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COOPERATION AND DEVELOPMENT
COMMISSION SYNDICALE CONSULTATIVE
AUPRÈS DE L'ORGANISATION DE COOPÉRATION
ET DE DÉVELOPPEMENT ÉCONOMIQUES

TUAC
Working Group on Trade and Investment
Paris, 2nd September 2009

THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES
BRAINSTORMING MEETING
REVIEW OF THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES
Paris, 2nd September 2009

Background Paper

GLOSSARY OF TERMS

Due Diligence	<i>“process whereby companies not only ensure compliance with national laws but also manage the risk of human rights harm with a view to avoiding it. The scope of human rights-related due diligence is determined by the context in which a company is operating its activities and the relationship associated with those activities”.</i>
Functional Equivalence	In comparing NCP performance, the focus is on achieving equitable performance rather than common structures/approaches. This is supposed to be achieved by NCP adherence to four core criteria: <i>visibility, accessibility, transparency and accountability</i> .
Guidelines	OECD Guidelines for Multinational Enterprises.
Investment Nexus	The Guidelines depends on <u>investment</u> by the multinational in the host country. Requiring an investment nexus means that the Guidelines would not apply to violations of labour rights violations by suppliers or other business partners in the context of pure trade.
National Contact Points (NCPs)	The National Contact Points are responsible for furthering the “effectiveness of the Guidelines” including promoting the Guidelines and implementing the ‘specific instance’ procedure.
Parallel Legal Proceedings	Existence of judicial proceedings that cover the same or closely related issues as the case raised under the Guidelines.
Peer Review	Pioneered by the OECD, this is an assessment process whereby each country’s policy or practices are examined by other member countries on an equal basis.
Rights-compatible grievance mechanism	According to the work of the UN Special Rapporteur for Business and Human Rights, ¹ this is a vehicle for addressing grievances – whether or not they raise substantive human rights issues – in a manner that respects and supports human rights.
Specific Instance	A complaint or a case submitted to the National NCP concerning alleged breach of the Guidelines. The terms ‘specific instance’, ‘case’ or ‘complaint’ may be used interchangeably.

¹ <http://www.business-humanrights.org/SpecialRepPortal/Home>.

PREFACE

The Guidelines are unique in that the provisions provide a set of recommendations on good corporate behaviour that are endorsed and enforced by governments. Whilst these are voluntary they are not optional – all multinational enterprises of adhering countries are required to comply with all the recommendations. TUAC has responsibility for assisting trade unions raise cases under the Guidelines, compiling information on trade unions cases and for liaising with the OECD Investment Committee. As part of this work, TUAC is currently preparing a database containing profiles of all trade union cases, which will be available on-line in October 2009.

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1. Introduction

1. The aim of this paper is to serve as a background document for the brainstorming meeting of the TUAC Trade and Investment Working Group on the 'Update' (Review) of the OECD MNE Guidelines. The meeting has been organised with the purpose of preparing a trade union position and work plan for the Update. The paper does not address trade union organisational arrangements for using the Guidelines.²

2. The remainder of this document is structured as follows:

- *Section 2* summarises recent developments at the OECD;
- *Section 3* focuses on the overall Corporate Social Responsibility (CSR) context;
- *Section 4* identifies potential key issues for the Update.

2. OECD: Key Developments

3. The Conclusions of the 2009 OECD Ministerial Council Meeting³ instructed the OECD to undertake further consultation on the "updating" of the OECD MNE Guidelines in order "*to increase their relevance and clarify private sector responsibilities*". The Guidelines were last reviewed in 2000. Between 1976 and 2000, reviews took place at regular intervals (between 3 and 5 years).

4. The consultation period has already started and will extend until June 2009. The OECD Investment Committee will take a formal decision on the Update in June 2010.

5. It does not appear that a formal structure has as yet been put in place for preparing the Update. The following, however, are all relevant:

- '*Friends of the Guidelines*' the OECD has established a 'Friends of the Guidelines' group. TUAC is not a member;
- *Professor John Ruggie, UN Special Representative for Business and Human Rights:* Professor John Ruggie has accepted an invitation to be an advisor on the Update;
- *Consultations:* TUAC, BIAC and OECD Watch have been invited to consultations with the Investment Committee on the Update of the Guidelines that will take place on the 7th October 2009.⁴ It is expected that a second consultation will be held in March 2010;
- *Bangkok Conference:* The OECD secretariat is organising a conference on the Guidelines in Bangkok on the 2nd- 3rd November 2009, in cooperation with the ILO, the UN Asia-Pacific Commission and the UN Global Compact.

6. The decision to undertake the first peer review of a National Contact Point (NCP) is also an important development. The Dutch NCP has volunteered to be the subject of a peer review, which will take place during the period 2009- 2010. The two reviewers are the UK and Austrian NCPs. This peer review is an important because it is highly likely that its findings will feed into the overall Update of the Guidelines.

² These are set out in the TUAC User Guide for the MNE Guidelines.

³ OECD Annual Ministerial Council Meeting, 24-25 June 2009.

⁴ Affiliates and partners are invited to attend this consultation.

3. Corporate Social Responsibility: Key Developments

3.1 *Protect Respect and Remedy: A Framework for Business and Human Rights: The Work of the UN Special Representative Business and Human Rights*

7. A major development in recent years has been the work of the UN Special Representative on Business and Human Rights, Professor John Ruggie,⁵ to develop a framework for addressing business and human rights. On the 3 June 2008, Professor Ruggie presented his report, *Protect, Respect and Remedy*, to the Human Rights Council, which mandated him to continue and operationalise the framework. On the 22 April 2009, he presented a further report outlining the strategic direction of this work (see *BOXES 1-3*).⁶

BOX 1: THE STATE DUTY TO PROTECT (PILLAR 1)

Pillar 1: States have a duty to protect against human rights abuses by third parties, including business. Ruggie explains that this ‘duty to protect’ is grounded in international human rights law. As the State duty to protect is a standard of conduct, not a standard of result, States may be considered to be in breach of their obligations when they fail to take measures to prevent or to investigate and punish human rights violations. Professor Ruggie reports that international law is unclear on the extra-territorial dimension of this duty, noting that States are neither required to, nor prohibited from, regulating the activities of home business abroad. He argues the case for home States ‘*encouraging*’ businesses to respect rights abroad, especially where the State is directly involved (e.g., procurement/export credits). Ruggie considers that such activity ‘*gets States out of the untenable position of being associated with possible overseas corporate abuse*’ and gives much needed support to host States. Ruggie describes the status quo as a ‘narrow approach’ to managing business and human rights agenda with human rights being poorly integrated into other policy domains.

