



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

The OECD Guidelines for Multinational Enterprises
Recommendations for Responsible Business Conduct in a Global Context
TUAC Submission to the OECD Investment Committee and the Working Party on
Responsible Business Conduct
14 October 2013

1. Introduction and Summary

1. TUAC welcomes this opportunity to make a submission to the OECD Investment Committee and Working Party on Responsible Business Conduct (WPRBC). Over two years on from the completion of the 2011 Update, it is critical that governments defend what has been achieved, whilst at the same time working to ensure that the Guidelines make a difference to those they are intended to help – workers and communities on the ground.

2. The controversy surrounding the POSCO case has brought into sharp relief the lack of functional equivalence of NCPs. The Norwegian Government is right to turn the spotlight on this issue. TUAC has long called for the OECD to focus on strengthening NCP performance across the board. TUAC is dismayed, however, that instead of using the political momentum created by the 2011 Update to build an ambitious work programme to strengthen NCPs, governments have sought to build an extensive proactive agenda.

3. TUAC has followed the developments around the POSCO case in Norway with grave concern. It is highly regrettable that a State-operated investment fund would choose not to cooperate in full with its own State-operated (albeit independent) grievance procedure. The NCP process is in the first instance non-adversarial – an opportunity for dialogue and problem-solving. It should have been possible to reach agreement on the steps to be taken to increase disclosure and widen human rights due diligence beyond child labour. Transparency and human rights due diligence are, after all, the building blocks of the global framework on responsible business conduct.

4. TUAC is surprised that the Norwegian Ministry of Foreign Affairs has written to the OECD Investment Committee requesting a clarification on the applicability of the Guidelines to Sovereign Wealth Funds and Central Banks – and disappointed that it did not find an alternative course of action that would have supported the Norwegian NCP – a high performing NCP – and furthered the implementation of the OECD Guidelines, rather than precisely the opposite.

5. TUAC calls on governments attending the meetings of the Working Party on Responsible Business Conduct and the Investment Committee to:

- Business Relationships: affirm that the term “business relationships” under the OECD Guidelines cover the relationships of Financial Institutions;
- Minority Shareholdings: affirm that that the term “business relationships” under the OECD Guidelines covers minority shareholdings;

- Interpretation of “*impact is...directly linked to their operations, products or services by a business relationship*”: request the UN Office of the High Commissioner for Human Rights (OHCHR) to make an interpretive statement on the intention of the qualification “directly” in the phrase “*impact is... directly linked to their operations, products or services by a business relationship*”. Given that the origin of this terminology is from the UNGPs then the only legitimate option is to ask the OHCHR for a statement explaining the term. **TUAC opposes this issue being referred to the multi-stakeholder Advisory Group;**
 - Oppose any exemptions: oppose any proposal that the OECD should make a decision to exempt, peremptorily, any organisation from the OECD Guidelines, whether a Sovereign Wealth Fund, a Central Bank or any other organisation. Any carve out would set a highly dangerous precedent that would risk irreparable damage to the OECD Guidelines, as well as to the UN Guiding Principles, as it would open the door for other sectors to seek a similar exemption;
 - Sovereign Wealth Funds: Affirm that the Guidelines apply to all groups of investors, whether they are operated or owned by the State or are private investors (see *BOX 1*);
 - Textile and Garment Industry: develop jointly with the ILO, BIAC, TUAC and OECD Watch a forward-looking agenda for the proposed OECD/ILO Forum in 2014 that puts workers, trade unions and mature industrial relations at the centre and takes account of the failed models of the past. 90 brands have signed the binding Accord on Fire and Building Safety in Bangladesh signalling company support for a new approach. TUAC confirms that three of the issues on the draft agenda of the Forum would be priorities from a trade union perspective: *trade union rights (freedom of association and collective bargaining)*; *living wage*; and *buying practices*. It would suggest two further topics: *anti-trust (competition)*; and *Burma*;
 - NCP Performance: re-balance the implementation of the mandate of the WPRBC and develop an ambitious work programme to improve NCP performance. TUAC calls on governments, in particular Norway, to make voluntary contributions to this activity;
 - Proactive Agenda: Stop the proliferation of projects under the proactive agenda at the OECD level and consider a less bureaucratic approach to proactive agenda projects including re-visiting the principles, which are not being applied and which have been re-written in the proposal on the Textile and Garment Industry (DAF/INV/RBC/RD(2013/18), paragraph 6, page 3);
 - Meetings of NCPs: hold meetings of the National Contact Points at a minimum twice a year. If resources are a constraint then TUAC proposes that number of meetings of the WPRBC be reduced to twice a year;
6. The remainder of the submission is structured as follows:
- *Section 2*: Application of the OECD Guidelines to the Financial Sector: Business Relationships;
 - *Section 3*: Application of the OECD Guidelines to the Financial Sector: Sovereign Wealth Funds and Central Banks;
 - *Section 4*. Application of the OECD Guidelines to the Textile and Garment Industry;

