

Testimony of

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Former U.S. Deputy Assistant Secretary of State Democracy,

Human Rights and Labor

Senate Judiciary Subcommittee on Human Rights and the Law

Extracting Natural Resources: Corporate Responsibility and the Law

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Mr. Chairman and members of the Subcommittee, thank you for the chance to testify today. I am Bennett Freeman, Senior Vice President for Social Research and Policy at the Calvert Group, the largest family of sustainable and responsible mutual funds in the U.S. Instead of testifying on behalf of Calvert, I am speaking today in my personal capacity as former Deputy Assistant Secretary of State for Democracy, Human Rights and Labor. I will also draw from my experience advising a number of the companies, NGOs and governments on the specific policy and operational issues that are the focus of this hearing.

During 1999-2000, I had the opportunity to lead the development of the Voluntary Principles on Security and Human Rights on behalf of the State Department, together with the British Foreign Office, major oil and mining companies, and human rights NGOs. A consensus was forged around a set of principles to address situations that in the Nineties had made major U.S. and UK flag companies appear complicit in human rights violations, and in turn subjected them to reputation damage and in some cases litigation under the Alien Tort Claims Act. Underpinning the State Department's initiative was a conviction that even the appearance (if not the legally proven fact) of such complicity, together with the tough realities and dilemmas of operating in conflict zones, required a response. Also underpinning the Department's initiative was a recognition that those tough realities and dilemmas were playing out above all in three countries of strategic interest to U.S. foreign policy and energy security: Indonesia and Nigeria, two countries both pivotal in their regions and at the time undergoing fragile transitions to democracy; and a third, Colombia, an embattled democracy in our own hemisphere. So while the Voluntary Principles were launched as a narrowly focused multi-stakeholder corporate responsibility and human rights initiative, broader U.S. interests were and remain clearly at stake.<sup>1</sup>

The theme of my testimony today is the critical, indispensable role that governments-especially the U.S. Government-must play in leading an initiative which has yet to meet its potential but remains more necessary than ever. After its launch in December 2000, the Voluntary Principles process drifted without clear direction and in 2006 descended into a crisis of accountability and credibility-a crisis that has threatened the survival of the initiative in its present form but now appears to be very close to positive resolution. That near-breakdown of the global plenary process has unfortunately not only diluted focus on the imperative of strengthening implementation in key countries, but has obscured much of the concrete progress that is being made by a number of companies on the ground in many countries. That progress must now in turn be reinforced by stronger outreach to host country governments and security forces.

The Subcommittee's focus on the Voluntary Principles is especially important and timely for four reasons that I will use to frame specific observations and recommendations:

First, the Voluntary Principles are more important than ever, not only to protect human rights and promote corporate responsibility but also to support U.S. foreign policy and energy security goals. There are a growing number of countries and regions where vital oil/gas and mining operations are in close proximity to current, latent or potential new conflict zones in which a combustible mix of conditions and incidents threaten both human rights and the ability of companies to operate.

Conceived and written as a global generic standard, the initial focus of Voluntary Principles implementation was on Nigeria, Indonesia and Colombia. The incidents and conditions addressed by the Voluntary Principles continue to pose human rights and broader operating risks to companies in Indonesia and Colombia. But they are far more acute today in Nigeria than even in the mid-to-late Nineties when violence in the Niger Delta, impunity on the part of security forces and serious allegations of complicity on the part of major oil companies were so apparent.

Since late 2005 the oil industry has faced a significant upsurge of violent disruption, and over the last three years attacks by organized criminal gangs and now the increasingly well-armed Movement for the Emancipation of the Niger Delta (MEND) have far overshadowed sporadic unrest from impoverished communities. Stepped up attacks in recent weeks (including this past weekend) against company and military installations have continued to disrupt the industry, with oil production down by various estimates by 150,000 barrels per day. This "oil war" has reduced overall output by approximately 20% to less than two million barrels per day from the world's eighth-largest oil exporter and the fourth-largest supplier to the U.S. It also poses heightened risks for U.S. and other oil companies in one of the world's most dangerous business operating environments, and underscores the need to ensure that necessary security arrangements are combined with human rights safeguards consistent with the Voluntary Principles.

