



INVESTMENTS IN WEAK GOVERNANCE ZONES

Summary of Consultations

September 2005

A recurrent theme of the OECD Investment Committee's work on the OECD Guidelines for Multinational Enterprises is that corporate responsibility goes hand-in-hand with government responsibility. The current document summarises the results of a multi-stakeholder dialogue that has sought to provide inputs to an answer on the following central 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?

INVESTMENTS IN WEAK GOVERNANCE ZONES – SUMMARY OF CONSULTATIONS

The Guidelines aim to ensure that the operations of enterprises are in harmony with government policies, to strengthen the basis of mutual confidence between enterprises and the societies in which they operate, to help improve the foreign investment climate and to enhance the contribution to sustainable development made by multinational enterprises.

OECD Guidelines for Multinational Enterprises, first paragraph of the Preface

Introduction and background

Weak governance zones are areas where governments are unwilling or unable to carry out their responsibilities¹. This means that public authorities do not protect rights (including property rights) or provide basic public services (e.g. social programmes, infrastructure development and prudential surveillance). These “government failures” lead to broader failures in political, economic and civic institutions that the OECD Investment Committee refers to as “weak governance”. A recurrent theme of the OECD Investment Committee’s work on the OECD Guidelines for Multinational Enterprises is that corporate responsibility goes hand-in-hand with government responsibility. The current document summarises the results of a multi-stakeholder dialogue that has sought to provide inputs to an answer on the following central 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?

In late 2004, the Investment Committee discussed a Secretariat background paper that identifies some of the ethical challenges posed by investments in weak governance zones. This paper focused on the challenges about which the OECD integrity instruments can shed light. The Committee then held three consultations organised around the issues identified in the paper: 1) an expert consultation held in Paris in December 2004; 2) a web-based expert consultation held in early 2005²; and 3) a conference in Addis Ababa attended by over 90 participants and co-sponsored by the OECD, UN Global Compact, NEPAD and Transparency International³. This Annex reports on the results of these consultations.

¹ Estimates made by the UK Department of International Development. See *Why we need to work more effectively with fragile states*, January 2005, page 5.

² The contributions to the web-based consultation are compiled in DAF/INV/RD(2005)3 and can be found at: www.oecd.org/daf/investment. Then click under What’s new.

³ Information about this conference, including contributions by participants, can be found at www.oecd.org/daf/investment (then click under What’s new) and at <http://www.unglobalcompact.org/content/NewsDocs/addis.htm>

Summary of consultations

General issues

Human dimension of the problem. Some participants recalled the human suffering caused by the institutional problems being addressed in the consultations -- this discussion is not a dry policy debate. One NGO participant recalls that "what is at stake is not simply the credibility or profitability of OECD investment, but the physical, social and economic well-being of millions of people throughout the developing world⁴."

Primacy of the roles of host country actors. The primacy of the roles of host country actors in reforming their own institutions was stressed both in the background paper and in the consultations. Indications are that host country actors -- even in weak governance zones -- are starting to assume these roles. Angola has taken the first steps toward enhancing revenue transparency, Nigeria has moved forward on fiscal reform and, in the DRC, an evaluation of SOE performance recently led to the suspension of six Ministers. At the Addis Ababa conference, one business representative noted the emergence of new African leadership whose goal is to leave a lasting political legacy. This augurs well for reform. Home country and international organisations can play important -- but only supporting -- roles in assisting weak governance host countries to get on the path to reform.

Missing issues. A number of participants remarked that, while the Investment Committee project addresses some highly relevant concerns in the anti-corruption and governance areas, it leaves aside many important issues⁵. Missing issues mentioned by consultation participants are: human rights and humanitarian law, handling of extortion and relations with rebel authorities and other belligerents, conducting business in the midst of war crimes, supply chain management, protection of workers' rights, management of security forces and the possible role of investment embargoes.

