

**PROPOSAL:  
IMPROVING IMPLEMENTATION OF THE OECD DUE DILIGENCE GUIDANCE  
THROUGH REPORTING AND ASSESSMENT**

***The Purpose of this Note***

*The note puts forward a proposal to improve implementation of the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas<sup>1</sup> (the “**Guidance**”) by both States and companies through reporting and assessment. In early 2016, the OECD advised that it was already working to bring into practice formal reporting at the country level by States that have adhered to the Guidance (“**adhering States**”).<sup>2</sup> Despite almost one year passing, the OECD has reported little progress by adhering States in this area.*

*Under the proposal below, adhering States would report every three years to the OECD on how they are promoting and monitoring implementation of the Guidance. The OECD or a multi-stakeholder group would then assess and publicly report on those efforts. This would enable the Multi-Stakeholder Steering Group for the Guidance (“**MSG**”) to: (a) see how the Guidance is being implemented by adhering States and companies; (b) meaningfully assess progress and impact over time, and (c) identify and promote standards and best practices for implementation.*

**The Problem**

States should play a central role in securing meaningful implementation of the Guidance. But at present, while awareness has increased, State efforts to promote and monitor implementation of the Guidance by companies operating in or from their jurisdictions remain limited and opaque, and are difficult to assess. Currently, little, if any, information exists in the public domain that captures State efforts to ensure that companies effectively implement the Guidance. In the absence of any formal assessment as to how States are implementing the Guidance, many governments are simply not doing enough. And in turn, in the absence of rigorous, public efforts by governments to improve adherence to the Guidance and achieve a greater degree of observance, many companies are simply not doing enough.

**Why We Need to Address the Problem**

The UN Guiding Principles on Business and Human Rights (“**UNGPs**”) reaffirm the State’s duty under international human rights law to protect against human rights abuses by third parties such as companies.<sup>3</sup> To fulfil this duty, a State should take effective steps to ensure that companies operating in or from its jurisdiction are fulfilling their responsibility to respect human rights throughout their global operations and supply chains, and to take action if they are not. The Guidance aims to operationalise this corporate responsibility in the mineral supply chain.

Adhering States should in fact be taking effective steps to ensure that companies operating in or from their jurisdiction are addressing – at a minimum – **all** of the risks outlined in Annex II (Model Supply Chain Policy) of the Guidance. Annex II lists acts that are violations of national or international law (whether international human rights law or international humanitarian law). This

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<sup>1</sup> OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, [www.oecd.org/corporate/mne/mining.htm](http://www.oecd.org/corporate/mne/mining.htm).

<sup>2</sup> MetalBulletin, *AMNESTY REPORT: OECD planning formal country reporting on mineral supply chains*, 28 January 2016, [www.metalbulletin.com/Article/3524739/AMNESTY-REPORT-OECD-planning-formal-country-reporting-on-mineral-supply-chains.html](http://www.metalbulletin.com/Article/3524739/AMNESTY-REPORT-OECD-planning-formal-country-reporting-on-mineral-supply-chains.html).

<sup>3</sup> Amongst other things, this requires governments to enact and enforce laws that require businesses to respect human rights, to create a regulatory environment that facilitates business respect for human rights, and to provide guidance to companies on their human rights responsibilities (UNGPs, Principles 1, 2 and 3).

includes serious human rights abuses such as forced labour and child labour as well as acts that are connected to these abuses such as: direct or indirect support to non-state armed groups or public or private security forces that control mine sites, transportation routes, or upstream actors; bribery and fraudulent misrepresentation; money laundering; and the non-payment of taxes, fees and royalties due to governments. As such, companies should also be taking steps to ensure that their supply chain operations do not involve violations of national and international law and standards.

34 OECD Member States, the 12 ICGLR Member States, and 9 additional non-OECD-Member States have endorsed the Guidance and pledged to promote its implementation. In the Recommendation that accompanies the Guidance, the Council (which is made up of representatives from OECD Member States) recommends that:

*“Members and non-Member adherents to the Declaration on International Investment and Multinational Enterprises actively promote the observance of the Guidance by companies operating in or from their territories.”<sup>4</sup>*

To meet these obligations and stated political commitments, States should (and can) play a central role in ensuring that companies operating in or from their jurisdiction meaningfully implement the Guidance. States should also show companies through their own actions that implementation of the Guidance is a priority.

