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Pillar III

Access to remedy:

State judicial and non-judicial and non-state grievance mechanisms

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[This outline is based on Peter T Muchlinski *Advanced Introduction to Business and Human Rights* (Cheltenham, Edward Elgar, 2022) chapter 6.]

1. Introduction

The third pillar of the UNGPs, access to remedy, is based on, "[t]he need for rights and obligations to be matched to appropriate and effective remedies when breached."[1]

Remediation connotes legal liability but, importantly, also includes other methods that offer reparation to victims of human rights abuses:

[1] UNGPs General Principle (c) at https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf

- Legal liability: this can help deter human rights abuses by providing compensation provided that liability cannot be avoided or mitigated because of
    - unsustainable litigation costs for claimants or
    - through substantive and/or procedural rules that complicate establishing liability.

- Human rights remediation raises not only questions of compensation but also of upholding respect for those rights. Human rights abuses can be a particularly serious form of misconduct requiring distinct forms of redress. Apart from monetary compensation this should also involve vindication for the victim by bringing the perpetrator to justice as part of a wider remediation process. Accordingly, in some cases, criminal sanctions may be appropriate.

- The remediation process may need to go beyond legal remedies and sanctions and cover what may be termed "moral remediation" which includes, for example, formal apologies, a commitment to the commemoration of victims and other symbolic forms of corporate acceptance of moral responsibility for the harm caused.

- Remediation strategies must also consider alternative methods of dispute avoidance and resolution so that potential victims can work with the business, either directly or through their representatives, to create an environment in which their rights are respected. These may be
    - state-sponsored mechanisms, such as a state-based ombudsperson or specialised human rights agency, with authority to intervene in corporate human rights issues. Of significance here is the system of National Contact

Points (NCPs) established by states members of the OECD. The NCPs interpret the OECD *Guidelines for Multinational Enterprises* which, as discussed in earlier chapters, now include HRDD as part of their requirements. Another relevant example is the Canadian Business and Human Rights Ombudsperson.

- In addition to state-sponsored mechanisms corporate level grievance mechanisms have been established by many firms to improve their understanding of human rights risks and to create dialogue with groups and individuals whose rights may be potentially, or actually, affected by corporate operations.

2. Legal Remedies

According to Principle 25 of the UNGPs, as part of their duty to protect against business-related human rights abuses, states must,

> "take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy."[2]

Access to legal remedies is essential because, without it, the state duty to protect, "can be rendered weak or even meaningless."[3]

[2] UNGPs above n 1
[3] ibid Commentary to Principle 25.

The state has a duty to prevent non-state actors from violating the human rights of other non-state actors within its jurisdiction. This is achieved through two main methods:

- Under the "horizontal effects" doctrine whereby the state may offer remedies for corporate human rights violations through legislation.
- In addition, the state creates the system of litigation through which human rights based claims against businesses may be brought.

In recent years such litigation has burgeoned:

- Initially, the US led the way with claims under the Alien Tort Claims Act (ATCA) but a series of US Supreme Court rulings has restricted the Acts reach.[4]
- More recently the courts of the UK, Canada, The Netherlands and France, among others, have admitted human rights related claims against parent corporations of MNEs based within these jurisdictions. These aim to hold the parent liable for negative environmental, health and safety, labour or human rights impacts associated with the operations of their overseas affiliates and contractors.

Access to justice can be hard, especially for developing host state-based claimants, due to local factors related to

- the lack of specialist litigation lawyers,
- the prohibitive cost of litigation in the absence of legal aid,
- the risk of judicial corruption and

[4] Detailed analysis is found in Peter T. Muchlinski *Multinational Enterprises and the Law* (Oxford, Oxford University Press, 3rd ed, 2021) at 588-94 and see further Beth Stephens "The rise and fall of the Alien Tort Statute" in Surya Deva and David Birchall (eds) *Research Handbook on Human Rights and Business* (Cheltenham, Edward Elgar Publishing, 2020) ch 3.