- *Section 5: Implementing/Funding the Mandate of the Working Party on Responsible Business Conduct.*

2 Application of the OECD Guidelines to the Financial Sector: Business Relationships

2.1 Business Relationships Including Minority Shareholdings

7. TUAC welcomes the OECD Secretariat's conclusion (DAF/INV/RBC(2013/2) that 'business relationships' under the OECD Guidelines cover the business relationships of financial institutions, including minority shareholdings (TUAC already made an email submission on this issue which was incorporated into the recommendations of the Advisory Group (see *ANNEX 1*). It also welcomes the affirmation of the decisions made by the Dutch and Norwegian NCPs respectively in relation to the minority shareholdings of APG and NBIM in POSCO and of the clarification made by the UN Office of the High Commissioner for Human Rights (OHCHR) that the UNGPs apply to minority shareholdings.

2.2 Scope and Application of "Impact is...Directly Linked to Operations, Products or Services through a Business Relationship"

8. The interpretation of "*impact is...directly linked to operations, products or services through a business relationship*" is a matter concerning the appropriate interpretation of a document. As the origin of this terminology is from the UNGPs then the **only legitimate option is for the OECD to ask the OHCHR for a statement explaining the term.** Further discussion among a multi-stakeholder group that is not fully informed about the document or its origin is more likely to further confuse rather than clarify the issue. Indeed, TUAC notes that it was a multi-stakeholder process that caused the confusion in the first place. **TUAC strongly opposes the proposal to tackle the interpretation of this important term in a multi-stakeholder advisory group. TUAC finds the proposed i) Literature search to identify authoritative and other guidance which can be used to interpret this language vis a vis the financial sector and 2) interviews to be wholly misplaced and considers that they should not go ahead.**

9. Furthermore, TUAC calls on the Secretariat to exercise great care in its own referencing of the text on this issue so as not to further contribute to the confusion. The use of short-hand references such as "being directly linked" to adverse impacts" which is the phrasing used in documents DAF/INV/RBC (2013/2) and DAF/INV/RBC/RD(2013/17), easily lead to the misinterpretation¹ that there is a need for the company to have a direct linkage to the adverse impact in order for responsibility of the company to be engaged under the Guidelines. Similarly paragraph 4 of DAF/INV/RBC/RD(2013/17) is a potentially misleading explanation of a company's responsibility under the Guidelines. The paragraph omits "*operations, products or services*". Such misinterpretation can have significant and long-reaching effects, particularly with regard to the correct application of the Guidelines to the financial sector. **The linkage is via a business relationship that involves the company's products, services or operations, and does not require a direct linkage to the potential or actual human rights impact. In the case of the financial sector, the linkage is through financial products and services provided to clients who may be involved in**

¹ (This misinterpretation was already the case in the report prepared for the Working Party under Phase 1 of the Financial Sector project).

human rights impacts. It is essential that the documents produced by the Secretariat on this issue make this clear.

3. Application of the OECD Guidelines with Respect to Sovereign Wealth Funds and Central Banks

“It would be difficult for a state to maintain credibility in promoting the Guidelines if it exempts its own activities from them”²

“NBIM operates in a highly competitive, global market, and we will continue to foster a competitive mindset in the years to come....”

