



Exploring elements of effective remedy

Parallel session

28 November

10:00-13:00

Part 1: How to integrate voices of the affected communities?

10:00-11:55

Organized by the UN Working Group on Business and Human Rights

Part 2: Settlement agreements and international standards on right to effective remedy: lessons from the Mariana dam disaster

12:05-13:00

Organized by Conectas Brazil

PART 1. How to integrate voices of the affected communities?

Brief description: This session, organized by the UN Working Group on Business and Human Rights, will explore the importance of listening to, and integrating, the voices of individuals and communities affected by business operations. The interaction of business enterprises with affected communities can take place in different forms, e.g., while conducting human rights due diligence, in the process of mitigating or remediating harm, or in establishing and operating an effective operational level grievance mechanism. Several case studies from diverse geographic regions will be considered to draw lessons about tools and strategies adopted by businesses to access voices of affected communities. The session will be geared at facilitating the identification of barriers in engaging communities in a meaningful manner, considering ways to overcome these barriers and sharing best practices of engaging impacted communities. The role of community-led engagement processes will also be discussed, including in empowering vulnerable communities.

Session objectives:

- Raise awareness on the importance for businesses to engage with affected communities meaningfully, prior to, during and after a business venture into impacted regions.
- Identify continued barriers to engagement, leadership and empowerment for communities affected by business-related human rights abuses and explore ways to overcome these barriers.
- Identify best practices and tools for businesses' engagement with affected communities.
- Discuss the role that both home and host states can play in facilitating the engagement between business and affected communities, including by providing information, redressing power imbalance and providing access to effective remedies.

Key discussion questions:

1. What can we learn from the stories of affected communities? Why does it matter to hear voices of affected individuals and communities when it comes to providing access to effective remedy?
2. In addition to the UNGPs, what standards or guidelines can we use in assessing the effectiveness of business engagement with affected communities?
3. What role can community-led human rights impact assessment play in providing access to effective remedy?
4. How to ensure that operational level grievance mechanisms satisfy the effectiveness criteria of Principle 31?
5. How to bridge the lack of trust between rights holders, government agencies and business enterprise, which often discourages engagement?
6. What role should the home/host states play in facilitating a meaningful and ongoing integration of voices of affected communities in business operations?

Speakers:¹

- **Moderators:**
 - **Surya Deva**, Chairperson of the UN Working Group on Business and Human Rights.
 - **Jena Martin**, Professor of Law, West Virginia University.
- **Speakers:**
 - **Bilkis Begum**, Sewing Machine Operator, Natural Denims Garment Factory, Dhaka, and President of the Natural Denim Union, an affiliate of Somnilito Garments Sramik Federation (SGSF), Bangladesh
 - **Mohammad Matin**, Assistant Director at Natural Denims Ltd., Bangladesh.
 - **Nahidul Hasan Nayan**, Operations Director, Awaj Foundation
 - **Rosey Hurst**, Director, Impactt Limited.
 - **Sergio Campusano**, President of the Indigenous Community of Los Diaguitas Huasco Altinos, Chile
 - **Bellinda Chinowawa**, Lawyer, Zimbabwe Lawyers for Human Rights, Zimbabwe
 - **Prashant Paikray**, Spokesperson, POSCO Pratirodh Sangram Samiti (PPSS), Orissa, India

¹ Further information on speakers provided in Annex

Format: The panel will begin with brief opening remarks from the moderators, highlighting the key objectives of the session and introducing the panelists. After brief presentation made by the panelists about specific case studies, moderators will pose follow up questions to each of the panelists before opening the session for interventions from the floor.

Background to the discussion: In its report presented to the UN General Assembly in October 2017, the UN Working Group stressed that rights holders should be at the heart of the entire remedy process and that the effectiveness of remedies should take into account their perspectives. The aim of this session is to learn more about how businesses are trying to engage with affected individuals and communities, identify barriers that do exist in accessing the voice of affected communities, find ways to overcome these barriers, and identify best practices and tools which can be shared among peers.

The panelists are members of impacted communities or work directly with them. They have formed personal, long-term bonds, which have allowed them to become embedded within affected communities. As a result, the session puts the perspectives and experiences of right holders at the forefront of discussion on access to effective remedy. The perspectives of other stakeholders will be integrated into discussion through interventions from the floor.

Links to background information

http://ap.ohchr.org/documents/dpage_e.aspx?si=A/72/162

<http://www.ohchr.org/EN/Issues/Business/Pages/OHCHRaccountabilityandremedyproject.aspx>

https://policy-practice.oxfamamerica.org/static/media/files/Chile_HRIA_Executive_Summary.pdf

PART 2. Settlement agreements and international standards on right to effective remedy: lessons from the Mariana dam disaster.

