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International Bar Association Working Group on the OECD Guidelines for Multinational Enterprises

Response to the UK consultation on the terms of reference for an update of the OECD Guidelines for Multinational Enterprises

UK Department for Business, Innovation and Skills

30 November 2009

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Introduction

1 The International Bar Association ("**IBA**") is the world's leading organisation of international legal practitioners, bar associations and law societies. The IBA takes an interest in the development of international law reform and helps shape the future of the legal profession throughout the world. Bringing together practitioners and experts among the IBA's 30,000 individual lawyers from across the world, with a blend of jurisdictional backgrounds and professional experience spanning all continents, the IBA is in a unique position to provide analysis and comments on the OECD Guidelines for Multinational Enterprises (the "**Guidelines**"). Further information on the IBA is available at www.ibanet.org.

2 The Guidelines provide voluntary principles and standards that OECD governments use to encourage international businesses to comply with wherever they are trading and operating. The Guidelines cover all the major issues in business ethics including employment and industrial relations, human rights, environment, information disclosure, anti-bribery, consumer protection, science and technology, competition and taxation. Additional key instruments closely related to the Guidelines, and which are also referred to in this submission, include the Decision of the OECD Council on the Guidelines (the "**Decision**") and its Procedural Guidance (the "**Procedures**"), and the Commentaries prepared by the Investment Committee to provide information on and explanation of the Guidelines (the "**Commentaries**").

3 The Guidelines were last updated in 2000. Since then major legal, economic, social and political developments have taken place, and an update of the instrument is critical. This has been acknowledged by National Contact Points ("**NCPs**")[1] in their 2009 Annual Meeting and at the Ministerial Level at the OECD Council Meeting in June 2009. As a result, the UK Department of Business Innovation & Skills ("**BIS**")[2] issued in October 2009 a consultation document requesting the views of key

[1] Governments that have signed up to the Guidelines are required to establish NCPs. They are responsible for the promotion of the Guidelines and for dealing with allegations against multinational enterprises for acting inconsistently with the Guidelines.
[2] In the UK, the NCP is staffed by officials from the BIS.

stakeholders on the priority areas in the Guidelines requiring update. The terms of reference were listed in the public consultation document prepared by the BIS and are available here.

4 On November 2009, the International Bar Association (IBA) created a Working Group (the "**WG**") to review the Guidelines and respond to the BIS consultation document. The WG is made up of IBA members from the following committees: Corporate Social Responsibility; Tax, Mining Law; Oil and Gas Law; Human Rights; Corporate and M&A; Business Crime; Environmental Law; and the Corporate Counsel Forum. A list of the members of the WG can be found in Annex 1.

5 The OECD deadline for submission is 25 January 2010; however the BIS recommended that submission of comments be made by 30 November 2009. Despite the tight timeframe in which to review and make comments, the WG welcome the opportunity to provide comments on the priority areas. It should be noted, however, that the extremely tight timeframe has made it impossible for the WG to collectively debate and vet the issues. This submission represents the WG best efforts to present their views under the circumstances, but in its entirety it may not necessarily reflect the individual views of each member, or of the IBA as whole. We have tried to indicate individual member views where possible.

6 While the WG understands that the OECD's intention presently is only to update the current chapters in the Guidelines, we have included a broad range of comments and ideas to help improve the instrument as a whole. The OECD must consider creating additional chapters to provide greater clarity to Multinational Enterprises ("**MNEs**"). We have made a few suggestions to that effect below. Regardless, the OECD should consider expanding the Commentaries to reflect the changing legal, economic and social framework that surround the Guidelines.

7 We note that in particular, the OECD consultation has been prompted in large part by the issuance of the "Protect, Respect, and Remedy" Framework of Prof. John Ruggie, the Special Representative of the UN Secretary General on Business and Human Rights ("**SRSG**"), and the majority of questions relate to consistency of the

Guidelines and their application with that Framework (the **"SRSG Framework"**).[3] In particular, the SRSG has raised specific issues regarding the Guidelines in his speech to the Annual Meeting of National Contact Points at the OECD on June 24, 2008.[4] The SRSG Framework has enjoyed substantial uptake by business, civil society, and governments, including most recently the strong endorsement of the Presidency of the European Union,[5] and its use by the UK NCP in recent complaint decisions. Likewise, we support the Framework, endorse the relevance of the SRSG's questions to the OECD, and believe that the Framework serves as a critical standard against which any update of the reform must be measured.

Question 1: Are technical updates of the OECD Guidelines needed, and if so what aspects?

8 The following technical updates are suggested:

- Technical updates of instruments already mentioned in the Guidelines:
- OECD Principles of Corporate Governance (revised in 2004);
- OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (2009 edition);
- OECD Guidelines for Pension Funds Governance (2009);
- 1977 Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (3rd edition, 2001); and
- Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters (as amended in 2005).

9 Instruments that should be referenced:

- Basel Convention on the restrictions of Transboundary Movements of Hazardous Wastes and their Disposal;

[3] Ruggie, John, *Protect, Respect, and Remedy: A Framework for Business and Human Rights*, A/HRC/5 (April 2008), available at http://tinyurl.com/4snzhm (last visited 27/11/2009).
[4] Ruggie, John, Keynote Presentation at the Annual Meeting of National Contact Points, available at: http://www.reports-and-materials.org/Ruggie-presentation-OECD-Natl-Contact-Points-24-Jun-2008.doc (last visited: 30/11/2009).
[5] Swedish Presidency of the European Union, *Protect, Respect, Remedy – Making the European Union take a lead in promoting Corporate Social Responsibility*, available at: http://bit.ly/3dVgVn (last visited: 30/11/2009).

- Basel II—International Convergence of Capital Measurements and Capital Standards;
- Equator Principles (as revised in 2006);
- EUROSIF - European SRI Transparency Guidelines (2008);
- Extractive Industries Transparency Initiative;
- Global Reporting Initiative – Sustainability Reporting Guidelines;
- Guidelines on Cooperation between the United Nations and the Business Community (2000);
- ICC—Combating Extortion and Bribery: ICC Rules of Conduct and Recommendations (2005);
- International Confederation of Free Trade Unions – Trade Union Guide to Globalization (2002);
- Johannesburg Declaration on Sustainable Development (2002);
- OECD Declaration on Fostering the Growth of Innovative and Internationally Competitive SMEs (2004);
- OECD Declaration on Green Growth (2009);
- OECD Declaration on International Science and Technology Co-operation for Sustainable Development (2004);
- OECD Guidelines for Fighting Bid Rigging in Public Procurement;
- OECD Guidelines on Corporate Governance of State-Owned Enterprises (2005);
- OECD Integrating Climate Change Adaptation into Development Co-operation: Policy Guidance (2009);
- OECD Policy Guidance on Integrating Climate Change Adaptation into Development Co-operation (2009);
- OECD Policy Guidance on Integrating Climate Change Adaptation into Development Co-operation (2009);
- OECD Recommendation of the Council Concerning Guidelines for Protecting Consumers from Fraudulent and Deceptive Commercial Practices across Borders (2003);
- OECD Recommendation of the Council Concerning Structural Separation in Regulated Industries (2001);
- OECD Recommendation of the Council on Tax Measures for Further Combating Bribery of Foreign Public Officials in International Business Transactions (2009);
- OECD Recommendation on Competition Assessment (2009);

- OECD Recommendation to Deter Bribery in Officially Supported Export Credits (2006);
- OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones (2006);
- SRSG Framework;
- Transparency International—Business Principles for Countering Bribery (2009 edition);
- UN Convention Against Corruption (2003);
- UN Convention on the Rights of Persons with Disabilities (2006);
- UN Global Compact (2000);
- UN Principles for Responsible Investment;
- UN Stockholm Convention on Persistent Organic Pollutants (2001); and
- Voluntary Principles on Security and Human Rights (2000).

