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### Submission on the Draft General Comment on “State Obligations Under the ICESCR in the Context of Business Activities”

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# Columbia Center on Sustainable Investment

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## Submission on the draft General Comment on “State obligations under the ICESCR in the Context of Business Activities”

The Columbia Center on Sustainable Investment (CCSI) is grateful for the opportunity to provide input on the draft General Comment. As a joint center of Columbia Law School and the Earth Institute, we focus on international investment and its impacts on sustainable development. While human rights are critical to ensuring sustainable international investment, we have observed that the human rights framework is often ignored or misunderstood in the context of investment. We thus strongly support the Committee’s work in this area, and believe that the General Comment will play an important role in clarifying States’ obligations under the Covenant as they relate to investment regimes and projects.

Our submission focuses on the draft Comment’s discussion of: (1) host and home states’ obligations as they relate to international investment agreements (IIAs), (2) extraterritorial obligations in the context of outward investment, and (3) obligations related to corruption issues.

### **I. Obligations of States Parties under the Covenant as they relate to international investment agreements**

As the draft Comment recognizes, IIAs raise tensions and can potentially create conflicts with States’ obligations under the Covenant. The draft Comment usefully clarifies that ensuring compliance with Covenant obligations requires each State Party to refrain from concluding any future trade or investment agreement that will infringe upon or limit its ability to respect, protect, and fulfill Covenant rights.<sup>1</sup> However, we respectfully submit that the Comment should also recognize that States Parties must ensure that *existing* treaties do not generate conflicts between obligations owed under IIAs and the Covenant, and that States Parties must take steps to avoid and resolve conflicts that may and do arise. An emphasis on existing IIAs is crucial, as more than 3,000 such agreements have already been concluded by States around the world.

The Comment could clarify that this duty to identify and address actual or potential tensions between obligations under IIAs and those under the Covenant applies equally to host *and* home States.<sup>2</sup> It could also

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<sup>1</sup> Draft General Comment ¶ 20. This may require a State Party to conduct a human rights impact assessment of a relevant trade and investment agreement. A/HRC/19/59/Add.5 (Report of the Special Rapporteur on the right to food; Guiding principles on human rights impact assessments of trade and investment agreements). CCSI notes that there are various ways in which interpretation and application of IIAs can interfere with Covenant obligations, including through: (1) their substantive obligations (either their express terms or the interpretations of arbitral tribunals), which may result in, for example, governments needing to compensate investors for losses incurred due to legal changes essential to realizing Covenant rights (such as tax collection or environmental protection); (2) the award of remedies that can deplete government budgets, give rise to moral hazards, interfere with government’s ability to secure redress for harms, or frustrate the rights of non-parties; and (3) non-transparent dispute settlement procedures with results that negatively affect the realization of rights without permitting rights-holders the opportunity to challenge the outcomes. For a discussion of some of these issues in the context of the Trans-Pacific Partnership Agreement, *see, e.g.*, Lise Johnson and Lisa Sachs, “The TPP’s Investment Chapter: Entrenching, Rather Than Reforming, a Flawed System” (CCSI 2015), available at: <http://ccsi.columbia.edu/files/2015/11/TPP-entrenching-flaws-21-Nov-FINAL.pdf>. 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*, Pursuant to Article 836 and Annex 836.1 of the Peru-Canada FTA (June 9, 2016), available at: <http://ccsi.columbia.edu/work/projects/participation-in-investor-state-disputes/>.

<sup>2</sup> CCSI notes that Draft General Comment ¶ 34, regarding the extraterritorial obligation to protect, could clarify that this duty is relevant not only with respect to the negotiation of new agreements, but also in the context of the interpretation and application of existing agreements. Extraterritorial obligations in the context of international investment are discussed further in Section II, below.

