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Columbia Center on Sustainable Investment

A JOINT CENTER OF COLUMBIA LAW SCHOOL
AND THE EARTH INSTITUTE, COLUMBIA UNIVERSITY

October 4, 2017

Professor Philip Alston

United Nations Special Rapporteur on extreme poverty and human rights
srextremepoverty@ohchr.org

Re: Call for Input - Country Visit to the United States

We at the Columbia Center on Sustainable Investment (CCSI) are grateful for the opportunity to provide input to the United Nations Special Rapporteur on extreme poverty and human rights with respect to his upcoming visit to the United States.

CCSI, as a joint center of Columbia Law School and the Earth Institute at Columbia University, focuses on international investment and the impacts that such investment, and the international legal framework governing such investment, can have on inclusive, rights-compliant sustainable development. While the realization of human rights is critical to ensuring sustainable international investment, the human rights framework is often ignored or misunderstood in the context of investment, particularly in the United States. Our comments below highlight some of the impacts that the international investment regime has on inequality, poverty, extreme poverty and human rights in the United States and with respect to US extraterritorial obligations.

We thank you for your consideration of this submission.

Sincerely,

Columbia Center on Sustainable Investment

I. Introduction: International Investment Agreements

Government officials from the US and from the rest of the world have erected a framework of economic governance with major – but under-appreciated – implications for poverty, extreme poverty, human rights, and inequality.¹ The components of this framework are over 3,000 treaties designed to protect international investment. The US is a party to over 50 of these international investment agreements (IIAs). Even as the costs of this framework have increasingly become apparent, and as other countries have considered withdrawing from or significantly changing the framework, the US continues to entrench this framework, and the structural inequalities that it creates, through the negotiation of new agreements and the continuation of existing ones.²

IIAs protect multinational corporations and the individuals who own them (collectively referred to as “MNCs”) from suffering economic losses stemming from government action or inaction. Those MNCs covered by IIAs have an extraordinary ability to sue their “host” government for laws, regulations, court decisions, or other actions that have a negative impact on their profit or expected profit, with no obligation to exhaustively pursue (or even commence) domestic remedies. Government conduct frequently challenged by MNCs includes measures that distribute the costs and benefits of economic activities in ways adverse to any given covered MNC.³ For example, MNCs have used this system to contest or seek compensation for: new and stronger environmental measures imposing costs on the MNC but aiming to benefit/protect surrounding communities and other stakeholders,⁴ requirements that MNCs develop linkages with and help develop the local economy when pursuing the investment,⁵ the failure of the state to protect the MNC from local communities protesting an investment,⁶ judicial interpretations narrowly construing MNCs’ claimed property rights (including pharmaceutical patents and other IP rights with public health implications),⁷ decisions preventing MNCs from raising tariffs charged for

¹ Some aspects of this submission are adapted from the discussion of IIAs and inequality in Lise Johnson and Lisa Sachs, “Investment Treaties, Investor-State Dispute Settlement and Inequality: How International Rules and Institutions Can Exacerbate Domestic Disparities” (2017) (*forthcoming*).

² The US is currently renegotiating the North American Free Trade Agreement and is in bilateral negotiations with China. The US recently terminated negotiations on the Transatlantic Trade and Investment Partnership and withdrew from the Trans-Pacific Partnership. If the US were to become a party to these treaties over 70% of foreign direct investment into the US would be protected by an IIA.

³ For a discussion of how international investment law can override domestic regulatory changes *see* Lise Johnson and Oleksandr Volkov, “[State Liability for Regulatory Change: How International Investment Rules are Overriding Domestic Law](#),” Investment Treaty News (Jan. 6, 2014). For a more in-depth discussion of the ways in which IIA-based suits are against the US public interest *see* Lise Johnson, Lisa Sachs and Jeffrey Sachs, “[Investor-State Dispute Settlement, Public Interest and U.S. Domestic Law](#),” CCSI Policy Paper (May 2015).

