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Abstract

This article considers the evolution of governance standards for determining the extent of an enterprise's responsibilities to protect human rights in weak governance zones. The article briefly describes the development of the standard and then evaluates the standard as it has been developed and framed within the U.N. Guiding Principles for Business and Human Rights and in the Organization for Economic Cooperation and Development's Guidelines for Multinational Enterprises (OECD Guidelines). Particular attention will be paid to the Risk Awareness Tool for Multinational Enterprises which was developed to complement the OECD Guidelines following the call made by 2005 G8 Summit for the development of OECD guidance. The article suggests the ways that CSR has been transformed, in some respects, to a mandate for assuming governance responsibilities in those states unable or unwilling to institute systems of law that conform to international consensus standards on human rights. It also explores the challenges of the approaches of both efforts. Both acknowledge the autonomy of enterprises as directly responsible for the operationalization of international norms wherever they operate. Yet both also open the door to extraterritorial application of law. The same framework that advances the governance autonomy of enterprises also envisions them as the vehicles through which home states may project national power within host states with weak governance regimes. Or it may be understood as an important vehicle for internationalizing the law of states characterized by weak governance. In this respect the weak governance zone principles parallels, on the private side, the efforts at legal internationalization general to many bilateral investment treaties. And this tension built into both frameworks, a tension that goes to the dual character of enterprises as both autonomous governance actors and as creatures of the states in which they are domiciled, that mark the potential and the challenge to the internationalization of regimes of CSR.

Multinational corporations (MNEs) operate in virtually every part of the world.[1] Their global operations are subject to a variety of rules. This is especially the case in matters touching on emerging global norms for corporate responsibility respecting social, cultural, environmental and human rights.[2] The principal conventional obligation of MNEs is to obey the laws of the jurisdictions in which they operate, or which may otherwise assert authority or some aspect of their operations. This obli-

1. *E.g.,* JOHN G. RUGGIE, JUST BUSINESS: MULTINATIONAL CORPORATIONS AND HUMAN RIGHTS (2013). For a more critical view, *see also*, RICHARD FALK, PREDATORY GLOBALIZATION: A CRITIQUE (1999).
2. *E.g.,* JENNIFER A. ZERK, MULTINATIONALS AND CORPORATE SOCIAL RESPONSIBILITY: LIMITATIONS AND OPPORTUNITIES IN INTERNATIONAL LAW (2006); *accord* SURYA DEVA, REGULATING CORPORATE HUMAN RIGHTS VIOLATIONS: HUMANIZING BUSINESS (2012).

gation poses no particular issue where the state and its institutions are well developed. That is so even where there may be substantial differences between the law of the home states of MNEs and those of its host states. But legal compliance becomes more challenging in weak governance zones, those jurisdictions, ostensibly states, whose governments are unable or unwilling to assume their responsibilities.[3] "Characteristics of such zones are likely to include areas of conflict and areas where serious violations of international human rights occur, often in the absence of accountability and with a broad failure of the rule of law."[4]

These weak governance zones represent some of the most challenging environments in which enterprises can operate.

> In his 2006 report, the Special Representative surveyed allegations of the worst cases of corporate-related human rights harm. They occurred, predictably, where governance challenges were greatest: disproportionately in low income countries; in countries that often had just emerged from or still were in conflict; and in countries where the rule of law was weak and levels of corruption high. A significant fraction of the allegations involved companies being complicit in the acts of governments or armed factions.[5]

Traditionally, enterprises had little guidance. For many enterprises, that meant operating in a law free zone.[6] In such circumstances enterprises would sometimes

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3. *See* OECD, Investments in Weak Governance Zones: Summary of Consultations (Sept. 2015) ("These "government failures" lead to broader failures in political, economic and civic institutions that the OECD Investment Committee refers to as "weak governance"."" Id., 1), available http://www.oecd.org/corporate/mne/35397593.pdf; see also Susan Rose Ackerman, *Governance and Corruption, in* GLOBAL CRISES, GLOBAL SOLUTIONS 301-44 (Bjorn Lomborg, 2004).
4. INTERNATIONAL ORGANIZATION OF EMPLOYERS, BUSINESS AND HUMAN RIGHTS: THE ROLE OF BUSINESS IN WEAK GOVERNANCE ZONES: BUSINESS PROPOSALS FOR EFFECTIVE WAYS OF ADDRESSING DILEMMA SITUATIONS IN WEAK GOVERNANCE ZONES (2006), http://www.reports-and-materials.org/sites/default/files/reports-and-materials/Role-of-Business-in-Weak-Governance-Zones-Dec-2006.pdf [hereinafter THE ROLE OF BUSINESS IN WEAK GOVERNANCE ZONES].
5. John G. Ruggie, *Protect, Respect and Remedy: A Framework for Business and Human Rights*, INNOVATIONS: TECHNOLOGY, GOVERNANCE, GLOBALIZATION 189, 190 (2008), *available at* http://www.mitpressjournals.org/doi/pdf/10.1162/itgg.2008.3.2.189.
6. The notion of a law free zone ought to be understood in a peculiar sense, not that corporations have no responsibility to comply with law, rather that they have no enforceable legal obligation to do so. Ursula Wynhoven, then of the United Nations Global Compact explained: "Regardless of whether governments are meeting their own duties, corporations must respect human rights; they don't operate in a law-free zone. However, they don't have a legal responsibility to do so. That's the difficulty of holding companies accountable under international law and through international channels." Danielle Marie Mackey, *In a world of borderless business, who may enforce human rights?* LE MONDE DIPLOMATIQUE (July 2014), http://mondediplo.com/blogs/in-a-world-of-borderless-business-who-may-enforce. *See also*, John F. Sherman III, *The UN Guiding Principles for the Corporate Legal Advisor: Corporate Governance, Risk Management, and Professional Responsibility* (April 4, 2012), http://www.americanbar.org/content/dam/aba/administrative/human_rights/sherman_legal_advisors_paper.authcheckdam.pdf ("however, this business responsibility does not exist in a law free zone . . .").

serve as the only source of regulatory authority within those areas in which they operated and with respect to those people with which they interacted. And sometimes they might find themselves, perhaps out of necessity, as complicit, directly or indirectly, in the human rights wrongs committed within the territories in which they operated. The problem was acute in areas of violent conflict and widespread human rights abuses, particularly in the Democratic Republic of the Congo, South Sudan and Angola at the start of the 21st century.

Business has been leery of any substantial public role, noting early in the process of the genesis of the creation of what was to become the United Nations Guiding Principles of Business and Human Rights (UNGP)[7] that their role "also requires recognition of the legal and practical limitations faced by any non-state actor."[8] For business that means nothing more than "to obey the law, even if it is not enforced, and to respect the principles of relevant international instruments where national law is absent."[9] Yet, over the course of the last decade, global actors have been moving toward a rough consensus around the notions of the extent of the responsibilities of business in global governance touching on economic, social, cultural and sometimes political rights among those touched by their activities.[10] More specifically, international actors and influential civil society elements have come to understand that enterprises operating in weak governance zones, especially in violent conflict areas, may have responsibilities of a kind quite distinct from a mere duty to comply with local law.[11] For civil society, and increasingly, public international organiza-

7. UNITED NATIONS OFFICE OF THE HIGH COMM'R FOR HUMAN RIGHTS, GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS: IMPLEMENTING THE UNITED NATIONS 'PROTECT, RESPECT AND REMEDY FRAMEWORK, (2011) *available at* http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf [hereinafter UNGP] ("The Special Representative annexed the Guiding Principles to his final report to the Human Rights Council (A/HRC/17/31), which also includes an introduction to the Guiding Principles and an overview of the process that led to their development. The Human Rights Council endorsed the Guiding Principles in its resolution 17/4 of 16 June 2011.') *Id*. at iv.

8. THE ROLE OF BUSINESS IN WEAK GOVERNANCE ZONES, *supra* note 4.

9. *Id.*

10. *E.g.*, ZERK, *supra* note 2*;* John G. Ruggie, *Business and Human Rights: The Evolving International Agenda*, 101 AM. J. INT'L L. 819 (2007); Andreas Georg Scherer, Guido Palazzo and Dorothée Baumann, *Global Rules and Private Actors: Toward a New Role of the Transnational Corporation in Global Governance,* 16 BUS. ETHICS QUARTERLY 505 (2015); Peter Muchlinski, *Implementing the New UN Corporate Human Rights Framework: Implications for Corporate Law, Governance and Regulation*, 22 BUS. ETHICS Q. 145 (2012).

11. *E.g.*, Virginia Haufler, *Governing Corporations in Zones of Conflict: Issues, Actors and Institutions, in* WHO GOVERNS THE GLOBE 102 (Deborah D. Avant, Martha Finnemore and Susan K. Sell eds., 2010); Virginia Haufler, *The Kimberley Process Certification Scheme: An Innovation in Global Governance and Conflict Prevention*, 89 J. BUS. ETHICS 403 (2009); Mungbalemwe Koyame, *United Nations Resolutions and the Struggle to Curb the Illicit Trade in Conflict Diamonds in Sub-Saharan Africa*, 1 AFR. J. LEGAL STUD. 80 (2005).

tions, it might mean more than legal compliance, even in the absence of the apparatus of a law-state. Additionally, the corporate social responsibility (CSR) of business in that context might also extend beyond conventional CSR and acquires a more compelling character.[12] The notion arises from the embrace of the judgment that such enterprises may inadvertently and indirectly help to provide both the means and the motive for violence or might enable local human rights violations by providing revenues that are channeled through weak fiscal institutions. As a consequence, the framework of transnational regulation of enterprises in such zones has embraced the premise that enterprises ought to bear a responsibility to provide effective protection of the human rights of local populations and to ensure that their activities do not enlarge conflict or serve to enhance or enable human rights violating conduct of governments or of combatants in the area. Current efforts to establish governance frameworks tend to try to mediate between a central role for enterprises grounded on their public and societal[13] obligations and a more peripheral role based on the premise that enterprises have a secondary public role.

This article considers the evolution of governance standards for determining the extent of enterprises' responsibilities to protect human rights in weak governance zones. Part I briefly describes the development of the OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones (the "Risk Awareness Tool") standard[14] and the UNGP for Business and Human Rights (and especially around Principles 7 and 23) and in the Organization for Economic Cooperation and Development Guidelines for Multinational Enterprises (OECD Guidelines).[15] The approaches of each are compared. Part II then considers some of the challenges of each system and of both applied simultaneously through the OECD Guidelines. The more significant of these issues are explored: (1) coherence and scope of coverage; (2) issues of definition; (3) risk and complicity; (4) the perils of a heightened managerial

12. Critics have maintained that Enterprise engagement in business in conflict zones especially may pose a threat to those areas by inhibiting the ability of lawful government to assert authority. *E.g.*, Ans Kolk and François Lenfant, *Multinationals, CSR and Partnerships in Central African Conflict Countries*, 20 CORP. SOC. RESP. & ENVTL. MGMT. 43 (2013).

