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# The OECD's Blueprint for Multinational Responsibility: Historical and Contemporary Perspectives

## *O plano da OCDE para a responsabilidade das empresas multinacionais: perspectivas históricas e contemporâneas*

Ana Rita Gil\* | Thaís Leonel Magalhães\*\*

**Abstract:** This paper presents a thorough analysis of the OECD Guidelines for Multinational Enterprises, examining their historical development and core principles. The Guidelines, established in 1976 and updated periodically, provide voluntary standards for responsible business conduct, addressing areas such as human rights, environmental protection, labor relations, and anti-corruption. A special focus is given to the implementation of risk-based due diligence and the role of National Contact Points in promoting and enforcing the Guidelines. Through a critical examination of these aspects, the paper evaluates the effectiveness and challenges of the Guidelines. The analysis underscores the importance of stakeholder collaboration and the need for continuous adaptation to maintain the relevance of the Guidelines in a dynamic global economy.

**Resumo:** Este artigo procede a uma análise das Diretrizes da OCDE para as Empresas Multinacionais, examinando a sua evolução histórica e princípios fundamentais. Estabelecidas em 1976 e atualizadas periodicamente, as Diretrizes fornecem normas voluntárias de conduta empresarial responsável, abordando áreas como os direitos humanos, a proteção ambiental, as relações laborais e a luta contra a corrupção. Um dos principais focos é a implementação da diligência devida baseada no risco e o papel dos Pontos de Contacto Nacionais na promoção e aplicação das Diretrizes. Através de uma análise crítica destes pontos, avalia-se a eficácia e os desafios de implementação das Diretrizes. A análise destaca a importância da colaboração entre as partes interessadas e a necessidade de uma adaptação contínua para manter a relevância das Diretrizes numa economia global em constante mudança.

\* Assistant Professor at Faculdade de Direito da Universidade de Lisboa. Researcher at the Lisbon Public Law Research Centre. This paper corresponds to the communication presented in the Workshop "Regulating Human Rights and Business", which took place at the Faculdade de Direito da Universidade de Lisboa, on the 30<sup>th</sup> of March 2023. This workshop was developed in the context of the Lisbon Public Law's Project *Human Rights & Business: regulation and duties from emerging companies of Human Rights protection standards*, funded by Fundação para a Ciência e Tecnologia (Ref. UIDB/04310/2020).

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**Keywords:** OECD Guidelines; Multinational Enterprises; Responsible Business Conduct; Risk-based Due Diligence; National Contact Points.

**Palavras-chave:** Diretrizes da OCDE; Empresas Multinacionais; Conduta Empresarial Responsável; Diligência Devida Baseada no Risco; Pontos de Contacto Nacionais.

**Summary:** 1. Introduction; 2. Historical Context; 3. Key Revisions; 3.1. Revision of 2000; 3.2. Revision of 2011; 3.3. Revision of 2023; 4. Current Framework; 4.1. Substantive areas of responsibility; 4.2. Disclosure; 4.3. Due Diligence Process; 4.4. The National Contact Points; 5. Practical Challenges and Suggestions; 6. Conclusion.

## 1. Introduction

The Organisation for Economic Co-operation and Development (OECD), founded in 1961, has modified its strategy to address the changing demands of multinational corporations over the decades. Created on June 21, 1976, the Guidelines for Multinational Enterprises on Responsible Business Conduct have been updated several times, with the most recent update published on June 8, 2023. These Guidelines offer voluntary norms and parameters for moral corporate conduct, with a focus on human rights, environmental impact, and anti-corruption initiatives. Their nature is not easy to frame within the traditional Sources of International Law. They provide voluntary principles and standards for responsible business conduct: that is, they are recommendations addressed by governments to multinational enterprises. However, the countries adhering to the Guidelines make a binding commitment to implement them in accordance with the Decision of the OECD Council on the matter. While the content of the Guidelines remains non-binding for both States and enterprises, adhering governments are obligated to promote their use and ensure the effective functioning of National Contact Points. The Guidelines represent the only multilaterally agreed and comprehensive code of responsible business conduct that governments have formally committed to support.

The development of these Guidelines has been marked by important turning points over the years. Important improvements include the formalization of the function of National Contact Points (NCPs) and the addition of a dedicated human rights chapter. Due diligence procedure has also been refined constantly. Moreover, new topics have been added, showing a commitment to update the instrument with the new challenges and evolutions of the current global markets.



This study offers a systematic examination of the OECD Guidelines for Multinational Enterprises, charting their development throughout time and evaluating their influence on international business practices. It starts with their history, from their creation in 1976 to their most recent update in 2023.

The Guidelines' guiding principles and optional requirements are then examined, with an emphasis on key topics including human rights and environmental impact. This section explores the standards that are expected of multinational corporations as well as the overarching objectives of fostering moral and sustainable business practices. The creation and operation of National Contact Points in each of the participating nations is then assessed, to learn more about how these organizations disseminate the Guidelines, handle complaints, and help to resolve problems that arise from the operations of multinational corporations. A significant aspect of the Guidelines is the emphasis on risk-based due diligence, which requires enterprises to identify, prevent, mitigate, and account for adverse impacts in their operations and supply chains. The study will dedicate a particular section to this important duty.

Finally, the paper will look at the difficulties in putting the Guidelines into practice, such as their voluntary nature and the general language employed. It responds to critiques and makes recommendations on how the Guidelines could be improved to increase their efficacy. In addition, it highlights the significance of cooperation as well as the requirement for improved reporting and support systems, as well as the role that different stakeholders – governments, businesses, and civil society – play in putting the Guidelines into practice.

## 2. Historical Context

In 1961, the OECD was established as a group of nations “sharing a commitment to democratic government and market economy”. The Organization for European Economic Co-operation (OEEC), which was founded to control US and Canadian funding as part of the Marshall plan for post-World War II reconstruction in Europe, was the forerunner of the OECD.

With the vocation to “to deliver greater well-being and to support worldwide resilient, inclusive and sustainable growth”, the OECD has worked to “develop strong economies in its member countries, enhance productivity, refine market systems, broaden free trade, and support the growth of both industrialized and developing nations”<sup>1</sup>.

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<sup>1</sup> OECD, *in* <https://www.oecd.org/>, accessed 23 April 2025.

