



TUAC and ICFTU comments on the OECD Policy Framework for Investment: A Review of Good Practices in OECD and non-OECD Economies (DAF/INV/TF(2006)2)

Introduction

TUAC and ICFTU welcome this opportunity to provide written comments on the background papers to the Policy Framework for Investment (PFI). Although they do not form part of the PFI, they will be published as a companion volume and thus play a role in the implementation and interpretation of the PFI. It should be made clear at the outset of the document that neither the PFI nor the accompanying documents have legal status. Their aim is to provide policy guidance to governments seeking to attract investment for development purposes.

It is essential to achieve consistency between the PFI and the background papers, and in this regard we also refer to our comments on the PFI made at the last meeting of the Task Force on 1 March.

Chapter 1 Investment Policy

It should be emphasised in paragraph 16 that land titling generally excludes the poorest. Rural poor who rely on a piece of land for a living cannot afford to buy the land they harvest and as a result end up as displaced and landless families. The existence of landless peasants is directly connected to titling, which should be mentioned in the text.

The problem of access to medicine is not to ensure a “sufficient supply” but to ensure access to medicine for all including the poor (paragraphs 17-18). The criteria used should therefore be universality of access or affordability of the medicines.

We would propose to remove the last sentence of paragraph 27. The text should not undermine governments’ right to regulate or enter into agreements with other states.

The call for bilateral and regional agreements containing investment provisions in paragraph 36 and 37 weakens the multilateral system which tends to favor developing countries. It is not appropriate to use the most criticised bilateral agreement (the NAFTA) as an example of good practices. It has been strongly condemned by civil society in Latin America.

Chapter 3 Trade Policy

The strong call for liberalisation of goods and services markets (paragraph 101-111), based on the questionable argument according to which tariffs and non-tariffs barriers might discourage or even damage investment, does not reflect the reality of those countries that did liberalise their markets but have failed to grow economically. The text should be qualified and made more balanced.

Paragraph 102 highlights the problems associated with the use of barriers to encourage domestic investment such as done by some South East Asian countries, which managed to grow through their integration in the world economy. However, it is precisely because of the fact that they have protected their infant industries that they were able to compete on the global markets.

It should be mentioned in paragraph 121 that excluding EPZs from the scope of labour and fiscal legal frameworks is extremely detrimental to host country economies and to workers. From a human development perspective EPZs generate more costs than benefits.

We believe that the text should not question legal measures such as anti-dumping, safeguards and countervailing measures (paragraph 129), which have been agreed upon by WTO members. It is up to the competent authorities to decide whether these measures are misused and each case should be judged on its own merit.

We do not agree that the WTO offers the right framework to deal with liberalisation of temporary workers (paragraph 135). Labour is not a commodity and the issue of Mode IV is highly contentious.

Chapter 5 Tax policy

TUAC and ICFTU welcome the fact that this chapter recognises that cutting corporate taxes often reduce revenues that would have improved the general investment environment.

Nevertheless, the chapter does not sufficiently take into account and emphasise that tax revenues is the main source to finance the development investment is supposed to achieve. Hence, the chapter focuses primarily on the incentives for investment – also in relation to what revenues are used for – and thereby does not consider that in order for investment to create development, revenues should also be used to enable expenses that does not necessarily increase the investment attractiveness of the country (i.e. health care, certain public services, some parts of social security etc).

With regard to tax incentives (section 5.4.3), governments should be made aware that many enterprises take advantage of tax holidays for the period of time they are given and then most often move on to a new country, where such incentives can be abused again. The text should state that investment attracted through tax incentives tend to be less sustainable than investment attracted due to other features.

Paragraph 233 should mention that tax incentives are most often given to large multinational enterprises with high profit margins and to a much lesser extent to SMEs which often operate

with smaller profits. Consequently, national, infant industries are often given less favourable means to mature than multinational enterprises.

Chapter 6 Corporate governance

Since our comments on the corporate governance chapter of the PFI and its background paper have been ignored, we reiterate our past observations and express our serious concern with regard to this policy area.