- the active discouragement of litigation against foreign investors by the host state.[5]

Nonetheless human rights based claims have been brought against corporations in developing host states as well.[6]

This section discusses the main obstacles faced by claimants in home state based corporate human rights litigation.[7] These relate to:

- substantive legal obstacles affecting the liability of transnational corporate groups and supply chains;
- the range of available causes of action and whether new human rights based remedies must develop;
- the financial problems faced by claimants; and
- certain tactical and political obstacles to the facilitation of business and human rights litigation.
- The section will end by examining some recent judicial developments recognising human rights based claims against corporate defendants.

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[5] See Gwynne Skinner, Robert McCorquodale and Olivier De Schutter *The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business* (Core, The International Corporate Accountability Roundtable (ICAR), The European Coalition for Corporate Justice (ECCJ), December 2013) 24 at http://corporatejustice.org/wp-content/uploads/2021/04/the_third_pillar_-access_to_judicial_remedies_for_human_rights_violation.-1-2.pdf ; Gwynne Skinner with Rachel Chambers and Sarah McGrath *Transnational Corporations and Human Rights: Overcoming Barriers to Judicial Remedy* (Cambridge, Cambridge University Press, 2020) ch 3.

[6] See e.g. *Gbemre v. Shell Petroleum Development Company of Nigeria Ltd. and Others* Unreported Suit No. FHC/CS/B/153/2005 delivered on 14 November 2005 at http://climatecasechart.com/climate-change-litigation/non-us-case/gbemre-v-shell-petroleum-development-company-of-nigeria-ltd-et-al/ where a Nigerian federal court ordered oil companies to stop flaring gas in the Niger Delta as this violated the guaranteed fundamental rights of life and dignity of human persons provided in the Federal Constitution and the African Charter on Human and Peoples Rights. The Nigerian government ignored the judgment see: Bukola Faturoti, Godswill Agbaitoro and Obinna Onya "Environmental Protection In The Nigerian Oil and Gas Industry and *Jonah Gbemre V. Shell PDC Nigeria Limited*: Let The Plunder Continue?" 27(2) African Journal of International and Comparative Law 225 (2019).

[7] See generally Skinner with Chambers and McGrath above n 5; Richard Meeran (ed) *Human Rights Litigation Against Multinationals in Practice* (Oxford, Oxford University Press, 2021). For the problems faced by corporate defendants see further Rae Lindsay "Multinational Human Rights Litigation from the Perspective of Business" in Meeran (ed) ibid ch 11.

While this section focuses on barriers to successful litigation it should be borne in mind that litigation can often be an incomplete answer to remediation:

- Litigation is hard on all parties,
- It can take many years to resolve and
- It may not provide sufficient "moral remediation" for victims.
- Many, if not most, cases settle out of court and the sums involved may prove inadequate recompense for the harm suffered.
- Victims also have limited control over litigation once it is in the hands of their lawyers especially if it occurs far away from home in a foreign jurisdiction.

2.1. Substantive Legal Obstacles to Group and Supply Chain Liability

The most important obstacles stemming from established principles of law are:

- The limitation of a state's legal jurisdiction to its territory,
- Restrictive corporate group and supply chain liability rules, and
- The problem of assessing corporate complicity in human rights violations.

2.1.1. Jurisdictional obstacles

The territorial nature of legal jurisdiction can limit the reach of a court when considering the responsibility of a parent company located in the court's jurisdiction for the acts of its subsidiary located in a host country: [8]

- The parent company can argue that it was not present in the host country when the alleged human rights violations arose and so the home jurisdiction has no link to the dispute.[9]
- In common law jurisdictions parent companies have also sought to avoid claims through the so-called *forum non conveniens* doctrine, whereby the court may vacate proceedings to another jurisdiction on the grounds that it constitutes a more appropriate forum for their resolution. The parent can argue that, as the main facts of the case occurred in the host country and the preponderance of evidence and witnesses is located there, the host county courts ought to have jurisdiction.[10]

2.1.2. Restrictive corporate group and supply chain liability rules

These jurisdictional arguments are tied up with the legal separation of the parent company from its subsidiary:

