



**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
INVESTMENT COMMITTEE**

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**UPDATE OF THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES**

**Submissions by BIAC, TUAC and OECD Watch**

*This document reproduces submissions on the update of the OECD Guidelines for Multinational Enterprises made by TUAC at the consultation with the Investment Committee on 7 October 2009 and by BIAC and OECD Watch at the multi-stakeholder consultation with adhering countries on 8 December 2009.*

Contact: Marie-France Houde, email: [marie-france.houde@oecd.org](mailto:marie-france.houde@oecd.org)

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## **BIAC SUBMISSION**

### **INITIAL BIAC COMMENTS FOR THE UPDATE OF THE OECD MNE GUIDELINES**

**December 2009**  
**Final version**

#### **I. Introduction**

BIAC welcomes the opportunity to provide our initial comments to the OECD Investment Committee on the potential update of the OECD Guidelines for Multinational Enterprises. Given the preliminary nature of the discussion to date on a potential update and our current knowledge of the forthcoming framework of any update, BIAC comments at this stage are fairly general. We look forward to taking part in additional consultations on more specific proposals.

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.

Business continues to support and use the Guidelines as a main cornerstone in understanding OECD expectations for multinational enterprises. BIAC believes that it is entirely reasonable to consider an update of the Guidelines to ensure that they keep pace with new ideas and developments that business, labour, NGOs and governments have undertaken in a collaborative manner to advance responsible business conduct.

In this connection, the OECD should take this opportunity to look beyond an update of the text and procedures of the Guidelines only. In particular, it should consider how they can be best positioned to build partnerships to help address current challenges of responsible business conduct facing business in the context of international investment. The purpose of the update should be to strengthen the outreach, credibility, legitimacy, effectiveness and reputation of the Guidelines. We believe the outcome of any update should be clear, understandable and have practical applicability.

#### **II. Lessons Learned from the Past Decade**

In the nine years since the release of the 2000 Guidelines revision, there has been considerable innovation in corporate responsibility efforts and a significant increase in the number of corporate responsibility initiatives. At the enterprise level, many companies have developed policies on a wide range of issues related to corporate responsibility that are integrated into overall company policies and objectives.

Across sectors, companies have worked together and with key stakeholders to address common problems through collaborative approaches and common standards or codes of conduct, most notably in efforts to improve business practices of suppliers in a variety of industries, including apparel and footwear, toys, electronics, automotive, extractive industries, defence and most recently retail. Additionally, many initiatives have been developed to address particular issues or problems, including HIV/AIDS, anti-

corruption and extortion, child/forced labour, diversity/inclusion, climate change, water, project financing, human rights, communication and reporting, environmental conservation, stakeholder engagement, community engagement, agriculture, product testing and tourism

There are a number of key lessons to learn from this growing body of experience in the private sector. First, corporate responsibility policies are most successful when they are integrated into existing company policies and procedures. Second, policies must be translated into specific action plans that are implemented throughout the organisation and can be modified over time to reflect changing circumstances. Third, many – if not most – corporate responsibility issues involve broad societal problems that no single company or stakeholder group can solve on its own. These will require collaboration across stakeholder groups, including governments, to address successfully.

Since it is essential that the structures that deliver corporate responsibility are mirrored by those that frame corporate responsibility policy, we believe that company level lessons are equally valid for how the OECD manages and uses the Guidelines in order to increase their relevance. First, the OECD could further support the work of the Investment Committee and seek to integrate the Guidelines horizontally throughout the Organisation, since the Guidelines cover many policy areas. Second, the OECD could develop a work programme that includes specific action plans that can help companies to address the difficult issues they encounter. Third, the OECD could create central and national fora to foster collaboration among the various stakeholders, including non-member economies, which could encourage joint action and seek solutions to common problems that build upon the existing NCP annual meetings.

### **III. General Comments**

Over the course of the past decade, BIAC has repeatedly emphasised the importance of certain fundamental dynamics that underpin the value of the Guidelines.<sup>1</sup> Any changes to the Guidelines must start with a clear definition of the scope and intent of an update. BIAC still believes certain characteristics are very important and we point to the following features:

- The Guidelines are voluntary recommendations by OECD governments on responsible business conduct for companies investing abroad.
- The Guidelines are part of the OECD Declaration on International Investment and Multinational Enterprises. Proposals to change their status should in every case be thoroughly reviewed and carefully considered to assess the potential impacts on both the Declaration and the Guidelines.
- The Guidelines should still aim at promoting dialogue by helping companies, employees and other stakeholders to avoid conflicts.
- 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.
- 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.

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<sup>1</sup> See previous BIAC submissions to the OECD Investment Committee in 2001, 2003, 2004, 2006 and 2007, as indicated in the Annex of DAF/INV/WP(2009)4.

### ***Increasing the number of adhering countries***

BIAC feels that it is a top priority for the OECD to increase the number of adhering countries to the OECD Declaration on International Investment and Multinational Enterprises, and this should form an important part of the 2010 update activities.

Non-OECD countries are attracting and engaging in a growing share of international investment, and multinationals from non-adhering countries have also grown in importance, as evidenced by the increased number of Bilateral Investment Treaties they have entered into. Thus, the OECD should take significant steps to boost the visibility of the Declaration in non-adhering countries and to encourage their adherence.

This should be carried out through constructive and collaborative dialogue with these countries where all relevant stakeholders, including business, are engaged in the process of expansion. The OECD Enhanced Engagement process and broader OECD outreach programme should make this one of their key priorities. Additional direct cooperation with non-OECD states would also be an opportunity to solve the problems that are not addressed today, including local problems and challenges in the individual countries.

