. 9.6 ((observing that provisions of the ICCPR may be interpreted conjunctively with article 1 thereof and UNDRIP, and, consequently, that these rights "have a collective dimension that transcends the individual rights...").



**PUTTING COMMITMENT TO ACTION FOR REAL CHANGES ON THE GROUND: IMPLEMENTING  
THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES ON RESPONSIBLE BUSINESS  
CONDUCT RELATING TO INDIGENOUS PEOPLES**

[2]. *Campo Agua'ẽ, of the Ava Guaraní People v. Paraguay*, CCPR/C/132/D/2552/2015 (12 October 2021), para. 8.7.

[3]. *Lars-Anders Ågren et al. v. Sweden*, CERD/C/102/D/54/2013 (18 December 2020), para. 6.7.

[4]. *Santos NA Barossa Pty Ltd v Tipakalippa* [2022] FCAFC 193. See also *Clyde River (Hamlet) v. Petroleum Geo-Services* [2017] SCC 40, 70 (where the Canadian Supreme Court observed in relation to lack of consultation around the granting of oil and gas permits that a "... project authorization that breaches the constitutionally protected rights of Indigenous peoples cannot serve the public interest").

[5]. Committee on Economic, Social and Cultural rights, General comment No. 26 on Land and Economic, Social and Cultural Rights, E/C.12/GC/26 (22 December 2022), para. 11 (land is "closely linked to the right to self-determination" and "Indigenous peoples can only freely pursue their political, economic, social and cultural development and dispose of their natural wealth and resources for their own ends if they have land or territory in which they can exercise their self-determination."

[6]. See e.g., *CRC/C/CRI/CO/5-6*, 4 March 2020, para. 44(d). In its review of Costa Rica, the UN Committee on the Rights of the Child recommended that indigenous children "are included in processes to seek free, prior and informed consent ... in connection with measures affecting their lives, and [that the State] ensure that development projects, hydroelectric projects, business activities, and the implementation of legislative or administrative measures, such as the establishment of protected areas, are subject to consultations and adhere to the [UNDRIP]."

[7]. Committee on Economic, Social and Cultural rights, General comment No. 26 on Land and Economic, Social and Cultural Rights, E/C.12/GC/26, para. 16.

[8]. See e.g., *E/C.12/ARG/CO/4*, para. 21 (citing arts 1(1) and (2) and recommending that, "for the implementation of the right to be consulted and to free, prior and informed consent, the State party use the protocols drawn up and agreed upon with indigenous peoples, in order to ensure that factors specific to each people and each case are taken into account"); and *E/C.12/MEX/CO/5-6*, para. 12-3.

# MISSED OPPORTUNITIES IN THE OECD GUIDELINES TECH-RELATED UPDATES



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## Introduction

Increasing digitalisation has spawned a system-wide disruption resulting in a reorganisation of production on a global to local scale. This is evident in both traditional value chains and in newer forms of work organisation, like platform work, cloud work, microwork and other invisible, but significant, sectors. The world of Big Tech, and its value chains, has recently reached the tipping point where governments and regulators are increasingly aware of the immense power these corporations hold. There is focus on ensuring these corporations are held accountable, corporations that make up a majority of the top ten companies by market capitalisation. This has been done either through legislative instruments like the Digital Markets Act, the proposed EU Corporate Sustainability Due Diligence Directive (Directive), or even the Platform Work Directive, which requires platform companies to provide basic minimum guarantees to their workers, or through action from regulatory agencies like the US Federal Trade Commission. These measures have been a step in the right direction to ensure that corporations, especially the enormously powerful Big Tech, are responsible for their actions and impact on people, society, and the planet. In this backdrop, the 2023 targeted updates to the OECD's Guidelines for Multinational Enterprises (MNEs) on Responsible Business Conduct (Guidelines) are also significant. While these Guidelines are voluntary for corporations, they offer an opportunity for improved conduct for MNEs, and scope for redress through the National Contact Point (NCP) process.

The latest update to the Guidelines, which comes over a decade after the adoption of the 2011 version, is certainly timely. The fast paced nature of development makes it imperative that regulation and oversight mechanisms are equally swift. This becomes significant especially in the context of the technology sector, which has seen changes in leaps and bounds in the last fifteen years. In particular, the 2011 Guidelines had become grossly outdated in today's context, especially with regard to its Science and Technology chapter. In the 2011 version, the tech chapter focused on encouraging MNEs housed in developed or Global North countries to bring technology to developing or Global South countries, in a version of tech evangelism. This version did not call on companies to undertake due diligence for their technology-related harms, and took a simplistic view of technology. In comparison, the 2023 Guidelines - which rename the chapter to "Science, Technology and Innovation" - recognise the importance of the data value cycle and need for risk-based due diligence across the entire technology value chain. This means that NCP complaints can now be filed against companies for failure to undertake due diligence over the human rights and environmental harms occurring in their technology value chains, providing affected communities a chance at remedy. The updated Guidelines also recognise the significance of privacy and data protection norms that must be maintained. Yet, the Guidelines fall short on several accounts.

## MISSED OPPORTUNITIES IN THE OECD GUIDELINES TECH-RELATED UPDATES

### Missed Targets

The updates to the MNE Guidelines were intended to be “targeted”, and this has been understood as the reason extensive changes have not been made to the text. The 2023 Guidelines updates have expressly sought to cover downstream impacts, including in the tech sector. While this may be the case, it is worth asking if such targeted updates should fail to incorporate nuances of the current context, especially when technology continues to evolve in myriad ways. In an increasingly digital economy, where technology occupies a primary position not just in tech companies, but also in more traditional corporations, this seems like a blinkered position to hold. Additionally, it is useful to also assess whom these gaps end up helping – for instance, if Big Tech corporations, with origins in either the US or China, are not held accountable for their data power by the Guidelines, then these enterprises are free to function as they wish to (as they have in the past).

It is important to acknowledge these gaps, which in the coming years are likely to become more apparent. The gaps can be grouped in the following buckets.

### Data value, frontier tech and extractivism

The Guidelines, in the tech chapter, don’t recognise the financial value of data, and consequently, the wealth and power that corporations holding data wield. There is also an absence of considerations beyond collection and sharing of vast amounts of data, outside of having transparent data sharing and access mechanisms. Questions of digital intelligence and aggregate data mapping do not find a place in the Guidelines. The chapter also fails to mention any emerging or frontier technology, in the nature of generative AI models, cryptocurrency, or metaverse and their regulation. The considerations of open data in the Guidelines also don’t account for freeriding and data capture-related issues by Big Tech. These are blind spots in the chapter, since they fail to account for business models of both first-mover tech and digitalising corporations. The result is that the extractivist nature of Big Tech corporations remains absent and goes unacknowledged in the text.

### Missing cross-linkages across chapters

The Guidelines fail to outline the specific impacts resulting from the technology sector on topics addressed in other chapters, including in labour, competition, and taxation. These areas have witnessed material impact because of digitalisation and platformisation, in the nature of digital labour platforms like Uber, Deliveroo, and Amazon Mechanical Turk; discussions around monopoly powers of Big Tech, driven by their data accumulation; and digital tax havens, which enable Big Tech to pay almost no tax, especially when compared to the profits they make.

### Downstream value chain impact

Risk-based due diligence can often be highly stratified – across regions, type of third party (including scale of operations) and type of business relationships corporations have with the third party. This means that smaller players in the value chain, that are often located in Global South countries and provide critical support, can be left behind. For instance, the fast fashion website Shein uses small scale suppliers in China to fulfil its orders, which can lead to a race-to-the-bottom scenario with regard to rates and working conditions. The updated Guidelines are clearly focused on the importance of companies preventing and acting against harm. However since the focus of companies is often on ensuring due diligence is practicable for corporations, and not in particular on preventing harm, those downstream the value chain often become invisible.

### **The Significance of Data Power**

As discussed earlier, the Guidelines do not consider Big Tech's data power – intensive and pervasive control over the entire value chain –, data accumulation, and digital intelligence as a factor in the tech chapter. This is of particular relevance for Global South countries, who are usually data suppliers for digital MNEs, who are based in the Global North. This introduces another issue, that of cross-border data transfer – again, only addressed by the Guidelines in terms of international commerce and knowledge exchange. The unidirectional flow of data and digital intelligence to the Global North, without any benefit sharing for the supplier countries, is not critically addressed in the text.

Separately, the fact that the Guidelines view data from the lens of privacy and personal data protection, but without setting down explicit standards, could be misleading. An UNCTAD study showed that the understanding of “sensitive data” varied from country to country and can often be based on the prevailing mores. The general understanding of data governance norms, data protection and privacy thus fall short in a transnational perspective, a gap the Guidelines could have, but did not, close.

### **Intersections with Trade Agreements**

While the Guidelines are important to have as a voluntary standard, they are often undercut by regional or bilateral trade agreements that set lower or conflicting expectations on overlapping issues. In the context of the digital, in particular, the trade agreements route has often been used as the primary mechanism of harmful (de)regulation that conflicts with the Guidelines. For example, aspects like the moratorium on tariffs on electronic transmission – which prevents countries from imposing customs duties on electronics products – have the effect of directly competing with the Taxation chapter of the Guidelines that require ‘enterprises to contribute to public finances of host countries’. The moratorium prevents host countries – usually from Global South – from the benefits of such taxes, revealing how the tech chapter fails to protect the interests of Global South countries.

