OECD Watch comments on the OECD Due Diligence Guidance for Responsible Business Conduct and the Due Diligence Companion February 2017

OECD Watch[1] commends the OECD for holding a public consultation on draft 2.1 of the *Due Diligence Guidance for Responsible Business Conduct* (DD guidance) and its accompanying draft *Due Diligence Companion* (DD companion). We believe public engagement will help foster the development of a more effective and useful DD guidance document.

OECD Watch appreciates that many improvements to the DD guidance have been over previous drafts. Nevertheless, additional improvements in several important areas are still required if the document is to become an authoritative source of guidance for companies to identify, prevent, mitigate and remediate adverse impacts through RBC due diligence. We appreciate the opportunity to provide comments and suggestions to that end. Aside from a brief initial comment on the status of the DD companion, this submission focuses solely on the core DD guidance and is divided into three major sections:

- I. General comments on process, structure, style and status
- II. General comments on substance
- III. Suggestions for improvement in specific paragraphs of the draft

I. General comments on process, structure, style and status

1. Process for developing the DD guidance

In order to ensure a credible process and stakeholder confidence in the course of developing the guidance and the eventual outcome, we encourage the OECD to be transparent about the feedback it receives through this consultation by publishing all of the comments it receives on its website.

2. Status of the DD companion

While we appreciate the idea of a companion document to provide additional examples, best practices and references that could be consulted and used by experts, we believe it is unnecessary to develop this piece in parallel with the core DD guidance and may in fact only deter potential users due to its length, repetitiveness, lack of clarity of its status vis-à-vis the core text, and discrepancies with the core text. OECD Watch recommends postponing further development of the DD companion until a later date. All important concepts, clarifications, and guidance should be included the core DD guidance document. Some examples of important clarifications that are currently in the DD companion that should be included in the core DD guidance include:

- Improved definition of severity: the first paragraph on "How severe are the impacts of concern" of the DD companion (Page 23, Box 20) should be incorporated into the DD guidance, as the guidance neglects to explain severity with regard to the seriousness of the offence.
- The need to cease activities causing impact: Within the DD companion (Page 16), the expectation that businesses have the responsibility to *cease activities causing the impact* and *prevent*

[1] This submission made on behalf of the entire OECD Watch network, which includes over 100 member organizations. For a full list of OECD Watch members, please see http://www.oecdwatch.org/members

recurrence is not currently included in the DD guidance, but an important RBC step in prevention and mitigation of impacts.

- While tools such as Know Your Customer/counterparty (KYC) processes are mentioned in the DD companion (Box 3), more information as to the importance of screening and avoiding potential risks and issues before engaging with new clients and governance contexts should be added into the GG guidance Section II-A.

If a decision is made to further develop the DD companion at a later date – and OECD Watch would support this – we recommend that it be focussed only on providing illustrative examples, best practices, and references. OECD Watch will be happy to provide such examples and references at that time.

3. A general comment on "Part I: Core concepts"

The messages in this part will set the tone and determine the quality and value of the entire document. As currently drafted, most of the 13 points, and most of the messages in the text under these points, are not concepts. They are better characterized as "Important considerations that should be taken into account". We have made detailed comments on "Part I: Core concepts" in section III of this submission, below.

4. The need for mandatory RBC due diligence

OECD Watch understands that the OECD's goal with developing this general DD guidance is to enhance the implementation of the recommendations contained within the OECD Guidelines, which are non-binding on enterprises. Recent research has revealed that corporate uptake of non-binding standards for RBC such as the OECD Guidelines remains extremely weak, even in front-running countries.[2] Governments have a duty protect human rights and the environment, including in the context of global supply chains. To meet this obligation, States should regulate the business sector both domestically and abroad. OECD Watch has observed that where States have imposed mandatory due diligence requirements, company transparency and accountability has improved. Thus, while OECD Watch recognizes the importance of developing non-binding guidance, we are convinced that the best way to strengthen due diligence in the context of business operations is through a legally binding instrument that will oblige governments to require businesses to conduct due diligence throughout their operations and business relationships. The OECD could work toward the development of such an instrument as it did with the Anti-Bribery Convention.

5. Style: terminology on "adverse impacts" and "business relationships"

The terms "adverse impacts," "RBC impacts," and "adverse RBC impacts" are used interchangeably throughout the DD guidance. For consistency and clarity, the documents should exclusively use either "adverse impacts" or "adverse RBC impacts." The use of "RBC impacts" is potentially confusing as it could, without referring back to the Key Terms section, connote both positive and negative impacts. Also, the draft DD guidance introduces and uses the term "commercial relationships" on several occasions, but this is actually more limiting than "business relationships" since a company may not define certain business relationships as commercial relationships.

[2] VBDO, "Commitment to OECD Guidelines by Dutch stock-listed companies", October 2016, http://www.vbdo.nl/files/news/VBDOReportOECDGuidelinesresearch.pdf.