BOX 2: CORPORATE RESPONSIBILITY TO RESPECT (PILLAR 2)

Pillar 2: Companies have a responsibility to respect human rights: Professor Ruggie explains that the corporate responsibility to respect is a ‘near-universal’ social norm that exists independently of the State duty to protect and of variations in national law. The Special Representative has found that few corporations have in place systems for verifying that they respect human rights and argues that companies need to undertake human rights due diligence to ensure that they do not infringe on the rights of others. Ruggie identifies 3 key factors that companies need to consider: a) the country and local context; b) the impact of the company’s own activities in its capacity as producer, employer and neighbour and c) whether and how the company might contribute to abuse through the relationships connected to its activities such as business partners, entities in its value chain, other non-State actors and State agents. Professor Ruggie recognises that some of these factors are outside the control of business but observes that companies use due diligence to assess other risks outside of their control – human rights should be no different. Importantly Ruggie emphasises the importance of addressing all human rights as ‘*companies can affect the entire spectrum of rights*’. He recommends that companies as a minimum look at: the Universal Declaration and the two Covenants, as well as the ILO Declaration on Fundamental Principles and Rights at Work.⁷

⁵ <http://www.business-humanrights.org/SpecialRepPortal/Home>.

⁶ Business and Human Rights: Towards Operationalising the “Protect, Respect and Remedy Framework”: 2009.

⁷ Ruggie recognises that human rights instruments were written ‘by States, for States’ and that the meaning for businesses is not well understood. Guidance is provided in an OHCHR Publication, ‘Human Rights Translated’.

BOX 3: ACCESS TO REMEDY (PILLAR 3)

Access to effective remedy is the third pillar of the Ruggie Framework – it is also an important component of Pillars 1 and 2. Remedy may be provided through judicial or non-judicial means at company, national or international level. As regards non-judicial mechanisms, such as the Guidelines, Professor Ruggie identifies six underlying principles for effectiveness: *legitimacy, accessibility, equitability, predictability, rights-compatibility* and *transparency*. Ruggie discusses National Contact Point (NCPs) in the context of national-level grievance mechanisms describing them as “*potentially important avenues for remedy at the national level*”⁸. He notes, however that whilst “*NCPs stress the need for operational flexibility that reflects national circumstance*”, the credibility of the whole system depends on their meeting a minimum set of performance criteria (i.e., the six principles set out above). Professor Ruggie considers that NCPs should find ways to give more weight to findings against companies using, for example, access to government procurement or export credits. Ruggie also stresses the importance of National Human Rights Institutions (NHRIs) as an important but under-utilised avenue for remedy in the national context. At international level, the UN Special Representative is exploring options for improving access to non-judicial remedy including: a clearing house for directing to the correct mechanism; a capacity-building body to help parties use the mechanisms; and an expert body to aggregate and analyse outcomes. The UN Special Representative has launched a global wiki, BASESwiki⁹, an online forum for sharing information on non-judicial grievance mechanism.¹⁰

8. The work of the UN Special Representative on Business and Human Rights has a number of implications for the Update of the Guidelines, in terms of both its scope and the functioning of NCPs. These are discussed further in *Section 4*.

3.2 OECD - ILO Dialogue

9. In 2008, the OECD Investment Committee and the ILO Sub-Committee on Multinational Enterprises agreed a (non-legally binding) Joint Statement on cooperation concerning the OECD MNE Guidelines and the ILO Tripartite Declaration on Multinational Enterprises and Social Policy (see *ANNEX I*). The two bodies agreed that there was “*scope to develop further the potential synergies between these two instruments and their common goal...*” and identified the following areas of cooperation:

- cross-referencing each other’s work;
- sharing research and analysis of corporate responsibility practices;
- cross-participation in outreach events;
- experience-sharing and capacity building among NCPs and ILO constituents.

10. So far there does not appear to have been any substantial follow-up to this Joint Statement.

⁸ Business and Human Rights: Towards Operationalising the “Protect, Respect and Remedy Framework: April 2009; pp. 24.

⁹ The Business and Society Exploring Solutions – A Dispute Resolution Community: <www.baseswiki.org>.

¹⁰ TUAC has agreed to provide trade union case profiles for publication on the Wiki in October 2009.

3.3 The UN Global Compact¹¹

11. The UN Global Compact has been criticised by international trade unions for lacking an adequate enforcement mechanism (*ANNEX II* sets out the current procedure). There are, however, recent signs of growing cooperation between the Global Compact and the NCPs:

- the Deputy-Director of the UN Global Compact, speaking at the June 2009 Annual Meeting of NCPs invited NCPs to explore “*how the synergies between the UNGC ‘integrity measures’ and the ‘specific instance facility’ could be enhanced with a view to improving both instruments*”;
- the German UN Global Contact Point Office and the German NCP have signed a formal agreement on the referral of cases from the Global Compact to the NCP (see *BOX 4*).

BOX 4: UN GLOBAL COMPACT: INCREASING COOPERATION

The UN Global Compact Office in Germany, represented by GTZ asked the German NCP for closer co-operation and in particular whether it could use the NCP's mediation capacity for cases of non-compliance with the Global Compact principles. The German NCP in response suggested a two-step procedure, to which the Global Compact representatives agreed:

1. The Global Compact tries to solve possible problems within its reporting system;
2. If the results are unsatisfactory, the case could be presented to the German NCP as a ‘specific instance’, which would offer mediation following the OECD Procedural Guidance.

The stakeholders of the UN Global Compact Germany have approved and formalized this possibility for co-operation.

¹¹ Following an address to The World Economic Forum in January 1999, United Nation Secretary-General Kofi Annan challenged business leaders to join the Global Compact and support nine principles in the areas of human rights, labour and the environment. The Global Compact was formally launched in 26 July 2000 and then extended in June 2004 to include a tenth anti-corruption principle.

4. OECD MNE Guidelines: Use and Key Issues

4.1 Overview

12. According to the OECD,¹² two hundred cases have been filed with NCPs since the review of June 2000. Of these, 153 have been taken up and 105 of these have been concluded. The OECD reports,¹³ that most cases deal with alleged violations of Chapter IV, *Employment and Industrial Relations*. The only Chapter that has not been used is Chapter VIII, *Science and Technology*.

13. According to information submitted to TUAC by trade unions,¹⁴ as of June 2009, trade unions had raised 105 cases. Trade unions have mainly submitted cases under Chapter IV of the Guidelines, *Employment and Industrial Relations*, although they are also using Chapter II, *General Policies (Sustainable Development)* and Chapter III, *Disclosure*. As far as we are aware trade unions have not submitted cases under the Chapters covering *Consumer Interests*, *Science and Technology*, *Competition* or *Taxation*.

