The OECD Due Diligence Guidance for Responsible Business Conduct:

A briefing for civil society organisations on the strongest elements for use in advocacy

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Table of Content

Introduction

On 31 May 2018, the OECD Council of Ministers adopted the "Due Diligence Guidance for Responsible Business Conduct" (Guidance).[1] The Guidance elaborates on the due diligence responsibilities of companies under the OECD Guidelines for Multinational Enterprises (OECD Guidelines). It is intended to be used in all sectors of the economy and by all companies, regardless of size, geographical location or value chain position. Its main objective is to help companies understand and implement their due diligence responsibilities. NCPs are also expected to use it in their work, which includes both promotional activities as well as assessment of specific instances (see "Purpose", p. 9).

The Guidance is accompanied by a Council Recommendation, which commits member governments to promote, disseminate, support and monitor implementation of the Guidance.[2] A Council Recommendation is the strongest form of endorsement at the OECD and represents a strong political commitment.

The first part of the Guidance consists of an overview of due diligence followed by a breakdown of the key due diligence "steps" as set forth in the UN Guiding Principles on Business and Human Rights (UNGPs) and the OECD Guidelines. Descriptions of the steps are followed by "practical actions" intended to show concrete ways of implementing the due diligence steps. The second part of the Guidance is an annex providing further elaboration of the first part, presented in a question-and-answer format.

The Guidance is the result of over two years of deliberations by the OECD Working Party on Responsible Business Conduct with the active involvement of an advisory group consisting of representatives of business, trade unions and non-governmental organisations, including OECD Watch and Amnesty International. An advance draft was the subject of a public consultation from December 2016 to February 2017.

Negotiations to draft the Guidance inevitably involved trade-offs and compromises. Nevertheless, OECD Watch and Amnesty International believe the net result is positive. Many elements and aspects of the Guidance are strong and will contribute to advancing a progressive understanding of due diligence.

[1] OECD, 2018, "Due Diligence Guidance for Responsible Business Conduct", available at http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf.
[2] The Council Recommendation is appended to the end of the Guidance, p.94.

Why this Guidance matters

The UNGPs and the OECD Guidelines have established due diligence as the fundamental and essential expectation of responsible behaviour by companies, especially with respect to human rights. However, companies across the board have been slow at adopting and/or adapting internal due diligence procedures to reflect those expectations.

The due diligence called for by these authoritative instruments is not the same as the due diligence familiar to business such as the investigations undertaken prior to signing commercial contracts or making investments. As in the UNGPs, the due diligence in the OECD Guidelines is concerned with impacts on people, not the company, and seeks to identify, prevent, mitigate and account for how actual and potential adverse impacts are addressed. The Guidance fleshes out and elaborates on these steps.

Civil society organisations will find the Guidance a solid basis to demand better behaviour from companies and a means to educate stakeholders about business responsibility. Because the Guidance elaborates on and clarifies frequently misunderstood concepts, it will also be a way of "raising the bar" for expectations of what constitutes responsible behaviour. Developed with multi-stakeholder input and endorsed by the OECD, the Guidance is the most authoritative elaboration of due diligence that is currently available.

Purpose of this briefing

This briefing is intended for civil society actors. It aims to break-down and highlight 14 of the strongest and most valuable principles and concepts in the Guidance.

The Guidance is likely to become one of the most influential international standards on corporate due diligence. It will contribute to defining global best practice and influence policy as well as regulatory developments at national and international levels. For this reason, it is important that civil society actors advance in their research and advocacy a strong interpretation of the Guidance. This will in turn contribute to advancing a strong and progressive understanding of corporate due diligence more generally. This briefing aims to facilitate that work.

14 Strong Principles and Concepts Useful for Civil Society

1. The Guidance is universally applicable.

The Guidance is intended for use in all sectors of the economy and by all companies, regardless of size, geographical location or value chain position (Scope, p. 9).

