



**Droits et Démocratie**  
**Rights & Democracy**

Centre international des droits de la personne et du développement démocratique  
International Centre for Human Rights and Democratic Development

## REFERENCE GROUP MEETING REPORT

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# **BILATERAL INVESTMENT TREATIES AND HUMAN RIGHTS**

March 19 – 20, 2009  
Montreal, Canada

## INTRODUCTION

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Foreign direct investment into the developing world is governed by a web of more than 2600 bilateral treaties, which limit what governments may require of foreign investors operating in their territory. These investment treaties are designed to protect investors from expropriation, discriminatory legislation and regulatory interference. Generally, these protections are backed up by a powerful dispute settlement mechanism that permits foreign investors to sue their host state and to seek financial compensation for real and/or potential losses. The number of lawsuits under these treaties has exploded over the past decade, although exact numbers are difficult to know because most are litigated and resolved behind closed doors.

Civil society organizations and affected communities have expressed concern that investment treaties place the property rights of foreign investors on a pedestal high above other treaty obligations of the state, including those that protect human rights.

The meeting brought together academics, legal experts and representatives of civil society to discuss bilateral investment treaties, their dispute settlement processes and the implications for human rights.

## OPENING REMARKS

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### **Razmik Panossian**

Director of Policy, Programmes and Planning, Rights & Democracy

For the next two days, this meeting of experts will discuss international investment arbitration in its relation to human rights. It is not simply an interesting academic subject but also an issue that has real and concrete impacts on the enjoyment of human rights, particularly in the developing world. Rights & Democracy's interest in this topic is first to better understand the complex relationship between human rights and investment, and second to identify opportunities to advance human rights including economic and social rights.

Key questions emerge from the new report written by Luke Peterson. For example, how can civil society encourage states to use human rights law arguments in disputes with investors? What additional tools can we provide to affected communities to better defend human rights in the context of foreign investment? And, how can we assist adjudicators so as to increase their knowledge of human rights law?

### **Carole Samdup**

Senior Advisor, Economic and Social Rights, Rights & Democracy

In 2004, Rights & Democracy developed a draft methodology designed to assess the impact of foreign investment at the project level. The primary purpose of the methodology was to build the capacity of affected communities (rights holders) to claim their human rights. This draft methodology was tested in five case studies in Argentina, the Democratic Republic of Congo, Peru, the Philippines and Tibet. The case study results and an accompanying chapter on lessons-learned were documented in Volume One of R&D's *Investing in Human Rights* series of publications. The experience led to a revised impact assessment methodology (Volume Two) which is now freely available as an interactive CD-ROM or for download from Rights & Democracy's website.

The case studies also pointed to broader conceptual challenges related to investment and human rights. These challenges suggested a need to look more closely at: bilateral investment treaties; corporate complicity; state-owned companies and public-private partnerships; the role of the home-state and extra-territorial obligations; "no-go zones" and economic sanctions. The third volume in the *Investing in Human Rights* series addresses the first of these issues—the influence of bilateral investment treaties on human rights. It is this study that has brought us here today and which will be the basis for our discussion during this meeting. We are fortunate also to have with us experts who have agreed to lead discussion on several of the other issues mentioned above.

Many of the participants at this meeting are members of the external reference group for the initiative. Others are actively involved in related areas of study or activism. What binds us all together is an interest in understanding how best to hold companies accountable for actions found to be in conflict with human rights standards. It is not our goal to formulate new legal theories or to debate various minutiae of international law. We are trying to find practical ways to ensure that foreign investment respects human rights and that economic rules do not in fact undermine state accountability for its human rights obligations.

## DAY ONE

### PRESENTATION ONE

#### Human Rights in Investor-State Arbitration

Presenter: Luke Eric Peterson, Editor, Investment Arbitration Reporter

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In recent decades, international commercial law has evolved separately from human rights law. More than 3000 bilateral investment treaties (BITS) now exist, some as investment chapters within trade agreements. Even if there is no agreement covering a particular investment, the investor can incorporate in a third country and find protection under the umbrella of its investment protection treaties.

This vast network of agreements—which guarantees investors “fair and equitable treatment,” “full protection and security,” and protection from expropriation—do not acknowledge other legal obligations of the state, including human rights or environmental obligations, and they place no related responsibilities upon the investor. Moreover, the agreements are enforced by rules that allow investors to sue governments directly, often in secret processes that have the power to award substantial financial penalties.

