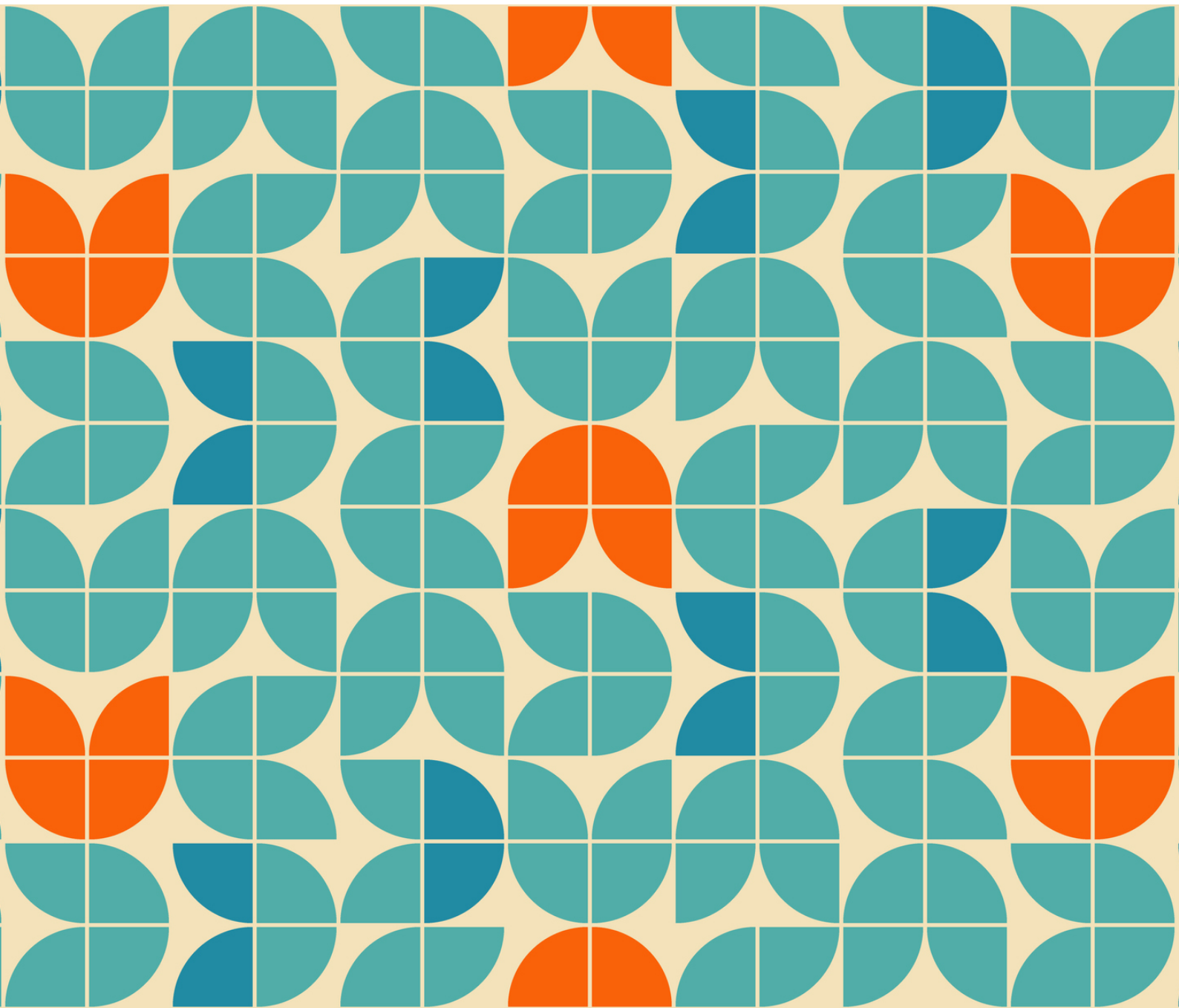




# Engagement with Trade Unions in Due Diligence Processes Conducted by Industry-led or Multi-Stakeholder Initiatives

CLARIFICATION BY THE OECD INVESTMENT COMMITTEE



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# 1 Introduction

## Basis of the request

On 10 March 2020, the OECD Trade Union Advisory Committee (TUAC), submitted a request to the Investment Committee for clarification and a recommendation based on paras. II.2. c. and d. of the Procedural Guidance of the Decision on the OECD Guidelines for Multinational Enterprises (hereafter, the 'Procedural Guidance'). Paras. II.2. c. and d. of the Procedural Guidance read: 'The Committee will, with a view to enhancing the effectiveness of the Guidelines and to fostering the functional equivalence of NCPs: [...]

c) consider issuing a clarification where an adhering country, an advisory body or OECD Watch makes a substantiated submission on whether an NCP has correctly interpreted the Guidelines in specific instances;

d) make recommendations, as necessary, to improve the functioning of NCPs and the effective implementation of the Guidelines [...].'

