25 February 2015

Consultation on the Policy Framework for Investment

BIAC Comments

OVERARCHING COMMENTS

- As highlighted in the preamble, the objective of the OECD Policy Framework for Investment (PFI) is to mobilize private investment that supports steady economic growth and sustainable development, thus contributing to economic growth and well-being of people around the world.

- Bearing this overarching goal in mind, which should guide the review of all the chapters, BIAC supports the revision to ensure that the instrument remains up-to-date and relevant in the current policy discussions. We submitted detailed comments on available chapters on several occasions and are pleased to see that a number of our comments have been reflected in the revised version. Other comments still remain to be addressed and are summarized hereafter.

- Bearing in mind that a comprehensive policy approach to investment is essential, BIAC appreciates that the PFI looks at framework conditions across different areas. At the same time, the PFI must remain focused on its main objectives of fostering private investment, both domestic and foreign direct investment, and effectively contribute to addressing barriers to investment flows which can foster growth and development. A careful balance needs to be struck between developing an instrument that is comprehensive and focused at the same time. It should not lead to a long shopping list of issues, for which other instruments or dedicated projects exist and which are not directly linked to the main objective of the PFI. With this in mind, the various chapters should not be considered in isolation or as stand-alone chapters.

- As investment will be the overarching theme of the June 2015 Ministerial Council Meeting, 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.

- At the same time, and in view of the high visibility that the PFI is likely to get at the Ministerial, we underline the importance of keeping the instrument as fact-based and objective as possible, without engaging in subjective discussions on key issues that are sometimes subject to an emotional debate. The PFI therefore needs to be drafted very carefully.

- We hope that previous and additional BIAC comments will be taken into consideration as the PFI is being finalized. With this in mind, we look forward to actively engaging in discussions on how to promote the new PFI also in the post-2015 development agenda. BIAC thanks the OECD Secretariat for a constructive cooperation and looks forward to remaining actively involved in this process.

CONTEXT

- In the first sentence of the paragraph titled “Context” (inside cover), we recommend removing the words “which started in 2008 and from which many economies have still not recovered”. This is not the focus of the PFI, and the other two issues (outward investment and global value chains) are not qualified in such ways. Incidentally, the paragraph also ignores the documented rise of protectionist measures adopted by certain countries.

INTRODUCTION

- The preamble and introduction have only been added to the most recent draft version of the PFI. As they set the overall tone of the instrument, it is important that they are carefully drafted, balanced and focused on the fundamental and overarching objectives of the PFI.

- In this respect we strongly recommend that the introduction clearly highlights upfront the **fundamental importance of both domestic and foreign investment for economic development and job creation**. While, as mentioned in the first paragraph, governments have of course a broader development agenda than corporate profitability, it should also mention that corporate profitability is a fundamental prerequisite for investment to come forward. No company will engage in a major investment if there is not a good chance of return on investment.

- We strongly recommend highlighting up front in the introduction **the essential and positive role the private sector can play** and the fact that the **right enabling conditions need to be in place** so that business can effectively act as a dynamic force for the success of our economies and the wellbeing of citizens. In particular considering the uneven recovery of OECD economies and imbalances in world markets, the PFI should highlight as a starting point that private sector-led growth is a top priority. Countries which have successfully mobilized domestic and foreign investment to sustainably support their development have done so because they have built enabling environments for investment.

- 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, is an important political message the PFI should prominently highlight.

- The section on **non-discrimination** (paras 23-25) refers to discriminations and restrictions that private and foreign investors are facing. Drawing from the OECD analysis in the area of competitive neutrality, we recommend that the section more clearly underline that the presence of state-owned enterprises (SOEs) in the market place should not thwart private entrepreneurs, distort competition or lead to inefficiencies.

- We note that **corruption** is briefly mentioned in paragraph 18, but considering that the OECD has a unique instrument in place, we would recommend further underlining the importance of effectively addressing corruption and bribery through international cooperation upfront and more fully as a fundamental prerequisite for investment in OECD and non-OECD countries.

Additional specific comments

- <u>*Paragraph 6, 3rd sentence:*</u> The words "can sometimes" make it seem as though FDI is only rarely advantageous to host countries. A much more positive statement about international investment is needed here. We recommend the following (additions shown in bold):

  > *Most investment is undertaken by domestic firms, but international investment can ~~sometimes~~ provide* ***significant amounts of capital that is often not available domestically and also provides*** *additional advantages as a conduit for the local diffusion of ~~technological~~* ***technology*** *and expertise, such as through the creation of local supplier linkages and by providing improved access to international markets.*

- <u>*Paragraph 9, last sentence:*</u> We believe that the point is for attractive investment climates to prioritize economic impact and with positive social consequences. Good economics should consider social impact. We recommend a minor edit as follows (additions shown in bold):

  > *It should also ensure that investment brings about the highest possible economic ~~and social~~ impact* ***with positive social consequences.***

- <u>*Paragraph 12, first bullet:*</u> Remove the word "overly". The over-protection of some workers' rights is likely to reduce employment opportunities for other workers.

