



Fédération internationale des ligues des droits de l'Homme

ORGANISATION INTERNATIONALE NON GOUVERNEMENTALE AYANT STATUT CONSULTATIF AUPRES DES NATIONS UNIES, DE L'UNESCO,
DU CONSEIL DE L'EUROPE ET D'OBSERVATEUR AUPRES DE LA COMMISSION AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES

International Federation
for Human Rights

Federación Internacional
de los Derechos Humanos

الغدرالية الدولية لحقوق الانسان

Open Letter to OECD Investment Committee on the review process of the OECD guidelines for Multinational Enterprises

Paris, 28 April 2011

The International Federation for Human Rights (FIDH) welcomes the review and update process of the OECD guidelines for Multinational Enterprises (the «Guidelines ») in light of the many developments witnessed over the past ten years in the field of Corporate social responsibility (CSR) and the growing understanding of the responsibility of transnational corporations with regard to human rights. Such a process is indeed timely in order to respond to the expectations of society and the international community regarding the conduct of multinational enterprises.

While FIDH had the opportunity to participate in meetings during the revision process and to share its views, in particular through OECD Watch on the draft text, FIDH nevertheless regrets the revision process has not been more inclusive.

FIDH deplores the lack of transparency and openness of the review process. At no stage have the negotiated drafts been made available online nor made accessible otherwise in the public domain for stakeholders within and outside adhering countries.

Although FIDH takes note of major improvements brought to the Guidelines in particular with regard to human rights, we believe that the text, as it stands in the version dated April 27, poses concerns in terms of coherence and clarity. Such inconsistencies may prevent the Guidelines from being successfully implemented.

The Guidelines and their Commentaries draw upon different instruments and references in an unequal and inconsistent manner which may jeopardize the clarity and the subsequent implementation of the Guidelines. For example, while the text seeks to integrate the Guiding Principles of the SRSR to be adopted by the UN human rights council, some parts are yet to be aligned, whereas others actually depart from the Guiding Principles in particular with regard to due diligence in the supply chain.

FIDH therefore urges the Investment Committee to extend the consultation process, including the

possibility for interested parties to comment on the draft text. Attached are a few comments we would like to draw your attention to as the negotiations seem to be drawing to a conclusion and which further stress the need to postpone the adoption of the Guidelines.

Should the Guidelines be adopted without any further consultation, FIDH recommends that an inclusive and transparent consultation process be undertaken in the event that further guidance or support documents are subsequently drafted. We also take this opportunity to encourage the OECD to adopt a consultation policy that would allow stakeholders to actively participate in the OECD policy development process.

FIDH believes it is in the interest of all stakeholders to ensure the guidelines are clear, coherent and in line with existing standards and principles.

We thank you for your consideration.

Yours sincerely,

A handwritten signature in black ink, appearing to be 'SB', written in a cursive style.

Souhayr Belhassen
President, FIDH

Remarks on the draft OECD Guidelines (version as of April 27)

1) Procedures

FIDH recalls the importance of procedural aspects to ensure credibility and effectiveness of the Guidelines. FIDH welcomes the attention given to the need for institutional arrangements that allow National Contact Points to operate in an impartial manner, in particular when dealing with specific instances, by promoting functional equivalence between NCPs through the adoption of core criteria and guiding principles for Specific instances. However, FIDH supports the demands made by NGOs and trade unions to explicitly reinforce the impartiality of the NCPs by requiring NCPs to have a multistakeholder composition including independent experts, as well as to establish multi-stakeholder advisory or oversight bodies to assist NCPs in their tasks. NCPs should also be given a defined period of time to deal with Specific instances. We welcome that in case mediation fails, the National Contact Points will issue a statement including where appropriate recommendations on the implementation of the guidelines.

FIDH notes that the Investment Committee will aim at enhancing the effectiveness of the Guidelines and in particular of the NCPs. However, in order to ensure the participation of interested parties and the success of the resolution of Specific Instances, FIDH recommends that the Investment Committee be able to «consider substantiated submission not only « by an adhering country, and advisory body or OECD Watch » (Part II. II.3b) but rather by « an adhering country, business organisations, employees organisations, other non-governmental organisations, and other interested parties », including National Human Rights Institutions (NHRIs).

We also believe that to reinforce the guidelines, and ensure greater policy coherence, public support to businesses (export credit, public procurement etc.) should be linked to compliance with the guidelines.