FIGURE 1: CASES BY NATIONAL CONTACT POINT

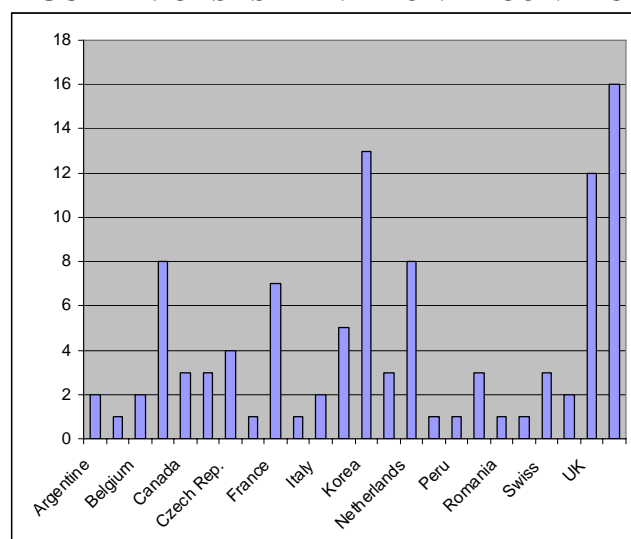


TABLE 1: SUMMARY OF CASES BY NCP

NCP	NO. OF OVERALL CASES ¹⁵	NO OF LABOUR CASES ¹⁶
USA	26	16
UK	20	12
Netherlands	19	8
Brazil	15	8
Belgium	12	3
Germany	10	2
Korea	5	13

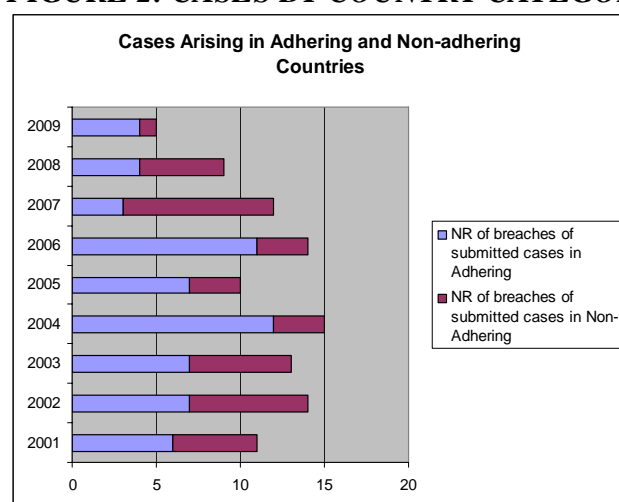
¹² Annual Meeting of the National Contact Points for the OECD Guidelines for Multinational Enterprises, OECD, May 2009 pp.15.

¹³ Ibid.

¹⁴ There is discrepancy between the OECD and TUAC's figures, which TUAC is trying to resolve.

¹⁵ Source: OECD.

¹⁶ Source: TUAC.

FIGURE 2: CASES BY COUNTRY CATEGORY

14. Trade unions have identified a range of issues that are obstacles to their effective use of the Guidelines (see *TABLE 2*). A number of these are discussed in the sections below.

TABLE 2: KEY TRADE UNION ISSUES

ISSUE	RELATED ISSUES	EXISTING RESEARCH
NCP performance	/	UN Special Rep.
NCP role	Parallel proceedings	UN Special Rep.
Burden of Proof	Resources	
Timescales	Resources	
Staff training	Resources/Role of the NCP (mediation)	
Confidentiality v transparency	Parallel proceedings Cooperation of companies Campaigns	UN Special Rep.
Parallel legal proceedings	Confidentiality/Transparency Role of the NCP National Law V International Standards	Sherpa TUAC to do research
Investment nexus/supply chains	Business relationships Due Diligence	UN Special Rep.
Lack of cooperation of companies	Confidentiality Parallel Proceedings National Law Need for a Follow-up procedure Lack of sanction	/
National law v international standards	Parallel proceedings	UN Special Rep.
Need for better cooperation with the NCP		
Changing working relationships	Business relationships Due Diligence Sphere of influence	UN Special Rep.
‘Living Wage’	New concept for the Guidelines	

15. In addition to these, the issues set out in *TABLE 3*, which reflect wider developments, are likely to be important for the review.

TABLE 3: OTHER ISSUES

ISSUE	SOURCE	TRADE UNION INTEREST
Human rights	Professor Ruggie	✓
Climate Change	UN Climate Change Talks/Copenhagen	✓
Green Growth	OECD	✓
Financial Sector	Economic and Financial Crisis	✓

16. In discussing trade union positions and strategies it is important to note that a number of issues are closely linked, with a common thread being the difficulty of engaging companies in the NCP process.

17. It is also worth noting the tendency of business, as represented by BIAC¹⁷, to interpret the commentaries and statements in such a way as to limit the applicability of the Guidelines. See BIAC's briefing on the investment nexus, parallel proceedings and conflict with national law (*ANNEX III: Preventing Forum Shopping*).

4.2 Effectiveness of the NCP

18. There are a host of issues that determine the effectiveness of an NCP.

19. **Performance Criteria:** the procedural guidance to the Guidelines sets out four core criteria on the basis of which the NCPS are supposed to deliver equal performance (functional equivalence). Professor Ruggie contends that in order to be effective non-judicial grievance mechanisms (like the NCPs) should operate according to six main criteria (see *TABLE 4*).

TABLE 4: IMPROVING PERFORMANCE CRITERIA

NCP Core Criteria	Related Issues	NCP Core Criteria	UN Special Representative
Visibility		✓	
Legitimacy	Structure		✓
Accessibility	Confidentiality Instrument of last resort	✓	✓
Predictability	Equal performance		✓
Transparency	Confidentiality and legitimacy	✓	✓
Accountability	Legitimacy Structure	✓	
Right-compatible			✓
Equitability	Need for common approaches on parallel proceedings/investment nexus/confidentiality/		✓

¹⁷ BIAC is the Business and Industry Advisory Committee to the OECD.

20. **NCP Structure:** TUAC has long argued that structure is a key factor affecting NCP performance and that there are clear benefits from involving the social partners in the NCPs. The OECD reports that “*as compared with multipartite structures, government-centred structures continue to be perceived by several stakeholders as falling short of giving them a decisive voice in NCP activities*”. A number of NCPs do not involve either the labour or social ministries/departments or the social partners. Whilst the procedural guidance gives flexibility to countries in how they organise their NCPs and the extent to which they involve the social partners and non-governmental organisations (NGOs), the official commentaries state that the structure put in place should “*provide an effective basis for dealing with the broad range of issues covered by the Guidelines*”.

BOX 5: NEW NCP STRUCTURES: DUTCH AND THE UK¹⁸

DUTCH NCP

In February 2007, the Netherlands adopted a new structure composed of independent experts operating at “arms length” from the government. The four independent experts were selected on the basis of their standing and experience in the area of corporate responsibility. The NCP also consists of four government advisors (from the Ministries of Economic Affairs, Foreign Affairs, Social Affairs and Housing, Spatial Planning and Environment). A key aim of the new structure was to secure independence and avoid conflicts of interest the functions of the responsible Minister. The new NCP continues to be hosted in the Ministry of Economic Affairs, but the NCP members act independently. However, the government can issue a public comment on final statements on specific instances made by the Dutch NCP. The connection with the government is maintained *via* the advisory members of the Dutch NCP. The Ministry or Foreign Trade instructs the Dutch NCP on decisions of the OECD Investment Committee.