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discuss mechanisms that States Parties can use to ensure that existing IIAs do not affect compliance with Covenant obligations. For example, aside from terminating or amending IIAs that create clear conflicts, one option available to States Parties is to use their interpretative power under international law to shape the meaning of IIA provisions and ensure they are not interpreted or applied in a manner inconsistent with Covenant obligations.<sup>3</sup> Indeed, the vague and malleable nature of many IIA provisions means that States Parties have considerable scope for clarifying or even determinatively settling questions regarding the meaning of their IIAs. States Parties can pursue interpretative strategies on an immediate and ongoing basis,<sup>4</sup> and outside of the context of any dispute, issuing unilateral, bilateral, or multilateral statements to clarify relevant questions of interpretation.<sup>5</sup> Additionally, in the context of a dispute, home States Parties can also make submissions to tribunals that help ensure the treaty is used by their investors, and interpreted by arbitrators, in a manner that does not undermine realization of Covenant rights.<sup>6</sup>

The Comment could also highlight the need for ensuring transparency of arbitral proceedings, and mechanisms for doing so, as another key issue that could affect States Parties' ability to meet their Covenant obligations in the context of existing IIAs. States Parties will be unable to effectively comply with their obligations to respect and protect economic, social and cultural rights in the context of business activities if they do not adopt measures to ensure that third parties' right to information is realized.<sup>7</sup> This reasoning extends to the resolution of disputes concerning investments, and suggests, at a minimum, that all States Parties that are parties to existing IIAs with investor-state dispute settlement (ISDS) provisions must ratify the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration without

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<sup>3</sup> See generally: Kaitlin Y. Cordes, Lise Johnson, and Sam Szoke-Burke, "Land Deal Dilemmas: Grievances, Human Rights, and Investor Protections," (March 2016), at pp. 36-37, available at: [http://ccsi.columbia.edu/files/2016/03/CCSI\\_Land-deal-dilemmas.pdf](http://ccsi.columbia.edu/files/2016/03/CCSI_Land-deal-dilemmas.pdf); Lise Johnson, "Ripe for Refinement: The State's Role in Interpretation of FET, MFN, and Shareholder Rights," Oxford GEG Working Paper 2015/101 (April 2015), available at: <http://ccsi.columbia.edu/2015/05/21/ripe-for-refinement-the-states-role-in-interpretation-of-fet-mfn-and-shareholder-rights/>; Lise Johnson and Merim Razbaeva, "State Control Over Interpretation of Investment Treaties," Columbia Center on Sustainable Investment (April 2014), available at: [http://ccsi.columbia.edu/files/2014/04/State\\_control\\_over\\_treaty\\_interpretation\\_FINAL-April-5\\_2014.pdf](http://ccsi.columbia.edu/files/2014/04/State_control_over_treaty_interpretation_FINAL-April-5_2014.pdf).

<sup>4</sup> See, e.g., Anthea Roberts, "Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States," 104 *American Journal of International Law* 179 (2010).

<sup>5</sup> For example, Draft General Comment ¶ 8 provides that States Parties must ensure that business entities under their jurisdiction respect Covenant rights and comply with Covenant provisions. In the context of certain investor-state disputes, business actors have sought protection for investments that, if granted, would enable the business actor to obtain compensation without first demonstrating compliance with its human rights responsibilities, thus requiring a *de facto* waiver of investor responsibilities under human rights law. An interpretive statement clarifying that the scope of protection available under investment treaties requires that covered investments be human rights-compliant could help to ensure that investment treaties and related enforcement mechanisms are not used by investors to circumvent or undermine their human rights responsibilities. See, e.g., CCSI's Submission as an "Other Person" in *Bear Creek Mining Corporation v. Peru*, Pursuant to Article 836 and Annex 836.1 of the Peru-Canada FTA (June 9, 2016), at pp. 7-10, available at: <http://ccsi.columbia.edu/work/projects/participation-in-investor-state-disputes/> (arguing that Claimant's failure to demonstrate compliance with its human rights responsibilities regarding consultation and free, prior and informed consent undermines its argument that it had the right to exploit minerals). Another issue that is ripe for interpretive statements relates to the fair and equitable treatment standard, including the relevance of a State's obligations under human rights law. See, e.g., CCSI's Submission, pp. 10-15.

