12[TH] ROUNDTABLE ON FREEDOM OF INVESTMENT

Paris, France – 26 March 2010

Summary of Roundtable discussions by the OECD Secretariat

The "Freedom of Investment" (FOI) process is a forum for inter-governmental dialogue that brings together the 30 OECD members, 12 adherents to the OECD Declaration on International Investment and Multinational Enterprises[1] and many other non-OECD governments. The FOI process seeks to support recipient countries' efforts to further open up to international investment and to design effective responses to genuine concerns raised by international investment. Since 2006, discussions on Freedom of Investment have focussed on investment measures relating to national security, and more recently on countries' investment policy responses to the financial and economic crisis.

Reporting on OECD and non-OECD participants' policy measures[2] supports discussions at the regular Freedom of Investment Roundtables. Monitoring and exchanges at the FOI Roundtables contribute to observance of international investment commitments, including those taken under the OECD investment instruments and in the context of the G20.

The present document summarises the views and information contributed by participants at the Freedom of Investment Roundtable 12. In addition to OECD members, Argentina, Brazil, Chile, Estonia, Indonesia, Israel, Lithuania, Malaysia, Morocco, Peru, Romania, Singapore, Slovenia, and South Africa participated in this Roundtable. Representatives from the Food and Agriculture Organisation (FAO), the Economic Community of West African States (ECOWAS), the International Monetary Fund also attended the Roundtable and contributed to the discussions. The Abu Dhabi Investment Authority, a sovereign wealth fund, participated and called to Roundtable participants' attention the publication of the first ADIA Annual Review, which reports on ADIA's investment activities in 2009.

Accounts of discussions at earlier FOI Roundtables are available on the website dedicated to the FOI process.[3]

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1 The adherents to the Declaration include all 30 OECD member countries, and 12 non-member countries: Argentina, Brazil, Chile, Egypt, Estonia, Israel, Latvia, Lithuania, Morocco, Peru, Romania, and Slovenia.

2 Reports on recent investment policy developments are available at: www.oecd.org/investment/foi.

3 www.oecd.org/daf/investment/foi.

***Tour d'horizon* of recent developments**

The *Tour d'horizon* provides an opportunity for Roundtable participants to monitor, share information and express views and recommendations on recent investment policy developments. Discussions at Roundtable 12 covered developments in many countries, and Argentina, Brazil, Canada, the European Union, and the Slovak Republic responded to specific questions.

- **Recent investment policy developments in the response to the financial and economic crisis.** As the financial crisis deepened in 2008, fears of a destructive cycle of protectionist and retaliatory policies took hold. In response, governments confirmed their commitments to openness for foreign investment and international capital flows under the OECD investment instruments and in the framework of the G20. The Freedom of Investment process has stepped up the monitoring of investment policies and has regularly established and published inventories of investment policy developments.[4]

  Overall, the findings of this policy monitoring by the OECD have been reassuring. The most recent inventory of investment measures, covering the period between 1 September 2009 and 14 February 2010 and subject to discussion at the Roundtable 12, suggested that most general investment measures (those not covered by exceptions for national security or emergencies) point towards greater openness and clarity – a confirmation of earlier assessments since mid-2009.

  Although this finding contrasts with more alarming assessments published by other organisations, Roundtable participants concurred with this description of the overall trend based on the evidence that policy monitoring of the Freedom of Investment process provided. At the same time, participants confirmed the finding that the considerable discretion given to some governments for the implementation of state support and rescue programmes might open up opportunities for disguised protectionism. They also agreed that government holdings acquired in the course of crisis response measures may jeopardise governments' impartiality in policy making and law enforcement and agreed that government ownership of firms and rescues may distort and delay economic restructuring.

