

OECD Watch's recommendations on the "Protect, Respect and Remedy" framework proposed by the Special Representative to the United Nations Secretary General on Business and Human Rights

The OECD Guidelines are at present one of the few mechanisms available to address the impacts of corporate misconduct. Though they can neither impose sanctions nor offer compensation, they provide a potentially valuable instrument for operationalising the "Protect, Respect, Remedy" framework developed by SRSG Ruggie.

This OECD Watch¹ paper provides a contribution to the current international debate on business and human rights, with a specific focus on the relationship between the OECD Guidelines for Multinational Enterprises and the 'Ruggie mandate'. The likely review of the OECD Guidelines in 2010 will provide an opportunity to strengthen human rights elements of the OECD Guidelines and contribute to the 'operationalisation' of the Ruggie framework.

Professor Ruggie has identified governance gaps created by globalisation as the root cause of the business and human rights failures. While MNEs have continued to grow and expand their operations and supply chains throughout the world, an effective global regulatory framework ensuring that corporations act responsibly and uphold international human rights standards wherever they operate is absent. While the OECD Guidelines do have global applicability, it must be recognised that they do not cover MNEs from non-adhering countries, including many large emerging economies such as Russia, India and China.

OECD Watch believes that fundamental changes are needed to harmonise performance of National Contact Points (NCPs) and enhance the overall effectiveness of the OECD Guidelines. A review of the Guidelines could address some of the instrument's current shortcomings. However, OECD Watch acknowledges that even with improvements, the OECD Guidelines cannot be regarded as a panacea for ensuring that human rights are universally respected or providing effective remedies for those adversely affected by irresponsible corporate conduct.

Although the SRSG's 2008 report points out that "*the OECD Guidelines are currently the most widely applicable set of government-endorsed standards related to corporate responsibility and human rights*" their current shape and form fall short of the parameters set by the SRSG's framework.² It is thus essential to look at the specific strengths and weaknesses of the Guidelines vis-à-vis the framework.

OECD Watch outlines below its core recommendations related to each pillar of the SRSG's framework, which the network believes could be considered by SRSG Ruggie for inclusion in his final report, thereby providing authoritative guidance and direction to a revision of the OECD Guidelines. OECD Watch calls on SRSG Ruggie and his team to engage with the OECD, member states, and non-member adhering states in upgrading the Guidelines. At this stage it is crucial to create synergy towards a more effective and accountable business and human rights framework.

¹ OECD Watch is an international network of civil society organisations promoting corporate accountability. The purpose of OECD Watch is to inform the wider NGO community about policies and activities of the OECD's Investment Committee and to test the effectiveness of the OECD Guidelines for Multinational Enterprises (MNEs). The network currently consists of 88 civil society organisations from 45 different countries around the working on human rights, labour rights, consumer rights, transparency, the environment and sustainable development.

² Ruggie, John, "Protect, Respect and Remedy: a Framework for Business and Human Rights," 2008, at para. 46.

1. The State Duty to Protect

OECD and adhering governments have signed the OECD Guidelines and committed to their implementation. As such, governments have a duty to investigate and ensure that their policies and practices promote adherence to the Guidelines and do not in any way hamper compliance by their MNEs in their operations worldwide. For states to perform the role expected of them in furthering corporate accountability, human rights must be an integral part of every activity or role that the states undertake with regard to business. This includes all relationships and functions, be it as a partner, consumer/public procurer, shareholder, investor, insurer or risk bearer and regulator (or de-regulator), and through trade and investment agreements, export credit agencies, aid funds, public-private partnerships, export credit insurance, subsidies, loans, investments, etc.