Other regional agreements, like the Indo-Pacific Economic Framework for Prosperity, which is a US-driven initiative, seeks to address issues of supply chains, digital innovation, labour, environment and corporate accountability standards. Trade agreements like this do not only undermine the voluntary OECD Guidelines, but also national legislations and norms. Such agreements can often be onerous when being negotiated by a Global North nation. Similar issues can be observed in bilateral situations, like the EU-India Free Trade Agreement (FTA) or the UK-India FTA, where India's Southern location can hurt its prospects. Enterprises are expected to implement the higher of the expectations demanded by the Guidelines, on one hand, and requirements in domestic or international law, on the other. But in practice, conflicts between the two standards, and the voluntary nature of the Guidelines, often result in companies following the lower treaty standards, alone.

### Way Forward

In many ways, clear directions for the Guidelines to be made robust emerge in this essay. At the first instance, it is important to acknowledge that the Guidelines are insufficient in their current form to ensure meaningful responsibility by Big Tech companies. They are insufficient to safeguard the rights of Global South countries and their citizens in an adequate manner. Additionally, since these are voluntary guidelines, a lot depends on their implementation by companies and the NCP process - which has its own challenges, including getting companies to come to the table for discussion. There is a need to evaluate the efficacy of such voluntary frameworks, and compare them with more binding obligations. This is necessary to ensure that impacted countries, which are usually located in the Global South, can have ample scope for recourse against digital MNEs. Finally, review processes for OECD Guidelines, if done every ten years or so, may not be sufficient especially for the tech chapter, given the pace of development. Targeted updates, if a more achievable goal, could be done at shorter intervals. In particular, it is useful for the OECD to develop sector-specific and practical guidances for the tech-sector, to address some of these gaps.

\*The analysis in this article draws from the work of IT for Change on data governance.

# TIME FOR A NEW APPROACH: REFLECTIONS FROM AFRICA ON THE 2023 OECD GUIDELINES TARGETED UPDATE



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## Introduction

Every rainy season for almost 50 years, Aggah Community in Rivers State, Nigeria, has faced a devastating reality: the natural watercourses that previously flowed freely through the village to the nearby Oloshi River run into elevated roadways and embankments built by a local subsidiary of Eni, the Italian oil giant. The waters then back up into the inhabited and cultivated areas of the community, creating floods that last months. During the flood season, malaria rates spike, crops rot in the fields, and inundated pits become hazards that have cost villagers their lives.

Frustrated by decades of fruitless negotiations and complaints, the people of Aggah filed a complaint against Eni with the Italian and Dutch National Contact Points (NCPs) for the OECD Guidelines on Multinational Enterprises in 2017. The Italian NCP appointed a mediator to settle the dispute, leading to an agreement (the Terms of Settlement, or ToS) in which Eni agreed to undertake engineering work intended to alleviate the flooding in Aggah.

In the ensuing years, Eni and its local subsidiary, NAOC, have hired engineers who have done little to end the flooding in Aggah. The NCP's involvement ended in 2020, with a single follow-up report that noted disagreements on implementation between the parties. Eni now insists that it has met its obligations and is not required to go any further in remediating the floods. The people of Aggah continue to suffer.

In 2023, the OECD undertook a "targeted update" of the Guidelines, adopting much-heralded provisions on climate change and stakeholder engagement, among others. In this post, we use the case study of Aggah to consider whether these changes give hope to African communities in future OECD cases.

## **TIME FOR A NEW APPROACH: REFLECTIONS FROM AFRICA ON THE 2023 OECD GUIDELINES TARGETED UPDATE**

### **1. Climate Change Adaptation and Mitigation**

From the beginning of the specific instance process, Eni insisted that it was not responsible for the floods - despite the contrary findings of regulatory and judicial authorities, as well as its own technicians - and that Aggah suffered from being in a flood-prone area. This denial underpinned its insistence that beyond digging culverts that (when functional) allow water to pass through its embankments, it has no further obligation to the community.

The updated Environment chapter of the 2023 Guidelines expressly refers to climate change as an “adverse environmental impact” in which companies can be involved. The Commentary directs companies to contribute to international goals of climate change adaptation and mitigation (para. 66), and to avoid activities that undermine community adaptation and resilience to climate change (para. 79). Rainy seasons are getting longer and more intense in the Niger Delta, and floods are becoming more likely due to climate change. If these provisions had been in the Guidelines when the complaint was filed, the complainants could have argued the expectation that Eni had a proactive responsibility to help the community alleviate the floods, since the interaction between its facilities and the worsening rains certainly increases the likelihood of climate change-linked damage to person and property. In other words, the climate change provisions would have defanged Eni’s excuse for inaction.

This application of the new climate change provisions could have parallels across Africa. In southern Senegal, for example, a mining company’s environmental impact assessment dismisses the existential threat its proposal to excavate a fragile barrier dune poses to the coastal community of Niafrang by pointing to existing sea level rise and salinization of fresh water sources. Under the newly updated Guidelines, such excuses wouldn’t fly; the company would be expected to contribute to the community’s resilience to climate change, not undermine it.

### **2. Meaningful Stakeholder Engagement**

Many of the ToS implementation problems between Aggah and Eni can be traced to a failure to engage and include the community in the resolution of the flooding problem. Time and again, Eni and NAOC made unilateral decisions, engaging untrustworthy contractors and designing interventions that had no discernible effect on the flooding situation at Aggah.

The 2023 Guidelines update calls for companies to engage in “meaningful” stakeholder engagement that, relevantly, is “two-way” and “responsive to stakeholders’ views” (para. 28 of the Commentary on Chapter II: General Policies). If these provisions had been in the Guidelines when the complaint was filed, we could have made a more forceful case that Eni was not honoring the Guidelines in its method of implementation by excluding the affected community from assessing contractors and designing engineering interventions.

These omissions resonate with cases across Africa. In northeastern Guinea, for example, AngloGold Ashanti imposed a resettlement plan on residents when it dug a new goldmining pit in the town of Kintinian, without any meaningful consultation at all. The consequence was a plan that coerced people into giving up their land, undervalued assets, and supplied them with replacement housing in an area devoid of infrastructure necessary for them to rebuild their lives with a modicum of dignity. When stakeholder engagement must be “meaningful” rather than a check-the-boxes exercise, these problems can be avoided.



## TIME FOR A NEW APPROACH: REFLECTIONS FROM AFRICA ON THE 2023 OECD GUIDELINES TARGETED UPDATE

### 3. Too Little, too Late

While the advances described above are promising, all the new substantive content in the world can do little to improve the lot of African communities without provisions to hold companies accountable for their commitments. In most of Africa, where accountability institutions tend to be weak, the Guidelines need a correspondingly strong architecture if they are going to make a difference.

#### *i. Determinations of non-compliance*

Specific instance complaints could be more effective in the African context if NCPs were all empowered and directed to make determinations as to the compliance of the respondent company with the Guidelines.

In the Aggah case, the NCP published a follow-up report, although the complainants had to push hard for their version of the facts to be heard. The report that was finally adopted acknowledged disagreements in the effectiveness and scope of implementation of the ToS. There was little the NCP could do to encourage Eni to meet its commitments, however, because it would not make determinations in its Final Statement as to Eni's compliance with the Guidelines.

The 2023 Guidelines update strengthens the expectation that NCPs will prepare follow-up reports. However, the updated Implementation Guidelines leave it up to individual member states to decide whether their NCPs may make factual determinations (Procedures I.C.4.c), and many do not.

#### *ii. Consequences*

Specific instance complaints would also be more effective in the African context if there were consequences to respondent companies for failing to respect the Guidelines or to honor their commitments in mediated settlements.

In the Aggah case, the NCP had no power to impose or recommend consequences, such as the withdrawal of state aid or exposure to civil penalties or government investigation. Even if it had been willing to try, there was little the NCP could do to encourage effective implementation of the ToS, even though it recognized substantial disagreements between the parties.

### 4. Conclusions and Recommendations

Successive updates have packed the OECD Guidelines with a nearly encyclopedic array of human rights-protective substance. These advances are incredibly important – they serve as evidence of the development of international norms and inform corporate public commitments. But without accountability, communities in Africa – Aggah included – will be hard-pressed to use these standards to protect their human and environmental rights.

In the absence of effective OECD action, the time has come to focus more squarely on national level implementation of the Guidelines. Rather than cramming more standards into the Guidelines, advocates should focus on reforms that give those standards clout. State agencies providing assistance and revenue streams to multinational companies – export credit agencies, political risk insurance providers, state contracting offices – should adopt the Guidelines as express conditions of patronage. Affected communities should be given a means of contesting a given company's performance. Justice officials should be directed to seek legal redress against companies that take the State's money and commit to the Guidelines but fail to honor their promises. Legislatures should enact fiscal incentives and preferences for companies that enshrine respect for the Guidelines in their corporate statutes, supply chain contracts, and actual conduct.

## **TIME FOR A NEW APPROACH: REFLECTIONS FROM AFRICA ON THE 2023 OECD GUIDELINES TARGETED UPDATE**

Unless there are consequences for failure to respect the Guidelines, concomitant rewards for upholding them, and more robust procedures for identifying and certifying good and bad practice under the Guidelines, they will serve as cold comfort to African communities, no matter how many laudable standards are included. If the OECD cannot provide these features, advocates should look to those that can - national governments - and put teeth into the expectation that adhering countries will promote and implement the Guidelines.