In sum, the proposed background paper:

- Does not take the much needed stance, in a development context, on the pre-eminence of binding regulation over self-regulation;
- Dismisses the judicial possibility that a corporation may have its own self-justifiable interest that is separate from the interests of the shareholders;
- Is in conflict with French- and German-legal origin jurisdictions (which incidentally constitute the overwhelming majority of non-OECD countries) for which directors' duties are to act in the interest of a broader community of parties than the company's shareholders (our alternative proposal is "Boards should be accountable to regulators as regard the fulfillment of their duties as defined by national law");
- Denies the rights of stakeholders (other than shareholders) to participate in corporate governance, which is in contradiction with the OECD Principles of corporate governance (chapter IV);
- Does not tackle the full implications of insider abuse and company resource diversion, as the draft restricts the scope of prevention to the protection of shareholders' rights (the very fact that other parties, the company's own interest, its workers, society at large may be equally affected by diversion, is not considered as an option in the proposed paper);
- Manipulates the meaning of the OECD Guidelines on Corporate Governance of State Owned Enterprise (SOEs) – for which we have expressed strong support – as regards the role and contribution of employee representatives on the board of directors; and
- Excludes the particular case of SOEs having public service delivery mandates.

In our view, the poor quality of this background paper is a direct consequence of the lack of dialogue and openness that TUAC, as an official advisory body to the OECD, observes from the side of the OECD Steering Group on Corporate Governance since our exclusion from its sessions following the review of the Principles in 2004.

Chapter 7 Policies for promoting responsible business conduct

A central part of this chapter should be devoted to the OECD Guidelines for Multinational Enterprises in its capacity as a principal tool to deal with responsible corporate conduct, negotiated and supported by OECD as well as non-OECD governments, BIAC, TUAC and NGOs. The Guidelines are briefly described in box 7.3 and paragraph 354. This is not enough. The profile of the Guidelines must be raised throughout the chapter. The PFI provides an excellent opportunity to raise awareness of the Guidelines and to encourage non-adhering countries to adopt them. The chapter should explain in more detail the implementation procedures; the functioning of National Contact Points (NCPs) and their

responsibilities to promote and implement the Guidelines. A couple of boxes should be added with examples of cases that have been resolved by NCPs. It should also be added which the 39 adhering countries are. That might inspire other countries to adhere to the Guidelines. Moreover, the Guidelines should be annexed to the chapter for easy reference.

Section 7.2 discusses the role of business and governments. A paragraph should be added on the role of trade unions and civil society. They also have a role to play in fostering and monitoring responsible business conduct.

Several sections of the chapter refer to law-making and the legal and regulatory system (particularly section 7.5). It should however be clearly stated that legal compliance is part of what is considered a responsible business conduct. As noted in the Commentaries to the Guidelines, “obeying domestic law is the first obligation of business”. The Guidelines and other corporate responsibility instruments such as the ILO Tripartite Declaration constitute supplementary principles and standards that business should comply with in addition to the law.

TUAC and ICFTU welcome section 7.7 on state-owned enterprises (SOEs). We would however propose to add a reference to the OECD Guidelines on Corporate Governance of SOEs. It should be mentioned that the SOE Guidelines recommend SOEs and their subsidiaries to apply high ethical standards and to comply with the Guidelines for MNEs (Guideline IV.C.123).

Chapter 8 Human resource development policy

We support the objective of extending access to basic education to all (paragraph 365). Yet, without linking related policies to efforts aimed to combat child labour, it will not be feasible to achieve the necessary goal. Many child labourers work in order to pay for school fees.

Paragraph 370 suggests that students should finance more of their studies in order to improve access to higher and tertiary education. The consequences of this recommendation for developing countries need to be seriously questioned. Pursuing such policies, for instance by introducing tuition fees, would create new impediments to the access to higher and tertiary education. This could lead to exclusion of students from poor or disadvantageous social backgrounds. Thus, governments in developing countries need to look at other ways to finance education.

Section 8.3.3 discusses training and the fact that enterprises under-invest in training. The responsibility of business to provide training to their employees must be stressed. The implementation of a levy-grants system for funding training, based on payroll related contributions by employers seems to provide an appropriate mechanism for strengthening investment in human resource development. Moreover, the paper should also look at ways to involve business and trade unions in the design and implementation of training programmes.