OECD Watch recommendations:

- **The particular responsibilities resting on state ownership in MNEs must be clarified.** Governments must address their responsibility to uphold adherence to the OECD Guidelines within enterprises they (partly) own or engage with through a public-private partnership. In such cases, the state has a direct obligation to comply with the OECD Guidelines as well as conform to the procedures established by the NCP when a complaint is filed. This is particularly relevant in light of the global financial crisis, and the growing number of financial institutions and other enterprises being nationalised or financially supported.
- **States should proactively seek to prevent any public support or export credit from contributing to or being complicit in human rights abuses.** When the state has a role in facilitating or supporting investments by its MNEs abroad, such as through export credit agencies or providing guarantees for exports or investments, the state should establish a potential beneficiary's human rights and environmental track record and make a screening based on the company's compliance with the OECD Guidelines. In this way, states and state bodies can use the Guidelines as a preventive measure for averting human rights abuses.
- **Conflicts of interest must be avoided by addressing the housing and independence of the NCP.** The SRSG highlighted this issue as one of the shortcomings of NCPs in his 2008 report. However, a large number of NCPs (including those of some of the largest economies in the world) continue to be housed in departments that are primarily responsible for promoting investments and business. OECD Watch therefore recommends that the Procedural Guidance of the OECD Guidelines be revised to ensure that NCPs are structured and housed to ensure independence from different potential stakeholders to avoid conflict of roles and interests.
- **Trade and investment agreements should be consistent with the state's ability and responsibility to adhere to and implement the OECD Guidelines.** Governments should ensure that international standards for responsible corporate behaviour are included in all bilateral and multilateral trade and investment agreements as well as in investor-state agreements. OECD governments, in particular, should ensure that the trade and investment agreements they make with developing countries do not infringe on the host government's ability to regulate MNEs in the area of business and human rights. Training for government negotiators human rights duties in the field of international trade, investment, business, and commerce could contribute to this objective.
- **The relationship and the responsibility shared by the "home" and "host" countries should be clarified.** Under the OECD Guidelines, home states are given a jurisdictional basis for taking cognisance of extraterritorial violations of human rights by their corporations, given that the Guidelines apply to MNEs from OECD and adhering countries and cover their operations worldwide. OECD Watch believes that regardless of whether or not there is an NCP in the host country, the home country must share the responsibility of redress in the event of a specific instance. The Human Rights Council has asked the SRSG to provide recommendations regarding "international cooperation" in relation to the state duty to protect, including joint problem-solving; we recommend the SRSG clarify this aspect and make the role and responsibilities of home country NCPs clearer to ensure effective cooperation among NCPs.

2. The Corporate Responsibility to Respect

The second pillar of the framework rests on corporations' responsibility to respect *all* human rights, independent of states' duties. It is a baseline expectation of *all* companies at *all* times and in *all* locations. It can be discharged through due diligence and good governance, i.e. steps a company must take to become aware of, prevent, and address adverse human rights impacts. Fundamental to this is transparency, disclosure and accountability.

OECD Watch recommendations:

- **A review of the OECD Guidelines provides a timely opportunity to “elaborate further on the scope and content of the corporate responsibility to respect all human rights”.**³ While corporate activity can affect all human rights, some rights are more vulnerable to violation through irresponsible corporate behaviour than others. A review of the OECD Guidelines could elaborate on what is expected from business by governments and the societies in which they operate in the 21st century.
- **The human rights provision of the OECD Guidelines should be revised to reflect the fact that MNEs are expected to respect all human rights wherever they operate.** The current text of the OECD Guidelines states that MNEs should respect the human rights of those affected by their activities “*consistent with the host government’s international obligations and commitments*”. This language is inconsistent with Ruggie’s notion that businesses should respect all human rights wherever they operate. The current Guidelines’ lack of reference to women and indigenous peoples’ rights should also be rectified.
- **The supply chain provision in the OECD Guidelines requires significant strengthening.** This provision must be adjusted to more accurately reflect the current structure of business relationships by not being restricted to investment and investment-like relationships only, but rather should employ a more comprehensive approach such as the concepts of ‘scope of responsibility’ and due diligence invoked by SRSG Ruggie. This also includes issues where companies become complicit in human rights abuses committed by host states or by security force. Building on the work of the SRSG, factors of control, causation and benefit and the duration and severity of the human rights impact should be taken into account when assigning responsibility.
- **Business operations in conflict zones, weak governance zones, and special economic/export/trade zones require particular attention and competence.** When operating in such zones, it is especially important that corporations follow international standards like OECD Guidelines and develop reliable systems for monitoring compliance in their operations. Greater emphasis should be placed on business’ responsibility to refrain from benefiting from conflicts and the heightened need for thorough due diligence in these situations.
- **The relationship between companies and the local population, as well as companies’ responsibility to engage in meaningful stakeholder dialogue, should be clarified.** The OECD Guidelines lack clarity on what demands companies should meet in engaging with local communities in relation to social and environmental damage and hazards to health. A revision of the OECD Guidelines should provide further detail as to what constitutes adequate and timely consultation with local stakeholders and access to information based on existing best practices.