Increasingly, human rights arguments are being raised in investor-state arbitrations, and the arbitrators are finding themselves on the front-lines of important human rights debates, including specifically around the right to water, the right to non-discrimination and access to land. In the recent study produced for Rights & Democracy (*Human Rights and Bilateral Investment Treaties: Mapping the role of human rights law within investor-state arbitration*), we have documented actual cases where human rights are arising in investment treaty disputes. We found two trends: first, investors themselves are invoking human rights law to support their cases; and second, in some cases host governments are justifying their actions by citing human rights obligations. We also found that civil society has begun to intervene in arbitration proceedings through the submission of *amicus curiae*.

By referencing the narrow range of human rights that can be understood to actually protect investors (e.g. rights to due process or protection for property), arbitrators have demonstrated that human rights law can be relevant to BITS dispute settlement. This concession, in turn, has opened the door for host states to justify their actions by referring to human rights law. For example, the Government of Argentina has argued that it has obligations related to the human right to water that justify the cancellation of a water concession to Aguas Argentina. In South Africa, the government has pointed to obligations to take steps to eliminate inequality in the workplace and in broader society as its defence in a case brought to arbitration by European mining companies.

An emerging set of cases that will be of interest to human rights advocates are those dealing with land reform initiatives designed to redress unequal ownership patterns. Investors are bringing complaints forward to demand full market-value compensation for “expropriation”.

What these case examples illustrate is that key human rights debates will be determined by investment dispute arbitration panels without the participation or oversight of the UN human rights system. It is important therefore to monitor developments in this booming area of international law—

acknowledging that this is difficult to do when legal pleadings and oral hearings may be closed to the public. Further, efforts should be made to provide clear guidance to arbitrators as they consider how to interpret human rights obligations in relation to BITS obligations. More attention should be given to resolving the overlapping jurisdiction of adjudicative mechanisms related to human rights and investment in an effort to protect the public interest. Also, given that governments have embraced powerful treaties which limit state sovereignty in order to protect foreign investors, these same governments can no longer oppose stronger human rights protection or adjudicative mechanisms on the grounds of sovereignty.

## **PRESENTATION TWO**

Domestic Adjudication of Bilateral Investment Treaties Arbitration: The *Foresti* Case  
Presenter: Malcolm Langford, Research Fellow and Director of the Human Rights and Development Research Group, University of Oslo

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The *Foresti* case involves Italian granite companies operating in South Africa who have filed a claim at the International Center for Investment Dispute Settlement (ICSID). The central questions in this case pertained to the definition of expropriation and the alleged unfairness of the black empowerment policies. The dispute challenges South Africa's Mineral and Petroleum Resources Development Act for its conversion of mineral rights into licenses and for application of the black economic empowerment policy.

Human rights advocates argue that given the state's primary responsibility for protection of human rights, domestic courts must have a role to play when pending investment arbitration potentially threatens the state's constitutional and international human rights obligations. For example, in *Foresti*, if the penalty requested is applied, it will violate the South African constitution. Moreover, the Universal Declaration of Human Rights entitles everyone to an "effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law".

There are three ways that ICSID arbitrators could interpret the BIT provisions in relation to international human rights law: as *lex specialis* (limited to the treaty provisions); as part of a unity of international law (not self-contained); or as subject to the supremacy of human rights law (based on UN Charter). There are a number of known cases illustrating these different interpretations of the relationship between legal regimes. They provide two legal models to support domestic adjudication of human rights disputes involving foreign investors. The first model derives from the premise that a particular BIT is inconsistent with a related constitution. The second model may allow the transfer of sovereign rights to inter-state institutions but does not permit alteration of the basic provisions of the constitution.

It will be difficult to overcome BITS provisions that mandate a direct path to international arbitration unless the treaty itself is struck down as unconstitutional. For example, mobilizing public opinion around these technical issues will be a challenge and even governments may hesitate in the interests of preserving their commercial reputations.