“As one of the world’s largest investment funds, we seek to recruit the best people in the industry. NBIM is looking for experienced investment professionals as well as new talent”

10. TUAC strongly opposes any decision by the OECD Investment Committee to peremptorily exempt any enterprise or commercial activity, especially if carried out by a State, from the OECD Guidelines. This would risk irreparable damage to the OECD Guidelines and the UN Guiding Principles as it would open the door for other sectors or business groups to seek similar exemptions;

11. TUAC considers that, in line with the aims of promoting responsible business conduct, the Guidelines should apply to *all commercial activities* as the OECD Secretariat itself noted in deciding whether to exempt central from the application of the Guidelines when carrying out typical central bank functions³. The criteria used to determine whether an enterprise or entity owned or operated by the State is engaged in commercial activities and therefore falls within the scope of the Guidelines should be determined by its activities, not its ownership or structure. Conversely criteria built around structure, which is decided by governments, would invite governments to game the system through their choice of structures, and therefore has been rejected as relevant test for the appropriate treatment of commercial activities of states in various forums. A number of international treaties use ‘activity’ as the test for determining when a State is involved in commercial transactions (see *BOX 3*).

12. A decision by the Investment Committee to exempt Sovereign Wealth Funds from the OECD Guidelines would mean that the vast majority of investment managers would be covered by the Guidelines, while Sovereign Wealth Funds situated in/linked to a Central Bank or similar government entity would not. This would run counter to the intention of the Guidelines, which is to require the same responsible business conduct regardless of ownership or structure. It is also contrary to the responsibilities of the State to argue for an exemption on the basis of proximity to the State (see *BOX 1*).

² Background Note from NCP Norway: Does Norges Bank Investment Management fall under the OECD Guidelines (DAF/INV/RD(2013)/9, p2.

³ (DAF/INV/RD(2013)/9, p 3, “Central Banks manage the monetary system for a state ... While they typically supervise the commercial banking system of their respective countries, their activities in general *do not include commercial activities*. For these reasons, most governments would not consider Central Banks to be enterprises and hence the Guidelines generally do not apply to Central Banks as such.” (emphasis added).

13. As regards NBIM, it is clear from statements it has made on governance, strategy and recruitment that NBIM considers that it operates in a *commercial* rather than an administrative environment. In its discussion of the division of responsibilities between the board and executive officers, for example, NBIM refers to itself as a “company” (see *BOX 2*). In its 2011-2013 Strategy, its discussion of the owner’s real return ambition (see *BOX 2*) reveals a relationship of an asset owner and an asset manager – not a relationship between different parts of a government administration. NBIM has an international office – this again indicates the commercial nature of its activities. It also refers to its place in the “competitive global market place” and to itself as an “industry”, not a public administration. And it recruits investment personnel, not public administrators (see *BOX 2*).

14. TUAC agrees with the proposed test of whether an entity can be considered to be enterprises to which the Guidelines apply as set out in paragraph 16 of the OECD Secretariat’s report – e.g., that this depends on a) the degree to which its activities and characteristics are associated with those of a commercial nature; and b) whether the entity has international operations and an international scope⁴. However, TUAC believes that the criteria for making the determination should turn on the activities rather than the structure of an entity.

15. It should be for the NCPs to apply this test on a case-by-case basis, in the limited circumstances when they are faced with a state entity where the commercial character of the activities is in question. The NCPs would apply the test in the same way that they apply other criteria in the initial assessment phase of the specific instance procedure to assess the eligibility of a case. If a party disagrees with the decision of the NCP then – as is the case with any other decision made by the NCP – the party should complain using the normal channels/appeals process of the NCP. **There is therefore no need for the OECD to make a decision to exempt any entity from the OECD Guidelines.**

⁴ In this respect, footnote 3 of this document applies again.