UK NCP

In September 2007, the UK NCP was changed from a single unit into a dual-departmental NCP with a Steering Board. The NCP continues to be hosted in the Department for Business, Enterprise and Regulatory Reform (BERR), which also acts as a secretariat for the Steering Board. The Steering Board oversees the effectiveness of the NCP ensuring that the procedures are followed. It also provides advice on the application and promotion of the Guidelines. It is chaired by a senior official from BERR and includes representatives from 8 other ministries (the Foreign Office, DFID, the Attorney General’s Office and Export Credit Guarantees Department, the Department for the Environment, Food and Rural Affairs, the Ministry of Justice, the Scottish Executive and the Department of Work and Pensions and BERR’s legal Department and the Directorate with overall responsibilities for Corporate Responsibility). There are four external members (representing business, trade unions and NGOs as well as an independent member who represents the All Parliamentary Group for the Great Lakes and the Prevention of Genocide. External members serve for a period of three years with the possibility of appointment for a further three years. The Steering Board can draw on external experts as appropriate. It meets on a quarterly basis or more often if required. Minutes of meetings are normally published on the NCP website.

21. **Peer Review:** The uneven performance of NCPs undermines the effectiveness of the Guidelines as a whole, as improvements in performance of some are offset by the weak performance of others. Even if there are changes to the underlying principles, TUAC considers that improvements across the board will only be achieved through a mandatory peer

¹⁸ This draws heavily from the descriptions provided in the OECD report: Review of NCP Performance, June 2008.

review mechanism. Whereas in principle, the annual reports submitted by the NCPs serve as a form of assessment, this is inadequate as there is no feedback or recommendations. The OECD peer review process – whereby each country is reviewed by other member countries on an equal basis – is a tried and tested method of review aims to ensure compliance with established standards and principles as well as a common standard of performance.

22. **Burden of Proof:** The difficulty for NCPs in discharging the burden of proof in complex cases is another key issue. Possible solutions include the use of specialist training and fact-finding missions. The 2008 OECD report on NCP Performance notes that site visits are more the exception than the rule¹⁹ and that a number of NCPs has underlined the potential value of having access to special funding to carry out on-site visits. Fact-finding missions have already been successfully used by some NCPs: e.g., the Swedish NCP. The desirability and feasibility of creating a centralised fact-finding facility was one of the options explored at a brainstorming meeting held at Chatham House in the UK in March 2009.²⁰

23. **Resources:** The OECD notes that several NCPs (Brazil, Belgium, Chile, France, Greece, Italy, Mexico, Poland, Romania, Spain) report increased difficulty in meeting the various demands placed on them, acknowledging that with additional resources, they could play a more active role in promoting the Guidelines. NCPs also acknowledge the need for more qualified staff, particularly staff trained in mediation.

24. **For Discussion: The Update must first and foremost focus on improving the effectiveness of the NCPs. The UN Special Representative on Human Rights and Business has found that the NCPs whilst “potentially important avenues” are failing to meet minimum performance criteria. TUAC considers it essential that the Update strengthens the procedural guidance as regards the functioning of NCPs by adopting Professor Ruggie’s six principles. The procedural guidance should be more prescriptive in terms of the NCP structures that would be in line with these principles. The Update should also provide for a mandatory peer review system that is transparent and participatory with published country reports setting out recommendations. The procedural guidance should be amended to set minimum standards on time scales and reporting requirements, which should include the level of resources and staff training. The Investment Committee should establish a central facility for training on mediation and for fact-finding.**

¹⁹ Pp. 11

²⁰ March 2009 meeting held at Chatham House and supported by the Norwegian Government.

4.3 Role of the NCP

25. Affiliates and partners have experienced problems with the willingness of some NCPs to offer their good offices for the purposes of mediation.

26. The procedural guidance sets out the role of the NCP as (*inter alia*):

- “...*the NCP will offer a forum for discussion*”
- NCPs will “*offer, and with the agreement of the parties involved, facilitate access to consensual and non-adversarial, such as conciliation or mediation, to assist in dealing with issues*”
- “*if the parties involved do not reach agreement on the issues raised, issue a statement and make recommendations*”

27. According to the UK’s review of NCP performance,²¹ the key role of the NCP is to mediate an acceptable solution between the parties involved.

28. However, the Dutch NCP notes²² that there is a conflict between the roles of ‘adjudication’ and ‘mediation’. It states that the goal of ‘adjudication’ – to establish the facts in order to determine whether the Guidelines have been complied with – conflicts with the role of mediation where the search for the objective truth is of less importance than reaching a future oriented agreement. “*In every SI procedure, an NCP will have to find that fine balance between mediation or offering its good offices to resolve the issue on the one hand, and determining whether the OECD Guidelines have been complied with on the other*”. The Dutch NCP states that it focuses on mediation, preferring a forward looking approach, “*while not hesitating to issue a final statement dealing with OECD Guidelines compliance if parties fail to reach an agreement*”.

29. For Discussion: Table 5 overleaf sets out some definitions of the different potential roles of NCPs. What would be the most valuable roles from a trade union perspective? Is there a trade-off between mediation and adjudication? Would favouring mediation rather than adjudication assist on the issue of parallel proceedings (as the main role of the NCP would not be the same as that of judicial process)?

²¹ Initial Review of the Operation of the UK National Contact Point (NCP) for the OECD Guidelines for Multinational Enterprises – January 2009.

²² OECD, 2009.

TABLE 5: DIFFERENT ROLES OF A GRIEVANCE MECHANISM²³

Negotiation	Negotiation is communication between individuals for the purpose of arriving at a mutually agreeable solution that is better for both individuals than no resolution. In negotiation, the disputants themselves attempt to resolve the dispute.
Mediation	Where the disputants cannot negotiate a solution to the problem, they may engage the assistance of a third party or mediator to assist them to overcome the barriers to a negotiated agreement. The parties remain ultimately responsible for deciding whether they wish to enter into an agreement to resolve their dispute. “aims to assist disputants in reaching an agreement. Whether an agreement results or not and the content of that agreement (if any) must be determined by the parties themselves, rather than accepting something imposed by a third party.” ²⁴
Conciliation	One model of mediation requires that the disputants remain in separate rooms while the mediator shuttles back and forth between the rooms. This process is sometimes called conciliation or shuttle diplomacy. The mediator (or conciliator) may exchange offers between the disputants or may engage in private discussions with the disputants to learn facts that may assist him or her to settle the dispute. ²⁵ “conciliation is an alternative resolution process whereby the parties to a dispute agree to utilize the services of a conciliator. The organ will meet with the parties separately and make proposals in an attempt to find an arrangement. The conciliation process has no legal standing.”
Facilitation	A facilitator helps people in a meeting to communicate more effectively and to reach consensus. The facilitator ensures that one person speaks at a time, that everyone has an opportunity to be heard, and that the participants remain focused on issues to be resolved.
Med/Arb (Mediation/ Arbitration)	Not all mediations result in agreement. As a result, a process called Med/Arb has developed where the disputants agree at the outset that if the mediation fails to result in agreement, the mediator or another neutral third party will act as an arbitrator and be empowered to reach a binding decision for the disputants.