Rapid growth of initiatives in this area. Many initiatives have been undertaken that, in various ways, help weak governance countries to find solutions to their problems. Initiatives cited by participants include: the Convention on Business Integrity in Nigeria; the OECD Development Assistance Committee's Guidelines on Conflict, Peace and Development Cooperation; Extractive Industry Transparency Initiative (EITI); Global Reporting Initiative; International Budget Project; International Association of Oil and Gas Producers' Guidelines on Reputational Due Diligence; Sarbanes Oxley; South Africa's King II Report (a corporate governance code); Transparency International (TI) and Social Accountability International's Business Principles for Countering Bribery; TI's Integrity Pacts; the Voluntary Principles on Security and Human Rights; the United Nations Convention against Corruption; the UN Global Compact Conflict Guidelines; and the Wolfsberg Principles.

These initiatives draw on the distinctive competences of many organisations. The rapid growth of initiatives to help improve the situation in weak governance zones -- sponsored by home and host governments, international organisations, businesses and business associations, NGOs and trade unions -- suggests that a broad, global effort to address these issues has developed. Organisations' contributions reflect their distinctive competences and have given rise to a framework that, while far from complete,

⁴ Fourth paragraph of FAFO's written contribution to consultation questionnaire. The same point was also made by Transparency International at the December 2004 consultation.

⁵ See, for example, submissions from BIAC, International Alert, Rights and Accountability in Development and the All Party Parliamentary Group on the Great Lakes Region.

nevertheless represents progress. Thus, while the consultations underscored the daunting nature of the challenges posed by weak governance zones, they also conveyed a hopeful message that many people are working in many different ways to help these countries in their quest for reform and for a higher quality of life. These diverse initiatives have been undertaken by home and host governments, business, trade unions and NGOs operating in both adhering and non-adhering countries. With this project, the OECD Investment Committee's aims to draw on the OECD's established strengths in the area of integrity and governance instruments so as to complement and reinforce other initiatives.

Strategic partnerships. Many of these initiatives are the fruit of collective action and strategic partnership was one of the major themes of the consultations⁶. These partnerships have involved and will continue to involve business, host and home governments, NGOs, trade unions and international organisations.

Nature and allocation of public sector and business responsibilities

Mixing politics and economics. Mixing politics and economics is, according to participants, a feature of weak governance zones – one contribution notes that “the political system in these environments is often closely intermingled with the economic framework”⁷. This intermingling is unhealthy in weak governance zones in the sense that it creates a situation in which neither the public sector nor the business sector does its job well. Participants reported that foreign investors (like their domestic counterparts) in weak governance zones tend to already be deeply involved in host country politics – they need to nurture political contacts to protect their investments and can also to use them to gain competitive advantage. This makes it difficult for companies operating in these countries to maintain credibly an apolitical, “strictly business” stance⁸. Given this situation, companies need to distinguish between appropriate and inappropriate political engagement.

Constructive political involvement. Participants underscored the double-edged position that companies find themselves in with respect to political involvement – for while consultation participants were concerned about excessive mixing of politics and economics, most of them also felt that companies have a role in supporting reform in weak governance host societies. For example, all written responses to the question as to whether companies have a role in supporting reform are either an emphatic or a (sometimes highly) qualified “yes”. Some participants emphasised the particular importance of this role in weak governance zones, where multinational enterprises are not only relatively powerful (compared with most host country actors), but also better informed about international “rules and standards”⁹. On the other hand, participants often expressed concern that “even the most well-meaning initiatives by companies to support host state reform will carry the risk of inappropriate involvement in host country

⁶ See, for example, Soji Apampa's (SAP, Nigeria) answer to consultation questionnaire and his presentation to the Addis Ababa conference (www.oecd.org/daf/investment).

⁷ Paragraph 2 of Edward Nathan Corporate Law Advisors' answer to question 1. The unhealthy intermingling of politics and business was described by numerous participants at the Addis Ababa conference.

⁸ See for example, the junior mining company's contribution on standards of political involvement and use of political relationships to gain competitive advantage, page 1 and 2. This point was also made in the background paper for the consultations.