Question 2: Is clearer guidance required regarding the application of the Guidelines to supply chains, and if so, what should this include?

10 In 2000, the OECD reviewed the Guidelines and significantly expanded the applicability to supply chains in both OECD and non-adhering countries. This effort was limited in 2003, however, when the Investment Committee issued a statement providing that the Guidelines are part of the OECD Declaration on International Investment and Multinational Enterprises (the "**Declaration on IIME**") and thereby limiting the Guidelines supply chain application to investments or when an investment nexus exists. Neither the Declaration on IIME nor the Investment Committee has defined investment or provided guidance on the investment nexus. As a result, National Contact Points (NCPs) have rejected complaints because of the lack of an investment nexus.

11 The Guidelines should apply not only to investments, or where an investment nexus exists, but should include contractual relationships at all levels of the supply chain. This is consistent with the SRSG Framework, which is not limited to investment relationships. As the SRSG has written, "Supply chains pose their own issues. It is often overlooked that suppliers are also companies, subject to the same responsibility to respect human rights as any other business. The challenge for buyers is to ensure

they are not complicit in violations by their suppliers. How far down the supply chain a buyer's responsibility extends depends on what a proper due diligence process reveals about prevailing country and sector conditions, and about potential business partners and their sourcing practices."[6] This approach is also consistent with the application by the UK NCP of the SRSG's Framework in its 2008 *Afrimex* decision, which is the correct approach.[7] Thus the proper extent of an MNE's obligations with respect to its supply chain should be defined by the MNE's due diligence, which we discuss below when we propose a new chapter on Human Rights.

12 The OECD should create a chapter dealing specifically with MNE relationships with their supply chains, which would encourage MNEs to conduct due diligence with respect to their supply chain at all levels, and without regard to investment nexus. Paragraph 10 of Chapter II of the Guidelines ought to be incorporated in the proposed new Supply chain chapter. Paragraph 10 reads as follows:

> Encourage, where practicable, business partners, including suppliers and sub-contractors, to apply principles of corporate conduct compatible with the Guidelines.

13 The Commentary on General Policies in paragraph 10, commencing in sentence 4, uses the term "influence" in the following context:

> The influence enterprises may have on their suppliers or other business partners is normally restricted to the category of products or services they are sourcing, rather than to the full range of activities of suppliers or business partners. Thus, the scope of influencing business partners and the supply chain is greater in some instances than in others…In cases where direct influence of business partners is not possible… (Emphasis added).

The term "influence," however, is inconsistent with the SRSG Framework. The SRSG has explicitly declined to use the term "influence" to define the scope of a company's responsibility to respect human rights because the term conflates two

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[6] Ruggie, John, *Business and Human Rights: Towards Operationalizing the 'Protect, Respect, and Remedy' Framework*, A/HRC/11/13 (April 22, 2009), available at http://tinyurl.com/4snzhm (last visited 27/11/2009).

[7] *Final Statement by the U.K. Nat'l Contact Point for the OECD Guidelines for Multinational Enterprises: Afrimex (UK) Ltd.*, (Aug. 28, 2008), available at www.berr.gov.uk/files/file47555.doc (last visited 27/11/2009).

separate concepts—impact and leverage. Impact is where a company's activities or relationships cause human rights harm. A company should exercise due diligence to prevent such harm as part of its responsibility to respect human rights, the so-called second pillar of the SRSG Framework. Tying a company's responsibility to respect human rights only to cases where it has leverage, however, expands its responsibility to cases where it did not cause the harm, directly or indirectly, and the term influence itself is subject to manipulation.[8] Consequently, the Commentary should be revised in a manner consistent with the SRSRG Framework.

Question 3: Should the human rights section of the current Guidelines be updated, and if so, what should it include?

14 Consistent with our support of the SRSG Framework, and the global social consensus on business human rights that underpins it, the current human rights language of the Guidelines must be revised and expanded beyond its current statement that MNEs shall "respect the human rights of those affected by their activities consistent with the host government's international obligations and commitments." A new chapter dealing with Human Rights is required.

15 In his June 2008 speech to the OECD NCP, the SRSG noted "the lack of specificity [in the Guidelines] with regard to human rights beyond the sphere of labor practices, and the omission altogether of some critical areas, such as business impacts on communities, including indigenous peoples." Therefore a detailed Human Rights chapter should be created that provides at least as much detail and guidance as the environmental chapter of the Guidelines. This Chapter should encourage MNEs to conduct human rights due diligence in accord with the SRSG Framework.

16 The chapter should identify the sources of international human rights standards to be followed, especially because many developing countries do not reflect such standards in their domestic laws. As the SRSG Framework states, the business responsibility to respect human rights is independent from domestic law

[8] SRSG Framework, ¶¶ 65-70.

17 Specifically, the human rights chapter should set out guidelines to help companies identify, prevent and address the human rights impacts of their operations. The current Environmental chapter of the Guidelines evidences the ability of the Guidelines to include due diligence milestones and provides some examples of guidelines that might be included. The new human rights chapter should be at least as detailed.

18 In his most recent statement on the scope of the responsibility to respect, the SRSG has stated:

> Within the framework, the scope of a company's responsibility is determined by the impact of its *activities* on human rights, and whether and how the company might contribute to abuse through the *relationships* connected to its activities. The national and local *contexts* in which the business operation takes place should also serve to alert the company to any particular human rights challenges it may face on the ground. Situational variations will always exist, but they cannot and should not become the basis for general and universally applicable principles.[9]

The SRSG Framework further provides that since companies can adversely impact all human rights, it should look for standards in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the ILO Declaration on Fundamental Principles and Rights at Work. Many of these standards may already be embodied in domestic law or in treaties that apply to the MNE's operations in a particular country. However, the responsibility to respect human rights is not limited to compliance with compliance with domestic law. The Guidelines should reflect the approach described above.

19 The Guidelines should specify that the due diligence process recommends that MNEs adopt human rights policies, undertake human risk impact assessments with respect to major projects and transactions and ongoing operations, integrate their human rights policies into their culture and business practices, and monitor and report on their human rights performance.

