Dr. Daniel Aguirre, Panel VI: Lessons learned and challenges to access to remedy (selected cases from different sectors and regions).

**Prosecuting Companies in Myanmar: Challenges and Opportunities**

Thank you again, Madam Chair, Ecuador and the OHCHR for supporting this important week of fruitful discussion. I will begin where I left off on Tuesday, discussing some of the practical challenges and opportunities that a binding treaty on business and human rights could possibly address.

Let me state that I am not here to pick on Myanmar. Myanmar is undergoing tremendous political, economic and social change. The situation in Myanmar is much better than it was 5 years ago and almost unrecognizable from the darkest days of the military regime. The Economy has changed rapidly and politics progressively; yet reform of the legal system and the judiciary lag far behind and will likely not be resolved in a generation. Yet into this accountability void billions of dollars of new investment flows.

Failure to provide for effective remedies and redress, even where provided for in domestic law, has a range of causes, legal and political. Among the most common are: weakness in the rule of law (including the independence of the judiciary and the legal profession); inability or unwillingness of officials to counter resistance by powerful corporate interests against regulation; public officials who lack knowledge or capacity; corruption; limited resources; and other procedural hurdles that create a system of disincentives to litigation against companies.

So Myanmar is not alone in this regard. I present it as a case study because a Binding Treaty on BHR must address investment in weak governance zones and transitional countries emerging from dictatorship or conflict where the rule of law is weak. The situation in Myanmar provides useful examples to keep in mind during the process of developing this important treaty.

Prosecuting corporations in Myanmar is difficult as the very notion of legal accountability is in its nascent stages. The judicial system was undermined by the military regime over 50 years, destroying a system once regarded as among the finest in the region. While inherited colonial law recognizes both criminal and civil liability for corporations as well as the possibility of class action suits, these provisions are not yet used to ensure corporate accountability.

The public does not trust the judiciary, which is under resourced, lacking in capacity and assumed to be corrupt. The only time a person goes to court in Myanmar is as a defendant. Disputes are resolved in any other means possible, with the courts avoided at all costs. This lack of the rule of law undermines the State duty to protect and provide remedy in the context of business and human rights.

**Access to Remedy**

On Tuesday, in Panel 2, I outlined the challenges Myanmar faces in adopting regulation to protect human rights, in the context of business activity. Indeed, the international community overwhelmingly supports deregulation, which is reflected in Myanmar’s’ national investment law and investment treaties.

Myanmar, like other transitional states, does not provide adequate access to remedy for victims of business related human rights abuses. Myanmar is unable to take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory those affected have access to effective remedy. The judiciary is not yet independent from the undue influence of other branches of government and the military, who themselves are connected to crony businessmen. This creates a public perception of injustice and undermines the rule of law.

Judges lack resources and capacity and are subject to pressure from the executive through the Attorney General’s Office and by direct intervention for the military in sensitive cases (ie Human Rights). Many Judges, including 4 of the 7 members of the Supreme Court, are military appointed officers. The courts are under resourced and require further support from the international community.

Lawyers do not have an independent bar association. The current legal body is headed by the Attorney General and has punished its members for taking on contentious cases.

Current land law creates administrative bodies to handle land disputes. These committees make vital decisions affecting human rights at the local level. Their decisions are perceived as final and have had not been subject to adequate judicial oversight despite the availability of constitutional writs as rights of citizens.

Yet there are positive signs. As you all know, there is a new government in Myanmar. There is an unprecedented opportunity to engage and cooperate. The Attorney General’s Office, the Supreme Court and the new government have all signaled their commitment to reform in line with the rule of law and human rights. There is a new Attorney General, appointed by the new government, who can take the lead on judicial reform. Lawyers are emboldened and increasingly willing to take on tough cases with less fear for their careers. The ICJ builds the capacity of and supports all of the above in the protection of human rights.

Under the current regulatory regime, it is unlikely criminal or civil litigation will hold powerful economic actors like corporations accountable. This is a generational change that will require reform of legal education, increased capacity building and support from the international community.

In the meantime, the state duty to protect and provide access to remedy cannot be fulfilled, bringing into question the utility of the corporate responsibility to respect human rights put forward by the UN Guidelines. Let’s face it, it is easy to respect rules and regulations that do not exist or are not enforced.

Access to justice, including the right to an effective remedy, is essential for business accountability for human rights abuses. The prospective treaty must require measures to ensure access to effective remedies and redress for persons and groups of persons that suffer abuse arising from the conduct of business enterprises.

The treaty should codify and develop provisions for access to an effective remedy for wrongful conduct against both States and business enterprises. For States, the remedy would be in respect of situations of complicity or participation in business activity or for failing to discharge their duty to protect against the conduct of business enterprises.

The possibility for victims to initiate judicial complaints against companies directly in their domicile (whether it is in a host State or the home State) will further help to redress the inequality in rights and obligations that exist as between companies on one side and people on the other side.

The growing web of bilateral or multilateral agreements on investments and free trade often grant business enterprises and investors in general the right to a very extensive set of protections including the right to sue governments before international arbitral tribunals, a right that individuals and communities do not have in relation to companies that abuse their human rights.

Try telling a farmer that a foreign company will have access to justice to protect its land while they have none. An international treaty that guarantees an enhanced remedy system for harm caused by companies including extraterritorially would serve as a corrective instrument in this respect.