Investment Nexus and Financial Institutions

in the Implementation of the OECD Guidelines for Multinational Enterprises

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Background

The Center for Human Rights and Environment (CEDHA) filed three Specific Instances requests relative alleged private and public sector breaches to the OECD Guidelines for Multinational Enterprises (the Guidelines) during the 2006 calendar year. Two of these involved financial institutions (one public and one private)[2] due to their investment nexus to a pulp mill investment by a Finnish company, which also was subject to a complaint filed earlier to the Finnish NCP. These filings have spawned much debate as to the applicability of the OECD Guidelines to Financial Institutions.

The financial relationship that an institution (public or private) enters into oftentimes is critical to the viability of that company's proposed project. One hence, cannot and should not divorce a company's tangible project (a physical investment) from the financial supports of the project, which generally are well aware (whether their financial accounting clarifies it or not) of where their investment funds are going to be invested by the company.

We postulate that an *investment nexus*, if shown to be directly applicable (or at least that has relative importance) to the investment project of a company, and particularly if the financial support contributes to the financial viability of a private sector project/investment, it should generally accepted that the investment itself also be grounds upon which to consider the financial institutions obligations to uphold guidelines like the OECD Guidelines for Multinational Enterprises, and that this obligation should hold whether the institution is public or private.

A discussion has ensued amongst NCPs precisely around these considerations, as to the applicability of the Guidelines to investment institutions, both public (as in the case of Export Credit Agencies) or to private financial institutions (as our Specific Instance Filing against NORDEA).

CEDHA's filing of two such Specific Instance Requests provides grounds upon which to review these issues involved in the debate, which is herein presented.

The OECD Guidelines

The OECD Guidelines for Multinational Enterprises (the Guidelines) are an evolving set of corporate responsibility standards that are rooted in international law and reinforce an established body of principles for dealing with responsible business conduct. The Guidelines were subject to a statement by the OECD Investment Committee in 2003 which introduced the investment nexus which we view as a critical dimension of the guidelines, to ensure their integral and universal application to investment projects. We are concerned however, when we see National Contact Points (NCPs) utilize discussion and text published by the Committee on and about the "investment nexus" as to mean that the mere discussion of an "investment nexus" should somehow limit the applicability of the Guidelines.

We argue that the "investment nexus" is merely the identification of a dimension of a corporate project that shows and establishes the linkage of a financial institution to the

[2] The public institution is Finnvera, Finland's official Export Credit Agency for its support to Botnia. The private financial institution is Nordes a multinational private Nordic investment group.

project itself. In and of itself, the "investment nexus" should not be considered as a measurement threshold but rather it is the identification of a clear financial relationship that an investment institution has with the company in which it invests. Our question, when examining the "investment nexus" should be, to what degree the financial relationship is oriented to finance a give physical project, whether or not, it is categorized as such in a given internal accounting exercise.

This last clarification is important, since the decision to define an investment according to a given accounting typology (for example, project finance, or corporate loan) can lead to a conclusion by the financial institution that the investment offered to the company is *a priori* related *or not*, to the actual investment. This is not a minor clarification since for example, in the applicability of the Equator Principles (EPs) as defined by financial institutions that uphold a commitment to the EPs, only projects that are accounted as "project finance", need to abide by the EPs. If a financial institution decides to file its financial contribution as a corporate loan (specifically *not project investment*), then the EPs do not apply and the company can be more lax about its relationship to the company receiving the financial support.

Local stakeholders, concerned about a project's impact on social or environmental interests, will not distinguish, as might a financial bank, whether that financial institution's support to a company contaminating or violating human rights in their community, categorize that investment as "a corporate loan" or "project finance". Granted this distinction may entail very different processes by which the financial institution considers the investment opportunity, when considering social and environmental impacts of an investment, what may make sense from an accounting perspective, does not from a social impact perspective. It will remain a responsibility of the financial institution to correct this inconsistency, or have to attend to the confusion and impasse it will face when trying to justify such an accounting difference to concerned local stakeholders.

Finally we should stress that a mere accounting formality, and the implications of that formality in terms of how a bank handles the review of its investment, needs to be revised. For the purpose of considering the OECD Guidelines, the nuance between project finance and corporate loans that arises in voluntary agreements of Corporate Social Responsibility such as the EPs, serves an important purpose, namely to begin to identify and recognize that and investment nexus, whether or not recognized by the financial institution to a given private sector project, has *inescapable* implications locally, and will be viewed by local communities and stakeholders as a tangible and complicit relationship of the financial institutions to the project.

The Guidelines Applicability to Business Partners

We have said that the "investment nexus" is a term relative to the applicability of the Guidelines to financial investors. We can call these investors, partners, or financial partners in a given investment project. For the sake of bringing this terminology to OECD Guidelines rhetoric, we call these "business partners". The Guidelines oblige business partners to encourage conduct compatible with the Guidelines. Chapter II, paragraph 10 states:

> *Enterprises should take fully into account established policies in the countries in which they operate, and consider the views of other stakeholders. In this regard, enterprises should:*
> *10. Encourage, where practicable, business partners, including suppliers and sub-contractors, to apply principles of corporate conduct compatible with the Guidelines.*

Chapter II, paragraph 10 forms a part of the text of the Guidelines, the text being the principal authority to apply the Guidelines. The Foreword to the Guidelines explains that 'authoritative texts … are found in the verbatim language of the Guidelines and the relevant decisions of the Committee on International Investment and Multinational Enterprise (CIME)'.[3] The Guidelines also incorporate commentaries, which provide 'information on and explanation of the Guidelines text and implementation procedures' and are not a part of the Declaration on International Investment and Multinational Enterprises.[4]

Commentary on Chapter II paragraph 10 explains factors which may limit the ability to influence business partners. Limiting factors may depend on sectoral, enterprise and product characteristics, including

- the number of suppliers or other business partners,
- the structure and complexity of the supply chain and
- the market position of the enterprise vis-à-vis its suppliers or other business partners[5]

Nothing exists in this explanation suggesting that a financial relationship should or could be a limiting factor. In fact, the limiting factor suggests the contrary, that limitation should or could be based on a relative distance of the partner from the investment. One could conclude that the idea behind the limitation clauses is geared to divorce the company from the responsibility to monitor or insure control over partners that would be physically too far removed the company's capacity to observe such a partner's actions.