20 *Engagement with host communities.* The Human Rights chapter should, like the Environment chapter, encourage MNEs to communicate and consult with members

[9] Ruggie, John, Note on ISO 26,000 Guidance Draft Document (November 2009).

of communities before and throughout the lifecycle of an investment/project. Several WG members believe that this also means obtaining the free and informed consent of communities affected by large footprint projects.

21 *Rights-Compatible Grievance Mechanisms*. The Guidelines should also encourage companies to establish company-level grievance mechanisms that are compatible with human rights, in accordance with the second and third pillars of the SRSG Framework—the business responsibility to respect human rights and the need for access to remedy. This is particularly encouraged for operations in countries whose government do not provide adequate access or remedy for business related human rights abuse. The use of grievance mechanisms to resolve non-commercial disputes with external stakeholders is consistent with emerging best practice. For example, the International Finance Corporation, which is the private lending arm of the World Bank, and the International Council on Mining and Metals; which is the mining and metals industry's leadership group on sustainable development, have each recently issued guides citing the importance of company based grievance mechanisms in large projects and providing advice as what those mechanisms entail.[10] The grievance mechanism should have characteristics identified by the SRSG Framework: they must be legitimate; accessible; predictable; equitable; rights-compatible; and transparent.

22 One WG member suggests that the proposed new human rights chapter should also include a cross reference to the most fundamental guidelines addressed in chapter IV on Employment and Industrial Relations—particularly, the discrimination prohibition and the respect for the right to gather in trade unions. The member also urges that specific reference to particular rights should be inserted, such as equal pay for equal work, reasonable wages, respect for limited working hours, the right to rest, freedom of association, and equal protection under the law.

[10] International Council on Mining and Metals, *Human Rights in the Mining & Metals Sector: Handling and Resolving Local Level Concerns & Grievances* (October 2009), available at http://bit.ly/dVDYn (last visited: 27/11/2009), and International Finance Corporation, *Good Practice Note—Addressing Grievances from Project-Affected Companies: Guidance for Projects and Companies on Designing Grievance Mechanisms* (September 2009), available at www.ifc.org (last visited 27/11/2009).

Question 4: Should the disclosure chapter of the Guidelines be updated, and if so, what should this include?

23 Regular disclosure of material information helps companies to be more reliable and transparent, and to be perceived by investors, consumers, communities, and governments as trustworthy. On the other hand, the disclosure of certain confidential information may prejudice the company and affect its competitiveness. Society's need for information regarding companies and the need of companies to ensure their position in the market must therefore be balanced.

24 The presumption should be disclosure—particularly with respect to the company's adherence to the Guidelines—absent prejudice to the company. Where companies do not comply with the Guidelines, they should explain why not. This is analogous to the corporate governance requirements in effect in the UK, The Netherlands, and many EU companies.

25 The Guidelines should make clear that disclosure of information should be in a medium that is accessible and in a form that can be interpreted by stakeholders impacted by the MNE's activities. Thus MNE should tailor disclosure as relevant to accommodate the affected/interested community in the host country. For example, in many countries only a minority has access to the internet, and of those with access, many will not have the capability to interpret financial or sustainability reports which affect them.

26 One member believes that the Guidelines already encourage significant disclosure to be made by MNEs and notes that "high quality standards" should be applied. Another believes that best practice corporate reporting in major markets, including developing country markets, exceeds the standards in the Disclosure chapter. For example, one WG member noted that most Indian firms have now established an investor complaints committee and report annually on the number and type of investor complaints received. Similarly, there have been numerous international instruments since the Guidelines were updated in 2000, which detail greater disclosure requirements. The Guidelines should detail these instruments and incorporate them in the principles.

27 Consequently, the Guidelines should take into account such instruments as the 2004 OECD Principles of Corporate Governance (the "**OECD Principles**"). Unlike the Guidelines, the OECD Principles encourage disclosure of related party transactions. As the Annotations on the OECD Principles state:

> It is essential for the company to fully disclose material related party transactions to the market, either individually, or on a grouped basis, including whether they have been executed at arms-length and on normal market terms. In a number of jurisdictions this is indeed a legal requirement. Related parties can include entities that control or are under common control with the company, significant shareholders including members of their families and key management personnel.

28 Other disclosure requirements should concern the following:

28.1 *Human Rights issues*. This is consistent with the human rights due diligence process discussed earlier.

28.2 *Climate change issues*. The Guidelines should encourage public companies, at a minimum, to disclose the financial and physical impacts climate change and its related regulations may have on their business. They should be requested to disclose legislations and regulations to which they are currently or may become subject to.

28.3 *Corruption and not just bribery*. One member of the WG is of the opinion that the Guidelines should reflect the international stance on money laundering and corruption. Such counterproductive practices should be discouraged by the Guidelines and MNEs should be encouraged to disclose for example, whether they have engaged in terrorist financing and bribery of foreign officials to obtain or facilitate a contract. Another member points out that such disclosure may be problematic from a self-incrimination standpoint.

29 One member has noted that government imposed confidentiality requirements can compromise disclosure and/or transparency. MNEs must comply with the laws and regulations of host countries, but the MNEs should be encouraged to support efforts to lobby for the lifting of any such restrictions.

30 The Disclosure chapter should re-examine the exemption in Paragraph 18 of the Commentary on Disclosure, which allows MNEs to avoid disclosure whenever such disclosure would impose "unreasonable administrative or cost burdens" or where disclosure "may endanger their competitive position." One WG member believes that this exemption should be eliminated in its entirety. Another believes that exemption should be restricted solely to cases of "substantial prejudice." A third asserts that the text in paragraph 1 of chapter should be amended to read:

> Enterprises should ensure that timely, regular, reliable, relevant and <u>substantiated</u> information is disclosed regarding their activities, structure, financial situation and performance. (Emphasis added).

The member further asserts that MNEs should provide an explanatory statement whenever they are unable to comply with the disclosure requirements. Another member suggests simplifying the Disclosure chapter by referring MNE's to international best practice standards (for example, The Global Reporting Initiative).

<u>Question 5: Is there a need to clarify the application of Chapter V on Environment to climate change and green growth issues, and if so what should the chapter cover?</u>

31 The existing Disclosure chapter already contains wide-ranging environmental disclosure requirements, which include the need for MNEs to "take due account of the need to protect the environment," "generally to conduct their activities in a manner contributing the wider goal of sustainable development," to "establish targets for improved environmental performance" and "continually seek to improve corporate environmental performance." These requirements would mean that a company must address the issues of climate change and green growth in order to comply with the Guidelines, regardless of any specific reference to them.

32 Nevertheless, given the adverse impact that global warming is having, and will continue to have, on the environment, business and society—particularly the most vulnerable in society—the Guidelines should contain specific references to climate change. One member notes that many countries, such as Japan and India, have already acknowledged the need to have a corporate plan on climate change.