### ***Developing a proactive OECD work programme***

The OECD should therefore start the process by rethinking the target audience for the Guidelines, including non-MNEs in non-OECD countries, and define where the problems at present exist, so that the relevant tool can be applied to a particular problem.

The main objective should not be to promote the Guidelines for their own sake, but to use them as a way to identify the problems to be addressed and develop the best solutions possible. The experience from many corporate responsibility efforts is that the process and outcome become more important than the originating code or set of principles. Thus, any update of the text of the Guidelines and the NCP procedures should be seen as the first step in the process, with the more significant impact coming from actual implementation through a proactive work programme, including best practice discussions based on successful case studies.

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.

The OECD should expand its efforts on the Guidelines beyond managing the text and NCP procedures to include a fully developed work programme that is focussed on problems or challenges that require collective action to address. It would be useful to develop a fresh approach in the context of a 2010 update that would boost dialogue, help multinationals, and prevent problems from arising in the first place. BIAC believes that the development of such a proactive approach would bring stakeholders together to explore the many different areas that are covered in the Guidelines. This is key to their future success. Learning from business and other stakeholder experience of dealing with real-world problems would also contribute to improving the value and uptake of the Guidelines.

A proactive work programme would have great potential to address current priorities, and could include the following items:

- OECD engagement with non-member countries to discuss how all stakeholders can work together to improve implementation and enforcement of national laws by non-OECD governments and improve compliance by all companies in a given country.
- An international forum that could serve as a platform for stakeholders to meet and share good practices on a set of common issues. Local networking groups could also be considered.
- The development of multi-stakeholder working groups under the Guidelines to address specific high priority issues such as anti-corruption.
- Horizontal groups across OECD Directorates to work on key elements of specific chapters of the Guidelines, including the development of tools and resources to help companies integrate the issues into their policies and operations.
- Examples of such tools that BIAC has proposed in the past include a web-based tool to track bribe solicitation among government officials and a web based tool to assist small and medium size companies investing in weak governance zones.

### ***Communicating the Guidelines***

Possibilities for a new approach could also involve developing a much condensed version of the Guidelines publication for smaller multinationals that may not be aware of the Guidelines, perhaps in a reader-friendly brochure format that could be easily distributed. The brief document could contain a summary of the Guidelines, and could refer to the longer 65-page Guidelines publication. Developing such a brief separate summary document/brochure would, in our view, be more accessible to business managers, particularly in non-OECD countries.

Additionally, it could be useful to develop a fuller user-friendly web tool for the Guidelines and their implementation. This could take a similar form to the website being proposed for the OECD Risk Awareness Tool for Investment in Weak Governance Zones or build on the structure of a guiding handbook. Such a dedicated web tool for the Guidelines could provide useful information to users about the Guidelines, their implementation, and any current events concerning the Guidelines.

## **IV. Specific comments relating to the substantive provisions of the Guidelines**

### ***Human rights***

BIAC would in principle support a new chapter on human rights if it is based upon – and is consistent with – the work of the Special Representative of UN Secretary General for Business and Human Rights, 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.

### ***Supply chains***

The business community has developed extensive experience on supply chain management programmes over the past 10-20 years. These programmes have undergone almost continuous revision and refinement based on lessons learned, leading to various initiatives, such as company supplier codes of

conduct, monitoring/auditing of such codes, sector-based supplier codes of conduct, and looking at the systemic reasons for poor working conditions or environmental performance in suppliers.

A very good example of such efforts is the ILO-IFC Better Work programme, which tries to leverage private sector programmes to develop national institutions and infrastructure to more effectively implement and enforce national laws. It recognizes that supply chain problems are caused by a governance gap that can best be solved by directly addressing the governance needs at the national level, which in turn would be better positioned to encompass the majority of domestic firms, including exporters. BIAC believes that the OECD could play a very useful role in furthering this approach through its engagement with non-member economies and through its peer review process.

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. The suggested pro-active work programme could, together with already accumulated business experience, provide effective ways to improve supply chain conditions. The 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.

### ***Taxation***

BIAC believes that the taxation chapter remains relevant as it stands. It is an adequate description of the OECD Principles on international taxation and constitutes appropriate guidance to MNEs on tax issues. BIAC could, however, see a need for an update of the commentaries related to the Guidelines to reflect current developments. Issues such as enhanced relationship between taxpayers and authorities, dispute resolution mechanisms and the practicality of the Transfer Pricing Guidelines could be included.

### ***Environment***

Paragraph 11 of the OECD document suggests that Part V of the Guidelines should be updated to clarify guidance vis-à-vis climate change and green growth. BIAC agrees with the present guidance provided in Part V and still finds it relevant.

If additional mention is made of climate change in particular, we feel it would be premature to make comments at this stage until after the Copenhagen climate change conference. Furthermore, if climate change is given specific mention in the text, we are of the view that additional environment-related challenges should also be mentioned, such as water supply and sanitation, food security, energy security, and ecosystem and waste management.

The Guidelines should encourage MNE"s to engage to develop strategies that combine long-run economic growth with environmentally sustainable policies, balancing costs and benefits of applying green measures.

### ***Disclosure***

As with supply chain management, the private sector has developed considerable experience with communication tools on environmental, social and governance issues to a variety of audiences. Experience to date reveals that the field continues to evolve across a number of factors and is by no means locked into any particular pattern. Annual company reports have received most attention but the experience has been decidedly mixed, with significantly low readership and material poorly suited for multiple target audiences. Targeted publications for different stakeholders have also been used to good effect, particularly with employees, who remain the primary target audience for most such communication.