If we look at the investment nexus, we could apply a similar criteria, suggesting more complicity as the financial relationship is closer and more directly influencing the company's actions. It is pretty clear that if a financial institution provides project financing monies to a company then it knows exactly what that money is going to, and it has a direct bearing on the company's ability/capacity to carry out its project. If the project is not project financing, but is a corporate loan necessary for the company to carry out its global corporate investment strategy that year (and the financial institution knows that one of the projects the company will invest in is a controversial project that may allegedly be violating the Guidelines) then the investment company still has fairly strong and verifiable information about the importance and the viability impact its financial investment makes on the company's project.

If on the contrary, we look at a personal investment portfolio in the stock of a small local private bank, which in turn invests in a large financial institution, which in turn provides a corporate loan to a controversial company investment in a developing country, it can be argued that the applicability of the Guidelines to the small local private could be questioned, since it is not clear that the small bank. This does not preclude responsibility or not of the small private bank, but is merely offered to show that distance from the actual investment can

[3] The OECD Guidelines for Multinational Enterprises, Foreword
[4] ibid.
[5] The Guidelines, Chapter II Commentary 10

generate in such a case, questions as to the clarity of the applicability of the Guidelines, based on a weak or distant "investment nexus".

The Investment Nexus as defined by the OECD

The scope of the Guidelines was recognized by the Chair of the CIME in 2002 as an issue that needed to be addressed. As a result the CIME released a statement on the scope of the Guidelines (the Statement) in April 2003 which was published in 2003 Annual NCP Report.[6] The body of the Statement consists of three paragraphs; the third introduces the concept of the "investment nexus", which limits Chapter II paragraph 10 of the Guidelines.

Before looking into the concept of the investment nexus, it is important to understand the foundation of the Guidelines, and how they relate to established principles. The second point of the Statement reads:

… the Guidelines are a major corporate responsibility instrument that draws on and reinforces an established body of principles dealing with responsible business conduct. These principles reflect common values that underlie a variety of international declarations and conventions as well as the laws and regulations of governments adhering to the Guidelines. As such, these values are relevant to the activities of multinational enterprises…

The key strength of the Guidelines is that they draw on and reinforce an established body of principles dealing with responsible business conduct. Similarly, the OECD states that the Guidelines 'are rooted in international conventions and declarations.'[7] The investment nexus refers to the applicability of responsible conduct to financial actors and investors in a manner which builds on established body of principles, international law, and of those governments adhering to the Guidelines. The CIME attributes corporate responsibility for investors and financial actors following the investment intent of the document's drafters that the Guidelines will draw on and reinforce international law and corporate responsibility principles.[8]

The *investment nexus* is similarly introduced with reference to the flexible approach inherent in the implementation of the Guidelines which aims to promote and encourage responsible business conduct amongst a wide range of actors. Flexibility in this sense, should can only be understood to suggest a flexibility with respect to the proactive and universal applicability of the Guidelines, and should *not*, be in any way construed to suggest that the investment nexus can or should be considered flexibly in a way to limit the interpretation. This conclusion from the very nature of the Guidelines and the intent that they serve to "protect" and not to "limit" responsibility.

[6] The OECD Guidelines for Multinational Enterprises: 2003 Annual Meeting of the National Contact Points, Report by the Chair.p12 http://www.oecd.org/dataoecd/3/47/15941397.pdf

[7] OECD, The UN Global Compact and the OECD Guidelines for Multinational Enterprises: Complementarities and Distinctive Contributions, 26 April 2006 http://www.oecd.org/dataoecd/23/2/34873731.pdf

[8] Another reason why the investment nexus must accord with international law is to enable NCPs (often government functionaries) to discharge the States obligations to promote and respect international law. The obligations of State actors to ensure adherence and promotion of the Guidelines is beyond the scope of this paper but is worth considering when discussing implementation of the Guidelines by NCPs.

The Guidelines aim to 'strengthen the basis of mutual confidence between multinational enterprises and the societies in which they operate'[9], and this can only be done by taking into account community expectations and the imperative need to protect community stakeholders from unnecessary and avoidable negative externalities deriving from irresponsible corporate behavior. Community expectations on business partners are mirrored by a large number of specific instances and civil society, both of which demand increased scrutiny on the actions across all enterprises and their relationship. Society expects responsible business conduct to extend to members of supply chain, trade partners, sub-contractors and ALL other business partners, including, *financial institutions*. It is clear that responsibility for investors and financial institutions coalesces with society's expectations, and by formalizing this responsibility the CIME is strengthening the basis of mutual confidence between enterprises and the societies in which they operate.

The *investment nexus* is not an established or preconceived international concept measurable by some specific criteria. In the realm of the OECD Guidelines, reference to an "investment nexus" has existed for less than four years. What has varied and what concerns us, is how NCPs have utilized the term, and how they are addressing Specific Instances which try to establish "investment nexus". NCP treatment of the "investment nexus", as we will show, has in many cases, precluded a settled interpretation of the term and issue, as if it were a limiting factor in the analysis of an investment institution's relationship to an company project. This erred treatment is both faulty from its origin and intent, but also risk derailing the very reason the investment nexus exists in the OECD Guidelines.