# A (SLIGHT) RAISE OF THE BAR: DUE DILIGENCE IN THE 2023 UPDATE OF THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES ON RESPONSIBLE BUSINESS CONDUCT



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More than a decade after the UN Guiding Principles on Business and Human Rights (UNGPs) introduced human rights due diligence (HRDD), that is a process for companies to identify, prevent, mitigate, and account for negative impacts on human rights, the approach is considered indispensable to address human rights abuses and other negative externalities in the context of business operations. The Organisation for Economic Cooperation and Development (OECD) has played a significant role to that end by disseminating and further developing the approach through the 2011 edition of the OECD Guidelines for Multinational Enterprises (OECD Guidelines), the OECD Due Diligence Guidance for Responsible Business Conduct (OECD Guidance) from 2018 and various sectoral frameworks. These standards do not only endorse the concept of HRDD, but also expand on “risk-based due diligence” as a general means for multinational enterprises (MNEs) to address negative impacts, including those relating to the environment, employment practices, consumer interests, and corruption risks. The work of the OECD has inspired corporate practice as well as new laws that transpose due diligence requirements from international frameworks into business regulation, including the planned Corporate Sustainability Due Diligence Directive (CS3D) of the European Union (EU) currently being discussed in trilogue. Considering the significant role of the OECD in shaping due diligence in practice and regulation, the targeted update of the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct (Updated OECD Guidelines) from June 2023 requires close attention. This blogpost hence examines the amendments to due diligence introduced by the updated framework and discusses the role of OECD standards alongside due diligence laws.

When compared to the 2011 edition, the Updated OECD Guidelines add several nuances to the due diligence approach. On the general level, the framework adopts the six-step due diligence process already set out in the OECD Guidance (Commentary 15 on Chapter II). This process description, which also serves as a template for the CS3D (compare Recital 16 of all legislative proposals), is consequently upheld as the “state-of-the-art”. At the detailed level, the Updated OECD Guidelines specify more clearly what due diligence entails and the specific role the process plays with respect to human rights, the environment, and science, technology and innovation. These changes reflect many of the developments in standards, law and practice that have evolved over the past decade.

## A (SLIGHT) RAISE OF THE BAR: DUE DILIGENCE IN THE 2023 UPDATE OF THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES ON RESPONSIBLE BUSINESS CONDUCT

For a start, the updated framework underlines that risk-based due diligence covers adverse impacts occurring at the downstream part of the value chain, meaning after a product or service has left a company. MNEs are expected to “take into account known or reasonably foreseeable circumstances related to the use of the product or service in accordance with its intended purpose, or under conditions of reasonably foreseeable improper use or misuse, which may give rise to adverse impacts” (Commentary 20 on Chapter II). The importance of managing impacts related to the use of products or services is again emphasised in Chapter IX on Science, Technology and Innovation (Commentary 112 on Chapter IX).

Already the due diligence recommendations in the OECD Guidelines from 2011 intend to cover the downstream part of the value chain, as emphasised in numerous decisions by National Contact Points as well as the OECD Guidance from 2018 (for a comprehensive analysis, click [here](#)). Moreover, various companies are already putting downstream due diligence into practice. The clarification in the Updated OECD Guidelines is yet important. Depending on the business context, the downstream value chain can pose severe human rights challenges. The information technology sector offers relevant examples, such as the misuse of software for surveillance or deepfake technology. When it comes to the CS3D, however, it remains debated whether and to what extent the planned due diligence requirements should cover the downstream value chain, including the use of products and services. In fact, neither of the negotiating positions of the Commission, the Council and the Parliament defines the value chain in a way that covers downstream economic activities and downstream business partners comprehensively. Against this background, the clarification in the Updated OECD Guidelines carries weight given the general interest and practical need to align due diligence laws with international standards. At the same time, the framework does not provide more details on what adequate downstream due diligence entails, although further guidance is needed to facilitate and align evolving corporate practice. This gap needs to be addressed in the future, for instance, through an OECD guidance document dedicated to downstream due diligence.

Another improvement concerns the dynamic nature of corporate involvement in an adverse impact, that is, whether an MNE (may) causes, contributes to or is directly linked to an impact through its business relationships. The Updated OECD Guidelines specify that corporate involvement is “not static” and “may change, for example as situations evolve and depending upon the degree to which due diligence and steps taken to address identified risks and impacts decrease the risk of the impacts occurring” (Commentary 16 on Chapter II). This welcome amendment underlines the need for regular assessments of whether a corporate response to an impact is still appropriate in light of the circumstances.

Furthermore, the updated framework places more emphasis on the proactive use and increase of leverage to address negative impacts that a company is directly linked to through its business relationships. The list of recommended measures features support, training and capacity building as well as the provision of positive incentives for business partners that operate more responsibly (Commentary 23 on Chapter II). These changes are laudable as they highlight the primacy of preventing negative impacts over responding to them.

Commentary 25 on Chapter II further underlines the importance of responsible disengagement. Already the 2011 edition of the OECD Guidelines stipulate that MNEs must consider negative impacts resulting from a decision to disengage from a business relationship. The Updated OECD Guidelines now emphasise that MNEs should also seek to meaningfully consult with relevant stakeholders in a timely manner and take appropriate steps to address negative impacts resulting from disengagement. These are important clarifications as the decision to disengage does not relieve MNEs of their responsibilities.

## **A (SLIGHT) RAISE OF THE BAR: DUE DILIGENCE IN THE 2023 UPDATE OF THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES ON RESPONSIBLE BUSINESS CONDUCT**

Noteworthy is also the specific mention of “enhanced due diligence” processes in the Updated OECD Guidelines that account for the severity of potential or actual impacts. While it is already recognised that due diligence processes should follow a risk-based approach, the framework specifically recommends “heightened” or “enhanced due diligence” in relation to marginalised and vulnerable individuals, in situations of armed conflict or increased risk of gross human rights abuse, and concerning risks to biodiversity in protected areas (Commentary 45 on Chapter IV and Commentary 80 on Chapter VI).

Finally, the Updated OECD Guidelines strengthen the role of due diligence in relation to environmental impacts, technology-related challenges and corruption. Chapter VI on the Environment now contains a non-exhaustive list of environmental impacts that risk-based due diligence processes should address (introduction to Chapter VI). This list features climate change as well as biodiversity loss and deforestation, among others. Due diligence processes are also recommended in the context of the green transition. The framework advises MNEs to undertake due diligence to address social impacts resulting from either decision, to move away from unsustainable activities or towards greener practices (Commentary 70 on Chapter VI). With respect to adverse impacts related to science, technology and innovation, Chapter IX advises MNEs specifically to undertake risk-based due diligence – an important amendment further discussed by Shreeja Sen in her contribution to this Blog Symposium. In addition, the Updated OECD Guidelines specify that corporate measures against corruption should include risk-based due diligence processes (Chapter VII on Combating Bribery and Other Forms of Corruption, paragraph 2).

Another important amendment is that due diligence requires meaningful engagement with relevant stakeholders or their legitimate representatives. This welcome improvement is discussed in Caroline Omari Lichuma’s contribution to this Blog Symposium.

Unlike the 2011 framework, the Updated OECD Guidelines could draw on a large set of general and sector-specific due diligence standards, evolving due diligence laws, and growing corporate practice. It is therefore not surprising that the latest version adopts many of the improvements to the concept of due diligence that evolved since 2011. The result is not a revolution, but a consolidation of the state-of-the-art. The nuanced changes are nevertheless important as they clarify and raise the standard of responsible business conduct against which corporate practice is assessed in the near future.

Furthermore, the Updated OECD Guidelines are likely to serve as a reference point in the development and reform of due diligence laws. The trilogue negotiations on the CS3D illustrate the many controversies surrounding due diligence in the context of regulation, such as the coverage of downstream economic activities. In this context, the Updated OECD Guidelines are an authoritative standard that calls for coherence. At the same time, there remain qualitative differences between soft law standards and hard business regulation. Whereas the Updated OECD Guidelines can define what adequate due diligence involves, the framework offers no guidance on inherently legal questions like how to define effective enforcement mechanisms, including liability clauses.

Looking forward, the OECD should continue to refine the due diligence approach. The potential future adoption and implementation of a CS3D will increase demand for guidance that is tailored to individual sectors or focused on specific challenges, like downstream due diligence. Here, the OECD is well-positioned to develop standards in close cooperation with stakeholders, including the EU. The Updated OECD Guidelines, in turn, may become less relevant for companies that fall under due diligence laws. Yet, courts may take the framework as a reference point to help resolve questions of interpretation arising from relevant legislation. In any event, the Updated OECD Guidelines remain significant as a common and continuously evolving standard on adequate due diligence that extends also to non-EU countries, whether they are members of the OECD or voluntarily adhere to the framework.

# A TIMELY DEVELOPMENT THE EU CAN LEARN FROM: THE CLIMATE CHANGE DIMENSION OF THE 2023 OECD GUIDELINES



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The 2023 edition of the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct mark a significant step forward in the definition of corporate responsibility in the area of climate change. The 2011 version of the Guidelines, while not making specific reference to climate change, already contained a clear recommendation for corporations to perform environmental due diligence based on measurable objectives, and encouraged them to develop strategies for emission reduction, including through their products and services. The 2011 Guidelines also encouraged disclosure of accurate information concerning a company’s greenhouse gas emissions, an area in which reporting standards were still evolving, with the aim to monitor ‘direct and indirect, current and future, corporate and product emissions’ (Chapter III, Disclosure).

