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DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
INVESTMENT COMMITTEE

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FREEDOM OF INVESTMENT PROCESS:

Responsible Investment in Agriculture

(Note by the Secretariat)

26 March 2010

This document has been revised -- the list of issues for discussion proposed for participants at "Freedom of Investment" Roundtable 12 has been removed. Other OECD bodies and international organisations have expressed an interest in referring to this document. Unless further comments are received by May 12, the Secretariat will post this version of the document on the Freedom of Investment webpage on that date, at close of business.

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I. Introduction

Investment, whether foreign or domestic, private or government-backed, plays a key role in financing agricultural growth. Participants from developing countries [at the Roundtable on Promoting Responsible Investment in Agriculture] emphasized their efforts to attract investment in and for their agriculture sectors, with a view toward improving food security, yields, output, and value added, while benefiting from additional farm and firm income, direct and indirect employment, productive infrastructure, technology transfer, new product development, and better access to attractive markets.

Many participants underlined, on the other hand, the complexity of issues related to land and other resources, and pointed out that poorly conceived or executed investments, particularly those involving large tracts of land in developing countries, could have unintended negative impacts in terms of political stability, social cohesion, human security, sustainable food production, household food security or environmental protection for the receiving country…

Chair's summary; "Roundtable on Promoting Responsible International Investment in Agriculture "held concurrent with the 64th United Nations General Assembly[1]

1. Cross-border investment in agricultural production and farmland is not a new phenomenon, but it is growing in importance. According to a recent UNCTAD report, FDI flows into agricultural production tripled to USD 3 billion annually between 1990 and 2007, driven by the food import needs of populous emerging markets, growing demand for bio fuel production and land and water shortages in some developing home countries. These flows are a small part of world FDI, but in many low income countries agriculture accounts for a relatively large share of FDI inflows and the latter are significant for capital formation in the sector.[2]

2. As noted in the above quote from the Chair's summary of the *Roundtable on Promoting Responsible International Investment in Agriculture*, increasing investment in agriculture is vital to achieving higher productivity and greater food production, thereby supporting global food security and poverty reduction. However, such investments can also give rise to concerns and the summary also noted that policy "measures to mitigate negative impacts associated with large-scale international investments in developing countries are urgently needed." The summary further states that "consensus emerged after discussions that all the constituencies which the participants represent, i.e. governments, the private sector, civil society and international organisations, should work together to develop principles and an international framework which translated the principles into action.[3]"

3. Participants in the Freedom of Investment (FOI) Roundtable 11, held in October 2009, asked the OECD Secretariat to prepare a background note to support discussions of responsible investment in agriculture at FOI Roundtable 12. They stressed the importance of adding value relative to existing initiatives. This document responds to that request. It reviews current multilateral initiatives in this area and explores what role, if any, the investment instruments housed in the OECD might play in facilitating

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1 This Roundtable was organised by the government of Japan, in cooperation with the Food and Agriculture Organisation, the International Fund for Agricultural Development and UCTAD in New York on September 23, 2009. Over 70 people, from 31 countries and 13 organizations, attended.

2 Source: *World Investment Report* 2009, "Transnational Corporations, Agricultural Production and Development", Key messages, page xviii.

3 Chair's summary: *Roundtable on Promoting* Responsible *International Investment in Agriculture*; paragraph 5.

and expediting work in other multilateral fora, in particular by providing relevant concepts and principles and unique government-backed, consensus-based follow up procedures.

II. International initiatives for promoting responsible investment in agriculture

4. Over the past two years, a number of private sector and government initiatives have explored the issue of responsible investment in agriculture. The current document's bibliography lists related publications and policy statements. These include analytical reports that provide valuable background information on the types of issues raised by investments in primary agricultural production. These cover a vast range of issues; for example, core labour standards, resettlement of local populations, public sector transparency and environmental protection. These studies also highlight the complex inter-connections between public sector and investor responsibilities in this area – reaping the full benefits of investment in agriculture involves responsible behaviour by both government and investors and effective coordination between the two.