The submission relates to the specific instance 'British American Tobacco (BAT) and the International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers' Associations (IUF)<sup>1</sup>, submitted to the National Contact Point (NCP) of the United Kingdom on 27 April 2016 and concluded on 2 December 2019.

## Specific question on which clarification of interpretation is requested

TUAC's submission relates to the following provisions of the Guidelines addressed in the Final Statement made by the UK NCP:

- Chapter II. (General Policies), A.10 and 12 (due diligence in general)
- Chapter IV (Human Rights), 1, 3 and 5 (human rights due diligence) (see below).

TUAC seeks a clarification and recommendation on the interpretation of these provisions in contexts whereby a company refers to industry-led and multi-stakeholder processes that do not involve, and are not recognised by, trade unions to conduct due diligence and address grievances in respect of impacts on the human and labour rights of workers.

With the above in mind, the specific question of interpretation on which the Investment Committee is being requested to issue a clarification can be formulated as follows:

Do industry-led or multi-stakeholder processes used by companies to conduct due diligence in respect of human and labour rights issues fulfil the requirements of Chapter II. A. 10 and 11 and Chapter IV. 1, 3, and 5 of the Guidelines if they do not include engagement with trade unions?

## Purpose and process of the clarification and recommendation

The purpose of all the measures set out in para. II.2. of the Procedural Guidance is to 'enhanc[e] the effectiveness of the Guidelines and to foster [...] the functional equivalence of NCPs.'<sup>2</sup> With this in mind,

when issuing clarifications or recommendations under para. II, the Investment Committee will not ‘reach conclusions on the conduct of individual enterprises’<sup>3</sup> or act as a ‘panel to settle individual issues.’<sup>4</sup> Any clarifications or recommendations issued by the Investment Committee will be general in nature and will not review the facts of the specific instance that gave rise to the request or how the relevant provisions of the Guidelines apply to those facts.

The response set out in this document has been prepared and discussed by the WPRBC upon request of the Chair of the Investment Committee of 1 April 2020, and subsequently approved by the Investment Committee. The views of TUAC on the elements of the response were obtained during a meeting held on 29 September 2020. The views of the UK NCP were obtained during a meeting held on 7 October 2020.

## Notes

<sup>1</sup> <http://mneguidelines.oecd.org/database/instances/uk0046.htm>

<sup>2</sup> Decision of the Council on the OECD Guidelines for Multinational Enterprises, Procedural Guidance, para. II.2.

<sup>3</sup> Decision of the Council on the OECD Guidelines for Multinational Enterprises, Section II.4.

<sup>4</sup> Commentary to the Procedural Guidance, para. 50.

# 2 Elements of clarification

## Box 1. Guidelines provisions on due diligence raised in TUAC's request

### Chapter II- General Policies

#### A. Enterprises should [...]

1. Carry out risk-based due diligence, for example by incorporating it into their enterprise risk management systems, to identify, prevent and mitigate actual and potential adverse impacts as described in paragraphs 11 and 12, and account for how these impacts are addressed. The nature and extent of due diligence depend on the circumstances of a particular situation. [...]
2. Seek to prevent or mitigate an adverse impact where they have not contributed to that impact, when the impact is nevertheless directly linked to their operations, products or services by a business relationship. This is not intended to shift responsibility from the entity causing an adverse impact to the enterprise with which it has a business relationship. [...]

### Chapter IV- Human rights.

#### 'Enterprises should [...]

2. Within the context of their own activities, avoid causing or contributing to adverse human rights impacts and address such impacts when they occur.
3. Seek ways to prevent or mitigate adverse human rights impacts that are directly linked to their business operations, products or services by a business relationship, even if they do not contribute to those impacts. [...]
4. Carry out human rights due diligence as appropriate to their size, the nature and context of operations and the severity of the risks of adverse human rights impacts.
5. Carry out human rights due diligence as appropriate to their size, the nature and context of operations and the severity of the risks of adverse human rights impacts. [...]

In relation to the interpretation of these provisions, the Investment Committee issues the following clarifications.

