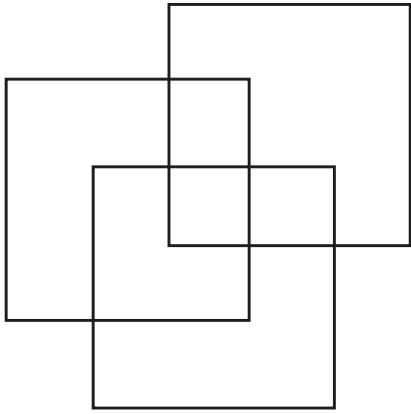




International
Labour
Organization

**SOCIAL DIALOGUE, COLLECTIVE BARGAINING
AND RESPONSIBLE BUSINESS CONDUCT:**

Promoting the strategic use of International Instruments for trade unions' action



Social dialogue, collective bargaining
and responsible business conduct:

Promoting the strategic use
of International Instruments
for trade unions' action

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Preface

Increasing production in global supply chains (GSCs) has transformed the world economy in the last three decades. GSCs have been an engine of growth and a significant driver of job creation, especially in the developing world. At the same time, questions have been raised as to whether participation in GSCs will continue to be a viable development strategy for inclusive growth and decent work in the future (Issue Brief 10, 2nd Meeting Global Commission FoW, 2018).

Recognizing the complex challenges linked with global supply chains for the promotion of Decent Work and inclusive and sustainable development, the Governing Body decided in 2016 (326th Session, March 2016) to review the text of the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (MNE Declaration) including its annex and addenda and the interpretation procedure.

In June 2016, the International Labour Conference debated at length the wide range of policies, strategies, actions and programmes that have been put in place by the Office, ILO constituents and other stakeholders to ensure that economic development and decent work in global supply chains, including respect for international labour standards, go hand in hand. All of these have been designed and implemented at the workplace, national, sectoral, regional and international levels. Despite this wide range of interventions, decent work deficits and governance gaps continue to exist in the areas of occupational health and safety, wages, and working time, and impact on the employment relationship and the protections it can offer. Such failures have also contributed to the undermining of labour rights, particularly freedom of association and collective bargaining. Informality, non-standard forms of employment and the use of intermediaries are common. The presence of child labour and forced labour in some lower segments of some global supply chains is really high. Migrant workers and homeworkers are found in many global supply chains and may face various forms of discrimination and limited or no legal protection. In many sectors, women represent a large share of the global supply chain workforce, disproportionately represented in low-wage jobs in the lower tiers; they are too often subject to discrimination, sexual harassment and other forms of workplace violence” (Decent Work in Global Supply Chains Conclusions, 105th ILC, 2016). The conclusions also stated that the review process of the MNE Declaration text and interpretation procedure decided by the Governing Body should consider the outcomes of the discussion of the International Labour Conference.” (para. 24) and that “Within the review process of the MNE Declaration, [the ILO] should consider the setting up of mechanisms to address disputes” (para. 23(e)).

Consistent with the conclusions, the Governing Body approved in November 2016 to develop a programme of action to address decent work in global supply chains through a comprehensive and coordinated framework with particular attention to the ILO Declaration of Philadelphia (1944), the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up (1998), the ILO Declaration on Social Justice for a Fair Globalization (2008), the Tripartite

Declaration of Principles concerning Multinational Enterprises and Social Policy, and all relevant international labour standards, including the conclusions concerning the promotion of sustainable enterprises (2007), the Future of Work Initiative, and the 2030 Agenda for Sustainable Development. (328th Session, INS/ 5/1, 27 Oct–10 Nov 2016). The decision also approved the organization of a tripartite Meeting of Experts in EPZ in 2017, a meeting on cross-border social dialogue in 2018, including human rights due diligence,¹ and in 2019, a meeting following a midterm report by the Office on para. 25 of the ILC conclusions (328th Session, INS/ 5/1, Decision on the fifth item on the agenda: Follow-up to the resolution concerning decent work in global supply chains).

Forty years after the adoption of the original MNE Declaration, in March 2017, the Governing Body revised the Declaration to respond to new economic realities, including increased international investment and trade, and the growth of global supply chains, and taking into account developments since the last update in 2006 within and outside the ILO, including new labour standards adopted by the International Labour Conference, the UN Guiding Principles on Business and Human Rights endorsed by the Human Rights Council in 2011, the revised OECD Guidelines for Multinational Enterprises (2011) and the 2030 Agenda for Sustainable Development. The revised MNE Declaration included a range of operational tools, including a regional follow-up mechanism, tripartite appointed national focal-points, company-union dialogue, and an interpretation procedure of the principles of the MNE Declaration. It is an instrument that provides direct guidance to enterprises on social policy and inclusive, responsible and sustainable workplace practices. Its principles are addressed to multinational and national enterprises, governments of home and host countries, and employers' and workers' organizations providing guidance in such areas as employment, training, conditions of work and life, industrial relations as well as general policies.

In November 2017, following the decision taken by the Governing Body on the follow up to the resolution concerning decent work in global supply chains, a Tripartite Meeting of Experts was organized to Promote Decent Work and Protection of Fundamental Principles and Rights at Work for Workers in Export Processing Zones (EPZs) in order to: a) discuss possible action to promote decent work and fundamental principles and rights at work for workers in export processing zones (EPZs); and b) adopt conclusions to provide guidance on the content and modalities for an action plan on EPZs as called for in the 2016 ILC conclusions. These conclusions build on the 1998 Declaration on Fundamental Principles and Rights at Work and its Follow-Up and on previous discussions regarding EPZs. The conclusions affirm the 1998 Tripartite Meeting of Experts of EPZ Operating Country² Conclusions: Priorities and guidelines for improving social and labour conditions in EPZs while recognizing the need to update them; and affirm the 2016 Conclusions concerning decent work in global supply chains of the International Labour Conference, which highlight the application of fundamental principles and rights at work and decent work to all territories, including EPZs, as well as the 2017 Conclusions concerning the strategic objective of fundamental principles and rights at work of the International Labour Conference (Tripartite Meeting of Experts to Promote Decent Work and Protection of Fundamental Principles and Rights at Work for Workers in Export Processing Zones (EPZs), Conclusions p.2, 21-23 November 2017).

¹ As called for in the 2013 International Labour Conference conclusions on the recurrent discussion on social dialogue, to address decent work in global supply chain issues. This proposal was included in the conclusions concerning the second recurrent discussion on social dialogue and tripartism in the 107th ILC, 2018.

² <https://www.ilo.org/public/english/standards/relm/gb/docs/gb271/gb-19.htm#Tripartite>

In June 2018, the International Labour Conference debated the report of the Recurrent Discussion Committee: Social dialogue and tripartism, which found that while global supply chains can be an engine of development and increase opportunities for men and women to transition to formality, failures within global supply chains have contributed to decent work deficits. Rapid changes, including technological advances and the green economy, may create new opportunities, but may also lead to disruption and job displacement. Social dialogue is indispensable for addressing these challenges. In this regard, action must be taken to provide an enabling environment for and promote, where appropriate, cross-border social dialogue to foster decent work, including for vulnerable groups of workers in global supply chains (Resolution concerning the second recurrent discussion on social dialogue and tripartism, 107th Session, 2018).

In February 2019 the Meeting of experts on cross-border social dialogue analysed contemporary experiences, challenges and trends characterizing cross-border social dialogue initiatives, developed between or among governments, workers and employers or their representatives beyond national borders, to promote fair globalization, decent work and sound labour-management relations in supply chains. The conclusions adopted underline that the Cross-border social dialogue, including among actors in supply chains, contributes to the effective implementation of many international instruments such as the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (MNE Declaration), the UN Guiding Principles on Business and Human Rights (UNGP BHR) and the OECD Guidelines for Multinational Enterprises (OECD GL). The MNE Declaration, which is consistent with the UNGPs, emphasizes that all enterprises should carry out human right's due diligence with meaningful consultation of relevant stakeholders including workers' organizations (Meeting of experts on cross-border social dialogue Geneva, 12-15 February 2019, Conclusions).

In June 2019, the International Labour Conference approved the Centenary Declaration for the Future of Work that declares "A. In discharging its constitutional mandate, taking into account the profound transformations in the world of work, and further developing its human-centred approach to the future of work, the ILO must direct its efforts to" (...) "(xii) ensuring that diverse forms of work arrangements, production and business models, including in domestic and global supply chains, leverage opportunities for social and economic progress, provide for decent work and are conducive to full, productive and freely chosen employment", among other key actions.

Finally, for 2020 a third meeting of experts on took place ILO Standards has been proposed to achieve decent work in GSC (Resolution ILC 2016, para. 25) and should take into account the main conclusions of the ILO Centenary Declaration for the Future of Work but unfortunately this meeting did not reached agreed conclusions.

The aim of this report is to map and analyse the various International Instruments to promote social dialogue, collective bargaining and responsible business conduct to address the main challenges raised by the ILO Resolution concerning Decent Work in Global Supply Chains (2016), including the Global Framework Agreement. In this regard, the ILO Centenary Declaration declares that "On the basis of its constitutional mandate, the ILO must take an important role in the multilateral system, by reinforcing its cooperation and developing institutional arrangements with other organizations to promote policy coherence in pursuit of its human-centred approach to the future of work, recognizing the strong, complex and crucial links between social, trade, financial, economic and environmental policies."(Chapter IV, F)

The first contribution was the ILO MNE Declaration: what's in it for workers? (ACTRAV, 2017). Now we have this second contribution for the debate and follow up of the key decisions adopted by the Governing Body to achieve decent work in GSC and EPZ and for the future discussions after the ILO Centenary Conference.

This is work in progress and the base to develop a Workers Guide on the strategic use of International Instruments for trade unions' action.

I would like to thank Fabrice Warnick who wrote this paper and ACTRAV's colleagues, in particular Victor Hugo Ricco and Hilda Sanchez, who provided input and edition.

María Helena André
ACTRAV director

Abbreviations

ACTRAV	Bureau for workers' activities
ACT/EMP	Bureau for employers' activities
BIAC	Business and Industry Advisory Committee to the OECD
BWI	Building and Wood Workers' International
CFDT	Confédération française démocratique du travail
CGT	Confédération générale du travail
CSR	Corporate social responsibility
CFECCG	Confédération française de l'encadrement - Confédération Générale des cadres
EC	European Commission
ECOWAS	Economic Community of West African States
EPZ	Export processing zone
ETI	Ethical Trading Initiative
ETUC	European Trade Union Confederation
EU	European Union
EUROFOUND	European Foundation for the Improvement of Living and Working Conditions
EWC	European Works Council
FDI	Foreign direct investment
FO	Force Ouvrière
FSU	Fédération syndicale unitaire
GFA	Global Framework Agreement
GRI	Global Reporting Initiative
GSC	Global supply chain
GUFs	Global Union federations
GWC	Global Works Council
IFA	International framework agreement
IFJ	International Federation of Journalists
ILC	International Labour Conference
ILO	International Labour Organization/International Labour Office
ILO 1998 Declaration	ILO Declaration on Fundamental Principles and Rights at Work
IMEC	International Maritime Employers' Council
IOE	International Organisation of Employers

ISO	International Organization for Standardization
ITF	International Transport Workers' Federation
ITUC	International Trade Union Confederation
IUF	International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers' Associations
MNE	Multinational enterprise
MNE Declaration	ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy
MSI	Multi-stakeholder initiative
NAFTA	North American Free Trade Agreement
NAPs	National action plans
NCP	National contact point
NGO	Non-governmental organization
OAS	Organization of American States
OECD	Organization for Economic Co-operation and Development
OECD Guidelines	OECD Guidelines for Multinational Enterprises
OEIGWG	Open-ended intergovernmental working group
OHCHR	Office of the United Nations High Commissioner for Human Rights
OSH	Occupational safety and health
PCI	Private compliance initiative
RBC	Responsible Business Conduct
SADC	Southern African Development Community
SDGs	Sustainable Development Goals
SNTPT	Syndicat National des Travailleurs des Postes et Télécom
TCAs	Transnational company agreements
TUAC	Trade Union Advisory Committee to the OECD
UKMSA	United Kingdom Modern Slavery Act
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UNGC	United Nations Global Compact
UNGP BHR	UN Guiding Principles on Business and Human Rights
UNI	Union Network International
UNSA	Union Nationale des Syndicats Autonomes
WTO	World Trade Organization

Executive summary

The means of action of trade union organizations have recently been strengthened through several international instruments promoting Social Dialogue, Collective Bargaining and Responsible Business Conduct (RBC). The 2017 revision of the ILO Tripartite Declaration of Principles on Multinational Enterprises and Social Policy (MNE Declaration) is an important advancement as well. The adoption of the UN Guiding Principles on Business and Human Rights (UNGPHR) and the revision of the OECD Guidelines for multinational enterprises (OECD GL) in 2011 are another relevant advancement in this regard. The ILO instrument sets up operational tools, including the so-called “company-union dialogue” and OECD GL have a concrete mediation mechanism called “National Contact Point”. They provide mechanisms for social dialogue and complaints that are described in this toolkit. Other mechanisms exist, not necessarily at company level, that can facilitate the influence of governmental institutions and policies by unions.

Thanks to the fundamental contribution of UNGP BHR, these two instruments – the MNE Declaration and the OECD GL - , reinforce the concept of “due diligence” which is a process of implementation of the UN Framework “Protect, Respect and Remedy” in order to anticipate, mitigate and/or remedy negative impacts on human rights, including those related to work at the level of the enterprise. The “due diligence” has the potential to place workers’ representatives and trade union organizations at the centre of the implementation of enterprise-level anticipation, monitoring and implementation processes. Management should now involve not only the representatives of the workers of the enterprise but also those of the global supply chain, which constitutes an important asset of cohesion between them to limit social dumping and reinforce solidarity.

The three international instruments establish a solid and coherent basis for unions to access social dialogue, influence the government to take the necessary measures promoting RBC and, where necessary, tackle the problem by attacking the image and reputation of an enterprise adopting irresponsible conduct.

These international instruments are a stepping stone for regulatory innovation. New legislation is gradually being introduced in several countries. This is the case of the new French legislation which requires the adoption of vigilance plans and has an extraterritorial dimension; it can thus benefit unions from other countries, including those of subcontracting enterprises.

At the same time, the Global International Framework Agreements or multi-stakeholder initiatives like the Bangladesh Accord developed by the global union federations and their affiliates reinforce social dialogue and respect for the fundamental rights of workers through close-to-the-field monitoring and consultation mechanisms. These agreements usually make reference to the international instruments of the ILO, UN and OECD as regards fundamental workers’ rights.

Besides these international instruments, in order to promote RBC, there are also other means for state-based judicial and non-judicial action and non-state grievance mechanisms. Without giving up the usual means of action such as industrial action, (i.e. striking), media campaigns or even lobbying in some countries, other tools are available to trade union organizations, to adapt the strategy facing a MNE on a case by case basis.

These three categories are interconnectable under certain conditions. Each of them has positive and negative sides to be taken into consideration when a trade union strategy is being planned.

On the basis of the identification of given criteria that cover realistic challenges like time, cost and outcomes, several strategies are proposed to enhance creative and agile trade union action and dispute-solving solutions; they can be progressive or sudden, and their internationalization is often a guarantee of strength and success.

In order for each of these tools to be as effective as possible in the hands of the workers and their unions, it is essential to find ways to generate more synergy between them.

A. Responsible Business
Conduct: ILO, UN and OECD
International Instruments

Although enterprises' operations and business relationships have a large influence on people's life and on development, they are not subjects of international law as States are. This paradox could not be solved by the "Corporate Social Responsibility" concept. A number of companies unfortunately continue to attempt to promote themselves through communication policies aimed at achieving a positive multiplier effect for their few good deeds. To avoid this type of situation in the future and to promote effective respect for internationally recognized human rights, including Fundamental Principles and Rights at Work, certain concepts such as "responsibility" and "due diligence" are now better defined, and certain mechanisms have been set up and recently reviewed, including the ILO MNE Declaration, the OECD GL and the UNGP BHR. These instruments offer various means for trade unions to improve their action in favour of workers' rights protection.

This working paper aims at identifying the conditions, pros and cons and links between the concepts and mechanisms to support trade unions in building efficient strategies encompassing social dialogue and/or complaint mechanism to promote responsible business conduct.

WHAT IS RESPONSIBLE BUSINESS CONDUCT?