6. Style: more examples to make the guidance more concrete and lively

In order to help underline the various types of sectoral risks an enterprise can be exposed to, we would recommend using more examples. The DD guidance could rely on successful OECD Guidelines specific instances that have dealt with specific due diligence aspects to illustrate certain points.[3]

II. General substantive comments

7. Upholding the highest RBC and international human rights standards

The DD guidance should draw from and reflect the highest existing standards in other OECD sector or issue-specific guidance as well as relevant non-OECD standards such as core international human rights instruments and the UNGPs. While it is important to ensure consistency with other existing standards (in the sense of not providing contradictory advice), consistency does not equate to paralysis. New guidance such as the DD guidance should seek to further elaborate, clarify, strengthen or advance concepts and standards wherever needed in order to remain relevant and effective at dealing with present-day challenges.

8. Confusion of general expectations in the OECD Guidelines with actions involved in due diligence

On a number of occasions, the DD guidance confuses expectations of companies under the Guidelines on issues such as disclosure and stakeholder engagement with actions involved in conducting due diligence that is effective in identifying and preventing potential impacts. For example, on p.12, point 12 in the "Core Concepts" section confuses the requirements of the disclosure chapter (Chapter III) of the Guidelines with the kind of disclosure that is involved in conducting due diligence. The OECD Guidelines' provisions on disclosure and stakeholder engagement were not written with the intention to provide thorough guidance for companies' due diligence. In a supplemental guidance document such as this, what could and should be suggested to companies in the form of disclosure and meaningful stakeholder engagement during due diligence should go much further than simply reverting to basic provisions in the Guidelines. The OECD has developed an entire separate document with Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector that is only referenced once in the current draft of the DD guidance. The general DD guidance should rely more heavily on the stakeholder engagement guidance in formulating specific and concrete recommendations for due diligence in other sectors, rather than simply relying on the very general expectation expressed in Chapter II, para 14 of the Guidelines.

9. Consultation vs communication throughout the draft

Consultation with potentially affected stakeholders is a core tenant of the Guidelines, yet both remain underemphasized and often conflated with "communication" in the draft. "Consultation" should be better explained in the DD guidance. The purpose of consultation is to inform the enterprise before it makes a decision therefore consultation must be done before the decision is made. Consultation requires communication in that a proper consultation requires the enterprise to provide all of the information needed for the stakeholders to understand how the enterprise's decision would affect their interests and then make an informed decision about how they feel the enterprise should respond to their concerns in its decision making process. It should also be specifically stated that, although surveys/polls can be useful in certain situations these techniques cannot be considered consultation.

[3] Cases such as WWF vs SOCO, ADHRB vs Formula 1, and Fivas vs Norconsult would be appropriate and useful in this regard.

Greater emphasis should be made in part I.12 and D3 to highlight that consultation, *in addition to communication*, with potentially affected stakeholders should be fully integrated into due diligence processes. This means ensuring that consultation happens at the earliest stage of the due diligence process, and that it is not a one-time action, but rather an on-going process.

The DD guidance should also draw more on the OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector to provide recommendations as how to tailor stakeholder communication and consultation to different contexts and the vital role that information disclosure plays in ensuring meaningful engagement and trust-building in the process. This should include information detailing how to identify and engage with the right stakeholders, as well as the importance of its timing, and the special attention and consideration that should be made to rights-holders and vulnerable groups, including women, indigenous people and children, in the due diligence process. The DD guidance should provide some specific guidance to companies whose operations impact indigenous peoples. At times, especially when free, prior and informed consent (FPIC) should be respected, stakeholder consultation and communication will need to also include consent, prior to decisions being made over how to avoid causing adverse impacts.

Given its importance, a full section in the DD guidance should be devoted to this topic and consultation with stakeholders should be included as a "Key Action" in Sections II-A and II-C, as well as in the "Key Actions" section of the two-page summary. The lack of a mention of consultation in the key action sections fails to reflect the importance of this element of the due diligence process. Furthermore, stakeholder consultation should be encouraged not only for severe risks, but for all possible adverse risks.

10. Transparency & disclosure of information

Guidance on transparency and disclosure are insufficiently robust in the draft DD guidance and should be given more prevalence. The DD guidance deals with disclosure in a specific section (Section II-D. "Due Diligence: Communicate") and otherwise in scattered sections throughout the text. As an example of the issue we raise in point 8 above, generally in this section – and especially the first two points under "B. Key Actions" on p.24 - the disclosure chapter (Chapter III) in the Guidelines is being conflated with the aspect of due diligence that is about accounting for how adverse impacts are addressed as part of the due diligence process, highlighted in Chapter II, paragraph 10 of the Guidelines.