## **PRESENTATION THREE**

### Understanding Complicity

Presenter: Carlos Lopez, Project Director, International Economic Relations, International Commission of Jurists (ICJ)

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The recent ICJ report entitled *Corporate Complicity and Legal Accountability* is comprised of three volumes that analyse the legal and policy content of corporate complicity with gross human rights violations. The report is the result of a three year process involving an international panel of experts

Volume One, *Facing the Facts and Charting a Legal Path*, defines what corporate complicity would mean in non-legal terms (ie. as used in the Global Compact or other similar documents). Volume Two, *Criminal Law and International Crimes*, looks at the circumstances in which international or domestic criminal law can be used to hold companies and their representatives responsible for human rights violations. Volume Three, *Civil Remedies*, explores the way in which civil law applies to situations in which companies are complicit with human rights abuses.

In volume two, the Panel considered three forms of accomplice criminal liability that would be most relevant to companies and their representatives: aiding and abetting; common purpose liability; and superior responsibility. Prosecution could take place both in international jurisdictions such as the International Criminal Court or in national courts. States could also exercise national criminal jurisdiction in relation to crimes committed outside its territory “if the crimes are committed abroad by its nationals”.

In looking at domestic civil law legislation (liability for tort or non-contractual), the objective is to regulate and provide compensation in situations where harm is caused outside of contractual obligations between the actor and the victim. However, it is often difficult for victims of human rights abuses of companies to obtain justice, particularly across borders. There are several recent examples of how the US Alien Tort Act has struggled to hold American investors accountable for human rights claims from communities in other countries.

It is clear from the Panel’s investigation that company representatives found to have been involved in human rights abuses can be held accountable in a variety of domestic and international jurisdictions. However, in the context of civil liability one outstanding problem remains: rules that provide for the application of law of the country where the violation took place, rather than of the country in which the decisions giving rise to those abuses were taken. This tendency restricts the ability of victims to obtain access to remedies and reparations, particularly in authoritarian or dysfunctional states.

## **PRESENTATION FOUR**

### The Question of Jurisdiction and Extra-Territorial Obligation (ETO)

Presenter: Rolf Künemann, Human Rights Director and ETO Secretariat, FIAN International

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Human rights define the relationship between individuals (alone or in community) and the state. States have the obligation to respect, protect and fulfil human rights within their territories. The state's obligation towards a person outside of its territory is called an extra-territorial obligation.

When human rights are breached, it is considered to be a violation. Breaches of obligations are “pre-damage”. They are identifiable before evaluation of damage and before determining responsibility. Responsibility is the result of attributing human rights damages to the violator. The principle of extra-territoriality must be consistent with the principles of responsibility which are best explained by the *Draft articles on Responsibility of States for Internationally Wrongful Acts* found at [http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf](http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf).

It is important not to confuse the jurisdiction of a state with the jurisdiction of a court to hear a case. Jurisdiction is not essentially a territorial concept. In human rights terms, it defines the scope of application of a particular treaty in relation to the situation in question.

International human rights law describes three levels of a state's human rights obligations: to respect, to protect and to fulfill. These obligations are applied both within the territory and extra-territorially. The respect obligation is always applicable and comes up in relation to situations of armed conflict or when sanctions may be applied. For protect and fulfill obligations, jurisdiction describes the competence and permission to act. These concepts may be relevant for discussions about the regulation of trade and investment for example or for development transfers (assistance).

For those of us interested in emphasizing the role of home states in negotiating bilateral investment treaties, there are several challenges before us. We must resolve the relationship between extra-territorial human rights obligations in relation to territorial obligations. We must better understand the meaning of “maximum available resources” in the context of international development assistance. We must clarify questions about responsibility, for example by looking at shared responsibility between the victim's state and the foreign state in question.

A consortium of university institutes, international lawyers and civil society representatives has been convened to address the issue of extra-territorial obligations. The goal of the consortium is to draft an informed expert opinion on the issue. The consortium will host a conference at the University of Lancaster in September. For more information, please see [www.lancs.ac.uk/fass/projects/humanrights](http://www.lancs.ac.uk/fass/projects/humanrights).

## **PRESENTATION FIVE (DEMONSTRATION)**

### The Human Rights Impact Assessment (HRIA) Guide for Communities

Presenter: Caroline Brodeur, Programme Officer, Economic and Social Rights Rights & Democracy

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The HRIA interactive guide is designed specifically for communities wishing to carry out assessments of foreign investment projects affecting their human rights. It provides information to explain and support a series of steps to be followed: preparation of the study; identification of the legal framework; adaptation of the guide to the context; the investigation process; analysis and report-writing; monitoring and follow-up.