⁴ *E.g.*, *Glamis Gold, Ltd. v. United States*, UNCITRAL; *Lone Pine Resources Inc. v. Canada*, ICSID Case No. UNCT/15/2; *The Renco Group, Inc. v. Peru*, ICSID Case No. UNCT/13/1; *Infinito Gold Ltd. v. Costa Rica*, ICSID Case No. ARB/14/5; *Bear Creek Mining Corporation v. Peru*, ICSID Case No. ARB/14/2; *Pac Rim Cayman LLC v. El Salvador*, ICSID Case No. ARB/09/12; *Bilcon of Delaware Inc. v. Canada*, UNCITRAL, PCA Case No. 2009-04; *TransCanada v. United States*, ICSID Case No. ARB/16/21; *Windstream Energy LLC v. Canada*, PCA Case No. 2013-22.

⁵ *E.g.*, *Mobil Oil Corporation v. Canada*, ICSID Case No. ARB(AF)/07/4; *Foresti v. South Africa*, ICSID Case No. ARB(AF)/07/01.

⁶ *E.g.*, *Copper Mesa v. Ecuador*, PCA Case No. 2012-2.

⁷ *Eli Lilly and Company v. Canada*, UNCITRAL, ICSID Case No. UNCT/14/2; *Philip Morris v. Uruguay*, ICSID Case No. ARB/10/7.

essential public services,⁸ actions taken pursuant to South Africa's post-apartheid black economic empowerment laws,⁹ efforts to raise the taxes of MNCs, and attempts to restructure sovereign debt in the face of widespread economic crisis.¹⁰

These suits addressing critical public policy and human rights issues are heard by an ad-hoc tribunal of three arbitrators who are subject to weak, if any, conflict of interest or impartiality obligations.¹¹ While some more recent agreements concluded by the US and others contain provisions on transparency, under the majority of the US's treaties there is no obligation to make public the award, the pleadings, or even the very existence of the suit, preventing awareness of and participation in the case.¹²

IIA tribunals have broad discretion to interpret treaty obligations and no obligation to consider the rights of affected third parties. Critically, tribunals typically do not consider the legitimacy or importance of a country's human rights or other environmental or social obligations underlying the disputed government action when determining whether the government must compensate an MNC for taking such action. A final award rendered by the tribunal is not subject to appeal, even if the tribunal makes a mistake of law or fact, and is enforceable in most countries in the world.¹³ The citizens of the losing host-country ultimately pay the award, usually in the millions, and sometimes billions of US dollars, to the MNC.¹⁴

As is described further in this submission, IIAs are relevant to, and threaten to exacerbate, the causes and effects of poverty and extreme poverty in various ways within (and outside of) the United States. This is by:

- Providing MNCs privileged and powerful procedural channels to assert their claims and have their voices heard. These heightened procedural powers, in turn, threaten to:
 - divert government attention toward MNCs and away from others, including already marginalized individuals and communities who lack economic and political power; and
 - alter outcomes in disputes between MNCs and those with less economic and political power as MNCs can uniquely use IIAs to contest unfavorable (a) court decisions in litigation between private individuals/communities against the MNCs; and (b) court and other government decisions favoring public interests that are adverse to the interests of a given covered MNC or group of MNCs.
- Providing MNCs strong substantive protections regarding their economic rights and interests, protections, which can diminish the scope of rights enjoyed by others.

⁸ E.g., *TECO Guatemala Holdings, LLC v. Guatemala*, ICSID Case No. ARB/10/23; *Iberdola v. Bolivia*, PCA Case No. 2015-05.

⁹ *Foresti v. South Africa*, ICSID Case No. ARB(AF)/07/01.

¹⁰ *Abaclat v. Argentina*, ICSID Case No. ARB/07/5; *Ambiente Ufficio v. Argentina*, ICSID Case No. ARB/08/9; *Alemanni v. Argentina*, ICSID Case No. ARB/07/8.