- <u>*Heading "Better, not less, government" (page 8):*</u> Remove the words "not less". Some countries may face burgeoning and costly public sectors, prompting their political leaders to make cuts and increase efficiencies. In such cases, it would be unhelpful if the PFI were seen to be promoting the opposite view. The emphasis should simply be on "better government".

- <u>*Box 1, Point 1*</u>*:* We question what is meant by the phrase "so far as possible" and recommend, if possible, its deletion.

- <u>*Box 1, Point 3*</u>*:* We have reservations about the phrase "unless objective, clearly stated differences justify discrimination". This qualifier appears highly open to interpretation by some governments and could result in serious repercussions for specific groups. We encourage the authors to check the source.

- *Box 1, Point 4:* After the word "Ministers", we recommend including *", officers of the courts,".*

- *Box 1, Point 5:* After the word "human", add the words "*and property".* Property rights are an important addition for investment principles.

- *Paragraph 16, 3rd sentence:* Insert "*necessarily*" between "not" and "mean". The current wording suggests more regulation may be desirable, which is rarely the case.

- *Paragraph 17, 4th bullet*: add *banking* to the list in brackets.

- *Paragraph 26, last sentence:* Delete the word "good" and replace with *"attractive".*

- *Paragraph 31, 3rd sentence:* Insert "accepted" between the words "to" and "international" – i.e. "to *accepted* international labor and environmental standards". Not all countries subscribe to the letter of international labor standards, and the standards can be open to some interpretation.

HORIZONTAL POLICIES AND PRACTICES

- This chapter has an important role as it underlines the need for effective investment policy to be grounded in strong institutions and effective public governance. The chapter correctly highlights up-front 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. We therefore recommend adding a paragraph up front, addressing more fully why 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 change. Regulatory predictability with transparent and robust legal regimes is also essential to encourage innovation and appreciate investment risks associated to innovation.

- An additional aspect that might be highlighted is the importance of reducing overly complex **administrative burdens** as red tape can significantly increase costs and delay the implementation of projects.

- BIAC agrees that the issue of **trust** is essential and is actively involved in both pillars of the OECD trust project, related to the public and private sectors. With regard to the 2013 opinion poll mentioned in paragraph 35, we recommend deleting it since it will quickly become outdated as there will no doubt be a number of years before the PFI is updated again.

Additional specific comments

- *Paragraph 40, 2nd sentence:* After the word "invest", insert the words *"and/or trade",* and then delete the words "or export". The draft report regularly refers to "export" rather than "trade", which implies that importing is somehow not a worthy undertaking. Importing is of course part of fundamental supply chain economics and is a key factor in resilient and competitive economies. The PFI should not infer otherwise.

INVESTMENT POLICY

- As mentioned previously, 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 appreciate that the chapter clearly highlights the importance of non-discrimination, protection of property rights, contract enforcement, dispute settlement and international investment agreements as important components of domestic investment policy.

- **Non-discrimination**: The section related to 'national treatment' should include a reference to the OECD Declaration on International Investment and Multinational Enterprises, of which "national treatment" is one of the four pillars. While the section mentions that exemptions to non-discrimination need to be evaluated, the text should be more forceful in pointing out to the negative impacts of overly tight investment screening procedures on cross-border investment, growth.

- **Conflicting requirements**: The OECD Declaration on International Investment and Multinational Enterprises consists of four elements: (1) national treatment, (2) conflicting requirements, (3) international investment incentives and disincentives and (4) the Guidelines for Multinational Enterprises. However, the recommendation on conflicting requirements is rarely given much visibility and could be easily highlighted in the context of the PFI. The Application of conflicting rules is burdensome to multinational activity and hence, poses a serious obstacle to international investment.

- As underlined in the PFI, protection of property, including **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 remain concerned by the statement at the end of paragraph 19 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 are pleased that the section on **land tenure** has been significantly revised to reflect more closely the language used in the FAO Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (2012). It is a significant improvement. Our remaining specific comments are provided below.

- We welcome that the section on **international investment agreements and arbitration** has been recast to address a number of the specific comments we submitted earlier. The PFI will get significant political attention and should therefore refrain from entering into the emotional debate that currently exists in this area and be as fact-based as possible. We recommend some further detailed changes, which are mentioned in the section on additional specific comments below.