## Clarification #1: Meaningful stakeholder engagement is a key feature of due diligence

The OECD Due Diligence Guidance for Responsible Business Conduct<sup>1</sup> (hereafter 'Due Diligence Guidance') specifies that '[d]ue diligence is informed by engagement with stakeholders.'<sup>2</sup> Engagement must also be meaningful, i.e. it 'involves the good faith of all parties.'<sup>3</sup>

Additionally, the Due Diligence Guidance specifies that '[m]eaningful engagement with relevant stakeholders is important throughout the due diligence process. In particular, when the enterprise may

cause or contribute to, or has caused or contributed to an adverse impact, engagement with impacted or potentially impacted stakeholders and rightsholders will be important.<sup>14</sup>

In practice, the Due Diligence Guidance recommends meaningful stakeholder engagement ‘when an enterprise is:

- identifying actual or potential adverse impacts in the context of its own activities.
- engaging in assessment of business relationships with respect to real or potential adverse impacts.
- devising prevention and mitigation responses to risks of adverse impacts caused or contributed to by the enterprise.
- identifying forms of remedy for adverse impacts caused or contributed to by the enterprise and when designing processes to enable remediation.
- tracking and communicating on how actual or potential identified human rights impacts in the context of its own activities are being addressed.<sup>15</sup>

### **Clarification #2: Companies should prioritise meaningful engagement with bona fide trade unions where these exist when conducting due diligence related to risks to employment and the human rights of workers**

The Due Diligence Guidance specifies that companies should engage with stakeholders that are or could be impacted by a specific activity. Therefore, when a company’s specific activity impacts or could impact workers, it should engage with workers in relation to these impacts.<sup>6</sup>

There are situations in which engagement with workers at individual level may not be appropriate and the company should engage with credible workers’ representatives. This is notably the case ‘where engaging with individuals can undermine certain rights or collective interests.’<sup>7</sup>

A company’s engagement with workers at individual level on working conditions may undermine the internationally recognised human rights to join a trade union or bargain collectively.<sup>8</sup> This may also be the case if individual workers, as pointed out by TUAC in its request, are unlikely to come forward independently to raise issues with their employer.

The Due Diligence Guidance lists employment and industrial relations, occupational health and safety, and human rights as issues on which involvement of workers representatives is relevant for the purpose of due diligence.<sup>9</sup> Therefore, in the design and implementation of due diligence processes related to such risks to workers and to human rights, companies should engage with worker’ representatives and trade unions. Such engagement should also extend to any remediation process supporting due diligence.<sup>10</sup>

In a recent specific instance<sup>11</sup> concluded in 2018, the Colombian NCP made a specific recommendation to the company to engage workers’ representatives in due diligence processes that address issues related to obstacles to collective bargaining, as well as the health and safety of workers.<sup>12</sup>

On the issue of determining which workers’ representatives to engage, the Guidelines and the ILO Tripartite Declaration of Principles regarding Multinational Enterprises and Social Policy, with which the Guidelines are consistent,<sup>13</sup> clearly identify trade unions as representative workers’ organisations to be engaged in respect of issues regarding labour conditions..<sup>14</sup>

## Box 2. Guidelines Chapter V provisions on company engagement with trade unions

‘Enterprises should, within the framework of applicable law, regulations and prevailing labour relations and employment practices and applicable international labour standards: [...]

1.b) Respect the right of workers employed by the multinational enterprise to have trade unions and representative organisations of their own choosing recognised for the purpose of collective bargaining, and engage in constructive negotiations, either individually or through employers’ associations, with such representatives and with a view to reaching agreements on terms and conditions of employment. [...]

3) Promote consultation and co-operation between employers and workers and their representatives on matters of mutual concern. [...]

8) Enable authorised representatives of the workers in their employment to negotiate on collective bargaining or labour-management relations issues and allow the parties to consult on matters of mutual concern with representatives of management who are authorised to take decisions on these matters.’

Illustratively, the OECD Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector clearly states that ‘workers and trade unions and representative organisations of the workers’ own choosing should be involved in the above due diligence processes for labour risks.’<sup>15</sup>

However, where they exist and are bona fide, engagement with trade unions should not be bypassed for other forms of engagement with workers.

