Consultation on the Policy Framework for Investment

BIAC Comments

December 2014

OVERARCHING COMMENTS

- BIAC thanks the OECD for the opportunity to submit comments on the update of the OECD Policy Framework for Investment (PFI), which provides an important framework and checklist for creating an investment-friendly environment for economic growth and development. BIAC supports the revision to ensure that the instrument remains up-to-date and reflects new developments.

- We submitted detailed comments on 5 of the chapters in early November, and are pleased to see that a number of our comments have been reflected in the revised versions of the chapters. We call upon the OECD to keep these comments in mind as the chapters are being further developed.

- While being a comprehensive instrument, BIAC would like to underline that the update needs to ensure that the PFI remains focused on its main objectives, i.e. addressing barriers to investment flows which can foster growth and development, which are at the core of the OECD mission. The PFI update should not lead to a long shopping list of issues being added to various chapters, but should keep the main objectives in mind all along the process. We recommend clearly highlighting up-front the fundamental importance of investment for growth and development.

- In view of the high visibility that will be given to the PFI at the 2015 Ministerial Council Meeting, we call upon the OECD to keep the instrument as fact-based and objective as possible, and not engage in subjective discussions on key issues that are sometimes subject to an emotional debate. Paragraphs, sentences, even individual words, can matter. The PFI update document therefore needs to be drafted, reviewed and edited very carefully to avoid inadvertently
incorporating any of the politicized controversies that unfortunately accompany some important investment and development issues these days.

- At the same time, we believe that the Ministerial will be an excellent opportunity to highlight the role of the OECD as a key organization that is instrumental in doing serious, fact-based analytical work which can foster open markets and a pro-investment policy framework.

- In addition to its communication at the OECD MCM in 2015, we believe that all avenues should be explored to promote the new PFI in the Post-2015 Sustainable Development Goals (SDGs) negotiations. Thinking already about the active dissemination of the PFI in the context of the SDGs is important, as the UN negotiations get underway in early 2015. We believe the PFI could be a particularly useful tool for SDGs 8 and 16, but also several others.

- More generally, while the PFI is a key instrument for contributing to sound investment policies, greater focus should already now be placed on the communication of key messages, implementation of policies, impact assessment and active engagement with the business community. BIAC looks forward to remaining actively involved in this process.
COMMENTS ON INDIVIDUAL CHAPTERS

Investment Policy (REV 1 version)

• This is a core chapter of the PFI, which needs to be given particular attention in the update process, underlining up-front the fundamental importance of high-quality investment policies, a transparent and predictable regulatory framework, as well as intergovernmental and international cooperation to address market barriers and administrative burdens for companies.

• We would therefore recommend including up-front a clear statement on the overall importance of investment as a key driver of economic growth, innovation, trade, job creation and prosperity in any economy as well as the importance of FDI as a vital pillar in the overall investment dynamic, even more so in light of global value chains and increased global connectivity.

• The introduction to this section on horizontal policies and practices, which precedes the investment policy chapter, correctly underlines that pre-requisites for investment policy include respect for the rule of law, quality regulation, transparency, openness and integrity. While the section then further develops the issues of trust, whole-of-government approaches, and transparency, we believe the importance of issues such as the rule-of-law and predictability should be given additional attention in this chapter and the PFI as a whole. Greater policy consistency and economic predictability are vital for companies to take risks and succeed in competitive markets. Long-term investment projects, such as infrastructure, can be particularly affected if there is a lack of predictability or sudden political changes.

• An additional aspect that might be highlighted is the importance of reducing overly complex administrative burdens as red tape can place a significant burden on investors by increasing costs and delaying the implementation of projects.

• We appreciate that the PFI highlights that non-discrimination, investor protection, and mechanisms for settling investment disputes are core investment policies that underpin efforts to create a quality investment environment. These messages are fundamental pillars of the OECD investment work and should be further highlighted, including in the overall communications about the PFI, once finalized.

• Protection of intellectual property rights is a fundamental foundation for promoting sustained creativity and fostering investment. The PFI correctly underlines the direct link between strong
IP rights and investment, and raises many important questions. However, we are concerned by the statement at the end of paragraph 29 referring to “new products priced affordably.” Affordability depends on a wide range of policy factors. We therefore suggest amending the phrase to focus on “ensuring availability of new products and return on investment.”

- We note that a large section on land tenure has been included in the REV1 version of this chapter. Worryingly, the language as it is currently written risks reopening some debates on which negotiated language already exists. We therefore believe it would be of critical importance for this section of the PFI to draw much more closely upon the FAO Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (2012), and to confine itself to the agreed statements therein. The FAO Voluntary Guidelines should be listed as one of the resources at the end of the chapter.

- We welcome that the section on international investment agreements and arbitration has been recast to address a number of the specific comments we submitted in early November. As mentioned before, the PFI will get significant political attention and should therefore refrain from entering into the emotional debate that currently exists in this area.