Responsible Business Conduct refers to:³

1. Conduct that respects human rights, ranging from applicable local laws to internationally recognized human rights. Business enterprises must respect human rights. This means that they should avoid infringing on the human rights of others and should address any adverse impact on human rights with which they are involved.

When a country does not respect these standards, an enterprise should not seek to benefit from this situation but should instead act in line with the standards. It should respect human rights in all situations, not only when the State fails to comply or monitor compliance.

2. A broad concept, reflecting that the enterprise can be financially successful while respecting internationally recognized human rights, and focusing on two aspects of the business-society relationship:
 - a. doing business does not preclude enterprises making a positive contribution to sustainable development and inclusive growth, and
 - b. avoiding negative impacts and addressing them when they occur; due diligence is at the heart of this process.

Responsible Business Conduct consists of corporate behaviour that goes beyond merely abiding by the law, and positively contributes to the protection of human rights and sustainable development by operationally implementing processes of prevention and remediation.

³ See UNGP BHR, Principle 11 and Commentary.

TO WHAT EXTENT CAN AN ENTREPRISE BE HELD “RESPONSIBLE” FOR ITS OPERATIONS?

Current mechanisms for seeking accountability from a multinational enterprise or sanctioning it, focus on its failure to comply with an internationally recognized standard, (potentially) impacting negatively on individuals, collectives groups, communities and/or the environment.

Additionally, trade unions and society can use these mechanisms to effectively expose a lack of action towards the sustainable development of a host country, such as a lack of technology transfer or not training local workers to strengthen the local economy. With reference to sustainable development, other routes are also possible, including best practices and civil or social dialogue.

HOW CAN TRADE UNIONS ASSESS THE RESPONSIBILITY OF ENTREPRISES REGARDING THEIR IMPACT ON FUNDAMENTAL PRINCIPLES AND RIGHTS AT WORK (FPRW) AND SUSTAINABLE DEVELOPMENT?

THE TYPE OF ACTION REQUIRED FROM AN ENTREPRISE TO ADDRESS A SPECIFIC ADVERSE IMPACT DEPENDS ON THE ENTREPRISE'S LINK AND RELATION TO THE IMPACT.

Enterprises may cause or contribute to adverse human rights impacts through their own activities (operations, products or services) or may be directly linked to these impacts through their business relationships (a supplier, a business partner, etc.) even if they have not intended to contribute to or cause them. The ILO MNE DECLARATION (Annex 1) includes a list with the main international labour standards linked with the employment, training, conditions of work and life, industrial relations as well as general policies.

Adverse impact is registered when an enterprise should avoid infringing on the human rights of others, including workers.⁴

⁴ There are many U.N. references to instruments but more specifically for workers, the ILO Declaration on Fundamental Principles and Rights at Work (1998) is the instrument of reference although other can also be taken into consideration.

Box 1: Examples of adverse impacts to workers' human rights:⁵

Right to information

- Failing to disclose material information on the financial and operating results of the enterprise; enterprise objectives, major share ownership and voting rights, remuneration policy for members of the board and key executives, and information about board members, related party transactions, foreseeable risk factors, issues regarding workers and other relevant stakeholders, governance structures and policies.

Failing to provide the public and workers with adequate, measurable, verifiable (where applicable) and timely information on the potential environment health and safety impacts of the activities of the enterprise.

Human Rights

- Forced labour
- Wage discrimination (equal pay for equal work value)
- Gender-based violence or harassment including sexual harassment
- Failing to identify and appropriately engage with indigenous peoples where they are present and potentially impacted by the enterprise's activities
- Involvement in reprisals against human rights defenders document, speak out about, or otherwise raise potential and actual human rights impacts associated with projects

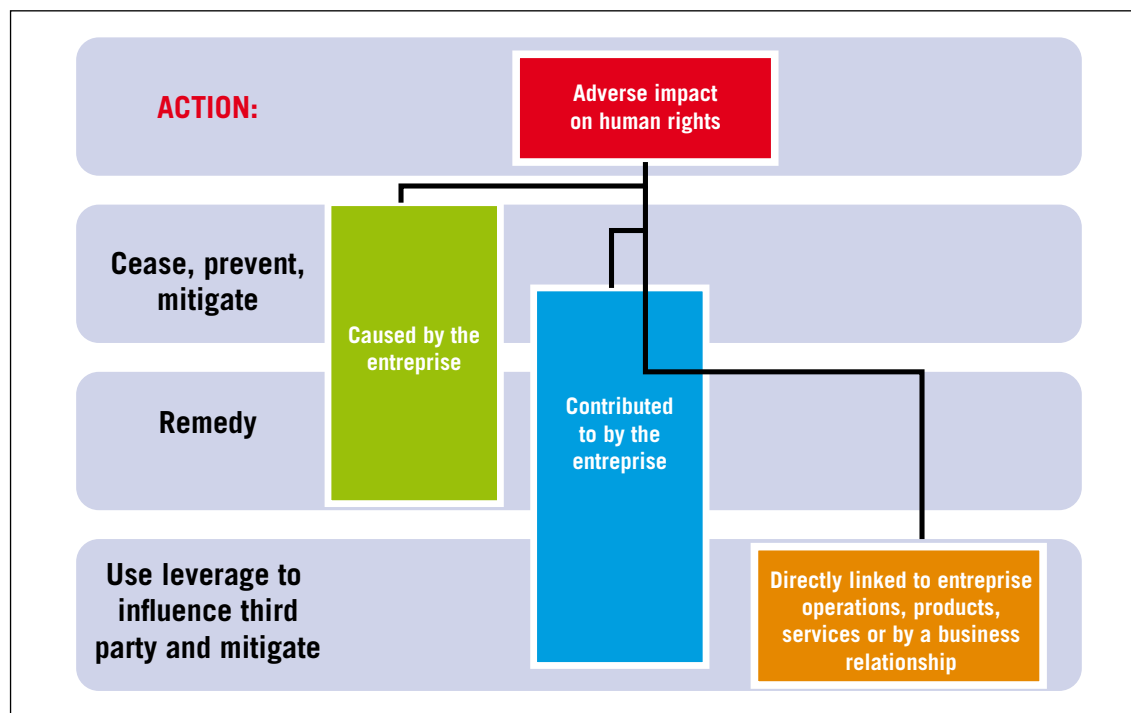
Employment and Industrial Relations

- Failing to respect the right of workers to establish or join workers organizations of their own choosing and have trade unions of their own choosing recognized for the purpose of collective bargaining
- Failing to engage in constructive negotiations, either individually or through employers' associations, with such representatives with a view to reaching agreements on terms and conditions of employment.
- Child labour, including the worst forms of child labour.
- Discrimination against workers with respect to employment or occupation on such grounds as race, colour, sex, religion, political opinion, national extraction or social origin, or other status.
- Failing to adapt machinery, equipment, working time, organization of work and work processes to the physical and mental capacities of workers.
- Failing to replace hazardous substances by harmless or less hazardous substances wherever possible
- Payment of wages that do not meet the basic needs of workers and their families.
- Threatening to transfer the whole or part of an operation unit in order to hinder workers from forming or joining a trade union.

Enterprises are expected to cease, prevent, remedy, and mitigate adverse impacts on human rights according to their specificities and adapted to each situation (Box 2).

⁵ These are some examples provided by the OECD Due Diligence Guidance for Responsible Business Conduct, 2018.

Figure 1. Potential areas to cease, prevent, remedy and mitigate impacts on human rights

**Three different scenarios may occur:**

Enterprises causing an adverse impact: an enterprise *causes* an adverse impact when it is the main perpetrator of the violation (i.e. it is directly responsible for it) through its own actions or omissions. The enterprise can be expected to stop, prevent, mitigate and remedy the adverse impact it has caused or could potentially cause. E.g.: An enterprise's subsidiary management is carrying out "union busting" activities. The central Management should order the immediate stop of these unlawful activities.

Enterprises contributing to an adverse impact: an enterprise *contributes* to an adverse impact when its actions or omissions substantially⁶ enable, encourage, exacerbate or facilitate a third party to create a negative impact. An enterprise may contribute to an adverse impact together with a business partner (for example, in a joint venture) or via a business relationship in its supply chain. In this scenario, an enterprise is expected to stop, prevent and remedy the adverse impact it has contributed to or risks it may contribute to in the future. Additionally, the enterprise should use its leverage to change the practices of the business partner in question to mitigate or prevent their adverse impact. E.g.: an enterprise supplier using unlawful means to break a strike as a consequence of the main buyer enterprise abusing its economic dominant position by requesting it to maintain its provision of services at any cost.

Enterprises directly linked with an adverse impact: while an enterprise may not be causing or contributing to an adverse impact itself, it may still be directly linked with a negative impact caused or contributed by a business partner through its operations, products or services. In this case, the enterprise is expected to use its leverage to change the practices of the business partner in

⁶ "Responsible Business Conduct matters", OECD, 2014.

question, getting it to stop, mitigate and/or prevent the adverse impact. Should this leverage be too limited, the enterprise should take the necessary steps to increase it. E.g.: An enterprise supplier using forced labour. The purchaser enterprise should ask its supplier to stop this unlawful practice and may threaten it by imposing fines or terminating the business relationship.

Box 2 To know more

In 2000, the Global Compact introduced the term of “sphere of influence” to describe the leverage of enterprises within their business environment: supply chain, marketplace, communities, etc.

This concept was also utilized by the ISO 26000 standard until it was replaced to a large extent by the more objective notion of “**impact**”.

The notion better directs the responsibility of the enterprises in an impact-based approach. It is both preventive and provides redress when negative impact occurs.

The objective of this classification is to identify the responsibility of each business partner in order to differentiate the respective actions expected from them. In some cases, however, these three scenarios may overlap.⁷ This may occur for instance when one economic player takes advantage of a dominant position over the supply chain or a specific market.

In order to prevent these three potential scenarios, enterprises should identify and assess any actual or potential adverse human rights impacts with which they may be involved either through their own activities or as a result of their business relationships. This process, called “**due diligence**” involves meaningful consultation with potentially affected groups and other relevant stakeholders including workers’ organizations, as appropriate to the size of the enterprise and the nature and context of the operation.

Box 3: UN Global Compact, Global Reporting Initiative and ISO 26000

Several multi-stakeholders initiatives will not be covered by this report because they are not legal standards. UN Global Compact, Global Reporting Initiative and ISO 26000, for instance, constitute key tools for multinational enterprises and they are often used as a benchmark when management drafts the enterprise’s sustainability reports. For the business world, they have the advantage of being internationally recognized, while having no grievance mechanisms in case of breaches.

Nevertheless, enterprises publicly endeavor to follow them, as they constitute important elements in the process of assessing the responsibility of businesses for the impact their operations have on human and labour rights. With an enterprise’s image and reputation constituting major assets, any deterioration of these may lead to significant financial losses.

The ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (MNE Declaration), the UN Guiding Principles on Business and Human Rights (UNGPs BHR) and the OECD Guidelines for multinational enterprises (OECD GL) are three major international instruments that provide workers with concrete tools to promote responsible business conduct and protect workers’ rights. The boxes below provide a summary of their main characteristics, highlighting their commonalities and differences.

⁷ “How to use the UN Guiding Principles on Business and Human Rights in company research and advocacy”, SOMO/ CEDHA/ Civedip India, 2012.

Box 4 The ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (MNE Declaration)

The document, adopted in 1977 by the ILO governing body, has been amended several times. The last update was in March 2017.

Elaborated and adopted by governments, employers and workers from around the world, the MNE Declaration is the only ILO instrument that directly addresses enterprises.

PROFILE AND NEW ELEMENTS:

The latest version: the MNE Declaration, has incorporated the UNGP BHR (2011, see below), the 2030 Agenda for Sustainable Development and the Paris Agreement (2015) as well as the OECD Guidelines for Multinational Enterprises (see below).

AIM:

The MNE Declaration encourages enterprises to:

- “contribute to economic and social progress and to the decent work for all agenda”: enterprises, including non-domestic ones, should contribute to national development efforts.
- “minimize and resolve the difficulties to which their various operations may give rise”: enterprises should be proactive, adopting effective measures to minimize the impact of their operations.”

SCOPE:

Multinational and national enterprises, governments (host and home country) and social partners. The scope is now extended to the Global Supply Chain and to labour administration / inspection.

TOPICS COVERED:

- **Employment:** the promotion of employment, employment and social security as well as equality; the fight against forced labour and child labour.
- **Training:** promote career opportunities and lifelong learning; support for state policies.
- **Working and living conditions:** wages, benefits and working conditions, occupational health and safety
- **Industrial relations:** freedom of association and the right to organize, collective bargaining, consultation, access to remedy and examination of grievances, settlement of industrial disputes.

TYPE OF INSTRUMENT:

Guidelines and recommendations to be observed on a voluntary basis. They cannot be used to minimize the effect of ratified ILO Conventions. They reflect “good practice for all”.

LINKS TO OTHER STANDARDS:

Following the MNE Declaration involves complying with the Universal Declaration of Human Rights (1948), the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights (1966), the ILO Constitution and principles, and the ILO Declaration on Fundamental Principles and Rights at Work (1998). Specific emphasis is put on the UNGP BHR of 2011 (see below).

Enterprise behaviour should be consistent with national law and in “harmony” with development priorities / social aims / structure of the host country.

Both host and home country governments should promote “good social practice” and cooperate with each other. Importantly, governments should promote the good practice approach toward enterprises operating abroad, “having regard to the social and labour law, regulations and practices in host countries” as well as to applicable international standards.

Box 5: The OECD Guidelines for Multinational Enterprises (OECD Guidelines)

Recommendations on responsible business conduct addressed by governments to multinational enterprises operating in or from both member and adhering countries (48 in total, a number of countries adhere to the guidelines without being an OECD full member). Since their adoption in 1976, the OECD Guidelines have been subject to periodic update and review, most recently in 2011.

AIM:

To promote positive contributions by enterprises to economic, environmental and social progress worldwide and minimize the difficulties to which their various operations may give rise.

The Guidelines reflect the “shared values” of the governments of countries from which a large share of international direct investment originates and which are home to many of the largest multinational enterprises. They are a “point of reference” for enterprises (and stakeholders) and thus “complement and reinforce private efforts to define and implement responsible business conduct.”

SCOPE:

Multinational enterprises (not domestic only ones) with regard to their operations inside or outside their home country. The Guidelines address both an enterprise’s headquarters and its local entities which are expected to cooperate with each other.

TOPICS COVERED:

- **Disclosure:** enterprises should be transparent as regards their operations, and responsive to public demands for information.
- **Human rights:** The Guidelines propose following the UN Framework “Protect, Respect and Remedy” and Guiding Principles on Business and Human Rights
- **Employment and industrial relations:** the guidelines promote a series of labour rights in line with the ILO Conventions; the Guidelines can be understood in the sense of the ILO MNE Declaration that is “of a greater degree of elaboration”
- **Environment:** as with the previous point, enterprises should adopt proactive measures to prevent negative effects and contribute to sustainable development, workers’ health and safety and public health.
- **Combatting bribery, bribe solicitations and extortion:** enterprises should not give or demand a bribe or undue advantage. They should resist demands for bribes and acts of extortion.
- **Consumer interests:** information provided to consumers and the quality of goods and services should comply with fair business practices.
- **Science and technology:** promote technology transfer to develop local capabilities and the skill development of local staff.
- **Competition:** avoid anti-competitive behaviours and cooperate with investigating authorities.
- **Taxation:** Enterprises should adopt timely behaviour as regards the payment of tax and the disclosure of information to tax authorities.

Note: The Preface to the Guidelines defining their aims and government obligations have the same legal status as the guidelines themselves. The Commentaries to the Guidelines, however, are not part of the OECD Declaration on International Investment and Multinational Enterprises and OECD Guidelines and therefore do not enjoy the same legal status. They can support interpretation, but do not constitute a basis for complaints.

Box 5: The OECD Guidelines for Multinational Enterprises (OECD Guidelines) (continue)**TYPE OF INSTRUMENT:**

On the one hand, the Guidelines consist of voluntary principles for multinational enterprises, in line with national laws and internationally recognized standards. They consist of principles and standards of good practice. On the other hand, the guidelines are binding for the countries adhering to them in the sense that they shall implement and promote them. This duty consists primarily of setting up “National Contact Points”

responsible for receiving grievances and resolving issues raised. NCPs are obliged to provide a platform for discussion and assistance to stakeholders to help find a resolution for issues arising from the alleged non-observance of the Guidelines. NCPs must do so in a manner that is impartial, predictable, equitable, and compatible with the principles and standards of the Guidelines. Specific instances are not legal cases and NCPs are not judicial bodies. NCPs focus on problem solving - they offer good offices and facilitate access to consensual and non-adversarial procedures (e.g. conciliation or mediation).

