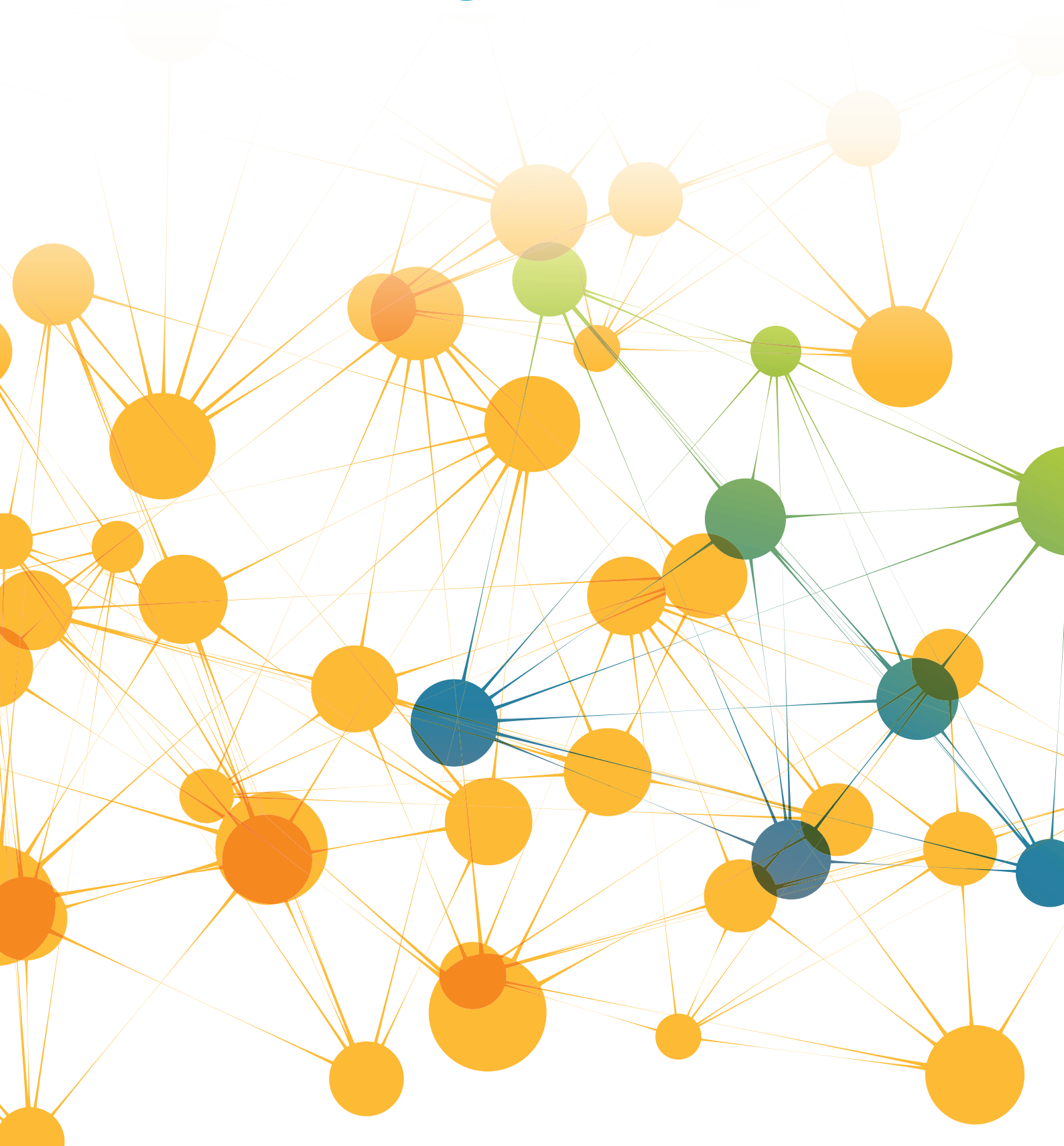


Facilitating Social Dialogue Under the OECD Guidelines for Multinational Enterprises



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A condensed version of this study was first published in Chapter 2 of the 2018 Global Deal Flagship Report “Building Trust in a Changing World of Work” (www.theglobaldeal.com/app/uploads/2018/05/GLOBAL-DEAL-FLAGSHIP-REPORT-2018.pdf). As part of the Global Deal Flagship Report, these case studies served to showcase the role played by the National Contact Points of the OECD Guidelines for Multinational Enterprises in promoting social dialogue and improving the enabling rights for collective bargaining in the context of global supply chains.

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Promoting social dialogue and improving the enabling rights for collective bargaining

With rising globalisation, global value chains have become a dominant feature of world trade and investment. The process of producing goods is increasingly fragmented and carried out wherever the necessary skills and materials are available at a competitive cost and quality. This has led to societal benefits, but also to challenges in balancing economic growth and the protection of international labour standards. The OECD Guidelines for Multinational Enterprises (OECD Guidelines) are a means to guide business behaviour to meet social conditions in their operations and supply chains.