This principle is clearly illustrated in the OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector: ‘[w]here there are bona fide trade unions present they will be the right representatives to consult with on behalf of direct employees and should not be by-passed to engage workers individually about issues affecting the group. A bona fide trade union is an entity which the workers control themselves, and is accountable only to those workers. Enterprises should not refuse to recognise bona fide trade unions and should not refuse any genuine opportunity to bargain collectively.’<sup>16</sup>

In a specific instance concluded in 2015, faced with the company’s stated preference for communicating with workers directly, the Chilean NCP restated the principle that companies should recognise and engage with trade unions on issues of interest to workers.<sup>17</sup>

In the absence of bona fide trade unions with whom to engage, companies can engage with other credible representatives or representative organisations, or put in place *ad hoc* processes for worker consultation, for the purpose of due diligence.<sup>18</sup> In a specific instance concluded in 2018 involving the subsidiary of a French multinational in Cambodia, a new collective bargaining agreement had to be negotiated. However, no negotiations with unions were possible at that moment given the complex legal local context. The relevant union had not yet been legally authorised to engage in collective bargaining under a new law, and was at risk of sanctions if it engaged in such bargaining prior to obtaining authorisation. To ensure that its workers’ working conditions were covered by an agreement, the company unilaterally issued a one-year agreement and organised preparatory meetings for a future three-year collective bargaining agreement, while waiting for the union to obtain legal authorisation. In the meantime, in light of the potential risks to workers posed by the newly issued organisation of labour, the company put in place a due diligence measure consisting in the identification of workers’ psycho-social conditions through an independent audit, followed by a discussion with social partners (including trade unions). The French NCP considered that such an alternative measure was appropriate. However, the NCP also recommended that the company ‘formalise’ its relation with workers’ representatives, in particular unions, in respect of future measures.<sup>19</sup>

### Clarification #3: Industry-led or multi-stakeholder due diligence processes through which companies conduct due diligence should be credible and include engagement with workers representatives

The Due Diligence Guidance states that '[e]nterprises can collaborate at an industry or multi-industry level as well as with relevant stakeholders throughout the due diligence process, although they always remain responsible for ensuring that their due diligence is carried out effectively.'<sup>20</sup> Such collaboration can take the form of multi-industry, sector-level or multi-stakeholder organisations. The Due Diligence Guidance recognises the benefits of such collaborative initiatives, but requires that these should be characterised by good governance and be credible. Good governance practices notably include a process 'for enabling stakeholder and expert consultation on the objectives and activities of the initiative.'<sup>21</sup>

As illustrated by the OECD-FAO Guidance for Responsible Supply Chains, such requirements are particularly important to the credibility of industry-driven due diligence collaborative initiatives: '[i]ndustry-driven programmes are most credible when they involve not only business but also civil society organisations, Trade Unions, and relevant experts and allow building consensus among them.'<sup>22</sup> As a result, '[w]here an enterprise engages in collaboration in carrying out due diligence it should first assess the quality of the initiative. This should include:

- Seeking the views of relevant stakeholders about the credibility of the initiative.
- Assessing whether the initiative and its processes are credible, meaning whether they align with the recommendations in this Guidance.
- Ensuring that collaborative approaches are applied and tailored to the enterprise in the ways necessary to constitute sufficiently robust due diligence.
- Being active participants in the collaboration.
- Applying good governance when the collaboration is carried out through a formal initiative.'<sup>23</sup>

A major factor in determining the quality of an initiative is therefore the existence of sufficiently robust engagement with the company's stakeholders or their representatives, including bona fide trade unions where relevant. Additionally, the initiative must apply 'good governance', which includes having:

- 'established a functioning, accessible and effective grievance mechanism that enables stakeholders to raise concerns relating to the activities of the initiative itself, without fear of retribution' and
- 'a process for enabling stakeholder and expert consultation on the objectives and activities of the initiative. [...]'<sup>24</sup>

The question of whether a collective initiative comprises a sufficiently robust mechanism for engagement with stakeholders was examined by the Dutch NCP in a specific instance concluded in 2016. The NCP reviewed the company's engagement with the Roundtable for Sustainable Palm Oil (RSPO) in light of its due diligence responsibilities. While recognising the value of such a collective initiative to advance sustainable palm oil, the NCP also stressed that participation in the RSPO did not relieve the company from discharging its own due diligence responsibilities where challenges to the RSPO required it. The NCP mentioned in particular engaging with relevant stakeholders, and exercising leverage in its business relationships.<sup>25</sup>

### Request for a recommendation

In respect of the question raised, and the clarification issued, the Investment Committee makes the following recommendation: 'When examining due diligence steps taken by a company in respect of risks to workers based on industry-led or multi-stakeholder initiatives, NCPs should consider whether these initiatives include meaningful engagement with worker representatives, including with bona fide trade unions as a priority where these exist, consistent with the clarifications set out above.'