The guide uses as its primary human rights reference, the *International Bill of Human Rights*. Its approach is participatory, emphasizing leadership of the affected community throughout the process. The methodology is adaptable and can be used to analyze issues of interest to indigenous organizations, trade unions, municipal associations, farmer associations, women's rights groups, and other civil society organizations. The guide could also provide useful guidance to companies wishing to integrate community participation into their project management systems.

An interesting characteristic of the guide is the flexibility it allows the user. It is possible, for example, to select specific human rights to be assessed from a list provided. Having selected the rights, the user is then able to select indicators (questions) for each right from a range of suggestions provided. The user is also encouraged to develop original indicators based on the particularities of the case and the objectives of the community.

As the assessment process unfolds and information is gathered, it is entered directly into the program and a draft report is automatically generated. However, this does not prevent the user from revisiting certain steps based on new information or other considerations. The program allows the user to move back and forth, changing or adding data within each step until the desired outcome is achieved.

It is important to note that the guide can be installed on an infinite number of computers and is trilingual (English, French and Spanish). Copies of the CD-ROM are freely available from Rights & Democracy. The program may also be downloaded from our website at [www.dd-rd.ca/hria](http://www.dd-rd.ca/hria).

## DAY TWO

### PRESENTATION SIX

#### Access to Information in Investment Arbitration

Presenter: Marcos Orellana, Center for International Environmental Law

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Since most investment arbitrations are held *in camera* and pleadings are not made public, access to information (ATI) is a useful tool to gather information related to investment disputes and their arbitration processes. The premise is based on three assumptions: that blanket secrecy in investment arbitration is incompatible with the human right to information; that access to information is itself rooted in freedom of expression and principles of democratic governance; and that ATI restrictions can accommodate privileged and proprietary information, but cannot justify blanket secrecy.

An illustrative example is the Trillium case in Chile. This case involved a dispute about massive logging in Patagonia and requests from civil society for information on contracts and about the investors. A key question in the case was whether or not the failure to provide information constituted a violation of the right to freedom of thought and expression. The case was heard at the Inter-American Court, which concluded, first, that there is a link between ATI and the freedom of expression protected by Article 13 of the *American Convention on Human Rights*. Second, the court found that although ATI is not absolute, it does impose positive obligations on the state to provide information of public interest.

The case has implications beyond the Americas, as the human rights cited by the Court are virtually the same as those found within the *International Covenant on Civil and Political Rights*. Africa also has provisions regarding the right to receive information and the vast majority of European countries have ATI laws. The application of human rights law on access to information to investment arbitration requires a determination about whether or not investment arbitrations are of public interest. In this respect, the fact that the state is acting in its sovereign capacity, that the proceedings will adjudicate on the international responsibility of the state, and that the subject matter of the cases involves the public interest, all confirm that the information produced in investment arbitration is of public interest. In addition, potential remedies affect the public purse and therefore are relevant. We might also want to clarify what information we are seeking, for example, pleadings, hearings, orders and awards. We should also think about how to ensure that the information requested is not received several years after the case has been decided.

Permissible restrictions to ATI exist in order to balance competing rights and to harmonize the enjoyment of rights with other concerns. Human rights law requires a strict interpretation of the permissible restrictions. For example, ATI can be restricted due to confidential proprietary business information and privileged information like state secrets. A reform of ICSID rules has taken place since the *Cochabamba* (Bolivia) decision. In that case, the tribunal stated that it had no power to allow public access to the arbitration. Another arbitral tribunal later departed from this reading in the *Suez/Vivendi (Aguas Argentinas)* case, by accepting an *amicus curiae* brief from NGOs despite the objection of one of the parties. This decision prompted a revision of the ICSID arbitral rules. Lastly, the UN Commission on International Trade Law (UNCITRAL) has been under revision since 2006 and despite conflicting views has recognized the importance of ensuring transparency and committed to addressing the topic.

In conclusion, blanket secrecy in investment arbitration is incompatible with the right to information, which itself is rooted in the freedom of expression and in the principles of democratic governance. Permissible restrictions to ATI can accommodate privileged and proprietary information but cannot justify blanket secrecy.