- **International Monetary Fund (IMF) – Position on capital controls**. OECD policy monitoring documented that emerging economies have recently shown growing interest in capital controls. In February 2010, the IMF issued a staff position note elaborating on the role of capital controls.[5] According to the IMF, the view expressed in this staff paper does not, contrary to some reports, constitute a fundamental shift of the IMF's position on capital controls. The staff paper should rather be understood as a clarification made necessary by the crisis. The IMF maintains its view that the free flow of capital is beneficial to home and host societies. It notes however that capital controls may in some cases complement standard macro-economic tools where these do not suffice to address massive financial flows. Such flows in emerging economies were observed recently as these economies recovered earlier from the global slowdown than mature markets. The IMF stressed however that capital controls should not become permanent and, in relation to the current situation, shared its view that capital flows will balance out as mature markets also emerge from the crisis. Participants in the Roundtable noted that the OECD Secretariat has recently issued a note

4 The inventories are available on the website dedicated to the FOI process www.oecd.org/daf/investment/foi.

5 "Capital Inflows: The Role of Controls", IMF Staff Position Note SPN/10/04, 19 February 2010, available at www.imf.org/external/pubs/ft/spn/2010/spn1004.pdf.

describing the treatment of capital controls under the OECD Code of Liberalisation of Capital Movements that reflected longstanding views based on the OECD Codes since 1961.[6]

- **Brazil – Levy on certain short-term capital flows.** Brazil introduced a 2 per cent levy on short-term capital flows in November 2009 to prevent strong capital inflows from provoking asset price bubbles and to ease upward pressure on the Real. Brazil reported that the wholesale reduction of interest rates in many other countries pushed Brazilian interest rates among the world's highest and led policymakers to introduce the levy. Brazil considers the levy an effective response to the 'problem' of excessive capital inflows.

- **Canada – Implementation of Canada-EU Air Transport Agreement**. Canada informed Roundtable participants about the timeframe it envisaged for implementing regulations to increase the foreign ownership limit of voting interests in its airlines from 25% up to 49%. This change would. This change would give effect to provisions on foreign ownership under the Canada–EU Air Transport Agreement that the parties signed in December 2009. Canada has already amended the law to allow the government to increase the foreign ownership limit, but implementing regulations were still under consideration. Canada also explained that the amended law respected Canada's obligations to accord most-favoured nation (MFN) treatment to investors, and that MFN obligations will also be kept in mind when implementing regulations are drafted. The Secretariat took this occasion to recall the specific scope that MFN obligations have for maritime and air transport, as these sectors are traditionally governed by bilateral treaties under international conventions. It noted that MFN treatment in this area requires that countries stand ready to accord MFN treatment to afford any interested countries adequate opportunity to demonstrate that comparable circumstances exist for entering into similar, more favourable agreements.

- **Slovak Republic – New Act on Certain Measures Regarding Strategic Companies**. The Slovak Republic reported on the implications of the Act on Certain Measures Regarding Strategic Companies. This Act was introduced in late 2009 as part of the government's anti-crisis package and gives the government a pre-emptive right to acquire assets of certain "strategic" companies when these face serious economic difficulties. The Slovak Republic reported that while the government has declared one bankrupt chemicals firm, *Novácke chemické závody*, as "strategic", it has not yet made use of its powers under the new Act, because it had not yet acquired the company's assets. The Slovak Republic explained that in terms of procedure, the Act required that the trustee of the bankrupt company offer the government the company's assets; the purchase price was to be determined by public tender or by estimate.

- **Argentina – Position regarding arbitral awards**. In an oral statement, Argentina reviewed the status of arbitration claims (see Box 1) brought by foreign investors following Argentina's financial crisis of 2001. Argentina reported that, so far, two claimants have received final arbitral awards against Argentina under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID). However, according to Argentina, these claimants have not initiated a formal process before the Argentine authorities to collect the awards, a necessary pre-condition for payment.

  Questioned about the conformity of such a domestic procedure with international obligations under the ICSID Convention, Argentina explained that this procedure essentially takes place before administrative authorities, but must be initiated before the court that Argentina has designated for the purposes of Article 54(2) of the ICSID Convention. Argentina noted that, according to the

[6] OECD Investment News no. 12, March 2010 (www.oecd.org/daf/investment).

ICSID website, other countries (e.g. Australia, New Zealand, Ireland, Switzerland and the United States) have likewise designated judicial authorities for this purpose. According to Argentina, the procedure, which is the same that must be followed by any creditor of a final judgment of a domestic court, was established before Argentina concluded its first Bilateral Investment Treaty and ratified the ICSID Convention, and has not been substantially modified since.

