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TO THE ORGANISATION FOR ECONOMIC
COOPERATION AND DEVELOPMENT
COMMISSION SYNDICALE CONSULTATIVE
AUPRÈS DE L'ORGANISATION DE COOPÉRATION
ET DE DÉVELOPPEMENT ÉCONOMIQUES

**TUAC Working Group on Trade and Investment
Paris, 16th February 2010**

**THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES
UPDATE OF THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES
Paris, 16th February 2010**

Background Paper

GLOSSARY OF TERMS

Due Diligence	Due diligence is a core concept of Protect, Respect, Remedy framework of the UN Special Representative on Business and Human Rights. It is defined as a “ <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> ” ¹ . The due diligence approach dispenses with the sphere of influence as a way of determining a company’s responsibility for human rights. It thereby negates the investment nexus, which was used to define the sphere of influence. Due diligence is already used extensively by business and is in the existing texts of the Environment Chapter of the OECD MNE Guidelines ² and the OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones (heightened managerial care’).
Functional Equivalence	An approach based on functional equivalence means that NCPs are required to reach the same level of performance but not necessarily in the same way so it affords considerable flexibility in terms of the structure of the NCP and other institutional arrangements.
Guidelines	OECD Guidelines for Multinational Enterprises.
Investment Nexus	Following a clarification of the Investment Committee in 2003, some NCPs have rejected cases on the basis that the application of 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)	NCPs are responsible for furthering the “effectiveness of the Guidelines” including promoting the Guidelines and implementing the ‘specific instance’ procedure.
Parallel Legal Proceedings	The existence of parallel legal proceedings is the most cited reason for NCPs declining or suspending cases and refers to the existence of judicial proceedings that cover the same or closely related issues as the specific instance (case).
Peer Review	Pioneered by the OECD, peer review is a process of mutual assessment, in which each adhering country is examined by other adhering countries on an equal basis. Best practice uses country visits that include face-to-face consultations with non-governmental groups, including trade unions, and the publication of a report, with recommendations and follow-up.
Specific Instance	A complaint or a case submitted to the NCP concerning alleged breaches of the Guidelines. The terms ‘specific instance’, ‘case’ or ‘complaint’ are used interchangeably in this report.

¹ John Ruggie check REFERENCE

² Article V.1 a.

PREFACE

The Guidelines provide a set of recommendations on good corporate behaviour that are endorsed and enforced by governments. The Guidelines are legally non-binding. Nonetheless, all OECD multinational enterprises are bound by the codes of conduct and are required to comply with all the recommendations. TUAC has responsibility for coordinating the trade unions cases submitted under the Guidelines and for liaising with the OECD Investment Committee on all issues relating to the Guidelines.

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1. Introduction

1. The aim of this paper is to serve as a background document for the second meeting of the TUAC Trade and Investment Working Group on the ‘Update’ of the OECD MNE Guidelines (16th February 2010). The meeting has been organised with the aim of further developing trade union positions for the Update, building on the discussion held at TUAC’s first meeting on the Update (2nd September 2009).

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

- *Section 2* sets out the key developments and milestones for the Update;
- *Section 3* summarises the key points of TUAC’s first meeting on the Update;
- *Section 4* sets out the issues affecting NCP performance, together with proposed amendments to the procedural guidance and commentaries;
- *Section 4* identifies the priority substantive issues and suggested amendments to the articles of the Guidelines and their commentaries;
- *ANNEX I*: describes the main elements of the Protect, Respect, Remedy Framework developed by the Special Representative on Business and Human Rights (SRBHR);
- *ANNEX II*: sets out the performance principles of a non-judicial grievance mechanism and presents five company pilot projects being implemented to test these principles;
- *ANNEX III*: provides excerpts from the OECD Investment Committee Statement (2003) on the Investment Nexus.

2. Update of the OECD MNE Guidelines: Key Developments/Milestones

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. Before then reviews were undertaken every 3 to 5 years.

4. The consultation period on the Update started in June 2009 and will extend until June 2010, by which time four consultations will have been undertaken:

- *16 June 2009*: Part of the Annual Meeting of National Contact Points;
- *7 October 2009*: Consultations between the OECD Investment Committee and TUAC, BIAC and OECD Watch;
- *8 December 2009*: Open consultations (Global Forum on Trade and Investment);
- *24 March 2010*: Consultations between the OECD Investment Committee and TUAC, BIAC and OECD Watch to discuss the Terms of Reference for the Update.

5. The Update is likely to start in June 2010 and to be completed by June 2011. The first consultation will take place as part of the Annual Meeting of the National Contact Points in June 2010 and is likely to focus on the functioning of the NCPs and the procedural guidance.

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

3. TUAC Meeting on the Update: Key Findings

7. TUAC held its first meeting on the Update of the Guidelines on the 2nd September 2009. The meeting was attended by representatives from TUAC affiliates, the GUFs, the ITUC and the Council of Global Unions, as well as from the OECD, the UN Special Representative of Business and Human Rights (SRBHR) and OECD Watch. Key points from the trade union discussion are summarised below. The main elements of the interventions by external speakers are set out in *BOXES 1-3*.

3.1 Trade Union Use of the Guidelines

8. Trade unions identified the following as reasons for using the Guidelines:

- To gain access to the company;
- As part of a campaign strategy: in many cases companies do not know the Guidelines;
- As a central plank of a national CSR strategy;
- As a fact-finding tool;
- As an instrument of last resort;
- In specific contexts: for example, restructuring in the current crisis.

9. The discussions also focused on why trade unions are not making greater use of the Guidelines:

- Lack of government promotion of the Guidelines;
- Lack of trade union promotion of the Guidelines;
- Low awareness among trade unions/ works councils;
- Greater effectiveness of domestic industrial relations processes: 'why not go to Court'?
- Delays due to parallel legal proceedings;
- Long timescales;
- Poor functioning of many NCPs.

3.2 NCP Performance: Drivers of and Obstacles to Success

10. Regarding performance, the discussions identified the following factors as positively affecting NCP performance:

- Setting of timescales;
- Transparency;
- Regular meetings with stakeholders;
- Trade unions being assigned a special status at the NCP;
- Creation of oversight mechanisms (e.g., Steering Board);
- Mediation: provides the 'possibility of working it out with the employer'.

11. The discussions also highlighted the following obstacles as impeding the performance of the NCP:

- Limited knowledge /capacity in the NCP's *start-up phase* (Brazil, Peru);
- *Inappropriate structure* of the NCP, and in particular *conflicts of interest* arising from the location of an NCP in a single Ministry;

- Lack of a common supportive position on *parallel legal proceedings*;
- Lack of *resources* (Austria, Sweden, US);
- Lack of *training* of NCPs, in mediation, for example;
- Lack of experience/knowledge of *industrial relations*;
- *Lack of transparency*, both internally within the NCP process and as regards the publication of information;
- *Insufficient promotion* of the Guidelines by NCPs/the OECD;
- Lack of common understanding on the *role of the NCP*;
- Lack of *cooperation by companies*;
- Inability of the NCP to ensure the *cooperation of companies*;
- Lack of *sanction* of companies for failure to cooperate in the process or comply with the recommendations;
- Lack of *follow-up* on cases;
- Lack of a *right of review/appeal*;
- *Long timescales*: even though these have been reduced, several months is a long time for a worker involved in a dispute;
- The difficulty for NCPs in meeting the *burden of proof*;
- The lack of resources for *fact-finding* on complex cases.

12. The discussions led to agreement on a number of points:

- *Role of the NCP*: the importance of mediation for trade unions and the need to clarify the role of the NCP in line with the proposal made by OECD Watch – to move to adjudication only if there is no mediation. This provides an incentive for companies to participate in mediation;
- *Incentives/Sanctions*: related to the above, the need to put in place incentives for companies to cooperate and sanctions for those who fail to cooperate/comply with NCP recommendations;⁴
- *Transparency*: the value of the procedural guidance setting out standards of transparency for internal proceedings between parties, as well as for public information;
- *Follow-up and Right to Appeal*: the need for the procedural guidance to provide for follow-up procedures;
- *Parallel proceedings*: the importance of common guidance from the OECD on parallel legal proceedings, based on the UK NCP approach. There must be a right of review.

3.3 Substantive Issues: Priority Issues

13. The discussion on substantive issues highlighted the following priorities. The first five issues are closely inter-related:

- *Investment nexus*: remove the requirement for an investment nexus;
- *Supply chains*: strengthen application to the supply chain and the full range of business relationships taking into account changing employment relationships;
- *Changing working relationships*: ensure the Guidelines apply in the context of declining direct, permanent employment and the increasing use of sub-contractors often for the purposes of avoiding union recognition and limiting the applicability of the ILO

⁴ Subsequently, on the 6th October 2009, at a side-event organised by OECD Watch at the consultation of the UN Special Representative on Business and Human Rights there was agreement amongst the participants; i) that there should be ‘consequences’ for failure to comply and; ii) that ‘consequences’ is a useful term for framing the discussion from here-on, rather than sanctions or incentives.

Conventions⁵. This issue relates to the need to remove the requirement for an investment nexus, which would mean that a transport company servicing one multinational company would fall outside the scope of the Guidelines;

- *Living wage*: the Guidelines should be updated to include provisions on a living wage in line with other international standards;
- *Due diligence*: this is a vast area and the subject of on-going work by the SRBHR;
- *Private equity*: ensure that the description of enterprises covered under the Guidelines captures private equity;
- Investment agreements.

14. In addition, it was noted that neither of the terms collective bargaining or Decent Work is present in the current text of the Guidelines.

3.4 Role of TUAC

15. The discussions also identified areas in which TUAC could play a stronger role:

- Exerting greater pressure on NCPs that are not functioning properly using its rights as an Advisory Body under the procedural guidance;
- Providing on-line comparative information on the performance of NCPs with headline statistics on key performance indicators (resources, average timescale for cases, number of successful outcomes etc.).⁶

BOX 1: PERSPECTIVE FROM THE OECD

The OECD secretariat referred to its paper on the Update⁷ and stressed that the aim is to have a targeted rather than an expansive Update. The 41 adhering countries are all equal partners in the Update. The term CSR (responding to an earlier point) is not used in the Guidelines. On the investment nexus, the OECD considers that the framework of the SRBHR is useful when looking at the responsibility of companies along the supply chain. It shifts the debate away from a focus on investment nexus, to how to apply human rights due diligence. On Chapter IV Employment and Industrial Relations, the OECD secretariat would like to know whether trade unions consider the text to be adequate. The OECD has so far not included changes to Chapter IV in its list of issues for the Update. The Update is being taken seriously by members of the Investment Committee. The OECD secretariat does not consider there to be any risk that the Update could be anything other than an Upgrade, given that the instruction from the Council to “*to increase their relevance and clarify private sector responsibilities*”.

