



## **Submission to the Committee on the Rights of the Child concerning the Draft General Comment regarding Child Rights and the Business Sector**

The Corporate Accountability Working Group (CAWG) of the International Network for Economic Social and Cultural Rights (ESCR-Net) fully supports the advancement of the draft General Comment regarding Child Rights and the Business Sector ('draft General Comment') and warmly welcomes this opportunity to provide input. The CAWG highlights the following areas in this submission:

1. Child Rights Due Diligence in Regard to State Agencies
2. Child Rights Due Diligence for Business
3. Obligations of States As Members of International Organisations
4. Extraterritorial Obligations

### **1. Child Rights Due Diligence in regard to State Agencies**

*Relevant text from draft General Comment:*

**V. FRAMEWORK FOR MEASURES OF IMPLEMENTATION**

**A. LEGISLATIVE AND REGULATORY MEASURES**

**(iii) Child rights due diligence for business**

States parties should ensure that export credit agencies themselves take steps to prevent, mitigate and remediate any adverse impacts the projects they support might have on children's rights before they offer support to businesses operating abroad" [para. 52].<sup>1</sup>

The CAWG appreciates the Committee's attention in the draft General Comment to the impact that export credit agencies (ECAs) have on the rights of the child, and fully supports the statement above. However, the potential range of State agencies that can violate the rights of the child is far broader than ECAs. According to the UN Guiding Principles on Business and Human Rights, agencies such as "official investment insurance or guarantee agencies, development agencies and development finance institutions" are required to undertake their own human rights due diligence, in recognition of the fact that if these agencies "do not explicitly consider the actual and potential adverse impacts on human rights of beneficiary enterprises, they put themselves

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<sup>1</sup> Draft General Comment, para 52.

at risk – in reputational, financial, political and potentially legal terms – for supporting any such harm, and they may add to the human rights challenges faced by the recipient State”.<sup>2</sup>

State development banks are significant sources of financial investment for public and private corporations, particularly involved in infrastructure projects. For example, in 2010 the Brazilian National Development Bank (BNDES), established in 1952 to provide long-term credit for infrastructure projects, dispersed loans that amounted to more than three times the amount dispersed by World Bank.<sup>3</sup> In the USA “there have been calls to revamp development banks. The US federal budget of 2011 included a US\$4 billion package to build a development bank supporting large infrastructure projects”.<sup>4</sup> Development banks also act as private equity firms, investing in private corporations that they lend to, and sometimes managing minority equity positions of their governments.<sup>5</sup>

State development aid agencies are also increasingly contributing significantly to economic development projects in the developing world. The ‘Global Development Alliance’ of the US Agency for International Development (USAID) has been able to ‘leverage’ “billions of dollars” in combined public-private partnerships with thousands of private corporations since 2001.<sup>6</sup>

Another development aid agency, the Canadian International Development Agency (CIDA) is currently under scrutiny for lacking safeguard procedures despite providing financial and technical support to implement the corporate social responsibility projects of extractive industry corporations such as Barrick Gold.<sup>7</sup> On numerous occasions Barrick Gold has been implicated in serious human rights violations.<sup>8</sup> The state development agencies of other countries are also increasingly coming under similar scrutiny, particularly AusAID, the international development agency of Australia.<sup>9</sup>

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<sup>2</sup> Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework, 21 March 2011, A/HRC/17/31, Commentary to Guiding Principle 4.

<sup>3</sup> Lazzarini, S. G., Musacchio, A., Bandeira-de-Mello, R. & Marcon, R (2011) ‘What Do Development Banks Do?’, p. 4. Harvard Business School: Working Paper: <http://www.hbs.edu/research/pdf/12-047.pdf>

<sup>4</sup> Ibid, p. 10.

<sup>5</sup> Ibid, p. 4.

