Revision of the OECD Policy Framework for Investment

BIAC Comments

General remarks:

The Policy Framework for Investment (PFI), which was adopted in 2006, has been extensively used to support international policy dialogue and reform. It provides an important framework and checklist for governments and is intended to create an investment-friendly environment and foster investment for economic growth and development. BIAC would like to underline that the overarching focus of the PFI should remain on addressing barriers to investment and fostering open markets, which are at the core of the OECD mission. This should be reflected in the introduction, the order of the chapters, and throughout the various chapters themselves. The PFI is a comprehensive instrument, but it should remain focused on its key objectives to be of concrete value added.

BIAC welcomes the proposal to update the PFI to ensure that it keeps pace with new developments regarding high quality approaches towards investment in all relevant policy areas. The update should ensure that the PFI continues to reflect the comprehensive approach that governments need to take in order to foster investment. Yet while being comprehensive, the specific objective of the PFI should be kept in mind throughout the chapters.

The overall format of the PFI should remain a flexible tool. Building on OECD outreach activities, the main focus should be to promote a shared view among OECD and non-OECD governments on what conditions need to be in place to attract and retain foreign and domestic investment, thereby encouraging a level playing field for investors.

The need for a level playing field is also particularly important in the context of development policy, where different national approaches to untied vs. tied aid can distort competition between companies. Recognizing the increased focus on development issues in the revised PFI, this aspect should be given due attention.

Another general issue which merits further attention in the PFI across several chapters is the informal economy. The authors should make clear that this is not a matter of simply providing incentives to firms and individuals to transition from the informal to the formal economy; more
importantly, efforts are needed to reduce the barriers to entry into the formal economy. This calls
for looking at aspects of the ‘doing business’ environment in countries (such as those developed by
the World Bank Group in its Doing Business reports), and examining whether it is easy to start-up a
company and operate.

While the PFI is a landmark tool in designing an effective policy framework for investment, much
greater focus should be placed on the implementation of such policies. Many emerging and
developing economies experience shortfalls in implementing their policies. This calls for attention to
consultation processes, impact assessments, and active engagement of the business community. It
would be particularly useful if the PFI could include questions relating to government interactions
with representative private sector associations concerning aspects of the investment policy
environment.¹

Finally, we encourage the OECD to consider appropriate means to communicate the PFI. This issue
cannot be over-emphasized – it is central to implementation efforts. The communication of the PFI is
critical to securing ‘buy-in’ from policymakers and the broader stakeholder community, which will
ultimately affect the success of the tool in future. In our view, it would be helpful if a concise
synthesis of key elements of the revised PFI were provided as a standalone summary suitable for
communication to senior politicians and business leaders of both multinational and local companies.
Looking ahead, the OECD could also consider a means for countries to be able to compare their
responses to PFI questions to the responses of other countries (this could help to increase policy
implementation through peer pressure).

We are pleased to submit our initial comments on the draft chapters that have become available.
BIAC will review these chapters in further detail as well as other chapters that will be issued, and will
provide additional comments in due course.

¹ We encourage the Secretariat to discuss with the OECD Development Cooperation Directorate’s Global
Partnership division, as its work on the formulation of an indicator measuring the quality of public-private
dialogue could be relevant in this context.
Draft chapter on investment policy

- This is a core chapter of the PFI, which needs to be given particular attention, underlining the importance of high-quality investment policies, a transparent and predictable regulatory framework, as well as the importance of intergovernmental and international cooperation to address the administrative burden on companies.

- The issue of predictability merits greater attention in this chapter and the PFI as a whole. In particular, changes in political leadership should not have profound effects on investment policies and projects. Long-term investment projects, such as in infrastructure, can be particularly affected. The PFI should encourage efforts that would contribute to greater continuity from one government to the next.

- As discussed at the AGID meeting, we would recommend greater emphasis on the “rule of law” as a fundamental prerequisite for investment in the section on horizontal policies and practices.

- One issue the chapter could expand upon is the linkage between the business climate and the general governance of a country, whereby it could stress the fact that a good business climate and better governance are closely connected. It should also be reinforced that an enabling framework for investment is instrumental in incentivizing firms and individuals to transition from the informal economy to the formal economy.

