



A POLICY FRAMEWORK FOR INVESTMENT

Responses received in public consultation

22 February 2006

On 16 January 2006, the OECD Investment Committee and its partners in the Task Force sought the public's views through an online consultation on the draft text of the Policy Framework for Investment and avenues for future use. This document is a compilation of responses received from business, labour and other non-governmental organisations, as well as individuals commenting in a personal capacity, as of 22 February 2006.

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africappractice operates at the intersect of business, government, and international organisations to implement and communicate their commitment to African investment and development. We have hub offices in London, Johannesburg, Kenya, and Lagos and also publish the continent's premier investment title - *Africa investor* to supply investors and policy makers with information on Africa's investment environment. As an organisation, we therefore have a clear African agenda and a direct interest in promoting and improving the investment climate in Africa. Over the past few years our various projects have included work on economic integration, economic trends and market analysis, SMEs (supporting Barclays' services to SMEs), infrastructure (Nepad Infrastructure Investment Facility), and notably, the launch of 'Bending the Arc'. Bending the Arc is a New Partnership for African Development (Nepad) Initiative supported by the United Nations and the African Development Bank that seeks to create a dialogue between key public and private sector actors and other stakeholders to assist in policy-formulation. Both our direct engagement with these issues and our strategic position at the centre of politics, business and development motivates *africappractice* to offer comment upon the OECD *Policy Framework for Investment*.

The Framework

The draft text of the *Framework* has rightly identified private investment as an integral force in driving development in the non-OECD countries, and policy formulation as being critical to facilitating such investment. In taking first steps to engage with this issue, the *Framework* can be highly commended. The paper states that it is a flexible tool kit for developing countries to frame and evaluate important policy choices, and whose core purpose is 'to ask appropriate questions about their economy, institutions and policy settings in order to identify their priorities, to develop an effective set of policies and evaluate progress'. It is my concern, however, that this overall aim is flawed, the corresponding structure and content of the *Framework* have significant limitations, and that this will have a bearing on achieving the ambitious goals that have been set.

The core purpose

It does not necessarily follow that 'asking appropriate questions' will 'develop an effective set of policies'.

Whilst the mechanism of self-evaluation has its value as a reference point, I suggest that in this situation it is not enough. 2005 has been a critical year for the developing world with much debate, conference and protest, yet much of this interest has been bland rhetoric with little concrete action. The OECD is ideally placed to make a more tangible impact by offering direction and prescriptive recommendations.

Limitations of the framework:

1. Asking a question in the format of the *Framework* does not necessarily require an answer. It implies an arbitrary, optional participation that deducts from the overall value of the paper. There is no call to report back, publish answers or even act upon the answer.
2. The draft text states that various elements of the list of questions 'can be flexibly adapted to particular economic, social, legal and cultural circumstances'. It can be argued that by attempting to be so broad that the *Framework* applies to all, in fact applies to none. Who is to decide which parts are more relevant at any one time?
3. Following on from this point, there is no ranking or indication of importance prescribed to any of the questions. Is country X (limited by capital, capacity, and technology) supposed to work its way down the list in chronological order to address each point raised? Given these restraints, is it more important to answer yes to the first question than any another?

4. There are no guidelines, working models, or quoted examples to add a tangible dimension for policy-makers to reference.
5. The questions only ask whether a policy is in place or not. The same policy may be in place in two very different countries X and Y, one operating successfully and the other inefficiently. Yet both country X and Y can answer 'yes.' There needs to be a greater level of detail and an indication of how good is good enough.
6. There is not enough emphasis within the 'Policies for Promoting Responsible Business Conduct' section on building local capacity and ensuring investment reaches the grassroots of the country. It is vital to ensure that the local economy benefits from private investment and that there are the structures in place to channel the resources. The *Framework* should stress that policies are needed to include local manufacturers, suppliers, and distributors, and that long-term training and education programmes are put in place. In the long-term, it is widely understood that building local capacity is the best way of growing a sustainable business environment and ensuring continued profitability.

Suggestions

The framework would have more value as a prescriptive tool. Instead of a list of questions, a checklist of recommendations ranked in order of importance would be useful for developing countries to prioritise various policy changes. Each recommendation can be accompanied in the annotations by examples of best practice, guideline information and details of available support.

Alongside this, a global index of national policy implementation and efficiency (according to the categories laid down in the Monterrey Consensus) could be published on an annual basis. This would allow non-OECD countries to benchmark themselves against the most effective systems, to quantify their progress over time, and allow them to see the tangible results of this progress. Each time a new policy is implemented, or an existing policy is improved, an independent assessment body can re-grade a country within the relevant category; the aim being to achieve full implementation of all the recommendations laid out in the framework, and to have those operating at full capacity.

Whilst commenting upon the draft text of this framework, it is also pertinent to address the role of the OECD countries in designing this paper. What more can member states do help and offer support? Are they compliant with the list of recommendations/questions themselves? Publishing a global ladder of progress increases transparency, accountability, and would allow the sharing of best practice.

Finally, whilst the OECD has identified policy development as a critical force for facilitating private investment, and has acknowledged that there are other factors involved, it is important not to underestimate these other factors. Much of the hesitancy on the part of investors results from perceptions of economic and political risk which are manipulated by the press and the media. In order to achieve high rates of private foreign and domestic investment, it is vital to communicate progress, stability and the reality of the business environment in developing economies. In short, the significant benefits of implementing effective policy can be diminished if their existence and potential impact are not publicised and reported on accurately in the wide international arena. Several parties are beginning to recognise this and there have been a number of initiatives launched to help improve the quality of business reporting on the continent, notably the Diageo Africa Business Reporting Awards and their associated initiatives.

In sum, the Framework is a great step in the right direction. It is comprehensive, relevant and well thought through. It is worth commenting however, that it would benefit from being more prescriptive, inspiring more accountability and working alongside an index that allows policy makers to share best practice and bench-mark their progress.

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Amnesty International

1. Amnesty International is a worldwide membership movement. Our vision is of a world in which every person enjoys all of the human rights enshrined in the Universal Declaration of Human Rights. We promote all human rights and undertake research and action focused on preventing and ending grave abuses of the rights to physical and mental integrity, freedom of conscience and expression, and freedom from discrimination.
2. Amnesty International takes a particular interest in foreign investment, and the potential implications of such activity for international human rights. All governments have international law obligations to respect, protect and fulfil human rights. Amnesty seeks to ensure that foreign investment, the policy framework in which it operates, and the legal agreements governing it, are supportive of these international human rights obligations.
3. In addition to governments, businesses also have responsibilities towards human rights. Amnesty International recognises the draft UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights as the best articulation of these responsibilities.¹
4. Amnesty International also monitors the OECD Guidelines for Multinational Enterprises. In a report launched in January 2006, Amnesty International UK and its partners highlighted shortcomings in the implementation of the OECD Guidelines in the United Kingdom, and proposed recommendations for improvement.²

Summary of Comments

5. Governments have binding human rights obligations under international law. These obligations find their source in international and regional treaties and customary international law and general principles of international law. States are obligated under international law to respect, protect and fulfil human rights.
6. Efforts to construct a legal and policy architecture for governance of foreign investment which ignores these binding human rights obligations are misguided at the policy level, and raise the likelihood that such human rights obligations will come into friction with any such investment rules. There is a need to acknowledge existing human rights obligations when elaborating investor-state contracts and investment protection treaties, as well as to promote enhanced national and international standards of business responsibility, beyond those contained in the OECD Guidelines for Multinational Enterprises.
7. Amnesty International's comments on the OECD draft Policy Framework on Investment are based on Amnesty's own analysis of a number of foreign direct investment agreements between companies and countries. As such they should not be read as exhaustive comments on the Framework. Amnesty International believes that international human rights law and standards should be used as a benchmark in drafting the Policy Framework on Investment.

¹ See AI Statement of August 8, 2003, at:
<http://web.amnesty.org/library/Index/ENGPOL300122003?open&of=ENG-398>

² Amnesty International UK, Friends of the Earth, Christian Aid, *Flagship or Failure? The UK's implementation of the OECD guidelines and approach to corporate accountability*, January 2006, <http://www.amnesty.org.uk/news/press/16710.shtml>

Amnesty International's Concerns about Foreign Investment Governance

8. Two recent Amnesty International research reports have examined the human rights impacts of the legal contractual framework used for major foreign investment projects. The first report, *Human rights on the line: The Baku-Tbilisi-Ceyhan Pipeline Project*, was published in May 2003.³ The second report, *Contracting out of human rights: The Chad-Cameroon pipeline project*, was published in September 2005.⁴
9. These reports make clear that human rights obligations are placed in jeopardy where investor-state contracts are concluded without reference to human rights obligations. Of particular concern are two elements: so-called "stabilisation-of-law" clauses; and the international arbitration process by which foreign investment disputes are resolved.

a) Stabilization provisions of investor-state contracts

10. Amnesty International is concerned that stabilisation-of-law clauses undermine the international human rights framework and provide disincentives to improvements in good governance and human rights protections. Stabilisation-of-law clauses generally place restrictions on the applicability of new law or regulations to FDI projects. They also provide for compensation to be paid to investing companies by the host state if new laws or regulations are applied and impose direct or indirect costs on the FDI project.
11. It is not Amnesty International's position that stabilisation-of-law clauses and international arbitration provisions should necessarily be eliminated. However, any approach to elaborate a stable environment for foreign investment must not come at the expense of progressive improvements in good governance, and the protection of human rights.
12. The UN Committee on Economic, Social and Cultural Rights has emphasized that states are obligated under international law to take actions which promote, protect and fulfil human rights by:
 - Refraining from interfering directly or indirectly with the enjoyment of a right;
 - Taking measures to prevent third parties, including companies, from interfering with the right in question; and
 - Adopting appropriate legislative, administrative, budgetary, judicial, promotional and other measures towards the full realisation of rights.⁵
13. Accordingly, stabilization clauses and other such contractual provisions create risks to human rights protection by:
 - Limiting state power to impose environmental, labour, health, safety and other standards on FDI projects;

³ For information about this 2003 report and follow-up activity see:
<http://www.amnesty.org.uk/business/btc/>

⁴ See: <http://web.amnesty.org/library/Index/ENGPOL340122005?open&of=ENG-390>

⁵ See UN Committee on Economic, Social and Cultural Rights, General Comment 14: The Right to the highest attainable standard of health, UN Doc. E/C.12/2000/4, para 33, which discusses the requirements to 'respect, protect, fulfil', [http://www.unhcr.ch/tbs/foc.nsf/\(symbol\)/E.C.12.2000.4.EN?opendocument](http://www.unhcr.ch/tbs/foc.nsf/(symbol)/E.C.12.2000.4.EN?opendocument). See also International Covenant on Civil and Political Rights, Article 2(1), which requires 'respect' for the rights in the Covenant, and Human Rights Committee, General Comment 31, 2005, UN Doc.CCPR/C21.Rev.1/Add.13, para 8, which discusses the state's obligation to 'protect' rights in the Covenant from interference by third parties, see: <http://www.cedim.uqam.ca/publications/GeneralComments31.htm>

- Placing a price tag on human rights protection for the host state; and
 - Eliminating the ability of host state authorities to hold the private company accountable in domestic law for breaches of standards or involvement in abuses of rights.
14. Amnesty International's research has found that the state-investor agreements in both the Baku-Tbilisi-Ceyhan pipeline project and the Chad-Cameroon pipeline project freeze the application of new environment, labour, health, safety or other human rights standards to the FDI project even when these are imposed by the host government in an effort to fulfil its international human rights obligations.
15. In effect, such investment contract provisions place a price tag on human rights, because the host state has to pay the company even when the regulation imposed is for the purpose of protecting human rights such as labour rights, the right to health and a healthy environment or the like. For poor states, these financial penalties can have a particularly chilling effect on the willingness to regulate the company's behaviour under circumstances where a state has a duty to do so under international law.

b) Concerns about international arbitration of investment disputes

16. A further concern arises with respect to the means by which foreign investment disputes between investors and governments are resolved. Amnesty International is concerned that the international arbitration provisions, along with the stabilisation-of-law clauses, have the effect of largely eliminating domestic legal accountability for the private investor for failures to live up to contractual standards. Domestic agencies and authorities may be unable to impose new regulations on companies without risking international arbitration claims for compensation. Moreover, it is unclear to what extent a government's international human rights obligations will be weighed by arbitrators in the event of a dispute.
17. This is problematic in so far as such arbitral proceedings are routinely closed to the public – and in many instances the very existence of the proceedings themselves is not acknowledged. In effect, international arbitrators are put in the position of determining under what circumstances host states are able to take legislative and administrative actions to protect rights, and what sort of costs a state will be liable for if they choose to live up to their binding international human rights obligations. Arbitral decisions are subject to very limited review by domestic courts, and in the case of some arbitrations at the World Bank, are subject to no domestic review whatsoever. Indeed, it is often possible for foreign investors to challenge the imposition of human rights inspired regulations or standards, without any risk that the details of this challenge, nor its adjudication by a tribunal, will become a matter of public record.

Specific Comments on the draft OECD Policy Framework

18. The draft Policy Framework fails to acknowledge explicitly that governments have international legal obligations to respect, protect and fulfil human rights, and any action they take to encourage investment has to be consistent with these obligations. For example, the draft Policy mentions or references only a very small sub-set of international legal obligations on host states with respect to human rights throughout its text. Ignoring these human rights obligations is inappropriate for the OECD, as an inter-governmental body, and it may serve to undermine these legal obligations of states. For example, while Chapter 8, part 8.6, of the draft Framework inquires into the enforcement of core labour standards, it neglects to discuss enforcement of other binding international legal obligations which enjoy similarly widespread ratification, such as the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the Convention on the Rights of the Child. These covenants impose legal obligations on Governments to promote and protect human rights, including in those contexts where the actions of non-state actors (business) might threaten human rights. For example, Articles 6-9 of the International Covenant on

Economic, Social and Cultural Rights and Article 32 of the Convention on the Rights of the Child prescribe obligations which are additional to the basic duty to respect core labour standards.

Recommendation: The inquiries in each chapter should coherently and consistently take into account the full spectrum of international human rights legal obligations that bind governments. These obligations apply equally in the context of foreign investment.

19. Several Chapters of the draft framework promote investment protection treaties and contracts which shield investors from unilateral change to their operating conditions (for example Chapter 1, part 1.1 and part 1.7). Yet, as described above, Amnesty International's own research has shown that investment contracts can create risks to human rights by requiring compensation to investors for regulatory changes, even those to protect human rights. Further, the emphasis placed upon arbitration of investment disputes, and accession to international arbitration conventions, fails to acknowledge procedural shortcomings of arbitration as a method for resolving such disputes. Indeed, in a June 2005 statement, the OECD Investment Committee has expressed its support for greater transparency in investment arbitration, and for the right of third-parties to participate in such proceedings, particularly where matters of public interest are at stake.⁶

Recommendation: If the OECD promotes investor-state contracts and investment protection treaties, then it must encourage the parties to acknowledge the parallel legal obligations of Governments in the area of human rights. Investment agreements should confirm that investor protections in no way are intended to undermine the human rights obligations of states. Further, the OECD Policy Framework on Investment should stress the need for greater transparency and accountability when it comes to the resolution of investor-state disputes.

20. Chapter 7 of the draft Framework is entitled "Policies for promoting responsible business conduct." Yet, the only direct reference to international standards is to the OECD guidelines for Multinational Enterprises (MNEs). Amnesty International's own research shows that there are serious problems with the implementation of these Guidelines at the national level and that concrete steps are needed to provide National Contact Points with greater investigative powers and resources to investigate alleged breaches, as well as to link adherence to the Guidelines with the granting of support from state-supported export credit agencies. Therefore, government participation in the OECD Guidelines is not a valid indication of whether there is meaningful support for responsible business conduct.
21. In addition, the Framework fails to recognise that responsible business conduct can be promoted through the governments' duties to regulate companies to ensure they do not interfere with the human rights of individuals and communities. Further, the Framework does not mention the most comprehensive statement of standards and rules relevant to companies in relation to human rights, the draft UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises (draft Norms).

Recommendation: The draft Framework should recognise explicitly in Chapter 7 that governments have an international legal duty to regulate companies to ensure they do not interfere negatively with the enjoyment of human rights. Further, Chapter 7 should encourage governments to take steps to ensure investors fulfil those responsibilities embodied in the draft Norms as the minimum standard for "responsible business conduct".

⁶ "Transparency and third-Party Participation in Investor-State Dispute Settlement Procedures", Statement of the OECD Investment Committee, June 2005, available on-line at: <http://www.oecd.org/dataoecd/25/3/34786913.pdf>

22. Chapter 7 of the draft OECD Framework addresses Policies for Promoting Responsible Business, including different steps Governments may take to “assist” companies with legal compliance and responsible business practice. Nowhere does this Chapter acknowledge that Governments have international law obligations to *ensure* that business activity does not jeopardize human rights. Such obligations will mandate government action, including regulatory action, in certain circumstances, in order to uphold human rights standards. For example, a 2005 Report of the UN Human Rights Committee has affirmed the obligation of states to “protect” rights from interference by third parties.⁷ Likewise, rulings of regional Courts of Human Rights have emphasized the same duty under regional Conventions in Europe and the Americas.⁸

Recommendation: It should be recognised that the international legal obligation of states to regulate economic activity and economic actors to protect human rights applies to the context of foreign investment.

23. The draft Framework accords considerable attention to the impact of government regulation upon foreign investors, and proposes that prospective regulations be subjected to regulatory impact assessments (Chapter 10, part 3). Yet the proposed impact assessment is not required to take into account states’ obligations to regulate companies to protect human rights. Additionally, no similar attention is devoted to the impact of investment activity upon citizens of the host state. This is in spite of the fact that the OECD Framework purports (page 3) to take its inspiration from the 2002 Monterrey Consensus.⁹ Indeed, the Monterrey Consensus identified “internationally agreed development goals”, including those contained in the UN’s Millennium Declaration, as its touchstone. These goals include: eliminating poverty, improving social conditions, raising living standards and protecting the environment. Given that investment activity is viewed as a means to the pursuit of these broader international development goals, any Policy Framework for Investment should countenance the impact of specific investments (particularly major ones) upon poverty-reduction, social improvement, and environmental protection where the investment takes place.

Recommendation: The draft Framework should be benchmarked against international law at a minimum. Any reference to an impact assessment on regulation should integrate considerations of host state duties to respect, protect and fulfil human rights under international law. Additionally, the framework should address the human rights impacts of the foreign investment upon individuals and communities in the host states that might be affected by the investment.

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⁷ Ibid.

⁸ See for example, *Velasquez Rodriguez v. Honduras*, Judgment of July 29, 1988, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988), at: http://www.corteidh.or.cr/seriecpdf_ing/seriec_04_ing.pdf

⁹ See the UN Report of the International Conference on Financing for Development, Monterrey, Mexico, March 18-22, 2002, available on-line at: <http://daccessdds.un.org/doc/UNDOC/GEN/N02/392/67/PDF/N0239267.pdf?OpenElement>

Business and Industry Advisory Committee to the OECD (BIAC)

I. Introductory comment

BIAC welcomes the opportunity to provide additional comments on the Policy Framework for Investment (PFI). As recognized by numerous OECD publications, the private sector is the engine of growth and development in market economies. Successful mobilization of private investment, foreign and domestic, is increasingly important for raising growth rates, creating employment opportunities, spreading good environmental management practices and technologies, promoting capacity building and reducing poverty. Business plays an integral role in promoting sustainable development through its investments.

Opportunities to attract, retain and grow investment are best enhanced when countries provide a well functioning legal, political, social and economic environment in which companies can operate successfully and competitively. An attractive investment environment includes in particular government accountability and transparency, rigorous enforcement of the rule of law, cost-effective, regulatory frameworks based on sound science, a strong commitment to fighting bribe solicitation and corruption, open trade and investment regimes, a level playing field between domestic and foreign investors, reduction of investor risk (excepting inherent entrepreneurial risks), labour market flexibility, intellectual property right protection, human resource and infrastructure development.

It is in this context that BIAC sees the potential for the PFI to engage policy makers on the importance of identifying and implementing high quality investment policies. Through a series of questions, the PFI should encourage government officials to embrace and promote the best standards as a means to attract and retain investment that renders broad societal benefits.

BIAC support is critical to the success of the PFI. Both potential investors and non-OECD countries will be interested in how the business advisory body to the OECD views this project. The OECD business community welcomes the comprehensive approach of the PFI. Countries that want to attract and retain investment must develop coherent policy approaches across all the policy areas that impact on investment.

BIAC recognizes that several of our recommendations have been incorporated into the revised drafts. Yet there are still critical areas of concern among some of the questions, annotations and background papers that will undermine the utility of the documents as meaningful benchmarks for policy makers to improve the investment environment. Further, there are points of fact and judgement in which we believe the OECD has either erred or not set its goals sufficiently high to merit the endorsement of BIAC.

We urge the OECD to take full account of and accept BIAC's chapter specific comments in revision of the PFI. In addition, the more detailed background documents which in BIAC's view should eventually be included into the PFI also require improvement. In some cases the necessary revisions will be substantial to adequately reflect suggestions and priorities of the OECD business community and to fully correspond to the PFI questions and annotations presented for public comment. In this context, we refer to the following BIAC submissions commenting on the background papers and that are available on the OECD's PFI web page:

- Policy Framework for Investment: Investment Policy (DAF/INV/TF(2005)8) - BIAC COMMENTS, 13 June 2005
- Policy Framework for Investment: Revised Draft Trade Policy Checklist (DAF/INV/TF(2005)3/REV1) - BIAC COMMENTS, 13 June 2005
- VITAL ISSUES FOR THE INVESTMENT COMMUNITY - Policy Framework for Investment: Revised background paper on investment policy (DAF/INV/TF(2005)8/REV1) - BIAC COMMENT, 22 September 2005

- BIAC comment on the draft OECD background paper on INFRASTRUCTURE AND FINANCIAL SERVICES For the Policy Framework for Investment (DAF/INV/TF(2005)10), 25 November 2005
- Policy Framework for Investment: Tax Policy for Investment: A draft Checklist DAF/INV/TF(2005)6/REV1 - BIAC COMMENT (REV1), 25 November 2005

II. Comments on specific parts and chapters of the PFI

Preamble

OECD text, para 1, p.3

In BIAC's view the preamble should explain in a more detailed and positive fashion why attracting and retaining investment is crucial to the development of economies. The PFI preamble should cite and reflect the spirit of paragraph 14 of OECD's paper 'Mobilizing Private Investment for Development: Policy Lessons on the Role of ODA' (DAF/INV(2005)3/REV1) (the insertions in brackets where not included in the original text):

“The private sector is the main engine of growth in market economies. It thrives and delivers sustained growth when a number of factors combine to produce a conducive environment for the private sector to develop. Private (domestic and foreign) investment is a crucial prerequisite for economic growth because it allows entrepreneurs to set economic activity in motion by bringing resources together to produce goods and services. Rapid and sustained growth is facilitated by a virtuous circle whereby entrepreneurship and investment lead to higher productivity, making it possible to invest larger sums in the future. In the course of this process, jobs are created and new technologies are introduced, especially through international trade and investment linkages. Competitive and well-functioning markets are crucial because they promote and reward innovation and diversification, foster firm entry and exit and help to ensure a level playing field for all private sector actors. They also have an important role in making the growth process more socially and geographically inclusive, which expands the opportunities for poor people to participate in and benefit from growth. Successful mobilisation of private (domestic and foreign) investment is thus increasingly important for creating employment, raising growth rates and reducing poverty. Not only the expansion of private production capacity matters for economic growth; the productivity gains that result from capital deepening and modernization are important as well.”

OECD text, para 4, p.3

The OECD business community was not just invited to provide input but actually did present numerous submissions and actively participated in the Task Force meetings throughout the whole PFI process. BIAC suggests replacing the second sentence of para 4, p.3 that currently reads

“Business, labour and other civil society organisations were invited to actively contribute to the development of the Framework”,

by (changes underlined)

“Business, labour and other civil society organisations actively contributed to the development of the Framework”.