- **ISDS** is a vital part of investment protection by providing a neutral mechanism for dispute resolution in cases of breaches of investment treaties and an essential component of good governance and the international rule of law. We welcome the deletion of a number of subjective sections included in previous drafts and would like to highlight a number of additional specific changes, which are mentioned in the following section. To read BIAC's recent statement on ISDS, click here.

- As a general comment, applying to this chapter and others, the list of additional resources that follows each chapter includes a number of UN and NGO documents cited. For balance, it would be useful to also include business references, such as relevant BIAC papers, the ICC Guidelines for International Investment and others.

Additional specific comments

- *Paragraph 1*: Make the following addition: Investment is by nature forward-looking, *although it is heavily impacted by past acts, policies and practices of the authorities of a prospective investment venue.*

- *Paragraph 2, line 4*: "…a list of *sub-sectors or* sectors.."

- *Paragraph 3, line 6:* add *"The legal format by which investments are regulated can be important. The more easily a constitution, law, regulation or decree can be amended or revised, often demonstrated by past practice, the less predictable the investment climate will be."*

- *Paragraphs 4 and 5:* The language should be slightly revised to illustrate that not all SMEs face compliance problems and that not all countries have sector specific legislation.

- *Paragraph 4, last sentence*: We recommend rewriting or deleting the last sentence, which seems subjective.

- *Paragraph 5:* add "conforming legislative and regulatory standards to international norms" in line 2, and in line 6 add *"providing efficient and non-discriminatory mechanism for dispute resolution".*

- *Paragraph 10*: Add after the first sentence *"Clearly, restrictions of the type described in the foregoing paragraph can have a chilling effect on foreign investment. On the other hand, …"*

- *Paragraph 11, line 3*: "…. Where a state interferes in the *ownership or* use of a property *right* or in the enjoyment of its benefits…" The addition is critical as some governments may strip an owner of a property right simply because they have not used it.

- *Paragraph 16, 2nd sentence:* Remove the words "large-scale". As mentioned in our previously-submitted comments, the text should avoid discriminating simply on the basis of size without mentioning *which land* and *for which use*. For instance, a local small-scale land investment may be just as concerning if it happens to involve an area of land, or a type of land use activity, that leads to the displacement of local residents or loss to their livelihoods. We recommend that the PFI should therefore avoid singling out large-scale investments in this section, and should instead remain objective and fact-based.

- *Paragraph 17, 1st sentence:* For the same reasons as those stated above, we recommend removing the word "large" from this sentence.

- *Paragraph 23*: Delete second sentence "it provides key public goods…" Add new sentence starting in line 5: *"The unwarranted criminalization of strictly civil cases in order for the plaintiff to garner bargaining leverage with the foreign investor is a common practice that demonstrates an abuse of process and manipulation of the domestic judicial system."*

- *Paragraph 24:* replace the second sentence by: *"Though confidentiality of such proceedings is important and often necessary for them to function as properly, this means they do not contribute to the development of the law as is traditionally the case with court cases."*

- *Paragraph 25:* delete "promotion" as the prime purpose of investment agreements is protection and guarantee of fundamental rights.

- *Paragraph 26:* The language "… governments should … ensure that they have the capacity to implement IIA commitments and the ability to negotiate IIAs…" should be changed as it could be interpreted in a way that developing countries may not benefit from such agreements, which is not the case.

- *Paragraph 27:* delete "additional" in the first line, which could be understood as companies being given special rights, as opposed to a set of rules which ensures that investors are properly and rightfully protected.

- *Paragraph 28*: "proliferation" sounds subjective. It would seem more accurate to underline in the first sentence that the treaties have tended to standardize and make more predictable the international investment policy landscape. There should be some acknowledgement that some countries have already made significant changes to such agreements.

- *Paragraph 29* needs further refinement. We recommend replacing the beginning of the paragraph with the following "*Investor-state dispute settlement proceedings in arbitration have been receiving increasing attention. The number of claims remains modest in comparison to the huge amounts of international* *investment that is covered by such provisions."* Replace "*which can amount to hundreds of millions or even billions of dollars*" with the following: *"… although the empirical evidence shows that the amount paid is significantly less than the amount claimed."*

- *Core questions:* add after question 17: *What is the government's record with respect to arbitration and judicial proceedings in which foreign investors are a party?*

- *Additional Supplemental question:* We suggest an additional question regarding investment screening (p. 29): *What is the scope for the investment screening program? "National security" (and if so, how narrowly/broadly is national security defined/interpreted?) or a broader "national interest" criteria?*

- *Supplemental questions, Section 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). It rightly refrains from suggesting whether or not such ceilings are effective. However, as stated in our previously submitted comments, we believe that further clarification is necessary to ensure that the question isn't misinterpreted. In line with the language used in the FAO Voluntary Principles (2012), we would recommend rewriting the bullet point as follows (additions shown in bold):