BIAC therefore warns that careful steps must be taken in order to avoid counterproductive effects since companies already report information on internal structures. In addition, the right balance between already existing disclosure requirements from national mandatory systems and further disclosure recommendations from the Guidelines must be sought. Obligatory reporting and binding indicators would be problematic and counter-productive.

### ***Consumer interests***

BIAC would consider relevant proposals for additions that address financial education, green products or ethical sourcing.

### ***Anti-bribery & corruption***

There is one sentence in the Guidelines about extortion. Any update should take the opportunity to shine more attention on the demand side of corruption where business often faces the most pressure.

### ***Technical updates***

BIAC supports Paragraph 7 in the OECD document to ensure that the Guidelines and Commentaries are accurate and up-to-date. This should be a fundamental part of the 2010 update of the Guidelines.

### ***Issues related to the procedural guidance to NCPs and the complaint mechanism***

BIAC believes that one of the key impediments to the effective use of the complaint mechanism is the existence of *parallel proceedings* (i.e. that a case might be taken up by local courts at the same time, or that a complainant may engage in “forum shopping” to promote the cause through multiple avenues at the same time, including multiple filings to NCPs).

In the Procedural Guidance part of the Guidelines, it would therefore be useful to include clarification under “C. Implementation in Specific Instances” regarding parallel proceedings. In BIAC’s view, it should be clearly stated that entities considering resolution of an issue through the Guidelines procedures are encouraged to first address their complaint through domestic channels, even if they are also considering legal action.

Further it should be made clear that the Guidelines are not a substitute for, nor do they override, applicable law or create any conflicting requirements. 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.

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. visibility, accessibility, transparency and accountability), BIAC sees room for improvement as the implementation process of the NCPs moves forward. Dialogue based on trust between all concerned parties is critical to this process and could address evaluation of whether changes to existing arrangements would be beneficial, including issues such as timeline requirement for processing of cases, and management of expectations.

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”.

## TUAC SUBMISSION

### 1. Introduction

1. TUAC welcomes decision of the 2009 OECD Ministerial Council Meeting<sup>2</sup> to instruct the OECD to undertake further consultation on the “updating” of the OECD MNE Guidelines.

2. On the 2<sup>nd</sup> September 2009, TUAC organised a meeting for trade unionists, held at the OECD, as a first step to formulating a trade union position.

3. The meeting identified a number of issues that impede the effectiveness of the Guidelines and discussed possible options for addressing them. Participants also agreed on the need for TUAC to undertake additional research, particularly regarding the possible implications of the work of the UN Special Representative on Business and Human Rights (SRBHR) on both the Procedural Guidance and the Content of the Guidelines and especially Chapter IV. TUAC will bring forward proposals over the coming weeks and months.

4. This submission therefore presents a *provisional* list of issues to be included in the Update based on the discussions held at the trade union meeting. These are cross-referenced with the OECD secretariat’s report on *Preparing for Consultation on an Update of OECD Guidelines for Multinational Enterprises*.

5. The remainder of this submission is structured as follows:

- *Section 2* identifies key principles for the review process.
- *Section 3* focuses on the key issues for the substantive provisions of the Guidelines.
- *Section 4* identifies key issues for the procedural guidance.

### 2. Update: Process – Principles and Modalities

6. First and foremost, it is essential to ensure that the Update is an ‘Upgrade’ in all respects. There must be no weakening of existing provisions and procedures or narrowing of interpretations of the applicability of the Guidelines. The mandate from the Council clearly states that the aim is “*to increase their relevance and clarify private sector responsibilities*”.

7. It is essential that the Update is conducted in a way that assures credibility, legitimacy and enhanced reputation of the Guidelines process.

8. There is also a need to place the Update in the context of the work being carried out by the UN Special Representative on Business and Human Rights (SRBHR) on the *Protect, Respect and Remedy* framework.

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<sup>2</sup> OECD Annual Ministerial Council Meeting, 24-25 June 2009.

9. Finally, there is a need to use the Update to improve coherence between the OECD MNE Guidelines and other relevant instruments both within and outside the OECD and especially the International Labour Organisation (ILO).

10. TUAC recommends that the Investment Committee takes steps to assure the following:

a) **Upgrade not a downgrade:** Safeguards should be put in place at the outset to ensure that there is no weakening of any of the current provisions or procedures;

b) **Transparent, participatory and inclusive:** The Investment Committee must take steps to ensure that the process for the Update is transparent, participatory and inclusive at international and national level. It should also ensure that trade unions and other key stakeholders are involved throughout the whole process. TUAC recommends that the Investment Committee:

– *OECD (see OECD note §22 and §23):*

– *Establish an Update/Upgrade Group.*<sup>3</sup> Beyond the regular consultations with TUAC, BIAC and OECD Watch, proposed by the OECD (see §23), TUAC recommends that the Investment Committee establishes an Update Group that involves the key institutional stakeholders, as well as outside experts, including representatives of the ILO and the UN SRBHR.

– *Liaise with other OECD Committees:* There is a need to ensure policy coordination with other instruments and policies (see *OECD note §17*) including: the *Principles of Corporate Governance*, the *Guidelines for the Corporate Governance of State-owned Enterprises*; the *OECD Export Credit Group*; and the *OECD Anti-bribery Working Group*.

