**APWLD submission on the “Draft General Comment on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities” by the Committee on Economic, Social and Cultural Rights (CESCR).**

The Asia Pacific Forum on Women, Law and Development (APWLD)[[1]](#footnote-1) is pleased to submit its comments on the draft General Comment on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities for consideration by the CESCR Committee.

**I. General remarks**

In an increasingly globalised world, business activities routinely infringe on the enjoyment of women’s human rights including economic, social, and cultural rights. The financial resources of many transnational corporations (TNCs) eclipse the economies of several states[[2]](#footnote-2), delivering them unprecedented power to shape national and global laws and policies and wield political influence.

APWLD commends the CESCR Committee for producing this General Comment, and in choosing to adopt an expansive understanding of business activities, ‘to include such activities of any business entity, whether they operate transnationally or whether their activities are purely domestic, whether fully privately owned or State-owned, regardless of its size, sector, location, ownership and structure’.

In this contribution, APWLD highlights the need to specifically address women’s human rights throughout the general comment and draws the Committee’s attention to critical areas that have not been addressed in the current draft General Comment, including

(a) the binding instrument to regulate transnational corporations (TNCs)

(b) trade and investment treaties;

(c) the role of international finance institutions;

(d) climate change, and

(e) tax systems.

**A. The legally binding treaty negotiations**: Although the draft mentions the Guiding Principles on Business and Human Rights, it does not acknowledge the UN Human Rights Council resolution on the *Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights* as detailed in A/HRC/26/L.22/Rev.1. This treaty has the potential to provide much stronger remedies for violations of economic, social, and cultural rights in the context of business activities, and as the Committee’s General Comment addresses state obligations, this comment could affirm the need to provide better binding remedies given existing obligations and an absence of trans-national remedies.

APWLD notes that other contributions, particularly that of the International Organisation of Employers, supports remaining within the limitations of the Guiding Principles. However, our analysis of the existing National Action Plans revealed that no NAP has adequately addressed the complexity of corporate violations, the supply chain and none provide binding remedies for violations outside of national borders. Independent Expert on the Promotion of a Democratic and Equitable International Order, Alfred de Zayas criticised the Guiding Principles as ‘pious pledges that thus far have not precluded egregious abuse by transnational corporations’.[[3]](#footnote-3) Mr de Zayas envisioned the treaty as a step to ‘put teeth on the Guiding Principles’ by providing monitoring and enforcement mechanisms and recourse and remedy to victims of abusive activities by transnational corporations.

Civil society from the Asia Pacific region have elaborated on the principles that would need to underpin a treaty and redress the existing failures of the international system to address human rights violations committed by the business sector.[[4]](#footnote-4)

**B. Trade and Investment Agreements**: Multilateral and bilateral agreements have played a large role in protecting the interests of the private sector, particularly of transnational corporations and foreign investors. These agreements often force the state to bypass its obligations as enshrined in the Universal Declaration of Human Rights and core human rights treaties, particularly ICESCR. This General Comment should unequivocally affirm the hierarchy of international law and the primacy of the UN Charter and human rights obligations over so called ‘investor rights’. This affirmation relates to both investor-state dispute settlement mechanisms (ISDS) and to other chapters including regulatory coherence and intellectual property chapters that may protect investment property at the expense of public health. The increasing use of ISDS (UNCTAD revealed that in 2015 alone a record high of 70 cases were filed[[5]](#footnote-5)) acts as a threat to states regulating the activities of corporate actors, denies states much needed public funds and erodes the importance of international human rights standard setting. The clause creates a supranational and secretive arbitration space where corporations have the power to sue states that attempt to pass legislation that may affect corporations’ profits yet may be essential in safeguarding economic, social and cultural rights.[[6]](#footnote-6)

For example, the Committee’s General Comment no 15 recognises that “The human right to water is indispensable for leading a life in human dignity. It is a prerequisite for the realization of other human rights.”[[7]](#footnote-7) It clarified that the right to water is essential for the realisation of articles 11 and 12. Yet in *Suez & Vivendi v Argentina*, an ISDS case brought before ICSID, the corporation argued that international human rights law was not relevant. While recognising that a human right to water exists, the tribunal concluded that human rights must be ‘counterbalanced’ against investor rights.[[8]](#footnote-8)

Companies have also sued states for attempting to implement labour[[9]](#footnote-9) and environmental[[10]](#footnote-10) protections, legislating for public health and even addressing corruption involving corporations and states, consequently violating Article 7 (‘just and favourable conditions of work’ including decent living), Article 11 (‘an adequate standard of living’) and Article 25 (‘Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources’) of ICESCR respectively.