- We would suggest some further changes, among others to put the numbers into perspective, as too much of the current focus is on the costs of some very specific cases and not the overall considerable benefits the ISDS system has provided for over 5 decades. We suggest avoiding any references to the publication of arbitral awards as well as reference to third party intervention.

- We would like to underline that ISDS is a necessary element of investment protection, not only in agreements with developing countries but in every agreement, including in agreements with consolidated democracies. Questions regarding the impartiality of courts can potentially arise due to specific sensitivities or political considerations in certain instances. We recommend adapting the language in paragraph 38 to underline that ISDS is important in every agreement.

- BIAC would like to reiterate that well-established international rules for investor-state dispute settlement (ISDS) are a vital part of investment protection and provide a neutral mechanism for dispute resolution in cases of breaches of investment treaties. Investors must be given a chance to seek recourse if needed. ISDS is an essential component of good governance and the international rule of law.
**Additional specific comments on investment agreements/ISDS**

- **Paragraph 37** diminishes the importance of investment agreements with language like “governments should...ensure that they have the capacity to implement IIA commitments and the ability to negotiate IIAs...”, which appears to suggest that developing countries may not benefit from such agreements. This type of language can, inadvertently or otherwise, feed into the politicized rhetoric that developed countries use IIAs to unfairly benefit from developing markets. Without a more substantive discussion on this topic, this language is quite misleading.

- **Paragraph 38** describes the purpose of IIAs as granting “policy stability” which investors “crave” by “providing an additional layer of security”. This phrasing paints a picture of special rights, as opposed to a set of rules that makes up the rule of law of transnational investment, which ensures that investors are properly and rightfully protected to enable economic growth.

- **Paragraph 39** generally states that IIAs help improve domestic legislation and promote good governance. While this statement is not inaccurate, we would like to note that specifically 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 the challenge.

- **Paragraph 40** alleges that “[a]rbitration can be costly for states”, suggesting that “possible claims...can amount to hundreds of millions or even billions of dollars”. This statement is misleading for several reasons. If costs were to be cited as a concern, the statement should focus not on the claims, but rather on the outcome figures. Not only do investors not win in the majority of the cases, but even when they do prevail, they rarely get an amount approximating the full amount claimed. We believe that it would be most appropriate to delete this reference.

- **Paragraph 41** states that there is a “growing awareness that some IIAs do not provide existing clarity of core provisions”. It should be recognized that IIAs have developed over time, becoming increasingly sophisticated and responsive to concerns at different rates. This, however, does not mean that there is a systemic problem with IIAs. Importantly, this paragraph neither acknowledges the progress that has been made, nor indicates in any way whether these are recent or older IIAs. Without further clarification, we believe that this statement is misleading.
**Additional specific comments on the new land tenure section**

- **Paragraph 24, second sentence:** This sentence points to negative assumptions about land rights registration, arguing that it can raise land value and thus incentivize vulnerable households or individuals to sell their land, which might lead them to be deprived of their livelihoods. In making this argument, the paragraph appears to undermine the case for land registration (as well articulated in paragraph 23). We find the argument questionable, as the value of land will always change when alternatives to equivalent or higher-valued land arise, or when only lower-valued use remains. We would appreciate information on the evidence supporting the claim made in this sentence, and what options the PFI therefore recommends to governments. If the claim cannot be supported, the authors should consider its deletion.

- **Paragraph 24, third and fourth sentences:** We agree to the importance of non-discriminatory land rights registration. However, we believe it is also important to state that land is used by all actors (large investors and vulnerable groups alike) in a sustainable manner. Furthermore, we believe this paragraph should also recognize that a number of developing and emerging economies with relatively low levels of land use will wish to increase or develop it in line with their sustainable development objectives.

- **Paragraph 25:** This paragraph puts more emphasis on what it regards as possible negative outcomes of a well-functioning land market, rather than the benefits thereof. Specifically, the paragraph suggests that smaller farms contribute to a more equitable revenue distribution which may be undermined by the crowding out effect of large-scale farms. But by only focusing on claims about equality among smallholders, the paragraph appears to neglect the positive impacts that well-functioning land markets can offer for broader economic growth, food security, and consequently positive impacts for raising incomes across society at large. For example, the Interagency Report to the Mexican G20 Presidency (2012) states that “secure tenure can double investment and significantly increase land values, while well-developed rental markets can result in increased productivity by around 60%”.1 We would encourage the authors to revise paragraph 25 to reflect the negotiated text in Section 13 “Land consolidation and other readjustment approaches” of the *FAO Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security* (2012). Finally, we request more explanation of the statement in the last sentence that regulations should “take into account the levels of inequality between actors”.