According to Argentina, this formal process is mandatory for all judicial creditors (domestic and foreign) of the Argentine State and does not entail any kind of review of the merits of the award. Argentina estimates that the procedure in its own country would take around six to twelve months to complete.

Argentina argued that while Article 53 of the ICSID Convention establishes the obligation to comply with an award, Article 54 defines the legal nature of an award in the domestic legal system of a state party to the ICSID Convention and the way in which an ICSID award needs to be executed.

Argentina further explained that the designation of Argentine federal courts with jurisdiction over administrative law matters pursuant to Article 54(2) of the ICSID Convention thus only designates an authority that receives documents necessary for initiating the process of payment of awards. According to Argentina, Article 54 of the ICSID Convention also ensures that a given state may subject the execution of ICSID awards to the same process that is applicable to enforcement of final judgments of domestic courts against the state. Argentina claimed that several countries have provisions similar to Argentina's legal framework, such as the United Kingdom that has made such arrangements in the UK Arbitration (International Investment Disputes) Act of 1966, which implemented the ICSID Convention in the United Kingdom.

Argentina asserts that the States Parties to the ICSID Convention did not intend to accord creditors of ICSID awards better treatment than that accorded to other private creditors of final domestic decisions. Therefore, Argentina holds that creditors of ICSID awards must follow the formal procedure for enforcement of the award as established under Article 54 of the ICSID Convention – just as much as domestic creditors must follow the process applicable for enforcement of decisions of domestic courts. Otherwise, they would be in a better position than domestic judicial creditors of Argentina, which, in Argentina's view, would be contrary to Article 54 of the ICSID Convention.

The United States challenged Argentina's interpretation of ICSID Article 54; the United States' view is that that Argentina's requirement for domestic procedures as a precondition for payment of arbitral awards is not consistent with the letter and spirit of the ICSID Convention.

More generally, participants noted that the discussion raised a number of points of generic interest to all governments and agreed that there will be merit in additional discussion and analytical work on investment dispute settlement.

Box 1. Argentina's Report on Arbitration Claims Brought against It*

Since 2001, international investors have brought 50 international arbitration claims against Argentina, alleging that it has breached its obligations under various bilateral investment agreements. Most of these claims arose out of actions taken by Argentina during its 2001 financial crisis. Initially, the total amount of the claims was approximately USD 50 billion and has been reduced to approximately USD 16 billion by March 2010. So far, 11 proceedings have been amicably settled between Argentina and the claimants, and another 11 cases are currently suspended while the parties hold amicable negotiations. Of the remaining 28 proceedings, final arbitral decisions have been issued in five cases, three of which in favour of Argentina and two in favour of the claimants. The remaining 23 cases are pending or under annulment proceedings.

The claims are based on various Bilateral Investment Treaties (BITs) that Argentina had concluded with certain states as follows: Seventeen cases have been brought under the Argentina-US BIT; nine cases under the Argentina-France BIT; seven cases under the Argentina-Spain BIT; five cases each under BITs with Italy and the UK, respectively; three cases under the Argentina-Chile BIT; two cases each under the Argentina-Germany BIT and the BIT with the Union Economique Belgo Luxembourgeoise; and one case each under BITs concluded between Argentina and Canada and the Netherlands, respectively.

The only awards issued against Argentina in cases where annulment proceedings have concluded are in favour of *CMS* (awarded USD 133 million of USD 265 million claimed), of *Azurix* (awarded USD 165 million of a claim of USD 566 or 571 million [depending on valuation method]). Neither company has initiated the process for the payment of awards pursuant to Article 54 of the ICSID Convention despite a notification from the Argentine Government that they had to follow a formal process before the competent Argentine authorities in order to obtain payment of their awards.

* Excerpts from an oral presentation by the Attorney General's Office of the Treasury of Argentina.

- **European Union – Investment policy implications of the entry into force of the Lisbon Treaty**. With the entry into force of the Lisbon Treaty, the European Union acquired the exclusive competence of foreign direct investment under the Union's common commercial policy. The European Commission noted that the inclusion of the competence for Foreign Direct Investment in the section on trade policy has consequences, in particular that the new competence does affect neither issues related to transport policy nor intra-EU arrangements. The European Commission also underlined that questions related to National Security remained, according to the Treaty, a matter for individual member states.