OECD text, p. 4, last para

The OECD Codes and the declaration constitute a comprehensive investment package. Thus, the OECD should promote the whole package instead of singling out the MNE Guidelines. BIAC suggests changing the last sentence, next to the last para on p. 4 to read (changes underlined):

“It complements OECD initiatives directed to governments and the business sector regarding national treatment, anti-corruption, corporate governance and corporate responsibility.”

Democratic governance and free markets

The draft PFI contains a reference to human rights in chapter 7 (question and annotations 7.2). However, the issue of human rights is part of the broader OECD principles and commitments to “democratic government and the market economy” that serve as the foundation of the Organization. BIAC believes that the PFI should include a reference to the principles of democratic governance and free markets as foundation of sustainable development directly in the preamble and/or forward (see also BIAC comment to question and annotations 7.2 on p.10).

Foreword

OECD text, para 1, p. 5

The OECD should explain better why it chose the ten policy areas that the PFI will comprise. In addition to their prominence the Monterey consensus, we believe it is justified to focus on these ten areas because they are critical to establishing a favourable investment climate.

OECD text, para 3, p.5

Para 3 explains the PFI structure. BIAC believes that the final PFI must include the background texts and not only the questions addressed to policy makers with brief annotations. The more extensive background texts are the backbone of the PFI. They are providing explanations and guidance for those countries that are serious about implementing better policies for investment. Without the background texts, the PFI will lack the substance, guidance and persuasiveness needed to positively impact the global investment environment. BIAC believes that the OECD should decide to publish the background text in a second publication as a PFI (Part II) and reference this publication in para 3, p.5.

Chapter 1: Investment Policy

The chapter on Investment Policy is the core of the PFI. The quality of investment policies directly influences the decisions of domestic and foreign investors. Transparency, predictability, property protection and non-discrimination are investment policy principles that underpin efforts to create a sound investment environment for all. Although BIAC believes that the chapter has been improved compared to its earlier version, we propose further changes in the text to ensure that it sets good benchmarks with regard to all important aspects of investment policy in order to help countries effectively to attract and retain investment.

OECD question 1.1

“What steps have been taken to ensure that the laws and regulations dealing with investment and their implementation and enforcement are clear, transparent and readily accessible?”

BIAC suggestion

Change question 1.1 to read (changes underlined) “... transparent, readily accessible and avoid unnecessary burdens on investors?”

OECD question 1.5

“Does the government maintain a policy of timely and adequate compensation for expropriation consistent with international norms? Have explicit and well-defined limits on the ability to expropriate been established? What independent channels exist for reviewing the exercise of this power or for contesting it?”

BIAC comment

BIAC believes that the OECD should remind policy makers in the annotations to question 1.5 that virtually all bilateral investment treaties (BITs) contain clauses describing the conditions under which a lawful expropriation may be made and a standard for compensation of the expropriated property.

We suggest changing sentence 3 in para 1, p.19 that currently reads

“If a government decides to expropriate land or other property, this decision should be guided by transparent rules that define the situations in which expropriations are justified and the process by which compensation is to be determined”,

to (changes underlined)

“If a government decides to expropriate land or other property, this decision should be governed by international standards described in virtually all bilateral investment agreements that define the situations in which expropriations are justified and the process by which compensation is to be determined”.

The third and the second to last sentence in para 1, p. 19, refers to a possible distinction between indirect expropriation for which compensation has to be paid on the one hand and non-compensable regulatory action on the other. Instead of explicitly mentioning that very few recent BITs provide that non-discriminatory regulatory measures applied to protect public legitimate welfare objectives are not considered to constitute expropriation, the OECD should acknowledge that there is no generally accepted and unambiguous definition of indirect expropriation. We suggest changing the second last sentence, para 1, p. 19 which currently reads

“An important ‘grey’ area concerns indirect expropriations. Some recent agreements provide that except in rare circumstances, non-discriminatory regulatory actions that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, are not considered to constitute expropriations”,

to (changes underlined)

“An important ‘grey’ area concerns indirect expropriations. There is no generally accepted and clear definition of the concept of indirect expropriation and what distinguishes it from non-compensable regulation. Governments need to remain mindful that certain regulatory action may constitute expropriation”.

OECD question 1.6

“Has the government taken steps to establish non-discrimination as a general principle underpinning laws and regulation governing investment? In the exercise of its right to regulate and to deliver public services, does the government have mechanisms in place to ensure transparency of remaining discriminatory measures and to periodically review their costs against their intended public purpose? Does the government allow and protect the free transfer of capital and profits. “

BIAC suggestion (change underlined)

“Has the government taken steps to establish non-discrimination as a general principle underpinning laws and regulation governing investment? In the exercise of its right to regulate and to deliver public services, does the government have mechanisms in place to ensure transparency of remaining discriminatory measures, a time bound commitment to eliminate exceptions to national treatment, and to periodically review their costs against their

intended public purpose? Does the government allow and protect the free transfer of capital and profits. “

OECD question 1.8

“Has the government ratified multilateral instruments established to protect the rights of international investors, such as the United Nations Convention on the Recognition and Enforcement of Arbitral Awards and the International Centre for Settlement of Investment Disputes?”

BIAC suggestion (change underlined)

“Has the government ratified and implemented multilateral instruments established to protect the rights of international investors, such as the United Nations Convention on the Recognition and Enforcement of Arbitral Awards and the International Centre for Settlement of Investment Disputes?”

Chapter 3: Trade Policy

The Trade Policy Chapter has evolved from earlier texts in the direction of greater clarity and stronger messages about the importance of trade liberalization for investment. However, BIAC believes that the message on the importance of open trade should be emphasised even more and formulated in a simpler fashion. The movement of goods and services is fundamental to overseas investments. Investors seek the most efficient trading environments. Put succinctly, investors are asking: To what extent has the potential host government minimized the barriers to import and export that will impact the goods and services of our business, through WTO disciplines, regional and bilateral trade agreements and unilateral actions? If investors are asking this question, governments that do not ask the same question will not be competitive in attracting investment.

OECD question 3.3

“How actively is the government increasing investment opportunities through market expanding international trade agreements and through the implementation of its WTO commitments?”

BIAC comment

BIAC suggests rephrasing the question to emphasize the importance of pursuing increased trade liberalization in all negotiations and even unilaterally, not just in bilateral or regional or existing WTO Commitments. BIAC suggests the following wording:

“To what extent has the government minimized the barriers to the import and export of goods and services, which investors will encounter, through WTO disciplines, regional and bilateral trade agreements and through unilateral trade liberalization?”

BIAC also suggests inserting additional language to the annotations to question 3.3 before the existing text in order better emphasise the importance of trade liberalization:

“In today’s global marketplace the most attractive investment sites are likely to be those that are most efficiently integrated into a global trading system; those that can be efficient parts of global supply chains for goods production and those that have full access to world class essential supporting services such as finance and communications. Integration into the global market is most efficiently achieved through the pursuit of trade liberalization in the WTO. Other options for opening markets to trade are bilateral and regional trade agreements as well as unilateral liberalization.”

OECD question 3.5

“To what extent do trade policies raise the cost of inputs of goods and services, thereby discouraging investment in industries that depend upon sourcing at competitive world prices?”

BIAC comment

The annotations to question 3.5 specifically emphasise the importance to liberalize services traded by modes 1, 2, and 4. Mode 3 (commercial presence) is only mentioned in passing as one of the modes by which services can be traded. In BIAC’s view the annotations should say more about the potential benefits of mode 3 liberalization, as mode 3 has the most direct relationship with investment in the service sector.

Annex 3.5 should also include explicit reference to the APEC-OECD Integrated Checklist on Regulatory Reform, which is a significant tool for promoting more open regulatory policies and one of the few means of addressing a vital issue for services investment. Badly designed regulations are the most important impediments to trade in services, as tariffs are the primary barrier to trade in goods. BIAC suggests replacing the sentence in the second para that reads:

“Reviewing and liberalizing existing regulations of home countries may lead to benefits for host countries”

with (changes underlined):

“Reviewing and liberalizing existing regulations to improve their compatibility with open markets (e.g. by applying the APEC-OECD Integrated Checklist on Regulatory Reform) is an essential process for improving services trade and enhancing investment.”

Chapter 5: Tax Policy

BIAC appreciates the recommendations made in the tax policy chapter and generally agrees with the statements made therein.

However, we suggest that the OECD includes reflections on how tax systems relate to market efficiency and barriers. The purpose is to stress that tax systems that do not induce economic inefficiencies or lead to misallocation of resources will help attracting and retaining investment. For example, tax rules must be simple, predictable, not subject to frequent and major changes and should not thus discourage the free movement of resources. As countries remove tariffs and other non-tariff barriers, it is important to ensure that tax rules do not replace previous controls on the free movement of capital, goods, services or labor.

The need for tax systems that do not distort the smooth functioning of market forces could for instance be made within the annotations to question 5.5, where the application of non-uniform effective tax rates based upon specific business characteristics is discussed.

Chapter 6: Corporate Governance

BIAC agrees with most of the policy recommendations identified in the questions and annotations of the chapter on corporate governance. However, we believe that the quality of the paper should be further improved to describe better the relationship between corporate governance and a sound investment environment. So far chapter 6 lacks a straightforward explanation how good corporate governance contributes to achieving the goal of the PFI to create attractive investment environments.

Furthermore, BIAC suggests that the text should better balance the emphasis on the need for regulatory corporate governance environments on the one hand and companies’ voluntary approaches on the other. The annotations to the OECD question 6.2 (last para, p. 35) read as follows:

“To reduce these costs, some controlling shareholders take voluntary measures to improve their own corporate governance and to improve their reputations with other shareholders. The creation of institutions like special stock market tiers and voluntary corporate governance codes can facilitate these voluntary measures by allowing companies to signal credibly to markets that they have high standards of corporate governance. However, there are limits to what voluntary actions can achieve. In the long run, controlling shareholders may actually benefit from legally binding and effectively enforced measures to improve investor protection.”

BIAC is concerned that this para places undue emphasis on the need for a strong legal and regulatory environment. While BIAC supports the OECD’s view that an “effective corporate governance framework requires an effective legal, regulatory and institutional foundation” (para 1, page 35), in terms of what is a desirable mix between legislation, regulation, self-regulation and voluntary standards, BIAC regards a self-regulatory framework of corporate governance, which includes the principle of “comply and/or explain”, to be preferable to a solely or pre-dominantly legislative approach. Such a framework, developed with input and recommendations by investors and other market participants, can lessen or avoid regulation and legislation. To correct the current imbalance in the emphasis on the need for a strong regulatory environment BIAC suggests deleting the last two sentences of the last para, p. 35.

Chapter 7: Policies for promoting responsible business conduct

In BIAC’s view, the PFI chapter 7 on responsible business conduct should be revised to adequately reflect international business views and experience with CR in principle and practice. Moreover, the background to chapter 7 on Corporate Responsibility (DAF/INV/TF(2005)13) must be revised to ensure coherence between the explanatory background and the PFI chapter with questions and annotations, which is currently lacking.

For BIAC, responsible business conduct is founded on a companies’ basic obligation to comply with all applicable laws and regulations. While legal compliance is mandatory, Corporate Responsibility (CR) - the actions of a company that go above and beyond compliance – is voluntary and business driven. There is widespread agreement among governments and companies about the distinction between CR on the one hand and legal compliance on the other.¹⁰ The PFI chapter on responsible business conduct should help governments that want to promote responsible business conduct be aware of the difference between legal compliance and CR and encourage them to fully respect the key principles of CR as it is practiced by the business community.

At a minimum, Chapter 7 should include a definition of “responsible business conduct” and clearly explain the necessary distinction between legal compliance and CR. The current text sets out an overly expansive view of the role of the government in CR. In BIAC’s view, the government’s primary role in promoting responsible business conduct is in implementing and enforcing national laws. It is precisely the lack of effective enforcement of national laws that has led to the widespread development and implementation of supply chain codes of conduct in the private sector. Given the increasing practice among companies to review a country’s commitment to compliance when allocating foreign investment, the PFI should clearly articulate the rationale and benefits of effective implementation and enforcement of national laws.

When setting policies related to CR, governments should avoid a prescriptive approach since CR is not based on minimum acceptable behaviour (as is the case with laws), but is rather based on encouraging a culture of corporate citizenship and a positive role for business in society.

¹⁰ See for example “European Multistakeholder Forum on CSR, 29 June 2004, Final Report”.

OECD question 7.1

“How does the government make clear for investors the distinction between its own roles and responsibilities and those ascribed to the business sector? Does it actively assume its responsibilities and avoid de facto privatisation of public roles?”

BIAC comment

Most areas that are encompassed by CR (e.g. environmental protection, human rights, labour standards etc) are already regulated to some extent in almost all countries and companies must comply with these regulations. Governments should not attempt to impose CR on companies in addition to existing regulations in these areas.

BIAC suggests replacing question 7.1 by the following three questions:

“Does the government focus on effective implementation and enforcement of national laws in the many areas associated with responsible business conduct (environmental protection, labour standards, financial accountability, etc.)?”

“Does the government promote the voluntary approach to CR that companies can use to go above and beyond legal requirements?”

“Does the government refrain from imposing mandatory requirements for what are essentially voluntary business actions (e.g. CR reporting) so as not to slow innovation in CR practices and turn responsible business conduct into a “check-the-box” activity?”

OECD question 7.2

“What steps does the government take to promote open communications so that existing and potential investors have the information they need on expected responsible business conduct? How does the government endeavour to protect the rights framework that underpins effective, two-way communication between business and society?”

BIAC Comment:

These two questions seek to cover a number of very different issues at once, leaving the reader unclear about the purpose and objective of the section. The issues covered include government expectations related to responsible business conduct, the state of domestic protections for human rights, and the general issue of stakeholder engagement. While these issues are all pertinent for the PFI, grouping them in this way confuses the issues and reduces the effectiveness this section will have with national governments.

Moreover, the issue of human rights is part of the broader OECD principles and commitments to “democratic government and the market economy” that serve as the foundation of the Organization. The PFI should address principles of democratic governance and free markets directly in the preamble and/or forward. BIAC strongly recommends that the first part of question 7.2 be revised as follows, and that the second part be revised and moved to a more prominent place in the forward and/or preamble to make their main objectives clear and unambiguous.

Suggestion for revised question 7.2:

“Does the government adequately inform companies of their legal obligations related to responsible business conduct? Does the government promote open communication between companies and other parties, such as governments, employees, and investors – to facilitate a broader dialogue on responsible business conduct?”

Suggestion for revised second part of the question which should be included in the preamble or forward:

“Does the government uphold the principles of democratic governance and free market economies that are the foundation of sustainable economic development?”

OECD question 7.3

“Does the government provide for an adequate framework to support the various types of disclosure companies make about their business activities? Is this framework flexible enough to meet the needs of investors and their stakeholders?”

BIAC comment

Financial reporting and non-financial reporting need to be distinguished, as the challenges for reporting about financial matters are totally different from the challenges for non-financial reporting. Thus, rules and guidelines for financial reporting that are already well developed in most countries should not be applied to non-financial reporting, which is still a rapidly evolving field. Enterprises report about their non-financial issues (economic contributions to the society, environmental management, and social aspects of company’s operations) in a variety of different ways, reflecting the great diversity that exists within business. This diversity of company responses to the challenge of non-financial reporting should be encouraged by ensuring that reporting remains voluntary and flexible, so as to foster further innovation and experimentation. Therefore, any framework for non-financial reporting must be voluntary, non-prescriptive, and flexible in order to allow that each company can identify by itself its main target audience and develop communication tools (including but not limited to CR reports) that are best able to reach that audience.

BIAC suggests replacing question 7.3 by the following two questions, the second of which could be linked with a question on stakeholder engagement from 7.2:

“Does the government provide for an adequate framework to support financial disclosure? Is this framework flexible enough to meet the needs of investors and their stakeholders?”

“Does the government promote the voluntary disclosure by companies of non-financial information to its employees, customers, owners, and the communities in which it operates? Does this framework also allow scope for innovation and for tailoring disclosure practices to the needs of individual investors and their stakeholders?”

OECD question 7.4

“In what ways does the government assist companies with legal compliance?”

BIAC comment

While question 7.4 refers only to “legal compliance”, only the annotations (para 1, second sentence) refer to “complying with law and other expectations”. In BIAC’s view “... *with other expectations*” should be deleted. First, as the question addresses only the issue of legal compliance the annotations should do the same to ensure coherence between the two. Second, it should also be noted in this context that, while business can seek to meet expectations, it does not “comply” with them in the same way that they comply with the law. Companies work to address societal expectations in many ways that go over and above legal requirements, but none of these efforts could be seen as complying with all social expectations.

The annotations also encourage governments to “*provide guidance to companies on appropriate compliance practises and to “reward” credible implementation of practises by reducing fines paid by companies that appear to have made a genuine effort to avoid misconduct.*” BIAC regards this only be a second best solution. The first best solution would be to develop binding rules with which companies need no assistance to comply. Laws should be transparent, unambiguous and comprehensible. Binding rules that fulfil these criteria and

that are effectively communicated to business can be implemented without special assistance from governments. The OECD should communicate this first best solution for effective lawmaking to governments.

Additionally, this section should also restate the obligation of governments to implement and effectively enforce their laws and regulations. While assistance for national companies seeking to comply with the law can be useful, the broader issue remains the lack of resources or ability by many governments to enforce their laws in the first place. The PFI should seek to instil a culture of compliance among the countries using it.

OECD question 7.5

“How does the government through partnership and promotion help to strengthen the business case for responsible business conduct?”

BIAC comment

CR is business driven and it is up to each individual company to establish its own business case for and unique approach to CR. Governments that attempt to reinforce the business case for CR will necessarily have to be selective and to pick “winners” (those companies or sectors whose CR efforts the government supports) and “losers” (those who are not supported by the government). Experiences made in other policy areas (e.g. identification and subsidization of future growth industries) in which governments have picked winners and losers are mixed at best. Governments lack the full range of information and knowledge to make a fact based and fair decision which CR initiatives to support and which ones not and should therefore not be encouraged to try to do so.

BIAC suggests revising question 7.5 to read:

“Does the government promote partnerships among companies and with other actors, including the government, in order to strengthen responsible business conduct and encourage positive contributions by business in society?”

OECD question 7.6

“How does the government, in its management of state-owned companies and through its business relations with private sector suppliers, ensure a level playing field for investors?”

BIAC comment

The OECD should state explicitly in the annotation to this question that it refers to the voluntary CR part of responsible business conduct and not to the legal obligations. In any case, state-owned companies must comply with legal obligations in the same way as their private counterparts. The annotations should indicate that state-owned enterprises should not be given preferential treatment and that governments should use their state-run companies as a positive example for the private sector in their country.

Furthermore, BIAC is not convinced that the level-playing field argument should be used to encourage the promotion of CR by state-owned companies. The goal of CR is to address societal expectations that go beyond what is stipulated by law and does not traditionally pertain to the concept of a “level playing field” between companies. Lawmakers and regulators establish a level playing field by implementing and enforcing non-discriminatory laws and regulations. Thus, BIAC suggests formulating the question as follows (changes underlined):

“How does the government, in its management of state-owned companies and through its business relations with private sector suppliers, ensure that it serves as a good example of responsible business conduct for private investors?”

OECD question 7.7

“Does the government participate in inter-governmental co-operation in order to promote international concepts and principles for responsible business conduct, such as the OECD Guidelines for Multinational Enterprises?”

BIAC Comment:

While inter-governmental efforts play an important role, national activities and initiatives tend to play a larger role in establishing the domestic culture related to responsible business conduct. In addition, few if any distinctions could be made between “national” and “international” concepts and principles related to business conduct. Thus, BIAC suggests that the question be revised as follows:

“Does the government participate in cooperative efforts in order to promote concepts and principles for responsible business conduct, such as those contained in the OECD Guidelines for Multinational Enterprises?”

Chapter 8: Human Resource Development

Human capital is a critical factor for economies’ capability to attract and generate investment. BIAC agrees with many of the statements in the chapter on human resource development in particular with those that refer to the importance of basic and higher education, the need to evaluate the effectiveness of public healthcare spending, the importance of labour market policies that support job creation and investment, and the need to ensure that labour market regulations maintain the ability of enterprises to adapt their operations and investment planning.

BIAC believes that chapter 8 should be further improved by adequately taking into account the following specific comments.

OECD annotations to questions 8.2

To underline the importance of basic education as a prerequisite for investment BIAC suggests emphasising in the annotations to question 8.2 that educational investment in the early childhood, and basic schooling, is crucial for later success in upper school levels and for developing a positive attitude for continued education throughout ones life, which is necessary in today’s global environment.

OECD question 8.4

“To what extent does the government promote training programmes and has it adopted practices that evaluate their effectiveness and their impact on the investment environment? What mechanisms are used to encourage businesses to offer training to employees and to play a larger role in co-financing training?”

BIAC comment

In BIAC’s view the effectiveness of governmental promotion of training programmes should not be overstated. An important factor that often limits the success of training programmes is lack of the employees’ motivation to train themselves after having left the education system. We suggest that the OECD promotes the concept of lifelong learning as the core principle for initiatives in the area of education undertaken by governments, individuals and businesses rather than only asking for more business co-financed training programmes.

OECD question 8.6

“What mechanisms are being put in place to ensure enforcement of core labour standards?”

BIAC comment

BIAC recommends that the annotations include reference to the fact that the ILO respects the autonomy of States to choose whether to give effect to its core labour principles in the manner

prescribed by the ILO Conventions, or in other ways. This should be added after the sentence reading “*Most countries have ratified the ILO core labour standard conventions, but compliance with and enforcement of the standards is uneven across countries,*” in order to help explain this statement.

The annotations also state: “*In some cases, such as within special export processing zones, governments deliberately waive components of the core labour standards for fear that their presence may deter investment. However, there is no unequivocal support for this concern.*” BIAAC finds the second sentence ambiguously formulated and suggests that it be re-written in order to ensure that this point is clearly understood by the reader. It should be re-worded to say: “*However, there is no unequivocal support for the belief that the presence and/or enforcement of core labour standards deters businesses from investing.*”

OECD question 8.7

“To what extent do labour market regulations support job creation and the government’s investment attraction strategy? What initiatives have been introduced that support policy coordination, balancing social objectives, the goal of a competitive workforce and the incentives for business to invest?”

BIAAC comment

BIAAC fully supports the first three sentences of the annotations and in particular sentence 3 which reads: “Badly designed labour market regulations can reduce the opportunities and incentives for businesses to make new investments and expand.” However, after this sentence the OECD continues by suggestion that wage formation institutions was one of the two main areas for government intervention. We disagree with this statement. BIAAC believes that governments should not influence or regulate wage formation institutions (social partners). We ask the OECD to take this argument out of the text.

OECD question 8.8

“Do laws and regulations restrict the deployment of skilled workers from an enterprise investing in the host country? What steps have been taken to unwind unduly restrictive practices covering the deployment of workers from the investing enterprise and to reduce delays in granting work visas?”

BIAAC comment

It should be noted in the annotations to this question that the need for expeditious temporary movement of skilled personnel can best be addressed through the WTO GATS framework, specifically through an agreement on Mode 4 liberalisation.

Chapter 9: Infrastructure and Financial Services

BIAAC regards this chapter as a good draft and generally agrees with most of the statements made therein.

On 25 November 2005 we submitted a comment aimed at further improving the background chapter on infrastructure and financial services (DAF/INF/TF(2005)10).¹¹ While some of the points raised by BIAAC focused more on the details of the background chapter some other comments relate to the questions and annotations part of the PFI as well. The following comments reflect adapted versions of those BIAAC comments from November that are relevant to the PFI questions and annotations part.

¹¹ BIAAC Comment on the Draft OECD Background Paper on Infrastructure and Financial Services for the Policy Framework for Investment (DAF/INV/TF(2005)10), 25 November 2005

Importance of private investment

The reference to the importance of private investor participation in infrastructure (sentences 1 and 2, para 2, p. 47) sounds half-heartedly. In BIAC's view the OECD should more strongly emphasize the need for private investment in infrastructure in sentences 1 and 2, para 2, p.47. We suggest that para 2 on p. 47 use the following formulation taken from another recent OECD document¹²:

“Within the developing world there is agreement that reaching the UN Millennium Development Goals will be possible only if large amounts of private investment are mobilised, and the Monterrey Consensus stressed the importance of FDI in this respect.”