To address this dissonance, the Committee’s draft can take cognisance of recommendations made by UN Independent Expert on the promotion of a democratic and equitable international order, Alfred de Zayas, who in 2016 warned that ‘investors and transnational enterprises have invented new rules to suit their needs, rules that impinge on the regulatory space of States and disenfranchise the public’.[[11]](#footnote-11) He argues that Article 103 of the UN Charter, which ‘stipulates that in case of conflict between the provisions of the UN Charter and any other treaty, the Charter prevails’ should render ISDS decisions invalid and recommends that ‘all future trade agreements stipulate the primacy of human rights’ while existing treaties should be revised.[[12]](#footnote-12)

**C. The role of international finance institutions**: International finance institutions such as the World Bank, the International Monetary Fund, regional and multilateral Development Banks play a significant role in enabling foreign investment that can have a detrimental impact on human rights. They also play a major role in shaping national laws and policies designed to attract foreign investment and minimise regulation on the private sector (for example, through the World Bank’s ‘Ease of Doing Business Rankings’). They have, for example, encouraged public-private partnerships (PPPs) for essential infrastructure, sometimes with devastating effects.[[13]](#footnote-13) The Committee has previously insisted that international organisations are bound to comply with international human rights law despite the failure to incorporate these obligations their articles of association.[[14]](#footnote-14) Furthermore, the Committee recognised the obligations member states have in their membership of such institutions to uphold human rights obligations. As of July 2016, the most recent World Bank policy framework[[15]](#footnote-15) does not require the bank to respect human rights throughout its operations, although it has integrated a limited number of rights.[[16]](#footnote-16) We encourage the Committee to make the obligations explicit in this comment in respect to the role of international finance institutions in enabling business activities that have negative impacts on human rights.

**D. Climate change**: Human rights violations resulting from business activities extend to the ‘externalities’ of business operations, including their long term impact on the climate. Scientific studies have found that only 90 companies produced nearly two-thirds of all greenhouse gas (GHG) emissions from the beginning of the industrial age.[[17]](#footnote-17) This impact affects the entire world, and the most devastating impacts will be felt by the global south, by women, by smallholder farmers, Indigenous peoples and populations living in coastal and low-lying areas. The legal obligations that business enterprises have to eliminate harmful emissions arise from international law, including ICESCR and should be made explicit through this comment.

We recommend that the committee consult the ‘Oslo Principles[[18]](#footnote-18)’, a collective legal opinion of eminent jurists which extrapolates on the obligations states and enterprises have to significantly reduce emissions. The detrimental effects of climate change falls under the purview of several Covenant articles, including Article 11 (‘adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions’), and Article 25 (‘Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources’). APWLD has also elaborated the gender-related dimensions of climate change in its submission to the Committee on the Elimination of All Forms of Discrimination against Women (CEDAW).[[19]](#footnote-19) The submission discusses women’s right to education and decent work in relation to climate change, also protected by ICESCR (Articles 6 and 7 on wage and living, Article 12 on education).

**E. Global financial systems**: Oxfam’s latest study finds that in 2017, eight men have the same wealth as the poorest half of the world’s population.[[20]](#footnote-20) Among the many contributing factors to this imbalance is a flawed and opaque finance system that allows the private sector to retain at least US$30 trillion in tax havens and unnamed bank accounts. A 2015 UNCTAD study estimated that at least US$100 billion of annual tax revenue is lost by developing countries related to inward investment stocks directly linked to offshore hubs.[[21]](#footnote-21) Many of the rights protected under the Covenant, including right to education, to fair wages, to an adequate standard of living, and to enjoyment of the highest attainable standard of physical and mental health, are made possible if states are able to fund necessary public services through tax systems ensuring transnational actors pay their fair share. Several member states have prevented progress in strengthening global tax cooperation that would allow states to collect and spend ‘maximum available resources’ to advance human rights. They also continue to resist the demand for country-by-country-reporting of transnational business actors, to bring visibility to how much tax business actors pay in each country. The issue of tax justice comes within the mandate of the Committee and in the purview of this General Comment, and we encourage the Committee to include commentary on the obligations business enterprises have to pay tax and to cooperate in global efforts to minimise all forms of tax evasion, trade mis-pricing and corporate structures that limit accountability and transparency through opaque supply chains.

**II. Comments on paragraphs of the draft General Comment**

Paragraph 1: It is not the prerogative of the Committee to applaud the role that business actors may have played in the fulfillment of economic, social and cultural rights. The Committee should be mindful of the serious harm some private sector actors have caused as well as recognise that member states have adopted different economic models which may or may not elevate private enterprise.

Paragraph 2: Here, as mentioned in the General Remarks section, the Committee should address the legally binding treaty.

