



The State-business nexus and access to remedy

Parallel session

29 November

10:00-13:00

Part 1: Realizing access to remedy: Implications of the international investment regime

10:00-11:20

Organized by the UN Working Group on Business and Human Rights in collaboration with Columbia Center on Sustainable Investment (CCSI) and the Laboratory for Advanced Research on the Global Economy

Part 2: The “State-business nexus” and the access to remedy pillar

11:30-13:00

Organized by the UN Working Group on Business and Human Rights

Part 1: Realizing access to remedy: Implications of the international investment regime

Brief description: This Forum session provides an opportunity to explore the implications of international investment agreements (IIAs) and investor-state dispute settlement (ISDS) for realizing access to effective remedy in the context of investment-related human rights violations. The session will build on discussions from an October 2017 roundtable regarding access to justice in the context of international investment, co-organized by the Columbia Center on Sustainable Investment (CCSI) and the UN Working Group on Business and Human Rights.

Background to the discussion: The international investment regime consists of more than 3,300 international investment agreements (IIAs), including both bilateral investment treaties (BITs) and free trade agreements (FTAs) with investment chapters. Largely due to the outsized costs of ISDS and the restrictions placed by the investment regime on the right of states to regulate in the public interest, a range of stakeholders have been advocating for reform of the current investment regime. States have already begun to take action: some have revised investment treaty standards to better protect their ability to regulate; others have advanced new approaches to investment promotion, protection, and dispute settlement; others still have withdrawn from the international investment regime entirely. While reforms have been the subject of broad and ongoing public debate in recent

years, the specific impacts of the international investment regime on access to justice for affected individuals and communities have received less attention.

This Forum session will build on discussions held at Columbia University in October 2017, during a roundtable on “Impacts of the International Investment Regime on Access to Justice”. The discussion, which was co-organized by the Columbia Center on Sustainable Investment (CCSI) and the UN Working Group on Business and Human Rights, included an assessment of the specific impacts of international investment agreements and investor-state arbitration on access to justice for rights-holders, and of the extent to which existing proposals for reform of the investment regime and improvement of human rights enforcement mechanisms address these impacts.

Session objectives:

- Identify and raise awareness about the specific impacts of the international investment regime on access to effective remedy for affected communities whose rights have been violated by large-scale investment projects, including by means of (a) reference to case studies and (b) providing an opportunity for participants to voice their own insights and experiences in this context.
- Assess whether and how existing proposals for improvement of the human rights regime address the investment regime’s impacts on access to remedy for rights-holders, or whether additional reforms or improvements are needed.
- Present and obtain feedback on key takeaways from an October 2017 roundtable discussion regarding access to justice in the context of international investment, co-organized by the Columbia Center on Sustainable Investment (CCSI) and the UN Working Group on Business and Human Rights.

Key discussion questions:

- In what ways do IIAs and ISDS affect judicial and non-judicial means of accessing effective remedies for investment-related human rights harms? What are the most effective strategies for tracking and documenting these effects in practice, and for improving understanding and awareness of these effects among stakeholders?
- Would the implications of the investment regime for access to remedy be fully addressed by existing proposals to improve enforcement of human rights obligations in the context of business activities? How can this challenge be incorporated into ongoing or new efforts?
- Should remedy be made an integral part of investment policymaking? If so, what implications would this have for the reform of IIAs and ISDS?
- What steps should host and home states take to address the impacts of IIAs and ISDS on access to remedy, and to comply with their obligation to provide access to effective remedies for human rights violations? What steps should investors take in this context to comply with their responsibility to respect human rights and remedy violations? How can we link the lessons learned from the grievance cases to build capacity at the local level (particularly government institutions) to handle these cases?

