

TUAC trade union advisory committee to the
OECD organisation for economic cooperation and development
■ CSC commission syndicale consultative auprès de
OCDE l'organisation de coopération et de développement économiques

**IMPLEMENTING THE OECD GUIDELINES ON MULTINATIONAL
ENTERPRISES
THE TRADE UNION EXPERIENCE**

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At the centre of the debate over globalization is the need for stronger rules to govern the activities of multinationals. Multinational corporations are the principal actors in the global market so these rules have to cover corporations and they must be set by governments. While few unions would dispute the potential benefits of inward investment in terms of jobs and technology transfer, the trend to offshoring and the outsourcing of production and services has reinforced the argument that more effective rules are essential.

If globalization is to be socially sustainable, and not create a race to the cheapest investment with lowest standards, competition these rules have to cover social and environmental concerns. The governmental void has encouraged some corporations to fill the gap themselves, setting their own codes of corporate behaviour of variable quality and effect. It has spawned a vast corporate social responsibility 'industry'. It is also true that many unions have successfully negotiated agreements with companies on their global activities. At the international level there are some 50 Global Frameworks Agreements concluded between Global Union Federations and MNEs covering directly more than 4 million workers.

But governments have to set a basis of regulation. Over the past six years a priority for TUAC has been to ensure that the OECD Guidelines for Multinational Enterprises are a more effective part of the process of defining government expectations of corporate behaviour - a step to rules which distinguish those corporations which observe standards, treat workers well and protect the environment from those that do not.

The OECD, under pressure from unions and civil society, in their Review in 2000 modernized an instrument that was already 25 years old. Unions welcomed changes in the text calling for respect for the core labour rights set out in the ILO Declaration on Fundamental Rights at Work. It could have gone further on child labour and other issues, but it represented a compromise. It was also important that the revised Guidelines addressed the responsibility of corporations for their sub-contractors in the supply chain and that it was clearly stated that the Guidelines apply globally and are a global instrument.

However the central change in the 2000 Review was the implementation mechanism that was strengthened. The continuing argument by trade unions to governments is that the Guidelines must be effectively implemented. This was not the case during 1980s and 1990s. Then "voluntary" came to mean "optional", and there were "Kafkaesque" "clarifications" from the OECD and very many supposed National Contact Points were non-existent. In the 2000 Review governments re-committed themselves to establish these National Contact Points (NCPs) to help resolve cases, facilitate conciliation and make public recommendations. The OECD is expected to exert "peer pressure" to make National Contact Points work.

Six years later TUAC, along with our affiliates have been taking stock. The OECD estimated in its survey of NCPs¹ that since 2000 83 case ('specific instances' in the OECD jargon) have been considered by NCPs and a total of some 130 requests to consider cases have been submitted to NCPs. TUAC affiliates and partners publish a regularly updated review of cases² on our website. As of June 2006, 64 cases have been submitted by trade unions to NCPs for alleged breaches of the Guidelines since the 2000 Review. Between 2002 and 2004, trade unions raised 13-15 cases a year. In 2005, trade unions filed a total of nine cases. Three cases have so far this year been submitted in 2006 (to the Polish & US NCPs) while another will be raised shortly before the UK NCP.

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

Most closed cases have been resolved and/or led to public statements and recommendations by NCPs. In some cases the outcome can be attributed to the efforts of the NCPs (the instances involving Siemens, Bosch, Aspocomp and Unilever). In others the efforts of the NCPs have been marginal (Trico Marine Services, PPR, Sees Corporation and Angelica Textile Services). Nevertheless, the mere fact that a case is submitted can sometimes have an impact on the outcome. I have seen myself that in several cases as an external trade union official making a site visit where there are ongoing cases, reporting on what I have seen and then meeting with home country management who may be concerned at issues of reputation risk, can make a difference. Even when not the main factor in a case, sometimes the Guidelines have contributed to the solution as part of a wider union campaign. In perhaps ten of the sixty-five cases the Guidelines have made a real positive difference for unions..

However the lower number of cases in 2005/2006 and the excessive length of procedures indicate that far more work remains to be done to achieve effective implementation of the Guidelines and to fulfil the full potential of the Instrument since its revision in 2000.

In its submission to the OECD, TUAC set out key elements a reinvigorated agenda for implementing the Guidelines, including:

- clarification as to the criteria by which the NCPs agree to deal with cases,
- government engagement in the promotion and awareness of the Guidelines,
- mainstreaming the Instrument in the OECD's other programmes and beyond.

We argued that the first step in increasing government commitment to the Guidelines must be soundly functioning NCPs. There have been improvements over the past year. Some NCPs have upgraded their capacities and dialogue procedures to assist in resolving cases. A relatively new signatory to the Guidelines, Chile's, has made considerable efforts and now

¹ OECD Annual report of NCPs 2006 forthcoming

² See <http://www.tuac.org/News/default.htm#1>

functions well. Where NCPs include employers and trade unions they have a higher profile and are more active. Yet many NCPs appear unwilling to meet their responsibilities to resolve cases. For instance, some NCPs do not systematically acknowledge receipt of cases. Not all NCPs issue a statement after the case has been finalised despite this requirement when the parties fail to reach agreement. The result should also be made public. This is something that NCPs often fail to do.