5. In addition to these analytical reports, inter-governmental initiatives have issued lists of "tenets" or "concepts and principles" or other policy statements on responsible investment in agriculture. These include a *Declaration on Land Issues and Challenges* from leaders of the African Union members states. The Declaration mandates work by various African partners on land governance in order to further the goals of poverty eradication, sustainable socio-economic growth and the preservation, protection and renewability of Africa's land. In addition, the UN Special Rapporteur on the Right to Food issued 11 "recommendations" to investors and home and host states in the field of investment in agriculture. The government of Japan working in cooperation with UNCTAD, World Bank, Food and Agriculture Organisation (FAO) and the International Fund for Agricultural Development issued seven tenets for responsible investment in agriculture; these resemble closely a related set of principles issued by the development ministry of Germany. More detailed descriptions of these and other initiatives may be found in the Annex.

6. Although their perspectives differ, these initiatives promote a shared set of fundamental principles. These "seven tenets" just mentioned distil the basic ideas. These are:[4]

- Land and resource rights: Existing rights to land and natural resources are recognized and respected;
- Food security: Investments do not jeopardize food security, but rather strengthen it;
- Transparency, good governance and the enabling environment: Processes for accessing land and making associated investments are transparent, monitored and ensure accountability;
- Consultation and participation: Those materially affected are consulted and agreements from consultations are recorded and enforced;
- Economic viability and responsible agro-enterprise investing: Projects are viable economically, respect the rule of law, reflect industry best practice and result in durable shared value;

[4] See paragraph 6 of the Chair's summary. These seven tenets were further developed and refined in a subsequent report by UNCTAD, World Bank, Food and Agriculture Organisation and the International Fund for Agricultural Development (see Bibliography).

- Social sustainability: Investments generate desirable social and distributional impacts and do not increase vulnerability;

- Environmental sustainability: Environmental impacts are quantified and measures taken to encourage sustainable resource use, while minimising and mitigating their negative impacts.

7. These seven tenets reflect fundamental values – transparency, sustainable development, corporate accountability, environmental protection, consultation, and respecting property, labour and indigenous peoples' rights -- that are widely shared within the international community. Many of these ideas are formalised in international treaties, recommendations or policy statements.[5] The challenge for multilateral efforts on responsible investment in agriculture resides in construing the exact meaning of these concepts and principles for responsible investment in agriculture (including for particular national and sectoral circumstances) and in devising institutional channels to promote them in this context.

III. Responsible investment in agriculture and OECD investment instruments

8. The investment instruments housed at the OECD also reflect and promote, in an investment context, these same fundamental ideas. As work on "responsible investment in agriculture" progresses in various international fora, it is worth reflecting on whether these investment instruments have the potential to facilitate and expedite this work. The investment instruments promote openness in international investment, the responsible design and implementation of public policy by both home and host governments, responsible business conduct by investors and international cooperation. Perhaps more importantly, the instruments are associated with unique government-backed follow up procedures. This section reviews these instruments and procedures.

9. Although many OECD-based investment instruments are available,[6] three instruments would appear to have the most immediate relevance for responsible investment in agriculture. First, the Policy Framework for Investment (PFI) provides ideas and guidance on developing an appropriate enabling environment for investment, both domestic and international. Second, the OECD Guidelines for Multinational Enterprises (the MNE Guidelines) provide recommendations for responsible business conduct in many areas (labour, environment, combating bribery, etc.) and are backed-up by follow up institutions, National Contact Points (NCPs), that are located in each of the 42 governments that adhere to the Guidelines. Third, the OECD Risk Awareness Tool for MNEs in Weak Governance Zones (WGZ Tool) provides ideas and guidance for investors operating in zones where governments are either unwilling or unable to assume government responsibilities – this creates special responsibilities for investors in these areas. Box 1 describes these instruments in more detail.

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5 For example: in the area of public sector transparency, the 1998 IMF Code of Good Practice on Fiscal Transparency and the 2002 APEC Leaders' Statement to Implement APEC Transparency Standards; in the area of human rights, the Universal Declaration and its related Conventions and Covenants; in the area of sustainable development and environment, numerous conventions and protocols housed within the UN system; in the area of labour rights, the ILO Conventions and Recommendations.

6 See also the Codes of Liberalisation and the OECD Declaration on International Investment and Multinational Enterprises, including its National Treatment Instrument at www.oecd.org/daf/investment.

