



OECD RISK MANAGEMENT TOOL FOR INVESTORS IN WEAK GOVERNANCE ZONES

Responses received in public consultation

23 November 2005

On 26 October 2005, the OECD Investment Committee launched an invitation for public comment on a draft risk management tool for investors in weak governance zones through an online consultation. This document is a compilation of responses received by 23 November 2005.

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BHP Billiton Development Trust, South Africa

I went through the draft document and I have realised that it is quite extensive. I however, would not agree with the concerns raised (item 25) that OECD should not be actively involved in promoting institutional reform in weak governance zones. I strongly believe that if OECD can take an active role in working with government of that particular country with weak governance zones that will bring about transformation needed.

Some deliberations that I had with some of the African states were exactly what is found in this document. Some companies are only interested with the production/profit and never bother about human rights, corruption and bribery as outlined in this document. They also are not interested with the environmental standards that need to be taken care of.

Generally I think this is a good Management Tool but who is going to implement it. Again if OECD only develops it without any mechanisms to implement it then what value add will it make. Believe me this is a good document for further management and implementation. The questions asked are quite interrogatory for one to be alert of the necessary standards.

Norah Sheillah Segoati
Manager: Health
BHP Billiton Development Trust
www.bhpbilliton.com

British Gas Group, United Kingdom

The tool outlined by the OECD team is more a method for assessing whether a company has the risk management systems in place to operate in high risk environments than a methodology to assess and compare the operating environments themselves. So it is different in aim than PRAMS or the composite index. However, it covers a broad set of areas that are of particular concern in weak governance - service provision, security, corruption, community relations and the ability of a company to avoid become embroiled in politics - and thus capture many of the areas we would pay particular attention to in assessing such an environment.

The OECD questions refer to a snapshot in time in the weak governance environment. There does not appear to be much emphasis on examining the environment to establish whether, for example, there is an improving or worsening trend in the quality of governance. This could be a useful additional layer. Questions currently ask whether the company is adequately prepared to manage the situation today. What if it deteriorates markedly tomorrow?

I would suggest that some additional commentary on how to use the "tool" might be useful in the document. The introduction does a good job of setting the task in context and explaining why the OECD has embarked on this exercise. Perhaps it could say more on how it might be appropriate to apply the tool.

British Gas Group
United Kingdom
www.britishgas.com

Business and Industry Advisory Committee to the OECD (BIAC)

What the international business community expects from the OECD

BIAC agrees with the OECD that Weak Governance Zones represent extremely difficult investment environments. Therefore, at the 2005 Annual Meeting of National Contact Points, BIAC requested that the OECD develop a tool which provides practical help to investors in WGZ.

BIAC would like to recognize the positive role the OECD can play in developing this toolkit. Aimed at helping businesses operating in high risk WGZ to voluntarily support OECD governments' actions, the toolkit will ensure that international instruments and standards in human and labour rights, anti-corruption and environmental protection are upheld. Establishing an effective corporate responsibility (CR) framework is especially difficult in these countries, and multi-national companies would welcome a document that asks difficult questions and addresses concerns of investors, financial institutions and governments alike while attempting to provide guidance to such stakeholders in trying to develop a solid CR framework for the future.

It is essential that the OECD recognize that for this toolkit to be used, it must not only raise questions addressed to companies already doing business in such a country but must also move the process along by offering suggestions, however tentative, as to how such investors can further increase the positive impact of their operations on WGZ in the face of government reluctance and international competition. While it is obvious that the OECD has put a lot of effort into this draft document, there are still a number of fundamental weaknesses that must be resolved to meet this objective.

In order to be useful for business, a toolkit provided by the OECD must:

1. **correctly position the role of companies** vis-à-vis the government in WGZ and the OECD governments;
2. **take a broad view of risks** to include financial risk, political risk, risk internal to the enterprise such as the adaptability of the business model, etc;
3. **identify the source of risks** (e.g. risks arising from dealings with other business entities, risks related to the uncertainties/inadequacies of the host government, risks associated with external events, etc);
4. **offer possible and practicable solutions** to the problems that investors face in WGZ by providing information about case specific experiences, sources of information that investor may find useful, instruments available for risk mitigation;

In addition, we believe it would be useful if the OECD would clarify how the WGZ toolkit relates to the OECD Guidelines for Multinational Enterprises.

General evaluation of the OECD paper

BIAC appreciates that the OECD has incorporated some of the comments made by the OECD business community in an informal submission on the previous OECD WGZ draft paper DAF/INV(2005)12. In particular we appreciate that the revised OECD paper does now acknowledge that investment – domestic and foreign – is the foundation for sustainable development in WGZ (para. 1). The new text also recognizes in the introduction that government failure increases the risk for companies in WGZ (para. 3). We note that the OECD has now defined what it means by "heightened care" (p.17, second

para). Furthermore, BIAC appreciates that the OECD has taken on board at least some of the concrete business suggestions for the formulation of specific questions addressed to investors in WGZ.

The changes made in the revised OECD paper provide some help towards better clarification of the political context of the discussion on business integrity in WGZ, and set the OECD's risk management tool into its rightful perspective. The inclusion of the additional questions provided by BIAC partially help to identify specific failures of host governments which contribute to overall weak governance and may represent key risk factors for businesses in WGZ.

Despite these improvements, the risk management toolkit offered by the OECD still falls short of being of real added value for business. The main shortcomings are the following:

Positioning corporate responsibility in WGZ

Currently the document's value is severely undermined by the lack of clarity as to what companies seeking to do business or expand its business can practically do in a WGZ country. Multinational companies should abstain from any improper involvement in local political activities (see for reference OECD Guidelines for Multinational Enterprises, General Policies, §11). In order to limit their exposure to risks, in most cases multinational companies decide to invest elsewhere or to reduce their investment if a region becomes a WGZ. This is the challenge of the OECD's "management tool". How can the OECD encourage investors to take voluntary action and to insist (generally with prodding from international institutions such as the OECD and from other governments) that WGZ governments develop strong public governance themselves. Companies are not the source of the problem, but can be valuable partners in establishing international norms in areas where governments have failed. They can do this through leading by example and dialogue with the stakeholders in the host country. The more the international community urges and helps WGZ to apply policies consistent with international standards, the more positive effects from multinational companies' activities in WGZ can be expected.

The action of multinational companies does not replace that of the government nor are they responsible for assuming the role of government. Nonetheless, their support for any governance project, particularly CR, is essential in implementing any project to improve WGZ and develop a healthier investment climate in that country.

For that reason, while there are no easy answers, the OECD toolkit should include a few paragraphs that lay out what the OECD is doing to address the issue of WGZ on an intergovernmental basis. Without this clarity in the preamble, the WGZ Toolkit is open to misinterpretation. NGOs may actually increase the risks to companies by suggesting to the press or others that satisfactory answers to the questions posed in the Toolkit represent a minimum management standard for any corporate investment in a WGZ.

With this clarity in place, BIAC and its affiliates from the 30 OECD countries can work in close partnership with the OECD to strengthen the document and, equally importantly, promote its use, as the process of strengthening WGZ's is necessarily a long-term effort.

A broad view of risk

A key question for every potential investor is whether his/her investment will be profitable. Potential investors should be explicitly encouraged to gauge how the risks referred to in OECD the paper may affect their profitability and reputation calculations for investments in WGZ. The OECD Toolkit should be helpful in positioning the need for companies to invest in activities related to CR by stating that a CR failure will severely damage their reputation. This, in turn, would result in a negative impact on their ability to raise capital while costing them millions, if not tens of millions of dollars – both negatively impacting the bottom line.

Identify the source of risk

Risks stemming from host governments' failures in WGZ are not yet adequately addressed despite the addition of some questions that refer to such failures. BIAC asks the OECD to adequately take into account the suggestions we make in our point-on-point comments.

Offering possible solutions

Another main shortcoming of the OECD paper is that it leaves the investor alone with a set of questions but does not offer any possible and practicable solution to the concrete problems investors face in WGZ. Considering most foreign investors in WGZ are already asking themselves similar questions as part of their internal due diligence procedures, companies who read and try to address the questions raised by the OECD will basically know what they knew before, namely that they are operating in a very difficult environment. However, the key question that an investor will raise after having studied the OECD paper is “*So what? Where can I find answers to these questions? What can I do to solve my problems? To whom can I turn to ask for assistance in solving specific problems? What instruments exist that could help me?*” The OECD WGZ Toolkit must offer answers to these questions including, where possible, suggested resources where investors can find such answers. This essential resource guide must become an integral part of the Toolkit.

General suggestions

In order to help investors, case experiences of corporate responsibility (CR) by companies operating in WGZ should be developed by the OECD and included in the paper. By providing such experiences (preferably in web based form), we believe the OECD can add value for companies in WGZ. We suggest that the OECD works closely with the World Bank and other international financial institutions in order to collect information about case experiences. In addition, the OECD could consult with business schools which have prepared case studies.

Furthermore, the OECD should include a resource guide that provides investors with practical information and contacts. The contacts should have had the experience of working with investors in WGZ on practical approaches to deal with business integrity and other risk issues associated with WGZ. Such a resource guide should include the contact details of experts at the International Finance Corporation (IFC), Extractive Industries Transparency Initiative (EITI), resource industry associations, development agencies, etc. It should also inform about existing instruments that may help mitigating some risks in WGZ such as guarantees provided by IFIs.

BIAC is asking the OECD for practical help for investors based on case experiences. New OECD recommendations for good business conduct are not required. With its Guidelines for Multinational Enterprises the OECD has already provided the recommendations for corporate responsibility, which serve as a useful reference point for investors.

Point-on-point comments

Para 13: The OECD should replace the term “international standards” in the last sentence by “international instruments” as used in the first sentence of the same para. For most of the issues addressed in the OECD’s paper there are no internationally agreed standards available for companies.

The following point-on-point recommendations should be introduced into the OECD paper to help raise potential investors’ awareness of risks stemming from government failure, the most important risk factor in weak governance zones.

General (page 6)

BIAC suggestion: “Does the host government have the necessary resources and expertise to establish a strong rule-of-law environment, to implement its own laws, and the commitments it has undertaken under international obligations? If not, does it recognize its responsibility to do so? Has it requested international assistance to do so? Is this assistance being adequately utilized? How do government shortcomings in the aforementioned factors raise the vulnerability of the investment and the ability to achieve your companies’ business objectives?”

Human Rights (page 6)

BIAC suggestion: A sub-point should be added to the second bullet: “What is the government’s action record when human rights violations are brought to their attention? Does the government respond positively in a timely and transparent manner? Have you developed corporate guidance for dealing with the potential risk of the government leaning on companies to engage public or private security forces when the government has a poor record in upholding human rights?”

Corruption and Money Laundering (page 8)

BIAC suggestions: “Does the host country have rules that prohibit government officials from demanding (directly or indirectly) a bribe from foreign and domestic business before business can carry out its legitimate activities?”

“Is the company aware of the host government’s reputation regarding extortion, bribery and corruption? Is it aware of the government’s record, attitude and reputation to combat extorting bribery and corruption? Is the government trying to resolve the problem or is it part of the problem?”

"Is there transparency in the bidding process for new contracts?"

"Is there any opportunity to make grievances or requests for improper payments known to some authority within the country for action?"

Policies (page 9)

“Does the host country’s laws and the government’s policies embrace international standards and instruments? Does the government communicate these laws and policies to business in a timely and transparent manner? What steps is it taking to rectify its shortcomings?”

Reporting and Disclosure (page 10)

“Is the government transparent regarding its rule making? Does business, domestic and foreign have an opportunity to comment on rules prior to their implementation?”

“Does business have easy and economical access to government information that impacts their business?”

“Is the government transparent on receipt of funds and use of funds? Does it participate in international programs such as EITI? If yes, is it an active or passive participant?”

Involvement in Local Politics (page 11)

BIAC suggestions: “Does the government refrain from improper involvement in business activities, e.g., suggestions to business to choose a certain supplier, to do business in a certain way, to hire certain people etc?”

“Does the government require transparency in financing elections? Does it require candidates for public office to disclose receipt of funds?”

“Does the government actively enforce laws to ensure that political activities do not aid and abet criminal or corrupt activities? How well do they do their job?”

“Does the government monitor contributions to charitable organizations to ensure that they are not used for illegitimate purposes?”

Business and Industry Advisory Committee to the OECD (BIAC)

www.biac.org

Business for Social Responsibility, United States

We are familiar with a number of tools and initiatives dealing with different aspects of the challenges faced in weak governance zones - security and human rights, bribery and corruption, conflict, business involvement in politics, etc. One advantage we see in the OECD risk management tool is that it is rather comprehensive - a one-stop shop for investors that need to be reminded of the specific sensitivities surrounding operations in weak governance zones.

However, while the tool gives investors a sense of which risks to look out for and manage, it provides less in terms of how to go about managing these risks. In that sense, this is more a tool for raising awareness about risks than for actually managing them. For example, we note that the control questions in the document are framed mostly in terms of 'yes' or 'no'. While it is understandable why this is the case, it makes it very easy for companies to go through the list in a 'checklist' type fashion without answering the questions with subtlety.

Also, there is one particular aspect of operating in weak governance zones that should be called out more directly in the document. This pertains to managing business under circumstances that are clear-cut: neither white nor black, but rather shades of gray. It entails dealing with complexities and dilemmas on everything from business impacts on human rights to business impacts on bribery and corruption. It requires trying to determine what is the legitimate role or sphere of influence of business relative to government and civil society under circumstances in which the boundaries are more blurred or confused than what is normal in the OECD countries themselves. An explicit acknowledgement of the dilemmas that this pose for business would have been a good point from which to start the questions and the awareness raising. The context that you provide at the beginning of the Business Roles section is a nice way to illuminate the complexities of these issues. Other sections would benefit from similar contextualization. The section called Speaking Out deals with the reputation considerations a company has when deciding to speak out against wrong-doing, but it does not explain how speaking out can have highly positive or negative effects in a given political context, and that this should be part of the 'self-test' companies go through to make their decision.

Lastly, after reviewing the document, we still lack a sense of the process once it has been finalized—this is critical to its role and effectiveness as an awareness-raising tool for investors. How does the OECD plan to use it? What lessons have been learned from the experience with the OECD Guidelines? Does the OECD plan to involve host country governments and others in a continuous dialogue around these risks and how best to manage them? Will there be any follow-up focused on how business, civil society organizations and governments can work better together to try to plug the governance gap at the core of many of these risks and challenges?

Business for Social Responsibility
United States
www.bsr.org

Company working in the Democratic Republic of Congo

The investment climate in the DRC is currently very difficult. It is hard for responsible companies to conduct business there. Being a responsible investor takes time, money and effort and there is no guarantee of success. One wonders why we should bother investing in this country when there are many other investment locations where conducting business is so much easier.

The main question I have about the draft risk management tool is: what happens when companies answer NO to the questions posed? We need more explanation on how to use the tool. It would also be helpful to explain better the roles of different organisations in relation to the tool. Of course, investors have responsibilities, but what do international authorities and home and host governments intend to do to improve governance and, more generally, the investment climate in weak governance zones?

Consultant on Human Rights, Belgium

As requested, here are some brief comments on the Risk Management Tool for Investors in Weak Governance Zones. Having come into the consultation at the very last hour, I recognize that there has been a great deal of work and discussion about the tool already. My comments are limited to the section on human rights.

The tool represents an important step in highlighting this important issue, breaking it down into manageable segments and providing some comfort of consensus about the core steps companies should take in weak governance zones -- i.e. heightened care. The tool is also very helpful in providing cross-references to a variety of international documents, initiatives and good practices relevant to the topics covered.

1. Human Rights Questions

(A) Imbalance among the questions

There are two very general questions on human rights and six quite specific questions on the management of security forces. Given the importance of building a culture of respect for human rights in weak governance zones, more emphasis could be given to prompting companies to think about their human rights obligations in these zones. The issue is much broader than just security forces. Presenting the two topics side by side could signal that they are of equal importance, when in reality, the management of security forces is just one of many human rights issues a company will need to address. It might be better to present these two topics under two separate but sequential headings.

(B) Framing more specific human rights questions

The tool already starts to break down the human rights questions with respect to what the host government is doing to respect human rights. (On this point it would be helpful to add references to where this kind of information can be found; if you are constrained in the type of sources to be cited in the tool, you could point people to the information on country compliance produced by the UN human rights treaty bodies.) Recognizing that the tool is not structured to accommodate a detailed list of questions about the substance of human rights and the relevance to company operations, one option to elicit some further reflection by companies using the tool is to focus on process. The tool might try to prompt companies instead to focus on whether they have the appropriate processes in place to address human rights responsibilities and concerns.

- Is the company well-informed about its obligations to respect human rights?
- Has the company assessed what impacts its operations may have on the human rights of its workers, the surrounding community and consumers?
- Is the company taking steps to implement the results of the assessment to ensure that it is “respecting the human rights of those affected by its activities consistent with the host government’s international obligations and commitments?”

(C) Labor Issues

The tool does not address labor issues at all. Concerns about the treatment of workers in weak governance zones was at the heart of many concerns and protests about the rapid pace of globalization -- so this is clearly a reputational risk issue as well as being a key human rights issue. Exploitation of workers

in areas of weak government enforcement and weak governance is still a well-known and widespread problem. This is a key area where companies can very concretely demonstrate their corporate responsibility, especially in weak governance zones, by treating their employees properly.

(D) Assessment of company activities

The classical response to impacts identified through an impact assessment process is: avoid, minimize, mitigate, manage. The question does not include a reference to “avoid” which is an important omission, particularly when speaking about human rights violations.

(E) References

As you have referenced other Global Compact publications, it might be useful to cite to one or more of the Global Compact human rights documents that, while not guidelines, nonetheless may help companies get started on figuring out how to address human rights issues. See: <http://www.unglobalcompact.org/Portal/Default.asp?>

2. Use of the Tool

You might consider a more detailed explanation of how companies and others, including civil society, can use the tool. At the moment, the explanation is spread out in a few key sentences in several parts of the text. A more specific step-by-step explanation would help get companies and others started in making the connection between the questions asked and guidance available. Over time, companies and others will inevitably come to develop their own methods for using the tool – but until that time, some further guidance would be useful. You might also consider highlighting what use OECD will make of the tool.

3. Balance

There are a number of issues of balance that could be considered.

(A) Balance among the questions:

- (i) See the comment above.
- (ii) Are all the questions written in the same way so that a "yes" or a "no" is the "correct" answer? For example: "Are employees aware that business that cannot be conducted without recourse to corruption or money laundering should not be conducted at all?" This expresses a very clear prohibition on doing business if certain conditions are not met. Non-compliance with other international convention standards should similarly present a red flag on doing business but are not stated the same way.
- (iii) “Does the company keep itself informed about and contribute to the development of international standards for strengthening accountability in management of security?” This sets a fairly high standard – but one that may correspond to “heightened managerial care.” Should this same level of interaction be encouraged in other areas – or even at least for other human rights issues?

(B) Balance as to footnotes:

Ultimately, is it relevant which party provided the text of the questions, as long as the comments were relevant and helpful? If the specific attributions are kept in because their submissions were considered helpful, then it would be useful to say up front in the text (rather than in footnote 32) that the submissions can be found on the OECD website, and specifically directing readers to those submissions for further information. You may want to check to make sure the written submissions are in fact on the page cited (I could not find the submissions).

It would also be very helpful if you could provide weblinks to documents referenced throughout the text or to include an appendix with all documents cited with full references and weblinks as the tool is meant to guide companies to other documents where they can find some further guidance on the subject.