<sup>6</sup> In addition to shaping outcomes, submissions by home States Parties in the context of disputes can be important for reducing the likelihood that investors will use IIAs and threats of ISDS claims in ways that are inconsistent with Covenant norms. Given the significant consequences of an ISDS claim, which include negative impacts on inward investment and high costs associated with defending a claim, it is particularly important for home States Parties to take action to narrow the range of permissible interpretations of their IIAs, and prevent or dispose of claims that would frustrate Covenant rights.

<sup>7</sup> See e.g. A/HRC/30/40 (Report of the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes, clarifying the scope and content of the right to information throughout the lifecycle of hazardous substances and wastes).

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reservations (the “Mauritius Convention”).<sup>8</sup> Wide implementation of the Mauritius Convention is crucial for ensuring public access to basic information about ISDS cases filed under most existing treaties. Adherence to this Convention, however, is not sufficient to guarantee that non-parties will have meaningful access to fundamental information regarding the disputes;<sup>9</sup> nor does it ensure that those affected by the dispute and its resolution will be able to have their voices heard. Thus, States Parties should take additional action at the national and international level to ensure that the rights and interests of non-parties are protected in any ISDS proceedings that occur.<sup>10</sup>

In addition, the Comment could stress that, even when a seemingly direct conflict arises between a State Party’s Covenant obligations and its obligations under an IIA, such a conflict does not change the State Party’s obligations to respect, protect, and fulfill rights codified in the Covenant. Just as the draft Comment notes that States Parties retain their obligations when private parties fail in their duties to deliver goods or services that are crucial to the enjoyment of Covenant rights,<sup>11</sup> States Parties’ obligations remain unchanged regardless of the existence or outcome of an international investment dispute.<sup>12</sup>

## II. Extraterritorial obligations of States Parties under the Covenant in the context of outward investment

In addition to elaborating on home States Parties’ obligations under the Covenant in the context of IIAs, as discussed above, we respectfully suggest that the Comment could also provide further details on extraterritorial obligations, and actions to comply with them, as they relate to outward investment from States Parties more generally.

The Comment could clarify, for example, that the extraterritorial obligation to respect also extends to ensuring that home States Parties’ own policies do not encourage or incentivize outward investment that is likely to lead to violations of Covenant rights. For instance, in its “Concluding observations concerning the fourth periodic report of Belgium,” this Committee signaled its concerns about a policy promoting the production of agrofuels that might encourage outward investors to cultivate crops overseas on a large scale in a way that could negatively impact on local rights-holders’ Covenant rights, and recommended that the State Party “systematically conduct human rights impact assessments” to ensure this would not be the case.<sup>13</sup> The Comment could thus encourage States Parties to review existing policies to assess whether they risk breaching their extraterritorial obligation to respect Covenant rights. The Comment could also suggest options that

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<sup>8</sup> United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, adopted by General Assembly resolution 69/116 (10 December 2014), *opened for signature* March 17, 2015.

<sup>9</sup> For example, the Convention allows certain potentially broad types of information to remain shielded from disclosure, including: confidential business information (which may be interpreted broadly); exhibits and communications; and arrangements between the disputing parties, such as the terms of settlement agreements. Additionally, even if hearings may be open for in-person attendance, they may held at a venue outside the host State where interested and affected citizens reside.

<sup>10</sup> At most, interested and affected non-parties may be able to participate as *amicus curiae*. But the tribunal has discretion regarding whether to permit *amicus curiae*. Even if non-parties’ rights will be negatively affected by Investors’ claims, States’ defenses, tribunal decisions, or settlement agreements, those non-parties have no rights to join or provide input into disputes. Similarly, tribunals have no clear power or obligation to decline to hear cases that will impact non-parties’ rights.

<sup>11</sup> Draft General Comment ¶ 28.

<sup>12</sup> See e.g., Jarrod Hepburn, “In a first, BIT Tribunal finds that it has jurisdiction to hear a host State’s counterclaim related to investor’s alleged violation of international human rights obligations,” *Investment Arbitration Reporter*, January 12, 2017 (noting that in the *Urbaser v. Argentina* Award, which is not yet public, the tribunal found that while the claimant’s contractual obligations may have had the effect of fulfilling the State’s own obligation to fulfill human rights, including the right to water, the obligation remained with the State).