⁵ There is a reference R198 Employment Relationship Recommendation, 2006.

⁶ TUAC is developing a database and web site which will provide on-line access to all the trade union cases, as well as to core information on the characteristics and performance of NCPs.

⁷ This paper has since been updated: Consultation on an Update of the OECD Guidelines for Multinational Enterprises, Consultation Note, 8 December 2009: << <http://www.oecd.org/dataoecd/32/62/44168690.pdf>>>.

BOX 2: PERSPECTIVE FROM THE UN SPECIAL REPRESENTATIVE⁸

The SRBHR has developed a framework for addressing business and human rights: *Protect, Respect Remedy*. It consists of three pillars; the state duty to protect; the corporate responsibility to respect; and access to remedy. The framework is underpinned by both law and policy and has domestic and extra-territorial implications. Whilst the legal basis for the extra-territorial dimension is unclear, the policy rationale is strong. The second pillar, the corporate responsibility to respect, states that the activities of the company must not infringe on the rights of others – companies must ‘do no harm’. To establish that they do no harm, the framework requires that companies undertake human rights due diligence (see *ANNEX I*). For the third pillar, access to remedy, the SRBHR considers that there is no one-size-fits-all grievance mechanism, but rather victims of human rights, including labour rights, abuses should have access to a range of different options. All grievance mechanism should comply with a six minimum performance criteria: *legitimacy, accessibility, predictability, transparency, accountability, rights-compatibility and equitability* (see *ANNEX II, BOX II.1*). In order to support policy coherence, it is important that decisions of grievance mechanisms, have an impact on that company’s access to public subsidies, such as export credits.

In 2008, the *Protect, Respect Remedy* Framework was unanimously adopted by the Human Rights Council. China, India and Brazil spoke at the Council in support of the Framework, which has also been endorsed by business and NGOs. Whilst not operational, it is already experiencing considerable uptake. The key implications of the framework for the Guidelines are:

- Businesses have an impact on *all human rights*: the human rights provisions of the Guidelines need to be considerably strengthened;
- *Due diligence*: how to concretise and apply this in the context of the Guidelines;
- *Investment and trade*: business relationships are horizontal; the SRBHR has rejected the notion of the sphere of influence in favour of an understanding that the scope of a company’s responsibility is determined by the impact of its activities and the relationships that are connected to those activities.

Future work: due diligence; supply chains; national law versus international standards, non-judicial mechanisms; responsible contracting; and the Wiki. A paper has also been commissioned on Export Processing Zones (to be published in 2010).

⁸ Andrea Shemberg, Legal Advisor to the SRBHR.

BOX 3: PERSPECTIVE FROM OECD WATCH

OECD Watch has been working on the OECD MNE Guidelines for ten years, with disappointing results to date. It has found that the Guidelines are:

- Ineffective in resolving conflicts;
- Unreliable due to malfunctioning NCPs;
- Unable to compel companies to engage in the NCP process;
- Unable to impose sanctions or compliance measures;

OECD Watch is looking for the following from the Update:

Process:

- Transparent and inclusive;
- Takes account of the global financial crisis and recent initiatives for a Global Standard;
- Reflects the recommendations of the SRBHR;
- Provides for safeguards against weakening: what commitments can be secured?

Substance:

- Provisions on human rights – all rights;
- Adherence to international standards not just host countries laws;
- A new chapter on due diligence;
- Stronger provisions on supply chain responsibility: this is key for the NGOs. The text that companies are to ‘encourage’ must be changed;
- Rights of local people/indigenous communities;
- Living wages/decent work;
- Flexibilisation/precarious work;
- Disclosure: require stronger language on non-financial information (GRI)

Procedural Guidance:

- Improve performance and ensure equal functioning;
- Improve NCP structure: interdepartmental/multi-stakeholder; oversight/Steering Board, appeals mechanism;
- Adopt the minimum performance criteria of the SRBHR;
- Provide more ‘teeth’ through the introduction of sanctions and incentives;
- Clarify the role of the NCP as regards mediation and adjudication: suggest a 2-stage process: if there is no mediation then you move to adjudication. This provides an incentive for the enterprise to participate in mediation.

4. NCP Performance/Procedural Guidance: Priority Issues

16. TUAC’s position has always been that the priority for increasing the effectiveness of the Guidelines is to improve the performance of the NCPs. This position was reaffirmed at TUAC’s September 2009 meeting on the Update. TUAC’s primary objective going into this Update is therefore to secure changes in the Procedural Guidance, which will translate into significant improvements in NCP performance across the board.

17. *TABLE 1* provides a summary of the priority issues. *TABLES 2-14* presents these issues in more detail, together with proposed amendments to the procedural guidance and commentaries.

TABLE 1: PROCEDURAL GUIDANCE

ISSUE	RELATED ISSUES	TUAC RECOMMENDATION	OECD	BIAC	OECD WATCH
KEY TRADE UNION ISSUES					
NATIONAL CONTACT POINTS					
Functional Equivalence	Cross-cutting	Expand the performance criteria to include six criteria of the SRBHR (<i>TABLE 2</i>).	✓	✓	✓
Institutional Arrangements	Conflicts of interest	Prohibit the possibility of creating a single department NCP, based solely in a department with conflicts of interest (<i>TABLE 3</i>).	✓		✓
Oversight Body	Timescales Parallel legal proceedings	Require NCPs to establish an oversight mechanism (<i>TABLE 3</i>).	✓		✓
Right of Appeal		Provide for a right of appeal (<i>TABLE 3</i>).	X	X	✓
Promotion by NCP	Cross-cutting	Develop a national promotional strategy in conjunction with external stakeholders (<i>TABLE 4</i>).	✓	✓	✓
Capacity-building	Training/Burden of proof Resources	Draw up a capacity-building plan (<i>TABLE 4</i>).	X	✓	✓
NCP Cooperation	Parallel legal proceedings Follow-up Consequences	Assign responsibility to the <u>home</u> NCP to provide mediation between the <u>parent company</u> , the <u>affected parties</u> and their international representatives (<i>TABLE 5</i>).	X	✓	✓
Role of the NCP	Consequences Cooperation of the Company	Provide for a two-stage process: first mediation and then, if mediation fails, adjudication (in line with the proposal of OECD Watch) (<i>TABLE 6</i>).	✓	✓	✓
Confidentiality/ Transparency	Parallel proceedings Cooperation of companies	Include minimum standards of transparency for handling confidential proceedings between parties, as well as for the publication of information including initial and final statements (<i>TABLE 7</i>).	✓		✓
Parallel Legal Proceedings	Confidentiality/Cooperation of companies/National law v international standards	Prohibit NCPs from automatically rejecting a case requiring proof of prejudice to the parallel proceedings and any decision to suspend or reject a case to be subject to external oversight (<i>TABLE 8</i>).	✓	✓	✓
Timescales	Parallel proceedings Cooperation of	Incorporate maximum timescales into the procedural guidance (<i>TABLE 9</i>).	✓	✓	✓

ISSUE	RELATED ISSUES	TUAC RECOMMENDATION	OECD	BIAC	OECD WATCH
	companies Resources/Campaigns				
Consequences	Cooperation of the company	Provide information on violations of the Guidelines or failure to cooperate in the process to government departments responsible for public subsidies and national pension funds (<i>TABLE 10</i>).	X	X	✓
Follow-up	Oversight	Require NCPs to follow-up their recommendations and to publicly report on this follow-up (<i>TABLE 10</i>).	X	X	✓
Peer Review		Require NCPs to cooperate in carrying out a systematic programme of follow-up and monitoring (<i>TABLE 11</i>).	✓	Voluntary only	✓
Reporting		Extend NCP reporting requirements to include resources and core performance indicators (<i>TABLE 11</i>).	X	X	✓
INVESTMENT COMMITTEE					
Peer Review	Cross-cutting	Conduct mandatory peer review including country visits, in-country consultations with trade unions and other stakeholders and public reports (<i>TABLE 12</i>).	✓	voluntary peer review	✓
Promotion		The OECD Investment Committee should develop and implement a three-year promotional programme. (<i>TABLE 13</i>).			
Capacity		The OECD Investment Committee should establish a central capacity-building fund to i) support NCPs in the start-up phase, ii) provide training in core skills and iii) to support fact-finding (<i>TABLE 14</i>).			
OTHER PRIORITIES					
Multi-jurisdictional Cases	Cases being submitted to different NCPs concerning different multinational but part of the same consortium		✓	✓	
Decoupling the Guidelines and the OECD Declaration	An idea is being discussed of de-linking the Guidelines from the OECD Investment Declaration. The NGOs support this. BIAC is cautious/against.		✓	✓	✓ +ve
Increasing the number of adhering countries	This is a priority for BIAC. The OECD is committed to involving non-adhering countries in the Update, including China, India, Indonesia and South Africa.		✓	✓	✓

TABLE 2: PROCEDURAL GUIDANCE: I. NATIONAL CONTACTS POINTS

FUNCTIONAL EQUIVALENCE/		EXISTING	✓	NEW	
Background	The uneven performance of NCPs is uncontested. The SRBHR has found that NCPs are “potentially important avenues”, but they are failing to meet minimum performance criteria. The Procedural Guidance accords governments flexibility in how they structure their NCPs, but sets out four performance standards with which all NCPs are required to comply: <i>visibility</i> ; <i>accessibility</i> ; <i>transparency</i> ; and <i>accountability</i> . Guidance on implementing these procedures is provided in Paragraph 8 of the Commentaries to the Procedural Guidance. These fall short of the six criteria identified by the SRBHR: <i>legitimacy</i> , <i>accessibility</i> , <i>predictability</i> , <i>transparency</i> , <i>accountability</i> , <i>rights-compatibility</i> and <i>equitability</i> (ANNEX II. BOX II.1)				
BIAC Position	‘Regarding Functional Equivalence BIAC believes it necessary to acknowledge that NCPs’ institutional arrangements (i.e., the procedures that NCPs have applied) and operational modalities differ according to their respective national cultures, and thus NCPs can be expected to develop and function differently. With respect to the application of the established core criteria of NCPs (i.e. <i>visibility</i> , <i>accessibility</i> , <i>transparency</i> and <i>accountability</i>), BIAC sees room for improvement as the implementation process of the NCPs moves forward.’				
Proposed TUAC Position	TUAC considers that the core criteria should be broadened in line with the recommendation of the SRBHR. The introductory paragraph of the Procedural Guidance should be amended accordingly. The list of core criteria set out in the first paragraph of the Procedural listed should be extended to include the additional performance criteria: <i>legitimacy</i> , <i>accessibility</i> , <i>predictability</i> , <i>transparency</i> , <i>accountability</i> , <i>rights-compatibility</i> and <i>equitability</i> . The two existing criteria, which are not included in the six minimum criteria of the SRBHR, should be maintained: <i>visibility</i> and <i>accountability</i> .				
Amendments to Procedural Guidance	Introductory paragraph: _“The role of National Contact Points is to further the effectiveness of the Guidelines. NCPs will operate in accordance with core criteria of -visibility, <u>legitimacy</u> , accessibility, <u>predictability</u> , transparency, _accountability, <u>rights-compatibility</u> and <u>equitability</u> .”				
Amendments to Commentaries	<u>I Procedural Guidance for NCPs, Para 8. Core Criteria for Functional Equivalence in the Activities of the NCP:</u> Add texts for the four additional principles: <i>legitimacy</i> , <i>predictability</i> , <i>rights-compatibility</i> and <i>equitability</i> (see ANNEX II, BOX II.1)				
Risks	HIGH		MEDIUM		LOW
Opportunity	The broadening of the core criteria would support a host of desired changes: e.g., the requirement for <u>legitimacy</u> would rule out single department NCPs on the basis of possible conflicts of interest and would support the case for trade union/external stakeholder participation; <u>predictability</u> would support the call for common guidance on parallel legal proceedings and the need to strengthen and publish standard operating procedures with clear stages and timescales.				

