Bridging the Public Interest Divide: Committee assistance for investor-host State Compliance with the ICESCR

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Bridging the Public Interest Divide: 
Committee assistance for investor-host State compliance with the ICESCR

Bruno Simma¹ and Diane A. Desierto²

Introduction: the ICESCR and investor-State disputes

International economic, social and cultural rights have only very recently begun to surface in contemporary international investment treaty design and arbitral reasoning. The first arbitral pronouncement referring to human rights in a more than cursory manner was that of the ICSID tribunal in the 2010 Suez and others v. Argentina award, which declared that Argentina was “subject to both international obligations, i.e. human rights and treaty obligations, and must respect both of them equally. Under the circumstances of these cases, Argentina’s human rights obligations and its investment treaty obligations are not inconsistent, contradictory, or mutually exclusive.” Leaving this pronouncement aside, however, there has not yet been an arbitral decision that fully and squarely adjudicates the issue of a State’s fulfillment of human rights obligations alongside investment treaty obligations. This is in part a consequence of the infrequent invocation of human rights obligations by litigants, the rare admission of amici curiae in arbitral proceedings, textual limitations within treaty provisions that cannot be redressed by resort to relevant external rules, or at times, a fundamental predisposition against so-called “unscientific” normative mergers across treaty regimes. The silence of arbitral awards on the subject could also be explained by the nascent nature of anything resembling a discourse on the paradigmatic importance of human rights and investment law compliance between the communities that speak to various understandings of the “public

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⁴ Suez and others v. Argentina, Decision on Liability, ICSID Case No. ARB/03/19, 30 July 2010, para. 262.
interest” in States – from academics focusing on investment law and public international law to practitioners, arbitrators, civil servants, foreign ministries and investment treaty negotiators, as well as to global and regional institutions for international development.6

As against this, certain recent State and institutional practice does demonstrate that policy inroads have been made towards achieving more calibration of investment protection and a host State government’s ability to regulate for the public interest within investment agreements. The recently released 2012 version of the United States Model Bilateral Investment Treaty (BIT)7 is among the few known international investment agreements that explicitly incorporate human rights as part of the law applicable to investment.8 The 2012 US Model BIT contains additional innovations that, in the words of the US Trade Representative and the US State Department, are intended “to enhance transparency and public participation; sharpen the disciplines that address preferential treatment to state-owned enterprises, including the distortions created by certain indigenous innovation policies; and strengthen protections relating to labor and the environment.”9 This revision of the 2012 US Model BIT comes after several recommendations on the design of international investment agreements had been released in December 2011 by UN specialized institutions such as the UN Conference on Trade and Development (UNCTAD) and the UN Human Rights Council. Thus, UNCTAD issued a new report on the design and formulation of fair and equitable treatment clauses, precisely to assist States drafting international investment agreements to retain sufficient policy flexibility for host States to be able to respond to emergencies and concerns in pursuit of public interest.10 The UN Human Rights Council, on its part, circulated a report


10 United Nations Conference on Trade and Development (UNCTAD), Interpretation of IIAs: What States Can Do, IIA Issues Note No. 3 (December 2011); United Nations Conference on Trade and Development
of the Special Rapporteur on the right to food, Olivier De Schutter, entitled *Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements*.\(^\text{11}\) The Guiding Principles recommend that States prepare human rights impact assessments before concluding trade and investment agreements; ensure that any such agreement will not impose obligations inconsistent with pre-existing international human rights obligations; and where incompatibilities are found, adopt remedial strategies such as treaty termination, amendment, insertion of safeguards in the agreement, provision of compensation by third-State parties, and mitigation measures.\(^\text{12}\)

