

**TUAC SUBMISSION
TO THE OECD ANNUAL MEETING OF
NATIONAL CONTACT POINTS (NCPs)**

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Implementation of the OECD Guidelines

1. As of June 2006, 64 cases have been recorded as having been submitted by trade unions to National Contact Points (NCPs) with regard to alleged breaches of the OECD Guidelines for Multinational Enterprises since their review in June 2000. Each year between 2002 and 2004, trade unions raised 13-15 cases. In 2005, trade unions filed a total of nine cases. Three cases have so far this year been submitted (to the Polish & US NCPs) and another is expected to be raised shortly before the UK NCP.

2. More than half of the cases concern violations of trade union rights and roughly one quarter concern restructuring (most often company closures). A few cases refer to other issues such as, health and safety, environment, corruption, or disclosure of information .Many cases concern a mixture of different issues. The share of cases taking place in non-adhering countries has decreased (more than a third compared to nearly half at the end of 2003). Of the 64 cases, 36 have been closed while 28 are still pending. On average, NCPs take 13 months to deal with a case. In terms of duration, the cases regarding Maersk, IHC Caland and Ivanhoe Mines have been the longest. Those lasted for three years or more before they were closed by the NCPs.

3. A majority of the closed cases have been resolved and/or led to public statements and recommendations. In some cases the outcome can be attributed to the efforts of the NCPs (the instances involving Siemens, Bosch, Aspocomp and Unilever), while in others the efforts of the NCPs have been marginal (Trico Marine Services, PPR, Sees Corporation and Angelica Textile Services). Nevertheless, the mere fact that a case is submitted can sometimes have an impact on the outcome. Even when the Guidelines have not constituted the main factor in the resolution of a case, they have on a series of occasions contributed to the solution.

4. The lower number of cases in 2005/2006 compared with previous years and the excessive length of procedures indicate that more work remains to be done to achieve effective implementation of the Guidelines and to fulfil the full potential of the Instrument since its revision in 2000. This submission maps out what TUAC believes should constitute key elements of a reinvigorated agenda for the Guidelines, including:

- harmonization and clarification as regards issues of “parallel legal proceedings” and the “investment nexus”,
- leadership and pro-active engagement for the promotion and awareness of the Guidelines,
- mainstreaming the Instrument in the OECD’s other activities and programmes and beyond.

Obstacles to treatment of cases: investment nexus and parallel proceedings

5. The first step in increasing commitment to the Guidelines must be the effective and soundly functioning NCPs. TUAC notes some improvements over the past year. Some NCPs have clearly upgraded their capacities and dialogue procedures to assist in resolving specific instances. The Chilean NCP in particular has made considerable efforts and is now functioning well, and where NCPs are tripartite they have a higher profile and are more active. Nevertheless, TUAC is still concerned about the large number of NCPs that appear unwilling to meet their responsibilities to resolve cases. For example, the basic requirement to acknowledge receipt of cases is not systematic for some NCPs. Of equal concern is the fact that not all NCPs issue a statement after the case has been finalised despite the fact that this is required when the parties do not reach an agreement. As a general rule, the result should also be made public. This is something that NCPs often fail to do.

6. The most important obstacles to the effective treatment of cases however lie in differing interpretation of the criteria for acceptance of cases and in particular the investment nexus¹ and the existence of parallel legal proceedings. Some NCPs have adopted a narrow interpretation of the investment nexus which in effect would exclude acceptance of many specific instances². Similar concern arises with the interpretation of parallel legal proceedings on the part of some NCPs. The US and Japan NCPs in particular have adopted a fundamentally negative approach: on numerous occasions they have put cases aside until there has been an outcome of the parallel proceeding, and have then “closed” the case³.

7. In recent comments submitted to the Working Party of the Investment Committee, the TUAC has argued that there is no alternative to treating all substantive cases seriously and that NCPs should always deal with a specific instance (which would meet the Guidelines’ own procedure guidance), even if it is partly or wholly addressed in parallel proceedings⁴. Taking a different approach to dealing with parallel proceedings would ultimately render the

¹ ie. linking the company targeted by the specific instance and the entity where the alleged breach occurs.