²³ This is mainly based on ‘Alternative Dispute Resolution for Organizations’, Alan Stitt, Ontario 1998, GM, which was published in the recent report: Rights-Compatible Grievance Mechanisms: A Guidance Tool For Companies And Their Stakeholders, John F. Kennedy School of Government, Harvard University, January 2008.

²⁴ Corrib Gas Project Case: Legal Opinion on Parallel Legal Proceedings in the OECD Guidelines for Multinational Enterprises, Sherpa (no date available).

²⁵ Ibid.

4.4 Transparency V Confidentiality

30. Confidentiality is a contentious issue, which was discussed at some length at the June 2009 Annual Meeting of the NCPs. The tension lies in NCP's 'need' for confidentiality in order to bring companies to the table (the Dutch NCP notes that confidentiality is often a requirement of companies) and the fact that those raising cases are often using the Guidelines as one element of a campaign, for which publicity is important, or as one instrument among others (what BIAC refers to as '*forum shopping*' – see *ANNEX III*). Parallel proceedings may further complicate the issue, as in a recent case, where commitments to keeping confidentiality could not be met when the matter came to court.

31. There are two levels on which to consider confidentiality and transparency: public transparency; and the transparency within (confidential) procedures of the NCPs. On the first, it is clear that NCPs have adopted quite different standards (see *TABLE 6*). On the second, the IUF has reported the different approaches of the UK and the Swiss, with the UK NCP copying all parties in on all correspondence and managing a highly transparent 'internal' process and the Swiss communicating separately with the different parties.

32. The procedural guidance states that: "4a) *In order to facilitate resolution of the issues raised, take appropriate steps to protect sensitive business and other information. While the procedures... are underway confidentiality of the proceedings will be maintained. At the conclusion of the procedures, if the parties involved have not agreed on the resolution of the issues raised they are free to communicate about and discuss these issues. However, information and views provided during the proceedings by another party will remain confidential, unless that other party agrees to their disclosure.* 4b) *After consultation with the parties involved, make publicly available the results of these procedures unless preserving confidentiality would be in the best interests of the... implementation of the Guidelines.*"

TABLE 6: CONFIDENTIALITY: NO FUNCTIONAL EQUIVALENCE²⁶

Always publish an initial statements	UK, Dutch
Never publish an initial statement	Swiss
Publication of all final statements	Dutch, UK
Publication of names of parties where a case is accepted	UK
It is also made clear to them that a breach of confidence could be treated as a breach of faith in the process and could result in either a refusal to consider a complaint further or an adverse final report.	USA
As provided by the Procedural Guidance outsiders are not, as a general rule, informed about the progress made in considering a case; this is more conducive to confidence-building between the parties more directly concerned.	USA

33. A report by the team of the UN Special Representative on the characteristics of grievance-mechanisms states that "*Since human rights are a public good, the outcomes of these grievance processes should rarely, if ever, be purely private transactions. Furthermore, grievance mechanisms grow in their perceived legitimacy and therefore their effectiveness through trust in the process they provide and the outcomes they produce. An adequate level of transparency is therefore essential to a rights compatible mechanism*".²⁷

²⁶ pp. 12.

²⁷ Rights-Compatible Grievance Mechanisms: A Guidance Tool For Companies And Their Stakeholders, John F. Kennedy School of Government, Harvard University, January 2008.

34. For Discussion: Trade unions accept the need for confidentiality in the proceedings to ensure the success of mediation and conciliation efforts of the NCPs. Trade unions do not accept that the existence of a specific instance should remain confidential, nor that the outcome should be confidential. We reject the ‘forum shopping’ argument, rather recognising that victims of labour rights and other violations will seek ‘remedy’ where they can and thereby would reject any attempt to condition access to the Guidelines on commitments not to use other forms of remedy or to assign the Guidelines as an instrument of ‘last resort’. Transparency is one the four core criteria of the NCPs. It is also one of the six principles identified by the UN Special Representative for Human Rights and Business. The procedural guidance should be revised as to set out minimum standards of transparency for handling confidential proceedings between parties drawing on the best practice of some NCPs. It should also set prescribe standards of transparency required *vis the vis* the level of public information (initial and final statements).

4.5 Improving NCP Cooperation

35. The OECD reports that 60 out of 164 cases received involved more than one NCP.²⁸

36. Trade unions have raised the need for improved NCP cooperation, particularly in the context of cases in adhering countries where the host country NCP is not functioning adequately or has rejected a case on spurious grounds. In such a scenario, trade unions have reported a reluctance of the home NCP to become involved either because, according to the procedures, they are not the lead NCP, or because they do not want to take up a case which another NCP has rejected.

37. The procedural guidance provides for NCPs to “2b) *consult the National Contact Point in the other country or countries concerned*”.

38. For Discussion: The effectiveness of NCPs could be increase by improved and more timely collaboration between home and host country NCPs in the treatment of cases. The procedural guidance should be strengthened in this regard.

4.6 Parallel Legal Proceedings

39. Parallel proceedings refers to the existence of court (or other judicial) proceedings that address the same or closely related issues of the specific instance at the same time.

40. According to the OECD parallel proceedings are the most frequently cited reason for turning down or delaying examination of a request to consider a specific instance. This is also true of trade union cases. In a report of NCP Performance, which analysed cases up until the end of 2007²⁹, around 60 % (94/164) of all cases raised with NCPs involved issues that were also being addressed in parallel proceedings. 27 out of these 94 were concluded meaning that NCPs have accepted 29% of cases irrespective of the fact of the issues were subject to parallel legal proceedings.

41. NCPs currently adopt a range of approaches to handling parallel proceedings:

²⁸ p.p. 16.

²⁹ OECD 2008.

- **Proceed regardless:** some NCPs have concluded cases regardless of the existence of parallel proceedings: Marks and Spencer, French NCP; Plaid, Dutch NCP; Bayer, German NCP;
- **Specific guidance:** Others have developed specific guidance for proceeding without prejudicing parallel legal proceedings (UK);
- **Automatic rejection:** others appear to routinely suspend or reject cases that involve parallel proceedings (Japan, US).

42. It is important to note that an NCP's position on parallel proceedings, in many cases, may be determined or affected by employers, either through their role within the structure of the NCP, or the company in the case refusing to come to the table because judicial proceedings are underway (see *TABLE 7*).