The draft does not articulate or expand on the definition of "material" (Section II-D.B), The term "material" seems to be used as it is used in financial reporting. "Material" is a term also used in non-financial reporting but the test of what is considered material is different. In Section II-D, Part C2, the DD guidance makes a generic reference to the disclosure of "additional information" required in the OECD Guidelines' disclosure chapter, but doing so does not actually provide any real guidance to companies. This DD guidance should seek to expand on what is already stated in the Guidelines and provide companies with additional recommendations and guidance. There is one specific recommendation in relation to what companies should report which is on "general findings of adverse RBC impacts". This is highly inadequate and falls fall short of reporting requirements under the OECD Minerals Supply Chain DD, the EU Directive on NFR and even the UNGPs reporting framework.

Within Section II-D, enterprises should be encouraged to have robust disclosure, which is also increasingly critical because robust disclosures serve as important material for investors who are increasingly looking at company due diligence reports, including beyond their own enterprise and along their entire supply chain, to evaluate company performance, attitude towards and ability to responsibly respond to risk. It is important to note that disclosure of risk should define the degree of

disclosure; for example, disclosure of risk to communities should be to the same degree as risk disclosure to investors and insurers. Bankable feasibility studies serve as a potentially useful example in this regard. When disclosures are done well, enterprises are able to demonstrate that its due diligence is working (e.g. risks are being identified and properly addressed and remediated), while also helping enterprises demonstrate progress over time.

Showing that an enterprise is respecting human rights requires communicating, at a minimum, the following information:

- A enterprise's policy on human rights and how it is communicated internally and externally, operationalized throughout the enterprise and in relation to business relationships, monitored and evaluated, and whether and how objectives are met;

- Human rights due diligence procedures to identify and address risks to and impacts on human rights, including those in the value/supply chain, risks to human rights identified and measures to prevent/mitigate them;

- Actual impacts on human rights (including specific instances of abuse that the enterprise acknowledges and concerns consistently raised by affected people even if contested by the enterprise), engagement with and response from affected people and measures to remediate impacts and avoid recurrence;

- The methodology to identify/assess risks and impacts, including grounds for determining severity, and any consultations held to this end.

- Detailed supply chain information, including the names, addresses and contact details of supplier facilities and other business partners, subcontracted suppliers and labour agents managing home-working facilities. The objective of this transparency is to allow community and worker (labour rights) organisations to organise, to bargain, etc. to defend human and labour rights.

Finally, concerning disclosure of information to stakeholders and local communities, the DD guidance should recommend that the relevant information be translated into local languages and presented in alternative formats for those who lack literacy.

11. Tools understand and evaluate environment & social risk

Consideration of the various tools and processes undertaken to understand, evaluate, and then manage environmental and social risks should be acknowledged in Section II-A of the DD guidance. At the moment, these tools are not detailed and instead are only briefly highlighted in the document. We would like to see greater elaboration given to the specific standards that help ensure adequate due diligence occurs, and which are in fact required for many projects. These include:

- Assessments of knowledge gaps in baseline data. Limited environmental and social baseline data can impede an enterprise's ability to understand the full extent of possible risks, especially risks to livelihoods, culture, food security, biodiversity, climate change and the environment in least developed and developing countries. While the limitations in scientific certainty require a precautionary approach to be applied, an enterprise can go further in terms of commissioning additional research to fill the gaps.
- Elaboration on what is expected in the various impact assessments (environmental, social, health and human rights), including the type, scale and various elements it should entail would be beneficial. The IFC's Performance Standard 1 and Guidance Note 1 (30 April 2006) provides further elaboration on some of these issues that may be of use.

- At times, trans-boundary, cumulative and strategic impact assessments may be necessary for some projects in terms of preventing and mitigating risks that pose cross-border risk or in which numerous projects in an area may further exacerbate the scale of risks.
- It is also important to emphasize the importance of incorporating public consultations into the impact assessment process. Furthermore, such assessments should be publicly disclosed to allow for public scrutiny.

12. Risk-based prioritisation

The DD guidance continues to carry the risk that it could be read as advising enterprises to concentrate on severe risks only. While appropriately prioritizing impacts is important by addressing the severest risks first and should be a starting point for companies, it is equally important that structural shortcomings are also considered simultaneously in order to make a larger impact. For instance, risks of corruption need to be considered to properly evaluate human rights or environmental risks. Furthermore, it is worth mentioning that a strong focus on severe risks distracting attention away from other impacts that potentially could cause serious harms. It is important to recognize that it can at times be difficult to fully assess the full scale and likelihood of an impact, including those considered moderate risks, if necessary baseline studies or consultations are not done before impact assessments or if the cumulative impacts of other projects are also not considered in advance. Rather than solely focusing on known impacts, the text should emphasise that enterprises have the responsibility to take a proactive approach to learn about all possible adverse impacts that may have been outside their radar.