BOX 1: WHY THE GUIDELINES APPLY TO SOVEREIGN WEALTH FUNDS

- Responsible Business Conduct: the OECD Guidelines aim to promote ‘responsible business conduct’ in a global context. It can be assumed therefore that its intent is to cover *all* entities that ‘conduct business’ – in other words *all commercial activity*. The meaning of ‘enterprise’ therefore under the Guidelines should be understood as covering all organisations engaged in commercial activity operating in or from the territories that observe the Guidelines;
- Ownership: the Guidelines state that ownership may be private, State or mixed. They therefore establish that ownership of the enterprise is not relevant to whether the Guidelines apply⁵;
- Sectoral coverage: the Guidelines state that they apply to all sectors of the economy. They do not identify any exceptions. The Guidelines therefore apply to the financial sector, including investors and including minority shareholders⁶;
- Role of investment funds: investment funds exist to generate returns – equivalent to profits – and are thus *commercial* organisations (‘enterprises’) in their own right. In addition, their core function is investing in other commercial organisations through *commercial* transactions;
- Link to adverse impacts: the negative impacts that the Guidelines seek to prevent or mitigate are linked to the investment funds through *commercial* relationships, not as a result of any administrative or other state function
- Level playing field: any decision to exclude Sovereign Wealth Funds would mean that the vast majority of investment managers would be covered by the Guidelines, while those situated in/linked to a Central Bank or similar government entity would not. This would run counter to the intention of the Guidelines, which is to require the same responsible business conduct, regardless of ownership or structure. Furthermore, to the extent that compliance with the OECD Guidelines requires up-front expenses in establishing due diligence systems this creates an uneven playing field between different types of investment organisations.
- Characteristics of the State: it is illogical as well as contrary to the responsibilities of the State to argue for an exemption on the basis of proximity to the State. Proximity to the State should facilitate compliance with the Guidelines in that governments have already made binding commitments to implement the Guidelines. Since 2000, the Guidelines have highlighted the higher level of expectation that surrounds enterprises owned by the State: “*State-owned enterprises are subject to the same recommendations as privately-owned enterprises, public scrutiny is often magnified when a State is the final owner*”.⁷ This expectation was strengthened in the 2011 Guidelines, which additionally refers to the State Duty to Protect Human Rights in the chapeau of the Human Rights Chapter (IV).

⁵ Paragraph 4. Chapter I. Concepts and Principles.

⁶ *Idem*.

⁷ Commentary on Chapter II. General Policies, para.10.

BOX 2: WHY THE OECD GUIDELINES APPLY TO NORGES BANKS INVESTMENT MANAGEMENT (NBIM)

The investment management activities shall be organised as a separate wing of the Central Bank: Norges Bank Investment Management (NBIM). **NBIM is part of the Central Bank** and shall comply with the laws and regulations applicable to the Bank.

The Central Bank's governance structure shall reflect the different nature and characteristics of the investment management activities that Norges Bank has been entrusted with. Norges Bank shall organize its investment management activities to reflect the recognised standards for the division of responsibilities between the board and the company's executive officers and administration.

The Executive Board shall issue a job description for NBIMs Chief Executive Officer. **NBIMs Executive Director reports directly to Norges Bank's Executive Board.**

NBIM Strategy 2011-2013:

- **"The owner's stated ambition is to build financial wealth**, and the real return estimate of 4 percent forms the basis of the guidelines for economic policy.... **To achieve the owner's real return ambition**, we intend to move our attention away from a benchmark focus in favour of the fund's long-term real return. We will develop investment strategies across asset classes to position the fund better on an absolute return-risk relationship

"NBIM's international offices **enable investment management across all time zones.**"

- **"NBIM operates in a highly competitive, global market**, and we will **continue to foster a competitive mindset** in the years to come. Without an all-embracing drive for results, NBIM will not be able to deliver high returns over time."

"NBIM is committed to measure performance according to industry practice and to ensure this, NBIM shall adhere to Global Investment Performance Standards (GIPS). To ensure fair value, the assets shall meet relevant International Financial Reporting Standards (IFRS) and the NBIM Accounting and Valuation policy."⁸

As one of the world's largest investment funds, we seek to recruit the best people in the industry. NBIM is looking for experienced investment professionals as well as new talent"⁹
Yngve Slyngstad, CEO, NBIM

"The overall compensation shall reflect the national and international framework and business environment that NBIM operates within." ... "Investment personnel in NBIM may be entitled to performance pay. Performance pay shall only be linked to return targets for the funds' investments in accordance with the risk profile of the funds under management."¹⁰

⁸ Policy on Performance Management: <http://www.nbim.no/en/About-us/governance-model/nbim-policies/performance-measurement/tp://www.nbim.no/en/About-us/governance-model/nbim-policies/performance-measurement/>

⁹ This is an excerpt from NBIM's careers web page: <http://www.nbim.no/en/careers/>

¹⁰ This is an excerpt from the NBIM's From the page on Principles for Compensation of NBIM Employees: <http://www.nbim.no/en/About-us/governance-model/executive-board-documents/compensation/>

BOX 3: DETERMINATION OF COMMERCIAL TRANSACTIONS: UN CONVENTION ON JURISDICTIONAL IMMUNITIES OF THE STATE ¹¹

The *United Nations Convention on Jurisdictional Immunities of States and Their Property* on state immunity (signed and ratified by Norway) is understood to capture the latest thinking in determining if a State is involved in a commercial transaction (in the context of its ability to claim immunity from a law suit in another State). The provisions below show that the decision is based on the commercial nature of the transaction. It does not rest on the way the State has set up structures to engage in the commercial transaction. This illustrates the consistency with international standards of using activity rather than form or structure for determining whether a publicly owned or controlled organisation is engaged in *commercial* activity.