- **Paragraph 26, second sentence:** This sentence argues that large-scale land negotiations or transactions shouldn't lead to the displacement, the loss of livelihoods, or more limited access

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to land for the local population. The text should be careful to avoid discriminating simply on the basis of size without mentioning which land and for which use, and we therefore question the recurring reference in the PFI text to solely “large-scale” transactions. In order to increase clarity in this sentence, we believe it is important to also refer to the benefits of well-structured readjustment approaches and redistributive reforms in Sections 13 and 15 of the FAO Voluntary Guidelines.

- **Paragraph 26, final sentence:** This sentence proposes ceilings on permissible land transactions and strict regulations on transfers that exceed a certain scale, and we note that it reflects part of Article 12.6 of the FAO Voluntary Guidelines. However, it doesn't refer to the definition of allowable transactions, nor does it refer to appropriate consultation in providing transparent rules. Either greater nuance is needed, or the sentence should be deleted. If the sentence is conserved in the PFI, we recommend that it be re-written to also fully reflect Article 12.5 of the FAO Voluntary Guidelines which states: “States should, with appropriate consultation and participation, provide transparent rules on the scale, scope and nature of allowable transactions in tenure rights and should define what constitutes large-scale transactions in tenure rights in their national context”.

- **Paragraph 27, second sentence:** It would be helpful if the text could give some examples of the types of “independent institutions” to which it refers.

- **Supplementary question 1.3, first bullet:** This bullet asks if there is a limit on the size of land area allocated to land users (i.e. a ceiling on permissible land transactions). Reflecting Article 12.6 of the FAO Voluntary Principles, we would recommend rewording the bullet as follows: “Are policies in place to regulate how transfers exceeding a certain scale should be approved?”

  We suggest that an additional bullet should appear at the top of section 1.3 which may be framed as follows: “Are rules in place, based on appropriate consultation, that clarify the scale, scope and nature of allowable transactions in tenure rights? Do these rules define what constitutes large-scale transactions in tenure rights?”

**Responsible Business Conduct (REV 1 version)**

- We generally believe that the revised draft chapter has been improved and thank the OECD for taking into account a number of our earlier written comments, including among others, the recognition that responsible business conduct (RBC) is equally important to MNEs and local
companies; making a clearer distinction between what are legal requirements and what goes beyond; as well as a number of the specific comments we made on the questions.

- The elaboration in the introductory paragraphs is generally helpful, bearing in mind that the PFI is addressed to governments (while the MNE Guidelines are addressed to companies).

The PFI looks into what governments do to shape a favorable investment climate. As complying with national laws and regulations is the starting point for responsible business conduct, we particularly appreciate the reference to the state’s duty to protect. In practical terms, this means that governments should have a National Action Plan (NAP) to ensure they protect citizens against human rights infringements while at the same time creating an environment for business to be able to ensure respect for human rights. Given the importance of these plans, a reference to governments’ NAP should be included in the chapter, e.g. under heading “A.

- The revised version of the chapter now recognizes the importance of ‘practice what you preach’: how far do governments apply RBC in their procurement and in State-Owned Enterprises? It would be useful to include this important point in ‘How Governments Can Support RBC.’ It is not just a way of promoting RBC; it is about the credibility of a government in doing so in the first place.

- In relation to applying RBC practices as a government itself, it might be useful to include a reference to the inappropriateness of setting RBC requirements for procurement and government tenders as a means to protect or favor domestic industries.

Additional specific comments

- The RBC-related conventions and treaties a government has ratified or endorsed are at the core of setting an RBC-friendly environment. This question is currently located under ‘supplemental questions’ but really merits being asked upfront.

- ‘Engaging with enterprises with a strong RBC record’ should be complemented with engagement with contractors or suppliers with less strong records in order to improve corporate conduct.

- Paragraph 4: It is unclear to what possible laws one refers to with ‘laws on respecting human rights’ in as far as they apply to non-state actors. The wording seems at odds with business’ responsibility to respect human rights.
• Paragraph 7: replace ‘define’ and ‘implement’ by ‘enact’ and ‘enforce’.

• Paragraph 8: [Through these instruments, states are also encouraged to set clear expectations that businesses respect human rights abroad. It is the duty of governments to ensure that a legal and regulatory framework to protect against such abuses is established and enforced.]

The term ‘abuses’ should be avoided. ‘Infringements’ is a better term, which is also applied in the OECD Guidelines. The order of the two sentences should be switched, because first comes setting a clear regulatory framework to be enforced to protect against human rights infringements and second comes the expectation that companies will also respect human rights outside a country’s jurisdiction. The current order and wording send a confusing signal about governments having to enforce respect for human rights extraterritorially. Also, ‘abroad’ should be deleted as respecting human rights is an expectation that applies both domestically and abroad.

• Supplemental question under (d) Promoting RBC abroad, first bullet: in a free market economy governments do not instruct companies. They either set laws or encourage particular corporate behavior.

• Ibidem, third bullet: questions related to reporting should be moved to (f) Promoting transparency around RBC.