33 Consequently, the Guidelines and its Commentaries should request that MNEs help in the fight against climate change and the protection of non-renewable resources. Several members have suggested that the following be incorporated in the Guidelines:

33.1 Adoption of internal policy statements in order to reduce greenhouses emissions, without compromising their production and development.

33.2 Application of policies based on the precautionary principle.

33.3 Substitution of production processes with technologically “clean” processes.

33.4 Promotion of technology transfer and innovation.

33.5 Investment in new technologies to increase the efficiency of production and the consumption of resources and materials.

33.6 Reduction of waste generation.

33.7 Reducing the movement of hazardous waste. The Basel Convention on the Restrictions of Transboundary Movements of Hazardous Wastes and their Disposal is instructive on this point.

33.8 Contribution to energy savings through the improvement of operations and the use of more efficient equipment and systems.

33.9 Investment in energy savings projects, changeover for fuels involving fewer gas emissions, which are prejudicial for the atmosphere or which are based on renewables.

33.10 Change towards a new energy infrastructure built on the basis of renewable resources.

33.11 Development of carbon capture and storage systems.

33.12 Substitution of the ozone-depleting substances with the appropriate substances in their production processes.

33.13 Contribution with the public sector in the development of mitigation and adjustment actions. and

33.14 Development of a sustainable management of water resources.

34 One member points out, however, that high CO2 emissions are frequently associated with projects which have a close association with government—such as power generation, heavy industry, refining, mining, oil & gas exploration, and so on. The costs of implementing state of the art technology in a new build or by way of a retrofit may be denied as being tax deductible or cost recoverable with the full burden being placed upon the MNE. Collective support from the international business and community may help persuade governments to actively promote the implementation of such technology.

Question 6: Should the consumer chapter of the Guidelines be expanded, and if so, what should it include/cover?

35 *Environmental and Human Rights Disclosure to Consumers*. Several WG members believe that the Consumer chapter of the Guidelines should encourage MNEs to inform consumers in user-friendly terms; the impact the company's products have on the environment, human rights and their policies to circumvent and reduce this. Doing so will enable consumers to make informed decisions when purchasing products and services.

36 *Financial Risk Disclosure to Consumers.* In light of the financial crisis, financial institutions should be required to disclose the risks of their products to consumers, again in user-friendly language appropriate to the consumer. The Guidelines should make clear that a financial institution should provide its consumers with the same level of information regarding the risks of failure of a financial product, the same type of information is usually provided by a product manufacturer or distributor. This information should include product's safety and health risks.

37 *Distance Selling.* Although the commentary to the Consumer chapter refers to the increasing importance of electronic commerce, it does not provide guidance on "distance selling". Distance selling entails purchasing of goods on the internet. Distance selling has become very important since the Guidelines were last updated in

2000, and has become the subject of legislation in many countries, the Guidelines should provide guidance to ensure that MNEs take appropriate steps to protect consumers who purchase products and services remotely. Within the European Union, distance selling is regulated by the Distance Selling Directive (the "**DS Directive**"), which is binding on all member states. Similarly, the Distance Marketing of Financial Services Directive (the "**DM Directive**") establishes a set of rules on the information that must be supplied to consumers when financial services are sold at a distance. Essentially therefore, MNEs from EU member states must comply with the DS and DM Directives whenever they are selling goods or services at a distance to EU residents. The same degree of consumer protection should be afforded to consumers outside of the EU, when buying the goods or services of MNEs (most of which are also residents in EU member states). Therefore, consistent with the EU DS and DM Directives, one member suggests that the Consumer chapter should be updated to include distance selling of goods and services, including financial services. The chapter should encourage, *inter alia*, the following:

37.1 Before the completion of a distance contract, the MNE should provide details of identity, address, the nature of the goods and services, and the price (including tax), and delivery costs:

37.2 Once the consumer agrees to purchase the goods or services from the MNE, a written confirmation of the terms and information concerning the contract should be provided to the consumer.

37.3 The consumer should expressly be given the right to withdraw from the distance contract without giving a reason. Once this is done, the Guidelines should specify that the MNE should reimburse the consumer within 14 working days of receipt of withdrawal.

37.4 The consumer should be afforded at least 14 days cooling off period from the date of receipt of the goods or service (there are exceptions).

Additionally, even though paragraph 5 in the Consumer chapter state that MNEs should "respect consumer privacy and provide protection for personal data", the emerging problem of credit card in the context of the distance selling suggests that special provision should be made for the protection of credit card information.

38 With respect to the infrequent use of the consumer chapter of by NCPs, one WG member has suggested that consumer groups and consumers should be permitted to lodge complaints with the NCP, in order to facilitate alternative dispute resolution of such disputes, as set forth in the commentary. Another member supports the recent expansion of NCP complainants to include NGOs, as demonstrated by the UK NCP decisions in the *Afrimex* and *Vedanta* cases, and sees no reason why that shouldn't include NGOs devoted to consumer protection. The WG member questions, however, whether it is realistic, efficient, and practical to require NCPs to handle individual consumer complaints.

Question 7: Should the taxation chapter of the Guidelines be updated, and if so, what should it include/cover?

39 Regarding tax avoidance, one WG member believes that the Guidelines should be updated to address the matter of Treaties to Avoid International Double Taxation. Such treaties are a fundamental tool aimed at mitigating, or even avoiding-international double taxation and the consequent discouragement of cross-border investment and global trading. The aim should be restricted to prevent abuses.

40 Subsequently, the Guidelines should encourage MNEs to follow proper tax planning practices in applying Tax Treaties to international transactions to avoid abuses of their benefits. This would not only be achieved by the arms-length principle, but also by transparent disclosure of the operations conducted in low-tax jurisdictions.

Question 8: How can the Risk Awareness Tool be more closely associated with the implementation of the Guidelines?

41 The Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones ("**RA Tool**") should be included in the Commentary of the Guidelines, and MNEs should be required to use it. In his June 2008 speech to the OECD NCP convention, the SRSG stated, "even though the OECD's work on weak governance zones is not part of the Guidelines, it has much to offer. The human rights regime cannot be

expected to function as intended when a country is engulfed in civil war, for instance. In such situations, the home countries of multinationals should play a more active role in providing information about human rights risks and, especially where the investment involves home country support, in providing greater oversight. The same is true of investments supported by international financial institutions." Risk impact assessment is a fundamental element of business human rights due diligence under the SRSG Framework, and is not limited to weak governance zones.

42 In order to enhance the interaction between the Guidelines and the RA Tool, NCPs should consider the RA Tool when doing an initial assessment of merit or when issuing a recommendation or statement. The WG supports the use of the RA Tool by the UK NCP in the *Afrimex* case, which involved importation of minerals by a UK company from the Democratic Republic of the Congo, a weak governance zone. The UK NCP recommended that *Afrimex* integrate the RA Tool it in its corporate policies and management practices. In this way, the Guidelines and the RA Tool would be integrated and complemented through the activity of the NCPs. NCPs should use the RA Tool as a standard to determine breach of the Guidelines regarding the behaviour of MNEs in countries of weak governance.