Speakers:¹

- Moderator: Surya Deva, Chair, UN Working Group on Business & Human Rights
- Kaitlin Cordes, Head: Land, Agriculture, and Human Rights, Columbia Center on Sustainable Investment
- Victoria Tauli-Corpuz, UN Special Rapporteur on the Rights of Indigenous Peoples
- Andrea Saldarriaga, Visiting Fellow, Laboratory for Advanced Research on the Global Economy, Centre for the Study of Human Rights at the London School of Economics and Political Science
- Cristóbal Yugra Villanueva, Executive Director, Derechos Humanos y Medio Ambiente - Puno (DHUMA)
- Elisabeth Tuerk, Chief, International Investment Agreements Section, Division on Investment and Enterprise, UNCTAD

Format: The 80-minute session will begin with a brief introduction from the moderator. Speakers will then have 5-7 minutes each to comment and provide their perspective on the session topic. The remaining 45-50 minutes of the session will be dedicated to sharing of perspectives and experiences among participants and speakers, dialogue on the proposed policy recommendations, and to strategic discussions regarding next steps. In advance of the session, the organizers will ask at least one participant to make an intervention from the floor in order to kick off the interactive portion of the session and guide the group discussion.

Background material: Further information about CCSI's work on the impacts of the international investment regime on access to justice can be found here:

<http://ccsi.columbia.edu/work/projects/access-to-justice/>

Part 2: The “State-business nexus” and the access to remedy pillar

Background and brief outline: In addressing what they call the “State-business nexus”, the UN Guiding Principles on Business and Human Rights clarify that all States are expected to ensure protection of and respect human rights in their role as economic actors. This aspect of the State duty to protect human rights covers policy areas such as management of State-owned enterprises, export credit, official investment insurance, and public procurement, and emphasize that States should both integrate human rights due diligence in the entities in charge of these areas as well as incentivize due diligence by business with which the State conducts commercial transactions. The Guiding Principles also highlight that States should ensure policy coherence between government departments and agencies that “shape business practice” and the States’ international human rights obligations.

While the Guiding Principles clarify normative and policy implications of States’ existing human rights obligations, further work to unpack to unpack good practice models and practical implications is necessary in order to support and scale up implementation efforts. A key issue is to support convergence and coordination among the various international, regional and state actors that play a role in shaping practice in relation to the “State-business” nexus.

¹ Further information on speakers provided in Annex

During 2015-16 the Working Group undertook the first part of this project, which has an overall aim of encouraging States to “lead by example” in their role as economic actors to a much larger extent than today. The first stage focused on the duty of States to protect against human rights abuses involving those business enterprises that they own or control, generally referred to as State-owned enterprises (SOEs). In the coming period, the Working Group will focus on the operation of “economic diplomacy tools”, such as export credit, investment guarantees, export promotion and trade missions, and public procurement. That is the focus of this Forum session, which will aim to unpack issues and practical implications with regard to the third pillar of the Guiding Principles in particular. It will build directly on a [consultation held by the UN Working Group on Business and Human Rights in September 2017](#) and help inform the Working Group’s report to the Human Rights Council in June 2018.

Speakers

- Moderator: Anita Ramasastry, UN Working Group on Business and Human Rights
- Kamil Zabielski, Head of Sustainability, Norwegian Export Credit Agency
- Marije Hensen, Senior environmental and social advisor, Atradius (Export Credit Agency of the Netherlands)
- Rachel Davis, Managing Director, Shift
- Anthony Miller, Coordinator of Sustainable Stock Exchanges Initiative, UNCTAD
- Caio Borges, Coordinator, Business & Human Rights, Conectas

ANNEX. SPEAKERS SHORT BIOS.

PART 1.

Surya Deva.

Asia-Pacific representative of the UN Working Group on Business and Human Rights; Current Chair of UN Working Group on Business and Human Rights.

Surya is an Associate Professor at the School of Law of City University of Hong Kong. He holds BA (Hons), LLB and LLM from the University of Delhi and a PhD from Sydney Law School, and has taught previously at the University of Delhi and at the National Law Institute University Bhopal. Surya's primary research interests lie in Business and Human Rights, Corporate Social Responsibility, India-China Constitutional Law, and Sustainable Development. He has published extensively in these areas, including books *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (co-edited with David Bilchitz) (Cambridge, 2013); and *Regulating Corporate Human Rights Violations: Humanizing Business* (Routledge, 2012). Mr Deva has also authored commissioned reports for the International Commission of Jurists and the Ethical Trading Initiative. He is a founding Editor-in-Chief of the *Business and Human Rights Journal* published by Cambridge University Press, and sits on the Editorial/Advisory Board of the *Netherlands Quarterly of Human Rights*, the *Vienna Journal on International Constitutional Law*, and the *International Journal on Human Rights and Business*. In 2014, he was elected a Member of the Executive Committee of the International Association of Constitutional Law.