In addition, when referring to the possible benefits of private investment in infrastructure the OECD should not only mention the additional funding private investors can provide (second sentence, para 2, p. 47) and the efficiency gains made possible through in private sector participation (third sentence, para 2, p. 47) but also that private investment in infrastructure presumes that a government has already identified societal goals and developed the public policy to be implemented, two items that are often lacking when a department of the government is directly providing the service.

Capacity building

(See also the BIAC comment on chapter 10 that refers to capacity building (p.18))

BIAC welcomes that para 1 on page 47 now addresses the need to have procedures in place that provide for conscious and well-informed decisions about the amount to be spend for infrastructure and the allocation and administration of the spending. This is indeed crucial to the success of infrastructure projects, including those with private sector participation. However, this is difficult to achieve for many non-OECD countries. In particular infrastructure projects that include the private sector often involve complex contractual agreements between private companies and public authorities. Business experience shows that officials at all government levels in developing countries can often lack the capacity to effectively negotiate such complex contracts. Developing countries should be encouraged to take their task seriously to qualify and train public officials involved in the negotiation of complex contracts. The text should state that OECD countries should be encouraged to provide capital and expertise to help support such qualification and training. Companies can and do provide additional support where appropriate and feasible.

OECD question 9.3

“In the telecommunications sector, does the government assess market access for potential investors and the extent of competition among operators? Does the government evaluate whether telecommunication pricing policies are competitive, favouring investment in industries that depend on reliable and affordable telecommunications?”

BIAC comment

BIAC agrees with the OECD that technological change and liberalization has transformed the telecommunication sector and reduced policy related risks of investment. However, significant political risks still remain.

¹² see OECD draft agenda ‘International investor participation in infrastructure: Lessons for governments - Expert meeting organised under the auspices of the OECD Investment Committee’, para 2, p.1

The OECD should point out that it is important that governments ensure that the legal and regulatory framework applied to telecommunications is coherent, predictable and stable and that foreign investors are not discriminated against national ones.

The independence of the telecom regulatory and antitrust functions from the government is a pre-requisite for ensuring the overall coherence of the rules governing all telecom operators, without discrimination.

Therefore, the OECD should enhance question 9.3 by adding:

“To what extent is the national telecom authority independent from the government, how is it empowered to regulate the telecom operators’ activities and how equitable is the competition framework between foreign investors and national incumbents.”

OECD question 9.7

“How has the government sought to attract private investment in the development of the financial services sector, offering a wide range of products to a broad cross-section of enterprises? What steps has the government taken to remove obstacles, including restrictions on participation by foreign institutions, to new investors entering the financial sector? To what extent do the authorities take advantage of information sharing and other international co-operative arrangements to facilitate adequate supervision of foreign financial institutions operating in the country?”

BIAC comment

Investment in infrastructure is often undertaken at sub-national level and related planning and financing are often undertaken at municipal government level. This means that differences (and sometimes tensions) between national and local government come into play. Sub-sovereign governments are less likely to be able to attract overseas aid directly, or provide meaningful guarantees. This is no doubt one of the reasons why it is increasingly difficult to attract private investors to the sector. The OECD mentioned in its background paper to the infrastructure and financial services chapter (second part of Para 51) that strengthening local government is crucial to progress with water and sanitation services. BIAC recommends that the OECD includes this important point in the annotations to question 9.7. The OECD could also include a cross-reference to the public governance chapter under question 10.2 that highlights the need to effectively manage and co-ordinate regulatory approaches across different government levels.

Chapter 10: Public Governance

The PFI draft chapter on Public Governance identifies some of the main challenges for governments seeking to improve the investment environment by improving their public governance and it also indicates some of the major linkages that exist between good public governance and investment.

Market openness

However, BIAC finds that chapter 10 does not sufficiently emphasise the importance that regulatory reforms can have on the market openness of economies. While chapter 10 has four separate questions addressed to corruption and bribery, market openness is only mentioned in passing in the annotations to question 10.3. BIAC believes that this needs to be corrected. Enhancing market openness should be an important policy objective for governments. Barriers caused by badly designed regulations are major impediments to trade, in particularly to trade in services, and through this also restrain investment.

The OECD has unique expertise on regulatory reform and it has developed a set of principles for open market regulatory reform. The latest edition is the APEC-OECD Integrated Checklist

for Regulatory Reform. This OECD product constitutes a major avenue for addressing regulatory barriers to services trade and investment. Chapter 10 should promote this approach and support the similar reference BIAC proposes for the Trade Chapter so that trade policy officials and regulators converge toward these best practices important for investment.

Therefore, BIAC suggests a new question to follow 10.3:

“To what extent do regulatory impact assessments incorporate assessments of open market compatibility with respect to potential regulatory trade barriers, as identified by the APEC-OECD Integrated Checklist on Regulatory Reform?”

The annotations for that question should explain why regulations should be designed in the least trade restrictive way.

Capacity building

(See also the BIAC comment on chapter 9 (p.16) that refers capacity building.)

Implementing high quality public governance policies can be a challenge for all countries particularly for developing and emerging countries. BIAC would therefore welcome if the OECD would acknowledge this and encourage OECD countries to undertake a commitment to assist those non-member countries that are poised to take credible approaches towards good governance. The need for capacity building is not limited to the public governance area however, it is particularly important in this field for example when it comes to

- managing and co-ordinating regulatory reforms across different government levels (question 10.2);
- effectively implementing international anti-corruption standards (question 10.6); and to
- implementing effectively and timely international anti-corruption conventions (question 10.9).

The OECD should also consider raising the capacity building issue more upfront in the preamble or the foreword to the PFI.

OECD question 10.1

“Has the government established a coherent and comprehensive regulatory reform framework, consistent with its broader development and investment strategy?”

BIAC suggestion (changes underlined):

“Has the government implemented a coherent and comprehensive regulatory reform framework, consistent with its broader development and investment strategy?”

OECD question 10.3

“To what extent are regulatory impact assessments used to evaluate the consequences of economic regulations on the investment environment?”

BIAC suggestion (changes underlined)

“To what extent are regulatory impact assessments used to evaluate the consequences of economic regulations on the investment environment? Are the results of these assessments made public on a timely basis?”

OECD question 10.5

“To what extent are the administrative burdens on investors measured and quantified? What government procedures exist to identify and to reduce unnecessary administrative burdens, including those on investors? How widely are information and communication technologies

used to promote administrative simplification, quality services, transparency and accountability?”

BIAC suggestion (changes underlined)

“How does the government measure the administrative burdens on domestic and foreign investors? What government procedures exist to identify and to reduce unnecessary administrative burdens, including those on investors? How widely are information and communication technologies used to promote administrative simplification, quality services, transparency and accountability?”

OECD question 10.6

“To what extent have international anti-corruption and integrity standards been implemented in national legislation and regulations? Do penal, administrative and civil law provisions provide a consistent legislative and regulatory framework for fighting corruption as well as promoting integrity, thereby reducing uncertainty and improving business conditions for all investors?”

BIAC suggestion (changes underlined)

“To what extent have international anti-corruption and integrity standards been implemented in national legislation and regulations? Do penal, administrative and civil law provisions provide an effective and consistent legislative and regulatory framework for fighting corruption and extortion as well as promoting integrity, thereby reducing uncertainty and improving business conditions for all investors? “

Bribe solicitation and extortion are the root causes of corruption and should be effectively addressed both by implementing strong legal frameworks and reducing the supply side of corruption.

OECD question 10.7

“Do institutions and procedures ensure effective and consistent application and enforcement of laws and regulations on anti-corruption and integrity in the public service? Have standards of conduct by public officials been established and what measures are used to assist public officials to meet the expected standards? What role do civil society organisations and the media play in favouring the open scrutiny of the conduct of public officials’ duties?”

BIAC suggestion

“Do institutions and procedures ensure transparent, effective and consistent application and enforcement of laws and regulations on anti-corruption, extortion and integrity in the public service? Have standards of conduct by public officials been established and made transparent? What measures are used to assist public officials ensure the expected standards are met? What role do civil society organisations and the media play in promoting the open scrutiny and accountability of the conduct of public officials’ duties?”

Background paper on public governance – precautionary principle

In addition to our comments on the questions and annotations part of the PFI public governance chapter, BIAC would like to make one comment on the text of the relevant background paper.

OECD text

Para 490 of the OECD text DAF/INV/TF(2005)14 reads as follows:

“OECD experience with regulatory reform suggests that government intervention should optimally be based on clear evidence that government action is justified, given the nature of the problem, which has to be correctly defined. Giving clear evidence of its nature and

magnitude, as well as explaining why it has arisen (identifying the incentives of affected entities) is the first step to propose regulations”

Footnote 159 (introduced after the first sentence of para 490) reads:

“While at the same time recognizing that sound risk management and the principle of precaution may require Governments to take action, even in the absence of “clear evidence.”

BIAC comment

BIAC believes that regulatory action should be based on sound science, risk assessment and management and cost-benefit analysis. Moreover, in the absence of an internationally agreed “precautionary principle,” misinterpretation and overly ambitious application of precaution would be an obstacle to investment and development. We urge the OECD to delete the word “optimally” from the first sentence, para 490 and to rewrite footnote 159 as follows:

“While at the same time recognizing that in the absence of full certainty, governments may choose to pursue precautionary measures based on sound science, risk assessment and cost benefit analysis.”

Dirk Mankse
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Boston Institute for Developing Economies (BIDE)

I incidentally saw your draft Policy Framework for Investment on OECD website. I can not help but express my few humble observations. While you have produced a very detailed list of issues for the governments and the donors to address for attracting investments, you compiled the two very important sectors, infrastructure and financial services, into one single item. In my mind, they deserve separate, full and detailed consideration.

The challenge for the next decade remains for many emerging and developing economies to attract the most needed investments into their traditionally non-competitive and fully-state-owned infrastructure sectors. Those range from fixed line telecommunications, electricity generation and distribution, transport (ports and container terminals, railways, roads and air transport), and to water. There are still several countries in Africa which have not privatized their fixed line telephone companies (Kenya) while some have done unsuccessfully in the past (Tanzania). The governments are struggling how to reconcile the unfavorable contractual arrangements given to Independent Power Producers (IPPs) with their new initiatives to bring competition to electricity generation (Turkey, Senegal, and Tanzania). The transport and water sectors need to attract private investments with “appropriate” contractual arrangements to improve coverage and service quality (Uganda, Tanzania and South Africa). Unfortunately contract design, implementation and monitoring have not always produced the desired end-results for several countries in Africa. We need to governments more concrete tools.

The same is also true for the financial services. State-owned banks still dominate the financial sector while the absence of appropriate reforms in those sectors fails to attract the needed investments. Several African and Middle Eastern countries are among them. The absence of competitive and healthy financial sectors continues to delay the arrival of private investments (foreign and domestic).

One last comment, I also would like to see your framework include the increasing presence and the role of informal economy and the way it impedes to attract investments, and what the governments can do about it. It is high time that we stop marginalizing the informal economy and address its role directly while discussing investments.

*Nilgun Gokgur, Development Economist
Boston Institute for Developing Economies (BIDE)*

Both ENDS

We would like to make use of the possibility to share some views on the draft text of the Policy Framework for Investment through the online consultation.

While we applaud the openness of this initiative in calling for broad public comments from interested parties we are concerned that given the tight deadline and limited dissemination of information about this possibility, the broad input which we assume the OECD is aiming for will not be possible.

We also have serious doubts as to how far the current draft can be easily and straightforwardly amended to fulfil its stated purpose. By way of illustrating these concerns we would like to highlight five major points:

1. The current draft seems to be based on the assumption that investment per se is good for development. This not only contradicts past experiences, but also confuses the difference between means and aim. If this document is meant to assist developing countries the central question should focus on why they are interested in attracting FDI. These objectives should then form the reference point for examining what strategies are best suited assisting them in reaching these objectives.

2. The section on intellectual property rights does not seem to reflect the current state of the debate on the issue. The negative impact of inappropriate far-reaching IP protection on economic development is now widely recognized. This is not only reflected in the recent initiatives in WIPO on the development dimension of IP, but also in the ongoing debate and recent decisions at the WTO in relation to the TRIPS agreement and public health.

3. As a multilateral institution the OECD also has the responsibility to look at the collective impact of stimulating national policy changes aiming at FDI attraction. The competition between countries to attract FDI is a problem that already exists and has a 'race to the bottom' dynamic.

4. This initiative by the OECD takes place at a moment when developing countries are involved in related multilateral negotiations at the WTO. OECD countries belong to the strongest demandeurs in such ongoing negotiations as on Mode 3 of GATS or on financial services. It is highly questionable in how far the OECD has taken sufficient note of the potential impact of this initiative on the negotiation position of non-OECD countries in these processes.

5. It is questionable in how far this document has relevance for the current questions and priorities of developing countries with respect to FDI. Precisely 8 months after the Finance for Development conference in Monterrey several developing countries made a submission to the WTO (WT/WGTI/W/152) in which they elaborate on some challenges developing countries face with respect to FDI. However most of these have not been addressed in the current draft.

In summary we believe that if this initiative wants to help countries to boost economic growth and development the focus of such a framework would require major adjustments. In order to become a reference document of relevance it will have to pay more attention to how to make private investment work for development. Addressing performance requirements only as obstacles to FDI (as in point 1.7) are not helpful in this context.

We therefore hope that there is still sufficient space to adjust the current outline and focus of the present draft text.

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Christian Aid

We write in response to the consultation on the Draft Policy Framework for Investment. Christian Aid is the official development agency of the protestant churches in the UK and Ireland. It works in more than 50 countries with the aim of eradicating poverty and challenging the structures and systems which make and keep people poor. The Framework is of key importance to our work as trade and investment form a core part of our global policy and advocacy work. However, given the short period of consultation (1 month) which occurred in the final stages of the Draft framework, we will not, at this late stage, be able to provide a detailed response. However, we would like to make a couple of main points regarding the Draft framework.

In general, we find that the balance of the Framework on investment is skewed. Throughout the draft there is a concentration on creating an enabling and favourable climate for investment with insufficient attention given to why countries might want to attract investment, and how to maximize the potential benefits and minimize the serious costs and negative impacts which can also occur. A central focus throughout the Framework is on the rights of investors without full consideration of needs of host economies. In particular, little to no importance is given to promoting and fostering domestic investment nor to the conditions under which FDI can create positive linkages with the domestic economy. This is regrettable, as evidence shows that this is one of the main ways that FDI can promote stable growth and reduce poverty. Likewise, the focus on host countries is on the obligations to foreign investors without due consideration of the regulatory frameworks needed to ensure good corporate practice,

As mentioned previously, the late stage at which this consultation was launched prevents us from making a full response to the framework document. However, we would like to take this opportunity to refer you to some of Christian Aid's recent work which more clearly outlines our position on FDI (Submission to the International development Committee enquiry on Private Sector development), and on corporate governance issues, namely the OECD Guidelines for Multinational Enterprises, ('Flagship or Failure?: The UK's implementation of the OECD Guidelines and approach to corporate social responsibility').

As you may know, Christian Aid recently approached the OECD to establish more constructive and systematic engagement on issues of importance to both our organizations, among them investment. To further this, we are in the process of arranging meetings with OECD staff. We hope that Christian Aid can take the debate forward in that context with a member of your team.

At a minimum we urge the OECD a further, much more comprehensive consultation with civil society before making a final decision on such an important document.

Sharon McClenaghan (Dr)
Senior Policy Officer (Private Sector)
Christian Aid
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The Corner House / Campagna per la Riforma della Banca Mondiale

We have read the proposed OECD Policy Framework for Investment and are disappointed by its unbalanced approach, which we believe focuses too narrowly on investor rights to the detriment of investor responsibilities and the duties of government to ensure that those responsibilities are met.

Using the “question and answer” approach of the document, we attach a list of questions which we believe should be addressed by the proposed framework. The questions, which focus on investor-state contracts, are accompanied by a commentary

We hope that you will take account of the concerns raised.

Finally, we join with other civil society groups in disputing the claim that the Framework has been developed “in cooperation with civil society” [www.OECD.org]. While the Framework has indeed received input from business (BIAC) and trade union (TUAC) stakeholders, only a few NGOs have commented, and NGO concerns are scarcely reflected in the Framework.

--ooOoo--

Have governments taken steps to bring in legislation to ensure that that investor-state agreements comply with the recommendations of the UN Commission on Human Rights, UNCTAD, UNCITRAL with regard to investment agreements and, in particular, the use of stabilization clauses? Have OECD governments taken steps to bring their bilateral investment agreements into compliance with these recommendations?

Commentary: Investor-state contracts (for example, production sharing agreements, host government agreements, concession agreements) have frequently resulted in investors rights being protected at the expenses of national development objectives, human rights and environmental protection.^{13 14} A particular concern is the “chilling effect” on public interest legislation of the growing use of broadly framed “stabilization” clauses which can either freeze environmental and social laws and regulations or require governments to compensate investors from all future such legislation that may impact on the profitability of their investments.¹⁵

¹³. Recently, for example, the Government of Belize not only exempted the proposed Chalillo Dam from any environmental laws other than those which the Canadian-owned project developer had agreed to follow¹³ but also to waive all taxes, except payroll taxes. An Act was also passed into law which put the project beyond legal challenge by any court – thereby arguably violating the protection of judicial rights guaranteed under the Inter-American Human Rights Convention. See, Government of Belize, Macal River Hydroelectric Development Act 2003, Para 4 (d): “For the avoidance of doubt and for greater certainty, BECOL [Belize Electric Company Limited] shall proceed with the design, financing, construction and operation of the Chalillo Project in accordance with paragraphs (a), (b) and (c) of this *section notwithstanding any judgment, order or declaration of any court or tribunal, whether heretofore or hereafter granted, issued or made*” (emphasis added).

¹⁴. A case in point are the Host Government Agreements (HGAs) reached between the BP-led BTC Consortium and the Governments of Turkey, Azerbaijan and Georgia for the Baku-Tbilisi-Ceyhan oil pipeline. Under the Host Government Agreements, the BTC consortium is exempted from *any* obligations under Azerbaijan, Georgian and Turkish law, aside from the Constitutions of the three countries, where those laws conflict with the terms of the agreements. In signing those agreements, the host governments have effectively abrogated their executive and legislative powers to protect their citizens from potential environmental damage and associated health and safety hazards or to improve the regulatory regime. By locking themselves into a frozen and drastically weakened regulatory environment, the governments are thus less able to respond to new environmental and other threats or to the evolving understanding of risk.

¹⁵. Again the BTC project provides an example. Under the HGAs, the host governments are bound by the HGAs to compensate the BTC Consortium for *any* changes in the law that the three countries may introduce over the 40-year lifetime of the project (including changes aimed at improving protection of human rights or the environment) where such changes adversely affect the profitability of the project. The

Host governments should adopt measures that embrace emerging international good practice with regard to stabilisation clauses, as reflected in: the UN Commission on Human Rights's 2003 Report on *Human Rights, Trade and Investment*¹⁶; the UN Commission on International Law (UNCITRAL)'s 2001 *Legislative Guide on Privately Financed Infrastructure Projects*; ¹⁷ UNCITRAL's 2004 *Model Legislative Provisions on Privately Financed Infrastructure Projects*; ¹⁸ UNCTAD's 2004 report on *State Contracts*; ¹⁹ and the OECD's own *Basic Elements of a Law on Concession Agreements*.²⁰

OECD Governments should also review their bilateral agreements and seek to have them amended to bring them into line with the recommendations of the above reports.

The following provisions are of particular relevance:

1. UNCHR:

- a) *Including the promotion and protection of human rights among the objectives of investment agreements.* Given States' international responsibilities with regard to the promotion and protection of human rights, States should consider including an explicit reference to the promotion and protection of human rights among the objectives of investment liberalization agreements.
- b) *Ensuring States' right and duty to regulate and the flexibility to induce new regulations to promote and protect human rights and the environment .* Broad interpretations of expropriation provisions could affect States' capacity and willingness to regulate for health, safety or environmental reasons. Therefore interpretations, or even explicit declarations by parties to agreements, that recognize and protect States' responsibility to fulfil human rights are encouraged.
- c) *Promoting investors' obligations alongside investors' rights.* There is a need to balance the strengthening of investors' rights in investment liberalization agreements with the clarification and enforcement of investors' obligations towards individuals and communities.

stabilisation clause (para 7.2 (xi) of the Host Government Agreement for Turkey reads: "The State Authorities shall take all actions available to them to restore the Economic Equilibrium established under the Project Agreements if and to the extent the Economic Equilibrium is disrupted or negatively affected, directly or indirectly, as a result of any change (whether the change is specific to the Project or of general application) in Turkish Law (including any Turkish Laws regarding Taxes, health, safety and the environment)."

¹⁶. United Nations Commission on Human Rights, Human Rights, Trade and Investment, E/CN.4/Sub.2/2003/9, 2 July 2003. The principle recommendations are summarised at pp 3-4 and at pp.30-32, with a fuller discussion in 'Section III: The Human Rights Implications of Investment Liberalisation' (pp.17-24). The main recommendations are reproduced in Annexe 2 to this statement.

¹⁷. United Nations, *UNCITRAL – Legislative Guide on Privately Financed Infrastructure Projects*, Prepared by the United Nations Commission on International Trade Law, New York, 2001, www.uncitral.org/pdf/english/texts/procurem/pfip/guide/pfip-e.pdf The recommendations made with regard to stabilisation clauses are found at pp.140-142 – see Annexe 3 to this statement.

¹⁸. United Nations, *UNCITRAL – Model Legislative Provisions on Privately Financed Infrastructure Projects*, Prepared by the United Nations Commission on International Trade Law, New York, 2004, www.uncitral.org/pdf/english/texts/procurem/pfip/model/annex1-e.pdf.

¹⁹. United Nations Conference on Trade and Development, *State Contracts: UNCTAD Series on Issues in International Investment Agreements*, United Nations, Geneva, 2004. The main conclusion is reproduced at Annexe 5 to this statement.

²⁰. Multilateral Centre for Private Sector Development Istanbul, *Basic Elements of a Law on Concession Agreements*, OECD and Federation of Euro-Asian Exchanges, www.oecd.org/dataoecd/41/20/33959802.pdf . The recommendations made with regard to stabilisation clauses are found at para 18, page 21 - see Annexe 4 to this statement.

2. UNCITRAL: Compensation for legislation that affects the costs and value of the investment should only be paid where the changes in legislation “are of such a nature that the concessionaire could not reasonably be expected to have taken them into account at the time the concession contract was negotiated or to have avoided or overcome their consequences.”²¹

3. UNCTAD: Balance “between the legitimate commercial expectations of the investor party and the right of the host country party to oversee the evolution of the resulting relationship in a manner that is consistent with national development policies”.

4. OECD: The financial consequences that might be compensated through a stabilisation clause must be “clearly and precisely defined”, as must be the nature of future legislation that would be covered by the clause.

Have governments taken steps to ensure transparency of investor-state contracts? Will the contracts be subject to parliamentary oversight and approval? Are measures in place to ensure that third parties have rights to challenge investor-state contracts where they infringe upon the public good or public interest?

Commentary: The terms of Investor-State contracts can have profound implications for the rule of law and public welfare, the environment, health and human rights. Where investors take advantage of the weak bargaining position of host governments, the terms of such contracts can be detrimental to a country’s development prospects, for example through the unfair apportioning of risks and rewards. Under the Production Sharing Agreement for Shell’s Sakhalin II project in Russia’s Far East, for example, costs are covered before profits are shared, and there is no cost cap, hence all cost over-runs come at the expense of the state’s revenue.²² During the planning and early construction of the project, costs have inflated dramatically from USD 10 billion to USD 20 billion. In February 2005, the Audit Chamber of the Russian Federation found that, as a result of the terms of the PSA, cost over-runs had already cost the Russian state \$2.5 billion.²³ What’s more, the Sakhalin II PSA overrides Russia’s water code to allow the dumping of drilling wastes into the delicate marine environment, and appears to require that the Russian Federation compensate the project sponsor for any costs associated with required compliance with new environmental laws and regulations.