⁹ Contribution of Asif Saeed, Government College University, Lahore Pakistan, page 1.

politics or the appearance of misconduct...¹⁰.” Participants identified a number of characteristics of constructive political engagement:

- Subject and purpose of involvement -- appropriate involvement promotes better participatory processes and a competitive market environment; strengthens reputational agents such as accounting, audit and legal professionals and civil society; promotes the integrity-enhancing institutions (e.g. business associations and chambers of commerce¹¹);
- Good faith test – “the test involves a company ensuring that its intention in the particular context is candid, *bona fide* and for the best interest of the host community and country in the long run¹²;
- Competence – the company is well informed about the local political situation and has taken steps to ensure that it understands the national, regional, local and ethnic dimensions of host country politics¹³.
- Partnership – Most contributions stressed the importance of partnership – for example, an NGO asks companies to engage in “multi-stakeholder dialogue ... which will enable different actors to pool their core competencies ... and will also facilitate the development of stronger inter-relationships, co-ordination and transparency¹⁴.” Partnerships with international organisations and with local embassies were also frequently mentioned.

No double standard. Participants noted that it is both possible and necessary to respect international standards (e.g. on human rights, anti-bribery and avoidance of conflict of interest) in weak governance zones. 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 political and legal framework is not providing reliable guidance for companies. 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 business¹⁵”.

Greater due diligence and managerial care. Participants considered that, while the same standards of business conduct apply in all the countries of the world, observing these standards requires more extensive due diligence and greater managerial care in weak governance zones. There is a need for a context-sensitive “heightened degree of caution” according to one mining company official. The International Association of Oil and Gas Producers’ contribution notes that “companies that conduct due

¹⁰ Karen Ballentine, FAFO written contribution on question 2, second bullet point, page 2. Also Edward Nathan Corporate Law Advisers, page 3.

¹¹ Edward Nathan Corporate Law Advisers page 2. See also FAFO response, page 2 on building local competence, building ‘remedial technical assistance into Production Sharing Agreements’ and strengthening civil society organisations.

¹² Edward Nathan Corporate Law Advisers page 3, answers to second bullet of question 2.

¹³ Edward Nathan Corporate Law Advisers page 3, answers to second bullet of question 2.

¹⁴ International Alert’s contribution, page 3. Question 10.

¹⁵ Edward Nathan Corporate Law Advisers page 2.

diligence will be better positioned to identify areas of risk and reduce the likelihood of reputation damage” and calls attention to its *Guidelines on Reputational Due Diligence*. Thus, at one level, the consultation participants appear to have answered the central question addressed to them: “Do companies have different roles and responsibilities when operating in weak governance zones than in healthier investment environments?” Broadly described, their answer appears to be: “Companies’ responsibilities are largely the same in weak governance zones as they are in other investment environments. What is different is the amount of due diligence and managerial care needed to ensure that these standards are adhered to – this has to be much greater in weak governance zones.”

Bearing witness. Consultation participants generally supported the view that companies have some kind of responsibility to “report wrongdoing to the appropriate authorities¹⁶” and provided indications that companies are already doing this¹⁷. One business executive at the December consultations noted that, in his company’s experience, when companies do speak out, they are often ignored – by host and home governments and by international organisations. Participants also stressed the obvious risks of whistle-blowing – losing business, “getting shot” and expropriation. Some doubted that companies could play an important role in this respect because of the gravity of the threats against them. One NGO suggested that there is a need for a “witness protection programme” for businesses and that, if companies felt they could not “report serious wrongdoing to an international body and/or host country institution without suffering negative consequences,” then this was a reason not to invest in that host country¹⁸. Noting that “unilateral action under such conditions is usually suicidal¹⁹”, participants highlighted the value of collective action²⁰ – e.g. operating through business associations or in partnership with international organisations²¹ – in facilitating effective whistle-blowing. The useful role played by some OECD embassies in channelling such information was acknowledged²².