Instead States are at present playing a limited role in promoting and monitoring the implementation of the Guidance:

- State participation in the OECD Forum is low, and representatives that do attend often have a limited mandate for constructive participation.
- States profess limited knowledge about the number of companies operating in or from their territories that fall within the scope of the Guidance, making a meaningful assessment of progress over time and industry coverage impossible. They typically over-emphasise the role of industry schemes and appear to rely on them to change company and supply chain behaviour.
- Assessments of how companies are implementing the Guidance typically rely on small *ad hoc* surveys.<sup>5</sup>
- States do not provide reliable information about how they are pursuing their commitment to “actively promote the observance of the Guidance”, or how they are evaluating the effectiveness of their chosen strategies, limiting the possibility for assessment of their efforts and the development of shared best practices.
- States take little or no action to engage with companies that are not adhering to the Guidance, even in the most egregious cases.

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<sup>4</sup> Recommendation of the Council on Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, 17 July 2012 – C(2012) 93, [acts.oecd.org/Instruments/ShowInstrumentView.aspx?InstrumentID=268&InstrumentPID=302&Lang=en&Book=](http://acts.oecd.org/Instruments/ShowInstrumentView.aspx?InstrumentID=268&InstrumentPID=302&Lang=en&Book=). Emphasis added by authors.

<sup>5</sup> See, for example, the Bundesanstalt für Geowissenschaften und Rohstoffe (BGR) study on small and medium-sized enterprises ([www.bmz.de/g7/includes/Downloadarchiv/Assessing\\_enhancing\\_due\\_diligence\\_supply\\_chains.pdf](http://www.bmz.de/g7/includes/Downloadarchiv/Assessing_enhancing_due_diligence_supply_chains.pdf)) and the OECD’s study of the one year pilot implementation of the Supplement to the Guidance on Tin, Tantalum and Tungsten ([www.oecd.org/corporate/mne/DDguidanceTTTilotJan2013.pdf](http://www.oecd.org/corporate/mne/DDguidanceTTTilotJan2013.pdf)).

This has in turn led to significant gaps in the implementation of the Guidance by companies:

- Despite progress in some mineral sectors, and increased awareness of the Guidance, the number of companies in the minerals sector doing due diligence to the OECD standard remains very low, especially outside of the 3TG sector and Great Lakes region.
- Most companies that identify themselves as engaged in the due diligence process are failing to meet the OECD standard in full. They may have strong policies and codes of conduct in place, but identification and reporting of substantive risk remains limited. Many companies still do not have a clear understanding of—or ignore—the supply chain risks that they are responsible for. In fact, many downstream companies still do not accept that they have any responsibility or leverage further up their supply chains despite the Guidance being clear on this point.
- Further, many companies that consider themselves engaged and implementing the Guidance view supply chain due diligence as a compliance exercise—a one-time, box-ticking endeavour. They rely on third parties to assess risks and conduct due diligence for them, rather than taking ownership of it.
- Supply chain audits commissioned by companies are not undertaken to the OECD standard and ensuing audit reports provide inadequate information. Audit reports are rarely made publicly available.
- Companies do not see observance of the Guidance as a legal, compliance issue even though it deals with acts that are illegal under national or international law.

In general, States, industry bodies, the OECD Forum, and companies are too focused on the progress of a relatively small number of proactive industry leaders, with limited or no information available about the practices and engagement of the silent majority of the companies that make up the minerals sector. Yet, the Guidance applies to all companies in the mineral supply chain that source from conflict-affected or high-risk areas.<sup>6</sup>

As a result, increased awareness and participation in the OECD Forum is yet to clearly translate into improved industry practice as well as demonstrable impact in affected communities on a large scale, with NGOs still uncovering evidence of serious abuses—including by participants in the Forum.<sup>7</sup>

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<sup>6</sup> See: OECD Guidance (at footnote 1), Who should carry out due diligence?, p15: “all companies should conduct due diligence aimed at ensuring that they do not contribute to human rights abuses or conflict”.