¹¹ Arbitrators are free to sit as "judges" in one case, and to represent a claimant in a similar dispute, and there are also concerns that the ad hoc nature of arbitrator appointments incentivizes arbitrators to expand jurisdiction and even substantive law.

¹² The US has signed but not ratified the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, which will come into force on 18 October 2017.

¹³ The 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the 1965 Convention on the Settlement of Investment Disputes Between States and Nationals of other States, permit the enforcement of awards within state-parties.

¹⁴ Claims are estimated at nearly US\$500 million with an average award of over US\$75 million.

- Imposing a financial cost on governments that diverts resources away from expenditures that could be used to address causes and conditions of poverty and toward the realization of human rights.

While the US has never lost an investment dispute,¹⁵ it is nevertheless fundamental to address these issues given that:

- Maintaining existing and (re)negotiating IIAs impose costs on the government in connection with negotiating treaties and defending IIA-based claims;
- US laws and regulations intended to alleviate poverty, inequality or to achieve other social and human rights objectives could be subject to review by an IIA tribunal;
- US IIAs provide MNCs the uniquely powerful procedural and substantive protections noted above, with which those MNCs can challenge US government conduct;
- US MNCs use US treaties abroad, with impacts on poverty, inequality (in economic, social and political terms), and human rights in other jurisdictions;
- Distributional consequences of mobile capital are inadequately understood and have yet to be addressed; and
- the US is a key “rule-maker” in this system with extraordinary power to shape international economic governance and the impacts such governance has on intra-national inequality, power, and rights.

II. IIAs: Impacts on Inequality, Poverty, Extreme Poverty, and Human Rights

IIAs to which the US is a party raise tensions, and can potentially create conflicts, with the US’s human rights obligations,¹⁶ including those that apply extraterritorially,¹⁷ and exacerbate conditions of poverty, extreme poverty and inequality.

a. Privileged and powerful procedural channels

IIAs provide MNCs with privileged and powerful procedural channels with which to protect their investments, thereby providing them with outsized power vis-à-vis the host government, as well as in connection with disputes with other private parties. These unequal procedural rights lead to unequal substantive rights and exacerbate inequality in legal, political, and economic terms.

One basis of this imbalance is the right of MNCs to bring claims directly to an international tribunal without first going to domestic courts, as well as the fact that that IIA-based rights are enforced more easily than other rights that are protected under international law. Because of this disparity in access and enforcement when compared with, for example, human rights tribunals,

¹⁵ The US effectively settled *Transcanada v. United States*, ICSID Case No. ARB/16/21, and also has lost critical aspects of certain suits.

¹⁶ For a discussion of how human rights and investor protection interact in the context of investments in land see Kaitlin Cordes, Lise Johnson, and Sam Szoke-Burke, “[Land Deal Dilemmas: Grievances, Human Rights and Investor Protections](#),” CCSI (March 2016). For a discussion of the interaction between certain investment and human rights obligations in the context of a specific investor-state arbitration, see [CCSI’s Submission as an “Other Person”](#) in *Bear Creek Mining Corporation v. Peru* (June 9, 2016). Recognizing that the US has signed but not ratified the International Covenant on Economic, Social and Cultural Rights, discussion of this covenant highlights the importance of the US ratifying this treaty.

¹⁷ See, e.g., CESCR, “General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities,” E/C.12/GC/24 at III(B) (Obligations to respect, to protect and to fulfill) and III(C) (Extraterritorial Obligations). For a further articulation of CCSI’s positions on the intersection of investment agreements and the ICESCR in the context of business activities, see CCSI, “[Submission on the draft General Comment on ‘State obligations under the ICESCR in the Context of Business Activities](#),” (Jan. 2017).

governments may devote more resources to ensuring compliance with IIAs than with human rights or other treaty instruments.

