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## THE INTERNATIONAL INVESTMENT REGIME AND ACCESS TO JUSTICE

*Roundtable Outcome Brief - September 2018*

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In October 2017, the UN Working Group on Business and Human Rights (Working Group) and the Columbia Center on Sustainable Investment (CCSI) co-hosted a roundtable in New York regarding the international investment regime's impacts on access to justice for investment-affected individuals and communities. Participants assessed the impacts of international investment agreements (IIAs) and investor-state dispute settlement (ISDS) on access to justice, and explored reform options related to international investment law and the human rights system. This brief summarizes key points discussed at the roundtable. *It has been published alongside a longer outcome document, available [here](#).*

### 1. FRAMING THE DISCUSSION

(a) The international investment regime provides privileged protection to foreign investors. Calls for reforming this regime have been ongoing, particularly in light of human rights-related concerns. Yet the regime's impacts on access to justice have received less attention to date. For the purpose of this brief, "access to justice" is taken to mean access to effective remedies, both judicial and non-judicial.

(b) Access to justice and the right to an effective remedy are central to state obligations under human rights law. Under the UN Guiding Principles on Business and Human Rights (UNGPs), businesses also have a responsibility to respect human rights and remediate adverse impacts that they have caused or contributed to. As articulated in the Working Group's 2017 report to the UN General Assembly ([A/72/162](#)), access to effective remedy means that both the process of seeking remedies and the outcome should be effective. Access to effective remedies requires, among others, that: (i) communities are involved in defining what makes remedies effective; (ii) seeking remedies raises no fears of additional victimization, including by way of criminalization; and (iii) a "bouquet of remedies" are available to cater to the diverse needs of impacted individuals and communities.

### 2. ACTUAL OR POTENTIAL IMPACTS OF THE INVESTMENT REGIME ON ACCESS TO JUSTICE

**Investor-state arbitration is exclusionary.** Investor-state arbitration does not permit investment-affected rights holders to meaningfully participate in proceedings, even in cases where the claims brought or relief sought affect their rights or interests. Participation as *amicus curiae* is complex, resource intensive, and lacks sufficient opportunity for rights holders to meaningfully assert and protect their rights. Beyond investor-state arbitration, participants also underscored that, despite the profound impact of investment treaties on the rights of third parties, there is little or no opportunity for meaningful input from, or consultation of, those whose rights may be affected by these treaties during their negotiation.

**Stalling, ending, or otherwise undermining remedies obtained by rights holders.** Investor-state claims have the potential to stall, end or undermine remedies obtained by rights holders in other fora. In addition, it is possible that a state's decision to waive all claims against an investor, as part of a counterclaim or settlement of an investor-state dispute, could adversely affect rights holders' access to justice. Similarly, the high costs of ISDS for host states might act as incentives for states to prioritize investors' concerns over those of rights holders in ways that indirectly undermine rights holders' access to justice.

**Victimization and criminalization of community members.** Systemic imbalances between investor protections and human rights protections are illustrated by the opportunity for investors to be awarded damages even when tribunals have acknowledged criminal behavior, while community members resisting investments are frequently victimized, including by way of criminalization. The investment regime may exacerbate the potential for criminalization by incentivizing states to suppress opposition to investments as a means of avoiding costly ISDS claims and potential liability.

**Allocation of state resources.** In the allocation of state resources, the interests or demands of investors have often been prioritized at the expense of broader public policy concerns, or competing claims of particular investment-affected rights

holders. Several host states have, for example, dedicated resources to institutional structures that support investors and specifically address investor grievances, even while human rights monitoring and enforcement bodies remain under-resourced and without power to provide effective remedies to affected rights holders.

**Regulatory chill exacerbating governance gaps.** Owing to the costs associated with potential or actual investor-state claims, the investment regime can create a “chill” on the adoption, enforcement, or amendment of a host state’s national laws, regulations, or other measures that may negatively affect foreign investors or their investments. Measures that directly or indirectly concern access to justice may be subject to this chilling effect. Principle 9 of the UNGPs reminds states to maintain adequate domestic policy space to ensure that investment treaties do not undermine their human rights obligations. However, the current investment regime may exacerbate existing governance gaps by constraining states’ duty to regulate effectively business activities and comply with their obligation to protect against human rights abuses caused or contributed by investors.

### 3. REFORM OPTIONS DISCUSSED

**Explore informed alternatives to the current approach to investment protection.** In recent years, certain states have terminated their IIAs and adopted alternative approaches to investment protection. There is a need for greater objective assessment of alternatives to the traditional approach to investment protection pursued by some states.

**Reform investment treaty standards.** To the extent that states continue to engage in the investment regime, it will be critical to reform treaty standards. States may, for example, include provisions that require or support compliance with human rights obligations and standards, including direct and binding investor obligations and exceptions regarding human rights measures. States may also consider excluding certain provisions that would undermine efforts to comply with human rights obligations, including umbrella clauses mandating state compliance with problematic stabilization clauses. IIAs could also be more effectively designed to address challenges regarding access to justice, including by providing for access to remedy in the home state, establishing mechanisms for technical cooperation and capacity building for strengthening of domestic court systems accessible by all, and including provisions regarding insurance or civil liability schemes.

**Reform investor-state arbitration.** Where states choose to retain investor-state arbitration, steps taken to reform dispute settlement should address the impacts of the current approach on investment-affected rights holders. Transparency of arbitral proceedings should be increased, and procedural issues such as the location of hearings and language of proceedings should aim to make the proceedings more accessible to stakeholders in the host country. Regarding reform of rules for selection of arbitrators, greater consideration should be given to expertise beyond investment law, including in human rights law. Proposals for an “investment court” should be closely scrutinized to ensure that failings of the current system are not carried forward. Overall, greater consideration of the impacts of the investment regime on investment-affected rights holders should be given during ongoing discussion regarding reform of investor-state arbitration in multilateral fora.

**Empower rights holders.** Greater transparency and access to information is only beneficial when such information is used meaningfully. Rights holders affected by investments and disputes related to them could be supported in better understanding the implications of IIAs and assessing opportunities to assert their own rights and interests. Support could include workshops within communities, the creation of literature on the topic in relevant native languages, and peer-to-peer community learning and information sharing.

**Develop and implement effective monitoring strategies.** Stronger documentation of investment projects can create an evidence base that may be useful for rights holders seeking redress in various fora or seeking to assert their rights and interests in the context of investor-state proceedings. More robust documentation, potentially combined with existing datasets on investments, could help in gleaning useful insights and in clarifying proposals for reform.

**Enhance human rights remedial mechanisms.** Going beyond the investment regime, avenues for seeking effective remedies available to investment-affected rights holders in home and host states, and at the regional and international levels, should be explored, expanded, and strengthened.

**Break down silos.** Greater awareness amongst a range of stakeholders regarding the investment regime’s impacts on public policy and on access to justice can encourage more participatory reflection and holistic discussions on needed reforms. Stakeholders include those working within the investment law community, the human rights community, policy makers, and rights holders.

#### FURTHER INFORMATION:

For more information about CCSI’s work on Human Rights & Investment, check out our [website](#).  
See also the Working Group’s [website](#).