Small- and medium-sized enterprises (SMEs). Participants (including SMEs themselves²³) generally held that “the same minimum standards apply to all companies, large or small. Whilst it may be unreasonable to expect small companies to adopt the same levels of reporting as large and listed companies, in weak governance countries in particular any lowering of the requirements on integrity and transparency will encourage irresponsible elements²⁴.” Understandably, the SME contributions tended to

¹⁶ De Beers contribution, page 3. DeBeers stressed that illegal activity needs to be reported.

¹⁷ Canadian junior mining company’s contribution. Groupe Forrest contribution, page 10.

¹⁸ Rights and Accountability in Development, page 3.

¹⁹ Soji Apampa (SAP Nigeria) contribution, page 2.

²⁰ This theme – the fact that business has information that could be useful to anti-corruption practitioners, but that it is often difficult to use it – was also an raised by participants at the June 2003 Corporate Responsibility Roundtable (see summary of discussions published in the *2003 Annual Report on the OECD Guidelines for Multinational Enterprises*). Follow up on this Roundtable is being undertaken Joint Task Force on Bribe Solicitation.

²¹ DeBeers stated that governments and international organisations have a comparative advantage in speaking out on matters of public sector management.

²² Junior Mining Company contribution.

²³ At least 5 SMEs participated in the consultation events.

²⁴ De Beers contribution page 5.

stress the high standards to which they already adhere²⁵. One NGO contributor stated that the real question was not so much whether international standards apply to SMEs, but how they can be made meaningful: "Quite clearly, due to their lesser visibility and, in the case of small unlisted companies, their imperviousness to shareholder accountability, these companies have fewer incentives to adopt best practices..."²⁶. One SME noted that some listed SMEs face growing legal pressure for fuller disclosure (e.g. from Sarbanes-Oxley) and that complying with these demands is quite costly for them.²⁷

Know your business partners and clients. Many participants underscored the importance of companies knowing their business partners and clients. According to the former Chairman of the Wolfsberg Group (speaking at the December 2004 consultation), "knowing your clients" is a core responsibility for banks. He advocated the use of the *Wolfsberg Principles* as a basis for designing bank procedures in this area. The International Association of Oil and Gas Producers' *Guidelines on Reputational Due Diligence* help companies to design due diligence procedures and to "establish a framework for in-house programmes." In particular, the *Guidelines* propose "red flags" (i.e. possible danger signals) that companies should research and take into account when deciding whether to conduct business with another company or an individual²⁸. Thus, the consultations provided indications that business – mainly through business associations – is moving forward in this area.

Management and reporting practices – maximising value with integrity

Enterprises should...

6. *Support and uphold good corporate governance principles and develop and apply good corporate governance practices.*
7. *Develop and apply effective self-regulatory practices and management systems that foster a relationship of confidence and mutual trust between enterprises and the societies in which they operate.*

OECD Guidelines for Multinational Enterprises, Chapter 2. General Policies

Weak governance zones confront companies with many decisions in areas over which they have only partial control, but they have almost complete control of their choice of corporate governance arrangements. A company's management and reporting practices are probably the best indicator of the importance that it attaches to facing various ethical and business challenges. One of the questions considered by consultation participants was whether or not companies operating in weak governance zones should use basic business tools – boards, internal management systems, external audit and

²⁵ See, for example, the written contributions by Groupe Forrester and the junior mining company.

²⁶ FAFO contribution, page 5. Soji Apampa's contribution (page 3) makes the same point and notes the role of regulation and stock market listing requirements in helping to "level the playing field".

²⁷ Canadian junior mining company, pages 4 and 5.

²⁸ According to the International Oil and Gas Producers submission, these include: "Public officials holding shares or other interests in the company in his own right; an officer, senior executive or key employee of the company has an interest in another company that might be considered to be a competitor; there are uncertainties in the business or financial references; payment instructions requested by the company include split payments, payments to an apparently unrelated third party or to a bank account in an offshore tax regime; and the company asks that the identify of the directors, owners or employees not be disclosed."

disclosure -- to manage the serious risks (human rights, corruption, etc.) encountered in these difficult business environments.

