



The OECD’s “Draft Risk Management Tool for Investors in Weak Governance Zones”

Comments of Human Rights Watch

November 23, 2005

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).¹

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.

¹ See Human Rights Watch, *Democratic Republic of Congo: The Curse of Gold* (New York: Human Rights Watch, 2005).

We also note that 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.

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 useful.

Proposed Changes to Definitions included in the *Glossary of Selected Terms*

“Weak Governance Zone”

The Draft’s definition of “weak governance zone” does not adequately address many of the situations in which companies face important risks and where their involvement without due safeguards can have serious negative consequences. The definition should be expanded accordingly. We would urge in particular that the definition specifically mention that such zones typically can be characterized by violent conflict, serious violations of international human rights or humanitarian law, and/or the absence of accountability.

“Relevant International Instruments”

We are concerned that the Draft’s definition of “relevant international instruments” is incomplete. It would be valuable to add, at a minimum, the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social, and Cultural Rights (ICESCR), the United Nations Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (U.N. Norms), and the Voluntary Principles for Security and Human Rights (Voluntary Principles).

We feel that explicit reference to each of these instruments would help to clarify the international standards companies are expected to observe. Each of the references adds value. The two international covenants, the ICCPR and the ICESCR, provide context for understanding the universal, indivisible, and interdependent nature of human rights. Moreover, in many cases the home or host country will be party to these widely adopted treaties. The Voluntary Principles outline standards and practices for security arrangements. They have received wide recognition, including from a number of OECD countries and non-OECD countries, international organizations, and companies in different industrial sectors, beyond those that have formally joined the initiative. The Norms, which were approved in 2003 by the U.N. Sub-commission on the Protection and Promotion of Human Rights, are not binding but provide important guidance. They recognize that the fundamental obligation for upholding human rights lies with governments, but that companies do have responsibilities as well. Along with an accompanying commentary, the Norms represent the most comprehensive and authoritative standard on corporate responsibility and, as such, fill an important gap in the protection of human rights world-wide.

I. “Introduction”

4. ... “Investors *should* obey the law and *observe* established international concepts and principles in their global operations, including in weak governance zones.” (A)

(A). The above revision is intended to clarify, consistent with the OECD Guidelines and Part II of the Draft, that companies are expected to comply with the law and observe international standards.

II. "Obeying the law and observing international standards"

12. *Human rights and management of security forces* (B)

- Does the company respect the human rights of those affected by its activities consistent with the host government's international obligations and commitments, *as well as standards elaborated in relevant international instruments*? (C)
 - *Does the company take adequate steps to ensure that those within its sphere of influence (including its suppliers and contractors) respect human rights*? (C)
- Is the company well-informed about the host country's human rights situation *and has it performed adequate due diligence to evaluate the impact of its activity on the human rights of those who might be affected*? In particular, can it provide answers to such questions as:
 - Do the host government, other important political bodies, *and non-state actors* respect human rights? (D) . . .
 - What steps *are* the host government, *international organizations, and other actors* taking to improve the human rights situation?
 - *In areas of violent conflict, do the parties to the conflict respect international humanitarian law*?
 - *Does the host government fully control all its territory? If not, what is the human rights situation in areas outside of effective government control*?
- *[Note: Text moved from below]* What actions does the company take, to assess and, where appropriate, *avoid or* mitigate the social and environmental impacts of its activities (for example, when a project affects local peoples' means of livelihood or creates large movements of people)? *How are matters of compensation or restitution addressed*?
- *Is the company prepared to decline to engage in a particular business venture or to withdraw if the human rights situation becomes so dire that it cannot do business with integrity? Has it defined the circumstances under which it would take such action and put in place measures to evaluate when and if such a situation arises*? (E)

13. *Security arrangements* ~~*Management of security forces*~~ (B)

- . . . Do company policies reflect good practice in the management of relations with public and private security services (as set forth, for example, in the *Voluntary Principles on Security and Human Rights*)? In particular: . . . - *Has the company considered whether the conduct of security forces is so abusive that it could not realistically adhere to good practice in the management of its security arrangements*? (F)

- Has the company evaluated the security risks that may exist in its operating environments? Does it follow good practice in making conflict impact assessments (possibly using tools developed by various international initiatives *or non-governmental organizations*)?²
- Is the company confident that its management of security for employees and physical assets does not inadvertently support or finance armed groups *or government forces* who may be responsible for human rights abuses?
- *Does the company ensure transparency regarding payments and other support for security services?*
- *Does the company take adequate steps to ensure that it does not risk complicity in abuses by the security forces (public or private) whose services it uses? The Voluntary Principles on Security and Human Rights, for example, call for vetting of security forces, monitoring and reporting regarding human rights abuses, transparency in security arrangements to the extent permissible by safety considerations, and regular consultations with host governments and local communities.* (G)
- *Does the company have in place a mechanism to monitor, record, and report any credible allegations of human rights abuses by security forces in their areas of operation to appropriate host government authorities, the United Nations, or other international organizations? Does the company actively monitor the status of investigations of human rights abuses and press for their proper resolution?* (G)
- *Does the company consult regularly with host governments, workers, and local communities about the impact of their security arrangements on affected communities?* (G)
- *Does the company have in place a grievance mechanism for complaints by workers and communities? Is it company policy to pursue resolution of disputes through dialog or other peaceful means before resorting to use of security forces?*³ . . .