LINKS TO OTHER INSTRUMENTS:

The Guidelines, as a non-binding instrument, have a role to play in promoting observance of ILO standards and principles as recognized in its 1998 Declaration on Fundamental Principles and Rights at Work among multinational enterprises.

LIMITS:

Even though the guidelines recognize the leading role of the MNE Declaration as an instrument of reference for employment, training, working conditions and industrial relations, “the responsibilities for the follow up procedures under the ILO MNE Declaration and the OECD guidelines are institutionally separate”.

Box 6: The UN Guiding Principles on Business and Human Rights (UNGPs BHR)

In 2008, UN SG Special Representative John Ruggie presented a framework “Protect, Respect and Remedy” to the UN Human Rights Council. This framework rests on three pillars:

- The state primary role and duty to “protect” against human rights abuses by third parties, including business, through appropriate policies, regulation and adjudication: many states have legal and policy inconsistencies. In most cases, states do not take sufficient measures to ensure law enforcement.
- The corporate responsibility to “respect” human rights, which means to act with due diligence to avoid infringing on the rights of others and to address any adverse impacts that may occur: “responsibility” is not a duty although it is defined as an “expected conduct” affirmed by the UN Human Rights Council itself. This responsibility goes beyond an enterprise’s internal organization, applying to any external relationship such as business partners, the value chain and communities. Enterprises should take the necessary steps to assess, prevent and address potential or actual adverse human rights impacts.
- Greater access by victims to “effective” remedy, both judicial and non-judicial. Victims of enterprise activities must be able to seek redress. States must take appropriate steps to ensure access to judicial and non-judicial mechanisms.

Box 6: The UN Guiding Principles on Business and Human Rights (UN BHR) *(continue)*

The Human Rights Council unanimously welcomed what is now referred to as the UN Framework and extended the Special Representative's mandate until 2011 with the task of “operationalizing” and “promoting” the framework. This operationalization is provided by the UN Guiding Principles on Business and Human Rights (UNGP BHR) endorsed by the Council in its resolution 17/4 of 16 June 2011.

SCOPE:

The UNGP BHR apply to a) all states, and b) all businesses whether international or local, whatever their size, location, sector, ownership or structure.

TYPE OF INSTRUMENT:

The Guiding Principles are guidelines, enhancing internationally recognized human rights and practices with regard to human rights respect and aimed at achieving tangible results.

TOPICS COVERED:

Human rights that are or may be adversely impacted by business operations. These include as a minimum the International Bill of Human Rights and the ILO Fundamental Principles and Rights at Work (1998).

LINKS TO OTHER STANDARDS:

The Guiding Principles facilitate the deployment of the UN Framework “Protect, Respect and Remedy”. The UN Framework’s minimum legal references are the Universal Declaration of Human Rights (1948), the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights (1966) and the principles concerning fundamental rights set out in the ILO Declaration on Fundamental Principles and Rights at Work.

LIMITS:

While not creating new international legal obligations, they shall however not be used to water down international law or a legal obligation a State may have adopted.

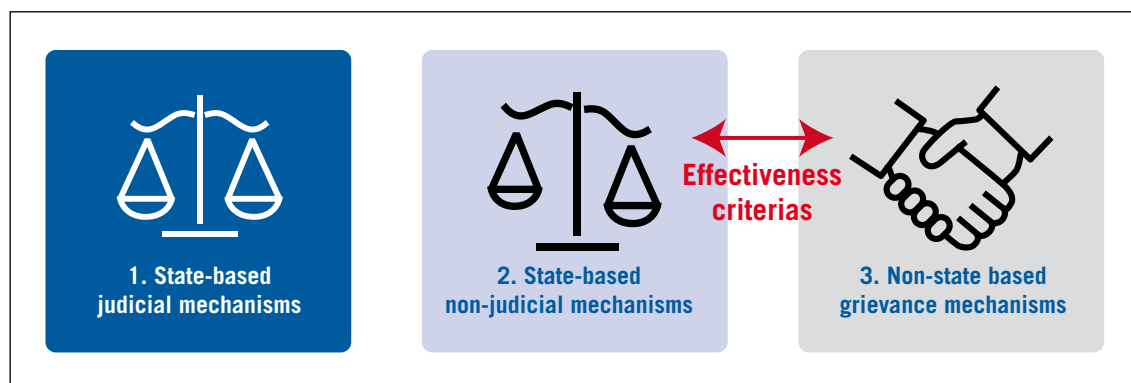
This instrument does not provide victims with a complaint mechanism.

B. The mechanisms to raise complaints: What is in it for trade unions?

In cases where enterprises are involved in human rights abuses, victims have sometimes difficulty gaining access to remedy for practical and legal reasons.

There are three complementary mechanisms: One is the (state-based) judicial system while the other two are state-based and private non-judicial mechanisms.

Figure 2. Three complementary mechanisms



I. State-based judicial systems:

a) Is your country's judicial system fit to address business-related abuses?

The following diagram shows a “stretch test” for the judicial system that can be used by trade union organizations to analyse whether their respective country's judicial system provides sufficient guarantees for the protection of human and workers' rights, by national or multinational enterprises.

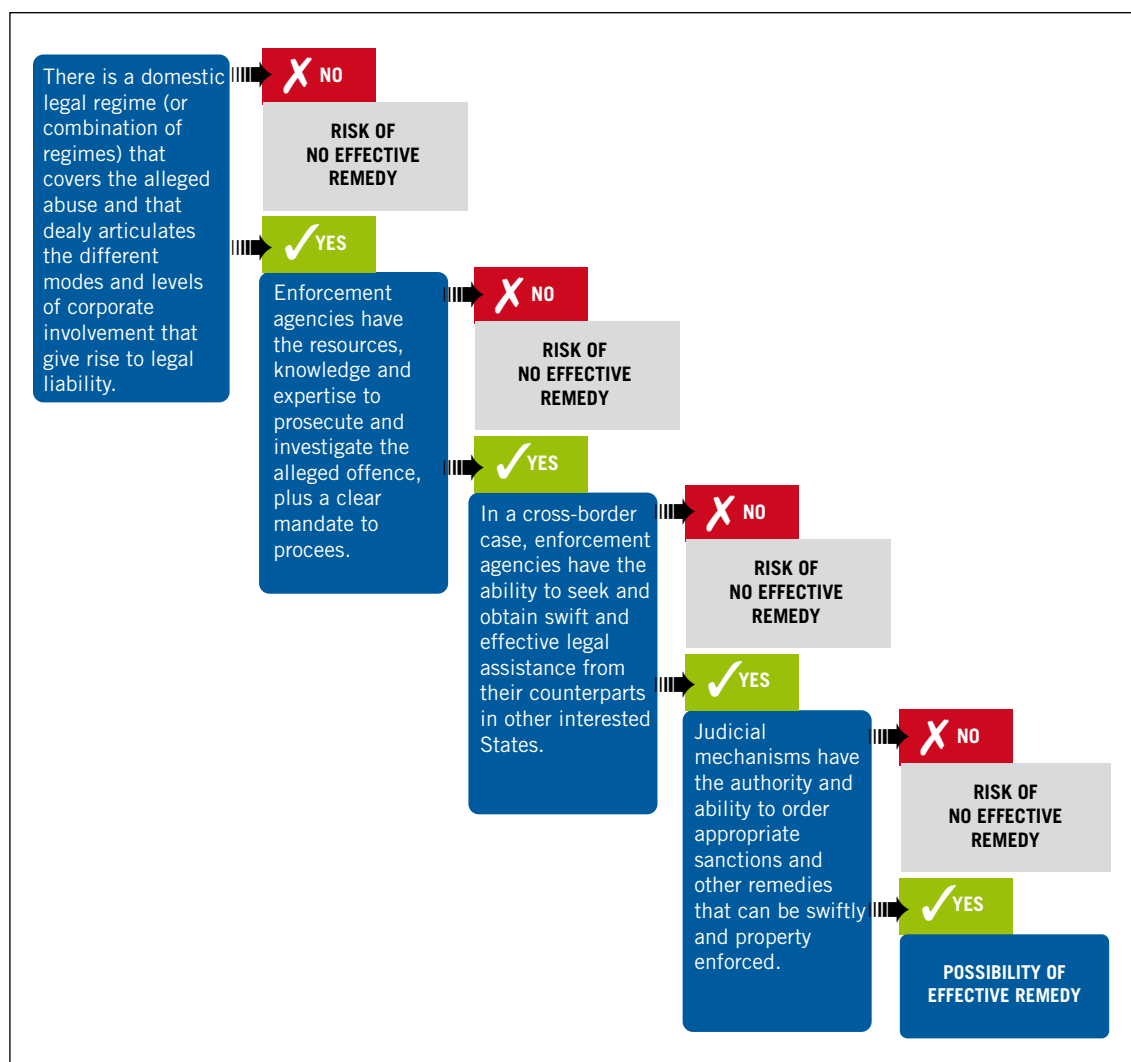
b) How can trade unions assess and seek improvement of state based justice?

There are several paths for States to improve their judicial system. The OHCHR⁸ “**guidance to improve corporate accountability and access to judicial remedy for business- related**

human rights abuse” (the guidance), sets out a list of practical steps for States and trade unions to consider, arranged by themes (“policy objectives”) relating to both procedural and substantive aspects of access to remedy. The policy objectives were developed through **inclusive multi-stakeholder** processes and were designed to take into account different legal systems, cultures, traditions and levels of economic development.

⁸ “Improving accountability and access to remedy for victims of business-related human rights abuse”, OHCHR, May 2016. See: https://www.ohchr.org/_layouts/15/WopiFrame.aspx?sourcedoc=/Documents/Issues/Business/DomesticLawRemedies/A_HRC_32_19_AEV.pdf&action=default&DefaultItemOpen=1

Figure 3. A “stretch” for judicial systems



As part of their implementation of the “Access to remedy” pillar of the UNGP BHR, Member States should consider undertaking a review of the coverage and effectiveness of their domestic law regimes that regulate the respect by business enterprises of human rights, using the guidance as a starting point, with a view to:

- developing policies and legal reforms that respond more effectively to the practicalities of organization and management of business enterprises and which take into account the particular challenges arising from complex global supply chains
- improving the effectiveness of state-based judicial mechanisms as a means of delivering corporate accountability and remedy in cases of business-related human rights abuses;

Moreover, States should take steps to improve the effectiveness of cross-border cooperation between State agencies and judicial bodies, with respect to both public and private law enforcement of domestic legal regimes.

National action plans on business and human rights can support the guidance by States.

The guidance is addressed primarily to State agencies and judicial bodies concerned with the development, administration and enforcement of domestic legal regimes that regulate the respect by business enterprises of human rights, including ILO fundamental rights.

However, **the guidance may also be drawn upon by trade unions.** The guidance lists 19 policy objectives, several which have direct or indirect relevance for trade unions as shown in the examples that follow:

- Policy objective 3: the principles for assessing corporate liability under domestic public law regimes (i.e. criminal law) should be properly aligned with the responsibility of enterprises to exercise human rights due diligence across their operations.
- Policy objective 11.3 (under “sanctions and remedies”): to the extent possible, victims are appropriately consulted with respect to the design and implementation of sanctions and remedies.
- Policy objective 4.4 (under “Responsible state agencies): Enforcement agencies ensure policy coherence between (a) policies and procedures that set performance targets for their personnel; (b) financial and other performance incentives for such personnel; and (c) policies relating to the use of enforcement discretion (the decision of the enforcement agency to investigate or not).
- Policy objectives 11.4 and 19.4 (non-implementation of remedies): judicial bodies and/or State agencies ensure that there is an effective mechanism by which interested persons can report and/or raise a complaint and/or seek remedial action with respect to any non-implementation of such remedies.

Box 7 Pros and cons of the state-based judicial mechanisms

PROS	CONS
• The simple threat by workers and their representatives of going to Court is lawful and can sometimes solve issues without initiating the procedure • Enforceability of Court decisions • Appeal is possible • Possibility for trade unions to build upon a positive outcome (mediatisation, jurisprudence, etc.)	• Length of the process • Cost of the counsel and sometimes of the process too • Uncertainty regarding the outcome • Domestic matters only, lack of extraterritoriality • Case law can be counterproductive when it restricts the interpretation of workers' rights

II. State-based non-judicial mechanisms

a) Can trade unions take legal action without going through a long and costly judicial system?

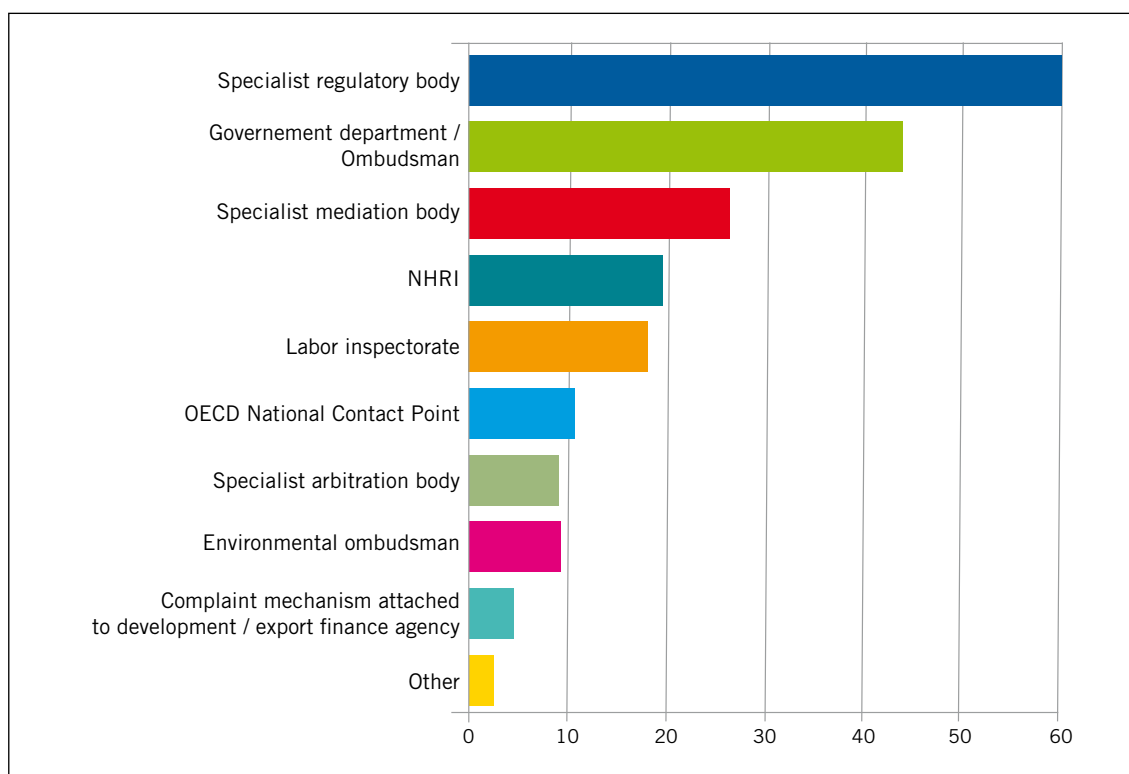
State-based non-judicial mechanisms take the form of labour inspectorates, mechanisms for resolving environmental disputes, consumer protection bodies, national human rights institutions, government ombudsman services and complaint mechanisms established under special-purpose or sector-specific regulatory regimes (e.g.: public health and safety or OECD National Contact Points). The diagram below shows that there are 200 bodies around the world.

The OHCHR has a mandate from the Human's Rights Council to investigate the status of non-judicial mechanisms and shall deliver a report to the HRC.

The information already available from research shows that States do not currently offer enough (varied) routes for individuals and communities affected by business operations to obtain remedies via state-based non-judicial mechanisms.

Information collected⁹ suggests that widespread use is already made of state-based non-judicial mechanisms to help resolve complaints and disputes arising from adverse impacts of business activities on human rights.