TABLE 3: PROCEDURAL GUIDANCE: I. NATIONAL CONTACTS POINTS

A. INSTITUTIONAL ARRANGEMENTS		EXISTING	✓	NEW	✓
Background	TUAC has long argued that the structure of many NCPs is inadequate and impedes overall performance. <i>Section A</i> of the Procedural Guidance states that “ <i>adhering countries have flexibility in organising their NCPs, seeking the active support of social partners...</i> ”. The guidance does not require governments to establish multi-departmental/multistakeholder structures thus according them the flexibility to establish single department NCPs. The guidance thereby fails to address the inherent conflicts of interest of an NCP being based only in the Ministry for Economy, or Trade and Investment.				
BIAC Position	/				
Proposed TUAC Position	<ol style="list-style-type: none"> 1. Introduce minimum standards on the type of institutional arrangements that should be put in place, in line with the extended core criteria. 2. Prohibit the possibility of creating a single department NCP that is based solely in a department where there might be a conflict of interest. 3. Require NCPs to create an oversight mechanism. 				
Amendments to Procedural Guidance	<p>Accordingly, the National Contact Point:</p> <ol style="list-style-type: none"> 1. Shall be led by a May be a senior government official or a government office headed by a senior official. Alternatively, the National Contact Point may be and shall be organised as a co-operative body, including representatives of <u>key relevant other</u> government agencies <u>including labour</u>. Representatives of the business community, employee organisations and other interested parties <u>should may</u> also be included. 2. <u>Will create an oversight body involving external stakeholders;</u> 3. <u>Will provide for the right of appeal and ensure that parties are aware of this right;</u> 4. <u>Will develop and maintain relations with representatives of the business community, employee organisations and other interested parties that are able to contribute to the effective functioning of the Guidelines.</u> 				
Amendments to Commentaries	<p>The composition of NCPs should be such that they provide an effective basis for dealing with the broad range of issues covered by the <i>Guidelines</i>. <u>This means involving Different forms of organisation (e.g representatives from different one Ministries y, as well as an interagency group, or one that contained representatives from the social partners as well as from from non-governmental bodies.) are possible. To avoid conflicts of interest, the NCP should not be located in a single Ministry. It may be helpful for the</u> The NCP <u>should to</u> be headed by a senior official. NCP leadership should be such that it retains the confidence of social partners and fosters the public profile of the <i>Guidelines</i>. NCPs, whatever their composition, are expected to develop and maintain relations with representatives of the business community, employee organisations, and other interested parties. <u>The NCP should create an oversight body, the role of which is to: oversee the work of NCP; ensure that the complaints procedure is followed correctly and within timescales; provide advice to the NCP; to review the performance of the NCP; and to review decisions of the NCP that are the subject of appeal.</u></p>				
Risks	HIGH	✓	MEDIUM	LOW	
	Likely to be opposed by NCPs with single Ministry NCPs.				
Opportunity	This is a key weakness. This undermines legitimacy and predictability.				

TABLE 4: PROCEDURAL GUIDANCE: I. NATIONAL CONTACTS POINTS

B. INFORMATION AND PROMOTION		EXISTING	✓	NEW	
Background	The level of promotion and therefore awareness of the Guidelines is widely considered to be low, despite instructions in the Procedural Guidance for NCPs to translate information into local languages and raise awareness.				
BIAC Position	“Key to the value of the Guidelines is ensuring that they are sufficiently promoted and brought into actual use by stakeholders. While positive steps have already been taken to improve the promotion of the Guidelines, there is a notable absence of practical help to increase their use by companies.”				
Proposed TUAC Position	<ol style="list-style-type: none"> 1. Develop a national promotion strategy. 2. Establish minimum awareness-raising standards. 				
Amendments to Procedural Guidance	<p>National Contact Points will:</p> <ol style="list-style-type: none"> 1. Make the Guidelines known and available by appropriate means, including through on-line information, and in national languages. Prospective investors (inward and outward) should be informed about <u>and receive information and training on</u> the Guidelines. as appropriate. 2. <u>Develop and implement a national promotional strategy to r</u>raise awareness of the Guidelines, including through co-operation, as appropriate, with the business community, employee organisations, other non-governmental organisations, and the interested public. 3. <u>-Draw up a capacity-building plan for the NCP in order to build knowledge and expertise in the policy areas covered by the Guidelines, as well in core skills such as mediation.</u> 				
Amendments to Commentaries	<p>Information and Promotion</p> <p>10. The NCP functions associated with information and promotion are fundamentally important to enhancing the profile of the Guidelines. These functions also help to put an accent on “pro-active” responsibilities of NCPs.</p> <p><u>11. NCPs are required to develop and implement a capacity-building plan to ensure that their staff have the necessary knowledge and the skills.</u></p> <p>12. 14. NCPs are required to make the Guidelines better known and available by appropriate means, including in national languages. On-line information may be a cost-effective means of doing this, although it should be noted that universal access to this means of information delivery cannot be assured. English and French language versions will be available from the OECD, and website links to the OECD Guidelines website are encouraged. As appropriate, NCPs will also provide prospective investors, both inward and outward, with information <u>and training</u> about the Guidelines. <u>This training could be organised in collaboration key stakeholders and the relevant international organisations.</u> A separate provision also stipulates that in their efforts to raise awareness of the Guidelines, NCPs will co-operate with a wide variety of organisations and individuals, including, as appropriate, the business community, employee organisations, other non-governmental organisations, and the interested public.</p> <p>13. 32. Another basic activity expected of NCPs is responding to legitimate enquiries. Three groups have been singled out for attention in this regard: (i) other National Contact Points (reflecting a provision in the Decision); (ii) the business community, employee organisations, other non-governmental organisations and the public; and (iii) governments of non-adhering countries.</p>				
Risks	HIGH		MEDIUM		LOW
Opportunity	✓				

TABLE 5: PROCEDURAL GUIDANCE: I. NATIONAL CONTACTS POINTS

C. IMPLEMENTATION IN SPECIFIC INSTANCES

NCP COOPERATION		EXISTING	✓	NEW	
Background	There is a need for the procedures to support the involvement of the NCP in the home country. Trade unions have reported a reluctance of the home NCP to become involved in cases involving violations of the Guidelines in adhering countries, where either the host country NCP is not functioning properly, or it has rejected a case on spurious grounds. Effectiveness could be greatly increased by greater responsibility of the home NCP in the treatment of cases.				
BIAC Position	None				
Proposed TUAC Position	Trade unions consider that the specific instance procedure should explicitly assign responsibility to the <u>home</u> NCP to provide mediation between the <u>parent company</u> , the affected parties and their international representatives.				
Amendments to Procedural Guidance	<p>Amend as follows:</p> <p>2. Where the issues raised merit further examination, offer good offices to help the parties involved to resolve the issues. For this purpose, the NCP will consult with these parties and where relevant:</p> <p>(a) Seek advice from relevant authorities, and/or representatives of the business community, employee organisations, other non-governmental organisations, <u>relevant international organisations</u>, and <u>other</u> relevant experts;</p> <p>(b) <u>Work jointly with</u> Consult the National Contact Point in the other country or countries concerned;</p>				
Amendments to Commentaries	<p>13. When issues arise relating to implementation of the Guidelines in specific instances, the NCP is expected to help resolve them <u>by providing mediation</u>. Generally, I- issues will be dealt with <u>jointly</u> by the NCP in whose country the issue has arisen <u>and the country in which the multinational company concerned has its headquarters</u>. Among adhering countries, such issues will first be discussed on the national level and, where appropriate, pursued at the bilateral level. This section of the Procedural Guidance provides guidance to NCPs on how to handle such situations. The NCP may also take other steps to further the effective implementation of the Guidelines.</p>				
Risks	HIGH		MEDIUM	✓	LOW
Opportunity	This is a very important issue.				

TABLE 6: PROCEDURAL GUIDANCE: I. NATIONAL CONTACTS POINTS
C. IMPLEMENTATION IN SPECIFIC INSTANCES

C. IMPLEMENTATION IN SPECIFIC INSTANCES		ROLE OF THE NCP		EXISTING	✓	NEW	
Background	TUAC considers that there a need for greater guidance on the role of the NCP. The Procedural Guidance states that the NCP will offer a forum for discussion and facilitate access to conciliation or mediation. Yet, trade unions report a range of practice, with some NCPs being reluctant to offer mediation, whilst others, such as the UK, considering mediation to be its key role.						
BIAC Position	No position to date.						
Proposed TUAC Position	TUAC supports the proposal made by OECD Watch to amend the Procedural Guidance, so as to more clearly delineate the two roles of the NCP and to provide incentives for the company to participate in mediation: the NCP should first seek resolution of the specific instance through mediation; if this fails it should then move to the adjudication stage and give its impartial assessment of the case.						
Amendments to Procedural Guidance	<p>The NCP will contribute to the resolution of issues that arise relating to implementation of the Guidelines in specific instances. The NCP will offer a forum for discussion-mediation and assist the business community, employee organisations and other parties concerned to deal with the issues raised in an efficient and timely manner and in accordance with applicable law <u>and the highest international standards.</u>- In providing this assistance, the NCP will:</p> <p>1. Make an initial assessment of whether the issues raised merit further examination and respond to the party or parties raising them.</p> <p>2. Where the issues raised merit further examination, offer <u>its</u> good offices <u>for mediation between the to help the parties, involved to resolve the issues.</u> for mediation between the to help the parties, involved to resolve the issues. For this purpose, the NCP will consult with these parties and where relevant:</p> <p>(a) Seek advice from relevant authorities, and/or representatives of the business community, employee organisations, other non-governmental organisations, and relevant experts;</p> <p>(b) Consult the National Contact Point in the other country or countries concerned;</p> <p>(c) Seek the guidance of the CIME if it has doubt about the interpretation of the Guidelines in particular circumstances;</p> <p>(d) Offer, and with the agreement of the parties involved, facilitate access to consensual and non-adversarial means, such as conciliation or mediation; to assist in dealing with the issues.</p> <p>3. If <u>any of the the parties fails to participate in the mediation then the NCP will made an impartial assessment of the issues raised and issue a public statement with recommendations on the implementation of the Guidelines.</u></p> <p><u>4. If the parties involved do not reach agreement in mediation, on the issues then the NCP will make an impartial assessment of the issues raised and issue a public statement with recommendations raised, issue a statement, and make recommendations as appropriate,</u> on the implementation of the Guidelines.</p>						
Amendments to Commentaries	/						
Risks	HIGH			MEDIUM		LOW	✓
	Some organisations may want to have a final statement.						
Opportunity	/						