[8] For a detailed analysis and discussion of jurisdictional problems relating to the operations of MNEs see Muchlinski above n 4 ch 4.
[9] See e.g. *Adams v Cape Industries plc* [1990] Ch 433 where the English Court of Appeal held that the defendant UK parent company need not comply with an order for damages, issued by a Texas court, compensating employees of third parties who had contracted disease after exposure to asbestos sold by the defendant in the US as it had no presence in the US even though it had sold the asbestos through a sales subsidiary that was later turned into an independently owned sales company in anticipation of the litigation.
[10] See e.g. *In Re Union Carbide Gas Plant Disaster at Bhopal India* (Opinion and Order 12 May 1986) 634 F.Supp. 842 (SDNY 1986), 25 ILM 771 (1986) and P.T. Muchlinski "The Bhopal Case: Controlling Ultrahazardous Industrial Activities Undertaken by Foreign Investors" 50 MLR 545 (1987).

- In a corporate group each company is a separate legal entity even though the enterprise is managed as an integrated economic unit. This permits the parent to deny legal responsibility for the acts of its subsidiary on the basis of their separate legal status.[11]
- In relation to jurisdiction the parent can also argue that the acts of the overseas subsidiary have no connection with the home jurisdiction and, according to the international legal rules on jurisdiction, the court cannot exercise personal jurisdiction over the subsidiary as this would be an impermissible act of "extraterritorial" jurisdiction.

In cases involving a contractually based global supply chain, the home country company may avoid liability on the basis that

- It does not have any direct legal relation with a sub-contractor further down the chain of contracts and so cannot be held responsible for the latter's alleged violations of human rights.
- Even in relation to the actions of a first tier sub-contractor, with which there exists a direct contractual link, home country company liability would be contingent on proof that the sub-contractor acted as the agent or "alter ego" of the former and not as an independent contractor. In such cases the home country court may restrict liability

[11] This should be distinguished from the doctrine of "lifting the corporate veil" which is used to attribute the acts of a company to its shareholders in cases of fraud or abuse of the corporate form: *Adams v Cape Industries* above n 9. Lifting the veil on the parent as the main shareholder in its subsidiary has been proposed as a solution to group liability but has been largely ineffective. See further Muchlinski above n 4 at 314-6; Barnali Choudhury and Martin Petrin *Corporate Duties to the Public* (Cambridge, Cambridge University Press, 2019) ch 5; Radu Mares "Liability within corporate groups: parent companies' accountability for subsidiary human rights abuses" in Deva and Birchall (eds) above n 4 ch 21.

due to the lack of any contractual control on the part of the home country company over the foreign sub-contractor.

- These obstacles have led courts to avoid a finding that the home country company can be held liable for the human rights violations of sub-contractors in the supply chain.

  For example,

  - In litigation arising out of the collapse of the Rana Plaza garment factory in Bangladesh in 2013, US and Canadian courts held that defendant garment retailers in the US and Canada were under no duty of care towards employees, and relatives of deceased employees, of sub-contractors, nor under any duty to oversee safety at Rana Plaza, over which they had no control.[12]

2.1.3. Corporate complicity in human rights violations

A further conceptual obstacle to parent company liability in a group, or home company liability in a global supply chain, is the issue of corporate complicity in human rights violations. In many cases the host state subsidiary, or sub-contractor, may be involved in human rights violations primarily committed by host state authorities. Here the extent of the subsidiary's complicity in these violations will be key to establishing liability.[13]

[12] Delaware Superior Court, *Abdur Rahaman et al. v JCPenney Corp. Inc. et al*., Decided May 4, 2016 C.A. No. N15C-07-174 MMJ at https://courts.delaware.gov/Opinions/Download.aspx?id=240380; *Das v. George Weston Limited* [2017] ONSC 4129 upheld on appeal: *Das v. George Weston Limited*, [2018] ONCA 1053.
[13] The following paragraphs are taken from Muchlinski above n 4 at 589-90.