² For example, the Dutch NCP closed a case involving travel agencies promoting tourism in Burma because of the lack of an investment context. It also refused one of the DRC cases for the same reason (In October 2002, the UN Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of Congo listed 84 multinational enterprises as being in violation of the Guidelines).

³ This is the strategy of the Japanese NCP, which argues that it does not want to interfere with legal systems particularly in non-adhering countries. The Canadian NCP refused a case involving the closure of part of the operations of UPM Kymmene. It considered that the provincial labour laws and remedies in Canada would be more suitable to deal with the issue, and that such recourse had already been taken by the parties. The US NCP has also been extremely reluctant to examine cases which are also filed with the National Labour Relations Board, or within overseas’ jurisdictions (for example the US NCP closed the case on the Liberian International Ship and Corporate Registry on the basis that the issue was “effectively addressed through other appropriate means”).

⁴ Paper by the OECD Secretariat (DAFFE) for the Working Party of the Investment Committee “Specific Instance and Parallel Proceedings – Draft Summary of Discussions” [DAF/INV/WP/WD(2005)1/REV2]

Guidelines irrelevant. The TUAC comments further note that the Guidelines are not part of national or international judicial systems, and that there should not be *prima facie* conflict or inconsistency between the Guidelines and legal proceedings. As mechanisms that can help resolve conflicts between companies and stakeholders, all state-to-state issues or concern about “adversity” between parties (arising from legal proceedings) should not influence the decision of NCP in considering acceptance of a case brought to its attention. NCPs should address in a comparable way the handling of cases that are, or might become, the object of parallel proceedings, so as to complement the procedural guidance given by the Guidelines. The Working Party’s discussion should focus on the implications these proceedings may have after initial acceptance by NCPs⁵.

Information on and promotion of the Guidelines

8. Since the 2000 revision of the Guidelines, the TUAC, its affiliated organisations, and other international trade union organisations (Global Union Federations, the ICFTU, the WCL the ETUC) have conducted significant activities to support information about and promotion of the Guidelines in all parts of the World. These activities have been conducted using the labour movement’s own resources as well as with the financial support of donors such as the Friedrich Ebert Foundation (FES) and the European Commission. In the past three years a total of 13 international seminars have been organised by the labour movement in which the OECD Guidelines were either the unique purpose or its essential agenda. A majority of these were open events in which labour had invited business, government and NGO representatives.

- In 2002/2003, four regional workshops took place in Mexico (Central America), Morocco (Maghreb), Zambia (Southern Africa) and Indonesia (South East Asia) as well as several other events in South Africa, Korea and Argentina.
- In 2004, one regional workshop was held in Montevideo and Buenos Aires (covering Latin America), while the Guidelines were a central part of the agenda in another four seminars held in Bulgaria, Ecuador, Thailand, and Ukraine.
- In 2005: two workshops was held respectively in Macedonia and Romania, and four others took place in Western Europe to support awareness and use of the Guidelines by European Works Councils (EWC): in Sweden (for Nordic members of EWCs), in the UK (for British and Dutch members), in Germany and in France (for French and Belgian members). The TUAC also ensured high visibility of the Instrument at the World Social Forum in Porto Alegre, as well as at the World Economic Forum in Davos.

⁵ In its comments the TUAC proposes the following four-step approach: (1) *Protection of parties*: in cases where there are reasonable indications that criminal activities are involved, the NCP should alert relevant enforcement authorities, and should make its best effort to monitor the handling of the case by the concerned authorities; (2) *Scoping of parallel proceedings*: once a parallel proceeding is identified, the NCP should evaluate where the Guidelines and parallel proceedings converge and differ. This scoping exercise should serve the unique purpose of better informing on compliance with the Guidelines; (3) *Forming a judgment on compliance with the Guidelines*: the NCP should take account of parallel proceedings insofar as it provides for relevant sources of facts and information in considering a specific case; and (4) *Facilitate dialogue and dispute resolution between private parties*: the NCP should facilitate dialogue taking due account of parallel proceedings. Where there is reasonable indication that a parallel proceeding is exposed to governance or administrative failures, such as extensive delays in procedures, it is especially important that an NCP makes its best effort to engage the parties in dialogue.