³ In paragraph 4 (b) of resolution 8/7, the UN Human Rights Council asked the Special Representative “to elaborate further on the scope and content of the corporate responsibility to respect all human rights and to provide concrete guidance to business and other stakeholders”.

3. Access to effective remedies

OECD Watch believes that legislation at the state level and voluntary instruments at the multilateral level alone cannot provide effective remedies for human rights abuses. A binding international framework at the UN level is needed. Although the OECD Guidelines cannot provide compensation, they should promote some form of remedy when an MNE has failed to comply with the Guidelines. In order to do so, the procedures for handling complaints must be revised and improved.

OECD Watch recommendations:

- The SRSG has identified six minimum criteria an effective grievance mechanism should meet: it must be **legitimate, accessible, predictable, equitable, rights compatible, and transparent**. These criteria should provide a starting point for the upcoming review of the OECD Guidelines.
- **Avoidance of conflicts of interest in seeking resolution and remediation:** In cases of state-owned or partially state-owned enterprises, the NCP should use an independent assessor in order to avoid the perception of a conflict of interest.
- **NCPs should have the resources and capacities to fulfil their tasks and ensure effective remedies:** NCP personnel should be properly trained, equipped and funded to ensure they have the capacity to successfully mediate, investigate, assess and adjudicate.
- **NCPs should have clear and uniform procedures** for initial assessment of cases, including a time frame for responses, additional information and completion of the assessment, and should clearly specify which aspects of the complaint will be further considered for mediation
- **The Procedural Guidance should provide an indicative time frame** for the completion of each stage and the entire complaint procedure.
- **For highly complex and/or time or issue-sensitive cases**, the NCP should “fast track” the process by hiring a reputable, independent mediator that is approved by both parties.
- **OECD Guidelines procedure and its relation to other (judicial) grievance mechanisms:** With regard to parallel proceedings, the NCP should only exclude cases when there is a clear risk of prejudicing criminal proceedings.
- **Transparency of the complaint procedure:** The complaint itself, the initial assessment and any final statement should not be covered by the confidentiality provisions of the Guidelines.
- **Rights compatible:** The final statement should list each allegation and the company’s response, provide clear, specific recommendations including measures for follow up, and clearly state if there has been a breach of the Guidelines.
- **As an accepted principle of due process and fairness**, the NCP should recognise that it is unacceptable to reach a decision on a complaint based on information supplied by one party but to which the other party has no access.
- If a party refuses to participate during the assessment phase, the NCP should examine the available material and produce a final statement.
- OECD Watch would also add to the list of criteria outlined by SRSG Ruggie the **capacity to implement and follow up** upon NCP recommendations.

OECD Watch secretariat

Sarphatistraat 30
1018 GL Amsterdam
The Netherlands
Ph: +31 20 6391291
info@oecdwatch.org
www.oecdwatch.org

Drafted by:

Joris Oldenziel (SOMO), Rashmi Venkatesan (CIVIDEP), Víctor Ricco (CEDHA), and Joseph Wilde-Ramsing (SOMO), with contributions from Patricia Feeney (RAID), Serena Lillywhite (Oxfam Australia), Cornelia Heydenreich (Germanwatch), Gunhild Ørstavik (ForUM), Paul de Clerck (Friends of the Earth Europe), and Federico Arenoso (Poder Ciudadano)
The OECD Watch secretariat is hosted by SOMO