OECD ROUNDTABLE ON CORPORATE RESPONSIBILITY:
EarthRights International's Prepared Remarks Regarding the Review of the OECD Guidelines for Multinational Enterprises

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1. My name is Matthew Smith and I am a Senior Consultant with EarthRights International (ERI), based in Thailand. EarthRights International is a nongovernmental, nonprofit human rights group with offices in Thailand and Washington, DC. We have been collecting sensitive information inside military-ruled Burma, also known as Myanmar, since the mid 1990s, documenting the human rights and environmental impacts of natural resource development projects. We specialize in fact-finding, legal actions against perpetrators of abuses, training grassroots and community leaders, and in advocacy campaigns. EarthRights International is a recent member of OECD Watch.

2. EarthRights International welcomes the decision of the OECD member states to upgrade the Guidelines and we appreciate the opportunity to share our experience of the specific instance procedure and the impacts of OECD member multinational firms. At issue for us is whether the Guidelines can become relevant for communities and business activity in repressive and weak governance zones, such as military-ruled Burma.

3. In 2008, EarthRights International, the Shwe Gas Movement, and 9 other co-complainants filed a specific instance complaint over six alleged violations of the OECD Guidelines for Multinational Enterprises. More details on this case can be found in the OECD Watch report *10 Years On* (2010) as well as in *A Governance Gap* (2009), which is a report we prepared for the Investment Committee in 2009 on the outcome of this case.

4. The complaint alleged violations of the Guidelines by two South Korean enterprises participating in the controversial Shwe Gas Project in Burma, which is a large scale natural gas project that will involve construction of a sizable overland natural gas pipeline from Burma to China.

5. In the complaint, we alleged the companies – Daewoo International and KOGAS – had failed to contribute to sustainable development on several grounds, not least of all by engaging in a type of infrastructure project well-known to result in severe human rights abuses in Burma.

   We provided documentation regarding land confiscation, forced relocations, and other violations of civil and political rights that had already occurred in connection to the project. At the time of filing, local community members who exercised their human right to express opposition to the companies' project were met with intimidation and force by the military

regime; students were detained, interrogated, and forced into hiding based on the suspicion they were opposed to the project and for allegedly hanging posters in public places expressing opposition to the project. Community members have endured torture by the Burmese authorities for acts as simple as organizing a meeting to discuss the company's project. To this day, some of these people are languishing in prison in truly terrible conditions.

We had alleged the companies failed to disclose vital information with regard to their project, a failure that bears down on human rights. Villagers in the vicinity of the project were simply unaware of the project and the potential impacts on their human rights, lives, and livelihoods.

6. Less than one month after the case was filed, the complaint was uniformly rejected by the National Contact Point. The final ruling opined that the companies are fulfilling the Guidelines and there was no investigation or offer of the use of the NCP's best offices to resolve the dispute.

   On human rights, the NCP simply ignored our allegations, declaring further that the Burmese military regime's well documented history of widespread and systematic human rights abuses in connection to gas projects was irrelevant.

7. Since the rejection of the complaint, we have continued to document a number of concerning human rights violations in connection to this project. Land confiscations for the project have continued, villagers have been arrested, detained, and interrogated under suspicion they harbor dissent against the project. People have been arrested, tortured, and imprisoned for having meetings to discuss the project.

   Not long after the NCP declared that a socio-economic program *per se* was sufficient to satisfy the requirement for sustainable development, we documented that local villagers were forced to work on Daewoo International's socio-economic program in its project area; villagers were forced to construct infrastructure on a project they never wanted and on a project for which they were never consulted. The company is aware of these abuses.

8. The reason that I have explained our experience with the Specific Instance procedure in this context today is that it raises some fundamental questions with respect to the Guidelines review. It raises one question we think is quite poignant: What can we realistically expect of the Guidelines and the Specific Instance procedure in repressive and weak governance states such as Burma, where serious human rights issues are at stake?

9. On moving forward, EarthRights International agrees with OECD Watch, TUAC, and the UN Special Representative John Ruggie's suggestion that the Guidelines update should develop more elaborated guidance on the application of the Guidelines to human rights, and we think that a separate human rights chapter is warranted in the upgraded Guidelines.

10. We recommend that member nations of the OECD take a special look at the role of the Guidelines in countries of high-risk-investment, such as Burma, Sudan, Congo, and other states. In these cases, the first of Professor Ruggie's three pronged-framework, the State Duty

to Protect, is not only unfulfilled, but in fact it is the state itself that is often the perpetrator of serious human rights abuses in partnership and to the benefit of multinational enterprises, as we have documented at length in Burma.

11. Regarding *Due Diligence*, we support the inclusion of due diligence as an operational principle in the Guidelines. It should be made clear that companies violate the Guidelines when they fail to take actions to prevent foreseeable abuses, even if those abuses have not yet occurred. While a due diligence approach is used in the Environment Chapter of the Guidelines and the OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones, we believe strongly that a lack of specific human rights due diligence requirements significantly undercuts the Guidelines as a mechanism for preventing abuses and promoting responsible business practice. In light of that, specific language about due diligence should be included in the human rights chapter of the updated Guidelines in addition to being included as an operational principle.