<sup>6</sup> USAID, (2011) ‘Factsheet: Global Partnerships’, p. 2:

[http://idea.usaid.gov/sites/default/files/attachments/GP\\_fact%20sheet\\_FINAL.pdf](http://idea.usaid.gov/sites/default/files/attachments/GP_fact%20sheet_FINAL.pdf)

<sup>7</sup> Coumans, C. (2011) ‘Whose Development? Mining, Local Resistance, and Development Agendas’ in Sagebien, J. & Lindsay, N.-M. (eds.) *Governance Ecosystems: CSR in the Latin American Mining Sector*. See also: MiningWatch Canada (2012) Brief prepared for the House of Commons Standing Committee on Foreign Affairs and International Development’s Study on the Role of the Private Sector in Achieving Canada’s International Development Interests - CIDA’s Partnership with Mining Companies Fails to Acknowledge and Address the Role of Mining in the Creation of Development Deficits’:

<http://www.miningwatch.ca/article/cida-subsidizes-corporate-social-responsibility-multinational-mining-companies>

<sup>8</sup> For e.g. see: Human Rights Watch, (2010) ‘Gold’s Costly Dividend: Human Rights Impacts of Papua New Guinea’s Porgera Gold Mine’: <http://www.hrw.org/sites/default/files/reports/png0211webcover.pdf>

<sup>9</sup> See: AidWatch (2012) ‘Sustainable Mining? Pull The Other One!>:

<http://www.aidwatch.org.au/news/sustainable-mining-pull-the-other-one;>

State development banks, investment arms and aid agencies, by contributing significantly to economic development in developing countries are exposing themselves to the risk of violating child rights, and realizing the warnings laid out above in the commentary to UN Guiding Principle 4.

**The CAWG encourages the Committee to clarify that all state agencies that have the capacity to impact on the rights of the child through their capacity to ‘shape business practice’ should be required to undergo a process of due diligence. The type of agencies should include, *but not be limited to*, ECAs, other official investment insurance or guarantee agencies, State development aid agencies and development finance institutions, such as development banks like BNDES and their private equity investment arms.**

## 2. Child Rights Due Diligence for Businesses

*Relevant text from draft General Comment:*

### V. FRAMEWORK FOR MEASURES OF IMPLEMENTATION

#### A. LEGISLATIVE AND REGULATORY MEASURES

##### (iii) Child rights due diligence for business

States parties should encourage and *where appropriate* require businesses to undertake human rights due diligence that has a specific focus on their impact on children's rights throughout their operations, including those operations conducted by their subsidiaries and other business partners globally...Child rights due diligence for business should be mandatory for activities and sectors where there is a *significant risk of abuse of child rights* such as in the context of conflict zones or where there is a foreseeable risk of child labour or child trafficking and sexual exploitation within business relationships” [para 49, emphasis added].

While the CAWG is encouraged by the inclusion in the draft General Comment of these requirements, the Committee has interpreted the contexts where there exists ‘significant risk of abuse of child rights’ to mean ‘conflict zones or where there is a foreseeable risk of child labour or child trafficking and sexual exploitation within business relationships’.<sup>10</sup> Presumably it is in these instances that States are being required by the draft General Comment to mandatorily require businesses to undertake human rights due diligence. The purpose of due diligence procedures is to detect and understand the foreseeable risks that are posed by a business operation to child rights, and how to mitigate and manage this potential. If used in a wider range of situations than the

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Bryant, G. (2012) ‘Beyond Aid Numbers: Accountability for Human Rights Abuses’, *The Conversation*: <http://theconversation.edu.au/beyond-aid-numbers-accountability-for-human-rights-abuses-6396>

<sup>10</sup> Draft General Comment, para 49.

restrictive category outlined by the draft General Comment (i.e. conflict zones, child labour, trafficking and sexual exploitation), due diligence procedures would more effectively identify significant risks to a broader range of fundamental child rights. Furthermore, a higher standard of due diligence should be required for evaluation of potential risks to children, to reflect their particular degree of vulnerability to human rights abuses. As the Committee has noted in the draft General Comment in relation to level or form of reparations “children can be more vulnerable to the effects of corporate violations of their rights than adults and that the effects can be irreversible and result in lifelong damage”.<sup>11</sup> This understanding should prevail in the accounting for what kind of circumstances amount to “significant risk” when determining the need for the mandatory application of due diligence procedures for businesses.