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The NCPs as a mechanism for enhancing social dialogue

This study explores the role of the National Contact Points (NCPs) in dealing with cases relating to the implementation of the OECD Guidelines with a particular focus on labour issues and social dialogue. Historically, a significant number of cases brought before NCPs have involved the OECD Guidelines' chapter on employment and industrial relations. As part of their mandate, NCPs often seek to resolve these cases (known as 'specific instances') by using their 'good offices' function, which can include alternative dispute resolution processes such as mediation or conciliation.

Table 1. The frequency of labour-related cases under the OECD Guidelines, 2012-2017

	Percentage of cases referencing employment and industrial relations	Percentage of cases referred by trade unions
2017	38%	34%
2016	25%	26%
2015	19%	11%
2014	10%	12%
2013	12%	7%
2012	11%	6%

Source: OECD Annual Reports on the OECD Guidelines for the relevant years

The OECD Guidelines play an important role within the broader context of expanding global value chains which employ more and more of the world's workers. The realities of international trade, such as increasing investment in emerging economies and the fragmentation of production, have created both challenges and opportunities for promoting social dialogue as a route towards sound industrial relations and improved labour rights. Traditional forms of social dialogue – such as bilateral discussion, formalised bargaining, and tripartite consultation – are coming under pressure to adapt in an increasingly international context. This adaptation process can take many forms and raises difficult issues. Insofar as the OECD Guidelines target multinational enterprises (MNEs), the NCP process has a significant and demonstrated potential to act as an institutional springboard for social dialogue within this shifting global context, particularly in instances which would otherwise remain deadlocked.

The challenges presented by global supply chains, as well as the relative frequency with which labour-related cases are brought under the OECD Guidelines (see Table 1), warrant further reflection and a better understanding of the outcomes sought and achieved through the NCP system to date.

Table 2. List of labour-related case studies profiled in this report

Parties	Lead NCP	Host Country	Sector
CASE STUDY 1 - International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers' Association (IUF) and Unilever	United Kingdom	India	Manufacturing
CASE STUDY 2 - Building and Wood Workers' International (BWI) and Fédération Internationale de Football Association (FIFA)	Switzerland	Qatar	Other service activities
CASE STUDY 3 - UNI Global Union (UNI)/ International Transport Workers Federation (ITF) , and Deutsche Post DHL (DP-DHL)	Germany	Bahrain, Colombia, Guatemala, China (incl. Hong Kong SAR), India, Indonesia, Malawi, Norway, Panama, South Africa, Turkey, United States, Viet Nam	Transportation and storage
CASE STUDY 4 - Central Unitaria de Trabajadores de Chile and Sindicato de Trabajadores de Starbucks Coffee Chile S.A. and Starbucks Coffee	Chile	Chile	Accommodation and food service

The majority of cases filed by trade unions to date¹ have dealt with the right to organise and the right to bargain collectively (approximately 61% and 62% respectively). The largest number of trade union cases concerns the food, agriculture, and tobacco sector.

This report looks at four case studies involving alleged breaches of the OECD Guidelines' chapter on employment and industrial relations, as well as the chapter on human rights where the issues are cross-cutting (see Table 2). Each case study describes a specific instance and offers some insight into how dialogue was promoted and why a particular outcome was achieved. These observations are informed by multiple sources including, most importantly, a number of stakeholder interviews conducted with trade union, business and NCP representatives.

The OECD Guidelines and the NCP system

The OECD Guidelines

Originally adopted in 1976, and most recently updated in 2011, the OECD Guidelines recognise and respond to the impact of international investment and the role of multinational enterprises (MNEs). They provide non-binding principles and standards relating to the business conduct of MNEs in a number of areas including information disclosure, human rights, employment and industrial relations, and the environment. The OECD Guidelines are addressed by governments to MNEs operating in or from 'adhering countries' which include both OECD and non-OECD countries. Businesses are expected to respect human including labour rights and ensure that they are not involved in adverse impacts. The OECD Guidelines call on businesses to conduct due diligence on their operations and throughout their supply chains and other business relationships to identify, prevent and mitigate actual or potential adverse impacts in relation to matters covered by the OECD Guidelines.

Chapter IV on Human Rights and Chapter V on Employment and Industrial Relations are particularly relevant in the context of labour rights and social dialogue. Throughout the history of the Guidelines, the chapter on Employment and Industrial Relations has played an important role. Its provisions have been closely linked to the ILO fundamental Conventions and the 1977 ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (most recently revised in 2017). The 2011 review of the OECD Guidelines led to the inclusion of a standalone Chapter IV on Human Rights aligned with the UN Guiding Principles on Business and Human Rights. Although the OECD Guidelines are ultimately a non-binding soft law instrument, adhering countries are committed to encouraging their observance by businesses operating in and from their countries. A unique feature of the OECD Guidelines is that they are equipped with a non-judicial grievance mechanism known as the National Contact Points (NCPs).

The NCP system and specific instances

Adhering countries are legally required to establish an NCP. While governments have significant freedom in how they organise their NCPs, NCPs are expected to operate in accordance with the core criteria of visibility, accessibility, transparency and accountability. Once established, NCPs are responsible for advancing the OECD Guidelines through their engagement in promotional activities and the addressing of inquiries, as well as for seeking to resolve cases of alleged violation of the OECD

¹ TUAC, Key statistics for trade union cases <http://www.tuaoecdmguidelines.org/statistics.asp>

Guidelines, which are known as ‘specific instances’. NCPs are required to handle specific instances in a way that is impartial, predictable, equitable and compatible with the OECD Guidelines.