A further implication of the ability of MNCs bypass domestic courts is that they are not bound by the same procedural rules on claims against a government as other individuals and entities.¹⁸ As such, they may be able to bring substantive claims that could not be brought in domestic courts.¹⁹ Again, this procedural privilege may result in governments devoting heightened attention to MNC interests to the detriment of competing rights. This broad and privileged access is particularly problematic in an era in which the US government is already captured by wealthy individuals and corporate interests.

This incentive to prioritize IIA-obligations over human rights obligations is exacerbated by the language (and interpretation thereof) contained in IIAs: while IIAs frequently include a provision that they are to be interpreted in accordance with “international law,” IIA tribunals typically interpret this to mean international economic law, thereby potentially rendering states unable to rely on human rights obligations to defend policy changes. Efforts to include international human rights law within the investment law framework have been haphazard and mostly unsuccessful.²⁰ In light of these developments within the IIA regime states should clarify the importance of human rights law and their human rights obligations when drafting a treaty rather than leaving it to tribunal interpretation.²¹ The US has declined to include clarification on this point.

Furthermore, in order to fulfill human rights obligations, states should identify potential conflicts between their human rights obligations and their obligations under IIAs before becoming a party to an IIA, and should refrain from entering into such treaties when conflicts exist.²² The identification of potential conflicts would require that the US conduct a meaningful human rights impact assessment as early as possible and in any event prior to signing an IIA. The US does not conduct human rights impact assessments with respect to its IIAs.²³

Finally, the procedural right of MNCs to IIA-based claims can impact the substantive rights of other rights-holders because IIA-based disputes do not permit full participation by affected third

¹⁸ For example, domestic procedural rules by which domestic individuals and firms are bound involve policy questions including: Which entity of a government is best suited to make appropriate determinations of whether conduct is lawful or appropriate (e.g. courts, legislators, executive)? What impact will allowing claims or allowing certain types of remedies have on future government performance and/or redress to victims? Who can bring claims (those directly harmed or others with another interest in the outcome)?

¹⁹ For example, TransCanada was able to sue the US government under NAFTA for US\$15 billion relating to the denial of a cross-border oil pipeline. This claim would have been barred by constitutional separation of powers in US domestic courts.

²⁰ Recently a tribunal recognized broad sources of international human rights law as being possibly relevant rules for investment treaty interpretation under Article 31(3)(c) of the Vienna Convention on the Law of Treaties. *Urbaser S.A. v. The Argentine Republic*, ICSID Case No. ARB/07/26, Award (Dec. 8, 2016).

²¹ CESCR, General comment No. 24, ¶ 13 (encouraging states to include in future IIAs “a provision explicitly referring to their human rights obligations, and to ensure that mechanisms for the settlement of investor-State disputes take human rights into account in the interpretation of [IIAs].”); Chairmanship of the OEIGWG, “[Elements for the draft legally binding instrument on transnational corporations and other business enterprises with respect to human rights](#)” (29 Sept. 2017) at 1.2 (Principles) (included a Principle “[r]ecognizing the primacy of human rights obligations over trade and investment agreements”).

²² See, CESCR, General comment No. 24, ¶ 13.

²³ See Report of the Special Rapporteur on the right to food, Olivier De Schutter, “Guiding principles on human rights impact assessments of trade and investment agreements,” A/HRC/19/59/Add.5 (19 December 2011).

parties, including when their rights will be directly affected by the IIA-based disputes.²⁴ Given the complex and conflicting interests of states (including at local, regional and national levels) there is a real risk that the interests of the most marginalized members of society are lost, sacrificed or intentionally ignored when a government defends these IIA claims.