43 In addition, the RA Tool should be widely publicized, and progressively integrated into the promotion of the Guidelines. The same promotional events and means that the NCPs and the Investment Committee use to make communities aware of the Guidelines should also be used to promote the RA Tool. For example, the NCP websites of numerous countries: Australia; Belgium; Canada; Germany; Ireland; Italy; Japan; Korea; Romania; Sweden; and United Kingdom, all publish or refer to the RA Tool along with the Guidelines on their NCP websites. All NCPs should follow this practice.

44 Finally, the Investment Committee should develop a website to inform investors in weak governance zones about how to operate, and encourage them to use the recommendations of the RA Tool. Last, the Guidelines should cross-reference to the RA Tool when referring to the responsibilities of MNEs.

Question 9: Does the procedural guidance need to be updated to give greater direction to institutional structure and functioning of NCPs, and if so, how?

The Procedures requires that the NCPs operate "in accordance with core criteria of visibility, accessibility, transparency, and accountability in order to achieve the objective of functional equivalence." This is consistent with the SRSG Framework's principles for grievance mechanisms, which are legitimacy, accessibility, predictability, equitability, rights-compatibility, and transparency. The key questions (Individually the "**SRSG Question**", collectively the "**SRSG Questions**"), according to the SRSG, are as follows:

44.1 Does the "functional equivalence" standard for NCPs include a sufficiently detailed common understanding among them of what they are expected to do? Is it clear to potential users what they, in turn, can expect from the NCP process?

44.2 Where NCPs are housed primarily within government departments tasked with promoting business, trade and investment, how are potential conflicts-of-interest managed?

44.3 Furthermore, are NCPs resourced to undertake adequate investigation of specific instances, and given either the training to provide effective mediation themselves, or the capacity to use external mediators when needed?

44.4 Are NCPs structured in a way that helps them manage the tension between being neutral conciliators, on the one hand, and assessors reaching authoritative recommendations, on the other?

44.5 Does the prevailing level of transparency provide sufficient assurance to aggrieved parties? Is it optimal for peer learning across NCPs?

44.6 Is there adequate guidance and oversight of NCPs at the national level, and by the Investment Committee safeguarding the brand integrity of the OECD system as a whole?

45 With respect to SRSG Question A (Clarity of Expectations), although there have been a number of cases, notably in the UK, The Netherlands, and Australia where NCPs have been able to successfully resolve disputes or provide useful guidance in accordance with the Guidance's core criteria and the SRSG grievance mechanism principles described above, the NCP process has not enjoyed credibility with NGOs that have been involved in Specific Instances. As OECD Watch has written, "NGO's increasingly view the process as arbitrary, unfair, and unpredictable. The cumbersome and vague manner in which many NCPs have dealt with specific instances is detrimental to the credibility of the Guidelines."[11] One WG member noted that it has been nine years since the Guidelines and procedural guidance were updated, and during that time, the complaint procedures used by NCPs have not contributed to a meaningful and effective resolution of most of the complaints filed. The member noted that only 5 out of the total of 85 NGO cases raised since the 2000 revision have been concluded through a mediated outcome or a satisfactory final statement. Clearly, the NCP process has not satisfied the expectations of its key stakeholders, which means that the goal of functional equivalence has not yet been met. This requires that consistent with the need for flexibility, the NCP process should meet minimal key guidelines in order to be credible.

46 With respect to SRSG Question B (Independence), it has been noted that "there is a perceived bias towards corporate interests stemming from the frequently dominant role of trade ministry staff, and a resulting reduction in legitimacy."[12] In order for the NCP process to gain legitimacy, it should be independent. The fact that the government convenes the NCP is its greatest strength, because it provides a strong incentive for the parties to participate. But it is critically important that the NCP governance structure be independent. The UK and Dutch NCPs are good examples of efforts to overcome some of these problems, because of their use of

[11] OECD Watch, *Five Years on: A Review of the OECD Guidelines and National Contact Points*, 2005, available at: http://www.foei.org/en/resources/publications/economic-justice-resisting-neoliberalism/2000-2007/pagesfiveyears.pdf/view (last visited: 30/11/2009).

[12] Rees, Caroline, *Access to Remedies for Corporate Human Rights Impacts: Improving Non-Judicial Mechanisms—Report of a Multi-Stakeholder Workshop, 20-21 November 2008*, Harvard Kennedy School Corporate Social Responsibility Initiative, Report No. 32, available at: http://www.hks.harvard.edu/m-rcbg/CSRI/publications/report_32_consultation_report_november_08.pdf (last visited: 30/11/2009).

multistakeholder representation, and particularly the Dutch NCP, which is independent from the government. It is also important that an independent board review the activities of the NCP. At minimum, the NCP process globally should be revised to require independence.

47 Regarding SRSG Question C (Investigation and Training), there are two issues. First, alleged violations by the Guidelines by a company will likely occur in a country that is remote from the NCP's home state. The NCP is not a court and has no power to compel the production of witnesses and evidence. This greatly increases the barriers of access to remedy by those aggrieved. The lack of geographic proximity could be addressed by requiring site visits and conducting hearings in the host country, where the violation alleged occurred. Additionally, as the UK has done in its recent determinations in the *Afrimex* and *Vedanta* cases, it is critically important for the NCP to focus on adequacy of the due diligence process actually followed by the MNE, since the facts about due diligence are more readily available for examination by the NCP. Second, with respect to training, the NCP can function as a mediator if it is perceived as independent and if it is trained in alternative dispute resolution techniques. Independence is already an issue, as discussed above. This indicates that the NCP should follow the lead of the UK in outsourcing its mediation function to independent alternative dispute resolution professionals.

48 As regards SRSG Question D (Neutral Conciliators versus Authoritative Evaluators), there is an inherent tension between having the same person or entity perform both functions. The NCP should follow the lead of the Compliance Advisor Ombudsman to the World Bank and separate the two functions.

49 With respect to SRSG Question E (Transparency) the following are instructive:

49.1 NCP procedures and how to access them should be widely publicized in order to meet minimum standards of accessibility, predictability, and transparency. A significant number of NCP websites, however, contain very little, if any information on how the NCP process is used, and others provide information only in one language. This is out of step with the increasing recognition of the need to make information about remedy widely available

in order to meet the objectives of the Remedy pillar of the SRSG Framework. The IBA is involved in the Business and Society Exploring Solutions project (www.baseswiki.org), a joint initiative of Harvard University's John. F Kennedy School of Government, the Compliance Advisor Ombudsman of the World Bank, the JAMS Foundation and the IBA. The BasesWiki website is one platform that can be used free of charge, to provide information to a large cross section of people.

