



Convention on Access to Information,
Public Participation in Decision-making and
Access to Justice in Environmental Matters
(Aarhus Convention)

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Michel Forst
Special Rapporteur on Environmental Defenders

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Ms. Christine Kaufman
Chair, Working Party on Responsible Business Conduct

Mr. Allan Jorgensen
Head, Responsible Business Conduct Centre
Organisation for Economic Co-operation and Development (OECD)

Dear Ms. Kaufman,
Dear Mr. Jorgensen,

I have the honour to address you in my capacity as Special Rapporteur on Environmental Defenders under the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention). I would like to thank you for the opportunity to comment, in the context of the public consultation, on the draft targeted revision of the OECD Guidelines for Multinational Enterprises.

As you may be aware, article 3 (8) of the Aarhus Convention requires that “each Party shall ensure that persons exercising their rights in conformity with the provisions of this Convention shall not be penalised, persecuted or harassed in any way for their involvement.”

More than two thirds of OECD countries (26 out of 38 countries) are Parties to the Aarhus Convention and are thus bound by its provisions, including article 3 (8).

At its seventh session (Geneva, 18 – 21 October 2022), the Meeting of the Parties to the Aarhus Convention adopted decision VII/9 on a rapid response mechanism to deal with cases related to article 3 (8) of the Convention.¹ Decision VII/9 establishes the rapid response mechanism in the form of an independent Special Rapporteur on Environmental Defenders under the authority of the Meeting of the Parties. At its third extraordinary session (Geneva, 23 – 24 June 2022), I was elected, by consensus, by the Meeting of the Parties as the Convention’s Special Rapporteur on Environmental Defenders.

In accordance with my mandate as set out in decision VII/9 of the Meeting of the Parties to the Aarhus Convention, I wish to provide the following comments on the current text of the draft revised OECD Guidelines for Multinational Enterprises:

¹ Available at: https://unece.org/sites/default/files/2022-01/Aarhus_MoP7_Decision_on_RRM_E.pdf

1. Consult with human rights experts regarding the proposed language on the protection of environmental and human rights defenders

I welcome the proposal to include explicit language on the protection of environmental and human rights defenders in the draft revised Guidelines for the first time since the Guidelines' adoption in 1976. Given that the current revision process will be the first occasion on which specific language on environmental and human rights defenders will be included in the Guidelines, it is important that environmental and human rights defenders, and experts working to ensure their protection, are specifically invited to participate in the preparation of that language.

I therefore urge the Working Group on Responsible Business Conduct to reach out to environmental and human rights defenders, and international experts engaged in their protection, to ensure that the language included in the revised Guidelines will be effective and appropriate. For my part, I stand ready to work with the Working Group on Responsible Business Conduct to this end.

2. Expand the definition of “environmental defender”²

While I welcome the express reference to “environmental defenders” in draft paragraph 10 of Chapter II “General Policies”, I recommend that the text of this paragraph be revised to make clear that “environmental defenders” include all natural and legal persons seeking to protect their right to a clean, healthy and sustainable environment,³ and not only those “working” on environmental matters.

In this regard, the Meeting of the Parties to the Aarhus Convention has recognized that “an ‘environmental defender’ is any person exercising his or her rights in conformity with the provisions of the Convention”.⁴ Similarly, the Aarhus Convention Compliance Committee has made clear that the obligation in article 3 (8) of the Convention “applies to all situations in which members of the public seek access to information, public participation or access to justice in order to protect their right to live in an environment adequate to their health or well-being.”⁵ This also includes situations when members of the public exercise their right to protest and to take part in demonstrations.⁶

“Environmental defenders” therefore include not only natural or legal persons “working” on environmental matters but all persons engaging in activities to protect their right to a clean, healthy and sustainable environment.

3. Delete the term “undue pressure” from the draft revised Guidelines

In a number of places, the draft revised Guidelines call on enterprises to refrain from applying “undue pressure” against human rights defenders and environmental defenders.⁷ The term “undue pressure” is not used in international human rights law. I consider the term to be deeply concerning, since it implies that a certain level of pressure is acceptable, so long as it is not

² See paragraph 10 of Chapter 2 “General Policies” of the draft revised Guidelines.

³ On 28 July 2022, the United Nations General Assembly, through a unanimous vote, recognized the human right to a clean, healthy and sustainable environment, A/HRC/RES/48/13.

⁴ See decision VII/9, ninth preambular paragraph, ECE/MP.PP/2021/2/Add.1.