Although many investors argue that contract confidentiality is essential if their competitiveness is to be protected, best practice is moving in the direction of greater transparency. As the International Monetary Fund (IMF) notes:

*The public availability of information on all resource-related transactions is central to fiscal transparency.*²⁴

According to the IMF, best practices for natural resource legal frameworks includes:

*[That] individual agreements and contracts regarding production from a license or contract area are disclosed. These practices are relatively standard in the advanced economies, but, in part because of limited administrative capacity, they are not well observed in many developing countries.*²⁵

²¹. United Nations, *UNCITRAL – Model Legislative Provisions on Privately Financed Infrastructure Projects*, Prepared by the United Nations Commission on International Trade Law, New York, 2004, p.27, Model provision 40.

²². Ian Rutledge, *The Sakhalin II PSA – A production ‘non-sharing’ agreement*, November 2004, Pub. PLATFORM et al available at <http://www.carbonweb.org/documents/SakhalinPSA.pdf>

²³. See *Associated Press*, 10 February 2005, ‘State Audit Chamber accuses Shell consortium of overspending’

²⁴ Guide on Resource Revenue Transparency, International Monetary Fund, June 2005

²⁵ Ibid

Even in more competitive contexts, such as negotiated deals (in contrast to open bidding), the IMF argues that contracts should be disclosed:

The reason usually advanced by governments (and to some extent by companies) is that in case of disclosure their bargaining power for future contracts would be eroded. In practice, however, the contract terms are likely to be widely known within the industry soon after signing. Little by way of strategic advantage thus seems to be lost through publication of contracts. Indeed, it could be argued that the obligation to publish contracts should in fact strengthen the hand of the government in negotiations, since it has to disclose the outcome to the legislature and the general public. Where conditions do not permit disclosure of contracts or individual company payments, an option could be the disclosure of individual company payments to an independent third party (e.g., the aggregator approach as suggested by the EITI).²⁶

Meanwhile, the call for more extractive sector investment contracts and revenue transparency has been supported by the World Bank's Extractive Industries Review, and is a key part of the 2006 US Foreign Operations Appropriations Bill, signed into US law in November, 2005.

Foreign investment contracts should be disclosed with sufficient time and means for people to participate in contract terms that impact the public interest, and should be accompanied by parliamentary oversight of inward investment, including the scrutiny and approval of individual investor-state contracts.

Have OECD governments taken steps to ensure that publicly-funded OECD export credit support and investment guarantees comply with international human rights norms and obligations and with sustainable development objectives?

Commentary: Overseas investment in many developing countries is viewed and few investors will operate in them without public insurance or export credit guarantees from their home government.²⁷

ECAs are responsible for providing 80 percent of gross capital market financing from private sources for developing countries.²⁸ Indeed, ECAs are now the largest source of public finance for private sector projects in the world, currently underwriting 10 percent of global exports from large industrial countries.²⁹ In 2000, ECAs were providing a total of \$500 billion in guarantees and insurance to companies operating in developing countries and issued \$58.8 billion worth of new export credits that year alone.³⁰ This compares to a total of \$60 billion given out globally in overseas development assistance that year and the \$41 billion provided as loans by multilateral development banks (MDBs), such as the World Bank or Asian Development Bank, in 2000.³¹

²⁶ Ibid

²⁷ World Bank, *Global Development Finance 2002*, Chapter 4, p.108. Between 1995-2002, there was not a single major commitment over \$20 million by a western commercial bank to companies operating in or trading with poor countries that was not accompanied by some form of official public guarantee

²⁸ Ibid. World Bank figures do not include a breakdown of export credit support by country, nor are figures available specifically for ECA support to projects located in war zones or conflict prone areas.

²⁹ Between 1982 and 2001, ECAs supported \$7,334 billion worth of exports, primarily to developing countries, and \$139 billion of foreign direct investment. See Vivian Brown, "Looking to the Future", *Berne Union Yearbook* 2003, p.5.

³⁰ World Bank, *Global Development Finance 2002*, Chapter 4, p.107; OECD, "Officially supported export credits – levels of new flows and stocks", data from 1999 and 2000.

³¹ Figures from OECD DAC Statistics and US Treasury note on Multilateral Development Banks, available at www.ustreas.gov/omdb/tab9.pdf.

At present, few export credit agencies have binding human rights, environment and development standards. The OECD Working Group on Export Credits and Credit Guarantees (ECG) is currently reviewing the environmental standards that will be apply to OECD ECAs. OECD governments should ensure that the new guidelines oblige ECAs to ensure that projects and investments they support comply with international human rights obligations and sustainable development objectives, including the OECD Guidelines for Multinational Enterprises and the instruments cited therein.³²

Have governments put in place measures to ensure public participation in framing national investment strategies in order to ensure that they meet the goals of poverty alleviation and sustainable development?

Governments internationally have endorsed a range of agreements or statements that commit to moving beyond consultation in project implementation to the active participation of affected communities in decision-making. Such agreements include: The 1992 Rio Declaration on Environment and Development;³³ Agenda 21;³⁴ The United Nations Development Assistance Framework;³⁵ and The Johannesburg Plan of Action (2002).³⁶ Moreover, in recent years, the move

³² Universal Declaration of Human Rights; OECD Principles of Good Governance; The Global Reporting Initiative; International Labour Organisation (ILO) Convention 29: Forced Labor Convention (1930); ILO Convention 105: Abolition of Forced Labor Convention (1957); ILO Convention 111: Discrimination (Employment and Occupation) Convention (1958); ILO Convention 138: Minimum Age Convention (1973); ILO Convention 182: Worst Forms of Child Labour Convention (1999); ILO Recommendation 94: Co-operation at the Level of the Undertaking Recommendation (1952); ILO Recommendation 146: Minimum Age Recommendation (1973); ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (1977); ILO Declaration on Fundamental Principles and Rights at Work (1998); Rio Declaration on Environment and Development; ISO Standard on Environmental Management Systems; Aarhus Convention on Access to Information, Public Participation in Decision-making, and Access to Justice in Environmental Matters; OECD Convention on Combating Bribery of Foreign Public Officials; OECD Recommendations on Combating Bribery in International Business Transactions (1977); OECD Recommendations on the Tax Deductibility of Bribes to Foreign Public Officials (1996); UN Guidelines on Consumer Policy; OECD Guidelines for Consumer Protection in the Context of Electronic Commerce; OECD Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data; Recommendation of the OECD Council Concerning Effective Action Against Hard Core Cartels (1998); Recommendation of the Council Concerning Co-operation between Member Countries on Anticompetitive Practices Affecting International Trade; OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations; Recommendation of the OECD Council on the Determination of Transfer Pricing between Associated Enterprises.

³³ UN General Assembly, Rio Declaration on Environment and Development, 12 August 1992, A/Conf.151/26 (vol.1), Principal 10, <http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm> See, Principles 10, 20, 22

³⁴ United Nations, Agenda 21, para 23.2, <http://www.un.org/esa/sustdev/documents/agenda21/english/agenda21chapter23.htm> “One of the fundamental prerequisites for the achievement of sustainable development is broad public participation in decision-making. Furthermore, in the more specific context of environment and development, the need for new forms of participation has emerged. This includes the need of individuals, groups and organizations to participate in environmental impact assessment procedures and to know about and participate in decisions, particularly those which potentially affect the communities in which they live and work. Individuals, groups and organizations should have access to information relevant to environment and development held by national authorities, including information on products and activities that have or are likely to have a significant impact on the environment, and information on environmental protection measures.”

³⁵ The United Nations Development Assistance Framework, <http://www.un.org/in/undaf.htm>, p.10 Adopted by 18 UN Agencies, the Framework views participation in decision-making as a right and states: “[S]upporting policies and legislation that protect and promote the rights of local communities to participate in the processes are essential . . . ensuring full participation of all groups in the development process are priorities.”

has been towards an increasing national and international acceptance that infrastructure projects, often funded through foreign direct investment, should obtain the demonstrable public acceptance of affected communities. Indeed, for indigenous peoples, free, prior, informed consent to developments that affect their lands is now firmly entrenched in international law and recognised as such by the UN.³⁷

If investment is to meet the goals of sustainable development, governments should ensure that procedures are in place to ensure wide public participation in framing investment policy.

Nicholas Hildyard
The Corner House

Antonio Tricarico
Campagna per la Riforma della Banca Mondiale

³⁶. The Johannesburg Plan of Action, Article XI. Institutional framework for sustainable development, para 164, http://www.un.org/esa/sustdev/sdissues/decision_making/decision_decisions.htm “All countries should also promote public participation, including through measures that provide access to information regarding legislation, regulations, activities, policies and programmes. They should also foster full public participation in sustainable development policy formulation and implementation. Women should be able to participate fully and equally in policy formulation and decision-making.”

³⁷. Most recently, in July 2005, the UN Commission on Human Rights’ Sub-Committee on the Promotion and Protection of Human Rights Working Group on Indigenous Populations accepted the principle of FPIC in international law. See: UN Economic and Social Council, *Legal Commentary on the Principle of Free Prior Informed Consent*, 21 June 2005, E/CN.4/Sub.2/AC.4/2005/2.

Emergency Committee for American Trade (ECAT)

On behalf of the member companies of the Emergency Committee for American Trade (ECAT), I am submitting the following comments on the proposed *Policy Framework for Investment* prepared by the Organization for Economic Cooperation and Development (OECD) in partnership with OECD and non-OECD governments.

Founded in 1967, ECAT is an organization of the heads of leading U.S. international business enterprises representing all major sectors of the American economy. Their annual worldwide sales total \$2 trillion and they employ approximately five and one-half million persons. ECAT's purpose is to promote economic growth through the expansion of international trade and investment.

ECAT and its member companies are particularly focused on the importance of improving investment climates worldwide as a way to promote economic growth and higher standards of living. Over the last quarter century, expanding foreign direct investment has become an increasingly important catalyst of global economic integration and new economic growth and opportunity. Foreign investment, both inward and outward, is of substantial importance to the American and global economies. It spurs productivity by promoting research and development, investment in physical capital, and new technology. The payoff is in higher-paying jobs and a higher standard of living in developed and developing countries, as is increasingly recognized.

The March 2002 Monterrey Consensus, reached at the United Nations' International Conference on Financing for Development, emphasized that countries need to attract investment inflows through the development of a "transparent, stable and predictable investment climate, with proper contract enforcement and respect for property rights" and of "economic policy and regulatory frameworks for promoting and protecting investments." Strong investor protections in developing countries are also critical to foster the rule of law, to reduce corruption and build institutions, to promote respect for and the protection of private property and contract rights, and to create a regulatory environment hospitable to capital formation in general and international investment in particular. Without these protections, foreign investment will simply not flow to the countries that need it most.

ECAT applauds, therefore, the efforts of the OECD to create a useable, practical blueprint to help developing countries further develop and reform their economies to create a healthy climate for investment. The breadth of issues covered in this blueprint is extremely useful to demonstrate the many facets that affect the growth of international investment flows from reform in specific policy areas to investment protection and transparency.

In reviewing the draft proposal, ECAT would like to offer the following suggestions for improving this document to improve both its utilization by developing countries and to ensure that the principles discussed reflect fully ways in which countries can improve their overall investment climate.

Improving Potential Utilization of Policy Framework

The success of the proposed Policy Framework will depend in significant part on whether developing countries are spurred to utilize the framework to help promote reform. To that end, ECAT urges that the document include a much stronger and more comprehensive explanation of why the promotion of international investment is so critical to promoting economic growth and the reduction of poverty. Many of the policies that governments need to undertake are complicated and difficult to explain domestically. By more concretely and directly enunciating the benefits that increased investment can bring to developing economies in the proposed Policy Framework, this document is more likely to spur countries to be able to undertake and to explain the difficult, but necessary, reforms that are needed.

Improving Explanations of Key Policy Areas

In several areas, the proposed Policy Framework could do an improved job of directing countries to the key issues and policy advice given. Identified below are some of the key areas where ECAT strongly urges modification:

Overall: The introduction to the 10 policy areas should emphasize that these areas are often interrelated and that to create the type of climate that will actually attract significant investment attention must be paid to each area. Investment decisions by companies are made based on a wide variety of policies, and reform in one area simply will not result in increased investment if other areas remain substantially deficient. Furthermore, the Policy Framework includes an important emphasis on transparency, an issue of very high importance for all companies in every sector of the economy. Transparency transcends each of the policy areas and deserves an overall mention emphasizing the importance of transparency in the creation, development and enforcement of all policy areas. Transparency is critical for local business development, as well as for fostering trust in the public-private dialogue.

Expropriation: In paragraph 1.5 of the Annotations, the proposed Policy Framework asks whether governments provide for compensation in the event of expropriation. It would be preferable to start, we believe, with an initial question asking whether governments have in place policies that limit the use of expropriation overall and whether they are further limited to a public purpose. As well, we suggest that this construction ask government how they make these decisions in a transparent and neutral manner. This construction would more clearly reflect the international law norms in this area.

Indirect Expropriation: In paragraph 1.5 of the Annotations, the proposed Policy Framework discusses the issue of indirect expropriation” – referring to it as a “grey area” and then stating a possible exception, rather than the general international principle against indirect expropriations. We strongly urge that this paragraph be revised to reflect the general rule of international law against expropriations, whether direct or indirect, and that timely and full compensation must be provided. Noting the recent exceptions to that general rule contained in a few recent free trade agreements only makes sense if the general rule is first emphasized.

Ratification of Multilateral Investment Instruments: Paragraph 1.8 of the Annotations should be modified to incorporate the issue not only of ratification, but of implementation, of such multilateral instruments. While ratification is extremely important, full implementation into a country’s domestic law is oftentimes required for the international instrument to have the full force of law.

Corporate Governance: Chapter 6 focuses on the important issue of corporate governance. In reviewing paragraph 6.2 of the Annotations in particular, we believe, however, that a far too great emphasis has been placed on legislative or regulatory mandates. We urge that the final document incorporate a stronger emphasis on voluntary business self-regulatory frameworks that in many cases are far more effective. We appreciate the enormous effort that the OECD has undertaken in preparing this document and the opportunity to provide our comments on it. We look forward to its completion and, most importantly, its constructive and concrete use by countries throughout the world to help improve the ability of their own domestic economies to attract investment that will promote economic opportunities, economic growth and poverty reduction.

*Calman J. Cohen, President
Emergency Committee for American Trade (ECAT)
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Friends of the Earth Finland

The recommendations of the OECD draft Policy Framework on Investment do mainly not encourage investment to the development of the developing countries, but encourage rather oppositely even the takeover of poor countries' resources into the hands of transnational corporations of the rich countries.

It is unacceptable that poor countries are pressured to this also by threatening that their development aid is made conditional if they do not follow the 'recommendations' given in this Policy Framework.

The recommendations of the draft are also not promoting economy to become transparently free for the people of the world, nor for the non-discriminative competition of their various different sustainable ways to invest, by which humanity has sustained its life throughout the millenniums. On the contrary the draft discriminatively favors and promotes the prevailing monopolisation of world's resources for such one-sided commercial and consuming form of using resources, which is not investment in sustainable sense, but has led rather to such crisis of overconsumption, which severely threatens the future of our globe.

The OECD draft is unacceptable in the sense explicated more in detail below.

1. What is investment? In which sense is investment needed for development or well-being?

Investments are to bring more economic resources to recipient countries to sustain their life and well-being in a stable manner, through renewing their resources of production, employment and subsistence. An act is thus investment to a country insofar as it sets resources to that country into such new and stable productive use, where the act and its treatment serve "the objective of human well being to which the international human rights instruments give legal expression" (UN Committee on Economic, Social and Cultural Rights; E/C.12/1999/9).

In this respect "investors' rights are instrumental rights... defined in order to meet some wider goal such as sustainable human development, economic growth, stability, indeed the promotion and protection of human rights" (Human rights, trade and investment. Report of the High Commissioner for Human Rights, E/CN.4/Sub.2/2003/9, paragraph 37). Also the OECD draft recognises this to be a crucial quality of investment that "sound and stable private investment supports economic growth and job creation, fosters innovation, promotes sustainable development and thus contributes to the prosperity of countries and their citizens".

To properly invest to something (for example to a Southern country) is thus not to consume its resources away, but to add and sustain the resources which are essential for its life and development, including jobs, production, etc..

But the measures, which the OECD draft proposes "to attract investment", however, oppositely remove the rights and abilities of countries to ensure the investors to bring or sustain any resources, production or employment into the country.

What 'liberalisation' assumes and treats as 'foreign direct investment' has "by no means always a positive influence on ... advancing human development in developing countries: employment, productivity and technology transfer". Such FDI "can easily be converted into liquid assets and remitted out of a country". "Retained profits, repatriated out of the host country, now account for a significant portion of foreign assets—as much as 50 per cent in the case of US-based foreign investors" (UNDP "Making global trade work for people" 30.1. 2003, pages 243 and 245).

An activity is a real investment to a country/area not by coming there to consume and exploit its resources but by sustaining and renewing the resources of life in that area. Real investment is therefore

unhiliated or severely restricted – not encouraged - by the OECD-proposed structures, which increase transfer of all profits and capital out from the area to which some investment was presupposed to be made, but which is left without any benefits, jobs, local production etc..

OECD draft proposes requirements for poor countries to allow their resources being transferred into the use of TNCs and markets of overconsumption in rich countries as "reference point for international organisations' capacity building programmes, for investment promotion agencies, for donors as they assist developing country partners". The OECD donor countries will thus support poor countries as far as poor countries give their resources to become available to be transferred by TNCs as repatriated profits to OECD countries. But states "have committed to international cooperation and assistance to promote human rights and to create a social and international order through which all human rights and fundamental freedoms can be fully realized" also "including the context of investment liberalization" ("Human rights, trade and investment", UN High Commissioner for Human Rights. E/CN.4/Sub.2/2003/9)

It is a black irony to demand that poor countries must recognise as productive investment to their area even further "transfer of capital and profits" away from their areas and that "repatriation of profit and the ability to exit an industry through the liquidation and repatriation of capital, is a basic condition for attracting investment. Governments should ensure such free transfers". (like the OECD draft presupposes) This means that in the name of "attracting investment" there is promoted such a consuming takeover of resources, which is not real investment. (If a corporation considers the conditions, which a developing country needs for its development as deterring "unnecessary barriers to entry, dissuasive taxation, and poor legal compliance", the aim of that corporation is not so much to invest to the development of that country, but to transfer resources away from the country to make profit by the cost of its development.)

"When not carefully regulated, foreign direct investment... can have a detrimental effect with regard to the enjoyment of human rights", which are in risk of getting marginalized. (UN Sub-Commission on Human Rights res. 2002/11) "States have a duty to regulate (duty to fulfil human rights)... investment - that can have negative effects... and reduce the available resources needed to promote human rights". States must have "the flexibility to use... performance requirements", "to withdraw commitments to liberalize investment" and "to introduce new regulations to promote and protect human rights" ("Human rights, trade and investment", UN High Commissioner for Human Rights. E/CN.4/Sub.2/2003/9)

Treatment of investment should thus "include consideration of the human rights and sustainable development implications of foreign direct investment". (Sub-Commission on Human Rights res. 2002/11) It is also a further conceptual mistake to say like the OECD draft that "a country's development depends... most of all, on a country's continuous efforts to improve and adapt public policies to emerging developments". To determine the content of "development" by "emerging developments" moves in an empty circle of the emerging serious environmental and social crisis, created and maintained to a large extent by this kind of 'investment' to unsustainable commercial mass-production and overconsumption for the luxurious needs of the rich.

2. What is non-discriminative, transparent and free competition on investment ?

Unfortunately the draft OECD Policy Framework for Investment continues to discriminatively favor that unsustainable form of commercial takeover of resources for production of more commercial overconsumption, which has led to this global crisis. This practice of endangering world's resources of life is not relevant to be called international investment.

To have non-discriminatory policy for investment, which is economic in a stable and lasting way, all forms of economic activity should be equally free to set resources into more sustainable (than the prevailing) use as far as they could be able to do that.

Therefore, the freedom of various forms of economic subsistence to invest or set the resources in a more sustainable use, should not be restricted by discriminatively favoring or promoting only one particular form of the use of economic resources, - the commercial "ability of investors to enter the market" (OECD draft 4.4.) -, not the various other forms of investment.

Non-discrimination in economy requires us to stop discriminative favouring of commercial profit-making by the cost of other forms of economy. It is discriminative and distorting also for sustainable economic competition if some form of economy, like commercial profit-making, is favored by being provided special rights - commercial rights or rights of commercial exchange - monopolised only for its way of using resources even where its way of using resources is less sustainable.

Non-discriminatively free competition between different forms of economic action can not be thus established through commercial rights (and their enforcement bureaucracy), - and certainly not by presupposing that "Ultimately, it is the possibility of buying and selling assets through market transactions that reveals the value of an asset" (like OECD draft suggests).

This is discriminative and non-free-economy for the poor majority of people, who live by less commercial livelihoods, especially when this discrimination is enforced by huge machineries of trade-rules and bureaucracies (like the WTO or the OECD administration).

a) What does non-discriminative investment to the South presuppose?

Investment to an area is a sustainable addition to the resources of life of that area. Those who live the life of the country/area know better (than an outsider) what adds to the resources of that life and development of that land and thus fulfils these conditions of being a real investment into that country.

To invest to the Southern countries, is thus primarily to provide resources to the needs of those livelihoods, by which the majority of those who live there has sustained the life there, often also through the less commercial sources of life and livelihood.

The Southern majority of the world has maintained their life by practising for millenniums more sustainable forms of investment than our commercialised governance and overconsumption of world's resources, which has led the whole globe quickly to an unforeseen global crisis.

It is thus wrong, if we require also the investment in the South to serve further commercial takeover of resources to serve our crisis-oriented overconsumption.

We shall try rather to learn from the less consuming and less commercial life and economies of the people in the South, how to invest and to use world's resources in more sustainable ways - by which the life of world's majority has been sustained for millenniums.

To be an investment to an area it is essential to sustain the life in that area. Therefore what it means to sustain life in that area, determines what is real investment to that area, to benefit non-discriminatively that what sustains life in that area.

The poor countries, where money is not the major resource of the life of majority, should be supported to ensure investment to poor people's resources of their less commercial forms of economies, and not pressured to follow rich countries requirements for creating "broad-based business environment" (OECD draft 2.1.), which discriminately favors unsustainable investment based on demand created by commercial overconsumption.

The aim of investment for poor people is certainly not to expand the takeover of the resources of their subsistence economy to become invested into the global commercial economy under its highly discriminative global power-relations, which are monopolising world's resources only for commercial economy. "Mergers and acquisitions - a more common form of foreign investment - is more likely to

lead to larger foreign investors with strong competitive advantages increasing market concentration and “crowding out” local investors and entrepreneurs which could potentially have adverse effects on ... local employment". ("Human rights, trade and investment", UN High Commissioner for Human Rights. E/CN.4/Sub.2/2003/9, paragraph 7) The endless rules and bureaucracies which 'liberalisation' and 'deregulation' has built are enforcing globally monopolising, transnational protectionism of transnational commercial business. Countries should review the unsustainable impacts and costs of such OECD-recommended policies, which favour in a monopolising manner, in the name of 'investment' the transfer of poor people's local resources into transnational commercial industries' profits of mass-consumption and discourage investment in other forms of more sustainable production.

The aim of investment for poor people is rather to get back from the monopolising global commercial economy those resources, by which the poor majority has sustained their life for ages by various less commercial or more subsistence-like economies, maintaining also world's resources in a renewable and sustainable local use.

Countries should be ensured full right to free transfer of resources out from the commercial mass consumption into these more non-discriminative and sustainable forms of investment to ensure the basic economic human rights for all.

The investment to the life and development of the Southern majority is clearly not encouraged or relevantly measured through the growth of the GNP-measures of the prevailing commercial overconsumption for those who can buy. To avoid economic discrimination, one should not treat (like the OECD draft) as "distortions" such development options "that favour investment in some industries and discourage it in others" (3.4) according to the development needs of poor countries.

b) Transparency of justice and non-discrimination for people's basic rights or for dead goods and dollars ?