  The European Commission explained that three principles would guide the use of the new competence: (1) progressive abolition of restrictions for inward and outward investment flows; this objective underlies the Treaty and has already materialised in the context of GATS and the 'minimum platform for investment', both of which deal with establishment; (2) uncertainty and instability are to be avoided. While the acquisition of the competence may have an impact on member states' existing bilateral investment treaties, the validity of these treaties will not be called into question; (3) the principle of subsidiarity holds in this matter, as in other matters of assigning policy competence between the EU and the member states.

  The European Commission also reminded Roundtable participants that many details on the matter still need to be discussed internally. This includes the question at which level questions of establishment and protection will be regulated; traditionally, market access was regulated at the level of the European Union, while issues related to protection were dealt with at member state level.

- **Malaysia – Investment policies**. Malaysia, represented at the Freedom of Investment Roundtable for the first time, informed the Roundtable about its investment policies and recent reforms. Details are presented in Box 2.

Box 2. Recent Developments of Malaysia's Investment Policies:*

Since 1980, Malaysia pursues an open policy towards international trade and investment. Foreign Direct Investment (FDI) has played an important role in the country's development and industrialisation. Malaysia's policies on external trade and investment in the manufacturing and non-government services sectors are set out in Industrial Master Plans. The current 3rd Industrial Master Plan (IMP3), covering the period 2006-2020, identifies as priorities investments in targeted growth areas and integrating Malaysian companies into regional and global networks.

Malaysia has for years been undertaking measures to liberalise and improve its investment regime. It has notably: liberalized its manufacturing and services sectors; deregulated foreign investment; concluded international investment agreements; and improved its investment climate.

Almost all manufacturing industry sectors are now open for foreign investment, with the exception of sectors sensitive to national security, public health, moral, and environment. Some restrictions on foreign investment also remain in sectors of excess capacity. In manufacturing sectors, foreigners can hold 100% equity ownership in greenfield investments and in investments in existing companies' expansion and diversification projects.

Further liberalisation of service sectors is planned to tap the potential for growth in this area. Under the IMP3, Malaysia has liberalised 27 service sub-sectors, including health and social services, tourism, transport, business services, and computer and related services. All foreign ownership limits in these sub-sectors have been abolished.

Malaysia also seeks to enhance its attractiveness for investment through deregulation. Earlier guidelines on acquisition of equity stakes, mergers and takeovers as well as a 30% affirmative equity requirement for Malaysian companies seeking public listing have been repealed recently.

Various bilateral and regional investment agreements also contribute to Malaysia's attractiveness for foreign investment. As of March 2010, Malaysia had concluded 73 bilateral investment guarantee agreements (IGAs) and several bilateral and regional FTAs that contain provisions on investment. As a member of ASEAN, Malaysia is notably party to the ASEAN-Australia-New Zealand FTA and the ASEAN-China FTA, for instance.

Malaysia has also made efforts to improve and accelerate the administration of investment proposals and related matters to further enhance the country's attractiveness for investors.

* Information provided by the Delegation of Malaysia to the Roundtable.

Identification of investors: comparative practice in security-related investment reviews

Roundtable participants extended their long-standing discussions of investment policies relating to national security (which have been taking place since 2006) by exploring how countries establish the identity of foreign investors in the context of security-related review procedures. The OECD Secretariat prepared a note on comparative national practices in this area. The executive summary of the note is reproduced in Box 3. The Roundtable discussion addressed three broad sets of issues.

First, they considered the general question of what countries that do not have such review authorities do if they are confronted with an investor that has been identified as undesirable (e.g. one with a criminal background). Such countries cannot use investment reviews to provide, as a last resort, the legal authority to stop such an investment. In considering this issue, the representative of a small European country noted that, while his country has no investment review mechanism, it does have licensing requirements in sectors where investors must have character references and the necessary qualifications (e.g. banking and armament). This leads to a non-discriminatory screening for all applicants. During its privatisation of a regional bank, the country was confronted with a bidder who appeared to have ties to organised crime. In response, the tender was cancelled and, when a new tender was subsequently organised, the investor did not bid again. The representative also stated that he did not believe that a small country, with limited security and international intelligence resources, could operate an effective cross-sectoral security-related investment review mechanism – thus, while such a system might provide some benefits, its costs (both direct costs and indirect costs in terms of serving as an impediment on legitimate investment) are judged to be too high.