The investment nexus and its treatment has not yet been entirely clarified by the Investment Committee. The Committee perhaps should review existing text on the investment nexus, and further clarify, so as to better guide NCPs in their interpretation and use of the reference and analytical point. Clearly the investment nexus, and whatever exercise the OECD embarks on to establish corporate complicity with the Guidelines for investment relations with controversial projects, or simply with projects facing stakeholder claims before NCPs for alleged violations of the Guidelines, the OECD position should ensure that any interpretation or analysis of the investment nexus, helps the NCP assess project compliance and investment institution compliance with its obligations under the Guidelines and under international law, as well as industry norms and established corporate responsibility principles.

In any such clarification or guidance, we strongly encourage that the OECD and/or the Investment Committee, as the case may merit, consider the "investment nexus" in a manner that is as flexible as possible, that allows for in-depth consideration of the chain and degree of responsibility, and as wide an array of investors, financial actors and activities and their services as possible, so as to allow for any given analysis to do a proper and most in-depth possible study of what the true and relative implications are of an investment on a given project. In no way should guidance or statements, text or any other reference of the OECD or of the Investment Committee limit in any way or form, or preclude the conclusions that an NCP should have or could make on the relative complicity of an investment nexus of a given project. In the best of cases, such text or guidance should err on the side of amplitude and flexibility in the interpretation and measurement of the nexus.

[9] OECD Guidelines, Preface, Paragraph 1

Scope and Applicability of the Investment Nexus

This paper provides recommendations which provide clarification of the investment nexus concurrent with corporate responsible principles and international law.

The third paragraph in the Statement by CIME introduces the investment nexus:

Third, the Guidelines have been developed in the specific context of international investment by multinational enterprises and their application rests on the presence of an investment nexus. When considering the application of the Guidelines, flexibility is required. This is reflected in Recommendation II.10 and its commentary that deal with relations among suppliers and other business partners. These texts link the issue of scope to the practical ability of enterprises to influence the conduct of their business partners with whom they have an investment like relationship. In considering Recommendation II.10, a case-by-case approach is warranted that takes account of all factors relevant to the nature of the relationship and the degree of influence. The fact that the OECD Declaration does not provide precise definitions of international investment and multinational enterprises allows for flexibility of interpretation and adaptation to particular circumstances.

We already mentioned above that the reference to "flexibility" should not and cannot be taken to suggest placing a "limit" on applicability, but rather that it should be interpreted as providing the widest and most universal understanding of the interpretation the obligation to apply the guidelines, in this case, to financial institutions.

It is worth clarifying the terms *applicability* and *scope*. *Applicability* can be taken to mean whether or not the Guidelines apply to an enterprise. In other words it describes the threshold limit which determines whether or not the Guidelines apply to a certain enterprise. Deciding on *applicability* is the first step an NCP should make. If the Guidelines are applicable to a company, then the investment nexus provide a flexible linkage to apply the guidelines to a business partner or as the case may be, to a financial institution. If the project itself has legitimate Guideline concerns, then it is clear that a business partner, that makes that project viable, must also generate those same concerns.

According to the Statement, the Guidelines are *applicable* to business partners which have an investment nexus.[10] The investment aspect of the investment nexus can be defined looking at previous specific instances and the type of relationships which are believed to be applicable under the Guidelines. What then are the type of investment like services provided to a business partner can create an investment nexus? Looking to define minimum standards that the relationship or nexus should have, the Guidelines point us to established principles such as international law and the sphere of influence.

The *scope* of the Guidelines can be taken to mean how NCPs should implement the Guidelines, and what steps they should take to ensure that conduct consistent with the Guidelines is encouraged by business partners. According to the Statement, the *scope* is

[10] The investment nexus is different to relationships of sub-contractors, trade or the supply chain. Current interpretations of the Guidelines relative to trade partners, supply chain members and all sub-contractors are beyond the scope of this paper, although to encourage widespread observance of the Guidelines all these relationships should be applicable under the Guidelines.

linked to the practical ability of enterprises to influence the conduct of their business partners. As such the type of investment relationship and the level of influence (a level in the sphere of influence depending on different factors) are useful to clarify the *scope* of the Guidelines. The phrase 'investment like relationship' is only to be used by NCPs to determine *scope*, not the *applicability* of the Guidelines.[11] It follows that those factors which influence the *scope* of the Guidelines should only be addressed by NCPs in the initial assessment of a specific instance. Factors influencing the scope of the Guidelines cannot therefore be employed by NCPs to determine or limit *applicability* of the Guidelines to business partners.

The Investment Nexus and International Law

International Law Standard of Complicity

Compliance with international law is the cornerstone of the Guidelines. Chapter I and II explicitly state that governments must comply with international law, and that the Guidelines are consistent with these applicable laws. International law does not restrict accountability for any actions whatsoever due to an 'investment like relationship' and that the Guidelines reinforce international law, therefore the investment nexus is to be considered as a concept which does not limit the applicability of the Guidelines, but rather concretizes its application to financial institutions and investors. Further clarification by the Investment Committee must also draw on and be consistent with international law.

The relevant standard to attribute accountability for the actions of another, such as to encourage business partners to apply conduct consistent with the Guidelines, is complicity at International Customary Law.[12] International Customary Law applies to all States. It is applicable to all OECD member states and all states in which the enterprises from OECD Countries may do business. Therefore complicity at International Customary Law is an appropriate complicity standard which the investment nexus must follow.

