Submission to the OECD Investment Committee consultations with stakeholders on March 17th 2015

1. Introduction

OECD Watch appreciates the opportunity to make a submission to the OECD Investment Committee consultations with stakeholders on March 17th, 2015. This submission provides input for the discussions on the following three subjects:

- *Implementation of the PFI*
- *OECD role in investment treaties*
- *Promoting Adherence to the MNE Guidelines*

2. Implementation of the PFI

OECD Watch questions the usefulness of the current draft of the updated Policy Framework for Investment draft. While improvements have been made *vis-a-vis* since OECD Watch submitted comments[1] during the February 2015 public consultation, the current draft continues to suffer from a notably one-sided focus on the primacy of private investment. In our view investment policy must be an instrument to meet wider goals of sustainable human development and the promotion and protection of human rights. In our February 2015 submission on the PFI, we recommended that the OECD fundamentally revisit the principles underpinning the current investment regime. A redirection to ensure that investment policy serves sustainable development and inclusive growth is required. OECD Watch would like to highlight two core issues:

- The need to integrate SDG in the PFI's structure and its implementation
- Policy space and policy coherence for sustainable development

The need to integrate sustainable development in the PFI's structure and its implementation
Investment policy promoted by the OECD should not centre on the promotion and protection of investments, but on the promotion of sustainable investment and the state's ability to fulfil its human rights obligations as laid down in core instruments and principles in international law.[2] In our opinion, investment policy is an instrument to meet wider goals relating to sustainable human development and the promotion and protection of human rights. In this context, OECD Watch would like to call attention to the UNCTAD Investment Policy Framework for Sustainable Development (IPFSD)[3] and the CSO-driven Alternative Trade Mandate.[4] UNCTAD's IPFSD principle 1 on the overarching principle of

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[1] See http://oecdwatch.org/publications-en/Publication_4174
[2] For example, the UN Charter (Article 55) and the Universal Declaration of Human Rights and the UN Guiding Principles on Business and Human Rights, the OECD Guidelines for Multinational Enterprises and the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy
[3] See: http://unctad.org/en/publicationslibrary/webdiaepcb2012d6_en.pdf
[4] See: UNCTAD (2012), Policy Framework For Sustainable Investment http://unctad.org/en/publicationslibrary/webdiaepcb2012d6_en.pdf. The Alternative Trade Mandate Alliance is an alliance of 50 organisations developing an alternative vision of European trade policy that puts people and planet before big business. The Alternative Trade Mandate has been developed in extensive civil society consultations all over Europe. See ATM (2013) "Trade: time for a new vision" http://www.alternativetrademandate.org/wp-content/uploads/2014/02/Trade-time_for_a_new_vision-JAN14-PRINT.pdf.

investment policy for sustainable development “recognizes the need to promote investment not only for economic growth as such, but for growth that benefits all, including the poorest. It also calls for the mainstreaming of sustainable development issues – i.e. development that meets the needs of the present without compromising the ability of future generations to meet theirs – in investment policymaking, both at the national and international levels.”

- The starting point for the implementation of the PFI must be that human rights and sustainable development have primacy over commercial interests of corporations. States have an obligation to respect, protect and fulfil human rights, not only domestically but also extra-territorially.

Policy space and policy coherence for sustainable development
Current social and environmental crises (*e.g.* widening national and international inequality; irreversible loss of biodiversity and climate change) demand a change of course in domestic and international economic governance.

- In implementation of the PFI, the OECD should focus on emphasizing the right to regulate in the public interest. UNCTAD’s IPFSD includes a principle (no. 6) on the right to regulate as an expression of a country’s sovereignty. The principle advocates that countries maintain sufficient policy space to regulate for the public good. Guarantees for sufficient policy space to implement tailored development policies and goals in particular are crucial for developing countries.
- The OECD might assist countries with periodically reviewing their business regulations at all levels to assess whether they are coherent with development commitments and protection of human rights, and adapt them where needed.

3. OECD role in Investment Treaties

Current international investment rules, including those contained in most bilateral investment treaties (BITs), continue to be based on the premise that all investments are beneficial to development and that foreign investment will be attracted by means of rules and agreements that guarantee the protection of foreign investors. This approach insufficiently takes into account the potential adverse impact of foreign investors on societies, local communities, workers, consumers and the environment.

The vague IIA rules provide arbitrators with interpretative leeway enabling them to challenge a broad range of public interest regulation. As IIAs delegate treaty interpretations to arbitrators, tribunals are effectively taking over state functions. States cannot bring claims against companies, and pay heavily (actual awards of up to US $50 billion) to defend themselves. The profit-driven arbitration market plays to the advantage of a small number of law firms and puts cash-strapped developing countries at a systematic disadvantage.