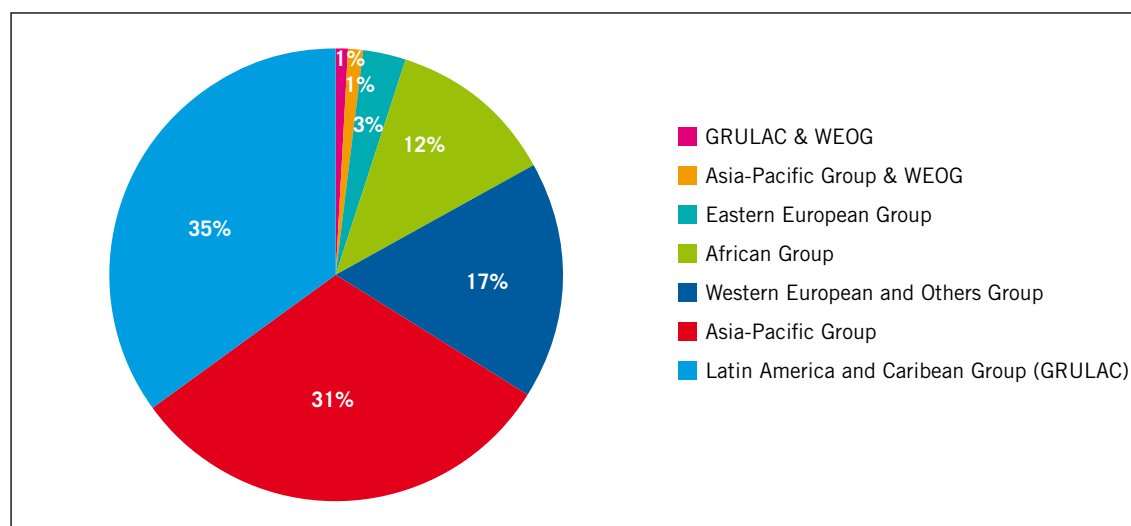
Figure 4. State-based non-judicial mechanisms and bodies



⁹ The OHCHR study focused on 'high-risk sectors' i.e. extractives and mining, agribusiness and food production, textiles and clothing manufacture and infrastructure and construction. Specific sector features may influence the data but not fully because otherwise Africa would be underrepresented.

The data shows that the Asia-Pacific and Latin American and Caribbean groups host two-thirds of the state-based non-judicial systems.

Figure 5. Widespread use is already made of state-based non-judicial mechanisms



Source: OHCHR discussion paper
* Accountability and Remedy project, part II. November 2107

Mechanisms with the strongest investigative and enforcement powers tend to be the most specialized ones. These powers are also linked to a high degree of autonomy.

In a number of countries, for instance, a labour inspectorate has the power to enter premises, seize documents and register statements by workers and management in order to decide whether the law was breached.

In some cases, labour inspectorates may even be empowered to impose financial sanctions.

Box 8 National cases of stated-based non-judicial mechanisms

Mechanisms	Profile	Example
Bodies responsible for the enforcement of public law standards	Strong fact-finding powers (investigation with on- site visits, interviews of victims/ stakeholders, ...) Determination and enforcement of remedies	Labour inspectorates in certain countries
Dispute resolution option 1	Some fact-finding powers Ability to issue legally binding decisions	Environmental “tribunal”
Dispute resolution option 2	Some fact-finding powers Role of determining and enforcing remedies delegated to another body	National Human Rights Institutions (NHRI)
Meditation type bodies	Few or no investigative powers No power to issue legally binding determinations. Mechanism based on cooperation and good-will	Sector-specific conciliation/mediation mechanisms: Ombudsman OECD NCP

Labour law and environmental law breaches are the most frequent causes of state-based non-judicial mechanisms. Other domains such as women's rights, children's rights, equal treatment and discrimination, social and economic rights are seldom referred too.

Box 9

In 2018, the Canadian government created an Independent Ombudsman to ensure respect for Human Rights by Canadian enterprises operating abroad.

The Ombudsman will have the power to investigate and force enterprises to disclose information, and to issue public recommendations; possible sanctions include suspension of subsidies. Civil society and unions welcome this step, but expect more information on investigative and coercive powers, as well as budget. The Ombudsman mandate will be limited to the extractive industries, textiles, oil and gas for the first year of activity.

Mechanisms representing a rather low proportion (39%) were either free to use or only charged a nominal fee to users. Virtually none of the mechanisms reviewed in this study contained any requirements for legal counsel and, in one case, the involvement of legal counsel was prohibited.

Box 10

NON JUDICIAL POSITIVE POINTS

- Easy access
- No need for legal counsel
- Fast processus
- Not diverting from the judicial mechanisms
- Opportunities for preventive and restorative compensatory and punitive remedies
- Feeding law reforms
- Appeals are sometimes possible
- Case law approach favourable to prevention and peer-learning



NON JUDICIAL NEGATIVE POINTS

- Lack of resources
- Lack of robust investigating powers
- Mandated of the body limited or unclear
- Lack of legal or political "cover" to enter in complex investigations
- Possible lack of independence particularly in cases involving government agencies
- Geographical scope limited to domestic level (some exceptions however, like OECD NCPs)

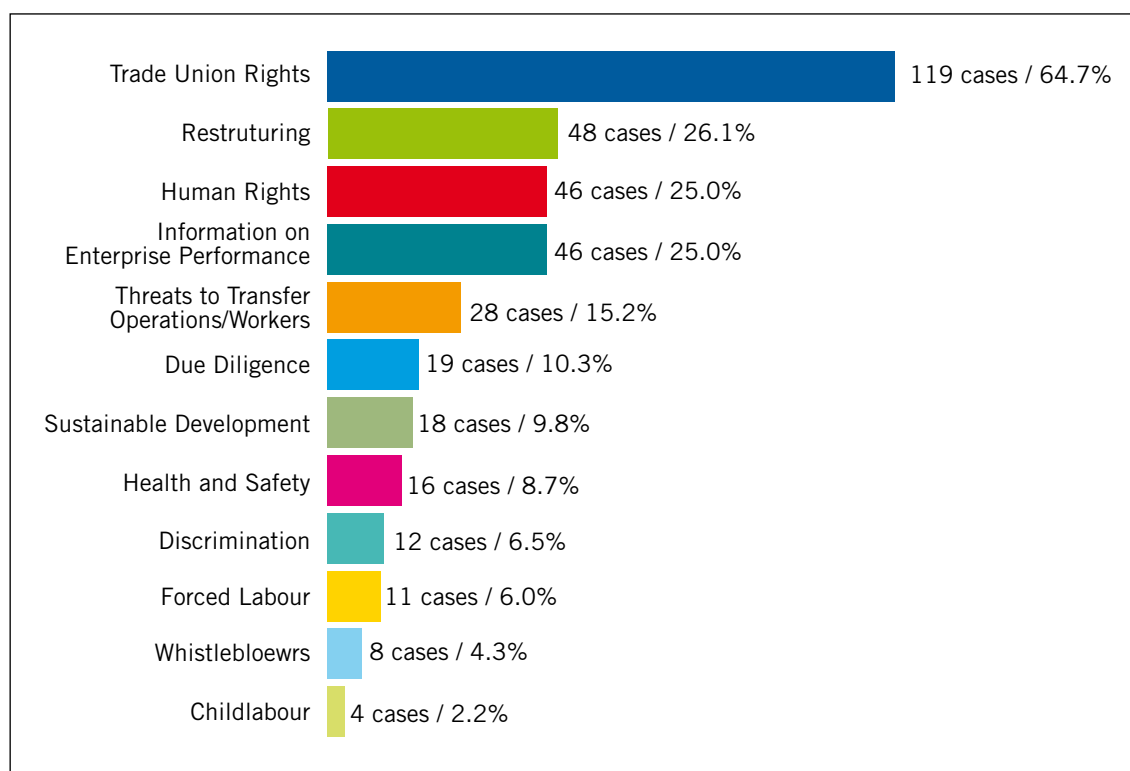
b) The OECD National Contact Points

Signing the OECD guidelines includes the obligation for Governments to set up National Contact Points (NCPs), to address complaints on potential breaches of guidelines. The OECD guidelines mechanism is a state-based non-judicial mechanism. This mechanism is accessible even if other (legal) proceedings have been conducted or are ongoing.¹⁰

¹⁰ See "Part II. Implementation Procedures of the OECD Guidelines for Multinational Enterprises, Commentary on the Procedural Guidance, Initial Assessment, para. 26, p.83."

The NCPs' role is to help parties (usually trade unions and multinational enterprises, as well as NGOs and governments in some cases) resolve an issue raised in the form of a complaint related to a breach of the OECD guidelines. Multinational enterprises are not obliged to participate in the process although they cannot impede the process to go on. Several NCPs can be simultaneously involved in the case when several countries are concerned. Where the breach of the the OECD GL takes place in a country that has signed the guidelines, the host country NCP will handle the case but should cooperate with the home country NCP.

Figure 6. Complaints addressed under the OECD Guidelines complaint mechanism



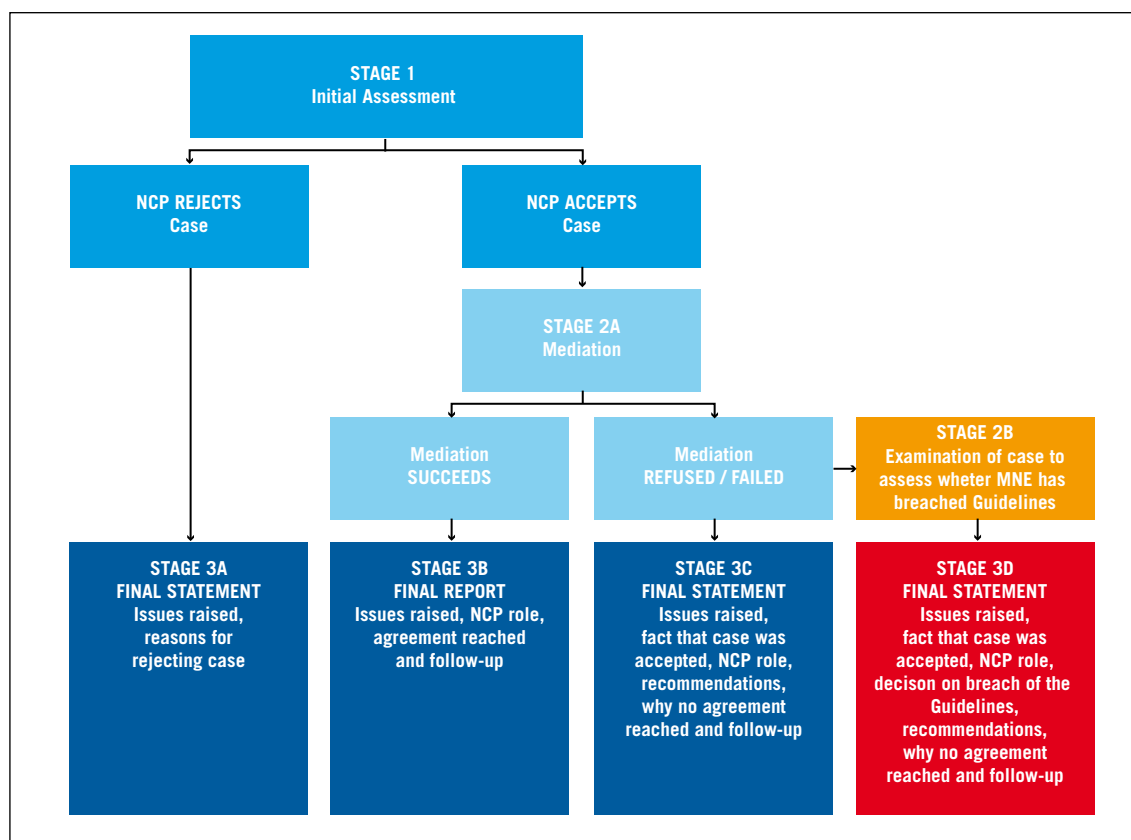
Source: Recommendation for a Responsible Business Conduct in a global context- a trade union guide". TUAC, 2016.

Box 11 Mediation

The Starwood Hotels and IUF dispute example:

In 2015 a specific instance was submitted to the US NCP by the International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers' Associations (IUF) claiming that Starwood Hotels had not observed the Guidelines with respect to discharge of workers and collective bargaining processes. Through mediation organized by the US NCP the parties reached an agreement and fully resolved some of the issues raised. The US NCP recommended that Starwood review their human rights policies and supplier code of conduct to make reference to recommendations on Responsible Business Conduct in line with the Guidelines.

Figure 7. The OECD Guidelines for multinational enterprises: the National Contact Point process



Source: TUAC trade Union Guide, 2016.

NCPs can play a proactive role in terms of interaction with Governmental bodies. Beyond making public statements and reports, they are entitled to inform Government agencies of these by raising their attention on breaches of the OECD guidelines, hence favouring their action.

For instance, an enterprise could be excluded from a Government agency public procurement call on this basis.¹¹

Since 2000, trade unions have submitted 191 complaints according to the Trade Union Advisory Council (TUAC).¹²

¹¹ See Commentary 37 on the Implementation Procedures of the OECD GL for MNEs.

¹² See "Recommendations for a Responsible Business Conduct in a global context - a trade union guide", TUAC, 2016 and <http://www.tuaoecdmguidelines.org/cases.asp>

Box 12 OECD Guidelines and NCP Mechanism: Pros and cons

PROS	CONS
• The OECD guidelines impose the adoption of a complaint mechanism by OECD Members including non-OECD adherent countries • The OECD Guidelines are an international instrument, not just national, territoriality does not matter; • Quick mechanism: one year maximum. • They can reach all supply chain and business relationship, including bank investments. • There is no need to discuss the category of workers, employee or worker, or short term / contractual workers. • NCPs facilitate dialogue and mediation. This is particularly important for those trade unions facing difficulties to obtain dialogue from enterprises' management. • Cooperation with NGOs is possible. • The NCP system can be used in parallel to legal proceedings. No need to preclude instances but NCP usually look at it...	• Only 48 countries have adhered to the OECD Guidelines • The mechanism success often depends on whether the enterprise comes to the table for mediation (often an issue in the USA). • The role of NCPs differ because of their large autonomy: there are 48 different NCPs and 48 different ways of dealing with complaints. Several NCPs do not work at all. A number of NCPs do not have clear internal rules. • Cost: usually free to use premises but the cost of participation in meetings can be an issue. • Lack of enforceability of decisions or outcomes. • The NCPs are composed of independent mediators only in few cases • In some cases, NCP mediators are not skilled to handle a professional mediation procedure.

Although trade union feedback of using the Guidelines has been mixed, NCPs provide a problem-solving forum that has helped to strengthen trade union organizing and collective bargaining.

Box 13

“One landmark case involving UNI Global Union and the private security MNE G4S led to the signing of a Global Framework Agreement”. But all too often, NCPs have failed to meet their obligations under the Guidelines, thereby failing in their responsibility to help ensure that multinational enterprises contribute to decent work and sustainable development.”

Former TUAC General Secretary, John Evans

Certain NCPs are more active than others, and some tend to better support trade union views than others. Where possible, trade unions, together with the TUAC and the GUFs, can analyse how to activate the relevant NCPs in accordance with the nature of the complaint and the multinational enterprise geographic scope, including its supply chain.

III. Non-state-based grievance mechanism

a) Is the enterprise level relevant for dealing with fundamental rights breaches?

An operational level grievance mechanism can be administrated by:

- the enterprise alone
- the enterprise with stakeholders
- by an industry association
- by a multi-stakeholder group (several enterprises, social partners, public institutions, etc.)

Profile: non-judicial but can be adjudicative (decision-making process, arbitration, mediation, conciliation, etc.).

Box 14 Pros and cons of the non-state based grievance mechanism

PROS	CONS
• Speed of access • Reduced cost • Transnational reach • Exclusion of public interest issues like criminal offences • Contribute to the ongoing “due diligence” process by providing additional channels to raise concerns, thereby helping to avoid escalation of harm or conflict ... • Such mechanisms do not replace collective bargaining and should not be used to undermine the role of legitimate trade unions in addressing labour related disputes, nor to preclude access to judicial or other non-judicial grievance mechanisms.	• Lack of appeal and of enforcement systems • Need to initiate other mechanisms among the state- based ones when enforcement is not reliable • Lack of independence and certainty regarding the access by victims • Possibility of encompassing “public interest topics” that should not be dealt in a private grievance mechanism.