• Supplemental question under (f) Promoting transparency around RBC, first bullet: the question should be phrased in a neutral way, e.g. ‘what standards for corporate reporting does the government promote’?

• Ibidem, fourth bullet: when assessing revenue transparency around significant public resources or expenditures, the first question should focus on what governments themselves report in this respect. Only then does it make sense to promote such transparency with business. Furthermore, BIAC recommends deleting the reference to contract disclosure as this is subject of an unsettled, sensitive debate that does not take place in this setting.

• Supplemental question under (h) Providing support and incentives for strengthened RBC: a question on how the government promotes the uptake of progressive business practices among companies that lag behind, due to e.g. size or other circumstances, could be included.

• Ibidem, first and second bullet: in order to avoid encouraging hidden protectionism, how does a government ensure objectiveness and qualification and/or quantification of RBC when favoring
RBC-performant companies in contracting and procurement processes and in providing financial incentives?

Other references in the PFI to RBC:

- Investment Policy and Horizontal Policies and Practices, page 20: the questions on land rights and indigenous peoples are, as all questions, aimed at governments. Therefore, it does not make sense to put ‘responsible business conduct’ in the left adjacent column.

Green growth (REV1 version)

- BIAC has been supportive of the OECD Green Growth Strategy and follow-up work in this area. We agree with the statement in the chapter 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. This message should be highlighted up-front.

- We appreciate that in the overview section green investment now also includes activities across the entire segments of the green value chain and industries producing intermediate inputs. We would however suggest either taking out the examples of PV or wind energy manufacturing, or clearly mentioning that these are just examples, as there are many more, such as insulation, etc.

- We also appreciate the recognition that pricing environmental externalities needs to be done in a credible way while taking into account national circumstances and potential competitiveness impacts. We welcome the fact that the chapter highlights that there is no one-size-fits-all approach as strategies for green growth need to be tailored to the specific circumstances.

Investment promotion and facilitation (REV 1 version)

- We welcome the focus on investment promotion and facilitation, which can include a wide range of measures and structures as important means of attracting investment. We appreciate the focus on close analysis of how to make such measures most effective, bearing in mind that different approaches are suitable in different contexts. Whole-of-government approaches, fostering effective coordination among all those involved are particularly important in this context.
Infrastructure (REV 1 version)

- As stated previously, BIAC appreciates that the revised PFI includes a dedicated chapter on infrastructure. Access to high quality infrastructure is critical for enabling investment, growth and development.

- In terms of the latest draft chapter:
  
  o Further to our previous comments, we welcome the increased focus in the chapter on clear project pipelines, as well as a reference to the bundling of small projects in order to help enhance the attractiveness for long-term investors.

  o We also appreciate that the chapter includes a supplementary question regarding the coordination of policies and regulations in the financial system in order to avoid potentially unintended consequences for the financing of infrastructure. This could also be usefully referred to in Paragraph 17, where it already mentions the tightening of banking regulations.

  o Paragraph 17 on the financing of infrastructure refers to the role played by development agencies in mobilizing additional investment in infrastructure. We agree, but we would recommend also adding an explicit reference to export credit agencies (ECAs), which are important enablers of financing of infrastructure worldwide. They not only provide export insurance, but also investment insurance (for the equity part) in project finance deals for infrastructure.

  o Under the section “Ensuring coherence and support for infrastructure development”, core question 3 refers to coordination across government and social partners. It may be useful to also refer to coordination with international development agencies and ECAs, as it is often reported by private sector actors that there could be more efficient allocation of these resources into infrastructure.

Trade

- Trade and investment go hand-in-hand, and open markets are crucial to allow for an optimal operation of GVCs and trade-driven economic growth. We generally welcome the approach taken in the trade policy chapter of the revised PFI.

- With this in mind, we would like to put forth the following comments and recommendations:
We commend the OECD for highlighting the links between GVCs, trade facilitation, and investment.

We agree with paragraph 13 on the need to facilitate assistance and support for capacity building in LDCs and developing countries.

On the supplemental questions, the chapter could ask governments what efforts have been undertaken to facilitate free movement across borders for the business purposes of managers, professionals, technicians, and suppliers.

We commend the integration of SMEs into the supplemental questions.

Given the importance of cross-border data flows in trade, a supplemental question in the “Targeted trade policies” section could ask what government efforts have been undertaken to enable the open flow of business data while addressing security and privacy concerns.

The chapter could mention the importance of non-discrimination in public procurement tenders to allow international competition. A draft question could ask: “to what extent does the government improve trade and investment opportunities by opening up public procurement to international tenders in a transparent and reliable way?”

The chapter could highlight the relevance of competitive neutrality in the context of trade and state-owned enterprises.

The question on “targeted trade policies” should be complemented by comments that highlight that local content requirements and export restrictions are detrimental to the overall business and investment framework within a country.

How states and national regulators engage in creating and are willing to apply international norms and standards (via international standard setting bodies or trade agreements) becomes increasingly important to foster trade and investment. Adding a question under the “international cooperation” section could reflect this point.