Box 1. Investment instruments with particular relevance for responsible investment in agriculture

The ***Policy Framework for Investment (PFI)*** is the most comprehensive and systematic approach for improving investment conditions ever developed. It addresses some 82 questions to governments to help them design and implement policy reform to create a truly attractive, robust and competitive environment for domestic and foreign investment. The instrument covers investment policy, investment promotion and facilitation, trade policy, competition policy, tax policy, corporate governance, responsible business conduct, human resource development, infrastructure and financial sector development and public governance.

The ten policy areas are widely recognised, including in the Monterrey Consensus, as underpinning a healthy environment for all investors, from small- and medium-sized firms to large multinational enterprises. The PFI is neither prescriptive nor binding. It emphasises the fundamental principles of rule of law, transparency, non-discrimination and the protection of property rights but leaves for the country concerned the choice of policies, based on its economic circumstances and institutional capabilities. The PFI has been used to conduct horizontal country reviews (Egypt, Morocco, Peru, Vietnam, India, Indonesia) and thematic country reviews (the Russian energy sector and responsible business conduct for China). Also, in the context of the NEPAD-OECD Africa Investment Initiative, the OECD is adapting the PFI to promote responsible investment in agriculture in Africa. A policy framework assessment for responsible investment in agriculture will be undertaken this year in Burkina Faso.

The Guidelines for Multinational Enterprises are recommendations addressed by governments to multinational enterprises operating in or from adhering countries. They provide principles and standards for responsible business conduct in a variety of areas including employment and industrial relations, human rights, environment, information disclosure, combating bribery, consumer interests, science and technology, competition, and taxation. Adhering governments - representing all regions of the world and accounting for 85% of foreign direct investment – are committed to encouraging enterprises operating in their territory to observe a set of widely recognised principles and standards for responsible business conduct wherever they operate. They establish National Contact Points (NCPs) that promote the Guidelines in the national context and that are responsible for an alternative dispute settlement procedure, called specific instances. The specific instance procedure is a government-backed, voluntary and non-adversarial mechanism for resolving conflicts regarding the observance of the Guidelines in a specific investment context. The most recent revision of the Guidelines was completed in June 2000; consultations are now being held about a possible new review.

The ***OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones*** aims to help companies that invest in countries where governments are unwilling or unable to assume their responsibilities. It poses a range of questions to investors addressing risks and ethical dilemmas that companies are likely to face in weak governance zones. These relate to obeying home and host country law and observing international instruments; the need for heightened care in managing investments in these difficult areas; and helping host countries build more solid economic and political institutions The WGZ Tool was developed inter alia in response the UN Security Council's call on OECD members to promote observance of the OECD Guidelines in response to the 2002 UN Expert Panel's report on illegal exploitation of natural resources in the Democratic Republic of Congo. In June 2007, the UN Security Council stressed the importance of the OECD Risk Awareness Tool for promoting responsible business conduct and avoiding the illegal exploitation of natural resources in countries in conflict.

10. Noteworthy characteristics of these instruments include:

- ***Internationally-accepted principles for appropriate conduct***. The investment instruments are derived from internationally agreed principles for responsible conduct by governments and investors – in effect, they open up a forum for promoting, in an investment context, concepts and principles that the international community has already agreed to. The PFI, for example, notes that it "should be seen in the broad context of the United Nations Millennium Development Declaration and recent multilateral efforts to strengthen the international and national environments in which business is conducted…. In common with those initiatives, it builds on…. universally shared values of democratic society and respect for human rights, including property rights.[7]" Likewise, the MNE Guidelines draw on 14 major international conventions and

[7] Part I. *The Policy* Framework *for Investment*. http://www.oecd.org/dataoecd/1/31/36671400.pdf.

declarations. Research shows that non-member countries have the same rate of formal adherence to the international instruments cited as sources for the MNE Guidelines as OECD members; thus, the Guidelines clarify the meaning for international investors of these internationally-agreed principles and provide a unique procedure for promoting them (see below).[8]

- ***Innovations in international concepts and principles***. Where internationally agreed concepts and principles do not exist, the OECD provides a forum in which emerging concepts can be identified, developed and refined. An important example of the dynamic development and monitoring of new principles in OECD-hosted fora can be found in the area of international taxation. Thus, in some areas, the investment instruments promote innovative concepts and principles; for example, the OECD Guidelines for Multinational Enterprises is the only government-backed corporate responsibility instrument to deal with tax ethics.