13. I use the term societal rather than social to distinguish the obligations from something that is discretionary or optional, to something that may be compelled by the rule structures of the systems within which enterprises operate—the governance systems of either enterprise self-constitution, or those of the systemic rules within which the enterprise operates. *See, e.g.*, Gunther Teubner, *Self-Constitutionalizing TNCs? On the Linkage of "Private" and "Public" Corporate Codes of Conduct*, 18 IND. J. GLOBAL LEGAL STUD. 617 (2011).

14. ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, OECD RISK AWARENESS TOOL FOR MULTINATIONAL ENTERPRISES IN WEAK GOVERNANCE ZONES, (2006), available at http://www.oecd.org/daf/inv/corporateresponsibility/36885821.pdf [hereinafter OECD RISK AWARENESS TOOL].

15. ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES 2011 EDITION, (2011), *available at* http://www.oecd.org/corporate/mne/48004323.pdf [hereinafter OECD GUIDELINES].

care standard; (5) legitimate and illegitimate political activities; (6) the projection of the ideology of legal internationalization into the private sphere; and (7) enforcement and the role of the lawyer. The article suggests the ways that CSR has been transformed, in some respects, from the expression of the social responsibility of enterprises to a mandate for assuming governance responsibilities in those states unable or unwilling to institute systems of law that conform to international consensus standards on human rights. In that respect, weak governance zone principles contribute to both the legitimation of extraterritoriality[16] as a justified principle of governance and also to the production of internationalized domestic law that has become an important part of public law through bilateral investment treaties.

I. The Regulatory Framework

The debate over the scope of the responsibilities of business enterprises in weak governance zones arises in the context of a wider discussion about the societal obligations of enterprises.[17] The issue of the extent of the societal obligations of enterprises, their public purpose, has been ongoing in developed states for almost a century.[18] That discussion has been centered, in turn, on the issue of the scope of stakeholders which corporations serve. One camp continues to hold that enterprises are centers of private economic activity (either permitted to operate through law or arising from the contractual arrangements among its stakeholders) which ought to serve its key internal stakeholders, principally shareholders. A variant extends that scope to the enterprise itself. In its most extreme form, this theory posits that the extension of any public purpose to private enterprises is itself anti-democratic. Enterprises might engage in socially positive acts, but only to the extent that these ultimately serve the interest of the enterprise in maximizing the welfare of its principal stakeholders. This view continues to serve as the bedrock of most modern approaches to the legal regulation of enterprises in developed states. Another camp takes the opposite view. They tend to hold that enterprises—as creations of the state and as recipients of substantial privileges by reason of their status as legal or juridical persons—ought to serve a public purpose. That purpose might be understood in a number of ways. That purpose might include an obligation to consider the effects

16. Discussed in Daniel Augenstein & David Kinley, *When Human Rights 'Responsibilities' become 'Duties': The Extra Territorial Obligations of states that Bind Corporations, in* HUMAN RIGHTS OBLIGATIONS OF BUSINESS: BEYOND THE CORPORATE RESPONSIBILITY TO RESPECT? 271 (Surya Deva & David Bilchitz eds., 2013).

17. *See, e.g.*, Rhys Jenkins, *Globalization, Corporate Social Responsibility and Poverty*, 81 INT'L AFFAIRS 525 (2005).

18. *See* Larry Catá Backer, *Multinational Corporations, Transnational Law: The United Nations' Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility in International Law*, 37 COLUM. HUM. RTS. L. REV. 287 (2006).

of corporate activity on a number of outside stakeholders—labor, local communities, consumers and the like—even if that consideration reduces the ability of companies to earn income for their shareholders or otherwise increase their wealth. As a consequence, enterprises are said to have a social responsibility beyond its bare legal obligations, and sometimes despite them. And, indeed, corporate social responsibility as a legal and operational concept arises from an acceptance of the premise of corporate purpose substantially broader than a purely internally driven economic one. This view has found its greatest expression, not in national law, but in developing soft law frameworks at the international level and among civil society efforts to develop corporate behavior norms under the umbrella of corporate social responsibility.

At its most extreme, the view that enterprises have societal duties suggests that corporations have a direct obligation to ensure enforcement not merely of local law but also of relevant international norms, and that this obligation produces legal consequences. At its limit, it might suggest that states might have obligations of a nature equivalent to that of states, and that consequently they may be liable to anyone affected by their failures. The view that enterprises ought to have direct responsibility for the enforcement of law and norms through their operations, has not yet gained a substantial enough following to be enacted in either national or international law. But the efforts leading to the failed Norms on Responsibilities of Transnational Enterprises[19] suggests that there are enough powerful supporters of this theory to keep it on the political horizon.[20] In any of its forms, the view of the societal responsibilities of enterprises has found substantial support within civil society organization and international public bodies. To some extent, and in less pronounced form, it has also found some acceptance among enterprises, especially multinational enterprises.

The embrace of the premise that enterprises do have a public responsibility has driven not merely the CSR movement, as an expression of societally compelled (extra-legal in its narrowest sense) obligation, but also the construction, by private and public organizations of rule systems for the articulation of CSR and its implementation. Indeed, though states have been reluctant to change their legislative approaches to impose societal responsibilities on enterprises as part of their basic corporate governance structures, states have been willing to develop, at the

19. Sub-Commission on the Promotion and Protection of Human Rights, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, University of Minnesota (Aug. 13, 2003), http://www1.umn.edu/humanrts/business/norms-Aug2003.html.

20. Discussed in Larry Catá Backer, *Moving Forward The U.N. Guiding Principles For Business And Human Rights: Between Enterprise Social Norm, State Domestic Legal Orders, and the Treaty Law that Might Bind them All*, 38 FORDHAM INT'L L. J. 457 (2015).

international level, a number of facilities for the articulation of guidance for socially responsible conduct. These efforts are palatable from the perspective of states and enterprises because they are soft law—they do not produce legal obligations that may be enforced. But for that reason, civil society and other actors, particularly from developed states, have found these efforts wanting.

Two of these efforts have been particularly influential—the OECD Guidelines and the UNGP. Both touch on related aspects of the societal responsibilities of enterprises beyond the obligation of relevant portions of the enterprise to obey the law of the jurisdiction to which they may be subject. The OECD Guidelines and the UNGP are premised on the assumption that enterprises engage in activities in territories governed by states that are well in control of their own territories. They assume a functioning government. But more than that, they assume a functioning government that is deemed a legitimate member of the community of nations. It is that premise, for example, that underlies the whole of the critical first pillar of the UNGP that speaks to the state duty to protect human rights. That state duty to protect human rights, along with the corporate responsibility to respect human rights (as specified in the UNGP), serves as the touchstone for the operationalization of the UNGP framework. The OECD Guidelines are recommendations addressed by governments to MNEs operating in or from OECD states.[21] "The Guidelines provide voluntary principles and standards for responsible business conduct consistent with applicable laws and internationally recognized standards."[22] The OECD Guidelines extend "beyond the law in many cases."[23] They are supported by an implementation mechanism overseen by states—the National Contact Point System[24]-to promote and implement the OECD Guidelines. And since 2011 they have also incorporated within their framework the substance of the UNGP.[25] The OECD Guidelines are grounded in high standards of business conduct.[26]

But what happens when the core premise of these systems of societal responsibility are undercut; that is, what happens when the state itself is unable to fully engage? That was the question central to the UN Expert Panel's report on illegal exploitation of natural resources in the Democratic Republic of Congo.[27] The Panel

21. OECD GUIDELINES, *supra* note 15, at 13.
22. *Id.*
23. *Id.* at 17.
24. Larry Catá Backer, *Rights and Accountability in Development (Raid) vs Das Air and Global Witness v. Afrimex – Small Steps Towards an Autonomous Transnational Legal System for the Regulation of Multinational Corporations*, 10 MELB. J. INT'L L. 258 (2009).
25. OECD GUIDELINES, *supra* note 15, at 3.
26. *Id.* at 14.
27. U.N. Security Council, Final report of the Panel of Experts on the Illegal Exploitation of Natural Resources and other Forms of Wealth of the Democratic Republic of Congo, U.N. Doc. S/2002/1146 (Oct. 16, 2002), *available at* http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2002/1146.

had been established by the United Nations in 2000 in response to reports of violations of international law in the course of the Second Congo War. It determined that a large number of companies had not been observing the OECD Guidelines in the Democratic Republic of the Congo and argued that OECD states had failed in their obligations to promote adherence to the OECD Guidelines among enterprises established within their territories.[28] The issues raised by this expert panel bore fruit within the frameworks of the UNGP and the OECD Guidelines. Each is discussed in turn.

A. The UNGP Approach.

The UNGP adopted a two-prong approach to the issue of enterprise conduct in conflict zones. That approach focused first on the state duty to protect human rights (the first pillar of the protect-respect-remedy framework of the UNGP). It then elaborated a standard by which enterprises could assess the extent of their second pillar responsibility to respect human rights. Together the UNGP establishes a regime in which home states are expected to manage the behavior of enterprises over which they assert a measure of control, including the enforcement of international norms extraterritorially through their regulatory power.[29] And enterprises are expected to measure their own conduct against international standards for complicity in the breaches of human rights by those operating in the territories in which they engage

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Discussed in Vuyelwa Kuuya, *The Illegal Exploitation of Natural Resources and Other Forms of Wealth in the Democratic Republic of Congo* (2008), *available at* http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=4&cad=rja&uact=8&ved=0CDIQFjAD&url=http%3A%2F%2Fbusiness-humanrights.org%2Fsites%2Fdefault%2Ffiles%2Fmedia%2Fbhr%2Ffiles%2FVuyelwa-Kuuya-on-UN-Expert-Panel-DRC-Nov-2008.doc&ei=lajSVLXYOsfFgwTdv4SIDA&usg=AFQjCNEFN8ayx0BDnXB_eyS3I_wKF0RsZA&sig2=lOjkmme_Ra_BthNlGO25Zg&bvm=bv.85142067,d.eXY.