@ProfSuryaDeva

Victoria Tauli-Corpuz

UN Special Rapporteur on the Rights of Indigenous Peoples, United Nations.

Victoria Tauli-Corpuz was appointed as the United Nations Special Rapporteur on the rights of indigenous peoples by the Human Rights Council in 2014. Victoria is an indigenous leader from the Kankana-ey Igorot people of the Cordillera Region in the Philippines. As an indigenous activist, she has worked for over three decades on building movement among indigenous peoples and as an advocate for women's rights. Victoria is the former Chair of the UN Permanent Forum on Indigenous Issues (2005-2010) has served as the chairperson-rapporteur of the Voluntary Fund for Indigenous Populations. As an indigenous leader, she was actively engaged in drafting and adoption of the UN Declaration on the Rights of Indigenous Peoples in 2007.

@UNSR_VickyTauli

Cristóbal Yugra Villanueva

Executive Director, Derechos Humanos y Medio Ambiente - Puno (DHUMA)

Cristobal is the Executive Director of Derechos Humanos y Medio Ambiente Puno (DHUMA), a civil society and community organization involved in opposition to Bear Creek's mining operations in Northern Puno, Peru. Cristobal, a lawyer, was involved in the preparation of an amicus submission in the investor-state dispute brought by Bear Creek against Peru. Cristobal and his colleagues at DHUMA have also been involved in the defense of Aymara community members charged with various alleged crimes concerning community opposition/ protest against Bear Creek's operations.

Elisabeth Tuerk.

Chief, International Investment Agreements Section, Division on Investment and Enterprise, UNCTAD.

As Chief of the Section on International Investment Agreements (IIAs) in UNCTAD's Division on Investment and Enterprise (DIAE), Elisabeth leads the Section's work across three pillars of UNCTAD activities, encompassing research and analysis, capacity- building and consensus-building. Prior to joining UNCTAD, Elisabeth worked a staff attorney for the Trade and Investment Program of the Center for International Environmental Law (CIEL, Geneva). She holds a Magistra Degree in Law and a Magistra Degree in International Management from the Karl-Franzens University, Graz, Austria as well as a Master's Degree (MILE, Masters of International Law and Economics) from the World Trade Institute (WTI) in Bern, Switzerland.

@ElisabethTuerk

Kaitlin Cordes

Head: Land and Agriculture; Lead: Human Rights and Investment, Columbia Center on Sustainable Investment (CCSI)

Kaitlin Y. Cordes developed and leads the Columbia Center on Sustainable Investment's work on investments in land and agriculture, as well as the Center's work on the intersection of human rights and international investments. At the Center, Kaitlin conducts and supervises research; creates resources and tools; designs and lectures at trainings; provides technical and advisory support on land and human rights issues; and convenes cutting-edge dialogue. She has served as a member of the New York City Bar's International Human Rights Committee, a member of the Advisory Group to develop the OECD-FAO Guidance for Responsible Agricultural Supply Chains, and a participant of the Working Group for UNIDROIT's Legal Guide on Agricultural Land Investment Contracts. Prior to joining CCSI, she worked with the Africa Division of Human Rights Watch and served as an advisor to the UN Special Rapporteur on the right to food (Olivier De Schutter).

@kaitlincordes; @CCSI_Columbia

Andrea Saldarriaga

Visiting Fellow, Laboratory for Advanced Research on the Global Economy (the Lab), Centre for the Study of Human Rights, London School of Economics and Political Science

Andrea Saldarriaga is an international lawyer and her practice has focused on international investment law and business and human rights. In 2007, after spending several years working in a Colombian law firm and later at the international firm Freshfields, Bruckhaus Deringer, Andrea launched her practice as an independent consultant. Since then, she has been working on a range of projects with international organizations, the private sector, not-for-profit and academic institutions in her areas of expertise. Andrea was the co-lead of the Investment and Human Rights Project at the LSE from 2013-2016. She is currently a member of the roster of experts to the Project Complaint Mechanism at the European Bank of Reconstruction and she also teaches business and human rights at ESSEC Business School in Paris and ESCP Business School Europe. Andrea is a Fellow at the Columbia Center on Sustainable Investment (CCSI).