Limited reforms in the EU, USA, and Canada do not yet reflect the growing public concern about ISDS (e.g. 97% of respondents to a recent European Commission consultation [150.000 respondents] rejected ISDS), nor global reform trends (Ecuador, Venezuela, Bolivia, South Africa and Indonesia have terminated several IIAs; Bolivia, Ecuador and Venezuela have withdrawn from ICSID; India has issued a model BIT restricting the use of ISDS). Current reform proposals of the EU are not sufficient, and ISDS is an inappropriate mechanism for a number of reasons. These include the fact that:
- ISDS allows investors to sue governments for public policy decisions
- IIA/ISDS are not determinants for FDI inflow
- More appropriate, i.e. less risky, alternatives for investment protection exist

The OECD's primary concern should be looking into how international investment and the rules governing it may contribute to inclusive and sustainable development.

OECD Watch advises the OECD to promote a new framework for international investment that encompasses and builds on, amongst others, the UN Guiding Principles on Business and Human Rights and its own OECD Guidelines for Multinational Enterprises. In a fundamental recalibration of the system, such investor obligations should be made binding and enforceable. The policy space of states must be independently and unequivocally established and should take firm precedence over investor rights and privileges to ensure the unfettered ability of the state to regulate in the wider public interest.

In addition, the OECD should explore alternative dispute resolution mechanisms along the following lines:

- Domestic legal remedies should become the norm where possible
- Appropriate multilateral state-state dispute mechanisms could be created, guaranteeing transparency, broad stakeholder participation, and the right to regulate
- Such mechanisms should be composed of independent and impartial judges free from conflicts of interest

And finally, the OECD should assist OECD members in:

- Initiating participatory reviews of their investment agreements
- Carring out Human Rights Impact Assessments of all IIAs
- Eliminating any inconsistencies of IIAs with international human rights obligations and include binding investor obligations in all investment agreements.

4. Promoting Adherence to the MNE Guidelines

Promoting greater adherence to the OECD Guidelines starts with improving the functioning of the National Contact Points. Research and analysis by OECD Watch has revealed that many NCPs are not functioning in line with the core principles of visibility, accessibility, transparency, accountability, impartiality, and predictability. For example, OECD Watch's 2014 review of NCPs[5] found cases where NCPs had allowed cases to languish (in one case for more than 3 years) without even issuing an initial assessment, other cases where NCPs set unreasonably high barriers for accessing the mechanism, and still other cases where different NCPs confusingly interpreted the Guidelines in vastly different ways. This is damaging the credibility and reputation of the Guidelines preventing greater adherence.

OECD Watch thus recommends that the Investment Committee significantly step up efforts to improve the functioning of NCPs. Specifically, this should include:

- *Revising the OECD Guidelines' Procedural Guidance*. The 2011 update of the OECD Guidelines saw important advances in improving the content of the OECD Guidelines (e.g. on human rights, supply chain responsibility, etc), but very few changes were made to the Procedural Guidance that instructs NCPs on how to carry out their tasks, including handling specific instances. Based on research into the more than three years of implementation of the

[5] http://oecdwatch.org/publications-en/Publication_4090/

"updated" OECD Guidelines, the Investment Committee should revise the Procedural Guidance so that it provides more specific and concrete guidance to NCPs with a view to ensuring that NCPs are sufficiently accessible, transparent, impartial and predictable.

- *Enhancing the oversight role of the OECD Investment Committee, the Working Party for Responsible Business Conduct, and the Secretariat*. The Investment Committee must play a more proactive role to ensure NCPs are functioning properly. Some steps – including encouraging an increased rate of NCP peer reviews – are underway, but the Investment Committee must to more to actively address NCPs that are underperforming and preventing greater adherence to the Guidelines by damaging the credibility of the NCP system. This implies that the OECD and adhering governments should ensure that sufficient funds are allocated to the secretariat to fulfill this crucial function.

- *Developing recommendations for NCPs in adhering countries' National Action Plans (NAPs) on business and human rights*. Most adhering countries are currently developing a NAP, and the NAPs that have been finalized (UK, Netherlands, Italy, Finland, Denmark) all reference the OECD NCPs (primarily in the plans for implementing the 3rd pillar on remedy). Given that the NCPs are being referenced and "called upon" in the NAPs in varying – sometimes contradictory – ways, the Investment Committee should develop a standard set of recommendations for NAPs processes outlining what NCPs are, what they can and cannot do to ensure access to remedy for victims of human rights abuses, and concrete proposals for improving the performance of NCPs so that they can play a meaningful role in implementation of the NAP.

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