As anticipated in 2000 at the launch of the initiative, the Voluntary Principles have also become relevant well beyond Nigeria, Indonesia and Colombia as extractive companies continue to search for resources in unstable parts of the world. Significant implementation is well underway by the BP-led Baku-Tbilisi-Ceyhan pipeline consortium. Other regions and countries should now be on the Voluntary Principles map as well: the five countries of Central Asia to the east of the Caspian; the Democratic Republic of the Congo; Equatorial Guinea and Angola, among many others in West and Central Africa; Peru, Ecuador, Bolivia and Venezuela in the Andean region; as well as Papua New Guinea and others in the Asia-Pacific. It is therefore more important than ever that the Voluntary Principles are implemented by the companies that are already committed to them and are embraced by others that have yet to do so-backed by the necessary combination of their home country governments and the host country governments where they operate.

Second, the explicit name and the mixed history of the Voluntary Principles have made them a lightning rod in the important global debate over the efficacy of voluntary versus legally binding standards bearing on the human rights responsibilities of business, beyond the extractives sector companies operating in zones of conflict. The ability of the Voluntary Principles to demonstrate success in advancing their goals will affect the credibility of the multi-stakeholder approach to a range of difficult human rights challenges.

The Voluntary Principles are making positive contributions to protecting and promoting human rights in communities surrounding company sites in many countries, as companies both inside and even outside the official process are taking significant steps to implement them. Yet the failure of the global plenary process until recently to resolve fundamental governance and accountability issues has undermined the credibility of the entire initiative, and in turn contributed to the "accountability deficit" that UN Special Representative on Business and Human Rights John Ruggie identified as a particular challenge for such voluntary multi-stakeholder initiatives in his second interim report delivered in early 2007.

Unlike other such initiatives focusing on human rights, the development of basic governance structures was delayed for far too long. The wrenching debate over "participation criteria" since 2006 has been necessary in order to determine reasonable standards by which companies and governments alike may join or, when challenged in certain circumstances, remain in the process. An imminent agreement with respect to "participation criteria" to be applied to potential new governments in particular would nearly complete the architecture of accountability that is essential to the future continuity and credibility of the Voluntary Principles.

A final element of that architecture is the completion of the long-delayed reporting criteria for the initiative. The lack of reporting criteria agreed and used by all participating companies, NGOs and pillars/participants undermines the accountability of the process, as well as the consistent company implementation and the dissemination of best practices that solid reporting encourages and makes possible. Criteria must be concise, reflecting and reinforcing the best practices established by any

companies on key issues such as training of security forces, communications with key company personnel and contractors, and stakeholder relations with the local communities for whom the implementation of the Voluntary Principles matters most.

Completing the Voluntary Principles' architecture of accountability is essential to finally achieving the credibility that is so critical to any voluntary initiative that largely operates outside the strictures of legislation and regulation. Yet in certain country and project-specific circumstances, the Voluntary Principles have in fact taken on a mandatory, legally-binding character. For example, the Voluntary Principles were annexed to the BP Tangguh LNG project contract in West Papua, Indonesia and became the basis of the host government agreements regarding security arrangements for the BTC pipeline consortium. The Voluntary Principles can become an unusual if not unique hybrid model in the business and human rights arena: a standard and a process that remain voluntary in letter if not in spirit, but gain a dynamism and momentum which blur the distinctions and transcend the debate between voluntary and mandatory approaches. An increasingly accountable Voluntary Principles on Security and Human Rights can illuminate that sparkling grey zone between the unnecessarily stark black and white voluntary and mandatory poles of the spectrum.

Third, now that the accountability architecture finally nears completion, stronger leadership on the part of the convening governments is essential to fulfilling the initiative's potential by engaging much more directly and effectively with host country governments whose security forces are its most critical operational focus. At the same time, addition of new governments to the global plenary process can make the Voluntary Principles more inclusive and accountable at the same time.

The current convening governments (the UK, Norway and the Netherlands as well as the U.S.) have too often managed rather than led a process that has from the outset required consistent, focused leadership to move forward. Besides letting the process drift into crisis and then paralysis over governance issues, insufficient efforts have been made to support implementation in priority countries. That government leadership is more necessary than ever to focus on supporting and strengthening implementation on the ground not only in the three original priority countries of Colombia, Indonesia and above all Nigeria, but also in the widening circle of countries where the situations they address are presenting clear risks to security and human rights alike.