Enterprise commitments via industry or multi-stakeholder initiatives (Codes of conduct, performance standards, global framework agreements between multinational enterprises and trade unions)¹³ should include mechanisms ensuring that trade unions (or legitimate stakeholders) can raise concerns when they believe the enterprise has not met its obligations and commitments.

¹³ UNGP BHR n°30: “industry, multi-stakeholder and other collaborative initiatives that are based on respect for human rights-related standards should ensure that effective grievance mechanisms are available”.

Two additional prerequisites should be met: the mechanisms should provide for accountability and help enable remediation.

Box 15 Danone / IUF Global Agreement on Sustainable Employment and Access to Rights (2016)

The Food and Agriculture Global Union Federation (IUF) has signed with Danone a **global framework agreement limiting precarious forms of employment through a process of monitoring and negotiation**.

Principle agreed: "Employment on fixed-term contracts shall be limited to circumstances where such employment can be identified exclusively as temporary and non-recurring and as such be justified as a requirement for the sustainable industrial activity of Danone locally."

The methodology agreed is based on **local/ domestic social dialogue**: "Local management and trade unions shall jointly identify the circumstances under which fixed term employment and/or the outsourcing of services may be introduced by mutual agreement."

The scope covers the enterprise and the supply chain / business relations: "This includes agreeing that necessary mechanisms are in place to ensure that any and all service providers understand and will adhere to the human rights and fundamental social principles that are established in international standards."

Legal basis of reference: a) The document is based on the reference to the UN and ILO instruments relevant to the employment relationship and the exercise of the human rights at the workplace and b) the agreement should be promoted "at operations in which Danone has minority ownership and at Danone's suppliers, in accordance with the **human rights due diligence** responsibilities set out in the OECD Guidelines for multinational companies"

A process of monitoring and negotiation will be set up to implement this agreement.

Box 16 The example of the global garment industry

The tragic collapse of the Rana Plaza factory in 2013 with a loss of over 1,130 lives led to the Bangladesh Accord on Fire and Building Safety and the Alliance for Bangladesh Worker Safety. Together, these initiatives led by UNI Global Union and IndustriAll, have been joined by over 250 brands, retailers and their suppliers. Their aim is to ensure the inspection and upgrading of shared factories, demonstrating that a sector-wide approach to building safer supply chains is not only feasible but effective.

Under the OECD "Due Diligence Guidance for Responsible Supply Chains in the garment and footwear sector", enterprises, particularly brands and retailers, are expected to assess their own purchasing practices and determine how their price setting and ordering may be contributing to excessive overtime, low wages, precarious contracts, illegal subcontracting, etc.

Are these mechanisms providing guarantees for effectiveness to trade union organizations?

The UNGP BHR "effectiveness test" can be used by trade unions for non-judicial mechanisms:

The UNGP BHR principle n°31 lists a series of criteria for ensuring the effectiveness of non-judicial grievance mechanisms, whether state-based and non-state-based. This list can be used by trade unions to assess the relevance of the mechanism that they intend to rely on or that they would like to improve. The "effectiveness test" implies that the non-judicial mechanism should be:

Box 17 Criterias for ensuring the effectiveness of non-judicial grievance mechanisms, whether state-based and non-state-based

1. “Legitimate: enabling trust from the stakeholder groups for whose use they are intended, and being accountable for the fair conduct of grievance processes;”
 - e.g.: publication of outcomes, independence of staff in charge of mechanism, annual activity reports
2. “Accessible: being known to all stakeholder groups for whose use they are intended, and providing adequate assistance for those who may face particular barriers to access;”
 - e.g.: at no cost or the provision of financial assistance
3. “Predictable: providing a clear and known procedure with an indicative time frame for each stage, and clarity on the types of process and outcome available and means of monitoring implementation;”
 - e.g.: publications of past decisions / determinations, clear procedures including appeals and timing
4. “Equitable: seeking to ensure that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair, informed and respectful terms;”
 - e.g.: access to relevant resources and experts to ensure similar levels of information and understanding by the parties
5. “Transparent: keeping parties to a grievance informed about its progress, and providing sufficient information about the mechanism’s performance to build confidence in its effectiveness and meet any public interest at stake;”
 - e.g.: procedural rules for exchanging information on allegations and comments, publication of procedural rules, clear and transparent appeal procedures
6. “Rights-compatible: ensuring that outcomes and remedies accord with internationally recognized human rights;”
 - e.g.: prioritization of “vulnerable” individuals and groups and those at risk of harm
7. “A source of continuous learning: drawing on relevant measures to identify lessons for improving the mechanism and preventing future grievances and harms;”
 - e.g.: publicising outcomes, fostering relations with civil society and trade unions, analysing frequency, causes and patterns to influence policies and practices for improvement
8. “Operational-level mechanisms should also be based on engagement and dialogue: consulting the stakeholder groups for whose use they are intended on their design and performance and focusing on dialogue as the means to address and resolve grievances.”
 - e.g.: trade unions should be recognized as groups of interest to defend and represent workers’ interests at large (employment, participation, health and safety, decent living standards, etc.), businesses cannot be both judge and party, hence a third party may be needed.

Box 18 Codes of Ethics and Ethics Committees

In a number of cases, enterprises have unilaterally adopted “Codes of Ethics”, i.e. internal rules for staff, and set up “Ethics Committees” only made up of management staff, to assess infringements by employees of the internal Code of Ethics, without any third party and/ or trade union participation. Trade unions can influence these practices in favour of a more participatory approach.

b) Due diligence: a new level of action for trade unions

WHAT DOES DUE DILIGENCE MEAN?

The “due diligence” concept is commonly understood as reasonable and appropriate steps taken by a (legal or natural) person to avoid committing an adverse human rights impact. It refers to prevent and/ or investigation prior to acting or making a decision.

Box 19 Definition of due diligence

“Enterprises, including multinational enterprises, should carry out due diligence to identify, prevent, mitigate and account for how they address their actual and potential adverse impacts that relate to internationally recognized human rights, understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the ILO Declaration on Fundamental Principles and Rights at Work.”

UN GP BHR definition the reference also used by the ILO MNE and the OECD Guidelines for multinational enterprises.

The emergence of this terminology, which is more usual under civil and competition law, is an important turning point in international public law. An enterprise should not only abide by law when performing its operations and ensure that its business partners do likewise. It should also take the necessary measures to assess the potential risks of its current and future operations and partnerships.

An enterprise should not hide behind national legal loopholes

An enterprise is no longer just a subject of national law but a) also an agent of law enforcement, and b) should the law not respect the core UN and ILO international labour standards, the enterprise should not hide behind the legal loopholes, but should undertake the necessary steps to comply with these standards.

This notion of responsibility for the impacts of economic activities, which extends well beyond the sole legal responsibility of the parent enterprise, is now used similarly in many texts, including those of the OECD guidelines, the UNGP BHR and the MNE Declaration (revised).

The UNGP BHR constitute the reference, the MNE Declaration pushes for the participation of workers' representatives and the OECD guidelines favour due diligence as a part of an overall business decision-making model as shown in the following table:

Box 20 International Instruments and due diligence: specifics of each instrument

Instrument	Characteristics of the instrument
UNGP BHR	A process that should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed.
MNE Declaration	The due diligence process should involve meaningful consultation with potentially affected groups and other relevant stakeholders including workers' organizations, as appropriate to the size of the enterprise and the nature and context of the operation. For the purpose of achieving the aim of the MNE Declaration, “this process should take account of the central role of freedom of association and collective bargaining as well as industrial relations and social dialogue as an ongoing process.”
OECD Guidelines	Guidelines general policies: “Enterprises should carry out risk-based due diligence, for example by incorporating it into their enterprise risk management systems , to identify, prevent and mitigate actual and potential adverse impacts” and “account for how these impacts are addressed. The nature and extent of due diligence depend on the circumstances of a particular situation. ” Guidelines Commentary (not legally binding): the process should be set up as “an integral part of business decision-making and risk management systems.” Due diligence can be included within broader enterprise risk management systems , provided that it goes beyond simply identifying and managing material risks to the enterprise itself, to include the risks of adverse impacts related to matters covered by the Guidelines. ¹⁴

c) Due diligence process in steps**DUE DILIGENCE PROCESS IN STEPS**

Note: the due diligence process is not a “one size fits all” one. The nature and extent of due diligence will be affected by factors such as the size of the enterprise, the context and location of its operations, the nature of its products or services, the sector and the severity of actual and potential adverse impacts.

¹⁴ The OECD has already produced a “Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas” and, together with the UN Food and Agriculture Organization, a “Due Diligence Guidance for Responsible Agricultural Supply Chains”. More recently, it has issued a “Due Diligence Guidance on Responsible Garment and Footwear Supply Chains” and in 2018, a cross-sectoral guide “Due Diligence guidance for Responsible Business conduct”.

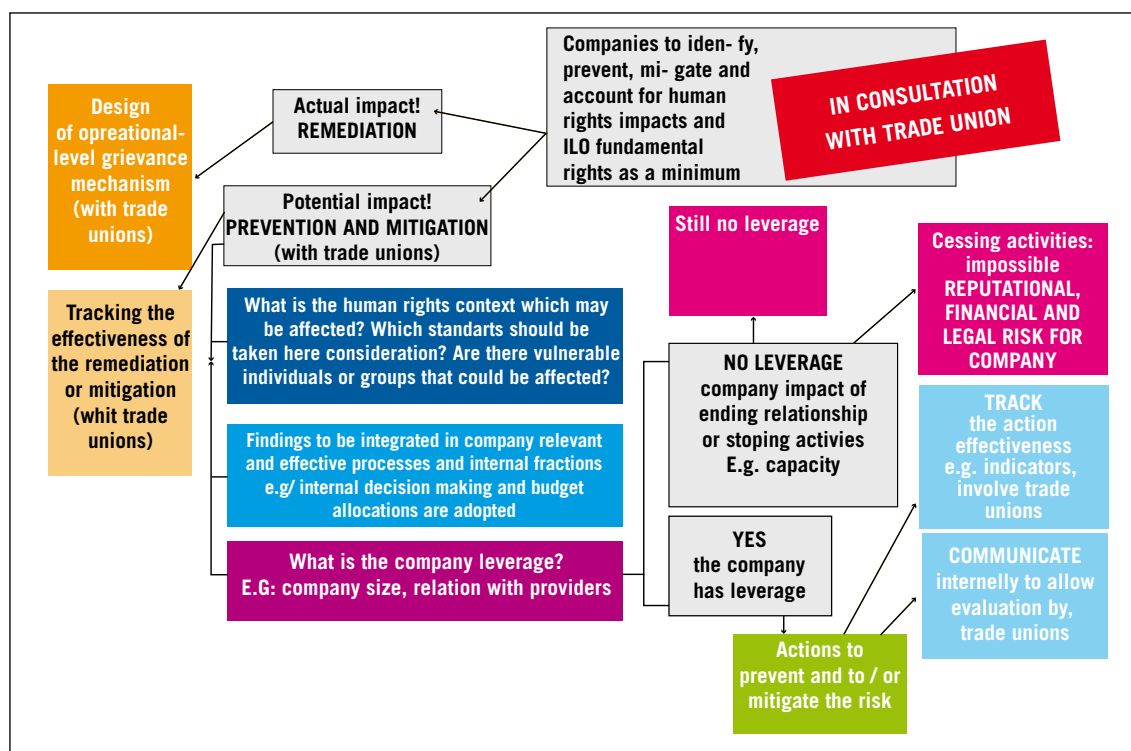
The diagram below shows that according to the industrial relations systems in place and the quality of social dialogue in the enterprise, trade unions should participate in the drafting of the process, the implementation and evaluation.

Steps for the participation of trade unions and/or workers' representatives in the due diligence process:¹⁵

- the elaboration of the due diligence process itself,
- the risk assessment process, including on-site supplier assessment,
- the adoption of indicators and data verification, development of corrective action plans, verification, validation and monitoring of impacts,
- tracking the effectiveness of the remediation or mitigation,
- design of operational-level grievance mechanisms.
- To what extent should stakeholders meaningfully be involved in this process?

Workers and the trade unions of their own choosing **as well as those of the supply chain** should be included in the process. This participation can be specified by a collective agreement, a Global Framework Agreement, an enterprise, sectoral or regional freedom of association protocol agreement, and transnational sectoral agreements.

Figure 8. The Due Diligence Process and Workers Representatives / Trade Union Involvement



¹⁵ See: "OECD Due diligence guidance for Responsible Supply Chains in the Garment and Footwear sector".

Box 21 The example of the grievance mechanism: “Due Diligence Guidance for Responsible Agricultural Supply Chains”:

“Enterprises should establish an operational-level grievance mechanism in consultation and collaboration with relevant stakeholders

A grievance alert can help alert enterprises to deviations from relevant standards and help them identify risks, including by allowing for improved communication with relevant stakeholders

Grievance mechanisms should complement judicial and other non-judicial mechanisms, such as (OECD guidelines) NCPs, with which enterprises should also engage.”

Box 22 Due diligence and freedom of association

- “Due diligence for the right to form or join a trade union will involve identifying and preventing anti-union policies and practices as well as mitigating the adverse impacts on the exercise of this right by other business activities and decisions such as changes in operations.
- Due diligence for the right to bargain collectively will recognize that business enterprises must be prepared to bargain under a wider range of structures in countries where the law and practice does not provide a well- defined framework for bargaining.
- Industrial relations, a system which requires both trade unions and collective bargaining, can play important roles in both due diligence and in the remediation of adverse human rights impacts”.

“The UNGP BHR and the human rights to form and join a trade union and to bargain collectively”, joint statement by ITUC, Clean Clothes Campaign, IndustriAll and UNI global unions.

d) How can trade unions push for legislation to foster Due diligence? National examples

Access to information: the EU, French, UK and Dutch examples:

How can trade unions push for legislation to ensure more accountability of enterprises?

An enterprise can easily declare its best intentions and have the best internal control processes, but these nevertheless need to be assessed by public authorities, trade union organizations and civil society to ensure their reliability. Several countries have seen their legislation evolve in recent years, acknowledging the importance of due diligence and the need for transparency.

The key point for trade unions is to analyse the extent to which such legislation can be leveraged outside the home country with regard to transnational operations. Cross-border trade union coordination can potentially have a powerful effect if such legislation is used in an efficient manner, also including supply chains.

THE UK MODERN SLAVERY ACT

In 2015, the UK Modern Slavery Act (MSA) entered into force: it is a legal tool to combat forced labour in the UK but also in the supply chains of UK-based enterprises. Each year, British enterprises with an annual turnover exceeding £36 million are obliged to publish a report on the steps adopted to avoid human trafficking and slavery. Such reports, adopted by top management, should disclose information on labour supply chain policies.

Although this law is a step in the right direction, it remains limited according to the ITUC.¹⁶

Box 23 The UK Modern Slavery Act

“Mandated due diligence must hold enterprises to account for treatment of workers in their supply chains. (...) We would urge trade unions wishing to tackle human modern-day slavery to build upon the UK Modern Slavery Act rather to adopt it as is.”

Sharan Burrow, ITUC General Secretary

THE FRENCH DUE DILIGENCE ACT

This new legislation covers those enterprises operating in France with more than 5,000 employees, including direct and indirect subsidiaries, and those with more than 10,000 employees headquartered anywhere in the world.

As of 2017, these enterprises must establish and implement a so-called “Plan of Vigilance”, identifying risks and stating measures aimed at preventing serious harm to human rights and fundamental freedoms, to the health and safety of people and the environment.

This plan must cover the risks generated by the activities of the enterprise itself, those of its subsidiaries, as well as subcontractors and suppliers. In short, France has made due diligence compulsory.

Box 24 EDF / IndustriAll / PSI new GFA to trigger worldwide vigilance plan

Electricity multinational enterprise EDF signed a global agreement in 2018 with IndustriAll and PSI along with 11 national trade union federations that recognizes the right of workers representatives to be involved in vigilance plan design and developments including throughout the supply chain and the monitoring process. The agreement was signed on the ILO premises in Geneva.

¹⁶ See: “Closing the loopholes - how legislators can build on the UK Modern Slavery Act”, ITUC, undated.

This law will force large corporations which have not yet internally implemented this type of scheme to coordinate the work of their CSR departments, their legal and/or risk assessment departments and their purchasing departments.