28. The Report noted:

> The Governments of the countries where the individuals, companies and financial institutions that are systematically and actively involved in these activities are based should assume their share of the responsibility. The Governments have the power to regulate and sanction those individuals and entities. They could adapt their national legislation as needed to effectively investigate and prosecute the illegal traffickers. In addition, the OECD Guidelines offer a mechanism for bringing violations of them by business enterprises to the attention of home Governments, that is, Governments of the countries where the enterprises are registered. Governments with jurisdiction over these enterprises are complicit themselves when they do not take remedial measures. U.N. Security Council, *supra* note 27, at 31.

29. Though the UNGPs are grounded in a more benign form of extraterritoriality it still appears to encourage extraterritorial application of the domestic legal orders of developed states at the expense of international norms applied by states within and without their borders. *See* Olivier DeSchutter, *Extraterritorial Jurisdiction as a Tool for the Human Rights Accountability of Transnational Corporations*, CATHOLIC UNIVERSITY OF LOUVAIN AND THE COLLEGE OF EUROPE (Dec. 22, 2006), http://cridho.uclouvain.be/documents/Working.Papers/ExtraterrRep22.12.06.pdf.

in economic activities.

The first pillar of the three pillar framework, the state duty to protect human rights, forms the backbone of the UNGP framework. That is a legal duty but is constrained by the willingness of states to adopt international human rights norms and to transpose them into their domestic legal orders. As such the precise extent of the state duty to protect human rights can vary widely from state to state. That approach first focused on the obligation of home states in the context of their duty to protect human rights (in this case through their regulatory power over enterprises). That duty extends, within the logic of the UNGP, to a duty to manage, through law, the behavior norms that ought to be followed by enterprises operating outside the national territory of the home state and in conflict zones.[30] UNGP Principle 7 sets out the basic rule: "Because the risk of gross human rights abuses is heightened in conflict-affected areas, States should help ensure that business enterprises operating in those contexts are not involved with such abuses."[31] The obligation applies not merely to enterprise home states but also to states that are neighbors of the conflict zone.[32] It is important to recognize, though, that the state duty under Principle 7 is limited to conflict zones. It does not extend to weak governance zones in the absence of conflict. That limitation is significant.

Principle 7 then specifies the manner of compliance with that duty through a coordinated program of management based on identification, assistance, penalties and regulatory constraints.[33] First, the state may engage with enterprises at an early stage to "identify, prevent and mitigate the human rights-related risks of their activities and business relationships."[34] This method seeks to develop coherence between the state duty to protect and the implementation of the corporate responsibility to respect human rights in a way that is managed by the home state, rather than

30. UNGP, *supra* note 7, § 7, at 8-9. The Commentary makes this clear: "In conflict-affected areas, the "host" State may be unable to protect human rights adequately due to a lack of effective control. Where transnational corporations are involved, their "home" States therefore have roles to play in assisting both those corporations and host States to ensure that businesses are not involved with human rights abuse" *Id.* at 9, Commentary.

31. *Id.* § 7, at 8.

32. *Id.* at 9, Commentary ("provide important additional support"). The nature of that support is not specified though it would likely be measured by reference to that neighboring state's own duty to protect human rights.

33. *Id.* The coordination is made explicit in the Commentary, which provides that:

> home States should foster closer cooperation among their development assistance agencies, foreign and trade ministries, and export finance institutions in their capitals and within their embassies, as well as between these agencies and host Government actors; develop early-warning indicators to alert government agencies and business enterprises to problems; and attach appropriate consequences to any failure by enterprises to cooperate in these contexts, including by denying or withdrawing existing public support or services, or where that is not possible, denying their future provision.

34. *Id.* § 7(a), at 8.

by either the enterprise or the host state. Second, the state should provide assistance to these enterprises "to assess and address the heightened risks of abuses, paying special attention to both gender-based and sexual violence."[35] The state, then, may manage responses in ways that contribute to the coordination of the state duty to protect under its national legal regime, and the corporate responsibility to respect under international norms. Third, where enterprises subject to home state control are engaged in gross human rights abuses and refuses to cooperate, then the state should help ensure that these enterprises be denied access to public support and services.[36] Fourth, and more generally, states should ensure "that their current policies, legislation, regulations and enforcement measures are effective in addressing the risk of business involvement in gross human rights abuses."[37] This produces an additional duty on states under the 1st pillar—a duty to "warn business enterprises of the heightened risk of being involved with gross abuses of human rights in conflict-affected areas"[38] The Commentary suggests that states review their domestic law to address these heightened risks—effectively inviting the extraterritorial extension of national law to territories which the state has determined are experiencing a governance failure.[39] Multilateral efforts are encouraged.[40] And these obligations are considered additional to the state's obligations under international humanitarian law in situations of armed conflicts and international criminal law, at least to the extent these obligations are recognized by the state. The extraterritorial implications ought to be troubling.[41] Yet they appear necessary where, as here, the

35. *Id.* § 7(b), at 9.
36. *Id.* § 7(c), at 9
37. *Id.* § 7(d), at 9.
38. *Id.* at 9, Commentary.
39. *Id.* "This may include exploring civil, administrative or criminal liability for enterprises domiciled or operating in their territory and/or jurisdiction that commit or contribute to gross human rights abuses."
40. *Id.* But these ought to be undertaken in a way that furthers the objectives of the UNGP. See *Id.*, § 10, at 11-12.
41. Sara Seck notes one of the more troubling aspects of the new extraterritoriality, the increasing pattern of developed states to build two sets of normative standards for multinational corporations, one applicable within their jurisdiction and the other applicable to MNC activities outside the state. *See*, Sara Seck, *Emerging Market Multinational Home States, Extractive Industries, and the Inside/Outside Problem*, LAW AT THE END OF THE DAY (July 2, 2015), *available at* http://lcbackerblog.blogspot.com/2015/07/sara-seck-on-emerging-market.html. A U.K. Parliamentary report noted:

> Perhaps unsurprisingly, we received far more evidence on the operations of UK companies abroad than about the human rights record of UK firms at home. The international debate on the impact of globalization and the cross-border influence of companies on human rights is more advanced than the discussion of corporate responsibility and human rights in the UK.

Human Rights Joint Committee, *Any of Our Business? Human Rights and the UK Private Sector*, 2009-10, H.L. 27, ¶ 72 (U.K.) *available at,* http://www.publications.parliament.uk/

UNGP framework contemplates states as the vehicle for providing international law governance in conflict territories. The troubling part occurs where states are inclined to export not just their sense of international law, but their own domestic policies and laws as well.

The second pillar of the three-pillar framework of the UNGP, the responsibility of enterprises to respect human rights exists independent of the enterprise obligation to comply with the law of the locations to which its operations and governance structures may be subject. It is founded on the obligation to respect a basic set of international human rights.[42] That responsibility to respect is operationalized through a process of human rights due diligence,[43] which requires the enterprise to develop policies, implement them and then "to identify, prevent, mitigate and account for how they address their adverse human rights impacts."[44] Large transnational civil society actors remain skeptical of the promise of this approach and continue to push for some sort of legal superstructure to impose national obligations on companies for breach of transnational legal standards.[45]

It is in recognizing this autonomous and independent responsibility, sourced in a specific set of international norms not directly imposed on enterprises, that the UNGP extended the scope of responsibility beyond the orbit of the state and of national legal systems. The corporate responsibility to respect human rights in conflict zones is founded on notions of context.[46] Principle 23 provides that: "In all contexts, business enterprises should: (a) Comply with all applicable laws and respect internationally recognized human rights, wherever they operate; (b) Seek ways to honor the principles of internationally recognized human rights when faced with conflicting requirements; (c) Treat the risk of causing or contributing to gross human rights

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pa/jt200910/jtselect/jtrights/5/507.htm.

42. The International Bill of Human Rights. UNGP, *supra* note 7, § 11, at 13.
43. UNGP, *supra* note 7, §§ 16-22, at 16-25.
44. *Id.* § 17 at 17-19.
45. Among these is the powerful and influential establishment NGO Amnesty International.

> Although it is now widely accepted that corporations have a responsibility to respect human rights, too many times profits are built on the back of human rights abuses. Despite laws in many countries that allow companies to be prosecuted, governments rarely even investigate corporate wrongdoing.
>
> When communities' attempt to get justice they are thwarted by ineffective legal systems, a lack of access to information, corruption and powerful state-corporate alliances. Worryingly, when the poor cannot secure justice, companies learn that they can exploit poverty without consequences.
>
> *Corporate Accountability,* AMNESTY INT'L, https://www.amnesty.org/en/what-we-do/corporate-accountability/.

46. UNGP, *supra* note 7, § 23 at 25-26.

abuses as a legal compliance issue wherever they operate."[47] The Commentary emphasizes that irrespective of the context in which they operate, all enterprises have the same responsibility to respect human rights wherever they operate.[48] What context changes is the nature of the response expected of companies as necessary to fulfill their responsibility.

> Some operating environments, such as conflict-affected areas, may increase the risks of enterprises being complicit in gross human rights abuses committed by other actors (security forces, for example). Business enterprises should treat this risk as a legal compliance issue, given the expanding web of potential corporate legal liability arising from extraterritorial civil
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> claims, and from the incorporation of the provisions of the Rome Statute of the International Criminal Court in jurisdictions that provide for corporate criminal responsibility. In addition, corporate directors, officers and employees may be subject to individual liability for acts that amount to gross human rights abuses.[49]

Complicity is the touchstone for responsibility. That is, ~~that~~ the responsibility to respect human rights includes the obligation to avoid becoming embroiled in the violations of human rights norms directly applicable against states. In these contexts, the enterprise is expected not to exacerbate the situation.[50] "In assessing how best to respond, they will often be well advised to draw on not only expertise and cross-functional consultation within the enterprise, but also to consult externally with credible, independent experts, including from Governments, civil society, national human rights institutions and relevant multi-stakeholder initiatives."[51] The expertise derives from two principal sources. The first is the enterprises' home states, under the framework established in UNGP § 7. The second is through international norms, which most importantly include those developed through the OECD, the character of which is considered next.

B. The OECD Approach—The Risk Awareness Tool.

The UNGP provisions relating to conflict zones had not been written in a vacuum. Indeed, that approach effectively supplemented an earlier and more extensive

47. *Id.*
48. *Id.* at 25-26.
49. *Id.*
50. *See* UNGP, *supra* note 7, §17, at 19 ("As a legal matter, most national jurisdictions prohibit complicity in the commission of a crime, and a number allow for criminal liability of business enterprises in such cases."). The Commentary emphasizes the dual nature of complicity, as a legal concept and as a non-legal concept. In the later case, it signifies a societal understanding that the corporation benefited informally from the bad acts of others.
51. *Id.* § 23, at 25-26.

framework for the structuring of corporate responsibilities in weak governance zones that were established through the OECD as a complement to its OECD Guidelines. In response to this report, the 2005 G8 Summit directed a request to the OECD, for developing guidance for companies operating in weak governance zones, which together with the UN Security Council's call on OECD members to promote observance of the OECD Guidelines served as the impetus for the consideration of the development of a set of additional guidance in the context of territories where government was effectively absent. The result was the unveiling of an OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones,[52] adopted by the OECD Council on June 8th, 2006.