Participants generally answer “yes” to this question. For example, a junior mining company, states that “the greater level of independence within the Board..., more rigour, responsibility and independence for audit committees, ... increased independent auditor responsibilities... will be helpful in better managing our roles in difficult environments²⁹”. Consultation participants stressed the need to undertake more extensive due diligence and use greater managerial care in supporting employees and business partners “on the ground” in weak governance countries³⁰ -- propriety in this area is “is one aspect in which there is no room for flexibility”³¹. One NGO notes that companies’ behaviour in these areas is central to how they will be viewed by surrounding societies – she states “companies are only expected to act in their ‘sphere of influence’. Companies will be assessed on the way in which they negotiate deals; the transparency of their transactions; their relations with local communities not merely in providing ‘services’ but whether they disclose relevant information about their activities, the composition of their boards, their ultimate beneficial owners and the scale and duration of their investment.”³²

Doing Business with State-Owned Enterprises (SOEs)

Enterprises should take fully into account established policies in the countries in which they operate ... In this regard, enterprises should:

1. *Contribute to economic, social and environmental progress with a view to achieving sustainable development ...*
3. *Encourage local capacity building through close co-operation with the local community, including business interests....*
6. *Support and uphold good corporate governance principles and develop and apply good corporate governance practices.*

OECD Guidelines for Multinational Enterprises, Chapter 2. General Policies

The Addis Ababa conference provided an opportunity to survey country experiences with SOEs (countries covered were the DRC, Ethiopia, Namibia, Nigeria, Senegal, South Africa and Tanzania). The SOE sector also featured prominently in more general discussions of public and private governance and of corporate responsibility at the conference. The sector was described by conference participants as “obstacle to development” and as a “liability to the African economy”. Thus, the Addis Ababa conference underscored the significance that African actors attach to the SOE sector, both as a target for promoting corporate responsibility and as an integrity issue for private companies conducting business with it.

²⁹ See junior mining company contribution, page 4. This statement is made in relation to governance changes imposed by “Sarbanes-Oxley-type initiatives”.

³⁰ See contributions from DeBeers, International Association of Oil and Gas Producers and Edward Nathan Corporate Law Advisers (page 2).

³¹ Contribution of Asif Saeed, Government College University, Lahore Pakistan, page 4, question 7.

³² Contribution of Rights and Accountability in Development. Page 2. See also contributions from Asif Saeed, DeBeers, the junior mining company, Edward Nathan Corporate Law Advisers, International Alert.

Although the discussion of African experiences with SOEs showed some differences among countries (e.g. in the degree of privatisation achieved to date), the overall picture painted at Addis Ababa was one of serious, but strikingly similar problems (including inefficiency and corruption, especially political corruption). SOE governance problems mentioned by conference participants include:

- *Regulator and ownership roles of the state not separated.* SOE relations with Ministries and top political actors are generally close. This gives rise to conflicts of interest in the formulation of a number of policies, including regulation, competition and procurement. Many African SOEs enjoy monopoly powers in their sectors.
- *Ineffective Boards of Directors.* Boards of directors often do not have *de facto* rights to exercise their responsibility to set the strategic direction of the company and to ensure that management acts in the best interest of the shareholders (for example, real control may reside outside the Board with political parties or top government officials). Board appointments are made on the basis of political connections, not business competence. SOE Board nominations can be a channel for political patronage and Boards are often beset with conflicts of interest.
- *Slack Internal Management Systems and Other Controls.* SOEs' internal control systems are often defective or non-existent. SOEs are frequently "excluded from the Auditor General's purview"³³ and sometimes hire their own auditors, who do not follow international audit standards and are subject to conflicts of interest.
- *Low standards of disclosure.* One participant at the conference noted that SOEs should adhere to higher transparency standards than privately owned companies because SOEs act in trust for the public. In reality, the average standard of disclosure observed by SOEs in most countries surveyed is low.