Second, countries that do have procedures talked about how they collect information on investor identity.

- Australia started by expressing scepticism about the size of the contribution to national security that could be made by investment reviews – such matters are, in its view, best handled by the authorities directly responsible for national security. Australia also noted that, under its investment review procedure, it had rejected 16 cases in total on national security grounds; some of these refusals were linked to the investor (having criminal or corrupt behaviour), but about half of the refusals were because the "target" was a sensitive one. For investment proposals where the review authorities have no experience with the investor, the review authorities check with other government departments.

- Canada stressed the advantages of the "whole of government" approach embodied in many security related investment review procedures (that is, those in which many government bodies participate). This not only provides more complete information from more parts of government, but it facilitates the full consideration of a wide variety of factors, including in particular the benefits that investments might bring. While national security authorities may place very high emphasis on possible security risks, which made lead to a bias toward limiting investments so as to minimise risk.

- The United States emphasised that investor notifications under the Committee on Foreign Investment in the United States (CFIUS) are voluntary – investors are free to decide whether or not they should make such a notification. It also noted that 16 agencies are involved in the CFIUS procedure, leading to what amounts to a 'whole of government' approach to gathering information relevant for the reviews.

Third, participants discussed the costs and benefits of investor identification and of various systems for generating information about investor identity. In this respect, the CFIUS model of information gathering – which relies on voluntary, but extensive information disclosure by investors at the outset of the CFIUS review procedure – attracted considerable attention. The Chair noted that a recent article in the business press had put the cost of making a "voluntary notification" to CFIUS at about USD 5 million. The United States noted that the expanded requirements for notification made after the 2007 CFIUS amendments enhance clarity and are thus more efficient. In addition, the costs of making the notification are not "net costs" because the investor would have to generate the same information as part of "normal due diligence". The United States is not aware of any evidence that CFIUS notification procedures discourage legitimate investors. It also stated that only 8 to 10 percent of mergers and acquisitions are subjected to a CFIUS review.

The Chair noted that the voluntary nature of CFIUS is 'curious', in light of CFIUS' important resource implications – companies that undergo the procedure must see an advantage despite the high costs; he suggested that the benefit was likely to be increased legal certainty.

Box 3. Identification of Foreign Investors: A Fact Finding Survey of Investment Review Procedures
(Executive Summary of the Note by the Secretariat)

Governments have both a right and a responsibility to safeguard the essential security interests of their people. Some governments use investment policy measures to pursue this goal. Having reliable information on identity helps recipient countries to bar investments by unwanted investors such as hostile foreign governments, terrorists or organised crime. At the same time, governments need to balance the threats posed by unwanted investors with the goal of not discouraging legitimate investors with burdensome disclosure requirements. This report presents the results of a survey of government practices in identifying foreign investors, particularly in the context of cross-sectoral, security-related investment reviews.

Eleven countries have cross-sectoral security-related investment reviews (out of more than 40 countries for which information is available). The survey shows that these 11 countries employ a variety of approaches to determining investor identity in the course of such reviews. The variations appear to reflect differing estimations of the costs and benefits of generating and analysing such information.

Some countries use "rules of thumb" to eliminate certain categories of incoming investment from consideration by review panels. This significantly reduces the information requirements for the review (including on investor identity) but may open up loopholes for access to the recipient country by unwanted investors. Others require investors themselves to disclose extensive information, including on their own identity. Others assign, at least initially, the burden of information gathering to the government.

Little information is publicly available on how governments clarify investor identity in the second, more in-depth phase of the review procedure. However, the membership of government bodies on the review panels sheds light on what government information resources are available to the review process. The present report indicates that such membership tends to be quite broad. Thus, the review panels seem to serve a "whole of government" forum in which various government information resources can be used in the context of investment reviews.