"Part II Proceedings in which State immunity cannot be invoked

Article 10

Commercial transactions

1. If a State engages in a commercial transaction with a foreign natural or juridical person and, by virtue of the applicable rules of private international law, differences relating to the commercial transaction fall within the jurisdiction of a court of another State, the State cannot invoke immunity from that jurisdiction in a proceeding arising out of that commercial transaction."

Art 2.1(c) " is defined as:

(c) "commercial transaction" means:

(i) any commercial contract or transaction for the sale of goods or supply of services;

(ii) any contract for a loan or other transaction of a financial nature, including any obligation of guarantee or of indemnity in respect of any such loan or transaction;

(iii) any other contract or transaction of a commercial, industrial, trading or professional nature, but not including a contract of employment of persons."

4. Application of the OECD Guidelines to the Textile and Garment Industry

16. TUAC agreed at the June meetings on the Guidelines that it would participate in an OECD/ILO meeting (Forum) on the Textile and Garment Industry. TUAC is disappointed that the proposal that has been circulated is not a joint draft proposal from the ILO and the Secretariat. As such there will need to be another round of consultations.

17. TUAC considers that it is premature to identify a proactive agenda project at this stage. TUAC did not agree to participate in a proactive agenda project. While there may indeed be some value in some follow-up projects after the Forum, this can only be identified by industry experts and in coordination with the ILO, which has work already planned in this area.

18. Moreover, trade unions working in the sector were critical of the proposed project because it does not put workers and trade unions centre-stage – with regard to labour rights workers and trade unions should not be treated as just one of many ‘stakeholders’. It also does not adequately take account of either the large volume of work that has already been done in this sector, or the failures of the past. In Bangladesh 90 companies have joined trade unions and NGOs in implementing a new (binding) model – the Accord on Fire and Building Safety – based on mature industrial relations for addressing supply chain risks (fire and building safety). It is essential that the tragedy of Rana Plaza marks a break with the failed models of the past. The OECD should take this as its starting point. Specific comments on the project proposal are made in *TABLE 1*.

¹¹ Emphasis in this box is added.

**TABLE 1: COMMENTS ON TEXTILE AND GARMENT INDUSTRY PROPOSAL
PROJECT PROPOSAL ON RESPONSIBLE SOURCING IN THE
TEXTILE AND GARMENT SECTOR**

PROJECT PROPOSAL ON RESPONSIBLE SOURCING IN THE TEXTILE AND GARMENT SECTOR	TUAC COMMENT
1: ...It should also be in line with the Sustainability Compact between Bangladesh and the EU and US ¹² for continuous improvements in labour rights and factory safety in the Ready-Made Garment and Knitwear Industry in Bangladesh, which stresses the need for multi-national enterprises (MNEs)/brands/retailers to deepen discussion on responsible business conduct with a view to addressing issues along the supply chain.	TUAC thinks it would be sufficient to be in line with the OECD Guidelines and the ILO MNE Declaration.
5. To prepare for a useful Roundtable, ILO and OECD will map existing international, national, multi-stakeholder or industry-led initiatives to address labour issues in the textiles industries of Southeast Asia and other high-risk areas, such as the ILO Better Work Program, FLA, and individual or cooperation countries as part of ODA programs.	We think the focus should be on learning the lessons and new approaches – not mapping the models of the past.
7.1 Mapping common textile supply chains, possibly by using hypothetical cases.	We do not understand what the value would be in mapping a hypothetical supply chain (or indeed how that could be done).
7.2 Identifying and assessing labour-related risks in those supply chains using relevant standards on responsible business conduct, e.g. those provided under national or international law, voluntary norms, government-backed tools and industry policies.	The proactive agenda is about the effective observance of the OECD Guidelines. We do not see any need to look at standards beyond the ILO (core labour standards and the ILO Core Labour Standards and Fundamental Principles and Rights at Work), the OECD and UN. The labour risks have already been identified. We should be able to identify a list of issues to be discussed at the Forum without doing an extensive mapping exercise.