What we want to sketch out in this essay in honor of Eibe Riedel is the way in which, beyond the recent developments thus described, the policy dialogue between States, investors, and other public interest constituents could be advanced further through the use of a hitherto untapped international institutional source of expertise on social and economic rights. We refer to the Committee on Economic, Social and Cultural Rights, the monitoring body created in 1985 and in operation since 1987, entrusted with overseeing the implementation of the International Covenant on Economic, Social and Cultural Rights of 19 December 1966 (the “ICESCR”) by its States parties. The first author of the present contribution was the German member of this Committee for the initial ten years of its existence; followed by the recipient of this *Festschrift* who, during the many years of his membership in the Committee, has made significant contributions towards the establishment of the present high reputation of this body. In the following, we will develop the thesis that the Committee could render substantial assistance to host States as well as investors towards the development of a transparent and cooperative understanding of ICESCR protection within and alongside investment treaty obligations. As the authoritative body of experts tasked with assisting the UN Economic and Social Council in monitoring States Parties’ ICESCR compliance,\(^\text{13}\) the Committee could thus help inform the content and design of international investment agreements towards better harmonization with State Party obligations under the ICESCR. Under the familiar typology of the obligations to “respect”, “protect”, and “fulfill” the rights enshrined in the Covenant,\(^\text{14}\) the Committee could extend advisory assistance to States to clarify the content of ICESCR obligations, in order to enable them to consider *ex ante* the consequences of international investment agreements and foreign investment contracts for a host State’s fulfillment of its ICESCR obligations.

To this end, we anticipate five roles for the Committee in encouraging both host States of foreign investments and home States of investors to comply with ICESCR obligations under a jointly authored and transparent process that should help manage the


\(^{12}\) Id. at pp. 3-8.


policy predictability expectations of all parties. What we have in mind, and will set out in more detail, is as follows: first, the Committee could extend technical assistance to States negotiating or designing international investment agreements, model investment contracts, template prospectuses, terms of reference and other significant due diligence documentation in the process of contracting foreign investment. Secondly, the Committee could also assist host States with the design of an ICESCR impact assessment to be applied during the negotiation of foreign investment contracts. Through its General Comments and Concluding Observations, the Committee has developed a state-of-the-art resource for the interpretation and implementation of the ICESCR. This body of expertise can serve as an informed starting point for the review of foreign investment due diligence processes currently used by States.

In the third place, we submit that the Committee could render significant contributions to the arbitral process. In a climate of economic emergencies that challenge States’ ICESCR observance, we expect that host States in future arbitrations will attempt to invoke their compliance with the ICESCR in order to defend or mitigate their non-compliance with investment treaty obligations, particularly the duty to pay compensation for both expropriation and non-expropriation breaches of international investment agreements. In these contexts, a possible role for the Committee would be to extend valuable amicus expertise to arbitral tribunals on the nature of implementation of ICESCR obligations. Arbitral tribunals have only recently started to permit amici participation as non-disputing parties to investment arbitrations and it is usually non-governmental organizations or civil society advocacy groups that have submitted amicus briefs. For complex public interest arbitrations involving fundamental economic and social rights such as the right to health or the right to water, however, the Committee’s interpretation of the ICESCR could be especially useful and persuasive. The Committee’s participation would complement the notion of international access to justice, enabling host States, investors and their home States, as well as arbitral tribunals to refer to an international body of experts, without need of mustering a political lobby traditionally associated with captive interests and strategic agendas under the NGO or interest group umbrellas.

A fourth possible role for the Committee to aid the arbitral process could be seen in impartial factfinding insofar as the ICESCR-related conduct of both host States and

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investors are concerned. It may be recalled that in December 2008, the UN General Assembly unanimously passed a resolution adopting an Optional Protocol to the ICESCR, which enables the Committee to receive individual complaints alleging violations of Covenant rights. Once this Optional Protocol enters into force, it is expected that the Committee will assume some fact-finding functions in relation to determining a State Party’s ICESCR compliance. We submit that such factual findings of the Committee, as an expert body within the UN, could be admissible as third-party evidentiary sources in the fact-finding dimensions of international investment arbitration proceedings involving issues of ICESCR compliance by host States.

