

*THE ROLE OF A FUTURE BINDING INSTRUMENT ON TNCS AND OBES
WITH RESPECT TO HUMAN RIGHTS IN PROVIDING INCLUSIVE
REMEDIES IN INVESTMENT-RELATED DISPUTES*

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Meeting Report
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Many investment-related disputes involve projects with significant impacts on local communities. However, the voices of these communities are seldom heard and virtually never taken into consideration in these disputes. On October 24, 2017, the International Institute for Sustainable Development (IISD) organized a multi-stakeholder discussion on how to address such gaps and what can be done to ensure the communities' access to meaningful intervention. With 30 participants representing business communities, civil society organizations, universities, national governments and human rights agencies, the discussion was organized as a side event of the Third Session of the Intergovernmental Working Group on Transnational Corporations and other Business Entities with respect to Human Rights, which took place in Geneva, Switzerland from October 23–27, 2017. The discussions were moderated by Ms. Nathalie Bernasconi, Group Director, Economic Law and Policy, IISD.

Mr. Nicolás Perrone, Assistant Professor in International Law, Durham Law School, explained how the current international investment policy-making is preventing the voices of local communities from being heard. Recognizing the important role international investment plays in affecting the social, economic and environmental rights of local actors and communities, Mr. Perrone highlighted the imbalance within the current international investment policy-making process and the implications for local communities. He offered two arguments pointing to such imbalance. First, transnational investment creates expectations for various stakeholders: while many investment treaties protect and enforce the expectations of the investor, the expectations of local communities are seldom taken into account due to the limitation of domestic and international laws. Second, many negotiations between transnational investors and host states are not public or inclusive, posing significant obstacles for local communities to voice their concerns prior to the commencement of the project. Mr. Perrone concluded by noting that the problem is not only the issue of primacy between the human rights law regime and the international investment law regime. It is also the lack of obligations imposed on investors to be enforced by local communities.

Ms. Makbule Sahan, Legal Director, International Trade Union Confederation (ITUC), gave the perspective of trade unions on the current international investment framework's impact on labour rights. Commenting on how foreign direct investment leads to a race to the bottom with regards to protection of labour rights, Ms. Sahan noted that the trade unions had been

advocating for the inclusion of labour protection provisions and ILO principles in trade and investment agreements. Nevertheless, despite the fact that there has been a gradual increase in the number of agreements containing labour protection provisions, a critical problem remains—the lack of any remedy and enforcement when those provisions are violated. Mr. Budi Afandi, Advocacy Coordinator, Indonesia for Global Justice, presented several case studies on the impact of trade and investment agreements on local communities' access to remedies. These case studies echoed the points made by Mr. Perrone earlier, namely, the lack of community involvement in the trade and investment treaty making process, and the power asymmetry between investors and the community. To address these gaps, Mr. Afandi put forth four recommendations, which he suggested be included in a future binding instrument with respect to business and human rights:

- Recognizing a community's right to information
- Requiring a mandatory human rights impact assessment prior to any investment decision
- Establishing a public complaint mechanism
- Providing access for public involvement in dispute settlement mechanisms.

Mr. Carlos López, Senior Legal Adviser, International Commission of Jurist (ICJ), then furthered the discussion on how the recently published elements of a future binding treaty on business and human rights, as prepared by the chairmanship of the Intergovernmental Working Group, can address some of the challenges arising in the area of investment law and arbitration. After an intriguing intellectual exercise on the interplay between international investment law and human rights law, Mr. López emphasized the positive contribution such a future binding treaty can make to the UN Guiding Principles on Business and Human Rights.

Mr. Luis Espinosa-Salas, Minister, Permanent Mission of the Republic of Ecuador to United Nations, reflected on discussions in the past sessions of the Intergovernmental Working Group. Mr. Espinosa-Salas further offered practical examples of where human rights were marginalized through trade practices. In order to achieve a balance between trade and human rights, Mr. Espinosa-Salas reaffirmed the importance of bringing the human dimension to the centre of the discussion. He concluded with an optimistic view, noting the recent progress and positive changes in the development of relevant international laws. While agreeing in principle with human rights primacy, participants expressed concern that the inclusion of such a clause in the negotiation of the binding treaty text might hinder the process of reaching a consensus. They proposed instead to address the issue within the investment and trade agreements, and to include alternative solutions to promoting human rights there. Questions were also raised on the potential institutional framework for the proposed binding instrument. It was noted that no matter what institutional framework the member states propose, inclusiveness, balance of rights and obligations, and broad scope of application are key issues to be included. In conclusion, there is a convergence of recognition that the current investment regime is not affording enough protection and access to justice to local affected communities, and that the on-going negotiation on a future binding instrument is an important opportunity where such a gap can be addressed.