TABLE 7: PROCEDURAL GUIDANCE: I. NATIONAL CONTACTS POINTS
C. IMPLEMENTATION IN SPECIFIC INSTANCES

CONFIDENTIALITY		EXISTING	✓	NEW	
Background	<p>This is a highly contentious issue: the tension lies in NCPs alleged ‘need’ for confidentiality in order to bring companies to the table and the fact that victims of abuses are often using the Guidelines as one element of a campaign, for which publicity is important. Parallel proceedings may further complicate the issue, where commitments to keeping confidentiality are likely to be broken when the matter comes to court. There are two levels on which to consider transparency: public transparency; and the transparency within (confidential) procedures of the NCPs. On the first, NCPs have adopted quite different standards and on the second, the IUF, for example, 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. For some NCPs, breaches of confidence are to 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. Transparency is a core principle of the Guidelines and also one of the six performance criteria proposed by the SRBHR (see TABLE 2 above): “[S]ince 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.”</p>				
BIAC Position	/				
Proposed TUAC Position	<p>The procedural guidance should be upgraded to include minimum standards of transparency for handling confidential proceedings between parties, as well as for the publication of information including initial and final statements</p>				
Amendments to Procedural Guidance	<p>This guidance should be updated using best practice from NCPs.</p> <p>4 (a) In order to facilitate resolution of the issues raised, take appropriate steps to protect sensitive business and other information. While the procedures under paragraph 2 are underway, confidentiality of the proceedings will be maintained. <u>Take steps to maximise the level of transparency within the confidential proceedings between parties so as to build trust and legitimacy.</u> - At the conclusion of the procedures, if the parties involved have not agreed on a 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 <u>will also be public unless that involved will remain confidential, unless that</u> other party <u>objects agrees</u> to their disclosure.</p> <p>(b) After consultation with the parties involved, make publicly available the results of these procedures <u>and publish the final statement.</u> unless preserving confidentiality would be in the best interests of effective implementation of the Guidelines.</p>				
Amendments to Commentaries	/				
Risks	HIGH	✓ NCPs	MEDIUM		LOW
Opportunity					

TABLE 8: PROCEDURAL GUIDANCE: I. NATIONAL CONTACTS POINTS
C. IMPLEMENTATION IN SPECIFIC INSTANCES

PARALLEL LEGAL PROCEEDINGS		EXISTING		NEW	✓
Background	<p>Neither the Procedural Guidance nor the Commentaries provide guidance on how to deal with parallel proceedings. 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. Parallel proceedings are the most frequently cited reason for turning down or delaying dealing with a specific instance. There is no common approach by NCPs: some <i>accept cases</i> regardless; others provide <i>guidance so as not to</i> prejudice parallel legal proceedings (see UK example below); and others <i>automatically reject the case</i> (Japan, US).</p> <p>UK Position⁹</p> <p>“3. The UK NCP adopts the following principles in respect of the impact of parallel proceedings:</p> <p>3.1 The fact that parallel proceedings exist will not of itself cause a suspension of its investigation and/or its determination of any dispute.</p> <p>3.2 The UK NCP will suspend a complaint only where it is satisfied that it is necessary in order to avoid serious prejudice to a party to parallel proceedings and appropriate in all the circumstances.</p> <p>4. The UK NCP will only consider suspension of a complaint upon an application by a party to the complaint.</p> <p>5. Before suspending a complaint, the UK NCP will expect the parties to give serious consideration to the benefits of conciliation/mediation which can lead to a quicker and more cost effective solution to the issues raised.</p> <p>6. The NCP will progress any aspects of a complaint that it concludes are not necessary to suspend. This means an element of the complaint may be suspended while the remainder is taken forward under the published UK NCP procedure.”</p>				
BIAC Position	<p>“Parallel proceedings should not automatically prevent NCPs from taking up specific instances, but NCPs must not override national rules or interfere with national legal or administrative procedures. NCPs can, however, offer their good offices to facilitate dialogue in cases where all parties express interest in a consensual and non-adversarial dialogue despite parallel proceedings. Finally, the procedures should require parties submitting a complaint to disclose where they are also seeking to address the same issue through other means.¹⁰”</p>				
Proposed TUAC Position	<p>The Update should develop guidance on parallel legal proceedings that emphasises the complementary and non-judicial role of NCPs as a forum for problem-solving and mediation. The guidance should prohibit an NCP from automatically rejecting a case on the basis of parallel legal proceedings, requiring instead that it demonstrates prejudice to the proceedings. Any decision to suspend proceedings should be subject to external oversight.</p>				
Amendments to Procedural Guidance	Amend text on the basis of UK guidance.				
Amendments to Commentaries	Add new text on the basis of the UK.				
Risks	HIGH		MEDIUM		LOW
Opportunity	UK widely seen as a good model.				

⁹ < <http://www.berr.gov.uk/files/file53069.pdf>>.

¹⁰ Emphasis added.

TABLE 9: PROCEDURAL GUIDANCE: I. NATIONAL CONTACTS POINTS
C. IMPLEMENTATION IN SPECIFIC INSTANCES

TIMESCALES				EXISTING		NEW	✓
Background	Setting timescales for the resolution of cases significantly improves NCP performance.						
BIAC Position	Supportive						
Proposed TUAC Position	The procedural guidance should be amended to set minimum standards on time-scales.						
Amendments to Procedural Guidance	The NCP will contribute to the resolution of issues that arise relating to implementation of the Guidelines in specific instances.—The NCP will offer a forum for <u>mediation discussion</u> —and assist the business community, employee organisations and other parties concerned to deal with the issues raised in an efficient and timely manner and in accordance with applicable law <u>and international standards</u> . <u>It will aim to have completed the specific instance procedures within twelve months of receiving a complaint.</u> In providing this assistance, the NCP will...:						
Amendments to Commentaries	Update Guidance to <u>upto include timescale for different parts of the specific instance procedure.</u>						
Risks	HIGH		MEDIUM			LOW	✓
Opportunity							

TABLE 10: PROCEDURAL GUIDANCE: I. NATIONAL CONTACTS POINTS
C. IMPLEMENTATION IN SPECIFIC INSTANCES

C. IMPLEMENTATION IN SPECIFIC INSTANCES						
CONSEQUENCES AND FOLLOW-UP		EXISTING		NEW		✓
Background	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. It affects a range of other issues as NCPs seeks to accommodate business concerns in order to secure their cooperation. It also highlights the need for follow-up. There is increasingly widespread recognition that there should be ‘consequences’ for failing to cooperate in the NCP procedures or comply with NCP recommendations. The SRBGR recognises the need for the decisions of NCPs to be “given more weight” and underlines the possibility of linking NCP decisions to the provision of government procurement/export credits.					
BIAC Position	Not addressed in its latest December 2009 submission.					
Proposed TUAC Position	The lack of cooperation of is of increasing concern. The SRBH explicitly recognises the need for NCP decisions to be given more weight, pointing to the potential for linking NCP decisions to access to government procurement and export credits. The Update must strengthen the hand of the NCP in this regard. This should form part of new Procedural Guidance on follow-up and enforcement.					
Amendments to Procedural Guidance	Amend the Guidance to include provisions on consequences and follow-up in particular as regards links to export credits and the provision of information to national pension funds.					
Amendments to Commentaries	Amend the Commentaries to include provisions on consequences and follow-up.					
Risks	HIGH	✓	MEDIUM		LOW	
Opportunity	This will be difficult.					

TABLE 11: PROCEDURAL GUIDANCE: I. NATIONAL CONTACTS POINTS

D. MONITORING AND REPORTING		EXISTING	✓	NEW	
Background	The current procedures do not provide for any monitoring of NCP performance beyond the information exchange of quarterly meetings and annual reports. As a result there is a wide variation in NCP performance. There is a need for NCP to be subject to monitoring through the OECD's tried and tested review process (see <i>TABLE 12</i> below). There is also a need to extend the reporting requirements so as to increase the basis for comparison and to support public scrutiny/oversight.				
BIAC Position	BIAC supports voluntary peer review.				
Proposed TUAC Position	Require NCPs to cooperate in carrying out a systematic programme of follow-up and monitoring and extend NCP reporting requirements to include resources and core performance indicators.				
Amendments to Procedural Guidance	<p>Section D of the Procedural Guidance should be amended as follows:</p> <p><i>D. <u>Monitoring and Reporting</u></i></p> <p>1. Each National Contact Point <u>shall co-operate in carrying out a programme of systematic follow-up to monitor and promote the full implementation of the OECD MNE Guidelines.</u></p> <p><u>2. Each National Contact Point</u> in-will report annually to the Committee.</p> <p><u>3. Reports should contain information on the nature and results of the activities of the National Contact Point, including its budget, staffing, structure, governance, capacity-building, outreach and</u> implementation activities in specific instances;</p>				
Amendments to Commentaries	<p>Reporting</p> <p>21. Reporting is would be an important responsibility of NCPs that <u>should would also</u> help to build up a knowledge base and core competencies in furthering the effectiveness of the Guideliness. <u>—NCPs should include the following information in their annual reports:</u></p> <ul style="list-style-type: none"><u>o Budget;</u><u>o Compliance with core performance criteria;</u><u>o P</u>N<u>umber of cases;</u><u>o Average timescales for dealing with cases;</u><u>o Level of resources allocated to the NCP;</u><u>o National accountability mechanisms (reporting to Parliament, meetings with stakeholders etc).</u><u>o The provision of staff training;</u><u>o Capacity-building activities;</u><u>o Promotional activities;</u><u>o Use of mediation and other external expertise; procedures for cooperating with other NCPS</u> <p>In reporting on implementation activities in specific instances, NCPs will comply with transparency and confidentiality considerations as set out in para. C-4.</p>				
Risks	HIGH		MEDIUM		LOW
Opportunity	To increase accountability and public scrutiny				