*Margaret Wachenfeld
Consultant
Belgium
M.Wachenfeld@skynet.be*

Control Risks Group, Japan

Structure

I particularly like the concept of ‘heightened managerial care’, and the need to obey the law and observe international standards is of course axiomatic. However, I don’t think that either of these concepts make appropriate section headings: they apply to the whole piece. So the introduction should say that of course you need to observe standards, and that this will require heightened care. The rest of the document will say how.

The document could then have separate sections on: transparency/anti-corruption/anti-money laundering; human rights/ security etc. Where appropriate each section should include guidance on international standards and the need for heightened managerial care with regard to these particular issues.

I think that ‘Knowing clients and business partners’ belongs primarily with anti-corruption/transparency, although there is an important political/social aspect too.

The introduction might also pick up on the phrase ‘a broadened view of self-interest’: if all goes well business helps countries escape from poverty and conflict, and most people benefit. However, in the worst case, business can reinforce bad governance while – directly and indirectly – increasing the risk to itself. This document is about managing risk in the common interests of individual companies and the societies where they operate.

Political activities and business roles in weak governance societies

These two sections overlap, and should perhaps be merged. They are both about politics.

Paragraph 18 has the rather trite question about whether the company is abstaining from ‘improper involvement in local political activities’. I wondered what ‘improper’ might mean. I found a definition in the appendix, more or less by chance, but if it is a core concept it should be in the main text.

A more helpful question might refer to abstention from partisan political activities, though the next bullet point implies that partisan political activities are acceptable as long as they are transparent. My own view is that – especially in countries with weak governance – it would be better for companies to avoid making political donations, even if these are transparent.

However, the more important point is that major investments inevitably have ‘political’ implications. The challenge is to understand what those implications are, and to find ways of managing them. The most important questions include the extent to which business activity helps one particular social/political group rather than another, and thus reinforces divisions rather than reducing them.

Proximity

The Danish Institute for Human Rights (see: www.humanrightsbusiness.org) has a useful pamphlet called *Deciding whether to do business with states with bad governments*. That introduces the concept of ‘proximity’ in relation to companies and their potential links to human rights abuses. I think that is a helpful concept.

Business associations

I see there is a reference in the final bullet point of paragraph 26. I think more could be made of this – both local, sectoral and international business associations. These can play an important role in capacity-building and in developing common standards.

Combating corruption

‘Facilitation payments’ are rising up the international agenda, and should perhaps be included.

I hope that this helps. Good luck with the project!

John Bray
Director (Analysis)
Control Risks Group
www.control-risks.com

The Corner House, United Kingdom

General

1. The Risk Management Tool focuses too heavily on the damage to reputational and business relations for foreign investors operating in weak governance zones, rather than on the damage to local governance structures created by investors that operate in ways that undermine these structures. Such damage (to local governance) is a long-term risk both for these investors but particularly for investors wishing to do business in a responsible way in such environments. Damaging behaviour by investors in these environments sets a tone for both local private sector companies and for companies wishing to come afterwards, and may make it much more difficult for companies wishing to do business in a responsible way. Investors furthermore have a clear responsibility not to exacerbate already weakened governance structures, and this should be more expressly stated in the Tool.
2. The current wording of the Risk Management Tool is weak because it has in many instances just taken the wording from the OECD Guidelines and turned it into questions. Investors are presumably already well aware of the Guidelines but need guidance on how to make sure they adhere to them when working in weak governance zones. The questions in the Tool would therefore be more useful if they looked in more detailed and more specific ways at how the risks can be managed. The Tool also needs to go beyond the Guidelines by drawing on emerging international best practice for investors in each of the fields and by framing the questions in a more robust way.
3. The document relies heavily on the phrase “heightened care” that should be taken by investors. This is a rather ambiguous phrase which does not specifically spell out what investors should be doing. At the very least, the phrase should be replaced with ‘taken all reasonable steps’, and in many instances with “has the company put in place the management procedures and does it have clearly enforced policies and procedures to ensure that it does not ...”

Specifics

II. 12. Corruption:

4. In line with the general comments above, the questions in this section are fairly weak. The first question would be more clear and robust if it read:

Has the company taken all measures within its power, including adopting appropriate management procedures and having clearly enforced and highly visible policies and procedures to ensure that no bribes or any other undue advantage has been offered, promised, given or demanded, directly or indirectly?
5. In line with emerging best practice on combating corruption developed by TRACE (Transparent Agents and Contracting Entities), Transparency International, the World Economic Forum's “Partnering Against Corruption Principles for Countering Bribery” (PACI), and the International Chambers of Commerce (ICC) Rules of Conduct – revised in 1998, the questions on corruption should provide much more detail particularly with regard to what kind of due diligence companies should be doing to ensure that corruption does not occur. For instance the following questions would be more appropriate:
 - Has the company done proactive due diligence on its agents, joint venture partners and other business partners?

- Has the company undertaken checks to ensure that agents, joint venture partners or other business partners are not related to a public official and do not have any business or other relationship with a public official?
- Has the company asked the agent to provide full invoices for all services rendered and has the company made checks to ensure that the agent has provided these services?
- Are all the agent's and joint venture partner's expenses accurately documented, accounted for and audited?
- Does the agent or joint venture partner have an experience in the particular industry sector to be employed?
- Has the agent or joint venture partner ever been involved in illegal or unethical practices in the past?
- Has the agency or representative agreement received prior approval from the senior management of the applicant?

III. 13. Management systems

6. "Heightened managerial care" should be replaced with "Appropriate management systems".
7. There is no mention of whistleblowing procedures that employers should put in place. Given that whistleblowing is referred to in the last section in relation to governments, this is a surprising omission. The section should make clear that companies should ensure they have proper whistleblower protection for employees who expose wrong-doing (including ensuring that employees who raise concerns with appropriate external bodies do not face disciplinary action), and have in place proper mechanisms for allowing employees to make confidential, anonymous reports of wrong-doing within the company.

IV. 17 and 18. Political activities

8. This section should more clearly reflect the extensive research done by the World Bank on the damage done by 'state capture', where investors exert inappropriate influence on legislation and regulation, thus weakening democracy.
9. The section on dealing with public officials with conflicts of interest is very weak. The phrasing should be:

Has the company put in place procedures to ensure that it abstains from developing political and business relations with public officials that may give rise to conflicts of interest?

V. 20 Knowing clients and business partners

10. Again the wording is weak. It would far more desirable for Tool to read:

“Has the company taken all reasonable steps to avoid forming business relationships with people who have an adverse role in the host country with regard to criminality, corruption and conflict.”

And rather than exercising “heightened care” with regard to ensuring its business relations to not aid and abet criminal or corrupt activities:

"Has the company put in place management procedures and does it have clearly enforced policies to ensure that it does not, through its business relations, aid and abet criminal and/or corrupt activities nor exacerbate conflict?"

VI Speaking out about wrongdoing

11. This section presupposes that companies should only speak out about wrongdoing of officials in the host country. It does not encourage them to speak out about wrong-doing by other investors, or to speak out about wrong-doing within their own company.

VII Business roles in weak governance societies

12. In paragraph 26, among the issues investors are invited to consider is whether the company promotes "the development of laws and policies that promote free and fair competition (including the development of competition policy, competitive tendering and appropriate reform of regulation and of the state-owned enterprise sectors)?" Given that some evidence has emerged that deregulation and liberalisation have actually exacerbated problems of corruption and weak governance, and given that many now recognise that good regulation is required to manage some of the risks of globalisation, it would be more appropriate for this to read: "the development of laws and policies and promote fair, well-regulated competition".

Susan Hawley
The Corner House
www.cornerhouse.org

Dacheng Law Firm, China

I fortunately read the draft of "OECD Risk Management Tool for Investors in Weak Governance Zones" , and the advices included in it are all valuable. I still want to say some words as complement to it from a Chinese lawyer's perspective. My advice is "Don't excessively count on local governmental commitment". In China, interregional competition encourages every local government to make tempting commitments to allure foreign investors. The typical one is free fee land use right. But if a multinational corporate took it very seriously, it would often be injured by it sooner or later. The reasons for explaining such trouble are as follows. First, local governments just take the commitments as political device to attract foreign investment, and they don't want to realize them at the very beginning. Second, most commitments provided by local governments conflict with laws and regulations promulgated by central government, and which will be forced to cancel during the course of legal enforcement check-up movements. Third, the head of local government often have a not long service period, and the successive one is prone to cancel the often unlawful commitments, which will be make space for himself or herself to provide new commitments. One more serious risk is that the commitment could be used as control tool to force investors to obey the orders made by local government. Such story has happened in some regions. For example, free fee land use right could be used as a tool, if investors would not meet the requirements, the local governments could immediately collect large and fatal land use fee on them. So my conclusion is "Don't excessively count on local governmental commitment" in Weak Governance Zones.

Li Shoushuang
Dacheng Law Firm, China
lishoushuang@gmail.com

DeBeers Group, United Kingdom

There is a clear need for a more practical code of conduct than currently provided by the OECD Guidelines. This should not only set out the criteria for operating in conflict or 'weak governance zones', but also establish a better mechanism for dealing with alleged breaches of the code. There is also a place for an international monitoring body with a clear mandate, fully briefed, with inclusive, transparent and accountable procedures. The certainty and clarity provided by such arrangements would give reputable companies the encouragement and confidence to invest in those countries whose need is greatest (as the Secretary-General has advocated), whilst deterring undesirable elements.

Rory More O'Ferrall
Director External Affairs
De Beers Group
United Kingdom
www.debeersgroup.com

Financial institution with operations in weak governance zones

With regard to coverage, the draft tool is first rate; it is very comprehensive covering a broad range of issues including important elements such as providing incentives for employee compliance with relevant international instruments etc etc (bottom page 9) and engaging with governments through Chambers of Commerce etc (bottom page 15). It also documents relevant background material very well. There is little that could be suggested to add to the coverage.

However, there is some room for improvement with regard to its usefulness as a Tool - but it should be noted that some of the following comments may not be so easy to address at this stage, and instead may be useful to consider for a further evolution of the tool in say 2-3 years time when more practical experience may be available.

First, there are extensive, potentially important citations in the footnotes and it might make the document into a more useful tool if many of these were included either directly in the text or else as attachments so that the manager looking at implementing the Management Tool has everything at his/her finger tips. For example, the fifth bullet in para 12, page 6 asks "what steps has the company taken to guard against extortion attempts..." and references in footnote 16 "the DAC Guidelines on Helping Prevent Violent Conflict ...". At minimum, the cited material might usefully be presented in the text.

Second, the Tool tends to provide questions, rather than solutions or actions that can be taken. With regard to the example noted in the paragraph above, rather than listing material from the DAC Guidelines as questions, it would be even better to present them as actions and say something along the following lines " The company may wish to put in place the following measures or undertake the following actions which are taken from the DAC Guidelines etc" , and then list a series of specific steps. In this way, the company manager would have a proactive set of specific actions/checklist at his/her fingertips rather than a more general question to think through.

Third, within the wealth of points made, the report does not attempt any priorities. There are two aspects here. First, the Tool may prove daunting for smaller companies, compared with large multinational, and some indication of priority areas might help managers in small companies. But looking at many of the points presented, this may not be such an easy task. Second, some aspects may be more important for some sectors than others. One such example is the use of security forces which is typically a very important issue for oil, gas and mining operations in weak governance zones but may not be so critical for say small textile or manufacturing plants or service businesses.

Fourth, the Tool could give more in the way of suggestions as to how companies might improve their internal capabilities to use the Tool. Essentially, this raises the issue of providing models or examples of good practice for others to learn from. While such examples of good practice may not be readily available at present, there are three broad possibilities to consider for the future;

- (i) with regard to internal structures, the Tool could indicate if it is effective or not to form some type of internal unit to monitor/verify compliance with good practice in weak governance zones OR alternatively if it is effective or not to form some type of internal unit to provide guidance, support and training to support good practice in weak governance zones.
- (ii) with regard to practical experience including internal procedures, the Tool might provide some case study examples (of the "Business School" type) that illustrate practical examples of either lessons to be replicated or to be avoided.
- (iii) with regard to skills, the Tool might give examples of training materials or courses if some are known .

Former oil industry executive

I am a former executive of an oil and gas company with investments in West Africa. We were confronted on several occasions with situations in which we asked ourselves if we had a role to play in "speaking out about wrongdoing" . In some cases, we did speak out, but through behind-the-scenes discussions or the kind of quiet diplomacy in which governments sometimes engage. This option is not mentioned in the draft risk management tool and it should be added.

On two occasions, we were asked to speak out and chose not to. In the first case, the "wrongdoing" was indirectly related to the presence of our industry, if not my own company, in the host country. We said nothing - invoking the principle of separation between business and politics. In light of subsequent events, we realized that we had made a mistake. In another case, the wrongdoing was very serious, but did not have even a remote link to our operations. In this case, we felt that our silence was justified.

Foundation for the Development of Africa, South Africa

I have managed to find time to peruse your OECD Risk Management Tool for investors in weak governance zones. Stunning document - this will add much value to developing countries and moreso to the interested investors

I did not check the document for grammatical errors.

You often refer to "actors" somehow I prefer the phrase "participants".

VI. Speaking out about wrongdoing

21. Information about wrongdoing

22. In thinking about these issues, companies might wish to consider the following questions:

I would add a section - Making recommendations - Here the company making an investment may wish to recommend that government introduce a 'scorecard' mechanism that will encourage transparency - both from government and from the company

VII. Business roles in weak governance societies – a broadened view of self interest

This would be the ideal heading for PPP - Public Private Partnerships - PPP's are having a great impact on investment in Africa!

Peter Metcalfe
Chief Executive Officer
Foundation for the Development of Africa
www.foundation-development-africa.org

Fundación Ideas para la Paz, Colombia

Who we are and what we do

The Fundación Ideas para la Paz

Fundación Ideas para la Paz (FIP) is an independent think-tank partly funded by private businesses in Colombia. It was created in 1999 by national business leaders to provide academic and technical support to the peace negotiations and promote an increasing and positive involvement of the business community in peace-building in Colombia. FIP works with domestic and foreign businesses but it does not represent the commercial interests of any given company or business association.

FIP disseminates information and conducts policy-oriented research in three main areas:

- Conflict dynamics, peace negotiations and the role of domestic and international actors.
- Post-conflict and the demobilization and reintegration of former combatants.
- The role of private sector in conflict prevention and sustainable peace.

Our Program on Private Sector and Conflict

Although international legislation is still forthcoming, there are explicit expectations and some tacit agreements on what companies should and should not do in weak governance zones or conflict areas -- whether large, small, domestic or international. The proliferation of voluntary codes of conduct and human rights guidelines (such as the Voluntary Principles), activism by international NGOs, the rise of socially responsible investment and new requirements by international banks for project implementation are clear evidence. The trend seems particularly important for Colombia. It not only suffers from an ongoing armed conflict but also has robust and legitimate businesses inserted in the global market through different activities (purchases, sales, loans, investment, etc). Additionally Colombia has solid foreign relations with most countries and is an active member in multiple international organizations. As far as political and social standards are concerned, Colombia has defined itself as a Western democracy, and it will be measured as such by the rest of the democracies around the world. This was one of the reasons motivating the creation in 2004 of a Private Sector and Conflict Program at FIP. On the other hand, the FIP's links to the business community in Colombia, its strong capacity to understand local conflict dynamics and its mandate to promote greater private engagement in peace-building meant our institutions had a unique opportunity to address the issue of appropriate conduct in conflict zones.

Our program seeks to raise local awareness among companies on the idea of "doing no harm"; promotes private sector adherence to international standards such as the Voluntary Principles and the Global Compact; and identifies and shares information on local best practices regarding private sector, conflict prevention and peace-building. We have specifically supported the Voluntary Principles process by disseminating its existence among local companies, helping multinationals develop the appropriate capacity to put into practice the code on the ground and collaborating with International Alert on the implementation of their "Conflict Sensitive Business Practice Tool".

Comments on the OECD Management Tool for Investors in Weak Governance Zones

The following comments draw from our observations and experience in Colombia as well as our participation in international workshops and conferences where company challenges in other parts of the world, such as in Africa, Asia and the Middle East, have been discussed by experts, academics, company employees and public officials. These are general observations and do not refer to any specific company or businesses funding FIP activities.

5. We highly commend the emphasis on “higher standards possible”, that is, the consistent reference throughout the tool to relevant international instruments and standards. Very often, multinational companies face the challenge of operating with local contractors and business partners that follow domestic law and norms which are often below international standards. While upgrading local partners standards on technical issues (including environmental protection and safety) is usually achievable, it is more problematic to the same with attitudes and behavior regarding human rights, gender equal opportunities, transparency, freedom of association and respect for ideological and cultural pluralism. Often companies end up operating according to least common denominators as opposed to higher standards possible. Therefore it is paramount to remind companies on the need to take relevant international standards as a guide especially regarding the above mentioned non-technical issues. In practice this may require the company to have the appropriate capacity and human resource in place, personnel that is acquainted with such relevant international standards and perceives them as legitimate. It would thus be useful to explicitly refer to “adequately trained personnel” in the chapter “Heightened Managerial Care” section “Management systems”, paragraph 14, and any other section of the tool that speaks about policies and management systems.
6. Specific reference should be made to the need of “adequately trained personnel” or “appropriate personnel” in thinking about human rights and management of security forces. The tool encourages companies to think about security management practices. While very often companies may have well intended security policies that are meant to follow international relevant standards on human rights, its implementation will depend on the attitudes, understandings, beliefs, profession and cultural background of ground personnel. Very often security departments will hire personnel with a military background or contract private security companies staffed with former local military and police, who have relevant skills to protect assets in contexts of weak governance or armed conflict. It is possible, however, that such individuals are less acquainted with risk analysis methodologies that lead to a more sophisticated understanding of and approach to social and political phenomena including the non military aspects of conflict, criminality or weak governance (such as the Risk Analysis suggested in the Voluntary Principles). It is also possible that former military and police establish close working relations with host country public security forces, former colleagues, thereby discouraging independent assessments on the conduct of such security forces and discouraging “Speaking about wrong doing”.
7. The tool should also have guiding questions so that companies can assess whether their policies and attitudes discourage the work of independent organizations that promote corporate social responsibility, human rights and transparency. While the tool makes explicit reference to “improper involvement in local political activities”, paragraph 18, it fails to address cases in which companies or their local partners indirectly or directly discourage organizations whose work monitors the conduct of businesses and governments.

8. In order to prevent aiding or abetting criminal and corrupt activities, which may exacerbate conflict, as mentioned in paragraph 20, chapter “Knowing clients and business partners” the concept of “money laundering” should be expanded. Drug traffickers, criminal networks, illegal armed groups and terrorist organizations not only use banks to launder or manage funds. They also create all types of legal businesses (transportation companies, agri-businesses). Therefore, the same provisions and standards used by financial institutions to “know their clients” should serve as guides for multinationals when conducting business. The chapter “Knowing clients and business partners” should explicitly refer to this in order to strengthen the guiding questions in paragraph 20. Criminal networks, illegal armed groups and terrorist organizations also steal goods from legal companies. Therefore “Heightened managerial care” should include “heightened” control systems to monitor materials and other goods used by companies which may be stolen or diverted to criminals.
9. Risks to reputation or damage to internal business culture are not the only possible negative consequences of remaining silent about wrong doing, paragraph 22. At times companies may feel that it is in their short-term interest not to have disagreements with host governments or local business partners, since operations may depend on their collaboration. However, in the long-term illegal conduct and wrong doing only weaken the rule of law thereby posing security, political and legal risks to companies. Speaking about wrongdoing will always translate into long-term gains for multinationals.

Bogotá, Colombia, November 23, 2005.