Inconsistent interpretations of the criteria for acceptance of cases is however the chief obstacle. What is meant by the “investment nexus”³ and the existence of parallel legal proceedings. Some NCPs have adopted a narrow interpretation of the investment nexus which excludes acceptance of many specific instances⁴. Likewise with parallel legal proceedings. The US and Japan NCPs in particular have adopted a negative approach: they have put many cases aside pending an outcome of parallel proceeding, and have then “closed” the case⁵.

TUAC has argued that there is no alternative to treating seriously all substantive cases and that NCPs should always deal with a case (which would meet the Guidelines’ own procedure guidance), even if it is partly or wholly addressed in parallel proceedings. The Guidelines are not part of national or international judicial systems, and there no *prima facie* conflict or inconsistency between the Guidelines and legal proceedings. As mechanisms that can help resolve conflicts between companies and stakeholders, all state-to-state issues or concern about “adversity” between parties (arising for instance from legal proceedings) should not influence an NCP decision to accept cases.. The Working Party’s discussion should focus on the implications these proceedings may have after initial acceptance by NCPs⁶.

³this follows an OECD 2004 conclusion that there must be an “investment relationship” linking the company targeted by the specific instance and the entity where the alleged breach occurs. This concerns what governments said were “trade relationships”.

⁴ For example, the Dutch NCP closed a case involving travel agencies promoting tourism in Burma because of the lack of an investment context. It also refused one of the DRC cases for the same reason (In October 2002, the UN Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of Congo listed 84 multinational enterprises as being in violation of the Guidelines).

⁵ This is the strategy of the Japanese NCP, which argues that it does not want to interfere with legal systems particularly in non-adhering countries. The Canadian NCP refused a case involving closure of part of the operations of UPM Kymmene. It considered that the provincial labour laws and remedies in Canada would be more suitable to deal with the issue, and that such recourse had already been taken by the parties. The US NCP has also been reluctant to examine cases which are also filed with the National Labour Relations Board, or within overseas’ jurisdictions (for example the US NCP closed the case on the Liberian International Ship and Corporate Registry on the basis that the issue was “effectively addressed through other appropriate means”).

⁶ In its comments on parallel legal proceedings the TUAC proposed the following four-step approach: (1) *Protection of parties*: in cases where there are reasonable indications that criminal activities are involved, the NCP should alert relevant enforcement authorities, and should make its best effort to monitor the handling of the case by the concerned authorities; (2) *Scoping of parallel proceedings*: once a parallel proceeding is identified, the NCP should evaluate where the Guidelines and parallel proceedings converge and differ. This scoping exercise should serve the unique purpose of better informing on compliance with the Guidelines; (3) *Forming a judgment on compliance with the Guidelines*: the NCP should take account of parallel proceedings insofar as it provides for relevant sources of facts and information in considering a specific case; and (4) *Facilitate dialogue and dispute resolution between private parties*: the NCP should facilitate dialogue taking due account of parallel proceedings. Where there is reasonable indication that a parallel proceeding is exposed to extensive delays in procedures, it is especially important that an NCP engages the parties in dialogue.

Since the 2000 revision of the Guidelines, the TUAC, its affiliated organisations, and other international trade union organisations (Global Union Federations, the ICFTU, the WCL the ETUC) have conducted activities to promote the Guidelines in different parts of the World.

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

In 2006, the TUAC has ensured visibility of the Guidelines in meetings on CSR and international investment. It has also expanded its supporting materials and publications. The TUAC Users' Guide is available in 23 languages⁷ including in Mandarin Chinese. In conjunction with the ETUC the TUAC released early this year a new Training Material for European Works Councils (consisting of a handbook and a CD-rom). This training material provides all the information needed to organise a three-day educational seminar on the use of the Guidelines by European Works Councils. We will adapt this material to a wider audience and are seeking funding.

In the past two years NGOs and their representative network at the OECD – the OECD Watch – have made a welcome step forward in the monitoring and awareness of the Guidelines⁸. However, the burden of developing the Instrument cannot rest upon trade unions and NGOs. We need renewed collective effort to promote and strengthen the Guidelines. A 2005 survey of TUAC affiliates has shown that a majority of NCPs have not organised any activities whatsoever to promote the Guidelines since 2004⁹. This is not acceptable. Recent developments in other multilateral fora, such as the EU¹⁰, the International Finance Corporation of the World Bank¹¹ (see below), and the UNEP¹² and in private initiatives such

⁷ Arabic, Bahasa Indonesian, Bulgarian, Chinese (mandarin), Croatian, Czech, English, Estonian, French, Georgian, German, Hungarian, Italian, Japanese, Korean, Latvian, Lithuanian, Macedonian, Portuguese, Romanian, Russian, Spanish and Turkish.