19. **TUAC also draws the WPRBC’s attention to the need to correct paragraph 6**, which is misleading as it appears to reference the OECD Principles for the Proactive Agenda when in fact it re-writes them (see *TABLE 2* below). The Principles, which were approved by governments, should be reproduced – not re-written.

¹² Sustainability Compact for continuous improvements in labour rights and factory safety in the Ready-Made Garment and Knitwear Industry in Bangladesh, July 8th, Geneva. Compact by Bangladesh, EU and US

TABLE 2: COMPARISON OF PRINCIPLES FOR THE PROACTIVE AGENDA

TEXT OF PRINCIPLES	TEXT QUOTED AS BEING IN ACCORDANCE WITH PRINCIPLES IN THE TEXTILES INDUSTRY PROJECT PROPOSAL
Projects supported under the proactive agenda should:	
Be demand-driven;	1 The project should seek to support the implementation of responsible business conduct in specific sectors, geographies or fields where there are serious risks of adverse impacts, and/or challenges for implementing responsible business.
Be broadly supported by NCPs and relevant stakeholders;	2 The project should be supported by the Adherent and affected countries, the business sector (e.g. BIAC or other industry groups), trade unions (e.g. TUAC) and civil society (e.g. OECD Watch);
Address issues where there may be risks of significant adverse impacts on matters covered by the Guidelines , and be sufficiently important and in need of attention to justify the time, energy and resources entailed in a broad and inclusive multi-stakeholder process;	3. The project should be carried out in a multi-stakeholder setting, including though not limited to aforementioned stakeholder groups;
Add value in terms of contributing to the effective observance by enterprises of the principles and standards contained in the Guidelines ;	4. The project should complement and strengthen existing efforts in the field, and avoid duplication;
Avoid duplication with other efforts relevant to the effective implementation of the Guidelines ; and	5. The project should seek to develop broadly supported implementation strategies that are practical, add-value and consistent with the concepts and principles of the OECD Guidelines and the ILO Tripartite Declaration. These strategies may take a variety of forms, including, among others, the development of any additional guidance deemed necessary by stakeholders and OECD and ILO bodies
Have a reasonable expectation of success in reaching an outcome that will be supported by adherents to the OECD Declaration on Investment and Multinational Enterprises as well as affected stakeholders.	
<p>V. Multi-stakeholder Advisory / Consultative Groups for Projects under the Proactive Agenda</p> <p>90. The Working Party may create Multi-stakeholder Advisory / Consultative Groups to facilitate collaboration with advisory bodies (BIAC, TUAC), OECD Watch, international partners, business, and other affected stakeholders on specific projects, especially projects on responsible supply chain management under the proactive agenda.²⁸ The Working Party should designate a Chair for, and approve the mandate and expected composition of, any Multi-stakeholder Advisory / Consultative Group created for these purposes. Such bodies should be created for a fixed term, which may be reviewed and extended as appropriate by the Working Party.</p>	

20. TUAC is calling on governments to develop jointly with the ILO, BIAC, TUAC and OECD Watch a forward-looking agenda for the proposed OECD/ILO Forum in 2014 that puts workers and trade unions at the centre and takes account of the failed models of the past. TUAC confirms that three of the issues on the agenda would be of value from a trade union perspective:

- trade union rights (freedom of association and collective bargaining);
- living wage (building on the German/Dutch Government initiative in Berlin, November 2013);
- buying practices.

21. In addition it would suggest two further topics:

- anti-trust (competition): efforts by brands to collaborate in the area of wages is viewed as a violation of anti-trust/competition law on the grounds that it constitutes collusion on price. This is an important issue that deserves discussion and analysis;
- Burma.

5. Implementation/Funding of the Mandate of the Working Party on Responsible Business Conduct

22. The mandate of the Working Party on Responsible Business Conduct¹³ identifies six tasks: NCP performance; outreach; the proactive agenda; consultations with stakeholders; and international partners; and other tasks relating to the Guidelines or responsible business conduct requested by the Investment Committee. While TUAC recognises the enormous work that has been carried by the secretariat in producing the NCP reporting system, the specific instance database and the new web site, **TUAC is concerned overall that the WPRBC is prioritising the work on the proactive agenda over the other areas of its mandate.**

23. TUAC “accepted” rather than supported the inclusion of the proactive agenda in the 2011 Update of the Guidelines on the condition that its aim was the promotion of the effective observance of the Guidelines and that NCPs alongside BIAC, TUAC and OECD Watch were to play a central role. Whilst we recognised the potential value of undertaking projects “*to identify and respond to risks of adverse impacts associated with particular products, regions, sectors or industries*” we also saw the risk that the proactive agenda would divert political momentum and resources away from the task of improving NCP performance. This in TUAC’s view is exactly what is happening.