Fundación Ideas para la Paz
Colombia
www.ideaspaz.org

Geneva Social Observatory, Switzerland

I encourage this important initiative. The OECD risk management tool for investors in weak governance zones seeks to shed light on a major dilemma in international business ethics - to what extent should international business take on the responsibilities for ensuring compliance with international ethical standards when governments are unable or unwilling to do so.. The initiative breaks new ground in proposing a methodology for helping companies to determine what they should do when governments are not doing their jobs.

The focus of the initiative is on basic ethical concerns regarding governance and human rights. The guidance covers how companies should act and what they should do when confronted with corruption, criminal activity and their spillover to the protection of human rights.

In my view, the scope of the initiative could usefully be broadened to encompass guidance on social and environmental standards as well as questions of governance and corruption. More specifically, the initiative could also provide methodologies and guidance for companies operating in frameworks of inadequate labour and environmental enforcement.

Finally, in view of the gravity of the problems that companies encounter in weak governance zones, the language used in the guidance tool seems weak in some places (e.g. it uses expressions like “might wish to consider”, “encourage the application of these principles”, “where possible”).

While this kind of language may be necessary to avoid making the text too prescriptive, the risk management tool is being developed as a service to companies for use on a voluntary basis. Given the heightened risk encountered in weak governance zones, perhaps the message about such issues as oversight of the supply chain should reflect a heightened tone in the text of the tool.

Karen Hagen,
Director
Geneva Social Observatory
www.hrigeneva.com/gso_home.htm

Global Reporting Initiative/Sustainability Strategies, Netherlands

The following thoughts are offered in my capacity as an independent consultant with a background in the formulation and implementation of policies and instruments relating to sustainable development and corporate social responsibility.

By and large, I consider the draft to be a model of precision, clarity and economy of style. It should prove invaluable to investors, governments and civil society organizations in assessing risks and areas where performance can be improved. The OECD is to be commended for taking the lead on this.

That said, there are a few observations I would make about the process, style and content of the draft. These are comparatively minor points, but need- I feel – to be registered.

The first point relates to process. To avoid any suggestion that this tool is only relevant to Africa, I think it was unfortunate that the only regional consultation meeting was held on that continent, and then with what seems to have been a relatively limited level of consultation. While agreeing that the tool should be useful in Africa, there are – sadly – many countries and regions where weak governance undermines respect for human rights, the environment and investors' rights. (Equally, this might also be said for countries like Myanmar, where excessively strong governance and a lack of democracy is the problem.)

Perhaps as part of the roll-out of this important tool, special effort might be made across all continents, with a clear request for feedback to be taken into account in a revised version at some future date? Like most such tools, there is a need to monitor the views of users on such aspects as its perceived utility; what is found most/least useful; who is using the tool; and how it might be improved.

The second point relates to style. While it is well taken that this tool is designed to assist investors in identifying and responding to potential risks, I think a little more might have been said about the negative impacts of weak governance on the local population. The point is there, but to avoid the impression that this is overly motivated by a desire to protect investors, I would recommend some further attention be given to balancing the text in a way that makes it clear that a strong and principled private sector contribution to the issues raised provides a win/win situation, for investors on the one hand, and for local citizens and governance institutions on the other.

The last points relate to substance.

- a) Use by OECD Government: I may have missed this point, but it doesn't seem clear whether OECD governments and the WBG will be encouraged to apply the tool in their financial dealings in weak governance zones, e.g. in relation to development assistance and like transactions, where the tool could also be relevant. I hope this is seen as a tool that should be used by all actors in assessing issues and risks, *mutatis mutandis*.

- b) ‘relevant international instruments’: Since the 2000 MNE revised Guidelines antedated the Millennium Development Goals and the WSSD Plan of Implementation, one cannot expect them to have been anticipated. Nonetheless, is it not a weakness of a tool of this nature not to somehow reference declarations of this significance that are directly relevant to issues of risk and responsibility? Universal Head of State and Government commitments on sustainable development did not end with the (referenced) Rio Declaration and Agenda 21, and it is important to recognize this.

Paul Hohnen
Special Adviser, Global Reporting Initiative
Chief Executive Officer, Sustainability Strategies
Weteringstraat 13, 1017SL Amsterdam, Netherlands
www.globalreporting.org

Global Witness, United Kingdom

For comments from Global Witness, International Alert and the Netherlands institute for Southern Africa(NiZA), please refer to the entry under Rights and Accountability in Development.

Government Accountability Project, United States

Thank you for the invitation to comment on this worthy effort of the OECD Investment Committee. There are several key themes that I find pivotal for the Risk Management Tool (“Tool”) to succeed in achieving their goal of “durable improvement” for the citizens in tumultuous, weak governance areas. In the comments that I follow, I highlight these and offer some thoughts on advancing them.

I hope this feedback, brief as it is, helps you and your colleagues evaluate the revision of the next draft text of the guidelines.

KEY THEMES TO STRESS

Role of government in investment. The current draft rightly places the integral relationship between public sector and private sector accountability in the forefront. This interdependency should frame every section that follows, even those that deal primarily within internal corporate practices. Regardless of the weakness or strength of the governance in place in any given country, it is society that gives business its license to operate. Business does not operate in a vacuum. For the well-being of citizens to be served, government must set the standards – and impose the enforcement – for how the fundamental rights of its citizens are protected. In the absence of a strong, functionally accountable government, the standards for companies to follow are well-established in international law and norms. The Tool appropriately references these instruments. Their fundamental guiding nature cannot be overemphasized.

High risk investment requires heightened care. This is another point stressed by the Tool as currently drafted. It is a fundamental one. When risks are high – as they necessarily are in weak governance zones - - the only responsible way to proceed is to redouble the due diligence that any investor undertakes before determining whether or not to proceed. This deeper level of information-gathering and in-depth analysis and evaluation if done thoroughly will require outreach to diverse sources. This reinforces the Tool’s emphasis on partnerships and other forms of engagement with civil society groups.

Political arrangements are not legitimate alternatives to rules-based protection of rights. The Tool properly addresses the issue of political alliances (in Section IV). However, there ought to be a more explicit understanding that political alliances – particularly in high risk zones -- are fundamentally at odds with the principles of accountability and security for citizens. Even if the political arrangements serve beneficial social outcomes, the very fact that they exist undermines governance that meets even baseline standards of transparency and popular participation. As currently addressed in the draft (see especially paragraph 17), there is ambiguity about the legitimacy of such outside investors’ involvement in local politics. I would urge that this paragraph be rewritten to make it explicitly clear that no informal system of investment protection is acceptable. Formal arrangements, whether guaranteed inside or outside of these zones are the only way investment should proceed.¹

¹ I would note however, that there is also danger in substituting “formal” arrangements through agreements with international financial institutions (IFIs, such as the International Monetary Fund or International Finance Corporation). These deals are too often detrimental to the development of stable democratization in weak governance areas if they by-pass representative citizen participation and accountable oversight.

Leading by example. Multinational enterprises that choose to invest in high risk, weak governance areas have a built-in level of security that offers them far more latitude to resist corruption and speak out against wrongdoing than ordinary citizens typically enjoy in such circumstances. If all else fails they can pick up and go home with the lives of their international staff and governing board intact. Not so for the local residents. The emphasis that the Tool places on providing safe channels within companies' own policies for blowing the whistle on misconduct is an essential private sector practice that mirrors the need for public recognition of the universal right to free expression and access to information. If companies make it a point to encourage and protect these rights, they can serve as the early warning system for harm that will extend far beyond their own operations and set an example of rights-based, rule of law-governed behavior.

Supporting the strengthening of civil society and of government. Beyond the example that adherence to rights-based standards presents to the general populace and public sector agencies, the Tool also rightly values the impact of partnerships between multinational enterprises and other groups – both governmental and citizen. There are indeed concrete ways companies can intervene in supporting the development of safe and transparent practices beyond their own walls. Through procurement and recruitment policies, direct engagement with community activities, inviting external oversight, making routine public disclosure, and providing technical assistance to multi-stakeholder initiatives that include government, private investors demonstrate that their investment is inclusive of the society in which they operate.

Relying on the body of laws, norms and policies that exist internationally and nationally. As noted throughout the draft text, and helpfully compiled in the Annex, the standards for investing safely and responsibly in weak governance areas are well-established. They reside in an extensive and tested body of international laws, norms and policies. Multinational enterprises have the resources to study these standards and the obligation to hold themselves to account based upon these standards. While they are neither individual citizens, nor governmental entities, private companies are inexorably connected to both.

Melanie Beth Oliviero
Director, International Program
Government Accountability Project
United States
www.whistleblower.org

Government College University, Pakistan

1. The work of the OECD's Investment Committee for the development of the risk management tool in weak governance zones (WGZs) is important for creating an enabling environment and encouraging foreign investment in these countries. Governments in many countries, which fall under this category, are working for promoting this objective, but the impact assessment and policy picture provided by the men at the helm remain subjective to foreign investors unless corroborated and verified by an impartial agency or organization. Risk management tool developed and designed by the OECD's Investment committee will bridge this information gap by enlightening the investors and removing their doubts about the accuracy of the policy information. On the other hand, it also acts as a check on the operations of the companies operating in these areas making them not only more informed and enlightened but also accountable, vigilant and above all more responsible.
2. The theme of the draft revolves around six key principles which constitute the core of the argument. These six principles range from obeying of law to the role the businesses can play by espousing the idea of enlightened self interest. The observance of these principles by the companies is reported through the reporting framework adopted by the companies. It is important to have independent and impartial reporting mechanism about the activities of the companies operating in these areas with regard to the list of questions covered in the main topics of the draft. This report which, should highlight company's record on these six key issues, be scrutinized by an impartial international agency and serve as a barometer for evaluating the performance of the company in WGZs.
3. The draft is appropriately structured, well written and designed and covers the main features and factors, which would not only enlighten and enrich the investors and companies operating in WGZs, but also go a long way toward reducing risk enormously. However, based on the review of the draft, some of the comments are given below:
4. **Part II (Observing the law and observing international standards).** The draft covers many aspects-moral, economical and ethical issues- which a company should not only aware of, but observe and make it a part of its implementation strategy. It must also be emphasized that there should be no discrimination between local and international companies engaged in similar investment projects and productions processes. It has often been observed that a foreign multinational company receives greater patronage and protection which at times amounts to discrimination with local entrepreneurs and companies. For example, company, X operates business in Pakistan. The kind of privileges and benefits given to it are denied to the companies engaged in similar business activities. The granting of some rights to international companies and its denials to others at the local level creates an environment in which local companies suffer in terms performance as well as profits. This calls for the creation of a level playing field both for the domestic and international businesses in WGZs where there is every likelihood that this malpractice will occur, and need to be checked. Risk management tool should ensure better risk management without any inadvertent harm to the local businesses.
5. **Part III (Heightened Managerial Care)** In terms of heightened managerial care, good corporate governance calls for special attention. The presence of international companies in weak governance zones requires that good corporate governance practices should also filter down to the local businesses. This can only when a company adopted above board policy in all its operation and relations with the management. Whatever is bad is bad every where? Truth requires universal practice. Preaching malpractices- corruption and actions which contravene the

law by the local employees - on the excuse of bona fides intentions should not be encouraged. Its discouragement will not only strengthen the internal risk management of the company, but also ensure external risk management. It will also ensure better reporting and disclosure of information by the companies. Actions that contravene the law are obviously not reported in the company's reporting mechanisms. When these unlawful actions based on bona fides reports, get unreported, there is a possibility that the internal structures and apparatus also start sweeping things under the carpet. As a result the company runs the risk of losing credibility and become more prone to risk. Thus risk management tool should promote good corporate governance in its letter and spirit and in all its forms.

6. **Part IV (Political Activities).** Multinational foreign companies are also looked upon with suspicion by people in weak governance zones. Their interaction with the high profile politicians and public officials creates an image in which they are believed to bear on the dynamics of domestic political scene. This impression can be dispelled only by the companies by maintaining a low profile of its outlook. Business is business no matter whether it is domestic or international. The prime motive of the business is its reward in terms of profits and revenues. An action of the multinational company which brings undue benefits to it through its overt or covert relations with the domestic political leadership contradicts not only the spirit of the competition but also agitates the minds of the domestic population. Risk management tool should present comprehensive code of conduct on the relations of the multinational companies and domestic public policy makers and officials. This code would not only promote clean practices but also contribute towards better risk management.
7. **Part V (Knowing Clients and Business Partners).** A company should be honest about its dealing with its clients and business partners. It is especially important in weak governance zones where not only the political structures are weak, but the social fabric of the society is also feeble and fragile. No way should a company resort to indulge in illegal practices by being a party with the local group with skeptical credentials. It increases the risk of financial resources being siphoned off from one place to another. For this purpose risk management tool should also highlight guidelines of company's interaction with local clients and customers. This set of guidelines should help the company identify and approach the agents and clients with good track record and reputation. It will not only mitigate the risk but would also go a long in making domestic people more reliable, responsible and trustworthy.
8. **Part VI (Speaking about wrongdoing).** Identifying a wrongdoing in good faith does not carry any risk. If the wrong action is reported in right earnest, there is less and less risk associated with it. But the problem in weak governance zones is that whenever wrong doings are exposed, foreign businesses are threatened with direct or indirect punitive actions. In such a case, risk management tool should not solely rely on the different actors of the weak governance zones – business associations, civil society and trade unions- for rescuing these multinational companies in times of trouble. A possible solution could be a formal legal guarantee by the host government to the company for protection in such situation. A third party or an agency could also be a signatory to this agreement in order to hold the host government back from taking illegal or unilateral action against the company.
9. **Part VII (Business roles in Weak Governance Societies).** Reforming weak governance societies, without giving the impression that the foreign companies are directly calling the shots, is perhaps the greatest responsibility of the international companies operating in weak governance zones. This is very sensitive task and needs to be pursued with caution. It has two features one at the private level and the other at the public level. Foreign companies should not give the impression that they are violating the sovereignty of these countries in the cover of

reform. The best way to ensure reform is its continuous monitoring through the lens of accountability. At the private level, foreign companies should inculcate the principles of good corporate practices by creating conditions in which their own systems should be emulated by the domestic business community. At the private level, they should ensure that their contributions made through taxes are judiciously utilized for social development. This can be done by developing a methodology of doing an impact assessment of the foreign business on the domestic state institutions in terms of governance. In this way, reform can be translated into reduction in risk creating a **win win win** situation,--- win for the domestic population, win for the public and private sectors of the host country and above all win for the international businesses.

*Asif Saeed, Economics Department
Government College University
Lahore, Pakistan*

Human Rights Watch

Human Rights Watch welcomes the Organisation for Economic Cooperation and Development (OECD) Investment Committee's publication of the *Draft Risk Management Tool for Investors in Weak Governance Zones* (the Draft) and the opportunity to comment on it. We support the development of such a tool for companies active in weak governance zones. The Draft recognizes that, in addition to the usual business and financial risks inherent in any business environment, companies operating in weak governance zones face additional risks.

In our view, the Draft presents a useful—although still incomplete—set of questions to help ensure that companies adequately consider and address the potential risks of their engagement in weak governance zones. We welcome the Draft's recognition that “companies have the same broad responsibilities in weak governance zones that they do in other investment zones.” We also agree that certain issues – such as human rights (including workers' rights) and related issues, including anti-corruption efforts and environmental protection – are always relevant to business activity, but merit greater attention when companies are active in zones of weak governance. Companies are not the only ones who pay a price when they fail to anticipate and proactively respond to the challenges of operating in weak governance zones; the negative consequences for local communities often are very serious, as has been seen for example in the Democratic Republic of the Congo (DRC).²

In this light, we are concerned that the Draft does not sufficiently address some of the most serious human rights concerns. It does not, for example, acknowledge that weak governance zones often are characterized by areas of violent conflict, serious violations of international human rights or humanitarian law, and/or the absence of accountability. It also fails to clearly recognize the possibility that companies operating in weak governance zones may in some cases risk complicity in human rights abuses, or to address the circumstances under which companies should refrain from engaging or should withdraw on human rights grounds.

We also note that the Draft does not clarify some important questions of application. It is addressed to “investors” and their “investments” but does not clarify whether these references cover both direct and indirect investments, as we hope they do. In addition, we feel that the focus on investment is too narrow to capture the issues at hand. We believe the OECD Guidelines for Multinational Enterprises (the Guidelines) and this risk management tool should apply more broadly to the activities of companies, including their ties to suppliers and contractors.

We draw special attention to the need to clarify the relationship between this risk assessment tool and the existing implementation procedures of the OECD Guidelines. The risk management tool, as originally conceived by the OECD, was intended to provide greater clarity about the steps companies should take to comply with the OECD Guidelines. The government officials charged with implementing the OECD Guidelines, known as National Contact Points (NCPs), regularly engage with companies investing in weak governance zones that would benefit from greater guidance on how to comply with the OECD Guidelines in challenging environments. NCPs also are responsible for handling complaints against companies under the OECD special instance procedure. Violations of the Guidelines have negative consequences for communities and companies alike. The risk management tool can help avoid violations, and the associated consequences, but only if companies make sufficient use of it. For this reason, we strongly encourage the OECD to make clear that NCPs should consider whether a company has used the tool when examining any complaints against the company under OECD Guidelines special instance procedures.

² See Human Rights Watch, *Democratic Republic of Congo: The Curse of Gold* (New York: Human Rights Watch, 2005).

We have several specific recommendations regarding the content of the Draft that we feel will strengthen it. Our comments seek to help identify the human rights issues likely to demand particular attention in weak governance zones. The issues that we feel need further elaboration relate to the following topics:

- The definition of a weak governance zone
- The identification of relevant international standards
- The understanding of heightened managerial care, including circumstances in which a company should refrain from engaging or should withdraw for human rights reasons
- The need to consider the conduct of all relevant actors (which may include non-state actors such as armed groups) as well as company relations with such actors
- The concept of complicity in human rights abuse, as well as measures to avoid the risk of complicity
- The importance of engagement with local communities, both to avoid disputes and to address them appropriately when they arise
- The need for transparency regarding security arrangements.

We have proposed several changes or additions to the Draft. In every case but the proposed changes to two of the Draft's definitions noted below, we have copied the relevant text from the Draft and inserted our proposed changes, marked in bold and italics, into the excerpt. We also have appended written explanations for our comments where we felt this might be

Please note that the changes to the Draft proposed by Human Rights Watch are available as a separate document on the web page for the public consultation at www.oecd.org/daf/investment/guidelines.

*Human Rights Watch
Business and Human Rights Program
www.hrw.org*

Initiative for Central Africa (INICA)

J'ai une petite contribution à apporter sur deux points:

- 1) Je suggère l'idée que le guidelines soit aussi proposé comme un outil qui donne des repères aux opérateurs économiques et aux acteurs politiques impliqués dans une dynamique de reconstruction socio-économique post-conflit.

On peut insérer cette remarque à la page 5, après le paragraphe 8 (version française).

- 2) Je propose qu'on ajoute au paragraphe 26 (page 16, version française) une ligne disant: "l'affirmation et la protection des droits économiques des populations des zones à faible gouvernance: revenus dignes, accès aux ressources vitales communes, etc."

Cyril Musila

Initiative for Central Africa (INICA)

www.inica.org

Institute of Business Ethics (EIBE), Nyenrode Business University, Netherlands

The background from which I read your draft text is my position as university researcher on political and social risks of FDI in developing countries.

I will limit my comments to the two main issues I would like to raise. These relate to clarifications that I think are required for companies to actually use this tool to in their investment policies.

First (p.1, par.3): A crucial element missing is, in my view, that the text does not identify precisely how business might be damaged by weak governance zones. A stronger case could be made for use of your tool if you could indicate which kinds of damage might result to business, and by what chain of causes these derive from weak governance. Moreover, these arguments would be more convincing if you could provide more contextual information regarding the significance of the potential risk to business. How serious are risks resulting from weak governance in relation to other business risks? How do these risks relate to the benefits that perhaps also exist in weak governance zones? The topics introduced on p.5 might also be linked more explicitly to specific business risks.