Example:

- *Doe v Unocal:* the United States Court of Appeal for the Ninth Circuit affirmed that a corporation could be liable for aiding and abetting crimes or torts involving alleged violations of fundamental human rights under the ATCA even if had not directly taken part in the alleged violations but had given practical assistance and encouragement to the commission of the crime or tort (termed the *actus reus* of aiding and abetting) and had actual or constructive knowledge that its actions would assist the perpetrator in the commission of the crime or tort (termed the *mens rea* of aiding and abetting). [14]

This principle was reviewed in *Doe v Nestle*:

- The US Court of Appeal for the Ninth Circuit accepted that knowledge of adverse human rights effects was sufficient to ground aiding and abetting liability.[15]
- On appeal to the US Supreme Court, this decision was overturned. The plaintiffs had argued that the US-based respondent corporations had aided and abetted human rights violations, involving abuse of child workers on cocoa plantations in the Ivory Coast, by providing training, equipment and finance to cocoa farmers employing child labour. The Supreme Court rejected these claims. The conduct relied upon by the plaintiffs all took place outside the US and so could not justify the extraterritorial application of ATCA.[16] The Supreme Court added that domestic conduct sufficient to

[14] *John Doe v Unocal* 395 F.3d 978; 2003 U.S. App. LEXIS 2716. The case settled in December 2004: "Unocal settles Burma abuse case" *Financial Times* 14 December 2004 at 12.
[15] See *Doe VIII v Exxon Mobil Corp* 654 F.3d 11 (DC Circ. 2011) and *Doe v Nestle* 738 F.3d 1048 (9th Cir, 2013).
[16] *Nestlé U.S.A.v Doe*, 593 U.S. __ (2021) (slip opinion) at https://www.supremecourt.gov/opinions/20pdf/19-416_i4dj.pdf.

> attract ATCA claims had to go beyond general corporate activity common to most corporations and in this case the respondents had done no more than this.[17]

2.2. Causes of Action

The choice of remedy for human rights violations depends on determining which heads of damage apply:

- These may involve civil claims and/or criminal claims based on injury to person and/or property.
- Furthermore, much will depend on whether the claim is decided according to the law of the court's jurisdiction or by the law applicable where the alleged violations took place. This turns on whether the court will accept that the claims have a sufficient factual connection to the court's jurisdiction to permit its law to apply.

A key question arises as to whether a direct human rights based claim can be admitted, illustrated by the Canadian Supreme Court decision in *Nevsun v Araya*:[18]

> Three workers at the Bisha mine in Eritrea, owned by Canadian mining corporation Nevsun Resources Ltd, brought a class action on behalf of over 1000 workers claiming to have been compelled to work at Bisha between 2008 and 2012. They claimed damages for breaches of domestic torts including: conversion, battery, false imprisonment, conspiracy and negligence. In addition, they claimed damages for

[17] ibid at 5.
[18] *Nevsun Resources v Araya* 2020 SCC 5 at https://www.canlii.org/en/ca/scc/doc/2020/2020scc5/2020scc5.html. For detailed analysis see Peter Muchlinski "Corporate Liability for Breaches of Fundamental Human Rights in Canadian Law: *Nevsun Resources Limited v Araya*" Amicus Curiae, Series 2, Vol 1, No 3, 515-41 (2020) available at https://journals.sas.ac.uk/index.php/amicus.

breaches of customary international law prohibitions against: forced labour, slavery, cruel, inhuman or degrading treatment and crimes against humanity.[19] The alternative claims were made as it was uncertain whether Canadian law could cover the claims under existing torts or whether new international law claims were admissible.