The vigilance plan and the report on its implementation will have to be published each year as part of the management report of the consolidated enterprise accounts.

French courts can sentence enterprises infringing due diligence to a civil fine of up to 10 million euros, setting the amount in proportion to the seriousness of the breach and in consideration of the circumstances.

An alert mechanism, together with the collection of reports relating to the existence or realisation of risks, has to be established in consultation with the representative trade union organizations in the said enterprise.

Box 25 Joint declaration of the French unions

‘We consider that in the future, the vigilance plans will have to be negotiated with the trade union organizations with the headquarters unions but also with the unions of subcontractors and suppliers; and when these suppliers are scattered in several countries by involving the Global Union Federations of the sectors concerned such as IndustriAll or ITF.’

Joint Declaration of the French unions
CGT, CFDT, FO, UNSA, CFE CGC, CFTC, FSU and Solidaires,
14/06/2017

CHILD PROTECTION AND DUE DILIGENCE IN THE NETHERLANDS

On 7 February 2017, the Child Labour Due Diligence Law [‘Wet Zorgplicht Kinderarbeid’], was adopted by the Dutch Parliament. The law requires enterprises to examine whether child labour occurs in their production chain.

Should this be the case, they should develop a plan of action to combat child labour and draw up a declaration about their investigation and plan of action. That statement would be recorded in a public register by a yet to be designated public authority. The Senate voted this Bill last May 14th, 2019.¹⁷

THE EU DIRECTIVE ON NON-FINANCIAL INFORMATION

Directive 2014/95/EU lays down the rules for the disclosure of non-financial and diversity information by large enterprises. EU rules on non-financial reporting only apply to enterprises with more than 500 employees but they do not need to be of “European origin”. This covers approximately 6,000 large enterprises and groups.

¹⁷ <https://www.mvoplatform.nl/en/the-netherlands-takes-a-historic-step-by-adopting-child-labour-due-diligence-law/>

Large enterprises have the legal obligation to publish reports on the policies they implement in relation to:

- environmental protection,
- social responsibility and treatment of employees,
- respect for human rights,
- anti-corruption and bribery,
- diversity on enterprise boards (in terms of age, gender, educational and professional background).

According to the EU Commission, enterprises may use international, European or national guidelines to produce their statements – for instance, they can rely on the UNGP BHR, ILO MNE, the OECD guidelines for multinational enterprises and ISO 26000.

Article 1 of the Directive states that the non-financial statement contains information including “a description of the policies pursued by the undertaking in relation to those matters”, including the due diligence processes implemented.

Enterprises should disclose information on their principal risks and on how they are managed and mitigated. Such risks may relate to their operations, their products or services, their **supply chain and business relationships**, or to other aspects. The EU Commission recommends an appropriate perspective on short, medium and long-term principal risks. Enterprises are expected to explain how principal risks may affect their business model, operations, financial performance and the impact of their activities.

Box 26

“Disclosures, where relevant and proportionate, should include material information on supply and subcontracting chains. (...)”

In these disclosures an enterprise may explain its management and board’s responsibilities and decisions, and how resource allocations relate to objectives, risk management and intended outcomes. For example, an enterprise may explain relevant governance aspects (like employment conditions), including board oversight. (...)”

An enterprise may consider disclosing the following health and safety information:

- workplace’s policies;
- contractual obligations negotiated with suppliers and sub-contractors;
- resources allocated to risk management, information, training, monitoring, auditing, cooperation with local authorities and social partners.”

EU Commission Communication Guidelines on non-financial reporting (methodology for reporting non-financial information) (2017/C 215/01)

IV. Mechanisms available to promote implementation of the MNEs Declaration, the OECD GL¹⁸ and UNGP BHR.

a) ILO MNE Declaration Interpretation mechanism and operational tools available

Box 27

“The MNE Declaration provides clear guidance on how enterprises can contribute through their operations worldwide to the realization of decent work.

Its recommendations rooted in international labour standards reflect good practices for all enterprises but also highlight the role of government in stimulating good corporate behaviour as well as the crucial role of social dialogue.”

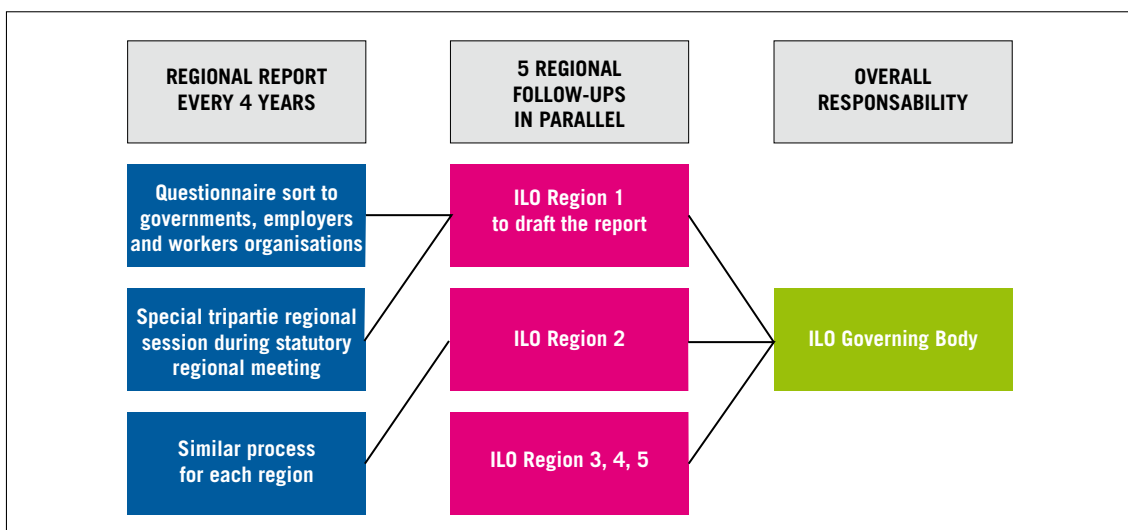
Guy Ryder, ILO Director-General

PROMOTION TOOL

The ILO Governing body that adopted the MNE Declaration is in charge of its promotion towards governments, employers’ and workers’ organizations and enterprises that are invited to follow them as good social practice.

To do so, Annex 2 foresees¹⁹ two parallel processes, though the text does not specify the link between the two.

Figure 9. Regional follow-up of the ILO MNE Declaration



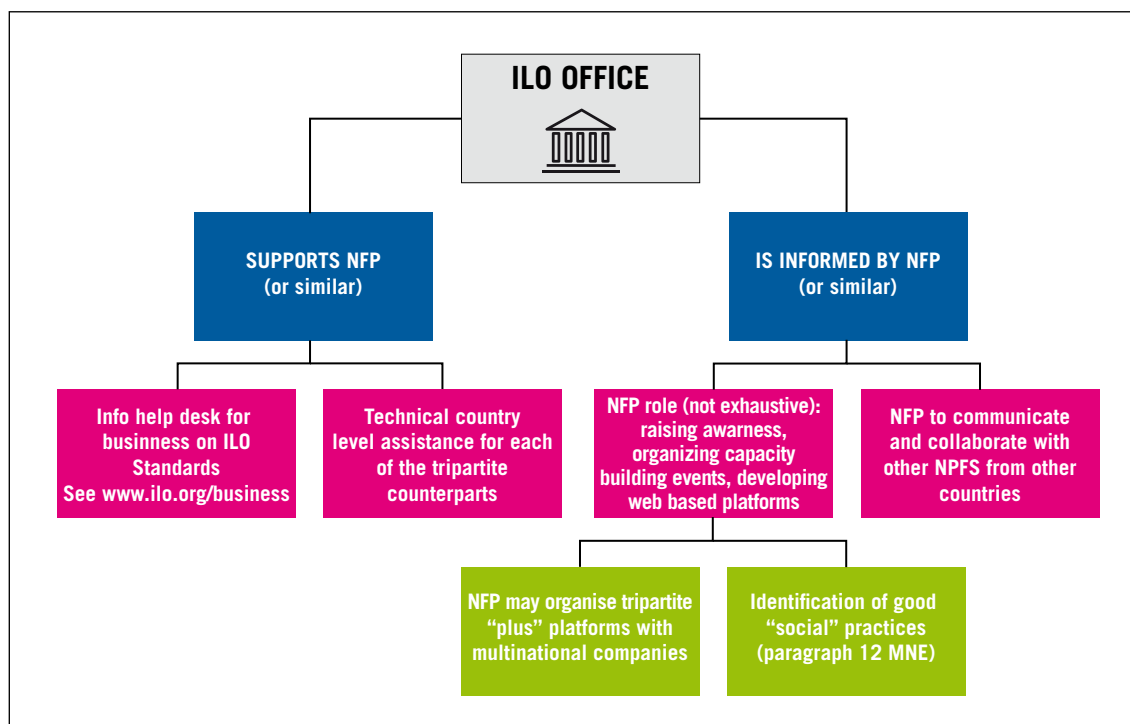
¹⁸ This instrument was already explained on page 20.

¹⁹ “ANNEX 2 of the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy” (the MNE Declaration).

Annex 2 foresees the establishment of tripartite-appointed national focal points responsible for promoting the MNE Declaration.

The annex recommends taking guidance from the Convention No.144 on Tripartite Consultations that is currently promoted for universal ratification by the ILO Office.

Figure 10. Promotion by the tripartite appointed NFPs (National Focal Points)



Box 28

More on this issue:

Convention No 144 concerning Tripartite Consultations to Promote the Implementation of International Labour Standards (Entry into force: 16 May 1978)

This Convention sets the rules for tripartite forums: consultations between governments, employers 'and workers' organizations should be effective and in accordance with national practice. Employers' and workers' organizations should be represented on an equal footing and be free to choose their own representatives. The Convention's main objective is to ensure a follow up by the social partners as regards governments' (lack of) ratifications of ILO standards. While a number of countries have not ratified this Convention, it is quoted by "Annex 2" solely for guidance and not for implementation.

I. ENTREPRISE-TRADE UNIONS DIALOGUE

ENTREPRISE- WORKERS REPRESENTATIVES/TRADE UNION DIALOGUE

Acknowledging that dialogue lies at the heart of the MNE Declaration, this procedure gives effect to the need to support dialogues involving multinational enterprises and the representatives of the workers affected, in particular trade unions, on the application of the principles of the MNE Declaration.

Offered by the ILO Office, this tool consists of providing the material support to facilitate dialogue between enterprises, workers representatives and/or unions. This support is provided on request only, on a voluntary basis. The tool is not result-oriented, but instead provides a platform for the social partners to “meet and talk” on issues of mutual concern. Hence, one party cannot drag the other into a discussion without its consent.

MATERIAL SUPPORT

The ILO Office offers:

- Its facilities as a neutral ground for a meaningful dialogue,
- Qualified facilitators (a list should be available),
- Experts to provide input to the enterprise-union dialogue.

The notion of confidentiality:

Confidentiality applies to both the enterprise and the workers’ representatives, as well as to the ILO officials.

The parties should agree beforehand on the scope and duration of confidentiality of the debates. The ILO Office will draft a list of criteria and practices in consultation with ACTRAV and ACTEMP.

Participants: they are determined by “the enterprise and the union”. Even if there is no indication of the rules applicable in the case of multiple unions or workers’ representation bodies, the “voluntary approach” can be construed to include only those who recognize each other as representative and legitimate. Nevertheless, issues may arise in cases where an enterprise meets certain unions but not others, despite the latter also being representative.

Outcome: the mechanism is not result-oriented, as Annex 2 does not foresee decisions, statements, mediation or arbitration. The outcome of the dialogue belongs to the parties and is a result of a consensus. Annex 2 states that the “content” of the dialogue “shall not be used for any binding procedure”. What about the outcome nature of the dialogue? Although Annex 2 does not provide guidance on this important topic, the text does not preclude suggesting (innovative) solutions to endorse dialogue outcomes.

The ILO Office should report to both ACTRAV and ACTEMP, of the procedure end but not its content.

II. DISPUTE MECHANISM ON THE INTERPRETATION OF THE DECLARATION

PROCEDURE FOR THE EXAMINATION OF DISPUTES CONCERNING THE APPLICATION OF THE MNE DECLARATION (INTERPRETATION PROCEDURE)

The interpretation of the MNE Declaration can be a source of dispute between governments, trade unions and employers' organizations. In that case, a clarification of the Declaration may be necessary to resolve the conflict.

SITUATIONS WHEN THE PROCEDURE CAN BE USED:

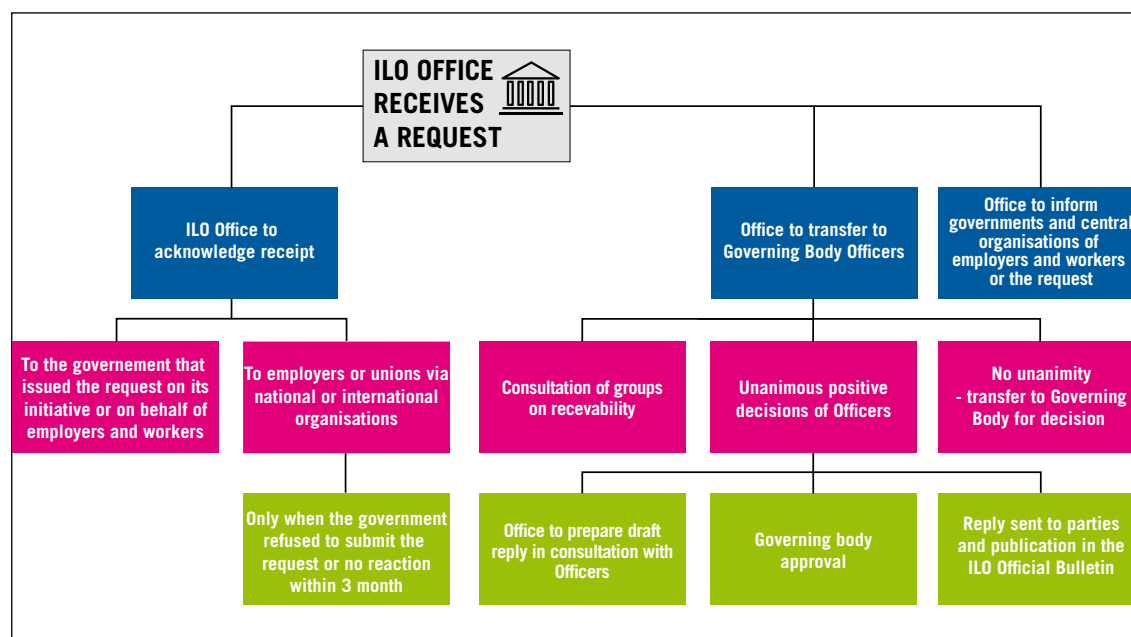
The procedure can be used when a "disagreement" on the provisions of the MNE Declaration arises from an actual situation, i.e. the disagreement should not reflect simple differences of view on theoretical approaches but should refer to specific cases.

SCOPE

An interpretation may be requested on the provisions of the MNE Declaration itself. This procedure cannot be invoked in respect of discrepancies in national law, ILO Conventions and Recommendations in general. It similarly cannot be used in respect of breaches of the freedom of association. In such cases, existing national or ILO procedures could be used a specific alternative procedure

The procedure does not state whether Annex 2 is also within its scope for interpretation. But, bearing in mind that Annex 2 was adopted by the ILO Governing Body as part of the MNE Declaration, it should also be subject to a potential interpretation.

Figure 11. Procedure for the examination of disputes concerning the application of the MNE Declaration



b) National Action Plans (NAP) on the UNGP BHR. Not a compliance nor an interpretation mechanism but a possibility to influence and promote implementation.

In the field of business and human rights, a NAP²⁰ is defined as an “evolving policy strategy developed by a State to protect against adverse human rights impacts by business enterprises in compliance with the UN Guiding Principles on Business and Human Rights (UNGPs BHR).”

Stakeholders invited to participate in NAP processes should include civil society organizations, national human rights institutions (NHRIs), trade unions, business enterprises and associations, as well as representatives of population groups that may be particularly vulnerable to business-related human rights abuse.

