

ICFTU COMMENTS ON OECD RISK MANAGEMENT TOOL FOR INVESTORS IN WEAK GOVERNANCE ZONES

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:

Section II

This section should have a subsection on the labour market. The questions should concern whether local business partners and supply chain relationships encourage economic activity to take place outside of the national legal and institutional framework. With respect to corruption the role of illegitimate or unregistered enterprises in tax avoidance should be raised. The role of informal economic activity in encouraging the exploitation and abuse of workers should also be raised. The role of informal economic relationships in denying workers access to justice should be raised.

Paragraph 11: “Labour management” suggests too narrow a conception of relevant instruments relating to company impacts in the area of employment and work.

Section IV

The section on political activities should provide more guidance on inappropriate behaviour by business. For example, promoting liberalisation or deregulation, which may be a legitimate expression of interest in a more normal environment - and provided that due democratic process is followed, including consultation with trade unions representing the workers affected - may aggravate the situation and further discourage the emergence of a culture of compliance with law in a weak governance zone.

Paragraph 16: Weak governance zones should also be characterized as having a high degree of informal labour relationships where the legal and institutional framework for labour protection and social security is inadequate or inadequately applied.

Section V

The main issue here should be whether business partners are operating within the legal and institutional framework and whether work is being performed in the context of a recognized employment relationship or by individuals who are legitimately self-employed.

Section VI

The role of trade unions in protecting whistle blowing is under emphasised. The protection afforded by binding collective agreements should be included.

Section VII

Paragraph 23: Institutional reform should include developing a framework for a mature system of industrial relations. Collective bargaining is one of the most important institutional frameworks that promote the rule of law and increase the positive social impact of business activity. It is the institutional framework that can be most directly strengthened by appropriate business activities.

Paragraph 26: Here, as elsewhere, property rights are singled out in the context of the rule of law and the protection of rights. The importance of the relationship of the rule of law to human rights, and especially those rights identified by the ILO as constituting fundamental rights at work should receive similar emphasis. The discussion of the 4th bullet point should address the importance of eliminating informal economic activity and illegitimate employers. It should also stress the importance of joining existing employer organisations participating in established collective bargaining structures.

III - Drafting suggestions by section:

Please find below specific drafting suggestions to be integrated into the text – these should be considered as additional to the more general comments above, which require further amendment to the text. Attention should be paid also to the deletions that are proposed, in case these are not immediately evident:

I. Introduction

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~~7. The Committee recognises that its efforts are only one of many international initiatives seeking to help people living in weak governance zones to get on the path of successful economic development~~⁸. The Committee aims to add value by basing its contribution on its experiences with the OECD Guidelines and on established OECD expertise. The tool is non-prescriptive and consistent with the objectives and principles of the Guidelines

→The first sentence of para. 7 has been proposed for deleting because the scope of this initiative is too narrow to make a real contribution to economic development or to help people living in WGZs.

II. Heightened care mechanisms maximizing compliance with the law and international standards. Obeying the law and observing international standards

Because legislation is enforced hardly at all in weak governance zones, companies may find it necessary to set up internal rules, procedures or practices in order to maximize compliance with the law and international standards. This could also increase a company's visibility in often instable and unpredictable contexts.

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12. In thinking about these issues, investors in weak governance zones might wish to consider the following questions:

General

- Is the company confident that, in this investment environment, it will be able to put in place business policies and processes that will allow it to obey applicable laws and to observe **relevant international instruments**, including the *OECD Guidelines for Multinational Enterprises*? If the answer to this question is no, what conclusions does the company draw for its investment strategy?

- Does the company inform itself about and analyse how its investment may impact on existing problems (e.g. conflict, corruption in state-owned enterprises)? Does the company seek to involve stakeholders, especially local actors, in this process?

- Has the company put in place internal mechanisms to monitor compliance with international standards (e.g. reporting procedures on environmental, social and health & safety issues, adoption of practices that prevent the establishment of "off the books" or secret accounts etc..)
- Has the company developed a positive attitude towards trade unions and to developing good industrial relations practices in order to maximize compliance with international standards?, i—in particular with regard to labour standards, workers information & consultation, and training opportunities?

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III. Heightened managerial care

Management systems

- 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 in accordance with internationally agreed standards such as ILO Conventions or OECD guidelines on Multinationals ?

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- 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?

- Has the company contemplated disciplinary actions against employees who have deliberately taken initiatives seriously contravening the law, the OECD guidelines or company policy? Are employees aware of these disciplinary actions?

- In absence of a functioning judicial system, has the company established and published guidelines consistent with international standards on labour dispute settlements?

Reporting and disclosure of information

- ~~.....~~ Does the company, in line with the OECD Guidelines (para. III.2), “apply high quality standards for non-financial information including environmental and social reporting” as well as disclosure? (eg reporting on how the company complies with freedom of association, collective bargaining, health & safety standards, etc..)

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

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26. In thinking about these issues, investors might want to consider the following:

- Does the company use its influence on political actors positively, not only to negotiate immediate conditions for their investment, but also to avert conflict and to promote broader reform? In particular, where possible, does the company promote:

- Observance in host country law and policies of relevant international instruments?

- The development of the rule of law and the protection of rights (including property rights)?

- Improvements in public security in line with internationally agreed principles?

- ~~- The adoption of public sector ethics programme covering such areas as solicitation, conflict of interest and campaign finance?~~

- 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)?

- Transparency and consultation in the adoption and implementation of law and public policy ~~and in the political process~~? Does this include easy and economical access to government information that impacts business or other parties?

- ~~• Companies should comply with the tax laws and regulations of all countries in which they operate. In weak governance zones, weak fiscal systems are one symptom of broader government failures. Companies that make large tax payments into governments with weak fiscal systems may want to assess possible risks (e.g. of damage to reputation) associated with making payments into fiscal systems that cannot control revenues or channel expenditures in a financially and politically accountable way. If such risks are deemed to be substantial, the company might want to ask itself the following questions:
- Is it possible for the company to engage constructively with host country institutions with a view to encouraging reform in this area?~~

~~- What are the benefits, costs and risks associated with engagement on this issue for the company's owners and for other people affected by its operations?~~

~~• If the company does engage on this issue, how can it organise its activities so as to maximize benefits and reduce risks of reprisals (e.g. by forming partnerships with host country, regional or international civil society organisations? by forming partnerships with home governments and international organisations for promoting more transparent and accountable fiscal policy)?~~

- Does the company encourage capacity building through close cooperation with the local community, including business interests, consistent with the need for sound commercial practices?

- In managing its relations with host country business partners – including state-owned enterprises - does the company support and uphold good corporate governance principles and apply good governance practices?

- Does the company participate in and support development of host country professional and business associations, chambers of commerce and other institutional supports for a constructive role for business in host societies?

→ These 3 items (public sector ethics programmes, political process and fiscal reform) should be deleted. Foreign country based companies should not be involved in these discussions since these issues belong exclusively to the sovereign competences of nations.