The Risk Awareness Tool aims to function as a complement to the principles of behavior set forth in the OECD Guidelines as well as other OECD instruments.[53] It was targeted for use in those contexts in which there was not a market failure requiring regulation, but analogously, a governance institutional failure that may require additional responsibilities of enterprises operating within them.[54] The definition of a "weak governance zone" is based on these core premises:

> A weak governance zone is defined as an investment environment in which governments are unable or unwilling to assume their responsibilities. These "government failures" lead to broader failures in political, economic and civic institutions that, in turn, create the conditions for endemic violence, crime and corruption and that block economic and social development.[55]

Note that the definition does not link the condition of weakness to states. The focus is on any area where governance is weak, even within states in which governance is strong in some, but not all of its territory. The definition draws on the work of the Development Assistance Committee's Fragile States Group. The definition of "fragile states" was premised on notions of limited state will or capacity to address their citizen's basic needs.[56]

The core premise of the Risk Awareness Tool is grounded in managing business

52. OECD RISK AWARENESS TOOL, *supra* note 14.
53. *Id.* at 11 ("Through its development of this *Risk Awareness Tool*, the OECD Investment Committee seeks to help companies in weak governance zones face these dilemmas and risks by calling to their attention to the guidance contained in OECD instruments and the findings of the broad-based consultations the Committee has conducted on this issue.").
54. *See id.* at 11-14.
55. *Id.* at 9 (noting the slight variation in definition in the Introduction, "'Weak governance zones' are defined as investment environments in which governments cannot or will not assume their roles in protecting rights (including property rights), providing basic public services (e.g. social programs, infrastructure development, law enforcement and prudential surveillance) and ensuring that public sector management is efficient and effective." *Id.* at 11.).
56. *Id.* at 13 n.1.

behavior in zones of heightened risk—businesses apply the same international principles wherever they operate, but exercise substantially more care and shoulder a greater governance burden, when they operate in places in which the state apparatus may not exist.[57] The Risk Awareness Tool itself is then framed as a set of questions *addressing risks and ethical dilemmas* that companies are likely to face in weak governance zones. The Tool proposes a list of questions that companies might ask themselves when considering actual or prospective investments in weak governance zones. The questions cover the following topics:

> I) Obeying the law and observing international instruments
>
> II) Heightened managerial care
>
> III) Political activities
>
> IV) Knowing clients and business partners
>
> V) Speaking out about wrongdoing[58]
>
> VI) Business roles in weak governance societies – a broadened view of self interest

Each of these question areas contains a set of questions and consideration that companies might consider in framing the behaviors in territories with weak public governance. The Risk Awareness Tool questions are also informed by a fairly detailed set of definitions,[59] discussion of some of which will be taken up in Part II. We consider each of the questions in turn.

1.Obeying the law and observing international instruments. This first question sets the basic rule. In the absence of enforceable local standards, international hard and soft law standards apply. That is these international standards apply to inform the parameters under which an enterprise ought to measure its conduct in weak governance zones.[60] The Risk Awareness Tool defines "relevant international instruments"[61] as those cited in the OECD Guidelines, and note that enterprises "will need to evaluate their particular business situations in order to decide which instruments are relevant to their operations."[62] Indeed, the questions suggest the value of enterprise use of and contribution to the development of these standards.[63] It is important to note that, like the UNGP, the relevant international instruments include

57. *Id.* at 12.
58. *Id.*
59. *See generally id.* at 35-42.
60. *See id.* at 15 ("Because legal systems and political dialogue in weak governance zones (almost by definition) do not work well, international instruments that provide guidance on acceptable behaviors are particularly useful in these contexts.").
61. *Id.* at 39.
62. *Id.*
63. *See id.* at 15-16.

both hard and soft law instruments; some have no legal effect. Moreover, it is possible that some of these instruments might neither have been ratified nor transposed into the domestic legal orders of home or host states. In that sense, then, the standard for business conduct in weak governance zones are situated beyond the state and without reference to their legal order. That referent affects not merely the sources of "law" for determining business behavior in weak governance zones, it is also relevant for determining the extent to which an "abuse" has occurred.[64] The enterprise is counseled to be sensitive to the need for stakeholder engagement as well as the prudence of following a do no harm policy. Particular attention is paid to the possibility of abuse in the context of enterprise security services,[65] money laundering and corruption.[66]

2. Heightened managerial care. The Risk Awareness Tool draws a connection between heightened risks of abuse in weak governance zones and the need to operate under a heightened managerial care standard "in order to ensure compliance with legal obligations and observance of international standards.[67] To operationalize this heightened duty of care, the Risk Awareness Tool looks to embedding relevant laws and international standards within the corporation's culture and policies.[68] Such policies ought to be promoted by the Board of Directors, be well communicated and ensure that front line employees are adequately trained. But like the OECD Guidelines and the UNGP, it also extends this heightened care duty and the culture embedding project, including the OECD Guidelines to all of the enterprise's downstream supply chain partners, through encouragement, "where practicable."[69] Heightened care is important in establishing appropriate corporate governance structures. It is also central "in putting in place the management systems and adequate internal company control that will allow it to manage the heightened risks of operating in weak governance zones."[70] It also plays a role in reporting and disclosure systems.[71]

3. Political activities. The Risk Awareness Tool recognizes the need for political

64. *See id.* at 35 ("Abuses" are defined as "acts that are excessive or improper when evaluated using widely accepted international concepts and principles for business conduct (see Relevant international instruments).").
65. *See id.* at 16-17.
66. *See id.* at 17-18.
67. *Id.* at 21 (The areas subject to this heightened care duty include "information gathering, internal procedures, relations with business partners. . . . and use of external legal, auditing and consulting services.").
68. *See id. at 21-24*; *see also* UNGP, *supra* note 7, §§ 16-22, at 16-25 (OECD mimics the requirements for human rights due diligence under the UNGP).
69. OECD RISK AWARENESS TOOL, *supra* note 14, at 21.
70. *Id.* at 22.
71. *See id.* at 23.

engagement in weak governance zones. It frames this question in terms of recognition of and separation between proper and improper involvement in political activities.[72] Improper activities are those entered into with the objective of gaining an improper advantage. And improper advantage appears to include efforts to secure waivers and exceptions from generally applicable law.[73] Transparency is understood as a key feature of the legitimacy of political participation.[74]

Yet underlying these efforts is a greater one—the effort to reduce the company's exposure to and complicity in corruption.

> Companies in weak governance zones often find it necessary to forge political alliances with high level governmental and political figures in order to protect . . . in effect companies, through their political activities, create an informal system of investment protection that compensates for the lack of rights-based protection of their rights.[75]

The Risk Awareness Tool offers application of the heightened care standard for managing at risk situations in what they describe as conflict of interest situations—corruption generally.[76]

4. Knowing clients and business partners. It is in the context of this question that the Risk Awareness Tool and the UNGP most closely align. The object of this section is to avoid complicity in the acts of business partners and others with which the enterprise must deal. "In weak governance zones, companies face heightened risks of entering into relationships with employees, clients or business partners that might damage business reputations or give rise to violations of law or other abuses."[77] Application of the heightened duty standard and reputational due diligence[78] are suggested as means of reducing this risk.

5. Speaking out about wrongdoing. This question presents itself almost as the converse of the question on political activities. Here the Risk Awareness Tool provides a positive form of political involvement—as a sort of civil society actor in a context in which civil society may otherwise be absent.[79] "Information about wrongdoing (including crimes and abuses such as human rights violations, private or public corruption) can be especially valuable in weak governance host countries, which

72. *Id.* at 25.
73. *Id.; id. at 26* ("What steps can the company take to refrain from seeking or accepting exemptions not contemplated in the statutory or regulatory framework related to environmental, health, safety, labor, taxation and financial incentives among other issues?")
74. *Id.* at 26.
75. *Id.* at 25.
76. *See id.* at 26.
77. *Id.* at 27.
78. *See id.* at 27 nn. 2-3 (the reference here is made to the Guidelines on Reputational Due Diligence of the International Association of Oil and Gas Producers and the OECD Guidelines).
79. *See id.* at 29.

have few institutions (e.g., free press, well developed legal and auditing institutions, active and free trade unions and civil society) that can collect and channel information."[80] In that context enterprises might best serve host states by sharing information about abuse with home and host state governments. The Risk Awareness Tools concedes that such activity can be dangerous, and thus advises a careful weighing of the "costs, benefits and risks of speaking out or sharing information."[81] There are a number of interesting tensions here. The first is the tension between the need for silence and the possibility that silence may well constitute complicity.[82] The second is that the weakness of the governance zone may displace the obligation to disclose from the host to the home state. And the last is the importance of balancing the risk to the enterprise against the risk to its employees and other stakeholders.[83] The Risk Awareness Tool references the facilities developed by the World Bank and the U.S. government's "Bribery Hotline."[84]

6. Business roles in weak governance societies – a broadened view of self interest. This last question is the most challenging; in it the Risk Awareness Tool seeks to make the business case for the societal obligations of enterprises.[85] And it is also the one that remains the most contentious among the enterprises to whom it is directed.[86] "Individual companies and the business sector as a whole might . . . find it in their broad self interest—as important members of weak governance host societies—to help these societies get on the path of institutional reform."[87] Here again there is a tension between the economic and societal responsibilities of enterprises, as well as the tension between the obligations of enterprises to participate or not in the political life of weak governance zones. And underlying this public, societal responsibility, is the idea advanced that it includes a role to "advocate for widely accepted good policy practices."[88]

II. Consequences and Issues

Both the UNGP and the OECD Risk Awareness Tool standards do much to develop a framework within which enterprises may gauge, manage and structure their activities in weak governance zones. But like other new set of standards, both raise

80. *Id.*
81. *Id.*
82. *See id.*
83. *See id.* at 29-30.
84. *Id.* at 30 n.1.
85. *See id.* at 31-33.
86. *See id.*
87. *Id.* at 31.
88. *Id.* at 32.

a number of issues that have neither been resolved nor might they promote the intended effect. The more significant of these issues are raised here:

A. Coherence—Scope of Coverage.

One of the more important structural objectives of the UNGP is to enhance regulatory coherence, and where that is impossible, at least seek regulatory coordination. It is not clear that these standards together contribute to those objectives. First, the two standards do not cover the same ground. The UNGP are focused on conflict zones. The OECD Risk Awareness Tool is focused on weak governance zones. They both seek to reach the public sphere equivalent of market failures of the sort that propelled the CSR movement nearly a generation ago—governance or institutional failures at the state level. Yet they do not reach the same set of actors. Coordination becomes more difficult in this context and implementation within an enterprise becomes more difficult (in terms of resources necessary to comply) where the standards may apply jointly in some contexts but not in others. Beyond that, of course, the difference may permit strategic behavior of the sort that the standards mean to discourage.