## **GROUP DISCUSSION: STRATEGIC OPENINGS**

Moderator: Carole Samdup, Senior Advisor, Economic and Social Rights, Rights & Democracy

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**Carole Samdup** moderated a concluding discussion about strategic openings provided by upcoming events. She also noted two distinct approaches that were highlighted during the meeting discussions. Some participants favour an “integrationist” approach, which seeks to engage the system in a variety of ways including through submission of *amicus curiae* or ATI requests. Others prefer to focus on challenging the legality of BITS themselves, described as the “stop it” approach. Participants felt that all efforts should include the creation of popular education materials for various stakeholder groups such as parliamentarians, arbitrators and civil society. Finally, participants felt that it would be important to more closely monitor cases being brought to arbitration that might have a human rights dimension.

### Review of upcoming events:

Seminar on Investment Treaties and the Extractive Sector  
Host: Canadian Council for International Co-operation  
Ottawa, May 13-14, 2009

Seminar: The Global Land Grab and Human Rights  
Host: University of Geneva, 3D  
Geneva, May 16, 2009

International Conference on Access to Justice  
Host: International Commission of Jurists  
South Africa, end June, 2009

Lancaster Conference on Extra-territorial Obligations  
Host: Lancaster University, UK  
September 9-11, 2009

## ANNEX 1: SEMINAR AGENDA

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Thursday, March 19, 2009

- 09:00        **Welcome**  
Razmik Panossian, Director of Programmes, Policy and Planning  
(Rights & Democracy)
- 09:15        **Meeting Introduction**  
Carole Samdup (Rights & Democracy)
- 09:30        **Human Rights in Investor-State Arbitration**  
Luke Eric Peterson (Investment Arbitration Reporter) will provide an overview of human rights in investor-state arbitration, including proposals for future research and advocacy.
- 10:00        **Discussion**
- 11:00        **Domestic Adjudication of Bilateral Investment Treaties Arbitration: the Foresti Case**  
Malcolm Langford (University of Oslo) – co-writing with Khulekani Moyo- will present how investment disputes are and could be addressed within national-level processes. The research draws on earlier collaboration with Bruce Porter (Social Rights Advocacy Centre).
- 11:30        **Discussion**
- 12:30        **Lunch**
- 13:30        **Understanding Complicity**  
Carlos Lopez (International Commission of Jurists) will present the key findings of ICJ's *Expert Legal Panel on Corporate Complicity in International Crimes* including identification of challenges for future work.
- 14:00        **Discussion**
- 15:00        **The Question of Jurisdiction and Extra-territorial Obligation**  
Rolf Künemann (FIAN International) will review the concept of extra-territoriality and the challenges it presents for legal claims related to economic and social rights in particular.
- 15:30        **Discussion**
- 16:30        **Demonstration of the Human Rights Impact Assessment Guide for Communities**  
Caroline Brodeur (Rights & Democracy) will present Rights & Democracy's methodology for community-based human rights impact assessments.

Friday, March 20, 2009

- 09:00            **Review Day One and Expectations for Day Two Discussion**  
Sylvain Beauchamp (Rights & Democracy)
- 09:15            **Access to Information in Investment Arbitration**  
Marcos Orellana (CIEL) will review opportunities and obstacles for researchers using ATI as a tool for gathering information related to investment disputes and their arbitration processes.
- 09:45            **Discussion: Strategic Openings**  
Participants will evaluate opportunities and challenges evolving from the previous day discussions including: gaps in existing research; expansion of networks; advocacy tools; and identification of key moments during the coming three years.
- 12:00            **Conclusion and Lunch**

## ANNEX 2: MEETING DOCUMENTS

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*Human Rights and Bilateral Investment Treaties: Mapping the role of human rights law within investor-state arbitration*, 2009, Rights & Democracy, [www.dd-rd.ca](http://www.dd-rd.ca)

*Mining the Gap? Human Rights, Bilateral Investment Treaties and Foresti v South Africa*, Malcolm Langford and Khulekani Moyo, Norwegian Centre for Human Rights, 2009

*Human Rights Law on Access to Information and Investment Arbitration*, Marcus Orellana, Center for International Environmental Law, 2009

*Final Report of the Expert Legal Panel on Corporate Complicity in International Crimes*, International Commission of Jurists, 2008, [www.icj.org](http://www.icj.org)