When a specific instance is raised and merits further examination, NCPs can support parties in their efforts to resolve the dispute. This may entail consensual and non-adversarial means of dispute resolution, such as conciliation or mediation, which can be carried out by the NCP or by external professionals. The most commonly treated issues relate to human rights and employment and industrial relations, and for the most part involve cases submitted by a trade union or civil society organisation.

The structure of NCPs varies by country and this inevitably impacts on the way in which they operate. Different approaches can be discerned in terms of where the NCP is located within the broader framework of government (i.e. within certain ministries or as independent agencies), resources, the existence of oversight and advisory bodies, and stakeholder engagement.

Methodology

In order to examine the way in which the NCP process can promote social dialogue in specific instances involving labour issues, a number of case studies were selected based on a range of criteria including: nature of the labour issues raised, geographical spread, outcomes achieved, industries and parties involved.

The results presented in this section are based on the analysis of these case studies, including desk research and interviews with relevant stakeholders. Interviewees had experience with the NCP process and, for the most part, were directly involved in the specific instances chosen for analysis. The individuals interviewed included NCP employees, trade unions and representatives from the business community. No individuals are attributed here and the process was careful to respect any confidentiality agreements which pertained to the specific instances.

Throughout the interviews and desk research, the aim was to identify:

- What were, in each case, the positive social dialogue or labour outcomes achieved;
- The extent to which there were distinct factors throughout the handling of the specific instance that led to improved outcomes;
- Stakeholders’ views on the practices that could be replicated to promote dialogue.

Specific instance case studies

Case study 1 – IUF and Unilever

<p>NCP: United Kingdom</p> <p>Host Country: India</p> <p>Sector: Manufacturing</p>	<p>BACKGROUND</p> <ul style="list-style-type: none"> • Specific instance submitted 19 October 2007. • IUF's allegations, which were denied by the company, claimed that management of Unilever's subsidiary at the Doom Dooma factory required employees to renounce their Hindustan Lever Workers Union (PPF) membership and join instead the Hindustan Unilever Democratic Workers Union, which reportedly had been established by management in 2007. • According to the allegations, management failed to respect the right of employees to be represented by trade unions and the right of employees to engage in negotiations as described in the OECD Guidelines. Unilever submitted that the Hindustan Unilever Democratic Workers Union was actually founded by employees. • The case was suspended pending a decision by the High Court in India, which was to deal with representation and collective bargaining in the Doom Dooma factory. It was progressed on 5 March 2010, and a conciliator from the Advisory, Conciliation and Arbitration service (ACAS) was appointed. <p>OUTCOME</p> <ul style="list-style-type: none"> • Discussions took place between 7 July 2010 and 29 September 2010 which led to a public agreement. This agreement established a process for ensuring that workers can become members of a trade union, hold voting procedures under secret ballot, have access to verification processes and obtain the deduction of membership dues. • A follow-up process was initiated which culminated in a follow-up statement from the UK NCP in February of 2013. This follow-up process addressed specific implementation issues stemming from the original agreement. Ultimately, both parties agreed that outstanding issues had been resolved and that the agreement had been implemented.
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The Unilever/Doom Dooma case was one among four specific instances involving Unilever and the IUF. These cases, which concerned Unilever's operations in India and Pakistan, were filed with the UK NCP from 2006 onwards. Taken together, the specific instances between Unilever and the IUF showcase an interesting evolution: from a lack of engagement between parties in the international arena to an ongoing trans-national relationship built on dialogue and the fostering of mutual trust. In this instance, the role of the UK NCP as an institutional springboard for social dialogue is clear. Although each case has notable features, the Doom Dooma case is particularly interesting for two reasons: (1) it used the UK NCP's follow-up mechanism, and (2) it highlights the NCP's revised approach to parallel proceedings.

Evolving understanding and engagement. Although Unilever had a prior history of dialogue with a range of national unions and works councils, it had no similar experience with international trade unions when it faced the first IUF case. In this respect, participation in the NCP system signalled a willingness by

the company to engage more with the unfamiliar international dimension of industrial relations. Engagement therefore implied a learning process which can be seen in the company's evolving approach to the NCP system and the specific instances. Whereas IUF's specific instances were initially understood by the company as a matter of public relations or external affairs, they were progressively recognised as being primarily an employee relations issue. This new understanding led to a shift in approach. For both parties, having the appropriate mind-set, as well as the right personnel involved, were crucial to the achievement of a successful outcome.

Evolving approach to parallel proceedings. The IUF's submission in the Doom Dooma case occurred in parallel to Indian court proceedings dealing with substantially similar issues. The UK NCP revised its approach to parallel proceedings during the course of the specific instance. After being held in abeyance due to the developments in India, the specific instance was eventually progressed following the issuance of the parallel proceeding guidance, which was endorsed by the UK NCP's steering board in 2009. A conciliator from the Advisory, Conciliation and Arbitration service (ACAS) was appointed to handle the instance.