  > *~~Are there any limits on the size of the land area allocated to land users?~~* ***Are rules in place that clarify the scale, scope and nature of allowable transactions in tenure rights? How are transfers exceeding a certain scale approved?*** *Are land tenure rights limited in time?*

INVESTMENT PROMOTION AND FACILITATION

- We welcome the clear recognition that investment promotion and facilitation can be a powerful means to attract investment and maximize its contribution to development. As is the case in other policy field, success depends on the quality of investment-related policies and the overall investment climate. Resources need to be employed effectively taking into account costs and benefits. In this respect, the chapter provides useful overarching key recommendations. Whole-of-government approaches, fostering effective coordination among all those involved are particularly important in this context. It should be born in mind that one size does not fit all and that different approaches are suitable in different contexts.

- The issue of streamlining administrative procedures to reduce cost of investment is mentioned in the questions, but should be more fully highlighted in the main text as a key message under investment facilitation. Overly complex administrative burdens represent significant barriers to investment as red tape places increased costs and delays the implementation of projects. This issue should be further underlined as a fundamental pillar of investment facilitation.

- We welcome the recognition of business linkages between MNEs and SMEs. Promoting these channels of collaboration calls for the creation of knowledge-based ecosystems focused on business perspectives to allow for the so-called 'match-making' between MNEs and SMEs. Business and government collaboration could also enable SMEs to invest in their in-house training capacity as a source of competitive advantage, and encourage the use of online networks to share expertise and experiences.

- Particularly important to SMEs is business access to finance, which acts as a founding pillar for their development at an early and mid-stage. The support of small business credit guarantee schemes and the development of adequate financial infrastructure tools are two pivotal policy considerations in this regard.

- We commend the PFI's focus on SME integration into global value chains. Beyond the involvement of SME local development from a foreign investor standpoint, government policy could simplify customs control mechanisms and regulations on export control to improve SMEs participation into GVCs. The internationalization of SMEs can also be achieved through targeted trade policy measures that could provide effective export support, and facilitate information on third country markets.

TRADE POLICY

- Open markets are crucial to allow for an optimal operation of global value chains (GVCs) and trade-driven economic growth. We generally welcome the approach taken in the trade policy chapter of the revised PFI. We commend the OECD for highlighting new issues in this updated version, including the links between GVCs, trade facilitation, and investment and the integration of SMEs into the supplemental questions. With this in mind, we would like to put forth the following comments and recommendations which were provided before but not taken into account into this version.

- 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. A specific mention on this issue could be added to core question number two and in the supplemental questions. Addressing this issue is critical given the growing importance of trade in services and its linkages to investment decisions.

- 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.

- Non-discrimination in public procurement tenders is important to support 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.

- 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.

- We suggest rewording the second sentence in para 6 saying that for least developed countries preferential access to larger markets through eased access for their goods and services can foster their participation in global trade.

Additional specific comments:

- *Supplemental Questions, "Services and other regulations":* Insert a new second bullet point as follows:
  Does the government regulate cross-border data flow and storage? For what reasons?

COMPETITION POLICY

- Effective competition policy is vital to attract foreign direct investment. Efforts to develop and improve competition policy have proven effective at spurring investment and growth. In the past 15 years we have seen a transformation in the global competition policy landscape. Developing countries have been establishing competition agencies, benefitting greatly from the support of dialogue and engagement with OECD and through participation to the International Competition Network (ICN). This has transformed the landscape of competition policy worldwide, and is an important element to support cross border investment flows including to developing countries.

- As BIAC stated in its comments to OECD when the original PFI chapter was being formulated, the establishment of a national competition law or policy focused on consumer welfare and economic efficiency is critical to its expanding foreign direct investment (FDI). We continue to emphasize that competition policy is a particular concern of the international business community and plays an important part in the decision by a company to invest in foreign markets. The business community equates absent or misdirected competition policy to increased investment risk, which, on balance, decreases the incentive to invest. It is important for a company to be confident that the application of a foreign competition law will be non-discriminatory in its application. Discriminatory application can take many forms, including, for example, on the basis of nationality, political affiliation or economic clout.

- The ability to accurately assess the risk of an investment also importantly depends on reliable and transparent enforcement of well-defined competition law or policy. The least amount of risk is present when a company can determine that the success of the investment will be based on its overall operational efficiency rather than inconsistent or arbitrary domestic enforcement.

Additional specific comments

- *Paragraph 6, 1st sentence:* Insert "anticompetitive" before "mergers". It needs to be clear in the text that not all mergers are considered anticompetitive, recognizing that some are essential to firm survival.

