**Panel 2, Subtheme 1 – Examples of national legislation and international instruments with obligations of States applicable to TNCs and other business enterprises and human rights**

***Comments by Dr. Ariel Meyerstein, United States Council for International Business / ICC-USA on behalf of the International Chamber of Commerce***

**Your excellency Ambassador Botora, Madame Chair:**

Thank you so much for including me in this discussion. I’m glad to have the opportunity to address the Working Group today. I work at the United States Council for International Business, the US National Committee of the International Chamber of Commerce.

Before I begin in earnest, I hope you’ll permit me a personal comment: I want to emphasize to everyone in the room that I really admire your passion for justice. To those of you who might yourselves be survivors of human rights violations, I cannot imagine what you have endured. But please rest assured that it resonates deeply with me – my grandfather was kicked out of his high school by the Nazis at age 16 and later his home in Dusseldorf was ransacked during *Kristallnacht –* the 78th anniversary of which we will observe in two weeks’ time; my grandfather was forced to flee at age 19 and became a refugee in England, orphaned by the Nazis, who put my great-grandfather into bonded labor and then deported and later killed him and my great-grandmother as well as many others in both my mother and father’s families.

My grandfather pursued justice and compensation for his parents’ insurance policies for 50 years, finally getting some symbolic restitution after decades of roadblocks. I don’t recount this family history for sympathy: his hard work as an immigrant in America laid the foundation for the relative comfort I was raised in and I thankfully have never experienced the kind of prejudice he had to endure. But I have also spent my time in small NGOs and in human rights courts, so I appreciate the hard work that everyone here does.

I should also say that every day I get to work with people in some of the largest companies in the world who share your passion for justice and try their hardest to inculcate those values in the companies in which they work. It’s not an easy task, but they’re definitely trying – I can tell you that much. The reasons I have raised all of this is simply to say that I think that, at the end of the day, many of us are genuinely committed to the same goals and we just have to continue the dialogue to find the best way of achieving them.

**Turning to the topic of the panel:** as is well known, there is a vast international human rights regime covering state obligations to protect, respect and fulfil the rights of their citizens, including by protecting them from the adverse impacts of third-parties, such as businesses. These include international treaties that are widely adopted, such as the Universal Declaration, the two international covenants and other treaties covering humanitarian law, as well treaties on women’s rights, indigenous peoples’ rights, and hundreds of international labor standards. We also have numerous environmental treaties that seek to regulate environmental impacts. As Professor Ruggie noted during his mandate and as is reflected in the UN Guiding Principles themselves, business is capable of positively and negatively affecting nearly all if not all of the rights of individuals and communities, and accordingly, States have the duty to protect them from all of these possible impacts and companies have a responsibility to respect internationally recognized human rights.

One example of this in action is just last year, when the Human Rights Committee that oversees implementation of the International Covenant on Civil and Political Rights addressed its concerns with a Member State with respect to its enforcement of human rights norms by companies domiciled in its jurisdiction. Under the UN Guiding Principles, the Human Rights Committee expected the Country to be doing more.

As is also well-known, there are several regional human rights courts and bodies to whose jurisdiction many countries have submitted themselves, including the Inter-American Court of Human Rights, the European Court of Human Rights and the African Court of Human and Peoples’ Rights.

There are, however, significant limitations to this international legal architecture, as is well-known, but worth reflecting on as we look to consider the viability of another international binding instrument.

Specifically, as many scholars have noted, compliance with the judgments of the regional human rights courts is far from ideal. As scholars have noted, the overall compliance rate of States with judgments of the European Court of Human Rights is **around 50 percent** and the Inter-American Court’s judgments get compliance **only 38 percent of the time**.[[1]](#footnote-1) The African Court of Human and Peoples’ Rights does not track compliance as rigorously, so comparable statistics are not available.

I raise these statistics to make a simple point: if a binding instrument on business and human rights seeks to expand jurisdiction of or to create new international mechanisms or expand civil liability for harms, it should be kept in mind that in order to be effective, these measures must be implemented by States. Currently, that appears to happen about half of the time – and that is for issues that have already been raised directly to States, exhausted domestic processes and are still left unresolved or unsatisfactorily addressed.

In addition, numerous countries have national laws in place that create either or both criminal and in some cases civil accountability for not only natural persons but also many cases accountability for legal persons for violations of jus cogens norms such as genocide, crimes against humanity, war crimes. In fact, while not jus cogens violations, Friends of the Earth very recently won two cases – one in the UK and one in the Netherlands – that awarded over $ 80 million dollars in damages to farmers who were victims of environmental impacts in Nigeria.