13. Prevention vs. mitigation of RBC impacts

A core objective of carrying out due diligence processes should be to avoid harm through a precautionary approach. In Section II.B., more focus should be given on what is needed to prevent and minimize risks before they become actual impacts that will require mitigation, as the DD guidance does not adequately demonstrate the difference between prevention and mitigation of existing impacts. Furthermore, it is important to emphasize in the DD guidance that moving between prevention and mitigation requires more than just a hierarchical approach of prioritized stages. The DD guidance should provide additional guidance to companies in terms of how an enterprise must first pursue one stage before moving to the next. For example, if harm to human rights or the environment is unavoidable under current plans and projects, enterprises should not automatically move to a consideration of whether harm can be “mitigated,” “restored/rehabilitated,” and/or “remediated”. They should first re-assess and if necessary re-design their plans so as to avoid the harms. If avoiding human rights or environmental harm appears impossible, the plans or projects should be reconsidered and not go ahead at all.

OECD Watch believes that prevention vs mitigation is not an either/or consideration. The priority should be to avoid social and environmental harm and as such that may include having a policy to prevent risks as much as possible by stating “no go” policies and commitments, including a commitment to not carry out operations that may adversely impact protected areas and their buffer zones or areas of high cultural and environmental significance (such as UNESCO World Heritage sites[4], IUCN Protected areas, or, locations where human rights defenders are threatened and at risk, etc.) and when not in a “no go” area to make a commitment to consider implementing a

[4] For example, UNESCO has stated that mineral, oil and gas exploration or exploitation is incompatible and should not be undertaken in World Heritage sites, see: http://whc.unesco.org/en/extractive-industries/

comprehensive options assessment, including alternative designs, sizes, and location changes, etc. or a commitment to use only proven technologies that work.

14. Business relationships vs. supply chains

The draft DD guidance sometimes conflates due diligence on business relationships with due diligence on physical flows of material e.g. along supply chains. Both are important and the document should consistently make that point throughout.

15. Embedding DD into business relationships and contractual obligations

While we appreciate mention that RBC expectations and policies should be incorporated into supplier and other business relationships, carrying out due diligence is not a linear process and should feed into all aspects of business operations. As such, it is essential that due diligence is not only at the transaction level, but that new clients and business relationships are first adequately screened, as well as the governance context in which they operate. For example, business relationships in countries with high levels of corruption, limited civil society space or tax avoidance havens, etc., should first be identified and if necessary excluded. Civil society monitoring reports can serve as a tool to help understand the wider context.

Once business relationships are developed, the responsibility to identify and avoid risks through on-going due diligence should be integrated into all contractual obligations. In this regard, the DD guidance could provide additional recommendations to business, including that it is important to have clauses that detail what carrying out due diligence means and that it must be incorporated into all other contractual obligations. This could include clauses that outline penalties for failure to mitigate or remediate on a timely basis and to allow for possible modifications without significant financial penalties that may need to occur to a project's construction and/or operations to allow for improvements to be made in terms of the project's management and handling of risks.[5]

16. Remediation of impacts by enterprises that are directly linked

The way in which the draft DD guidance deals with remediation in cases were enterprises are "directly linked" (but have not caused or contributed) to abuses is problematic. The text suggests that in these cases there is no responsibility to remediate and that this would be optional. In at least one place in the text (section III-A), the draft DD guidance actively discourages directly linked companies from making efforts to facilitate remediation by noting that they are "not expected to provide for or cooperate in remediation". This is unacceptable, and in providing this unsound advice to enterprises, the draft DD guidance fails to reflect a number of important nuances. Firstly, enterprises that are directly linked to an impact are expected to use their leverage to seek to prevent/avoid recurrence. These actions in themselves are important aspects of remediation (cessation of the abuse; guarantees of non-repetition). Secondly, while the primary responsibility to remedy harm rests with the enterprise that caused or contributed to the harm, the DD guidance should recognize that, often, the directly-linked enterprises may be the only real avenue for those harmed to seek remedy. Accordingly, in all

[5] As an example: Should the project developer decide to integrate a sediment flushing system into the operations of a large-scale hydropower dam in a later stage of development, in order to allow for better management of sedimentation and reduced downstream impacts, the project may need to stop producing electricity during the given flushing period. The ability to carry out these modifications in a project should be included in all contractual agreements, including in the project's power purchase agreement, etc.

areas where the DD guidance addresses remediation, the recommendation should be, "When adverse impacts are directly linked to an enterprise's operations, products or services, the enterprise is expected to use its leverage to convince the entity that caused or contributed to the impact to remedy the impact. The directly linked enterprise is furthermore encouraged to collaborate with other enterprises or entities in remediation efforts."

Finally, as is elaborated further under point 19 below, the current draft should indicate that an enterprise's relationship of "contributing" or "directly linked" to an adverse impact is dynamic rather than static, and that this has implications for remediation responsibilities. The DD guidance should clarify that if an enterprise remains in a business relationship that directly links it to an on-going adverse impact that is not remediated, after a reasonable period of time the enterprise will be considered to be contributing to the on-going adverse impact and will be responsible for providing for or collaborating in remediation of the impact.

