SOMO OECD Watch

Submission to the UN Working Group on Business and Human Rights: Input Concerning State Leverage in Advancing Corporate Accountability in Trade and Investment Promotion Activities

1. Introduction

SOMO and OECD Watch appreciate the opportunity to provide input to the UN Working Group on Business and Human Rights regarding its study on state leverage in advancing corporate accountability in trade and investment promotion activities. This submission provides input in relation to questions 2, 3, 5, and 6, providing examples of:

- *State ministries or regional economic cooperatives imposing human rights requirements on businesses (Questions 2 and 3); and*
- *States or state-related grievance mechanisms imposing consequences on businesses for negative human rights impacts or failure to engage in remedial activities (Questions 5 and 6).*

2. State ministries or regional economic cooperatives imposing human rights requirements on businesses

The authors of this submission welcome the UN Working Group's examination of states that set responsible business conduct requirements on businesses as conditions for receipt of trade and investment support. Several states or regional economic cooperatives have required investors to respect human rights and follow certain labour, human rights, sustainable development, or responsible business conduct guidelines, including as a condition to receive government support.

- The Economic Community of Western African States (ECOWAS) requires foreign investors to take under consideration 'the development plans and priorities of the host state; the Millennium Development Goals and; the indicative list of corporate social responsibilities agreed by the member States'.[1] ECOWAS also requires foreign investors to meet certain responsibilities after investments are established, including to 'uphold human rights in the workplace and the community in which they are located' and to 'act in accordance with fundamental labour standards as stipulated in the ILO Declaration on Fundamental Principles and Rights of Work'.[2] ECOWAS has sought to make its Investment Rules adaptable to future improvements in social responsibility standards, by asserting that 'where standards of corporate social responsibility increase, investors should endeavour to apply and achieve the higher level standards'.[3]

- The Southern African Development Community (SADC) requires investors and (proposed) investments under its model bilateral investment treaty (BIT) to meet environmental and social assessment criteria and conduct a human rights impact assessment, and holds that the precautionary principle will be applied 'to their environmental impact assessment and to decisions taken in relation to a proposed investment, including any necessary mitigating or alternative approached to the Investment, or precluding the Investment if necessary'.[4] Art

[1] ECOWAS Common Investment Market Vision, Appendix 3: Supplementary Act A/Sa.3/12/08 adopting community rules on investment and the modalities for their implementation with ECOWAS, Art. 16 on Corporate Social Responsibility. http://investmentpolicyhub.unctad.org/ Download/TreatyFile/3266.

[2] Ibid., art. 14.

[3] Ibid., art. 16.

[4] SADC Model Bilateral Investment Treaty with commentary, Southern African Development Community, July 2012, art. 13, http://www.iisd.org/itn/wp-content/uploads/2012/10/SADC-ModelBIT-Template-Final.pdf.

15.1 of the SADC's model BIT establishes minimum standards for human rights, environment, and labour by asserting that, 'Investors and their investments have a duty to respect human rights in the workplace and in the community and State in which they are located. Investors and their investments shall not undertake or cause to be undertaken acts that breach such human rights. Investors and their investments shall not assist in, or be complicit in, the violation of the human rights by others in the host State, including by public authorities or during civil strife'.[5] Art. 15.2 requires investors to meet ILO core labour standards and Art. 15.3 says that '[i]nvestors and their investments shall not [establish] (sic), manage or operate Investments in a manner inconsistent with international environmental, labour, and human rights obligations binding on the Host State or the Home State, whichever obligations are higher'.[6]

For further information on the above examples, please see the paper "The EU – Indonesia CEPA negotiations: Responding to calls for an investment policy reset: are the EU and Indonesia on the same page?".[7]

Some states have placed requirements on investors in connection with their model international investment agreements (IIAs). According to UNCTAD's World Investment Report 2017, a growing number of states has begun to re-evaluate the process of arbitration and the substance of their model IIAs. Innovative reforms in IIAs concluded in 2016 have included: better safeguarding the state's right to regulate; placing performance requirements and obligations on investors; limiting the scope of clauses upon which investment claims may be brought; obliging investors to exhaust national legal remedies before resorting to international arbitration; and exempting altogether sensitive policy areas from investor-state dispute settlement. For example, the Morocco-Nigeria BIT requires investors to undertake environmental and social assessments before launching investments, while the Chile-Uruguay Free Trade Agreement protects the right of each country to regulate with gender-specific policies in mind, to seek the elimination of all of forms of discrimination against women and promote equal and inclusive development for men and women.[8]

Several European trade and investment agreements have included Trade and Sustainable Development (TSD) chapters purporting to ensure that trade and liberalised investment do not contribute to a decline in environmental, social, or labour conditions. It is critical to note, however, that at present such chapters "generally lack concrete commitments" and "are excluded from the scope of the state-to-state dispute settlement procedure."[9] Most relevant to this submission, "TSD chapters contain no binding obligations on the transnationally operating companies and investors benefiting from the treaty and contain no sanction mechanisms."[10] SOMO argues that TSD chapters should set binding, actionable requirements on investors in relation to their human rights and environmental due diligence, and ensure that affected individuals and communities have access to remedy.[11] Further, companies that "knowingly" engage in human rights or environmental violations, fail to exert adequate supply chain due diligence, or engage in tax avoidance should face consequences,[12] for example in