The 2023 edition, adopted by the OECD Council after conducting consultations with institutional stakeholders and with the wider public, markedly raises the ambitiousness and the specificity of the Guidelines’ climate due diligence recommendations. Climate change is now explicitly included in the non-exhaustive list of environmental impacts that guide the recommendations of Chapter VI, ‘Environment’. Compared to the 2011 edition, greater emphasis is placed on ‘risk-based’ environmental due diligence and prioritization, which requires taking steps that are commensurate to the severity and likelihood of the adverse impact. Whereas the 2011 edition encouraged the use of targets for improved environmental performance only ‘where appropriate’, the 2023 Guidelines recommend ‘establishing and implementing’ measurable science-based targets consistent with national policies and international environmental goals and commitments (Chapter VI, Guideline 1). The corporation’s environmental due diligence system must also include the provision of measurable information to the public concerning relevant environmental impacts, as well as providing for or collaborating in the remediation of the adverse impacts that it has caused or contributed to.

## A TIMELY DEVELOPMENT THE EU CAN LEARN FROM: THE CLIMATE CHANGE DIMENSION OF THE 2023 OECD GUIDELINES

### **Multinational corporations must measure and reduce their greenhouse gas emissions...**

These recommendations, which considerably strengthen the Environment chapter of the Guidelines, are then complemented with specific remarks on the climate change-related responsibilities of corporations. The Commentary to Chapter VI underlines the role of corporations in contributing to net-zero greenhouse gas emissions. While the role of businesses in the needed sustainability transitions is leveraged by both the Paris Agreement and Sustainable Development Goals, these frameworks, as explained by Jägers, view such involvement within a logic of partnership, not of corporate responsibility. The 2023 OECD Guidelines, instead, start from the proposition that multinational enterprises have a responsibility to 'ensure that their greenhouse gas emissions and impact on carbon sinks are consistent with internationally agreed global temperature goals based on best available science' (para. 76). This entails putting in place mitigation and adaptation strategies including short-, medium-, and long-term mitigation targets that need to cover scope 1 and 2 emissions as well as, 'to the extent possible', scope 3 emissions. While not elaborated upon in detail, this part of the Commentary confirms that corporations should measure their direct and indirect emissions and ensure that their mitigation strategy aligns with the goals of the Paris Agreement. It also confirms that corporate responsibilities under the OECD Guidelines, unlike under the French Law on the Duty of Vigilance, also concern downstream supply chain relationships (see also Leonard Feld's blog post for the symposium).

Even before the adoption of the revised Guidelines, the Dutch National Contact Point (NCP), in a specific instance concerning ING Bank, had affirmed that businesses must 'seek measurement and disclosure of environmental impact in areas where reporting standards are still evolving', including in relation to direct and indirect greenhouse gas emissions. The 2021 judgment against Shell in the Netherlands also elaborated on the responsibility of the multinational corporate group to cut its direct emissions, which the court defined as an obligation of result, and to produce 'best efforts' to cut its indirect, or scope 3, emissions, construed as a due diligence obligation. Although the Dutch court left Shell discretion on how to design the reduction strategy that would allow it to achieve the court-mandated 45% emissions reduction by 2030 (necessary to align with the Paris Agreement), it also emphasized the importance for the company to take responsibility for its scope 3 emissions, namely, for emissions produced by the group's business relations and end-users, which constitute 85% of the Shell group's total emissions.

A study of the African Commission on Human and Peoples' Rights, whose draft has recently been published, elaborates on the duties of States and corporations under the African Charter of Human and Peoples' Rights. In doing so, it recognizes that 'corporations have the obligation to reduce greenhouse gas emissions from their own activities and their subsidiaries' (emphasis added), as well as from their products and services. In addition, they must 'minimize greenhouse gas emissions from their suppliers', which once again suggests that their climate change responsibility extends to indirect emissions, albeit as an obligation of conduct. Thus, in emerging definitions of the climate change responsibility of transnational corporations, there is a clear expectation that companies will consider both direct and indirect emissions, as well as emissions from their downstream value chains. The revised Environment chapter of the OECD Guidelines reflects this trend.



## A TIMELY DEVELOPMENT THE EU CAN LEARN FROM: THE CLIMATE CHANGE DIMENSION OF THE 2023 OECD GUIDELINES

### **...in a credible manner**

In encouraging the adoption of science-based reduction targets, the 2023 OECD Guidelines refer to absolute targets but also, 'where relevant', intensity-based targets (para. 77). The latter approach sets the reduction targets as relative to an economic metric, for instance, to a certain amount of output. While this approach allows to factor in the corporation's economic growth or other changes in circumstances, such as mergers and acquisitions, it is important to underline that implementing this type of target does not ensure an absolute reduction of total emissions. The wording of the OECD Guidelines, however, suggests that absolute reduction targets are essential, whereas intensity-based targets are optional.

The revised Guidelines also contain a crucial watershed between the responsibility to mitigate emissions, on the one hand, and carbon credits or offsets, on the other. The Guidelines are very clear in stating that corporations 'should prioritise eliminating or reducing sources of emissions over offsetting, compensation, or neutralization measures' (para. 77), which should only be considered as residual avenues (last-resort option) to address unabated emissions. To make the message clearer, the Guidelines underline that:

Carbon credits or offsets should be of high environmental integrity and should not draw attention away from the need to reduce emissions and should not contribute to locking-in greenhouse gas intensive processes and infrastructures (para. 77).

This specification is crucial, not only considering the doubtful environmental outcomes of this type of projects, but also the serious land-grabbing and human rights concerns too often associated with them. From a normative standpoint, the notion of corporate responsibility elaborated under the UN Guiding Principles on Business and Human Rights and incorporated into the OECD Guidelines since 2011 does not allow a corporation to 'offset a failure to respect human rights' by putting in place 'other commitments or activities to support and promote human rights' (UNGP 11, Commentary). Similarly, a multinational corporation must address its own climate change impacts, which will often require an absolute reduction of emissions, and cannot circumvent this responsibility by invoking the supposed positive social and environmental outcomes of carbon offsetting projects.

It is important to underline that the soundness of a corporation's climate change action and communication could also be assessed under the Guidelines' chapter on Consumer Interests (Chapter VIII), which deals with advertising and marketing practices, including environmental claims. Already in 2019, the UK NCP examined a specific instance against British Petroleum (BP) in which the accuracy of sustainability statements made in the company's advertising campaign was questioned by the NGO ClientEarth. As BP withdrew the campaign in 2020, the NCP never issued a statement on the matter. However, it is to be expected that Chapter VIII, in conjunction with the improved Environment of the Guidelines, will form the basis for future 'greenwashing' specific instances before the OECD NCPs.

## A TIMELY DEVELOPMENT THE EU CAN LEARN FROM: THE CLIMATE CHANGE DIMENSION OF THE 2023 OECD GUIDELINES

### A lesson for the EU draft Corporate Sustainability Due Diligence Directive

The upcoming EU Directive on Corporate Sustainability Due Diligence can be a turning point in regulating the transnational activities of corporations, providing new instruments and remedial avenues to affected communities and to activists around the globe. In this respect, while it is commendable that the Commission's draft includes an environmental due diligence dimension, it must be observed how corporate climate change responsibilities are addressed in a conservative manner. Relegated to one article of the draft Directive (Art. 15), climate change does not form an integral part of the fully-fledged due diligence strategy that the Directive would mandate. The European Parliament's position adopted earlier this year proposes including climate change as an integral part of environmental due diligence, covering scope 1 to 3 emissions, but this is not the case in the current draft. Under the Commission's 2022 draft, corporations are only asked to devise a climate change plan assessing whether climate change is 'a principal impact' of the company. Only if it is would the company be required to include emission reduction goals in the plan. Even then, the obligation would be to adopt mitigation objectives, not to implement or monitor them. Thus, while the climate change plan should ensure that the 'business model and strategy of the company are compatible with the transition to a sustainable economy' and the Paris Agreement, the design and contents of that plan can fundamentally be left to the corporation's discretion. It is not clear whether such plans would be made public, which would at least allow some degree of monitoring on the part of the civil society. Joseph Wilde-Ramsing has identified three key lessons that the EU Directive, currently under negotiation in the institutional 'trilogues', could learn from the 2023 edition of the OECD Guidelines. I would add to those a fourth one, namely, including in the Directive's final text a more ambitious climate due diligence dimension.

# THE UPDATED OECD GUIDELINES AND ANIMAL WELFARE: FROM RECOGNITION TO REALITY



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Earlier this year, the updated [OECD Guidelines for Multinational Enterprises on Responsible Business Conduct](#) (Guidelines) were adopted. These Guidelines include, for the first time since their inception in 1976, a clause on animal welfare, which has the potential to transform the lives of billions of animals. It states:

“Enterprises should respect animal welfare standards that are aligned with the World Organisation for Animal Health (WOAH) Terrestrial Code. An animal experiences good welfare if the animal is healthy, comfortable, well nourished, safe, is not suffering from unpleasant states such as pain, fear and distress, and is able to express behaviours that are important for its physical and mental state. Good animal welfare requires disease prevention and appropriate veterinary care, shelter, management and nutrition, a stimulating and safe environment, humane handling and humane slaughter or killing. In addition, enterprises should adhere to guidance for the transport of live animals developed by relevant international organisations.” (Chapter 6, Paragraph 85).

## THE UPDATED OECD GUIDELINES AND ANIMAL WELFARE: FROM RECOGNITION TO REALITY

The WOAH definition of animal welfare encompasses the Five Freedoms (which focus on the absence of negative states - freedom from hunger and thirst; freedom from fear and distress; freedom from discomfort; freedom from pain, injury, and disease; and freedom to express normal behaviour) and the more up-to-date Five Domains model (which emphasises the provision of positive states relating to sufficient and species-specific nutrition; environment; health; behaviour; and mental state). Both are tools to understand animal welfare rather than standards that companies and governments should follow. It is widely accepted that animals can experience a life not worth living; a life worth living; and a good life. Our assertion is that all policy-makers and decision-makers should be striving for the latter.