<sup>13</sup> CESCR, Concluding Observations Concerning the Fourth Periodic Report of Belgium, ¶ 22, U.N. Doc. E/C.12/BEL/CO/4 at 6 (Dec. 23, 2013).

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States Parties could undertake when a policy promotes business conduct that imperils Covenant rights, such as: rescinding the policy (where the risks of breach are too high), modifying the scope of the policy (where doing so can meaningfully alleviate the risk), and making any investor benefits under the policy conditional on compliance with safeguards or the conduct of human rights due diligence (where such safeguards or due diligence can weed out investments that would place rights at risk).<sup>14</sup>

The draft Comment notes the need to monitor the impacts of business activities on the enjoyment of Covenant rights,<sup>15</sup> and suggests reporting requirements to help ensure that related entities comply with Covenant requirements.<sup>16</sup> The Comment could usefully elaborate more generally on reporting requirements that States Parties could implement in support of their extraterritorial obligations to protect. Are there particular contexts—high-risk industries or sectors, high-risk activities, or even high-risk countries<sup>17</sup>—for which reporting requirements on human rights due diligence, or on human rights risks and steps taken to address them, are especially important to ensure compliance with the extraterritorial obligation to protect? For instance, the UN Working Group on human rights and transnational corporations and other business enterprises has stated that “[r]eporting requirements for business enterprises on how they address human rights risks is of particular relevance for high-risk sectors.”<sup>18</sup> The Working Group has also highlighted the U.S. Government’s Burma Responsible Investment Reporting Requirements, which seek information relating to human rights and financial transparency for US investors,<sup>19</sup> as one example of reporting requirements that could be established.

The role of incentives as part of States Parties’ efforts to meet extraterritorial obligations to respect, protect, and fulfill Covenant rights could be further explored in the Comment. Home States Parties that support outward investors can create powerful incentives for respecting Covenant rights by conditioning any financial or diplomatic support or tax exemptions on compliance with the Covenant, or with other human rights-related standards or processes.<sup>20</sup> For example, Canada’s outward investor corporate social responsibility policy sets out that extractive companies choosing not to participate in disputes referred to Canada’s National Contact Point for the OECD Guidelines for Multinational Enterprises face withdrawal of government advocacy support and economic diplomacy;<sup>21</sup> this may also affect applications for financial support.<sup>22</sup> Similar

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<sup>14</sup> Kaitlin Y. Cordes and Anna Bulman, “Corporate Agricultural Investment and the Right to Food: Addressing Disparate Protections and Promoting Rights-Consistent Outcomes,” 20 *UCLA Journal of International Law & Foreign Affairs* 87 (2016), 87-161, at 154-5.

<sup>15</sup> Draft General Comment ¶ 18.

<sup>16</sup> Draft General Comment ¶ 38.

<sup>17</sup> Or potentially some combination of industries, activities, and countries. *See, e.g.*, CCSI, Submission to the US Securities and Exchange Commission on Addressing Land Tenure Risks Through Regulation S-K, July 2016, available at: <http://ccsi.columbia.edu/2016/07/22/submission-to-the-sec-on-addressing-land-tenure-risks-through-regulation-s-k/> (arguing, in the context of understanding financial risks, that companies should be required to report on direct land acquisitions in countries with weak land governance).

<sup>18</sup> *Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises*, U.N. Doc. A/71/291 (August 4, 2016), ¶ 27, [http://ap.ohchr.org/documents/dpage\\_e.aspx?si=A/71/291](http://ap.ohchr.org/documents/dpage_e.aspx?si=A/71/291).

<sup>19</sup> Responsible Investment Reporting Requirements, OMB NO. 1405-0209, arts. 5, 8 11, <https://www.humanrights.gov/pdf/responsible-investment-reporting-requirements.pdf>. The reporting requirements apply to any person contracting with the Myanmar Oil and Gas Enterprise or whose aggregate investment in Burma exceeds \$5 million, and require disclosure by the investor as well as “related entities,” including “subsidiaries, subcontractors, and other business partners.” (Art. 5).