2. Prevention of adverse impacts is the most important purpose of due diligence.

The Guidance is clear that the purpose of due diligence is first and foremost preventative. The purpose is *"to avoid causing or contributing to adverse impacts"* and *"to seek to prevent adverse impacts directly linked to operations, products or services through business relationships"* ("Due diligence is preventative", p. 16). Stressing the purpose of prevention is important for the following reasons:

- It establishes an overarching principle to guide corporate decision-making and a lens through which outside observers can judge the appropriateness and adequacy of a company's choice of action in relation to a given risk. Preventing harm (versus merely minimising harm or remediating harm foreseen) should be the paramount consideration in assessing the adequacy of a company's due diligence.
- It resolves the confusion that can result from vague concepts such as "risk management" and from descriptions of due diligence that appear to place prevention, mitigation and remediation on an equal footing.

Recognizing prevention as the primary goal of due diligence is reinforced by the statement under "Why carry out due diligence" (p. 16), which notes that where the risk of an adverse impact is "too high" (i.e. prevention might be difficult or impossible), the only appropriate course of action might be to avoid an activity or relationship in the first place, or discontinue it if already underway. The principle is also reiterated under Question 32 of the Annex.

3. Due diligence must be commensurate with risk and adequately resourced.

The Guidance states that *"The measures that an enterprise takes to conduct due diligence should be commensurate to the severity and likelihood of the adverse impact."* ("Due diligence is commensurate with risk", p. 17). This is what the "due" in "due diligence" means.

It emphasises the importance of ensuring the necessary level of resources required to enable 'effective' due diligence. This is reflected in "Due Diligence involves multiple processes and objectives" (p. 16); "Due diligence is appropriate to an enterprise's

circumstances" (p. 18); and language calling for companies to *"…provide adequate resources commensurate with the extent of due diligence needed"* (Section 1.2 (f)); and Question 6 of the Annex.

This is important for prioritisation and sequencing. The Guidance makes clear that prioritisation is only necessary where companies cannot address all their risks and impacts at once (see point 4 below). Whether they can or cannot do this will often come down to their available resources. Indeed, resource constraints are often used to justify the need to prioritise among risks. However, the legitimacy of any prioritisation decision based on resource-constraints should be judged not only against the company's capacity, but also its willingness to devote the resources necessary to address all of its risks simultaneously. A company's genuine inability to address certain risks due to capacity constraints should result in a decision not to commence or to discontinue an activity in certain circumstances.

4. Companies must prioritise their significant risks while working toward progressively addressing all their risks and impacts.

The Guidance makes clear that while companies may need to prioritise addressing their most severe or likely harmful impacts, they should address all their risks and impacts. This is consistent with the UNGPs. A reading of the relevant provisions of the Guidance point to the conclusion that prioritisation is only justified:

1. Where it is not feasible or possible to address all risks and impacts at once; and
2. For purposes of *sequencing* a company's response to risks, not of excluding certain risks from being addressed altogether.

Regarding the first point, the Guidance states: *"Where it is not feasible to address all identified impacts at once, an enterprise should prioritise the order in which it takes action based on the severity and likelihood of the adverse impact (*"Due diligence can involve prioritisation", p. 17). The parameters for prioritisation are reiterated in Section 2.4: *"Drawing from the information obtained on actual and potential adverse impacts, where necessary, prioritise the most significant RBC risks and impacts for action, based on severity and likelihood. Prioritisation will be relevant where it is not possible to address all potential and actual adverse impacts immediately.* These principles are reiterated in Questions 4 and 5 of the Annex.

Read together, these provisions make clear that, as a starting point, companies should address all their risks and impacts simultaneously, and that exceptionally, (i.e. where this is not "possible" or "feasible"), they may prioritise certain risks and impacts for immediate action. The effect of these provisions is to place the onus on companies to explain why it may not be feasible or possible – in certain circumstances – to address all risks and impacts at once.

The Guidance clearly signals to companies that – where they are not already doing so – they should work towards a position of being able to address all their risks and impacts simultaneously. Question 39 of the Annex expressly references companies' *"long term strategy to systemically respond to all adverse impacts"*. More concretely, it explains that "*Once the most significant impacts are identified and dealt with, the enterprise should move on to address less significant impacts"* ("Due diligence can involve prioritisation", p. 17 and Questions 4 and 5 of the Annex).

Finally, the Guidance also clarifies that companies must continuously update their scoping of risks and impacts and their prioritisation decisions, including by considering information provided by stakeholders.[3] This makes clear that companies cannot have a fixed or static list of risks and impacts they will address or prioritise. The text helps counter corporate arguments that may seek to exclude consideration of new or missed risks or impacts.