– *Non-adhering Countries:* Provide for the input of non-adhering governments involvement prioritising China, India, Indonesia, South Africa and SouthEast Asia as suggested in the *OECD note (§22)*;

– *Adhering Countries:* Provide for national level consultations that involve trade unions and other relevant stakeholders.

– *International Organisations:* Use the Update to enhance cooperation with the ILO Tripartite Declaration on Multinational Enterprises and Social Policy following the joint agreement of the OECD and ILO.

c) **Integrate work of the UN SRBHR:** It is essential to incorporate key developments and concepts arising from the mandate of the SRBHR in the Update. This requires in-depth study of relevant issues. TUAC recommends that the Investment Committee set up a task team for this purpose.

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<sup>3</sup> TUAC understand that the Investment Committee has established a *Friends of the Guidelines*, which is primarily composed of ‘non-institutional’ members. TUAC considers that it would be necessary to involve the institutional stakeholders in any structure established for the Update.

### 3. Update: Procedural Guidance

#### 3.1 Key Obstacles

11. **Effectiveness of the NCPs:** TUAC has always contended that improving the effectiveness of the Guidelines depends above all else on improving the effectiveness of the NCPs. The Procedural Guidance sets out the framework for NCP effectiveness. Hence TUAC considers that strengthening the Procedural Guidance should be a key focus of this Update.

12. **Lack of functional equivalence** (see *OECD note §16*): The uneven performance of NCPs is uncontested. The effects of unequal access, unequal treatment of cases, lack of predictability, and thereby loss of confidence and reputation, undermine the Guidelines as a whole. The Procedural Guidance sets out four core criteria on the basis of which NCPs are supposed to achieve functional equivalence: *visibility*; *accessibility*; *transparency*; and *accountability*. These fall short of the six criteria identified by the SRBHR (see *TABLE 1*) who has assessed the NCPs to be failing to meet minimum performance criteria.

**TABLE 1: UPGRADING NCP PERFORMANCE CRITERIA**

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

13. **Inadequate institutional arrangements** (see *OECD §17*): TUAC has long argued that the structure of many NCPs is inadequate and impedes overall performance. *Section A* of the Procedural Guidance states that “*adhering countries have flexibility in their NCPs, seeking the active support of social partners...*”. Furthermore, the guidance explicitly gives governments the option of establishing NCPs in a single department, failing to address the conflicts of interest that are likely to occur if an NCP is based only in the Ministry for Economy or Trade and Investment (see *OECD §17*). Whilst the Official Commentaries state that the structure put in place should “*provide an effective basis for dealing with the broad range of issues covered by the Guidelines*”, this guidance is insufficient.

14. **Role of the NCP** (see *OECD §17*): TUAC considers that there a need for greater guidance on the role of the NCP. The Procedural Guidance clearly states that the NCP will offer a forum for discussion and facilitate access to conciliation or mediation (see *BOX 1*). 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.<sup>4</sup> Moreover, the Dutch NCP<sup>5</sup> identifies a potential conflict between the role of adjudication –

<sup>4</sup> Initial Review of the Operation of the UK National Contact Point (NCP) for the OECD Guidelines for Multinational Enterprises – January 2009.

establishing the facts for determining compliance with the Guidelines – and mediation where the focus is on reaching agreement. *“In every SI procedure, an NCP will have to find that fine balance between mediation or offering its good offices to resolve the issue on the one hand, and determining whether the OECD Guidelines have been complied with on the other”*.

### **BOX 1: ROLE OF THE NCP**

The Procedural Guidance sets out the role of the NCP as (*inter alia*):

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

15. **Confidentiality v transparency:** TUAC considers that there is a need for improved guidance to NCPs on confidentiality that provides for maximum transparency. Transparency is a core principle of the Guidelines and also one of the six performance criteria proposed by the SRBHR (see *TABLE 1*): *“[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. An adequate level of transparency is therefore essential to a rights compatible mechanism.* The Procedural Guidance (see *BOX 2*) offers safeguards on confidentiality, whilst providing that results should be made public. However, NCPs are adopting quite different practices on confidentiality (see *TABLE 2*) both in relation to publishing information their handling of communications between parties. The UK, for example, copies *all* parties on *all* correspondence, managing a highly transparent ‘internal’ process, whilst the Swiss NCP, for example, communicates separately with the different parties.

### **BOX 2: PROVISIONS FOR CONFIDENTIALITY**

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

<sup>5</sup> OECD, 2009.

**TABLE 2: CONFIDENTIALITY: NO FUNCTIONAL EQUIVALENCE<sup>6</sup>**

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

16. **Cooperation between NCPs:** Trade unions consider that the specific instance procedure should explicitly recognize the responsibility of the parent company and provide for the home NCP to play a role in engaging the parent company in talks with international and affected trade unions. Trade unions have reported a reluctance of the home NCP to become involved in cases involving violations of the Guidelines in adhering countries. The procedural guidance currently provides for NCPs to “2b) *consult the National Contact Point in the other county or countries concerned*”. This guidance should be strengthened.

17. **Burden of proof:** Trade unions also identified the difficulty for an NCP of discharging the burden of proof in complex cases as an obstacle to effectiveness. This clearly relates to the issue of resources, with possible solutions including the use of specialist training and fact-finding missions. The OECD reports that site visits are more the exception than the rule.<sup>7</sup> A number of NCPs have emphasised the value of access to funding to carry out on-site visits.