Earth Rights International defines the minimum customary international law standard for corporate aiding and abetting liability to be *knowing practical assistance, encouragement, or moral support that has a substantial effect on the perpetration of the abuses.*[13]

Complicity in all international jurisdictions is a two fold test which incorporates the required conduct of practical assistance, conduct or moral support by the accomplice (*actus reus*), and

[11] The phrase 'investment like relationship' cannot apply to interpreting the 'investment nexus'. Investment nexus is a broad concept, requiring only a link to investment related activities. To limit the concept of investment nexus to those which have an investment like relationship goes against the established principles of corporate responsibility, none of which further limit the applicability of standards and guidelines. The Investment Committee Statement also infers that an 'investment like relationship' refers to *scope* of the Guidelines, not the *applicability*.

[12] Similarly, the Investment Committee must clarify investment nexus issues in a manner which is consistent with NCP's procedural responsibilities. Again, international law must be taken into account. Procedural Guidance for NCPs states 'the NCP will take into account: … how similar issues have been, or are being, treated in other domestic or international proceedings'. (Procedural Guidance for NCPs, para 14)

[13] Earth Rights International, *The International Law Standard for Corporate Aiding and Abetting Liability*, presented to the UN Special Representative to the Secretary General on Human Rights and Transnational Corporations and other Business Enterprises, July 2006, p9

the required mental state of knowledge that one's act would contribute to the commission of such abuses (*mens rea*).

Required conduct refers to an act or omission that is deliberate and 'directly affects the crime itself'.[14] The minimum standard for required conduct for complicity at international law is termed *silent complicity*, where omissions alone (tolerance) can amount to moral support or encouragement of the violation. The *investment nexus* establishes an investment or business like relationship between the parties, creating a circumstantial threshold that is defined by the nature of the relationship between the company and the investment institution. The importance or direct implication of the investor on the company will be determined specifically in each case. It suffices to say that in most of the types of cases that derive into a Specific Instance request, it is clear that the company and its financial institution supporter have a clear investment nexus, and that the investment is key to the operations of the company in the controversy. No case presently exists where this is not so. Once the existence of an investment like relationship is satisfied, then an enterprise's failure to act with regards to violations of the OECD Guidelines will be sufficient to satisfy the company's ability to influence those breaching the Guidelines.

A company may have a stronger ability to influence others in situations which International Law considers *indirect complicity* or *direct complicity*. Indirect complicity refers to any action that has a substantial effect on violations, even where the enterprise may not have actual control over the perpetrator.[15] Direct complicity refers to the promotion or assistance with the carrying out of the violation. These distinctions of levels of influence are helpful in establishing the scope of the Guidelines and how NCPs can implement and promote behavior consistent with international law and the Guidelines.

It is important to note that in many jurisdictions which incorporate international law into domestic legal systems, the perpetrator of the abuse need not be charged for complicity to be invoked.[16] The Guidelines demand respect for domestic law. The investment nexus should not be in any way invoked to somehow limit the applicability of domestic law to the project. When considering the investment nexus as a valid analytical tool to examine a project's viability, one should always consider analyzing project compliance with international law to aid interpretation. It is be possible for an NCP to deal with a specific instance regarding an investment nexus whilst parallel proceedings are underway, or whilst another NCP is dealing or has closed (even dismissed) proceedings with regard to the principal perpetrator of Guideline violations. The principal perpetrator need not even be subject to any action whatsoever.

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[14] *Prosecutor v. Tadic*, ICTY Case No. IT-94-1-T (Trial Chamber May 7, 1997), ¶ 678, *available at* http://www.un.org/icty/tadic/trialc2/judgement/index.htm; *see also* A. Clapham & S. Jerbi, *Categories of Corporate*
Complicity in Human Rights Abuses, 24 HASTINGS INT'L & COMP. L. REV. 339, 341 (2001).

[15] *U.S. v. Friederich Flick, in* 6 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO.10, pp. 1217, 1222 (1947) (Defendants were Friedrich Flick and five other highranking directors of Flick's group of companies

[16] Ramasastry A and Thompson R C, *Commerce, Crime and Conflict: Legal Remedies for Private Sector Liability for Grave Breaches of International Law: A survey of Sixteen Countries*, Fafo, 2006, Fafo-report 536, p18

The required mental state at international criminal law is that an accomplice must have knowledge that their act or omission contributes to the breach. Here an NCP may wish to consider at minimum, that the lodging of a specific instance is sufficient to make the enterprise aware of their contributions, thus this threshold is automatically satisfied by any enterprise subject to a complaint involving the investment nexus from the time of lodgment, and will automatically refer to the enterprise' behaviour after the Specific Instance is made. Given that specific instances will refer to conduct in the past, NCP's may wish to consider the likelihood of enterprise's knowledge of breaches of the Guidelines due to publicity, previous attempts at communication with the enterprise, and the nature of relationship between the principal perpetrator. It should also be noted that the required mental state does not require that the enterprise intend the breaches to occur[17], neither knowledge of specific breaches are required.[18]

The examination of the investment nexus must incorporate the consideration of above principles when applied to investors and financial institutions to attribute responsibility for corporate conduct. Unfortunately the investment nexus, which has no value in and of itself, has been categorized as if it had by NCPs and interpreted by NCPs to limit corporate accountability in a manner not foreseen by the drafters of the Guidelines nor in any manner consistent with international law (discussed below). Consideration of the investment nexus must concur with the remainder of the established principles, and its relevance is to be invoked when a financial institution *knows* that it provides practical assistance, encouragement, or moral support to an enterprise which is violating the Guidelines. It is worth noting that many jurisdictions incorporate an objective test such as the standard of 'ought to have known'. This is consistent with the UN Norms on Human Rights and Business which represents an established body of principles which the OECD Guidelines is to draw upon and reinforce, and therefore should be incorporated by the Guidelines.[19] It follows that the Guidelines will be applicable to a business partner with an *anticipated* investment nexus.