Thus, overall, the Addis Ababa conference confirmed the relevance of the focus placed by the background report on the way OECD-based companies structure their business transactions with state-owned enterprises. The consultations revealed no general view that companies should avoid all business relations with weak governance SOEs; rather the tenor of the conversation was that companies should give carefully monitor the structure of individual transactions; should be particularly diligent in monitoring relations with problematic SOEs; and should promote improved SOE governance arrangements. The consultations showed clearly that companies themselves recognise that how they manage their relations with weak governance SOEs is an important issue and that they are willing to try to promote better governance with these business partners (as recommendation II.6 of the OECD Guidelines for Multinational Enterprises urges them to do). At the same time, companies wished to avoid giving the impression that they can assume full responsibility -- one business contribution, while expressing a willingness to engage on this issue, stresses that the "responsibility for proper governance of SOEs lies with governments, not industry"³⁴.

The consultations indicated, in particular, that there is a role for OECD-based companies who sit on boards of partially-privatised SOEs to protect the rights of "other shareholders", notably those of host

³³ Participant in the parallel session on state-owned enterprises at the Addis Ababa conference.

³⁴ De Beers contribution, page 5.

country citizens who are (or should be) the ultimate owners of their SOEs³⁵. FAFO's contribution states that larger multinational enterprises sitting on SOE Boards "have a legitimate shareholder right to demand accountability from these companies and the leverage to make a difference, something that local citizens in weak governance zones do not have³⁶."

Dealing with the authorities of weak fiscal systems

It is important that enterprises contribute to the public finances of host countries by making timely payment of their tax liabilities. In particular, enterprises should comply with the tax laws and regulations in all countries in which they operate and should exert every effort to act in accordance with both the letter and spirit of those laws and regulations. This would include such measures as providing to the relevant authorities the information necessary for the correct determination of taxes to be assessed in connection with their operations and conforming transfer pricing arrangements to the arm's length principle.

OECD Guidelines for Multinational Enterprises, Chapter 10. Taxation

Fiscal policy determines who gets what out of government spending and who has to pay for it. Many societies have developed elaborate systems for meeting their collective needs and implementing their models of social justice. These policies have created their own distinctive rent seeking opportunities and have contributed to fiscal imbalances in many countries, but they are also widely recognised to have helped create prosperous, just and peaceful societies. Spending and taxation programmes need effective political oversight to ensure that money is well spent and to prevent abuses. As stated by the contribution from the Institute for Democracy in South Africa (IDSA): "In a democracy, citizens have a right to know what public money is being spent on, and what decisions their elected representatives make on their behalf. It is only with this knowledge that elected officials can be held accountable for their budget planning, allocations and implementation."

The OECD Guidelines are one of the few major corporate responsibility instruments that recognise the importance of the business responsibilities as taxpayers – Guidelines Chapter 10 deals with this issue. Consultation participants generally accepted the importance of these responsibilities, but had mixed views about the willingness and ability of OECD-based companies to play a major role in supporting fiscal reform. Generally, the importance of partnership was stressed: "[companies] should not be unilateral proponents of reform but must be willing to get involved in a coalition of interests seeking reform³⁷." As one business executive states, companies can "use best endeavours to encourage [fiscal] transparency. Business can help to create a positive environment and influence such reform – and it is in its interest to do so – but is a guest in the host country and cannot dictate. Again, the EITI is leading the way on this issue³⁸." In general, the effective and useful role played by the EITI in this area was acknowledged by many participants in all the consultation processes. The OECD Investment Committee

³⁵ See, for example, Asif Saeed, DeBeers, Edward Nathan Corporate Law Advisers, FAFO, International Alert and the junior mining company's answers to Question 10.

³⁶ FAFO contribution, page 7.

³⁷ Contribution of Soji Apampa, SAP Nigeria, page 5. answer to question 11.

³⁸ DeBeer contribution, page 6.

has twice associated itself with the EITI³⁹ and considers that the current project reinforces and complements the EITI.

IDSA states that companies, in partnership with civil society and international organisations, can make a significant contribution to improving budget systems. Companies are often important revenue sources for weak governance fiscal systems and are potentially a powerful force for promoting budget reform. IDSA's contribution proposes a number of ways that non-governmental actors (including companies) might be able to contribute to improving budget systems. These include helping to build a culture of accountability and advocating more public access to budget decision-making.