<sup>7</sup> See for example: Global Witness, *River of Gold*, July 2016, [www.globalwitness.org/en/campaigns/democratic-republic-congo/river-of-gold-drc/](http://www.globalwitness.org/en/campaigns/democratic-republic-congo/river-of-gold-drc/); Global Witness, *War in the Treasury of the People: Afghanistan, Lapis Lazuli and the Battle for Mineral Wealth*, June 2016, [www.globalwitness.org/en/campaigns/afghanistan/war-treasury-people-afghanistan-lapis-lazuli-and-battle-mineral-wealth/](http://www.globalwitness.org/en/campaigns/afghanistan/war-treasury-people-afghanistan-lapis-lazuli-and-battle-mineral-wealth/); Amnesty International, “*This is What We Die For*”: Human Rights Abuses in the DRC Power the Global Trade in Cobalt, January 2016, [www.amnesty.org/en/documents/afr62/3183/2016/en/](http://www.amnesty.org/en/documents/afr62/3183/2016/en/); Human Rights Watch, *Toxic Toil: Child Labor and Mercury Exposure in Tanzania’s Small-Scale Gold Mines*, August 2013, [www.hrw.org/report/2013/08/28/toxic-toil/child-labor-and-mercury-exposure-tanzanias-small-scale-gold-mines](http://www.hrw.org/report/2013/08/28/toxic-toil/child-labor-and-mercury-exposure-tanzanias-small-scale-gold-mines); Human Rights Watch, *Precious Metal, Cheap Labor: Child Labor and Corporate Responsibility in Ghana’s Artisanal Gold Mines*, June 2015, [www.hrw.org/report/2015/06/10/precious-metal-cheap-labor/child-labor-and-corporate-responsibility-ghanas](http://www.hrw.org/report/2015/06/10/precious-metal-cheap-labor/child-labor-and-corporate-responsibility-ghanas); Human Rights Watch, “*What ... if Something Went Wrong?*” *Hazardous Child Labor in Small-Scale Gold Mining in the Philippines*, September 2015, <https://www.hrw.org/report/2015/09/29/what-if-something-went-wrong/hazardous-child-labor-small-scale-gold-mining>; and Berne Declaration, *A Golden Racket: The True Source of Switzerland’s “Togolese” Gold*, September 2015, [www.publiceye.ch/fileadmin/files/documents/Rohstoffe/BD\\_2015\\_Investigation-Gold.pdf](http://www.publiceye.ch/fileadmin/files/documents/Rohstoffe/BD_2015_Investigation-Gold.pdf).

Translating increased awareness of the Guidance and participation in the Forum into improved industry practices and positive impacts in affected communities will require greater State engagement in promoting and monitoring implementation of the Guidance.

#### **What Does Effective State Engagement Look Like?**

- Adhering States regularly, reliably and publicly report on what activities they have undertaken to promote and monitor implementation of the Guidance.
- Adhering States regularly, reliably, and publicly report on: (i) the estimated number of companies operating in or from their jurisdiction that are operating in the minerals supply chain, (ii) the number of companies who are reporting on their due diligence policies and practices under Step 5 of the Guidance, and the number of companies who are not (i.e., the estimated number of companies as calculated in (i) above, less the number of reporting companies who are reporting), and (iii) the number of reporting companies that are undertaking due diligence in accordance with the Guidance, and the number of reporting companies that are not.
- These reports contain sufficient detail to allow: (i) an assessment of the adhering State's and companies' progress – or lack thereof – in implementing the Guidance, (ii) comparisons across jurisdictions, and (iii) the identification of effective implementation strategies and activities used by States and companies that might be replicated elsewhere.
- Relevant States that are failing in their commitment to actively promote the Guidance can be identified and incentivised by both their peers and the OECD to improve their efforts.
- Future Forums are attended by a greater number of actively participating States.
- Future Forums are able to meaningfully acknowledge and quantify both progress and gaps in the uptake of the Guidance in all covered sectors and jurisdictions.

#### **How Could This Be Achieved?**

State reporting requirements should be aligned with the spirit of the Guidance and focused on evaluating progress on implementation against the ultimate aim of ensuring all companies involved in the extraction and trade of all mineral resources are implementing due diligence to the required standard on their supply chains.

