



Trade Union
Advisory Committee
to the OECD
*Commission
syndicale consultative
auprès de l'OCDE*

TUAC Proposal: Verified Due Diligence in Specific Instances

Paris, 26 October 2020

TUAC would like to take the opportunity to offer this submission in support of the work of the Working Party for Responsible Business Conduct. Development of a new method for NCPs to verify responsible business outcomes through effective due diligence has been consistently advanced by TUAC.

Most recently the concept was introduced at the March 2020 and November 2019 meetings of the Working party for Responsible Business Conduct. This proposal coincides with both the Stocktaking of the OECD Guidelines (Item 5) and with the drafting of a report by the Working Party in response to the TUAC request for clarification of the Guidelines (Item 10.c) that are being discussed at the 2 November 2020 meeting.

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Background

TUAC participates in several important RBC projects at the OECD where we observe an increase in demand for effective forms of MNE due diligence, consistent with the OECD Guidelines for Multinational Enterprises and related due diligence guides, to demonstrate positive impacts are happening and risks of negative impacts are minimised.

The Guidelines and related due diligence guides by the OECD have become the hallmark of effective due diligence as a way to promote inclusive workplace structures and economic equality. The Guidelines are referenced in International Finance Corporation project standards, Institutional Investment mandates and in Global Framework Agreements between trade unions and MNEs.

In addition, the Business for Inclusive Growth (B4IG) initiative requires a commitment to the Guidelines in its membership criteria. It also intends to “innovate” new ways to measure impacts and make sure there is a “level playing field”. New work is also being done by the OECD to develop ways to integrate RBC due diligence in financial transactions and procurement.

NCPs frequently include some form of due diligence verification as part of recommendations for follow up on specific instances.

The Gap between MNE Commitments and Practices

Evidence of self-reported commitments to OECD Guidelines and to the UN Sustainable Development Goals continues to grow faster than impacts, exposing an impact gap. In addition, approaches vary among OECD member MNEs depending upon practice and their respective domestic regulatory environment. Impact gaps appear in MNE industrial relations and in related willingness to engage in NCP processes.

NCPs Struggle to Resolve Specific Instances in Support of the Guidelines

TUAC is concerned about MNEs refusing to participate in mediation. Seventy-eight percent (78%) of cases concluded in 2019 did not resolve the issues raised by the filing party. The data imply a persistence of adverse impacts, especially in specific instances where one or both parties refused to participate in mediation.

MNEs should be asked to obtain trade union verification of outcomes recommended by an NCP

Trade unions are in a position to strengthen NCP follow-up, even when one party refuses to participate. When it comes to employment and industrial relations and human rights due diligence, trade unions can play a stronger role in confirming or identifying shortcomings in due diligence and outcomes. This is especially true for human rights, employment and industrial relations. Without some way to obtain worker verification, an NCP has limited capacity for knowing whether self-reported impacts are realized.

Example: Underlying uncertainty about day-to-day scheduling, for example, exposes the operations to risk of absenteeism and workplace morale issues that affect productivity. Unresolved issues can prolong industrial relations conflicts that are counterproductive to positive MNE contributions to the Guidelines. Prolonging

conflict extends operational disruptions, affecting revenue. Several external stakeholders are impacted in addition to the directly impacted workers.

All of these adverse consequences can be addressed by the NCP requesting a form of verification from the *MNE* that establishes worker involvement in due diligence processes. In playing such a role, the NCP would both verify positive outcomes and help mitigate the risk of industrial conflicts disrupting productivity, operations and revenue.

First Mover Example of NCP Recommends Trade Union Due Diligence in Follow up

In the Final Declaration for **BHP Vale**, the Brazil NCP included two recommendations TUAC considers instructive for resolving supply chain due diligence cases before an NCP:

5. Encourage the positive contribution of Samarco [MNE] dialogue with SITICOP and CNQ-CUT [UNION] so that they can cooperate jointly to take action to promote the Guidelines and to verify whether labour rights of employees and outsourced are being observed;

10. Carry out due diligence on mining activities, mainly in the dams, providing IBRAM [Brazilian Mining Institute] with evidences of due diligence agreement with trade unions to promote the Guidelines.¹

Recommended Steps:

1) The Working Party for Responsible Business Conduct is respectfully invited to direct drafting work be done to develop a tool to verify due diligence in resolving NCP Specific Instances. Our proposed enabling language for the WPRBC follows in Exhibit A.

2) The work could involve a collaborative process with advisory committees to agree on a simple form of evidence like the one appearing in Exhibit B, to be used to verify outcomes of a specific instance, consistent with the OECD Guidelines & Supply Chain Due Diligence doctrine.

3) Boilerplate language should also be developed that an NCP may incorporate in its follow up recommendations, establishing a preference for verified outcomes by signatures of the parties. (See Exhibit C)

4) The WPRBC and NCP Network is requested to consider at the earliest opportunity.

¹ Final Statement of the Brazil NCP in *Building and Wood Workers' International, IndustriALL Global Union, Labor Union of Heavy Construction Industries of the State of Minas Gerais (SITICOP) and National Confederation of the Chemical Sector (CNQ/CUT) v. Vale S.A. and BHP*. 1 November 2019.

EXHIBIT A: Suggested Due Diligence Approach for NCPs

The OECD is committed to policies that improve the economic and social well-being of people around the world. That interest is served by ensuring due diligence for responsible business conduct by Multinational Enterprises doing business in OECD member and adherent states. An effective way to ensure due diligence is leading to positive impacts could involve having a process to easily verify processes and outcomes in collaboration between multinational enterprises, workers, worker representatives or their chosen trade unions.

In addition, positive social contributions are maximised when economic wellbeing and productivity are underpinned through collaborative efforts consistent with Sustainable Development Goal 17, inasmuch as collaboration contributes to a social peace, avoiding disagreements that may otherwise interfere with sustainable business activities and raise the possibility for negative impacts on workers and their communities.

To achieve the desired objective of promoting positive contributions made by MNEs and minimize negative social impacts, it is recommended that a procedural device be established to enable OECD National Contact Point to request from an MNE evidence of having a Due Diligence Validation Agreement that establishes an inclusive and collaborative approach to due diligence with recognized worker representatives or trade union representatives.

EXHIBIT B – Example of Form of Evidence of OECD Guidelines & Due Diligence

XYZ Enterprise (the “MNE”) has complied with recommendations made by the _____ National Contact Point for the OECD (“NCP”), requesting the MNE provide evidence of adherence to the OECD Guidelines for Multinational Enterprises, in which MNE performs due diligence on environmental and social impacts directly related to the MNE operations or indirectly linked to its supply chain. This NCP request can be validated by an agreement between the MNE and worker representatives or workers’ chosen trade union, that contains provisions under which the partners agree to implement an action plan and validate progress being achieved for one or more environmental and social impact(s).

FOR THE MNE:

FOR Workers/Worker
Representatives/Trade Union:

BY: _____

BY: _____

DATE: _____

DATE: _____

EXHIBIT C – Boilerplate language for NCP to use in follow-up recommendations

The NCP recommends MNE should verify due diligence is being carried out in support of the OECD Guidelines for Multinational Enterprises by providing the NCP with evidence that it has obtained a due diligence agreement with the recognized trade union or workers representative that promotes the Guidelines and mitigates negative environmental and social impacts.