Bribery of Public Officials

Chapter VI of the OECD Guidelines – Combating Bribery -- is the Organisation's main direct communication to business on the subject of combating bribery to obtain or retain business or other improper advantage⁴⁰. As such, it is an essential complement to the OECD Convention on Bribery of Foreign Public Officials in International Business Transactions and to the Revised Recommendation on Combating Bribery in International Business Transactions. An NGO consultation participant notes the particular relevance of this chapter for investors in weak governance zones and "the fact that the OECD [member countries] also have legislation on this issue is of particular significance. The link between bribery and corruption and poor development is well-documented – as is the cycle of bribery, extortion and violent conflict. Paying bribes directly implicates companies in these dynamics...⁴¹".

Participants emphasised the need for a "zero tolerance" policy and for "tone from the top". Business representatives working in African subsidiaries of OECD-based multinational enterprises described incidents where they were forced to assume very high costs in saying no to bribe solicitors (for examples, a Nigerian executive abandoned \$250,000 of production inputs blocked in a Nigerian port rather than pay a bribe to have it released). They noted the importance of support from headquarters for resisting solicitation⁴². In this sense, the consultations reinforce a finding of the Phase II reviews of signatories' implementation of enabling legislation under the OECD Convention. These have shown that, if support from headquarters is to be effective, it requires a clear chain for reporting corruption (sometimes through a hotline) as well as whistleblower protection. Such measures should be set forth in company guidelines and supported with regular awareness and training activities.

An NGO and a trade union participant addressed a word of caution to international business – prosecutions and investigations are underway and are becoming more common among the 36 countries that have signed the OECD Convention⁴³. In addition, since the Convention came into force there have

³⁹ A formal statement was made by the Investment Committee Chair at its June 17, 2003 meeting of the EITI and a statement by the Chair was also submitted to the March 17, 2005 meeting (DAF/INV/RD(2005)6).

⁴⁰ Chapter 6 was added to the Guidelines at the June 2000 Review. The text of the chapter and its commentary was developed by the Working Group on Bribery in conjunction with the Investment Committee.

⁴¹ International Alert contribution, page 7.

⁴² Two business executives speaking at the Addis Ababa conference.

⁴³ Transparency International and UNICORN – Global Unions Anti-Corruption Network, speaking at the Addis Ababa conference.

been several convictions – for example, in Canada, Korea, Mexico, Norway, Sweden (under appeal) and the United States. The Addis Ababa conference showed that – beyond the OECD Convention – the anti-corruption framework is being built up at the international, regional and national levels. Companies engaging in bribery now run greater risks.

Chapter 6 of the OECD Guidelines provides guidance on the appropriate use of agents. The OECD Convention requires signatories to criminalise bribery of foreign officials “whether directly or through intermediaries” – thus, bribery through agents is clearly covered by the Convention⁴⁴. Current good practice suggests that companies should first ascertain if the use of an agent is really required. If it is, then companies need to handle their relationship with care *inter alia* by” 1) engaging in due diligence in the selection and appointment of the agent; 2) ensuring that the amount paid to the agent is reasonable and that it corresponds to a real service; and 3) establishing a clear contractual relationship in which the agent is informed of and accepts the policies of the company.

The Expert Panel Report on the DRC revealed a case where a company found that one of its agents had bribed public officials – its letter to the Panel⁴⁵ states that the company severed its relations with the agent as soon as it became aware of the problem. Participants were asked whether this measure is sufficient, or whether other remedial activities should be undertaken by a company confronted with such a situation. Many noted the need to change the way the company selects and manages agents. In addition, consultation participants proposed a number of other measures that might be undertaken in the event that an agent is found to have engaged in bribery. These include: 1) reporting the agent to the appropriate authorities⁴⁶; 2) reduction in the discretionary powers of agents to release payments⁴⁷; 3) publication of a press release explaining the company’s decision to sever its ties with the agent (but also take action to protect company against potential backlash)⁴⁸; 4) and communication with other stakeholders.⁴⁹

Responsibilities of home governments and international organisations

The responsibilities of home governments and international organisations identified by consultation participants were of three types.