- *Paragraph 9:* We suggest that the paragraph also emphasizes that structural separation should only be used in cases of clear market failure, as a remedy of last resort.

- *Questions, section 3:* Suggest to add an additional question as follows: "*Does your competition law recognize and respect the importance of Intellectual Property Rights?*"

- *Section 6:* We suggest deleting the following question (first bullet point): "*Does the competition authority have the power to undertake market studies in markets where competition does not appear….may identify?*" We do not agree with the implied suggestion that the ability to undertake market studies is an important element of competition policy. The competition authority should rather focus on detecting and investigating infringements of competition law.

TAX POLICY

- As mentioned in our previous comments, BIAC recognizes that taxation is a core element of a country's investment framework. We welcome the emphasis on the importance of assessment of tax systems by developing countries to ensure that their tax systems are aligned with the type of investment they seek to attract. However, BIAC points out that a holistic approach needs to be taken when setting up guidance for developing countries. 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.

- We also welcome the guidance around tax incentive regimes and emphasize the principles of transparency and clarity of tax incentive 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.

- We would also like to refer you to the many detailed comments which we submitted on 19 December 2014 (see link), many of which still need to be addressed. We encourage the OECD to take these detailed comments into account as the text is being revised, and stand ready to provide any clarifications if necessary.

CORPORATE GOVERNANCE

- The OECD Corporate Governance Principles, referenced in the chapter, are an international benchmark for policy makers, investors, corporations and other stakeholders worldwide. While the 2004 OECD Principles and 2006 OECD SOE Guidelines are mentioned, it should be borne in mind that the revised version of both instruments will reflect a number of developments that have occurred over the decade. We refer to the recent BIAC comments on the Principles, which we submitted in the context of the public consultation on 2 January. The section on overarching comments summarizes a number of the changes that have taken place and we have highlighted in the context of the update (click here). Some of these comments also provide useful input to the review of the PFI chapter.

- The specific focus of the chapter on corporate governance in the PFI should be on the framework that governments should provide for effective corporate governance, which requires an overall enabling legal, regulatory and institutional framework as well as mechanisms for effective implementation, which need to be clearly defined. The corporate governance framework should promote overall economic performance as well as transparent and well-functioning markets. While the chapter is generally drafted in a clear manner and includes many useful straight-forward recommendations, in view of the fact that it is mainly based on the 2006 text, it would be helpful to review it with a view to reflecting recent developments, such as for example the role of the board, the role of institutional investors and the need to minimize misalignments between investors and companies where they invest.

- As mentioned in the text, governments have a major role in ensuring accountable and well-governed SOEs. The OECD SOE Guidelines, once finalized, should also help avoid distortions of competition between the public and private sector, an issue which is particularly important in the context of the PFI. The OECD's work on competitive neutrality, which resulted in a major publication in 2012, should be referenced in this chapter. It clearly highlighted the need of SOEs and the private sector to be able to compete on a level playing field, which is essential for an efficient use of resources and thus to achieve growth and development.

- While stakeholders have an important role, para 16 seems to give additional weight to stakeholders compared to shareholders. The paragraph should be amended to highlight that the Board's top priority and fiduciary duty is to the company and its shareholders. Related to the above-mentioned point, we also recommend a change in the supplemental question on stakeholders where reference is made to the possibility to be able to freely communicate their concerns. The word "concerns" is overly broad, and due attention should be given to company-internal procedures.

- While other chapters of the PFI have undergone several rounds of comments, we understand that this chapter has not yet been discussed by the OECD Corporate Governance Committee. If during the review process of this chapter significant changes are introduced, BIAC would appreciate the opportunity to review and provide comments on the revised draft.

POLICIES PROMOTING RESPONSIBLE BUSINESS CONDUCT

- We thank the OECD for taking into account a number of our earlier written comments. The elaboration in the introductory paragraphs is very helpful, underlining that while the MNE Guidelines are addressed to companies, the PFI is addressed to governments and that governments have an important role in providing an enabling framework for responsible business conduct.

- We appreciate the inclusion of the need for governments to act responsibly in the context of governments' role as an economic actor. Through SOEs and procurement, governments indeed play an important role in this area. At the same time, 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.

- With regard to human rights, we 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. A reference to governments' NAP should be included in the chapter.

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

- Regarding the implementation and enforcement of norms and standards, a question could be included regarding the role of specific enforcement agencies.

- We suggest rewording the second sentence in para 14 as it currently suggests that when a government is not performing a commercial role it does not have to be expected to behave responisibly.