TABLE 7: NCP APPROACH TO PARALLEL LEGAL PROCEEDINGS

NCP	APPROACH
Brazil	The Brazilian NCP reported that it tried to offer its good offices despite the existence of parallel legal proceedings, but that the parties were unable to identify issues that were not covered by the parallel proceedings (Shell).
France	The French trade unions report a division with the French NCP with trade unions pushing the NCP to accept cases that involve parallel proceedings and the employers and the government not wishing to accept such cases.
Italy	Italy has called for further guidance from the Investment Committee on this issue.
Japan	The Japanese NCP reports that parallel proceedings are a problem for the Japanese NCP as " <i>the company involved tends to avoid commitment to the operation of the NCP</i> ".
Netherlands	The Dutch NCP reports that it has been confronted with the " <i>unwillingness</i> " of the MNCs to cooperate on the basis of parallel legal procedures.
UK	The UK NCP is currently preparing its guidance on parallel proceedings. Its draft guidance ³⁰ states that whilst the UK NCP will not prejudice parallel proceedings, it will nonetheless accept specific instances even if parallel proceedings are underway and encourage parties to engage in mediation. <u>It will push for the continuation of the NCP process unless there is strong evidence that this would prejudice proceedings.</u> It also envisages circumstances under which it might suspend elements of the specific instance that are subject to parallel legal proceedings, whilst proceeding with other issues.

43. TUAC's past position has been that specific instances should be accepted regardless of the existence of parallel proceedings on the basis that:

- Guidelines are non-judicial and thereby a complementary and separate process;
- Guidelines are stand-alone, not an instrument of last resort;
- the role of the NCPs is to provide mediation and conciliation and to assist the parties involved in trying to reach an agreement;

³⁰ May 2009.

- the lack of a common approach undermines the functional equivalence of NCPs;
- rejecting or suspending specific instances on the basis of parallel proceedings directly undermines accessibility, which is one of the core criteria.

44. The French NGO Sherpa³¹ similarly argued, in its legal opinion on parallel proceedings, that specific instances should not be suspended due to legal proceedings because the Guidelines are different in their nature, grounds and (sometimes) their object. Sherpa contends that the primary role of the NCP, to provide “*a forum of discussion and mediation*”, is completely different function from the role of a court judge.³² Sherpa also argues that the dismissal of a specific instance on the grounds of parallel proceedings denies people access and thus violates one of the four core principles of the Guidelines. Furthermore, the object of the Guidelines may be different from that brought before national courts (the focus on the ‘object’ mirrors the UK NCP’s approach to the issue).

45. Neither the procedural guidance nor the commentaries provide any information on how to deal with parallel proceedings.

46. For Discussion: Addressing this issue should be a priority for trade unions and for the Guidelines. The review should deliver guidance on parallel legal proceedings so as to ensure a common approach by NCPs. The guidance must ensure that access to the Guidelines process – a core principle – is not unduly restricted by the existence of parallel legal proceedings. It should emphasise the complementary nature of judicial and non-judicial mechanism and focus on the primary and unique role of NCPs as providers of a forum for discussion and mediation. TUAC should also undertake detailed work in this area to establish under what circumstances, if any, there would be justification for suspending specific instances on the basis of parallel proceedings and to provide a clear set of options for NCPs, drawing on past cases and emphasising the positive role that can be played by NCPs.

4.7 *Investment Nexus*

47. According to the OECD, the investment nexus is the second most common reason cited by NCPs for rejecting specific instances (see examples in *BOX 6*). It reports³³ that by the end of 2007 just under 20 % (29/164) of specific instances raised related to the “investment nexus” and involved supply chain responsibilities.

³¹ Sherpa is a member of OECD Watch,

³² *N.B.* see previous discussion on the role of the NCP – this is not the case if the NCP is an adjudicator – para. 28.

BOX 6: NCPS: REQUIRING AN INVESTMENT NEXIS**GERMAN NCP**

In a case concerning the UN Oil for Food Enquiry the German NCP's initial assessment found that the Inquiry related only to supply transactions and that thereby without any reference to investment, the Guidelines did not apply.

DUTCH NCP

A case raised with the Dutch NCP concerning travel agencies promoting tourism in Burma was first considered eligible to be considered under the Guidelines process. Thereafter the NCP changed its position on the grounds that the Guidelines were not applicable because of the investment nexus.

48. The investment nexus issue came to the fore after the OECD Investment Committee issued a statement in April 2003 concerning the scope of the Guidelines (see BOX 7).

BOX 7: INVESTMENT NEXIS: STATEMENT OF THE INVESTMENT COMMITTEE

“• First, the Guidelines are an Annex of the OECD Declaration on International Investment and Multinational Enterprises. The fact that they are part of the Declaration and that oversight responsibility for them has been assigned by the Council to the CIME – the body charged

with responsibility for the Organisation’s work on investment and multinational enterprises – indicates the investment intent of the drafters of the instrument.

• Second, the Guidelines are a major corporate responsibility instrument that draws on and reinforces an established body of principles dealing with responsible business conduct. These principles reflect common values that underlie a variety of international declarations and conventions as well as the laws and regulations of governments adhering to the Guidelines. As such, these values are relevant to the activities of multinational enterprises. Thus, as it has already done in a number of areas, the international community may continue to draw on the values underlying the Guidelines in other contexts.

• Third, the Guidelines have been developed in the specific context of international investment by multinational enterprises and their application rests on the presence of an investment nexus.³⁴

When considering the application of the Guidelines, flexibility is required. This is reflected in Recommendation II.10 and its commentary that deal with relations among suppliers and other business partners. These texts link the issue of scope to the practical ability of enterprises to influence the conduct of their business partners with whom they have an investment like relationship. In considering Recommendation II.10, a case-by-case approach is warranted that takes account of all factors relevant to the nature of the relationship and the degree of influence. The fact that the OECD Declaration does not provide precise definitions of international investment and multinational enterprises allows for flexibility of interpretation and adaptation to particular circumstances.’

49. The statement, which is not a formal decision, sets out on the one hand that the application of the Guidelines depends on the “*presence of an investment nexus*” and on the other hand that “*flexibility is required*” in the context of the provisions of the Guidelines (II.10) on the application of the Guidelines to business partners: II. 10 states that enterprises should “*encourage, where practicable, business partners, including suppliers and sub-*

³⁴ Emphasis added.

contractors to apply principles of corporate conduct compatible with the Guidelines". Nonetheless, it is clearly the case that many NCPs are rejecting cases due to the lack of an investment nexus. It is also clear that business has used this statement to support a restricted interpretation of the applicability of the Guidelines (see *ANNEX III*).