Second (general, introduction): Could the introduction be more precise as to how this list of questions can function as a tool? How exactly will the use of this tool contribute to a reduction in risk?

Dr Frans Paul van der Putten
Institute of Business Ethics (EIBE)
Nyenrode Business Universiteit
www.nyenrode.nl/eibe

IUCN Commission on Environmental, Economic and Social Policy

Draft on behalf of CEESP-SEAPRISE (The IUCN Commission on Environmental, Economic and Social Policy and SEAPRISE CEESP's working group on the Social and Environmental Accountability of the Private Sector.)

SEAPRISE welcomes these guidelines and it is vital that Industry particularly extractive Industries follow them. Governments should investigate breaches of the guidelines and take appropriate action.

SEAPRISE has a number of comments/recommendations:

1 Introduction

The emphasis should not just be on OECD helping companies to work in weak governance areas it should also be on ensuring that companies help Governments and Civil Society to deal effectively with them.

One of the biggest problems is that Extractive Industries are moving into areas of very high biodiversity and very weak government and civil society capacity. There is also a completely unequal relationship between Developing Country Governments and companies whose annual turnover is greater than the GDP of the countries in which they are working. This often results in the Government and Civil Society getting little if any benefit from the Extractive Industry. Indeed they are often left to carry the environmental and social costs left by the Industries. Worse still their poverty increases when don't have the money to import expensive oil, gas or minerals once they have exported their own.

To avoid this happening, extractive industries should only be developed when a Strategic Environment Appraisal (SEA) has been carried out by the Government with support from International Agencies. This should set the base line for the Environmental and Social studies (ESIAs) that the companies will have to carry out as well as the Environmental Managements Systems (EMS) they will have to put in place.

There is also a special responsibility on companies to ensure that they not only respect National Laws and International standards, treaties etc but also ensure that any agreement on benefit sharing they make with the Government is as good as the Government would get in a more Developed country. In addition companies should help build the capacity of the Civil Society organisations and Government departments they are dealing with.

Climate change is the biggest threat to the environment and people, Companies must ensure that they do not take advantage of Weak Governance to make the situation worse.

2- EIR

The biggest surprise is that there does not appear to be any reference to the World Bank Extractive Industry Review (EIR) which was extremely critical of the Extractive Industries and the situation is made worse in areas where there is weak governance. The extract from Dr Emil Salim's press release in the UK Times 16th June 2004 was very clear.

"Not only have the oil, gas and mining industries not helped the poorest people in developing countries, they have often made them worse off"

There were many key recommendations in the EIR for the World Bank which companies and financial institutions should also follow particularly in areas of poor governance and these are summed up by Hannah Ellis of FOE as follows:

"The report clearly shows World Bank support for oil and mining does not benefit local communities, protect basic human rights or the environment in the vast majority of cases. The World Bank Group, with its stated mission of poverty alleviation and sustainable development, must keep its promise to implement the crucial changes recommended in the review."

The recommendations of the Extractive Industries Review include:

- **Informed consent from local communities and indigenous peoples affected by extractive projects as a pre-condition for financing;**
- Phasing out lending in support of oil and coal and to invest its scarce development resources in renewable energy by setting lending targets of increasing renewable energy lending by 20% a year;
- **Ensuring the establishment of indigenous peoples' land rights as a condition for project finance;**
- Ensuring that revenues of Bank-financed projects benefit all affected local groups;
- Requiring that freedom of association be present in Bank financed projects as a basic human/labor rights requirement;
- Ensuring that good governance structures are in place before project finance and implementation occurs;
- **Protecting biodiversity through establishing "no go" areas for internationally recognized critical habitats;**
- **Requiring that submarine tailings disposal not be used in World Bank Group supported mining projects;**
- Increasing revenue transparency and improving public disclosure about projects; and promoting overdue key institutional reforms to deal with the long documented "pressure to lend" in the World Bank that has resulted in weakening of implementation of key environmental and social protection policies.

(The items in bold need to be added into the guidelines, others appear to be included)

3 Missing references

There is no reference in the Guidelines to the IUCN 2000 Amman Declaration calling on governments to protect category 1-4 Protected Areas by not allowing Oil, Gas and Mining operations to take place within these protected areas. **Companies are also expected to respect the Declaration particularly in areas of poor governance.**

There is also no mention of WWF's document "To Dig or Not to Dig" which provides criteria for working in areas of high Biodiversity. This was circulated to all major extractive industries in 2001-2.

4 **Double standards particularly in poor governance areas**

No one denies that the need for extractive Industries but their performance in many developing countries is completely unsatisfactory and it appears to many civil society organisations that some companies are practising double standards in developing countries. They would not be allowed to use these standards in their home countries. (This needs to be emphasised in the guidelines)

Companies are calling themselves "Industry leaders" when they are "Illegally Flaring off \$ billions worth of Gas in countries like Nigeria so that they can produce cheap Oil" see recent Nigerian Federal Court Ruling. Other companies are knocking down Mountains and throwing them in Rivers or into the sea (riverine or submarine tailings disposal) in PNG, West Papua etc. Other companies are abandoning mines in countries such as the Philippines but are still pressuring the Philippines Governments to liberalize Mining against the wishes of the community including Indigenous people. See attached paper by the Catholic Bishops of the Philippines.

5 **Use of HGAs and Contracts of Work**

Some Companies are signing HGAs (Host Government Agreements) or "Contracts of Work" which some NGOs believe are questionable legal instruments sometimes used to undermine/supersede both the National Environmental and Social Laws and the Ministries of the Environment and Health which are trying to enforce the laws e.g. BTC.

In the view of many NGOs the BTC HGA broke Georgian Law, the OECD Guidelines for Multi Nationals, the Equator Principles etc. **On top of everything else the Minister for the Environment in Georgia was forced to sign the EIA for the BTC project against her will by the President shortly before he was forced to leave Georgia**

6 **The Equator Principles**

These were a good idea but when problems arise too many IFIs and commercial banks still support their "Client" even if the client is not following the "Equator Principles" e.g. The BTC pipeline went straight through Qtsia Tabatskuri, a High Altitude Category 4 Protected Area protected by Georgian Law, in breach of the Equator Principles.

An oil spill in that area will damage the protected area and will also damage the water supply for the Capital of Georgia. In spite of being informed of all these issues some IFIs including IFC, EBRD and some commercial banks funded the BTC project fortunately others including HSBC respected the Equator Principles.

There is no point in having the Equator Principles if companies and the Financial Institutions are not willing to respect them.

7 **The presence of Mineral resources can in itself become a cause for destabilisation and conflict.**

Companies can find that they have directly helped to start a conflict which can suck them into an impossible situation. Examples are numerous including mining and oil and gas projects in Bougainville, West Papua, Sudan, Sierra Leone, Democratic Republic of Congo etc.

8 There is no reference to the UN Secretary General Special Commission on Conflict in Africa which named companies which they felt had contributed to the conflict.

Some of the conflicts were highlighted in a presentation in London in 2004 by HE Ahmedou Ould Abdallah Special Adviser for West Africa to UN Secretary General. His key points were:

Tensions in Oil Rich Areas result in:

- Scramble for highly priced oil in the region.
- Delimitation and Demarcation of Inherited boundaries
- Corrupt practices
- States weakened by over dependence on oil

This has led to disputes:

- Between governments and oil companies on contracts and revenues.
- Between governments and their populations on revenues and redistribution.
- Between States on delimitations of borders and maritime boundaries.
- Disputes between oil companies.

These disputes have led to Territorial Claims .e.g.

- Gabon and Equatorial Guinea
- Nigeria and Equatorial Guinea
- Nigeria and Sao Tome and Principe

9 Disputes occur within countries as well as on the borders of countries

In the case of a number of countries including Sudan and Nigeria the border disputes are not simply at the National level with other countries but they are also internal at State and even local government levels. This can seriously affect companies operations

10 Section 11 Obeying the Law and observing international standards

Would you please remove the words “applicable and relevant” from the whole guidelines.

The use of the words “**applicable and relevant laws**” leaves a hole for some companies to abuse. Companies have to follow the law and not pick and chose which ones they want to follow.

One of the fundamental problems NGOs are facing is that companies do not follow laws which do not suit them (not **relevant** or are not **applicable** to them) for example;

Gas flaring in the Niger Delta Nigeria

Right from the beginning companies knew it was illegal to flare after the 5 year period of grace but they continued to flare and pay the small fines.

They did not pay the cost of the gas that they flared and \$ billions of potential revenue and a vital energy source was lost. Worse still as the Government was a 60% share in all the Oil companies the Government ended up paying 60% of the fine!

Recently a High Court Judge has at last ruled against the companies see Press Release below:

Immediate Release: Monday 14 Nov 2005

COURT CASE RESULT - OIL COMPANIES ORDERED TO STOP GAS FLARING IN NIGERIA

”In a historic judgment today, the Federal High Court of Nigeria has ordered companies to stop gas flaring in the Niger Delta, as it violates guaranteed constitutional rights to life and dignity. In a case brought against the Shell Petroleum Development Company of Nigeria (Shell), Justice C. V. Nwokorie ruled in Benin City that the damaging and wasteful practice of flaring by all the major companies, including ExxonMobil, ChevronTexaco, TotalFinaElf and Agip, as well as Shell, in joint ventures with the Nigerian National Petroleum Corporation, cannot lawfully continue and must stop.

Nigeria has been the world's biggest gas flarer, and the practice has contributed more greenhouse gas emissions than all other sources in sub-Saharan Africa combined, as well as poisoning localities with their toxic cocktail. The practice costs Nigeria about US\$2.5 billion annually, while about 66% of its population live on less than US\$1 a day.

The judge also declared the Nigerian gas flaring law to be unconstitutional, and ordered the Attorney General to meet with the Federal Executive Council (the country's highest executive body, including the President, Vice President and Ministers) in order to bring the law into line with present day practice, rules and regulations governing oil and gas activities”

11 Page 6 Human rights and management of security forces

SEAPRISE suggests that you add the following:

- Will the stationing of large numbers of security forces and their families undermine the culture and traditions of the local population?
- Will the importation of large numbers of outsiders brought in to work undermine the culture and traditions of the local population?
- Are the local population satisfied with the training and employment of local workers and with the companies plans with regard to outside workers
- Have adequately plans been made to repatriate outside or foreign workers when they are no longer needed.

12 Policies Page 9 Para 14

It is suggest that you add under policies:

- Do the company’s policies encourage the country in which they work to develop long term sustainable development plans?
- Will any of the company’s actions damage the long term sustainability of the country?

(Oil Exporting companies must avoid damage to a countries ability to provide energy for its people and they must play a great role in helping developing countries to develop sustainable systems of energy. For example pumping oil from small oil reservoirs quickly (8-20 years) from a poor developing country may leave it very vulnerable when it has exported all its oil and has to import oil at very high prices +/- \$200 a barrel.)

13 Page 12 first Para

We propose a change to the first Para.

- Does the company refrain from seeking or accepting exemptions (for example through “**Host Government Agreements**” or “**Contracts of Work**”) not contemplated in the statutory etc
- Does the company cooperate fully with the Ministries and Governments Departments responsible for Environmental, Social and Health issues and do they avoid any actions which could undermine their work.

14 Page 15 after last Para

The IUCN Commission on Environmental, Economic and Social Policy is extremely keen on building up the Capacity of Civil Society to monitor the operations of Extractive Industries. A very good model is the Alaskan Prince William Regional Citizens Advisory Council. See Web page <http://www.pwsrcac.org>.

It is therefore proposed that you include:

- Is the Company willing to work with others to finance Independent Citizens Councils on the lines of the Alaskan “Prince William Sound Regional Citizens Advisory Council” which was set up after the EXXON Valdez oil spill? It is financed by the Oil Industry and now employs 13 professional staff. They monitor the impact of the Oil Industry in Alaska and provide high quality reports to companies, government departments, US Coast Guard and civil society organisations.

Note: These draft notes are prepared by members of SEAPRISE the Working Group on the Accountability of the Private Sector and they do not necessarily reflect the official position of IUCN or its Commissions.
www.iucn.org

International Alert

For comments from Global Witness, International Alert and the Netherlands institute for Southern Africa(NiZA), please refer to the entry under Rights and Accountability in Development.

International Business Leaders Forum, United Kingdom

The Prince of Wales International Business Leaders Forum (IBLF) welcomes the opportunity to share its views on the OECD draft Risk Management Tool for Investors in Weak Governance Zones. IBLF works with multinational companies to promote responsible business practices. It does this through partnership with NGOs and public sector bodies, in particular in developing countries and emerging markets. It engages with, but does not represent, its member companies. IBLF, together with Business for Social Responsibility, performs the secretariat function for the Voluntary Principles on Security and Human Rights. IBLF facilitates the network hub for the international business coalition, Business Action for Africa, and is soon to assume the position of secretariat to the UN Global Compact UK Network. In the field of human rights and conflict, IBLF has authored of *Business of Peace* (together with International Alert and CEP), and jointly published with Amnesty International *Human Rights - is it any of your business?* and *Business and Human Rights - a Geography of Corporate Risk*.

We welcome the references to the Voluntary Principles on Security and Human Rights and Security in the text of the draft OECD draft *Risk Management Tool for Investors in Weak Governance Zones*. The Voluntary Principles are one of the few instruments currently available to guide companies seeking to protect and promote human rights when operating in weak governance zones. They have been adopted by many major extractives sector companies, who are building and exchanging experience of best practice for operating in such zones.

As others have noted, while *the draft* contains various references to relevant international instruments, it is not particularly forthcoming in identifying precisely which instruments it is referring to, or the responsibilities of companies arising out of these instruments. For example, in the context of human rights – as addressed in paragraph 12 of *the draft* – the only international human rights standard directly footnoted is paragraph II.2 (human rights) of the *OECD Guidelines for Multinational Enterprises*, which itself only provide a fleeting reference to the *Universal Declaration of Human Rights*. As it is the UN rather than the OECD that has much of the relevant expertise in this area, we believe this could be best addressed by the OECD working closely with the Special Representative to the UN High Commissioner for Human Rights, John Ruggie, who has been tasked by the UN Commission on Human Rights to take work forward in this area.

Also with regard to paragraph 12, specifically the section headed: *Human rights and management of security forces*, it is not entirely clear what definition of human rights the OECD is employing. Some would argue that a section on human rights risk ought to look beyond security management and address in similar depth investor exposure to the risks associated with such challenging areas as child labour, forced labour and indigenous peoples' rights. Moreover, whilst not IBLF's area of expertise, it is also curious that risks concerning the weak governance of environmental matters are not given greater prominence.

In conclusion, key to the effectiveness of the tool is whether and how it will be used by investors. We would therefore like to hear in due course what steps the OECD and its member States intend to take to promote the tool among investors. Clearly the OECD has a particular role in promoting the tool to companies headquartered in OECD member countries and to non-member adherents to the OECD Declaration on International Investment and Multinational Enterprises. However, as multinational enterprises from other countries are becoming increasingly important actors in weak governance zones, we would also encourage the OECD and its member states to promote the tool to these enterprises also."

IBLF, 22 November 2005
www.iblf.org (www.csrforum.org)

International Chamber of Commerce

Contribution by François Vincke, Anti-Corruption Committee

I will try hereunder to answer the various questions of the questionnaire on the management tools for investors in weak governance zones.

I do this in my capacity of a former oilman, a lawyer and a person who has participated twice in a “mission” trying to convince the Congolese business world and officials to adopt and apply a Reform Program. In addition, I am chairman of the ICC Anti-corruption Commission.

1.- Obeying the law and observing international standards.-

- It is important that the investors try to be as law obedient as possible under the given circumstances, even if it is not possible to apply conflicting laws and regulations in countries with a territory divided in different “influence zones” with opposed clans (e.g. Angola during the long years of the civil war between the three fractions FNLA, MPLA and Unita), often corporations will have to try to find a common denominator ;
- Knowing the applicable law and interpret it accurately and properly is often a tough challenge, as the texts change very often and their dissemination over the territory is problematic (e.g. in the DRC the central government did not have at a certain point of time the logistic means to publish, print and distribute the legal and regulatory documents);
- The implementation of the law can be very variable, as the courts have not so often an integrated jurisprudence and, in some instances, the judges do not show a high enough degree of independence and impartiality;
- Some regulations can, if applied literally, become anti-economic, e.g. medical and sanitary assistance to be provided to the “enlarged” African family can become a huge strain on the budget;
- In front of these obstacles, the corporations will rarely find practical help in the “relevant international instruments”, as they are mentioned in the questionnaire and will need to define precise self regulatory rules in the codes of conduct, applicable across the whole organization, which have to try to reconcile as much as possible the conflicting requirements existing in the host country;
- They will have to discuss, through local and regional networking, these rules with other local and/or foreign investors active in the area and confronted with similar situations or with colleagues in national, regional or sectoral business federations;
- The host country should try do the utmost to exclude from its legislation provisions which are anti-economic, like a dissuasive taxation on the contribution of share capital in a corporation or high export taxes.

2.- Human rights and management of security forces.-

- I have always considered that the safety and well being of the expatriate and local employees working on an exposed location was the utmost priority for an employer and part of his obligations resulting from the contract of employment; based on an evaluation of the security risks, in (civil)

war zones, evacuation plans will have to exist, be discussed with the authorities/diplomats of the home country and will have to be continuously updated;

- A corporation rarely has the possibility to know fully or in detail the human rights situation of a host country, but can locally have some indications;
- As a matter of fact, the company has the obligation to respect human rights within the perimeter of its pay roll and with its contractors and sub-contractors;
- The possibility for a corporation to intervene in cases of non-respect of human rights outside its (extended) pay roll is limited, but it can inform/warn its foreign and local colleagues of any recurring occurrences, it can inform its local or sectoral federations, NGO's or the diplomats of its home country;
- I am not aware that security forces may have had a negative impact on the respect of human rights.

3.- Mitigation of social / environmental impacts of the corporation's activities.-

- I have not seen any large movements of population as the result of an investment; the negative impact of oil producing wells can be fairly easily repaired; on the other hand, leaking pipe-lines can be very detrimental to the environment (in poor countries pipe-lines are leaking because they are not frequently repaired or because they are tapped by the local population for own consumption). In general, the industry is making huge efforts for mitigating the damage.

4.- Combating corruption and money laundering.-

- The 1997 OECD Convention and the national implementation laws have been a turning point in matters of international corruption, even in areas of weak governance zones; the same is true for the 40 + 9 recommendations of FATE, even if the practical mechanisms to detect suspicious transactions are evaluated as very expensive; in the latter case, the reputational risk is considered as too enormous to be taken;
- I perceive a new trend which consists, in highly exposed areas for instance in Africa, to create zero tolerance perimeters, based on the idea that, particularly in these areas, it is difficult to make the distinction between "petty corruption" and "grand corruption";
- There is a growing trend to pay much more attention to the designation/renewal of intermediaries or agents, whereby one uses also more frequently "red flags";
- On the other end, I do not see very much evolution in the keeping of (central) lists of agents or intermediaries.

5.- Heightened managerial care.-

- I am puzzled by the concept of "heightened managerial care", because it leads to the idea that some areas would only deserve to have a lessened or moderate level of managerial care, which is probably not the intention, I suspect that it will be difficult to define what is the "normal managerial care" and what is the "heightened managerial care";

- I have tried to find the answer in the DeBeers submission, but found no indication to the concept in their submission³;
- I would rather give preference to the idea that all areas, regions, activities should be subjected to the same high level of managerial care;
- One should be aware that communication of information out of weak government zones can be very difficult (e.g. communication in good time of accounting data for consolidation purposes in the accounts of the ultimate mother company), this may lead to delays in the information provided to the shareholders.