Efforts to influence and regulate multinational enterprises (MNEs) began in earnest in the 1970s, following the concerns expressed by the Chilean delegate to the UN Economic and Social Council (ECOSOC) in the summer of 1972, on the influence of foreign firms on domestic politics in his nation<sup>2</sup>. The secretary-general established a Group of Eminent Persons to research and report on the role of MNEs in the global economy, with an emphasis on the global south, at the behest of ECOSOC undersecretary Philippe de Seynes. Twenty specialists from nineteen countries, including eight developing nations, comprised the Group of Eminent Persons. The chairman was L. K. Jha, a former Reserve Bank of India governor<sup>3</sup>. This group emphasized the importance of MNEs recognizing and supporting the development goals defined by their host countries<sup>4</sup>.

The United Nations Center for Transnational Corporations and the United Nations Commission on Transnational Corporations were established, as a result of this procedure. These organizations took the lead in negotiating a multilateral MNE code of conduct. This outlined several duties related to the legal authority of States to regulate MNE activity, their compliance with development objectives, the MNE's non-interference in domestic politics, their observance of host countries' cultural customs and traditions, anti-corruption clauses, and their reporting obligations. Despite these efforts, this code of conduct was abandoned due to the growing contentious nature of the meetings<sup>5</sup>.

The OECD Guidelines for Multinational Enterprises, a framework for a non-binding soft-law system to support MNE ethical conduct were adopted by the OECD in 1976, 16 years after the establishment of the OECD. This was a direct result of the aforementioned efforts. The purpose behind the non-binding, soft law approach was to provide guidance rather than to enact law, as the name of the guidelines suggests<sup>6</sup>.

The nine-chapter 1976 edition of the Guidelines was first published as an appendix to the OECD's Declaration on International Investment and Multinational

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<sup>2</sup> J. BAIR, *Corporations at the United Nations: echoes of the new international economic order?*, "Humanity: An International Journal of Human Rights, Humanitarianism, and Development", 6(1), 2015, p. 161.

<sup>3</sup> J.H DUNNING, *New Challenges for International Business Research: Back to the Future*. Edward Elgar Publishing, 2010, p. 386.

<sup>4</sup> K. PROPP, *The United Nations and International Business*, "American Journal of International Law", 85(2), 1991, pp.398-400.

<sup>5</sup> T. SAGAFI-NEJAD, *The UN Galaxy, Transnational Corporations and Sustainable Development*, in *Multinational Enterprises and the Challenge of Sustainable Development*, Edward Elgar Publishing, 2009, pp. 28-49.

<sup>6</sup> J. MURRAY, *A new phase in the regulation of multinational enterprises: The role of the OECD*, "Industrial Law Journal", 30(3), 2001, pp.255-270. p. 257.

Enterprises, which was the first multilateral instrument to include the principle of national treatment in the investment context. The Declaration annexed a set of “recommendations” that the OECD member states addressed to global companies – the original OECD Guidelines for Multinational Enterprise.

These Guidelines were not legally binding on multinational corporations, but OECD member governments were required to promote them. Companies were merely advised to comply with national laws, to make a positive contribution to economic and social progress in the countries of operation (referred to as host countries), not harm the environment and respect freedom of association and the right to bargain collectively<sup>7</sup>. The Guidelines at the time made no reference to any other international human rights norms, apart from freedom of association and the right to collective bargaining, which were recognized in International Labor Organization (ILO) accords<sup>8</sup>.

A system of National Contact Points, aimed at promoting the Guidelines, was foreseen in Part II of the 1976 OECD Guidelines. Their purpose was to promote the Guidelines and “to contribute to the solution of problems which may arise” in connection with their observance<sup>9</sup>. However, no formal or systematic complaint-handling mechanism had yet been established. It was decided that NCPs should, generally speaking, start *national dialogues*<sup>10</sup>. Participation in these procedures was voluntary, and multinational enterprises were not legally obliged to take part<sup>11</sup>.

### 3. Key Revisions

#### 3.1. Revision of 2000

In 1998, the Multilateral Agreement on Investment negotiations within the OECD – that aimed to produce a deal that would cover every facet of investment protection – collapsed<sup>12</sup>. The inability of States to agree upon global guidelines

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<sup>7</sup> J.G. RUGGIE, AND T. NELSON, *Human Rights and the OECD Guidelines for Multinational Enterprises: Normative innovations and implementations challenges*, “Brown Journal of World Affairs”, 22, 2015, p. 101.

<sup>8</sup> J. MURRAY, *A new phase...*, *cit.*, p.57.

<sup>9</sup> ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, *International Investment and Multinational Enterprises*, 1984, p. 28.

<sup>10</sup> OECD (1984b), *Second Revised Decision of the Council on the Guidelines for Multinational Enterprises*, Paris, 1984, Par. 2.

<sup>11</sup> J.G. RUGGIE & T. NELSON, *Human Rights and the OECD Guidelines...*, *cit.*, p. 101.

<sup>12</sup> J.L. CERNIC, *Corporate responsibility for human rights: A critical analysis of the OECD guidelines for multinational enterprises*, “Hanse Law Review”, 4, 2008, p. 78.

for the protection of foreign direct investment was one factor contributing to the situation<sup>13</sup>. Following that, the OECD and the observer governments of Brazil, Argentina, Chile and Slovak Republic revised the Guidelines in the 2000s.

The 2000 Review sought to balance a range of competing priorities: preserving national legal diversity while promoting international standards; navigating the tension between aspirational principles and enforceable rules; addressing the legitimate concerns of civil society alongside fostering cooperation between states and multinational enterprises – particularly in sensitive areas like transfer pricing; and clarifying the respective roles and responsibilities of trade unions, governments, and multinational corporations<sup>14</sup>.

The Guidelines were also expanded in a double perspective. Firstly, the OECD “encouraged” OECD-based multinationals to follow these Guidelines in all host countries in which they operated, and not only in OECD countries. It also invited non-member States to adhere to the Guidelines. Secondly, it expanded the scope of issues covered by the instrument: firms were specifically advised to “respect the human rights of those affected by their activities consistent with the host government’s international obligations and commitments” a broader standard than that of the previous version (that only mentioned a narrow recommendation to respect a select few labor-related rights).

A new requirement for MNEs to uphold human rights was presented, along with guidelines for sustainable development, corporate governance, whistleblower protection, local capacity building, training opportunities, child labor, forced labor, and compulsory labor, environmental performance, disclosure and transparency, and new chapters on bribery and consumer protection were among the issues covered in the 2000 edition<sup>15</sup>.