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

19. **Parallel proceedings** (see *OECD §17*): Parallel proceedings are the most frequently cited reason for turning down or delaying dealing with a specific instance.<sup>89</sup> NCPs have adopted a range of approaches: *accepting the specific instance* regardless of the existence of parallel proceedings (Marks and Spencer, French NCP; Plaid, Dutch NCP; Bayer, German NCP; Nestlé, Swiss and Korean NCPs); providing *guidance so as not to prejudice* parallel legal proceedings (UK); and *automatic rejection* (Japan, US). In many cases an NCP’s position on parallel proceedings is determined or affected by that of the employer (see *TABLE 7*). Neither the Procedural Guidance nor the Commentaries provide guidance on how to deal with parallel proceedings. TUAC considers this to be priority issue for the Update.

<sup>6</sup> pp. 12.

<sup>7</sup> pp. 11.

<sup>8</sup> OECD 2008.

<sup>9</sup> According to 2007 data, around 60% (94/164) of all cases raised with NCPs involved issues that were also being addressed in parallel proceedings. 27 out of these 94 were concluded meaning that NCPs have accepted 29 % of cases irrespective of the fact of the issues were subject to parallel legal proceedings.

**TABLE 3: NCP APPROACH TO PARALLEL LEGAL PROCEEDINGS**

<b>NCP</b>	<b>APPROACH</b>
Brazil	The Brazilian NCP reported that it tried to offer its good office despite parallel legal proceedings, but the parties were unable to identify issues that were not covered by the parallel proceedings (Shell case).
France	The French trade unions report a division with the French NCP, with trade unions pushing the NCP to accept cases that involve parallel proceedings and the employers and the government not wishing to accept such cases.
Italy	Italy called for further guidance from the Investment Committee on this issue.
Japan	The Japanese NCP reports that parallel proceedings are a problem for the Japanese NCP as " <i>the company involved tends to avoid commitment to the operation of the NCP</i> ".
Netherlands	The Dutch NCP reports that it has been confronted with the " <i>unwillingness</i> " of the MNCs to cooperate on the basis of parallel legal procedures.
UK	The UK NCP has prepared guidance on parallel proceedings that means that it will only suspend aspects of proceedings where a party can show that a party is likely to suffer serious prejudice as a result of parallel proceedings should that aspect of the proceeding continue.

**BOX 3: PARALLEL LEGAL PROCEEDINGS**

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

- Guidelines are non-judicial and thereby a complementary and separate process;
- Guidelines are stand-alone, not an instrument of last resort;
- the role of the NCPs is to provide mediation and conciliation and to assist the parties involved in trying to reach an agreement;
- the lack of a common approach undermines the functional equivalence of NCPs;
- rejecting or suspending specific instances on the basis of parallel proceedings directly undermines accessibility, which is one of the core criteria.

The French NGO, Sherpa,<sup>10</sup> similarly argued, in its legal opinion on parallel proceedings, that specific instances should not be suspended due to legal proceedings because the Guidelines are different in their nature, grounds and (sometimes) their object. Sherpa contends that the primary role of the NCP, to provide "*a forum of discussion and mediation*", is completely different function from the role of a court judge. Sherpa also argues that the dismissal of a specific instance on the grounds of parallel proceedings denies people access and thus violates one of the four core principles of the Guidelines. Furthermore, the object of the Guidelines may be different from that brought before national courts.

20. **National law v international standards:** TUAC considers the assertion of the SRBH that the corporate responsibility to respect is a 'near-universal' social norm that exists independently of variations in national law presents a significant challenge to the Guidelines, which frame the obligations of companies in terms of national law. The SRBH identifies freedom of association as an area where national law either contradicts or offers lower protection than international standards. The principle of using

<sup>10</sup> Sherpa is a member of OECD Watch.

international standards is further elaborated in a paper on company-based non-judicial grievance mechanisms (see *BOX 4*).<sup>11</sup> This needs to be addressed in the Update.

**BOX 4: APPLYING INTERNATIONAL STANDARDS**

*“Given that the specific legal and political human rights framework will vary by country, causing often unhelpful uncertainty, and that it may fall below the standards of a company’s home state, the approach recommended here is that a company acknowledges the relevance to the grievance process of rights in all core UN human rights treaties<sup>3</sup>. This is not to say that these documents are legally binding on corporations – they are not. It is to acknowledge that they form the overarching human rights context within which companies and other non-state actors operate.... Where domestic law is in contradiction to any of these standards, the dialogue process within the grievance mechanism will need to look carefully at options that can fulfill the spirit of the rights to the maximum extent possible without violating domestic law.”*

21. **The lack of cooperation of companies:** The reluctance of companies to participate in the specific instance procedure is reported not only by trade unions, but also by NCPs. It manifests itself in a variety of ways ranging from the participation of junior rather than senior staff at NCP meetings, to reluctance to participate in dialogue, especially if parallel legal proceedings are underway, or refusal to comply with recommendations made by the NCP (e.g., Afrimex in the UK). It affects a host of other issues as NCPs seeks to accommodate business concerns. This is a key and cross-cutting obstacle.