6.- Political activities.-

- I wish to remind the reader that it was originally the involvement of ITT in the overthrow of the Allende regime in Chile which brought about the movement to “regulate” the behaviour of the multinationals⁴;
- The fear for any interference in local politics appears from the first article of the draft UN Code of Conduct of the UN of 1976 (“The multinationals should not interfere in the national politics of the home country”)⁵;
- Admittedly, things have changed since that time, but one has witnessed not so long time ago political interferences of European multinationals on the African political scene, which were, to say the least, not generally considered as acceptable;
- As a result, I would caution against active involvement in any political activity and in any case in any partisan activity;
- One way to avoid abuses, could be for foreign investors to conclude multi-sectoral, regional or sectoral alliances of enterprises to promote non-partisan, democratic ideas (a bit as economiesuisse does for the Swiss enterprises in Switzerland, specially in relation with referendums).

7.- Speaking out about wrongdoing.-

- It is indeed difficult for enterprises to speak out about wrongdoing. This is the reason why the International Chamber of Commerce is proposing to create within its London office “Commercial Crime Services” a facility to which enterprises could turn to communicate solicitations or extortion from foreign officials, in order to have these made known in a non-identifiable manner; one could adapt the ICC proposal to cover not only solicitation of bribes but any kind of wrongdoing.

³ OECD Risk Management Tool for Investors in Weak Governance Zones, Responses received in public consultation, November 23, 20005, p. 22.

⁴ Dominique Carreau, Patrick Juillard et Thiébaud Flory, “Droit international économique », L.G.D.J., Paris, 1980.

⁵ Guy Pevtchin, “Les codes de bon comportement , notamment dans la gestion des sociétés multinationales », in L’hypothèse du non-droit, XXXè séminaire organisé par la faculté de droit, d’économie et des sciences sociales de l’Université de Liège, CDVA, p. 61.

8.- Business roles in weak governance societies.-

- I have said it above, I am not very favourable to direct political action, but I can see the merits of a broad based medium-term reform program presented by the industry or a segment thereof;
- This was specifically what we tried to do (within the framework of the Fédération des Entreprises de Belgique with the Fédération des Entreprises du Congo) in the DRC: a list of essential points of reform and modernization to be implemented by the Congolese government. Some points of the program were realised.

----- 05/01/06

François Vincke
Anti-Corruption Committee
International Chamber of Commerce
www.icc.org

International Committee of the Red Cross

Please find herewith the draft OECD Risk Management Tool for Investors in Weak Governance Zones, with comments from the International Committee of the Red Cross (ICRC) included directly in the text, in Edit mode. *Please note that this response is available as a separate document on the web page for the public consultation at www.oecd.org/daf/investment/guidelines.*

We think this text is likely to become a useful tool with an interesting potential in terms of managing the heightened risks encountered in weak governance zones and facilitating heightened care by companies investing in these zones. Ultimately we hope that the OECD Risk Management Tool... will encourage responsible investments that will durably improve the well-being of citizens in weak governance zones.

As an organisation with a mandate to protect and assist persons affected by conflicts and promote/disseminate international humanitarian law (IHL), we would strongly suggest to widen, or rather precise the definition/framing of what are 'weak governance zones' in order to include situations of armed conflicts. 'Weak governance zones' are indeed often zones where armed conflict do take place, and vice-versa.

Explicitly including armed conflicts as situations that may at times be constitutive of, or cause for 'weak governance zones' would automatically draw in the text the body of law that applies in situations of armed conflicts: IHL. That would make it possible to draw the attention of all state and non-state actors investing in 'weak governance zones' on their obligations to know and respect IHL when such zones are affected by armed conflicts.

We think this is all the more necessary to introduce armed conflicts as one potential characteristics of 'weak governance zones' from the onset that the word 'conflict' appears here and there in the lists of guiding questions that are proposed later in the draft text. An early clarification in the first paragraphs (definition of subject) would be helpful also for the readers.

This central suggestion triggers then most of the other suggestions made in the text, that are of a more 'technical-legal' nature.

We hope these comments are useful. We naturally remain at your full disposal for further explanations or clarifications if need be.

And above all we thank you warmly for drawing our attention to this draft text and soliciting our opinion on it.

With our best regards,

Emanuela Gillard, Legal Division
Claude Voillat, Private Sector Relations Unit
International Committee of the Red Cross
www.icrc.org

International Confederation of Free Trade Unions (ICFTU)

I – Overall general comments:

1. Generally speaking the document relies too much on highly questionable stereotypes. Throughout the document, a lot is said about corrupt governments, while investors are presented as “willing to obey the law and respect international standards”. However this underlying dichotomy (good investors versus bad governments) is far from reflecting the reality of weak governance zones (WGZ). Precisely because law enforcement is often nonexistent in these zones, they are particularly attractive for those companies willing to escape what they consider to be overly burdensome legislation in countries with a higher level of governance. Needless to say, these regulations often relate to fiscal, social and environmental norms and standards. Therefore it would be important to mention in the introduction that unfortunately, abusive companies taking advantage of the absence of effective regulation are to be found in WGZ.
2. The OECD Risk Management Tool only focuses on one aspect of the governance crises – those good governance deficits that are of most importance to investors. Not as clearly appreciated is that the extent of the positive contribution that FDI could make to social and economic development is also affected by good governance deficits. These deficits would include labour market regulation and the institutional framework for industrial relations. They are insufficiently addressed in this draft.
3. On the positive side, the issues raised in the document (formulated as a list of questions addressed to companies) are certainly relevant. The risks have been correctly identified and the questions do appear to correspond to the reality of weak governance zones. The central place given to the OECD Guidelines for Multinational Enterprises is welcome. In that regard, we would propose that adequate reference further be made to the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, in particular in paragraphs 4 and 12.
4. More controversial is the question of whether this document can be considered as a tool. The ICFTU could not agree more with the affirmation that “heightened risks” encountered in weak governance zones (e.g. in relation to corruption and human rights abuses) create a need for “heightened care” in ensuring that the companies comply with law and observe relevant international instruments. But we are doubtful as to whether the current document actually provides sufficient elements to establish an adequate “heightened care” system at the company level.
5. The OECD itself describes the tool as a list of questions companies might ask themselves when investing in WGZ. The OECD defines risk management as “systematic application of management policies, procedures and practices to the tasks of identifying, analyzing, evaluating, treating and monitoring risk.” In our view, if this document is to be an effective tool, it needs to go beyond the identification phase, especially concerning the issues raised in chapter 2 (“obey the law and respect international standards”). However we recognize that an effort has been made in Chapter 3 (“heightened managerial care”) which gives some basic inputs on how to “treat” the identified risks.
6. Therefore the ICFTU would insist that a tool should encompass more guidance on how to deal with the correctly identified problems that companies may be confronted with in WGZ.
7. In this regard, the ICFTU considers that there is a “bottom line” below which this document could not be considered as an operational tool. In our view, a tool should at last include the following elements:

Section 2 (“*Obeying the law and observing international standards*”)

To palliate the low level of enforcement in WGZ, a heightened care system must include internal company mechanisms (e.g. rules, procedures or practices) aiming at:

- collecting information on the level of compliance with international standards
- Achieving compliance with international rules (especially with regards to social and environmental standards)

Section 3 (“*Heightened managerial care*”)

A “heightened care” system must include heightened disclosure of information. In particular, in line with the OECD Guidelines, companies should report and disclose information on non financial issues including social and environmental concerns.

II – General comments by section:

Detailed comments and drafting suggestions by section are available as a separate document on the web page for the public consultation at www.oecd.org/daf/investment/guidelines.

International Labour Organisation

Overall, the tool provides useful and important guidelines by which investors can ensure that their activities in weak governance zones lead to sustainable development. I appreciated the emphasis on the need to comply with relevant international instruments. In particular, it was encouraging to see mention of the ILO's Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (MNE Declaration) and the Tripartite Declaration of Fundamental Principles and Rights at Work as relevant international instruments.

I believe that the tool could be strengthened if it addresses further three issues:

1. Based on our work in promoting the MNE Declaration, it would be useful to highlight the need to build partnerships and engage in dialogue with relevant stakeholders, in particular national trade unions and employer organizations. This aspect is touched upon briefly in para 12 but the partnership and dialogue aspect could be more emphasized particularly under the question 'What actions does the company take, to assess and, where appropriate, mitigate the social and environmental impacts of its activities?'
2. Under Chapter III 'Heightened managerial care' it would be useful to ask the question 'Does the company consult with worker representatives or the worker organization on the design and implementation of the internal company controls?'. This question can be important as many of the questions under the Chapter concern employees.
3. Under Chapter VII 'Business roles in weak governance societies - a broadened view of self interest' , the issue of supporting the development of host country professional and business associations is highly appropriate. It might however also be useful to highlight the importance of foreign investors making use of local suppliers, subcontractors and employees to the greatest extent possible. These linkages with the domestic economy can play an important role in ensuring that MNE activities have the buy-in of the local population while playing a role in local economic and social development

More specifically, in para. 4, it states that 'The evolving framework of international instruments provides guidance in such areas as respecting human rights, combating corruption, disclosing information and protecting the environment.' It will be useful to include also 'labour issues' in this sentence.

I hope you will find these observations useful in the important work you are spearheading. Best regards,

Kee Beom Kim
Technical Officer
Multinational Enterprises Programme
International Labour Office
www.ilo.org

Mining company with operations in sub-Saharan Africa

In going through the draft text, it was hard to make too many comments – a lot of work has been put in by others and it seems to cover most issues that I could think of. A few comments I do have that might be considered are:

Article IV – Political Activities;

- that investors take particular efforts to be well documented in their communications with political officials. For us, we made sure we prepared minutes for most of the key meetings we had with officials over the course of our negotiations. From time to time we would provide the other party with these records of the meeting if issues arose, and in one circumstance it was very helpful to be able to quickly provide one of the senior politicians with a list of the dates of the numerous meetings we had with the State mining company to counter false accusations by others to keep things clear.
- provide short executive summaries of your project, business plan or issues to the senior politicians, again to keep the facts straight, and in situations where there is a coalition government, use best efforts to provide the same information to each competing party for maximum transparency.

Article VI - Speaking out about wrongdoing:

- My biggest issue in our experiences in sub-Saharan Africa were the fact that Western companies have a strict code of conduct, corruption protection laws, public reporting disclosure obligations etc in pursuing our business efforts, whereas there were many other national companies competing against us with no obligations or constraints. In the DRC where economic relief programs will only be successful if large responsible industrial development progresses, we would have expected the IMF/World Bank to have taken a heavier hand on requiring/encouraging the politicians to keep a level playing field, using the IMF/World Bank funding as the leverage. This did not appear to happen and unchecked action by foreign competitors (Russian/Israeli, Lebanese, etc) caused us many problems over time, in particular putting pressures on our assets related to the illegal cobalt trade and delaying our project from advancing.
- We did our best to elevate the visibility of these issues regularly with the Canadian and American embassies and the UN Monuc chief representatives who were helpful, but frankly we saw little if no support from the World Bank representatives despite the positive/crucial role that western developers can have in support of IMF/WB rebuilding initiatives.

Article VII – Business Roles in Weak governance societies

- There is a need to educate key politicians and other authorities in weak governance to help them govern better – for instance many such countries appoint Ministers of Mines who have never seen a proper mine, so they have never seen high standard environmental, safety, social and technology programs and facilities in order to appreciate what standard of investment should be encouraged/required in their country. As long as such trips funded by investors are at cost, and in the spirit of technology and business practice transfer, then there is a positive role for this type of investment. Workshops organized by Investors for government authorities as a way to communicate positive experiences from other developing countries could also aid in better governance.

Netherlands institute for Southern Africa(NiZA)

For comments from Global Witness, International Alert and the Netherlands institute for Southern Africa(NiZA), please refer to the entry under Rights and Accountability in Development.

Octech Associates, Australia

OVERALL COMMENT

Philosophically, the matrix asks some relevant questions that business must look at before working in a country with a weak governance structure. Whether businesses do ask themselves these questions is up for debate and it depends on the organisational structure and philosophies of the organisation. Large companies (multinational) may have more available capital to invested in answering the questions while small to medium size enterprises have a much more limited budget. I also wonder about the requirements of national businesses as these can be required by culture or family or tradition to work with different set priorities than an international or inter regional business.

I think there also needs to be some assumptions made for business to be able to operate. These are:

- That is there some form of Government and regulations however tenuous
- There is some basic law and order and legal system in the country
- There is a willingness (however small) for businesses to work in the country
- Support for the development of a business sector from the IFI's and other international organisations

LOOKING AT SPECIFICS

Human Rights and Management of Security - Where human rights are concerned it is a matter of operating under relevant conventions etc of the country in which the business is registered rather than the host country. Many countries with weak governance sign conventions etc as a way to increase their aid budgets or keeping donors happy without necessarily having a strong commitment to Human Rights. If the international business can operate within the conventions signed by their own governments, they can have some leverage at least within the communities they are operating in and within their own staff. Care must be taken to ensure that policies enacted do not disadvantage the target group they are trying to support e.g. pro women agenda has been shown in some cultures to lead to an increase in domestic violence against the women and children. (I can supply an example for you if required).

Security is a very different element of the equation and needs to be considered at various levels. Whilst in the ideal world it would be good if the same security requirements apply for all staff nationals and internationals, however in reality this is not so. In looking at the issues associated with security for businesses it goes beyond human and infrastructure. There is also information and asset security and business confidentiality to be considered.

Human Security of national staff is different to international staff and they face different pressures and dangers. National staff face the direct pressure of corruption, extortion and bribery that may not be applied to internationals. This can come from family members, government officials or tribal connections and can have direct consequences on them personally or their families.

Often they have less protection than international staff unless deemed as key staff. In the case of evacuations they are often left behind to watch the business. This places them at considerable risk particularly if the country is anti western or anti business.

International staff may face the risks of kidnapping and murder and more indirect corruption, extortion or bribery. Businesses often provide considerably more protection for international staff and their families than national staff and their families. When looking at human security in an ethical and cost effective manner consideration must be given to both levels of employees to ensure their safety. It does not mean it has to be the same as the threat maybe different, it just needs thought and a clear understanding of the risk levels and appropriate actions to be taken in different circumstances. Professional assistance is worth considering.

Another element of human security is that of the community in which the business is working. The community may face threats from outside or even within the community structures. Know the culture and traditions and work with them. Again a different level of threat and consideration should be given to their protection in case of conflict.

Corruption - Where corruptions, bribes or extortions are concerned it can be extremely difficult to do business in situations where these are an expected part of the culture and not adhere to them e.g. gift giving or expensive dinners are considered a legitimate part of business in some Asian societies and not to adhere to these makes life difficult.

It should be noted that bribes etc are often required by the Government to get things done. This can be a simple cost for processing a license (above the government cost) or it can be sponsoring a Minister's daughter to university in a Western country. Often Government officials are not paid (Government does not have the money or have used it for other purposes) and this is their way of survival. National employees are particularly vulnerable to these practices however it happens at all levels of the organisation. Where an international staff member may not get the required service or get it very slowly. If the bribe etc is not paid the punishment can be much more extreme for the national staff member e.g. beatings of family or themselves or in some cases even killing can occur. With the question of whistle blowing, it is very difficult to implement and safe guard staff. Companies can have policies and procedures but national staff will not usually use this mechanism. It is more likely that they will tell management over a cup of tea or in a more relaxed format once trust has been developed. How management reacts is the most important element. Confidentiality must be adhered to and no action taken without the express permission of the national staff member. For international staff the process can be more in line with head office procedures; however care must still be taken in the areas of confidentiality.

I have noticed that while these incidents can be reported to international entities, governments both home and host governments very rarely take any action. Unless the whole system is tightened and some redress is taken I am not sure it is in the best interest of business to act. One organisation I worked with in a weak governance zone simply built into their budget a figure for corruption.

Employment Declarations - In the use of subcontractors or even in the general recruitment policies it is very difficult to know who is related to whom, who is in the same tribal setup or village structure. For business to adequately screen all sub contractors, agents, etc it is time consuming and expensive. A declaration can be signed however if the legal system is not in place to uphold it, it has a value. I agree policies should be in place for declarations, however I also know how hard it is to enforce the policies.

Policies – While head office should set the parameters of policies and procedures, there must be an understanding that these are guidelines and may need to be modified to suit the cultural dimensions of the country. The host countries policies must reflect the philosophies of the head office and where applicable reflect the conventions etc signed by the host country. It is often very difficult for businesses to implement standard policies in a country with weak governance.

Management – One of the challenges in working in countries with weak governance is the lack of human resource capacity. While companies may bring in key international staff the majority of employees will be national. In looking at the governance issues of the organisation it is important to look at the capacity of staff to implement them.

Internal and External Audits are not an established function of many national business or governments. External auditors can be unreliable, difficult to attract to countries in conflict, lacking in skills or corrupt themselves (I can provide an example if required) and this throws a different light on the process of auditing. If internal auditing functions are used to improve the overall business management of the organisation and not as a discipline tool they can have a positive impact on businesses, however they are a very necessary tool in whatever form employed.

Speaking up is not a cultural norm for many countries with a weak governance structures, in fact it can get staff into a lot of trouble and danger. The development of trust between management and staff is the best way to implement polices and ensures that reliable information is exchanged in a confidential and free manner.

Involvement with Politics – If one looks at this issue from a view of civil society with a three tiers structure, then business has some responsibilities in the equation. This does not mean direct intervention in government; however where the government is weak in certain areas, business often steps in e.g. direct service provisions. Business has a responsibility to be available for consultation by Government on relevant issues associated with their operations in the country e.g. regulations and an obligation to abide by the systems of the country e.g. taxation or labor laws (if there is any system). Business can also in a limited way support the development of the second tier of civil society which is the civil society organisations and national NGOs. Business can provide examples of best practice in governance etc and can actively support the development of business associations with relevant training and capacity building opportunities. One area when multinationals could play an active role is the mentoring of national businesses or business men and women to provide guidance and support in operating in an ethical manner.

Conflict of Interest - A difficult concept at times. Multinational companies have a responsibility to try and restrict or declare any conflicts of interest to Board Members, Regulation bodies etc. However, what the western eyes sees as conflict or interest may not be seen by national eyes in the same light. One function of the Internal Audit unit maybe to discuss with staff and monitor this aspect of business.

In looking at the tool overall, there needs to be an awareness of the requirements of an extensive risk assessment in all elements of the operations to try and mitigate the risks or at the very least know what they are. This paper provides an outline of some of the issues and questions and as such is very valuable. I wonder how the OECD is going to monitor its implementation, measure the success and report what business is actually doing in the areas described in this consultation paper.

Overseas Development Institute, United Kingdom

Overall - Excellent draft document, well targeted, and short which is helpful to companies.

1. ***Obeying the Law***

Could not there be an annex listing the relevant international instruments. Bullet 1 under General is a little vague.

You must be clear about whether you are referring to (a) human rights abuses or the (b) the 48 articles in the UN human rights declaration. These are different things. If you are focusing on security then you must be referring to human rights abuses (as suggested by the language 'human rights record'). Don't let this tool get mixed up with the debate on a 'rights based' approach to development/investment, which is something entirely different.

I liked the emphasis on security.

2. ***Heightened Management Care*** - a little weak, not sure that what you saying that is 'new or different' from what companies do already. Can you not be explicit about how companies should modify their internal risk (and opportunities) systems to continually scan for and manage the types of risks that are more apparent in weak governance states.