## Notes

<sup>1</sup> OECD Due Diligence Guidance for Responsible Business Conduct [available at <http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf>].

The Recommendation on the OECD Due Diligence Guidance for Responsible Business Conduct [OECD/LEGAL/0443] calls on Adherents and, where relevant, their National Contact Points “to actively promote the use of the Guidance by enterprises operating in or from their territories with the aim of ensuring that they observe internationally agreed standards of responsible business in order to prevent the adverse impacts of their activities and contribute to sustainable development”.

<sup>2</sup> *Id.*, p. 18.

<sup>3</sup> *Id.* See also Q9, p. 49.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*, Q10, p. 50.

<sup>6</sup> *Id.*, Q8, p. 48.

<sup>7</sup> *Id.*, Q8, p. 49.

<sup>8</sup> *Id.*, Q10, p. 50.

<sup>9</sup> *Id.*, Table 5, p. 58.

<sup>10</sup> *Id.*, para. 6.2, practical action c., p. 35: ‘Engage with workers and trade unions to establish a process through which they can raise complaints to the enterprise, for example through grievance mechanisms set forth in any collective agreements or through Global Framework Agreements.’

<sup>11</sup> Specific instances are discussed in this paper not as precedents that other NCPs must follow, but as illustrative examples that demonstrate one approach that has been taken by an NCP to particular situations and questions, while recognising that other approaches may be available, and may be adopted by other NCPs and in other situations.

<sup>12</sup> See Drummond and the National Trade Union of Diseased and Disabled Workers of the Mining Sector (SINTRADEM), the General Federation of Labor, Cesar Office (CGT Cesar), and the General Confederation of Labor, Colombia (CGT Colombia), <https://www.mincit.gov.co/mincomercioexterior/temas-de-interes/punto-nacional-de-contacto-pnc-de-las-directrices/presentacion-de-una-instancia-especifica/el-pnc-de-colombia-ha-recibido-instancias-especifici/una-instancia-especifica-fue-aceptada-parcialmente/consulte-la-declaracion-final-del-caso-drummond-lt.aspx>.

<sup>13</sup> See Commentary to the Guidelines, paras. 48 and 49.

<sup>14</sup> See also ILO, *Tripartite Declaration of Principles regarding Multinational Policies and Social Policy*, Fifth edition, March 2017, paras. 55, 56, 58.

<sup>15</sup> OECD (2018), *OECD Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector*, OECD Publishing, Paris. <http://dx.doi.org/10.1787/9789264290587-en>, p. 28.

<sup>16</sup> OECD (2017), OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector, OECD Publishing, Paris. <http://dx.doi.org/10.1787/9789264252462-e>, p. 104.

<sup>17</sup> See Starbucks Coffee and Trade Unions, [https://www.subrei.gob.cl/docs/default-source/punto-nacional-de-contacto/instancias/declaraci%C3%B3n-final-starbucks.pdf?sfvrsn=b2aaec8f\\_2](https://www.subrei.gob.cl/docs/default-source/punto-nacional-de-contacto/instancias/declaraci%C3%B3n-final-starbucks.pdf?sfvrsn=b2aaec8f_2), p. 25.

<sup>18</sup> For example, the Due Diligence Guidance indicates that engagement with workers and employees can take place with trade unions, but also ‘under informal arrangements within supply chains.’ See Due Diligence Guidance, Q8, p. 48.

<sup>19</sup> Vinci and Vinci Airports and ITUC in Cambodia, <https://www.tresor.economie.gouv.fr/Articles/4d97f9c9-de34-426e-8112-5da697dfbfe8/files/f7fd3554-0c79-46cf-a841-5142d6b4b1e9>, p. 6.

<sup>20</sup> Due Diligence Guidance, p. 19.

<sup>21</sup> *Id.*, Q12, p. 52.

<sup>22</sup> OECD/FAO (2016), OECD-FAO Guidance for Responsible Agricultural Supply Chains, OECD Publishing, Paris. <http://dx.doi.org/10.1787/9789264251052-en>, p. 23.

<sup>23</sup> *Id.*, Q12, p. 53.

<sup>24</sup> *Id.*, Q12, Box 3, p. 52.

<sup>25</sup> Rabobank, Bumitama Agri Group (BGA) and the NGOs Friends of the Earth Europe and Friends of the Earth Netherlands/Milieudefensie, <https://www.oecdguidelines.nl/documents/publication/2016/1/15/fs-foe-milieudefensie-rabobank>, p. 4.

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