9. In the first half of 2006, the TUAC has continued to ensure visibility of the Guidelines in various meetings on CSR and international investment. It has also expanded its supporting materials and publications. The 2002 TUAC Users' Guide is available in 22 languages⁶ including in Mandarin Chinese. Thanks to the support of the European Commission, the TUAC released early this year a new Training Material for European Works Councils (consisting of a handbook and a CD-rom). This training material provides all the information needed to organise a three-day educational seminar on the use of the Guidelines by European Works Councils. The TUAC is currently considering adapting this material to a wider audience and is actively seeking funding partners.

10. The TUAC will for the time being continue to promote awareness and use of the Guidelines worldwide. In the past two years NGOs and their representative network at the OECD – the OECD Watch – have also invested in the monitoring and awareness of the Guidelines, which is very welcome. However, the burden of developing the Instrument cannot rest upon trade unions and NGOs. There needs to be a renewed consensual and collective effort to promote and strengthen the Guidelines, and thereby uphold the leadership of the OECD in the field corporate responsibility. A 2005 survey of TUAC affiliates has shown that a majority of NCPs have not organised any activities whatsoever to promote the Guidelines since 2004⁷. This is not acceptable. Recent developments in other multilateral fora, such as the EU⁸, the International Finance Corporation of the World Bank⁹ (see below), the UNEP¹⁰ and in private initiatives such as ISO¹¹ and the GRI¹², necessitate a re-invigorated, pro-active and positive agenda for the Guidelines if they are not to become irrelevant.

Building a positive agenda at the OECD and beyond

11. A re-invigorated agenda for promoting the Guidelines is essential if they are to be an instrument for the promotion of responsible corporate conduct world wide. The falling number of cases over the past two years is not due to the fact that breaches of the Guidelines have not occurred. To the contrary the numbers justify serious concern as to the effective implementation of the instrument by all parties concerned and reveal that serious obstacles remain to the effective treatment of cases by NCPs. Much more needs to be done by

⁶ Bahasa Indonesian, Bulgarian, Chinese, Croatian, Czech, English, Estonian, French, Georgian, German, Hungarian, Italian, Japanese, Korean, Latvian, Lithuanian, Macedonian, Portuguese, Romanian, Russian, Spanish and Turkish.

⁷ or at least no activities publicised in the public domain or to trade unions in the countries concerned. See TUAC Submission 2005

⁸ Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee "Implementing the partnership for growth and jobs: Making Europe a Pole of Excellence on CSR" Brussels, 22.3.2006, COM(2006) 136 final, http://europa.eu.int/eur-lex/lex/LexUriServ/site/en/com/2006/com2006_0136en01.pdf

⁹ The International Finance Corporation's (IFC - the private sector lending arm of the World Bank) new performance standards became operational on May 1, 2006. Henceforth, all new IFC loans will require clients to respect the core labour standards as defined by the International Labour Organization's (ILO) eight core conventions. The complete text of the new standards is currently available in 4 languages (English, Spanish, French, and Russian) on the IFC website: www.ifc.org/ifcext/enviro.nsf/Content/PerformanceStandards

¹⁰ UNEP Finance Initiative and UN Global Compact supported Principles for Responsible Investment: www.unpri.org

¹¹ development of a ISO 26000 standard on CSR : <http://isotc.iso.org/>

¹² Review of the Sustainability Guidelines : www.grig3.org

stakeholders other than trade unions and NGOs, and by Governments' themselves to sustain the leadership of the Instrument in the field of corporate responsibility.