- ***Responsible conduct by home and host governments and investors***. The instruments help clarify the meaning of responsible conduct in the field of investment for three types of decision maker: 1) recipient countries governments, (building appropriate policy frameworks for domestic and international investment); 2) international investors (obeying the law and observing internationally-agreed standards for business conduct, even when these are not reflected in the host country policy frameworks); and 3) home governments (promoting responsible conduct by "their" investors through such policy channels as overseas investment promotion and management of state owned enterprises operating abroad).

- ***Unique implementation procedures - Promoting government responsibility through peer review.*** Peer reviews of policies are a hallmark of policy discussions hosted at the OECD. In them, participating governments review each other's policies. They may decide to issue, using consensus-based decision rules, reports on and evaluations of these policies. Thus, peer reviews enhance transparency and provide a forum for shared learning and peer pressure in support of policy reform. But the process also recognises that the ultimate responsibility for effective policy implementation lies with the government that is undertaking it.

- ***Unique implementation procedures of the OECD Guidelines – promoting responsible business conduct***. The main responsibility for promotion of the Guidelines resides with the National Contact Points (NCPs) – government offices located in each of the 42 adhering governments that look at investments made in or from their territories. In addition to publicising the Guidelines, the NCPS are responsible for a unique dispute settlement procedure, referred to as "specific instances." This procedure – which involves voluntary participation in consensual and non-adversarial means of dispute settlement – has been used some 170 times since its creation in 2000. The specific instance procedure provides a way for governments to engage in dialogue with investors and other parties regarding the way that specific investment projects are managed; it can be and has been used on two occasions to discuss management of projects in primary agricultural production. Relevant cases are described in Box 2.

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8 See OECD Working Paper on International Investment 2005/2 "Multilateral influences on the OECD Guidelines for Multinational Enterprises". www.oecd.org/dataoecd/29/40/35666447.pdf.

Box 2. Alternative dispute settlement ('specific instances') and responsible investment in agriculture

The "specific instance" procedure is a unique government-backed dispute settlement procedure – based on the MNE Guidelines' recommendations on appropriate business conduct. The procedure is used to help resolve disputes relating to investments "in or from" the territories of the 42 adhering governments. Under the procedure, the National Contact Points (NCPs; institutions set up in each adhering government to promote observance of Guidelines' recommendations among multinational enterprises operating in or from their territories) provide "access to consensual and non-adversarial means, such as consultation or mediation, to assist in dealing with the issues"[9] raised by specific investment projects.

The specific instance procedure has been used to look at 171 cases of business conduct since the creation of the procedure during the 2000 review of the MNE Guidelines. These cases concern investments in both adhering countries (e.g. Argentina, Australia, Austria, Belgium, Brazil, Chile, France and the United States) and in non-adhering countries (e.g. Colombia, Democratic Republic of Congo, India, Myanmar and Zambia). The majority of these have looked at labour issues – numerous cases have dealt with child labour, forced labour and the right to organise and collective bargaining. However, the procedure has been used to look at business conduct under all the chapters of the Guidelines, including environment, combating bribery, consumer interests and taxation.

Two specific instances – Marine Harvest and Bayer CropScience -- dealt directly with investor conduct in primary agricultural production. An additional 8 instances (mainly in mining) have addressed issues similar to those raised by investments in primary agricultural production -- e.g. treatment of local people, including during resettlement operations and management of relations with business partners, including suppliers. The two agriculture cases are described below.

Marine Harvest. In September 2002, the Chilean NCP received a request from Dutch and Chilean NGOs to consider a specific instance involving the labour and environmental management practices of a Dutch fisheries and aquaculture company, Marine Harvest S.A., operating in Chile. The request raised a number of issues, including legal compliance, freedom of association, right to collective bargaining, protection of artisanal fishing rights and protection of the environment. The Chilean NCP met several times with the parties and requested information from Chilean fisheries experts, from Chile's National Labour Directorate and from the Netherlands NCP. It visited the company's facilities, interviewed trade union leaders and met with representatives of local associations. The NCP issued a public statement and a report containing detailed recommendations designed to reduce tensions and to improve compliance with fisheries and aquaculture regulations and to improve the company's local suppliers' compliance with labour regulations. The report proposed that ongoing dialogue be initiated between the company, the NGOs and various local associations; this proposal was followed up on by the parties concerned and by the Chilean government.

