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DRAFT OECD RISK MANAGEMENT TOOL FOR INVESTORS IN WEAK GOVERNANCE ZONES

Comments from Global Witness, International Alert, the Netherlands institute for Southern Africa(NiZA), and 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 though 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.*

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".†

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* 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".

† 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

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 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.*[‡]

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.

[‡] Human Rights Watch, *Sudan, Oil and Human Rights*

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:

> ***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 give 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.* [§]

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 behaviour*** [**]

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

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

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

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'.

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 sited 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 or 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.[††] 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*

[††] *Our Common Interest*, 5.2.4 48

enterprises have responded to the CSR issue domestically, many are reluctant to apply standards internationally and particularly amongst their supply chains.[‡‡]

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:

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 though 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.

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

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. [§§] 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.

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.

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

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.