

Proposed trade union comments on the OECD Draft Policy Framework for Investment (PFI)

General

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 emphasis 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.