⁵ See the findings of the Aarhus Convention Compliance Committee on communication ACCC/C/2014/102 (Belarus), para. 66, ECE/MP.PP/C.1/2017/19.

⁶ Ibid, para. 109.

⁷ See, for example, Chapter II “General Policies” and the Implementation Procedures.

“undue”. I therefore recommend that the term “undue pressure” be entirely deleted from the text of the revised Guidelines and that the widely accepted language used in international human rights law be inserted in its place.

With respect to suitable terminology to use in place of “undue pressure”, I recall that article 3 (8) of the Aarhus Convention requires Parties to ensure that persons exercising their rights in conformity with the Convention are not “penalised, persecuted or harassed” in any way for their involvement. In turn, article 12 (2) of the 1998 UN Declaration on Human Rights Defenders requires that States take all necessary measures to ensure the protection of everyone, individually and in association with others, “against any violence, threats, retaliation, de facto or de jure adverse discrimination, pressure or any other arbitrary action” as a consequence of his or her legitimate exercise of the rights referred to in the Declaration.⁸

Whichever terminology is used, it is important that it is broad enough to cover all forms of intimidation, harassment and reprisals against defenders. I express my willingness to discuss appropriate terminology with the Working Group on Responsible Business Conduct during the ongoing revision process and I encourage the Working Group to consult with other United Nations Special Rapporteurs and other international human rights experts on this matter also.

4. Broaden the scope of defenders’ activities that are protected by the Guidelines

Paragraph 10 of Chapter II “Concepts and Principles” of the draft revised Guidelines recommends that enterprises should refrain from undue pressure or reprisals against persons or groups who “monitor or report practices” of enterprises or associated entities “that contravene the law or are inconsistent with the Guidelines or the enterprises’ policies”. This is too narrow. In line with article 3 (8) of the Aarhus Convention, members of the public must be protected from persecution, penalization and harassment for engaging in any activity in which they seek access to information, to participate in decision-making or to have access to justice in order to protect their right to live in an environment adequate to their health or well-being. This must not be limited to only situations in which members of the public are “monitoring or reporting” on activities that “contravene the law or are inconsistent with the Guidelines or the enterprises’ policies”. I again express my willingness to discuss with the Working Group on Responsible Business Conduct regarding this issue.

5. Retain text on Strategic Lawsuits Against Public Participation (SLAPPs)

I welcome the explicit recognition in the draft revised Guidelines of SLAPPs as a form of retaliation against defenders.⁹ The increasing use of SLAPPs against persons seeking to exercise their rights to protect the environment is an increasing, and very concerning, trend.

6. Broaden guidance for National Contact Points on preventing and addressing retaliation

While I welcome the express inclusion of text requiring National Contact Points (NCPs) to take all appropriate steps to address risks of retaliation against parties to a complaint, the current text is too narrow in several respects:

⁸A/RES/53/144.

⁹ See draft Commentary on Chapter 1 “Concepts and Principles”.

First, draft paragraph C.8 of the Implementation Procedures, and draft paragraphs 25–27 of the Commentary thereto, address reprisals against the “parties involved in the procedure”, and against the NCP itself. However, acts of retaliation may be taken not just against the specific parties to the complaint, but also against local communities, nongovernmental organizations, lawyers, journalists and other stakeholders affected by, or associated with, the case. The wording of draft paragraph C.8 and paragraphs 25–27 therefore should be broadened to explicit address acts of retaliation, reprisal or harassment in this wider context.

Second, draft paragraph C.8 of the Implementation Procedures currently instructs the NCP to “support” the party at risk to “avoid” or “mitigate” any harm. While it is important that the revised Guidelines include text explicitly requiring the NCP to take measures to protect any individuals or groups experiencing, or at risk of, reprisals, retaliation and intimidation, the text should also require the NCP to take direct action to prevent the perpetrators from engaging in reprisals, retaliation and intimidation. If the revised Guidelines fail to address this aspect, they enable perpetrators to continue to engage in such actions with impunity.

In conclusion, I would like to thank the Working Group on Responsible Business Conduct for the opportunity to comment during the current public consultation on the draft revised Guidelines. I express my willingness to engage with the Working Party on Responsible Business Conduct regarding my comments if that may be helpful. I also stand ready to provide input during the further development of the language in the draft revised Guidelines concerning the protection of environmental and human rights defenders.

Please accept the assurances of my highest consideration.

A handwritten signature in blue ink, consisting of stylized, overlapping loops and a long horizontal stroke extending to the right.

Michel Forst
Special Rapporteur on Environmental Defenders under the Aarhus Convention