Paragraphs 5 & 6: We commend the expansive understanding of a business entity and the inclusion of non-state actors in the business sector.

Paragraph 7: While we support the reiteration that states have the primary obligation to respect, protect and fulfill rights enshrined in ICESCR, it would be useful to mention in this section that all business actors are also obliged to respect, protect, and fulfill these rights. Asia-Pacific representative of the Working Group on the issue of human rights and transnational corporations and other business enterprises, Prof Surya Deva, states: ‘If individuals have certain human rights obligations under national or international law, these obligations should not disappear simply because a group of individuals decided to operate as a corporation. If an individual cannot use child labour, infringe the privacy of others or pollute a river, why should a corporation be allowed to do these very human rights violative acts?’[[22]](#footnote-22)

Paragraph 10: We recommend the addition of the concept of free, prior and informed consent (FPIC), not limited to indigenous communities, and applicable to all communities and minority groups affected by business activity.

Paragraph 11: Not only are women overrepresented in the informal economy, the structure of the global capitalist market drives women into precarious, low wage and flexibilised labour, while land confiscation and climate change push more women to migrate and become more vulnerable to trafficking. Women’s representation in the labour market needs to be more than improved: invisible, domestic and care work must be recognised, and sectors that rely on unpaid or lowly paid work carried out mostly by women must undergo radical change fitting with Decent Work standards.

Paragraph 15: Not only have states seized land from individuals and communities on behalf of the private sector, it has militarised areas and used security forces to drive out these communities, and along with responsible private sector actors must be held accountable for these measures. The obligation to respect the Covenant is also compromised in trade and investment treaties, and by conditions imposed by finance institutions, as detailed in the General Remarks.

Paragraph 18: The legal framework requiring business entities to exercise human rights due diligence can potentially be the binding treaty that is under negotiation. However, as mentioned by Prof Surya Deva, the existing human rights treaties do apply to business entities, therefore new ‘human rights based codes of conduct for their management and employees’ may be superfluous. This paragraph can also endorse the principle of country-by-country reporting of corporate taxes, if not the establishment of a global tax body.

Paragraph 20: We commend the points made on intellectual property and medicines, seeds, and right to food. However we disagree on the recommendation of measures to increase ‘trade volumes and investment flows’ as these do not automatically contribute to the realisation of Covenant rights. The Committee must go further than to say that states should ‘refrain from entering into such agreements’ and recognise the geopolitical pressures that have led states to enter these agreements as mentioned in the General Remarks above. This paragraph can recommend transparency in trade negotiations and acknowledge how Covenant rights have been directly affected by existing trade agreements that protect profit over people.

Paragraph 22: We recommend stronger language against the private sector taking on important roles in water, sanitation, health, education. As observed in this paragraph, privatisation should not lead to the denial of basic goods and services due to inability to pay, or the creation of new forms of socioeconomic segregation. The Committee should also recommend measures to undo these two effects of privatisation of public services that has already taken place in many states.

Paragraph 23: We commend the need for protection of human rights defenders, including trade unionists, indigenous leaders, and anti-corruption activists, and suggest the inclusion of women human rights defenders, who are targeted for specific forms of gendered harassment.

Paragraph 26: It is dangerous to suggest that states are required to create an enabling environment for business actors; the facilitating measures listed fit more with a World Bank ease-of-doing business index and have damaging implications when states face corporate capture.

Paragraph 30: We support the importance of extraterritorial application of human rights obligations in the context of business activities. However, the Committee must go beyond observing the rising role of public-private partnerships and specify necessary limits fitting with the Covenant so that public goods and services are not out of the reach of the general public. Pursuing profitability in this area has not led to efficacy or increased delivery.