50. The Commentaries to the Guidelines concerning II.10 and the responsibilities of multinationals *vis a vis* suppliers and other business partners are framed in terms of the level of 'influence' companies have in their business relationships. It is worth noting that this concept of the 'sphere of influence' has been rejected by the UN Special Representative for Business and Human Rights in favour of a corporate responsibility to protect and 'do no harm'. Professor Ruggie contends that in order to discharge their responsibility, companies need to undertake due diligence on their human rights impacts.

51. There is evidence that this concept is already being applied: the UK NCP used due diligence in its assessment of two cases, Das Air and Afrimex (see *BOX 8*); the UN Security Council has similarly called on member states to ensure that companies under their jurisdiction perform due diligence on their suppliers of Congolese mineral materials.

BOX 8: UK NCP - APPLYING DUE DILIGENCE

In its final statement on the activities of Afrimex in the Democratic Republic of Congo, the UK NCP focused on the level of due diligence applied to the supply chain. The final statement quotes Professor Ruggie's definition of due diligence as a "*process whereby companies not only ensure compliance with national laws but also manage the risk of human rights harm with a view to avoiding it. The scope of human rights-related due diligence is determined by the context in which a company is operating its activities and the relationship associated with those activities*". The NCP found the steps taken by Afrimex *vis a vis* its supplier to be inadequate and concluded that Afrimex had violated Chapters II.1, II.2, IV 1b, IV 1c and IV 4b of the Guidelines. In its recommendations, the NCP drew the company's attention to Professor Ruggie's recommended basic human rights due diligence process, underlining the need for Afrimex to apply due diligence to the supply chain.

52. **For Discussion:** *Removing the requirement for an investment nexus is a priority. The Update should repeal the 2003 Statement of the Investment Committee on the scope of the Guidelines vis a vis the investment nexus. TUAC should follow the work of the UN Special Representative on Human Rights and Business on the corporate responsibility to "do no harm" and the requirement to undertake due diligence in its supply chain and other business relationships. It should also look at how this work can be used to support the application of the Guidelines in the context of changing employment relationships and precarious work. TUAC should seek to develop wording for the text and the commentaries.*

4.8 National Law V International Standards

53. Professor Ruggie's assertion that the corporate responsibility to respect is a 'near-universal' social norm that exists independently of variations in national law is controversial (see BOX 2). It also directly challenges the Guidelines, which frames the obligations of companies in terms of national law.

54. In his April 2009 report, Professor Ruggie specifically discusses freedom of association as an area where national law either contradicts or offers lower protection than international standards. The principle of using international standards is further developed in a recent paper on company-based non-judicial grievance mechanisms (see BOX 9).³⁵

BOX 9: APPLYING INTERNATIONAL STANDARDS

"Given that the specific legal and political human rights framework will vary by country, causing often unhelpful uncertainty, and that it may fall below the standards of a company's home state, the approach recommended here is that a company acknowledges the relevance to the grievance process of rights in all core UN human rights treaties³. This is not to say that these documents are legally binding on corporations – they are not. It is to acknowledge that they form the overarching human rights context within which companies and other non-state Actors operate.... Where domestic law is in contradiction to any of these standards, the dialogue process within the grievance mechanism will need to look carefully at options that can fulfill the spirit of the rights to the maximum extent possible without violating domestic law."

55. For Discussion: *This is an important and complex issue. TUAC should follow the work of the UN Special Representative on Human Rights and Business.*

4.9 Lack of Cooperation of Companies

56. The lack of cooperation of companies is a key obstacle, manifesting itself in a variety of ways ranging from the participation of junior rather than senior staff at NCP meetings, to reluctance to come to the table, especially if parallel legal proceedings are underway, or refusal to comply with recommendations made by the NCP (e.g., Afrimex in the UK). It also affects a host of other issues as NCPs seek to accommodate business concerns, which relates to another weakness in the Guidelines procedures, which is a lack of follow-up.

57. Professor Ruggie recognises the need for the decisions of NCPs to be given more weight and underlines the possibility of linking NCP decisions to government procurement and export credits.

58. For Discussion: *The lack of cooperation by business is of increasing concern. There is a need to give the decisions of the NCP greater weight by strengthening the links between the statements and recommendations of NCPs and the awarding of government procurement contract and export credits. The Upgrade must strengthen the hand of the NCP in this regard. This should form part of new guidance on follow-up procedures.*

³⁵ Rights-Compatible Grievance Mechanisms: A Guidance Tool for Companies and their Stakeholders, John F. Kennedy School of Government, Harvard University, January 2008.

³⁵ p.p. 16.

4.10 Other Issues

TABLE 8: OTHER ISSUES

ISSUE	DESCRIPTION	For Discussion
Human rights	Professor Ruggie concludes that it is not possible to identify a short-list of human rights due to the fact that the activities of business have the potential to have an impact on all rights (see <i>BOX 2</i>).	This provides an opportunity to strengthen the substance of Chapter IV of the Guidelines if required. Are there any labour rights issues that are not adequately covered?
Climate Change	UN Climate Change Talks/Copenhagen	
Green Growth		
Financial Sector	Economic and Financial Crisis	This is an important issue which the Investment Committee is giving considerable attention to.

Annex 1

DRAFT JOINT STATEMENT BY THE OECD INVESTMENT COMMITTEE AND THE ILO SUB-COMMITTEE ON MULTINATIONAL ENTERPRISES (OECD and ILO bodies)

COOPERATION ON THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES AND THE ILO TRIPARTITE DECLARATION ON MULTINATIONAL ENTERPRISES AND SOCIAL POLICY

1. Stressing the comparative strengths and complementarities of the OECD Guidelines for Multinational Enterprises (OECD Guidelines) and the ILO Tripartite Declaration on Multinational Enterprises and Social Policy (ILO MNE Declaration), the OECD Investment Committee and the ILO Governing Body Sub-committee on Multinational Enterprises have agreed that there is scope to develop further the potential synergies between these two instruments and related work to advance their common goal of promoting the positive contribution of multinational enterprises to social and economic progress. OECD and ILO bodies have identified the following areas for closer cooperation.
2. **Cross-referencing each other's instruments and related work.** The ILO Fundamental Principles and Rights at Work, as well as the principles contained in several other international labour standards, are referenced in the OECD Guidelines. The OECD Guidelines cover all major areas of business ethics and have detailed implementation procedures. The OECD and the ILO bodies will actively promote cross-references to each other's instruments and related work in relevant publications, communications and initiatives such as ISO 26000.
3. **Sharing research and analysis of corporate responsibility practices.** The analysis of the impact of the principles and standards referenced in the OECD Guidelines and ILO MNE Declaration in shaping corporate behavior and supporting private initiatives is an important ongoing activity in both the OECD and the ILO. Both will undertake to regularly share the findings of their research and analytical work, including seeking mutual feedback on relevant work in development.
4. **Cross-participation in outreach events.** Raising awareness by governments, businesses and stakeholders of international principles and standards of responsible business conduct, particularly when operating in host countries which are less economically developed, as reflected in the ILO MNE Declaration and OECD Guidelines; and is a priority for both the OECD and the ILO. The ILO has a large network of offices and programs in these countries while the OECD has programmes of enhanced engagement with major non-OECD countries and of co-operation with a large range of other non-OECD economies. OECD and ILO cross-participation in relevant promotional seminars and other events will result in a more effective promotion of the OECD and ILO instruments and their implementing procedures.
5. **Experience sharing and capacity building among NCPs and ILO constituents.** It is important that National Contact Points have a good understanding of the principles and standards promoted by the ILO MNE Declaration in addressing labour-related specific instances and it is also equally important that the ILO tripartite constituents are well aware of the support and follow-up mechanisms provided by the OECD Guidelines in addressing labour issues. We will engage in joint capacity building exercises and share national experiences through, for example, seminars organized back-to-back to meetings of either the OECD Investment Committee/and its subsidiary bodies, including the Annual Meeting of the NCPs or the ILO Governing Body MNE Sub-committee meetings, side-events and other ILO training sessions.
6. It is also agreed that the four areas of cooperation identified in the present statement should also be considered in any revision of the 1963 Memorandum of Understanding governing the institutional arrangements between the ILO and OECD, should the two organizations decide to update it.
7. The implementation of this Joint Statement, which is not legally binding, is subject to the normal rules and decision-making procedures applicable to each of the Organisations. The officers of the respective bodies will work together to implement co-operation in the areas identified.