Nevsun had argued that claims based directly on customary international law violations should be struck out as they disclosed no reasonable claim or were unnecessary. The majority rejected this argument as it was not "plain and obvious" that the claims had no reasonable prospect of success, or were unnecessary, adding that Canadian courts were an active participant in the global development of international principles in the fields of human rights and other laws impinging on the individual, that international law not only comes down from the international to the domestic sphere but also "bubbles up" from national courts and that Canadian courts should meaningfully contribute to the "choir" of domestic court judgments around the world shaping the "substance of international law".[20] Abella J, for the majority added:

> "As a result, in my respectful view, it is not "plain and obvious" that corporations today enjoy a blanket exclusion under customary international law from direct liability for violations of "obligatory, definable, and universal norms of international law", or indirect liability for their involvement in what Professor Clapham calls "complicity offenses"."[21]

[19] *Nevsun Resources* ibid para 4.
[20] ibid paras 70-72.
[21] ibid para 113.

> Furthermore, the majority concluded that Eritrean workers allegations encompassed conduct not captured by existing domestic torts as their character was of a more public nature since they "shock the conscience of humanity" and their heinous nature could not be adequately addressed by such torts, even by awarding punitive damages.[22]

The *Nevsun* decision ended in an out of court settlement leaving unanswered the question whether there was indeed an international law based Canadian remedy for corporate human rights violations.[23] Nonetheless it can be regarded as a landmark in the development of corporate human rights liability.[24] *Nevsun* permits the framing of claims based on norms of international human rights law that go beyond domestic law torts which have steered decisions in other jurisdictions.[25]

Was *Nevsun* correctly decided?

- In their dissent in *Nevsun*, Justices Brown and Rowe asserted that the courts were not as well suited to make legal change as the legislature which had the institutional competence and the democratic legitimacy to enact major legal reform. By contrast the courts were confined to considering the circumstances of the particular parties before them, and so could not anticipate all the consequences of a change.[26]

[22] ibid paras 124-6.
[23] Yvette Brend "Landmark settlement is a message to Canadian companies extracting resources overseas: Amnesty International" CBC News (23 October 2020) at https://www.cbc.ca/news/canada/british-columbia/settlement-amnesty-scoc-africa-mine-nevsun-1.5774910
[24] See Upendra Baxi "Nevsun: A Ray of Hope in a Darkening Landscape?" 5(2) BHRJ 241 (2020), doi:10.1017/bhj.2020.17.
[25] See Beatrice A. Walton "International Decisions: *Nevsun v Araya*" 115(1) AJIL 107 at 112 (2020). doi:10.1017/ajil.2020.103
[26] See *Nevsun* above n 18 Brown and Rowe JJ para 225.

- This argument has also held sway before the US Supreme Court when considering whether ATCA established a principle of corporate human rights liability:

    - In *Jesner v Arab Bank* the majority held that neither the language of ATCA nor precedent supported an exception to the general principle that the courts should be reluctant to extend judicially created private rights of action.[27] This applied with particular force to the ATCA which implicates foreign-policy concerns that are the province of the political branches.[28]

- Furthermore, it is not entirely obvious that human rights based claims are better than tort claims.
    - Human rights claims originate against states not private persons or corporations.
    - In this light the dissenting judges in *Nevsun* asserted that tort remedies can offer effective relief against a corporate wrongdoer including the award of punitive damages to underscore the seriousness of the breach.[29]
    - Indeed, a variety of regulatory standards, in which human rights violations are implicit, are enforced against corporations through tort remedies.[30]

[27] *Jesner v Arab Bank* 584 U.S. ____, (2018) (Slip Opinion) at https://www.supremecourt.gov/opinions/17pdf/16-499_1a7d.pdf ; 57 ILM 631 (2018).
[28] ibid at 19. But see the dissent of Sotomayor, Ginsburg, Breyer and Kagan JJ accepting that tort claims can be brought against corporations for violations of international law and do not raise foreign policy concerns: *Jesner* ibid.
[29] *Nevsun* above n 18 Brown and Rowe JJ paras 220-1. See too Richard Meeran "Multinational Human Rights Litigation in the UK: A Retrospective" 6(2) BHRJ 255 at 268-9 (2021), doi:10.1017/bhj.2021.15 who sees tort claims as the easiest route to success.
[30] See Lisa J. Laplante "Human Torts" 39 Cardozo L. Rev. 245 (2017).