Second, the two approaches are distinct enough to raise a question of coherence and coordination. The UNGP focus on state duties to extend the reach of their national power to conflict zones. That effectively suggests that within conflict zones any number of states may project their national law on the backs of the enterprises domiciled in their jurisdictions as well as all of those individuals and entities involved in that enterprise to the extent of their relationships. The resulting fracture produces a strange mix of law in conflict zones, one where the laws of multiple jurisdictions may apply unevenly through the activities of enterprises. The UNGP focus on corporate responsibility targets complicity. The Risk Awareness Tool, on the other hand, focuses on risk to the enterprise.[89] It also targets compliance with international norms in the context of weak governance zones and suggests a smaller role for extraterritoriality concepts in regulation.[90] On one hand, the Risk Aware-

89. *See generally id.* at 12.

90. The has been more sensitive to concerns of developing states on this score, though in the service of internationalism rather than of preserving any sort of distinct sovereign dignity for fragile or developing states. See, e.g., OECD, Investments in Weak Governance Zones: Summary of Consultations (Sept. 2015), supra. 3 ("Home country and international organizations can play important -- but only supporting -- roles in assisting weak governance host countries to get on the path to reform." Id., at 3). Civil society has sought a broader scope for extraterritoriality, grounded in the power of developed states to export their domestic legal orders with the economic activities of enterprises they might control. *See, e.g.*, *Comments in response to the UN Special Representative of the Secretary General on Transnational Corporations and other Business Enterprises' Guiding Principles – Proposed Outline*, AMNESTY INT'L 1, 16-17 (October 2010), https://www.amnesty.org/

ness Tool is more explicit in promoting the autonomous public and societal responsibility of enterprises in these zones. On the other, the UNGP, standing alone, appears more concerned about derivative liability. Yet that raises questions. A complicity and legal compliance touchtone seems to be a cautious approach in light of the overall framework of the corporate responsibility, which is grounded on risk assessment, prevention and mitigation.[91] While the two approaches are not incompatible, their methodologies are distinct enough to raise issues of institutional costs. It also raises the possibilities that application of the two methodologies might not, in every circumstance, produce the same result in terms of corporate behavior.

In the face of the many voluntary structures that have been developed to help guide states and economic actors in this context, one might well ask whether coherence and coordination are even relevant to the analysis.[92] One easy answer is that they are not relevant in any significant respect. The OECD suggests that these distinct approaches represent a recognition of the essential polycentricity of the governance framework within which global economic activity functions—between, within and beyond states, and beyond the competence of any single actor to control fully.[93] The UNGP is itself built on the premise of a social license to operate that may be autonomous of the state's public power.[94] Another intimates that the weakness of states is in itself not an inevitable indicator of weak governance, in part precisely because governance is now transnational and polycentric, and may be taken up by others.[95] Yet this last point makes a stronger case for coherence and coordination among those normative structures that mean to guide non state actors (and manage the temptations of states contemplating projecting their authority into other states). Governance processes do not need the state so much as they need modes of

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en/documents/IOR50/001/2010/en.

91. *See* INT'L COUNCIL ON MINING & METALS, HUMAN RIGHTS IN THE MINING AND METALS INDUSTRY: INTEGRATING HUMAN RIGHTS DUE DILIGENCE INTO CORPORATE RISK MANAGEMENT PROCESSES 28 (March 2012), http://www.icmm.com/document/3308.

92. The OECD has recognized "[t]he rapid growth of initiatives to help improve the situation in weak governance zones – sponsored by home and host governments, international organizations, businesses and business associations, NGOs and trade unions – suggests that a broad, global effort to address these issues has developed." OECD, Investments in Weak Governance Zones: Summary of Consultations (Sept. 2015), *supra* note 3.

93. *Id.*, 3-5.

94. *See* John G. Ruggie, *Protect, Respect and Remedy: A Framework for Business and Human Rights*, MIT INNOVATIONS 189-212 (2008), available at http://www.mitpressjournals.org/doi/pdf/10.1162/itgg.2008.3.2.18. *See generally* Kathleen M. Wilburn & Ralph Wilburn, Achieving Social License To Operate Using Stakeholder Theory, 4 J.INT'L BUS. ETHICS 2, 3-16 (2011).

95. *See, e.g.*, Faisal Z. Ahmed, Anne Greenleaf, and Audrey Sacks, *The Paradox of Export Growth in Areas of Weak Governance: The Case of the Ready Made Garment Sector in Bangladesh,* 56 WORLD DEVELOPMENT 258-71 (2014); Tanja A. Börzel and Thomas Risse, *Governance Without a State: Can it Work?*, 4 REGULATION AND GOVERNANCE 113-134 (2010) ("social norms of local, national, or international communities often create a strong logic of appropriateness" *Id.*, 114).

societal coordination that are either to be provided instrumentally—by conscious coordination among institutional actors—or in markets.[96] Or, alternatively, competition among systems in the marketplace of governance may eventually sort things out—either by displacing all but one system or, more likely, by merging them into some sort of workable approach—derived from pragmatic implementation over time rather than by the application of any sort of instrumental oversight. In the case of the governance structures for projecting non state power within weak governance or conflict zones, the answer to the coordination problem will depend on the way in which enterprises embed CSR and business and human rights practices within their operational structures for decision making and reporting and the way in which the OECD's NCP's special instance jurisprudence evolves.[97]

B. Issues of Definition—What Are Weak Governance or Conflict Zones and Who Decides?

The issue of application looms large under both standards. The UNGP define "conflict zones" indirectly through references in their commentary (e.g., "conflict affected area").[98] The Risk Awareness Tool attempts a definition of "weak governance zone" explicitly.[99] That raises two issues. The first relates to the meaning of these terms. The second relates to who is empowered to make the determination of what qualifies either as a weak governance or conflict zone.

While conflict zone or conflict affected area appears on its face to be fairly straightforward, a closer analysis reveals some difficult issues. It is clear that war zones come within the definition. It is also clear that territories touched by civil war, broadly defined, also qualify. But there are substantial areas within states in which there is not recognized conflict that might also come within the meaning of the term. For example, a state like Mexico might be deemed to include "conflict zones", defined as those areas effectively controlled by narco-traffickers. At its limits, territories deemed to be high crime zones—portions of Chicago or Detroit perhaps—might also be included.[100] But that might not reflect the intent of the drafters. The words,

96. Börzel and Risse, *supra* note 95, 120-126 (speaking to what they reference as the shadow of hierarchy in the absence of the state.

97. Cf. Ashley L. Santer, *A Soft Law Mechanism for Corporate Responsibility: How the Updated OECD Guidelines for Multinational Enterprises Promote Business for the Future*, 43 GEO. WASH. INT'L L. REV. 375 (2011).

98. UNGP, *supra* note 7, § 23, at 25-26.

99. *See* OECD RISK AWARENESS TOOL, *supra* note 14, at 42.

100. *See, e.g.*, Adam Chandler, *Chicago's Problem With Gun Violence,* THE ATLANTIC (Sept. 29, 2015) *available at* http://www.theatlantic.com/national/archive/2015/09/chicago-shooting-record-year/408070/; Daniel Fisher, *America's Most Dangerous Cities; Detroit Can't Shake No. 1 Spot*, FORBES, Oct. 29, 2015, available http://www.forbes.com/sites/danielfisher/2015/10/29/americas-most-dangerous-cities-detroit-cant-shake-no-1-spot/.

though, survive its drafters and states which seek to apply it, may not be bound by any notion of legislative or original intention.

More interesting perhaps is the open-endedness of the Risk Awareness Tool definition of a "weak governance zone". One of the two markers of such a zone is subject to a fairly straightforward analysis grounded in data. It is presented as an objective standard, derived from markers of development and stability—where governments are unable to assume their role and responsibility in protecting rights. To a large extent, those markers go to the incapacity of a government to deliver the choice of data services and provide an institutional framework that is viewed as legitimate. Those markers are themselves derived from standards developed through the United Nations, by international financial institutions or by civil society actors.[101] But the objectivity of this data driven standard also veils the ideological presumptions that underlie the choice of markers. The markers tend to enhance the project of global socialization to a standard of behavior, and an expectation of material culture that reflects the views of these global institutions. This is not to suggest at all that this sort of "ideal standard" embedded in the markers is bad. Not at all, but it does suggest that states that might lag are now more open to legal colonization through the importation of host state law through enterprises operating in their territories when such states are labeled weak. That possibility is exacerbated by the second criterion for weak governance.