<sup>20</sup> Cordes and Bulman, *supra* note 14, 155-7; *see also* Kaitlin Y. Cordes and Anna Bulman, “Land investments and human rights: how home countries can do more,” *Columbia FDI Perspectives* (March 14, 2016), 2.

<sup>21</sup> Canadian Ministry of International Trade, *Doing Business the Canadian Way: A Strategy to Advance Corporate Social Responsibility in Canada’s Extractive Sector Abroad*, (November 14, 2014), available at <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/csrstrat-rse.aspx?lang=eng>.

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incentives could be used to encourage compliance with different international processes and standards that serve to protect Covenant rights, and in other industries or sectors.

As part of their efforts to comply with extraterritorial obligations to fulfill Covenant rights, States Parties can also provide guidance and assistance to companies on respecting Covenant rights abroad.<sup>23</sup> The Comment could illustrate how States Parties can do so by, for example: collaborating with business groups to develop learnings and processes for specific rights issues or industries,<sup>24</sup> working with specific investors on new approaches to achieving responsible outward investments,<sup>25</sup> or raising awareness among business actors regarding responsible and rights-respecting business practices for specific industries or types of investment. Such efforts require internal coordination among different agencies and offices of the home State Party, with support offered by entities located within the home country as well as by diplomatic outposts.

### III. Obligations of States Parties under the Covenant Related to Corruption Issues

The impact of corruption on the realization of human rights—and economic, social and cultural rights in particular—is widely recognized and has been affirmed by this Committee.<sup>26</sup> While the draft Comment notes the connection between corruption and failure to respect Covenant rights,<sup>27</sup> it could further articulate steps that States Parties could take to ensure that corruption does not interfere with their obligations under the Covenant. This could potentially be combined with the draft Comment’s suggestion to develop national action plans and strategies,<sup>28</sup> by noting concrete measures that could be included in a National Action Plan. For example, to decrease the odds of corruption affecting Covenant rights, States Parties should require public disclosure of certain types of investor-state contracts, such as those for natural resource investments. To help address illicit financial flows, States Parties should require companies operating in the jurisdiction to disclose details of beneficial ownership in a publicly available registry.

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<sup>22</sup> See “Final Statement on the Request for Review Regarding the Operations of China Gold International Resources Corp. Ltd., at the Copper Polymetallic Mine at the Gyama Valley, Tibet Autonomous Region,” *Global Affairs Canada* (last updated Apr. 8, 2015), <http://www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/statement-gyama-valley.aspx?lang=eng>.

<sup>23</sup> Also discussed by the Working Group on the issue of human rights and transnational corporations and other business enterprises, *supra* note 18, ¶¶ 28-30.

<sup>24</sup> Working Group on the issue of human rights and transnational corporations and other business enterprises, *supra* note 18, ¶ 28 (discussing the Netherlands’ development of “sector covenants on international corporate responsibility risks”).

<sup>25</sup> For example, in 2016 USAID made a call for expressions of interest on Public-Private Partnerships to Support Responsible Land-Based Investments: <http://www.uscib.org/uscib-webinar-series/>.

<sup>26</sup> Committee on Economic, Social and Cultural Rights (CESCR), *Report on Thirtieth and Thirty-First Sessions*, U.N. Doc E/C.12/2003/14, ¶ 302 (November 28, 2003); see preamble United Nations Convention Against Corruption, October 31, 2003, 2349 U.N.T.S.; see U.N. Human Rights Council, Res. 7/11, March 27, 2008; see Christy Mbonu, Special Rapporteur on corruption and its impact on the full enjoyment of human rights, *Preliminary report*, U.N. Doc E/CN.4/Sub.2/2004/23 (July 7, 2004), p. 9.

<sup>27</sup> Draft General Comment ¶ 16, see also ¶¶ 21, 29.

<sup>28</sup> Draft General Comment ¶¶ 52, 53.