To achieve this, reporting and assessment would operate at two levels:

##### ***Level 1: State information gathering and reporting***

- 1.1 States should nominate a government department formally responsible for overseeing and promoting the observance of the OECD Guidance and for regularly assessing the effectiveness of the State's efforts to do so. This department should establish a specific working group that is responsible for actively promoting observance of the Guidance. This working group should be cross-departmental and contain members from all areas relevant to the risks outlined in Annex II (Model Supply Chain Policy) of the Guidance, such as law enforcement, customs, foreign affairs, tax, bribery and corruption. States should also give strong consideration to including civil society as well as industry representatives within this working group on a permanent or regular basis. States should otherwise be free to place and organise this working group where they have relevant expertise and capacity given the legislative and non-legislative strategies they have in place to promote observance of the Guidance.
- 1.2 This working group should meet regularly. It should develop and publish a State strategy, which includes laws and policies, for actively promoting and monitoring observance of the

Guidance by companies that fall within the scope of the Guidance and operate in or from that State's territory. In initial years, this working group may prioritise certain sectors (e.g., high-risk industry sectors) and/or companies of a certain size/significance (e.g., listed companies with profits / employees in excess of agreed figures). They should however aim towards a complete overview in time and publicly report on any such prioritisations and clearly explain the reasoning behind them.

- 1.3 This working group should identify and maintain a list and brief overview of companies operating in or from the State's jurisdiction and that fall within the scope of the Guidance by liaising with customs authorities, tax authorities, chambers of commerce, stock exchanges, industry bodies, and other relevant institutions and bodies. This list and overview can reflect sectors and/or types of companies selected for prioritisation in line with 1.2 above, but it should in any event: (i) provide a strong, representative selection of companies and not just those known for good due diligence or reporting, and (ii) reflect a broad range of minerals, including but not limited to tin, tantalum, tungsten and gold ("***Sampling Criteria***").
- 1.4 This working group should use best efforts to collect **all** reports that companies operating in or from their jurisdiction have published on their mineral supply chain due diligence policies and practices under Step 5 of the Guidance ("***Reporting Companies***").
- 1.5 A certain number of States would report each year, on a rotating basis, to the OECD Secretariat or a newly created "Minerals Guidance Working Group" (see "Level 2" below). This should be organised so that each State reports every three years. Reporting should be consistent across the States, using a reporting tool developed by the OECD Working Group (see "Level 2" below).
- 1.6 Based on information gathered in that reporting period in accordance with 1.2-1.4 above, each State reporting that year would assess the due diligence policies and practices of either (i) each Reporting Company or (ii) a representative sample of Reporting Companies (the "***Assessed Companies***"), against the due diligence standards in each of the five steps of the Guidance. Any representative sample under this 1.6(ii) should reflect the Sampling Criteria in 1.3 above.
- 1.7 Each State's report should then include: (i) details of which government department and working group is tasked with implementing the OECD Guidance, (ii) details of what cross-department collaboration efforts are made to implement the Guidance (including with trade and development agencies), (iii) the State's then current strategy for promoting and monitor implementation of the Guidance, including what specific legislative, policy, outreach and other measures it has taken to meet its commitment to "actively promote the observance of the Guidance" and, if relevant, why it has decided to promote implementation of the Guidance within certain sectors or types of companies, and (iv) an evaluation of the State's strategy for promoting and monitoring implementation of the Guidance, which identifies any gaps and limitations in that strategy and their plans for addressing those gaps or limitations.
- 1.8 Each State's report under 1.7 above should also detail: (i) the estimated number of companies operating in or from their jurisdiction that are operating in the minerals supply chain (or that fall within the sector or type of company selected by the State for prioritization in accordance with the above), (ii) the number of such companies who are publishing a report under Step 5 of the Guidance outlining their due diligence policies and practices, and the number of such companies who are not, (iii) the State's assessment of whether each Assessed Company has complied or not with the due diligence standards in the Guidance, and (iv) the State's estimate (based on that assessment) of how many Reporting Companies are meeting the due diligence standards outlined in the Guidance, and how many Reporting Companies are not. If any information is unavailable under 1.8(ii), the

State's report should also provide a thorough explanation and detail its strategy for addressing this gap in information as part of its strategy evaluation under 1.7 above.

- 1.9 Each State report should include any document referred to in the report.
- 1.10 Reports should be received from relevant reporting States in June of each year, so that reports and progress can be assessed by the OECD Working Group (see "Level 2" below) and then presented in the following year at the usual Forum sessions on how States are implementing the Guidance.
- 1.11 Reporting States should make all their reports and accompanying documents public and easily available online at the same time as they are sent to the OECD.