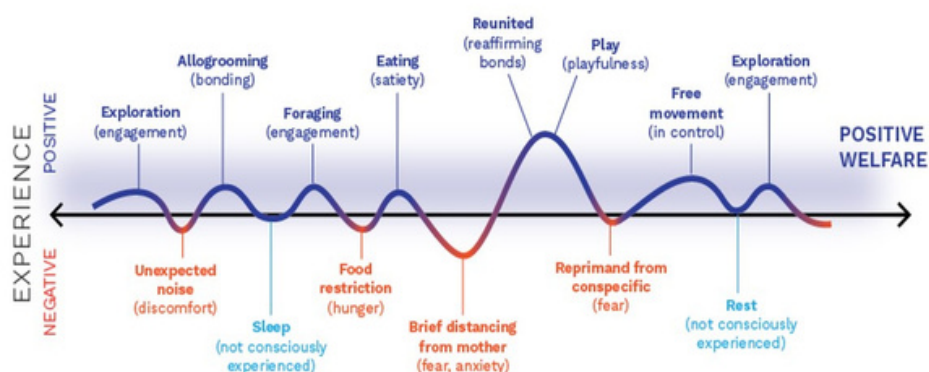


Diagram by the Zoo and Aquarium Association (ZAA), showing that animal welfare is a continuum and how positive and negative experiences can impact an animal's physical and mental state.

Numerous animal protection organisations, including FOUR PAWS, Humane Society International, and World Animal Protection campaigned for the OECD to specifically include animal welfare in the revised Guidelines. Overall, we are pleased with the result as it should reduce the suffering that animals endure. Do we wish that the language was stronger? Yes. Are we concerned that member states and multinational enterprises will continue to do the bare minimum? Of course. However, the Guidelines now give us a mechanism in which to hold both to account.

### Animals used by industry

From corporate food procurement to global and local tourism, animals are part of countless businesses and their value chains.

Approximately 92 billion land animals and 500 billion aquatic animals are farmed for food each year, the majority of whom are kept in industrialised production systems that cause immense suffering. Animals experience stress and pain due to selective breeding, severe confinement, and mutilations without anaesthetic, amongst myriad other welfare issues.

Animal use in fashion is also big business, with more than 100 million animals killed annually for their fur alone and 3.4 billion ducks and geese slaughtered for down and feathers. Despite the growing number of viable alternatives to animal-derived materials on the market, many fashion brands continue to use animals without ensuring their welfare. Animals are trapped from the wild or bred on farms, kept in overcrowded cages or sheds, and often skinned alive, beaten to death or electrocuted so as not to damage their skins or feathers.

The entertainment industry also causes animal suffering, in the captive display of wild animals in roadside zoos, for lions bred for trophy hunting, in elephant feeding/bathing/riding experiences, and in dolphin exhibits, among other contexts. These animals are removed from their natural environments, or born into captivity, and forced to perform unnatural behaviours. They are trained using techniques based on fear and pain, and often caged or chained. Wild animals exploited by the global pet, food, and traditional medicine trades suffer similar fates. It is difficult to put a figure on the total number of animals traded but the legal wildlife trade, including timber and fisheries, generates over \$300 billion per annum.

### **Risks of poor animal welfare**

The Guidelines' inclusion of animal welfare supports its growing presence in mainstream environmental, social, and governance (ESG) and sustainability conversations. The risks of ignoring animal welfare fall into three main categories: reputational, operational, and societal.

Although animals are scientifically recognised as sentient beings, in animal agriculture they are treated as units of production. As a result, standard industry practices such as breeding animals for higher yields and the adoption of intensive confinement systems including battery cages, colony cages, gestation crates, and farrowing crates have highly detrimental effects on their health and welfare.

Animals may have poor welfare on farms of any size, but most operations supplying multinationals are large-scale, intensive operations that use crowded, barren confinement facilities. Animals may be transported over long distances between production sites or to slaughter, where they experience fear, distress, and intense pain, depending on the species and method used.

#### *Reputational risks*

More than 2,000 major food companies, including McDonald's, Marriott, Conagra, Compass Group, and Aramark, have pledged to eliminate eggs and/or pork from caged animals in their supply chains. Those that have not made the switch have been subject to damaging public information campaigns. In 2023, animal welfare campaigners engaged in a multi-country campaign targeting Jollibee, the largest restaurant chain in Asia. After four months of protests and digital campaign actions the company published a commitment to stop using eggs from caged hens, which is an important first step to improving welfare for some of the animals in their supply chain.

#### *Operational risks*

Companies that do not comply with the Guidelines, ensuring or enhancing animal welfare standards in their supply chain, now can face formal complaints to the OECD governments' National Contact Points (NCPs). If mediation facilitated by an NCP leads to an agreement, companies could, among other measures, make an apology to their consumers for bad animal welfare practices in the past or improve their policies and practices, as well as those of their suppliers, by using mandatory contractual provisions on ensuring good animal welfare. Additionally, when companies refuse to engage in improving animal welfare, they are at risk of traditional campaigns and investigations. Most civil society organisations (CSOs) prefer to have meaningful dialogue with key players and to support companies in taking action to improve welfare instead of going down a more negative route.

## THE UPDATED OECD GUIDELINES AND ANIMAL WELFARE: FROM RECOGNITION TO REALITY

It is also an operational risk for companies to only address animal welfare shortcomings once dictated by the law. A growing number of countries have enacted farmed animal welfare laws, directives, and regulations. The trend toward legislating higher welfare is clear, for instance, the European Union, the United Kingdom, Bhutan, Norway, and 11 states in the United States of America have banned or are phasing out the use of battery cages. Austria, Germany, and Switzerland have banned cage systems entirely for laying hens. The European Union prohibits keeping sows in gestation crates for more than 28 days. In 2018, California passed Proposition 12, prohibiting the sale of animal products produced using cages for hens or gestation crates for pigs. On the other hand, some countries have done little to nothing, leaving a patchwork of policies for multinational companies to contend with. Wise companies are adopting their own strong animal welfare policies, which put animals first, by going above and beyond outdated laws to streamline efficiency and avoid having to play “catch-up” with new legislation. For example, companies had 5 years to implement crate-free systems for mother pigs with Proposition 12, but many producers that sell in California are now rushing transitions because they had hoped that failed legal challenges would stop the implementation of the law.

Sustainability reporting standards, including the Global Reporting Initiative (GRI), the International Sustainability Standards Board (ISSB), and the World Benchmarking Alliance (WBA) are increasingly including animal welfare as a reporting metric by financial institutions when they do their due diligence for loans. The ISSB states “Consumer demand has driven shifts in industry practices, such as eliminating the use of gestation crates in hog production and eliminating caged enclosures for poultry.” If a company wants financing for new projects, they are going to be asked questions about the company’s plans to eliminate antiquated and cruel systems that consumers no longer support. Such benchmarks not only report, but also help to improve, standards by bringing transparency to what companies are doing, or not as the case may be, and creating a race to the top for those that want a competitive edge.

### *Societal risks*

When it comes to large-scale animal agriculture, most current production practices are designed to maximise profit over animal welfare. In addition to packing as many animals as possible into a facility through intensive cage confinement or producing animals that grow so fast their bodies cannot withstand their own weight, the impact of so many animals in one location or in one region can create more pollution than the environment can absorb, resulting in the degradation of land and water systems, and human health concerns. Further, with production systems untouched, we can expect an increase in the number of animals kept due to a growing population and demand for meat in the Global South, even though research indicates that animal agriculture is responsible for at least 16.5% of all global anthropogenic greenhouse gas emissions.

### **Next steps for the OECD, governments, and multinational enterprises**

#### *OECD and governments*

Due to the complexity of the issue, the OECD should develop and publish evidence-backed guidance for companies on animal welfare standards, like it has done for specific sectors and risk issues, as well as at a cross-sectoral level through the OECD Due Diligence Guidance for Responsible Business Conduct. When developing such guidance, it must continue its good practice of consulting and closely engaging with all stakeholder groups, including animal welfare organisations and civil society experts, to gather crucial perspectives and further build on the progressive text now embodied in the Guidelines. The guidance would also clarify and explain to enterprises their role and responsibilities under the updated Guidelines.

## THE UPDATED OECD GUIDELINES AND ANIMAL WELFARE: FROM RECOGNITION TO REALITY

Civil society welcomes the opportunity to work with the OECD, governments, and NCPs to offer training programs, workshops, and capacity-building initiatives to help governments, NCPs, and enterprises improve their understanding of animal welfare issues and ensure proper implementation of related laws. Animal welfare problems are an issue in every country, but priority issues may vary based on the country's top industries and the current legislative landscape. For example, a top egg-producing country may need to address battery cages while a country that is investing in aquaculture may need to address fish welfare.

We also look to OECD states to ensure that businesses are aware of the new standards in the Guidelines and the consequences for poor animal welfare in their own activities as well as in their supply chains. Governments should proactively and meaningfully raise enterprises' awareness of this critical issue.