Finally, it should be recalled that investment treaties are also forms of State economic law-making that generate distributional consequences over time. The political decision to conclude an investment treaty constitutes a social and economic commitment that binds the State and its resources to protect foreign investment through prescribed standards of treatment during the life of the investment. We submit that such a long-term allocation of State resources should also be read with dynamic consideration for the evolving and continuing allocation of resources required of States Parties to the ICESCR. In much the same way that investors are expected to forecast, estimate, and project the value of an investment and their anticipated returns on investment for the duration of a given contract, host States can be expected to contend that their evolving institutional capacities and resource constraints in the context of fulfilling ICESCR obligations require some adjustment and harmonization between ICESCR and investment treaty obligations.

Committee’s reporting process and periodic dialogue with States Parties. The Committee can thus serve as an indispensable repository of information regarding States Parties’ status of compliance and record of implementation of ICESCR obligations alongside their foreign direct investment practices.

**Technical assistance in the ICESCR-sensitive design of international investment agreements and due diligence process**

There is considerable literature on particular interactions between substantive standards of protection within international investment agreements and specific human rights, but scarcely any that fully specifies the relationship between ICESCR obligations and investment treaty obligations. In this regard, the Committee could supply expertise to assist States in the drafting and formulation of investment agreements that would not be incompatible or inconsistent with ICESCR obligations. This could include, for example, redefining the “fair and equitable treatment” standard to include within its contemplation the concept of “investor obligations” to comply with (and prevent entering into contractual arrangements that violate) law of the host State such as the ICESCR (whether implemented by national legislation or domestically incorporated as such); providing justiciability constraints within the agreements that would subject investors and host States to a continuing obligation not to impede or prevent the latter’s

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26 For an example of a justiciability constraint built into an investment treaty, see Article 6.12(4) of the 2005 India-Singapore CECA: “...any decision of the disputes Party taken on such security considerations shall be non-justiciable in that it shall not be open to any arbitral tribunal to review the merits of any such decision, even where the arbitral proceedings concern an assessment of any claim for damages and/or compensation, or an adjudication of any other issues referred to the tribunal.”
observance of the ICESCR, before allowing treaty or contract parties access to the dispute settlement mechanisms of the investment treaty; or placing obligations on States of the nationality of the investor to require the latter to abide by the ICESCR as well as the environmental, social, and corporate governance and disclosure requirements under the 2006 UN Principles on Responsible Investment.\footnote{See UN Principles of Responsible Investment in \url{http://www.unpri.org/principles/} (last accessed 1 May 2012).}

Furthermore, the Committee could extend assistance to host States in formulating an ICESCR-sensitive design of the foreign investment due diligence process,\footnote{For a proposal for a human rights audit or due diligence process, see Simma at footnote 3.} taking into account the particular regulatory circumstances and resource constraints of these Parties to the ICESCR. The Committee receives information from a broad spectrum of actors (NGOs, governments, international governmental organizations, among others), which positions it well to assist States Parties to make the necessary ICESCR-impact assessment in relation to current or prospective investment agreements.\footnote{See for example an international fact-finding mission report on the effect of Kenya’s trade and investment agreements on human rights protection, in \textit{Economic Development or Human Rights? Assessing the Impact of Kenya’s Trade and Investment Policies and Agreements on Human Rights}, International Fact-Finding Mission Working Paper No. 506a, October 2008, available at \url{http://www2.ohchr.org/english/bodies/cescr/docs/info-ngos/FIDHKenya_41.pdf} (last accessed 1 May 2012), at pp. 42-51.} The periodic reports submitted to the Committee typically require a comprehensive review of existing legislation to determine ICESCR compliance. The Committee’s Concluding Observations after each review period also include suggested reforms to domestic legislation that would encourage compliance with economic and social rights.\footnote{See Christof H. Heyns and Frans Viljoen, \textit{The Impact of United Nations Human Rights Treaties on the Domestic Level}, (Martinus Nijhoff Publishers, 2002). For an example of a domestic parliamentary report responding to the Committee’s suggested legislative reforms, see Democratic Audit, Economic and Social Rights in the UK, Inquiry into the UN Committee on Economic, Social and Cultural Rights on the Fourth Periodic Report On Economic and Social Rights in the UK, available at \url{http://filestore.democraticaudit.com/file/bb2c261f72a8c0505e2b7c648434550-1282645550/jchr.pdf} (last accessed 1 May 2012).} In our view, the Committee’s legislative audit should be expanded to include the international investment agreements concluded by a State Party to the ICESCR. Such agreements comprise forms of State law-making that should also be included within the coverage of the Committee’s assessment and review to more comprehensively determine a State’s performance (or non-performance) of its ICESCR obligations.