17. Due diligence as an outcome-oriented process aimed at identifying and avoiding specific RBC risks

The DD guidance should make it clear at the outset that due diligence for RBC is not a stand-alone, tick-the-box exercise, but rather an outcome-oriented process that should result in the concrete and measurable identification of specific risks and impacts and the prevention and remediation of harm. This means that a due diligence process – even if it is genuine and well-designed – that fails to identify an impact, or that identifies an impact but fails to result in the impact being prevented or remedied is not the end of the line for enterprises. Enterprises are expected to take additional (indeed, on-going) action until the risk of adverse impact is definitively prevented (e.g. by deciding that the plan or projects should not go ahead) or, if harm has occurred, it has been fully remediated. This is also true for adverse impacts to which an enterprise is directly linked through a business relationship. If actions to address impacts to which an enterprise is directly linked do not result in the prevention or remediation of an adverse impact, then the "outcome" of the due diligence process should be the responsible disengagement of the enterprise from the relationship linking it to an adverse impact.

18. Responsible disengagement

The draft DD guidance recognizes that if an enterprise's efforts to use (and increase) its leverage to convince its business partner to prevent, or cease and remediate the harm fail, it should consider disengaging from the business relationship. However, the issue of responsible disengagement should receive more attention and nuance in the DD guidance than it currently does. The credible prospect of responsible disengagement is fundamental to the responsibility of the enterprise itself to avoid causing, contributing to and being directly linked to adverse impacts, but the draft DD guidance discourages companies from considering this option. Responsible disengagement should not only be considered if the (potential) impacts are "severe" as is suggested on p.21, but in all cases where there is no prospect of harm, whether it be severe harm or less-severe harm. The DD guidance should also provide clearer guidance to companies that decide to remain in a business relationship despite the failure to address impacts. The DD guidance should be clear that "If the adverse impacts continue and the investor remains in the relationship, the investor should be able to demonstrate its own on-going efforts to mitigate the impact and be prepared to accept any consequences – reputational, financial or legal – of the continuing connection."[6] The DD guidance should also note that by making the decision to remain in a business relationship where there is little or no prospect for addressing the impact, the

[6] This is text directly from the UNGPs (Pillar II, Section B, Human Rights Due Diligence, Commentary paragraph 19).

enterprises actions can change its relationship to the adverse impact from directly linked to contributing (see point 19 below).

At the same time, the DD guidance should make clearer that an enterprise that has caused or contributed to an adverse impact cannot alleviate itself of its responsibility to remedy the impact by disengaging. The DD guidance can and should provide additional recommendations to enterprises on how to disengage responsibility and thus avoid engaging in the "cut and run" tactic of irresponsibly abandoning suppliers, which can have significant adverse impacts on local employees, communities, and economies.

19. "Contributing" and "directly linked" relationships as dynamic, not static

The DD guidance should clarify that an enterprises' relationship to a (potential) adverse impact is not static but dynamic and can change over time based on a company's own actions or omissions. For example, an enterprise's refusal to seek to convince a business partner it knows is causing/risking an adverse impact to stop the harm and remediate the impact can be considered an omission that substantially contributes to (the risk of) an impact and thus shift the enterprise's relationship with the impact from directly linked to contributing. Similarly, an enterprise's decision to remain in (i.e. not disengage responsibly from) a business relationship linking it to an on-going adverse impact despite no prospect of having the harm stopped or remediated can be considered a substantial contribution to the continuance of the impact.

20. Due diligence in conflict-affected areas

The DD guidance could do more to provide recommendations to enterprises on how to avoid the risk of contributing to (including financing of) conflict and related adverse RBC impacts.

21. Due diligence guidance for responsible tax planning

While we recognize that issues covered in the Guidelines' chapter on taxation (Chapter XI) are technically exempt from the due diligence provisions laid out in Chapter II, para. 14 of the Guidelines, OECD Watch nonetheless believes that the OECD could and should provide additional guidance to companies on how conduct due diligence with regard to responsible tax planning. The OECD Guidelines themselves clearly acknowledge that responsible tax planning is a part of responsible business conduct, so it would make sense for the OECD's due diligence guidance for responsible business conduct to also address the issue of taxation. If certain important RBC issues are to be excluded from this guidance, it is misleading to call it DD guidance "for RBC".

III. Suggestions for improvement in specific paragraphs of the draft

22. Two-page summary, under the heading "Capturing the "essence of due diligence"

- Rewrite the **second point** as follows: "A risk-based approach means that efforts should be proportional to the likelihood and severity of adverse impacts. The nature and extent of due diligence must be commensurate with this risk.
- Rewrite the **third point** as follows: "Due diligence should give priority to actual and potential adverse impacts on the basis of their relative severity."
- **Point 5** is misleading. The nature and extent of due diligence is mainly determined by the nature and extent of the risk. The other factors cited (sector, environment, size of the enterprise, etc.) are important when they add or decrease risk. As written, the sentence could be used to say that due diligence for smaller companies will not be the same as due diligence for larger companies regardless of the risk. At the least the following phrase should be added at the end of the sentence: "… but always must be commensurate with the likelihood and severity of actual and potential impacts."