Furthermore, in recent years, new laws have arisen in the United States, including the Dodd-Frank conflict minerals reporting requirements, the California Supply Chains Transparency Act, the UK Modern Slavery Act and the Chinese conflict mineral due diligence guidelines, which are based on the OECD Guidelines Due Diligence Guidance on Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas. The EU’s Non-Financial Reporting Directive, which will be implemented domestically in all European Union Member States beginning in 2017, calls upon companies of a certain size to report on material non-financial issues, including human rights. Depending on the law, these rules can reach thousands to tens of thousands of companies. For example, the UK Modern Slavery Act should apply to over 16,000 companies and the Chinese conflict minerals rules promote conflict free sourcing for the over 6,000 members across the entire mineral supply chain of the members of the China Chamber of Commerce of Metals, Minerals and Chemicals Importers and Exporters.

Finally, I’d like to turn to some other international instruments not commonly thought of as related to human rights – as evidenced by the discussion yesterday.

First, the Transpacific Partnership aims to expand labor protections in several countries in binding and enforceable ways. Specifically,

* there are only four trade agreements worldwide (US FTAs with Peru, Panama, Colombia, and Korea) that include strong, **enforceable** **requirements** to adopt and maintain the principles of the ILO Declaration on Fundamental Principles and Rights at Work (1998), including prohibition of forced labor, child labor and guarantees of freedom of association and collective bargaining.
* TPP calls for domestic protection of these fundamental ILO labor rights and will expand these requirements to 10 other countries, several of which have existing agreements with the U.S. that have weaker labor provisions, and others, including Vietnam and Malaysia, have no other trade or labor agreements with the US.
* In addition to expanding the reach of these core principles in domestic laws, the TPP will also create enforceable seven-year commitments on its parties not found in any other trade agreement or in many existing national laws, including:
  + commitments to discourage trade in goods produced by forced labor, including child forced labor
  + commitments to adopt and maintain laws on acceptable working conditions, including minimum wage, hours of work, and occupational safety and health
  + commitments to require countries not to weaken labor protections in export processing zones governing acceptable conditions of work with respect to minimum wages, hours of work, and occupational health/safety
  + commitments that parties will not fail to effectively enforce their labor laws in a sustained or recurring pattern that would affect trade or investment between the TPP Parties
* All labor chapter commitments are covered under the same dispute settlement procedures that are available for other chapters of TPP, the penalties for which can include trade sanctions. Thus, labor violations are treated equal with core trade commitments.
* Beyond this, TPP has several side agreements with trading partners where there have been historic decent work deficits, including Malaysia, Vietnam and Brunei, which plans must be implemented – including changing laws and improving implementation – for the agreement to enter force; these requirements will be monitored for 5-7 years.

Finally, it bears correcting the record from yesterday regarding investor-state dispute resolution, which, it is often forgot, is a direct descendant, and in many instances, also act as a form of human rights protection. To be clear, the system was not established for the explicit purpose of promoting and protecting human rights – and certainly not of non-foreign investors or other victims of human rights abuse; but the fact is that there are claims that do forward individual human rights claims that could just as well have been brought in other international courts, including regional bodies like the European Court of Human Rights, which broadly protects property rights not only of natural but also of legal persons.[[2]](#footnote-2)

Why would I characterize investment agreements as a kind of human rights protection? Well, to the extent that they do protect **individual investors**’ – individual human beings’ property – they ensure for the protection of some of the fundamental rights enshrined in the canon of human rights law, such as Articles 10 and 17 of the Universal Declaration (on the right to own property and not be arbitrarily deprived of it), Article 1 of the European Convention; not to mention the Takings Clause of the U.S. constitution and many other constitutions. It might be worth recalling, in this regard, that one of the first instruments to give voice to a notion of civil and political – and even human – rights, was the French Declaration of the Rights of Man and of the Citizen, which in 1793 declared men to have natural rights to property, liberty and equality beyond any guarantee to these things by the State.

And in fact, when we study the profiles of the U.S. investors filing claims, you might be surprised to learn that of the 105 claims brought by U.S. investors under the auspices of the International Center for the Settlement of Investment Disputes at the World Bank, 2/3 of the claims were brought by individual investors or SMEs – i.e., firms with 500 employees or fewer – as defined by the U.S. Small Business Association. And the claimants won only 6 of the 29 completed arbitrations – 4 of their claims settled and the vast majority – 19 – were won by the States.[[3]](#footnote-3)

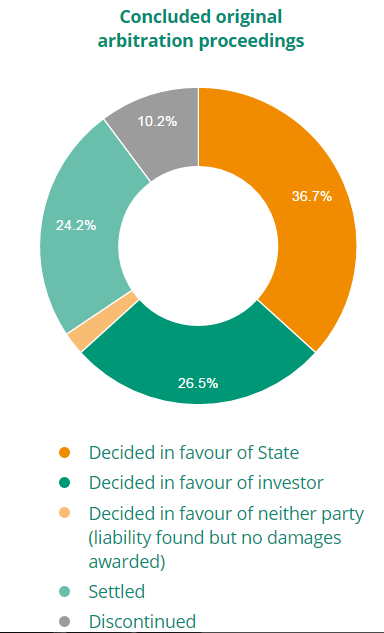
In listening to yesterday’s presentations, one would get the feeling that ISDS is only a tool of large TNCs for world domination and that all of the claims are unmeritorious, brought without justification and severely hamstring governments in their ability to regulate for the public welfare.