\textit{Assisting host States with the design of ICESCR impact assessments for negotiating foreign investment contracts}

Given the experience it has gained in the course of the monitoring process that it coordinates with States Parties, the Committee has acquired a distinct institutional expertise that would be valuable to host States seeking to design impact assessments of
their investment agreements on ICESCR compliance. In this direction, the UN Special Representative to the Secretary-General on Business and Human Rights, Professor John Ruggie, noted various public sources of human rights information that States may draw upon in developing human rights impact assessments of private sector activities.

The Committee may also assist States in the re-examination of the foreign investment contracting process to examine ICESCR-specific impacts. Special Representative Ruggie developed a general framework for human rights risk assessment and integration in the contract negotiation process under the December 2011 Principles for Responsible Contracts. As seen below, these Principles recommend human rights risk assessment built into different phases of the investment contracting process:

“1. Project negotiations preparation and planning: The parties should be adequately prepared and have the capacity to address the human rights implications of projects during negotiations.

2. Management of potential adverse human rights impacts: Responsibilities for the prevention and mitigation of human rights risks associated with the project and its activities should be clarified and agreed before the contract is finalized.

3. Project operating standards: The laws, regulations and standards governing the execution of the project should facilitate the prevention, mitigation and remediation of any negative human rights impacts throughout the life cycle of the project.

4. Stabilization clauses: Contractual stabilization clauses, if used, should be carefully drafted so that any protections for investors against future changes in law do not interfere with the State’s bona fide efforts to implement laws, regulations or policies in a non-discriminatory manner in order to meet its human rights obligations.

5. “Additional goods or service provision”: Where the contract envisages that investors will provide additional services beyond the scope of the project, this should be carried out in a manner compatible with the State’s human rights obligations and the investor’s human rights responsibilities.

6. Physical security for the project: Physical security for the project’s facilities, installations or personnel should be provided in a manner consistent with human rights principles and standards.

7. Community engagement: The project should have an effective community engagement plan through its life cycle, starting at the earliest stages.

8. Project monitoring and compliance: The State should be able to monitor the project’s compliance with relevant standards to protect human rights while providing necessary assurances for business investors against arbitrary

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interference in the project.

9. *Grievance mechanisms for non-contractual harms to third parties*: Individuals and communities that are impacted by project activities, but not party to the contract, should have access to an effective non-judicial grievance mechanism.

10. *Transparency/Disclosure of contract terms*: The contract’s terms should be disclosed, and the scope and duration of exceptions to such disclosure should be based on compelling justifications.“

The Committee can assist host States to properly concretize the above Principles, by particularizing the application of the ICESCR to the foreign investment contract context. By situating the assessment, review, and reform of the investment contracting processes as part of the State Party’s functional areas for reporting to the ICESCR, the Committee could extend support to the global initiative spearheaded by the United Nations towards human rights-compliant investment practices.

*Acting as amicus curiae in the assertion of economic and social rights by host States and investors*

As seen in the Methanex, UPS, Suez/Vivendi, Glamis Gold, and Piero Foresti cases, non-governmental organizations and civic groups have frequently attempted to participate in investment arbitrations. In some awards, arbitral tribunals have also referred to publications of the UN Conference on Trade and Development (UNCTAD) in their analysis of investment treaty standards, such as in the Suez/Vivendi case and the Total case against Argentina (on the scope of fair and equitable treatment); the Mytilineos Holdings case (on the definition of investment in relation to “every kind of asset”); and the Fraport case (on the scope of investment in accordance with the host

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34 *Methanex Corporation v. United States of America*, In the matter of an arbitration under Chapter 11 of the North American Free Trade Agreement, UNCITRAL, Final Award of the Tribunal, 7 August 2005; *Compania de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007; *UPS v. Canada*, Decision on Authority to Accept Amicus Submissions, 17 October 2001; *Glamis Gold v. United States*, Decision on Application and Submission by Quechan Indian Nation of 16 September 2005; *Piero Foresti et al. v. Republic of South Africa*, ICSID Case No. ARB(AF)/07/1, Award of the Tribunal, August 4, 2010. See also NAFTA FTC 7 October 2003 Statement on Non-Disputing Party Participation.