**Level 2: OECD assessment of State efforts**

- 2.1 The OECD Secretariat or a newly created "Minerals Guidance Working Group" (the "**OECD Working Group**") should be mandated to receive State reports and to assess and publicly report, including at the annual Forum, on State reporting.
- 2.2 This OECD Working Group should consist of representatives from the OECD (including from the OECD Working Group on Bribery, as this is a specific risk identified in Annex II of the Guidance), civil society and industry (for example, the MSG Co-Chairs). It should be assisted by two independent experts with a background in legal or compliance issues. The role of these experts would be to undertake a preliminary review of State reports, prepare summaries for the OECD Working Group and provide advice on assessing State reports.
- 2.3 The OECD Working Group should create a reporting tool for States to use (for example, a questionnaire and a standard reporting template that sets out what documentation should accompany the report).
- 2.4 The OECD Working Group should evaluate each State's efforts to actively promote and monitor implementation of the Guidance by: (i) reviewing the reports and accompanying documents provided by that State under "Level 1" above; and (ii) assessing whether or not a representative sample of the Assessed Companies from each State has met the due diligence standards set out in the Guidance (this representative sample should reflect the Sampling Criteria in 1.3 above). This evaluation should take place between the date on which States report (i.e., June) and 31 December of each year.
- 2.5 Where the OECD Working Group considers that any State's reporting and/or efforts to actively promote and monitor implementation of the Guidance are inadequate (including because the State has failed to properly assess whether any Assessed Company has met the due diligence standards set out in the Guidance), it should engage further with the relevant State department / working group, seeking an explanation through follow-up questions or one-on-one discussions. It should re-assess that State's efforts to address these issues by May of the year following that State's original report and, in any event, in time for reporting at the annual Forum.
- 2.6 The OECD Working Group should produce and make public and easily available online: (i) a report of their findings for each reporting cycle, (ii) a separate report on any individual State that has failed to improve implementation despite follow-up efforts, and (iii) press releases or summaries of their findings in these reports. These findings should also be presented at the annual Forum.
- 2.7 The report in 2.6 (i) above should document: (i) the completeness of reporting by each of the States reporting that cycle, (ii) the working group's assessment of individual State efforts to promote and monitor implementation of the Guidance (including the OECD Working Group's conclusion as to which States are fulfilling their commitment to "actively promote

the observance of the Guidance” and which States are compliant, partially compliant or not compliant with that commitment), (iii) according to the States’ reports under “Level 1” above, how many companies in each State are reporting under Step 5 and (if the information is available) how many are not, (iv) the results of its assessment in 2.4(ii) above as to whether the representative sample of the Assessed Companies in each State meet or fail to meet the due diligence standards set out in the Guidance, and (v) any best-practices and gaps or limitations in State promotion, monitoring and reporting identified during its assessments.

### **Conclusion**

While the OECD Guidance is not legally binding in itself, as explained earlier it does seek to ensure that companies identify, prevent and address risks that are premised on human rights standards as well as national and international law. It is our belief that formal reporting and assessment, as outlined above, would contribute to improved industry practice so that relevant risks are better identified and managed in line with prevailing laws and standards.

Amnesty International

Global Witness

Human Rights Watch

Action Aid, The Netherlands

AEFJN – Africa Europe Faith & Justice Network

ALBOAN

ARM - Alliance for Responsible Mining

BEDEWA – Bureau d’Etudes et d’appui au Développement du territoire de WALIKALE

CENADEP – Centre National d’Appui au Développement et à la Participation Populaire

Children’s Voice

CIR – Christliche Initiative Romero

Comisión española de Justicia y Paz

Commission Justice et Paix Belgique francophone

COSOC-GL – The Coalition of Civil Society Organisations in the Great Lake Region against Illegal Exploitation of Natural Resources

CREDDHO – Centre de Recherche sur l’Environnement, la Démocratie et les Droits de l’Homme

CRESA – Centre de Recherches et d’Etudes Stratégiques en Afrique Centrale

FOCSIV

Fundación Mainel

GermanWatch

JESC – Jesuit European Social Centre

Justicia I Pau Barcelona

London Mining Network

Maniema Libertés

Max Impact

MPEDH – People's Movement for Human Rights Education

RAID – Rights and Accountability in Development

REDES – Red de Entidades para el Desarrollo Solidario

Save Act Mine

Social Justice, Côte d'Ivoire

SOFEDI – Solidarité des Femmes pour le Développement Intégral

Solidaridad

Solidaritat Castelldefels Kasando

Stop Mad Mining

SVH – Solidarité des Volontaires pour l'Humanité