That broad characterization is simply not true. While there have been some limited instances where aggressive legal theories have been pushed and some public-interest oriented regulation has been challenged, the vast majority of claims are brought as a last resort when investors’ property has been unfairly or arbitrarily threatened or taken-away without adequate due process of law or proper regulatory controls. Rather than grant super-rights to investors, investment agreements try to raise the minimum standard of treatment in a given country to reflect international norms of government regulation and to ensure that foreign investors are not discriminated against, as has been the clear and robust historical trend. They seek to compensate for a basic floor of due process protections when it is often lacking.

Moreover, investment arbitration tribunals do not have the power to over-turn legislation nor can they re-write legislation, nor does the judicial function get handed over to outside arbitrators; in fact, treaties can protect regulation for the public interest (which is already guaranteed as a sovereign right under international law) and preserve that policy space from being the basis of claims; at the most, if a state ruins an investor’s investment, arbitral tribunals can order the state to compensate the investor – but arbitral tribunals are not empowered to re-write legislation.

In addition, we heard a lot of negative anecdotes and suggestions yesterday about ISDS, but the ‘big data’ tells a different story:

* First, 90 percent of the 2600 active treaties have not been subject of an arbitration.
* Second, a 2015 study of the 268 arbitration awards rendered under the auspices of the International Center for the Settlement of Investment Disputes, shows that 33 percent of cases settled. Of the remaining cases (181) that did not settle, 66 percent (121) were won by States, ***not investors***. A more recent study of all concluded cases (ICSID and other arbitral rules) by UNCTAD also shows States still winning more than investors (see next page figure), although not with as wide a margin as within the ICSID-only cases:



*See* UNCTAD, <http://investmentpolicyhub.unctad.org/ISDS>

* Also, according the 2015 ICSID award study, the awards given are in fact the equivalent of a few cents on the dollar of the original amount claimed by investors. Yes, the claimed amounts can be large – the average amount claimed is $622 million – but the average award is only $16.6 million – far from enough to bankrupt any country.[[4]](#footnote-4) In fact, a mining claim involving environmental permitting was just dismissed against an investor recently and the arbitral tribunal ordered the investor to pay the State US $ 8 million in legal fees.[[5]](#footnote-5)

It is true that it can be expensive for States to defend these claims, but the evidence does not support an argument that, on average, States are *needlessly* having to respond to *inflated and baseless* claims; yes, there have been instances in which investors have challenged State regulations that are promulgated for the public interest, but the numbers of these known cases is quite small compared to the hundreds of cases that legitimately challenged arbitrary overreach by States, and several of these cases have in fact not been resolved in favor of investors, suggesting that the system is working to, on the whole, fairly adjudicate claims through principled judgments in line with international law.

While ISDS arbitration is far from perfect – and no system of laws is – on the whole, it has worked relatively well to achieve its purpose. There is also a very robust debate within the ISDS system and without it about ways to tweak it and make it work even better. But this process on a binding instrument is not the forum for resolving that debate.

I hope in these discussions we can continue to debate this and other issues based on empirical evidence and an open exchange of ideas.

Thank you for your attention – I’m looking forward to continuing this discussion with you all.

1. Courtney Hillebrecht, Domestic Politics and International Human Rights Tribunals: The Problem of Compliance (Cambridge University Press, 2014). [↑](#footnote-ref-1)
2. *See* Protocol to the Convention of the Protection of Human Rights and Fundamental Freedoms art. 1, Mar. 20, 1952, 213 U.N.T.S. 262 (“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.”); for a discussion of the human right to property, see generally U Kriebaum and C Schreur, “The Concept of Property in Human Rights Law and International Investment Law,” HUMAN RIGHTS, DEMOCRACY AND THE RULE OF LAW 743, 753 (Stephan Breitenmoser et al. eds., 2007), at <http://www.univie.ac.at/intlaw/wordpress/pdf/88_concept_property.pdf> ; *see also generally* Sarah C.C. Tishler, “A New Approach to Shareholder Standing Before the European Court of Human Rights,” 25 Duke Law Journal 259 (2014), 259-261, at <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1470&context=djcil> [↑](#footnote-ref-2)
3. Scott Miller and Gregory N. Hicks, Investor-State Dispute Settlement, A Reality Check (Center for Strategic and International Studies, January 2015). [↑](#footnote-ref-3)
4. Scott Miller and Gregory N. Hicks, Investor-State Dispute Settlement, A Reality Check (Center for Strategic and International Studies, January 2015), at pp. 8-12; *see also* Susan D. Franck and Linsey E. Wylie, “Predicting Outcomes in Investment Treaty Arbitration,” 65 Duke Law Journal 459 (2015) at <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3825&context=dlj> [↑](#footnote-ref-4)
5. *Pacific Rim Cayman, LLC v. El Salvador*, Award (14 October 2016), at <http://www.italaw.com/sites/default/files/case-documents/italaw7640_0.pdf> [↑](#footnote-ref-5)