2) General Policies and Human Rights Chapter

FIDH welcomes the inclusion of a distinct human rights chapter and acknowledges that substantive improvements have been made to the Guidelines.

Respect for human rights as a baseline requirement

FIDH recalls that the respect for internationally recognised human rights should be considered as a baseline requirement or global standard of expected conduct (as rightfully stated in chapter IV) for all business enterprises rather than « good practice »(I.5), indeed international human rights law recognises the responsibility of non-states actors to at the minimum respect human rights. FIDH recommends that the guidelines be consistent in recommending to Business enterprises that they respect internationally recognised human rights rather (as in II.2) than pointing out the « human rights obligations of the countries in which they operate » (IV. Chapeau). Most States have ratified the treaties comprised in the Bill of Rights and multinationals have already committed to respect standards comprised in these instruments. A systematic reference to international human rights standards would ensure coherence in the Guidelines.

Conflicting law requirements: the highest standards should prevail

FIDH is concerned about a lack of consistency in the recommendations to multinational enterprises confronted to conflicting legal requirements. While the human rights chapter acknowledges that enterprises should seek to honour internationally recognised human rights to the fullest extent in case domestic law and requirements conflict with human rights, the Guidelines also worryingly state (I. 2

and IV. Commentary) that enterprises should not be placed in violation of domestic law. FIDH considers that in cases where laws are clearly in contradiction with human rights, as for example in cases of discriminatory laws, enterprises should strive to apply international standards and demonstrate their efforts in that regard.

Scope of corporate responsibility to respect human rights

FIDH believes that it is confusing to make the distinction between adverse human rights impacts an enterprise “has caused or contributed to within the context of its own activities” and “those directly linked to their business operations”. If an enterprise has caused or contributed to an adverse human rights impact, it should suffice to establish its responsibility regardless of whether it is in the context of its own activities or if it is directly linked to its operations. What is important is the fact that the enterprise has caused or contributed to the adverse impact. It is of course more frequent that an enterprise causes or contributes to an adverse impact within the context of its own activities, but it should not be excluded that it could cause or contribute to an adverse impact through a business relationship. FIDH thus recommends that “within the context of its own activities” be deleted from the text in Chapter IV.2.

While the Guidelines recommend that business enterprises address human rights impacts “with which they are involved” (IV.4), they unnecessarily precise that enterprises should provide for or co-operate through legitimate processes in the remediation of such impacts only “where they have caused or contributed to these impacts” (IV. 8) and not where the adverse impact is directly linked to their operation but that they have not caused or contributed to it. The difference between the two scenarios may be clear in theory, however in practice it may not be the case. For example where multinational enterprises have externalised certain activities to other business partners that are entirely dependent on them and/or that they are benefiting from adverse human rights impacts directly linked to their operations, FIDH believes that the multinational enterprises should not be exempted from the need to remediate the situation. Again the determining factor for understanding the responsibility of the multinational enterprise is the extent to which it is contributing to the adverse impact.

Stakeholder engagement

FIDH supports the mention that enterprises should not engage in discriminatory or disciplinary action against workers who make reports on practices that contravene the law, the guidelines or the enterprise's policies (II. 9). In addition, the guidelines should also include a prohibition to engage in denigration or support any acts of criminalisation of human rights defenders in cases of human rights abuses involving businesses. On the opposite, FIDH supports the need for multinational enterprises to genuinely engage, as part of due diligence processes, with stakeholders and potentially affected communities including indigenous peoples (such engagement and consultation is not mentioned in chapter IV). Finally, FIDH is concerned about the mention of “good faith of the participants on both sides” when referring to stakeholder engagement in the Commentary on General Policies. While good faith from involved parties is certainly essential to ensure the success of Specific Instances, FIDH fears that such notion could inappropriately be interpreted in the context of stakeholder engagement. In light of the frequent imbalances between the parties to business-related human rights claims, as recognized in John Ruggie's Guiding Principles, FIDH recalls the fundamental importance to ensure meaningful stakeholder engagement, in particular with affected communities and indigenous peoples. Such engagement requires taking into consideration their concerns and respecting the principle of Free, Prior and Informed Consent.

FIDH is available for further comments and clarification should the OECD Investment Committee be willing to undertake due consultation with all stakeholders.