Setting the NCP process as a complementary means of dispute resolution played an important part in reaching an outcome that was mediated and ultimately built on dialogue. This result also relied on the ability of NCPs to connect with the right personnel: in this case employee-relations specialists took a central role and allowed the issue to move beyond a legalistic liability-focused perspective and risk-averse perspective. It is also worth noting that the current version of the OECD Guidelines, as revised in 2011, contains language that helps clarify the role of NCPs in situations where there are ongoing parallel proceedings. The text reads: *"NCPs should not decide that issues do not merit further consideration solely because parallel proceedings have been conducted, are under way or are available to the parties concerned"* (para. 26).

Agreeing on an outcome and creating sustainable dialogue. The conciliator in this case was central to reaching an agreement which could be carried forward. After establishing credibility, the conciliator attempted to build a consensus between the parties and within the parties themselves. In order to ensure that any solution wasn't a 'one-off', it was necessary to understand the underlying relationship and the realities of employee relations in an international context. This involved knowledge of relevant international instruments (including the OECD Guidelines and ILO Conventions), as well as a firm grasp of the challenges and information gaps which the parties faced. Conciliation resulted in an agreement which was made public by the parties. In summary:

- Unilever committed to establishing a process for allowing workers to join a trade union of their choice. This process would be acceptable to both the IUF and local union, and any outcomes would be verified by an independent third-party deemed acceptable by all other parties.
- The process in question provides for secret ballot procedures, the application of an alternative verification process, and the deduction of trade union membership dues.

After later attempts to implement certain aspects of the agreement stalled, a meeting was held with the UK NCP in July 2012. It was agreed by all parties that a follow-up process should be engaged. This follow-up process was preferable to formalised proceedings for obvious reasons, and allowed the parties to review the case and develop a solution on neutral territory. Ultimately, a mutually satisfactory outcome was reached. Following the specific instances in question, the parties have not returned to the NCP process. Yearly meetings between IUF and Unilever continue to take place and the relationship is viewed as productive and strong. From a social dialogue perspective, the NCP system contributed to the

resolution of specific disputes, while also promoting a general and systemic process for managing an ongoing relationship.

Overall, a number of factors led to this outcome:

- **NCPs as a complementary process.** It was important that the UK NCP decided to offer mediation to the parties, despite ongoing parallel proceedings. This is especially true in labour cases, where there are almost always parallel proceedings in labour courts or other relevant fora. From the perspective of the parties, the NCP process can be much cheaper and more expedient compared to formal proceedings.
- **The conciliator's role, as professional with experience in bringing parties together and forging agreement, was crucial.** The conciliator made it clear from the outset that the objective was to achieve a good outcome consistent with the OECD Guidelines. The conciliator also facilitated the process of sharing information between the parties, as well as within the different levels among the parties (national, international).
- **Getting the right people in the room.** Involving and supporting the appropriate people, both on the company and trade union side, is an important part of the process. Including employee-relations specialists paved the way for an agreement by bringing in people with suitable experience and a different perspective on the issue – ie. one focused on dispute resolution as opposed to liability, CSR, or public relations. Building an understanding of industrial relations in an international context contributed to a lasting dialogue and an ongoing relationship.

Case study 2 – Building and Wood Workers' International (BWI) and Fédération Internationale de Football Association (FIFA)

NCP: Switzerland	BACKGROUND
Host Country: Qatar	<ul style="list-style-type: none"> • Specific instance submitted 28 May 2015. • Concerns raised by the plaintiff, the Building Workers International (BWI), involved migrant workers and the construction of facilities for the FIFA 2022 Football World Cup in Qatar. • BWI's human rights concerns included the Kafala system operated by the Qatari Government, discrimination, non-payment of wages, restrictions on freedom of association, and lack of safe and decent accommodation. It was alleged that FIFA had violated the OECD Guidelines by appointing Qatar as a host at a time when human rights violations were widely documented. It alleged that FIFA's bidding agreements did not address human or labour rights and that FIFA failed to conduct ongoing human rights due diligence. These allegations were firmly contested by FIFA. • BWI made a number of requests of FIFA related to the implementation of the OECD Guidelines including that it: conduct due diligence; commit to ILO Fundamental Conventions, UN Guiding Principles and OECD Guidelines; include these instruments in its bidding documents; adopt decent work standards; agree to conduct joint labour inspections etc.
Sector: Other service activities	OUTCOME
	<ul style="list-style-type: none"> • The public joint outcome from the NCP process identifies five agreed areas of change: (1) identification and use of FIFA's leverage in Qatar; (2) the

Human Rights Policy under art. 3 of the FIFA Statute; (3) a process for monitoring labour conditions; (4) a mechanism for worker complaints and grievances; (5) establishment of an oversight/advisory body.

- FIFA also agreed to seek ways to honour the OECD Guidelines, mitigate human rights risks, improve enforcement vis-à-vis migrant workers, and strengthen collaboration with BWI etc. Furthermore, FIFA committed to include stakeholders in the development of its human rights policy, follow relevant guidance in order to develop a human rights due diligence policy, integrate human rights in existing mechanisms, secure human rights compliance of subcontractors, capacity building and establish joint labour inspections and include BWI as a member of the FIFA Human Rights Advisory Board.
- A follow-up provision was included which would involve regular dialogue; the parties committed to meet at least twice a year to discuss human rights and capacity building, and report progress to the Swiss NCP.