- It has also been argued that the common law of negligence may offer a stronger analytical tool than a claim based on a violation of positive human rights obligations for establishing the parameters of, and limits to, liability.[31]
- Accordingly, the use of existing tort claims may not effectively deprive the claimants of redress, though, as a matter of public policy some jurisdictions may develop new torts based directly on breaches of customary international law.
- Ultimately the choice should be based on what is the best claim to make to ensure effective remediation of victims.

2.3. Financial Obstacles

Principle 26 of the UNGPs expressly requires states to,

"ensure the effectiveness of domestic judicial mechanisms …including considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy."

The Commentary to Principle 26 lists examples of substantive and procedural barriers to litigation.[32]

Among practical and procedural barriers are:

[31] Vladislava Stoyanova "Common law tort of negligence as a tool for deconstructing positive obligations under the European convention on human rights" (2019) The International Journal of Human Rights, https://doi.org/10.1080/13642987.2019.1663342.

[32] UNGPs above n 1. For detailed analysis of obstacles to corporate human rights litigation and recommendations for improvements see Skinner, McCorquodale and De Schutter above n 5; Report of the United Nations High Commissioner for Human Rights "Improving accountability and access to remedy for victims of business-related human rights abuse" (UN Doc. A/HRC/32/19 10 May 2016) at https://undocs.org/A/HRC/32/19.

- Costs of bringing claims that go beyond an appropriate deterrent to unmeritorious cases and/or cannot be reduced to reasonable levels either through government support, litigation insurance, legal fee structures or other means;
- Difficulties in securing legal representation or inadequate procedures for class actions and other collective action procedures; and
- Lack of resources for the state to investigate individual and business involvement in human rights-related crimes.
- Procedural obstacles revolve mainly around the cost of litigation and the inequality of arms between corporations, enjoying expert legal resources and funding, and claimants, who often have few resources and rely on legal aid or other sources of benevolent funding.[33]
- The need for effective legal aid comes to the fore.[34]

2.4. Tactical, Political and Social Obstacles

- Key to an effective judicial remedy is that the court system is free from corruption, political or business influence.[35]
- The Commentary to Principle 26 of the UNGPs highlights, in addition, "that the legitimate and peaceful activities of human rights defenders are not obstructed."
- Furthermore, societal and cultural factors such as poverty levels, discrimination against women, minorities or other groups, literacy levels and access to legal information all contribute to the environment for remedy in the jurisdiction concerned.

[33] See UNGPs above n 1 Commentary to Principle 26.
[34] On which see further Muchlinski above n 4 at 595-6.
[35] See Muchlinski ibid at 596-7.

- A further issue concerns access to relevant corporate information, which may be withheld on grounds of commercial confidentiality, without which claimants may find it impossible to found their case.[36]

2.4.1. Human rights defenders

On the question of human rights defenders the UN Working Group on Human Rights and Business (UNWG) has reported that,

> "A large number of human rights defenders are under threat and attack because they raise concerns about adverse human rights impacts of business operations, often in the context of large development projects that affect access to land and livelihoods." [37]

According to the Office of the UN High Commissioner on Human Rights (OHCHR),

" "human rights defender" is a term used to describe people who, individually or with others, act to promote or protect human rights in a peaceful manner."[38]

Human rights defenders can act anywhere in the world, though mostly on the local or national level, to further and uphold any human rights. Their principal functions include:

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[36] For detailed analysis see Nicola Jägers "Access to effective remedy: the role of information" in Deva and Birchall (eds) above n 4 ch 19.
[37] UN Working Group on Business and Human Rights "The Guiding Principles on Business and Human Rights: guidance on ensuring respect for human rights defenders" UN Doc. A/HRC/47/39/Add.2 (22 June 2021) para 1 at https://undocs.org/A/HRC/47/39/Add.2. See further Business and Human Rights Resource Centre "Human Rights Defenders and Civic Freedoms" at https://www.business-humanrights.org/en/big-issues/human-rights-defenders-civic-freedoms/; David Birchall "The role of civil society and human rights defenders in corporate accountability" in Deva and Birchall (eds) above n 4 ch 20.
[38] UN Office of the High Commissioner on Human Rights "About Human Rights Defenders" at https://www.ohchr.org/en/issues/srhrdefenders/pages/defender.aspx