3. ***Speaking out about wrongdoing*** - something more perhaps on companies modifying their Disclosure Policy so that it is clear to all in what circumstances they will disclose information about rights abuses.

4. I wasn't taken with the language about '...the company might want to ask itself the following questions' - should a little weak, could you not just say 'Issues for Consideration'

*Dr Michael Warner, Programme Director
Programme on Business and Development Performance
Overseas Development Institute
www.odi.org.uk*

Partners in Change, India

Whilst I am in agreement with you that 'corporate responsibility goes hand-in-hand with government responsibility, as also your definition of 'weak governance zones as investment environments in which governments cannot or will not assume their roles in protecting rights' (presumably of both, its most vulnerable citizens as well as those of investors).

The latter definition requires further elaboration to take into account-

- 1) Situations where the investment itself is a contributing factor in weak governance, through either the government reducing standards (for e.g. labour and environment related) to attract investments under pressure or at the behest of TNCs/large Domestic companies, either because of their unwillingness or inability, depending on the specific country context. The statement contained in point #4 of the Introduction, that 'investors will want to obey the law and to observe established international concepts and principles in their global operations, including in weak governance zones', is at best a hypothesis for a very few leadership companies, and can easily be countered by a long list of specific examples to the contrary by most developing countries. It would be helpful therefore to consider the introduction of a requirement for Companies to review/disclose the impact of their lobbying positions in respect of the provisions of international CSR norms.
- 2) Criteria and Classification of 'weak governance zones'- it would be helpful to articulate further the very wide definition (government failures leading to broader failures in political, economic and civic institutions), by providing, for example, symptomatic indicators against the appropriate 'rights' that is the primary duty of the State to ensure, protect and preserve. Further, some reference to specific weak governance criteria and indicators (e.g. the risk assessment Tool launched by the Danish Institute of Human Rights) ,and, even if the OECD doesn't itself wish to do so, country classification. as an example, the Amnesty/IBLF document on Business and Human rights- a geography of corporate risk. it would also be helpful to recognise that in many countries (India is a good example), governance standards vary enormously across regions within the country.
- 3) Role of the Governments vis a vis CSR; would be helpful to articulate more fully the roles of governments in promoting responsible business, and these include (ref. the IIEd framework for the World Bank's CSR Practice); mandating, facilitating, partnering and endorsing- we have suggest a fifth category, viz. demonstrating.
- 4) Whilst we recognise that the 'Mission of the OECD Investment Committee is to enhance the contribution of investment to growth and sustainable development', I fail to see how we can ignore reference the crucial role of Trade/WTO issues in the context of (a weakening of) state sovereignty and sustainability/poverty.
- 5) Would recommend the inclusion of robust and transparent stakeholder engagement category under the list of topics, as a potent means of reducing the effects of a weak or unwilling government, by a Company strengthening and supporting genuine multi-stakeholder dialogue with its stakeholders, particularly thos from amongst those most at risk or vulnerable to corporate impact.
- 6) The format of the Tool, rather than a series of questions, should be positioned as a series of questions against a set of suggested indicators; companies are accustomed to using a balanced scorecard.

*Viraf Mehta, Chief Executive
Partners in Change
India
<http://picindia.org/>*

Reliance Industries Ltd, India

The nitty-gritty, primordial, belief for all involved in financial markets today, notwithstanding the company or country, must be to maintain high scruples – legal, regulatory, and ethical – that breed trust and confidence. It is a actuality that capital will dodge, duck, elude, environments that are unstable or unpredictable – whether that's a function of slipshod, sloppy corporate governance, ineffective accounting standards, a lack of transparency, or a weak enforcement regime. Investors must see for themselves that companies are living up to their avocation and embracing the spirit bedrocking all securities laws.

In my 25 years experience promoting investments , I have seen Institutional investors frequently claiming that they avoid firms that are poorly governed, particularly when it comes to investments in poor governance foreign countries. Similarly, government officials and securities regulators often express concerns that hinders such risky foreign investment and may in turn impede financial development. An information asymmetry prevails with respect to local governance structures and their expropriation potential, which require an in-depth understanding of institutional arrangements and business norms. In many poor governance countries, financing arrangements, business transactions, and corporate governance are shaped not by arm's length dealings, but by relationships (such as political connections, board memberships, and private gatherings of the business elite).

Understanding these relationships requires an intricate social knowledge, which foreigners are less likely to have. These information asymmetries can give rise to an adverse selection problem when investors transact in foreign markets.

In this context, the OECD Risk management Tool for Investors in Weak Governance Zones , will serve a very useful and pragmatic purpose.

*Mohan Murti
Chief Representative -Europe
Reliance Industries Limited, India &
Member of the Board of Shareholders,
TREVIRA GmbH, Germany*

Rights and Accountability in Development

Comments from Global Witness, International Alert, the Netherlands institute for Southern Africa(NiZA) and Rights and Accountability in Development (RAID)

Overview

We welcome the initiative by the OECD's Investment Committee to strengthen guidance for companies that are operating or considering operating in 'weak governance zones' by developing a Risk Management Tool. The current draft is significantly improved from earlier documents in its direct inclusion and expansion on security and human rights dilemmas confronting companies in such situations. It also benefits from reference to other sources of OECD expertise relating to such situations, namely that emanating from the Development Assistance Committee, and other external sources of guidance such as the Voluntary Principles on Security and Human Rights.

The Risk Management Tool (RMT) is a response to the concerns voiced by non-governmental organizations (NGOs), many of which are members of OECD WATCH, about the activities of OECD-based companies in countries like Burma and the Democratic Republic of the Congo. The Investment Committee has developed the tool as a way of helping investors deal with the risks arising "directly from government failure – e.g. widespread solicitation, extortion, endemic crime and violence, abuses by security forces and violations of the rule of law" (paragraph 3). In order to help investors deal with these risks, the Investment Committee is "calling to their attention the guidance contained in OECD integrity instruments and the findings of the broad-based consultations the Committee has conducted on this issue". The creation of the RMT also reflects a recognition among the Group of Eight (G8) and other OECD governments that corporate activities in weak governance zones can directly or indirectly, or through negligence or ignorance, contribute to human rights abuses, particularly in countries where weak governance is largely a result of war, conflict over natural resources, and/or repressive and corrupt regimes.⁶

This point has been raised a number of times with National Contact Points (NCPs) and affirmed in consultations with the Investment Committee. For example, the Chair's Report for the 2004 Annual Meeting of NCPs states: "Business' role in the protection of human rights has arisen on several occasions in the context of Guidelines' implementation – including recent work on the Democratic Republic of Congo. NCPs acknowledged that this was an area on which some might criticize the Guidelines for not being sufficiently explicit or detailed".⁷

We feel that, against the backdrop of ongoing and widespread concern about the impact of certain OECD investments in weak governance zones, the draft RMT does not adequately reflect and address companies' direct or indirect roles in human rights abuses, including economic, social, cultural, political and civil abuses, and conflict, being more concerned with the reputational risks posed by operating in a context of governance failures. While the format of a series of "questions that companies might ask themselves when considering investments in weak governance zones" may be a useful one from the risk

6 It is notable that the reference in Paragraph 6 to the UN Panel's findings on illegal exploitation in the Democratic Republic of the Congo has been deleted. Furthermore, the draft RMT also does not include any reference to the IC's report entitled "Multinational Enterprises in Situations of Violent Conflict and Widespread Human Rights Abuses".

7 Report by the Chair, "OECD Guidelines for [MNEs]: 2004 Annual Meeting of the National Contact Points", p. 23: <http://www.oecd.org/dataoecd/5/36/33734844.pdf>

assessment perspective, it also runs a risk of implying companies have a choice on whether to operate in a manner that is consistent with international human rights instruments.

To counter this implication, on some of the most sensitive human rights-related issues (or when the answer to the questions posed is a resounding ‘no’), the RMT should:

- emphasize companies’ responsibility to operate in a manner that is consistent with international human rights instruments; and
- elucidate the key international human rights instruments that can help guide companies’ behaviour when operating weak governance zones.

Below we offer several recommendations that we believe will strengthen the effectiveness of the RMT and better respond to respond to the Group of Eight leaders’ 2005 Gleneagles Summit Communiqué, which calls for “developing OECD guidance for companies working in zones of weak governance.”

With regard to the overall status of the RMT vis à vis the *OECD Guidelines*, we regret that this is not fully articulated. The OECD should make clear that failure to adhere to the best practice advocated by the RMT will be sufficient grounds for complaints to the National Contact Points. We feel that it would be in keeping with the request from the G8 Communiqué for the RMT to be translated into concrete guidance on these issues by being formally appended to the text of the *OECD Guidelines*, as a Recommendation, or at least incorporated into the Commentary.

One startling omission in the document is the failure to spell out what companies should do if they find the answer to the questions posed to be negative. The implication is that companies will face increased risk if they decide to invest in such situations. But this is not sufficient. We believe the OECD should make clear the circumstances in which a company should disinvest or postpone investing. As Human Rights Watch has stated elsewhere:

*In some rare cases, companies cannot avoid the taint of complicity in human rights violations: their activities are inextricably intertwined with the abuses, the abuses are gross, the corporate presence either facilitates or continues to benefit from violations, and no remedial measure exists to mitigate those abuses. This amounts to inappropriate corporate presence, meaning that a corporation should not operate in a particular area because of its unavoidable, negative impact on human rights.*⁸

Finally if a company decides to operate in a weak governance zone without using the RMT or employing heightened due diligence then OECD governments should state openly that such negligence constitutes a reckless disregard for accepted international standards of corporate behaviour.

I. Introduction

In paragraph 4 there is a reminder about the existence of ‘declarations, conventions and guidelines’ that set out ‘agreed concepts and principles for business conduct’ which provide guidance to companies in the areas of human rights, combating corruption, information disclosure and environmental protection. Some are addressed directly to companies; others create obligations for signatory governments. The formulation ‘Investors will want to obey the law and to observe established international concepts and principles in their global operations including in weak governance zones’ is inadequate and may give rise to confusion. We therefore recommend that the text should be amended as follows:

⁸ Human Rights Watch, *Sudan, Oil and Human Rights*

Investors are obliged to obey the law and to observe established international concepts and principles in their global operations including in weak governance zones.

We welcome the acknowledgement in paragraph 5 that ‘the principal distinction between investments in weak and in stronger governance host countries lies not in differences in the concepts and principles that apply to managing them, but in the amount of care required to make these concepts and principles a reality’. ‘The “heightened risks” encountered in weak governance zones in relation to corruption and human rights abuses create a need for “heightened care” in ensuring that the company complies with law and observes relevant international instruments.’ This was a clear conclusion of the Investment Committee’s consultations:

Some might say that it is impossible to respect international standards (e.g. on human rights, anti-bribery and corporate governance) in weak governance zones, but this was not the view of consultation participants. On the contrary, they stressed that it is in weak governance zones that these standards become doubly relevant and useful – they help frame and provide boundaries to corporate responsibilities in countries where the legal framework is not operating well. One business participant states that “... not only is adherence to international standards sufficient, but clear internal guidelines and support should be given to management and staff deployed in such zones.... It is essential for companies to ensure that their own standards of operation are emphatically consistent – whatever the state of governance... in the regions in which they conduct business.”⁹

II. Obeying the Law and Observing International Standards

In paragraph 11 the draft states that companies are expected to obey the law and ‘to observe relevant international instruments’. We recommend that the document should adapt the following quote from the Report of the Commission for Africa:

Where there are no laws to govern the actions of multinational extractive companies, codes and norms should be used to set standards for behaviour¹⁰

Obeying the domestic laws and regulations of host countries is the minimum expected of an OECD company but when these clash with a fundamental human rights principle then the company would be expected to act in a way that conforms to international human rights standards. But requiring companies to adhere to supranational standards does not mean that they should disregard or contravene national law, but rather they should do more than simply meet domestic legal requirements when these are silent or else fall short of the principles and standards set out in the *OECD* instruments and international human rights documents.

To help avoid situations where company investments can exacerbate security and human rights problems, further clarity on the international laws that companies need to keep at the forefront of their investment decisions would be useful. There are seven core international human rights treaties and six optional protocols, which form the basis of international human rights law. In addition to these core instruments, there are 90 instruments listed on the Office of the United Nations High Commissioner for Human Rights website, many of which contain principles and standards that could be applicable to companies’ activities in weak governance zones and high risk areas. These should be referenced in paragraph 4, page 4 and listed in the Annex - *Glossary of Selected Terms* under ‘Relevant International Instruments’.

⁹ OECD Conducting Business in Weak Governance Zones: Lessons Learned – Summary of consultations April 2005

¹⁰ Commission for Africa, *Our Common Interest*, March 2005; Chapter 4.4.173

Complementary assessment tools have been developed by NGOs in the past year that could also be referenced, in line with the proposal made at a recent consultation between NGOs and NCPs in Paris, 23 September 2005, 'Guidance for Companies in Conflict Zones'. These include International Alert's *Conflict-Sensitive Business Practice: Guidance for Extractive Industries* - which includes a comprehensive conflict impact assessment tool such as is called for on page 7 and expanded on in footnote 23 – and which is also cited in the UN Global Compact *Enabling Economies of Peace: Public Policy for Conflict-Sensitive Business* report, April 2005. This could also be referenced in footnote 10. Another useful tool for assisting companies to understand whether their investment may impact negatively on human rights is the Danish Centre for Human Rights *Human Rights Compliance Assessment Tool*.

Human Rights and management of security forces

According to the Office of the United Nations High Commissioner for Human Rights, a company is complicit in human rights abuses if it authorises, tolerates, or knowingly ignores human rights abuses committed by an entity associated with it, or if the company knowingly provides practical assistance or encouragement that has a substantial effect on the perpetration of human rights abuse. The participation of the company need not actually cause the abuse. Rather, the company's assistance or encouragement has to be to a degree that, without such participation, the abuses most probably would not have occurred to the same extent or in the same way.¹

Encouraging companies to follow best practice through reflecting the *Voluntary Principles on Security and Human Rights* is a welcome addition to this tool, as are specific questions relating to the security risks posed to and by the company to the environment. Notwithstanding this, and references to 'extortion' and the inadvertent 'support or finance' for armed groups, the draft does not directly tackle the problem of how to deal with rebel forces, or in what circumstances it would be appropriate and consistent with the OECD and human rights instruments for a company to continue to operate in 'rebel' held territories. The tool should emphasise in this section that operating in the vicinity of armed conflict, and provision of logistical or other support to state or non-state armed forces, can lead to corporate complicity in human rights violations or even war crimes.

We recommend the following addition:

Companies should not provide financial or logistical assistance to the security forces of a country where it operates, except where that assistance is explicitly required by law. Where such assistance is required, a company should publicly declare all assistance that it provides to the security forces, whether in cash or kind, making clear the identities of the recipients of the assistance and the checks that the company has put in place to ensure that the assistance is being used for its intended, legal purposes.

Combating Bribery and Corruption

The wording of the RMT might give companies the impression that agreed standards, and principles from OECD and other international instruments are somehow optional rather than being either firm recommendations to business by adhering governments or even matters of hard law. For example, the first, third and fourth bullets in this section simply frame the recommendations to companies contained in Chapter VI of the *OECD Guidelines* as questions. There is little value added in the RMT and it weakens the *OECD Guidelines'* anti-bribery provisions. We would recommend beginning this section with the second bullet, which makes clear that some activities are prohibited, but it should be framed as a statement not a question:

Business that cannot be conducted without recourse to corruption or money laundering should not be conducted at all.

We think the incorporation of the question on international standards for combating money laundering in the fourth bullet is useful but again companies should be reminded that this is now a matter of hard law and is not discretionary.

We recommend the following addition:

Companies that make revenue payments to the governments of countries where official corruption is known to be significant should take every possible step to fully disclose these payments to the public, either unilaterally or through participation in such multilateral initiatives as the Extractive Industries Transparency Initiative.

III. Heightened Managerial Care

The Commission for Africa recognized that while foreign investment is often desperately needed in unstable countries, companies can have a negative effect on peace and security.¹¹ Business cannot therefore assume that its presence in a weak governance zone is invariably beneficial or that the benefits that a company may bring to an area outweigh the risks.

Policies

Relations with business partners and joint ventures are raised in paragraph 14 and the *OECD Guidelines*' supply chain provision (II.10) is turned into a question.

The question 'Does the company encourage the application of these principles [i.e. the *OECD Guidelines*] to the company's subsidiaries and joint ventures in weak governance zones' will do little to ensure companies prioritise dissociating themselves from unsavoury or unscrupulous partners.

As OECD WATCH has noted elsewhere:

Practical experience in the daily life of globalisation shows that increasingly the critical aspects of business activities are outsourced to suppliers. No children work for OECD enterprises, but they do work for their suppliers. No serious environmental damage is done by OECD enterprises. That is done by their disinvested former subsidiaries, now turned trading partners. In part, this is a deliberate risk management strategy. Companies may choose to place 'riskier' parts of their activities in separate legal entities for insurance purposes, or to allow more effective valuation of the different parts of the corporate groups. Or they may aim, through outsourcing, deliberately to isolate themselves from the reputational impacts of risky activities. But while some multinational enterprises have responded to the CSR issue domestically, many are reluctant to apply standards internationally and particularly amongst their supply chains.¹²

Most cases raised with the National Contact Points relating to supply chain issues in the DR Congo have been rejected which has encouraged companies engaged in unethical trading relationships

We recommend the following:

¹¹ *Our Common Interest*, 5.2.4 48

¹² OECD WATCH, Policy Briefing "Supply Chain Responsibility in the OECD Guidelines for Multinational Enterprises", December 2004

A company that knows or should know that it is entering into a business relationship with a sub-contractor, supplier or joint venture partner that engages in corrupt practices or is responsible for a systematic pattern of gross human rights violations, war crimes or crimes against humanity, will be deemed to be complicit.

Reporting and disclosure of information

The definition of “related companies” and the “arms’ length principle” contained in the *glossary of terms* is excellent and should be included in the body of the text. Experience in the DR Congo shows that this is one of the means through which corrupt or fraudulent payments are channelled.

Dealing with public officials with conflicts of interests

Similarly we believe that the annex has some explicit guidance for companies about “At risk” situations for conflicts of interest, which draws on the *OECD Guidelines for Managing Conflict of Interest in the Public Service*. We believe that it would be useful to incorporate this into the main body of the text.

- “Outside” appointments – The appointment of a public official on the board or controlling body of, a community group, a professional or political organisation, another government entity, a government-owned corporation, or a commercial organisation which is involved in a contractual, regulatory, partnership or sponsorship arrangement with their employment organisation.
- Contracting – The preparation, negotiation, management or enforcement of a contract involving a public organisation.
- Gifts and other forms of benefits – Offering of traditional or new forms of gifts or benefits.
- Additional employment – Public officials engage in ancillary (“outside”) employment while retaining their official positions.
- Activity after leaving public office – A public official who is about to leave public office may negotiate an appointment or employment or other activity which creates a potential for conflict of interest with their employing organisation.
- “Inside information”— Using information collected or held by public organisation which is not in the public domain or information obtained in confidence in the course of official functions.

IV. Political Activities

Paragraph 15 states “If investors use political activities to gain access to improper advantages they might violate home or host country laws or fail to observe international standards”. We think that this could be framed more powerfully. We recommend the following:

Investors should be aware that using political activities to gain access to improper advantages may lead to a violation of home or host country laws and/or a breach of international standards of corporate governance and accountability.

Paragraph 17 notes that “Investors in weak governance zones often find it necessary to forge political alliances with high level governmental and political figures in order to protect their investments”. A company needs to be warned that such “alliances” may help foster a corrupt relationship and lead to prosecution under anti-bribery legislation.