The concept of identity used in security related investment reviews is compatible with the concept of "beneficial ownership" which is central to the work of the tax and anti-money laundering (AML) authorities. However, the concept of investor identity used for security-related investment reviews is somewhat broader than that of "beneficial ownership". The information sought about investors' identity in the investment reviews surveyed suggests that national security concerns interact with individual identity in many ways. For example, some recipient governments seek information on links with foreign governments, agreements to act in concert and on professional and military experience.

Responsible investment in agriculture

Roundtable 12 participants discussed responsible investment in agriculture and benefitted from the contributions of David Hallam of the Food and Agriculture Organisation (FAO) and of Alain Sy Traoré of the Economic Community of West African States (ECOWAS). The discussions were supported by David Hallam's written submission (see Box 4 for excerpts), an issues note by the OECD Secretariat[7] and a submission by the Club of the Sahel and West Africa. The FAO and ECOWAS contributions both emphasized that the main challenge for multilateral efforts in this field lies not in developing relevant concepts and principles, but in implementing existing principles in the context of agricultural investment.

In his presentation, David Hallam noted that political and legal frameworks are rather weak in many host countries. Despite their efforts to attract investments, it is difficult for these countries to direct them toward the most useful avenues. Several international meetings have been held so far involving international organizations (the FAO, World Bank, International fund for Agricultural Development (IFAD) and UNCTAD) plus consultation partners to help host countries do this more effectively. The procedure has been to conduct research on impacts first, and then to catalogue best practice. This information will soon be put in a knowledge platform that is designed to be used both by investors and policymakers.

7 The issues note is available at www.oecd.org/investment/foi.

A second strand of the FAO-WB-IFAD-UNCTAD work is the development of guidelines or principles for responsible investment in agriculture. These guidelines will be voluntary. A set of 7 principles, reproduced in Box 4, has been agreed on and the organizations are now checking political support in a variety of fora. Mr. Hallam stressed that there is not much in the principles that anyone would disagree with; it is the operationalisation and implementation of the tenets that will be difficult and it is in this area that the OECD can make the most significant contribution. Other international organizations are also active; for example, the African Union has also been coordinating the efforts of regional and national initiatives in this area.

Alain Sy Traoré began his presentation by noting that the ECOWAS Commissions participation in FOI Roundtable 12 was the first by a regional economic organisation from Africa. He also noted that the ECOWAS Commission is a coordination body vested with powers to ensure implementation, and stressed the importance of attracting investment into the region in an effective manner. While the ECOWAS Member states have a combined population of some 300 million people, their financial resources are limited. Mr. A. Sy Traoré emphasized the importance of including West African states and their people in the development of guidelines for responsible investment in agriculture and of developing effective frameworks for both domestic and foreign investors, both of whose investments in land have sometimes had questionable impacts on local populations. The ECOWAS Commission already has a Code of Conduct in the Mining Sector in collaboration with the UN System and a similar project for agriculture may be worth pursuing. However, implementation will remain a national responsibility.

Numerous other speakers (e.g. from France, Japan, the United States and the European Commission) spoke in support of these initiatives and of using OECD instruments to expedite progress and for implementation. Several also noted that this issue opens up a good channel for two-way dialogue and, notably, for the OECD to learn from the experiences of home and host countries and investors.

The Chair summarized the discussions by reiterating the finding that the main OECD contribution to responsible investment in agriculture will reside in implementation, highlighting, in particular, the relevance of three OECD instruments and of their follow-up mechanisms for promoting responsible business investment: the Guidelines for Multinational Enterprises, the Risk Awareness Tool for Multinational Enterprises operating in Weak Governance Zones and the Policy Framework for Investment. The Secretariat's issues note shows that the Guidelines' mediation procedures have already been used to promote responsible investment in Chilean aquaculture and responsible supply chain management in primary cotton production in India; it also describes a project, currently underway, that applies the Policy Framework for Investment to responsible investment in agriculture in Burkina Faso.

Roundtable participants accepted the Chair's proposal that future Roundtable efforts in this area concentrate on the two avenues: 1) analyzing the results of Burkina Faso project and drawing out lessons learned for the Policy Framework on Investment; and 2) considering issues relevant for responsible investment in agriculture in the upcoming update of the Guidelines for Multinational Enterprises.