Brief description: This session, organized by Conectas Brazil, will explore some key issues that arise from the negotiation of settlement agreements in the context of large-scale socio-environmental disasters. The affected communities might enter into such agreements with companies due to multiple challenges in access to judicial remedies in cases involving business-related human rights abuses. The session will draw on the Mariana dam disaster case to discuss key aspects pertaining to the negotiation and implementation of complex settlement agreements from a multi-stakeholder perspective. The following aspects will be considered: i) institutional architecture; iii) limitation of civil and criminal liability; iv) participation and monitoring mechanisms; iv) provisions limiting the legal right to sue and access to justice; and v) criteria to define the scope of remedies.

Session objectives:

- To assess the compatibility of settlement agreements with international standards related to access to effective remedy, such as the UNGPs and the Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law.
- To discuss instruments of public participation in the negotiation and implementation of settlement agreements and explore other ways to guarantee the meaningful consultation with affected communities.
- To explore different forms of reparation and how to implement promised remedies.
- To discuss whether confidentiality or transparency should prevail in order to improve access to effective remedies.
- To examine the extent to which settlement agreements may limit companies and States' civil and criminal liability.

Key discussion questions:

1. How can we ensure meaningful consultation with affected communities in the phases of negotiation and implementation of settlement agreements in cases of business-related human rights abuses?
2. What should be the institutional architecture of settlement agreements to ensure that the perspective of the affected communities are effectively taken into account?
3. What are the lessons that can be drawn from existing cases such as Mariana? Have the agreements ensured or eschewed accountability of the involved business enterprises?
4. How to reconcile the objective of prompt dispute resolution involving a large number of affected people with the imperative of full remediation?
5. What are the trade-offs between transparency and confidentiality in the negotiation and implementation of settlement agreements?
6. What methodologies can be used to assess the potential gains and losses of affected communities in entering into settlement agreements vis-à-vis proceeding with judicial litigation?

Speakers:²

- **Moderators:**
 - **Surya Deva**, Chairperson of the UN Working Group on Business and Human Rights
 - **Jena Martin**, Professor of Law, West Virginia University
- **Panelists:**
 - **Caio Borges**, Coordinator, Conectas Human Rights
 - **Shubhaa Srinivasan**, Attorney, Leigh Day
 - **Regiane Soares**, community member in Espírito Santo, Brazil. Member of the Movement of People Affected by Dams (MAB)
 - Representative of one of the involved companies (TBC)

Format: Panel-style discussion session, with screening of a short video produced by the organizer with interviews with affected communities and information on the case two years after the disaster. Moderators will actively seek audience views and opinions on the challenges presented by speakers.

Background to the discussion: This session will explore some key issues that arise from the negotiation of settlement agreements in the context of large-scale socio-environmental disasters. Access to judicial remedies in cases involving corporate-related human rights abuses often comes with a number of challenges, such as high costs, lengthy processes and the claimants' hardship in producing evidence about the links between companies' actions or omissions and the violations on the ground. When it comes to large-scale disasters, the challenges also include the risk of unfairness with conflicting judicial decisions as opposed to the difficulty in grouping a wide range of different rights violations into collective lawsuits.

Seeking a more efficient instrument of conflict resolution, parties often decide to resort to alternative arrangements, such as by entering into settlement agreements. However, concrete cases have shown that the decision-making processes leading to these agreements have served to evade the liability of the State or the involved companies to the detriment of the affected communities' right to full remediation and to the obligation to repair the damages caused to the environment. As noted by the Working Group on Business and Human Rights, settlement agreements have in many cases poorly fulfilled their obligation to hold companies accountable and to offer affected communities adequate remedy.

In the case of Mariana, Federal and state-level governments and the companies involved signed a settlement agreement to provide remedies for the damages that a massive tailings dam burst caused. It is the worst socio-environmental disaster in Brazil's history and it resulted in the release of 32 million cubic meters of toxic residue into one of Brazil's main river basins, affecting more than 3 million people and contaminating the soil, riverbanks and vital sources of water supply. Civil society groups and public prosecutors questioned the settlement agreement on the basis of: i) the absence of meaningful consultation with affected communities; ii) provisions that attempt to restrict the liability of the State and the involved companies; iii) provisions that shift the responsibility of the State entirely onto the companies; and iv) the creation of obstacles for access to justice (such as clauses that limit victims'

² Further information on speakers provided in Annex

choice to resort to independent judicial avenues). Affected communities also claim that the involved companies adopt an excessively narrow criteria when defining what injuries they would be willing to provide remedies for.

Federal courts in Brazil annulled the settlement agreement, an action welcomed by experts of the United Nations, but the involved companies are negotiating other agreements and the issue is still pending before lower courts. Claimants in individual lawsuits are facing the risk of not receiving full remediation because judges will provide the same monetary reparation to all the individuals seeking moral damages.

Links to background information:

<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20829&LangID=e>

<http://www.conectas.org/en/actions/business-and-human-rights/news/46919-doce-river-a-year-with-no-solution>

ANNEX. SPEAKERS SHORT BIOS.

Surya Deva.

Chairperson, WG business and human rights.

Mr. Surya Deva 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. Mr Deva's primary research interests lie in Business and Human Rights, Corporate Social Responsibility, India-China Constitutional Law, and Sustainable Development.

Jena Martin.

Professor of Law, West Virginia University.