International investment agreements

- We have significant concerns about part of the wording in the section on international investment agreements, in particular the second part of the section. The importance of bilateral investment treaties (BITs) as a key factor in helping countries attract foreign direct investment and ensuring a predictable and fair treatment of investors should be more duly highlighted. Likewise, in the area of arbitration, the fundamental importance of well-established international rules for investor-state dispute settlement (ISDS), which is a vital part of investment protection, should be clearly underlined.

- The PFI, once finalized, will get significant political attention as well as attention by the media. The PFI should therefore be fact-based and refrain from entering into the emotional debate that currently exists in this area. We therefore strongly suggest changing/deleting some of the language in the current draft, and focus on objective facts.

- Additionally, please find below specific comments on some of the sections that are of particular concern:
Para 33: The language “…any decision to offer international investors protections beyond those accorded to domestic investors” suggests an inherent anti-ISDS bias, as it adopts the rhetoric that without ISDS there is a level playing field, which becomes unlevel with ISDS, when in fact ISDS is intended to provide a level playing field, where there is none at the outset.

Para 35: “One possible benefit of IIAs”. Change to “One benefit of IIAs”.

Para 35: “Such agreements may also help countries”. Change to “such agreements also help countries”.

Para 36: Many of the ISDS-related concerns listed appear overdrawn, lacking in balance, and emotional, particularly the statement regarding “reputational risk”, which is made without providing any further explanation or evidence. This kind of language is deferential to the opponents’ views.

In paragraph 37, the drafting simply asserts that current IIAs do not clearly define “the scope and content” of core provisions of IIAs. We do not share that assessment. High quality IIAs are, in our view, sufficiently clear in these key definitions.

Nowhere in this text is there any mention or discussion of how the existence of ISDS clauses may help promote good governance, good regulatory policy, transparency, and rule of law. Regulators who are aware that their actions are subject to legal review and challenge in domestic courts or international tribunals, take the time to ensure the regulation is appropriate to the objective and can withstand challenge.

**IPR**

- In the section on IPR, we recommend deleting the reference to essential medicines as it is a very specific sectorial example and as their supply relies on a broader context than just IPR. The pharmaceutical sectorial issues are very complex and should not be turned into a simplistic “bumper sticker” passing reference in an investment policy document.

**Draft chapter on investment promotion and facilitation**

- Investment promotion and facilitation, which can include a wide range of measures and structures, are important means to attract investment. We appreciate additions to the chapter to reflect recent developments and important OECD activities, including in the areas of global
value chains and the link between investment promotion and facilitation and countries’ overall development goals.

- One issue the document could further highlight is the need to enhance a closer coordination between different governmental bodies involved in the promotion of investment and also between the different layers of the Administration.

**Draft chapter on responsible business conduct**

- We suggest underlining that responsible business conduct is equally applicable to all companies: MNEs as well as local companies.

- ‘Responsible business conduct’ (RBC) includes both legal norms and recommendations that go beyond what is legally required in various subject areas. A distinction should be made between legal terms and non-legally binding standards. The text should avoid giving the impression that the focus is only on binding obligations.

- Care needs to be exercised to ensure that the final text of this chapter does not inadvertently suggest that foreign investors are particularly problematic in their behavior or require special scrutiny. Other stakeholders, including civil society, labor groups, local businesses, and various government entities should also be held to comparable levels of responsible conduct.

- Many issues relating to public governance and upholding the rule of law are phrased in a RBC setting, whilst they are also important on their own merits when assessing a country’s investment climate.

- Since the PFI is aimed at governments, the core questions about responsible business conduct should clearly mirror the Protect, Respect and Remedy framework vis-à-vis avoiding human rights infringements. Critical questions should be asked first in relation to how the rule of law and the judicial system function in a country. How enterprises are encouraged or obliged to observe and comply RBC standards is the second step.

- **Para 2**: “It also involves responding to societal expectations [...]”: We suggest adding ‘justified, bona fide societal expectations’. RBC does not entail the responsibility to respond to any kind of societal expectations.

- **Para 4**: “It is also the government’s role to establish and enforce an adequate and coherent legal framework for responsible business conduct.” Rather than focusing on establishing new frameworks, there should be focus on implementing the existing ones.
• **Para 4:** “By providing incentives for RBC related action that goes beyond legal compliance”. It should be clarified to which incentives it refers.

• **Para 5:** Add employer associations.