Box 4. International efforts to promote responsible investment in agriculture:
Excerpts from a submission to FOI Roundtable 12 by David Hallam, Food and Agriculture Organisation

Background

The recent high international food prices and policy-induced supply shocks led some countries, especially those facing land and water constraints and hence dependent on imports, to seek to secure their future supplies of food and other agricultural products through investment and production abroad. These investments, particularly in developing country agricultural land, have attracted substantial international concern. Certainly, complex and controversial economic, political, institutional, legal and ethical issues are raised in relation to food security, poverty reduction, rural development, technology and access to land and water.

On the other hand, lack of investment in agriculture over decades has meant continuing low productivity and stagnant production in many developing countries, especially in Sub-Saharan Africa. Lack of investment has been identified as an underlying cause of the recent food crisis and the difficulties developing countries encountered in dealing with it. FAO estimates that additional investments of $70 billion annually are needed in developing country agriculture and related downstream activities to meet global food needs in 2050.

Developing countries' own capacity to fill that gap is limited. The share of public spending on agriculture in developing countries has fallen to around seven percent, even less in Africa, and the share of official development assistance going to agriculture has fallen to as little as five percent. Commercial bank lending going to agriculture in developing countries is also small – less than ten percent in Sub-Saharan Africa – while microfinance loans are in general too small and not suited to agriculture. Private investment funds targeting African agriculture are an interesting recent development but actual investments are still small.

Given the limitations of alternative sources of investment finance, foreign direct investment in developing country agriculture could make a significant contribution to bridging the investment gap. Many developing countries are making strenuous efforts to attract such investments to exploit what is regarded as underutilised land, encouraging international access to land and other resources whose ownership and control in the past have typically been entirely national. The question is not whether foreign direct investment *should* contribute to meeting investment needs but how its impact can be optimised to maximise the benefits and to minimise the inherent risks for all involved.

International responses

Recent large-scale land acquisitions by foreign investors have attracted international concern and the perceived risks attached to such investments are such that there have been calls for an international code of conduct to regulate them. In the absence of strong domestic legislation and equitable investment contracts, such a code could highlight host country interests but could also be seen as a guide for investors to socially responsible investment. The case for a voluntary international code of conduct or guidelines which highlighted the need for transparency, sustainability, involvement of local stakeholders and recognition of their interests and emphasised concerns for domestic food security and rural development appears to have broad political support.

The FAO, together with UNCTAD, IFAD and the World Bank is developing such a code. A voluntary code of conduct or guidelines based on detailed research concerning the nature, extent and impacts of foreign investment and best practices in law and policy could distil and encapsulate the lessons learned and provide a framework to which national regulations, international investment agreements, global corporate social responsibility initiatives and individual investment contracts might refer.

A minimum set of principles for responsible agricultural investment that respects rights, livelihoods and resources proposed by the four organizations and to be reflected in a code of conduct or guidelines would include the following:

i) *respect for land and resource rights*: existing rights to land and natural resources are recognized and respected.

ii) *food security and rural development*: investments do not jeopardize food security and rural development, but rather strengthen it.

iii) *transparency, good governance and enabling environment*: processes for relating to investment in agriculture are transparent, monitored, and ensure accountability by all stakeholders.

iv) *consultation and participation*: all those materially affected are consulted and agreements from consultations are recorded and enforced.

v) *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.

vi) *social sustainability*: investments generate desirable social and distributional impacts and do not increase vulnerability.

vii) *environmental sustainability*: environmental impacts are quantified and measures taken to encourage sustainable resource use while minimizing and mitigating negative impacts.

However, while there appears to be broad support for a code promulgating these principles, agreement on how to operationalize and implement them is likely to prove more difficult to achieve. A rigorously enforceable international code of conduct embodying these principles is likely to be problematic. However, a voluntary code of conduct or guidelines based on detailed research concerning the nature, extent and impacts of foreign investment and best practices in law and policy could distil and encapsulate the lessons learned and provide a framework to which national regulations, international investment agreements, global corporate social responsibility initiatives and individual investment contracts might refer.