**3.2 TUAC Recommendations**

22. TUAC considers it essential that the Update addresses the following:

a) **Expand the core/performance criteria:** TUAC considers that the core criteria should be broadened in line with the recommendation of the SRBHR (see *TABLE 4*). The introductory paragraph of the Procedural Guidance should be amended accordingly. Additionally minimum standards should be included providing greater direction on what compliance with these performance standards entails;

b) **Strengthen guidance on institutional arrangements:** Amend *Section A* of the Procedural Guidance to include minimum standards on what type of institutional arrangements should be put in place, in line with the extended core criteria. The guidance should exclude the possibility of creating a single department NCP that is based solely in a department where there might be a conflict of interest;

c) **Introduce a mandatory Peer Review process (see OECD §20):** There is a need to go far beyond the current ‘peer learning’ between NCPs and introduce a mandatory peer review mechanism in order to secure improvements in performance across the board. The OECD peer review process is a tried and tested method of review. The peer review process should be rigorous, transparent, participatory and adequately resourced, with published country reports, setting out recommendations. The Investment Committee should further consider whether the provisions for monitoring should be incorporated into the text of the Guidelines themselves, as a specific chapter on Monitoring and Follow-up. An example is provided by the OECD Anti-

<sup>11</sup> Rights-Compatible Grievance Mechanisms: A Guidance Tool for Companies and their Stakeholders, John F. Kennedy School of Government, Harvard University, January 2008.

<sup>11</sup> p.p. 16.

bribery Convention, the provisions on monitoring for which are contained in Article 12, with a detailed description provided in the Official Commentaries;

d) **Clarify the role of the NCP** (see *OECD §17*): TUAC support the proposal made by OECD Watch to amend the Procedural Guidance so as to more clearly delineate the two roles of the NCP and thereby avoid potential conflicts. The NCP should first seek resolution of the specific instance through mediation; if this fails it should then move to the adjudication stage, to give its impartial assessment of the case.

e) **Improve transparency**: The procedural guidance should be upgraded, so as to set out minimum standards of transparency for handling confidential proceedings between parties drawing on the best practice of some NCPs. It should also set out the standards of transparency required *vis-à-vis* the publication of information (initial and final statements). TUAC understands that confidentiality may be necessary in the proceedings to ensure the success of mediation. However, there is no need for a case or the outcome of the case to be confidential.

f) **Set minimum timescales**: The procedural guidance should be amended to set minimum standards on time-scales;

g) **Support specialist training**: The Investment Committee should establish a central facility for training on core skill areas such as mediation;

h) **Provide for fact-finding**: Fact-finding missions have been successfully used by some NCPs: e.g., the Swedish NCP. The desirability and feasibility of creating a centralised fact-finding facility was one of the options explored at a brainstorming meeting held at Chatham House in the UK in March 2009. The Investment Committee should consider the feasibility of establishing such as fund;<sup>12</sup>

i) **Extend reporting requirements**: The Procedural Guidance should be amended so as to strengthen reporting requirements such that NCPs be required to report back on the level of resources allocated to the NCP and for the provision of staff training;

j) **Develop guidance on parallel legal proceedings**:<sup>13</sup> 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 demonstrate prejudice to the proceedings. Any decision to suspend proceedings should be subject to external oversight;

k). **NCP Cooperation**: The effectiveness of the specific instance procedure would be significantly improved by amending the Procedural Guidance to give the home NCP specific responsibility for liaising with the parent company and offering its good offices for dialogue, even when violations take place in adhering countries;

l) **National Law v international standards**: This is an important and complex issue. TUAC will bring forward proposals on this issue, drawing on the work of the SRHRB. TUAC recommends that the Investment Committee also assesses its implications;

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<sup>12</sup> March 2009 meeting held at Chatham House and supported by the Norwegian Government.

<sup>13</sup> TUAC is working on this issue and will elaborate its position over the coming months.

m) **Lack of cooperation of employers:** The lack of cooperation of employers in some cases 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.

#### 4. Update: Substantive Issues

##### 4.1 Key Obstacles

23. **Supply chain, other business partners and the investment nexus (see OECD §8):** TUAC considers it essential that the Update provide clearer guidance on the application of the Guidelines to supply chains and other business partners. It is essential that the applicability of the Guidelines reflects the reality of horizontal business relationships that characterise the global economy. There is a need to remove the requirement for an investment nexus<sup>14</sup> – which is the second most common reason cited by NCPs for rejecting specific instances<sup>14</sup> – and which came to the fore after the OECD Investment Committee issued a statement in April 2003 concerning the scope of the Guidelines (see *ANNEX 1*). The statement, which is not a formal decision, on the one hand states that the application of the Guidelines depends on the “*presence of an investment nexus*”, and on the other hand that “*flexibility is required*” in the context of the provisions of the Guidelines (II.10) on the application of the Guidelines to business partners: II. 10 states that enterprises should “*encourage, where practicable, business partners, including suppliers and sub-contractors to apply principles of corporate conduct compatible with the Guidelines*” (see *BOX 5*). Nonetheless, it is clearly the case that many NCPs are rejecting cases due to the lack of an investment nexus (see *BOX 6*). The work of the SRBH on the need for companies need to undertake due diligence on their human rights impacts across their business relationships (see *BOXES 5* and *7*) highlights the need for anomaly of the investment nexus to be removed.

##### **BOX 5: SUPPLIERS AND BUSINESS PARTNERS**

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

##### **BOX 6: REQUIREMENT FOR AN INVESTMENT NEXIS**

###### **GERMAN NCP**

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

###### **DUTCH NCP**

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

<sup>14</sup> It reports that by the end of 2007 just under 20 % (29/164) of specific instances raised related to the “investment nexus” and involved supply chain responsibilities.

**BOX 7: UK NCP - APPLYING DUE DILIGENCE**

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

The UN Security Council has similarly called on member states to ensure that companies under their jurisdiction perform due diligence on their suppliers of Congolese mineral materials.