• **Core Question 7 (reference to the informal sector):** It should be highlighted more clearly that policies should first focus on formalizing informal jobs.

• **Point a) second bullet:** Clarity would be improved if the text specified if it referred to the national court system instead of using the term ‘grievance mechanism’. This is the most important grievance mechanism and it would be worthwhile when assessing a country’s investment climate to check how the judiciary branch functions.

• **Point b) second bullet:** Clarity would be improved by asking how a government enforces business related laws and regulations. Last bullet: replace “comply” with “implement”.

• **Point c) first bullet:** Is there an official OECD position on the effectiveness of referencing to RBC standards and sustainable development in trade and investment agreements on the way enterprises do business in the territories of the signatories?

• **Third bullet:** The question about the functioning of a government and how they overcome the silos that may exist is also relevant in other subject areas within the PFI and should be raised in the public governance chapter.

• **Point d) fifth bullet** regarding reporting: This text is unclear and could therefore potentially create confusion among governments. Is the text trying to suggest governments should, in order to support RBC, legally/administratively require reporting, such as through a securities regulatory framework? What does “information on local partners” mean? In the United States, for example, there are no government requirements to report on due diligence procedures or specific information on relationships with local partners.

  “Payments to officials” should be clarified as it could be understood as a bribe or tax revenue.

  This paragraph should be improved by: 1) changing “require” to “encourage” and 2) clarifying the expectations for what specifically should be reported, how and to whom.

• **Point f) second bullet:** It is unclear what “the changing needs of investors and their stakeholders” refers to.

• **Point f) fourth bullet:** Concerning the question related to contract transparency, the highly business sensitive nature of such information should be given due attention. The notion of “contract transparency” is controversial among revenue transparency stakeholders. Some actors in the construction sector see value in making some aspects of their contracts available to public
scrutiny, recognizing that doing so can help to garner public support in the early stages of long-term investment projects. On the other hand, however, it would not be constructive to such investments if the full contract details were made publicly available. Given that this is controversial and unsettled terrain, in which far more detailed and nuanced discussion is necessary, it would be highly inappropriate for the PFI to take the position that RBC requires governments to adopt and/or promote contract transparency. It is also not appropriate to single out the extractive and construction industries in the context of contract transparency.

- **Point h) first bullet:** How do you define and measure “demonstrated commitment to RBC”? A government can measure compliance with local laws within its jurisdiction. However, the realm of RBC is larger, but cannot be objectively measured by a government in a way that meets administrative law standards.

- **Point i) Due consideration should be given to how these questions could be addressed in reviews of developing nations?**

**Draft chapter on green growth**

- BIAC has been very supportive of the OECD’s Green Growth Strategy and the important follow-up work in this area. BIAC has consistently underlined that green growth policies should aim to foster innovation, entrepreneurship and competitiveness across sectors, focusing on improvements that are socially beneficial, economically efficient and environmentally effective and take into account life cycle approaches and impacts. Recognizing the close links between sectors and between economies, we need to concentrate increasingly on cooperation, integration and life-cycle thinking across the entire value chain.

- In this respect, the enumeration in the first paragraph on what is “green investment” is not broad enough. While referring to green infrastructure and environmental goods and services, it should recognize that many of the “traditional sectors” contribute to green growth and are often important input materials and intermediate products to so-called environmental goods. For example, the chemicals industry and other base-industries produce many products which are necessary to promote environmental and sustainability goals (wind turbines, insulation, etc.).

- We agree with the statement that a policy framework for green investment is in many respects comparable to an enabling environment that is conducive to investment in general, bearing in mind the importance of specific enabling framework conditions. We suggest moving this message up front. We also underline the importance of tailoring strategies to their specific circumstances.
The section should underline that pricing environmental externalities needs to be done in a credible way, acknowledging the challenges involved in setting the "right" price, paying due attention to the use of revenue and the importance of a global level playing field. Market-based approaches and carbon markets play an important role, but need to take into account different national circumstances and potential competitiveness impacts.

Draft chapter on infrastructure

BIAC appreciates the increased focus on infrastructure in the revised PFI. We particularly welcome the focus on the enabling environment for competitive private investment in infrastructure, and the insistence on a level playing field for private providers to coexist with SOEs. Policy predictability and transparency are vital in the infrastructure sector since the underlying economic and political conditions may vary significantly over a project lifetime. Following our initial review of the chapter, we wish to share the following three suggestions for the section on financing infrastructure projects:

- The chapter could encourage governments to ensure sufficient preparation and transparency around their project pipelines. Clear pipelines create greater certainty for investors.