Just as a state may be labeled a weak governance zone when it lacks capacity, so might be labeled a weak governance zone when its government is deemed unwilling to assume its role and responsibility. By what standard does one measure unwillingness? "Unwillingness" is essentially a subjective standard. It permits the imposition of an assessment of weakness in governance where a state chooses a governance model that might not be compatible with some consensus standard or other. Consider for example a state that chooses to order its internal affairs on the basis of ancient custom and tradition incompatible with international political economic and social notions. Moreover, it is not clear how much conflict, inability or unwillingness is necessary to trigger the application of the definitions. Is a high crime rate enough? Is it enough that a government fails to extend its reach enough to satisfy the taste for government of the home states of enterprises seeking to enter into a territory? That is hardly velar, but the potential for abuse is quite clear. What is also clear is that the concept of weak governance and conflict zones permits a loss of sovereignty in a peculiar way—such states remain sovereign in the sense that they remain distinct political entities, but they lose their sovereignty to the extent that the determi-

101. *See* OECD RISK AWARENESS TOOL, *supra* note 14, at 42.

nation of weak governance or conflict zones opens the door to intervention in domestic affairs either by other public actors—states and international organizations—or by private actors. In theory this may be for the best—especially where the alternative increases human rights abuses against individuals. But solicitude comes with a price--

This last point serves as a gateway to a larger concern—who gets to make the determination of weak or conflict status. Both the UNGP and the Risk Awareness Tool are silent on this point. Both seem to suggest that the question is not worth asking because the answer is well known. In the first instance, international organizations would likely rely on measures developed through international financial institutions. The World Bank's "Worldwide Governance Indicators", [102] for example, looks to measures of (1) voice and accountability;[103] (2) political stability and the absence of violence;[104] (3) government effectiveness;[105] (4) regulatory quality;[106] (5) rule of law;[107] and (6) control of corruption.[108] These measures have been developed by and through international communities. They reflect factors, and definitions of factors, that are consonant with the world view and operations of the institution that deploy them. They further an ideology that, in its own way, is a more powerful set of techniques for harmonizing projections of regulatory power than any effort at the practice of conventional extraterritoriality. The disciplinary character of these

102. The World Bank Group, Worldwide Governance Indicators, available http://info.worldbank.org/governance/wgi/index.aspx#home.
103. "Voice and accountability captures perceptions of the extent to which a country's citizens are able to participate in selecting their government, as well as freedom of expression, freedom of association, and a free media." *Id.*, "Voice and accountability, available http://info.worldbank.org/governance/wgi/va.pdf.
104. "Political Stability and Absence of Violence/Terrorism measures perceptions of the likelihood of political instability and/or politically- motivated violence, including terrorism." *Id.*, "Political Stability and the Absence of Violence" available at http://info.worldbank.org/governance/wgi/pv.pdf.
105. "Government effectiveness captures perceptions of the quality of public services, the quality of the civil service and the degree of its independence from political pressures, the quality of policy formulation and implementation, and the credibility of the government's commitment to such policies." *Id.*, at Government effectiveness, *available at* http://info.worldbank.org/governance/wgi/ge.pdf.
106. "Regulatory quality captures perceptions of the ability of the government to formulate and implement sound policies and regulations that permit and promote private sector development." *Id.*, at Regulatory Quality, available http://info.worldbank.org/governance/wgi/rq.pdf.
107. "Rule of law captures perceptions of the extent to which agents have confidence in and abide by the rules of society, and in particular the quality of contract enforcement, property rights, the police, and the courts, as well as the likelihood of crime and violence." *Id.*, at Rule of Law, available http://info.worldbank.org/governance/wgi/rl.pdf.
108. "Control of corruption captures perceptions of the extent to which public power is exercised for private gain, including both petty and grand forms of corruption, as well as "capture" of the state by elites and private interests." *Id.*, at Control of Corruption, available http://info.worldbank.org/governance/wgi/cc.pdf.

measures can be discerned by the inclination to use the measures not merely to reveal but to rank, and to use ranking to pressure conformity to the principles on which the measures are grounded.[109] It is not hard to imagine the use of these indicators and the power of rankings to establish baselines of legitimacy both in terms of government structure and its normative operations.[110] Yet for the moment that disciplinary power is fractured. Like the OECD Risk Awareness Tool and the UNGPs, no one institution or state "owns" weak or conflict zone standards.[111] For institutions like the World Bank, this is viewed as either inevitable or necessary. As a consequence their approach to standards construction appear meant to be complementary to any number of other measures—and to the institutions whose ideologies of governance conformity they reflect.[112] There is thus an element of polycentric anarchy—a marketplace of standards and the competing ideological agendas on the basis of which they are framed—in the sense of emerging multiple measurement structures without a single ordering principle, in the construction and implementation of these standards.

But whatever the source or techniques used, it is apparent that the government of the state affected rarely makes that determination, and usually has even less power to object. It might be possible to vest that determination on relevant regional associations—for example the Organization of American States or the African Union, with respect to its own members. Ought it to be made by the governments of the home states of enterprises seeking to engage in activities in these areas? That is implied by the UNGP. But those implications might also produce an unwelcome invitation to extend national law, through enterprises, to host states, to serve as a substitute, within the areas controlled by the enterprise, of any remnant of host state law or governance. Must the home states use international standards, perhaps like those techniques developed by IFIs to make that determination? That may also be implied by both UNGP and the OECD Risk Awareness Toolkit. The application of international standards would appear, at first blush to eliminate the nationalist element of extraterritoriality. Yet if it is left to states, and especially developed states, to apply those international standards, the possibility for misapplication remains

109. Robert I. Rotberg, *Strengthening Governance: Ranking Countries Would Help*, 28(1) THE WASH. Q. 71-81 (2010).

110. Oded Löenhelm, *Examining the State: A Foucaldian Perspective on International 'Governance Indicators"*, 29(2) THIRD WORLD Q. 255-274 (2008).

111. Compare, for example, the approach of the Worls Bank, supra, notes 103-109, with SUASN E. RICE AND STEWART PATRICK, INDEX OF STATE WEAKNESS IN THE DEVELOPING WORLD (Brookings, 2008).

112. "The WGI are complementary to a large number of other efforts to construct more detailed measures of governance, often just for a single country. Users are also encouraged to consult the disaggregated individual indicators underlying the composite WGI scores to gain more insights into the particular areas of strengths and weaknesses identified by the data." *Id.*, available at http://info.worldbank.org/governance/wgi/index.aspx#doc.

substantial. Many states might be unable to resist the temptation to apply their own national version of international law and to project that outward. For some, especially in developing states, in whose territory such determinations are most likely to be implemented, the functional effect of these regimes might begin to look like the old colonial system.[113] But rather than endure projections of power directly through the application of military force, power projections are made through the invocation of international soft law devices. And, indeed, the UNGP are written to push enterprises into consultation with home state governments, and for home state governments to project their own domestic legal orders (including hopefully some measure of international norms transposed into national law) as the framework for monitoring, assistance and sanctions.

C. Risk and Complicity.

If issues of coherence and identification focus on the constitution of *states* that may be targeted for analysis and action under the UNGP and OECD standards, then issues of complicity and risk focus on the triggers for actions by *enterprises*. One of the most interesting aspects of the two standards touch on the anchors chosen by each around which to order their governance framework. The two ordering concepts are not the same. That alone produces coherence and coordination issues—the "language" of each is different enough that each might require different approaches to implementing the sort of human rights due diligence at the heart of the UNGP. Ironically, both were deemed necessary to incorporate the requirements developed within their respective frameworks.

For the UNGP, the anchor is complicity. For the OECD Risk Awareness Tool, the anchor is risk. For the UNGP, the foundation of enterprise action is legal; under the Risk Awareness Tool the foundation is economics. Complicity points to the issue of legal compliance—explicitly referenced in the UNGP. Risk points to the objectives of enterprises understood in terms of gain and loss.[114] They thus point in somewhat different directions. For the Risk Awareness Tool, legal non-compliance (including

113. Discussed in Larry Catá Backer, *Economic Globalization Ascendant: Four Perspectives on the Emerging Ideology of the State in the New Global Order*, 17(1) BERKELEY LA RAZA LAW JOURNAL 141-168 (2006).

114. This is emphasized by the U.N. Global Compact, from which the Risk Awareness Tool draws. *See* OECD RISK AWARENESS TOOL, *supra* note 15, at 14 n.3; *See* U.N. GLOBAL COMPACT, BUSINESS GUIDE TO CONFLICT IMPACT ASSESSMENT AND RISK MANAGEMENT (June 2002), https://www.unglobalcompact.org/docs/issues_doc/Peace_and_Business/BusinessGuide.pdf. The Guide to Impact Assessment is meant to help companies create conflict impact risk strategies to further sustainable business environments in the face of operational risk. It is organized as a matrix of risk assessment, *id.* at 7-10, and questions for management, *id.* at 11-27.

presumably the risk of liability through application of complicity principles) is a subset of risk analysis.[115] The emphasis is on the aggregate effect of choices on reputation and performance. For the UNGP, risk is a subset of compliance, including legal compliance. Those might arise from out of the relationship contemplated by Principle 7 between the enterprise and its home state. Or it may arise autonomously from out of the corporate responsibility to respect human rights by reference to the International Bill of Human Rights.

Yet both then produce limitations on their respective scope that might make them less useful in practice. UNGP §17 does note, in its commentary to the general framework for human rights due diligence that complicity has both a legal and non-legal meaning. It points to the societal consequences of business enterprises being "perceived as being 'complicit' in the acts of another party where, for example, they are seen to benefit from an abuse committed by that party."[116] But it is not clear how that societal complicity concept carries over to weak governance zones, where, indeed, the formative act of complicity is to fail to apply at least the core international law standards to the enterprises' behavior.

The risk approach avoids interdiction. It suggests the costs of decisions made in the course of operation in weak governance zones speaks to consequences, but within them legal complicity, or even societal complicity, form a subset of those factors that might be considered. And it suggests the "business case" against making certain decisions, in terms of the overall aggregate effect on performance, as that is usually understood in a business context. But an enterprise may indeed engage in such analysis and decide that the risk, including the legal risk, is worth the reward. And where the legal risk can be contained—within a subsidiary or in a contractual relationship, then the overall risk to the enterprise as a whole may be reduced further still. A complicity standard, on the other hand, is meant to impose limits on the range of choices implied by risk analysis. And those limitations are based on public law concerns—the public policy of state, especially as it reflects emerging international norms. Some have taken that analysis farther and suggested a duty on the part of enterprises to circumvent the law of weak governance zone states where to do so furthers the corporate responsibility to respect.[117] But that, itself, could suggest both a broader view of complicity standards and a danger to enterprises, one

115. *See* OECD RISK AWARENESS TOOL, *supra* note 14, at 40-41 (defining "risk").
116. UNGP, *supra* note 7, § 17, at 18-19.
117. *See* INST. FOR HUMAN RIGHTS & BUS., FROM RED TO GREEN FLAGS: THE CORPORATE RESPONSIBILITY TO RESPECT HUMAN RIGHTS IN HIGH-RISK COUNTRIES 3 (2011) (it suggested a more complex analysis, though one still grounded on legal compliance as a touchstone: "Do national, international and soft law collectively provide instruments that enable companies to meet their responsibilities. . . . Probably not. Though companies should not break the law, they can (and often should) go beyond it when national governance is weak or corrupt. Where national laws positively

bound up in legal rather than societal constraints. That framework will produce a different approach to decision making, narrower and more formal, but also one with its own dangers.