24. **Changing employment relationships and precarious work:** A key issue identified in the trade union meeting was how to use the Guidelines to address changing employment relationships and precarious work. TUAC will bring forward proposals on this issue.

#### 4.2 *Other Issues*

25. **Living wage:** A further issue discussed at the trade union meeting was how to use the Guidelines to encourage the payment of a Living Wage, focusing on possible changes to Chapter IV. This is a priority for TUAC for the Update.

#### 4.3 *TUAC Recommendations*

26. **Supply chains/business relationships:** Removing the requirement for an investment nexus is a priority. The Update should repeal the 2003 Statement of the Investment Committee on the scope of the Guidelines *vis-a-vis* the investment nexus. The Investment Committee should also examine how to incorporate the requirements for due diligence, as proposed by the SRHRB, into the Update.

**ANNEX 1: INVESTMENT COMMITTEE STATEMENT: INVESTMENT NEXUS**

“• *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.***<sup>15</sup>

*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.’*

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<sup>15</sup> Emphasis added.

## **OECD WATCH SUBMISSION**

### **Key issues for a review of the OECD Guidelines**

OECD Watch welcomes the Investment Committee's initiative to prepare for and consult stakeholders on a potential update of the OECD Guidelines.

In preparation for the review of the Guidelines and in order to provide the most thorough and constructive input possible, OECD Watch has conducted an extensive round of internal consultations among all 88 OECD Watch members as well as a number of key non-OECD Watch NGOs. Furthermore, on 4-6 November 2009 in Bangkok, Thailand, OECD Watch held an Asia-Pacific regional capacity building programme on "Corporate Accountability: Tools to Promote Responsible Business Conduct" at which the OECD Guidelines and their review were thoroughly discussed and debated. This 3-day regional event aimed to gather the perspectives of organizations and individuals in non-adhering developing countries on the Guidelines and the review, and to encourage those organizations and individuals to actively provide input for the review. The Bangkok seminar included a multi-stakeholder session in which representatives of business, unions, NGOs and governments, including several NCPs and a representative of the OECD Investment Committee, participated and exchanged ideas and views about the review of the Guidelines.

Based on these consultations, OECD Watch has compiled the following key issues that must be addressed in a review of the OECD Guidelines. The key issues fall into three categories: conditions and modalities for the review process, scope and issues related to the substantive provisions of the Guidelines, and Procedural Guidance-related issues. The list should be seen as indicative, not exhaustive.

#### **Conditions and modalities for the review process**

- A revision would need to take into account the dramatically changing global economic realities and ensure the revised Guidelines contribute significantly to the OECD's aim to build "a stronger, cleaner and fairer world economy" to address and move beyond the current financial and economic crisis, recognising that reckless and unethical business conduct has contributed to the severity of the crisis.
- The OECD must ensure that the standards, principles and scope of the Guidelines are not diluted and narrowed but strengthened and enhanced through the review process.
- The revision process must, from its conceptualisation until its completion, strive for utmost transparency, objectivity and inclusiveness. OECD Watch welcomes the Secretariat's proposal to involve all relevant stakeholders, relevant OECD committees, interested non-adhering countries, and international organizations responsible for key instruments related to the Guidelines. In particular, OECD Watch believes that the OECD Guidelines should be revised with the aim of harmonising the Guidelines with other standards for responsible corporate behaviour such as the ISO 26000

Guidance on Social Responsibility and the ILO's Declaration on Social Justice for a Fair Globalization.<sup>1</sup> These instruments should compliment and mutually reinforce each other.

- OECD Watch agrees with the Secretariat that the framework of UN Special Representative on business and human rights, Professor John Ruggie, should be used as a starting point for a revision to ensure specific provision for human rights. Further, an upgrade should address the shortcomings, identified by Professor Ruggie, that are preventing the Guidelines from meeting their full potential. These include: the potential conflict of interests due to NCPs' institutional set-up, the lack of resources to investigate complaints, the lack of training to provide effective mediation, unclear timeframes and the lack of transparent outcomes.
- In the context of a review of the Guidelines, the Investment Committee should consider how the environmental, labour and other standards articulated in the Guidelines can be better incorporated into bilateral, regional and international trade and investment agreements.

### **Scope and issues related to the substantive provisions of the Guidelines**

OECD Watch supports the list of substantive issues drawn up by the IC Secretariat, but would like to reiterate the importance of the following issues:

- As SRSR Ruggie has indicated, the human rights provision of the OECD Guidelines should be revised to reflect the fact that MNEs are expected to respect all human rights wherever they operate. OECD Watch concurs with the Secretariat that the current reference to respecting human rights "consistent with the host government's obligations and commitments" contradicts Professor Ruggie's recommendation.
- The supply chain provision requires significant strengthening. This provision must be adjusted to more accurately reflect the current structure of business relationships by not being restricted to investment and investment-like relationships only, but rather should employ a more comprehensive approach such as the concepts of 'scope of responsibility' and due diligence invoked by SRSR Ruggie. This also includes issues where companies become complicit in human rights abuses committed by host states or by security forces. Reference to supply chain transparency and responsibility must also be strengthened in other chapters, such as the Disclosure and Consumer Interest provisions.
- The chapter on Combating Bribery entails many useful recommendations for preventing a considerable range of corruptive behaviour. Whilst going beyond most international conventions and business recommendations, the Guidelines usefulness for combating bribery in practice is, however, seriously undermined by some NCPs' categorical refusal to deal with corruption in trade. In view of the Guidelines reference to key international conventions including the OECD Convention against Bribery and the ICC recommendations, none of which differentiate between bribery in investment and trade activities, the contradiction between the Guidelines and the cited sources in this chapter must be examined and resolved in the review

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<sup>1</sup> Adopted by the International Labour Conference at its Ninety-seventh Session, Geneva, 10 June 2008.