5. Stakeholder engagement is essential for due diligence.

The Guidance lists stakeholder engagement as one of the essential characteristics and components of due diligence (p. 18 and Question 9 of the Annex). This makes clear that a lack of or deficient engagement with stakeholders constitutes a due diligence failure.
The Guidance describes meaningful stakeholder engagement as being characterized by:

- Two-way communication, and good faith of all parties;
- Timely sharing of relevant information, particularly with rights-holders, *prior to* project approval as well as during project activities (Section 2.2(h) and Question 9 of the Annex);
- Accessibility of the information both in terms of its physical accessibility and its understandability to all parties;
- Occurance in an ongoing manner *throughout* the due diligence process, and expressly not as a one-off endeavour.

6. Rights-holders take centre stage in consultations about actual and potential human rights impacts.

The Guidance places particular emphasis on the need for direct engagement and consultation with people whose human rights are harmed or at risk of harm (p. 18 and Section 2.2(h)). The Guidance makes clear that in the context of actual or potential impacts on human rights, rights-holders are the most important stakeholders.

The Guidance recognizes that stakeholder engagement or consultation can be a human right in and of itself (Question 10 of the Annex) and gives as an example the case of Indigenous People's right to free, prior and informed consent (footnote 8). This means that in these

[3] "Due diligence is Dynamic", p.17, Sections 2.1(g) and 4.1 (e), and Question 19 of the Annex.

types of circumstances, a lack of consultation will not only amount to a due diligence failure but could constitute a human rights violation.

The Guidance expressly names rights-holders (sometimes jointly with stakeholders, sometimes exclusively) taking part in, or being consulted on:

- Identification of actual or potential impacts (Question 10 of the Annex);
- On-site assessments (which could include ESIAs; EIAs, HRIAs and other inspections reports and targeted assessments) (p. 19). The importance of access by rights-holders to this type of information is re-emphasized in Section 2.2(h).
- Development of risk-mitigation measures (p. 19);
- Ongoing monitoring (p. 19);
- Design of grievance mechanisms (p. 19);
- Assessment of the nature of an enterprise's involvement with an actual or potential impact (Section 2.3(b));
- Assessment of business relationships' involvement with an actual or potential impact (Question 10 of the Annex);
- Prioritization decisions (Section 2.4(e));
- Roadmaps for ceasing activities that are causing or contributing to adverse impacts (Section 3.1(b));
- Development and implementation of preventive and mitigation actions and plans (3.1(f) and Question 10 of the Annex);
- Tracking implementation and effectiveness of due diligence activities (Section 4.1(c));
- Design of processes to enable remediation and determination of appropriate reparation measures (Section 6.1(c) and Questions 10 and 50 of the Annex).

The Guidance also highlights the need to identify and remove barriers to effective rights-holder engagement (Section 2.2(h) and Question 11 of the Annex). These could include barriers related to language, distance to meeting places, lack of understanding of the process or fear of retaliation.

7. Due Diligence requires ample disclosure and respect for the right to information.

The Guidance calls on companies to "communicate how impacts are addressed" (See "Due Diligence Involves Multiple Processes and Objectives", p. 16, and Section 5 "Communicate how impacts are addressed"). This aligns with language in the UNGPs and OECD Guidelines; however, the Guidance gives much more detail on what should be disclosed, to whom, when, why and how.

The Guidance lays down three important principles:

- Information about due diligence – including due diligence processes, findings and plans, "*is part of the due diligence process itself*" ("Due diligence involves ongoing

communication", p. 19). This means companies cannot simply state that they are conducting adequate due diligence; they must disclose the relevant details on it, such as findings on human rights risks and abuses arising in their operations, to show that their procedures are adequate.

- Information disclosed should be "*sufficient to demonstrate the adequacy of an enterprise's response to impacts*" (p. 19 and Question 46 of the Annex). This places a high bar in relation to both the quality and nature of the information that should be disclosed.
- Non-disclosure based on commercial confidentiality and other competitive concerns are an exception, not the rule. The Guidance dedicates a full section of the Annex to discussing the "various strategies" companies can use to disclose to the greatest extent possible while managing confidentiality limitations (p. 19 and Question 47 of the Annex). This helps move companies from a default position of non-disclosure to one of disclosure.