- First, they are responsible for supporting integrity in weak governance zones via the financial support they provide for businesses operating in these zones (e.g. via overseas development assistance and export credit and investment guarantee schemes). Although the message was mixed, consultation participants sometimes questioned these organisations’ willingness and ability to become deeply involved in the fight against corruption in these areas. The need for Official

⁴⁴ In addition, the agent is liable under the Convention for aiding and abetting the bribery transaction, where he or she has the requisite intent.

⁴⁵ See Reaction number 4 (page 13) in the Addendum to the report of the UN Panel of Experts to United Nations Security Council on the Illegal Exploitation of Natural Resources in the Democratic Republic of Congo. S/2002/1146/Add.1. Distributed 20 June 2003.

⁴⁶ Groupe Forrest contribution, page 10.

⁴⁷ Asif Saeed contribution, page 8.

⁴⁸ Soji Apampa of SAP Nigeria, page 5.

⁴⁹ Edward Nathan Corporate Advisers, page 18.

Development Assistance (ODA) programmes to become more sophisticated and rigorous in dealing with corruption in all its forms was noted by many consultation participants, particularly in Addis Ababa. One consultation participant jokingly advocated the creation of a Kimberly Process for tracking ODA funds. A keynote speaker at the conference described the arsenal of “Weapons of Mass Diversion” that is arrayed against African economies -- home governments need to increase the sophistication of their policies, controls and reporting as they face this arsenal.

- Second, many participants looked to home governments and international organisations to provide guidance and assistance to companies in the fight against corruption.
- Third, home governments and, especially, international organisations were viewed as having a comparative advantage (relative to companies) in promoting institutional reform in weak governance host countries and were urged to continue to play this role. However, a keynote speaker at the Addis Ababa conference noted that “Northern” interventions in “Southern” reform processes sometimes had unintended and undesirable consequences and that, in undertaking reform, there can be no substitute for genuine political commitment in the host country.

Summing up

The themes and views that emerged from the consultations may be summarised as follows:

- *No double standard.* Consultation participants were of the view that companies have the same responsibilities when operating in weak governance zones as in healthier investment environments – they are expected to comply with law and with other widely held international standards (e.g. on human rights, management of security forces, protection of local populations, corporate governance). While business responsibilities are the same everywhere, what is different in weak governance host countries is: 1) the amount of due diligence and managerial care that has to be taken to ensure that these standards are adhered to; and 2) the effort companies need to make to ensure that they can be held accountable for their performance in these weak governance zones (where such transparency-enhancing institutions as business associations, legal and accounting institutions, free press and civil society do not function well).
- *Political involvement and the business community.* The consultations brought into relief the extreme importance of political involvement as an ethics issue for investors in weak governance zones – investors' cultivation of political relations is a necessary condition for survival (e.g. to protect their investments or to ward off competitors). The difficult (and still open) question is: what kind of political involvement is acceptable under these circumstances? How can companies and others tell the difference between constructive political involvement and inappropriate involvement? The consultations provided some interesting answers to these questions (e.g. constructive involvement is transparent and done in partnership with other civil society actors). In general, though, OECD and non-OECD societies will need to continue dialogue on this important question.
- *Home governments and international organisations* can and do play a role in helping weak governance countries develop healthier institutions. The importance of the EITI and the positive roles of home country embassies were frequently mentioned during the consultations. More generally, though, the consultations highlighted the need for home governments and international organisations to become more sophisticated in and more committed to ensuring that their operations do not contribute, directly or indirectly, to corruption. In addition, it was felt that both could do more to assist companies in dealing with the many difficult challenges they face as they try to conduct business with integrity in weak governance zones. This assistance could include providing advice to companies and helping them channel information about wrongdoing to authorities who are in a position to make use of it.