**Human resource development**

- The chapter could benefit from greater clarity in language that the guidance is also directed to developing country governments.
The chapter could benefit from greater consistency between the overview text (which is unclear and incorrect in parts) and the checklist (clear and straightforward). We have provided specific comments to this point.

**Chapter Title**

- We suggest renaming the chapter title. The title of the chapter “Human Resources (HR) Development” is unclear and can be misleading. We understand that the guidance is aimed towards developing countries – HR development is a term that may be more closely associated with the staffing of companies. We also note that there is use of term HR Policies (countries) and HR practices (companies). For greater clarity we suggest renaming the chapter to address “Human Capital Development”. This would also bring clarity to the fact that the questions in the chapter are addressed to governments and not to companies.

**Overview text:**

- The chapter may benefit from some definitions to bring clarity to specific terms. It would also be helpful to clarify to whom various points in the chapter are directed, given that it is primarily directed at governments of developing countries.

- **Paragraph 1:** The global financial crisis mentioned in paragraph 1 had the greatest impact on the advanced economies and we would suggest that it does not necessarily specifically impact the problems faced by developing countries in this context. We would suggest deleting this reference as it seems to be out of context.

- **Paragraph 2:** We would question the statement that ‘well-designed labor policies’ create ‘more and better jobs’, since policies don’t create jobs. The sentence should be qualified with words such as ‘can help to create more and better jobs’.

- **Paragraph 4:** While referring to adaptability of the labor force, it would be important in this context to refer to the labor market relevance of education learning outcomes.

The second sentence refers to “basic and higher education”, but the definition of basic education is not clear. Does this mean only primary, or primary + secondary? Does it include early childhood education and care? Does it include vocational education? Instead of writing “basic and higher education”, it may be more appropriate in this case simply to put “education”.
Also, in the final sentence, we recommend inserting “and education systems” after “the capacity of the labor force”.

- **Paragraph 5:** We suggest changing the first sentence “In a global economy that is becoming increasingly dependent on skills, countries with lower skill levels risk losing in competitiveness” to the following: “In a global economy that is becoming increasingly dependent on skills, countries with lower skill levels need to ensure they develop their human capital in order to boost their competitiveness.”

We also note that vocational education and training (VET) is not mentioned anywhere in paragraph 5, while it refers to the full range of primary, secondary and tertiary education. We recommended including reference to VET.

- **Paragraph 6:** The term ‘business-specific training program’ seems not to indicate firm-specific training but rather to imply business training in general. We suggest that the text provides greater precision on this term. We suggest revising the text as follows: “To complement formal education, there is also the need for training programs for individuals entering and working in companies and the business environment to develop business skills and firm specific knowledge – key to unlocking productive potential and career mobility.”

We would also suggest including a reference to the need for education/business/industry links to assist young people with the ability to get better information on jobs available and the kind of study needed to help them make realistic choices.

- **Paragraph 7:** We believe that the propositions made on labor standards, in particular on the ILO core labor standards, are misleading and do not make sense in this context. We question why the OECD in aiming to “creat(ing) a level playing field for foreign and domestic investors” (page 2, paragraph 2), does not instead first refer to the OECD Guidelines for MNEs, which are not mentioned in the whole chapter.

In addition, we note that it is not correct to say that the ILO core labor standards “are applicable to all countries”, as they are binding only for those countries, which have ratified them.

The confusion in the text arises from mixing up the 1998 Declaration, which is cited, with the Conventions to which the Declaration refers. The Principles underlying the Conventions by virtue of the 1998 Declaration, apply to all ILO members. So, unless a Convention has been
ratified, a country’s laws are not required to conform with all of the details of the Conventions. However, they do have to demonstrate that their national laws adequately address the Principles.

- **Paragraph 8:** The issue of labor market regulation, which is crucial in this context, is not properly addressed in the draft. For example, the draft constructs an artificial dichotomy between “social goals of employment protection, including the protection of core labor standards and others, such as occupational health and safety standards, minimum wage regulation, restrictions on hiring and firing, and legal guarantees of social insurance regimes” on the one hand and “the business interests of companies looking to keep their costs down” on the other. This approach is too simplistic and does not take into account that globally competitive companies and an enabling environment for business are actually the prerequisite for employment creation – an enabling environment benefits employers and employees alike. The “flexicurity” concept developed in the EU-context provides useful guidance in this respect.

We would delete the language “with the business interests of companies looking to keep costs down and replace with: “…with the need to enable companies to invest and create jobs, and in doing so contribute to boosting productivity and economic growth”.

In the penultimate sentence of the paragraph, after “Specific strategies are needed to”, we recommend inserting “reduce regulatory burdens in order to incentivize transition into the formal economy, while also addressing social protection for workers in the informal sectors...”