    Moreover, it should be stressed in the upgraded Guidelines that the satisfaction of due diligence requirements would not be sufficient in and of itself to absolve a company from violations of the Guidelines. There is no shortage of enterprises that would regard specific due diligence guidance as exclusive due diligence guidance; cautionary language in the updated Guidelines could guard against this type of misuse or misinterpretation of the Guidelines.

12. We are encouraged by and support the many recommendations that due diligence requirements mandate the development of non-judicial grievance mechanisms, and that they provide "early warning systems" to companies. However, these grievance mechanisms should not preclude local peoples' participation in other existing grievance mechanisms.

13. In any requirement for companies to undertake due diligence with respect to human rights, a reasonable place to start would also be a requirement that companies conduct human rights impact assessments (HRIAs). HRIAs are an overdue and sensible topic gaining traction, advanced considerably by materials produced as part of John Ruggie's mandate.

14. Detailed guidance on the potential requirement of OECD enterprises to conduct HRIAs would be appropriate. In repressive and weak governance zones, HRIA's should in theory be a principal factor in a company's decision to proceed or not with a project. If an HRIA is conducted objectively and demonstrates an unreasonably high risk of adverse human rights impacts connected to proposed business activity, it is reasonable to expect the company to postpone or cancel their business activity. Impact assessments are rarely, if ever used in this way, which is problematic. The Guidelines could address this implementation problem by providing elaborated guidance for companies on the fundamental role that HRIAs should play in any company's business activities and decision-making calculus, emphasizing the primacy of human rights in the most key business decisions, such as whether or not to proceed with a project.

15. On the issue of security and human rights, we recognize that the presence and activities of security forces with respect to companies in conflict zones is a complicated subject, both

legally and politically. However, the Guidelines should reflect that an enterprise is responsible for human rights abuses committed by security forces providing protection for its operations when it has contributed to or has the ability to control the forces' activities, especially when the enterprise has not done due diligence and taken proper precautions to prevent such abuses. Due diligence in this area would include human rights impact assessments, training employees and security personnel, consultations with and inclusion of communities, and development of grievance mechanisms – it would be a positive development for both communities and businesses if these elements of due diligence were elaborated in the Guidelines. Moreover, enterprises are responsible for abuses committed by such security forces when they consent to or benefit from their deployment, despite knowledge that a high risk of abuses cannot be mitigated, as is often the case in Burma.

16. Regarding *Procedural Recommendations*, it is clear there is no *Functional Equivalence* among NCPs, and it is also clear that this has adversely impacted the Guidelines' function with regard to human rights.

17. In any case, access to good offices and resolution of disputes between communities and multinational enterprises should not depend on what host country a company happens to come from, and the divergence in the performance, standards, resources, and expertise across NCPs should be met head on in the Guidelines review.

18. Furthermore, we support an increase in functional equivalence in the updating of the Procedural Guidance to give minimum standards for the functioning of NCPs. This would require the *elimination of conflicts of interest* in NCP offices. The NCP that rejected our complaint, for example, is located in the same Ministry tasked with promoting overseas energy investments, and in the same Ministry that provided a multi-million dollar loan for the very company that was the subject of our complaint.

19. EarthRights International supports increased *Transparency and Oversight of the NCP*, and supports including relevant stakeholders within NCP offices, such as offices or agencies responsible for human rights and environmental protection, not only representatives focusing on commercial interests and the promotion of investment.

20. Regarding the *Specific Instance Mechanism* and due process at the initial stage of a complaint, each side of a complaint should have an opportunity to review and comment on the adequacy of the other side's submissions at the initial stage, before the NCP decides whether cases merit further investigation. In the case of our complaint, Daewoo International was given the opportunity to respond to our submission, but we were not given the opportunity to respond to theirs. Compounding this, the NCP essentially reprinted the company's response as their own decision.

21. Regarding standards for deciding whether a case merits further investigation, NCPs should be implored by the Investment Committee to not reject cases in which there is some credible evidence that the company is responsible for violations of the Guidelines, particularly for violations of human rights.

22. Importantly, the Guidelines and the NCPs should require that companies comply with the Guidelines in practice, and not just in theory. A corporate policy or code of conduct should not in and of itself be a substitute for implementation of such policy and actual impacts on the ground. Our allegation that Daewoo's project in Burma posed an unreasonably high risk of contributing to forced labor was crudely dismissed by the NCP on the simple grounds that Daewoo had a code of conduct prohibiting forced labor.

23. Lastly, we support the creation of an appeals process through which NGOs could directly appeal NCP decisions and/or request clarification from the OECD investment committee; in the alternative, we support proposals to grant OECD Watch standing to request clarification and bring non-performance complaints to the Investment Committee on behalf of NGO complainants. Had we had the opportunity to request a clarification of the Korean NCP's interpretation of the Guidelines, we'd have done that swiftly and well over year ago.

24. In conclusion, in our experience, the Guidelines, the specific instance procedure, and the NCP offices have not worked and risk becoming irrelevant in repressive and weak governance zones such as Burma. In Burma, at least, the Guidelines have not encouraged responsible business conduct or built confidence and trust between international businesses and the host society. We are hopeful this does not have to be the case, and we feel strongly that this very important review process can make the Guidelines relevant for investment in troublesome contexts such as Burma. Thank you very much.

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