TABLE 12: PROCEDURAL GUIDANCE: II. INVESTMENT COMMITTEE

PEER REVIEW		EXISTING		NEW	✓
Background	Expanding the performance criteria will not be sufficient to deliver improved NCP performance across the board. The procedural guidance already contains four performance criteria, which NCPS have failed to comply with. There is a need to introduce formal monitoring so as to hold NCPs to account for their implementation of the Guidelines. The OECD peer review process is a transparent and participatory review process, which involves trade unions and other stakeholders.				
BIAC Position	<i>“BIAC recognises the established OECD principle of peer review and supports the suggestion of introducing a voluntary peer review mechanism, subject to the results of the Dutch NCP. In our view, peer learning should, however, remain voluntary and unbinding due to the recognition of no “one-size-fits-all”.</i>				
Proposed TUAC Position	Introduce a mandatory transparent, participatory and adequately-resourced peer review process, based on OECD best practice. The process should involve country visits, with in-country consultations with non-governmental actors (trade unions, business, NGOs, academics, the media, the SRI community) and result in published country reports, translated into the national language, which set out recommendations together with a time-table for implementation and follow-up.				
Amendment to Council Decision	<u>Adhering countries shall co-operate in carrying out a programme of systematic follow-up to monitor the implementation of the OECD MNE Guidelines. This shall be carried out within the framework of the OECD Investment Committee. The adhering countries shall bear the costs of the programme.</u>				
Proposed Amendments to Procedural Guidance	Section II Investment Committee <u>The Investment Committee shall carry out an ongoing programme of systematic follow-up to monitor and promote the full implementation of the OECD MNE Guidelines, in co-operation with the Committee for Corporate Governance, the Committee for Fiscal Affairs, the Development Assistance Committee, the Working Group on the OECD Anti-bribery Convention, the Working Party on Export Credits and Credit Guarantees, and other OECD bodies, as appropriate. This follow-up will include, in particular: i. a programme of rigorous and systematic monitoring of National Contact Points through an ongoing system of mutual evaluation, where each National Contact Point is examined in turn by the Investment Committee, on the basis of a report which will provide an objective assessment of the progress of the adhering country in implementing its obligations and which will be made publicly available; ii. regular reporting on steps taken by adhering countries to implement the OECD MNE Guidelines; iii. development of tools and mechanisms to increase the impact of monitoring and follow-up, and awareness raising; iv. provision of regular information to the public on its work and activities and on implementation of the OECD MNE Guidelines</u>				
Proposed Amendments to Commentaries	<u>Section D (addition of new guidance) The monitoring and follow-up provide for: i) regular reviews of steps taken by adhering countries to implement the Guidelines based on: a system of self evaluation, where adhering countries’ responses to a questionnaire will provide the basis for assessing implementation of the Guidelines and; a system of mutual evaluation, where each adhering country will be examined in turn by the Investment Committee and after which a report will be published which will provide an objective assessment of the progress of the adhering country in implementing the Guidelines with recommendations for action and a timescale for implementation and follow-up. The costs of monitoring and follow-up will, for OECD Members, be handled through the normal OECD budget process. For Non-Members of the OECD, the current rules create an equivalent system of cost sharing.</u>				
Risk	HIGH	MEDIUM	✓	LOW	
Opportunity	Peer Review is vital for improving performance across the board.				

TABLE 13: PROCEDURAL GUIDANCE: II. INVESTMENT COMMITTEE

PROMOTION OF THE GUIDELINES		EXISTING		NEW	✓
Background	There are no provisions requiring the Investment Committee to promote the Guidelines– neither in the Council Decision, the Procedural Guidance, nor in the Commentaries to the Procedural Guidance. This is a significant omission, given the acknowledged view that awareness of the Guidelines is low.				
BIAC Position	<p><i>“Key to the value of the Guidelines is ensuring that they are sufficiently promoted and brought into actual use by stakeholders. While positive steps have already been taken to improve the promotion of the Guidelines, there is a notable absence of practical help to increase their use by companies”.</i></p> <p>BIAC has also suggested <i>“developing a much condensed version of the Guidelines publication”</i> to make it more accessible and developing a <i>“fuller user-friendly web tool”</i> for the Guidelines.</p>				
Proposed TUAC Position	The OECD Investment Committee should develop and implement a three-year promotional programme.				
Proposed Amendments to the Council Decision	The mandate for the Investment Committee to undertake promotional activities should be incorporated into a Revised Council Decision.				
Proposed Amendments to Procedural Guidance	<p><u>6. The Committee shall be responsible for promoting the Guidelines.</u></p> <p><u>Section II Investment Committee</u></p> <p>Additional Point</p> <p><u>5. The Investment Committee shall develop and implement a promotional strategy ÷</u></p>				
Proposed Amendments to Commentaries	<p>Additional Point</p> <p><u>29. The Committee should develop and implement a promotional strategy working in collaboration with other relevant OECD Departments, including the Committee for Corporate Governance, the Committee for Fiscal Affairs, the Development Assistance Committee, the Working Group on the OECD Anti-bribery Convention, the Working Party on Export Credits and Credit Guarantees, other relevant international organizations, including the ILO, National Contact Points of adhering countries and TUAC, BIAC and OECD Watch and other external stakeholders.</u></p>				
Risks	HIGH		MEDIUM		LOW
Opportunity	Yes				

TABLE 14: PROCEDURAL GUIDANCE: II. INVESTMENT COMMITTEE
CAPACITY-BUILDING

	EXISTING		NEW	✓
Background	The NCPs suffer from a lack of capacity on a number of levels. First, recent cases have highlighted the capacity problems of NCPs in their start-up phase, which have led to NCPs being non-functioning for many months, or even years, after adhering to the Guidelines. There is no mechanism in place for new NCPs to learn from established NCPs, other than attending meetings in Paris. Secondly, for established NCPs there is the ongoing problem of inadequate skills and training, particularly in the areas of mediation, and industrial relations. Finally, there is difficulty for an NCP of discharging the burden of proof in complex cases and the need for specialist training/expertise and fact-finding.			
BIAC Position	/			
Proposed TUAC Position	The Investment Committee should establish a central facility for capacity-building to support NCPs in i) the start-up phase first; ii) training in core skills; and iii) fact-finding.			
Proposed Amendments to Procedural Guidance	<u>Section II Investment Committee</u> <u>The Investment Committee shall establish a central capacity-building fund for the purposes of providing:</u> <u>i. start-up capacity building for new NCPs with a country capacity-building visit to be scheduled within six months of adhering to the Guidelines;</u> <u>ii. researching and producing common guidance on key issues such as parallel legal proceedings;</u> <u>iii. training;</u> <u>iv. a fact-finding fund.</u>			
Proposed Amendments to Commentaries	<u>Section D (addition of new guidance)</u>			
Risks	HIGH		MEDIUM	✓
Opportunity	Norway likely to support: the Norwegian Government funded research on the feasibility of creating a centralised fact-finding facility on environmental complaints: a fairly narrowly-defined remit of providing independent fact-finding in respect of particular ground level disputes, possibly within a single sector (e.g., extractives).			

5. Substantive Issues

5.1 Trade Union Priorities

18. Discussions at the first TUAC meeting on the Update agreed the following priorities:

- Strengthening the applicability of the Guidelines to *supply chains* and the full range of horizontal business relationships (II.10);
- Removal of the *investment nexus*;
- Ensuring the applicability of the Guidelines to *non-direct employment relationships*;
- Inclusion of provisions that *encourage direct, permanent employment*;
- Inclusion of provisions on a *living wage*.

19. In addition, there is a need to incorporate those principles and concepts from the work of the SRBHR that would serve to strengthen the effectiveness of the Guidelines in protecting workers and workers rights:

- *Removing reference to the voluntary nature* of the Guidelines, in view of the corporate responsibility to respect;
- Referencing the *highest international standards* in addition to applicable laws and regulations, given the assertion of the SRBHR that the corporate responsibility to respect exists independently of variations in national law and that international standards may not be reflected in applicable law;
- Including a chapter on *human rights and human rights due diligence*.

20. In addition there are other areas of the text that could usefully be strengthened in the Update:

- Strengthening existing provisions on the *protection of whistleblowers* (II.9);
- Requiring *country-by-country reporting of tax*.

20. *TABLE 15* provides a summary of priority issues. *TABLES 16-24* presents these issues in more detail, together with proposed amendments to the text and the commentaries.

**TABLE 15: SUBSTANTIVE ISSUES
TRADE UNION PRIORITIES**

ISSUE	RELATED ISSUES	TUAC RECOMMENDATION	OECD	BIAC	OECD-WATCH
Voluntary Status	Cross-cutting Corporate responsibility to respect	The Guidelines are non-legally enforceable, not voluntary (<i>TABLE 16</i>).	X	X	√
Applicable Law v International Standards	Parallel Proceedings Corporate responsibility to respect	The Guidelines should provide for the observance of the highest possible standards and give guidance on the standards that apply in the event of conflict between national law and international standards (<i>TABLE 16</i>).	√	√	√
Human Rights/Due Diligence	Supply Chains Investment Nexus Sphere of Influence	TUAC supports the inclusion of a human rights chapter and the inclusion of guidance on human rights due diligence and its application to supply chains and other business relationships (<i>TABLE 17</i>).	√	√	√
Supply Chains	Investment Nexus Human Rights Due Diligence Changing Employment Relationships	TUAC supports the inclusion of a human rights chapter, together with the requirement to undertake, and provide guidance on, due diligence throughout the supply chain, and the rejection of the sphere of influence and the investment nexus as the means of determining corporate responsibility (<i>TABLE 18</i>).	√	√	√
Investment Nexus	Supply Chains Due Diligence	TUAC considers it essential that the Update removes the requirement for an investment nexus (<i>TABLE 19</i>).	√	√	√
Decent Work	Cross-cutting	This needs to be incorporated into the text or the commentaries of Chapter II, General Policies, as well as Chapter IV Employment and Industrial Relations (<i>TABLE 20</i>).			√
Changing Employment Relationships	Business relationships Supply Chains Due Diligence Sphere of influence	Include new provisions on changing employment relationships in Chapter IV Employment and Industrial Relations (to be discussed) (<i>TABLE 20</i>).	X	X	√
Living Wage	Changing Employment Relationships Gender	Include a new paragraph on the living wage in Chapter IV Employment and Industrial Relations (to be discussed) (<i>TABLE 21</i>).	X	X	√
Grievance Mechanisms		Given the focus of the SRBHR on company-based grievance mechanisms should we include text in the Guidelines (see (<i>TABLE 22</i>)?	X	X	X
Whistleblower		Strengthen whistleblower protection provisions (<i>TABLE 23</i>).	X	X	X