At the time of the submission of the case, there was considerable tension between BWI and FIFA, although there were clear channels for dialogue. There had been a long-running campaign by the trade union movement related to working conditions associated with the construction of facilities and infrastructure to be used in the FIFA 2022 World Cup. FIFA had pointed out that there were limits to its degree of responsibility for the way in which a local organising committee implements the tournament.

NCPs as a useful platform for dialogue. The Swiss NCP provided a convenient and timely forum for two parties that were willing to countenance dialogue as a means of resolving long-standing concerns. The involvement of a third-party presented numerous advantages over bilateral dialogue, which both parties were well-acquainted with. One advantage was the formalisation of dialogue within the NCP. This allowed the parties, with the assistance of the NCP and the Mediator, to structure their conversation, identify key topics for discussion, establish which issues were either beyond the scope or non-relevant to the case, and develop clear terms of reference. This allowed the participants to focus their efforts on the key issues and identify next steps in an efficient manner, leaving subsidiary issues to be dealt with in separate bilateral discussions.

As in the other cases considered in this section, the Mediator seems to have played a critical role. From its initial list of potential mediators, the Swiss NCP identified an expert professional with good knowledge of the OECD Guidelines, and the UN Guiding Principles and of their implementation. On a broader level, the Mediator also understood the nature of the dialogue between an international trade union and an international organisation like FIFA.

Initial issues. One of the first points which the NCP dealt with related to whether the OECD Guidelines, apply to international sporting federations. The NCP took into account prior cases (specifically Formula One's operations in Bahrain), and decided that the OECD Guidelines apply because, in the **case in question**, FIFA was engaged in commercial and international activities.

Determining a process for moving the parties towards an agreement on ways forward. At the outset of the process, the Swiss NCP identified the need to establish a dialogue between BWI and FIFA and move the parties to a position whereby they could agree on practical steps to address some or all of the issues raised by the case. This process had to be acceptable to both sides while also promoting an outcome that was consistent with the OECD Guidelines.

The mediation process. The mediation process took place over a number of months. Allowing gaps between the meetings was considered to be helpful, as a significant amount of trust-building needed to be carried out. An additional procedural factor that should be noted in this case was that a member of the NCP Secretariat was also present at the mediations to ensure that the process and outcomes were consistent with the OECD Guidelines and the rules of procedure of the Swiss NCP. Another key aspect of the mediation underlined by the participants relates to the sharing of information. The nature and depth of information was necessarily different between the two parties. It was felt that the Mediator worked well to identify ways in which information could be effectively shared from one party to another, thus creating a better picture on what was actually happening on the ground and what steps could feasibly be taken by the parties.

Ultimately, a confidential outcome was reached and the parties agreed to disclose the majority of the agreed element in the public statement. This agreement addressed a number of issues, including:

- Identification and use of FIFA's leverage on relevant actors in Qatar;
- FIFA's human rights policy emanating from art. 3 of its statutes;
- A process for monitoring labour conditions;
- Mechanisms for workers' complaints and grievances;
- Establishing an oversight/advisory body.

A key outcome of the process highlighted by BWI was the establishment of direct relations between BWI and the Supreme Committee for Delivery and Legacy in Qatar – which is responsible for the construction of stadiums and associated infrastructure. This has allowed BWI to directly engage with FIFA on a range of issues related to migrant workers' rights on an ongoing basis. A related result that was identified, albeit beyond the specific scope of the case, was the establishment of dialogue with workers and inspections of working conditions through FIFA with respect to the work leading up to the 2018 FIFA World Cup in Russia.

All of these outcomes indicate significant progress towards better social dialogue on many different levels. Key factors which led to the results were the following:

- **Trust building and focus.** Both parties were willing to participate in the dialogue at the outset of the case, but there was considered to be a need to build trust in order to make further progress. In this regard, the fact that the NCP was an independent platform was important. Early procedural steps, such as a ruling that the specific instance only related to FIFA's commercial activities, and not its role as an international sports regulatory body, helped move the process forward. The Swiss NCP's commitment to developing dialogue and mediation was also important, as was its patience in supporting the process and timely interventions to push it forward.
- **Finding the right mediator.** The Mediator's role was considered to be central to the outcome. The mediator was trusted by both parties to the dispute, and was also a member of the advisory board of the Swiss NCP. As such, the Mediator had a strong understanding of the different perspectives and of the structural constraints on the process.
- **Give the process time and build a level-playing field in terms of information.** There were 6 half-day mediation meetings over a 12-month period. One issue that was crucial was the apparent

difference in information between the parties. To bridge this gap, the mediation allowed for consistent sharing of information and knowledge.

- **Role of confidentiality.** The fact that the NCP mediation proceedings are confidential was considered crucial in helping to promote openness between the parties within the dialogue and a willingness to contemplate some of the agreements that came out of this process.