[5] Ibid. art. 15; note that the agreement language assigning businesses a 'duty' to respect human rights may elevate business' role in respecting human rights beyond the requirement envisioned in the UN Guiding Principles on Business and Human Rights, which asserts that while states have a 'duty to protect human rights', businesses have a lower 'responsibility to respect human rights'.
[6] Ibid. art. 15.
[7] See Indonesia for Global Justice, SOMO, TNI, "The EU – Indonesia CEPA negotiations: Responding to calls for an investment policy reset: are the EU and Indonesia on the same page," Chapter 5, pg. 20-23.
[8] See UNCTAD, World Investment Report 2017, Chapter III, pg. 122-23, for a more complete list of innovative requirements placed on businesses in recent international investment agreements.
[9] See SOMO, TNI, Milieudefensie, and Greenpeace, "Position paper on the enforceability of trade and sustainable development chapters in EU trade and investment agreements," pg. 4.
[10] Ibid.
[11] Ibid.
[12] Ibid., referring to OECD Watch, "A 4x10 plan for why and how to unlock the potential of the OECD Guidelines: A briefing for policymakers."

the form of denial of trade or investment benefits. Even absent binding international obligations on investors, home states can enhance accountability of their national companies by implementing domestic legal requirements governing such companies. France, which has recently passed a Duty of Vigilance Law imposing supply chain due diligence requirements on covered multinational corporations, is an example of a country taking legal steps to guide the overseas impacts of covered corporations.

SOMO argues that the state's 'right' to regulate should not be relegated to the exceptions section of an investment treaty, nor should the legitimacy of the state's public policy interventions be left to the determination of arbitrators in an investment cases. Instead, the state's duty to regulate in the public interest (including the promotion and protection of human rights and the environment) should be reaffirmed as an overriding principle.[13]

3. States or state-related grievance mechanisms imposing consequences on businesses for negative human rights impacts or failure to engage in remedial activities

The authors of this submission appreciate the UN Working Group's focus on examining the potential of state-based grievance mechanisms to use trade and investment promotion activities as consequences for business compliance or non-compliance with RBC standards. OECD Watch particularly appreciates the Working Group's attention to the use of consequences by the National Contact Points (NCPs) of the OECD.

On the basis of the outcomes of state-based grievance mechanisms, including the NCPs, States may decide to issue consequences eliminating trade and investment support for businesses that refuse to participate in the grievance process and/or fail to follow the requisite standards for responsible business conduct. If a company refuses to engage fully in the NCP process or fails to implement the NCP's recommendations, material consequences should result, to include suspension of access to export credit guarantees, public procurement contracts, development assistance, tax breaks, and participation in trade missions.

OECD Watch has found that consequences for corporate non-engagement in the NCP process may promote participation and ultimately produce more impactful outcomes. OECD Watch argues further that tying sanctions to a company's actual compliance with the Guidelines (rather than merely its willingness to engage in mediation) may be an even stronger approach to achieving these aims while ensuring respect for the ultimately voluntary nature of the Guidelines.[14] The OECD Investment Committee's 2017 Annual Report on the OECD Guidelines for Multinational Enterprises discusses "economic diplomacy," or government services and support to businesses operating in foreign markets. The report asserts that "these tools are not only instrumental to promote foreign trade and investment, but they can also be powerful levers for governments to guide corporate behaviour and support best practices on RBC." The report notes that some governments are "using economic diplomacy to create further incentives for business to behave responsibly."[15]

States that have committed to imposing trade and investment-related consequences for businesses refusing to participate in the NCP process include those of Canada, Germany, and the Netherlands:

- In the China Gold case, the Canadian-based mining company China Gold refused to participate in mediation over allegations of environmental, human rights, and labour violations at a Chinese mine. In response to the company's refusal to engage in the NCP complaint process, the Canadian NCP imposed sanctions on the company, including withdrawing Trade Commissioner Services and other Canadian advocacy support abroad.[16]

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[13] See SOMO, "Discussion Paper: Impacts of the International Investment Regime on Access to Justice,"pg. 9.
[14] See OECD Watch, *Remedy Remains Rare*, Chapter 4, pg. 44-46.
[15] See OECD, Investment Committee, Working Party on Responsible Business Conduct, Annual Report on the OECD Guidelines for Multinational Enterprises 2017, DAF_INV_RBC(2018)10, pg. 52-53.
[16] See OECD Watch, *Remedy Remains Rare*, Chapter 4, pg. 46.

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- According to the recent Peer Review report of the German NCP, the German National Action Plan “recently created a link between [a business’] participation in a specific instance procedure and the grant of export credit guarantees, providing an additional incentive for the company to participate in mediation.”[17] The German NCP has also asserted that it will limit business’ participation in state trade missions focused on investment promotion to companies that have participated in the NCP process

- The Dutch NCP also has committed to applying consequences to businesses that refuse to participate in the NCP process, a commitment that will be tested for the first time in an ongoing case.

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[17] See OECD, Investment Committee, Working Party on Responsible Business Conduct, Peer Review of the OECD National Contact Point of Germany, OECD DAF_INV_RBC(2018)1_REV1, Box 6.