The Investment Nexus and Sphere of Influence

The sphere of influence is useful to define the extent of an investment nexus or business relationship which attracts accountability under the Guidelines. This concept of the sphere of influence appears in two United Nations (UN) documents which describe the establish body of principles dealing with responsible business conduct. They are the UN Norms on Transnational Corporations and Other Business Enterprises with Regard to Human Rights (the Norms) and the UN Global Compact.

The Norms have evolved over a long process which has placed them in a prominent position in international standing, at the UN Sub-commission on Human Rights. Custom amongst the business community indicates widespread acceptance and incorporation of the Norms into business practice. Therefore the Norms can be considered as part of the established body of principles on corporate conduct.

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[17] *Furundzija*, *supra* note 19, ¶ 252; *see also Tadic*, *supra* note 23 ¶¶ 689, 691-92 (holding that the "accused will be found criminally culpable for any conduct where it is determined that he knowingly participated in the commission of an offence that violates international humanitarian law")

[18] *The Farben Case*, Military Tribunal VI, Case 6: *U.S. v. Krauch, in* 8 TRIALS OF WAR CRIMINALS UNDER CONTROL COUNCIL LAW NO. 10, p. 1169

[19] OECD Investment Committee, Statement on Investment Nexus, Point 2

The Norms state that "*within their respective spheres of activity and influence*, transnational corporations and other business enterprises have the obligation to promote, secure the fulfillment of, respect, ensure respect of and protect human rights recognized in international as well as national law, including the rights and interests of indigenous peoples and other vulnerable groups."[20]

Commentary on the UN Norms for Human Rights and Business explains that activities of businesses must not directly nor indirectly contribute to human rights abuses. Silent complicity standards at international law (mentioned above) is a from of indirect contribution to breaches, so like international law, the Norms confirm that a minimum standard to attribute responsibility for breaches to the Guidelines resulting from an investment nexus is an omission.

According to Commentary on the Norms, businesses must also inform themselves of impacts of their principal activities and their proposed activities so that they can further avoid complicity.[21] Therefore, the mere existence of a possible investment nexus relative to alleged violations of a normative standard on human rights, the environment, social norms, etc. demands businesses to a proactive role in avoiding breaches to the Guidelines, keep themselves informed of breaches, and that the Guidelines apply to planned or foreseen business partnerships where a formal business arrangement has not been entered into.

We recommend that Norms be used as Guidance to interpret the investment nexus, noting that the Guidelines and the investment nexus are based on the same common established principles of business conduct the Norms. Amnesty International also recommends that the UN Norms be used by the OECD as reference to understand human rights clauses in the Guidelines.[22]

The Investment Nexus and the Level of Influence

The UN Global Compact, like the Norms, is similar in scope and premises to the Guidelines, and like the Norms are widely accepted by enterprises as an appropriate code of conduct or standard of business behavior. Principle one of the Global Compact asks companies to '[s]upport and respect the protection of international human rights within their sphere of influence.'[23]

Considering the Global Compact, the Office of the High Commission on Human Rights (OHCHR) explains that bodies within the sphere of influence include joint venture partners, suppliers, contractors, sub-contractors or others with whom the company has a working relation.[24] Similarly the Guidelines apply to suppliers and subcontractors (Chapter II, Paragraph 10) and count on the 'practical ability of enterprises to influence conduct of

[20] General Obligations of the Norms. Emphasis added.
[21] General Observations, Commentary 1(b) http://www1.umn.edu/humanrts/links/commentary-Aug2003.html
[22] Amnesty International, The UN Human Rights Norms For Business: Towards Legal Accountability, 2004, p16 http://www.amnesty.org.ru/library/pdf/IOR420022004ENGLISH/$File/IOR4200204.pdf
[23] The UN Global Compact http://www.globalcompact.org.pk/aboutgc.htm#nineps
[24] OHCHR Briefing Paper, The Global Compact and Human Rights: Understanding Sphere of Influence and Complicity. http://www.unglobalcompact.org/Issues/human_rights/gc_and_human_rights.pdf

business partners'. (Chapter II, Commentary 10). Both documents address corporate social responsibility and are rooted in international conventions and declarations.[25] They are based upon the same established body of principles dealing with responsible business conduct, the Guidelines and the investment nexus must take them into account.[26]

The OHCHR explains the sphere of influence takes into account an enterprise's ability to act on its human rights obligations. Similarly, the *scope* of the Guidelines is linked to the practical ability of business partners to influence another.[27] It follows that Guideline *scope* and the sphere of influence are analogous concepts. The OHCHR explains that the sphere of influence stretches to those with a 'certain political, contractual, economic or geographic proximity', and these factors are to be taken into account by NCPs regarding the extent of influence that a business partner may have on the conduct of another.

The OHCHR also names size and strategic significance as factors affecting the sphere of influence.[28] Logically, these also affect the level of influence that a business partner has over another, and are to be used by NCPs to determine how to deal with a business partner violating the Guidelines. In other words this is the scope of the Guidelines. In the past NCPs have also referred to factors such as the duration of the general relationship between the business partners and whether the type of benefits received, such as a commission from the initial investment. The points are all valid considering how a NCP enforces the Guidelines, but are not to be used to determine (or restrict) the applicability of the Guidelines since international law standard of complicity prevail in this regard, and simply require that an accomplice has a 'substantial effect' on commission of the violation. Complicity, a test which should be used to determine the applicability of the Guidelines, does not refer to the length of time of the previous relationship.