HUMAN RESOURCE DEVELOPMENT

- The latest draft of this chapter is much improved and raises a number of important questions in its checklist. For example, the chapter encourages policymakers to examine whether excessive taxes and regulations may discourage firms and individuals from operating in the formal economy. It also promotes an adequate employment protection framework while ensuring to allow sufficient flexibility to enhance productivity and overall competitiveness. Its emphasis on skills is appreciated, particularly regarding curriculum design, skills mismatches, skills assessment, education funding, and cooperation among all education stakeholders.

- However, we are still of the view that **the title and reference to 'human resources development' (HRD) could be misleading to many readers.** The authors include a definition for HRD early in the chapter which refers to the "knowledge, skills and capacities of all the people in a society", though the definition dates back to a publication from the 1960s. HRD in today's language is more often associated with the staffing of companies, rather than the skills and capacities of individuals in society. To avoid confusion regarding the focus of this chapter, we recommend rewording the title and the use of the term HRD throughout the chapter. For instance, it could be rephrased as "Human Capital Development", or alternatively "Skills and Labor Market Development". This revision would also bring clarity to the fact that the questions in the checklist are addressed to governments and not to companies.

Specific comment:

- *Paragraph 6:* We suggest adding the following sentence immediately prior to the final sentence of this paragraph:

  > ***Effective systems linking potential employees to suitable job vacancies are also important to ensure training and skills acquired can be used effectively.***

- *Paragraph 10, 3rd sentence:* An example of possible confusion is apparent in paragraph 10, which states that *"A general challenge of HRD policies is to encourage the engagement of individual companies to adhere to good HRD practices."* We question what is meant by the notion that individual companies should adhere to good HRD practices, bearing in mind that developing people's knowledge and skills is first and foremost the prerogative of governments. Companies will look for an investment environment that provides employable individuals, and these companies may choose to implement further training programs as may be relevant to their specific business. To avoid confusion, we would recommend deleting the third sentence of paragraph 10.

INVESTMENT IN INFRASTRUCTURE

- We commend the OECD authors for including a chapter dedicated entirely to infrastructure, bearing in mind its crucial role in development and growth. We also appreciate that many of our prior comments have been incorporated into the chapter.

Specific comments:

- *Paragraph 12, 5th sentence:* Prior to the word "effectiveness", insert "duration and". This would help to recall the principle that subsidies should be temporary and targeted.

- *Paragraph 12, 6th sentence:* Delete the word "deteriorating" and replace with "reducing".

- *Checklist, "Financing infrastructure investment", 7th bullet:* There is often a need for greater coordination and better allocation of financial resources for infrastructure in developing countries. We appreciate that this point has now been mentioned in Paragraph 17, though it would be important to also mention it in the Checklist where ODA is referred to. It could for example take the form of an additional question in the 7th bullet point: *"Are ODA resources from donors well-coordinated with other sources of infrastructure finance, such as export credit agencies?"*

FINANCING INVESTMENT

- *Note: Having only received this new chapter very recently, we can offer only the following preliminary general and specific comments at this stage. We may follow-up with additional specific comments in due course.*

- Generally, we find the draft well-constructed in that it covers the broad range of aspects that should be taken into consideration to create a sound environment for financing investment in countries.

- While the chapter emphasizes the importance of financial sector regulation and supervision, it should more explicitly highlight the importance of **regulatory impact assessment** (for example in Paragraph 5). Financial regulations introduced since the 2008 global financial crisis were intended to strengthen financial market stability, but these may be having unintended consequences for economic growth and investment. This is becoming a growing concern at the level of the G20 and Financial Stability Board (FSB) as this year the focus of the Turkish G20 Presidency is on the completion and implementation of the international regulatory program. We therefore underline the importance of this PFI chapter raising the need for *regulatory impact assessment*, to ensure a more coordinated approach to financial regulation. It should furthermore emphasize the need for *cooperation between government, regulators, and industry.*

- The chapter should also say more about the **use of official sources of development finance to leverage private finance.** This is referred to in the Infrastructure chapter, but it is not solely an infrastructure issue, and we suggest that a cross-reference should therefore be drawn in the Financing Investment chapter. This would be particularly relevant now that the issue of leveraging private financing is a key focus of the Post-2015 development agenda. The emphasis should be on the use of instruments that mitigate risks.