Case study 3 – UNI/ITF and Deutsche Post DHL

<p>NCP: Germany</p> <p>Supporting NCP(s): Colombia, Turkey</p> <p>Host countries and territories involved: Bahrain, Colombia, Guatemala, China (incl. Hong Kong SAR), India, Indonesia, Malawi, Norway, Panama, South Africa, Turkey, United States, Viet Nam</p> <p>Sector: Transportation and storage</p>	<p>BACKGROUND</p> <ul style="list-style-type: none"> • Specific instance submitted 21 September 2012. • The trade unions alleged that Deutsche Post DHL failed to respect the right of workers to establish and join trade unions in several countries, and failed to implement due diligence procedures with respect to these issues. • The German NCP accepted the submissions involving trade union rights in Turkey, India, Colombia, Indonesia, and Viet Nam; allegations in other countries were either deemed insufficiently precise or had already been resolved. <p>OUTCOME</p> <ul style="list-style-type: none"> • Mediation was enabled with the assistance of the Colombian and Turkish NCPs. • Germany's NCP addressed issues on a country-by-country basis: <ul style="list-style-type: none"> ○ In some cases, legal or administrative developments obviated or limited the need for comment on certain issues (Turkey, India, Indonesia); ○ In Colombia, the respondent agreed to carry out an industrial relations assessment; ○ In Viet Nam, DHL agreed to allow union activists to make another call for nominations, and the parties therefore agreed that the issue had been settled. • With respect to the unions' due diligence concerns, DHL submitted that it had industrial relations processes and compliance programs in place, as well as a forum for introducing labour relations issues. The NCP observed that the company's overall sustainability performance was good, however it suggested that the number of union/company meetings could be increased. The NCP also requested that it be provided with reports on these meetings for two years. • Ultimately, the parties agreed that the mediation process had clarified the main issues of contention and that outstanding issues could be resolved through further dialogue. • A protocol was concluded in July 2016 committing the parties to ongoing quarterly meetings and dialogue with the continuous support of the NCP. In September 2017, the follow-up protocol was extended until December 2019.
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The specific instance involving DHL and UNI/ITF highlights the many challenges which face NCPs, while also underscoring their potential to encourage dialogue. Allegations by UNI and ITF were made in connection with a vast international business network, and concerned different activities in several countries with heterogeneous labour relations standards and cultures. The main thrust of these issues stemmed from DHL's alleged failure to respect workers' rights to establish or join trade unions. It was also alleged that DHL failed to implement due diligence procedures with respect to freedom of association.

Following its initial evaluation of the case, the German NCP accepted the specific instance as regards the alleged violations in Turkey, India, Colombia, Indonesia, and Viet Nam. With respect to Bahrain, Guatemala, Hong Kong (China), South Africa, Panama, Malawi, the United States and Norway, the case was not accepted since the allegations were not deemed sufficiently precise, or had been resolved several years earlier.

NCP coordination and cooperation. Given the number of jurisdictions involved, mediation was enabled with the assistance of the Colombian and Turkish NCPs, as well as involvement from the German embassies in Turkey and India. These supporting actors were important in resolving the dispute, and ultimately took on an active role in the implementation of the agreement. The German embassies were involved in information gathering and provided a more complete picture of the situation on the ground. Recourse to an independent source of information was crucial in a case involving several moving parts. As the case spanned a multitude of jurisdictions, the parties had different levels of information, different histories of engagement and varying degrees of trust in the process. Familiarisation and information-sharing were therefore essential to the resolution of that specific instance.

The 'value-added' of NCPs and mediation. Due to the number of jurisdictions involved, it was important to understand the role and value of NCP proceedings. Beyond the coordinating function mentioned above, the NCP process presented a number of advantages. The parties were keen to attain resolution and saw clear value in having a set of multi-jurisdictional issues addressed in one convenient forum. The parties were committed to reaching a forward-looking solution and were aided in this by the relative flexibility of the NCP process. Finally, the fact that the NCP was a German public institution, viewed as both independent and authoritative, was also seen as crucial to maintaining trust and engagement throughout the process.

Mediation was conducted by an NCP staff member, and began as a trilateral meeting between the company, unions, and NCP. In this setting, the parties clarified their expectations, shared information and built mutual trust. Following this process, a series of bilateral meetings between the mediator and each party was held in order to probe the possibility of settlement and determine what solutions were feasible. A final trilateral meeting was held in order to develop the Final Statement and monitoring process.

Each freedom of association issue was addressed on a country-by-country basis. In some countries, including Turkey, India, and Indonesia, legal or administrative developments meant that the unions' issues were overtaken by events and did not require further consideration. In Colombia, DHL agreed to carry out an industrial relations assessment which entailed discussions with employees and meetings with stakeholders and unions. In Viet Nam, DHL agreed to allow union activists to make another call for nominations, and the parties therefore agreed that the issue had been settled.

In the Final Statement, it was agreed that both parties accepted that the mediation process had clarified issues and that any outstanding questions could be resolved through further dialogue. The Final Statement offers helpful insight into the strengths of NCP-led dispute resolution. It notably highlights

the role that greater clarity can play in helping reconcile positions without having to engage in a lengthy and possibly contested process of fact-finding. Instead of focusing on tangible forms of compensation, dialogue was viewed as a form of remedy in and of itself.