ANNEX II: UN GLOBAL COMPACT: INTEGRITY MEASURES³⁶

“...safeguarding the reputation, integrity and good efforts of the Global Compact and its participants requires transparent means to handle credible allegations of systematic or egregious abuse of the Global Compact’s overall aims and principles. ...the Global Compact Office will not involve itself in any way in any claims of a legal nature that a party may have against a participating company or vice versa. ... measures ...below are not intended to affect, pre-empt or substitute for other regulatory or legal procedures or proceedings in any jurisdiction. ...the Office will:

- a. Use its judgement to filter out prima facie frivolous allegations. If a matter is found to be prima facie frivolous, the party raising the matter will be so informed and no further action will be taken on the matter by the Global Compact Office.
- b. If an allegation of systematic or egregious abuse is found not to be prima facie frivolous, the Global Compact Office will forward the matter to the participating company concerned, requesting:
- c. Written comments, which should be submitted directly to the party raising the matter, with a copy to the Global Compact Office, and that the Global Compact Office be kept informed of any actions taken by the participating company to address the situation which is the subject matter of the allegation. The Global Compact Office will inform the party raising the matter of the above-described actions taken by the Global Compact Office.
- d. The Global Compact Office would be available to provide guidance and assistance, as necessary and appropriate, to the participating company concerned, in taking actions to remedy the situation that is the subject matter of the allegation in order to align the actions of the company with its commitments to the Global Compact principles. The Global Compact Office may, in its sole discretion, take one or more of the following steps, as appropriate:
 - i. - Use its own good offices to encourage resolution of the matter;
 - ii. - Ask the relevant country/regional Global Compact network, or other Global Compact participant organisation, to assist with the resolution of the matter;
 - iii. - Refer the matter to one or more of the UN entities that are the guardians of the Global - -
 - iv. - Compact principles for advice, assistance or action;
 - v. - Share with the parties information about the specific instance procedures of the OECD Guidelines for Multinational Enterprises and, in the case of matters relating to the labour principles, the interpretation procedure under the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy.
 - vi. Refer the matter to the Global Compact Board,
 - vii. ...The Global Compact Office reserves the right to remove that company from the list of participants and to so indicate on the Global Compact website. ...Only the Global Compact Office can make a final determination of reinstatement. ... In order to promote the productive resolution of matters raised, no entity involved in the process should make any public statements regarding the matter until it is resolved.

³⁶ <http://www.unglobalcompact.org/aboutTheGC/integrity.html>

ANNEX III: BIAC BRIEFINGS: INVESTMENT NEXUS/ PARALLEL PROCEEDINGS

Investment Nexus and Parallel Legal and Administrative Proceedings: Preventing Forum Shopping

Basics

- In order to deal with a case ('specific instance') under the Guidelines procedure in front of a National Contact Point (NCP), any transaction covered must include an "investment nexus", i.e. an operation equivalent to investment.
- The OECD Guidelines procedures are supposed to be used only after the host countries' legal and administrative procedures have been exhausted.

Context

Investment Nexus

- The issue can be of relevance for MNE activities involving sub-contractors and other global sourcing practices.
- Any transaction covered by the Guidelines must include an "**investment nexus**", i.e. an operation equivalent to investment. That means that **pure trade cases** are clearly outside the scope of the Guidelines. However, as long as a **direct influence** of the investor on the commercial transaction in question can be proved, an "investment nexus" exists. That means, that under certain narrowly defined conditions and depending on the nature of the commercial relationship trade cases *could* in fact be regarded as falling under the scope of the Guidelines.
- No 'one-size fits all' approach, each specific instance will be treated by NCPs on its own merits. Difficulties in drawing the borderlines between "investment nexus" and "pure trade" cases are unavoidable.
- There seem to be an understanding amongst some NCPs that even for issues outside of the scope of the Guidelines, NCPs remain "allowed to provide a helping hand", though not under the Guidelines procedures.

Parallel national legal or administrative proceedings

- Forum shopping by interested parties must be prevented. The Guidelines Commentary must be interpreted in a way that NCPs can not override national rules and regulation nor override or interfere with national legal or administrative procedure. Investors' conduct which is dealt with by host country law and procedures can not be brought in front of NCPs.
- The OECD should encourage interested parties to address their issues with the appropriate regulatory/legal authorities prior to lodging a complaint with the NCP. This issue which was very sensitive for some OECD member countries during the 2000 revision, must be taken seriously.

The OECD Guidelines for Multinational Enterprise, Text and Commentary

Investment Nexus

Guidelines are part of the “Declaration on International Investment and Multinational Enterprises”, the other being the National Treatment Instrument.

They serve to “improve the foreign investment climate” (Preface , para.1).

Parallel legal or administrative procedures

Para. 2 of the Commentary on the Guidelines: "The Guidelines are not a substitute for nor should they be considered to override local law and regulation...[.....]...,they should not and are not intended to place an enterprise in a situation where it faces conflicting requirements."

Para. 14 of the Commentary on Procedures:

In this context, the NCP will take into account: ...[...] the relevance of applicable law and procedures; how similar issues have been, or are being, treated in other domestic or international proceedings.

Para. 20: Conflicts with host country laws, regulations, rules and policies may make effective implementation of the Guidelines in specific instances more difficult than in adhering countries. As noted in the commentary to the General Policies chapter, while the Guidelines extend beyond the law in many cases, they should not and are not intended to place an enterprise in a situation where it faces conflicting requirements.