- Delete the **7th point**. This is an unqualified endorsement which will not always be true. Moreover the use of the word "enhanced" next to the word "due" changes the meaning of "due".
- Replace the **8th point** with "Remediation is one way that an enterprise should address adverse impacts.
- Add a **new point**: "The cost of due diligence should be taken into account when the enterprise makes a decision to undertake any activity".

23. Part 1 Core concepts for implementing due diligence under the guidelines

The points made in the heading sentences are not always the right points and do not always capture what the following text is about. Moreover, the text following these heading sentences is often difficult to follow. Some heading sentences need to be changed and more points need to be added. The text that follows the heading sentence should be shortened and made easier to read.

- One text concerns a complex subject that should be treated differently and elsewhere in the document: **Point No. 10** is about the relationship of the impact to the enterprise and is so important and somewhat complex that it deserves to be treated separately and not as the 10th item on this list. The basic point in the relationship of the impact to the enterprise (cause, contribute, linked to) can easily and succinctly be noted under **Point No. 1** where it is explained that it is the enterprise's own actions that create its responsibility. The explanatory discussion of "cause, contribute, linked to" and a fuller elaboration of the implications of these relationships, should be put in first section of "Part II A identify and assess adverse RBC Impacts". This section should begin with an explanation of the kind of adverse impacts on others that create responsibilities for the enterprise – these are the impacts that are the reason that an enterprise has a responsibility to conduct due diligence.

- Some points that should be included in a list of considerations are absent. There should be an early point about "salient risks" - perhaps as a new Point No. 2. Salient risks are risks that are readily understood to be inherit in specific activities. These are the risks of adverse impacts against which due diligence can begin. (Of course the nature and extent of due diligence and the adverse impacts against which it is conducted can change as more is learned.) All businesses should be aware of the salient risks involved in their regular on-going activities and in the locations in which they do business. Indeed, one of the most important disclosures any enterprise can make about its responsibility is what the salient risks in its activities are and the due diligence that it has taken against these risks.

- **Point No. 2** which is recommends "managing in an integrated way" will not always be true and is unlikely to be especially important - at least as it is presented here. A more basic point, and one that should be made early, is that due diligence cannot be conducted in an abstract way – it must be conducted against specific adverse impacts. Due diligence against bribery will not be the same as due diligence against building fires. One test for whether something constitutes due diligence is whether it was directed against the right adverse impact. The activities that would constitute due diligence will vary with the nature of the impact that the due diligence is being conducted against. The value, meaning or purpose of taking an "integrated approach" to such diverse activities is not clear. The really important integration is that of potential adverse impacts on others in the decision by the enterprise to undertake a specific activity. This does not seem to be the subject of this point however. Another absent point is that the cost of due diligence should be a factor in the decision to undertake an activity. The nature and extent of due diligence should not be redefined because the cost of due diligence is later found to be "unreasonable". The planned cost of an activity should include a realistic estimate of the cost of due diligence.

- Some points are really about more than one issue. **Point No. 3** deals with more than contrasting the due diligence in the Guidelines with more traditional forms of due diligence sometimes referred to as transactional due diligence. This contrast is an important consideration that should be made here. However, what is not quite right is that the first paragraph seems to be suggesting that due diligence is a process that can be independent of its outcome. This is not consistent with the idea in the first sentence of the second paragraph which is that due diligence must be commensurate with the risks. Outcome cannot be avoided. A process that fails to identify actual adverse impacts or to address them should not be considered due diligence. Furthermore, the phrase "a process intended to help enterprises meet their responsibilities" is tautological as due diligence is in itself a responsibility.

- Not all of the text under each of the 13 heading statements is what the heading sentence is about**. Point No. 4** is not really about how due diligence can help enterprises obey domestic law as the heading sentence suggests – the text below this heading sentence is about the conflict that may exist between domestic law and the internationally agreed expectations of responsible behaviour in the Guidelines.

- **Point No. 6** on "continuous improvement" needs this caution: with respect to human rights, continuous improvement can only be about process and not outcome. Process issues that can be measured such as the number of inspections, the number of qualified personnel, amount of training etc. could be the subject of continuous improvement but the number of human rights abuses that an enterprise causes or contributes to cannot be treated in this way.

- Some points seem to go in the wrong direction. The heading sentence for **Point No. 7** seems to be contradicting the idea that due diligence is a function of risk. The text however is better than the heading sentence.