The practical ability of a business partner to encourage conduct consistent with the Guidelines is important when considering how NCPs should respond to investment nexus issues, and not the first step to determine applicability of the Guidelines. The ability to influence is the same as the level of influence a business partner enjoys. The level of influence can be determined by looking at factors which influencing the sphere of influence.

The Investment Nexus and Social Expectations

The Investment Nexus is a flexible concept which has minimum requirements of international law and established body of principles. OECD instruments, including the Guidelines, are 'designed to improve the international investment climate and to strengthen the basis of mutual confidence between multinational enterprises and the societies in which

[25] OECD, *The UN Global Compact and the OECD Guidelines for Multinational Enterprises: Complementarities and Distinctive Contributions*, 26 April 2006 http://www.oecd.org/dataoecd/23/2/34873731.pdf
[26] CIME Statement on Investment Nexos, Point 2 'Second, the Guidelines are a major corporate responsibility instrument that draws on and reinforces an established body of principles dealing with responsible business conduct.'
[27] ibid.
[28] A detailed discussion on Financial Institution Sphere of Influence can be found in BankTrack's Position Ppaer on Financial Institutions and Human Rights, www.banktrack.org/doc/File/BankTrack%20publications/BankTrack%20publications/0_070213%20human%20rights%2C%20Banking%20risks.pdf

they operate'.[29] Mutual confidence is a direct consequence of societal expectations. Therefore, the investment nexus must also take into account social expectations.

Today, business partners are bound by robust social expectations and business partner behavior is closely scrutinized. An example of robust expectations is of behavior expected by financial institutions investing in projects linked with violations of human rights.[30] Declining trust in business partners that operate within OECD countries is fuelled by their association with harmful projects which not only do they profit from, but facilitate and make possible by providing financial, logistical or service related support, eroding the trust enjoyed by these enterprises in their home countries.[31] The Guidelines provide flexibility in expectation of enterprises so that Guideline scope and applicability are consistent with the societies in which they operate, and also consistent with the common legal framework of all OECD countries. Therefore, NCP's should take into account community expectations, often reflected by Specific Instances lodged by civil society and those affected by issues related to the Guidelines.

The Investment Nexus and Applicable Enterprises

The Guidelines recognise that 'multinational enterprises, like their domestic counterparts, have evolved to encompass a broader range of business arrangements and organizational forms. Strategic alliances and closer relations with suppliers and contractors tend to blur the boundaries of the enterprise.'[2] A definition of multinational enterprise is not given by the Guidelines to encourage a wide application of the Guidelines, thus drawing on and reinforcing existing principles. The investment nexus emphasizes that the Guidelines are applicable to investors and financial institutions with regard to the wide range of services they provide. Further, the Working Party on the Declaration background paper asserts: 'In this context, definitions of business activities such as investment may be quite broad. This suggests that there may be room for flexibility in assessing multinational enterprises' influence and the presence of an investment relationship in the supply chain, depending on the specific circumstances.'[32] Similarly, the definition of business activities such as investment may be quite broad, broad enough to encompass any activity which may have a practical effect on the investment.

Considering the flexibility inherent in the Guidelines to ensure wide observance and the statement on the investment nexus, the Guidelines are applicable but not limited to, private political risk insurance providers, financial advisors, legal advisors and other business partners that profit from an investment like relationship or assist in the creation of investment like relationships between the principal perpetrator and other enterprises with an investment like relationship.

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[29] OECD Guidelines, Foreword
[30] BankTrack Position Paper: Banks and Human Rights – currently in draft form
[31] Refer to Netwerk Vlandeeren, Banking and Human Rights, and also BankTrack position paper on Banking and Human Rights.
[32] WPD 'Background paper on the scope of the Guidelines,' as it appears in *OECD Guidelines for Multinational Enterprises: 2003 Annual Meeting of National Contact Points, Report by the Chair*.; available at http://www.oecd.org/dataoecd/3/47/15941397.pdf

The Investment Nexus and Types of Business Relationships

The investment nexus covers business partner relationships which have a nexus or a link to investment activities, so it follows that for an investment nexus to exist, a formal investment relationship need not be proven. A nexus is any link to investment related activity. It should be reiterated that the ability to influence business partner conduct consistent with the Guidelines forms a part of the scope of the Guidelines, and how an NCP should go about facilitating the resolution of issues. Under this interpretation, which like the established principles of responsible business conduct does not further limit the applicability of standards or Guidelines, examples of relationships that are covered by the investment nexus include, but are not limited to:

- Syndicated loan participants, lead arrangers
- Export guarantee providers, political risk insurers
- Financial advisors / analysts
- Providers of banking service such as wire transfers, bank guarantees, term loans, bonds, underwriters, bridge loans / lines of credit, mergers / acquisitions
- Shareholders with voting rights

Characteristics of the Investment Nexus

The existence of an *investment nexus* highlights obligations on enterprises with a business relationship, current or proposed, to encourage other parties to act in a manner consistent with the Guidelines. The ability and obligation of an NCP to examine the *investment nexus* provides NCPs with direction to promote adherence to the Guidelines by a greater number of enterprises, especially investors and financial institutions, and should welcome the chance to fulfill their procedural obligations to implement and promote the Guidelines. NCPs often fail to do this, preferring to make arguments based on references in the CIME statement on "flexibility" as an excuse for dumbing down the Guidelines in favor of limiting the interpretation and alienating financial institutions from complicity in alleged company violations. However the relationship between the Guidelines, International Law and other instrument employing sphere of influence tests, demand that the investment nexus be considered in accordance with existing standards and community expectations.