- The Disclosure chapter should be strengthened to reflect the importance of due diligence in corporate governance and responsible business conduct. Stronger language on non-financial information and use of the GRI should be included in the chapter, as is suggested by the Secretariat.
- The Employment chapter should be strengthened through harmonisation with the ILO Decent Work Agenda and the ILO Declaration on Social Justice for a Fair Globalization. This includes reference to a decent wage that meets basic needs (i.e. a living wage). Specific attention should also be paid to outsourcing as well as the the informal sector, which is not properly covered in the current text of the Guidelines.
- There is a need for a provision that is clearer on the relationship between companies and the local population, specifically including the rights of indigenous peoples and other groups that are disadvantaged or structurally excluded or discriminated against. The Guidelines lack clarity on what demands companies should meet in engaging with local communities in relation to social and environmental damage and hazards to health. Further detail of what constitutes adequate and timely consultation with local stakeholders should be provided on the basis of existing best practices such as pro-active consultation and the principle of free, prior and informed consent.
- The current environmental chapter needs revision to ensure the policy developments and available knowledge on climate change and environmental impact assessments (EIAs) over the last decade is better integrated into clear guidance of what is expected from individual companies.
- The principle of consumers' right to know should be included in the chapter on Consumer Interest.
- The Competition chapter should be revised to ensure that market dominance is not only interpreted from a consumer's perspective, but also takes into account abuse of market power towards suppliers and workers.
- OECD Watch agrees with the Secretariat that Chapter X on Taxation should be revised to include provisions on the disclosure of revenues to host governments in line with initiatives such as the EITI and the OECD Risk Awareness Tool for MNEs in Weak Governance Zones. A revised Chapter X should include a provision to prevent companies from abusing tax havens and avoiding taxes through practices such as thin capitalisation and tax deferral.

### **Procedural Guidance-related issues**

OECD Watch's 2007 "Model NCP" provides many recommendations with regard to necessary improvements related to the Procedural Guidance and functioning of NCPs.<sup>2</sup> However, a number of issues merit reiteration here.

- The Procedural Guidance needs to be strengthened to give greater direction to the institutional structure and functioning of NCPs, with the aim of improving NCP performance and ensuring equal functioning. A revision of the Procedural Guidance should ensure that all NCPs meet the minimum requirements identified by Professor Ruggie for effective non-judicial mechanisms: legitimate,

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<sup>2</sup> The OECD Watch Model NCP: [http://oecdwatch.org/publications-en/Publication\\_2223](http://oecdwatch.org/publications-en/Publication_2223)

accessible, predictable, equitable, rights-compatible, and transparent. OECD Watch would also add to the capacity to implement and follow up upon NCP recommendations to the list of minimum requirements.

- NCPs should be given more authority by enabling them to implement sanctions and provide incentives. For example, government guarantees and credits for businesses (such as export credit insurance, participation in trade missions, etc) could be made conditional upon observance of the Guidelines and cooperation in specific instance procedures in order to encourage compliance.
- The roles and tasks of NCPs in handling specific instances must be further clarified. OECD Watch recommends that, when implementing the Guidelines in specific instances, the NCP play a dual role. Firstly, the NCP should seek resolution through mediation. Secondly, should mediation fail, the NCP should be required to undertake a fair and impartial assessment and determination of the complaint. This adjudication phase requires that NCPs have the capacity, resources, and will to undertake fact finding. Furthermore, the Procedural Guidance should stipulate the NCP's role in monitoring and follow up.
- The Procedural Guidance should require NCPs to develop a clear time frame for the completion of each stage specific instance procedure and should provide NCPs with an indicative time frame; OECD Watch suggests a period of twelve months for completion of the entire process.
- The Procedural Guidance should address the issue of parallel legal proceedings. OECD Watch's position is that the existence of parallel proceedings should not automatically result in the NCP suspending the specific instance process. The NCP should only suspend the process if there is strong evidence that continuation of the NCP process may prejudice parallel proceedings.
- Clarification on the issue of cooperation between home and host NCPs is necessary. OECD Watch has long called for greater recognition of parent company responsibility for the actions of a foreign subsidiary accused of violating the OECD Guidelines, as well as the need for involvement of home country NCPs in specific instances involving both a parent company and a subsidiary. Since corporate policies and strategies are generally set at the headquarters level and passed down for subsidiaries to follow, specific instances involving a parent and a subsidiary in two different OECD or adhering countries require close cooperation between host and home country NCPs.
- The Procedural Guidance should include mechanisms to promote a 'race to the top' among NCPs or, at a minimum, ensure functional equivalency through intermittent peer reviews. Lessons and recommendations resulting from the Dutch NCP's peer review experience could provide a valuable starting point for discussion.
- Finally, the Investment Committee must strengthen its oversight role and implement a serious monitoring system to evaluate NCPs' compliance with minimum institutional and operational standards. This is imperative if the inconsistency and lack of functional equivalence in NCPs' structure, functioning and results is to be reduced.

These suggestions for improvement are provided at this point to complement and reinforce the IC Secretariat's note, and to demonstrate that a review of the Guidelines is timely and has the support of OECD Watch. They are not, at this stage, a complete inventory of suggested improvements. OECD Watch looks forward to active participation in a review.