The Guidance lists a broad range of issues concerning due diligence policies and practices that companies should disclose. These include:

- Due diligence processes, findings and plans. In particular, companies should explain how they identify and address actual or potential adverse impacts ("Due diligence involves ongoing communication", p. 19 and Section 5 "Communicate how impacts are addressed"), and the findings and outcomes of those activities (Section 5 "Communicate how impacts are addressed");
- RBC policies and due diligence policies more specifically (Section 5);
- Measures taken to embed RBC into policies and management systems (Section 5);
- The company's identified areas of significant risk (Section 5);
- The significant adverse impacts or risks identified, prioritised and assessed, as well as the prioritisation criteria (Section 5 and Question 3 of the Annex);
- Actions taken to prevent or mitigate those risks including, where possible, estimated timelines and benchmarks for improvement and their outcomes (Section 5);
- Measures to track implementation and results (Section 5);
- Provision of or cooperation in any remediation (Section 5);
- Results of on-site assessments ("Due diligence is informed by engagement with stakeholders", p. 18);
- Results of labour, human rights or environmental audits or assessment related to the activities of business relationships (Question 46 of the Annex);
- How impacts are addressed in relation not only to their own operations, but to those of their supply chains and other business relationships ("Due diligence involves multiple processes and objectives", p. 16).

The Guidance emphasises the importance of timely disclosure to stakeholders to enable effective engagement, and elaborates on how this should be done to ensure usefulness and accessibility.[4]

It specifically recognises the need to communicate the above information to rights-holders. It describes the manner in which this should be done to maximize the usefulness and accessibility of the information, especially to marginalised or vulnerable groups (Section 5 and Question 46 of the Annex). In particular:

- The Guidance recognises the special status of rights-holders among stakeholders concerning information access, and the particular needs of certain groups of rights-holders.
- Crucially, the Guidance recognises that access to information may be a human right in and of itself, and that disclosure would therefore be necessary to meet the responsibility to respect human rights (footnote 19 under Question 9 of the Annex and Question 47 of the Annex). The Guidance gives useful examples of information that should be disclosed by companies to meet their responsibility to respect the human rights to life and health (Question 47 of the Annex).

8. A gender perspective is critical.

The Guidance explicitly refers to gender-based risks and impacts, highlights the need for companies to identify and address these risks and impacts and provides recommendations on how they can do this.

- It specifically recommends that due diligence address specific risks and identify how these risks may impact women differently, disproportionally or exclusively (see "Due diligence is commensurate with risk", p. 17, Section 2.2(i) and Questions 2 and 11 of the Annex).

Question 2 of the Annex is entirely dedicated to providing recommendations on how to integrate gender into due diligence. Particularly important provisions address the need for companies to:

- Develop gender-sensitive and gender-responsive policies and plans;
- Identify overlapping vulnerabilities;
- Support women's equal participation in consultations and negotiations;
- Assess women's equal access to compensation and other forms of reparation.

Question 11 of the Annex highlights the need to identify and remove potential barriers to effective engagement of women.

[4] See "Due diligence is informed by engagement with stakeholders", p. 18; "Due diligence involves ongoing communication", p.19, and Question 46 of the Annex.

9. Companies must proactively address the risks and impacts of their business relationships.

The Guidance advances key principles and standards regarding a company's responsibilities not merely in relation to its own activities, but toward impacts caused or contributed to by its business relationships.

First, the Guidance clarifies that the criterion for prioritization is not proximity or importance of the business relationship to the company, but significance of the risks or impacts.[5] The Guidance articulates this expressly under Question 24 of the Annex: *"…business relationships are categorized as "high-risk" and prioritized for further assessment on the basis of their risk profile and not on the strength of their relationship with the enterprise."*

Second, the Guidance promotes a "hands on" approach even for risks and impacts to which a company is connected by virtue of its business relationships, but which it did not cause or contribute to (i.e. "directly linked" situations). In this context, the Guidance encourages companies to take a broad range of proactive measures to ensure, to the best of their ability, that risks are minimized and impacts prevented. These measures include:

- Proactively seeking information about remote suppliers and assessing their risks and impacts (Sections 2.2 (c) and (d) and Question 28 of the Annex);
- Assessing whether suppliers have appropriate due diligence policies and processes in place (Section 2.4 (c));
- Developing and implementing plans to prevent or mitigate actual or potential adverse impacts by business relationships (Section 3.2);
- Periodically assessing business relationships to verify that risks and impacts are being adequately addressed (4.1(b)).

