

**Public Consultation Survey re Targeted Update of OECD Guidelines
Due Feb. 10**

<https://survey.oecd.org/index.php?r=survey/index&sid=655294>

Name of submitting organisation

Inclusive Development International

Please identify the organisation type of the submitting party

Civil society organisation

General comments (max 2000 characters)

Inclusive Development International welcomes the opportunity to comment on the update of the Guidelines. As an organization that supports communities impacted by business activities and that has experience using the Guidelines to encourage responsible business conduct and secure remedy via NCP complaints, we are well placed to comment on the revision. Our comments are grounded in our extensive experience supporting communities through NCP and other non-judicial grievance processes, including in one of the few NCP cases - regarding ANZ bank's financing activities in Cambodia - that have resulted in tangible remedial outcomes for communities.

In the 12 years since the Guidelines were last revised, other relevant global standards have been developed, making the Guidelines outdated in several respects, including with regard to land and resource rights; vulnerable groups, including human rights defenders and Indigenous Peoples; and climate change and a just transition. Moreover, while NCPs have a vital role to play in ensuring the effectiveness of the Guidelines, including by handling complaints and providing what is often the only viable forum available to impacted communities to seek remedy, their track record is poor. Therefore, updates to both the substantive chapters of the Guidelines, as well as the Procedures governing NCPs, are badly needed. While the proposed revisions are positive in many respects, they remain insufficient in others, particularly in relation to the guidance to NCPs on: transparency, issuing determinations and recommendations in final statements, follow-up on outcomes, and consequences for non-conformance. Each of these is vital to the effectiveness of NCPs and their relevance in the context of increasing RBC due diligence legislation and judicial proceedings.

Chapter I: Concepts and Principles (max 2000 characters)

Chapter II: General Policies (max 2000 characters)

- Definition of MNEs: The update limiting Guidelines application to companies conducting *a significant amount of* business in more than one country should be eliminated as it lacks clarity and may significantly reduce the accessibility and effectiveness of NCP complaints.
- Scope of due diligence: We note that due diligence has always covered MNEs' entire supply and value chain, including downstream business relationships, and request that the text makes this clear.
- Human rights defenders (HRDs): We welcome language on HRDs but are concerned that OECD's approach is not aligned with and in places contradicts best practice. The language

should reinforce existing and widely accepted standards on HRDs and their role in promoting responsible business conduct. In particular, revisions should address the following issues:

- The term “undue pressure” is problematic not only because it is not found in any other international standard but also it suggests that “due” pressure against HRDs is acceptable.
- Current text suggests that HRDs may only contest business practices “that contravene the law, or are inconsistent with the Guidelines.” HRDs should be able to criticize any business practice without fear of retaliation, even when those are legal or consistent with the Guidelines but may still be opposed by communities.
- Respecting the human rights of HRDs means not only refraining from retaliation against them, but also avoiding contribution to adverse impacts and preventing or mitigating impacts directly linked by a business relationship, in line with the principles set out in the Guidelines. We encourage you to add language outlining the scope of this responsibility, including by clarifying the need to, at times, take proactive steps to engage with and openly acknowledge the legitimacy of HRDs, and to use leverage in business relationships, including with governments and private or public security officials.

Chapter III: Disclosure (max 2000 characters)

- Materiality: We welcome revised language in ¶30-32 that clarifies the concept of materiality and specifies that information related to RBC issues and due diligence should be considered material if it can reasonably be expected to influence an investor’s investment decisions, and that this materiality assessment may evolve over time according to societal and legal contexts. However, the disclosure framework established by the OECD should go beyond this traditional materiality standard to instead align with the principle of double materiality, which pays equal heed to the risks and impacts of corporate activities on human rights and the environment as it does to enterprise value. While human rights and environmental risks associated with a company’s operations are sometimes considered financially material, they often are not unless they pose a significant risk to an enterprise’s value or profit margins. Corporate reporting on these issues should be divorced from financial considerations, in line with the expectations of the UNGPs.

Chapter IV: Human Rights (max 2000 characters)

- Human rights due diligence and human rights defenders: HRDs, along with community leaders, are an important expert resource for human rights due diligence, enabling MNEs to better understand concerns and expectations of local stakeholders and thus more accurately identify and address potential and actual adverse impacts on them. We encourage you to add new language to the commentary to openly acknowledge the active role HRDs can play in human right due diligence process. The commentary should also reference the expectations laid out in Chapter II with regard to respecting and protecting HRDs.
- Land and resource security: Land and natural resource security underpins the realization of numerous other human rights and are frequently affected by the activities of MNEs.

Therefore, we recommend that Chapter VI explicitly urge MNEs to fully implement the VGGTs and other applicable human rights instruments as relevant to their operations.

- Indigenous Peoples rights: We welcome the recognition of MNEs' responsibility to take additional steps to assess and address human rights impacts on Indigenous Peoples, among other vulnerable groups, and the specific reference to UNDRIP. However, the updates should go further, to recognize the unique rights of self-identified Indigenous Peoples to self-determination and the rights of Indigenous Peoples and tribal/customary communities to FPIC. Additional guidance should be provided to MNEs regarding the need to identify vulnerable populations, including Indigenous Peoples, remove barriers to participation and address the unique adverse impacts on such populations.