(B). The Draft should distinguish between human-rights-informed questions generally and questions specific to security arrangements. While there is often a relationship between the two, it would be helpful to separate out those human rights issues that extend beyond security arrangements.

(C). Companies and others have noted that the OECD Guidelines, from which this question is derived, do not offer much clarity regarding human rights issues. A reference to relevant standards—together with a more complete listing of relevant international instruments in the Annex to the Draft, noted above—is needed to provide greater guidance. We also have added a reference to a company’s “sphere

² See, for example, International Alert, *Conflict Sensitive Business Practice: Guidance for Extractive Industries*, March 2005, available at http://www.international-alert.org/pdfs/conflict_sensitive_business_practice_all.pdf. In “Flashpoint 7: Security Arrangements,” for example, International Alert (IA) recommends that companies conduct a thorough context analysis of their operating environment at both macro and micro levels to identify possible security threats. IA suggests that, once identified, security threats can be addressed at various levels, through: security management strategies, security sector reform, and community and policy dialogue.

³ *Ibid.* IA notes that when community grievances are met by armed security as opposed to dialogue, the likelihood of further conflict actually increases.

of influence,” which is a concept that underpins discussions of corporate responsibility and is included in some international instruments.

(D). Companies should be well-informed about the host country’s human rights record, but also that of relevant non-state actors, including armed groups that may be government-allied, opposed to the government, or private in nature (e.g., rebel groups, community militias, local defense forces, vigilante groups, militias of political parties, or other armed proxy groups). Such non-state actors can play important roles in zones of weak governance. The Draft should incorporate throughout the text companies’ need to recognize that both government and non-state actors may be engaged in human rights abuses or other behavior of concern.

(E). The Draft should reflect the fact that in some circumstances, including situations of gross and systematic violations of human rights or international humanitarian law, it may become impossible for a company to adhere to the OECD Guidelines or other relevant standards. It should encourage companies to consider in advance under what conditions it might decline to engage or, if already active, might need to withdraw, and to put in place procedures to ensure timely action if such conditions arise.

(F). Companies also must weigh the human rights record of the security forces that will provide protection services. In some cases, as in Burma, these forces are so abusive, and their record of abuse so intimately connected with their “protection” role, that a company would not be able to use their services without breaching the standards elaborated in the Voluntary Principles.

(G). We recommend further elaboration of the principles enumerated in the Voluntary Principles to provide explicit guidance on how companies should manage security relationships in a way that respects and promotes human rights.

III. “Heightened managerial care”

14. In thinking about what heightened managerial care means, investors might wish to consider the following questions: . . .

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 relevant international instruments?***
- ***Do the company’s due diligence procedures adequately cover social and environmental issues, including the risks associated with business activity in weak governance zones?*** (H). . .

Reporting and disclosure of information

- Does the company ensure that timely, regular and reliable information is disclosed regarding its activities, structure, financial **and non-financial** information and performance **consistent with the right to freedom of information and best practice?** . . .

(H). As noted above, we believe that the Draft should reflect additional instruments that offer valuable guidance to companies regarding human rights standards relevant to business. We also feel that, consistent with the concept of a heightened managerial care, companies should consider whether their due diligence procedures sufficiently incorporate the various social and environmental issues that are at stake.

IV. “Political activities”

17. Investors in weak governance zones often **act** to forge political alliances with high level governmental and political figures **or others** in order to protect their investments from heightened threats of direct or indirect expropriation. (I) . . .

18. . . • Does the company exercise heightened care to ensure that its political activities in weak governance zones do not aid and abet criminal and/or corrupt activities, **risk complicity in human rights abuses**, or exacerbate conflict? (J)

- Does the company exercise heightened care in managing relations with high level governmental and political figures **or others likely to have influence on human rights or security conditions** (e.g. by providing for board-level approval for and monitoring of these relations)? (I). . .

(I). Depending on the context, the individuals in question may be high-level governmental or political figures, but they also could include less senior officials; representatives of government security forces, associated militias, or other armed groups (whether allied with or opposed to the government or acting in a private capacity); or others who exercise or assert authority or control.