- collecting and disseminating information on violations;
- supporting victims, including through legal representation and bringing lawsuits;
- taking action to secure accountability and to end impunity;
- supporting better governance and government policy through political action;
- contributing to the implementation of human rights treaties; and
- playing a significant role in human rights education and training. [39]

2.4.2 Human rights defenders and the UNGPs:

- The UNWG recommends that states, in discharging their duty to protect human rights, actively enable human rights defenders to further business and human rights concerns including by protecting their rights and introducing sanctions against businesses that "caused or contributed to harm to a defender, or failed to actively take steps to prevent harm to a defender once such a risk is known to the business."[40]
- Equally, businesses, in furthering their responsibility to respect human rights, should at a minimum ensure that, "their activities, actions and omissions do not lead to retaliation, violence or stigmatisation against human rights defenders." [41] Respect for human rights defenders must inform business policy on human rights, HRDD must take account of the risk of human rights infringements against human rights defenders and human rights defenders should be treated as an expert resource enabling business enterprises to understand the concerns of affected individuals and communities on the

[39] ibid.
[40] UN Working Group above n 37 para 118.
[41] ibid para 123.

ground.[42] Furthermore businesses should use their leverage to ensure respect for human rights defenders is developed and maintained.[43]

- Finally, in relation to access to remedy, the UNWG recommends states to prevent strategic lawsuits against public participation (SLAPPs) being used to silence human rights defenders, and develop ways for courts to stop such lawsuits.[44]

2.4.3.Controlling SLAPPS and the protection of human rights defenders

- According to a recent comprehensive study by the Business and Human Rights Resource Centre (BHRCC),

  "SLAPPs are an abuse of the legal system by powerful actors. The tactic can intimidate defenders and drain the resources of community members, environmental advocates, and journalists who speak out in support of human rights and the environment. The impact can have a broad chilling effect, deterring others from speaking out against abuse."[45]

- A SLAPP appears to be a normal lawsuit, and may be difficult to identify, but the BHRCC report offers the following indicators:
  - it is brought or initiated by a private party such as a company, owner of a company, or employees at a company;

[42] ibid paras 124, 127.
[43] ibid para 126.
[44] ibid para 120.
[45] Business and Human Rights Resource Centre (BHRRC) *SLAPPed but not silenced* (June 2021) "Executive summary" at https://media.business-humanrights.org/media/documents/2021_SLAPPs_Briefing_EN_v51.pdf

- it targets acts of public participation, from peaceful protest to public criticism or opposition campaigns, related to human rights, social justice, and environmental protection; and
- the lawsuit came after the defender and/or organisation expressed a critique of the claimant's economic activities through those acts of public participation.[46]

- The BHRRC report identified 355 SLAPPs since 2015. Within this sample, it found the highest number in Latin America (39%), followed by Asia and the Pacific (25%), Europe and Central Asia (18%), Africa (8.5%), and North America (9%). Nearly three-quarters (73%) of cases were brought in countries in the Global South. 63% of cases involved criminal charges. Most individuals and groups facing SLAPPs (65% of cases) raised concerns about projects in four sectors: mining (108), agriculture and livestock (76), logging and lumber (29), and palm oil (20).[47]

- Several US States and the Canadian Provinces of Quebec, Ontario and British Columbia have laws to control SLAPPS while Australia defends public interest litigation through its defamation laws.[48] By contrast protection against SLAPPs is weak in European legal systems and there is evidence that it is on the rise, though cases are not confined to business based claimants.[49] This has prompted a civil society campaign for an EU wide anti-SLAPP law.[50]