The reference in the OECD Guidelines to an *investment nexus* should be seen as an opportunity a test to bring a specific types of business partners to the attention of the NCP, such that the investor or financial institution is responsible for the influencing the conduct of the principle perpetrator. The standard of complicity should be used to determine the applicability of the Guidelines with respect to the investment nexus, whilst other factors such as the type of relationship between the principal perpetrator and the business partner, the length of the relationship, the geographic, political, economic, geographic proximity are to be used by the NCP to determine the extent of influence a business partner may have, thus relating directly to how an NCP materially deals with a specific instance.

The Investment Nexus and Previous NCP Statements

For the Investment Committee to issue clarifications on the investment nexus, it is worth identifying misinterpretation made by NCPs over the short life of the investment nexus. Below are prominent cases that refer to the investment nexus, and are analysed with respect to international law standards (applicability) and the interpretation of the scope of Guidelines.

Niza & Co. v Chemie Pharmacie Holland BV (Netherlands, 2004)
In this specific instance brought by Niza & Co., the Dutch NCP considered whether it was possible to conduct business in an area occupied by rebel groups. The NCP discussed the investment nexus with reference CPH's relationship with the principle operator of the mining activity, taking into account the duration and nature of the business relationship. CPH provided logistical support in transport the mining product, facilitated financial transactions by acting as an intermediary meanwhile profiting from commission paid and advised on operational aspects. No investment nexus was found. The NCP explained that CPH's responsibilities referred to the 'business chain'.[33]

The duration of the business relationship does not determine whether there is an investment nexus for purposes of applicability, rather whether the business partner had a substantial effect on alleged Guidelines breaches over a specific period of time. Further, clearly an investor can have a very concrete nexus in a given period which makes the investment viable not only for that period, but for a much longer prolonged period. In this sense, limiting the investment nexus to a specific time period, and ignoring the relative and time extended implications of that nexus for the life of the project, can be irrational and inappropriate. As in the case of the investment nexus itself, the time-specific nexus should be assessed not only for the time period, but residual nexus should also be considered to measure a financial institution's bearing on entire life of the investment project in question.

In accordance with social expectations, and flexible interpretation of the investment nexus, facilitation of financial transactions and profiting from an involvement in investment related commission is sufficient for the investment nexus to apply, and that the principle operator is within CPH's sphere of influence, and that it knowingly supplied practical assistance to an operations which may have been in violation of the Guidelines. As such, the NCP should have taken these issues up with CPH and facilitate CPH to encourage practices consistent with the Guidelines. That CPH's responsibilities referred to the 'business chain', as stated by the NCP also invokes the Guidelines, as they are applicable to 'other entities with which MNEs enjoy a working relationship'.[34] Therefore the NCP is obliged to facilitate the resolution of issues that arise in this context.

Proyecto Gato v KBC, ING and Dexia (Belgium, 2004)
Three commercial banks KBC, ING and Dexia were part of a syndicate of 15 banks to provide loans to the BTC pipeline project.[35] Belgium's NCP accepted that all three banks had

[33] NCP Statement on Chemie Pharmacie Holland BV Specific Instance
http://www.oesorichtlijnen.nl/documenten/NCP_verklaring_NIZA_CPH.pdf
[34] Guidelines, Chapter II, Commentary 10
[35] *Netwerk Valendeeran, Where do you draw the line? Research into the financial links between five bank groups and companies that abuse human rights*, p34; available at www.mymoneyclearconsciensce.be

a sufficient investment and were eligible for inclusion under Guidelines.[36] This case highlights that participants in a loan syndicate have a relationship which is sufficient to invoke the investment nexus. In accordance with international law and established principles, this case correctly determines that the Guidelines are applicable to banks involved in a loan syndicate.

ACF v ANZ (Australia, 2006)
The Australian NCP explained that risk was a requirement if a financial institution's service was to be considered an investment. The Australian NCP considered that bank guarantees supplied by ANZ as a 'fee for service' relationship held no degree of risk to for the financial institution.[37] The Australian NCP offered no response to the fact that Bank Guarantees, when invoked, are 'functionally equivalent' to a loan whereby the beneficiary would be indebted to ANZ.[38] Accordingly, a full credit analysis was performed by ANZ prior to entering into the business agreement, an analysis which is considered standard procedure for all banks providing bank guarantees to determine the risk. Risk is not an appropriate limiting factor for the Investment Nexus considering that nowhere in International Law or established principles of corporate responsibility is accountability limited by the risk undertaken by the business partner.

It should be noted that in all business dealings, whether they be fee for service or contractual relationships outside what is considered to be an investment, risks will always arise. The difficulties that can arise in determining the actual risk faced by business partners such as in ACF v ANZ, and the numerous risk avoidance / minimizing instruments such as export credit agencies, private political risk providers, bilateral investment treaties, host government agreements where parties include enterprises, and the range investors and insurers are not appropriate to determine the applicability of the Guidelines. Australia's NCP must consider the international law standards of complicity and determine whether ANZ had knowingly provided practical assistance for violations to the Guidelines to occur. The fact that ANZ is a financial institution facilitating actions of a business partner should be sufficient to highlight the case as one which should be analyzed with respect to flexible interpretation and the investment nexus which is considered as an important tool to implement the Guidelines by NCPs.