### *Multinational enterprises*

Multinationals with complex supply chains may not have a full view of how animals are being used in their businesses. The first step for these enterprises is to recognise that they now have responsibilities to ensure good animal welfare in their own operations, as well as the activities of companies with which they conduct business. As set out in the Guidelines and OECD Due Diligence Guidance, enterprises should conduct due diligence to assess how they use animals, as food products, for clothing, testing for cosmetics, etc. and if they may be linked to poor animal welfare practices. If they are, they should stop, prevent, or mitigate these harms and in some cases provide for or cooperate in remediation of these harms. This should involve considering whether there is a more humane and sustainable way for the company to operate, such as using fewer animals, striving for high welfare, or diversifying their portfolio to include plant-based or synthetic options. At a minimum, companies should adopt and implement good animal welfare policies in alignment with the WOAHA definition referenced in the OECD Guidelines.

People working in procurement, sustainability, and other corporate departments tasked with overseeing animal welfare are encouraged to contact global and local CSOs that can help provide expert guidance which aligns with the most up to date science-based animal welfare recommendations and the current legal landscape.

### **Conclusion**

The strong corporate standards on animal welfare in the Guidelines must be implemented by companies. Companies that fail to meaningfully address poor animal welfare within their supply chains face material risk and return implications. Many standard practices violate the WOAHA animal welfare definition.

The standards in the Guidelines also need to move from just voluntary recommendations to enforceable regulation enacted by governments, with the OECD and multinationals engaging on this topic to make change for animals. While important progress has been made, it is time to go further. The Guidelines can play a key role in encouraging good practice by enterprises and in their value chains now, and also in shaping policy and law promoting good animal welfare in the future.



# ADDRESSING THE ROOTS: HOW A JUST TRANSITION CAN NAVIGATE US OUT OF THE CLIMATE CRISIS



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## Introduction

In the midst of the climate crisis, urgent action is paramount. We are in a race against time, even more pressing than initially estimated by climate scientists. The most recent [IPCC report](#) reinforces this urgency, and the global forest fires and floods we are increasingly experiencing also underline the need for immediate, far-reaching and sustainable emissions reductions. In this context, the updated [OECD Guidelines for Multinational Enterprises on Responsible Business Conduct 2023](#) align with a growing consensus that recognizes that business enterprises not only have responsibilities but also a pivotal role to play in addressing climate change while ensuring a Just Transition for all stakeholders. While this blog focuses on the latter, Just Transition, the updated text on climate change in the 2023 Guidelines was analysed by [Chiara Macchi in her contribution](#) for this blog symposium.

## Just Transition in the OECD Guidelines 2023

While the term “Just Transition” wasn’t present in the 2011 OECD Guidelines, the 2023 Guidelines set new standards for the corporate contribution to a Just Transition. Referring to the Paris Agreement and taking into account the imperatives of a just transition, enterprises are now called upon to assess and address social impacts in the context of their environmental management and due diligence activities and to take action to prevent and mitigate such adverse impacts both in their transition away from environmentally harmful practices, as well as towards greener industries or practices, such as the use of renewable energy (Chapter VI, Environment, Commentary 70). Respecting labour rights, including engaging in social dialogue and collective bargaining, meaningfully engaging with relevant stakeholders and, where relevant, practicing responsible disengagement, will be important in this respect. Enterprises are also encouraged to provide training for up- or re-skilling of workers in anticipation of future changes in operations and employer needs, including societal and environmental changes linked to a Just Transition (Chapter V, Employment and Industrial Relations, Commentary 64).

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**Though it is important to see Just Transition included in the 2023 OECD Guidelines, the guidelines still operate on a rather narrow definition of Just Transition, leaving several key justice dimensions unaddressed.**

Below we analyze how the Just Transition provisions in the OECD Guidelines 2023 measure up against Just Transition principles that are increasingly being put forward by movements across the globe.

### **Addressing the roots of the problem**

To address climate change, transitioning away from fossil to renewable energy is key. The IPCC and IEA are clear: no new fossil fuel development is possible if we are to limit warming to below 1.5 degrees, nor is it needed to meet growing energy demand. However, rapidly replacing dirty energy with clean energy is not enough. It is key that the transition from fossil to renewable energy is also “just”, as the Paris Agreement underscores, and to which the revised OECD Guidelines refer. The Paris Agreement explicitly acknowledges “the imperatives of a just transition of the workforce and the creation of decent work and quality jobs in accordance with nationally defined development priorities”.

**However, since the Paris Agreement, the concept of what defines a Just Transition has been fiercely debated and has evolved.**

The Paris Agreement’s definition of Just Transition originated from the labour movement and narrowly focused on employment. Today, however, the concept of Just Transition has considerably expanded. Advocates across the world underline that a Just Transition needs to address and comprise multiple justice dimensions. In particular, civil society advocates in the Global South highlight how climate change cannot be disconnected from multiple layers of interconnected injustices. Their perspectives stem directly from lived realities marked by historic and ongoing manifestations of systematic exploitation and oppression resulting in environmental degradation, human rights violations, (energy) poverty, conflict, corruption and impunity. Climate change is not an isolated phenomenon, but the culmination of an unequal and exploitative global system that has normalized the existence of zones of sacrifice around the world.

**“Fossil fuels are the driving force behind the climate catastrophe and are trapping the [African] continent in a climate emergency, leaving African people on the receiving end of the exploitative cycle of neocolonialism, profit maximization and exploitation” - Don’t Gas Africa**

Just Transition advocates point to the need to stop fossil exploration and expansion. Don’t Gas Africa campaigners have raised the alarm on Africa becoming locked into a fossil future. They highlight that 48 out of the 55 African countries have ongoing fossil fuel expansion projects, mainly designed for exporting fossil to international markets. Many companies headquartered in the Global North are rapidly fostering fossil dependencies in so-called newcomer or frontier countries, which currently have little or no oil and gas production, and often have abundant renewable energy potential, such as solar and wind power capacity[1]. These countries are already hit hard by climate change impacts and reliance on fossil extraction may increase their economic vulnerability due to the future risk of stranded assets and crippling debt. Moreover, these fossil developments and investments risk undermining their leapfrogging capacity to renewable energy, of which they often hold enormous potential.

## ADDRESSING THE ROOTS: HOW A JUST TRANSITION CAN NAVIGATE US OUT OF THE CLIMATE CRISIS

Renewable energy can be a critical component of building a more just, sustainable, democratic and inclusive global future in countries that have been plagued for decades by energy poverty and economic hardship. But this potential can only be harvested when the transition is people-centred and decentralised via renewable energy systems that are accessible, affordable, reliable and sustainable for local populations. Moreover, this is only possible when territories are not once again made zones of sacrifice at the mercy of global powers seeking to control their renewable resources, markets and institutions for own benefits.

A Just Transition to renewable energy hence requires the unveiling and addressing of interconnected and deep-rooted systemic traps, which have held many so-called “developing” countries back for decades. Colonialism has forced many African countries into meeting the labour and material needs of Western industrialisation and development. This reality has persisted throughout post-colonial times; with energy crises, indebtedness and structural adjustment policies locking many African countries into ongoing economic dependency, fragility and exploitation. Many have become dependent on exporting their natural resources; making them vulnerable to resource curse impacts and economic shocks, as well as overly dependent on foreign industries, states, and their finance mechanisms.

With the rapid growing demand for critical transition metals and minerals to power the transition – of which many located in the global South and on indigenous territories – there is a risk that many resource rich countries end up once again caught in the post-colonial trap of extractivist and low-value-added export economies. This reality, combined with debt burdens, constrains their sovereignty over their own natural resources and economic policies. Also, with patents and manufacturing capacity for renewable and other green technologies being mostly held in the Global North and China, this further obstructs them in developing, using, and deciding on their own green technologies, keeping them locked in a vicious cycle of economic dependency. If not addressed, the current system will simply reproduce a green energy framework that forces many to continue to live in material and energy poverty while facing the human rights and environmental costs. Recent research by [Global Witness](#), studying several lithium projects in African countries, underscores this, warning that instead of renewable energy-related mineral supply chains benefiting producer nations, they risk embedding corruption, failing to develop local economies, while harming citizens and the environment.

**“We need to promote energy investments that meet the energy needs of consumers in Africa before seeking to satisfy wealthy nations’ demands. We need to promote energy systems that allow for all Africans to become producers of energy, rather than just consumers” – [Don’t Gas Africa](#)**

Renewable energy therefore holds great potential, but this potential cannot be realized without a Just Transition that ensures that countries and communities can also benefit from the renewable energy resources they hold. A Just Transition approach by governments and companies hence consists of supporting industrial policies that support the sustainable development of local and national natural resources and human capacities, decent jobs, and expanding internal renewable energy industry capacities across the value chain, in order to empower local resource control and production capacities. [According to the Business and Human Rights Resource Centre](#), for a Just Transition to take place, government and businesses should commit to exploring policy frameworks supporting consent and shared asset models between companies and communities impacted by transition mineral mining and renewable energy projects.

## ADDRESSING THE ROOTS: HOW A JUST TRANSITION CAN NAVIGATE US OUT OF THE CLIMATE CRISIS

It also requires industrialized countries addressing their resource consumption and reducing their material footprint. This can be done by prioritizing circular economy solutions to prevent resource depletion and minimizing disposable consumption and private transportation in favour of equitable access to services and low-carbon public transit.

Without address these deep-rooted inequalities, the transition cannot be called “just”, as it likely will further consolidate and increase social inequalities, exclusion, environmental degradation, human rights violations, and social unrest and conflict.