TRADE UNION PRIORITIES					
ISSUE	RELATED ISSUES	TUAC RECOMMENDATION	OECD	BIAC	OECD-WATCH
Protection					
Environment	Climate change	/	√	√	√
Climate Change	Environment	/	√	√	√
Disclosure (GRI)	/	/	√		√
Application of the Guidelines to the Financial Sector	/		√		√
OTHER PRIORITIES					
Country-by-country reporting	The OECD has set up a Task Force to work on Tax and Development and a Committee to work on country-by-country reporting.		√		√
Anti-corruption	Private-to-private bribery, use of agents and intermediaries, solicitation and extortion , corporate compliance. <u>BIAC has identified solicitation and extortion as a priority for the Update.</u> This is demand-side corruption - public sector. It's not easy to see why or how this should/could be addressed in what is (in corruption terms) essentially a supply-side instrument. Extending the Guidelines to cover <u>private-to-private bribery</u> would be useful. So would incorporating stronger provisions on corporate compliance.		√	√	√

TABLE 16: VOLUNTARY/INTERNATIONAL STANDARDS

CHAPTER I: CONCEPTS AND PRINCIPLE		EXISTING	✓	NEW
Background	<p>Paragraph 1 of Chapter I:</p> <p>1. Applicable Laws¹¹: that principles and statements of the Guidelines are required to be consistent with <u>applicable laws only</u>, runs counter to the SRHRBs' second pillar, which states that the corporate responsibility to respect is a 'near-universal' social norm that exists independently of variations in national law. This means that companies have a responsibility to respect the highest possible standards. These are not necessarily incorporated into applicable laws. The SRBH identifies freedom of association as an area where national law either contradicts or offers lower protection than international standards (see ANNEX I, BOX I.4).</p> <p>2. Voluntary Nature: The SRBHR framework means that companies have a <u>responsibility</u> to respect human rights – this is not voluntary. The voluntary nature of the Guidelines is invoked in arguments against the use of sanctions or 'consequences' for companies who fail to cooperate in/comply with the Guidelines process or comply with NCP recommendations.</p>			
BIAC Position	<p>Applicable Laws</p> <p><i>"The Guidelines do not replace national law and should not blur the differences between the responsibilities of governments and those of business. All companies must first and foremost comply with national law – even where enforcement is weak." "it should be made clear that the Guidelines are not a substitute for, nor do they override, applicable law or create any conflicting requirements."</i></p> <p>Voluntary</p> <p><i>"BIAC supports the Guidelines as voluntary recommendations by OECD member governments and other adhering governments on responsible business conduct, assisting business to fulfil its obligations consistent with applicable laws".</i></p> <p>BIAC listed the important characteristics of the Guidelines including:</p> <p><i>"The Guidelines are voluntary recommendations by OECD governments on responsible business conduct for companies investing abroad."</i></p>			
Proposed TUAC Position	<p>The Guidelines should provide for the observance of the highest possible standards and provide guidance on the standards that apply in the event of conflict between national law and international standards. The Guidelines are non-legally enforceable, not voluntary.</p>			
Proposed Amendments to Text	<p>Chapter I Paragraph 1: 1. The <i>Guidelines</i>...They provide principles and standards of good practice consistent with applicable <u>national laws and regulations and the highest international standards</u>. <u>Where there is a conflict between applicable national laws and regulation and international standards, the enterprise should comply with the (spirit of) the highest international standards</u>. Observance of the <i>Guidelines</i> by enterprises is voluntary and not legally enforceable.</p>			
Proposed Amendment Commentaries	<p>There is a need to amend <u>paragraph 2</u> of the Commentaries on General Policies:</p> <p>2 Obeying domestic law is the first obligation of business. <u>However, in line with the corporate responsibility to respect, compliance with the</u> The Guidelines requires companies to adhere to the highest possible standards. are not a substitute for nor should they be considered to override local law and regulation. They represent supplementary principles and standards of behaviour of a non-legal character, particularly concerning the international operations of these enterprises. 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.</p>			
Risks	HIGH		MEDIUM	✓
	BIAC likely to be against; OECD advised tackling 'voluntary versus legal'			
Opportunity	These are fundamentally important issues.			

¹¹ This point is also relevant to the chapeau in Chapter IV Employment and Industrial Relations.

TABLE 17: HUMAN RIGHTS AND HUMAN RIGHTS DUE DILIGENCE

II GENERAL POLICIES		EXISTING		NEW	✓
Background	In view of the work of the SRBHR, it is highly likely that there will be a new chapter in the Guidelines on Human Rights, which will set out the requirement for enterprises to establish their activities are ‘doing no harm’ by undertaking due diligence on their human rights. The inclusion of a new chapter on Human Rights is supported by business, as well as by the NGOs and is identified by the OECD as one of the issues for the Update.				
BIAC Position	<p><i>“BIAC would in principle support a new chapter on human rights if it is based upon – and is consistent with – the work...Professor John Ruggie. It could usefully provide recommendations on how multinational enterprises could fulfil their responsibility to respect human rights, focusing on the due diligence process the UN Special Representative has articulated. BIAC would be happy to take part in any further work on this area”.</i></p> <p>In relation to supply chains: <i>“[T]he nature of due diligence needs thorough investigation before any recommendations are made. Companies should only be made accountable on issues that they can control, not on issues that they are assumed to influence.”</i></p>				
Proposed TUAC Position	TUAC supports the inclusion of a human rights chapter and the inclusion of guidance on human rights due diligence and its application to supply chains and other business relationships, with strong cross-referencing to Chapter IV. Employment and Industrial Relations.				
Proposed Amendments to Text	<p>Amend paragraph 2 of Chapter II General Policies</p> <p>2. Respect the human rights of those affected by their activities consistent with <u>national laws and regulations and (the spirit of) the highest international standards. host government’s international obligations and commitments.</u></p>				
Proposed Amendments to Commentaries	Update the Commentaries to paragraph II. 2 on General Policies				
Risks	HIGH		MEDIUM		LOW
Opportunities	This should be an opportunity.				

TABLE 18: SUPPLY CHAINS

II. GENERAL POLICIES		EXISTING	✓	NEW
Background	The text in the Guidelines on supply chains is weak: Article II.10 states that enterprises should “ <i>encourage, where practicable, business partners, including suppliers and sub-contractors to apply principles of corporate conduct compatible with the Guidelines</i> ”. This wording is out of step with the second pillar of the SRBHR, according to which enterprises have a responsibility to do no harm and to take steps – <u>due diligence</u> – to ensure that the impact of their activities do not infringe on the rights of others. Moreover, the SRBHR has rejected the notion of the sphere of influence, which underpins Article II.0 (see Commentaries), in favour of an understanding that the scope of a <u>company’s responsibility is determined by the impact of its activities and the relationships that are connected to those activities.</u>			
BIAC Position	BIAC’s position is that violations of human rights along the supply chain occur due to host country government failure to enforce laws and regulations and that the most effective course of action is for the OECD to tackle this governance gap. BIAC further states that “ <i>the OECD should treat the issue of supply chains with caution because of the difficult issue of companies’ ability to influence in a practical manner the behaviour of each and every supplier and sub-contractor.</i> ”...and that “[T]he nature of due diligence needs thorough investigation before any recommendations are made. Companies should only be made accountable on issues that they can control, not on issues that they are assumed to influence.”			
Proposed TUAC Position	TUAC supports the inclusion of a human rights chapter, together with the requirement to undertake, and provide guidance on, due diligence throughout the supply chain and the rejection of the sphere of influence (and the investment nexus) as the means of determining corporate responsibility.			
Proposed Amendments to Text	There is highly likely to be a new chapter on Human Rights and Human Rights Due Diligence. The existing text on Human Rights would either be completely superseded or re-written to reflect the principles of the work of the SRBHR: 10. <u>Undertake human rights due diligence to ensure that</u> Encourage, where practicable, the activities of business partners, including suppliers and sub-contractors, to do not infringe on the rights of others. apply principles of corporate conduct compatible with the Guidelines.			
Proposed Amendments to Commentaries	10. <u>Undertake due diligence of</u> Encouraging, where practicable, compatible principles of corporate responsibility among business partners, suppliers, contractors, subcontractors, licensees and other entities -with which MNEs enjoy a working relationship. <u>INSERT DUE DILIGENCE GUIDANCE</u> It is recognised that there are practical limitations to the ability of enterprises to influence the conduct of their business partners. The extent of these limitations depends on sectoral, enterprise and product characteristics such as the number of suppliers or other business partners, the structure and complexity of the supply chain and the market position of the enterprise vis à vis its suppliers or other business partners. The influence enterprises may have on their suppliers or business partners is normally restricted to the category of products or services they are sourcing, rather than to the full range of activities of suppliers or business partners. Thus, the scope for influencing business partners and the supply chain is greater in some instances than in others. Established or direct business relationships are the major object of this recommendation rather than all individual or ad hoc contracts or transactions that are based solely on open market operations or client relationships. In cases where direct influence of business partners is not possible, the objective could be met by means of dissemination of general policy statements of the enterprise or membership in business federations that encourage business partners to apply principles of corporate conduct compatible with the Guidelines.			
Risks	HIGH	MEDIUM	✓	LOW

TABLE 19: INVESTMENT NEXUS

INVESTMENT NEXUS		EXISTING	✓	NEW	
Background	The investment nexus is closely related to the issues of human rights due diligence and supply chains. It refers to the requirement for there to be investment by the multinational for the Guidelines to apply. The investment nexus issue came to the fore after the OECD Investment Committee issued a statement (April 2003) concerning the scope of the Guidelines (<i>ANNEX III, BOX III.1</i>). This statement however is not a legal decision. It is also somewhat ambiguous finding that the application of the Guidelines depends on the “presence of an investment nexus”, but also that “flexibility is required” in the context of the provisions of Article II.10: “ <i>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</i> ”.				
BIAC Position	Investment Nexus: <i>“All issues covered by the Guidelines must consist of direct investment or operations equivalent to investment where there is explicit, long-term control by the parties involved. If such control as defined by the OECD is not present, the entity is not a foreign investor and not subject to the recommendations of the Guidelines.”</i> BIAC’s position is contradictory as on the one hand it accepts the framework of the SRBHR and on the other hand it is rejecting its implications: that the responsibility of the company to respect is not defined by the existence of an investment nexus but by its activities and the relationships that are connected to those activities.				
Proposed TUAC Position	TUAC considers it essential that the Update removes the requirement for an investment nexus.				
Proposed Amendments to Text	There is no proposed wording at this stage. If the concepts of the Protect, Respect, Remedy framework are incorporated into the new chapter on human rights and human rights due diligence then this issue may be superseded without having to actually address it. As the statement (<i>ANNEX III</i>) has no legal standing, it does not need to be formally repealed.				
Proposed Amendments to Commentaries	The reference to the level of ‘influence’ will have to be removed. However, this will probably be dealt with in the new Chapter on Human Rights.				
Risks	HIGH	✓	MEDIUM		LOW
	BIAC is strongly against, despite having endorsed the framework of the SRBHR.				
Opportunity	The OECD recognises that the requirement for an investment nexus does not reflect the reality of global business.				