The essential interaction among the convening and host country governments remains the weakest link in the entire Voluntary Principles process. Among the top priority countries, relatively encouraging progress is being made with the government of Colombia, less with the governments of Indonesia and Nigeria. Now the entire Voluntary Principles process must accelerate and deepen that on-the-ground implementation with the direct cooperation of host country governments and security forces. Nigeria must become the most urgent priority given the rising violence and constant threat to company security and human rights alike. The embassies of the convening governments-especially those of the U.S. and

the UK-can and should play more active roles in facilitating dialogues with those governments and security forces to support implementation efforts by the companies.

Adding key host country governments to the global process---consistent with the new Participation criteria-is essential to the vitality and even the fundamental logic of a process aimed at promoting in-country implementation by companies in direct cooperation with those host country governments. Stepping up implementation efforts with host country governments will strengthen the constructive contribution they make to the global plenary process when that commitment can be made.

At the same time, the overall process would gain from inviting Brazil, Canada, Chile, and South Africa to assume observer if not full status very soon. These countries have relatively few major domestic extractives-related human rights issues but are serious players in the extractives industry. Their inclusion can build a bridge to other home country governments of companies operating in zones of conflict, even those operating in the most repressive countries in the world. At some point soon a way should be found to align the Chinese government and oil companies with the Voluntary Principles on an inclusive yet accountable basis.

These implementation efforts will require not only more focused leadership from the home country governments but also a much better resourced Secretariat to focus on coordinating implementation and outreach activities. The Voluntary Principles process has lacked the adequate implementation, coordination and communications resources which have become indispensable to the basic functioning of contemporary multi-stakeholder initiatives such as the Extractive Industry Transparency Initiative (EITI) and the Fair Labor Association.

Finally, the approach of a new Administration offers the opportunity to renew and revitalize the State Department's leadership of an initiative which urgently needs greater focus and momentum to achieve its original and still vital objectives. The Voluntary Principles can not only do more to advance specific country-by-country security and human rights objectives, but should be more closely linked to a more strategic and comprehensive U.S. approach to energy security in a world of continuing conflict

The next Administration and the State Department should undertake a series of steps beginning in early 2009, focused on accelerating concrete implementation of the Voluntary Principles and linking it to other initiatives aimed at strengthening the governance and development foundations of secure energy supplies. Drawing from the observations and recommendations offered above for Voluntary Principles' home country governments, the State Department should specifically:

1. Allocate significant new resources to expanding the external Voluntary Principles Secretariat to focus on non-sensitive implementation tasks, especially plenary planning, best practice dissemination, outreach, communications and reporting.
2. Elevate the diplomatic priority attached to Voluntary Principles implementation with key countries, especially Nigeria as well as Indonesia, Colombia and others, in conjunction with related initiatives such as the EITI.
3. Add staff and assistance resources to embassies/USAID missions in priority implementation countries, above all Nigeria, to support outreach to and coordination with host country governments, participating companies, civil society and local communities.
4. Adapt human rights training for security forces (military and police) in priority implementation countries to cover Voluntary Principles content through IMET, ICITAP and other programs.
5. Reach out to other potential home country governments to construct a more global, inclusive and credible Voluntary Principles process.
6. Add elements related to the Voluntary Principles to OPIC loan guarantees and Ex-1m Bank projects in the extractives sectors in relevant countries.
7. Link Voluntary Principles and EITI implementation support in Nigeria as key elements to stabilize the Niger Delta, generate more equitable distribution of oil resources, and strengthen overall governance and the rule of law.
8. Support the development of the non-extractives version of the Voluntary Principles recently launched in Colombia, with a particular focus on the agriculture/food/ beverage and heavy energy-related infrastructure structures.

Renewed and revitalized State Department leadership of the Voluntary Principles on Security and Human Rights can connect corporate responsibility and human rights to stronger governance and rule of law in countries that are critical to our foreign policy and energy security goals. While the Voluntary Principles address what are usually narrow issues and situations, they touch some of the largest problems and challenges that our companies face in the world-ones which cannot be solved without

greater leadership, diplomacy and resources from our government consistent with our broader interests.