We note that in the checklist (point 8.8) the balance needed on this issue between flexibility and protection is good, and would suggest this balance is reflected in the opening paragraphs to the chapter – referring to our comments above on paragraph 8.

We note that there tends to be a division of thought when it comes to determining what comes first, that is, whether standards’ observance helps or hinders job creation. In other words, whether a degree of economic development is required before job standards can be raised without affecting job creation. This paragraph demonstrates the essential dilemma that over-burdensome regulation – which may or may not reflect ILO standards – can lead to less, rather than more, employment protection. There needs to be far greater emphasis on the need to first create an environment that encourages business development and growth.

- **Paragraph 10:** There is a reference to “individual companies” in the sentence “A general challenge of HRD policies is to encourage the engagement of individual companies to adhere to good HRD practices, to comply with labor standards, and to contribute effectively to the development of appropriate frameworks.”
Again it is unclear what is meant by human resource development – which with respect to education and developing a quality workforce is first and foremost the domain of governments. Companies will look to an investment environment that provides this quality human capital, and then may choose to implement further training programs as relevant to their business.

It is unclear what is meant by the reference to “appropriate frameworks”.

There is a reference to individual companies, which would need to “comply with labor standards”. We note that ILO labor standards are explicitly addressed to governments, not to companies. We suggest referring to the OECD MNE Guidelines in this context to ensure consistency across OECD instruments and correct language with respect to company operations within the framework of the core labor standards.

We note that there seems to be some confusion between HRD policies and basic employment protections, with the one not necessarily equating to the other. The suggestion that the title should be changed to Human Capital Development, with an explanation that the paper is intended to cover all aspects of the employment relationship, might help to make matters clearer. And policies can’t of themselves encourage individual company engagement in good HRD (HCD) practices – they’re inanimate. It is policy-makers (that is, governments) that must do the encouraging by creating policies with which businesses are able to comply. It is up to governments to develop an ‘appropriate framework’ so that human capital development can occur.

**Checklist:** With respect to the bullets on “Overall HRD framework for investment and development”, we suggest the following:

- Bullet 5: Insert “the quality of” immediately after “strengthen”.

With respect to 8.6 *(Health and Occupational Safety)* we have the following comments and questions:

- Generally on the OSH issue we believe that there should be reference in the chapter to the need for a robust regulatory framework for OSH, a culture of compliance and prevention, and a viable labor inspection capacity to enforce the regulations.
• Are the questions ranked in terms of priority or relevance?

• We suggest putting the question on mental health after the question on protecting workers from adverse effects from chemicals. We note that mental health in developing countries might not translate to the same cause of mental health in developed countries. External environment outside of work might contribute much more to mental health issues for workers in these countries than in developed countries.

• For the questionnaire to be all encompassing, we agree on the need to include a question on mental health. However, its relevance is a little mitigated given the scale of other health problems workers in these countries face.

With respect to point 8.7 on Core Labor Standards;

8.7 Point 1
• The correct language for the ILO conventions which relate to the core labor standards is: fundamental ILO Conventions.

• We suggest eliminating the first question in the checklist since in terms of ILO Conventions, ratification is the key element, then the country must comply with “provisions of the ratified convention.”

8.7 Point 2
• This second question might be misleading, as it seems that it is based on the premise that those conventions are applicable to all countries. Therefore, it would be better to add at the beginning: “If the government has ratified the relevant ILO fundamental Conventions, what measures ….”

8.7 Point 5
• The various questions seem to avoid reference to the role of workers’ and employers’ organizations in designing, revising and participating in the implementation of the fundamental conventions. It is not clear what it is intended in this question and whether the non-governmental actors are the workers’ and employers’ organizations.

8.8 Point 5
• It is suggested that it is somewhat of a contradiction to propose protections for workers not covered by labor law since how might this be expected to vary from the labor law in place?
Rather than create a two-tier system, it might be better to advise countries to ensure their labor protections have universal application but are not so restrictive as to encourage informal sector growth.

**Taxation**

**General**

- Taxation is a core element of a country’s investment framework. One of the most important advances in the development agenda has been the insight that taxes, and a well-functioning tax administration system, are increasingly recognized as critically important factors that can encourage sustainable economic growth in developing countries.

- Capacity building for tax administration in developing countries generally involves the design of tax policy reforms for an effective tax policy framework, and the strengthening of tax administration organizations to manage the tax system. Developing countries may also need support with financial resources – with funding required to develop IT infrastructures and deliver training programs for example.

- The OECD Model Tax Convention and Transfer Pricing Guidelines, together with OECD guidance and instruments relating to transparency and information exchange, are also important instruments for developing countries. We support the involvement of developing countries in the G20/OECD BEPS project and the close engagement that is being encouraged to ensure that the outputs will be relevant and appropriate for developed and developing countries alike.