Importantly, as explained below, failure to take these measures may move an enterprise from a situation of being "directly linked" to an abuse (i.e. being linked to a situation of abuse which the company did not directly cause or contribute to) to one of "contributing to" this abuse.

Finally, although not strictly required under the MNE Guidelines, the Guidance encourages companies to play a role in ensuring remediation of abuses by business relationships even if they have neither caused nor contributed to them. In these contexts, *"The enterprise may still take a role in remediation",* for example by using its leverage "*to compel the business relationship to participate in processes to provide for remedy* (Question 52 of the Annex). Combined with the expectation that companies take proactive measures to prevent further impacts by business relationships, or ensure "non-recurrence", it would be difficult for a company to justify, under the Guidance, a lack of engagement in relation to a supplier's or

[5] Sections 2.1 and 2.2, also Section 2.4(d) and Questions 3, 19 and 24 of the Annex

other business relationship's failure to remedy adverse impacts (even if, strictly speaking, they don't have to under the UNGPs and MNE Guidelines).

10. Companies have a role in enabling partners to comply with their responsibilities.

Companies are expected to use leverage with their business relationships to prevent or mitigate adverse impacts. Such leverage need not be negative and indeed can take positive forms such as capacity-building. The Guidance provides examples of measures that companies can take to help their less well-resourced partners such as:

- Providing partners adequate resources to comply with RBC standards;
- Providing partners support and training on how to meet RBC standards;
- Providing partners assistance in designing and implementing preventive, mitigation or corrective action plans.[6]

Outsourcing must not be used to avoid responsibility by shifting of responsibility to other entities. Moreover, the Guidance recognizes that some risks and adverse impacts in supply chains result from a buying company's own commercial practices (such as short lead times and low pricing). The Guidance urges companies to cease these practices (Section 1.3(e)).

11. The failure to carry out due diligence could increase a company's responsibilities.

The Guidance makes a clear link between due diligence failures and causation and/or contribution to adverse impacts. It recalls that an enterprise causes an adverse impact if its *actions and omissions*, on their own, are sufficient to result in the adverse impact (Question 29 of the Annex). Although not a new concept, it is useful that the Guidance reconfirm that "omissions" can be a cause of adverse impacts.

In its description of what might amount to "contribution" under Question 29 of the Annex, the Guidance explains that contribution can be the result of activities (again, understood to be both actions and omissions) that:

- In combination with the activities (actions and omissions) of another entity *cause* the impact, or;
- Cause, facilitate or incentivise *another* entity to cause an adverse impact.

Question 29 also sets out factors that can be considered to assess contribution, but does not suggest that all of these factors must be present. These factors include: whether a company encouraged or motivated an adverse impact by another entity; whether this impact or risk

[6] Sections 1.3(d); 3.2; 3.2(b) and (g) and Questions 34, 38 and 40 of the Annex.

of this impact was foreseeable; and the effectiveness of the company's own due diligence efforts to minimise the risk of the impact occurring.

Importantly, a risk exists (or may be increased) by the very fact of a company not taking the due diligence measures indicated by the MNE Guidelines:

> *"the likelihood of adverse impacts increases in situations where an enterprise's behaviour or the circumstances associated with their supply chains or business relationships are not consistent with the recommendations in the MNE Guidelines"* ("Adverse Impacts and Risk", p. 15).