"The potential for investment to affect human rights... will differ depending on the type of investment" and on "the sector targeted by investment" ("Human rights, trade and investment", UN High Commissioner for Human Rights. E/CN.4/Sub.2/2003/9, paragraph 7). Such sustainable local production, which ensures the non-discriminative realisation of basic economic rights for all, must certainly be treated differently from such mass-production for commercial overconsumption by powerful global corporations, which do not sustain the non-discriminative realisation of basic economic human rights.

Liberalisation's principle of "treating unequals as equals is problematic for the promotion and protection of human rights and could result in the institutionalization of discrimination against the poor and marginalized.". There is needed thus "a clarification of the human rights principle of non-discrimination as it relates to... trade rules, including the principles of national treatment (NT) and... MFN", which do "not make a distinction between... commercial agriculture or subsistence agriculture" but control the conditions of food by same commercial agribusiness criteria also for subsistence farmers who has lived without money. "The application of the same rules to widely different populations and conditions without effective affirmative action for the poor risks exacerbating existing inequalities." "When people and countries start from astronomically distant starting points... how truly equal is equal in this case" if it should be "aimed not at some hypothetical equality but at the actual equality"? Such "agricultural trade liberalization is likely to impact negatively on the... poor" and "has... led to the displacement and marginalization of farm labourers" and "created hardship for small farmers and food-insecure populations" ("Globalization and its impact on the full enjoyment of human rights", UN High Commissioner for Human Rights, E/CN.4/2002/54, paragraphs 35-36, 41, 43 47)

As basic economic human rights are forced to unstable, non-transparent and discriminatory conditions by rules and bureaucracies built by 'liberalisation', these are severely restricting and eliminating further the economic rights and freedom of people through institutionalised discrimination for the benefit of unsustainable commercial economy. "There might be situations where a human

rights measure guaranteed to prohibit discrimination and promote equality might be contradicted by a trade measure" or criteria of commercial non-discrimination as their "objectives are quite different". "International human rights principles are intrinsically linked to achieving substantive equality" as human right to non-discrimination of basic economic rights, but this might be punished as a discriminative barrier for commercial profit.. For example "greater export... might lead to the reallocation of land and other resources away from domestic food production, with possible adverse consequences for.... food security", "workers' rights and other rights of.... the rural poor".("Analytical study of the High Commissioner for Human Rights on the fundamental principle of non-discrimination in the context of globalization" E/CN.4/2004/40 and "Human rights and world trade agreements" OHCHR 2005).

Rights to non-discrimination, transparency, development and freedom in investment cannot be rights or freedom of dead entities like commercial wares or money (like in OECD-promoted NT and MFT) but shall be demonstrable as freedom of living beings and as equal rights of people. Otherwise the non-adequate entitlement of the primary rights and freedoms for dead wares and money and not for the people, leads to marginalisation and discrimination of rights of people.

Acts can be treated non-discriminatively as investments to an area, as far as these acts treat and advance non-discriminatively the sustainable means of life of that area so that the countries and their inhabitants can see and verify this. Only so far as investors treat in a transparent way the people and the conditions of life of the country, only so far it is logically possible to treat their acts in a transparent manner as investments to that country so that "transparency reduces uncertainty and risk for investors and the transaction costs associated with making an investment." What is fair equal treatment for all investors, requires thus that those who claim to invest to an area, prove that they really bring in new resources to the life in that area in a sustainable way. As far as they can be actually proved to sustain resources for the life of that area in a non-discriminative way, so far their acts can be treated equally as investments to that area.

Only when laws ensure investments to bring in and maintain resources benefiting the life in that area in a manner transparently accessible and recognizable for those who live in that area, only then one can thus actually "ensure that the laws and regulations dealing with investment and their implementation and enforcement are clear, transparent and readily accessible". Therefore, rather than to verify transparency of "the equitable treatment of shareholders?" (OECD draft 6.2.) one should verify transparency of the equitable treatment and participation of the affected people.

The prevailing "absence of an equitable multilateral trade, investment and financial system" and other "structural obstacles confronting developing States" are "beyond their control in the contemporary international order" and have led to "massive and systemic breaches of ...Human Rights" in the South. "It is imperative that measures be urgently taken to remove these global structural obstacles" (UN Committee on Economic, Social and Cultural Rights E/C.12/2001/10).

As rights of shareholders are very specific economic rights and as the acts and treatment of corporations affect economic rights of all people in general, therefore rather than to ask "What are the procedures and institutional structures for legal redress in cases of violation of shareholder rights? Do they function as a credible deterrent to such violations?" (OECD draft 6.3.), one should ask what are the procedures and institutional structures for legal redress in cases where investment violates basic economic rights of the people. Regarding the rights to food, water health, etc., States "have to respect the enjoyment of the right in other countries... to refrain from actions that interfere, directly or indirectly, with the enjoyment of the right to water in other countries" and "to prevent their own citizens and companies from violating the right... of individuals and communities in other countries". (CESCR General Comments on rights to water, food and health). As the mode of investment serving only shareholders' profits has led to the global crisis, therefore rather than "to ensure that shareholders have the ability to influence significantly" to the investment (OECD draft 6.4), one should ensure that the affected people have the ability to influence significantly the investment.

As it is not an investment to a country to cause damage to a country, it is necessary to ensure, that all such damages for economic, social or environmental development which can be caused in a country by an actor, will get compensated by that actor, especially if the actor claims he is investing to that country. Only those actors, who guarantee that all costs of such damages which they may cause to a country, can be expropriated from their property, are acting as investing to that country, and can be treated as having investment in the country. Otherwise more sustainable forms of investment are negatively discriminated.

To avoid discrimination of basic economic rights, rather than to ask "Have alternative systems of dispute settlement been established, including mediation, to ensure the widest possible scope of protection at a reasonable cost?", one should ask: "What could be the effects of allowing recourse to strong dispute settlement provisions under investment agreements in the absence of similarly strong accountability mechanisms for human rights issues arising in the context of investment?" ("Human rights, trade and investment"; UN High Commissioner for Human Rights* E/CN.4/Sub.2/2003/9, paragraph 55)

Investment dispute settlement systems may often consist of such "sanctions and negative conditionalities" determined by the commercial powers, which affect human rights but "are not appropriate ways of promoting the integration of human rights in international economic policy and practice" (UN Sub-Commission on Human Rights 2002/11, 14.8.2002) "The recent growth of international judicial bodies, such as ... the quasi-judicial mechanism for the settlement of disputes... poses a risk of fragmentation in international law". (UN Secretary General; A/56/326; 6.9. 2001). Instead there shall be developed procedures where transnational corporations "shall provide prompt, effective, and adequate reparation to those persons, entities, and communities who have been adversely affected". (UN Sub-Commission on Human Rights)

The forms of economic activity/subsistence in a country should be treated also juridically transparently in an equal way according to that how far they set economic resources into such a use, which is proved to benefit people and life in a sustainable way in that country. Investment needs thus to be targeted to strengthen those less commercially consumptive means of subsistence, which have maintained the life in the globe for millenniums without bringing any such globally harmful environmental and socio-cultural degradation of biodiversity and socio-cultural diversity as the recent 'modern development'.

The responsibility of the industrialised OECD countries is therefore not so much to 'teach' or pressure the South, how it should treat the investments for the purposes of our crisis-oriented commercial power-structures but on the contrary, the industrialised countries should start to learn from the South more sustainable ways to invest and to treat the investment.

Ville-Veikko Hirvelä
Friends of the Earth Finland

German Confederation of Trade Unions (DGB - Deutscher Gewerkschaftsbund)

The Confederation of German Trade Unions (DGB) welcomes OECD's initiative to invite labour, business and civil society organisations to comment on the draft Policy Framework for Investment (PFI). Transparency and accountability of OECD work is both welcome and needed in the framework of globalisation and growing uncertainty.

As is stated in the Preamble of the draft text, sound and stable investment supports economic growth and job creation, fosters innovation, promotes sustainable development and thus contributes to the prosperity of countries and their citizens. Against this background the DGB believes that the PFI remains imbalanced through promoting foreign investors' rights and interests nearly unilaterally without taking sufficiently into account social goals.

The PFI intends to advance the implementation of the United Nations Monterrey Consensus, which identified private capital, including foreign direct investment, as "vital compliments to national and international development efforts" and emphasized the need "to create the necessary domestic and international conditions to facilitate direct investment flows". Despite some positive elements the PFI at this state focuses too narrowly on the assumption that investment per se leads to economic growth and welfare. Other policy areas such as sound macroeconomic policies, social and labour market policies that are crucial to "enhance the benefits of investment to society" – another aim stated in the PFI – are largely ignored in the text. The suggestion that there is a need for "reducing the complexity of legal procedures in the event of job redundancy" (annotation to question 8.10) is highly questionable. This is just one example to show that the PFI tends to undermine the principle of policy coherence through supporting a race to the bottom of labour rights.

Furthermore the PFI encourages governments to liberalize its markets ignoring the negative effects of trade liberalisation and the need of governments to have the choice over their domestic development strategies. The DGB clearly does not agree with the annotation to question 3.5 concerning the liberalisation of GATS / Mode 4. Since this point is discussed critically and controversial not only among trade unions but also between countries, the PFI must not prejudice current WTO negotiations.

The Monterrey Declaration also urges business to take "not only the economic and financial but also the developmental, social, gender and environmental implications of their undertakings" into account. Taking this point seriously, the OECD Guidelines on Multinational Enterprises and other instruments such as the ILO Tripartite Declaration on Multinational Enterprises and Social Policy should be further strengthened within the PFI.

On other issues of concern, the DGB supports the comments and proposals made by the Trade Union Advisory Committee to the OECD (TUAC).

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German Confederation of Trade Unions (DGB - Deutscher Gewerkschaftsbund)*

Global Direct Investment Solutions

The Framework is an interesting initiative to help government policymakers to self-assess their business climate on some of the basic concerns which influence foreign and domestic business investment decisions. I hope you will pass these thoughts along to the Task Force members.

The Framework should be particularly helpful if taken seriously by governments in less developed countries which already recognize the value of attracting and retaining successful foreign investment and encouraging private investment activity within their borders. In short, they can become examples for others to follow, or inspire others to do even better.

In particular, it is important to build consensus within a country and specific communities on the importance of continuity in efforts to steadily improve the business climate as progress is achieved, rather than for investment policies to change dramatically from one leader to the next, or for leaders to become complacent about success and develop less attractive climates for business investment over time.

After all, capital investment projects in general are not very mobile, whether domestic or foreign in origin. They are long-term commitments to take risks in the expectation of a predictable ability to achieve results, so short-term government policies which may change with the next leader do not provide a very compelling case for taking the investment risks. The risk of adverse surprises is a major location selection factor.

Regardless of who is leading the political institutions at the time, and what policies they are following, the economic health of each country and local community depends fundamentally on the business climate it maintains, because business is the organizational process through which individuals work together efficiently to achieve their personal goals of progress, however they may define progress. Different individuals and cultures define success differently, which is OK. In this context, note that even a family farm in subsistence agriculture is a business, and the motivation and ability to invest in new ways to achieve better performance in that production process matters, as in any other type of business.

Some of the points in the Framework are equally relevant to leaders in "developed" countries. In the spirit of continuous improvement, as in quality assurance processes, there is a constant need for leaders to avoid complacency about maintaining a highly attractive business climate. As in the routine warning messages about forward-looking statements in financial reports, past performance is no assurance of future success. There is a need for the market leaders - the "developed" countries - to keep innovating at challenges such as sustainable development.

My own focus is on the practical aspect of helping specific companies with their investment project plans in whatever business environment the governments at all levels, and the people they represent, have created. For background, refer to the websites related to my work. This is not to promote what I do, but I think these sites will provide a very different perspective on the task of dealing with individual investment project location decisions, which has been my specialty for many years. My bio is at http://www.ontheshortlist.com/bios/bruce_donnelly.htm - which includes work in this field at PricewaterhouseCoopers, Deloitte & Touche, and for a British regional development agency after leaving the US Foreign Service.

Global Direct Investment Solutions www.gdi-solutions.com

- A free global reference source for information and contacts to support direct investment projects anywhere
- This service introduces corporate executives to relevant business advisors and development professionals

OnTheShortList www.OnTheShortList.com

- Selective tools for researching business locations and services to assist executives and business advisors

Global Direct Investment Forum www.gdiforum.org

- A new non-profit to organize a global network of executives with strong interests in community development

Global Direct Investment Foundation www.gdifoundation.org

- A related new initiative for business investment leaders in the GDI Forum to help many communities in transition
- The gist is to support innovative approaches to development challenges by local leaders and social entrepreneurs
- The focus will be on priority locations as identified by the GDI Forum membership according to their interests.
- It is not an instrument of government policy, nor intended to influence such policies. The focus is on making progress happen together.

It is worth noting in this regard that local areas can sometimes create very competitive clusters even in countries which are unattractive in general. The Framework is not just a national policy issue. Companies do not invest in countries. They invest in specific communities - whether to serve the market potential in that local area, region or country or as part of a larger configuration strategy decision about where to deploy their operations worldwide.

Thanks again for helping to develop such a Framework. It should help to spread awareness of some issues of importance to investors which leaders in both developed and developing countries do not always recognize, or neglect in the flow of events and pressures from other interest groups. The effect of successful investment is exponential over time. Failure to achieve local socio-economic goals creates unsustainable social pressures and conflicts, which can become a downward rather than upward spiral. Business investment is a major driver of social progress. It is not always good or benign, but it drives change in places which are ready to make valuable changes, within whatever constraints that society may impose.

The Framework is a useful reminder about the value of working together for progress, rather than pursuing an adversarial or unpredictable government approach to business development. There is much talk today about corporate social responsibility, but less recognition of the need for government business responsibility. Ultimately, we are all in this together in the communities where we live and work around the world, and one doesn't have to be a brilliant analyst to recognize the terrible impact on development in places which have created unattractive business climates.

The Framework is, it seems, a useful way to stop putting the blame for that bad outcome on others, and focus instead on what needs to change to achieve progress. It really doesn't matter how so many unsuccessful business climates were created. What matters is local commitment to progress, not just national policies, because all business investment is local - no matter how global the nature of that business operation may be.

Bruce Donnelly

Global Direct Investment Solutions

www.gdiforum.org

Institutional Shareholder Services (ISS)

Institutional Shareholder Services (ISS) is the world's leading provider of proxy voting and corporate governance services with over 20 years of experience. ISS serves more than 1,600 institutional and corporate clients worldwide with its core business — analyzing proxies and issuing informed research and objective vote recommendations for more than 35,000 companies across 115 markets worldwide.

ISS supports the OECD Investment Committee and its Task Force partners in their efforts to develop a Policy Framework for Investment, aimed at helping interested governments to create an environment that will attract foreign and domestic investors. We value the Committee's invitation for contributions from external institutions and organizations. As we underlined in previous comments on the OECD Principles of Corporate Governance, we believe that a robust corporate governance framework, combined with proactive corporate governance practices by individual companies, is central to attracting foreign capital.

Considering ISS' experience with the subject matter, we would like to submit the following additional notes to be taken into consideration regarding Chapter 6: Corporate Governance.

6.1. What steps have been taken to ensure the basis for a corporate governance framework that promotes overall economic performance and transparent and efficient markets? Has this been translated into a coherent and consistent regulatory framework, backed by effective enforcement? Are periodic assessments made of the impact of the corporate governance framework?

One additional question to consider would be whether there is a benchmark in place to measure progress and performance.

As a general comment, a balanced mix of legislation, regulation, self-regulation, voluntary standards, and effective implementation and enforcement creates a solid foundation for corporate governance. In addition, it is paramount that framework members communicate effectively amongst themselves, as well as with other market participants (e.g. issuers, trade associations, consultants, institutional investors, and academics). Soliciting feedback from market participants is a good way to evaluate the impact of interventions.

Consultation processes set up by a government body – such as the recent consultation rounds on shareholder rights conducted by the European Commission – can be an effective and constructive way to solicit ideas and experiences from various market participants. Such consultations can increase market pressure on issuers to adopt better standards, while also taking into account issuers' concerns.

6.2. Does the corporate governance framework ensure the equitable treatment of shareholders?

ISS acknowledges the positive impact that voluntary corporate governance codes and special stock listing segments have had, such as in the UK and Brazil, respectively, which have allowed companies to signal credibly to markets that they have high standards of corporate governance. These initiatives, which are often market-driven, are particularly important when a government imposed corporate governance framework is weak and ineffective or still in development.

In cases when there are controlling shareholders or other circumstances resulting in the inequitable treatment of shareholders and voluntary measures to address such inequalities have failed, ISS agrees that governments should intervene with enforced measures to improve investor protection, which is in a country's interest to remove any obstacles that impede the free flow of investment.

6.3. What are the procedures and institutional structures for legal redress in cases of violation of shareholder rights? Do they function as a credible deterrent to such violations? What measures are in place to monitor and prevent corporate insiders and controlling owners to extract private benefits?

Effective judiciary systems undoubtedly provide a credible deterrent to abuse of shareholder rights and help to create an environment that attracts outside investment. In those markets, however, where the judicial system does not afford shareholders adequate means of redress, other legal mechanisms can be applied and/or created. In addition to prevention, shareholders can be afforded the right to a binding arbitration proceeding or similar avenues of alternative dispute resolution. This type of legal redress can prove to be cost-effective and avoids the obstacles associated with an ineffective judicial system.

6.4. What procedures and institutions are in place to ensure that shareholders have the ability to influence significantly the company?

In addition to the annotation provided, government entities should ask themselves not only what new initiatives can help, but also what existing obstacles need to be reviewed, addressed, and/or eliminated in some cases.

Influencing a company involves many steps, including: timely delivery of relevant information, being heard by the company, active participation in general meetings, and reliable vote execution. Active participation includes, among others, the right to ask questions and submit shareholder proposals. In order to facilitate shareholder participation, companies should effectively provide shareholders with all information relevant to the upcoming general meeting. The proposed EU Directive on the Cross-Border Exercise of Shareholder Rights provides a good example of requirements, such as notice and complete disclosure of materials 30 days before the meeting. ISS emphasizes the importance of simultaneous disclosure of meeting notice and meeting-related materials via publicly available channels and in a timely manner.

In this respect, it is important to grant not only a theoretical possibility of influencing board decisions through general meetings, agenda items, and counterproposals. The possibility of exercising influence should in practice not be hindered by disproportionate conditions – e.g. thresholds that are difficult to meet or unachievable – which may make it virtually impossible for shareholders to participate.

6.5. By what standards and procedures do companies meet the market demand for timely, reliable and relevant disclosure, including information about the company's ownership and control structure?

After establishing the importance of timely and relevant information, the means by which that is provided should be examined. For example, the posting of detailed company information on a corporate Web site provides easy access to investors at a relatively lower cost than traditional means. Governments or stock exchanges may in addition act as a central clearinghouse for such information. If at all possible, disclosure should take a standardized form – as is done through Form 20-F in the US or with a uniform corporate governance document in Spain and Switzerland. Finally, companies should consider the international level of their shareholder structure and, if appropriate, issue documents in a language of international business.

One area that is remiss from the OECD framework is the focus on vote execution and vote processing, which is antiquated and inefficient in many markets. The benefit of timely and reliable disclosure is undermined if shareholders are unable to vote their shares.

6.6. How does the corporate governance framework ensure the board plays a central role in the strategic guidance of the company, the effective monitoring of management, and that the board is accountable to the company and its shareholders?

While boards play a central role in the governance of a company, only with an active and open exchange will shareholders be able to monitor the board – i.e. through regular board elections – and will the board in turn be able to monitor management. To aid the board in exercising its fiduciary duties, a mechanism should be in place for shareholders to bring their concerns before the board.

We would like to emphasize that non-executive directors have a fiduciary responsibility of being properly informed, so as to avoid an overly powerful management to dominate any discussion held at board level. Specialized board committees, with members who possess relevant expertise, are valuable instruments and recommended by most codes of best practice.

6.7. What has been done and what more should be done in terms of voluntary initiatives and training to encourage and develop a good corporate governance culture in the private sector?

Voluntary and “comply or explain” corporate governance codes have been recognized as one means of developing a good corporate governance culture. In addition, corporate governance and director institutes provide a valuable network aimed at promoting and teaching good governance. Good corporate governance is a means of risk management, which investors take into consideration when making investment decisions and that directors should be aware of. In this context, shareholders expect more than literal compliance with existing frameworks. All such programs must be able to rely on the sincere commitment of individual companies and their agents. In addition, governments can lead by example by introducing the concept of corporate governance into common vocabulary and vernacular when referring to markets and industry, and by emphasizing the importance and benefits of good corporate governance.

6.8. How is the ownership function of state-owned enterprises structured and separated from other state functions to enable the state to act as an active and informed owner, while ensuring a level playing field and competitive market conditions? What are the processes in place to ensure the state does not interfere in day-to-day management of state-owned enterprises (SOEs) and that board members are nominated in a transparent manner, based on competencies and experience, rather than to serve as a conduit for undue political pressure? What procedures and institutions are used to ensure accountability of SOEs to both the government and the public, and in the case of listed SOEs, to other shareholders?

As ISS commented in its previous consultation on the OECD guidelines on SOEs, while the state is unlike any other investor, ISS believes that when the state is an owner and investor in listed companies, it is important that it apply even higher standards of diligence and financial discipline than other investors would. In addition, if the state decides to list SOEs, it must imperatively be accountable to outside investors. If the state refuses to treat outside investors equitably, it will drive away both foreign and domestic capital, and deny itself the benefits of outside investment. In relation to being accountable to other investors and especially shareholders, national states should refrain from installing structures that grant them disproportionate power in relation to their stake, which may deter foreign investment and should therefore be applied with great caution.

We hope that the OECD Investment Committee and its partners in the Task Force will consider our comments when finalizing the Policy Framework for Investment. Please contact us with any questions.

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International Institute for Sustainable Development

Introductory Comments

The OECD Investment Committee has published a draft Policy Framework for Investment for public comment. The International Institute for Sustainable Development (IISD) has reviewed the draft Framework and considered how best to respond to it. In the end, we believe that it is far more important to comment on the “big picture” issues than to focus on the details.

There are two major reasons for this approach. The first is that we have reviewed the NGO letter to the OECD, which is attached here as an annex for the convenience of readers. We agree fully with the thrust of this letter, and support it on this basis. The letter also enumerates a large number of details as illustrations of the flaws it points to. We feel no need to reiterate such an itemized list here.

Second, the major flaws of the draft Framework need to be understood, we believe, in and of themselves. We simply do not believe that parsing through the multitude of questions posed in the guise of neutral issues and answers subsequently provided from a singularly investor-oriented approach will accomplish much. It is, rather this very approach that lies at the root of the problem.

Thus, the IISD comments below fall into three more general categories:

- the failed assumptions that appear to lie behind the draft Framework;
- the flawed toolbox chosen to address these assumptions; and
- separation of governmental and business roles, rights and responsibilities that has outlived its utility from a sustainable development perspective.

Prior to entering into the discussion of these concerns, it is important to note that IISD has long been on record for noting the importance of investment – domestic and foreign – for sustainable development. Indeed, we have long considered that the only viable means to achieve sustainable development is through vastly increased levels of investments, in particular in developing and least developed countries. But for such investments to achieve their goals from a societal perspective, i.e. sustainable development and poverty alleviation, new thinking that ensures investments respond to these imperatives rather than merely hoping that they might be incorporated into the international investment law and policy regime. The draft OECD Framework, in our opinion, utterly fails to achieve any such new thinking.

Finally, we wish to note that IISD’s comments are based on our fifteen years of activity on sustainable development, and our eight year old programme on investment and sustainable development. The full breadth of this programme, including our pioneering work on a *Southern Agenda on Investment*, IISD’s *Model International Agreement on Investment for Sustainable Development*, Investment Treaty News bulletin, *Bilateral Investment Treaties and Development Policy Making* and *Investment and Sustainable Development*, are fully available for public review at www.iisd.org/investment.

The Failed Assumptions

The most basic flaw of the Framework is seen from the opening paragraph of the preamble:

“Sound and stable private investment supports economic growth and job creation, fosters innovation, promotes sustainable development and thus contributes to the prosperity of countries and their citizens.”