Additionally, there was a greater emphasis on global orientation, stronger ties to international law, and norms of behavior<sup>16</sup>.

The 34 OECD member nations were all covered by the 2000’s version. Even though, more nations accepted the Guidelines, increasing the total number of accepting nations to 42<sup>17</sup>. As a result, MNE’s activities both inside and outside of

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<sup>13</sup> S. TULLY, *The 2000 Review of the OECD Guidelines for Multinational Enterprises*, “International & Comparative Law Quarterly”, 50(2), 2001, p. 400.

<sup>14</sup> S. TULLY, *The 2000 Review...cit.* p. 396.

<sup>15</sup> OECD, *Report on the 2000 review of the Guidelines*, Paris, 2000.

<sup>16</sup> J. MURRAY, *A new phase...*, *cit.*, p. 258.

<sup>17</sup> Argentina, Brazil, Egypt, Estonia, Latvia, Lithuania, Peru, and Romania were added. Estonia became an OECD member in 2010.

OECD nations were included in the 2000 version<sup>18</sup>. This, together with support from the G-8 and the Special Representative of the UN Secretary General for Business and Human Rights<sup>19</sup>, helped the Guidelines to gain more significance.

In the 2000 revision of the OECD Guidelines, the role of National Contact Points was also significantly strengthened. First, annual meetings were introduced to enhance coordination and consistency among NCPs. Most notably, the revision established their function as non-judicial mechanisms for resolving disputes, introducing the concept of “specific instances” and encouraging the use of conciliation or mediation to address alleged breaches of the Guidelines<sup>20</sup>.

Finally, the 2000 MNE Decision clarified the NCPs’ responsibilities<sup>21</sup> and required them to provide annual reports to the Investment Committee<sup>22</sup>. These reports were intended to enhance transparency and accountability, detailing the NCPs’ activities, including their handling of specific instances, as mandated by the OECD Council.

### 3.2. Revision of 2011

The OECD Principles were revised again in 2011, due to the “structural changes” that international business, namely due to the broader range of business arrangements and organisational forms. By 2011, service and knowledge-based industries were becoming more and more significant in global markets, the Internet economy had grown, and MNEs with headquarters in developing nations had become major foreign investors<sup>23</sup>. The UN Special Representative collaborated closely with the OECD and also all non-adhering G20 countries were invited to participate on an equal footing. As a result, a new version of the Guidelines was endorsed on May 25, 2011. The most recent update to the MNE Guidelines and MNE Decision included a new chapter, reaffirmed the NCPs’ stance, and also introduced a number of minor but adjustments.

The 2011 update introduced, for the first time, a dedicated chapter on human rights. This was a major milestone, aligning the Guidelines with the UN Guiding

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<sup>18</sup> K.A. REINERT, O.T. REINERT & G. DEBEDE, *The new OECD Guidelines for Multinational Enterprises: better but not enough*, “Development in practice”, 26(6), 2016, p. 818.

<sup>19</sup> The mandate of the Special Representative was first established by the then Commission on Human Rights in 2005 in its resolution 2005/69. The G8 countries endorsed the revised Guidelines as part of their broader agenda to promote responsible globalization and corporate accountability.

<sup>20</sup> OECD, *Report on the 2000 review...*, cit., Annex 3, Annex to the Council Decision, Section C.

<sup>21</sup> OECD, *Report on the 2000 review...*, cit., Par. 7, 8 and 11.

<sup>22</sup> Annex 3, Annex to the Council Decision, Section D.

<sup>23</sup> OECD, *Guidelines for Multinational Enterprises*, Update 2011, Paris. Preface, 2011, Para. 2–3.



Principles on Business and Human Rights<sup>24</sup>. The addition of a specific human rights chapter and the reinforcement of human rights provisions throughout the guidelines was one of the most important changes made to the MNE Guidelines.

Another innovation was the use of risk-based due diligence to address potential negative effects on topics covered by the MNE Guidelines<sup>25</sup>: the amendment states that actual and prospective bad impacts must be detected, averted, and managed, by integrating risk-based due diligence into the enterprise-wide risk management framework<sup>26</sup>.

Additionally, the human rights chapter states that due diligence on human rights must be carried out in accordance with the company's size, nature, and operational conditions as well as the seriousness of the risk of negative effects<sup>27</sup>. This indicated that the entire supply chain, including the commercial connections, was now included in the analysis of risk-based due diligence, which was formerly exclusive to the operations of multinational corporations. Indeed, in the 2000 edition of the OECD Guidelines, multinational enterprises were primarily expected to *encourage* responsible behavior among their business partners. However, after the 2011 revision, MNEs were now expected to *actively conduct due diligence* to identify, prevent, and mitigate adverse impacts that are directly linked to their operations, products, or services – even if they had not directly caused those impacts. This expanded the scope of corporate responsibility, to include accountability for business relationships<sup>28/29</sup>.

There were also some changes involving the NCP system: NCPs were now required to handle specific instances in accordance with key principles: impartiality, predictability, equitability, and conformity with the Guidelines<sup>30</sup>. Additionally, these mechanisms would have to respect an indicative timeline for each stage of

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<sup>24</sup> The UNGPs were unanimously endorsed on June 16, 2011, by the United Nations Human Rights Council. They set forth a global standard for preventing and addressing human rights abuses linked to business activity, based on three pillars: the State duty to protect human rights, the corporate responsibility to respect human rights, and the need for greater access to remedy for victims of business-related abuses. United Nations (2011). Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework.

<sup>25</sup> S. VAN’T FOORT, *The history of national contact points and the OECD Guidelines for Multinational Enterprises*, “Rechtsgeschiedte-Legal History”, (25), 2017, p. 205.

<sup>26</sup> OECD, *Guidelines for Multinational...*, cit., Chapter II, Par. A.10.

<sup>27</sup> OECD, *Guidelines for Multinational...*, cit., Chapter IV, Par. 5.

<sup>28</sup> OECD, *Guidelines for Multinational...*, cit. II, Para. 12–13.

<sup>29</sup> OHCHR, *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide*, Office of the High Commissioner for Human Rights, New York and Geneva, 2012.