### Conclusion and recommendations

While the 2023 OECD Guidelines represent progress in corporate responsibility to ensure a Just Transition, they still refer to the narrow definition of Just Transition in the Paris Agreement, leaving out several key justice dimensions essential to a truly fair Just Transition. To bridge this gap, we make several recommendations to the OECD, governments, and companies. We recommend for the OECD to develop further guidance - which could be part of a climate due diligence guidance similar to the OECD’s existing sectoral guidances - reflecting the comprehensive principles of a Just Transition described above. All governments, OECD members or otherwise, should also align their laws and policies aimed at supporting businesses in the renewable energy sector with these Just Transition principles. This extends to the European Green Deal and its green oath of ‘do no harm’, which requires that all actions and policies of the European Union achieve a successful and just transition towards a sustainable future.

As well as ensuring that all companies fully align with human rights and social and environmental standards, including the new standards in the OECD Guidelines 2023, it is important for governments as well as companies to demonstrate that their involvement in renewable or green activities do not undermine a Just Transition in the countries where their activities take place. All such activities, including the halting of new fossil exploration and expansion, should meet the principles of a fair and Just Transition promulgated by civil society advocates.

### References

[1][GOGEL](#), a public database that provides a detailed breakdown of the activities of oil and gas companies worldwide, recently published that 96% of the 700 upstream companies on its database are still exploring or developing new oil and gas fields. For example, TotalEnergies (which tops the list of companies expanding in the highest number of countries) is exploring and developing new oil and gas resources in countries such as South Africa, Namibia, Mozambique and Papua New Guinea.

# GUARDIANS OF RIGHTS? THE ROLE OF GOVERNMENT IN PROMOTING RESPONSIBLE BUSINESS CONDUCT UNDER THE UPDATED OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES



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According to the UN Guiding Principles on Business and Human Rights (UNGPs), States have a responsibility to protect individuals from human rights abuses within their territory and/or jurisdiction by third parties, including business enterprises, by taking appropriate measures to prevent, investigate, punish and remedy such abuses through effective policies, laws, regulations and jurisprudence. The Updated Guidelines 2023 of the OECD Guidelines on Multinational Enterprises (OECD Guidelines) also include some recommendations for governments regarding their responsibility to protect human rights from corporate misconduct through legislative and regulatory measures. In addition, in advance of the adoption of the Updated OECD Guidelines, the OECD adopted a Recommendation on the Role of Government in Promoting Responsible Business Conduct and the OECD Declaration on Promoting and Enabling Responsible Business Conduct in the Global Economy as guidelines for governments on how to promote responsible business conduct by companies in their territory and abroad. However, the new focus on the role of governments has received little attention so far. In this post, we discuss the important role of governments to assist multinational enterprises in adopting responsible business conduct, particularly with respect to the associated risks abroad, as added to the Updated Guidelines. In addition, we use 10 concrete cases handled by OECD National Contact Points (NCPs) to illustrate the main roles of governments: creating an enabling policy environment, effectively engaging and communicating with multinational companies and other stakeholders on responsible business conduct and promoting the role of NCPs in maintaining the environment for responsible business conduct by multinational enterprises.

## GUARDIANS OF RIGHTS? THE ROLE OF GOVERNMENT IN PROMOTING RESPONSIBLE BUSINESS CONDUCT UNDER THE UPDATED OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES

### Create an enabling policy environment to promote responsible business conduct

Paragraph 6 of the Preface to the Updated Guidelines emphasises that governments have an important role to play in supporting the effective implementation of the Guidelines, including the creation of an enabling policy environment that encourages, supports and promotes responsible business conduct. In addition, the OECD Recommendation provides a set of guidelines for governments to create an enabling policy environment through trade and investment policies, public procurement instruments and the setting of clear expectations by their government authorities with attractive economic benefits and incentives. While neither the Updated Guidelines nor the Recommendation contain legally binding norms on governments, they can be seen as soft law standards or tools to interpret existing state obligations in the field of business and human rights.

Specific instances of the OECD NCPs indicate the crucial role of governments in creating an enabling policy environment for companies to do business responsibly. For example, the Dutch and Norwegian NCPs have considered the commitments of the respective countries to human rights treaties when investigating human rights violations by companies based in their territory. In the case against the Dutch bank ING alleging adverse effects on climate change by the bank, the Dutch NCP analysed the case taking into account the Netherlands' commitment to the Paris Agreement. Also, in the case against the pharmaceutical company Mylan concerning the supply of lethal injections to US prisons for the execution of the death penalty, as stated in the NCP's final statement, the members of the Dutch Parliament and the Ministry of Foreign Trade and Development Cooperation took the allegation seriously and informed Mylan to comply with the Dutch CSR policy to avoid involvement in human rights violations anywhere in the world. They also claimed that the Netherlands considers the death penalty a significant violation of human rights and therefore advised Mylan to make contractual arrangements with its US partners to reduce the risk of its drugs being used in executions. At the end of the case, the Dutch NCP was pleased that shareholders and investors are using their influence and dialog to hold companies accountable for their responsible business conduct. In addition, the Swedish NCP, in cooperation with the Norwegian NCP, emphasized in its Final Statement on Statkraft's allegations regarding the rights of indigenous Saami villagers that both Sweden and Norway have actively supported the relevant international instruments to protect the rights of indigenous peoples and that Norway has already ratified ILO Convention 169. Furthermore, it underlines that there is a contradiction between these state recognitions and the non-compliance with the OECD Guidelines by the Norwegian state-owned company Statkraft.

These cases demonstrate that strong commitment and willingness of states to adhere to international standards have an impact on the successful resolution of cases by NCPs. However, to increase the effectiveness of the regulatory and policy environment, the standards in the OECD Guidelines should be aligned with other international and national standards on responsible business conduct. For example, states should align mandatory human rights and environmental due diligence laws including the proposed EU Corporate Sustainability Due Diligence Directive (CSDDD) with the OECD Guidelines. Among NCP practises, some NCPs assess companies' compliance with the OECD Guidelines in light of their own legal human rights obligations. The French NCP, for example, appears to attempt to link the NCP's case handling system to its own binding human rights due diligence legislation by assessing compliance and implementation of the French Duty of Vigilance Act when evaluating the company's responsible business conduct following complaints received by its NCP. In the cases involving the COPAGEF Group and Teleperformance, the French NCP assessed the vigilance plan of both companies in the context of human rights due diligence. In the case of Teleperformance, the French NCP paid particular attention to Teleperformance's vigilance plan to assess whether it contained a sufficient policy and plan to protect the health and safety of workers during the Covid-19 period and provided concrete advice on how to improve the plan.

## **GUARDIANS OF RIGHTS? THE ROLE OF GOVERNMENT IN PROMOTING RESPONSIBLE BUSINESS CONDUCT UNDER THE UPDATED OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES**

These examples show that the NCP's case handling system can complement the monitoring of mandatory human rights due diligence to better align the requirements for the implementation of human rights due diligence. This is a good example of how the NCP can act as a link between the OECD Guidelines and the responsibility of states to monitor their own national initiatives, such as mandatory human rights due diligence.

### **Engage effectively with business enterprises, civil society organisations and other stakeholders**

The Updated Guidelines emphasise in paragraph 2 of the Commentary to Chapter II the importance of governments communicating and working effectively with business and other stakeholders to develop their voluntary and regulatory approaches. This provision highlights that business and other stakeholders, including civil society organisations and trade unions, should be important partners for States. Furthermore, the OECD Recommendation further elaborates on the important role of governments in facilitating stakeholder engagement and calls on governments to pay particular attention to small and medium enterprises (SMEs) and vulnerable groups, including human rights defenders and indigenous groups, by removing the barriers that prevent them from engaging in dialogue with others on the development of responsible business conduct.

While these recommendations are good, governments need to provide businesses more guidance on which stakeholders need special attention, should be more involved and in what circumstances, including extractive industries or other multinational companies operating in conflict-affected and high-risk areas. As Joan Carling argues here, for example, government guidance for multinational enterprises on how to engage with indigenous peoples need to be effectively carried out. Some OECD NCP cases can highlight some state practises on how governments should support companies operating in high-risk areas. For example, in the case against G4S at the UK NCP, G4S was accused of supplying security products to the Israeli government that were used for Israeli operations in the Occupied Palestinian Territories (OPT). The UK NCP pointed out that the UK's Overseas Business Risk Information clearly states that the UK Government does not encourage commercial links with settlements in the OPT as these are illegal under international law and have negative consequences. As a result, the UK NCP recommended that G4S review its business behaviour with Israeli partners in order to address the adverse impacts mentioned in the complaint. In contrast, in the recent case against Mallee Resource Limited, the Australian NCP, in assessing the due diligence process of the mining company operating in Myanmar, found that the Australian government had provided little guidance to companies to conduct enhanced due diligence, particularly those operating in countries with ongoing military operations such as Myanmar. At the end of the case, the Australian NCP advised relevant government authorities to work closely with companies operating in conflict-affected countries such as Myanmar to provide specific guidance to companies on enhanced due diligence and responsible disengagement.

These cases demonstrate the importance of providing governments with concrete guidance on the areas and circumstances in which they should work more closely with multinational companies. The Danish NCP has done exemplary work in this respect by maintaining close contact with the companies operating in Myanmar since the expansion of military operations. This was demonstrated in the case against Bestseller in the Danish NCP, in which the company stated that it was in regular contact with the Danish Ministry of Foreign Affairs and other actors regarding the situation in Myanmar.