It is true that all of this *can* happen from what is referred to as sound and stable private investment. However, it is far from certain that all of this *will* happen from private investment. Indeed, how one defines sound and stable is critical from this perspective, and no definition is provided in the text. If it were, then perhaps the policy elements that follow would be more easily articulated in a manner that might achieve such a result.

The assumption that seems to permeate the rest of the Framework appears to be, however, that positive results *will* flow from all private investment. How else can one explain the resulting Framework which focuses almost exclusively on the steps a state should take to attract more and more investment, rather than ensuring that the investment it does attract is sound and stable from the perspective of the positive results the preamble suggests will flow from private investment?

Yet we know that not all investment is sound or stable or beneficial to the host country from a sustainable development or poverty alleviation viewpoint. Government policy decisions have to be made to ensure that these results are achieved. This is barely noted in the framework. The protection of core labour standards receives attention, but environmental protection and human rights protections are absent from all practical measures suggested for governments. At best, these only get addressed by reference to the non-governmental side of business responsibilities through the OECD Guidelines on Multinational Enterprises. This approach is simply inadequate to deliver what the preamble posits.

Fundamental to understanding this issue, in our view, is the need to refocus on the quality of all investments as opposed to the quantity of foreign investments as a driver of sustainable development. Again, this is scarcely reflected in the Framework, Indeed, it appears to maintain the view that the more foreign investment the better the result, without even beginning to build into the framework the necessary checks and balances to ensure that this is achieved.

These flawed underpinnings of the Framework infect virtually all that follows. It means that the Framework does not do what it says it seeks to do: promote ... appropriate roles and responsibilities for governments, business and others with a stake in promoting development.

The Flawed Toolbox

The main tools in the OECD Draft Framework toolbox appear to be transparency, protection of private investor's property, and trade and investment liberalization.

IISD believes that transparency and accountability in governmental activities is a good thing. We also agree it is an important element for attracting quality investment. Our concern does not lie with this in principle, but in some of the more detailed elements that accompany this, most notably the linkages that arise from the very unclear jurisprudence on this issue in international investment agreements. Today, these agreements (more on this below) are being used to impose standards of transparency and accountability that are often not met in developed countries and are often impossible for developing countries to meet due to lack of capacity and resources. It is important that issues relating to transparency are carefully tied to the provision of the necessary capacity to achieve higher levels of transparent and accountable government so that appropriately high targets can be achieved.

The draft framework makes dozens of references to the need to protect the property of foreign investors. The creation of a rights-based legal system is advocated where this may not exist, and the adoption of the current form of bilateral investment treaties is advocated for enforcement of the rights based approach.

The protection of private property rights is reflected in different ways in different legal systems. At the same time, all legal systems provide a very broad range of rules governing how private property may or may not be used, and how benefits from the possession of private property may be required to be shared with other stakeholders. The key point here is that property rights are never absolute. They are balanced against the rights and interests of others. This is scarcely reflected in the advocacy of private property rights for foreign investors in the draft Framework. Again, more reliance is placed on

non-legal approaches here, such as the Guidelines on Multinational Enterprises, than on the role of the state in creating well balanced and clear rights *and* responsibilities, in law, for property owners.

The most prevalent tool running through the draft Framework appears to be the call for very broad and deep unilateral liberalization of trade and investment rules at the domestic level. Running through the constant stream of calls for more and deeper liberalization is virtually every sector of the economy: agriculture, manufactures, services and so on. Yet there is absolutely no mention here of the potential legal risks associated with this: one of the preferred negotiating positions now in the WTO on trade and services negotiations is for the inclusion of a provision on entrenching extant levels of domestic liberalization into the multilateral regime. In other words, this approach would see any levels of domestic liberalization immediately enshrined as a multilateral commitment that would then not be retractable. The policy flexibility that unilateral liberalization implies would be completely removed. In the absence of a final result on this approach, any domestic liberalization by developing countries carries high risks of the loss of policy space for the future. This is not even noted in the draft Framework, even though such proposals have been circulating and were a feature of the recent discussions in Hong Kong.

This issue is not just relevant in the WTO context. The spread of regional and bilateral free trade negotiations and investment treaties makes the same concerns as to how to promote and manage steps to open sectors of the economy to foreign investment and trade a live issue.

Together with this one sees the undercutting of the WTO decision not to address the Singapore issues through their inclusion into unilateral strategies advocated by the OECD. There is also a very significant intrusion into the ongoing GATS negotiations, and on critical poverty and development related issues like the provision of water and energy. The simplistic placing of the perspective of the foreign investor's water use needs over the needs of local communities on such issues reeks of disregard for those very needs, however unintended such a result may be. The call for greater clarity of access rights to water for foreign investors foretells exactly the kinds of social battles that are likely to arise when the rights of ALL stakeholders to access water are not fully clarified before new foreign investors are allowed to share in the resource.

The patent endorsement of highly controversial policies on water sector liberalization further illustrates the degree of imbalance in this report. Indeed, reading farther on in the Framework, one sees exactly the kinds of juxtapositions that have led to innumerable failures of water privatizations to date: reduce regulations, incorporate more competition (which cannot be done for a natural monopoly) and allow market-based competition to ensure good water services. This is the precise recipe for failure that has plagued water privatizations over the last decade. But it appears to be fully incorporated into the Framework.

The Framework likewise has an undercurrent of deregulation running through it. Labeled variously as the removal of unnecessary regulations, continued reviews of existing regulations from the perspective of the foreign investor, and so on, there is scant attention paid to the need for regulations that ensure public welfare is improved and that private interests are fit into the broader picture of appropriate public interests. Terminating unnecessary regulation is well and good. Determining the full breadth of perspectives needed to make that assessment, however, is critical.

Much of this is reflected in the call for developing countries to be more sensitive to the need of large corporate (mainly OECD-based) supply chains. It is true that an ever increasing proportion of trade is intra-company. And appealing to such investors is important. Yet one must also be careful that the efforts to have such an appeal do not lead to disproportionate rights of foreign investors to access raw materials and underpaid labor resources in developing countries. Here, one must bring in the call for more bilateral and regional investment agreements, and an expansion of investment liberalization through such agreements. There is an ever growing risk that such agreements are abusing the role of international law as a tool for development and in fact creating corporate rights that are completely disconnected from the sustainable development and poverty alleviation needs of developing countries. This situation becomes exacerbated when the existing regulatory systems lack the capacity to control

access and the impacts such access may create on the local communities and the environment. The superior financial resources of many foreign investors that can be used to obtain access to resources generate potentially high risks in this regard. Thus, great care must be taken when considering how and how far states should respond to the supply chain economics of foreign investors.

The Archaic Separation of Government and Investor Rights and Responsibilities

Finally, we note the continued separation in the draft Framework of the business dimensions from the development, social and environmental dimensions of foreign investment. All of our learning on sustainable development over the past thirty or so years has taught us that sustainable development requires exactly the opposite: the integration of all of these issues so that the appropriate balances can be achieved.

Nowhere is this more evident than in the call for more uptake of bilateral and regional investment agreements that manifest the current model of investor rights and nothing else. The creation of rights without commensurate legal responsibilities and liabilities is a dangerous road, and one the OECD should well know from its own effort to enter into this field through the Multilateral Agreement on Investment negotiations of the mid 1990s. The failure of those negotiations should not simply be shifted by the OECD to call for more of the same result through often secretive bilateral means that lack the same kind of transparent and accountable dispute settlement processes that the OECD in this framework rightly says should be applied by governments. How can the OECD promote this for governments, while promoting secret, non-transparent and unaccountable processes for the benefit of foreign investors and they alone?

Conclusion

IISD is of the view that the draft OECD Policy Framework for Investment is fatally flawed in its underlying assumptions, is imbalanced in its content, and intellectually stagnant in its limited choice of tools to achieve what must be achieved today: investment policies that will actively contribute to sustainable development and poverty alleviation. These problems are very similar to the ones that led to the collapse of the OECD's effort to spearhead a Multilateral Agreement on Investment in the previous decade. They are no less serious now for the design of a major policy instrument as they were then for the design of a major legal instrument. We believe that more can and should be expected of this initiative.

Annex: NGO Letter

Dear Members of the OECD,

We, the undersigned NGOs, acknowledge the consultation period for the public and civil society organisations to comment on the Draft Policy Framework for Investment. However, at this late stage in the Framework's development, we disagree with the claim that the Framework has been developed "in cooperation with civil society" [www.OECD.org]. While the Framework has indeed received input from business (BIAC) and trade union (TUAC) stakeholders, only a few NGOs have commented, and NGO concerns are scarcely reflected in the Framework. The undersigned NGOs want to make clear that we do not want to be seen as supporting the current Framework text.

The Framework does consider some concerns for developing country governments seeking investment beneficial to their economies. In the area of tax policy, these considerations include para. 5.7, which highlights the revenue losses associated with tax holidays, and para. 5.4, which even mentions that tax incentives may discourage investment. Also, in para 6.3 it is explicitly stated that governments need effective methods to obtain redress for grievances and the need for more disclosure of materials from companies. Para 7.3 underscores the protection of the rights framework to secure a balance with investment.

Despite these positive elements, the undersigned NGOs believe that the Framework is largely based on misplaced priorities and incorrect assumptions. The current draft Framework does not offer a balanced contribution that "enhances the benefits of investment to society" – the stated aim of the Framework – nor does it sufficiently contribute to economic development in developing countries, let alone a development based on sustainability, equality and Human Rights. The Framework does not adequately reflect the current debate raised by UNCTAD surrounding the impact of foreign investment and investment incentives on development. Instead of examining whether investment is beneficial for development, the Framework takes as its starting point that all investment is desirable. Also, the draft Framework is not consistent with the Monterrey Declaration, which urges business to take "not only the economic and financial but also the developmental, social, gender and environmental implications of their undertakings" into account. The Monterrey Declaration also warns against rapid deregulation of capital flows and the crowding out of domestic investors.

One of our main concerns regarding the Framework is the inequality between the promotion of investors' rights and the specification of investors' responsibilities and obligations. Another principal concern is the imbalance between the instruments the Framework promotes to protect foreign investors' rights and interests, on the one hand, and the lack of instruments it suggests to protect the rights, interests and development needs of host governments, their citizens and their natural environment, on the other hand.

The Framework claims to be based on three basic principles:

1. Policy coherence between various policy areas on investment protection and openness,
2. Transparency in policy formulation and implementation, and
3. Continuous evaluation of policies on the investment environment.

A balanced approach should also include:

1. Policy coherence to protect and safeguard government's obligations to implement Human Rights conventions, including core labour standards, and democratic policies to protect against unwanted effects of investors;
2. Transparency of business operations, government-business contracts and business revenues to enhance corporate accountability; and
3. Continuous evaluation of business practices and effects of their investment.

In order to complement some of the positive elements of the draft Framework, the following imbalances need to be addressed:

- The protection of investors' rights that the Framework considers the best way to attract investment is not balanced by governments' responsibility to fulfil the different aspects of Human Rights and environmental protection.
- There is too much focus on host countries' responsibilities and regulatory frameworks to support investors and a lack of emphasis on legally binding regulations for responsible behaviour by foreign investors.
- The Framework focuses on attracting foreign investment but gives little specific advice with regard to promoting domestic investment.
- The Framework warns against targeting (foreign) investment in particular sectors (para. 1.6) and against promoting domestic industries (para. 1.7 and 4.5), but it does not offer instruments to attract quality investment that is needed or desired according to the development policy of the country and that contributes to sustainable development, fair employment and the transfer of needed technology.
- The promotion of the principle of non-discrimination fails to recognize a de facto discrimination against local investors, tax payers and citizens as well as the unequal competition between small, domestic companies and large, foreign, corporate investors.
- The Framework thoroughly delineates host countries' obligations to (foreign) investors, but provides few recommendations about how home countries can support sustainable investment.
- The Framework promotes greater input and lobbying by (foreign) investors (paras. 7.4 and 3.2.), but it fails to recognize investors' elevated financial power compared other stakeholders and, thus, the need for more parliamentary input in investment policies.
- The promotion of free transfer of capital and profits is not balanced with equal promotion of guarantees and policy options for reducing financial instability and for increasing the sharing of the benefits of investment.
- The Framework promotes investor-to-state dispute settlement mechanisms (para. 1.8) but does not advocate fully exhausting domestic court avenues. This reduces governments' ability to protect essential social and environmental rights from expropriation rules (para. 1.5).

Other important principles and issues that are missing from the Framework include:

- Preventing countries' desire to attract FDI from leading to a 'race to the bottom' in which human, labour and environmental rights are undermined;
- Disciplining and balancing corporate lobbying;
- Increased participation of parliamentarians in investment policy development and assessment;
- Providing balanced policy space to uphold human rights and protect public health, safety and the environment even if this goes against the principles of non-discrimination and expropriation rules.

Promoting a Policy Framework on Investment as it currently stands should not be done without more obligations by home countries to enforce the OECD Guidelines for Multinational Enterprises and have the National Contact Points play a positive role in making the OECD Guidelines fully operational. This could be done, for instance, by questioning whether host countries should provide investors' rights to companies that do not respect the OECD Guidelines by linking home country export finance and insurance or other subsidies to obligations to respect the OECD Guidelines (see the OECD Working Group on Export Credits and Credit Guarantees). The NCPs should also be made more receptive and instrumental in effectively tackling breaches of OECD Guidelines.

The following are a few concrete examples that illustrate the imbalances and explain why the undersigned NGOs do not agree with the current draft of the OECD Policy Framework on Investment.

- The investment policy annotations regarding intellectual property rights (para. 1.3) ignores principles of benefit sharing and the need for access to essential medicines and other essential technologies to promote sustainable societies. The investment policy annotations (para. 1.5) about timely and adequate expropriation measures do not mention that states should limit investors' rights to compensate indirect expropriation in cases of regulations that are essential to implementing Human Rights and internationally agreed social or environmental standards.
- With respect to trade policy, by promoting free trade and investment agreements through the WTO and regional agreements in para 3.3, the Framework does not take into account that developing countries are not always able to have their interests included in such agreements, nor does the Framework recognize that such agreements limit policy space that developing countries need to stimulate sustainable societies and protect human rights. The Framework's focus on cheap and smooth international supply chains for investors (paras. 3.1, 3.2, 3.5, 4.4) discourages the development of local agricultural, industrial and services sectors. The Framework does not consider that crowding out local suppliers and removing protection for infant industries can have negative social and economic effects that outweigh the benefits of investment. Nor does the Framework link supply chain strategies and trade policies to the observation of labour or environmental standards by suppliers.
- The Framework encourages governments to take unilateral measures that have not yet been agreed upon multilaterally in the current WTO Doha round of negotiations, for example:
 - uniform tariffs (para 3.4), which are to be agreed upon in the WTO agricultural and NAMA negotiations;
 - liberalisation of mode 4 in trade in services, which is a complex and controversial issue in the GATS negotiations (para. 3.5);

- removing restrictions on participation by foreign companies in domestic financial service companies (para. 9.7) is a matter of GATS negotiations; and
- promoting the least trade and investment restricting policies (para. 3.7) while, in the GATS negotiations on Art. VI, the appropriate degree of domestic regulation is yet to be determined (note that around 60% of investment is in the services sector).

All paragraphs and sentences relating to issues still on the WTO negotiating table should be removed from the Framework. Countries that take unilateral measures before they are agreed upon in trade negotiations undermine their own negotiation positions and have no guarantee that their companies will receive the same treatment and advantages from other countries.

- Regarding competition policy, another area where no international binding agreement has been reached, the Framework provides a few useful elements (e.g. in paras. 4.6 and 4.7), but is too focused on the principles of non-discrimination (para. 4.1), market opening for foreign investors (paras. 4.2 and 4.4). At the same time, the Framework fails to take into account elements of competition policy that promote domestic investment, avoid concentration at the international level, effectively deal with restrictive business practices (RBPs, including predatory pricing) and address the buyer power of foreign investors who have the capacity to lobby or threaten governments. Why is no reference made to the Set of Principles and Rules for the control of Restrictive Business Practices and the lack of support from rich countries for the implementation thereof?
- Regarding corporate governance and corporate responsibilities (chapters 6 and 7) the recommendations for coherent and consistent regulatory frameworks, backed by effective enforcement, in order to protect the rights of incoming investors and shareholders are clear and explicit. In contrast, when corporate responsibility is discussed – i.e. when the question is about public, rather than private, interests – no such strong measures are required. The concept of corporate accountability is not at all mentioned, in contrast with the outcome of the WSSD. The language is general, focusing on the promotion and stimulation of measures and favouring voluntary action by corporations. Accountability in corporate governance should not only be towards shareholders, but also other stakeholders such as consumers, local communities, trade unions, etc. Corporate governance should have more emphasis on foreign investors contributing to social inclusion and environmental sustainability, including through greater consideration of directors' duties and responsibilities.
- While the whole Framework should strive to be an instrument that achieves the fulfilment of the OECD Guidelines, the Framework only promotes the Guidelines under the weakly drafted chapter on business responsibility.
- The Framework's questions and annotations relating to investment policy in infrastructure provide some useful elements to balance investors' rights and the rights and needs of the population they burden. However, too much of the responsibility for protecting the rights of the poor by, for example, providing universal access to water and communication equipment (paras. 9.4, 9.6) is placed upon governments and not enough upon (foreign) investors. The Framework's suggestions in the area of financial services do not provide enough guarantees that the foreign financial industry's current practice of neglecting domestic farmers and small and medium-sized enterprises in favour of rich clients will be reversed in order to enable broader economic development of the country.

This letter by no means constitutes a full response from the undersigned NGOs because the consultation period did not provide adequate time for all interested NGOs to comment. Please note that many NGOs have not been, and still are not, aware of this consultation document and have thus not been able to respond.

The undersigned NGOs hope that their comments will be heard and no Policy Framework on Investment will be launched without redressing the current imbalances.

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Nippon Keidanren (Japan Business Federation)

I. Comments on Chapter 7: Policies for promoting responsible business conduct

1. Nippon Keidanren welcomes the revision of the title of Chapter 7 to "Policies for promoting responsible business conduct." It makes the scope of the chapter more clearly than just saying "corporate responsibility."

2. However, chapter 7 depends too much on law-making as a means of communicating societal expectations to companies (as seen in OECD annotation 7.2). It should be clearly stated that the societal expectations communicable through laws should be minimum requirements.

3. It is important for companies to understand the needs of stakeholders through active dialogue with them in order to enhance its value. The laws should be limited so far as possible to rules that would help foster initiative and a spirit of originality in the business sector and would not impede their corporate activities.

II. Comments on the Document on Corporate Responsibility

1. The Document on Corporate Responsibility, or the background CR document (DAF/INV/TF(2005)13) is not only coherent with the PFI chapter 7 which carries questions and annotations, but also includes a lot of problems as stated below. The overall tone of the CR document seems to intend to expand the government roles under corporate responsibility. Since the CR document sends different and even misleading message from the intended goal of PFI to promote private investment, it should be deleted or totally revised.

2. The irrelevant materials, such as quotations and tables should not be included.

The purpose and standing of the CR document has become all the more obscure with the mere use of quotations and the inclusion, in Table 1, of an inventory of "corporate responsibility" that seems out of touch with the current international debate. Materials such as quotations, tables, boxes, graphs and the checklist of other policy initiatives have no use other than eliciting questions, and they are not relevant for answering the questions as well as analyzing their relationship to investment. These materials should be deleted.

3. What governments must play their assigned role is the first step toward creating an environment to corporate responsibility is

Section II, "The meaning of corporate responsibility," addresses three areas of corporate responsibility: the economic responsibility of the business sector to achieve the core mission to yield returns on capital, compliance with legal and regulatory requirements, and responding to societal expectations. Among them, responding to societal expectations, the so-called corporate social responsibility, goes beyond compliance with law. As it is understood internationally, corporate social responsibility is a concept whereby an organization, through engagement with its stakeholders, deals with societal matters on a voluntary, independent basis and in a creative manner so as to enhance the corporate value.

As outlined in a question in Section V, "Influencing motivations for appropriate business conduct," the role for governments in promoting corporate responsibility is to "provide for well-designed laws and for credible enforcement that provides adequate incentives for complying with law." The laws should be limited so far as possible to rules that would help foster independence and a spirit of originality in the business sector, and would not impede their corporate activities.

4. Excessive legal constraints and excessive involvement in private-sector initiatives could weaken the business sector's independent ability to "comply with societal expectations."

Table 1 "Public Sector Roles in Encouraging Corporate Responsibility: An inventory" should be deleted. The reason is that this table contains mandatory provisions even on the domain of voluntary activities of the business sector; this is inconsistent with the OECD Guidelines for Multinational Enterprises and is out of touch with the international debate on corporate responsibility. Whether it is mandating corporate contributions, licensing requirements for stakeholder consultation, or mandatory environmental management systems, all these provisions dampen initiative and originality in the business sector. As well as putting excessive burden on the private sector, there is little hope that these rules would help businesses enhance their corporate value. Countries and territories with such rules do not project the image of an attractive destination for businesses to invest their money.

Also, both Section V, "Influencing motivations for appropriate business conduct," and Section VI, "Promoting the development of management expertise and systems," contain questions calling for government participation in private-sector initiatives. However, the government role should be limited to incentives to the private sector to pursue its diverse activities in an independent manner. In every field, corporate responsibility calls for a spirit of independence and originality on the part of businesses and a distinct identity on the part of countries and territories concerned. Even in publicity matters, there is no place of uniformity in government policies.

Examples of problem areas in Table 1

(1) Mandating corporate contributions

Corporate contributions to local communities is a field where a variety of activities initiated and created by the private sector is most in demand. For sustainable development, the effective way is to let the private sector bring its diverse expertise, know-how and resources into play. Mandating corporate contributions means shifting to the private sector the public roles that should have been assumed by the government. It even contravenes the question posed in Section III: "Does (the government) assume its responsibilities and avoid de facto privatization of public roles?"

(2) Licensing requirements for stakeholder consultation

A private business should identify stakeholders that are important to its activities and, by fulfilling its societal responsibility through dialogue, gain the trust of stakeholders and their empathy. Consulting a licensed "stakeholders expert" would not lead to a better understanding of the needs of stakeholders. For instance, when one wants advice from employees or clients, it does no good if one only talks to licensed experts.

(3) Mandatory environmental management systems

With respect to environmental issues, the point is not whether there is an environmental management system in place. What is important is to minimize the environmental burden, and develop and provide environmentally-friendly products and services. In short, do something that yields results. Take the ISO quality and environmental management systems. Since these ISO rules are based on documentation and require third-party certification, they have become a huge burden to medium-sized and small enterprises and developing countries. As a result, the ISO standardization of social responsibility has not been turned into management system standard; rather, it has been turned into a practical and useful guidance. The idea of mandatory environmental management systems also runs counter to the debate on social responsibility at the ISO.

5. Nippon Keidanren thinks the CR should be promoted in every company, be it private or state-owned. There is no need to differentiate private and state-owned companies.(7.6)

Daisuke WAKISAKA
Nippon Keidanren (Japan Business Federation)

OECD Watch co-ordinated NGO Submission

We, the undersigned NGOs, acknowledge the consultation period for the public and civil society organisations to comment on the Draft Policy Framework for Investment. However, at this late stage in the Framework's development, we disagree with the claim that the Framework has been developed "in cooperation with civil society" (www.OECD.org). While the Framework has indeed received input from business (BIAC) and trade union (TUAC) stakeholders, only a few NGOs have commented, and NGO concerns are scarcely reflected in the Framework. The undersigned NGOs want to make clear that we do not want to be seen as supporting the current Framework text.

Rather, we believe that the current draft Framework does not offer a balanced contribution that "enhances the benefits of investment to society" – the stated aim of the Framework – nor does it sufficiently contribute to economic development in developing countries, let alone a development based on sustainability, equality and human rights. The Framework does not adequately reflect the current debate raised by UNCTAD surrounding the impact of foreign investment and investment incentives on development. We consider that the framework is largely based on misplaced priorities and incorrect assumptions, although we recognize some concerns of importance to developing countries have been included (see below). Instead of examining whether investment is beneficial for development, the Framework takes as its starting point that all investment is desirable. Also, the draft Framework is not consistent with the Monterrey Declaration, which urges business to take "not only the economic and financial but also the developmental, social, gender and environmental implications of their undertakings" into account. The Monterrey Declaration also warns against rapid deregulation of capital flows and the crowding out of domestic investors.