<sup>30</sup> OECD, *Decision of the Council on the OECD Guidelines for Multinational Enterprises 25 May 2011*, Paris, 2011, Procedural Guidance, Section C, Preface.

the procedure, in order to improve its transparency and speed. It was also clarified that “specific instance” should not be terminated simply because there was a parallel procedure, such as a lawsuit or other type of disputes between the same parties<sup>31</sup>.

In 2018, the OECD enacted a practical guidance for companies on how to take due diligence procedures: the *Due Diligence Guidance for Responsible Business conduct*. This tool offered practical suggestions on how commercial organizations should use the OECD Guidelines for due diligence<sup>32</sup>. This procedure was compliant with the United Nations Guiding Principles on Business and Human Rights, but covered more topics, such as negative effects on consumer interests<sup>33</sup>, the environment<sup>34</sup>, bribery and corruption<sup>35</sup>, and disclosure related to the undertakings’ internal operations, supply chains, and other business relationships<sup>36</sup>.

### 3.3. Revision of 2023

In 2023, a new revision of the Guidelines took place, considering the evolving global challenges, such as the climate change, biodiversity loss, technological advancements and data governance, increased awareness of human rights, and the growing need to prevent corruption. This revision was described as a “targeted update” rather than a full renovation. Such an approach was chosen for several reasons: first, the OECD wanted to focus on urgent priorities that corresponded to the pressing global challenges. A “targeted update” would allow it to move more quickly and maintain a consensus among adhering countries. Moreover, following a public consultation in 2022, relevant stakeholders expressed their support for more pointed updates. Finally, the Guidelines were already widely used by governments, businesses, and civil society, so it would be preferable to maintain a certain continuity of practices that were already deeply internalized.

Aligned with the priorities of the moment, the 2023 revision incorporated climate and biodiversity goals, extended due diligence to tech and corruption, strengthened NCPs’ procedures, and enhanced protections for vulnerable groups.

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<sup>31</sup> OECD, *OECD Due Diligence Guidance for Responsible Business Conduct*, Paris, 2018.

<sup>32</sup> C. SHAVIN, *Unlocking the potential of the new OECD due diligence guidance on responsible business conduct*, “Business and Human Rights Journal”, 4(1), 2019, p. 143.

<sup>33</sup> OECD, *OECD Due Diligence Guidance*, Chapter VIII.

<sup>34</sup> Id., Chapter VI.

<sup>35</sup> Id., Chapter VII.

<sup>36</sup> Id., Chapter III.

## 4. Current Framework

The *OECD Guidelines for Multinational Enterprises on Responsible Business Conduct* are currently divided into two major Parts: Part I develops the guidelines themselves, and Part II regulates the implementation procedures. The first Part is divided into eleven chapters: (1) Concepts and Principles, (2) General Policies, (3) Disclosure, (4) Human Rights, (5) Employment and Industrial Relations, (6) Environment, (7) Combating Bribery and Other Forms of Corruption, (8) Consumer Interests, (9) Science, Technology and Innovation, (10) Competition and (11) Taxation.

This section of the paper will deviate slightly from the structure outlined in the Guidelines. It will begin by addressing the substantive areas of responsibility proposed for businesses (Section 4.1), with a particular focus on human rights, environmental responsibilities, and the fight against corruption and bribery. The discussion will then turn to more procedural duties, such as disclosure and due diligence (Sections 4.2 and 4.3, respectively). Finally, the implementation procedures through National Contact Points will be examined (Section 4.4).

### 4.1. Substantive areas of responsibility

Part I of the OECD instrument sets forth guidelines in eight different areas, ranging from human rights to tax, science and competition. It broadly surpasses the scope of other instruments, such as the UN Guiding Principles, which mainly focuses on Business' behavior towards Human Rights. The following analysis will provide a brief comment on the Human Rights, Environment and Prevention of Corruption Chapters.

#### 4.1.1. Human Rights

Chapter IV, under the name of "Human Rights" is quite self-explanatory. Its objective is to lay forth the general guidelines pertaining to businesses' respect for human rights<sup>37</sup>. As mentioned, it was introduced in the 2011 revision, fully aligning it with the UN Guiding Principles in this realm.

According to the Guidelines, companies are expected to observe all human rights, irrespective of States' abilities and/or willingness to fulfill their own obligations. This shall include a minimum to the internationally recognised human rights

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<sup>37</sup> OECD, *OECD Guidelines for Multinational Enterprises on Responsible Business Conduct*, OECD Publishing, Paris, 2023, Chapter IV, Commentary, para. 41.

expressed in the International Bill of Human Rights, consisting of the Universal Declaration of Human Rights and the main instruments through which it has been codified: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, and to the principles concerning fundamental rights set out in the 1998 International Labour Organisation Declaration on Fundamental Principles and Rights at Work. This observance is broadly envisaged: business shall respect these principles not only in their dealings with employees, but also with respect to all people affected by their activities. Issues include topics such as those related to community consultations, impeded or destroyed sources of livelihood, health, and housing, security of the person and privacy. Further considerations on Human Rights are also present in the chapter related to employment and industrial relations, namely as regards workers' rights, compulsory and child labour, nondiscrimination, health and safety.

The 2023 modification advises businesses to give special consideration to the negative effects on disadvantaged and vulnerable people, either as individuals or as members of particular groups. Specific groups or populations that require particular attention encompass, for example, indigenous peoples, persons belonging to national, ethnic, religious and linguistic minorities, women, children, persons with disabilities, and migrant workers and their families. Also, attention to specific conjunctures, such as armed conflicts, is mentioned. In this realm, the Guidelines remarkably advise companies to increase their due diligence when there is a significant chance of armed conflict or grave mistreatment, such as breaking humanitarian law<sup>38</sup>, which seems to be a step in the direction of MNE responsibility during armed conflicts for violations of humanitarian law<sup>39</sup>.

#### 4.1.2. Environment

Chapter VI, named "Environment", lays out expectations for how businesses should prevent negative environmental effects, deal with them, and help achieve goals related to mitigating the effects of climate change, preserving and restoring biological diversity, using land, resources, and energy sustainably, efficiently, and legally, promoting circular economy strategies, and preventing, reducing, and controlling pollution<sup>40</sup>.

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<sup>38</sup> Id., para. 45.

<sup>39</sup> On this topic, see V. KAPLINA, *International Humanitarian Law and Business: Finding a Bridge, "e-publica"*, Vol. 11, Issue 2, 2024, pp. 142-171.