D. The Perils of the Heightened Managerial Care Standard.

The Risk Awareness Tool is grounded on its implementation by enterprises under a "heightened managerial care standard."[118] It is described as a variant of the risk management term "due care."[119] Yet the term also carries with it the echo of a legal standard of "care" for determining the standard of compliance by directors with their duties to the enterprise. Thus the Risk Awareness Tool may also carry with it the possibility of affecting the way in which a legal standard applicable to director duty, might be applied in a legal proceeding. Indeed, the focus of the heightened care obligation tracks the legal standard for duty of care applied under the corporate codes of many U.S. States. This avenue of corporate governance has generated some interest among academic commentators.[120] But it remains primarily an abstract discussion. On the other hand, the argument from contract may be more fruitful. Might it be possible for a court to determine that the decision of an enterprise to conform to the standards of the Risk Awareness Tool has the effect of imposing a higher legal duty of care in line with the heightened care standard of the Risk Awareness Tool itself? That legal duty might be derived from contract. It could not bind the enterprise where these contractual obligations contradict baseline corporate fiduciary obligations to the enterprise and its shareholders. But within that set of constraints, it might bind the enterprise (though not its directors). Yet, even that possibility raises another set of risks for the enterprise, one perhaps of similar magnitude to the risks assessed relating to operation in weak governance zones.

E. Legitimate and Illegitimate Political Activities.

The Risk Awareness Tool devotes substantial attention to the issue of legitimate and illegitimate political activity by enterprises in weak governance zones. Improper involvement in political activity is subject to an objective and a subjective test. The former focuses on the host and home states, the latter on sensibilities beyond the host states (with effects on conduct within the host state). The objective test is a

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obstruct adherence to the 'Respect' framework (by restricting public meetings, or formation of trade unions, for example), companies need to circumvent the law creatively."); *accord id.* at 33-42.

118. *See* OECD RISK AWARENESS TOOL, *supra* note 14, at 36-37 (defining "heightened managerial care").

119. *Id.*

120. *See, e.g.*, Jena Martin, *Business and Human Rights: What's the Board Got to Do With It?,* U. ILL. L. REV. 959 (2003); Cynthia A. Williams & John M. Conley, *Is There an Emerging Fiduciary Duty to Consider Human Rights?,* 74 U.CIN.L.REV. 75 (2005). .

simple illegality standard—the political activity is improper if it is illegal in either home or host state.[121] But that raises the problem of extraterritoriality indirectly. If conduct is legal in the host state, may a home state affect host state legal norms by enforcing an inconsistent home state legal standard through enterprises operating within the host state? If so, the interference with sovereignty originates in home states, and the enterprise serves as an instrument of the projection of regulatory power beyond the borders of the projecting state. That ought to be problematic. The response, of course, is that this is necessary in those territories already suffering from institutional failures. It appears that where governments are weak or collapsed, other states have a freer hand, through their enterprises, to export their laws. This is especially problematic when such exporting is undertaken through state owned enterprises, where the role of the state might be more direct, and the conduct of the enterprise might be of more direct interest to the home state government. The second, subjective, test—whether the enterprise would feel comfortable if their political activities were transparently reported in detail in the media. There again, the referent is not the sensibilities of the host state, but rather the global community. The standard furthers the objectives of harmonization of notions of legitimacy as an international matter. But it does so without much participation by the sovereign rights holders of the jurisdiction in which its effects will be most felt. From the perspective of functional effect—the primary driver of the Risk Awareness Tool—the result is net positive; from the perspective of theory and democratic principle, the result is at best mixed.

Similar issues arise in the context of the definition of legitimate political activities of enterprises[122] in at least one respect. The Risk Awareness Tool defines legitimate political activity in part by reference to its purpose. That purpose is defined as the promotion of "better participatory processes and a competitive market environment."[123] That purpose is then complemented by a number of additional requirements: good faith, transparency, and working partnership with indigenous individuals and organizations.[124] For states whose political systems, and cultural tastes do not run to those of advanced western democracies this invitation to political participation may smack of interference, and not just interference but as an invitation to dismantle system in favor of something else. On the other hand, IFIs have long been criticized for these efforts as well through their loan and technical assistance work. The definition, of course, may be inevitable given the thrust of the Risk Awareness

121. *See* OECD RISK AWARENESS TOOL, *supra* note 14, at 37-38 (defining "improper involvement in local political activities").
122. *Id.* at 38-39 (defining "legitimate political activity").
123. *Id.*
124. *Id.*

Tool's emphasis on the societal obligations of enterprises.[125] Yet that may also be the problem. If foreign enterprises are encouraged to participate in the political processes of host states, or to direct their local operation's participation in host state politics, and they are encouraged to do this for their self-interest, it might be as likely that this activity will weaken rather than strengthen local governance. It certainly runs the risk of shifting the locus of power from popular centers and local elites, to the enterprises that may seek to inject themselves in local politics, even if they do this through local association. The Risk Awareness Tool candidly explains that a segment of the business community consulted strongly opposed political involvement for fear that it would be difficult to police the legitimate-illegitimate divide.[126] But it errs on the side of participation—and perhaps not unreasonably in light of the strong premise of societal purpose in both the OECD Guidelines and the UNGP. But policing that divide will prove to be a problem, and the demarcation of that divide remains problematic even in advance industrial states.[127]

F. The Projection of the Ideology of BITs into the Private Sphere.

The move toward an internationalized institutionalization of enterprise responsibility in weak governance and conflict zones has not occurred in a vacuum. Beyond its intimate connection with the development of normative and administrative structures for CSR regimens in public and private sectors, weak governance zones rules reflect, in part, and must be understood within, developments in the consensus structuring of trade and investment regimes among states, especially those articulated in bilateral investment treaties (BITs). The convergence is to some extent conscious. The United States, for example, has declared that its BIT program have as their core objectives to "[p]rotect investment abroad; [e]ncourage the adoption of market-oriented domestic policies that treat private investment in an open, transparent, and non-discriminatory way; and [s]upport the development of international law standards consistent with these objectives."[128]

Those objectives point to an important development in the ideology of international trade that is increasingly embedded in the international legal framework within which cross border investment is structured. The ideology increasingly looks to the internationalization of domestic law and its application as such in determining disputes between investors and states. The idea is that the BIT itself effectively

125. *See id.* at 31-33.
126. *Id.* at 31.
127. *See, e.g.*, Citizens United v. FEC, 558 U.S. 310 (2010).
128. *Bilateral Investment Treaties and Related Agreements*, U.S. DEP'T OF STATE, http://www.state.gov/e/eb/ifd/bit/index.htm (last visited Nov. 24, 2015).

internationalizes domestic law, in the sense that domestic law assimilated international law into its framework as general principles of law and because by their character these BITs pulled its subject matter out of a purely domestic legal context.[129] Where that view has been rejected, an alternative basis of internationalization is put forth—that though domestic law may be applicable, only that part of domestic law not in conflict with principles of international law would be applied.[130] Though the specifics of BIT dispute resolution processes have advanced substantially since the 1980s, the ideological framework, overlaying domestic law with the constraints of international law and its principles, remains.

That ideological line—internationalizing obligations within a domestic legal order appear as well in the context of corporate responsibility in weak governance or conflict zones. The consequences can be significant. If the foundational ideology of BITs embraces notions of legal internationalization with respect to business conduct touching on investment, then it is possible that this approach can be applied as well to the private conduct of business in weak governance or conflict zones. Indeed, enterprises might be safer applying the domestic law of such zones only to the extent of its conformity to general principles of international law in order to conform their behavior generally to expectations of business conduct. In effect, what BIT culture with respect to internationalization may accomplish is to amplify and manage the approach of enterprises in selecting the nature and form of its responsibility in weak governance and conflict zones. That internationalization, though may also work against those with an expansive notion of the sort of international law that enterprises ought to apply in those zones. Specifically, a narrow reading of legal internationalization may preclude the effective implementation of the UNGP or the OECD Guidelines precisely because they are not international law. On the other hand, their acceptance within the business community may suggest that as a matter of international practice some of UNGP or the OECD Guidelines compliance may be a necessary component of determining the form in which domestic law would have to be applied by the enterprise in such zones.

What clearly emerges, however, is that even a narrow reading of the enterprise obligations in weak governance or conflict zones under these standards likely takes as its starting point the ideological approach of BITs and its expectations of legal internationalization. That will mean that whatever normative framework is applied, the domestic legal order of states in weak governance or conflict zones may not be unquestioningly applied as written or as traditionally implemented. Rather,

129. *See* Texaco Overseas Petroleum Co. v. Gov't of the Libyan Arab Republic, 17 I.L.M. 1 (1978); Revere Copper & Brass, Inc. v. Overseas Private Investment Corp., 17 I.L.M. 1321 (1978).

130. *See* Libyan American Oil Co. (LIAMCO) v. Gov't of the Libyan Arab Republic, 20 I.L.M. 1 (1981); Am. Indep. Oil Co. (AMINOIL) v. Kuwait, 21 I.L.M. 976 (1982).

enterprises will have to carefully choose how to approach such domestic legal orderings in light of emerging international law principles sand standards including those of the OECD Guidelines and the UNGP. That appeared to be the position taken in 2006 by the business sector. In a paper prepared by the International Organisation of Employers (IOE), in collaboration with the International Chamber of Commerce (ICC) and the Business and Industry Advisory Committee (BIAC) to the OECD,[131] the legal internationalization was taken as a matter of course.[132]

Within this embedding of the cultures of BITs within weak governance and conflict zone responsibility regimes, then, has another important consequence. It moves us toward the last significant issue implicated in their construction—the role of the lawyer (governmental lawyers, in house counsel or counsel for NGOs, for example)—in the enforcement of these emerging governance frameworks. That is the subject taken up next.

G. Enforcement and the Role of Lawyers.

Enforcement of legal norms within the domestic legal orders of the states responsible for their implementation tends to be straightforward. Traditionally that relationship between the state, judicial or administrative authority, and law served as the boundaries of enterprise activity of interest to lawyers. But the rise of soft law systems at the international level has added a level of complexity, as well as ambiguity to the issue of enforcement, and consequently to the nature of the lawyer's role in advising the enterprise that faces choices under these governance frameworks. The UNGP and OCED systems provide an excellent example of both, as well as the traps that now face both enterprises and lawyers within regimes that are not *formally* legal but *function* like law in some respects.

The UNGP are not directly enforceable in the conventional sense.[133] They are, as their name suggests, guiding principles directed to states and enterprises. They are meant to provide a framework within which states might better undertake their duties under national and international law (and norms to the extent that states might be convinced to give them legal effect) as a basis for approaching policy choices. States are encouraged to sharpen their compliance by creating and implementing

131. THE ROLE OF BUSINESS IN WEAK GOVERNANCE ZONES, *supra* note 5.

132. They suggested as an approach to legal compliance two relevant actions. First, "Determine national legal obligations and structure operations to ensure compliance. If there are no such obligations or structures, reference to international human rights instruments may provide guidance." *Id.* at 5. Second, to "Promote the ILO's 1998 Declaration on Fundamental Principles and Rights at Work in its operations and in its relationship with suppliers." *Id.*

133. UNGP, *supra* note 8, at 1 ("Nothing in these Guiding Principles should be read as creating new international law obligations, or as limiting or undermining any legal obligations a State may have undertaken or be subject to under international law with regard to human rights").