- **Point No. 8** involves an issue that should be resolved in a consistent way throughout the document: how to describe the nature and extent of due diligence needed for a specific situation as contrasted to other situations. How is due diligence to be described when the level, detail, robustness must be increased if it is to remain "due" - that is commensurate with the risk. Here the expression "more detailed" is used. The problem is to avoid the evolution of the term "due diligence" away from a meaning defined by something commensurate with the risk.

- Some points do not provide any helpful guidance. Consider the wish expressed at the end of the first paragraph under **Point No.9:** "The complexity of the business relationship….means that due diligence should be adaptive, with dynamic approaches tailored to these complexities." There is no useful guidance in this. More useful would be the reminder that a sourcing company's responsibility for adverse impacts is not limited to the first or second tiers in its supply chain but is determined instead by the adverse impacts that it causes, contributes to or that are linked to it.

- One paragraph in the text under **Point No. 9** concerns "leverage". This important idea deserves its own point. The point should be that the amount of leverage and its ability to change behaviour does not create or remove responsibility which is determined by other things. Moreover, the failure of leverage to change things should invoke consideration to disengage. This should be considered for a possible point.

- The first sentence in the text under **Point No. 11** is making a better point than the heading sentence. The second paragraph about the Guidelines procedures should link the resolution of disputes brought to the procedure to remedy. After all, the procedures are used by parties seeking

remedy. Moreover, it is not fair to say that the issues arise from the implementation of the Guidelines – more often it is the failure of enterprises to observe (respect) the Guidelines.

- **Point No. 12**: Add a new sentence immediately following the first sentence in the text (the one ending with "on both sides"): "Because they are not two-way, surveys or polls are not this kind of engagement." With respect to the second paragraph of text, one sentence should be amended to read as 'follows: Hence the engagement must take place *before t*he decision is made and *all* of the information needed to make an informed opinion by the stakeholder should be provided to the stakeholder in a timely manner." The final paragraph of text should be deleted because it is confusing the requirements of the Disclosure Chapter of the Guidelines with the kind of disclosure that is involved in conducting due diligence.

- There are concerns with **Point No. 13**. One is the use of the word "enhance" in the heading sentence. It seems to be changing the meaning of "due". Another is the uncritical endorsement for any collaboration. The experience with many CSR initiative is that they were industry PR schemes that did not constitute due diligence. Although some of the activities mentioned – training and capacity building for instance- could be considered a part of due diligence to the extent that they mitigated the risk of specific adverse impacts, the danger is that these activities become a way for enterprises to avoid responsibility. The concept of prior existing "root causes" must not become a way of redefining an enterprises responsibility. Similarly, addressing "root cause" through philanthropy cannot substitute for an enterprise addressing adverse impacts that it has caused or contributed to or is linked to on specific rights holders.

24. <u>Part II – Practical steps for implementing due diligence under the Guidelines</u>

- On **p.16**, the section on the identification and assess of adverse impacts should use the idea of "salient risks" and explain that for most activities and there will be salient risks that are well known and do not require the enterprise to "discover" through some activity. The human rights of workers in labour intensive agriculture or manufacturing involve salient risks that must be taken into account in these activities. Similarly, the rights of indigenous peoples are salient risks where extractive industries operate in or near their land. They must be taken into account at the beginning.

- On **p.16** "B. Key Actions". Numbering points and describing them as "key actions" is not the best way to explain how an enterprise should decide what adverse impacts to conduct due diligence against and how the focus of due diligence can change.

- On **p.21** the fourth and final bullet point makes too many qualifications with respect to disengagement from business relationships. In situations where the enterprise has no leverage and there are severe impacts caused by the supplier the guidance is that the enterprise "should consider" disengagement but only as a "last resort" and only after "an assessment" of how crucial the supplier is to the enterprise itself and only after taking into account the impacts of any decision it may take to disengage. Moreover it should be made clear that where the adverse impact is irremediable then the enterprise should immediately consider responsibly disengaging.

- On **p.21** under "Collaborating," it is important to note that while collaborative multi-stakeholder initiatives can play a helpful role, the DD guidance should also make it clear that engagement in such an initiative or scheme does not absolve a company of its own responsibility to act responsibly and in full accordance with the Guidelines. Bluntly put, an enterprise cannot outsource its responsibility to a scheme or initiative.