<sup>40</sup> OECD, *OECD Guidelines...*, 2023, *cit.*, Para. 66.

The revised Guidelines in 2023 list climate change as the primary environmental effect that businesses need to take into account while doing their due diligence process. Businesses should adopt and execute science-based policies, strategies, and transition plans on climate change adaptation and mitigation. This includes setting and carrying out short, medium, and long-term mitigation targets as well as monitoring and reporting on them<sup>41</sup>. Moreover, companies are advised by the Guidelines to regularly report against, review, and update their greenhouse gas emissions targets<sup>42</sup>.

#### 4.1.3. Combating Bribery and Other Forms of Corruption

Chapter VII, named “Combating Bribery and Other Forms of Corruption” was previously named “Combating Bribery, Bribe Solicitation and Extortion”. With this change, the 2023 revision aimed at broadening the scope of corruption, to include trading of favors, embezzlement, and improper use of sponsorships and donations to charities<sup>43</sup>.

The 2023 modification goes further and requires senior management to authorize the political donations, whereas the 2011 Guidelines simply required enterprises to disclose them to top management. Additionally, the 2023 revision suggests that companies be urged to reveal all misconduct pertaining to bribery and other forms of corruption, as well as the steps taken to address cases of suspected bribery and other forms of corruption, without impairing national laws and requirements<sup>44</sup>.

#### 4.2. Disclosure

Chapter III, under the name of “Disclosure”<sup>45</sup> aims to assist MNEs in implementing accountability and transparency in their business processes through four sets of disclosure suggestions<sup>46</sup>.

The first set of suggestions was aimed at accompanying the Corporate Governance Principles of the G20/OECD, also enacted in 2023, which similarly dealt with

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<sup>41</sup> Id., para. 68.

<sup>42</sup> OECD, *OECD Guidelines...*, 2023, *cit.*, Para. 67.

<sup>43</sup> Id., Para. 86.

<sup>44</sup> Id., Chapter, Art. 5.

<sup>45</sup> Id., Chapter III.

<sup>46</sup> Id., Chapter III, Commentary, Para. 30.

issues relating to disclosure<sup>47</sup>. The second set of recommendations concerned more precise information on what constitutes “material information” in respect to the disclosure principle. For instance, the 2023 modification included information about sustainability<sup>48</sup>, compensation for top CEOs and board members<sup>49</sup> and the degree of adherence to national corporate governance guidelines or rules and the way they are put into practice<sup>50</sup>. The third set highlights that Responsible Business Conduct (RBC) disclosures must adhere to the six-step due diligence framework<sup>51</sup>. The 2023 amendment explicitly included “RBC information” relating to due diligence instead of the word “additional information”.<sup>52</sup>

Finally, the fourth set of recommendations emphasizes the use of third-party review and assurance to enhance the credibility of company reports, warranting that they align with the due diligence framework<sup>53</sup>.

### 4.3. The Due Diligence Process

#### 4.3.1. Concept, scope and goals

The due diligence process is defined by the OECD as “the process through which enterprises can identify, prevent, mitigate and account for how they address their actual and potential adverse impacts as an integral part of business decision-making and risk management systems”<sup>54</sup>.

The most important characteristic of due diligence has already been mentioned in this study: it is a *risk-based process*. This means that enterprises ought to assess the severity and likelihood of the adverse impact of their activities on the areas covered by the Guidelines’ chapters. Scale (the degree of the adverse impact), scope (the impact’s spread, such as the number of people impacted or the amount of damage), and irremediability (the likelihood of bringing the affected parties or the environment back to a state similar to that which existed prior to the adverse impact) should all be considered when determining the severity of the impact<sup>55</sup>.

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<sup>47</sup> OECD, *G20/OECD Principles of Corporate Governance*, OECD Publishing, 2023, Paris.

<sup>48</sup> OECD, *OECD Guidelines...*, 2023, *cit.*, Chapter III, Art. 2(b).

<sup>49</sup> OECD, *OECD Guidelines...*, 2023, *cit.*, Chapter III, Art. 2(f).

<sup>50</sup> *Id.* Chapter III, Art. 2(i).

<sup>51</sup> The six-step due diligence framework will be analyzed and detailed further into this study.

<sup>52</sup> OECD, *OECD Guidelines...*, 2023, *cit.*, Chapter III, Art. 3.

<sup>53</sup> *Id.*, Chapter III, Art. 4.

<sup>54</sup> *Id.*, Chapter II, Commentary, para. 15.

<sup>55</sup> *Ibidem*.



The risk analysis encompasses not only the companies' own operations but also their supply chain and other business relationships. The 2023 revision mandates that businesses conduct due diligence on *all business relationships*, including those with clients, joint venture partners, business partners, subcontractors, franchisees, investee companies, and other state agencies and non-governmental organizations that are directly related to the business's operations, goods, or services<sup>56</sup>. Indeed, the 2023 revision made it clearer that commercial interactions cover the whole supply chain of companies and go beyond contracts or "first-tier" ties.

Adverse impacts are to be related to the topics mentioned in the guidelines: human rights, including workers and industrial relations, environment, bribery and corruption, disclosure, consumer interests, etc. These impacts may arise in numerous contexts and exhibit a broad spectrum of expressions. In the realm of human rights, such impacts may include the use of forced labor, wage discrimination, and incidents of gender-based violence or harassment. Additionally, the failure to identify and engage appropriately with indigenous populations, or the restriction of access to essential resources such as clean water, also constitute significant issues. Within employment and industrial relations, adverse outcomes may arise from the disregard of collective bargaining processes, the continued use of hazardous substances without seeking safer alternatives, or the payment of wages that are insufficient to meet workers' basic needs. These practices not only undermine labor standards but also contribute to broader social and economic inequalities. Environmental adverse effects may include the deterioration of ecosystems, the presence of unsafe levels of biological, chemical, or physical hazards in products or services, and the contamination of water sources. Corruption-related practices, such as bribery and extortion, may also occur in various institutional contexts. These include attempts to secure public procurement contracts, obtain favorable tax treatment, expedite customs procedures, or acquire necessary permits and authorizations. Finally, in relation to consumer interests, adverse effects may be observed when goods and services fail to meet agreed-upon or legally mandated standards for health and safety. This may be compounded by the dissemination of inaccurate, unverifiable, or unclear information, or by the use of deceptive, misleading, fraudulent, or otherwise unfair commercial practices.