12. Within the realm of the OECD Investment Committee, there are several actions which could be of help to strengthen the effectiveness of NCPs in dealing with cases. As indicated above, discussion on the investment nexus, and on parallel proceedings should lead to harmonised interpretation and to procedures that enhance rather than restrict use of the Guidelines. Beyond that the Committee should envisage using the Organisation flagship instrument, the peer review process. The OECD Special Group on Regulatory Policy could serve as a successful example to give useful direction in setting up a system of peer-group monitoring of NCPs.

13. But the OECD itself should promote the Guidelines beyond the NCPs and the Investment Committee. The Guidelines are a relevant instrument for many other programmes and Committees of the OECD. Yet too often it is at the insistence of the TUAC, and the TUAC only that proper reference is made to the Guidelines in other OECD standard-setting, implementation and revision processes. Closer linkages should be made with the implementation of the Anti-bribery Convention as well as with the Working Party on Export Credit Agencies. Last but not least, the TUAC is surprised to note that dialogue between the Investment Committee and the Steering Group on Corporate Governance is almost non-existent. This is a missed opportunity. No comparative analysis has been conducted to date, between the Guidelines and the Principles of corporate governance. The TUAC conducted preliminary work in that direction in 2005¹³.

14. OECD outreach activities are also important opportunities to raise awareness of the Guidelines and to broaden the number of non-OECD countries adhering to the Investment declaration. So far, nine non-Member States have adhered to the Declaration¹⁴, and we understand that three additional economies – Egypt, Hong-Kong China, Malaysia and Taiwan – are, or may be in the near future, in advanced dialogue with the Organisation on this matter. Dialogue with these countries should continue as well as with others whose high level members of government have in the past expressed interest in the Guidelines, including Costa Rica, Indonesia, Morocco, Singapore, South Africa and Thailand. The Guidelines should also be fully integrated in on-going outreach programmes such as the joint OECD/UNDP policy dialogue on investment and governance in the MENA region (Middle East and North Africa) and the OECD-APEC dialogue programme. Implementation of the recently adopted Policy Framework for Investment, part of which addressed responsible business conduct, should provide a further opportunity to inform non-adhering countries of the legitimate expectations

¹³ “A Comparative explanation of the OECD Guidelines for Multinational Enterprises and the OECD Principles of Corporate Governance”, April 2005, Internal report by the TUAC Secretariat (Available on demand). The report identifies five areas where there should be closer articulation between the two OECD standards: (1) employee rights to collective bargaining and to representation within the company, (2) protection of whistleblowers, (3) consultation of shareholders and employees in extraordinary transactions such as restructuring operations, (4) disclosure and transparency (including implicit revision of the Guidelines’ Disclosure chapter to incorporated review of the Principles in 2004) and (5) duties of directors and executive management to explain non-compliance or to comply with the Guidelines.

¹⁴ Argentina (22 April 1997) Brazil (14 November 1997) Chile (3 October 1997) Estonia (20 September 2001) Israel (18 September 2002) Latvia (9 January 2004) Lithuania (20 September 2001) Romania (20 April 2005) Slovenia (22 January 2002)

to which investors are held to in the Guidelines. The proposed project on OECD and Chinese government approaches to corporate responsibility must build on the Guidelines.

15. Finally, the Organisation should strengthen its dialogue with other multilateral fora. It is welcome that the Safeguards Policy of the International Finance Corporation (IFC), the World Bank's private sector-lending arm, now stipulates that all borrowers from the IFC must respect core labour standards. Synergy and links should be developed between the IFC policy and the OECD Guidelines. The assistance of the ILO and its regional offices worldwide could also be useful in developing the use and visibility of the Guidelines'. The ILO Committee on the Tripartite Declaration has expressed the desire further to develop its role as a clearing point for labour-related cases arising from the application of different instruments. In return NCPs could also act as points for disseminating information on relevant ILO instruments.