24. In its letter to the Chair of the Investment Committee (12 September 2013) the Norwegian Royal Ministry of Foreign Affairs highlighted that NCPs reached different conclusions in the POSCO case on whether there should be proceedings or not, stating that this raised questions for the general principle of non-discrimination between OECD countries and shining the spotlight on NCP performance.

¹³ Document (CE(2013)5)

25. TUAC shares the concern of the Norwegian Government. Trade unions have consistently highlighted the problem of poorly performing NCPs and have long campaigned for a robust and regular monitoring process as well as increased training, capacity-building and peer learning.

26. In recent years TUAC has named and shamed non-functioning “invisible” NCPs and identified those NCPs that are failing to report or that report inaccurately (see *BOX 4*). Yet there has been no systematic follow up. The >300 trade union and NGO cases filed with NCPs have thrown up a wide range of issues that present on-going obstacles to attaining success in cases. Few have been addressed (see *BOX 5*) Furthermore, the 2011 Update provided for an increase in the number of NCP meetings (see *BOX 6*) yet there is not yet a decision or resources for a second meeting of NCPs in 2013.

BOX 4: NCP FUNCTIONAL EQUIVALENCE: REPORTING

- Invisible NCPs with no web site, contact telephone or contact person;
- NCP that fail to report to the OECD;
- NCPs that report inaccurately;
- NCPs that report incompletely.

BOX 5: NCP FUNCTIONAL EQUIVALENCE: ISSUES ARISING FROM CASES

- *Non-functioning NCPs: solutions:* buddying/ mentoring, capacity building, peer review;
- *Improve NCP consistency/cooperation in cases: solutions:* more regular NCP meetings, case meetings, fact finding, early warning systems of problems involving the secretariat;
- *Parties refusing to participate in the NCP process: solutions:* cooperation between home and host country NCPs; strengthening the authority of the NCP; examination; consequences;
- *Confidentiality V transparency: solutions:* workshop with trade unions, NGOs and NCPs to explain issues on all sides; horizontal peer review;
- *Imposing conditions on campaigning: solutions:* workshop with trade unions, NGOs and NCPs to explain issues on all sides; horizontal peer review.

BOX 6: NCP FUNCTIONAL EQUIVALENCE: NCP MEETINGS

“3. National Contact Points shall meet ~~annually~~ regularly to share experiences and report to the Investment Committee.”
Amendment of the Decision of the Council on the OECD Guidelines for Multinational Enterprises

27. TUAC calls on governments to:

- NCP Performance: re-balance the implementation of the mandate of the WPRBC and develop an ambitious work programme to improve NCP performance. TUAC calls on governments, and in particular Norway, to make voluntary contributions to this priority activity;
- Proactive Agenda: Stop the proliferation of projects under the proactive agenda at the OECD level and consider a less bureaucratic approach to proactive agenda projects including re-visiting the principles, which are not being applied and which have been re-written in the proposal on the Textile and Garment Industry (DAF/INV/RBC/RD(2013/18), paragraph 6, page 3);

- Meetings of NCPs: hold meetings of the National Contact Points at a minimum two times a year. If resources are a constraint then TUAC proposes that the number of meetings of the WPRBC be reduced to twice a year.

**ANNEX: TUAC COMMENTS ON ISSUE OF BUSINESS RELATIONSHIP
SUBMITTED TO THE ADVISORY GROUP
Annex: Comments TUAC on issue of ‘Business Relationship’**

Scope and Application

Business relationships

“Does it include clients of financial institutions?” □

“**Client** Entity to which a financial institution provides investments, lending or other types of financial services and products.” □ Page 3

‘any other non-State or State entities directly linked to its [the FI’s] business operations, products or services’ □.

We find the first question, *as it is written now*, and the reported findings to make little sense. We cannot see how a client – an entity to which a financial institution provides investments, lending or other financial services – would not constitute a business relationship.