(J). Companies must be vigilant to avoid political or other alliances with known human rights abusers. Entanglements with known human rights abusers can lead to company involvement in the abuses (for example, through direct complicity, beneficial complicity, or silent complicity). For that reason, companies should carefully evaluate the human rights record of those with whom they might forge ties, actively monitor the nature and effect of their political activities or other associations, and take due care to ensure that their political activities do not appear to facilitate, support, and/or condone human rights abuses.

V. “Knowing clients and business partners”

19. In weak governance zones, investors face heightened risks of entering into relationships with employees, clients or business partners that might damage business reputations, give rise to violations of law, *or fuel human rights abuses* (K) . . .

20. In thinking about these issues, investors might wish to consider the following questions:

- Has the company taken adequate steps to inform itself about possible roles in host country criminality, corruption, conflict, *or human rights abuse* of people with whom it may have business or political relations? (K)

- Does the company exercise heightened care to ensure that it does not, through its business relations, aid and abet criminal and/or corrupt activities *and/or human rights abuses*, or exacerbate conflict? (L) . . .

- *Does the company publicly disclose payments to governments, government officials, and government agents?* (M)

(K). The risk of entering into a partnership or other relationship in a weak government zone extends beyond issues of company reputation and compliance with the law; as noted above in connection with political ties, such associations could also risk complicity in the perpetration of human rights abuses. This concern is serious enough to deserve special mention, to ensure that companies duly consider human rights risks in advance of forming such relationships.

(L). In keeping with the principle of heightened managerial care, companies should make an extra effort to inform themselves about the human rights records of potential partners and ascertain that the company would not risk aiding and abetting the perpetration of human rights abuses through such relationships. We also note that criminality, corruption, and conflict are factors that often go hand in hand with human rights abuses.

(M). When a government is the direct beneficiary of a centrally controlled major revenue stream and is therefore not reliant on domestic taxation or a diversified economy to function, those who rule the state have unique opportunities for self-enrichment and corruption, particularly if there is no transparency in the management of revenues. Because achieving political power often becomes the primary avenue for achieving wealth, the incentive to seize power and hold onto it indefinitely is great. This dynamic has a corrosive effect on governance and ultimately, respect for human rights. Instead of bringing prosperity, rule of law, and respect for rights, the existence of a centrally controlled revenue stream—such as oil revenue—can serve to reinforce or exacerbate an undemocratic or otherwise unaccountable ruler’s or

governing elite's worst tendencies by providing the financial wherewithal to entrench and enrich itself without any corresponding accountability. Human rights typically are among the first casualties.⁴

VI. "Speaking out about wrongdoing"

21. Information about wrongdoing (including crimes and abuses such as human rights violations, solicitation of bribes and extortion) is especially valuable in weak ... *In the course of their activities, which should include active monitoring of human rights conditions, companies sometimes become aware of* such information and share it with home or host governments, international organisations or the media. (N). . .

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

- If a company envisages making an investment that is likely to put it in a position of frequently knowing of and having to remain silent about wrongdoing, has it considered associated risks of damage to its reputation; damage to internal business culture? *Has the company considered that through silence it could become complicit in the wrongdoing? Considering these risks, has the company identified in advance the circumstances under which it would be prepared to refrain from engaging in a given business venture or, if already active, to withdraw from a country? Has it put in place procedures to evaluate the circumstances under which it would do so and ensure a timely response?* (O). . .

(N). The Draft notes that in weak governance zones information about wrongdoing is especially valuable and that companies should carefully consider how to handle such information. Unfortunately, the language employed in the Draft implies a passive scenario of a company "coming across" instances of wrongdoing, including human rights abuses. This is insufficient and also inconsistent with the concept of "heightened managerial care." Additionally, choosing to remain silent about known instances of wrongdoing or abuse can make the company complicit in the wrongdoing or abuse, especially if the company benefits from the abuse or the suppression of information.

(O). See explanation above on the same issue.

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

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

⁴ See Human Rights Watch, "Some Transparency, No Accountability: The Use of Oil Revenue in Angola and Its Impact on Human Rights," January 2004, Vol. 16, no. 1 (A).

- . . . In particular, where possible, does the company promote: . . .
 - Improvements in public security in line with internationally agreed principles, ***standards, and best practices?*** . . .
- . . . Companies that make large tax payments into governments with weak fiscal systems may want to assess possible risks (e.g. of damage to reputation, ***or to human rights conditions generally***) associated with making payments into fiscal systems that cannot control revenues or channel expenditures in a financially and politically accountable way . . .
- Does the company encourage capacity building through close cooperation with the local community ***and civil society***, including business interests, consistent with the need for sound commercial practices?
...
- ***Does the company actively engage with local communities, including through participation in multi-stakeholder forums, on questions of human rights, sustainable development, and environmental protection?***