One of our main concerns regarding the Framework is the inequality between the promotion of investors' rights and the specification of investors' responsibilities and obligations. Another principal concern is the imbalance between the instruments the Framework promotes to protect foreign investors' rights and interests, on the one hand, and the lack of instruments it suggests to protect the rights, interests and development needs of host governments, their citizens and their natural environment, on the other hand.

The Framework claims to be based on three basic principles:

1. Policy coherence between various policy areas on investment protection and openness,
2. Transparency in policy formulation and implementation, and
3. Continuous evaluation of policies on the investment environment.

However, if the Framework were to be a genuinely balanced approach it should also include:

1. Policy coherence to protect and safeguard government's obligations to implement Human Rights Conventions, including core labour standards, and democratic policies, against unwanted effects of investors;
2. Transparency of business operations, government-business contracts and business revenues to enhance corporate accountability; and
3. Continuous evaluation of business practices and effects of their investment.

To this end, the following imbalances need to be addressed:

- The protection of investors' rights that the Framework considers the best way to attract investment is not balanced by governments' responsibility to fulfil the different aspects of human rights and environmental protection.

- There is too much focus on host countries' responsibilities and regulatory frameworks to support investors, and a lack of emphasis on legally binding regulations for responsible behaviour by foreign investors.
- The Framework focuses on attracting *foreign* investment but gives little specific advice with regard to promoting *domestic* investment.
- The Framework warns against targeting (foreign) investment in particular sectors (para. 1.6) and against promoting domestic industries (para. 1.7 and 4.5), but it does not offer instruments to attract quality investment that is needed or desired according to the development policy of the country and that contributes to sustainable development, fair employment and the transfer of needed technology.
- The promotion of the principle of non-discrimination fails to recognize a de facto discrimination against local investors, tax payers and citizens when foreign investors receive better treatment, as well as the unequal competition between small, domestic companies and large, foreign, corporate investors.
- The Framework thoroughly delineates *host* countries' obligations to (foreign) investors, but provides few recommendations about how *home* countries can support sustainable investment.
- The Framework promotes greater input and lobbying by (foreign) investors (paras. 7.4 and 3.2.), but fails to recognize investors' elevated financial power compared to other stakeholders and, thus, the need for more regulation of lobbying and more parliamentary oversight of investment policies.
- The promotion of free transfer of capital and profits is not balanced with equal promotion of guarantees and policy options for reducing financial instability and for increasing the sharing of the benefits of investment.
- The Framework promotes investor-to-state dispute settlement mechanisms (para. 1.8) but does not advocate fully exhausting domestic court avenues. This reduces governments' ability to protect essential social and environmental rights from expropriation rules (para. 1.5). Also, this does not recognize the opposition of NGOs already expressed against the investor-to-state dispute mechanisms.

Other important principles and issues that are missing from the Framework include:

- Preventing that countries' desire to attract FDI from leads to a 'race to the bottom' in which human, labour and environmental rights are undermined;
- Disciplining and balancing corporate lobbying;
- Increased participation of parliamentarians in investment policy development and assessment;
- Providing balanced policy space to uphold human rights and protect public health, safety and the environment even if this goes against the principles of non-discrimination and expropriation rules.

Promoting a Policy Framework for Investment as it currently stands should not be done without substantial obligations by home countries to enforce the OECD Guidelines for Multinational Enterprises and have the National Contact Points play a positive role in making the OECD Guidelines fully operational. The current guidelines and its implementation mechanisms are inadequate as a

global mechanism to improve the operations of multinationals, due to the lack of monitoring and enforcement mechanisms. Moreover, the way NCPs perform their role is arbitrary, unfair and detrimental to the credibility of the guidelines. Making the guidelines relevant as a mechanism to regulate corporations could be done, for instance, by questioning whether host countries should provide investors' rights to companies that do not respect the OECD Guidelines, or by linking home country export finance and insurance or other subsidies to obligations to respect the OECD Guidelines (see the OECD Working Group on Export Credits and Credit Guarantees). The NCPs should also be made more receptive and instrumental in effectively tackling breaches of OECD Guidelines.

The following are a few concrete examples that illustrate the imbalances and explain why the undersigned NGOs do not agree with the current draft of the OECD Policy Framework on Investment.

- The investment policy annotations regarding intellectual property rights (para. 1.3) ignore the principles of benefit sharing and the need for access to essential medicines, other essential technologies and essential natural resources to promote sustainable societies. The investment policy annotations (para. 1.5) about timely and adequate expropriation measures do not mention that states should limit investors' rights to compensation for indirect expropriation in cases of regulations that are essential to implementing human rights and internationally agreed social or environmental standards.
- With respect to trade policy, by promoting free trade and investment agreements through the WTO and regional agreements in para 3.3, the Framework does not take into account that developing countries are not always able to have their interests included in such agreements. Nor does the Framework recognize that such agreements limit policy space that developing countries need to stimulate sustainable societies and protect human rights. The Framework's focus on cheap and smooth international supply chains for investors (paras. 3.1, 3.2, 3.5, 4.4) discourages the development of local agricultural, industrial and services sectors. The Framework does not consider that crowding out local suppliers and removing protection for infant industries can have negative social and economic effects that outweigh the benefits of investment. Nor does the Framework link supply chain strategies and trade policies to the observation of labour or environmental standards by suppliers.
- The Framework encourages governments to take unilateral measures that have not yet been agreed upon multilaterally in the current WTO Doha round of negotiations, for example:
 - Uniform tariffs (para 3.4), which are to be agreed upon in the WTO agricultural and NAMA negotiations;
 - Liberalisation of mode 4 in trade in services, which is a complex and controversial issue in the GATS negotiations (para. 3.5);
 - Removing restrictions on participation by foreign companies in domestic financial service companies (para. 9.7) is a matter of GATS negotiations; and
 - Promoting the least trade and investment restricting policies (para. 3.7) while, in the GATS negotiations on Art. VI, the appropriate degree of domestic regulation is yet to be determined (note that around 60% of investment is in the services sector).

All paragraphs and sentences relating to issues still on the WTO negotiating table should be removed from the Framework. Countries that take unilateral measures before they are agreed upon in trade negotiations undermine their own negotiation positions and have no guarantee that their companies will receive the same treatment and advantages from other countries.

- Regarding competition policy, another area where no international binding agreement has been reached, the Framework provides a few useful elements (e.g. in paras. 4.6 and 4.7), but is too focused on the principles of non-discrimination (para. 4.1) and market opening for foreign investors (paras. 4.2 and 4.4). At the same time, the Framework fails to take into account elements of competition policy that promote domestic investment, avoid concentration at the international level, effectively deal with restrictive business practices (RBPs, including predatory pricing) and address the buyer power of foreign investors who have the capacity to lobby or threaten governments. Why is no reference made to the Set of Principles and Rules for the control of Restrictive Business Practices and the lack of support from rich countries for the implementation thereof?
- Regarding corporate governance and corporate responsibilities (chapters 6 and 7) the recommendations in order to protect the rights of incoming investors and shareholders are clear and explicit in favour of coherent and consistent regulatory frameworks, backed by effective enforcement, In contrast, when corporate responsibility is discussed – i.e. when the question is about public, rather than private, interests – no such strong measures are required. The concept of corporate accountability and regulation is not at all mentioned, in contrast with the outcome of the WSSD. The language is general, focusing on the promotion and stimulation of measures and favouring voluntary action by corporations while not addressing corporate responsibilities to operate in a manner to uphold human rights and environmental protection, and to combat corruption, particularly when governments lack the capacity to do so. Accountability in corporate governance should not only be towards shareholders, but also other stakeholders such as consumers, local communities, trade unions, etc. Corporate governance should have more emphasis on foreign investors contributing to social inclusion and environmental sustainability, including through greater consideration of directors’ duties and responsibilities.
- While the whole Framework should strive to be an instrument that achieves the fulfilment of the OECD Guidelines, the Framework only promotes the Guidelines under the weakly drafted chapter on business responsibility.
- The Framework’s questions and annotations relating to investment policy in infrastructure provide some useful elements to balance investors’ rights and the rights and needs of the population they burden. However, too much of the responsibility for protecting the rights of the poor by, for example, providing universal access to water and communication equipment (paras. 9.4, 9.6) is placed upon governments and not enough upon (foreign) investors. Also, the Framework should recognise that prohibiting foreign investment in essential services may be a necessary step for governments striving to fulfil their responsibility of universal access and democracy towards their citizens. The Framework’s suggestions in the area of financial services do not provide enough guarantees that the foreign financial industry’s current practice of neglecting domestic farmers and small and medium-sized enterprises in favour of rich clients will be reversed in order to enable broader economic development of the country.

Finally, we acknowledge that the draft Framework also does consider some concerns for developing country governments seeking investment beneficial to their economies, which we support:

- In the area of tax policy, these considerations include para. 5.7, which highlights the revenue losses associated with tax holidays, and para. 5.4, which even mentions that tax incentives may discourage investment.
- In para. 6.3 it is explicitly stated that governments need effective methods to obtain redress for grievances and the need for more disclosure of materials from companies.

- Para. 7.3 underscores the protection of the rights framework to secure a balance with investment.

This letter by no means constitutes a full response from the undersigned NGOs because the consultation period did not provide adequate time for all interested NGOs to comment. Please note that many NGOs have not been, and still are not, aware of this consultation document and have thus not been able to respond.

The undersigned NGOs hope that their comments will be heard and no Policy Framework on Investment will be launched without redressing the current imbalances.

Yours sincerely,

Myriam Vander Stichele, SOMO

On behalf of:

Organisations:

- | | |
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| <ol style="list-style-type: none"> 1. 11.11.11.- Coalition of the Flemish North–South movements, Belgium 2. Amici della Terra, Friends of the Earth Italy 3. Amis de la Terre, Friends of the Earth France 4. ATTAC Essen, Hans Adler, Germany 5. ATTAC Finland 6. ATTAC Hungary 7. ATTAC Mazowsze, Poland 8. The Berne Declaration, Switzerland 9. Both Ends, the Netherlands 10. Brotherhood of St. Laurence, Australia 11. Bund für Umwelt und Naturschutz Deutschland, Friends of the Earth Germany 12. Campaign for the Welfare State, Norway 13. CBRM - Campagna per la Riforma della Banca Mondiale, Italy 14. Corner House, UK 15. CUTS International 16. Ecologistas en Acción, Spain 17. Fair Food, the Netherlands 18. Friends of the Earth Scotland 19. Friends of the Earth US 20. FIAN, Germany 21. Foundation for Gaia, UK 22. Fundación El Otro, Argentina 23. Fundación SES – Sustentabilidad, Educación, Solidaridad, Argentina | <ol style="list-style-type: none"> 24. Gerechtigkeit jetzt!: Die Welthandelskampagne, The German Trade Justice Movement, Germany 25. Germanwatch, Germany 26. Greenpeace International, Jean-Luc Roux 27. GRESEA – Groupe de Recherche pour une Stratégie économique alternative, Belgium 28. ILRIG - International Labour Resource and Information Group, South Africa 29. ICN - India Committee of the Netherlands ICN 30. IRENE – International Restructuring Education Network Europe, the Netherlands 31. The Jus Semper Global Alliance, USA 32. KEPA - Service Centre for Development Cooperation, Finland 33. L'Entraide missionnaire, Canada 34. Millennium Solidarity - Geneva Group, Switzerland 35. Milieudefensie, Friends of the Earth Netherlands 36. NIGD – Network Institute for Global Democratization, Finland 37. NiZA – Nederlands instituut voor Zuidelijk Afrika, the Netherlands 38. Novib – Oxfam Netherlands 39. Oxfam Germany 40. Oxfam - Solidariteit, Belgium 41. Polaris Institute, Tony Clark, Canada 42. Proyecto Gato, Belgium 43. The Quaker Council for European Affairs |
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44. RAID - Rights and Accountability in Development, UK
45. SOMO - Centre for Research on Multinational Corporations, the Netherlands
46. SÜDWIND - Institut für Ökonomie und Ökumene, Germany
47. Third World Network, International (secretariat in Malaysia)
48. URFIG - Unité de Recherche, de Formation et d'Information sur la Globalisation, France
49. Ver.di, Hans Adler, Germany
50. WIDE - Women in Development Europe
51. WEED - World Economy, Ecology & Development, Germany
52. World Development Movement, UK
53. XminusY Solidarity Fund, Netherlands

Individuals:

1. Prof. Dr. Walden Bello, executive director of Focus on the Global South* (*for identification only), Thailand
2. Prof. Dr. Christoph Scherrer, Universität Kassel, Germany
3. Jan Brezger, Germany
4. Dr. Ing. Peter Broedner, Germany
5. Lothar Höfler, Germany
6. Klaus Majer, Germany
7. Prof. Dr. Maria Mies, Germany
8. Frank Scholz, Germany
9. Antje Schultheis, HBS-student-Committee, Bonn, Germany

OSCE Office of the Coordinator of Economic and Environmental Activities

Overall Comments

The PFI is an excellent document. The PFI's comprehensiveness addresses a tremendous need. While investors, NGOs, donors, and governments advocate for better investment climates and many excellent documents related to the investment climate exist, rarely are all the major components of the investment framework addressed in a systematic fashion as they are in the PFI. The questions' emphasis on "measures" and "enforcement" is also important. As countries and donors develop business environment improvement programs, they now have a standard framework in which they may apply their efforts.

For economies with less desirable investment climates, the PFI and the Investment Reform Index will go well together. The PFI gathers the status and the IRI measures the progress. Well done.

There is one comment on document "tone." There are many questions such as, "Has the government developed a strategy on ...?", "Do the government support programmes ...?", etc., that reflect a great deal of government activity. Many of the intended users of the PFI, or governments with poor investment climates need to move into the state's role of a fair and independent regulator and economic facilitator rather than the state's chief economic actor. Private investors seek less bureaucracy. Thus, attention must be paid to tone and wording so the audience fully understands that the government's role is to develop a good investment climate and "not manage the investment process." (In conversations with government officials in a former Communist state, they have spoke of the state "attracting and managing foreign investments.")

The only general comment regarding future refinement of the PFI is to look at the framework in the context of most developed to least developed economies in rough categories. Understanding the OECD's desire not to single out nations, be too prescriptive, or establish priorities without considering a country's individual circumstance, there still may be a way to "tailor" the PFI's universal applicability more closely to the status of a country's investment climate. Specifically, the Netherlands, Slovakia, and Albania are all mid-sized European countries but have markedly different investment climates and needs. Thus, if there was a coding mechanism to prioritize or weight certain sections and questions based on a level of economic development – OECD, Developed, Middle Income, Transition, Developing, Least Developed. It might provide more specificity for the PFI user.

Section Comments

1. Investment Policy

Question 1.2 about land ownership might want to have additional sub-questions regarding the process of land restitution claims and the ability to purchase agricultural land directly and use it for industrial or commercial purposes.

9. Infrastructure and Financial Services

A general comment is that the Financial Services questions seem a bit incongruous. Maybe they could be included under the Investment Policy section. The rationale being that developing capital markets is part of a larger pro-investment policy.

10. Public Governance

Questions 10.6-10.8 on corruption seem that they could be condensed into two questions. For example, “To what extent have international anti-corruption and integrity standards been implemented in national legislation and regulations?” and “Do institutions and procedures ensure effective and consistent application and enforcement of laws and regulations on anti-corruption and integrity in the public service?” are not equivalent questions but are similar, and may lead to similar answers.

In Question 10.7, “What role do civil society organisations and the media play in favouring the open scrutiny of the conduct of public officials’ duties?” might be expanded and serve as its own question. It could be:

10.8 Are civil society organizations and the media free to scrutinize the conduct of public officials’ duties? Are these organizations independent and free to operate without undue government regulation or interference?

The following question might be added in Section 10:

“Are privatizations and government tenders free and open to all bidders with transparent processes? Is e-Government used to manage the process?” Unfair privatizations and tenders, or reprivatizations send terrible signals to investors, foreign and domestic.”

*Barry Kolodkin, Senior Investment Expert
(Consultant) OSCE Office of the Coordinator of Economic and Environmental Activities
Bucharest, Romania*

Oxfam-Solidarité / Centre National de Coopération au Développement / Comité pour l'annulation de la dette du Tiers Monde, Belgique

Mesdames, Messieurs les représentants des Etats membres de l'OCDE,

Nous, les ONG signataires de cette lettre, répondons par la présente à la consultation publique mise en ligne sur le site de l'OCDE concernant le Cadre d'Action pour l'Investissement .

Tout d'abord nous tenons à préciser que nous sommes en désaccord avec l'affirmation selon laquelle ce Cadre d'Action a été développé en collaboration avec la société civile. En effet, bien que ce cadre d'action ait bénéficié d'inputs de la part du monde de l'industrie (BIAC) et des syndicats (TUAC/CSC), seules quelques ONG ont commenté le texte. Les préoccupations des ONG sont très peu prises en compte dans le projet de cadre d'action.

Nous tenons donc à établir clairement que nous ne soutenons pas le texte du Cadre d'Action dans sa forme actuelle.

Nous considérons au contraire que le projet actuel n'apporte pas une contribution équilibrée visant à l'amélioration des bénéfices des investissements pour la société, ce qui est pourtant l'objectif déclaré du Cadre d'action. Il ne prend pas non plus en compte de manière satisfaisante le développement économique des pays en développement, sans parler des questions de durabilité, d'égalité et de droits humains. Le Cadre d'Action ne reflète pas de manière satisfaisante les débats actuels qui ont été soulevés au sein de la CNUCED concernant l'impact des investissements étrangers et des mesures visant à attirer les investissements sur le développement. Bien que nous devons reconnaître que quelques préoccupations importantes pour les pays en développement sont incluses dans le texte de projet, force est de constater que le Cadre d'Action repose en grande partie sur des priorités mal définies ainsi que sur des hypothèses erronées.

Sans examiner si les investissements sont bénéfiques pour le développement, le Cadre d'Action prend comme point de départ que tout investissement est souhaitable.

L'une de nos principales préoccupations concernant le projet de texte porte sur le manque d'équilibre entre la promotion des droits des investisseurs et la description des responsabilités et obligations de ces mêmes investisseurs. Un autre point de préoccupation pour les ONG signataires de cette lettre concerne le déséquilibre entre d'une part la promotion d'instruments visant à protéger les droits et intérêts des investisseurs et, d'autre part, l'absence d'instruments pour la protection des droits, intérêts et besoins des pays hôtes, de leur population et de leur environnement.

S'il voulait adopter une approche réellement équilibrée, le Cadre d'Action devrait inclure et traduire les principes suivant :

1. Cohérence politique en vue de sauvegarder la capacité des Etats à respecter leurs obligations concernant le respect des principes démocratiques et la mise en œuvre des conventions internationales portant sur les droits humains, dont les normes fondamentales du travail.
2. Transparence concernant les activités des entreprises, les accords conclus entre gouvernements et entreprises ainsi que les bénéfices des entreprises, et ce en vue de renforcer la responsabilité des entreprises.
3. Evaluation continue des pratiques des entreprises et de l'impact de leurs investissements.

En lien avec ces principes fondamentaux qui devraient être inclus dans un tel Cadre d'Action, nous soulignons un certain nombre de déséquilibres. Il en est ainsi par exemple de la promotion du principe de non-discrimination. Ce principe en effet, ne tient pas compte des discriminations de fait au préjudice des investisseurs locaux, des contribuables et des citoyens, observées fréquemment lorsque des investisseurs étrangers bénéficient d'avantages divers et imposent une concurrence déloyale vis-à-vis de plus petites entreprises nationales.

Un autre exemple de déséquilibre porte sur la promotion du transfert des capitaux et profits qui, dans le texte n'est pas contre-balançée par la promotion de garanties pour réduire les risques d'instabilité financière et pour assurer une répartition minimum des bénéfices de l'investissement.

D'autres principes et éléments importants qui manquent à ce projet de texte sont les suivant :

Alors que de tels déséquilibres doivent être pris en compte de manière sérieuse, nous attirons également l'attention sur le fait qu'il est essentiel que toute proposition de régulation des politiques d'investissements assure que les tentatives des gouvernements pour attirer les investissements ne mènent à une surenchère dans la dégradation des droits humains, sociaux et de l'environnement.

Il est également fondamental d'assurer la régulation de la présence des entreprises dans la sphère politique ainsi que la participation des élus politiques dans la définition et l'évaluation des politiques d'investissements.

Finalement, nous soulignons l'importance d'assurer la présence d'un espace politique équilibré qui fasse prévaloir les droits humains, la protection de la santé publique de la sécurité publique ainsi que de l'environnement, même si cela implique d'aller à l'encontre des principes de non-discrimination et des règles d'expropriation.

Il est à noter que étant donné le peu de temps qui a été accordé pour la consultation des ONG, cette lettre ne prétend pas répondre à la consultation, mais simplement fournir quelques éléments en lien avec nos préoccupations.

Les ONG signataires espèrent que nos commentaires seront pris en compte et que aucun Cadre d'Action ne sera adopté sans prendre en compte nos préoccupations.

Veuillez agréer, mesdames, messieurs, les représentants des Etats membres de l'OCDE, l'expression de nos sentiments distingués.

*Xavier Declercq, Directeur de Mobilisation
Oxfam-Solidarité, Belgique*

*Pour les organisations suivantes :
CNCD / Centre National de Coopération au Développement – Belgique
Oxfam – Magasins du monde – Belgique
CADTM / Comité pour l'annulation de la dette du Tiers Monde Belgique/France*

Rights and Accountability in Development (RAID)

Comments on Chapter 7: Policies for Promoting Responsible Business Conduct

Rights and Accountability in Development (RAID) has endorsed the joint NGO letter commenting on the draft Policy Framework for Investment (PFI), which has been submitted by the Dutch NGO SOMO on behalf of more than 50 organisations. We concur with our NGO colleagues that the current draft PFI lacks a number of key elements. However, RAID wishes to submit some additional comments on Chapter 7 regarding policies for promoting responsible business conduct.

Our main concern is that the draft misses an important opportunity to include much more explicit references to the key OECD instrument in this area – the *OECD Guidelines for Multinational Enterprises* – which along with other international human rights and environmental standards equip governments and investors alike with the essentials for promoting equitable and sustainable growth. The draft chapter could also do more to promote one particularly relevant objective of the Monterrey Declaration: companies should contribute to social and environmental progress through responsible behaviour. We therefore strongly recommend a number of modifications to the official text and annotations so that the interdependent and mutually reinforcing pillars of sustainable development are better reflected.³⁸

1. Provision 7.1 appropriately accentuates the public responsibilities of governments, however, it should also emphasize the imperative on companies to operate in a manner that bolsters governments' efforts to combat corruption, uphold human and labour rights and protect the environment. This is particularly the case when governments lack the capacity to adequately monitor and enforce regulatory requirements because of significant budgetary shortfalls, conflict or corruption. The demonstration effect of responsible business behaviour is certainly as important, if not more important, than voluntary and philanthropic endeavours in promoting positive development outcomes.
2. Provision 7.1 should also explicitly ask whether governments have fulfilled their obligations and commitments in accordance with international environmental, labour and human rights conventions and treaties. The absence of any language in this regard is one of the weakest aspects of Chapter 7. Moreover, it ignores one of the over-arching aims of the PFI: "It is best described as a tool that can assist different types of countries to benchmark their strategies against broadly accepted international practices"³⁹
3. Provision 7.2 should explicitly convey the importance of upholding a human rights framework that promotes and protects civil society, as government repression in this regard prohibits any effective two-way communication between business and society and ultimately the development of healthy, democratic societies. The Task Force should not shy away from conveying to governments the importance of democratic dialogue and participation in fostering an enabling investment environment. Indeed, if the PFI is meant to be a "series of probing questions to test for quality and coherence, based on OECD and non-OECD experiences, as well as the established principles embodied in international agreements"⁴⁰, the language of this provision should be strengthened.