49.2 NCP decisions should be made public and set forth a reasoned basis for their conclusions. The UK NCP's recent decisions and guidance set an example of how this should be done, but its approach is currently the exception rather than the rule. This must be changed.

49.3 Mediation requires a certain level of confidentiality in order for the process to work effectively. It is suggested that in such cases, the default approach in mediations should nevertheless be transparency, with confidentiality to be applied in cases of actual prejudice.

50 Concerning SRSG Question F (National Oversight), it is critically important that NCPs avoid the danger of horizontal policy incoherence, a term used by the SRSG to designate inconsistent action on human rights by parallel but different governmental entities. That is, one agency may be charged with assuring the country's protection of human rights—including ensuring that its MNEs respect human rights—and another with promoting trade, with no or little communication between the two, resulting in mixed messages to country MNEs regarding their respect human rights in its trade activities. This is particularly problematic where the NCPs lack independent governance, and are staffed and controlled by trade agencies, with no countervailing checks and balances. Thus NCPs should liaise with relevant national authorities to facilitate follow up and monitoring of corporations that are the subject of an adverse final statement.

51 Although an NCP determination is not legally binding—in the sense of enforcement judgment for damages or a mandatory injunction—that does not mean that it should be without serious consequences.

52 In that regard, one member suggests that a state could attach serious consequences which respect to companies that have been found to violate the Guidelines, including:

52.1 Ensuring that stakeholders are made aware that the company is the subject of an adverse finding.

52.2 Seeking withdrawal of public subsidies or export credits.

52.3 Excluding companies from public procurement and/or trade missions.

52.4 Advising the legal community, corporate investigation consultants, consumer action groups and other stakeholders that the company is the subject of an adverse finding.

53 In cases of egregious and deliberate violations, the State might employ even more stringent measures, such as seeking disqualification of company directors or seeking delisting of public companies.

Question 10: How can the complaints procedures of the current Guidelines be improved?

54 A number of procedural problems with the complaints procedures need to be addressed, in light of the fact that NCP process has not resulted in resolution of the vast majority of complaints, as noted earlier.

55 There are no rules or timelines NCPs that must follow after a complaint has been filed. The Investment Committee has not created basic administrative procedures NCPs must follow when complaints are filed. In fact, NCPs have a great deal of flexibility in how they handle complaints. In fact, some NCPs have avoided formally accepting a complaint. This should be fixed, and the OECD can build on the initiatives of individual NCPs in this regard. For example, the Australian NCP has developed timelines that recommend 30 days for the initial assessment phase and 90 days for the second (mediation) phase of the complaint process. In the UK, there are new procedures for handling specific instances within a 12-month time frame.

56 The obligations of companies and governments in the complaint process are asymmetric, which contributes to the failure of the NCP process to resolve the vast majority of complaints filed. While governments have obligations to implement the Guidelines, they are voluntary for companies. Apart from the fact that the government convenes the process—potentially a major incentive—there is little compulsion for a company to engage, particularly where, as noted earlier, there are few or no serious consequences from an adverse determination. As part of the state duty to protect human rights—the first pillar of the SRSG Framework—OECD countries should encourage MNEs to respond to/ engage with complaints that are accepted by an NCP. Alternatively, states could include a clause in all foreign investment approvals requiring the MNE to agree in advance to engage in any complaint process initiated against it.

57 There are additional actions which do not require the action of state legislation that NCPs can and should take to secure greater participation by companies in the process. NCPs should issue a statement if the company engages, but then decides to pull out. The confidentiality provisions of the Guidelines should be amended to facilitate such publicity, which should be limited only by relevant national laws in the relevant jurisdiction(s).

58 The NCP process should provide for a meaningful and timely triage of complaints filed, in order to take necessary action promptly. The Procedural Guidance states that NCPs should "[m]ake an initial assessment of whether the issues raised merit further examination." However, some NCPs have taken months or even a year or more to notify a complainant of the outcome of an initial assessment, due to lack of timelines. This also must be fixed. In addition, the failure of an NCP to make any initial assessment may be hidden by the 'confidentiality principle' in the Guidelines. Consequently, the Guidelines should provide for a specified time scale for the initial assessment phase, along with clear rules on the process for determining whether the NCP will accept the case. The acceptance or rejection of each part of a complaint should be made against a set of transparent criteria, including reasons for the NCP's decision, and the initial assessment should be published. The confidentiality principle of the Guidelines should be modified to enable the publication to be as

transparent as possible and consistent with national laws. In July 2006, the UK NCP agreed to make initial assessments available to both parties at the same time. NCPs should also be required to share information and documents freely between the parties to a complaint. All documents received from any party to a complaint should be made available to the other party; unless there are strong reasons for not doing so and these reasons are explained in writing. All NCPs should be required to follow this example.

59 The lack of uniform and detailed guidance on the issuance of final statements, and its content, is a significant deficiency of the Guidelines. At the conclusion of the complaint procedure, the NCP should issue a reasoned basis for its decision, and make that decision public, for the reasons we have already expressed in response to earlier questions. The final statement issued by an NCP should indicate whether, and the extent to which the Guidelines have been breached. As noted above, this would require, in cases involving alleged violations of human rights, a determination of whether the MNE has undertaken human rights due diligence process in accordance with the SRSG Framework. Where mediation has been successful, the statement should make this clear and should contain details of any agreed measures to be taken. the mediation process itself should be transparent, except where necessary to avoid actual prejudice to the parties. Where mediation fails to produce a mutually acceptable outcome, the NCP's statement should contain recommendations for remedying the breach. Final statements should be written in full consultation with all parties, so far as is possible. The failure of a party to engage in such a consultation should not impede the issuance of a final statement.

60 Finally, any revision of the Procedures should ensure that all NCPs meet the principles identified by for the SRSG Framework to effective non-judicial mechanisms: legitimate, accessible, predictable, equitable, rights-compatible and transparent.

Question 11: Would there be merit in developing further guidance on parallel proceedings and building it in the Procedural Guidance or Commentary, and if so, what type of guidance?

61 As Prof. Larry Cata Backer has noted, it may be disconcerting for companies to face the simultaneous application of two governance systems, a state law-system and the social norm system represented by the Guidelines.[13] However, the two systems are complementary, not contradictory. As noted earlier, the SRSG Framework requires companies to respect human rights whether or not domestic law requires them to do so. The WG endorses the approach of the UK NCP in the *Vedanta* case, where these concerns were raised—which was to issue a recommendation that the Vedanta should adopt a practically-implemented human rights policy, rather than an aspirational one, consistent with the SRSG process.

Question 12: Is there scope for adding references to the NCP following-up on the publication of a Specific Instance by building it in the Procedural Guidance or Commentary, and if so, what type of follow up?

