

RAID

Rights & Accountability in Development

DRAFT POLICY FRAMEWORK FOR INVESTMENT

Comments on Chapter 7: Policies for Promoting Responsible Business Conduct

Rights and Accountability in Development (RAID) has endorsed the joint NGO letter commenting on the draft Policy Framework for Investment (PFI), which has been submitted by the Dutch NGO SOMO on behalf of more than 50 organisations. We concur with our NGO colleagues that the current draft PFI lacks a number of key elements. However, RAID wishes to submit some additional comments on Chapter 7 regarding policies for promoting responsible business conduct.

Our main concern is that the draft misses an important opportunity to include much more explicit references to the key OECD instrument in this area – the *OECD Guidelines for Multinational Enterprises* – which along with other international human rights and environmental standards equip governments and investors alike with the essentials for promoting equitable and sustainable growth. The draft chapter could also do more to promote one particularly relevant objective of the Monterrey Declaration: companies should contribute to social and environmental progress through responsible behaviour. We therefore strongly recommend a number of modifications to the official text and annotations so that the interdependent and mutually reinforcing pillars of sustainable development are better reflected:¹

1. Provision 7.1 appropriately accentuates the public responsibilities of governments, however, it should also emphasize the imperative on companies to operate in a manner that bolsters governments' efforts to combat corruption, uphold human and labour rights and protect the environment. This is particularly the case when governments lack the capacity to adequately monitor and enforce regulatory requirements because of significant budgetary shortfalls, conflict or corruption. The demonstration effect of responsible business behaviour is certainly as important, if not more important, than voluntary and philanthropic endeavours in promoting positive development outcomes.
2. Provision 7.1 should also explicitly ask whether governments have fulfilled their obligations and commitments in accordance with international environmental, labour and human rights conventions and treaties. The absence of any language in this regard is one of the weakest aspects of Chapter 7. Moreover, it ignores one of the over-arching aims of the PFI: "It is best described as a tool that can assist different types of countries to benchmark their strategies against broadly accepted international practices"².

¹ Several United Nations texts, most recently the 2005 World Summit Outcome Document, refer to the "interdependent and mutually reinforcing pillars" of sustainable development as economic development, social development, and environmental protection.

² Manfred Schekulin, "Investing for development: The Policy Framework for Investment". *OECD Observer*, October 2005. <http://www.oecdobserver.org/news/fullstory.php/aid/1673>

3. Provision 7.2 should explicitly convey the importance of upholding a human rights framework that promotes and protects civil society, as government repression in this regard prohibits any effective two-way communication between business and society and ultimately the development of healthy, democratic societies. The Task Force should not shy away from conveying to governments the importance of democratic dialogue and participation in fostering an enabling investment environment. Indeed, if the PFI is meant to be a “series of probing questions to test for quality and coherence, based on OECD and non-OECD experiences, as well as the established principles embodied in international agreements”³, the language of this provision should be strengthened.
4. The manner in which Provision 7.3 is written could be interpreted as referring only to the investors’ stakeholders such as employees and shareholders. Whether intended or not, consistent with best practices for disclosure, these frameworks should meet the needs of all relevant stakeholders and not simply investors’ stakeholders.
5. Provision 7.7 should ask whether adhering governments to the *OECD Declaration on International Investment* have established an effective National Contact Point to implement the *OECD Guidelines for Multinational Enterprises*. Without effective implementation by governments, companies that strive to conduct their activities responsibly will continue to be undermined by those that flout international best practice. A critical first step in curtailing irresponsible practices by companies is ensuring governments fulfil their obligations to effectively implement the Guidelines. Otherwise, OECD governments are essentially telling both developing country governments and business: “Do as we say, not as we do”.
6. The OECD Guidelines principles and standards reflect and draw on a number of important instruments. However, one must navigate the Guidelines’ ample Clarifications and Commentary to learn which instruments are noted. Adding a footnote to the annotation of Provision 7.7 that lists the instruments cited in the *OECD Guidelines for Multinational Enterprises* will help elucidate to governments – particularly non-adhering governments – some of the key instruments that can help guide their policy reforms.
7. Lastly, while we recognize it is beyond the scope of the PFI to address the inadequacies of the *OECD Guidelines for Multinational Enterprises* as well as the unsatisfactory implementation by many National Contact Points, we call the Task Force’s attention to the following paragraph from the joint NGO letter mentioned above. These comments are particularly relevant to promoting responsible business behaviour and investment by way of the PFI.

Promoting a Policy Framework for Investment as it currently stands should not be done without substantial obligations by home countries to enforce the OECD Guidelines for Multinational Enterprises and have the National Contact Points play a positive role in making the OECD Guidelines fully operational. The current guidelines and its implementation mechanisms are inadequate as a global mechanism to improve the

³ Manfred Schekulin, “Investing for development: The Policy Framework for Investment”. *OECD Observer*, October 2005. <http://www.oecdobserver.org/news/fullstory.php/aid/1673>

operations of multinationals, due to the lack of monitoring and enforcement mechanisms. Moreover, the way NCPs perform their role is arbitrary, unfair and detrimental to the credibility of the guidelines. Making the guidelines relevant as a mechanism to regulate corporations could be done, for instance, by questioning whether host countries should provide investors' rights to companies that do not respect the OECD Guidelines, or by linking home country export finance and insurance or other subsidies to obligations to respect the OECD Guidelines (see the OECD Working Group on Export Credits and Credit Guarantees). The NCPs should also be made more receptive and instrumental in effectively tackling breaches of OECD Guidelines.

Recommendations to the text

(Note: Edits and deletions are bolded and only those sections with recommended changes are included.)