³⁸ Several United Nations texts, most recently the 2005 World Summit Outcome Document, refer to the "interdependent and mutually reinforcing pillars" of sustainable development as economic development, social development, and environmental protection.

³⁹ Manfred Schekulin, "Investing for development: The Policy Framework for Investment". *OECD Observer*, October 2005. <http://www.oecdobserver.org/news/fullstory.php/aid/1673>

⁴⁰ Manfred Schekulin, "Investing for development: The Policy Framework for Investment". *OECD Observer*, October 2005. <http://www.oecdobserver.org/news/fullstory.php/aid/1673>

4. The manner in which Provision 7.3 is written could be interpreted as referring only to the investors' stakeholders such as employees and shareholders. Whether intended or not, consistent with best practices for disclosure, these frameworks should meet the needs of all relevant stakeholders and not simply investors' stakeholders.
5. Provision 7.7 should ask whether adhering governments to the *OECD Declaration on International Investment* have established an effective National Contact Point to implement the *OECD Guidelines for Multinational Enterprises*. Without effective implementation by governments, companies that strive to conduct their activities responsibly will continue to be undermined by those that flout international best practice. A critical first step in curtailing irresponsible practices by companies is ensuring governments fulfil their obligations to effectively implement the Guidelines. Otherwise, OECD governments are essentially telling both developing country governments and business: "Do as we say, not as we do".
6. The OECD Guidelines principles and standards reflect and draw on a number of important instruments. However, one must navigate the Guidelines' ample Clarifications and Commentary to learn which instruments are noted. Adding a footnote to the annotation of Provision 7.7 that lists the instruments cited in the *OECD Guidelines for Multinational Enterprises* will help elucidate to governments – particularly non-adhering governments – some of the key instruments that can help guide their policy reforms.
7. Lastly, while we recognize it is beyond the scope of the PFI to address the inadequacies of the *OECD Guidelines for Multinational Enterprises* as well as the unsatisfactory implementation by many National Contact Points, we call the Task Force's attention to the following paragraph from the joint NGO letter mentioned above. These comments are particularly relevant to promoting responsible business behaviour and investment by way of the PFI.

Promoting a Policy Framework for Investment as it currently stands should not be done without substantial obligations by home countries to enforce the OECD Guidelines for Multinational Enterprises and have the National Contact Points play a positive role in making the OECD Guidelines fully operational. The current guidelines and its implementation mechanisms are inadequate as a global mechanism to improve the operations of multinationals, due to the lack of monitoring and enforcement mechanisms.

Moreover, the way NCPs perform their role is arbitrary, unfair and detrimental to the credibility of the guidelines. Making the guidelines relevant as a mechanism to regulate corporations could be done, for instance, by questioning whether host countries should provide investors' rights to companies that do not respect the OECD Guidelines, or by linking home country export finance and insurance or other subsidies to obligations to respect the OECD Guidelines (see the OECD Working Group on Export Credits and Credit Guarantees). The NCPs should also be made more receptive and instrumental in effectively tackling breaches of OECD Guidelines.

Recommendations to the text

(Note: Edits and deletions are bolded and only those sections with recommended changes are included.)

7.1 How does the government make clear for investors the distinction between its own roles and responsibilities and those ascribed to the business sector? **Does the government fulfil its obligations and commitments to combat corruption, uphold labour and human rights and protect the environment consistent with its international obligations and commitments?**

Does it actively assume its responsibilities and avoid de facto privatisation of public roles? The core mission of business is to identify and manage investment projects that yield competitive returns to suppliers of capital. **Business plays an important demonstrative role, particularly in countries with weak governance, by observing international environmental, labour and human rights standards and principles that befits their activities.** The role of governments is to look after the collective interests of their citizens. As part of this role, they work with companies, trade unions and other civil society to create enabling environments for responsible business conduct. If this enabling environment is well designed, including through a clearly communicated distinction between the respective roles and responsibilities of government and business, uncertainty over expectations concerning responsible business conduct are lowered, thus encouraging investment, and private and public sector actors will be encouraged to play mutually-supporting roles in enhancing economic, social and environmental well-being.

7.2 What steps does the government take to promote open communications so that existing and potential investors have the information they need on expected responsible business conduct? How does the government endeavour to protect the **human** rights framework that underpins effective, two-way communication between business and society?

Law-making is a key channel for communicating societal expectations to companies, thus creating a stable, predictable environment conducive to investment. Expectations concerning responsible business conduct are also communicated through a multitude of other channels and these also impact upon the quality of the investment environment. Such communication can take place within the workplace, with local communities, through discussions with investors, via the press and so forth. These two-way communication channels provide inputs that can be valuable for setting company policies and evaluating performance. These other channels complement the information communicated to companies through formal legal and regulatory processes.

Governments play several roles in ensuring that these other communication processes work well. While the protection of human rights (e.g. political, social, civil, labour and property) is a fundamental objective in itself, it is also a pre-condition for effective communication to take place. This removes threats of rights violations so that many voices, including those of investors **and civil society**, can be heard. **Government restrictions in this regard will prohibit effective two-way communication and ultimately the development of enabling investment environments and healthy, democratic societies.** Thus, the protection of the rights framework is a key responsibility of governments. Government-based instruments for corporate responsibility – such as the *OECD Guidelines for Multinational Enterprises* – are also important channels for communicating with business.

7.3 Does the government provide for an adequate framework to support the various types of disclosure companies make about their business activities? Is this framework flexible enough to meet the needs of investors and **their relevant** stakeholders?

Rules and guidance for financial reporting are already well developed in most countries (see also Chapter 6). The framework for non-financial reporting has emerged relatively recently and is still evolving.

Several countries actively encourage non-financial reporting. As in any other area where investors need to respond to societal expectations, whether these are codified in laws and regulations or not, a healthy investment environment requires transparency and effective communication. Governments can enhance the quality of the investment environment by clearly communicating all relevant rules, guidelines, and expectations for both financial and nonfinancial disclosures. When disclosures are mandatory, governments need to ensure that the application and enforcement of these requirements is non-discriminatory. At the same time, governments should seek to avoid undue regulatory burdens and to allow innovation and adaptation to particular company circumstances to take place.

7.7 Does the government participate in inter-governmental co-operation in order to promote international concepts and principles for responsible business conduct, such as the *OECD Guidelines for Multinational Enterprises*? **Have adhering governments to the *OECD Declaration on International Investment* established an effective National Contact Point to implement the *OECD Guidelines for Multinational Enterprises*?**

Multilateral instruments dealing with responsible business conduct communicate and promote concepts and principles for appropriate business conduct. Thirty-nine countries have committed to promoting responsible business conduct of their multinational enterprises -- wherever they operate in the world -- under the *OECD Guidelines for Multinational Enterprises*. The Guidelines draw on the broader framework of international declarations and conventions (e.g. the Universal Declaration of Human Rights, the International Labour Organisation's declarations and conventions).⁴¹ While the Guidelines recommendations are addressed to business, governments through their network of National Contact Points are responsible for promoting the Guidelines, handling enquiries and helping to resolve issues that arise in specific instances. By promoting inter-governmental co-operation in this field, governments can help to broaden awareness of basic principles for appropriate conduct. Increased global acceptance of common principles for business conduct also helps to reduce the likelihood that observing appropriate corporate responsibility principles could become a competitive disadvantage for investors.

Tricia Feeney,
Rights and Accountability in Development (RAID)

⁴¹ The OECD Guidelines for MNEs reflect and draw on the following instruments: the Universal Declaration of Human Rights; OECD Principles of Good Governance; The Global Reporting Initiative; International Labour Organisation (ILO) Convention 29: Forced Labour Convention (1930); ILO Convention 105: Abolition of Forced Labour Convention (1957); ILO Convention 111: Discrimination (Employment and Occupation) Convention (1958); ILO Convention 138: Minimum Age Convention (1973); ILO Convention 182: Worst Forms of Child Labour Convention (1999); ILO Recommendation 94: Co-operation at the Level of the Undertaking Recommendation (1952); ILO Recommendation 146: Minimum Age Recommendation (1973); ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (1977); ILO Declaration on Fundamental Principles and Rights at Work (1998); Rio Declaration on Environment and Development; ISO Standard on Environmental Management Systems; Aarhus Convention on Access to Information, Public Participation in Decision-making, and Access to Justice in Environmental Matters; OECD Convention on Combating Bribery of Foreign Public Officials; OECD Recommendations on Combating Bribery in International Business Transactions (1977); OECD Recommendations on the Tax Deductibility of Bribes to Foreign Public Officials (1996); UN Guidelines on Consumer Policy; OECD Guidelines for Consumer Protection in the Context of Electronic Commerce; OECD Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data; Recommendation of the OECD Council Concerning Effective Action Against Hard Core Cartels (1998); Recommendation of the Council Concerning Co-operation between Member Countries on Anticompetitive Practices Affecting International Trade; OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations; and Recommendation of the OECD Council on the Determination of Transfer Pricing between Associated Enterprises.

Rights and Democracy/Droits et Démocratie

C'est avec grand intérêt que nous vous faisons part de quelques commentaires sur le « Cadre d'action pour l'investissement » présenté par le Comité de l'investissement de l'OCDE. Malheureusement, n'ayant pris connaissance de ce document que très tard dans le processus, nous ne sommes en mesure de vous soumettre que quelques commentaires d'ordre général.

Nous constatons avec regret la faible importance accordée aux droits humains dans ce projet alors que sur la scène internationale, qu'il s'agisse du milieu des institutions financières internationales, des gouvernements et même du secteur minier, le débat concernant l'impact des investissements sur les droits humains prend une ampleur grandissante. Selon notre expérience, les retombées positives de l'investissement sur le développement, les droits et la démocratie, n'ont rien d'automatique. Au contraire, Droits et Démocratie considère qu'il est essentiel d'intégrer une analyse détaillée des droits humains à chaque phase d'un projet d'investissement afin d'en maximiser les effets positifs sur la situation des droits humains et d'en minimiser les risques de violations.

Pour soutenir cette position, nous tenons à vous informer qu'en juin 2003, Droits et Démocratie a été l'hôte d'une conférence portant sur la question de l'investissement et des droits humains. Cet événement nous a permis, grâce à un examen critique et comparatif des deux régimes normatifs qui constituent les droits humains et les investissements, ainsi qu'à la lumière de quelques expériences concrètes partagées, de documenter cette importante problématique. Nous considérons qu'il est effectivement impossible de penser développer un cadre pour l'investissement sans accorder une place considérable aux droits humains auxquels les pays membres de l'OCDE sont d'ailleurs grandement attachés.

Nous profitons d'ailleurs de cette prise de contact pour vous informer que Droits et Démocratie développe actuellement un modèle d'évaluation d'impacts sur les droits humains (EIDH) à l'intention des décideurs et des collectivités. Basée sur les Normes des Nations Unies sur la responsabilité des entreprises transnationales, cette initiative vise à responsabiliser les acteurs concernés et éviter que les investissements et le financement de projets n'aient d'effets contraires aux normes internationales des droits humains. Échelonné sur trois ans, ce projet s'inscrit dans les efforts que déploie Droits et Démocratie pour que les politiques économiques et les pratiques d'investissement tiennent prioritairement compte des droits humains. Actuellement en phase exploratoire, la méthodologie est donc mise à l'essai dans le cadre de cinq études de cas réalisées sur trois continents. Elle est constituée d'une série de questions – ou indicateurs – permettant de cerner concrètement les impacts positifs et négatifs d'un projet d'investissement sur les droits humains. Ce type de démarche pourrait à notre avis accroître de façon substantielle la cohérence des politiques d'investissement et leur impact sur le développement et correspond à un besoin de mettre en application les normes développées depuis plusieurs années. Nous pouvons ici rappeler le constat réalisé par le Haut commissaire aux droits de l'homme selon lequel le travail normatif en terme de droits humains est largement accompli, et que le réel défi se présentant à nous maintenant, est l'application de ces normes afin de permettre aux millions d'individus privés de ces droits d'y avoir accès.

Nous incluons ici des hyperliens vous permettant d'accéder aux documents qui avaient été élaborés pour la rencontre de 2003, au rapport de cette conférence, ainsi qu'à la description du projet d'Étude d'impacts sur les droits humains développé par Droits et Démocratie, en espérant que ces documents pourront vous être utiles au cours des débats de l'OCDE. Nous vous ferons également parvenir ces documents par service de messagerie.

Jean-Louis Roy, Président
Rights and Democracy/Droits et Démocratie
www.dd-rd.ca

Trade Union Advisory Council to the OECD (TUAC) and ICFTU

General

First, since the PFI is not available in French, it should be noted that we have not been able to fully consult our French-speaking affiliates.

The PFI remains imbalanced with an excessive focus on the rights of investors. Given that it is addressed primarily to non-OECD governments, the PFI should ensure that policies to attract investment do not conflict with societal goals such as reducing poverty, creating decent work and providing quality public services. The aim of the PFI, which is not to help governments attract investment per se, but to offer a tool to attract investment to increase development, cannot be stressed enough and must permeate the PFI. The document, however, has not been adapted to a developing country context.

Chapter 1 Investment policy

The last paragraph that has been added to the annotation to question 1.6 should be removed or modified. First, free repatriation of profit is not a basic condition to attract investment. Secondly, developing countries should not be pushed into guaranteeing free repatriation of profits for foreign investors. This issue can only be considered in relation to a country's tax system, eventual tax schemes offered to investors and other investment incentives.

Chapter 3 Trade policy

The analysis made of trade liberalisation measures should reflect both the positive and negative effects. A disproportionate attention is given to the positive impact, overlooking the harmful consequences trade liberalisation has had in some contexts. The sentence in the annotation to question 3.3 referring to trade agreements boosting the gains from trade to society should either be sustained by reliable internationally recognised studies or be deleted.

The right of every country to regulate should be emphasised in the text. In particular the need for developing countries to have enough policy space to implement their own development agenda is crucial. The text argues that a requirement for investors to source locally part of their investment project (annotation to question 3.5), or the application of high import tariffs (annotation to question 3.4), may harm the investment environment. However it should recognise that such measures may well be indispensable for developmental or social purposes. The use of trade distorting measures can be justified when it aims at protecting nascent industries, or avoiding massive unemployment or social distress in a particular sector.

Affirming that liberalisation of existing regulations under the GATS agreement may lead to benefits for host countries (annotations to question 3.5) is an unfounded generalisation. The same could be said with regard to the sentence referring to a liberalisation of GATS Mode 4 which "may mutually benefit the home and host country" (annotation to question 3.5). We reiterate that the WTO and trade policies in general do not offer the appropriate framework to deal with movement of natural persons across the borders.

Chapter 4 Competition policy

The PFI should at least be neutral with regard to privatisation. Question 4.6 needs to be reformulated so not to indicate that governments need to privatise with the purpose of attracting investment. Privatisation or not is a choice that should be left to the governments and their citizens.

Chapter 5 Tax policy

In order to make the PFI more balanced, it should, before discussing the level of tax burden preferred by investors, discuss the level needed to contribute to economic growth, job creation and higher living standards. Section 5.3, concerning the level of tax burden that would be consistent with the government's investment attraction strategy, needs to be modified to take into account the fact that developing countries are struggling with poverty reduction and need tax revenues to achieve this.

The annotation to question 5.6 should state that “policy makers are encouraged to give recognition to the reasonable expectations of taxpayers when designing or reforming the tax system” (not “their corporate tax system”) or be deleted altogether.

Chapter 6 Corporate governance

The current text misrepresents the crucial issue of corporate governance for development. It is excessively focused on the protection of shareholders while insufficient consideration is given to other core governance mechanisms, such as the functioning and accountability of the board. In particular, the role of stakeholders in corporate governance – which takes a whole chapter in both the OECD Principles of Corporate Governance and the OECD Guidelines on Corporate Governance of State-Owned Enterprises – is completely absent from the text. The structure of the chapter should be revised accordingly.

Regarding the current text, we have the following observations.

While question 6.1 is welcome, the annotations do not propose a clear direction as regards the appropriate regulatory mix between self-regulation and binding regulation. Given the development angle of the PFI, it is important, although self-evident, to stress the primacy of robust and enforceable regulation over self-regulation.

Question 6.3 and its annotation are particularly indicative of the lack of consideration for anything else than the rights of shareholders. The question rightly addresses a very important form of corporate governance failures (resource diversion by corporate insiders). However, the text limits prevention mechanisms to the protection of shareholders' interest. The very fact that such abuse may impact other parties – workers in particular, if not the company itself – appears to be of complete secondary concern.

The first sentence of the second paragraph of the annotation to question 6.4 should not target foreign investors in particular.

The annotation to question 6.6 “Boards have a duty to act in the best interest of the company and its shareholders” is in conflict with regulations enforced in civil law jurisdictions, for which directors' duties are to act in the sole interest of the company, not its shareholders. It should be rephrased: “Boards should be accountable to regulators as regard the fulfilment of their duties as defined by national law”.

Question 6.8 and its annotation should focus on governance and accountability of state-owned enterprises. The additional requirement of “ensuring a level playing field” with the private sector should be confined to commercial SOEs and should not conflict with public service regulations.

Chapter 7 Policies for promoting responsible business conduct

This chapter would benefit from a paragraph on the role of trade unions in fostering and monitoring responsible business conduct. It focuses too much on the role of governments and business.

It should also include reference to the ILO Tripartite Declaration on Multinational Enterprises and Social Policy in its consideration of what should be considered a responsible business conduct.

Although the Guidelines are referred to in this chapter, they should be emphasised further. The PFI should clearly stress adhering governments' responsibility to promote and implement the Guidelines. A question should be added on measures taken to make companies comply with the Guidelines. Furthermore, non-adhering countries need to be made aware that the Guidelines are applicable to multinational enterprises operating in their countries. Even if this is mentioned briefly in one of the annotations (7.7), it needs to be stated more clearly.

The background paper deals with several important issues that are not treated in the PFI, such as companies' responsibility for sub-contractors, links to export credits and the protection of human rights and whistleblowers. These issues are essential when discussing policies for responsible business conduct and should be included. They could for example be examined in connection with the Guidelines.

As to the annotation to question 7.1, we would suggest adding the following paragraph:

“One of the principal reasons that companies undertake voluntary corporate social responsibility activities has been the moral issues and negative consequences for companies of doing business in countries where governments do not provide the necessary enabling environment for human rights to be respected. In distinguishing the role of governments and companies it is important to emphasize that voluntary activities of companies cannot in any way substitute for the rule of law and the obligation of the state to take positive measures to guarantee that human rights are respected.”

Question 7.2 should specifically reference industrial relations and collective bargaining. The following question should be added: “How does the government provide an enabling environment for industrial relations including the institutional and legal framework for genuine collective bargaining?”

As regards the annotation to question 7.2, the following paragraph should be added:

“Industrial relations and collective bargaining should be recognised as the most effective and efficient private means to ensure that business activities have positive social outcomes. Industrial relations are also one of the most important and effective forms of two way communication.”

As to the annotation to question 7.3, we would suggest that the last sentence is removed. It is not appropriate for the PFI to suggest to developing country governments that they should “seek to avoid undue regulatory burdens”. This section discusses frameworks for disclosure, which is an area which is not sufficiently regulated. Voluntary initiatives may be useful as complements to law and regulation, but they are not enough to ensure transparency and disclosure of company information.

We would also propose that the last part of the annotation to question 7.4 is deleted. We do not share the view that governments should “reward credible implementation of such practices by reducing fines paid by companies that appear to have made a genuine effort to avoid misconduct”. Companies have an obligation to comply with laws and regulations and should not be rewarded for their compliance. As to private initiatives, it is not the role of governments to reward companies for observing voluntary standards.

As to the annotation to question 7.5, it correctly notes that “To the extent that the business case exists, private initiatives are self-enforcing (that is government intervention is not required to make them happen).” What should also be stated is that where there is no business case for responsible behaviour (for instance where this would put the responsible business at a competitive disadvantage), then the government must regulate as promoting CSR activities would not be an effective policy.

Question 7.7 and its annotation should also explicitly refer to the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy.

Chapter 8 Human resource development

The PFI should recognise the role of trade unions and the importance of collective bargaining. This is the basis for a well functioning labour market and effective human resource development policies and it has to be clearly stated in the PFI.

The following paragraph should be added to the annotation to question 8.7 on labour market regulation and job creation:

“Trade unions play an important role in representing the interests and preferences of workers. Their impact on investment depends on having a healthy dialogue between freely elected associations of workers and employers.”

The annotation to question 8.10 has to be revised. Although improved, we could not agree to a text suggesting that there is a need for “reducing the complexity of legal procedures in the event of job redundancy”. Labour market policies vary enormously in countries as they reflect different conditions and choices. The Nordic countries have traditionally combined high employment with a high level of security, while other countries have chosen other models. Thus, the PFI should not make general recommendations which may work in some countries, but not in others.

Chapter 10 Public governance

As to regulatory impact assessments, we would suggest that the following paragraph is added to the annotation to question 10.3:

“Such assessments of the economic and social impact of regulations should give due weight to the multiple benefits that can derive from the effective application of regulation to economic activity that is currently undertaken on an informal basis. The extension of regulation, by means of its proper enforcement, can be beneficial for governments (by providing higher fiscal revenues), for investors (by providing greater predictability and stability in their operations, and by avoiding competition with "free-riders" that fail to comply with regulations) and for workers (by enabling them to have legal recourse for the protection of their rights).”

Although the annotation to question 10.7 refers to whistle-blowing, the text should also encourage governments to protect whistleblowers from discriminatory or disciplinary action or any other retaliation.

Veronica Nilsson, TUAC

ICFTU

Robert Szewczy, NSZZ "Solidarnosc"

Annex. Text of the Invitation for Public Consultation

Conducted online between 16 January 2006 and 15 February 2006

The OECD Investment Committee and its partners in the Task Force are seeking the public's views through an online consultation on the draft text of the Policy Framework for Investment and avenues for future use. This draft is work in progress. Comments of all sorts are welcome -- from a general assessment of only a few lines to detailed, point-by-point remarks.

The Policy Framework for Investment aims to help governments improve their investment environments, taking into account the broader interests of the communities in which investors operate. Drawing on good practices from OECD and non-OECD experiences, the Framework supports the United Nations Monterrey Consensus adopted in 2002, which emphasised the critical importance of private investment, both domestic and foreign, for achieving important development objectives, including the Millennium Development Goals. The Monterrey Consensus ascribed responsibility to governments for creating the domestic conditions for private investment to flourish.

The Policy Framework for Investment proposes a set of practical policy considerations in ten inter-related areas that contribute to a healthy investment environment. Governments can make use of the Policy Framework for Investment in country self-evaluations and reform implementation, in regional co-operation, and in peer reviews. The Framework can also provide a reference point for international organisations' capacity building programmes, investment promotion agencies, donors as they assist developing country partners in improving the investment environment, and business, labour and other non-governmental organisations in their dialogue with governments. Following completion, the OECD, working with the World Bank, UNCTAD, and other international organisations, will assist governments and interested parties in using the Framework.

While the Policy Framework for Investment is addressed to governments, it is to be seen in the broader context of other converging international initiatives to improve the investment climate, including the OECD Guidelines for Multinational Enterprises.

The Framework is being developed by a Task Force through a partnership process involving OECD and non-OECD government representatives, in co-operation with civil society and international organisations.

Procedure

DRAFT TEXT: Download the draft text of the Policy Framework for Investment in pdf file format.

CONTACT: Comments may be sent to Takeshi Koyama, OECD Investment Division [takeshi.koyama@oecd.org].

CUT-OFF DATE FOR COMMENTS: In order for comments to be considered at the next meeting of the Task Force in March 2006 and by the other OECD bodies involved in the development of the Policy Framework for Investment, they must be received by 10 February 2006.

POSTING COMMENTS: Comments will be posted on the OECD Investment Committee's website (www.oecd.org/daf/investment). It is the policy of the OECD to publish all responses, and anyone not wishing to have his/her response published, or anyone wishing to remain anonymous, should say so explicitly.

COMMENTS NAMING ORGANISATIONS AND INDIVIDUALS: The purpose of the consultations is to provide inputs of generic interest for the Task Force's consideration – they are not intended for use as a forum for waging campaigns and self-promotion.