11.11.11 et al v Forrest George International; Belgolaise et al (Belgium, 2004)
Belgolaise Bank was accused of violating the Guidelines by profiting from the transfer of money from a Congolese State owned diamond mining venture to high-level government officials for their personal benefit or for the purchase of weapons.[39] Belgium's NCP has deferred the case due to parallel proceedings. In this case, Belgolaise Bank has knowingly supplied practical assistance to another party alleged to violate the Guidelines. The investment nexus clearly exists and is relevant/important to the project as the Bank was alleged to have provided knowing assistance to transactions linked with the redistribution of profits from a diamond mining investment. Therefore, the Guidelines are applicable

[36] *OECDWatch, 5 Years On: A Review of the OECD Guidelines and National Contact Points*, 2005 at p58; available at http://www.oecdwatch.org/docs/OECD_Watch_5_years_on.pdf
[37] www.ausncp.gov.au/content/docs/331_376_20061013AncpInitialAssessmentStatement.pdf
[38] *ACF v ANZ, Specific Instance*, p 15; available at www.oecdwatch.org/docs/ACF_vs_ANZ_specificinstance.pdf
[39] *OECDWatch, 5 Years On: A Review of the OECD Guidelines and National Contact Points*, 2005 at p59; available at http://www.oecdwatch.org/docs/OECD_Watch_5_years_on.pdf

following the analysis and conclusions of the existence of an investment nexus, particularly relative to the level of influence that the bank has over the situation is high, and the NCP is obliged to act in a manner which reflects the bank's ability to influence the actors.

CEDHA / Bellona v Nordea Bank (Sweden / Norway, 2006)
Sweden's NCP will facilitate discussion on Nordea's role arranging finance for Botnia's controversial pulp mill on the River Uruguay and associated violations, so far a statement has not been issued. In the related Botnia specific instance, Finland's NCP has dismissed issues relative to Botnia's Guidelines violations, but in the view of the complainants has done so incorporating incorrect interpretations of the Guidelines and usurping the role of international law. At the time of writing the Statement is being reviewed by the OECD Investment Committee upon request by the complainants.

Nordea bank is a mandated lead arranger for the project, which means it is organizing the banks participating in the project's syndicated loans and most probably contributing as an investor. It is knowingly supplying assistance to Botnia in a matter directly related to its project, or investment, by which Guideline issues are believed to arise. A mandated lead arranger organizes banks participating in a loan syndicate, such as the banks named in *Proyecto Gato v KBC, ING and Dexia (Belgium, 2004),* therefore Nordea has easily satisfied applicability under the investment nexus, international law, and established principles of corporate responsibility. In its role as lead arranger, Nordea has a substantial influence over the project, and the NCP should act proportionally, ensuring that Nordea encourages conduct consistent with the Guidelines.

CEDHA v Finnvera (Finland, 2006)[40]
Finland's NCP released a statement which dismissed the Guidelines applicability to Finnvera due to its nature as an export credit agency.[41] Finnvera is 100% owned by the Finnish State, and facilitated the principal enterprise accused of Guideline breaches, pulp mill company Botnia. The investment nexus is interpreted to not apply to Finnvera's 'special financing activities'.

Finland's NCP did not consider that Finnvera is knowingly providing or will provide assistance in an investment related manner to a business partner violating the Guidelines. It has ignored international law and established principles of corporate responsibility, thus assessing the investment nexus incorrectly. It is also important to note the definition of MNE is not provided by the Guidelines to encourage flexible interpretation to encourage implementation of the Guidelines. In the statement (not released to the public by the Finnish Government) Finland's NCP also provides illogical interpretation of the existence of other policies for export credit agencies, declaring that the OECD's policy on export credit agencies excludes applicability under the Guidelines when in fact there is no instance under international law or established principles of corporate responsibility to exclude the application of a set of principles due to the existence of another. Custom also dictates that enterprises commonly promote more than one set of corporate standards, and that different mechanisms are applicable to enterprises under OECD countries' national law, and different

[40] CEDHA / Bellona v Finnvera (Finland, 2006) www.cedha.org.ar/en/initiatives/paper_pulp_mills/OECD-Specific-Instance-Finnvera-CEDHA.pdf
[41] Finland has not published the Statement, but a transcript can be found at http://www.cedha.org.ar/en/initiatives/paper_pulp_mills/ncp_finn.pdf

international treaties and conventions apply to single countries. Further, the Guidelines not only draw on existing standards, they *reinforce* existing standards.[42] Therefore the Guidelines apply to Finnvera and all export credit agencies.

NCPs in other jurisdictions have commented that export credit agencies would be deemed applicable under the Guidelines due to flexible interpretation to encourage responsible business practices and wide observance of the Guidelines.

Final Recommendations on Investment Nexus

The Guidelines draw on and reinforce established principles for corporate behavior, principles which include international law, the UN Norms and the Global Compact. None of these established principles, nor the Guidelines themselves restrict accountability or obligations of responsible behavior to business partners with an investment nexus. As such the role of the NCP to determine if an investment nexus exists is essentially to render clarity as to the applicability of the Guidelines to the investors and financial institutions that may be influencing or having an important bearing on a company about to conduct business practices that may be in violation of the OECD Guidelines. In this sense, the financial institution providing investment could be complicit in such violations.

The Investment Committee should provide further clarity on the investment nexus debate, issuing clarification and further information to clearly establish the applicability of the Guidelines to financial institutions. The Committee should help NCPs understand their responsibility to ensure that the Guidelines are in fact respected by investors and financial institutions, and that these institutions are in deed following established international law and norms.

Other factors such as proximity and ability to influence will vary from case to case, and should be taken by NCPs to determine their material response to Guideline breaches for financial institutions and investors, and should be addressed in the assessment of specific instances as to the practical steps business partners can utilize to influence conduct of principal violators of the Guidelines in a manner consistent with established principles on corporate responsibility.

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[42] For more information see CEDHA's evaluation of Finland's NCP Statement: Finnvera Specific Instance http://www.cedha.org.ar/en/initiatives/paper_pulp_mills/evaluation-finland-ncp-statement-finnvera-CEDHA.pdf