Jena Martin is a Professor of Law at West Virginia University. Her research and scholarship focuses on examining accountability and governance mechanisms for transnational corporations using methodologies generally reserved for securities violations. At WVU, Prof. Martin teaches in the areas of business, securities regulation, and human rights. In addition to several articles in the field, Professor Martin's publications include a co-edited volume from Cambridge University Press entitled *The Business and Human Rights Landscape, Moving Forward, Looking Back* and a co-authored book entitled *When the Levees Break: Re-visioning Securities Regulation*.

PART 1.

Bilkis Begum

Sewing Machine Operator, Natural Denims Garment Factory, Dhaka, Bangladesh

President of the Natural Denim Union, an affiliate of Sommilito Garments Sramik Federation (SGSF)

Bilkis works in The Natural Denim Factory. The factory is located in Dhaka, Bangladesh and supplies a number of well-known high street brands. Bilkis first joined in 2009 as a helper in the cutting section before being promoted to an operator. Alongside her work as an operator, Bilkis is very active in the Natural Denim Union, an affiliate of Sommilito Garments Sramik Federation. Her desire to improve conditions at Natural Denim resulted in her being elected to President the Union last year. During a recent wave of strikes across factories in the same industrial zone, Bilkis led the union's submission of 14 demands for negotiation with management. These included demands on wages, maternity leave, and termination of employment. Following a successful negotiation period, the factory management accepted 11 out of 14 demands, stabilising production in a time of wider crisis.

Mohammad Matin

Assistant Director at Natural Denims Ltd in Dhaka, Bangladesh.

Mr Matin is joined the factory in 2014, after serving as a commissioned officer in the Bangladesh Army and a blue helmet for UN peacekeeping forces in Ivory Coast. As Assistant Director at Natural Denims, Mohammad has particular responsibility for HR, Admin and Compliance. He is the Assistant General of the 'Alumni on Workplace and Social Protection' and a member of the advisory committee of the Employment Injury Protection Scheme (EIPS) at the Ministry of Labour and Employment. Mr Matin led the negotiation from the employer's side

Nahidul Hasan Nayan

Operations Director, Awaj Foundation

Nahidul Hasan Nayan started his career as a cutting assistant in Nissian Garments Ltd. at the age of 14. He went on to become the Founding General Secretary of Nissian Garments Ltd. Sramik Union and has been leading labour movements and negotiations ever since. He was engaged with the 1997 (930 campaign) and the 2006 minimum wage declaration, and has submitted over 100 union registrations to the Joint Directorate of Labour, receiving more than 50. Nayan has been working with Awaj Foundation since 2005. Now Awaj's Operations Director, he continues to organise union activities throughout Dhaka and Chittagong. Nayan also oversees a range of creative programmes at Awaj – including singing, dancing and filmmaking – for garment workers and their children.

Rosey Hurst

Director, Impactt Limited

Rosey Hurst, Director of Impactt, organization that has worked in the Bangladesh export garment industry for the past 15 years to improve working conditions whilst maintaining the industry's competitiveness.

Sergio Campusano Villches.

President, Agricultural Community of Los Diaguitas Huasco Altinos (CADHA), Chile.

Sergio Campusano Villches is an indigenous leader and President for the Agricultural Community of Los Diaguitas Huasco Altinos in Chile, a position he has held for the past 13 years. The community is made up of around 250 indigenous families of farmers and herders of sheep and goats of the Huasco Valley, and is the only indigenous community in Chile that has a title of ownership recognized by the Chilean State on ancestral lands of this magnitude.

Bellinda Chinowawa

Senior Projects Lawyer, Zimbabwe Lawyers for Human Rights

Bellinda Chinowawa has a wealth of experience in human rights litigation through the filing of cases in the superior courts of Zimbabwe, and before the African Commission on Human and People's Rights. She has a keen interest in corporate accountability in the extractives sector and is a Board Member of the Centre for Natural Resource Governance, is a leading campaigner against illicit financial flows and advocate for transparency in the extractives.

@BChinowawa

PART 2.

Caio Borges

Coordinator, Business and Human Rights Program Conectas Human Rights

Caio Borges coordinates the Business and Human Rights Program at Conectas Human Rights. His areas of expertise include finance and human rights, global economic governance and human rights and access to justice in the context of high-impact economic activities. Mr. Borges holds a Master degree in Law and Development from the Getulio Vargas Foundation Law School and is a Ph.D. candidate at the University of São Paulo.

@caiosborges

Shubha Srinivasan

Partner, International Claims Department, Leigh Day

Market leader in business & human rights litigation and international environmental litigation in the UK. Regularly represents both UK and non-UK claimants against corporations and public bodies.

@LD_Shubhaa

Regiane Soares

Fisherwoman Movement of People Affected by Dams,

Regiane Soares is a fisherwoman from Baixo Guandu, Espírito Santo, living in the margins of the Doce river. She has been a member of the Movement of People Affected by Dams (MAB) since 2016, organizing protests and events to discuss the remedies for the people affected by the Doce river disaster.

