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Rights & Accountability in Development

DRAFT OECD RISK MANAGEMENT TOOL FOR INVESTORS IN WEAK GOVERNANCE ZONES

Recommendations of Rights & Accountability in Development
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We want to thank the Investment Committee and the OECD Secretariat for their efforts to develop an instrument for multinational companies investing in weak governance zones (Guidance). We believe the "Draft OECD Risk Management Tool for Investors in Weak Governance Zones" ("Draft") constitutes a good start insofar as it lays down a comprehensive set of questions for companies to identify potential risks, including human rights and security risks, based on existing and emerging OECD and non-OECD instruments.

'Risk management' is the process of identifying, analysing, and either accepting or mitigating risks in order to quantify the potential losses in an investment. Risks are managed or mitigated in ways that are most suitable to a company's investment objectives. Essentially, risk management is about protecting a company's financial bottom line and not necessarily about managing the risks to communities, except to the extent a company's reputation can be severely tarnished if communities are harmed through a company's direct or indirect complicity in human rights abuses.

In developing the Draft, the Investment Committee sought stakeholders' views on the question: "Do companies have different roles and responsibilities when operating in weak governance zones, where governments are not working well, than in healthier investment environments?" While the consensus was that companies do indeed have additional responsibilities in several areas, there is a stark absence of any concrete guidance in the Draft on precisely what those additional responsibilities are with respect to human rights and security – two issues of extraordinary relevance in countries with weak governance resulting from war, natural-resource driven conflict and/or repressive or authoritarian governments (high risk areas).

We therefore believe that the current Draft does not offer enough value-added, because it does not offer any concrete guidance on 1) interpreting the human rights provisions of the *Guidelines for Multinational Enterprises*; and 2) managing security forces in ways that also promote and protect human rights.

We note that throughout the Draft, the text "relevant international standards" is bolded, and we appreciate the Committee's intent. However, while bolding this text may encourage companies to take steps to identify the relevant international standards for their sector, the Draft must provide references to the norms and standards that are highly relevant to companies investing in high risk areas. In Section II on "Human Rights and Management of Security Forces", it is as if

the Investment Committee has told multinational enterprises 'be careful not to speed', but then not identified the minimum or maximum 'speed limits'.

Indeed, we are troubled that the Investment Committee has not used this opportunity to offer further guidance on how companies should interpret the human rights provisions of the *Guidelines for Multinational Enterprises*, the Commentary for which references the Universal Declaration of Human Rights and *other human rights obligations*. Presently, 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. Furthermore, companies operating in conflict prone countries run an increasing risk of becoming implicated in abuses of human rights and may faces criminal charges or civil litigation if they are seen to have been aiding and abetting security forces, directly or indirectly, in the commission of such abuses.

Therefore, we strongly recommend that the Guidance make explicit reference to the *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights* (UN Norms) and also the *Voluntary Principles for Security and Human Rights* (Voluntary Principles).

While we fully recognize that the UN Norms have not been adopted yet and there is some resistance from companies and business associations, the core purpose of the UN Norms was to explain how international human rights law is applicable to companies. In referencing the UN Norms in the Guidance, the Investment Committee will not be creating new legal obligations for companies, but simply referencing good intellectual work in order to provide further guidance on the intent of the human rights provision of the *Guidelines for Multinational Enterprises*. We believe the UN Norms offer invaluable guidance to companies that want to ensure they are operating in accordance with today's 'best practice' human rights framework.

Although governments have the primary role of maintaining law and order and security and respect for human rights, companies have an interest in ensuring that actions taken by governments, particularly the actions of public security providers, are consistent with the protection and promotion of human rights. The Voluntary Principles offer important guidance to companies about how to manage the relationships between companies and public security.

It is now five years since the Voluntary Principles were launched and there is an emerging collection of best practice and examples of how companies (both participants to the process and others) are implementing them The fact that four leading OECD countries – the US, the UK, the Netherlands and Norway – are already formally participating in the Voluntary Principles process means that it should be possible to obtain support among other OECD and adhering governments to their inclusion in the final document.

It is worth noting that a much wider group of countries recognize the value of the Voluntary Principles. For example, the Colombian Government has openly expressed support for the Principles; the Indonesian Government refers to them in a legislative act that approved the

environmental and social impact assessment for the BP Tannguh project; and the host country agreements between BP and Turkey, Azerbaijan and Georgia for the Baku-Tbilisi-Ceyhan pipeline makes specific reference to the application of the Voluntary Principles. Numerous countries have informally expressed interest in the Principles or a desire to become participants to the process. Following the Extractive Industries Review, the World Bank Group now requires its private sector project sponsors (companies) to follow provisions regarding the use of private and public security forces based on the Voluntary Principles and the Multilateral Investment Guarantee Agency has required warranties to this affect from companies seeking political risk insurance.

Given the lessons from the Democratic Republic of Congo (DRC), it is reasonable to expect the Guidance to refer companies to existing and emerging non-OECD instruments concerning human rights and security issues, particularly if the OECD is not presently in a position to take steps to develop guidance in these areas. Indeed, we note the Draft's reference to the Extractive Industries Transparency Initiative and welcome its inclusion.

As the Investment Committee moves forward with this process, it is important that the Guidance is clear on OECD governments' shared expectations for responsible corporate behaviour in high risk areas, including guidance on how companies should properly handle security issues arising from their activities. Furthermore, communities and NGOs will also benefit from understanding the international human rights norms and standards that are relevant to companies, particularly those communities in high risk areas. We are also aware that many companies (multinational and junior companies) see the need for greater guidance and clarity from the OECD on these issues. Their views are not always adequately reflected in the OECD's debates. However, they are looking to their home governments to draw a clear line between acceptable and unacceptable behaviour on how to operate in areas where the host government is unwilling or unable to enforce the rule of law.

In closing, we believe incorporating the UN Norms and Voluntary Principles will strengthen the effectiveness of the Guidance to better reflect the lessons from the DRC and also to aptly respond to the Group of Eight leaders' 2005 Gleneagles Summit Communiqué, which calls for "developing OECD *guidance (emphasis added)* for companies working in zones of weak governance."