- In 2013, BIAC issued two sets of voluntary guidance, a Statement of Tax Principles to promote and affirm responsible business tax management by international businesses, and a set of Best Practices for Engaging with Tax Authorities in Developing Countries. These documents aim to promote stability, certainty and consistency in the application of tax principles, as well as to support capacity building for efficient, effective tax authorities in developing countries. We hope that these principles and best practices will foster cross-border trade, investment and sustainable growth for the benefit of all.
General comments on the draft OECD PFI revised tax chapter:

- We generally agree with the 6 questions in the tax chapter, and the related guidance that emphasizes the need for a whole of government approach to ensure consistency between tax policy, development objectives and investment attraction strategy.

- We welcome the emphasis on the importance of assessment of tax systems by developing countries to ensure that their tax systems are well aligned with the type of investment they seek to attract.

- BIAC points out that a holistic approach needs to be taken when setting up guidance for developing countries. We should not leave developing countries to grapple with complicated and sophisticated tax concepts such as cross-border tax planning strategies, marginal effective tax rate, average effective tax rate, and actual vs target tax burden. Developing countries need support with the actual implementation of tax policy and regulatory frameworks to attract investments, secure long term viability, and ensure sustained economic growth. For example, more could be done to support developing countries with revenue forecasting and modelling of the financial impacts of tax incentives and investment frameworks in nominal and net present value terms using appropriate discount rates to assess the costs and evaluate the economic and financial benefits that the investments bring to the countries.

- We welcome the guidance around tax incentive regimes and emphasize the principles of transparency and clarity of tax incentives provisions. BIAC supports the OECD analysis that a well-designed tax incentives program may help to contribute to a country’s economic welfare. In line with the OECD analysis, BIAC believes that businesses may legitimately respond to tax incentives and exemptions offered by governments.

- BIAC believes that the document raises interesting tax policy issues for developing countries to consider, and provides guidance to developing countries for creating a robust and competitive environment. For a broader participation, BIAC suggests also including countries from Western and Central Africa in the PFI Task Force. Africa is a vast and rich mineral resources continent and there are large-scale mining projects and operations in Western and Central African countries which require significant capacity building and support in the development of the required policies and legal and fiscal frameworks to attract long-term investments.
Detailed comments on the specific sections of the draft OECD PFI revised tax chapter:

Annex 1: The Updated Tax Policy Chapter of the PFI

On the updated tax policy chapter of the PFI, we would like to provide the following comments:

- To add in the 2nd paragraph of page 5:
  
  “Compliance costs from excessive complexity, a lack of transparency, excessive penalties, and unpredictability in the tax system should also be taken into account.”

- On location-specific profit opportunities (page 6), BIAC questions if the OECD intends for the term “location-specific profit opportunities” (as used in the draft OECD revised tax policy chapter for the PFI) to have the same meaning as “location-specific advantages” (as used in the OECD Transfer Pricing Guidelines)? We do not think so, and would recommend that this be clarified as policy-makers may misunderstand the term “location-specific profit opportunities” as “location-specific advantages”.

- BIAC highlights that businesses do take levels of taxation into account when making decisions to invest in a country, and that high taxes can discourage such decisions. Tax policy instability may also risk future and continued levels of investment (such as investments in quality of service, new technologies, or extension of network coverage to rural areas) despite the location-specific profit opportunities referred to in the draft OECD paper.

- To add in the 2nd paragraph of page 6:

  “Where an economy offers an abundance of location-specific profit opportunities, policy makers may understandably resist pressures to adopt a relatively low tax burden to protect their revenue base. Tax policy instability and increasing levels of taxation can however reduce the location-specific profit opportunities of an activity and adversely impact businesses’ continued investment decisions in an economy. Further, a higher host country tax burden could generally be acceptable to investors if the country offers attractive business conditions, a stable macroeconomic framework, a stable tax policy environment, the rule of law, regulatory certainty, a well-trained labor force, and effective investment promotion systems.”

- Where tax incentives are targeted to special groups/locations, BIAC supports the OECD argument that such targeting should be based on sound reasoning e.g. the need to correct market imperfections (page 7). Similarly, where governments impose tax rate changes that are targeted at specific industries, BIAC highlights that such targeted changes should also be reviewed to ensure that the targeting is justified. Where possible, such changes should
be based on a clear economic analysis to justify the decision, taking into account the benefits and costs of the proposed changes.

- To add in the 3rd paragraph of page 8:

  “Consolidating all tax incentives, along with their eligibility criteria, into the main body of the tax law, and providing assurances within the law that such incentives will remain in place for a given period of time, increases transparency and may remove any doubt that the tax administration is empowered to administer them”

- On the unintended and unwelcome results of tax incentives (page 8), BIAC cautions against creating undue suspicion about companies’ efforts to qualify for tax incentives.

**Annex 2: Tax Policy Checklist**

- For a more holistic review, BIAC would suggest that the following points be added to the tax policy checklist:

1. Consistency of tax policy with broader development strategy
   - To add under the 3rd bullet point:
     
     “What is the average current tax burden on domestic profits? Has the assessment of the actual tax burden taken into account statutory provisions as well as tax-planning opportunities and compliance costs? Similarly, does the assessment of the actual tax burden take into account instances of double taxation?”