FIs may well consider that there are types of business relationship or circumstances under which these business relationships should not engage the responsibility of FIs for adverse impacts under the Guidelines. But that is a separate issue and is not what is written in this text.

But even in its own terms we don’t find the report findings convincing (more explanation is given below). The discussion on the three terms (business partner, supply chain and any other non-state or state actor...) was reported to be held with just a small number of FIs (less than 20% of the sample – we don’t know the actual number) and was presented as being illustrative, not representative – this is not made clear in the findings reported as part of the recommendations.

The report does not in fact state that FIs considered their client or investee companies **not to be business relationships** but rather says that the interview process ‘*yielded no evidence*’ that FIs supported the view that they were – this is rather ambiguous phrasing. If FIs in this small sample rejected the notion that their clients and investee companies constitute business relationships, then it would be very helpful to know what it is they consider them to be.

Also, just for the record, the report refers to ‘**investee companies**’ as well as to ‘**clients**’ as falling outside the scope of a business relationship in the view of some FIs, whereas the recommendation only refers to ‘**clients**’.

TUAC opposes the inclusion of this recommendation on business relationships.

Illustrative not Representative

The report makes it clear that the findings on this issue are **illustrative** not representative:

“As mentioned above, a **small number** of FIs refer to the OECD Guidelines in the context of E&S risk due diligence (13 out of 52 survey respondents). The three terms above were discussed with an **even smaller number of FIs**; those that have considered the OECD Guidelines provisions in detail. The discussion below should therefore be seen as **illustrative and not fully representative** of the views of all FI study participants or the financial sector.” □

We don't know how many 'even smaller' than 13 is, but if we assumed less than 10 then this would mean less than 20% of the sample.

What were the Questions?

The report acknowledges that

“Depending on interpretation, clients or investee companies could arguably fall under the term “any other non-State or State entities directly linked to its [the FI’s] business operations, products or services” □.

But then says:

“However, the survey and interview process yielded no evidence to support this as an interpretation considered or supported by any of the FI study participants” □

‘Yielded no evidence’ is a rather ambiguous term. Is it the case that all (let’s assume) 10 FIs were asked whether their clients were either a state or non-state entity directly linked to their business operations, products or services and they all said ‘no’, Did the consultants then ask what they considered to be in fact? We have looked at the summary questions and don’t see any questions specifically on this issue. It would be helpful to know what questions they were asked.

Relevant excerpts from the Report

Business relationships: views from FIs

Our research found that how the OECD Guidelines and FIs define “business relationships can differ, which has implications for some FIs with regard to their interpretation of how the OECD Guidelines apply to them.

A number of FI study participants do not perceive the term “business partners”, particularly when described to include suppliers or sub-contractors, to comprise their clients or investee companies. In practice, some FIs refer to “business partners” to include other entities with which the FI has a type of partnership, such as other FIs with whom they develop a joint financial product. Other international standards used by the FIs such as the United Nations Principles for Sustainable Insurance (UN PSI) also make a distinction between the FIs’ (in this case, insurance companies’) clients versus business partners, which are seen as two separate categories.⁵⁰ Thus the term “business partners” can be interpreted in a number of ways that, in the absence of a definition of the term under the OECD Guidelines, could lead an FI to conclude that clients or investee companies are not “business partners” under the OECD Guidelines.

When considering “entities in the supply chain” □, a number of FI interviewees indicated that they generally understand this term to include their suppliers (e.g. entities involved in the procurement of goods and services for the FI, such as suppliers of IT services, stationary or electricity), but that their supply chains would not include their clients or investee companies. Some participant FIs could thus conclude that clients or investee companies are not “entities in their supply chains” □.

Depending on interpretation, clients or investee companies could arguably fall under the term “any other non-State or State entities directly linked to its [the FI’s] business operations, products or services” □. However, the survey and interview process yielded no evidence to support this as an interpretation considered or supported by any of the FI study participants.

According to some FI study participants if clients or investee companies do not fall under either one of the three categories, it could be argued that they are not entities with whom FIs have “business relationships” □ as defined under the OECD Guidelines. (THIS IS FOR SURE BUT THE QUESTION IS WHETHER AND HOW A CLIENT OR INVESTEE COMPANY COULD NOT BE COVERED BY ‘ANY NON-STATE OR STATE ENTITY DIRECTLY LINKED TO ITS OPERATION PRODUCTS OR SERVICES’)