- The chapter, particularly in core question 20, could point to the need for sufficient coordination of policies and regulations in the financial system. The key issue here is to avoid unintended negative consequences for financing infrastructure projects as a result of new regulations aimed at financial sector stability. These possible impacts are still the subject of much uncertainty and debate.²

- The chapter could encourage the aggregation of projects where possible. Many small infrastructure projects can be inefficient and unappealing to major long-term investors, and thus an aggregated approach should be sought where possible.

- The chapter could take account of the fact that significant parts of public infrastructure are decided and implemented at sub sovereign level and highlight the needs to harmonize the powers and responsibilities of the central state and sub sovereign entities. This applies notably to public service infrastructure such as water and sanitation, local transportation systems etc.

Specific comments:

- Page 2, item 1, line 2: suggest adding the words “poorly maintained and badly operated” after the word “inadequate”.

²FSB (September 2014) “Update on financial regulatory factors affecting the supply of long-term investment finance”
- Page 2, item 2, line 3: suggest adding the words “reducing social and environmental costs” after the words “transaction costs”.

- Page 2, item 4, line 4: suggest adding the words “and private providers” after the words “policymakers”.

- Page 3, item 5, line 5: suggest adding the words “long-term” between the words “governments’” and “political”.

- Page 4, item 9, line 4: suggest adding a new sentence at the end of this paragraph to the effect: “They also need to protect investors from client induced scope creep or revenue reduction occurring post contract completion.”

- Page 4, item 10, line 8: we do not understand the use of the word “Alongside” in this context.

- Page 6, items 1-4: it is important in this context to spell out that infrastructure development should be more than “hard infrastructure” and should also cover “infrastructure services” and “soft infrastructure”.

- Page 6, item 9, line 2: suggest adding the words “and operation” after the word “investment”.

- Page 7, item 12: suggest adding a new sentence at the end of this point to the effect “How does this compare with the authority’s ability to manage “in-house” provision?”

- Page 7: suggest a new point (14a) be added to the end of the section on “Mitigating risk and ensuring value for money”. This should be to the effect: “How is the evolution of base conditions and changed requirements dealt with in long-term contracts?”

- Page 7: suggest a new point (16a) be added to the end of the section “Regulation and pricing of infrastructure markets”. This should be to the effect: “Are the principles of the OECD’s 3 Ts (taxes, tariffs, transfers) applied, and in particular is there predictability in the application of fiscal support and subsidies in the operation’s cash flows?”

- Page 8, point 26: add a new sentence to the end of this to the effect “Are these principles applied symmetrically to public providers?”.

- Suggest adding to the bullet points in the first section of this table on page 9 “Enabling environment for competitive private investment in infrastructure” the following: “Are the powers and responsibilities of national versus sub-national entities clear and well defined?”
- Page 10: Add to the list of bullet points under the heading “Sector-specific considerations”: “water and sanitation services, energy (electricity gas etc.) and potentially many others”.

- Page 10: Add to the list of bullet points under the heading “Mitigating project risk and ensuring value-for-money” the following: “How are changing circumstances and constraints accommodated in the implementation of PPP contracts?”

- Page 11: In the section headed “regulation and pricing of infrastructure markets” we suggest adding new bullet points to the following effect:
  - Is there a clear distinction between the powers and responsibilities of the public contracting authority and those of the regulator(s)?
  - Are contract agencies adequately staffed in number and skills to allow the agency to work at the level required by the industry?
  - What measures are in place to ensure the transparency and predictability of subsidy support (T2), both to the project and across the sector in a symmetrical manner?

- Page 13: Under the heading “Sector specific considerations” it would be useful to spell out that water and sanitation, local transportation and other infrastructure is often conducted at sub sovereign level, which means that there needs to be coherence between national policy and sub sovereign activity.

- Page 13: We suggest adding a new bullet point to the section headed “Balanced market structure for private participation in infrastructure” to the effect:
  - Are the profits/surpluses of SOEs or locally owned public service companies transparent, and how they used by the state/municipal “shareholders”?