1. APWLD is Asia Pacific’s leading feminist, membership driven network. Our 200 members represent organisations and groups of diverse women from 27 countries in the region. We use capacity development, research, advocacy and activism to claim and strengthen women’s human rights. [↑](#footnote-ref-1)
2. Nicholas Freudenberg, ‘The 100 largest governments and corporations by revenue’, 27 August 2015 <http://www.corporationsandhealth.org/2015/08/27/the-100-largest-governments-and-corporations-by-revenue/> [↑](#footnote-ref-2)
3. Statement by Alfred de Zaya. Second session of OEIWG on TNCs and other business enterprises with respect to human rights, Panel IV: Open debate on different approaches and criteria for the future definition of the scope of the international legally binding instrument [↑](#footnote-ref-3)
4. Unity Statement: Asia Pacific Civil Society’s Demands for the Legally Binding Treaty on Business and Human Rights; also submitted to the open-ended working group on transnational corporations and other business enterprises with regards to human rights. <http://apwld.org/unity-statement-asia-pacific-civil-societys-demands-for-the-legally-binding-treaty-on-business-and-human-rights/#_ftn1> [↑](#footnote-ref-4)
5. UNCTAD Investment Policy Hub: ‘Record Number of Investor-State Arbitrations Filed in 2015’ <http://investmentpolicyhub.unctad.org/News/Hub/Home/458> [↑](#footnote-ref-5)
6. More on the nature of ISDS and the financial and human costs of arbitration can be read in the 2016 Buzzfeed News Investigation, ‘Secrets of a Global Supercourt’: <https://www.buzzfeed.com/globalsupercourt> [↑](#footnote-ref-6)
7. UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant), 20 January 2003, E/C.12/2002/11, availaable at: <http://www.refworld.org/docid/4538838d11.html> [accessed 19 January 2017] [↑](#footnote-ref-7)
8. Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentine Republic ICSID Case No ARB/03/19, Decision on Liability (July 30, 2010). [↑](#footnote-ref-8)
9. *Veolia Propreté v. Arab Republic of Egypt*, Minimum wage <http://investmentpolicyhub.unctad.org/ISDS/Details/458> [↑](#footnote-ref-9)
10. *Chevron v. Ecuador*, Amazonian oil pollution. <http://www.italaw.com/sites/default/files/case-documents/ita0155_0.pdf> [↑](#footnote-ref-10)
11. OHCHR News, ‘Mainstream human rights into trade agreements and WTO practice – UN expert urges in new report’ [http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20473&LangID=E#sthash.AHwtitQb.dpuf](https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20473&LangID=E#sthash.AHwtitQb.dpuf) [↑](#footnote-ref-11)
12. *ibid* [↑](#footnote-ref-12)
13. *The Economist*, ‘Water war in Bolivia’, 10 February 2000. <http://www.economist.com/node/280871> [↑](#footnote-ref-13)
14. Statement by the Committee on Economic, Social and Cultural Rights: 'Public debt, austerity measures and the International Covenant on Economic, Social and Cultural Rights' E/C.12/2016/1. The Committee also cited the International Court of Justice, which stated: 'international financial institutions and other international organisations are "bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties’. International Court of Justice, Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion (20 December 1980), I.C.J. Reports 1980, 73 at 89–90 (para. 37) [↑](#footnote-ref-14)
15. World Bank Environmental and Social Framework: Setting Environmental and Social Standards for Investment Project Financing, 20 July 2016

<http://consultations.worldbank.org/Data/hub/files/consultation-template/review-and-update-world-bank-safeguard-policies/en/materials/third_draft_esf_for_disclosure_july_20_2016.pdf> [↑](#footnote-ref-15)
16. Human Rights Watch, ‘World Bank: Human Rights All But Absent in New Policy

Bank’s Management a Key Obstacle’ 21 July 2016

<https://www.hrw.org/news/2016/07/21/world-bank-human-rights-all-absent-new-policy> [↑](#footnote-ref-16)
17. Heed, Richard. ‘Tracing anthropogenic carbon dioxide and methane emissions to fossil fuel and cement producers, 1854–2010’ *Climatic Change* January 2014, Volume 122, Issue 1, pp 229–241 <http://link.springer.com/article/10.1007/s10584-013-0986-y> [↑](#footnote-ref-17)
18. http://globaljustice.macmillan.yale.edu/sites/default/files/files/OsloPrinciples.pdf [↑](#footnote-ref-18)
19. APWLD Submission on the on “General Discussion on Gender Related Dimensions of Disaster Risk Reduction and Climate Change (DRRCC)” by the Committee on the Elimination of All Forms of Discrimination against Women (CEDAW). [http://www.ohchr.org/Documents/HRBodies/CEDAW/ClimateChange/APWLD.pdf](https://www.ohchr.org/Documents/HRBodies/CEDAW/ClimateChange/APWLD.pdf) [↑](#footnote-ref-19)
20. Eight men earn more than 3.6 billion people: our economics is broken <https://www.theguardian.com/commentisfree/2017/jan/16/eight-people-earn-more-billion-economics-broken> [↑](#footnote-ref-20)
21. UNCTAD: multinational tax avoidance costs developing countries $100 billion+

<http://www.taxjustice.net/2015/03/26/unctad-multinational-tax-avoidance-costs-developing-countries-100-billion/> [↑](#footnote-ref-21)
22. Statement by Surya Deva. Second session of OEIWG on TNCs and other business enterprises with respect to human rights, Panel III: Examples of International Instruments Addressing Obligations and Responsibilities of Private Actors [↑](#footnote-ref-22)