## ANNEX 3: PARTICIPANT LIST

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Sylvain Beauchamp	<a href="mailto:sbeauchamp@dd-rd.ca">sbeauchamp@dd-rd.ca</a>	Senior Policy Advisor, Partnerships Rights & Democracy ( <i>Montreal, Canada</i> )
Jason Brickhill	<a href="mailto:jasonb@lrc.org.za">jasonb@lrc.org.za</a>	Attorney, Constitutional Litigation Unit Legal Resources Centre ( <i>Johannesburg, South Africa</i> )
Caroline Brodeur	<a href="mailto:cbrodeur@dd-rd.ca">cbrodeur@dd-rd.ca</a>	Programme Officer, Economic & Social Rights Rights & Democracy ( <i>Montreal, Canada</i> )
Maude Côté	<a href="mailto:mcote@dd-rd.ca">mcote@dd-rd.ca</a>	Attorney, Consultant Rights & Democracy ( <i>Montreal, Canada</i> )
Peter Frankental	<a href="mailto:peter.frankental@amnesty.org.uk">peter.frankental@amnesty.org.uk</a>	Director, Economic Relations Program Amnesty International, UK ( <i>London, Great Britain</i> )
Rolf Künnemann	<a href="mailto:kuenemann@fian.org">kuenemann@fian.org</a>	Human Rights Director and ETO Secretariat FIAN International ( <i>Heidelberg, Germany</i> )
Malcolm Langford	<a href="mailto:malcolm.langford@nchr.uio.no">malcolm.langford@nchr.uio.no</a>	Research Fellow, Director, Human Rights and Development Research Group, Norwegian Centre on Human Rights, University of Oslo ( <i>Norway</i> )
Michelle Leighton	<a href="mailto:mleighton@usfca.edu">mleighton@usfca.edu</a>	Director, Human Rights Program Center for Law and Global Justice University of San Francisco ( <i>USA</i> )
Carlos Lopez	<a href="mailto:carlos.lopez@icj.org">carlos.lopez@icj.org</a>	Director, International Economic Relations International Commission of Jurists ( <i>Geneva, Switzerland</i> )
Ezequiel Nino	<a href="mailto:enion@acij.org.ar">enion@acij.org.ar</a>	Attorney, Asociación Civil por la Igualdad y la Justicia ( <i>Buenos Aires, Argentina</i> )
Marcos Orellana	<a href="mailto:morellana@ciel.org">morellana@ciel.org</a>	Senior Attorney, Center for International Environmental Law, ( <i>Washington, DC, USA</i> )
Razmik Panossian	<a href="mailto:rpanossian@dd-rd.ca">rpanossian@dd-rd.ca</a>	Director of Policy, Programmes and Planning Rights & Democracy ( <i>Montreal, Canada</i> )
Luke Eric Peterson	<a href="mailto:lukeericpeterson@gmail.com">lukeericpeterson@gmail.com</a>	Editor, Investment Arbitration Reporter ( <i>New York, USA</i> )
Aisling Reidy	<a href="mailto:reidya@hrw.org">reidya@hrw.org</a>	Senior Legal Advisor, Human Rights Watch ( <i>New York, USA</i> )
Cesar Rodriguez	<a href="mailto:crodrigu@ssc.wisc.edu">crodrigu@ssc.wisc.edu</a>	Attorney, De Justicia ( <i>Bogota, Colombia</i> )
Carole Samdup	<a href="mailto:csamdud@dd-rd.ca">csamdud@dd-rd.ca</a>	Senior Advisor, Economic and Social Rights Rights & Democracy ( <i>Montreal, Canada</i> )
Isabelle Solon Helal	<a href="mailto:ihelal@dd-rd.ca">ihelal@dd-rd.ca</a>	Programme Officer, Women's Rights Rights & Democracy ( <i>Montreal, Canada</i> )
Alexandra Spieldoch	<a href="mailto:aspieldoch@iatp.org">aspieldoch@iatp.org</a>	Director, Global Norms, Institute for Agriculture and Trade Policy ( <i>Minneapolis, USA</i> )
Gauri Sreenivasan	<a href="mailto:gauri@ccic.ca">gauri@ccic.ca</a>	Policy Coordinator, Canadian Council for International Co-operation ( <i>Ottawa, Canada</i> )