7.1 How does the government make clear for investors the distinction between its own roles and responsibilities and those ascribed to the business sector? **Does the government fulfil its obligations and commitments to combat corruption, uphold labour and human rights and protect the environment consistent with its international obligations and commitments?** Does it actively assume its responsibilities and avoid de facto privatisation of public roles?

The core mission of business is to identify and manage investment projects that yield competitive returns to suppliers of capital. **Business plays an important demonstrative role, particularly in countries with weak governance, by observing international environmental, labour and human rights standards and principles that befits their activities.** The role of governments is to look after the collective interests of their citizens. As part of this role, they work with companies, trade unions and other civil society to create enabling environments for responsible business conduct. If this enabling environment is well designed, including through a clearly communicated distinction between the respective roles and responsibilities of government and business, uncertainty over expectations concerning responsible business conduct are lowered, thus encouraging investment, and private and public sector actors will be encouraged to play mutually-supporting roles in enhancing economic, social and environmental well-being.

7.2 What steps does the government take to promote open communications so that existing and potential investors have the information they need on expected responsible business conduct? How does the government endeavour to protect the **human** rights framework that underpins effective, two-way communication between business and society?

Law-making is a key channel for communicating societal expectations to companies, thus creating a stable, predictable environment conducive to investment. Expectations concerning responsible business conduct are also communicated through a multitude of other channels and these also impact upon the quality of the investment environment. Such communication can take place within the workplace, with local communities, through discussions with investors, via the press and so forth. These two-way communication channels provide inputs that can be valuable for setting company policies and evaluating performance. These other channels complement the

information communicated to companies through formal legal and regulatory processes. Governments play several roles in ensuring that these other communication processes work well. While the protection of human rights (e.g. political, social, civil, labour and property) is a fundamental objective in itself, it is also a pre-condition for effective communication to take place. This removes threats of rights violations so that many voices, including those of investors **and civil society**, can be heard. **Government restrictions in this regard will prohibit effective two-way communication and ultimately the development of enabling investment environments and healthy, democratic societies.** Thus, the protection of the rights framework is a key responsibility of governments. Government-based instruments for corporate responsibility – such as the *OECD Guidelines for Multinational Enterprises* – are also important channels for communicating with business.

7.3 Does the government provide for an adequate framework to support the various types of disclosure companies make about their business activities? Is this framework flexible enough to meet the needs of investors and **their relevant** stakeholders?

Rules and guidance for financial reporting are already well developed in most countries (see also Chapter 6). The framework for non-financial reporting has emerged relatively recently and is still evolving. Several countries actively encourage non-financial reporting. As in any other area where investors need to respond to societal expectations, whether these are codified in laws and regulations or not, a healthy investment environment requires transparency and effective communication. Governments can enhance the quality of the investment environment by clearly communicating all relevant rules, guidelines, and expectations for both financial and non-financial disclosures. When disclosures are mandatory, governments need to ensure that the application and enforcement of these requirements is non-discriminatory. At the same time, governments should seek to avoid undue regulatory burdens and to allow innovation and adaptation to particular company circumstances to take place.

7.7 Does the government participate in inter-governmental co-operation in order to promote international concepts and principles for responsible business conduct, such as the *OECD Guidelines for Multinational Enterprises*? **Have adhering governments to the *OECD Declaration on International Investment* established an effective National Contact Point to implement the *OECD Guidelines for Multinational Enterprises*?**

Multilateral instruments dealing with responsible business conduct communicate and promote concepts and principles for appropriate business conduct. Thirty-nine countries have committed to promoting responsible business conduct of their multinational enterprises -- wherever they operate in the world -- under the *OECD Guidelines for Multinational Enterprises*. The Guidelines draw on the broader framework of international declarations and conventions (e.g. the Universal Declaration of Human Rights, the International Labour Organisation's declarations and conventions). **[Add Footnote]** While the Guidelines recommendations are addressed to business, governments through their network of National Contact Points are responsible for promoting the Guidelines, handling enquiries and helping to resolve issues that arise in specific instances. By promoting inter-governmental co-operation in this field, governments can help to

broaden awareness of basic principles for appropriate conduct. Increased global acceptance of common principles for business conduct also helps to reduce the likelihood that observing appropriate corporate responsibility principles could become a competitive disadvantage for investors.

Text of Footnote:

“The OECD Guidelines for MNEs reflect and draw on the following instruments: the Universal Declaration of Human Rights; OECD Principles of Good Governance; The Global Reporting Initiative; International Labour Organisation (ILO) Convention 29: Forced Labour Convention (1930); ILO Convention 105: Abolition of Forced Labour Convention (1957); ILO Convention 111: Discrimination (Employment and Occupation) Convention (1958); ILO Convention 138: Minimum Age Convention (1973); ILO Convention 182: Worst Forms of Child Labour Convention (1999); ILO Recommendation 94: Co-operation at the Level of the Undertaking Recommendation (1952); ILO Recommendation 146: Minimum Age Recommendation (1973); ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (1977); ILO Declaration on Fundamental Principles and Rights at Work (1998); Rio Declaration on Environment and Development; ISO Standard on Environmental Management Systems; Aarhus Convention on Access to Information, Public Participation in Decision-making, and Access to Justice in Environmental Matters; OECD Convention on Combating Bribery of Foreign Public Officials; OECD Recommendations on Combating Bribery in International Business Transactions (1977); OECD Recommendations on the Tax Deductibility of Bribes to Foreign Public Officials (1996); UN Guidelines on Consumer Policy; OECD Guidelines for Consumer Protection in the Context of Electronic Commerce; OECD Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data; Recommendation of the OECD Council Concerning Effective Action Against Hard Core Cartels (1998); Recommendation of the Council Concerning Co-operation between Member Countries on Anticompetitive Practices Affecting International Trade; OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations; and Recommendation of the OECD Council on the Determination of Transfer Pricing between Associated Enterprises.”