Monitoring and follow-up. Although a mediation was concluded that set the ground for ongoing discussions between the parties, NCP involvement did not stop there. The German NCP suggested that the number of union/company meetings could be increased to four per year, and that the NCP would receive reports on these meetings. This arrangement was formalised in a protocol that was signed in July 2016, committing the parties to ongoing quarterly meetings and continued dialogue. With respect to the agreed outcome in Colombia, the Colombian NCP played a role in supporting dialogue and in conducting the agreed industrial relations assessments.

The value of ongoing NCP support was clear to the parties. After the agreement was signed, the parties requested continued NCP engagement to assist with the implementation of the agreement. This helped stimulate further dialogue. Moreover, in September 2017 the parties requested an extension to the follow-up protocol which provides for the continuing of structured dialogue until December 2019, when it may be reviewed again.

Despite the complexity of the claim, a positive outcome was reached for a number of reasons:

- **Collaboration.** The involvement of other supporting NCPs, as well as diplomatic resources, ensured that the parties were accompanied in their efforts to reach a solution. This involved efforts by other NCPs to encourage dialogue, assistance with carrying out industrial relations assessments and information-gathering.
- **Communication and trust.** The combination of bilateral and trilateral meetings facilitated information sharing and trust-building, while also permitting candid discussions about expectations and realistic solutions. Sharing of information was important to the process due to the complex and wide-ranging nature of the specific instance. The role of a strong NCP, which could transmit information, steer discussions, and project an image of authority and independence was significant.
- **A forward-looking vision.** The NCP setting allowed parties to contemplate a solution which was forward-looking, dialogue-driven and which addressed systemic concerns. By de-emphasising retrospective issues and wrongdoing, parties were able to find a useful and mutually agreeable resolution.
- **Ongoing support.** The agreement to engage in continuing dialogue, which included ongoing NCP support and follow-up, allowed parties to address issues as they arose while creating a mutually agreeable forum for solving deadlocks. The request for an extension to the follow-up protocol demonstrates the value of this mechanism. A structured process for dialogue, combined with firm NCP-led recommendations where necessary, has led to progress and action when needed.

Case study 4 – Central Unitaria de Trabajadores de Chile and Sindicato de Trabajadores de Starbucks Coffee Chile S.A. and Starbucks Coffee

<p>NCP: Chile</p> <p>Host Country: Chile</p> <p>Sector: Accommodation and food service</p>	<p>BACKGROUND</p> <ul style="list-style-type: none"> • In May 2014, the union Central Unitaria de Trabajadores de Chile (CUT), together with the union Sindicato de Trabajadores de Starbucks Coffee S.A. (STSCSA), submitted a complaint to the Chilean NCP claiming that there had been alleged anti-union practices by Starbucks Coffee Chile S.A. • It was alleged that Starbucks had interfered with the right to organise and bargain collectively by running anti-union campaigns, terminating union members and refusing to recognise the union. • In early 2015, the parties agreed to start a mediation process led by the Chilean NCP. After holding joint and individual meetings with the parties, the NCP found that progress could not be made due to allegations of breaches of good faith and confidentiality. <p>OUTCOME</p> <ul style="list-style-type: none"> • The NCP closed the case and issued a Final Statement on 1 June 2015 where it made a number of recommendations, including: that Starbucks should not refer to workers as partners if they are not shareholders or do not receive direct profit; that worker representation is positive and that statements that unions were unnecessary were unhelpful; and while the fact that the company delivered various benefits was beyond question, that did not imply that workers should have no say in how those benefits were delivered. • Following the closing of the case, the company and the unions independently reached an agreement on a new collective bargaining agreement in the weeks following the final statement.
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This case study differs from the other ones referred to in this section as the mediation process did not lead directly to agreement between the parties, but rather contributed to the parties reaching agreement between themselves.

Initial issues

The complaint to the NCP in this instance came from national trade unions regarding events that allegedly happened in the country itself. They covered broad allegations, which were refuted by the company, about various ‘anti-union’ activities. The NCP first had to decide whether Starbucks Coffee Chile S.A. was a multinational company for the purposes of the OECD Guidelines. They decided that the company was horizontally integrated and included the US parent and Chilean subsidiary which shared the same strategy, administration and policies.

On the question of the relationship between national law and the OECD Guidelines, the NCP pointed out that the OECD Guidelines were not the same as national legislation, and that there were situations which could be in line with national law but not with the OECD Guidelines. Furthermore, in considering the relationship between the process initiated under the OECD Guidelines and parallel national

proceedings, the NCP stated that it would not interfere with national legal proceedings on the same issues, but would rather use its good offices function to promote a sustainable solution.

Mediation

The NCP in this instance carried out some preliminary meetings with the parties independently of each other to build trust and understanding of the issues. Subsequently, it held a joint meeting with the parties to clarify the issues and seek ways to move forward. Problems arose when CUT discussed the specific instance at an event with external participants. The company viewed this as a breach of confidentiality and good faith. As a result, the NCP concluded that the company had lost confidence in the process and closed the case.