Trade unions, by participating in meetings and seminars organized by the relevant public authority can actively contribute to the shaping, implementation and evaluation of NAPs. For instance, they can request the State to adopt the necessary means to support the development of business-based grievance mechanisms and to take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses, including considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy. In several countries, the OECD National Contact Points have supported designing and implementing the NAPs. On the other way around, several NAPs support the setting up of effective grievance mechanisms, including NCPs.²¹

According to the ITUC,²² the development of National Action Plans by all governments should be a priority. “These plans should be developed by all countries in a transparent and participatory manner with the full involvement of civil society and trade unions. They should result in greater policy coherence nationally and internationally by obliging governments to review their investment policies and treaties, and their procurement policies and to ensure coherence with their duty to protect human rights.”

²⁰ To check the list of National Action Plans, consult this page: <https://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx>

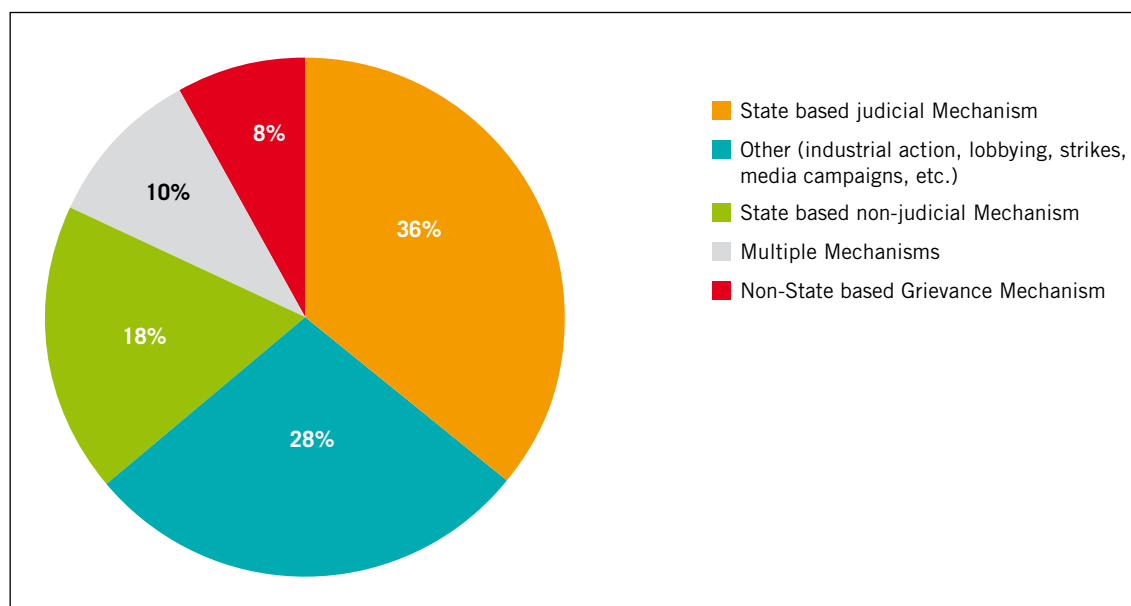
²¹ National Action Plans on Business and Human Rights to enable policy coherence for responsible business conduct, OECD, June 2017.

²² Sharan Burrow, Speech, 2014 United Nations Forum on Business and Human Rights 22 December 2014.

C. Shaping and sharpening
trade union approaches:
combining actions on a case
by case practice

The OHCHR, thanks to extensive surveys in “high-risk” sectors (extractives and mining, agribusiness and food production, textiles and clothing manufacture and infrastructure and construction), has arrived at the following breakdown of the means used to seek remedy in response to businesses’ abuse of human rights:

Figure 12. What are the most commonly used mechanisms or actions?



Source: OHCHR discussion paper
* Accountability and Remedy project, part II. November 2107

What are the most commonly used means of action?

Even though these four sectors are not fully representative of a country’s entire economy and its associated industrial relations systems or of specific human rights-related issues, it is important to note that collective actions as strikes or communication campaigns play a major role (28%) in seeking remedy to human rights abuses by multinational and national enterprises. This means that in almost one third of the cases assessed, remedy was sought by unilateral action.

It is important for trade union organizations to choose the right tools corresponding to each situation and to combine them with an appropriate strategy. Indeed, each mechanism has specific characteristics to take into consideration, especially in the case where several of these leverages are used simultaneously.

a) Criteria of relevance

Box 29 What are the most commonly used means of action?					
Criteria	International instruments mechanisms	Stated-base judicial procedures	State-based non-judicial processes	Non-State- based grievance mechanisms	Others (industrial action including strike, media, lobbying)
Geographical scope and extraterritoriality	The MNE Declaration and the UNGP BHR are international instruments that can be used in any country that is member of the ILO or the UN. The UNGP BHR has no enforcement mechanism. For the OECD GL, however, complaints can be raised only in the 48 countries that have adhered to them even though the breach of the guidelines may have taken place in another country. UN National action plans and ILO National. Focus Points are supposed to be sources for exchange of information.	In principle, the judicial system is competent only for domestic issues. There can be some exceptions however (see chapter on French law on due diligence plans).	There are two possible scopes here: national/ local only (e.g.: labour inspection) or extraterritorial. For the latter, the extraterritoriality may be dependent on cooperation with other similar bodies as the one requested.	In the case of sectoral or company level agreements, they are usually extraterritorial. The countries covered are those represented by the parties adopting the mechanism (countries of operation for companies, affiliated organizations for GUFs).	Industrial actions, and the right to strike in particular is recognized as fundamental right by the ILO. Nevertheless, its implementation is based on national law. Lobbying over international institutions have an extraterritorial impact. Media campaigns can potentially have an extraterritorial impact through coordination of national campaigns or via international media access.
Transnationality	In principle, there it is not necessary that a company has cross border operations to raise a complaint, it most cases they are deemed receivable even though they happened in the company's country of origin. The UN and ILO instruments cover all kinds of enterprises, the OECD GL however, address only multinational companies. Nevertheless, local companies owned by multinational companies are included into their scope as well as the supply chain.	No.	Yes, except some cases like for labour inspection.	Yes.	Although the right to strike does not exist at transnational level, simultaneous industrial actions can potentially be coordinated in a fashion to enable a transnational impact.

Box 29 What are the most commonly used means of action? (concl.)

Criteria	International instruments mechanisms	Stated-base judicial procedures	State-based non-judicial processes	Non-State- based grievance mechanisms	Others (industrial action including strike, media, lobbying)
Supply chain	The supply chain is covered by the international instruments, which makes them very relevant to trade union action.	Yes.	Yes.	Yes, potentially.	Yes, potentially.
Cost	No OECD NCP: in principle no cost. However, bringing workers from abroad may not be funded.	Depending on the country of the Court.	Depending on the country where the mechanism is situated.	No.	Yes, depending on the length of strikes and campaigns.
Length	ILO MNE Declaration: no time limit. UNGP BHR: not applicable OECD NCP: one year. ILO tools: not defined.	Often long except where interim proceedings exist. Nevertheless, the length of mechanism again varies. very much from country to country. This might be a decisive criterion for trade unions.	Short or mid-term.	Short or mid-term.	Short or mid- term.
Outcome	ILO MNE Declaration: interpretation, support to dialogue. UNGP BHR: influencing the State National Action Plan. ILO "company- union" dialogue: not action oriented process. Nevertheless, parties may find an agreement thanks to the process that may help dialogue to happen. OECD NCP: conciliation, arbitration, public statements against enterprises, recommendations.	Judicial decisions have the strongest authority. However, the Courts decision may be changeable	Depending on the system it may result on conciliation or mediation (seldom on fines). In case of lack of outcome implementation, acting into the frame of the Judicial system may become necessary.	Conciliation, agreement, prevention. In case of lack of implementation, other means (judicial, industrial action) may be necessary.	Strikes and media campaigns are usually followed by another instrument allowing for the reinstatement of dialogue. Lobbying may have a direct effect on legislative procedures and international negotiations and bring concrete outcomes.

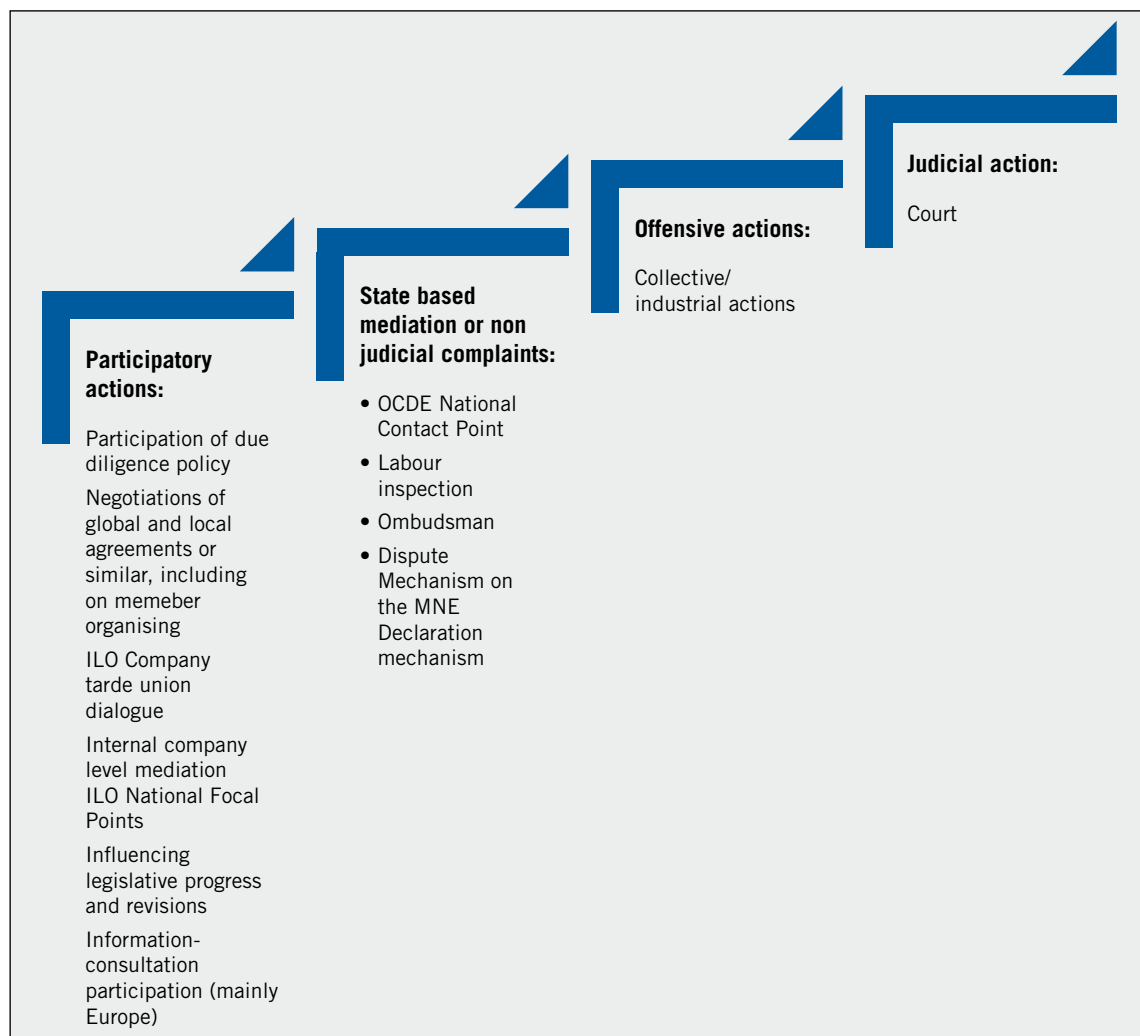
b) Strategy examples: using the right leverage and ensuring coherence of actions

There are multiple strategic approaches that can combine different mechanisms and actions. Their combination will depend on the criteria detailed above (cost, length, transnationality, etc.).

- **Example of a gradual escalation strategy**

The objective here is to adopt a progressive response and increasing pressure on enterprises if the outcome of a proceeding or action is not satisfactory. It starts with social dialogue and constructive exchange of views and ends, in case of failure of the latter, with industrial and/or judicial disputes.

Figure 13. Example of a gradual escalation strategy

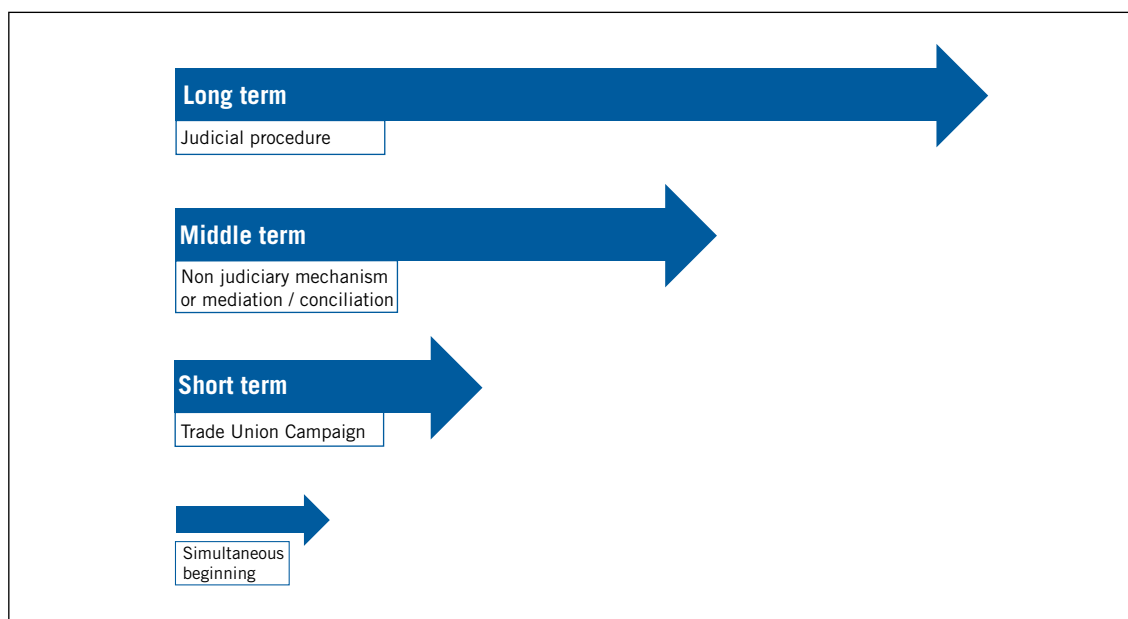


- **Example of multiple action strategy on the basis of time criteria**

The mechanisms and actions can complement and reinforce each other as long as there is no breach of their respective rules of functioning. For instance, the OECD guidelines do not prevent simultaneous judicial procedures from taking place. Therefore, a trade union may go to Court and raise a complaint to an OECD NCP. However, the MNE Declaration “company-union” dialogue requires a good faith commitment from trade unions that may require not undertaking collective action or media campaign during the negotiation/conciliation process.

The objective of this strategy is to combine proceedings and actions to “hit hard” and reach a result in an expected and limited time or deadline. The mediation/conciliation or other similar mechanism may help keep some room for dialogue between the parties to, when appropriate, rebuild confidence in view of a negotiated outcome that could lead to the termination of the parallel proceedings and establish more peaceful relations.

Figure 14. Example of multiple action strategy on the basis of time criteria



Box 30 DHL, GUFs, German NCP and national industrial action in Senegal and Turkey: the postal package²³

Deutsche Post DHL Group (DPDHL), the International Transport Workers' Federation (ITF) and UNI Global Union have jointly asked the German National Contact Point (NCP) for the Organization for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises to extend a protocol to continue regular dialogue on industrial relations topics.

It provides DHL workers worldwide with a firm and public commitment to dispute resolution mechanisms, supply chain responsibility and reaffirms the rights of workers to a collective voice at work without fear of retaliation.

Signed in 2016 for the first time, the three parties met with the German NCP and the protocol was recently formally extended until December 2019, when it will be reviewed again.