Bayer CropScience. On October 2004, 3 NGOs requested that the German NCP look at allegations that suppliers of Bayer CropScience in the Indian state of Andrah Pradesh employed children in cotton cultivation and that Bayer CropScience had not taken adequate measures to counter the practice. Bayer CropScience argued that all reasonable means had been taken to prevent the practice. After comprehensive discussions with the parties to the dispute, Bayer CropScience published a "voluntary commitment to act in conformity with the Guidelines recommendations on relations with business partners and on contributing to the effective abolition of child labour, including making period monitoring reports available to the German NCP and other interested parties.

For more information on specific instances and NCP handling of these and other specific instances, see the NCP statements on specific instances, which are archived at: www.oecd.org/daf/investment/guidelines.

[9] See Procedural Guidance, Section C.2.d). of the June 20, 2000 Decision of the OECD Council www.oecd.org/daf/investment/guidelines.

ANNEX. GUIDELINES FOR PROMOTING RESPONSIBLE INVESTMENT IN AGRICULTURE – OFFICIAL INITIATIVES

African Union. In July 2009, the Heads of State of the African Union (AU) adopted the "*Declaration on land issues and challenges in Africa*". In it, AU Heads of State stress the urgency of building a solid institutional framework for investment in agriculture. The statement stresses that poverty eradication, sustainable socio-economic growth and the preservation, protection and renewability of Africa's land are the goals of its efforts to develop strong systems of land governance that recognize the diversity and complexity of the systems under which land and related resources are hold, managed and used. The Declaration provides specific mandates to many organizations (e.g. the AU Commission, the Regional Economic Communities, and Member States) to undertake efforts to make progress on this issue.

The Government of Japan, UNCTAD, World Bank, Food and Agriculture Organisation and the International Fund for Agricultural Development held a roundtable on 23 September 2009, concurrent with the 64th United Nations General Assembly, on "*Promoting Responsible International Investment in Agriculture*". The meeting was attended by over 70 people from 31 countries all over the world and 12 organizations including OECD. Together with UNCTAD, the World Bank, FAO and IFAD, the chair of the meeting issued a summary, which includes 7 tenets on responsible investment in agriculture addressed to investors', home and host states. These 7 tenets deal with: land and resource rights; food security; transparency good governance and enabling environment; consultation and participation; economic viability and responsible agro-enterprise investing; social sustainability and environmental sustainability.

The German Federal Ministry for Economic Co-operation and Development published, in August 2009, a report called: "*Development Policy Stance on the Topic of Land Grabbing – the Purchase and Leasing of Large Areas of Land in Developing Countries*". In it, the ministry proposes six principles for responsible investment in agriculture. These principles are nearly identical to the ones listed in the preceding entry.

The Inter Parliamentary Union (IPU) adopted a resolution on the issue of global food security at its October 2009 assembly in Geneva, Switzerland. The document includes calls for action in the following areas: increasing investment in agricultural technology; making knowledge and know-how in agriculture more accessible, particularly to the rural poor; properly regulating private investment, which is recognized to play an important role in development; and facilitating greater cooperation between international, regional and non-governmental organisations, governments and farmer representatives.

The Economic and Monetary Union of West Africa (French: Union Economique et Monétaire Ouest Africaine, "UEMOA") held in October 2009, a workshop on "*the question of rural land rights in the face of the challenge of regional integration is within the core area of the UEMOA*". In its final document the results of the workshop were presented as recommendations to the UEMOA, its member states and to the Economic Community of West African States, "ECOWAS" as well as other regional.

UN Special Rapporteur (UNSR) on the Right to Food. On 11 June 2009 Olivier De Schutter, UN Special Rapporteur on the Right to Food, published "*Large-scale land acquisitions and leases: A set of core principles and measures to address the human rights challenge*". The paper contains 11 "recommendations" to investors home and host states in the field of investment in agriculture. These include transparency; participation of local communities; free prior informed consent of local communities; appropriate enabling legislation to define and safeguard the rights of local communities; employment creation; respecting the environment; close management by public authorities of investors' respect of agreements; selling food into local markets; impact assessments prior to the completion of the negotiations; recognition of the particular rights of indigenous peoples; and protection of agricultural wage workers.

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