35 *Compania de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007 at para. 7.4.9 (on the scope of fair and equitable treatment standards); *Total SA v. Argentina*, Decision on Liability, ICSID Case No. ARB/04/1, 21 December 2010, para. 112.

country’s laws),\textsuperscript{37} to name a few.

Arbitral tribunals could properly appreciate, verify, and weigh assertions of incompatibility between the ICESCR and investment treaty standards by soliciting the Committee’s opinion in these instances. In the Suez case, for example, the civic and non-governmental organizations that submitted the \textit{amicus curiae} brief posited the theory that “[h]uman rights law could displace investment law in a conflict of norms situation…[which] could arise if the Tribunal were to find, for example, that the backdrop of a severe economic crisis, the guarantees offered to foreign investors with respect to the concession’s economic equilibrium were incompatible with the government’s duty to ensure access to water to the population.”\textsuperscript{38} The \textit{amici} considered that resolving this conflict was “not necessary for the adjudication of the case…as the contextual interpretation of investment law provides avenues for accommodation and normative dialogue. Still, in such situation of normative conflict, the primacy of human rights may need to be recognized and given effect.”\textsuperscript{39} While the Suez tribunal noted the applicability of both human rights and investment treaty obligations to Argentina, it made no finding on the \textit{amici}’s broad theory of normative displacement of investment treaty obligations by human rights norms. The Committee could lend authoritative expertise to arbitral tribunals and assist in addressing this issue of alleged treaty hierarchy.

\textbf{Contributing factual findings under the Optional Protocol complaints mechanism to the fact-finding dimensions of future investment arbitrations}

Were a host State to invoke its ICESCR compliance as a defense to mitigate the consequences of non-compliance with international investment obligations, arbitral tribunals would encounter new factual burdens. In such a situation, the Committee could assist arbitral tribunals seeking to resolve these issues by contributing factual findings gained in the Optional Protocol complaints mechanism. Once the Optional Protocol has entered into force, the Committee can be expected to obtain more information about State compliance (or non-compliance) with the ICESCR under the Protocol’s individual complaints procedures. The Committee’s factual findings can then help to ensure that arbitral tribunals, faced with assertions of ICESCR compliance by respondent States, would be able to distinguish genuine efforts at fulfilling ICESCR obligations from manoeuvres to evade investment treaty compliance under the pretext of complying with Covenant obligations. Coordination between tribunals and the Committee on the issue of ICESCR compliance could expedite fact-finding stages in the arbitral proceedings, as well as lend the weight of the Committee’s expert determinations to the arbitral tribunal’s

\textsuperscript{37} \textit{Fraport AG Frankfurt Airport Services Worldwide v. Philippines}, Award, ICSID Case No. ARB/03/25, 16 August 2007, para. 301.

\textsuperscript{38} See full text of the Amicus Curiae Submission by Centro de Estudios Legales y Sociales (CELS), Asociación Civil por la Igualdad y la Justicia (ACIJ), Consumidores Libres Cooperativa Ltda. de Provisión de Servicios de Acción Comunitaria Unión de Usuarios y Consumidores, Center for International Environmental Law, 4 April 2007, at \texttt{http://www.ciel.org/Publications/SUEZ_Amicus_English_4Apr07.pdf} (last accessed 25 February 2012) [hereafter, “\textit{Suez amicus curiae} brief”] at p. 26.

\textsuperscript{39} Id. at p. 26.
consideration in the case before it.

