

# Investment for Sustainable Development: Views from the Global South

## *Consultation outcome of the Annual Forum of Developing Country Investment Negotiators*

October 2017

At the *9th Annual Forum of Developing Country Investment Negotiators*, which took place in Rio de Janeiro, Brazil, in November 2015, negotiators and policy-makers from some 50 developing countries expressed their desire to develop a set of principles on investment from a developing country perspective, building on the United Nations Conference on Trade and Development's (UNCTAD) Investment Policy Framework for Sustainable Development. In response, a preliminary draft of a set of South–South Principles on International Investment for Sustainable Development was developed based on several consultation rounds. The draft was presented and discussed at the *10th Annual Forum of Developing Country Investment Negotiators* held in Colombo, Sri Lanka in November 2016. Thereafter, a revised draft was developed and circulated to forum participants and intergovernmental organizations. After additional consultations with developing country governments as well as regional and international organizations, a more advanced document was prepared to represent a consolidated view of developing countries on investment policy.

In the consultations, countries stressed the importance for developing countries to receive quality investment and acknowledged the usefulness of a concerted effort to develop international policies to maximize the positive contribution investment can make to achieve the Sustainable Development Goals (SDGs). They identified the following priorities for investment policy-making from a developing country perspective.

## **I. Investment and Sustainable Development**

- Investment, when accompanied by sound government policies,<sup>1</sup> is an essential requirement for achieving inclusive growth and sustainable development.
- Foreign investment will provide the greatest benefits for sustainable development when it is aligned with national social and economic development strategies and priorities.

<sup>1</sup> Some stakeholders also noted the importance of a comprehensive, coherent and integrated development strategy. It was further noted that effectiveness and relevance of investment policies can be enhanced through appropriate implementation and institutional mechanisms at the administrative level, including by investment promotion agencies.



- The opening of economies to foreign investment should be aligned to national social and economic development strategies and priorities. Investment liberalization through domestic law and policy can ensure this alignment.
- Increasing the quantity and quality of investment requires a positive institutional legal and regulatory environment that is transparent, efficient, and based on accountability and the rule of law.<sup>2</sup>
- National economic development strategies will vary depending on the natural endowments of each country and its stage of development. When developing international rules, special consideration should be given to developing countries<sup>3</sup> to safeguard policy space needed for achieving national social and economic development strategies and priorities.
- The use of performance requirements, including local content initiatives, where warranted, can play an important role for enhancing the quality of investments.<sup>4</sup>
- Investment policies should be regularly reviewed for effectiveness and relevance and adapted to changing development dynamics. International rules should take into account the need for such reviews.
- Governments should not lower their environmental, labour or health standards as incentives to attract or maintain investments.

## II. Balance of Rights and Obligations

- Domestic and international regimes should reflect a dynamic balance between the rights and obligations of governments and investors.<sup>5</sup>
- States have the right to regulate economic activity in their territory in order to promote sustainable development,<sup>6</sup> enhance the public welfare and prevent harm to the public interest.
- Foreign investors and their investments must comply with the applicable laws and regulations of the country in which they are located, as well as any applicable international rules.
- Governments should ensure that their administrative, legislative and judicial processes do not operate in a manner that denies administrative and procedural due process to investors or their investments.
- Recognizing the need to exercise discriminatory measures in a non-arbitrary manner to achieve legitimate economic, social and environmental goals, governments should at all times avoid arbitrary and targeted discrimination of established investors.
- Governments should adopt and apply strict criminal laws on bribery and corruption, including laws against corruption by their investors abroad.
- While domestic law should remain the primary source for ensuring responsible business conduct and holding investors accountable, international rules on investor conduct can supplement and strengthen domestic legal frameworks. Voluntary international standards and best practices can also help implement economic and social development objectives of the country where the investment is made.
- Countries that are home to outward investors should take measures to ensure responsible business conduct by their outward investors and should cooperate with the countries where investments are made on methods for achieving this.
- Governments and investors should promote, protect and respect the human rights of citizens and communities, in accordance with the UN Guiding Principles on Business and Human Rights and other applicable instruments.

<sup>2</sup> Some stakeholders also noted the role of active policies to encourage and guide investment to priority sectors and programs in this regard.

<sup>3</sup> Reference to and definition of “developing countries” are subject to further discussion.

<sup>4</sup> Whether or not to include a reference to the WTO Agreement on Trade-related Investment Measures (TRIMs) and other rules is subject to further discussion.

<sup>5</sup> It was noted that these rights and obligations would also evolve over time to respond to changing demands and requirements.

<sup>6</sup> Some stakeholders considered it important to also emphasize the right to protect and guarantee human rights.



- Where applicable, governments should be able to adopt measures to tackle tax avoidance strategies that exploit gaps and mismatches in tax rules to artificially shift profits to low-tax or no-tax locations, also referred to as base erosion and profit shifting (BEPS). Investors should avoid such practices, as it undermines the fairness and integrity of tax systems.<sup>7</sup>
- Governments and investors should hold good faith consultation with communities and Indigenous Peoples and gain their consent prior to initiating an investment operation that would affect the lands, territories and resources that they customarily own, occupy or otherwise use.

### III. Investment Cooperation

- Governments should seek to enhance mutual cooperation for the promotion and facilitation of investment that supports sustainable development. Such promotion and facilitation can be made operational through multilateral, regional, and bilateral investment policies and cooperation agreements.<sup>8</sup>
- Regional cooperation and harmonization can be a particularly effective means for developing and implementing effective investment policies, including the mitigation of harmful tax competition through tax incentives programs that have failed to benefit governments in the past.
- Governments should seek to enhance the role of all stakeholders in the development of transparent, and mutually beneficial investment policies and practices at the community, national and international levels, including in particular local communities who are often directly affected by investments.

### IV. Dispute Prevention and Resolution

- Domestic courts and remedies should play a central role in settling investment-related disputes.<sup>9</sup> Governments should seek to continually improve the independence and efficiency of their judicial processes, and ensure the availability of timely and meaningful domestic remedies in the event of a dispute.<sup>10</sup> A requirement to exhaust domestic remedies before resorting to international dispute settlement can contribute to improving and strengthening domestic judicial processes.
- International dispute settlement relating to investment, when used, should be transparent, based on accountability and the rule of law, free of conflict of interests and accessible to a range of affected or potentially affected stakeholders, including local communities. Appropriate safeguards to prevent abuses should be in place. Regional judicial processes can be considered as a viable option for international dispute settlement.
- Meaningful remedies should be available in the country where the investment was made, as well as in the home country of an investor for the actions or decisions of investors that have a causal relationship to damages suffered in the country where the investment was made.<sup>11</sup>
- Non-adversarial dispute resolution, such as mediation and other methods, should be considered at the national, regional and international levels, with attention being paid in particular to preventing the escalation of possible disputes. These should be as inclusive as possible.

<sup>7</sup> Businesses that operate across borders can use BEPS to gain a competitive advantage over enterprises that operate at a domestic level

<sup>8</sup> Some stakeholders indicated their reluctance in developing and subscribing to binding disciplines in this regard.

<sup>9</sup> It was noted that international proceedings should not be abused as supranational bodies.

<sup>10</sup> It was noted that processes for dispute settlement at the national level could also include national arbitral processes.

<sup>11</sup> In this regard, some suggested that states should abolish barriers to file claims in the home state based on doctrines such as *forum non conveniens*.

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