This Protocol and international solidarity have backed up the trade union actions in several countries including Senegal and Turkey:

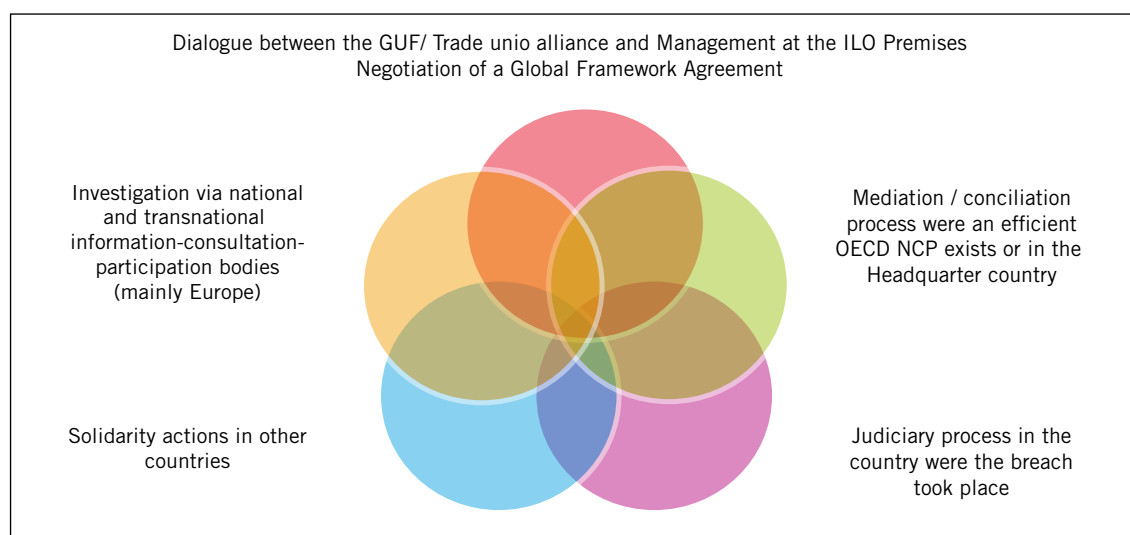
In Senegal, the SNTPT union achieved over 50 percent density in a workforce of approximately 150, and in the election, they won four out of the five seats on the Works Council, guaranteeing bargaining rights with DHL in Senegal.

In Turkey, thanks to local pressure and international campaigning, the DHL union in Turkey, Tümtis, has signed its first collective-bargaining agreement, and most of the workers who had been sacked have got their jobs back.

• **Example of links between the national and international levels**

In the case of multinational companies or in cases where the supply chain is at the centre of the debate, the link between national and transnational strategies is important to ensure a coherence in the defence of workers' rights between different countries. Even if the issues at stake may not necessarily be the same, the objective here is to ensure a corporate level solution.

Figure 15. Example of links between the national and international levels



²³ See more on: <http://www.uniglobalunion.org/news/dp-dhl-itf-uni-global-union-agree-continuous-dialogue-until-december-2019>

Box 31

Rio Tinto, GUF, industrial action in Madagascar, labour inspection, due diligence, collective agreement: discussions over a minefield²⁴

Workers at Rio Tinto's QIT Madagascar Minerals (QMM) operations downed tools twice in five days over management's violation of their collective bargaining agreement relative to salary increases.

The union has argued that the company's approach militates against workers in the lower rankings of the salary scale, and that those workers never achieved the intended purchasing power parity intended in the collective bargaining agreement.

The unions suspended the strike one afternoon after local management promised a labour inspectorate led mediation the following day. The strike started again because of harassment and threats of several trade unionists. Finally, an agreement could be reached for wage increases and wages of employees participating in the strike will not be cut, and any form of harassment related to participating in the strike is prohibited.

The unions also demanded that the company live up to its supplier code of conduct, presented during the recent joint IndustriALL/Rio Tinto high level global mission to QMM in February 2018, and implement its due diligence requirement for contractors. Contractor employees are afraid to join the union due to intimidation by contractor owners, who fail to respect the provisions of the supplier code of conduct, guaranteeing freedom of association and the right to join a union of workers' choice.

c) Global Framework Agreements: Achieving Decent Work in Global Supply Chains

Global Framework Agreements have developed over the last two decades in response to economic globalization and as a result of campaigns by international trade unions for additional governance structures that build on labour relations. These agreements are negotiated between a "multinational enterprise and a Global Union Federation (GUF) in order to establish an ongoing relationship between the parties and ensure that the company respects the same standards in all the countries where it operates" (ILO Press Release, 2007) and the features that most of the agreements share, namely: a GFA should be global in scope and include a reference to the supply chain, involve GUFs as signatories and explicitly include references and recognition of the rights reflected by the ILO in its Fundamental Conventions at a minimum and other standards with regard to working conditions, industrial relations, health & safety conditions, training, and environmental protection provisions in more than one country and often worldwide. These ILO Fundamentals Conventions are:

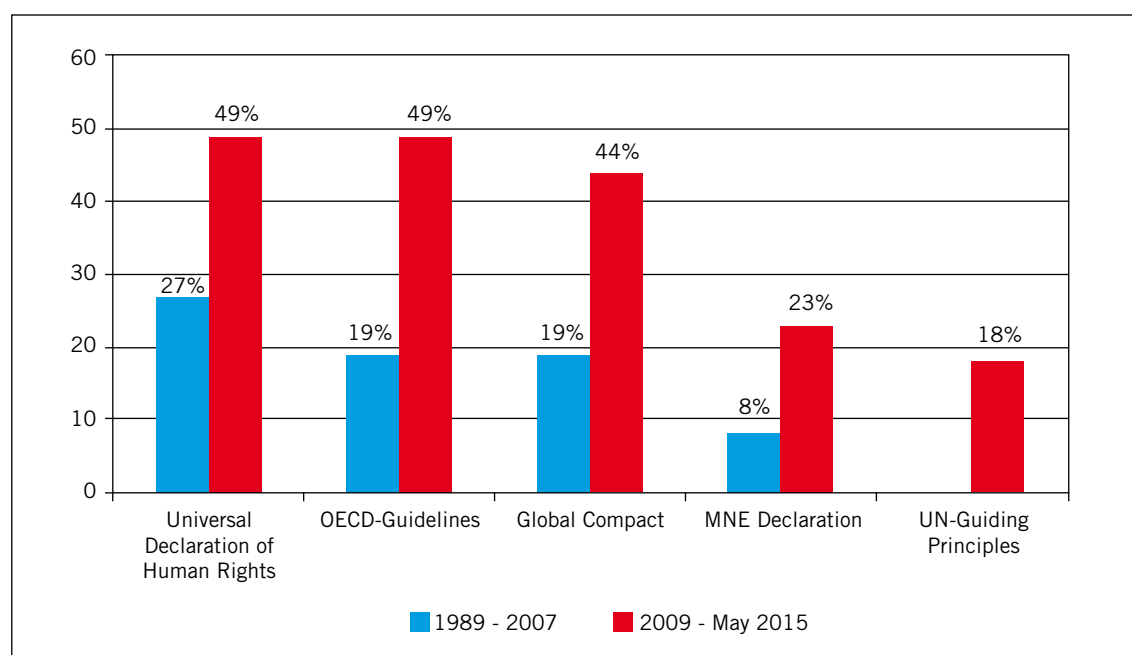
- Freedom of Association and Collective Bargaining (Conventions No 87 and No 98);
- Discrimination (Conventions No 100 and No 111);
- Forced Labour (Conventions No 29 and No 105); Protocol on Forced Labour (P29)
- Child Labour (Conventions No 138 and No 182).

²⁴ For additional information on this example see: <http://www.industriall-union.org/industriall-and-rio-tinto-make-joint-mission-to-madagascar>

The number of new GFAs has grown constantly since the beginning of this Century, and at the beginning of 2018 there were around 160 framework agreements registered. Two-thirds are signed by IndustriALL and UNI. For the remaining third, most of the agreements correspond to the BWI and the IUF.

There is also a qualitative evolution with regard to the inclusion of international instruments and principles. GFAs generally include provisions primarily in relation to ILO international labour standards by explicitly mentioning either the “core ILO Conventions” or the ILO Declaration on the Fundamental Principles and Rights at Work of 1998. Moreover, a considerable number of agreements make reference to the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (MNE-Declaration) (1977, updated in 2000, 2006 and 2017). Additionally, many GFAs include other international instruments within the UN system. Most notably are the UN Universal Declaration of Human Rights (1948), the Global Compact (2000), and the UN-Guiding Principles on Business and Human Rights (2011).²⁵ Less frequent are references to the Rio Declaration on Sustainable Development, the UN Declaration on the Elimination of All Forms of Discrimination against Women as well as the UN Convention on the Rights of the Child. Moreover, many GFAs include instruments adopted by other international organizations, most prominently the OECD Guidelines for Multinational Enterprises (1976, last updated in 2011). The following figure compares the references to international instruments and principles in GFAs concluded or renewed between 2009 and May 2015. (see box).

Figure 16 References in GFAs to International Instruments and Principles²⁶



Source: Hadwiger F., op. cit. 2015

²⁵ This chapter is based on the main conclusions of Hadwiger F, Global Framework Agreements: Achieving Decent Work in Global Supply Chains, Background Paper, Draft: July 2015. Different international instruments and principles are sometimes interconnected. For example, the Global Compact builds among others on the UN’s Universal Declaration of Human Rights. However, only explicit references in the text of GFAs to international instruments and principles were considered for the evaluation of GFAs (2009 – 2015).

²⁶ The UN Guiding Principles on Business and Human Rights were enacted in June 2011. Therefore, the share of GFAs relating to the UNGP takes only into account agreements concluded after this date (n=39).

D. Final remarks

The evolution of trade union practices in the context of globalization is necessarily impacted by international instruments aimed at national and multinational companies. More and more business leaders have already realized that they can no longer hide behind the non-binding nature of international instruments. Companies whose actions have a negative impact on human rights, including at work, are likely to be subject to media campaigns by trade unions and civil society that can have a disastrous effect on their image and have consequences on the trust of their investors and business relationships, for the benefit of their competitors.

Changing union practices does not involve breaking with the usual actions. Indeed, the opposite is true. The international instruments as they exist today, with their challenges and opportunities, make it possible to broaden the modalities of action within the context of each one. Trade union cultures and traditions can integrate them. Depending on how open they are to dialogue and negotiation, and whether those companies are individually, jointly or directly related to a negative impact by their activities or relations with third parties, the strategies will be more or less offensive. Once again, international instruments are adaptable to these differences.

These instruments provide the framework of the expected conduct from MNEs to respect internationally recognized human rights. The need to undertake human rights due diligence opens new opportunities to promote social dialogue and collective bargaining with respect to the responsible business conduct expected in the world of work. This means respect for ILS and as a minimum the FPRW. Social dialogue and Collective Bargaining are important tools to promote responsible business conduct with the engagement of workers organizations and it would be for the trade union to find the best strategy considering each instrument and scenario, to effectively promote RBC to respect workers' rights

Transnational trade union coordination is a key element of success in using complaint mechanisms because it allows for more information and evidence to be gathered, but also to bring together different means of complementary action.

In addition to the possibility of settling violations of human rights at work individual cases, an enlarged trade union strategy may, first and foremost, help to strengthen unionization and thus its representativeness, and secondly, to be able to influence social progress by legislative and regulatory means as well as that democracy in the business.

The support of the Global Union Federations and their affiliates is decisive because they not only facilitate coordination but also have an in-depth knowledge of sectoral and institutional mechanisms and players. National Confederations and international trade union federations can thus promote the consideration of the interests and trade unions of workers in subcontracting companies.

The Global Framework Agreements implemented by the Global Union Federations provide other ways that converge with those that characterize the intergovernmental instruments. In fact, these agreements mention these instruments in their protocol.

Each trade union organization should become familiar with these instruments in order to understand their scope, functioning and limitations and participate in the collective effort of the reinforcement of the international trade union movement for decent work and sustainable employment development. Thus, the possibility of participating in the establishment of due diligence processes offers the unions a stepping stone to strengthen their position in the implication of the strategic development choices of the company and in the follow-up of the consequences of their implementation.

E. Annexes

I. The TUAC pre-complaint check-list for trade unions

Before deciding to submit a complaint to a national NCP, TUAC recommends checking a number of questions in order to avoid possible negative consequences for trade unions:

Box 32 The TUAC pre-complaint check-list for trade unions

1. National Contact Point: Have you identified the correct NCP (see figure 4.5)²⁷	You are submitting the case to the host country NCP because the alleged breach of the <i>Guidelines</i> occurred in a country that has signed the <i>Guidelines</i>; OR You are submitting the case to the <i>home</i> country NCP because the alleged breach of the <i>Guidelines</i> occurred in a country that has not signed the <i>Guidelines</i>; OR You are submitting the case to the <i>home country</i> NCP and asking it to take the lead, while copying the complaint to the other relevant NCPs, because the alleged breach of the <i>Guidelines</i> involved the same MNE in different countries some of which have signed the <i>Guidelines</i>; OR You are submitting copies of the same case to several NCPs because the alleged breach of the <i>Guidelines</i> occurred in a country that has not signed the <i>Guidelines</i> and involved a consortium involving MNEs from different countries that have signed the <i>Guidelines</i>.
2. Complainants: Have you explained who you are and what your interest is?	You have given the name/s of the trade union/s and others involved in the complaint, together with a brief description and contact details; You have explained your interest in the case (e.g., your members are affected by the breach of the <i>Guidelines</i>); You have provided the NCP with a single contact point.
3. Enterprises: Have you provided details of all the enterprises involved and the relationship between them?	You have provided the name and the contact details of the local <i>entity/ies</i> involved in the alleged adverse impacts/breach of the <i>Guidelines</i>; You have provided the name, the country of headquarters and the contact details of the MNE; You have explained the link between the local <i>entity/ies</i> involved in the breach of the <i>Guidelines</i> and the MNE; You have explained the link between the issues that breach the <i>Guidelines</i> and the activities or relationships of the MNE.
4. Provisions of the <i>Guidelines</i>: Have you cited the relevant provisions of the <i>Guidelines</i> and the Commentary?	You have matched the issues raised in the complaint with the relevant paragraphs of the <i>Guidelines</i>; You have cited relevant paragraphs of the Commentary of the <i>Guidelines</i>; You have cited articles of relevant Human Rights instruments and ILO labour standards
5. Description of Facts and Circumstances: Have you provided the NCP with an adequate description of facts and circumstances?	You have provided the NCP with a description of the relevant facts and circumstances; You have included relevant dates and places; You have provided supporting evidence (e.g., relevant correspondence, minutes of meetings, excerpts from collective bargaining agreements, affidavits, excerpts from national law).

²⁷ "OECD Guidelines for multinational companies: Recommendations for a Responsible Business Conduct in a global context, a trade union guide.

The TUAC Complaint Checklist: making sure that your complaint is properly submitted to the NCP

1. Trade Union Support: Have you sought support from trade unions with experience of submitting complaints under the <i>Guidelines</i> ?	National unions; Global Union Federations (GUFs); Trade Union Advisory Committee to the OECD (TUAC).
2. Eligibility: Have you checked that the complaint is eligible under the <i>Guidelines</i> ?	The issues are covered by the paragraphs of the <i>Guidelines</i> ; There is a link between the issues raised in the complaint and the activities or relationships of an enterprise; The enterprise in question is headquartered or operating in a country that has signed the <i>Guidelines</i> .
3. No Quick Fix: Are you prepared to engage in a process that may take up to twelve months?	You are aware that the timescale of the NCP complaints process is twelve months; You have the resources/time to engage in the process throughout.
4. Protection of Workers: Are you concerned that there may be retaliation against workers or others?	You are aware that the NCP normally sends the complaint to the enterprise; You are aware that you can request that part of the complaint be kept confidential; e.g., that the identity of the workers be withheld from the enterprise/s; You are aware that a complaint cannot be made anonymously.
5. Good Faith: Are you willing and able to participate in conciliation/ mediation in “good faith”?	You understand that the NCP will first offer conciliation/mediation to try to resolve the issues raised in the complaint; You are aware that “good faith” means: responding in a timely fashion; maintaining confidentiality during conciliation and mediation proceedings; not misrepresenting the process; not threatening or taking reprisals against involved parties; engaging with a view to finding agreement.
6. Publicity: Have you considered how you will publicise your complaint?	You have checked the website of the NCP and are aware of the NCP's position on publishing the complaint.
7. Participation in the Process: Have you considered who will participate in the conciliation/mediation process and how this will be financed?	You understand that representatives in conciliation/mediation should have the authority to make binding commitments on behalf of the complainants; You understand that there may be as many as two or three conciliation/ mediation sessions; You have checked the position and understand that the NCP may not pay the participation costs of parties; Where resources are a constraint you have considered the option of trade union partners supporting your participation/ representing you in the NCP process.

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