Paragraph 385 misses the point in stating that there is not any unequivocal empirical support to suggest that lowering labour standards will attract FDI. The point is that as long as governments believe that lowering labour standards will attract FDI (for example in EPZs), the perception and in cases the reality of the “race to the bottom” will continue. As stated in

paragraph 386, it is therefore important to ensure that the core labour standards are enforced and a level playing field for all investors is maintained and strengthened.

It is misleading to claim that labour regulations are a significant obstacle to business operations in many developing countries (paragraph 387 and figure 8.2). The claim is based on a perception reported by employers and does not reflect reality. According to the World Bank survey referred to, only in one country (Brazil) did a majority of companies report that labour regulations were an obstacle. As for the other countries, merely about 20 per cent of the companies mentioned labour regulations as an obstacle. Besides, the explanatory power of the survey is highly questionable. Its assertions are at odds with FDI flows. A case in point in this respect is the inflow of FDI into Brazil. The country has recently not only consolidated its position as the largest recipient of FDI in Latin America. It has also experienced a steep rise of FDI inflow. Experts have ranked Brazil very high in a list of the most attractive global business locations; only China, the US and India were ranked higher. A similar assessment was also made by representatives of MNEs; surveyed by UNCTAD they ranked Brazil as the fifth most attractive global business location.

The suggestions regarding the design of labour market interventions (paragraph 389) draw heavily from the draft OECD Employment Outlook 2006. The analysis conducted in the process of reassessing the *Jobs Strategy*, found a negative relationship between bargaining coordination and the unemployment rate, implying that higher levels of bargaining coordination are associated with lower levels of unemployment. However, the draft Outlook failed to provide compelling evidence regarding the assertion “that wages tend to be rigid in countries with industry-based and uncoordinated bargaining”. The text should therefore refrain from suggesting policies aiming to adjust reality to alleged knowledge based on strong priors not supported by compelling evidence.

In addition, TUAC cannot accept a text which recommends governments to leave negotiations on work conditions to the employer and the individual worker. This is inconsistent with Chapter IV of the OECD Guidelines for MNEs. The sentence should read “...governments should refrain from leading negotiations on work conditions with employers, leaving it to the social partners”.

Chapter 9 Infrastructure and financial sector development

Paragraph 409 should mention that developing countries were often forced to privatise their public services because of loan conditionality imposed by the International Finance Institutions.

The sentence “private provision has often lowered costs and improved services” in paragraph 410 should be deleted. Although this may be true in a few countries, privatisation of public services has had the opposite effect in the vast majority of developing countries.

Paragraph 419 should make reference to the fact that “when the government is no longer a provider of services...” the poor are excluded from these services.

The first sentence of paragraph 436 should be deleted. It is not true that “the evidence suggests that competition has led to better service”.

Paragraph 441 needs to be rewritten to take into account the fact that many privatisations have not had the desired results. Corruption is still widespread in privatised ports. It is also worth noting that the privatisation of the international port of Djibouti has led to serious violations of workers rights.

Paragraph 450 should also mention the disadvantages of shifting the financial burden from taxpayers to users, that is, the poor risk being excluded from water services, which is a fundamental human right. To prevent this from happening direct subsidies must be put in place to assist the poor.

Chapter 10 Public governance

We welcome the content of this chapter and, hereby reiterate our call for it to be moved up front in the order of appearance of the PFI chapters, given the obvious horizontal dimension of public governance issues.

Section 10.3 on corruption cannot address the issue properly by focusing only on the bribe-taker. To ensure a corruption-free environment for investment, emphasis must also be put on the bribe-payer. The need to take action to deter and detect the payment of bribes by business must also be highlighted.

One important tool in the fight against corruption is the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. Box 10.5 does not adequately describe the implications of the Convention. It should explain that the Convention makes it a criminal offence for companies operating overseas to bribe foreign public officials. As a result of the Convention the bribe-payer may be prosecuted in its home country.

On the demand side, the text ignores the issue of low pay in the public sector, which is widely acknowledged to be a major contributor to corruption. Governments must address this issue in order to tackle corruption.

We support the reference to whistleblowing in paragraph 528. It should however be noted that governments have a responsibility to protect from retaliatory action workers and others that reveal wrongdoing.