Due diligence encompasses more than just following the law. Although adhering to national regulations and International law should be an undertaking's main priority, the process is required to take other activities as well. The type and scope

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<sup>56</sup> Id., Chapter II, Commentary, para. 17.

of the due diligence procedure should be customized to the unique circumstances of each case, taking into account the enterprise's size, resources, operational environment, business model, supply chain position, and type of goods or services it provides.

The 2018 guidance sets forth that due diligence must be taken more demandingly by some business operations, products or services when these are inherently risky. Sectors considered high-risk typically exhibit systemic vulnerabilities due to the nature of their activities, products, or production processes – such as those found in the extractive industries. Product-related risks stem from the materials or methods used in the development or application of specific goods, which may pose ethical, environmental, or safety concerns. Geographic risks refer to contextual factors within a particular country that may amplify sector-specific risks. These can be broadly categorized into four dimensions: the regulatory environment (e.g., the degree of alignment with international legal standards), governance quality (e.g., the effectiveness of oversight institutions, rule of law, and levels of corruption), socio-economic conditions (e.g., poverty rates, access to education, and the marginalization of vulnerable groups), and the political landscape (e.g., the presence of conflict or political instability). At the enterprise level, risks may arise from internal weaknesses such as poor corporate governance, a history of non-compliance with human rights, labor, anti-corruption, or environmental standards, or a general lack of commitment to responsible business conduct. These factors claim for a more robust and context-sensitive approach to due diligence.

#### 4.3.2. The Steps of the Due Diligence Process

Chapter II, under the name of “General Policies”<sup>57</sup> describes the due diligence process and its common fundamental principles. Various aspects covered by the United Nations Guiding Principles are mentioned, including the prioritization of measures to be adopted – where it is not possible to address all impacts at once – based on a severity and likelihood analysis of the adverse impact, and the adoption of measures to conduct due diligence in accordance with a risk-based approach<sup>58</sup>.

Due diligence is not a static procedure; rather, it is a continuous, flexible, and dynamic activity. Businesses should be able to adapt to shifts in the risk profile, keep learning from past mistakes, and strive for incremental system and process

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<sup>57</sup> Id., Chapter II.

<sup>58</sup> Id., Chapter II, Commentary, Para. 20.

improvements<sup>59</sup>. Moreover, as already mentioned, the procedure should be tailored to the enterprise's condition and the risk of the specific scenario, and other factors, rather than being a “tick-the-box” activity. In some cases, steps not mentioned in the Guidance may be needed<sup>60</sup>.

The *OECD Due Diligence Guidance for Responsible Business Conduct* lists the several steps that must be followed in the due diligence procedure: (1) incorporating ethical business practices into management systems and policies; (2) determining and evaluating actual and potential negative effects linked to the company's operations, goods, or services; (3) stopping, preventing, and lessening negative effects; (4) monitoring implementation and outcomes; (5) disclosing how effects are handled; and (6) offering remediation or assisting in it when necessary<sup>61</sup>.

On the first step, undertakings should go beyond the conventional outside-in approach to risk management and incorporate the examination of the enterprise's activities' impacts, those of their group businesses', and their business connections' impacts as well<sup>62</sup>. In order to ensure that policies are incorporated into routine business procedures, they should then be integrated into the enterprise's management systems and oversight bodies. The Guidelines also offer other recommendations for generating incentives for employees and business divisions, training, and channel development for communication<sup>63</sup>.

The identification and evaluation of existing and possible negative effects connected to the enterprise's activities, goods, and services, as well as its commercial connections, constitute the second step. Businesses are encouraged to conduct a preliminary scoping study to identify and prioritize potential impacts based on a risk-based approach. This involves mapping all areas of their operations and business relationships where the risks outlined in the Guidelines are most likely to occur and have the greatest impact<sup>64</sup>. Corporations may conduct ongoing, phased assessments to identify and evaluate actual and prospective negative effects, starting with the substantial areas of risk<sup>65</sup>. In order to identify and analyze the consequences on human rights, it is imperative that stakeholders be effectively engaged at this point<sup>66</sup>. These stakeholders may encompass rights holders or other

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<sup>59</sup> Id., Commentary, Para. 25.

<sup>60</sup> Id., Commentary, Para. 15.

<sup>61</sup> *Ibidem*.

<sup>62</sup> Id., Chapter II, Commentary, Para. 16.

<sup>63</sup> *Ibidem*.

<sup>64</sup> Id., Chapter II, Commentary, para. 20.

<sup>65</sup> Id., Chapter II, Commentary, para. 24.

<sup>66</sup> Id. Commentary, Para. 28.

reliable representatives. Adverse effects on those who are marginalized or at risk should get particular consideration.

Following the mapping process, the company should evaluate whether it has a direct impact on the identified issue through its operations, products, services, or business relationships, and determine whether it is causing the impact, contributing to it, or both<sup>67</sup>. On that matter, if an organization's actions alone are sufficient to have a negative impact, then the enterprise "causes" the impact. An enterprise is said to "contribute to" an effect if its actions alone or in concert with those of other entities result in the impact, or if the business's actions encourage, assist, or induce another entity to take actions that have a negative impact<sup>68</sup>. As already stressed, the contribution must be significant, which excludes minor or insignificant inputs<sup>69</sup>.

The third step is to stop, prevent, and mitigate negative effects. Building on the findings of step two, the organization needs to handle the identified actual and potential repercussions. Potential effects should be avoided or, if that is not feasible, mitigated; existing impacts should be stopped or, if that is not possible, the repercussions of the impact should be mitigated and remedied<sup>70</sup>. This should be done through the creating and carrying out appropriate strategies. The company must employ its power to persuade the party causing the negative effect to stop or lessen it<sup>71</sup>. The Guidelines list the following as appropriate actions: maintaining the relationship while implementing risk mitigation strategies; temporarily stopping the relationship while implementing risk mitigation measures; and, as a last resort, disengaging, while taking into account other factors and potential negative social and economic effects<sup>72</sup>. If a company decides not to disengage, it should continue to monitor the business relationship, reassess its position if circumstances evolve, or as part of its broader strategy to address any adverse impacts. It should also be prepared to respond for its risk mitigation efforts and consider any potential financial, legal, and reputational risks associated with continuing the business relationship<sup>73</sup>.