"national action plans," though these, like the UNGP themselves, have no legal effect in and of themselves.[134] In a similar way they provide a framework within which enterprises understand the scope of the societal norms that may assert an effect on their operations—not as "law" but as the consequences of failing to meet the expectations of enterprises' stakeholders. This so-called business case for the UNGP,[135] is grounded in firm economics and self-interest. Societal norms shape the environment in which enterprises may maximize their welfare. Breaches of these societal norms will consequently increase risk of reducing income or the viability of activity. When such reductions are severe enough they might lead to liability, usually for breaches of duty.

For the lawyer, this means an emphasis on risk and compliance auditing. Human rights due diligence generally provides a useful framework for such compliance and risk auditing. While the risks could be legal at the outer boundaries, the societal nature of the UNGP "responsibility to respect" principles speak more to business risk. The basis for that risk, though, is normative and framed by the UNGP. It also means an additional emphasis on counseling for the conceptualization and implementation of internal corporate governance and operational rules—employee codes, supplier codes of conduct, compliance with their party norms (sourcing and vendor payments), and the like. This internal law of the enterprises is as much an issue of policy for the enterprise as it is a matter of "lawmaking" understood in its functional and contractual (private law) sense.[136] The private law of the enterprise produces a transnational code effective within the enterprise and its supply chain, one that interacts with a large and varied set of national law over parts of its operation.[137] Where the "business case" for the UNGP is embraced, then its "soft law" character can become hard via the governance contract system that constitutes corporate transnational self-government. But that also requires the lawyer to counsel the enterprise seeking to harmonize the law of its internal operations respecting those instances in which rule consolidation is warranted and those situations in which it does not—and to some extent the object of the UNGP seeks to inform the enterprise

134. *See National Action Plans*, BUS. & HUMAN RIGHTS RES. CTR., http://business-humanrights.org/en/un-guiding-principles/implementation-tools-examples/implementation-by-governments/by-type-of-initiative/national-action-plans (last visited Nov. 24, 2015).

135. *See, e.g.*, *Operationalize the UN Guiding Principles on Business and Human Rights*, ACTION 2020, http://action2020.org/business-solutions/operationalize-the-un-guiding-principles-on-business-and-human (last visited Nov. 24, 2015).

136. *See, e.g.*, Larry Catá Backer, *Governance Without Government: An Overview*, *in* BEYOND TERRITORIALITY: TRANSNATIONAL LEGAL AUTHORITY IN AN AGE OF GLOBALIZATION 87 (Günther Handl et al. eds., 2012).

137. *See* Larry Catá Backer, *Multinational Corporations as Objects and Sources of Transnational Regulation*, 14 ILSA J. INT'L & COMP. L. 499 (2008).

(and its lawyers) in making these decisions.[138] Where the enterprise operates in a conflict zone, the internal law of the enterprise may be the only effective governance system applicable on the ground.

Like the UNGP, the OECD Guidelines and its complementary Risk Awareness Tool, is not directly enforceable.[139] This framework applies to the UNGP, as it has been incorporated into the OECD Guidelines.[140] To that extent, they are of interest to the lawyer in the way the UNGP are—risk and compliance will tend to dictate the scope and extent of an embrace of the guidelines within the enterprises' culture and written into its internal law (by lawyers mostly). But unlike the UNGP, the OECD Guidelines does include an implementation procedure.[141] The OECD Guidelines provide for the establishment of National Contact Points (NCP) within OECD Member State governments, "undertaking promotional activities, handling enquiries and contributing to the resolution of issues that arise relating to the implementation of the Guidelines in specific instances, taking account of the attached procedural guidance."[142] Most of the activities of the NCPs are of small interest to the enterprise and its lawyers, except one—the authority to contribute to the resolution of disputes arising when an actor brings a claim to the NCP that an enterprise has failed to comply with its obligations under the OECD Guidelines. Though these actions have no *formal* legal or binding effect, because they *function* like a fact-finding determination that might have business risk implications, these proceedings become of interest to lawyers. And they have become of greater interest to global civil society actors who view specific interest claims as a means of forcing functional compliance outside of national law but effected through an organ of national government. For most NCP jurisdictions, the extent of involvement in these specific instances is limited to sometimes quite anemic efforts to mediate disputes. Failure of mediation ends their involvement. For a few jurisdictions, these disputes might lead to written recommendations and quasi-judicial fact-finding. But even the threat of a specific instance may pose risk to a company, risks which have produced efforts to settle

138. While the UNGP might favor application of a "most favored nations" approach to consolidation, business would likely prefer governance fracture where that reduces costs without raising compliance costs or legal risk.

139. OECD GUIDELINES, *supra* note 15, at 3 (the guidelines "provide non-binding principles and standards for responsible business conduct in a global context consistent with applicable laws and internationally recognized standards.").

140. *See* OECD GUIDELINES, *supra* note 15, at 31-34.

141. *See* Larry Catá Backer, *Rights and Accountability in Development ('RAID') v Das Air and Global Witness v Afrimex: Small Steps Toward an Autonomous Transnational Legal System for the Regulation of Multinational Corporations*, 10 MELBOURNE J. INT'L L. 258 (2009).

142. OECD GUIDELINES, *supra* note 15, at 68.

these specific instances before these proceedings become public or fester.[143] *This becomes an important element of the risk calculus of lawyers especially in conflict zones (UNGP) or in weak governance zones, with respect to which civil society actors may have a greater incentive to bring claims (because of the absence of a state).*

But these considerations do not end the analysis of "soft" enforcement. Increasingly, regional human rights organs have begun to incorporate the OECD Guidelines and the UNGP within the body of international law that they oversee. Enterprises may see their operations subject to review by regional human rights organizations seeking compliance with the OECD Guidelines and the UNGP. In the context of allegations of gross human rights abuses these instruments may play a greater role where operations are undertaken in weak governance zones or conflict areas. Thus, for example, the African Court for Human and Peoples' Rights is empowered to apply relevant African and international instruments.[144] The Inter-American Commission for Human Rights individuals may petition determining the human rights responsibilities of OAS Member States that allege violations of the human rights guaranteed in the American Declaration of the Rights and Duties of Man ("the American Declaration"), the American Convention on Human Rights ("the American Convention"), and other inter-American human rights treaties. Enterprise complicity may be part of that petition or may be used as evidence. In either case the enterprise may be involved in a proceeding that may raise its rise and potentially its compliance exposure. Taken together, what is beginning to emerge is a picture in which the hard law-soft law divide has become increasingly irrelevant either to determine enterprise risk, or the role of lawyers in counseling enterprises for "legal" compliance. Where the enterprise operates in weak governance or conflict zones, the exposure grows, and the avenues for functionally effective enforcement. Yet as a consequence, the gaps, conflict and tensions within the Risk Awareness Tool and UNGP weak or conflict zone standards, some of which have been noted in this section, become more important to the development of a coherent regulatory response to the issues posed in weak or conflict zones.

143. *See* Larry Catá Backer, *Realizing Socio-Economic Rights Under Emerging Global Regulatory Frameworks: The Potential Impact of Privatization and the Role of Companies in China and India*, 45 GEO. WASH. INT'L L. REV. 615 (2013) (some discussion on national contact points).

144. Super User, *African Court in Brief*, THE AFRICAN COURT OF HUMAN AND PEOPLES' RIGHTS (April 28, 2015), http://en.african-court.org/index.php/component/k2/item/29-k2-african-court-in-brief ("The Court has jurisdiction over all cases and disputes submitted to it concerning the interpretation and application of the African Charter on Human and Peoples' Rights, the (the Charter), the Protocol and any other relevant human rights instrument ratified by the States concerned.").

III. Conclusion.

The management of economic activity now increasingly seamlessly organized as functionally differentiated global systems within and among an architecture of domestic legal orders and international public and private normative orderings of differing legitimacy and authority has created an environment of governance complexity[145] whose parameters are only recently being addressed as the processes of CSR governance have helped "constitute the objects which come to be governed."[146] Complexity assumes a specific character when enterprises operate in territories in which the institutions of the state are weak or where there may be conflict, they face unique challenges. Over the last decade two international organizations have sought to provide some basis guide corporations in determining how they should conduct their activities in that context. Here, both frameworks were explored. Also explored were the ways that CSR has been transformed, in some respects, from to a mandate for assuming governance responsibilities in those states unable or unwilling to institute systems of law that conform to international consensus standards on human rights into something new, and explored a number of issues that have neither been resolved nor might they promote the intended effect.

Both the UNGP and the Risk Awareness Tool have significantly advanced the framework within which enterprises can understand and mold their behaviors in territories in which there are failures of government. The UNGP relies heavily on the state as a principal means of disciplining home state enterprises, and through them their supply chain relations. International law and norms are advanced through state management of enterprise extraterritorial operation in conflict zones, and through legal compliance programs focusing on international standards. The Risk Awareness Tool more heavily focuses on the enterprise as the bearer of international law and norms within weak governance zone. Though it, too, would have the enterprise look to its home state for guidance in the absence of rule of law frameworks in the zones in which they operate. Both approaches are thus grounded on the superiority of international norms, irrespective of their character as law within the domestic legal orders of states, but in distinct ways. Both acknowledge the autonomy of enterprises as directly responsible for the operationalization of international norms wherever they operate. Yet both also open the door to extraterritorial application of law. The same framework that advances the governance autonomy of enterprises also envisions them as the vehicles through which home states may project

145. *See* Bob Jessop, *The Governance of Complexity and the complexity of Governance: Preliminary Remarks on Some Problems and Limits of Economic Guidance, in* BEYOND MARKET AND HIERARCHY: INTERACTIVE GOVERNANCE AND SOCIAL COMPLEXITY 95 (Ash Amin & Jerzy Hausner eds., 1997).

146. *Id.* at 124 ("these objects do not fully pre-exist the process of governance").

national power within host states with weak governance regimes. And this tension built into both frameworks, a tension that goes to the dual character of enterprises as both autonomous governance actors and as creatures of the states in which they are domiciled, marks the potential and the challenge to the internationalization of regimes of CSR.