The settlement of these disputes can also be particularly problematic with respect to non-party rights-holders.²⁵ While rules and mechanisms surrounding settlement of domestic claims exist under the US Federal Rules of Civil Procedure and other applicable law, IIAs and arbitral rules do not have any rules aimed at protecting non-party rights and interests.²⁶ As such, the perspectives of some constituents, particularly those who are politically marginalized, may not be taken into account by government positions when a government is seeking to dispose of an IIA-based claim. While treaties could be drafted in a way that would prevent a proceeding from moving forward if there are individuals or entities whose human rights would be impacted by the proceeding but have not been afforded the meaningful opportunity to join the dispute, the US has declined to include these kinds of provisions into its treaties.

b. Strong substantive rights

IIA-based tribunals influence distributions of economic, social, and political power through the creation of substantive rights that are not otherwise recognized within a domestic jurisdiction. For example, the “fair and equitable” treatment standard protects MNCs “legitimate expectations”. In this way, “expectations” are effectively turned into compensable property rights: rights that otherwise would not be recognized under domestic law, and which may at the same time infringe on others’ rights.²⁷

According to tribunals, “legitimate expectations” frequently arise when those expectations are based on government officials’ representations or specific assurances to an MNC. Therefore, MNCs with the strongest claims to “legitimate expectations” are those that have benefitted from a closeness with the government, and IIA-based awards in their favor therefore widens the power gap between those with the ear of the government and those without. Further, binding a government to (or requiring compensation for) unlawful, non-binding, and often non-public representations or commitments can upset the normal separation of powers by effectively giving

²⁴ Amicus submissions are permitted but only at the discretion of the tribunal. For a discussion of the impacts of international investment on the rights of indigenous peoples *see* [Report of the Special Rapporteur of the Human Rights Council on the rights of indigenous peoples on the impact of international investment and free trade on the human rights of indigenous peoples](#), A/70/301 (7 August 2015).

²⁵ *See* Lise Johnson and Brooke Skartvedt Guven, “[The Settlement of Investment Disputes: A Discussion of Democratic Accountability and the Public Interest](#),” Investment Treaty News, March 13, 2017.

²⁶ *E.g.*, statutory requirements that apply prior to the formation of a settlement agreement, such as rules requiring the government to give the public notice of and an opportunity to comment on proposed agreements; rules permitting or giving non-parties the right to intervene in disputes and comment on or object to settlements; requirements for judicial approval of certain proposed agreements; or doctrines preventing enforcement of settlement agreements that violate the law.

²⁷ Tribunals have found rights for MNCs including: to continue to enjoy government subsidies, to be free from having to pay higher taxes, to be awarded permits for activities such as developing hazardous waste sites, to enjoy certain rates of return in public infrastructure projects and for the provision of public services (including water and electricity), and to continue to enjoy environmental exemptions, among others.

executive officials the ability to knowingly or negligently override or bypass limits set by the legislature and can encourage improper collusion between the MNC and government officials.²⁸

c. Enormous financial cost

With awards in the millions, and sometimes billions, of US dollars, the financial strain caused by IIA claims (or settlement of claims) is not insignificant. The US, like all countries, has budgetary constraints that can be impacted by IIA-based MNC suits, and similarly, when US MNCs use IIAs to sue lesser-developed nations, awards can impose extreme financial constraints on a state's ability to realize its human rights obligations. Further exacerbating human rights impacts, awards are often paid to holding companies based in tax havens, thereby permitting the MNC to avoid tax obligations on the award

III. Conclusion

We ask that the Special Rapporteur, as part of his mandate, investigate how heightened legal protections afforded to MNCs through US IIAs exacerbate the causes and effects of poverty, extreme poverty and inequality and negatively impact human rights in various ways within (and outside of) the United States. Because the US is a powerful treaty-maker and standard-setter, the longer that these damaging provisions remain in US treaties, the longer the global response will take to combat this problematic regime.

²⁸ Many domestic legal systems have developed rules to prevent such corruption and collusion by imposing strict rules against the enforcement of unauthorized or illegal promises. IIA-based dispute resolution rejects this approach favoring investors' reliance interests over other public policy interests.