TABLE 20: DECENT WORK AND CHANGING EMPLOYMENT RELATIONSHIPS
II GENERAL POLICIES/IV EMPLOYMENT AND INDUSTRIAL RELATIONS

	EXISTING		NEW	✓
Background	<p>Decent work is not referenced at all in the Guidelines. Changing employment relationship has been identified as priority issue. There are no provisions in the current text addressed at this issue.</p> <p>Ethical Trading Initiative: “8. Regular employment is provided 8.1 To every extent possible work performed must be on the basis of recognised employment relationships established through national law and practice. 8.2. Obligations to employees under labour or social security laws and regulations arising from the regular employment relationship shall not be avoided through the use of labour-only contracting, sub-contracting, or home-working arrangements, or through apprenticeships schemes where there is no real intent to impart skills provide regular employment, nor shall any such obligations be avoided through the excessive use of fixed-term contracts of employment.</p> <p>INDITEX/ITGWLF International Framework Agreement 10. REGULAR EMPLOYMENT. External Manufacturers, Suppliers and their Subcontractors undertake that all the employment formulas they use are part of the ordinary labour practice and the applicable local laws. External Manufacturers, Suppliers and their Subcontractors shall not impair the rights of workers acknowledged under the Labour and Social Security Laws and regulations by using schemes of: subcontracting, homeworking, training and apprenticeship contracts or any other like formula which prevents promotion of regular employment in the framework or regular employment relationships</p> <p>ILO Suggestion for Update Submitted to the OECD 4c) “Respect national policies designed to combat disguised employment relationships in line with the ILO Employment Relationship Recommendation, 2006 (No. 198).”</p> <p>ISO 26000¹² “An organization should be confident that all work is performed by women and men who are legally recognized as employees or who are legally recognized as being self-employed. Not seek to avoid the obligation that the law places on the employer by disguising relations that would otherwise be recognized as an employment relationship under the law”.</p>			
BIAC Position	None			
Proposed TUAC Position	<p>For discussion. <u>Concerned about any proposal that grounds the standard in national policies only.</u> IUF has suggested that we use the words ‘direct, permanent employment’ rather than ‘regular’ employment (because ‘irregular’ work has become ‘regular’).</p>			
Proposed Amendments to Text	<p>Chapter II. General Policies Need to either i) propose a over-arching text on decent work and poverty alleviation in the Chapter on General Policies or ii) incorporate Decent Work and direct employment relationship into the commentaries to paragraph 1 on sustainable development.</p>			
Proposed Amendments to Commentaries				
Risks	HIGH	✓	MEDIUM	LOW
Opportunity	/			

¹² ISO 26000 is still using the concept of sphere of influence.

TABLE 21: LIVING WAGE

IV EMPLOYMENT AND INDUSTRIAL RELATIONS		EXISTING		NEW	✓
Back ground	<p>Including provisions on a living wage in the Guidelines has been identified as a priority:</p> <p>UN The Universal Declaration of Human Rights contains the following relevant language “Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity and supplemented, if necessary, by other means of social protection.” Article 23 (3).</p> <p>ILO The Preamble of the ILO Constitution refers to the "provision of an adequate living wage". The Declaration of Philadelphia (1944) states "policies in regard to wages and earnings, hours and other conditions of work calculated to ensure a just share of the fruits of progress to all and a minimum living wage to all employed and in need of such protection". This principle was reaffirmed in the ILO Declaration on Social Justice for a Fair Globalisation (2008).</p> <p>ITGLWF and INDITEX International Framework Agreement¹³ “External Manufacturers, Suppliers and their Subcontractors shall ensure that wages paid for a standard working week shall meet at least the minimum legal or collective bargain agreement, whichever is higher. In any event, wages should always be enough to meet at least the basic needs of workers and their families and any other which might be considered as reasonable additional needs.”</p> <p>Ethical Trading Initiative 5.1 Wages and benefits paid for a standard working week meet, at a minimum, national legal standards or industry benchmark standards, whichever is higher. In any event wages should always be enough to meet basic needs and to provide some discretionary income.</p> <p>SA8000 “The company shall ensure that wages paid for a standard working week shall meet at least legal or industry minimum standards and shall always be sufficient to meet basic needs of personnel and to provide some discretionary income”.</p> <p>Workers’ Rights Consortium “Licensees recognize that wages are essential to meeting employees' basic needs. Licensees shall pay employees, as a floor, wages and benefits which comply with all applicable laws and regulations, and which provide for essential needs and establish a dignified living wage for workers and their families. [A living wage is a "take home" or "net" wage, earned during a country's legal maximum work week, but not more than 48 hours. A living wage provides for the basic needs (housing, energy, nutrition, clothing, health care, education, potable water, childcare, transportation and savings) of an average family unit of employees in the garment manufacturing employment sector of the country divided by the average number of adult wage earners in the family unit of employees in the garment manufacturing employment sector of the country”.</p>				
BIAC Position	None.				
Proposed TUAC Position	To discuss.				
Proposed Amendments to Text	<p>To discuss The ILO has proposed change to the Preface, paragraph 4. 4. The activities of multinational enterprises, through international trade and investment, have strengthened and deepened the ties that join OECD economies to each other and to the rest of the world. These activities bring substantial benefits to home and host countries. These</p>				

¹³ International Framework Agreement between Industria De Diseño Textil, S.A. (INDITEX S.A.) and the International Textile, Garment and Leather Workers’ Federation (ITGLWF) on the Implementation of International Labour Standards throughout the INDITEX Supply Chain;
<<[<http://www.itglwf.org/DisplayDocument.aspx?idarticle=15382&langue=2>](http://www.itglwf.org/DisplayDocument.aspx?idarticle=15382&langue=2)>>.

TABLE 21: LIVING WAGE					
IV EMPLOYMENT AND INDUSTRIAL RELATIONS		EXISTING		NEW	✓
	benefits accrue when multinational enterprises supply the products and services that consumers want to buy at competitive prices, <u>provide the best possible wages, related to the economic position of the enterprise, but at least adequate to satisfy the basic needs of the workers and their families –and when theyand</u> provide fair returns to suppliers of capital. Their trade and investment activities contribute to the efficient use of capital, technology and human and natural resources. They facilitate the transfer of technology among the regions of the world and the development of technologies that reflect local conditions. Through both formal training and on-the-job learning enterprises also promote the development of human capital in host countries.				
Proposed Amendments to Commentaries	Depends on the text that is selected.				
Risks	HIGH	✓	MEDIUM		LOW
Opportunities	/				

TABLE 22: GRIEVANCE MECHANISMS					
IV EMPLOYMENT AND INDUSTRIAL		EXISTING		NEW	✓
Background	<p>The issue of a grievance mechanism was not discussed at the TUAC September 2009 meeting but has arisen now in the context of the work of the SRBHR.</p> <p>SRBHR</p> <p>The third pillar of the Protect, Respect and Remedy Framework (see <i>ANNEX I BOX I.3</i>) specifically concerns access to remedy. The SRBHR considers that there is no one-size-fits-all grievance mechanism, but rather victims of human rights abuses should have access to a range of different types of grievance mechanisms. These include NCPs, but also company-based mechanisms. All grievance mechanisms should comply with the six minimum performance criteria already discussed. To test out these principles, the SRBHR has launched five pilot projects representing mining, apparel, electronic products, oil and gas, and food (<i>ANNEX II, BOX II.2</i>): <u>Cerrejon</u> in Colombia; <u>Esquel Group</u> based in Hong Kong, China; <u>Sakhalin II</u> in Russia; <u>Tesco</u>, working with fruit suppliers in South Africa; <u>Hewlett Packard</u> in China (mini-project). Lessons will be reported in early 2011, including any possible revisions of the six principles.</p> <p>ILO Tripartite Declaration</p> <p>The ILO Declaration on Multinational already includes provisions on grievance mechanisms:</p> <p>“any worker who acting individually or jointly with other workers considers that <u>s/he</u> has grounds for a grievance should have the right to submit such grievances without suffering any prejudice whatsoever as a result and to have such grievance examined pursuant to an appropriate procedure”</p>				
BIAC Position	/				
Proposed TUAC Position	For discussion: whether there is a need to include provisions on grievance mechanisms.				
Proposed Amendments to Text/Commentaries	/				
Risks	HIGH		MEDIUM		LOW
Opportunities	/				✓

TABLE 23: WHISTLEBLOWER PROTECTION

II GENERAL POLICIES		EXISTING		NEW	✓
Background	<p>Whistleblowers have a vital role to play in exposing malpractice in the workplace, in the <u>public interest</u> and thereby building an organisational culture of openness and accountability. Public interest concerns cover a vast spectrum: health and safety; fraud and corruption; environment; neglect in care services. It is important to note that whistleblowing is different from reporting a grievance in that whistleblowing is about disclosing information in <u>the public interest</u>, whilst reporting grievances are generally <u>private interest</u> matters. Company whistleblowing procedures should thus be distinct from grievance mechanisms. Companies should have in place reporting mechanisms, as well as policies designed to protect those who speak out from retaliation. Protection from retaliation must cover individuals who report <u>outside</u> the organisation:</p> <p><i>“The essence of a whistleblowing system is that staff should be able to by-pass the direct management line because that may well be the area about which their concerns arise, and that they should be able to go outside the organisation if they feel the overall management is engaged in an improper course.”</i></p> <p style="text-align: right;"><i>Committee on Standards in Public Life</i></p> <p>The British Standard on whistleblower protection states that <i>“The organization’s policy should state that, while it is hoped concerns will be raised internally, the organization recognizes that employees can also contact an appropriate external body. Some organizations use a stronger message, stating that they would rather employees went to a regulator or the police than stayed silent.”</i></p> <p>It is also important that organizations <u>do not make it a requirement</u> that employees blow the whistle.</p>				
BIAC Position	None, but the International Chamber of Commerce has developed Guidelines on whistleblower policies and procedure in the context of anti-corruption.				
Proposed TUAC Position	Strengthen the whistleblower protection provisions.				
Proposed Amendments to Text	<p>9. <u>Enterprises should ensure that appropriate measures are in place to protect from Refrain from</u> discriminatory or disciplinary action against employees who make <i>bona fide</i> reports to management or, as appropriate, to the competent public authorities, <u>or other external bodies</u>, on practices that contravene the law, the <i>Guidelines</i>, or the enterprise’s policies.</p>				
Proposed Amendments to Commentaries	<p>9. Enterprises are expected to take adequate steps <u>to Safeguards to</u> protect <i>bona fide</i> “whistle-blowing” activities are also recommended, including protection of employees who <u>make external disclosures and</u>, in the absence of timely remedial action or in the face of <u>fear, or</u> reasonable risk of negative employment action, report practices that contravene the law <u>or the Guidelines</u> to the competent public authorities <u>or other appropriate bodies</u>.—While of particular relevance to anti-bribery and environmental initiatives, such protection is also relevant to other recommendations in the Guidelines.</p>				
Risks	HIGH		MEDIUM		LOW
Opportunities	/				

5.2 Chapter IV. Employment and Industrial Relations: Other Changes

Enterprises should, within the framework of the highest international standards and applicable national laws and regulations ~~and prevailing labour relations and employment practices~~:

1. a) Respect the right of their employees to be represented by trade unions and other *bona fide* representatives of employees, and engage in constructive negotiations, either individually or through employers' associations, with such representatives with a view to reaching agreements on employment conditions;

b) Contribute to the effective abolition of child labour and take adequate steps to ensure that there is no child labour in their activities;

c) Contribute to the elimination of all forms of forced or compulsory labour and take adequate steps to ensure that there is no forced labour in their activities;

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d) Take adequate steps to provide for equal treatment and opportunity and do not ~~Not~~ discriminate against ~~their~~ employees with respect to hiring, employment, –or– occupation, promotion, termination or retirement –on such grounds as race, colour, age, disability, sex, pregnancy, marital status, sexual orientation, HIV/Aids, religion, political opinion, national extraction or social origin, trade union activity, unless selectivity concerning employee characteristics furthers established governmental policies which specifically promote greater equality of employment opportunity or relates to the inherent requirements of a job.