The [Business and Human Rights Documentation Project](#) (B-HRD), a joint project of the CAWG and the Center for Human Rights and Global Justice, has catalogued over 60 cases where businesses have directly and/or indirectly negatively impacted child rights. Furthermore, a study commissioned by the former UN Special Representative of the Secretary General on Human Rights and Business, relying on a sample of 320 cases of alleged corporate abuse of human rights collected over a 35 month period, found that “all industry sectors were alleged to impact human rights, and impacts were alleged to occur in all regions”. The allegations spanned the full range of human rights, “civil and political rights; economic, social and cultural rights; and labour rights”.<sup>12</sup>

Many of the findings included in this research are connected to impacts not related to conflict zones. For example;

Environmental concerns were raised in relation to all sectors and translated into impacts on a number of rights, including the right to health, right to life, rights to adequate food and housing, minority rights to culture, and the right to benefit from scientific progress. Access to clean water was also raised in 20 per cent of cases, where firms had allegedly impeded access to clean water or polluted a clean water supply.<sup>13</sup>

Environmental damage can happen in conflict and non-conflict zones, and as the Committee points out, “increasing levels of environmental degradation and contamination arising from business activities can compromise children's food security, health and nutrition”,<sup>14</sup> threatening their right to life, survival and development,<sup>15</sup> and many other important related rights. So, while it is clear that the risk of impacting the rights of the child may be higher in some situations, such as conflict zones, significant

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<sup>11</sup> Draft General Comment, para. 57.

<sup>12</sup> Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises: Addendum - Corporations and human rights: a survey of the scope and patterns of alleged corporate-related human rights abuse. 23 May 2008, A/HRC/8/5/Add.2, p 2.

<sup>13</sup> Ibid, p 3.

<sup>14</sup> Draft General Comment, para. 33.

<sup>15</sup> *Convention of the Rights of the Child*, Article 6.

risks to child rights, including economic, social and cultural, do not only arise in the situations defined as posing ‘significant risk’ by the draft General Comment.

While acknowledging there are challenges for broadly requiring businesses to implement due diligence processes in a wide range of instances, a system to address business impacts on child rights should reflect real-world circumstances.

In this case, the interpretation falls on the reading of ‘foreseeable risk’. Currently the draft reads ‘conflict zones or where there is a foreseeable risk of child labour or child trafficking and sexual exploitation’. Limiting the category of risks that are foreseeable fails to acknowledge the serious risks posed to child rights that arise in situations outside of conflict zones, and other situations that likely lead to child labour, child trafficking and sexual exploitation. As noted above, environmental damage can have far reaching impacts on human rights, including child rights to health, food, housing, culture, etc.

The nature of the potential human rights impact (whether economic, civil, social, political or cultural) does not necessarily make the risk of that right being violated any more or less foreseeable. Continuing with the previous example, the vast scope of environmental damage is foreseeable, as are the risks that environmental damage will have on the full range of child rights. Yet, in the formulation of the draft at present, the impact that business conduct could foreseeably have on the economic, social and cultural child rights in particular is not being fully considered.

**The CAWG urges the Committee to consider extending the requirement for instances where states should require businesses to conduct mandatory child rights due diligence to accurately reflect the full range of circumstances where business operations foreseeably pose serious risks to the rights of the child. As such this requirement should not be limited to “conflict zones or where there is a foreseeable risk of *child labour or child trafficking and sexual exploitation*”, and be more considerate of other rights, particularly economic, social and cultural rights, that are frequently in serious danger of foreseeably being violated by business conduct.**