⁸ See <http://www.oecdwatch.org>

⁹ Or at least no activities publicised in the public domain or to trade unions in the countries concerned. See TUAC Submission 2005

¹⁰ Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee "Implementing the partnership for growth and jobs: Making Europe a Pole of Excellence on CSR" Brussels, 22.3.2006, COM(2006) 136 final, http://europa.eu.int/eur-lex/lex/LexUriServ/site/en/com/2006/com2006_0136en01.pdf

¹¹ The International Finance Corporation's (IFC - the private sector lending arm of the World Bank) new performance standards became operational on May 1, 2006. All new IFC loans now require clients to respect core labour standards as defined by the International Labour Organization's (ILO) eight core conventions. The complete text of the new standards is currently available in four languages (English, Spanish, French, and Russian) on the IFC website: www.ifc.org/ifcext/enviro.nsf/Content/PerformanceStandards

as ISO¹³ and the GRI¹⁴, necessitate a re-invigorated, pro-active and positive agenda for the Guidelines if they are not to become irrelevant.

It is essential that the OECD discussion on the “investment nexus” and on “parallel proceedings” should lead to harmonised interpretation and to procedures that enhance rather than restrict use of the Guidelines. Beyond that the Committee should introduce a more formal system of “peer-group monitoring” of NCPs.

But the OECD itself should promote the Guidelines beyond the NCPs and its own Investment Committee. Closer linkages should be made with the implementation of the Anti-bribery Convention as well as with the Working Party on Export Credit Agencies. Last but not least, dialogue between the Investment Committee and the Steering Group on Corporate Governance is almost non-existent. This is a missed opportunity. No comparative analysis has been conducted to date, between the Guidelines and the Principles of corporate governance. The TUAC conducted preliminary work in that direction in 2005¹⁵.

OECD outreach activities can raise awareness of the Guidelines and broaden the number of non-OECD countries adhering to the Investment declaration. So far, nine non-Member States adhere to the Investment Declaration that includes the Guidelines¹⁶, and three additional economies – Egypt, Hong-Kong China, Malaysia and Taiwan – are in advanced dialogue with the OECD. Dialogue with Costa Rica, Indonesia, Morocco, Singapore, South Africa and Thailand should continue. The Guidelines should also be integrated in outreach programmes such as the joint OECD/UNDP policy dialogue on investment and governance in the MENA region (Middle East and North Africa) and the OECD-APEC dialogue programme. Implementation of the Policy Framework for Investment provides additional opportunity to inform non-adhering countries of the legitimate expectations to which investors are held to in the Guidelines. There is now a project to be launched in September 2006 between the OECD and Chinese government on approaches to corporate responsibility that TUAC has insisted must build on the Guidelines.

Finally, the Organisation should strengthen its dialogue with other multilateral fora. It is welcome that the Safeguards Policy of the International Finance Corporation (IFC) now stipulates that all borrowers from the IFC must respect core labour standards. Synergy and links should be developed between IFC policy and OECD Guidelines. The ILO Committee on the Tripartite Declaration has expressed the desire further to develop its role as a clearing

¹² UNEP Finance Initiative and UN Global Compact supported Principles for Responsible Investment : www.unpri.org

¹³ development of a ISO 26000 standard on CSR : <http://isotc.iso.org/>

¹⁴ Review of the Sustainability Guidelines : www.grig3.org

¹⁵ “A Comparative explanation of the OECD Guidelines for Multinational Enterprises and the OECD Principles of Corporate Governance”, April 2005, Internal report by the TUAC Secretariat (Available on demand). The report identifies five areas where there should be closer articulation between the two OECD standards: (1) employee rights to collective bargaining and to representation within the company, (2) protection of whistleblowers, (3) consultation of shareholders and employees in extraordinary transactions such as restructuring operations, (4) disclosure and transparency (including implicit revision of the Guidelines’ Disclosure chapter to incorporated review of the Principles in 2004) and (5) duties of directors and executive management to explain non-compliance or to comply with the Guidelines.

¹⁶ Argentina (22 April 1997) Brazil (14 November 1997) Chile (3 October 1997) Estonia (20 September 2001) Israel (18 September 2002) Latvia (9 January 2004) Lithuania (20 September 2001) Romania (20 April 2005) Slovenia (22 January 2002)

point for labour-related cases arising from the application of different instruments. NCPs might also act as reciprocal points for disseminating information on relevant ILO instruments.

The Guidelines are a far from perfect instrument, yet their governmental nature, the implementation mechanism and their content mean that strengthening them can help unions to confront the challenges presented by globalisation. With more political will on the part of governments they could become a truly effective tool.