2. Prudent use of targeted tax incentives
   - To add under the 1st bullet point:
     
     “Are tax incentives applied uniformly to all investors or are they targeted to special groups/locations? Similarly, are there any particular groups, locations or industries that suffer from specific punitive taxes?”

   - BIAC fully supports the 3rd bullet point: “Is the tax system neutral in its treatment of foreign and domestic investors?” BIAC points out that the key benefits of tax treaties includes non-discrimination, and effective mechanisms for resolving disputes.
(4) Evaluation of costs and benefits of investment incentives

- To add under the last bullet point:

  "Has the government assessed the largest beneficiaries of tax incentives for investment? Are the largest beneficiaries of tax incentives highlighted in public statements? **Similarly, has the government conducted a similar review on the impact of punitive taxes on specific industries?**"

(5) Transparency and good governance of tax incentives system

- To add under the 2nd bullet point:

  "Can tax incentives be granted outside of the country’s tax and investment laws (e.g. through special agreements, memoranda of understanding, etc.)? **Similarly, has the government conducted a similar review on additional taxes or fees that are being imposed outside of the country’s tax and investment laws (e.g. at local levels or through the imposition of regulatory fees)?**"

- To add under the 5th bullet point:

  "Where appropriate, do tax incentives have sunset clauses after which investors are expected to follow the general fiscal rules? **At the same time, do investors have sufficient assurances that tax incentives will remain in place for a given period of time?**"

(6) Countering abusive tax planning strategies domestically and internationally

- For a holistic review, BIAC recommends also including an additional point regarding international tax cooperation to resolve cross-border taxation conflicts. Anecdotal evidence suggests that whether a country has effective non-discrimination policies and efficient mutual agreement procedures (MAP) in place to resolve cross-border taxation conflicts is an important consideration when making an investment decision, in particular long-term direct investment decisions.
Annex 3: Tax Policy User’s Toolkit of the PFI

On the tax policy user’s toolkit of the PFI, we would like to provide the following comments:

- On page 19, to add in the 1st paragraph after the bullet points:
  
  “Nor do they account for the costs to business of complying with the tax system, including costs associated with registration, completing and filing tax returns, tax audits and penalties associated with disputes.”

- On tax burden measures adjusted for compliance costs (page 21), BIAC welcomes the OECD recommendation for policy makers to also consider the qualitative side of tax burden analysis. The importance of adherence to the rule of law, and the need for mechanisms to resolve disputes effectively could also be highlighted.

- BIAC fully supports the argument set forth in the draft OECD paper that a thorough analysis be conducted both prior to the introduction of investment-promotion measures as well as systematically measuring ex-post outcomes, to assess the extent to which the measures meet their intended objectives (page 25). Similarly, BIAC believes that the same concept should be applied to the BEPS project. That is, a framework for measuring the costs and benefits of anti-BEPS actions is needed in order for a holistic review of the BEPS debate and counter-measures to be made.

- On triggering competition (page 25), BIAC highlights that tax competition between countries may have a positive impact on the global economy. Tax competition can help to address shortcomings in governments’ budgeting processes and encourage fiscal prudence by limiting the tendency for governments to spend and tax excessively.

- On the equity principle (page 27), to add in the 5th paragraph:
  
  “Where tax relief is targeted, policy makers should examine and weigh arguments in favour of and against such treatment, and ensure that the different treatment can be properly justified. Where justifications are weak (e.g. where corporate tax relief is targeted at foreign investors to the exclusion of domestic investors) consideration should be given to a non-targeted approach. Similarly, governments should also review justifications for imposing additional taxes that are targeted at specific industries such as the telecommunications sector.”

- On international tax cooperation (pages 35-37), we would like to provide the following comments:
  
  - To add in the 2nd bullet point regarding the benefits of having a wide tax treaty network:
“Treaties reduce investor uncertainty over tax treatment by providing a consistent and principled approach to international taxation (e.g. definitions of a PE, the attribution of profits, the types of payments that are subject to withholding, how business travelers should be treated, and what gains will be taxed etc.); and by establishing procedures to help resolve disputes over the allocation of taxing rights between host and home countries.”

- On the number of tax treaty partners (page 36), BIAC questions the need to list countries such as Belgium, the Netherlands, and the United Kingdom as attractive conduit locations for the routing of investments.

- On the level of non-resident withholding taxes (page 36), BIAC suggests the following amendment:

  “To guide the assessment of tax treaties, the table below suggests withholding tax rates that would generally be regarded as acceptable by investors.”

- On resources for further study (page 37), for a complete listing, BIAC suggests to also include as study resources: the UN Model Convention, and the UN Manual for the Negotiation of Bilateral Tax Treaties.