### **3. Obligations of States as Members of International Organisations**

*Relevant text from draft General Comment:*

#### **III. GENERAL OBLIGATIONS**

##### **E. OBLIGATIONS IN THE CONTEXT OF INTERNATIONAL ORGANISATIONS**

When it is a member of an international economic or financial organisation, a States party must take all reasonable steps to ensure that the organisation enables rather than restrains their ability to meet their obligations under the Convention. International development banks,

and/or their specialised branches for lending to States' development projects or to private investment projects can play a very important role in promoting the principles and goals of the Convention. They can clearly incorporate policies and measures into their operational criteria that are aimed at the protection of children's rights – such measures should go beyond the eradication of child labour and include, for instance, prohibiting the sexual abuse and exploitation of children. Violations of children's rights committed by businesses funded by those banks should be the object of appropriate investigation and remedial action in accordance with existing standards [para. 25].<sup>16</sup>

The CAWG welcomes the acknowledgement by the Committee of the relationship between the activities of international financial organizations and the realization of child rights, particularly the responsibility to incorporate policies that protect child rights. We encourage the Committee to elaborate on this issue further, in full recognition of the many and varied ways international financial organizations impact on child rights. In particular, the Committee should explore fully the responsibilities that States have as members of these organizations to uphold their individual international legal obligations, and ensure that these institutions do not act in a way that would violate the obligations that these states are obliged to uphold as individuals members.<sup>17</sup>

International organizations themselves, such as the agencies of the World Bank Group that are organs of the United Nations, also have similar international legal obligations. Furthermore, State members of international organizations are in a position to influence the policies and behavior of these organizations: “the organizations that make up the World Bank Group are owned by the governments of member nations, which have the ultimate decision-making power within the organizations on all matters, including policy issues”.<sup>18</sup>

The five different agencies of the World Bank Group, itself a specialized agency of the UN, have the capacity to impact on child rights in different ways. The International Centre for the Settlement of Investment Disputes (ICSID) conducts its activities without reference to international human rights, or acknowledgement of their obligation as an international organization to abide by international law. There is growing recognition of how the actions of ICSID can have a direct impact on the capacity of States to implement social and environmental policy that impact on the realization of child rights, and other human rights, within their territory and jurisdiction.<sup>19</sup>

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<sup>16</sup> Draft General Comment, para 25.

<sup>17</sup> For instance, see: International Law Commission (2011) ‘Draft articles on the responsibilities of international organizations, with commentaries’, Article 61.

<sup>18</sup> World Bank Group webpage ‘About Us’:

<http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/0,,contentMDK:20046292~menuPK:1696892~pagePK:51123644~piPK:329829~theSitePK:29708,00.html>

<sup>19</sup> See: Jacob, M. (2010) ‘International Investment Agreements and Human Rights’ INEF Research Paper Series on Human Rights, Corporate Responsibility and Sustainable Development 03/2010: [http://www.humanrights-business.org/files/international\\_investment\\_agreements\\_and\\_human\\_rights.pdf](http://www.humanrights-business.org/files/international_investment_agreements_and_human_rights.pdf); Anderson, S. Perez-Rocha, M., Dreyfus, R. & Artiga-Purcell, J. A. (2011) ‘Mining for Profits in

The CAWG encourages the Committee to elaborate more on the full range of activities that States should be required to do to ensure that the international organizations they are members of (and have significant influence over) uphold the provisions of the Convention. This is particularly relevant for international organizations dealing with international finance and development, such as the various agencies of the World Bank Group.

#### 4. Extraterritorial Obligations

*Relevant text from draft General Comment:*

##### III. GENERAL OBLIGATIONS

###### C. OBLIGATIONS IN THE CONTEXT OF BUSINESS' GLOBAL OPERATIONS

States parties also have an obligation to protect child rights from abuse by business enterprises operating extra-territorially when there is a reasonable link between the State and the conduct concerned.<sup>20</sup> A reasonable link can include when a business enterprise has its centre of activity, is registered or domiciled or has its main place of business or substantial business activities in the State concerned.<sup>21</sup> This is provided that the measures taken to implement this requirement do not infringe the sovereignty or diminish the obligations of the host State under the Convention [para. 22].<sup>22</sup>

The CAWG welcomes acknowledgement by the Committee of the extraterritorial obligations of State parties to the Convention, and supports the Committee's construction of what constitutes a "reasonable link". However, the CAWG urges the Committee to reconsider the qualification that where they may "infringe the sovereignty" of a host State it overrides a State's extraterritorial obligations.