An additional question of relevance to companies considering investing in a weak governance zone is the following:

What is the attitude of civil society or the political opposition to foreign investment in the country?

V. Knowing Clients and Business Partners

There are now mandatory reporting requirements imposed on banks, and designated non-financial business and professions such as *diamantaires* and mineral and metal traders (in some jurisdictions) which oblige them to inform the authorities about **any** criminal activity – not only about suspicions of money laundering or terrorist activities.¹³ The RMT should make reference not only to the FATF but also to the US Patriot Act and the EC Anti-Money Laundering Directive.

The customer/client due diligence measures includes a requirement to:

- Identify, and verify the identity of, the customer using reliable, independent documents, data or information.
- Identify the beneficial owner taking all reasonable measures to verify the identity of the beneficial owner.
- Obtain information on the purpose and intended nature of the business relationship

When a company is not able to obtain satisfactory information on these points the RMT should make clear that it should not enter into a business relationship or perform a transaction and/or should terminate the business relationship. Companies that have suspicions about wrongdoing should file a Suspicious Transactions Report with the relevant Financial Intelligence Unit.

¹³ Chaim Even-Zohar, *Diamond Industry Strategies to Combat Money Laundering and the Financing of Terrorism*, ABN-AMRO 2004

VI. Speaking Out About Wrongdoing

Companies should be reminded of their obligation under stock exchange listing requirements to report human rights abuses and/or other acts of wrongdoing that may have an impact on their activities.

Companies should also be warned that colluding in the concealment of serious human rights violations may, under certain circumstances, constitute complicity.

The footnote 61 on page 13 states that ‘extortion involves wrongdoing only by the party that extorts the payment, since the other part does not have the intent to commit bribery’. But it is clearly not acceptable for a company to continue to operate in an area if it can only do so by means of regular payments to armed groups who may be responsible for systematic human rights violations. The only excuse for extortion is duress. Extortion cannot be defined to absolve a company that decides to remain in an area and keep paying the money.

We would like to take this opportunity to reiterate our appreciation of the work of the Investment Committee and Secretariat in this area.

Global Witness www.globalwitness.org

International Alert www.international-alert.org

Netherlands institute for Southern Africa(NiZA) www.niza.nl

Rights and Accountability in Development (RAID) www.oecdwatch.org

Samata, India

1. If companies working in weak governance zones are found to be violating human rights or not complying with the RMT guidelines, what are the regulatory mechanisms or monitoring mechanisms to identify these violations and hold companies accountable? Ultimately, these are again voluntary and self regulatory codes of conduct, so how do they ensure that companies are held responsible?
2. Will companies working in weak governance zones have a formal or written compliance to these RMT guidelines, so as to enter into a system of accountability
3. What role does OECD play in bringing accountability of companies from member countries working in weak governance zones
4. We do not recommend that companies should be involved in any political activities
5. What accountability systems are put in place by companies for different levels of its staff and Board members to comply with/inform/speak out on violations, if any
6. Can the companies list out the standards of disclosure set up by them for independent review, monitoring or audit?
7. Are these RMT guidelines disclosed to the staff before they are recruited/posted to work in weak governance/conflict zones and do they take written compliance from their staff to work under these conditions?
8. Does the company disclose information about/whether it hires private or government armed security forces for its or in the name of its protection and that of its staff?
9. Other than setting up/ allowing for independent financial audit, what mechanisms for non-financial audit like social and environmental audit of the companies.

Mr. Ravi Rebbapragada
Chairperson – MM&P (Mines, Minerals & People)
Executive Director – Samata
India

South African Institute of International Affairs (SAIIA)

This is quite a comprehensive document and the OECD team should be congratulated on it. The challenge is how to make it more user-friendly and accessible without losing the specificity required. Too much cross-referencing should be avoided to assist this and the tool should be as self-contained as possible.

The overall introduction should make the link between good investors and long-term sustainable development, which also drives the point to host governments about why support for such codes/tools is necessary.

General comments

1. How do you close the loop between business's use of this tool and working towards improving the governance climate in WGZ? And what role for the OECD is this regard? Such a focus would also be seen by companies as outcome-driven. Ultimately, companies on their own cannot bring about an improved governance climate, although, as it is mentioned, they can make an important contribution to its development.
2. What exactly are the roles and responsibilities of companies in such difficult environments? It would not be to take up the burden of weak state governance and seek to rectify it on its own. Companies are not states and do not have such related obligations. Hence, the process of developing this tool should also look at how such an exercise by individual companies doing business in WGZ can be used by international organisations, governments, aid agencies, IFIs to work with states in improving and strengthening institutional weaknesses. (This is predicated upon and will be restricted to states which are willing to do so.)
3. An important concern in assessing the operability of the tool is the difference in resource capabilities between big multinationals, smaller foreign companies and the domestic private sector.
4. Related to the above, the tool should not have the unintended consequence of deterring investors in WGZ – if the tool seems to make the process of ascertaining many of these elements (which may fall outside their normal risk assessments) very onerous. The ultimate objective is to have companies with good track records of CR investing in WGZ. If they are deterred, others who are far less scrupulous will fill the vacuum (see point 5 below). As it is, the returns on investment in Africa are high because companies going in tend to do so only where the returns are expected to be high, thus mitigating the high risk.

The tool should therefore aim to provide as much assistance to companies in terms of the documentation on international standards, agreements, protocols etc, that they would need to have easily accessible; and also a list of some useful institutions (research organisations, both international and local, international NGOs etc) that could provide them with input on the political landscape and the trends over time in any particular country, rather than only a snapshot. It would also be useful for the tool to include references to the types of documents that companies can refer to when doing their homework on understanding the political landscape. (This is particularly relevant for smaller companies, who may not have vast capacity to carry out these properly.)

5. I assume that in the first instance this tool is for use by OECD companies, but one should be looking at generating a critical mass beyond the OECD. Have you also held consultations with African intergovernmental organisations and key African countries about the tool? Buy-in from African champions would be invaluable. The Gleneagles Communique can be used as a springboard for this. A key question should be how to use it as a tool for working with host governments to improve the

governance framework (the incentive there is the possibility of greater investor confidence – domestic and foreign – in the country), and how to develop commitments from developing country MNCs.

For example, many new investments in Africa, especially in natural resources, are being made by parastatals/multinationals from other developing countries. Not all of them adhere to codes of conduct or ethics, but many of them end up getting lucrative deals because they have ‘good working relations’ with the governing elites and do not fear to operate in difficult environments, because often they do not have the constraints of adherence to certain types of conduct.

6. What constitutes a fragile state or a weak governance zone? Does the OECD intend to produce annual lists of what constitutes such, as these may of course change as performance in countries improves or deteriorates? I would also argue that a weak governance zone may not necessarily be the same as a fragile or failed state. (Some states in Africa may in fact have certain strong institutions that have been subverted and abused.)
7. Often, the experience in African states with weak governance structures is that while the policies or accessions to protocols etc are there, there is a wide gap between their existence and their ability/willingness to implement and enforce.

This gap should be reflected in the questions.

8. Some of the definitions or explanations should not be consigned to the glossary at the back but should actually be footnoted in the body of the tool.

Comments on specific sections

1. In the ‘heightened managerial care’ section, procurement policies in terms of service providers also requires scrutiny. The same applies to entering into joint ventures and in subsequently in the codes of conduct of such partners.
2. On the section on human rights (p.6), the question “Does the company respect the human rights.... Consistent with the host government’s international obligations and commitments?” – What if the host government has not ratified some of the protocols in the first instance?
3. In the same section, it would be appropriate to ask the question about the moving picture, i.e. are things getting better or worse?
4. On management systems, (p. 9), “employees at all levels... are aware... relevant to their work”, I would add “...and understand...”
5. On extortion, it’s also necessary for companies to anticipate this and to have some guidelines in place to help employees confronted with it to deal with it.
6. On the section, ‘Involvement in local politics’, it is highly unlikely that WGZ will have public disclosure requirements relating to contributions to political parties and public office. There are also situations where not only are governments not keen on companies contributing to all political parties’ campaigns based on some proportional formula, but where they regard such contributions to other parties as unacceptable... and fomenting dissent.

Furthermore, defining ‘improper involvement’ in countries like Zimbabwe, may not only refer to corruption or bribery, but include elements that would not ordinarily have been regarded as contentious, in terms of providing assistance to communities in which a company may operate.

7. On section VII, (p.14), I would argue that these are quite ambitious expectations of business. While they may try to take a broader self-interest approach, many don’t have the capacity to engage on these levels. Again it is the point about who the target constituency is. Clearly, the bigger companies can make a bigger difference, both positively and negatively, but some thought should be given to what one can expect of smaller companies in this regard.
8. On business associations and chambers (p.15), many in African states have very little capacity (both financial and human) to act as successful lobbyists for their members’ interests. Therefore, capacity building by relevant institutions in OECD states for example, (not by companies) would help in the long-term in developing a voice for the domestic private sector (even though it is nascent in many WGZs).

Elizabeth Sidiropoulos
The South African Institute of International Affairs (SAIIA)
South Africa
www.saiia.org.za

Swisspeace, Switzerland

The research program on business & peace at swisspeace examines the complex interrelations between economic power and violent conflicts in order to foster proactive engagement of the private sector in civil peacebuilding. We consider it very important that OECD, as a government-based organisation, engages in exactly the types of questions the tool addresses. The more thorough consideration of the special challenges investors face in weak governance zones will benefit not only investors and local population, but is also an indispensable factor for efforts of development cooperation and peacebuilding in those zones.

Swisspeace

Switzerland

www.swisspeace.org

Trade Union Advisory Committee to the OECD (TUAC)

General comments

TUAC welcomes this opportunity to provide comments on the draft OECD Risk Management Tool for Investors in Weak Governance Zones. We believe that the work carried out by the OECD Investment Committee and the OECD Secretariat in fostering corporate responsibility and exploring the role of business in so called weak governance zones is both important and urgent. TUAC supports the aim to develop a particular risk management tool for investors in weak governance zones. We are not, however, convinced that the best method to formulate the risk management tool is to develop a list of questions addressed to investors. It may be more appropriate to transform the set of questions to a set of recommendations or at least to provide concrete guidance to companies operating in weak governance zones.

The questions in the risk management tool are largely drawn from the OECD Guidelines for Multinational Enterprises. Their disadvantage is that they may give the impression that the Guidelines are optional, that companies can pick and choose among the provisions of the Guidelines. The risk management tool should stress that companies are expected to comply with the Guidelines and that they are good recommendations for all companies, not only multinational enterprises.

A second problem with the list of questions is that it does not offer any guidance on how to interpret the provisions of the Guidelines in situations of conflict and weak governance zones. Although some paragraphs are quite straightforward, others are not.

The risk management tool is targeted at foreign investors operating in weak governance zones and draws on a number of OECD integrity instruments. It should therefore be widely disseminated to foreign companies that are active in those countries. The risk management tool provides an excellent opportunity to promote the OECD integrity instruments: in particular the OECD Guidelines for Multinational Enterprises given that they are addressed directly to companies, but also the OECD Anti-bribery Convention, the OECD Principles of Corporate Governance and the DAC Guidelines on Helping Prevent Violent Conflict as well as other relevant instruments.

In TUAC's view, the risk management tool should provide a summary of these OECD instruments together with a list of the most relevant paragraphs and information to investors how to obtain a copy of the instruments. Currently, some of the instruments are mentioned only in footnotes or the annex. We believe that they merit a more prominent role. As the OECD case study of the DRC has shown, many companies active in these countries are junior companies which may not be affiliated to business organisations and may have a low awareness of OECD integrity instruments.

Labour issues

The lack of effective regulation in countries with weak governance zones has serious implications for workers. Labour abuses are frequently occurring in these zones. Yet the risk management tool does not deal with these issues. Reference should be made to the text of the OECD Guidelines for MNEs on employees' right to be represented by trade unions and the fact that the Guidelines encourage companies to adopt a positive attitude towards trade unions. Moreover, companies should be made aware that the Guidelines cover all ILO core labour standards. The respect of these standards constitutes the basis of all labour-management relations. Consequently, the following question should be added to the document:

Does the company ensure that employees can freely organise and establish trade unions at the workplace without fear of reprisal?

TUAC recommends a separate section on labour issues. Nevertheless, the question could also be included in Part II on Obeying the law and observing international standards.

I Introduction

It is symptomatic that the risk management tool stresses its voluntary nature and that it aims to “help companies” (paragraph 3, 4 and 6). Although TUAC does not dispute that the risk management tool is designed to assist investors, emphasis must also be put on their obligations. In paragraph 4 it is stated that “investors will want to obey the law”. This should be strengthened to “investors are required to obey the law”.

Furthermore, it is suggested in paragraphs 12, 14, 18, 20, 22 and 26 that investors in weak governance zones “might wish to consider the following questions...” This is too weak. The risk management tool should state that they “need to consider the following questions...”

II Obeying the law and observing international standards

It would be useful to add a paragraph on whether companies have or are considering to establishing a mechanism to monitor compliance with international standards.

III Heightened managerial care

The Guidelines should be added to the first question under “Management systems” in paragraph 14:

“Are senior management and members of the Board of Directors visibly and actively committed to ensuring that investments in weak governance zones are managed in accordance with company policies and internationally agreed standards such as the OECD Guidelines for MNEs or the ILO core labour conventions?”

The second question under “Reporting and disclosure of information”, which refers to the provisions of the Guidelines on high quality standards for disclosure (chapter III:2), should also include non-financial reporting such as environmental and social reporting.

VI Speaking out about wrongdoing

As previously stated, the questions might give the impression that principles and standards are optional and not enforceable. The first question under paragraph 22 appears to imply that it would be acceptable to remain silent about wrongdoing. The text should clearly state that companies must not assist in wrongdoing.

VII Business roles in weak governance societies – a broadened view of self interest

Paragraph 23 discusses the role of business in helping governments “to get on the path of institutional reform”. This should also include the role of business in developing proper industrial relations.

Paragraph 25 would benefit from the inclusion of trade unions. Companies should not only be encouraged to work with NGOs, but also with local, national and international trade union organisations.

Finally, given the difficult environment in countries with weak governance zones, questions 5 and 6 relating to the OECD Policy Framework for Investment under the first bullet point of paragraph 26 appear misplaced. Most of the questions relate to basic issues such as respecting human rights, protecting employees from violate conflict, applying adequate management control systems, abstaining from improper involvement in political activities, speaking out about wrongdoing etc, while these two questions add a new and unnecessary dimension to the risk management tool.

Trade Union Advisory Committee to the OECD (TUAC)

www.tuac.org

Transparency International

I General

Content. The document is not so much a “tool” as a general guideline and reference document. We would understand a tool to be a much more practical guide with “how to” recommendations and solutions rather than considerations that could be taken into account.

Standard. The document makes the case for “heightened managerial care” in weak governance zones but appears to propose throughout the document a standard of what we would consider “due care”. In other words, the standard of diligence does not in our view set the bar much higher than what is already required for responsible business practices.

Format. The use of questions throughout the document gives an optional tone to much of the contents. Affirmative statements which spell out the specifics of what constitutes heightened managerial care would be much more helpful in providing actual guidance and helping to set a standard.

Business perspective. If this document is written for business an almost exclusive focus on written outputs from governments and intergovernmental organisations will be less convincing than outputs where business has played a significant part in generating them.

Identification of weak governance zones. More guidance is required beyond that in the *Definitions* section on how companies should assess weak governance zones. For this purpose, we would suggest references to the TI Corruption Perceptions Index and the World Bank Governance Indicators which are both widely used by businesses.

Role of boards. The draft omits to cover the role of boards.

Definitions. There is no definition of company in the glossary. The use of “companies” is limiting. There are other forms of structure such as professional firms and mutual organizations where such a tool would be applicable.

II Specific

a) The document should place more emphasis on those actions which are of particular importance or present special problems for business in conflict zones. They are all referred to in some places in the document, but get lost as of special importance by being mixed in with general comments that apply to good business management in all normal cases as well. Examples include:

- the need for exact guidelines to staff to help them distinguish between extortion i.e. physical threat which allows the payment of bribes and threatening situations that do not involve physical threat;
- the need to have outreach programmes to a wide selection of stakeholders;
- the need for safeguards in case of change of regime to avoid over identification with the previous regime that may have been (or regarded as) very corrupt;
- the need to help overcome conflict by supporting business associations, civil society organisations, opposition groups, etc;

- a reference to the fact that staff, and particularly managers assigned to zones of conflict, need special training by their companies, preferably before taking up their assignments, to help them deal with some of the challenges they will have to face, including when to pull out staff, when to walk away from transactions or a total investment. (To our knowledge no managers are currently trained in this way, whereas many have learned on the job and could pass on valuable lessons if their knowledge was tapped into.)

b) Page 4, paragraph 4.

Paragraph 4 omits reference to existing codes for the private sector. Much of the content in the Tool is already set out in the Business Principles for Countering Bribery and the supporting Guidance Document. The ICC Rules of Conduct and supporting handbook also provide extensive guidance. We suggest these should be referred to. If supporting the documents are to be referred to only in footnotes as at present, footnotes on page 4 (footnote 8), page 8 (footnote 32), page 9 (footnote 38), page 12 (footnote 57) should be added to by referring to the Business Principles for Countering Bribery and its accompanying the Guidance Document, The TI Six-Step Process and as appropriate the ICC Rules and the Fighting Bribery handbook.

c) III Heightened Managerial care

i) Policies

(Bullet 3) (p 9). “Does the company encourage, where practicable, business partners, including suppliers and sub-contractors, to apply principles of corporate conduct compatible with the OECD Guidelines.”

The language here is too weak. “Where practicable” does not support the principle of heightened care. In weak governance zones, companies must be encouraged to apply more stringent standards.

ii) Management systems

Bullet 2 – item 2 (p9). “Employees at all levels - from senior executives from to field workers – are aware of company policies, their legal obligations and of the international standards relevant to their work.”

The wording is weak. Given the challenging environment of weak governance zones, employees should not only be “aware” of company policies and their legal obligations but should be able to demonstrate their knowledge and understanding of company policies via on-line testing or other means.

Bullet 2 – item 4 (p10). “Employees know where to turn to for help dealing with situations in which they are under pressure to violate the law or to not observe company policies and relevant international instruments?”

Why not be more direct and refer to hotlines and whistle blowing?

iii) Reporting and disclosure of information (Bullet 4) (p 10)

“Does the Company support the development of international principles of transparency that are relevant for its operations?”

The company should not only support this but it should be encouraged to participate in the development of international principles (such as EITI). Company “support” without willingness to actually increase its own transparency levels is not very useful.

d) IV Political activities

Involvement in local politics (Bullet 1) (p 11)

“Does the company abstain from improper involvement in local political activities?”

Define “improper”. Experience has shown that standards of impropriety vary widely! The word can only be meaningful if it is defined. Furthermore, one could argue that all involvement in local politics on the part of investors is inappropriate in all circumstances.

e) Footnote 61:

The word “country” should read “company.”

Transparency International

www.transparency.org

13 December 2005

Transparency International, France

Comments on the OECD draft consultation (weak governance zones)

The document is divided in 6 sections :

- obeying the law
- heightened managerial care
- political activities
- knowing clients and business partners
- speaking out about wrongdoings
- business role in weak governance societies

Some preliminary remarks may help understand the choices which serve as a guide line throughout the document and suggest a few adjustments.

First, the document addresses the concerns, and presupposes the important means, of multi-nationals and other large companies which are able to make the proper inquiries in a Foreign environment. Would it not be advisable to suggest to the readers a range of institutions and professionals who would be able to provide an unbiased and reliable advice?