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<sup>67</sup> Id., Commentary, Para. 33.

<sup>68</sup> Id., Chapter VI, Commentary, Para. 68.

<sup>69</sup> Id., Chapter VI, Commentary, Para. 69. In this context, the term "Linkage" refers to the connection – a commercial relationship – between the negative effect and the enterprise's goods, services, or activities through another organization.

<sup>70</sup> Id., Chapter II, Commentary, Paras. 21-22.

<sup>71</sup> Id., Chapter II, Commentary, Para. 23.

<sup>72</sup> Id., Chapter II, Commentary, Para. 25.

<sup>73</sup> Id., Chapter II, Commentary, Paras. 25-27.

Monitoring outcomes and implementation is the fourth step. Businesses are required to examine the efficiency of the actions taken to recognize, address, and, where necessary, correct the negative effects. This covers the involvement of stakeholders, as well as recurring evaluations of the business partnerships and internal process reviews. Carrying out periodic internal or third party reviews or audits of the outcomes achieved can be good strategies in this context. The impacted rights holders and their representatives must be consulted on human rights. Indeed, business must interact promptly and sensitively with affected rights holders in the event of harmful effects on human rights<sup>74</sup>.

To effectively communicate how impacts are managed, the fifth step involves publicly disclosing relevant information about the due diligence process in a manner that is appropriate and accessible. This disclosure should include the company's policies, procedures, and actions taken to identify and address adverse impacts. It should also cover the outcomes of these efforts, the criteria used for prioritization, the measures implemented, the monitoring of their execution, and the results achieved.

The final phase is to arrange for remediation or, if necessary, assist with it. Remediation is only expected when an organization has genuinely caused or contributed to a negative outcome. If there has been a real negative impact, the company should offer a solution or assist with the redress, trying to put the injured individual or people back in the same situation as they would have been in if the negative impact had not happened<sup>75</sup>. The type and extent of the detrimental impact will determine the appropriate remedy, which should be commensurate with its significance and magnitude.

Finally, the OECD Guidelines advise businesses to establish a grievance procedure and work with respectable extrajudicial and judicial redress systems. These grievance mechanisms, which can be judicial or extrajudicial, State-based or non-State-based, are meant to allow affected stakeholders and rights holders to file complaints<sup>76</sup>. Cooperation in good faith with judicial or non-judicial mechanisms, including the NCP, or in-house worker complaint mechanisms or third-party complaint systems may be key strategies in this context.

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<sup>74</sup> Id., Chapter III, Commentary, Para. 39.

<sup>75</sup> Id., Chapter IV, Commentary, Para. 41.

<sup>76</sup> Id., Chapter IV, Commentary, Para. 51.

#### 4.4. The National Contact Points

While Part I comprises normative directions for businesses, the Guidelines' Part II titled "Implementation Procedures of the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct" sets forth the procedures for the implementation of NCP's complaint handling competence.

Any individual or organisation can bring a specific case against an enterprise to the NCP where the enterprise is operating or based, regarding the enterprise's operations anywhere in the world. According to the Guidelines, NCPs shall provide their "good offices" to assist the parties in resolving the complaint when they are addressing it. This will be developed through non-adversarial dispute resolution, which is usually mediation. Through this method, the process is driven by the objective of supporting "win-win" resolutions in accordance with the notion of alternative conflict resolution<sup>77</sup>. Such outcomes are generally viewed as the most constructive, reflecting the spirit of dialogue and problem-solving encouraged by the Guidelines.

Once a complaint ("specific instance") is submitted, the NCP begins with an initial assessment to determine whether it fulfils the necessary conditions to be examined. If the NCP finds that the complaint does not meet the admissibility criteria – for example, it lacks a clear link to the OECD Guidelines, is too vague, or may be better addressed through other channels – it may decide not to proceed with the case. If the NCP accepts the case, informal discussions, mediation, or conciliation are facilitated. If the parties reach a mutually agreed solution, the process is considered successful, and the NCP shall issue a final statement that may offer recommendations or a follow-up plan to monitor implementation. However, in some cases, the parties are unable to reach an agreement. In these cases, the NCP still issues a final statement, which summarizes the positions of the parties, describes the process undertaken, and may also provide an assessment of the enterprise's conduct in light of the Guidelines. It can also include recommendations for the company's future conduct and a follow-up review to monitor the implementation of any suggested measures. While less conclusive than an agreement, these outcomes still contribute to transparency and accountability, and may, in the long run, change the company's behaviour.

Occasionally, one or both parties refuse to engage in the NCP process. This may occur at any stage: after the initial assessment, during mediation, or even

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<sup>77</sup> K. BUHMANN, *Analysing OECD national contact point statements for guidance on human rights due diligence: method, findings and outlook*, "Nordic Journal of Human Rights", 36(4), 2018, pp. 393-394.



before any engagement begins. In this scenario, the NCP issues a final statement noting the refusal and outlining the steps taken. It may also comment on the enterprise's failure to engage, issue recommendations for future conduct and where appropriate, make a determination on whether the Guidelines were breached. These statements may naturally produce reputational implications.

This regime was introduced as part of the 2023 revision. Previously, a recommendation would only be given if a party declined to take part in the proceedings or if the parties were unable to come to an agreement<sup>78</sup>. A report would be released in the event that all parties came to an agreement on the problems presented<sup>79</sup>, and a statement could be issued in the circumstances mentioned above, if the NCP concluded that the issues raised did not require more investigation<sup>80</sup>. With the 2023 update, however, NCPs can now provide recommendations as appropriate, including in cases when the parties reached a consensus on the problems highlighted<sup>81</sup>. The NCP is also now required to publish suggestions on the adoption of the OECD Guidelines when appropriate, in cases where a party declines to participate in the proceedings or when the parties are unable to come to an agreement<sup>82</sup>. Also, the 2023 update clearly states that, when the special instance procedures have concluded, the parties should follow up on the execution of the recommendations or, if applicable, the agreement made between them, and the NCP shall provide a follow-up statement. Additionally, the NCP's plans must be included in the final declaration, together with the dates by which they must be completed<sup>83</sup>.

The 2023 revision also brought other changes, including the rebranding of NCPs as "National Contact Points for Responsible Business Conduct"<sup>84</sup>. Additionally, it required NCPs to assess the involvement of counterparts from other jurisdictions and, where applicable, to initiate good faith discussions to designate lead and supporting roles as an initial step<sup>85</sup>.