Establishing links between reporting by host States on their implementation of ICESCR obligations and these States’ investment practices

ICESCR obligations share some similarity with investment treaty obligations insofar as the dynamism of their content is concerned. The nature of the general obligations to “respect”, “protect”, and “fulfill” ICESCR rights must be read as evolutive standards that take into account a State’s resource constraints and institutional efforts to further heighten ICESCR compliance. The Committee explains the obligation “to take steps” as one that should be “deliberate, concrete, and targeted as clearly as possible towards meeting the obligations recognized in the Covenant,” with the means to be used to fulfill the obligation to take steps being “all appropriate means, including particularly the adoption of legislative measures.” Other possible appropriate measures may include, and are not limited to, “administrative, financial, educational and social measures.” Most importantly, the Committee has maintained that the “principal obligation of result reflected in article 2(1) is to take steps ‘with a view to achieving progressively the full realization of the rights recognized’ in the Covenant.” The CESCR explained “progressive realization” in the following terms:

“…The concept of progressive realization constitutes a recognition of the fact that full realization of all economic, social and cultural rights will generally not be able to be achieved in a short period of time. In this sense the obligation differs significantly from that contained in article 2 of the International Covenant on Civil and Political Rights which embodies an immediate obligation to respect and ensure all of the relevant rights. Nevertheless, the fact that realization over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the raison d’être, of the Covenant which

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42 Id. at para. 3.
43 Id. at para. 7.
44 Id. at para. 9.
is to establish clear obligations for States parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal. Moreover, any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.”\(^{45}\)

The reporting process administered by the Committee is designed precisely to acknowledge and accommodate the dynamic nature of ICESCR obligations and modes of compliance by States Parties to the ICESCR. As States Parties to the ICESCR assess the impact of the treaties they conclude and the contracts they enter into on their ability to fulfill ICESCR obligations within the dialogic and consultative processes of review and assessment by the Committee, the perceived gap between public policies on ICESCR and investment treaty compliance can be better monitored and reduced by host States and the Committee long before investor-State disputes arise.

**Conclusion: the Committee and Public Interest in the Global Investment Regime**

Foreign investment affects the “inherent dignity of the human person”,\(^{46}\) by contributing to the material conditions of “the [human rights] ideal of free human beings enjoying freedom from fear and want…whereby everyone may enjoy his economic, social, and cultural rights, as well as his civil and political rights.”\(^{47}\) The Committee’s work, as we have suggested here, bears significance to the challenges of ensuring ICESCR protection within the global investment law regime, in ways that appear consistent with the “welfarist and interventionist purposes of international law.”\(^{48}\) The Committee bridges the “public interest” divide between States Parties, investors and their home States, as well as arbitral communities, through the detection of potential conflicts

\(^{45}\) Id. Underscoring in the original.


\(^{48}\) Emmanuel Jouannet, The Liberal-Welfarist Law of Nations: A History of International Law (Cambridge University Press, 2012), at p. 179: “…International law of the inter-war years was not aimed solely at the social protection of certain categories of individuals within states, but also at remedying the position of economic weakness of states themselves, and underlying that, the embryonic idea of a necessary correction in the excessive inequalities between states if these were detrimental to the whole. To this end, a Financial Committee was set up within the framework of the League of Nations, which intervened in a quite novel way and on many occasions at the time to correct the economic and financial situation of failing states. As an example, Austria benefited from sporadic but effective aid from the Financial Committee so as to cope with the collapse of its currency in 1920-1. The first moves were made, then, to go beyond the formal equality between states so as to take account of their actual economic and social situation and support the most vulnerable of them….this great co-operative movement was the re-emergence of a welfarist and interventionist purpose of international law.”
between ICESCR obligations and investment treaty obligations, the dialogic process of assessing ICESCR impacts in foreign investment contracting and due diligence review, and facilitated cooperation and communication on ICESCR protection between all public interest stakeholders across and beyond the global investment law regime. While the consideration of ICESCR protection is still a latent trend in international investment arbitrations, we submit that engaging the Committee at this juncture to help inform the content of both the investment treaty and contract design will help to avoid more visceral and unresolved clashes involving a host State’s public policy space to comply with both ICESCR and investment obligations.