Second, there is an obvious hesitation in the document about the handling by Foreign investors of local politics : should they stand clear of any involvement, should they distinguish, with their own wisdom, what is “proper” or “improper”, or should they take positive action to help local parties or NGOs whose goals are seen as moving in the right direction? It seems that setting a clear rule would be appropriate if all investors are to be given the same opportunities. Financial support provided to a local political party, or hiring of a local politician as a non – executive officer, has often been a way of obtaining unfair advantages over competitors.

Third, the use of legal devices to hide ones identity and the channelling of transactions through offshore financial centres is viewed as a normal practice provided “the company exercises heightened care not to be a party to misuse of (the same)”. This recommendation will be viewed as an approval of legal devices which perpetuate the lack of transparency in transactions with developing countries.

Let us now examine the 6 chapters :

1 – Obeying the law...

1. The two bullet points under “General” assume that the investor has been able to form his own judgement on the host country. A realistic approach would give the investor more suggestions on how to collect information and associate other stake holders.

2. A specific issue arises for lending institutions, when they finance long term projects, such as dams or pipe lines. Should they get into the use of their funds, or is it the sole responsibility of the contractors? (last bullet point under “Human rights and management of security forces”)

2 – Heightened managerial care.

Under “policies”, it might be advisable to stress the importance of a promotion of ethical concepts down the line, and adjusted to local perceptions. Codes of ethics drafted in the country of the parent company may be alien to a specific local culture.

Under “Management systems”, more emphasis could be given to the channels through which information from local units goes up and eventually reach top management and board members.

3 – Political activities.

Para. 15 should distinguish between domestic and foreign investors. It is doubtful whether a foreign firm “can play legitimate and useful role in the political process”. Should it not be the basic rule that Foreign investors must not play any role in local politics? Then a few (narrow) exceptions could be expressed, although we do not see which ones.

In para. 18, the wording carefully avoids any critic against involvement in local politics : what is an improper involvement versus a proper one? In many countries, contributions by companies to political parties are forbidden. The wording refers to the situation in the USA, but it may put investors from other countries at a disadvantage.

One should also refer to the practice of appointing Government officials to the board of directors or even to chairmanship of the local entity. This is one of the most favored means of “traffic d’influence”.

It seems to us that the criterions of proper versus improper involvement should be twofold :

10. Is the investment impacting the local economy or the local society enough to give the investor an important leverage on local decision making? If so, the investor should refrain from any involvement at all.
11. Politics is either (a) governance, that is implementation of the law by government, or (b) the exercise of democracy through the electoral process and the expression by citizens of their needs and wills. It is appropriate for Foreign investors to have a say on governance, not to interfere with the electoral process or the expression of citizen’s will.

The last bullet point under “Involvement in local politics” should not include partnerships with business associations in the category of political activities.

4 – Knowing clients and business partners

In para. 20, the suggestion we made previously of guiding smaller companies in their collection of appropriate information on the host country could apply.

The second bullet point dealing with offshore centers and corporate vehicles should give a clearer view of what is transparent and therefore legitimate and what is not. In some situations, the recourse to those devices may be imposed by certain legitimate constraints, but it should be an exception, and those constraints should be specifically recorded for possible controls.

5 – Speaking out about wrongdoing

In the last bullet point under para. 22, would it not be appropriate to include Foreign service?

6 – Business roles in weak governance societies – a broadened view of self interest

The memories of association of foreign interests with political parties or labor unions to overthrow democratic governments are still in the peoples' minds.

It is our view that Foreign people are not fit for “promoting reform”, “promoting the protection of property rights”, and that their involvement in these issues will be suspected of hiding more selfish interests. This should be left to local citizens, possibly employed by foreign entities.

These reservations do not apply to the last bullet point of the whole document (encouraging capacity building) which recommends acting as a good citizen in civil society.

The glossary

The word “corruption” is not defined correctly : corruption means each of the two sides of the bribery, the one who pays the bribe as well as the one who accepts it.

“Improper involvement in local political activities” and “legitimate political activity” :

There are too many subtleties in the two definitions! The different treatment of political party funding in the various jurisdictions is not mentioned, not either the traffic d'influence.

The legitimacy of the purpose of promoting a competitive market environment depends on the context, and it may be used to paralyse emergency measures imposed by an economic crisis. It is not the role of foreigners to interfere with such a process.

XXX

The foregoing is the sum of the remarks that reading the document has suggested to us in order to make it more acceptable to our members. The document is extremely useful and adequately sums up all ethical aspects of risk management that an investor faces in a Foreign environment. We appreciated particularly subpara.12, “general”, which introduces the issues with great clarity; para. 22, which raises very useful questions; and the last bullet point of the document, which might deserve a more detailed development. Congratulations to the writers!

Transparency International, France
www.transparence-france.org
21 Novembre 2005

UNICORN: A Global Unions Anti-corruption Network

Introduction

1. UNICORN welcomes this opportunity to provide comments on the draft *OECD Risk Management Tools for Investors in Weak Governance Zones*. UNICORN is the Global Unions Anti-corruption Network, which is supported by the international trade union bodies the TUAC, ICFTU and PSI.

General

1. UNICORN considers that the titles of the headings could usefully be changed to reflect the risk management process (as defined in footnote 3) and the information be restructured accordingly (see *BOX 1*) given that *Sections II* and *III* are *over-arching*, whereas *Sections IV, V, VI* and *VII* focus on specific risks.

BOX 1: SUGGESTED HEADINGS/RESTRUCTURING

Section II: Identifying, Analysing and Treating Risk

II.1 Key Risks Facing Companies in Weak Governance Zones;

II.2 Analysis and Treatment of Risks

II.2.1 Human Rights and Management of Security Forces

- A set of questions on *external factors* to assess this risk;
- A set of questions on *internal company policies and practices* that relate to these risks
- Suggested responses/options/for responding to this risk
 - Policies
 - Good Practice
 - Monitoring Systems

II.2.2 Combating Corruption

- A set of questions on *external factors* to help risk identification;
- A set of questions on *internal company policies and practices* that relate to these risks
- Suggested responses/options/for responding to this risk
 - Policies
 - Good Practice
 - Monitoring Systems

Section III: Company Systems

III.1 Combating Corruption

III.2 Management Systems

III.3 Reporting and Disclosure of Information

2. UNICORN considers that the document could be significantly strengthened *throughout* by changing its language and tone so as to reflect the fact that companies are *obliged* to meet standards - under both soft and hard law instruments - and therefore *should* undertake steps to ensure adherence to these standards. In *paragraph 4*, for example, in relation to international instruments, it would be useful to replace the text “*provide various types of guidance*” with “*imposes various types of obligations*”. Later in the same paragraph the words “*Investors will want to obey the law*” could usefully be replaced by “*Investors are required to obey the law*”.

Specific Comments

1. *Obeying the law and observing international standards: General*
 - a) UNICORN considers that the questions are too broad in scope. Companies could be better *guided* by being asked to respond to specific questions concerning specific risks.
2. *Obeying the law and observing international standards: Combating Corruption and Money Laundering*

External Assessment

Include questions on assessing the external risk such as:

- a) Have you identified external assessments of the level and type of corruption in the host country?
- b) Have you identified external assessments of the level and types of corruption that affect your industrial sector?
- c) Is the host government accountable?
- d) Is decision-making discretionary or on the basis of transparent objective criteria?
- e) Is extortion common practice?
- f) Is the payment of bribes by competitors, common practice?
- g) Is there an independent judiciary?

Internal Company Assessment

- a) Has your company put in place a corporate internal compliance programmes to ensure that employees and directors do not pay bribes to foreign public officials as required by national laws following the implementation of the OECD Anti-bribery Convention?
- b) Do you undertake internal due diligence in selecting local agents including checks on ownership, company structure and address as well as checking publicly available information and where appropriate, providing a list of agents employed on contracts with public or publicly-owned bodies to competent authorities?
- c) Do you ensure that remuneration of agents is appropriate and for legitimate services only?
- d) Do you require agents to sign a non-bribery warranty?

Suggested Response

- a) Provide example of, or reference to, an Anti-corruption Policy.
- b) Provide example of, or reference to, a Corporate Compliance System including monitoring.

3. Heightened Management Care: Management Systems

“Employees are confident that, if they lose business because they comply with company policies, **relevant international instruments** or with home or host country law, they will be supported by their supervisors and by senior management and will not suffer adverse consequences?³⁹

- Employees know where to turn to for help when dealing with situations in which they are under pressure to violate the law or to not observe company policies and **relevant international instruments**?
- Does the company refrain from discriminatory or disciplinary action against employees who make bona fide reports to management or, as appropriate, to the competent authorities, on practices that contravene the law, the OECD Guidelines or company policies?”

These could be strengthened by ‘unpacking’ each of the questions so that companies, in their responses, have to demonstrate *how* the above is being achieved. Otherwise the company can answer ‘yes’, even in good faith, when in reality there are no safeguards in place.

“*Employees are confident...*”

- a) Are incentives in place to reward employees who behave ethically?

“*Employees know where to turn...*”

“*Does the company refrain...*”

- a) Does the company have in place a policy for protecting those who disclose information in the public interest (whistleblowers)?
- b) Has the company developed an implementing procedure with designated lines of management accountability?
- c) Does the company support the policy with an adequate allocation of resources for monitoring, training and awareness-raising?
- d) Is the company aware of the role that trade unions can play in: promoting policies that protect whistleblowers; providing training on procedures; and acting as a disclosure route?
- e) Does the company have in place accessible and well publicised reporting channels?

Add examples of, or reference to, policies and implementing procedures.

4. Heightened Management Care: Reporting and disclosure of information

- a) Does the company ensure that timely, regular and reliable information is disclosed regarding its activities, structure, financial information, including, in the case of the extractive industries, royalties, taxes, signature bonuses, duties, profit shares and significant payments in kind, material liabilities and performance?

UNICORN: A Global Unions Anti-corruption Network
Global Political Economy Research Group
Cardiff School of Social Sciences
www.againstcorruption.org

United Nations Global Compact

I refer to the OECD Investment Committee's current call for comments on its draft Risk Management Tool for Investors in Weak Governance Zones.

We commend the Investment Committee and the OECD Secretariat for embarking on the development of such a tool, which we regard as complementary to our own efforts in this area. Our comments are general in nature.

We would like to suggest that situating the tool more clearly within the context of existing standards, initiatives and tools in this field would enhance its usefulness for companies in an already crowded corporate responsibility landscape. In addition to the Global Compact principles themselves and our own work on business in conflict zones, human rights and anti-corruption, important work has been undertaken by the Danish Institute of Human Rights, including on tools for human rights assessment. International Alert has also produced practical Guidance on Conflict Sensitive Business Practices. The Business of Peace, a joint publication by International Alert, the International Business Leaders Forum and the Council on Economic Priorities, is also an often cited and helpful resource. You may also wish to reference the Equator Principles.

Operating in weak governance zones poses many dilemmas that businesses cannot easily resolve on their own. In addition to consulting with their own stakeholders, businesses may benefit from dialogue and collective solution finding with other businesses and societal actors. The Global Compact, through its local networks and policy dialogues, offers such opportunities.

As the draft tool itself makes clear, it is important not to see corporate responsibility in a vacuum. For this reason, as part of our work on business in conflict zones, we produced a report entitled Enabling Economies of Peace, which concludes with a set of recommendations addressing concrete actions that the public policy community can take to support private sector efforts. You may wish to reference that.

Finally, the draft tool might benefit from being organized in a more user-friendly fashion for business managers. Perhaps that is planned for the final version. The businesses commenting may be able to make more concrete suggestions along these lines. Please do keep us informed of progress on the tool's development. When it is finalized, we hope to help disseminate it through our own channels, including the Global Compact website.

*Georg Kell
Executive Head of Global Compact
Office of the Secretary-General
www.unglobalcompact.org
23 November 2005*

Universities Superannuation Scheme Ltd, United Kingdom

The Universities Superannuation Scheme Ltd (USS) welcomes the development by the OECD of this Tool as a useful aid for the companies in which we invest in their operations in weak governance zones.

Whilst the most advanced companies are likely to have adopted the types of practice identified in the tool, it will provide essential reading for those companies looking to achieve good practice and those entering new countries.

As we move into an increasingly globalised world, and as companies increasingly internationalise their operations, risk management as identified in this Tool will become as essential part of doing business and protecting investment returns.

David Russell
Advisor, Responsible Investment
Universities Superannuation Scheme

United Nations Conference on Trade and Development (UNCTAD)

I have had a chance to go through the document and in my opinion it is a very good piece of work. It provides a relatively clear definition of a weak governance zone and addresses common subjects of concern for enterprises operating in such areas. I think the content strikes the right balance between detailed information and overall user friendliness. This balance will allow the document to become a useful tool for enterprises. The numerous and well placed footnotes provide a valuable source of further reading for readers requiring additional information.

The document also usefully complements UNCTAD's research on the subject of positive corporate contributions to host developing countries, as well as UNCTAD's work on corporate responsibility reporting.

My only suggestions concern adding two additional references to the document: First, I would suggest adding to the section on "Human rights and management of security forces" a reference to the publication: *Embedding Human Rights in Business Practice (2004)*, produced by the United Nations Global Compact and the United Nations High Commission for Human

Rights. Second, I would suggest adding to the section on "Reporting and disclosure of information" a reference to the publication: *Disclosure of the Impact of Corporations on Society (2004)*, produced by the United Nations Conference on Trade and Development. I believe these two additions will further enrich this document as a useful tool and valuable resource.

*Anthony Miller, Economic Affairs Officer
Enterprise Policies & Corporate Governance
UNCTAD
www.unctad.org/ISAR*

University of Western Ontario, Canada

I am deeply impressed by the comprehensiveness of the OECD Risk Management Tool for Investors. I offer the following comments:

1. Very few companies have much of an idea of what kind of scenarios they need to avoid. Including a scenario or two would aid well-meaning enterprises in applying these admonishments effectively in concrete situations. Few enterprises operating in weak governance zones consider payments to local officials to be of any consequence - to take one example - though they might think differently about them if they had the benefit of a scenario or two that connected such payments to humanitarian abuse. It may be possible, and useful, to include somewhere in the Introduction - as a 10th paragraph among the existing 9, a scenario or two that alerted otherwise well-meaning enterprises to the direct linkages between such payments and human rights abuses and severe violations of the integrity package. I could easily provide one or two short paragraphs, as of course could many others.
2. This risk management tool is addressed principally to well-intended enterprises and their investors who would like to do well and do so conscientiously in high risk or weak government environments. It is important to stress, perhaps in Section II "Obeying the law and observing international standards," that these environments also offer attractive business environments for those enterprises who benefit from the commercial advantages that such environments offer, and for such enterprises, the risks identified here may well be regarded as opportunities. Well-meaning enterprises must make an assiduous effort to resist joining the ranks of such companies that find in these 'risks' profitable commercial strategies. Enterprises operating in these environments must therefore, not only avoid these practices which risk violating provisions in OECD's integrity package, but they must, in some circumstances be prepared to forego financial returns in doing so.
3. I would recommend reiterating the point that enterprises must be prepared to make some sacrifices in adhering to these guidelines, as a paragraph under Para 13 section III, Heightened Managerial Care. This then should be followed, at some point, by a summary of the potential costs of ignoring these risks, in not reporting wrong-doings or in offering inappropriate payments or in directly abetting conflict. These costs do appear in various places, i.e. under Para 22 where mention is made of risks to reputation, damage to business culture and so on, but a more robust list of costs should be included in a separate paragraph.

*Jim Freedman
Professor Emeritus
University of Western Ontario*

Vincular-CSR at Catholic University of Valparaiso, Chile

1. Consider the management tool to be very comprehensive and adequate for large multinationals operating in Weak Governance Zones. It requires for implementation a “sophisticated” system to deal with issues, which I am not sure to be in place in most part of multinationals, especially those that are not large corporation, but rather medium size ones, or even small ones. The “incremental approach” seems to be missing.
2. On point 12 of draft text for consultation, about considering questions, on “General” would suggest adding a third question or complement second one (this comment is linked with points 24-25-26):

Does the company inform itself and analyze what positive impact its investments may have on existing local problems. Just by doing the “right or standard thing” in a visible way, might trigger local improvements in practices, serve as an example for other companies and throw its supply chain generate a cascade effect of good or just “reasonable” practices.

Dante Pesce, Executive Director
Vincular-CSR at Catholic University of Valparaiso-Chile
www.vincular.org

Annex. Text of the Invitation for Public Consultation

Conducted online between 26 October 2005 and 23 November 2005

The OECD Investment Committee is seeking the public's views on its draft Risk Management Tool for Investors in Weak Governance Zones through an online consultation. Comments of all sorts would be welcome -- from a general assessment of only a few lines to detailed, point-by-point remarks.

A weak governance zone is an investment environment where the government is not working – public officials are unable or unwilling to assume their roles in protecting rights, providing basic public services and ensuring that public sector management is efficient and effective. These “government failures” lead to broader failures in political, economic and civic institutions that, in turn, create the conditions for endemic violence, crime and corruption and that block economic and social development.

Corporate responsibility goes hand-in-hand with government responsibility. This is a recurrent theme of the OECD Investment Committee's work on the OECD Guidelines for Multinational Enterprises (“the Guidelines”) – a government-backed, voluntary code of conduct for international business. As companies themselves often note, weak governance zones pose many ethics issues and represent some of the most difficult investment environments in the world. Through the development of a risk management tool, the Investment Committee seeks to assist companies in responsibly managing their investments in weak governance zones. This work is also part of its implementation of the OECD Guidelines for Multinational Enterprises and furthers the Committee's broader mission of promoting prosperity and stability by harnessing the benefits of investment. The tool is non-prescriptive and consistent with the objectives and principles of the Guidelines.

Drawing on the OECD Guidelines for Multinational Enterprises and the recognised strengths of the OECD in the integrity area, the draft risk management tool focuses on those issues about which the OECD integrity instruments shed light. In addition to the Guidelines, these instruments include the Convention and Recommendations on Combating Bribery of Foreign Public Officials and the Guidelines for Managing Conflict of Interest in the Public Sector. The draft tool also incorporates earlier Investment Committee discussions of investments in Myanmar and the Democratic Republic of Congo as well as inputs received during earlier consultations on this issue.

The importance of this work has been recognised by the UN Security Council and by G8 Heads of State and it will serve as a basis for ongoing OECD outreach on investment issues in Africa, Asia and Latin America. Comments will be used to improve the draft risk management tool to be considered at the next meetings of the Investment Committee. The tool is scheduled for finalisation in the first half of 2006.

Procedure

DRAFT TEXT: Download the Risk Management Tool for Investors in Weak Governance Zones: Draft text for public consultation in pdf file format.

CONTACT: Comments may be sent to Kathryn Gordon, Senior Economist, OECD Investment Division. [kathryn.gordon@oecd.org].

CUT-OFF DATE FOR COMMENTS: In order for comments to be reflected in the draft to be considered at the next meetings of the Investment Committee, they must be received by 23 November 2005.

POSTING COMMENTS: Comments will be posted on the OECD Investment Committee's website (www.oecd.org/daf/investment). It is the policy of the OECD to publish all responses, and anyone not wishing to have his/her response published, or anyone wishing to remain anonymous, should say so explicitly.

COMMENTS NAMING ORGANISATIONS AND INDIVIDUALS: The purpose of the consultations is to provide inputs of generic interest for the Investment Committee's consideration – they are not intended for use as a forum for lodging accusations or waging campaigns. Likewise, they should not be used for self-promotion by organisations or individuals unless such self promotion contributes to enhancing understanding of generic issues. The OECD Secretariat reserves the right to remove references to individuals or organisations that are not in the spirit of the consultations.