This runs counter to international law. Firstly, international law obliges states to exercise extraterritorial jurisdiction in cases of violations of preemtory norms.<sup>23</sup> Furthermore, analysis of the concluding observations of the UN treaty bodies reveals a trend to broaden

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International Tribunals: How transnational corporations use trade and investment treaties as powerful tools in disputes over oil, mining and gas'. Institute for Policy Studies.

<sup>20</sup> See, for example, Restatement (Third) of the Foreign Relations Law of the United States (American Law Institute, 1987), § 402, (2) ("...a state has jurisdiction to prescribe law with respect to ... (2) the activities, interests, status, or relations of its nationals outside as well as within its territory").

<sup>21</sup> Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights, Principle 25.

<sup>22</sup> Draft General Comment, para 22.

<sup>23</sup> Ibid, Principle 25 (e).

the range of extra-territorial obligations of State parties. Concluding observations of the Committee on the Rights of the Child for Azerbaijan,<sup>24</sup> Bahrain,<sup>25</sup> Denmark,<sup>26</sup> Italy,<sup>27</sup> the Republic of Korea,<sup>28</sup> Thailand,<sup>29</sup> and Turkey<sup>30</sup> all recommend that they provide a clear framework to regulate the overseas operations of domiciled companies, none of which include a State sovereignty qualification. Rather, in some cases, the recommendations draw connections with activities that impact child rights beyond those protected by preemptory norms, including violations connected to forced evictions, resettlement and displacement.<sup>31</sup>

In other cases, such as concluding observations of the Committee on the Elimination of Racial Discrimination (CERD) for Australia,<sup>32</sup> Canada,<sup>33</sup> Norway,<sup>34</sup> and the UK,<sup>35</sup> CERD requested implementation of appropriate legislative or administrative measures to prevent transnational corporations under their jurisdiction from negatively impacting on human rights overseas. Again, in some of these cases the requirements responded to business activities that threaten or violate rights not within the limited category preemptory norms. For example, in the case of Australia, CERD relates their recommendation to information they received of land dispossession connected to the activities of Australian mining companies.<sup>36</sup> In the case of Norway, the recommendation to enact legislative measures was in response to information they received that the activities of Norwegian companies were impacting peoples' "way of life and environment".<sup>37</sup>

**The CAWG urges the Committee to ensure the General Comment is consistent with its own and other UN treaty body jurisprudence concerning extraterritorial obligations, so that the primacy of the best interests of the child standard is maintained ahead of a deferment to state sovereignty that could eliminate extraterritorial obligations and undermine the realization of child rights.**

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<sup>24</sup> CRC/C/OPSC/AZE/CO/1, para 29.

<sup>25</sup> CRC/C/BHR/CO/2-3, para 21.

<sup>26</sup> CRC/C/DNK/CO/4, para 30.

<sup>27</sup> CRC/C/ITA/CO/3-4, para 21.

<sup>28</sup> CRC/C/KOR/CO/3-4, para 27.

<sup>29</sup> CRC/C/THA/CO/3-4, para 29.

<sup>30</sup> CRC/C/TUR/CO/2-3, para 22.

<sup>31</sup> Ibid.

<sup>32</sup> CERD/C/AUS/CO/15-17, para 13.

<sup>33</sup> CERD/C/CAN/CO/18, para 19.

<sup>34</sup> CERD/C/NOR/CO/19-20 para 17.

<sup>35</sup> CERD/C/GBR/CO/18-20 para 29

<sup>36</sup> CERD/C/AUS/CO/15-17, para 13.

<sup>37</sup> CERD/C/NOR/CO/19-20 para 17.