- On **p.22**, the fourth bullet point under "C. Explanation of key actions 1. Developing or adopting tracking systems…". This bullet point seems like a strange way to consider the many collaborative initiatives (both multi-stakeholder and industry-led) established over the past 20 years that address supply chain responsibility. It is strange because the treatment of these initiatives in this DD guidance is placed in a section on tracking performance. (The only other place where collaborative initiatives are treated is in point 13 on page 12.) It's also strange because of the importance attached to a difference between tracking "compliance with standards" on one hand and "tracking actual impacts "on the other. There are two other problematic notions under this bullet point. One is the problem of collaborative initiatives that "address root causes" (a point also considered in page 12). The problem is that these initiatives can become a way for enterprises to use philanthropy to avoid their own responsibility. The other problematic point is the uncritical attitude toward private or multi-stakeholder initiatives. What needs to be said about these in guidance on due diligence is not said: Where an enterprise uses private or multi-stakeholder initiatives as part of its due diligence (such as conducting compliance audits), the responsibility of the enterprise for adverse impacts is not diminished. As with commercial "third party" auditors, enterprises must assume responsibility for the effectiveness of collaborative initiatives to the extent that these initiatives are a part of its due diligence process. In other words, the enterprise cannot pretend that the failure of an auditor or an initiative to discover or prevent an adverse impact means that it was not the enterprise's fault. This was how the enterprise chose to do its due diligence.

- On **p.24** "Due diligence: communicate". The requirements of the OECD Guidelines chapter on disclosure are being conflated with the requirement in the definition of due diligence to "account for how adverse impacts are addressed". In order to meet the due diligence requirement of accounting for how it addresses its adverse impacts, the enterprise must first disclose what these impacts are or at least what it considers to be the risks against which it conducts due diligence. (It would be a major advance if we can use this aspect of due diligence to press companies to report on what they consider to be the risks in their activities and relationships.

- On **p.26** change title of section III to "Provide for Remediation". The qualifier "or co-operate in" can be brought in at a lower place in the text where the forms of cooperation that are acceptable can be explained. The qualifier "when appropriate" should be removed altogether. In line with point 16 above, these qualifiers should be removed throughout the document and replaced with more robust guidance throughout the entire document. (such as point 11 on p.11).

- On **p.26**, reorganise the text under "A. Purpose" by putting the second paragraph first followed by the 3rd sentence and 4th sentences of the first paragraph. Under "B. key actions", delete the "(where appropriate)" and replace "enable remediation" in point 1 with "remediate or ensure that remediation takes place" for harms. "Enable remediation" should in fact be deleted throughout the document and replaced with "Remediate or ensure that remediation takes place".

- On **p.27**, the DD guidance highlights the option of an enterprise to establish an operational level grievance mechanism (OGM), which underscores an existing gap between the Guidelines and the UN Guiding Principle 29, which states that enterprises should establish or participate in effective OGMs. As such, the DD guidance should follow the higher standard and emphasize that OGMs are not optional. Furthermore, the language around "an operational level grievance mechanism should not preclude access to judicial or non-judicial proceeding" is too vague to be of use to enterprises. We recommend that it should be rewritten as "…an operational level grievance mechanism should not require a legal waiver in return for remedy or otherwise preclude access to judicial or non-judicial proceedings." Finally, the guidance should include a requirement for the

monitoring and review of the compatibility of the enterprise's OGM with the UNGP's effectiveness criteria.

25. Annex on understanding cause, contribute, directly linked

- On **p.28** under the section on "Contribute to", the definition of contribution given refers to situations where an enterprise's activities "*significantly* increase the risk of an adverse impact". This language is picked up again in the flow chart. It's unclear what the definitional value of "significant" is as compared to the word "substantial", which is used in the Guidelines. Given that the DD guidance seeks to align with the UNGPs, the DD guidance should perhaps note that this is an important area of difference between the OECD Guidelines and the UNGPs, which use neither "substantial" nor "significant" in their definition of contribution.

- Also on **p.28** under the section on "Contribute to", we recommend clarifying that there are two sub-scenarios to this relationship: 1) Contribute via a third party and 2) contribute by combination of own actions and those of a third party or third parties.

- On **p.28** under "Omissions", we recommend introducing the notion of the dynamic character of a company's relationship to the adverse impact. For example, a failure or refusal to act can be considered an omission that significantly contributes to the risk of an impact and that can thus move an enterprise from the directly linked to the contribute relationship.

- On **p.29**, the last bullet in the "directly linked" section already acknowledges that enterprises are "responsible for their own actions". This should be followed by a clarification that an enterprise's own actions and omissions partly determine its relationship to the impact. This bullet should also clarify that, even if it has no leverage over a business relationship, the enterprise is responsible for its own decision to stay engaged in or disengage from the relationship. .

- On **p.31**, responsible disengagement should be included as an "expected response" if efforts to prevent/mitigate/remediate fail in both the contributing and directly linked bullets.

- On **p.32**. In the same vein as the point on p.28 above, the Simplified Flow Chart of Questions on Cause-Contribute-Directly Linked should really be a straight evaluation from "did I cause?" to, if not, "then did I contribute (substantially)?" and so on. Also, the possible scenario that an enterprise may contribute via a third party is missing and should be added to the chart. Finally, at the bottom right of the flow chart, a box should be added under the directly linked box to indicate that directly linked enterprises should "use leverage to convince the entity that caused or contributed to the impact to remedy the impact and collaborate in remediation efforts".

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