This concept is reiterated in Box 1 of the Guidance, which explains that risks on RBC issues can emanate from:

> *"divergences between what is recommended in the MNE Guidelines on the one hand, and the circumstances associated with their operations, supply chains or business relationships on the other."*

The above provisions mean that due diligence failures can be built into the very concept of "risk". A company's failure either to take steps to identify risks and impacts in relation to both its own activities and those of actors in its value/supply chain, or to respond appropriately to risks and impacts identified in line with the recommendations in the MNE Guidelines, could create, exacerbate, or fail to prevent or minimise those risks. These failures can thus amount to contribution to an adverse impact. Again, this reaffirms the view that "omissions" – or a failure to act – can be a cause of or contribute to adverse impacts. This is particularly important in the context of value or supply chains and "directly linked" scenarios. This means that companies that would normally only be "directly linked" to abuses caused or contributed to by others may be considered to be contributing to these abuses if they are not taking the steps expected under the MNE Guidelines.

Consistent with the above, the Guidance expressly indicates that "*an enterprise's relationship to adverse impact is not static*", and that this "*may change, for example as situations evolve and depending upon the degree to which due diligence and steps taken to address identified risks and impacts decrease the risk of the impact occurring*". The significance of this language in the context of due diligence is that an enterprise's *ongoing* failure to seek to identify and prevent its suppliers' harmful impacts could move the enterprise from being "directly linked" to a negative impact, to "contributing to" all or some part of that impact. Companies in these situations have a heightened responsibility for respecting human rights, including for remedying the harm.

Finally, the Guidance clarifies that *"Contribution can occur in the context of activity related to an enterprise's own operations or through a business relationship"* (Question 29 of the Annex). Although this may appear obvious, the clarification is important as some companies

or industry sectors (banking, for example) often claim that they can only ever be "directly linked" to abuses in their supply/value chains. This is not true. Banks and other companies could be contributing to adverse impacts in their supply or value chains as a consequence of their own due diligence failures (as explained above). This would be the case, for example, where a bank knowingly finances the manufacture of weapons prohibited under international law or a buying company imposes prices on a supplier that drive wages below the living wage.

12. Principles concerning the human right to remedy should guide companies' remediation responses.

The Guidance reflects critical elements of the human right to remedy, such as the need for remedy to:

- "[R]estore the affected person or persons to the situation they would be in had the adverse impact not occurred (where possible)", and
- "[E]nable remediation that is proportionate to the significance and scale of the adverse impact" (Section 6.1 (a)).[7]

It also, importantly, calls on companies that have caused or contributed to human rights abuses to seek guidance from relevant international instruments on, or related to, the right to remedy (Section 6.1(b)).[8] In relation to human rights impacts, instruments such as the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law will be essential documents to consult.

13. Sometimes disengagement is the only right thing to do.

The Guidance establishes disengagement as an option companies must consider and take in certain circumstances. Importantly, the Guidance urges companies to disengage from a partnership or project not merely after mitigation efforts have failed, but proactively where the risk or impact is serious enough to warrant disengagement. It explains that companies should disengage when:

- Attempts at mitigation have failed;
- The enterprise deems mitigation impossible; or
- The severity of the adverse impact warrants disengagement, and the entity causing the impact does not take immediate action to prevent or mitigate the impacts (Section 3.2).

[7] These reflect well-established principles concerning the right to remedy under international human rights law. For example, the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (UN Basic Principles), http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx.

[8] Such as the UN Basic Principles mentioned above, and authoritative guidance such as that provided by UN human rights treaty bodies in their General Comments.

The Guidance observes that a credible possibility of disengagement is sometimes necessary to give the enterprise true leverage to encourage a supplier or other partner to take action to stop or prevent an adverse impact (Section 3.3(d)).

At the same time, it states that the decision to disengage should take into account potential social and economic adverse impacts and that disengagement itself should be conducted responsibly (Section 3.2).

14. Bribery and corruption can harm people other than the company.

Instead of focusing on the risk from bribery to the enterprise, such as criminal liability for executives, the Guidance recognizes that corrupt business practices can result in adverse impacts for workers, communities, and the environment. Importantly, these impacts constitute indicators of the severity of the bribery.

The Guidance notes that several units within a company – and not merely the legal team – have a due diligence responsibility regarding bribery, including for example the sales and marketing team (Table 5). It encourages companies to establish early warning systems enabling workers to report not only safety concerns, but incidents of bribery (Section 6.6). The Guidance also encourages enterprises to engage in "collective action in high-risk areas to train local entities in resisting solicitation of bribes and improving local government capacity to monitor and enforce anti-bribery laws" (Section 3.2).