Specific comments:

- <u>*Paragraph 4:*</u> To improve the flow of this paragraph, we recommend putting the final sentence (beginning with "The 2008 global financial crisis…") immediately after the second sentence of the paragraph. We also believe that the sentence beginning "The 2008 global financial crisis…" should insert the words "insufficiently supervised and" before "poorly regulated", as insufficient supervision was also a key factor in the crisis. Finally, we recommend adding an additional sentence at the end of this paragraph which should underline the importance of regulatory impact assessment, as there is now growing consensus at the G20-level that the possible unintended consequences of regulations introduced since the 2008 crisis need to be better understood and mitigated. The revised paragraph 4 could therefore be rewritten as follows (our edits shown in bold):

> *A key challenge for policymakers is to put in place a policy mix that avoids macroeconomic imbalances and financial sector vulnerabilities that can thwart the growth process. Macroeconomic stability is a necessary condition for savings mobilization and credit expansion and for overall financial deepening.* ***The 2008 global financial crisis has highlighted the risks that insufficiently supervised and poorly regulated financial systems can pose to financial stability and to economic growth and development. Regulatory impact assessment is also vital to assess and address possible unintended consequences of financial regulations on growth and investment.***

- *Paragraph 9, 4th sentence:* Where this sentence refers to SMEs being "disadvantaged relative to larger and more established firms in this regard", it would be prudent to explain why this may be so. We would recommend rewriting the sentence as follows (addition in bold):

  > *SMEs, **often lacking the capacity to provide information about their creditworthiness, can be** particularly disadvantaged relative to larger and more established firms in this regard.*

- *Paragraph 9, final sentence:* SMEs' difficulty in obtaining financing will also be compounded when pro-stability financial regulations may inadvertently render the financing of SMEs as too risky for lenders. We would recommend rewriting the sentence as follows (addition in bold):

  > *Their difficulty in obtaining financing will be compounded when the business environment lacks transparency, when the legal system is weak, when monopolies are present, **and when regulations might unintentionally disincentivize lenders from financing SMEs.***

- *Paragraph 11, 3rd sentence:* Insert the words *"and sustainably,"* after "efficiently". State interventions should after all seek to make new markets become more sustainable.

- *Paragraph 11:* Only fleeting reference is made in this paragraph, and indeed in the chapter as a whole, to financial literacy and financial education. However, this is often a key issue in developing and emerging markets. Even with an effective financial system in place, growth and development can be impeded by individuals' and firms' lack of understanding about financial services. It would be useful if more could be said about how governments, in collaboration with the financial industry, might strengthen financial literacy.

- *Paragraph 16, first sentence:* After the word "improving", insert the words *"policy predictability and".* Policy predictability is essential for investors to have the confidence to make long-term investments.

- *Paragraph 18:* We recommend the deletion of this paragraph. We question what is meant by "cherry-picking by foreign banks" and how this may "undermine overall access to financial services". This sentence seems unduly negative about the presence of foreign banks and does not reference any supporting evidence. We feel the paragraph might be misleading to policymakers in emerging and developing countries.

- *Supplemental Questions, "Enabling environment for financing investment", 3rd bullet:* Insert the words *"and regulatory"* immediately after "policy". We believe greater coordination is required between pro-growth economic policies and pro-stability financial regulations.

- *Supplemental Questions, "Enabling environment for financing investment", 4th bullet:* Insert an addition question here on regulatory impact assessment, such as:

"Does the government make use of regulatory impact assessments to determine the possible consequences of financial regulations on stability, economic growth, and investment?"

PUBLIC GOVERNANCE

- BIAC overall supports the spirit of the public governance chapter and in particular the statement that "nothing contributes more to investor confidence about regulation than predictability and the recognition that rules achieve their objectives" (§2). We also welcome the spirit of promoting efficiency and effectiveness of regulations. Efficient, stable, transparent and predictable governance and effective enforcement of legal and regulatory frameworks are crucial markers for businesses to operate, and for the economy as a whole.

- BIAC is actively engaged in OECD work on regulatory impact analysis, stakeholder engagement, and ex-post evaluation. We believe that a reference to ongoing work on measuring regulatory performance could usefully be incorporated.

- ***Regulatory frameworks and Administrative Simplification:*** In BIAC's 2014 *Economic Policy Survey*, reforming product market regulation and public sector efficiency were named as the first two priorities of the private sector. In this context, reform of product market regulation refers to measures aiming to reduce economy-wide regulatory burdens, to reduce sector-specific regulatory burdens and to address barriers to foreign direct investment (FDI) and international trade. Public sector efficiency indicators essentially relate to efficiency and transparency of public procurement, efficiency at sub-central level and improved monitoring mechanisms. We recommend that the impact of burdensome state bureaucracy on business and investment is highlighted in the text: by excessive and complex procedures result in a hostile environment to business, a decrease in investment and increased transaction costs for goods and services.

- ***Regulatory Impact Assessments:*** Systematic, timely and coordinated engagement of stakeholders representing a legitimate interest is key to secure the efficiency and adequacy of regulatory measures from their inception. RIA is an essential tool for transparency in the decision-making process and consultation schemes in place in OECD countries should follow OECD recommendations in the field. Again, a reference to existing OECD activity could prove useful.