## **GUARDIANS OF RIGHTS? THE ROLE OF GOVERNMENT IN PROMOTING RESPONSIBLE BUSINESS CONDUCT UNDER THE UPDATED OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES**

### **Promoting the role of National Contact Points in maintaining an environment for responsible business conduct by multinational enterprises**

The Updated Guidelines emphasise the effectiveness of the NCPs in the Procedures that form the second part of the Guidelines. The Procedures encourage governments to use different structure of NCPs to fulfil the key effectiveness criteria and to involve different stakeholders in NCP operations to maintain meaningful engagement. Also, NCPs not only serve as a non-judicial mechanism to provide affected communities and stakeholders with access to redress, but also promote the effective implementation of the Guidelines. The updated Guidelines also added the new provision indicating that NCPs are encouraged to assist governments in developing, implementing and promoting coherence of policies (section D of I. National Contact Points for Responsible Business Conduct of the Procedures). The OECD cases show examples of some NCPs providing advice to states on the protection of human rights by business enterprises. For example, in the case against Dredging International in Belgium NCP, the NCP recommended that the relevant Indian authorities cease further operations of the Dhamra port project in India to address the negative impact on the environment and local communities. This was also done in the case against Van Oord, Atradius and Industrial Port at the Brazilian NCP, in which the companies are allegedly linked to human rights violations committed by Suape, a Brazilian state-owned company, through its investments. The NCP recommended that the Dutch Government raise awareness among Dutch financial institutions about the situation in the port of Suape and the negative impact on the interests and rights of traditional communities, including fisheries, and develop initiatives to promote corporate social responsibility in the Suape port and industrial complex. The importance of the role of NCPs in implementing and promoting responsible business conduct is undeniable, considering that they have the privilege of being confronted with a range of different information and situations related to human rights violations around the world through their case handling system. This needs to be further developed and encouraged so that NCPs can effectively support governments in fulfilling their responsibility to protect.

### **Conclusion**

The updated provisions of the OECD Guidelines on the State Responsibility to Protect and the OECD Recommendation and OECD Declaration for Governments on Promoting Responsible Business Practises clearly demonstrate the importance of the role of governments in the effective implementation of the OECD Guidelines. However, as some OECD cases in this analysis show, the updated Guidelines could have provided clearer guidance to governments on the implementation of some specific measures. In particular, the creation of a favourable policy environment could have focused on aligning mandatory human rights due diligence laws with the OECD Guidelines. In addition, while government engagement with companies and other stakeholders was discussed, the focus could have been placed on what specific areas of co-operation and engagement could be further strengthened. For example, governments could work more closely with certain multinational companies operating in extractive industries abroad, particularly when operating in conflict-affected and high-risk areas. The Procedures for NCPs in the Updated Guidelines also emphasised the important role of NCPs in promoting the effective implementation of the Guidelines by supporting governments. Some OECD cases show the importance of such a role of NCPs, and it needs to be further promoted in all NCPs.



# CONCLUDING REMARKS ON THE BLOG SERIES EXPLORING NEW FRONTIERS IN THE UPDATED OECD GUIDELINES: DEVELOPMENTS, CHALLENGES AND THE ROAD AHEAD



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## Introduction

OECD Watch and the NOVA Centre on Business, Human Rights and the Environment partnered together to facilitate discussion on the June 2023 revision of the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct through the virtual symposium Exploring new frontiers in the updated OECD Guidelines. The purpose of the symposium was to delve into the updated OECD Guidelines through global multi-stakeholder perspectives on progress, strengths, and weaknesses of the new text. Additionally, the symposium aimed to discuss the connections and coherence of the Guidelines and legislative initiatives focused on corporate accountability across the globe, including the impending EU Corporate Sustainability Due Diligence Directive (CSDDD) and other regional initiatives.

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### Responsible business conduct standards for companies

#### *Improved, notable, and new corporate standards...*

Blog contributors to the symposium, experts in their respective fields, highlighted key updates to the Guidelines with the potential to meaningfully impact corporate policies and practice. **Chiara Macchi** welcomed the inclusion of new and notable text on climate change and the corporate responsibility to conduct climate due diligence. **Blake Harwell** stressed the significance of the revisions to the Employment and Industrial Relations chapter, which was amended to cover all workers – not just employees – in corporate value chains. **Caroline Omari Lichuma** also highlighted the importance of new text meaningful stakeholder engagement in due diligence processes, including with vulnerable and marginalised people, such as human rights defenders and Indigenous Peoples. Another revision with the potential for ground-breaking impact is the inclusion of new text on good animal welfare standards, which **Michelle Baxter Wickham, Katie Arth, and Sophie Aylmer** describe as “ha[ving] the potential to transform the lives of billions of animals”. Additionally, **Leonard Feld** appreciated the inclusion of the notion of “enhanced due diligence” in relation to marginalised and vulnerable individuals, in situations of armed conflict or high risk and situations concerning risks to biodiversity in protected areas.

#### *... But with some gaps and requiring more OECD guidance*

Some contributors pointed out gaps and other weaknesses in the updated text. **Shreeja Sen** criticised the glaring gaps in the Science, Technology, and Innovation Chapter, including the failure to recognise the financial value of data and therefore the immense power companies holding data wield, and the absence of references to emerging/frontier tech and the need for their regulation. **Joan Carling** also critiqued the reference to Indigenous Peoples’ rights as individual rather than collective rights, as they are referred to in United Nations instruments.

Other authors also called for additional OECD guidance, similar to the OECD’s existing sectoral guidances on due diligence, on issues included in the Guidelines. **Joan Carling** urged the publication of corporate guidance on incorporating Indigenous Peoples’ perspectives into the due diligence process, including on respecting the right to free, prior, and informed consent (FPIC). **Michelle Baxter Wickham, Katie Arth, and Sophie Aylmer** also advocated for guidance on companies’ new responsibilities to respect good animal welfare standards in the updated Guidelines. Moreover, **Janneke Bazelmans and Isabelle Geuskens** raised concerns about the narrow definition of Just Transition in the Guidelines, which could leave key justice dimensions unaddressed, adding, “A Just Transition to renewable energy hence requires the unveiling and addressing of interconnected and deep-rooted systemic traps, which have held many so-called “developing” countries back for decades”.

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### Alignment between the Guidelines and existing and upcoming corporate accountability standards and laws

#### *The updated Guidelines are based on existing instruments...*

Several authors pointed out that the updates to the Guidelines drew on an array of well-known OECD and international (responsible business conduct) standards, including OECD (sectoral) due diligence guidance, guides for NCPs when handling complaints, and previous decisions and statements of OECD National Contact Points (NCPs). In her blog, **Danielle Anne Pamplona** highlighted that the revised text on human rights defenders and corporate disclosure in the Guidelines is harmonised with the Escazú Agreement, noting: “It is hoped that these texts can be combined to demand the rights they protect, representing progress that can be measured beyond the language they use, and that represent real and tangible positive impacts.” **Joan Carling** also welcomed the broad alignment between the updated Guidelines and the UN Declaration on the Rights of Indigenous Peoples, especially given the disproportionate impacts of corporate activities on Indigenous Peoples. The resulting Guidelines text is, as **Leonard Feld** aptly concludes in his blog, “not a revolution, but a consolidation of the state-of-the-art.”

#### *... And the EU CSDDD should be harmonised with the Guidelines*

Several authors also discussed the updated Guidelines in the context of the European Union’s proposal for a CSDDD, for which only today it has been announced that the Council and European Parliament have reached a provisional deal. In this regard, **Joseph Wilde-Ramsing** emphasised the importance of the EU CSDDD being aligned with the strong standards in the Guidelines, including with regard to the need for companies to consider their downstream impacts as part of due diligence, and for multi-stakeholder initiatives or industry auditing/certification schemes to not substitute for a company’s own actions to address impacts. **Chiara Macchi** and **Caroline Omari Lichuma** highlighted the need for the EU CSDDD to cover corporate climate change impacts and include strong text on meaningful stakeholder engagement, respectively. **Otgontuya Davaanyam and Markus Krawjewski** also affirm that states should align their human rights due diligence legislations, including the EU CSDDD, with the current update of the Guidelines, illustrating the example of the French NCP that “appears to attempt to link the NCP’s case handling system to its own binding human rights due diligence legislation”.

### Important role of NCPs in ensuring implementation of the Guidelines

Strong corporate standards, however, are no more than words on paper without equally strong implementation by companies, governments, and their NCPs. **Blake Harwell** urged OECD governments to do more through their NCPs to implement the new standards in the Guidelines, including to be more demanding of companies to contribute to remediation: “Anything less and the Guidelines will continue to be good intentions without meaningful impact.” In the context of lack of (corporate) accountability in Africa, **Jonathan Kaufman** urged for NCPs to have strong architectures to ensure they make a difference on the ground, including by making determinations of (non-) compliance with the Guidelines and recommending consequences for corporate bad faith, such as for non-implementation of agreements reached in mediation and more broadly in NCP procedures. **Otgontuya Davaanyam and Markus Krawjewski** also emphasised the role that NCPs should play in assisting governments in implementing and promoting coherence of policies and effectively supporting governments in fulfilling their responsibility to protect.

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### **Conclusion: New standards must lead to changes on the ground**

This blog symposium was convened in recognition of the significant developments in the business and human rights field that have taken place during the last years and especially in 2023. It is important to take stock of these developments and to recognise the leaps and bounds that have been taken and are continuing to take place in terms of responsible business conduct, both in voluntary standards for companies and in binding legislative initiatives on human rights and environmental due diligence. Indeed, today's announcement on the CSDDD is a significant step towards enhancing the protection of human rights and the environment across the world. These developments, however, must lead to change on the ground. As **Joan Carling** aptly stated, "Ultimately, the success of these efforts will be measured not only by adherence to the Guidelines but by the positive impact they create in the lives of those most affected."

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