Final statement

The NCP issued a Final Statement setting out findings and recommendations to promote compliance by Starbucks with the OECD Guidelines' provisions regarding freedom of association and collective bargaining. In addition with regard to the closing of the case, the NCP also clarified that the obligation of confidentiality does not extend to the fact that the specific instance exists or the reasons that the good offices of the NCP have been sought. It further noted that "parties are free to make public statements about the case provided that information raised and discussed during mediation is safeguarded."²

Agreement between the parties

The issuing of the Final Statement by the NCP was followed almost immediately by the workers declaring the start of a legal strike. Subsequent to the conclusion of that strike, the company and the unions concluded a first collective bargaining agreement. This agreement included the setting of new basic rates. Additional negotiations have taken place and further collective agreements have been agreed in the following two years.

Key factors / lessons

There was a significant level of distrust between the parties. The NCP endeavoured to "filter" comments made by each party and communicate them in a productive manner. This reduced tensions and allowed discussions to start, but a number of problematic issues remained. Not least of these were the issue of confidentiality and the degree to which it applied to the facts of the case before the NCP, as opposed to the details of the complaint. The NCP needed to strike a careful balance between encouraging parties to submit to voluntary dispute resolution and satisfying the need for public accessibility and sharing.

The parties managed to reach an agreement with one another upon the issuance of a final statement which provided an analysis of the issues raised in the submission and the process to date. This agreement represented an important step towards recognition and engagement of Starbucks Coffee Chile S.A. with the company union, something which had previously not been

² www.direcon.gob.cl/wp-content/uploads/2014/06/DECLARACION-FINAL.pdf

possible despite several legal proceedings on this issue between the trade union and company. This achievement was attributed to the NCP led mediation and publication of the final statement. As such, this case demonstrates the potential value of the NCP process as a precursor for agreement between parties outside of the NCP mechanism.

The NCPs as a mechanism for enhancing social dialogue

The case studies demonstrate that the NCP process can lead to positive outcomes with respect to labour issues and social dialogue. Furthermore, a number of overarching themes and common features can be identified. While the outcome of a specific instance will invariably depend on the parties involved and the issues at stake, the NCP contribution was crucial in all the cases considered.

NCPs can successfully act as a mechanism for resolving labour disputes and as an institutional springboard for social dialogue due to a number of characteristics.

► NCPs can bring parties together at the right level

As opposed to state-focused mechanisms, the OECD Guidelines specifically contemplate MNEs, their role and their remedial power. This is particularly important in disputes or disagreements which primarily concern the actions of an MNE as opposed to alleged state behaviour or regulatory shortcomings. When an underlying issue is multifaceted (i.e. has private and public elements), NCP proceedings can coexist with other processes, whether they be domestic or international. The realities of this interaction can be seen in the FIFA case.

The ability of NCPs to bring parties together is conducive to dialogue and problem-solving for obvious reasons. However, in the context of a system that is specifically targeted at MNEs, NCPs are important as a mechanism for uniting plaintiffs with representatives from senior international management. Whereas organisations bringing cases may deal with local employers or local management, involvement at higher level may encourage dialogue and resolution due to increased capacity, willingness or exposure to public scrutiny. In many cases, international management may not be fully aware of what has been happening in countries of operation. Furthermore, this approach supports due diligence obligations under the OECD Guidelines.

► NCPs can focus on dialogue

Unlike processes which rely primarily on fact-finding and corrective measures or processes which assess national legal frameworks against international standards, NCPs can focus on establishing dialogue in a less adversarial or State-focused setting. This is particularly useful in labour cases where dialogue is often, in and of itself, the outcome being sought (for instance in cases involving trade union intimidation or refusal to bargain). The advantages of this 'good offices' function may explain why certain cases are referred under the OECD Guidelines, perhaps in parallel to or instead of more formal adjudicative processes.

► **NCPs can support the right mediation process**

Specific instances involving labour issues and MNEs require an understanding of business relationships, global value chains, international labour and human rights norms, and the realities of industrial relations in advanced and developing countries. Within this context, knowledge of national labour laws, industrial relations cultures and challenges may be insufficient.

The importance of an experienced and knowledgeable mediator was a common thread throughout the cases examined. Successful cases were driven by mediators who had prior exposure to the OECD Guidelines and who were able to adopt an international perspective. Mediators must support an outcome which is consistent with the OECD Guidelines, while remaining sensitive to the realities and complexities of international business operations.

► **NCPs can contribute to an ongoing dialogue process and follow-up**

Labour disputes generally involve dynamic and long-standing relationships between employers and workers. Specific instances can be brought in connection with factual circumstances which are 'live' or ongoing. NCPs also have a capacity to focus on forward-looking solutions as opposed to retrospective wrongdoings. When the NCP process can respond to the fluidity of events, there is an increased possibility that outcomes will be relevant, sustainable, and satisfactory.

The relative flexibility of the NCP procedures allows NCPs to provide ongoing support and supervision, even after mediation has led to an agreed outcome. This ability to offer follow-up through continuing advice and monitoring allows NCPs to match the parties' realities of dispute resolution: even the best agreements can give rise to disputes relating to meaning or implementation. This is particularly true when an agreement negotiated at a higher level has to be implemented by local or national management. Whenever an impasse is reached, NCPs can offer a convenient forum to all parties to move forward.

<https://mneguidelines.oecd.org/ncps>