It is in this manner that we see some truth in neoliberal claims of international investment’s potential for improving human welfare.  We recognize that foreign investment can either be welfare reducing or welfare increasing. When foreign investors operate with fewer transaction costs than their domestic counterparts, “foreign investment may decrease national welfare due to the transfer of profits to foreigners, even when the increase in the rate of growth has a positive effect on welfare. Foreign investment increases welfare only if the increase in productivity is great enough to compensate for the loss of profits…” On the other hand, when foreign investment is appropriate to a State’s comparative advantages, resource capabilities, and economic needs, the positive yields transcend generations: “[g]iven the appropriate host-country policies and a basic level of development, a preponderance of studies shows that FDI [foreign direct investment] triggers technology spillovers, assists human capital formation, contributes to international trade integration, helps create a more competitive business environment and enhances enterprise development. All of these contribute to higher economic growth, which is the most potent tool for alleviating poverty in developing countries. Moreover, beyond the strictly economic benefits, FDI may help improve environmental and social conditions in the host country by, for example, transferring ‘cleaner’ technologies leading to more socially responsible corporate policies.”

Because foreign investment has the dual potential to yield positive benefits as well as negative consequences for national economies, local communities, and human capabilities, we submit that the regulatory environment – exemplified primarily by the investment treaty, the investment contract, and all fundamental laws of the host State to which the investment is subject – cannot omit the importance of compliance with the ICESCR to sustainable and responsible investment practices.

States influence the relationship between foreign investment and human welfare within their respective jurisdictions. To the extent that States translate policy preferences into the ex ante design of their international investment agreements, they define the

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regulatory environment which, in their view, is best suited for attracting, managing, and maintaining desirable, sustainable, and optimal levels of foreign investment. While the actual ability of international treaties to accomplish this objective (and the precise empirical contribution of such treaties to the realization of positive economic and social outcomes) remains a fertile subject of academic dispute, it is clear that, at the threshold of concluding these agreements (and long before admitting the entry of foreign investment into one’s jurisdiction pursuant to said agreements), host States possess a monopoly of police power and regulatory authority. When it concludes the investment treaty, the host State voluntarily commits itself to constrain its regulatory authority over time, while investors are bound to observe all fundamental regulations and laws timely and properly notified by the host State to them. Since ICESCR protection belongs to the corpus of those fundamental host State laws, it cannot be overemphasized that the ultimate quality (and not just the empirical quantity) of foreign investment thus depends, for the most part, on the host State’s authoritative decision-makers, and how judiciously they exercise the State’s treaty-making powers to create positive welfare effects for their citizens while retaining sufficient policy flexibility to respond to the dynamism of ICESCR obligations. It is urgent and imperative for the Committee to recognize this reality within its mandate of safeguarding ICESCR compliance. We consider that the Committee has the distinct ability to help host States, investors and their home States, as well as arbitrators, to bridge the public interest gap in a constructive manner.

52 See UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (UNCTAD), THE ROLE OF INTERNATIONAL INVESTMENT AGREEMENTS IN ATTRACTING FOREIGN DIRECT INVESTMENT TO DEVELOPING COUNTRIES (2009), at pp. 14-26 (showing that IIAs contribute to the “coherence, transparency, predictability, and stability of investment frameworks of host countries”, at p. 25).
53 See Tim Büthe and Helen V. Milner, Bilateral Investment Treaties and Foreign Direct Investment: A Political Analysis; Eric Neumayer and Laura Spess, Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?; Peter Egger and Michael Pfaffermayr, The Impact of Bilateral Investment Treaties on Foreign Direct Investment; and Susan Rose-Ackerman, The Global BITs Regime and the Domestic Environment for Investment, all in KARL P. SAUVANT AND LISA E. SACHS, THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT: BILATERAL INVESTMENT TREATIES, DOUBLE TAXATION TREATIES, AND INVESTMENT FLOWS (Oxford University Press, 2009).