62 Consistent with the need to attach serious consequences to NCP decisions, it is also important that NCPs have the ability and obligation to monitor compliance with their decisions and recommendations once made. Unlike a court judgment, compliance with an NCP decision or recommendation is not easily enforced. This gap should be addressed. For example, the Australian NCP's statement and agreed outcomes in the *Global Solutions* case were forwarded to the relevant organisations and individuals with the capacity and interest in monitoring the company's operations, and this helped to ensure on-going external monitoring of agreed commitments. A more direct approach was adopted in the French NCP's final statement concerning the *Nam Theun II dam project* in Laos, in which the NCP offered to hold annual meetings with the company. In contrast, one member cited the *Afrimex* case, where the company did not provide information to the NCP on whether, or how, it was

[13] Backer, Larry, *Law at the End of the Day: Part II: The OECD, Vedanta, & the Indian Supreme Court—Polycentricity, Transnational Corporate Governance and John Ruggie's Protect/Respect Framework*, (November 3, 2009), available at http://bit.ly/4Jzc8x (last visited 27/11/2009).

implementing the recommendations in the Final Statement which found that the company violated the Guidelines.

63 Follow up procedures are therefore necessary, and could take the following form:

63.1 An NCP Final Statement determining that a breach of the Guidelines has occurred would indicate what agreed measures or recommendations have been developed to address the situation.

63.2 Any such statement would trigger an obligation for the NCP to issue a follow up report between 12 and 15 months after the date of the Final Statement.

63.3 The follow up report would be written in consultation with the parties to the original complaint, and would indicate the extent of the MNE compliance with the recommendations and /or agreed measures outlined in the original Final Report.

63.4 The follow up report would be published.

63.5 If the follow up report indicates a lack of satisfactory compliance with the relevant recommendations/ agreed measures, then a further follow up report would be issued between 12 and 15 months after the date of the first follow up report.

63.6 Up to three follow up reports in relevant cases would be issued.

Question 13: Would there be merit in further developing guidance on retrospective guidance on new cases and building it in the Procedural Guidance or Commentary, and if so, what type of guidance?

64 When the OECD guidelines are updated, guidance will have to be provided to the NCP on how to proceed with issues prior to the date of the updated document. The OECD should state whether the new rules will be applicable to those cases pending. Failure to do so may cause unreasonable expectation from complainants, especially if NCPs unilaterally decide not to apply the new guidelines to breaches that occurred prior. That said, we no reason why the SRSG Framework, even if incorporated explicitly into the revised Guidelines should not apply retrospectively to pending

cases as a standard against which business conduct with respect to human rights must be judged. The global consensus on the need for business to respect human rights, as articulated in that Framework, has pre-existed the Framework.

Question 14: Is clarification needed on the circumstances under which NCPs could accept a complaint against a financial institution, and if so, what type of clarification is needed?

65 There is some uncertainty as to the application of the Guidelines to financial institutions. Financial institutions are confused as to whether they are liable if the parties they supplied a loan to for a project, engage in unethical business practices. Some NCPs have construed the application of Chapter II paragraph 10 to include financial institutions.

66 The current financial crisis has underscored the profoundly adverse impact that overly risky lending practices can have on society. The WG recommended earlier that the Guidelines should provide that financial institutions disclose the risks of products to consumers. Beyond that, the SRSG Framework provides that companies should exercise due diligence to ensure that their actions do not infringe on human rights directly or indirectly:

> "The corporate responsibility to respect human rights includes avoiding complicity. The concept has legal and non-legal pedigrees, and the implications of both are important for companies. Complicity refers to indirect involvement by companies in human rights abuses - where the actual harm is committed by another party, including governments and non-State actors. Due diligence can help a company avoid complicity."[14]

67 While the factual circumstances in each case are critical, there does not appear to be any reason why financial institutions should be excluded from the obligation to conduct human rights due diligence in order to avoid complicity in the human rights violations of their borrowers and others. Conducting such due diligence is already best practice in the international banking industry. The Equator Principles already provide that the projects financed by financial institutions must be developed in a

[14] SRSG Framework, ¶73.

manner that is socially responsible and reflect sound environmental management practices.

68 Consequently, the Guidelines should apply to financial institutions, and any inference to the contrary should be corrected.

Question 15: Should a more structured peer review process be considered and built into the Procedural Guidance or Commentary of the Guidelines, and if so what type of review process?

69 NCPs currently have no formal mechanism for self-reflection or objective review by independent parties. A peer-review mechanism would assist in enabling such self-reflection and evaluation, and help to end the extreme variability in use of the process from country to country. It would promote more constructive criticism and peer pressure among NCPs and raise the bar for performance in both promotional activities and handling of Specific Instances. The Dutch NCP, which underwent a major organizational revision in 2007 towards an independent body with considerable human rights and financial resources, has now scheduled a peer review to assess its functioning, to be conducted by the end of 2009. This is a best practice and should be followed by all NCPs.

70 The NCP guidance note on the peer review process should include recommendations on time frames and the scope of the peer review, which might include evaluations of the last Statements and of the rejected complaints, as well as structural and organisational issues. The outcome of the peer review should be issued as a report to the Investment Committee.

71 For the implementation of a peer review process, the OECD may consider assessing the experience of the Financial Action Task Force (FATF) in relation to the promotion and follow up of the implementation of the 40+9 Recommendations on anti-money laundering and terrorism financing. Importantly, the mutual evaluations processes carried out by FATF and the FATF regional organisations have had a

significant impact in law reform and in the harmonisation of laws and regulations in the anti-money laundering area[15].

72 One WG member further believes that an independent review mechanism, which could be internal and/or external, should also be required for all NCPs. The United Kingdom NCP has recently established a Steering Board. The Board has four external members drawn from four key constituencies (parliament, NGO, union and business). This initiative has been valuable in improving the UK NCPs procedures and enhancing the quality of debate on policy issues. A similar or appropriately adapted form of such a review panel should be recommended for all NCPs.

Question 16: Apart from the possible issues listed above, are there any other specific issues or parts of the OECD Guidelines that need updating, and if so, what should this include/cover?

73 Several WG members believe that NGOs should be allowed to appeal if their complaint is rejected or if they are unsatisfied with the decision of the NCP. Although NGOs have been able to lodge complaints with NCPs since 2000, only NCPs, the Trade Union Advisory Committee ("**TUAC**") and the Business and Industry Advisory Committee ("**BIC**") can request that the Investment Committee provide further clarification on issues raised in a complaint or how the NCP handled a complaint. Several NGOs have sought clarification from the Investment Committee, but these requests have been rejected. In order to enhance the credibility of the process, and make it accountable to those who use it, NGOs should be treated equally with the TUAC and the BIAC when it comes to appeals and requests to the Investment Committee. One member believes that the Investment Committee may not be a sufficiently independent body to decide an appeal.

74 Several other WG members suggest consideration of an NCP-driven certification programme that would provide the certified MNE with a rebuttable presumption of compliance in an NCP complaint proceeding. The NCP or a CSR committee could incentivize MNE's to meet and exceed the standards of conduct raised by the OECD

[15] Further information on the functioning of the FATF mutual evaluations is available at http://bit.ly/8ptMd8 (last visited: 27/11/2009).