Chapter V: Employment and Industrial Relations (max 2000 characters)

Chapter VI: Environment (max 2000 characters)

- Land and resource rights: We welcome the reference in the commentary to the VGGTs and suggest strengthening the language to more strongly urge MNEs to fully implement the VGGTs as applicable to their operations and activities. We further recommend that this reference also be incorporated into the Human Rights Chapter reflecting the importance of respect for land and resource rights as a precursor to other human rights.
- Environmental and land rights defenders: HRDs focused on environmental and land rights issues are among the most vulnerable to serious retaliation. According to Global Witness, more than 1,700 such HRDs were killed between 2012 and 2021, an average of one defender killed approximately every two days over 10 years. We encourage you to add new language to the commentary specifically addressing the vulnerability of environmental and land rights defenders and calling attention to MNEs' responsibilities with regard to HRDs, as laid out in Chapters II and IV.
- Just transition: While we welcome references to a just transition, the text needs to be strengthened to clarify MNEs' responsibilities. The text should clearly define "just transition" and articulate the expectation that MNEs identify and address any adverse impacts both from their actions to address climate change, as well as in the extraction, production or use of natural resources and/or renewable energy to be used as part of the global energy transition. The text should also promote equitable access to benefits derived from natural resource exploitation, particularly for directly affected communities.

Chapter VII: Combatting Bribery, Bribe Solicitation and Extortion (max 2000 characters)

Chapter VIII: Consumer Interests (max 2000 characters)

Chapter IX: Science, Technology and Innovation (max 2000 characters)

Chapter X: Competition (max 2000 characters)

Chapter XI: Taxation (max 2000 characters)

Implementation procedures (max. 4000 characters)

- Effectiveness criteria: We welcome UNGP alignment and ensuring that power and resource imbalances don't prevent effective engagement. We recommend enhancing the language to guarantee access to resources by vulnerable groups (i.e. travel, translation, technology, technical experts).
- Transparency: Transparency should be a core principle. It is essential to leveling power imbalances and the effectiveness of NCP processes. We welcome updates that emphasize transparency and better define narrow confidentiality requirements, but our position is that confidentiality should almost always be negotiated between parties, not imposed.
 - Grounds for information confidentiality in ¶C.6 should be narrowed (i.e. replace sensitive information with trade secrets). Limited legitimate reasons for confidentiality exist; access to information is key for parties to effectively engage.
 - Added language in ¶46 is an important improvement. However, the sentence "Nonetheless, it remains important to strike a balance..." implies that NCPs can, at their discretion, add additional confidentiality requirements to "build confidence." This should be removed: imposed confidentiality requirements reduce confidence of complainant communities.
 - We encourage further alignment of ¶48 with ¶C.7. Ultimately, parties must agree on the level of disclosure, and it is problematic for the Commentary to set confidentiality as a default for the whole proceeding. Good practices such as publishing complaints, sharing progress updates and agreements reached with the public or a limited group of stakeholders should be encouraged.
 - ¶39 should be amended to provide justifiable grounds, such as security risks, to keep the identity of a party confidential.
 - ¶40 should be amended to require publication of decisions that the issues raised warrant further examination.
- Initial assessment: This is a basic eligibility determination, not a merits assessment. The criteria leave too much room for arbitrariness. They should be simplified to: (1) the identity of the parties; (2) whether the issues raised are covered by the Guidelines; and (3) whether the allegations are plausible.
- Good Offices: The language in ¶24 and ¶36 on the need for agreements to be Guidelines-compatible is critically important. We recommend further strengthening by directing NCPs to make recommendations about any incompatibilities that remain unresolved.
- Final Statements: We welcome clarifications (¶I.c.4, ¶24, & ¶43) of NCPs' authority to make determinations and recommendations. The Guidelines should more clearly encourage this practice. Public determinations and recommendations are one of the few tools to incentivize MNEs to provide remedy or implement reforms aligning their operations with the Guidelines. Final statements should include clear determinations of non-conformance and tailored recommendations whenever no agreement is reached; as well as in some instances following an agreement, taking into account any commitments already made by the MNE.
- Follow up: We welcome language on follow up, but it lacks clarity. The text should direct NCPs to undertake follow up until agreements and/or recommendations are fully implemented, unless not warranted for specific reasons, and to publish follow up statements

evaluating implementation and making further recommendations as necessary. We welcome flexibility on the ability to resume good offices.

- Consequences: It is crucial that NCPs be equipped with tools to incentivize MNE engagement in dialogue and implementation of recommendations. Text should be added to encourage consequences (i.e. exclusion from trade promotion privileges, public procurement contracts, export finance and credit guarantees) when MNEs refuse to engage, or do not implement agreements or recommendations. Such consequences for Guidelines non-conformance are consistent with due diligence responsibilities.