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<sup>78</sup> OECD, *Decision of the Council...*, cit., Section C, 3, c.

<sup>79</sup> OECD, *Decision of the Council...*, cit., Section C, 3, b.

<sup>80</sup> Id., Section C, 3, a.

<sup>81</sup> OECD, *OECD Guidelines...*, 2023, cit., Procedures, I. C. 4. b.

<sup>82</sup> Id., Procedures, I. C. 4. b.

<sup>83</sup> Id., Procedures, I. C. 5.

<sup>84</sup> Id., Chapter 1, Art. 1.

<sup>85</sup> Id., Procedures, I. C. 1.

## 5. Practical Challenges and Suggestions

States must set up NCPs to closely monitor the operations of multinational corporations, even if the Guidelines' requirements are not legally binding. This system continues to serve a unique function today, as a forum where individuals, communities, and civil society representatives can directly raise cases against multinational enterprises<sup>86</sup>. Cases submitted to NCPs largely continue to reflect patterns very similar to the past: host countries (where operations take place) tend to be in the Global South and emerging markets, and home countries (where MNEs are headquartered) in the Global North<sup>87</sup>.

However, there are still several gaps regarding the OECD implementation system. A commonly noted concern among scholars is that the broad and somewhat vague language of the Guidelines can undermine their practical applicability<sup>88</sup>. While the Guidelines offer specific examples, they also allow flexibility to accommodate the unique circumstances and resource capacities of different enterprises, all while preserving an aspirational tone. However, it can also be argued that the broader and less prescriptive language of the Guidelines grants States greater flexibility to gradually align their national legislation with its principles, thereby facilitating wider international adherence. Another consequence of using broad language is that it helps create a more level playing field among adhering States, enabling them to work collectively toward compliance. This approach can be complemented by initially less ambitious language in the Guidelines, which may result in a slower pace of implementation across countries. However, it could also foster a more stable and effective long-term adoption of the standards.

When it comes to the scope of due diligence, the most pressing issue is the absence of a universally recognized framework for mapping business connections and carrying out due diligence<sup>89</sup>.

Finally, NCPs still fall short of being a perfect system, partly due to their inability to issue legally binding decisions. Indeed, the growth of international markets has not been accompanied by binding safeguards for the individuals and communities affected by human rights' violations perpetrated by MNCs. It seems

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<sup>86</sup> J.G. RUGGIE, AND T. NELSON, *Human Rights and the OECD Guidelines...*, *cit.*, p. 101.

<sup>87</sup> *Id.*, p. 110.

<sup>88</sup> J.L. CERNIC, *Corporate responsibility...*, *cit.*, p. 94.

<sup>89</sup> I. CRISPIM, *Demystifying the Due Diligence Process under the 2023 OECD Guidelines for Multinational Enterprises on Responsible Business Conduct*, 2024, in <https://thinktank.plmj.com/en/corporate-sustainability>.

that NPCs are not being envisaged as efficient means of disputes solving, as they hardly receive complaints<sup>90</sup>.

A solution would be to formalize the OECD Guidelines into an official international treaty, similar to the OECD Convention against Bribery and Corruption<sup>91</sup>. Former OECD Secretary-General Donald Johnston acknowledged that, while public opinion plays a vital role in shaping corporate behavior, it would be unrealistic to expect a truly effective system of global norms to function without some form of binding regulation and formal enforcement mechanisms<sup>92</sup>. With such an instrument, companies that would violate human rights and other duties should be subject to sanctioning<sup>93</sup>. However, securing binding commitments from States within a mandatory framework is likely to be a challenging effort. For this reason, adopting a less aspirational tone in the initial stages – paired with a gradual strengthening of human rights protections – could facilitate a broader acceptance. An alternative approach, still within the context of transforming the OECD Guidelines into a treaty, would be to establish a broad framework or ‘skeleton plan’ within the convention itself. This structure could outline the progressive enhancement of protections, requiring States to submit national implementation plans based on the framework for review and formal commitment.

## 6. Conclusion

The evolution of the OECD and its Guidelines for Multinational Enterprises demonstrates a significant commitment to responsible business conduct globally. From its establishment in 1961 to the latest update in 2023, the OECD has continuously refined its approach to address the multifaceted challenges of multinational enterprises.

The addition of a human rights chapter, the emphasis on risk-based due diligence, and the formalization of the NPCs’ roles highlight the organization’s dedication to fostering ethical conduct and accountability. As the Guidelines continue to evolve, emphasizing the breadth and scope of due diligence, disclosure,

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<sup>90</sup> J.G. RUGGIE, AND T. NELSON, *Human Rights and the OECD Guidelines...*, *cit.*, p. 101.

<sup>91</sup> Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, adopted on 21 November 1997.

<sup>92</sup> D. JOHNSTON, Promoting Corporate Responsibility, The OECD Guidelines for Multinational Enterprises, in *OECD, International Investment Perspectives*, Paris, OECD Publishing, 2005, pp. 179-188.

<sup>93</sup> J.L. CERNIC, *Corporate responsibility...*, *cit.*, p 94.

human rights, environmental impact, and combating bribery and corruption, they provide a comprehensive framework for responsible business practices.

The interactive process of review and update demonstrates a commitment to adapt to the changing landscape of global business and ensure relevance and effectiveness. However, challenges remain, particularly in the voluntary nature of adherence and the broad, non-specific language of the Guidelines.

As the global economy becomes increasingly interconnected, the Guidelines must continue to evolve, balancing specificity and adaptability, to effectively address the complex issues faced by multinational enterprises in moving forward. It is also crucial for stakeholders, including governments, enterprises, and civil society, to collaborate in implementing and monitoring the Guidelines. This calls for enhanced reporting and monitoring mechanisms, as well as comprehensive support for victims of corporate violations. Achieving these goals will require a concerted effort to advance the standards of responsible business conduct and ensure ethical, sustainable, and inclusive global business practices.

With the 2023 update, the OECD Guidelines for Multinational Enterprises represent a significant step forward in promoting responsible business conduct. As we look ahead, it is imperative that all stakeholders commit to upholding the standards outlined in the Guidelines, driving positive change and fostering a global business environment that prioritizes human rights, sustainability, and ethical conduct.