2. a) Provide facilities to employee representatives as may be necessary to assist in the development of effective collective agreements;

b) Provide information to employee representatives which is needed for meaningful negotiations on conditions of employment;

c) Promote consultation and co-operation between employers and employees and their representatives on matters of mutual concern.

3. Provide information to employees and their representatives which enables them to obtain a true and fair view of the performance of the entity or, where appropriate, the enterprise as a whole.

4. a) Observe standards of employment and industrial relations not less favourable than those observed by comparable employers in the host country; PROBLEMATIC FOR LIVING WAGE?

b) Take adequate steps to ensure occupational health and safety in their operations.

5. In their operations, to the greatest extent practicable, employ local personnel and provide training with a view to improving skill levels, in co-operation with employee representatives and, where appropriate, relevant governmental authorities.

6. In considering changes in their operations which would have major effects upon the livelihood of their employees, in particular in the case of the closure of an entity involving collective lay-offs or dismissals, provide reasonable notice of such changes to representatives of their employees, and, where appropriate, to the relevant governmental authorities, and co-operate with the employee representatives and appropriate governmental authorities so as to mitigate to the maximum extent practicable adverse effects. In light of the specific circumstances of each case, it would be appropriate if management were able to give such notice prior to the final decision being taken. Other means may also be employed to provide meaningful co-operation to mitigate the effects of such decisions.

7. In the context of bona fide negotiations with representatives of employees on conditions of employment, or while employees are exercising a right to organise, not threaten to transfer the whole or part of an operating unit from the country concerned nor transfer employees from the enterprises' component entities in other countries in order to influence unfairly those negotiations or to hinder the exercise of a right to organise.

8. Enable authorised representatives of their employees to negotiate on collective bargaining or labour-management relations issues and allow the parties to consult on matters of mutual concern with representatives of management who are authorised to take decisions on these matters.

6. Technical Updates

21. There following technical standards should be added to either the text or the commentaries.

TABLE 24: NEW CHAPTER: HUMAN RIGHTS

KEY STANDARDS	CHAPTER	REFERENCE IN
Universal Declaration of Human Rights (1948)	I. Concepts and General Principles New Chapter Human Rights Chapter IV Employment and Industrial Relations	TEXT
International Covenant on Economic, Social and Cultural Rights	I. Concepts and General Principles New Chapter Human Rights Chapter IV Employment and Industrial Relations	TEXT
International Covenant on Civil and Political Rights	I Concepts and General Principles New Chapter Human Rights Chapter IV Employment and Industrial Relations	TEXT
Declaration on Fundamental Principles and Rights at Work (1998)	I. Concepts and General Principles II General Policies IV Employment and Industrial Relations	TEXT
Protect Respect and Remedy: A Framework for Business and Human Rights	I. Concepts and General Principles II General Policies IV Employment and Industrial Relations	TEXT
OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones	I. Concepts and General Principles II General Policies IV Employment and Industrial Relations	COMMENTARIES
IFC Policy and Performance Environmental and Social Standards (2006)	III Disclosure IV. Employment and Industrial Relations V. Environment	COMMENTARIES
Equator Principles	III Disclosure	COMMENTARIES
UN Principles of Responsible Investment (2005)	III Disclosure	COMMENTARIES
Global Reporting Initiative	III Disclosure	COMMENTARIES
OECD Principles of Corporate Governance (2004)	III Disclosure	COMMENTARIES
Extractive Industries Transparency Initiative	III Disclosure	COMMENTARIES
ILO Employment Relationship Recommendation, 2006	IV Employment and Industrial Relations	COMMENTARIES
2009 Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions (26 November 2009).	VI. Combating Bribery	COMMENTARIES

KEY STANDARDS	CHAPTER	REFERENCE IN
2006 OECD Council Recommendation on Bribery and Officially Supported Export Credits into the 1997 Revised Recommendation.	VI. Combating Bribery	COMMENTARIES
2009 Recommendation on Tax Measures for Further Combating Bribery of Foreign Officials in International Business X. Taxation Transactions	VI. Combating Bribery X. Taxation	COMMENTARIES
United Nations Convention against Corruption (2003)	VI. Combating Bribery	COMMENTARIES
OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (2009 edition)	X. Taxation	COMMENTARIES
Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (Third edition, 2001)	IV Employment and Industrial Relations	TEXT
2008 ILO Declaration on Social Justice for a Fair Globalization	IV Employment and Industrial Relations	TEXT
Labour Inspection Convention, 1947	IV Employment and Industrial Relations	COMMENTARIES
Labour Inspection (Agriculture) Convention, 1969 (No. 129)	IV Employment and Industrial Relations	COMMENTARIES
R198 Employment Relationship Recommendation, 2006	IV Employment and Industrial Relations	COMMENTARIES

ANNEX I: THE PROTECT, RESPECT REMEDY FRAMEWORK

BOX I.1 STATE DUTY TO PROTECT (PILLAR 1)

Pillar 1: States have a duty to protect against human rights abuses by third parties, including business. The SRBHR 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. The SRBHR 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). The SRBHR 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 I.2 CORPORATE RESPONSIBILITY TO RESPECT (PILLAR 2)

Pillar 2: Companies have a responsibility to respect human rights: the SRBHR 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. The SRBHR 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*’. The SRBHR 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.¹⁴

¹⁴ The SRBHR 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 I.3 ACCESS TO REMEDY (PILLAR 3)

Access to effective remedy is the third pillar of the SRBHR Framework – and is important for 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, the SRBHR identifies six underlying principles for effectiveness: *legitimacy, accessibility, equitability, predictability, rights-compatibility* and *transparency*. The SRBHR 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*”¹⁵. 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. The SRBHR 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, BASESwiki¹⁶, an online forum for sharing information on non-judicial grievance mechanism.¹⁷

BOX I.4: USING 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 treaties. 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 fulfil the spirit of the rights to the maximum extent possible without violating domestic law.”

¹⁵ Business and Human Rights: Towards Operationalising the “Protect, Respect and Remedy Framework: April 2009; pp. 24.

¹⁶ The Business and Society Exploring Solutions – A Dispute Resolution Community: <www.baseswiki.org>.

¹⁷ TUAC has agreed to provide trade union case profiles for publication on the Wiki.

ANNEX II: GRIEVANCE MECHANISMS

BOX II.1 MINIMUM PERFORMANCE PRINCIPLES¹⁸

Legitimate: a mechanism must have clear, transparent and sufficiently independent governance structures to ensure that no party to a particular grievance process can interfere with the fair conduct of that process;

Accessible: a mechanism must be publicized to those who may wish to access it and provide adequate assistance for aggrieved parties who may face barriers to access, including language, literacy, awareness, finance, distance, or fear of reprisal;

Predictable: a mechanism must provide a clear and known procedure with a time frame for each stage and clarity on the types of process and outcome it can (and cannot) offer, as well as a means of monitoring the implementation of any outcome;

Equitable: a mechanism must ensure that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair and equitable terms;

Rights-compatible: a mechanism must ensure that its outcomes and remedies accord with internationally recognized human rights standards;

Transparent: a mechanism must provide sufficient transparency of process and outcome to meet the public interest concerns at stake.

BOX II.2 TESTING THE PRINCIPLES

The Framework has launched a pilot project to test these six principles. The pilot involves five companies, from four continents and representing five different sectors: mining, apparel, electronic products, oil and gas, and food. The four main pilot companies are:

- *Cerrejon* in Colombia - a joint venture of Anglo American, BHP Billiton and Xstrata;
- *Esquel Group* based in Hong Kong, China – piloting a mechanism at their apparel facility in Vietnam;
- *Sakhalin II* in Russia –working with Sakhalin Energy Investment Company, the joint venture of Shell, Gazprom, Mitsui and Mitsubishi Corp;
- *Tesco* – working with a group of their fruit suppliers in South Africa.

The aim of the project is to identify the types of concerns that the mechanism will need to handle and to review existing grievance procedures and the steps needed to align them with the Principles. The revised and aligned mechanisms will be monitored and evaluated over a period of 12 months and the lessons reported in early 2011, including any for the revision of the six Principles.

Hewlett-Packard is working on a mini-pilot with two of its suppliers in China, which will review recent work to introduce improved grievance processes and the alignment with the Principles. This work will be completed in early 2010. The project is being supported by the International Organisation of Employers, the International Chamber of Commerce and BIAC.

The companies recently presented their pilot projects in Berlin at a consultation on the mandate of the SRBHR. The conclusions to the meeting reported that the “discussion repeatedly turned back to the generally underemphasized roles of customers and workers” as well as the heavy focus in the business and human rights debate on multinational companies, instead of on national companies and laws (this is the business view). “The effectiveness of Global Framework Agreements was mentioned, as was the importance of a company educating its workers no matter where they reside, and of transparency in publicizing information about working conditions.”

¹⁸ This is taken from a report on non-judicial grievance mechanisms by Caroline Rees (2009).

TABLE II.1 DIFFERENT ROLES OF A GRIEVANCE MECHANISM¹⁹

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. <i>“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.”²⁰</i>
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. ²¹ “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.

¹⁹ 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.

²⁰ Corrib Gas Project Case: Legal Opinion on Parallel Legal Proceedings in the OECD Guidelines for Multinational Enterprises, Sherpa (no date available).

²¹ Ibid.

ANNEX III: INVESTMENT NEXUS

BOX III.1: 2003 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.*²²

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.’

²² Emphasis added.