- ***Regulatory Compliance and Enforcement:*** We fully agree that rule of law is an indispensable prerequisite for fostering investment and predictability for business, and the fair and consistent implementation of rules is a crucial element for trust in business. Essential internal procedural safeguards should include transparency of the process and non-discriminatory application regarding nationality of the parties concerned as well as fairness of enforcement actions.

- ***Regulatory coherence across levels of government:*** BIAC is a strong supporter of international regulatory cooperation. In the field of investment, harmonized regulatory frameworks greatly facilitate the operators' visibility and confidence. Among others, improving the investment environment can be achieved in part by harmonizing investment regulations and streamlining procedures, as indicated in the draft. This would naturally lead to a decrease in bureaucratic steps and therefore costs.

- ***Public Procurement:*** We support the aim to achieve "high levels of efficiency, effectiveness and economy [in public procurement processes]", as well as to implement mechanisms to ensure the integrity and accountability of the procurement processes. We would also stress that a level playing field is necessary to the integrity of the procurement processes. Access to the public procurement market remains a major concern for foreign invested enterprises, in some instances due to governments explicitly barring foreign companies from bidding on public contracts. Foreign investors should be placed on the same footage as local investors.

- ***Core Questions and Principles:*** Again, a reference to OECD work on Measuring Regulatory Performance: Regulatory Impact Analysis (RIA), Stakeholder Engagement, and Ex-post evaluation, could usefully complement the list of core questions.

Comments related to anti-bribery/corruption

- Paragraph 19: Add the following sentence: *"Governments should also promote modern anti-corruption measures as for example integrity pacts with the private sector in public infrastructure projects and should encourage companies to invest in Compliance systems in order to level the playing field in the fight against corruption."*

- After paragraph 23: We suggest inserting two additional paragraphs:

  - *"24. Fighting corruption and other related misconduct can only be effective and sustainable if the public and the private sector join forces. This requires as a first step an enhanced dialogue between public authorities and representatives of the private sector in order to determine joint measures and initiatives. Furthermore, governments should consider rewarding companies who report voluntarily suspicion of misconduct, cooperate with enforcement agencies and put effective compliance systems in place in order to prevent corrupt activities by their employees."*

  - *"25. Collective action, understood as joint integrity initiatives involving the private and the public sector, can be a powerful instrument to level the playing field in the fight against corruption. Collective action provides a wide range of instruments, beginning with an exchange between governmental bodies and the private sector on anti-corruption measures up to a binding integrity pact in infrastructure projects involving an external monitor."*

- Core questions and principles, "Regulatory framework": We suggest adding the following two questions:

  - *"7. Does the government encourage the private sector to put effective compliance systems in place and reward companies that voluntary disclose misconduct and cooperate with enforcement agencies?"*

- *"8. Does the government promote a dialogue between the public and private sector on how to fight corruption and related misconduct and support integrity pacts on all levels involving the public and private sector?"*

Additional specific comments

- *Paragraph 6, 3rd sentence:* Insert the words "unintended consequences and" between "and result in" and "regulatory failures".

- *Paragraph 15, 3rd sentence:* This sentence infers that the political influence of the financial industry through lobbying led to regulatory failure and, consequently, the 2008 global financial crisis. This is an over-simplification. For example, the sentence fails to consider political influence *in* the financial industry and the shortcomings of independent supervisors. Singling out only the lobbying activities of the financial industry is unhelpful just as the G20 is seeking to implement the new global regulatory program. We recommend deleting the sentence.

INVESTMENT FRAMEWORK FOR GREEN GROWTH

- BIAC appreciates the inclusion of the new chapter on green growth and agrees 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 welcome that the chapter defines green investment broadly, including not only environmental goods and services, but also underlines the contributions of sectors across the value chains, including traditional sectors, which provide important intermediate products.

- The chapter also recognizes that there is no one-size-fits all approach, as specific investment strategies need to be tailored to the specific needs and circumstances, which can vary considerably from one country or region to another. This is particularly relevant as the PFI is intended for member and non-member economies. 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.

- **Bullet 10, p. 142:** *Does the government ensure a balance between IPR protection and the need to disseminate environment-friendly technologies?* As currently drafted, this question is overly broad and could give rise to different interpretations.

- We suggest adding a paragraph referring to the role business can play in promoting green growth:

  Recognizing the unique role of business in resolving sustainability issues, for example by:
    - Developing better products and services

- Creating awareness of risks and opportunities
- Supporting consumers to reduce their environmental impact
- Improving others’ performance through supply chains
- Making transparent and informed decisions
- Collaborating in leading sustainable solutions that can be used across multiple industries