Guidelines. Another member points out that any such certification program should be seen as credible by all stakeholders, conducted by independent and qualified entities in accordance with objective, agreed upon standards, and, and not be seen as a tick-the-box approach which elevates form over substance.

75 Several other WG members suggests rewriting paragraph 5 in chapter II entitled "General Policies", which now reads:

> Refrain from seeking or accepting exemptions not contemplated in the statutory or regulatory framework related to environmental, health, safety, labour, taxation, financial incentives, or other issues.

The members would revise it to read as follows:

> Refrain from seeking or accepting exemptions ~~not contemplated~~ in the statutory or regulatory framework, including by way of government contracts, related to environmental, health, safety, labour, taxation, financial incentives, or other issues. MNEs should refrain from asserting or advancing any claim against a host government or another party with respect to laws, regulations or measures relating to human rights, health, safety or the environment.

The WG members requests that the words "not contemplated" should be deleted to ensure that MNEs do not seek to have exemptions that are already contemplated in host government laws and regulations applied to them with respect to these issues. Notably, a number of developing countries have already granted MNEs exemptions in their statutory and regulatory frameworks in relation to these issues. Second, the WG member requests that the words "including by way of government contracts" should be added following "in the statutory or regulatory framework". The WG members point out that the SRSG and others are concerned that many governments, particularly, in developing countries, have included stabilization clauses in their contracts with foreign investors that prohibit them from applying regulation to investors or require them to compensate investors for the economic impact such regulation may have.

76 Several members believe that the last added sentence is desirable in light of the fact that SRSG and others are concerned that many bilateral investment treaties ("**BITs**") and host government agreements may permit foreign investors to seek compensation from governments for such regulation before international arbitral tribunals. In fact, a

number of governments have recently launched reviews of their own BITs. The United States has, for example, embarked on a review of its Model BIT, which it adheres to closely in its BIT negotiations with other countries. The BIT review follows campaign pledges by President Obama, in which he committed to "ensure that foreign investor rights are strictly limited and will fully exempt any law or regulation written to protect public safety or promote the public interest". South Africa has also launched an official policy review of its BITs, explaining that "the Executive had not been fully apprised of all the possible consequences of BITs," including for human rights, when the young post-apartheid government began entering into BITs in 1994. Norway, countries that acceded to the European Union in 2004 and 2007, and a number of countries in Latin America, including Ecuador, are also reviewing their BITs.

77 A WG member notes that employment/industrial relations issues were not deemed a priority area for update by the OECD, and suggests the following:

77.1 The OECD should recommend that MNEs foster appropriate pension plans in their countries of operation and the inclusion of compensation where health and safety procedures, while legal, do not avoid harm to an employee. At the moment, chapter IV entitled Employment and Industrial Relations in sentence 4b) only speak to MNEs taking "adequate" steps to "ensure" occupational health and safety in their operations. The wording in this sentence should be revised in order to extend compliance, ensuring that MNEs also comply with applicable domestic law and international standards.

77.2 The Science and Technology chapter should include language promoting ethical research in accordance with principles of human rights and the environment (and prevention of cruelty to animals) as well as sustainable economic development.

78 Several members suggest that the chapter on Combating Bribery should be amended as follows:

78.1 Including "Corruption" in the title,

78.2 Amending the opening paragraph to provide that "enterprises should not, directly or indirectly, offer, promise, give, receive, or demand a bribe or other undue advantage…" so that this is more extensive than merely demanding a bribe.

78.3 Requiring MNE's to foster increased transparency in all transactions, such as publicly announcing all contracts open for bid/tender, the procedures by which to apply, and with a requirement that they thereafter publish who received the contract and potentially for how much.

78.4 Disclosing transactions in cases of actual or perceived conflicts of interests

78.5 Extending MNE anti-corruption policies and guidelines contractually to suppliers with appropriate sanctions/indemnities for noncompliance.

78.6 Requiring MNEs to visibly and actively promote to employees non-retaliatory whistleblower mechanisms for anonymous freephone/email reporting.

79 One member noted that non-OECD countries (for example, Malaysia) are becoming increasingly involved in international business that was previously dominated by MNEs headquartered in OECD countries, and asks what steps, if any, the OECD is taking to promote its principles within, and therefore attract adherence to its principles, by governments of, and MNEs headquartered in, non-OECD countries.

80 One WG member observed that the Guidelines appear to only acknowledge the use of mediation by NCPs. This should not be read to exclude other ADR mechanisms, such as arbitration and conciliation, which, depending on the circumstances can be faster.

81 One WG member recommends that NCPs specifically address the Combating Bribery chapter. The Guidelines currently provide that MNEs should not be "solicited or expected to render a bribe." However, the Guidelines fail to outline the procedure to be followed where a bribe has been offered or used to influence the award/close of a transaction. The WG member believes that this omission has the unintended impact of placing the burden on the MNE to prove that bribery has not occurred.

82 Finally, one WG member suggests that the OECD look to the due diligence process described in the U.S. Sentencing Guidelines for Organizational Defendants, which is designed to prevent companies from engaging in criminal misconduct. Another WG member notes that the Sentencing Guidelines is an excellent source of learning, and that it has much in common with the SRSG Framework's human due diligence process, and observes that the former is designed primarily to ensure compliance with domestic U.S. law, and the latter is designed to ensure compliance with global norms of business behaviour, which may exceed the requirements of local law.

ANNEX 1

IBA WORKING GROUP ON THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES

Working Group Members:

John F. Sherman, III (Chair of the Working Group) Harvard Kennedy School, USA

Kala Anandarajah Rajah & Tann LLP, Singapore

Peter Blessing Shearman & Sterling LLP, USA

Anne Bodley Global Challenge Group, Australia

Michel Collet CMS Bureau Francs Lefebvre, France

Alice de Jonge Monash University, Australia

Jan Eijsbouts Consultant and mediator, formerly with Akzo Nobel, The Netherlands

Peter Flipsen Simmons and Simmons, The Netherlands

Jan Handzlik Green Traurig, USA

Thomas Hickey Hess Corporation, Malaysia

Tzvi Levinson The Levinson Environmental Law Firm, Israel

Haider Naqui Haider Naqui & Company, Pakistan

Peter M.W. Nias McDermott Will & Emery UK LLP, UK

Susan Poffley Clifford Chance, UK

Javier Robles Western Union Company, USA

Juan Sonoda Beretta Godoy, Argentina

John Southalan Rio Tinto Research Teaching Fellow at the CEPMPL at the University of Dundee, UK

Suzanne Spears WilmerHale, UK/USA

Chief Fassy Adetokunboh Yusuf Chief F.A.O. Yusuf & Company, Nigeria

Wayne White Globeleq, USA

Coordination and Support:

Gonzalo Guzman International Bar Association, UK

Patricia Adams International Bar Association, UK