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[46] ibid at 29.
[47] "*SLAPPed but not silenced:* Briefing" at https://www.business-humanrights.org/en/from-us/briefings/slapped-but-not-silenced-defending-human-rights-in-the-face-of-legal-risks/.
[48] BHRRC above n 45 at 22-3.
[49] See Nik Williams, Laurens Hueting and Paulina Milewska "The increasing rise, and impact, of SLAPPs: Strategic Lawsuits Against Public Participation" *The Foreign Policy Centre* (9 December 2020) at https://fpc.org.uk/the-increasing-rise-and-impact-of-slapps-strategic-lawsuits-against-public-participation/.
[50] BHRRC above n 45 at 23. See further European Centre for Press and Media Freedom "Ending Gag Lawsuits in Europe - Protecting Democracy and Fundamental Rights" 8 June 2020 at https://www.ecpmf.eu/ending-gag-lawsuits-in-europe-protecting-democracy-and-fundamental-rights/

- In July 2022 the UK Government announced proposals to introduce a new judicial test to control SLAPPS which consists of three steps:
    - Whether the case is against journalistic activity that is in the public interest
    - Whether there is evidence of abuse of process
    - Whether the case has a realistic prospect of success.[51]

- Courts will not always allow a case to proceed if it is seen as a SLAPP. For example in
    - *Mineral Sands Resources v Reddell* the South African High Court held that a series of defamation lawsuits brought by Australian mining company Mineral Commodities Ltd and its local subsidiary, against six environmental activists, was an abuse of the legal process.[52]

- In addition, defendants in SLAPP lawsuits have used the case against them as an opportunity for disseminating their criticisms of the claimant business through their defence and, thereby, discredit the lawsuit and legitimate their critique of the business.[53]

[51] See BHRCC "UK: Government announces new powers for courts to dismiss SLAPPs" (21 July 2002) at https://www.business-humanrights.org/en/latest-news/uk-govt-announces-new-powers-for-courts-to-dismiss-slapps/

[52] *Mineral Sands Resources (Pty) Ltd and Another v Reddell and Others; Mineral Commodities Limited and Another v Dlamini and Another; Mineral Commodities Limited and Another v Clarke* (7595/2017; 14658/2016; 12543/2016) [2021] ZAWCHC 22; [2021] 2 All SA 183 (WCC) (9 February 2021) at http://www.saflii.org/za/cases/ZAWCHC/2021/22.html

[53] On which see further Christopher J. Hilson "Environmental SLAPPs in the UK: threat or opportunity?" 25(2) Environmental Politics 248 (2016), DOI: 10.1080/09644016.2015.1105176.

2.5. Recent Case-Law Developments

As noted above, Principle 26 of the UNGPs expressly requires states to reduce legal barriers leading to a denial of access to remedy. The Commentary to Principle 26 lists, among such legal barriers, "the way in which legal responsibility is attributed among members of a corporate group under domestic criminal and civil laws may facilitate the avoidance of appropriate accountability."[54]

2.5.1. England

In England there has been a significant move towards accepting the right to bring claims against parent companies for the acts of their overseas subsidiaries.[55]

- In *Vedanta Resources PLC and another v Lungowe and others* the Supreme Court held that there can be a sufficient connection between the acts of an English-based parent company and its overseas subsidiary to permit the case to go to trial. English law requires an arguable case to be shown against the parent for the court to assert jurisdiction. English law accepts that a parent company can, in appropriate circumstances, be liable for injuries caused by its subsidiary not only where it has sufficient control to direct the subsidiary's actions but also where it uses its power to influence group policies and the subsidiary, in carrying out those policies, causes harm.[56] The parent/subsidiary relationship does not affect the

[54] UNGPs above n 1.
[55] See Meeran above n 29.
[56] *Vedanta Resources PLC and another v Lungowe and others* [2019] UKSC 20 para 61. See Meeran ibid; Muchlinski above n 4 at 312. See further Marilyn Croser, Martyn Day, Mariëtte van Huijstee and Channa Samkalden "*Vedanta v Lungowe* and *Kiobel v Shell*: The Implications for Parent Company Accountability" 5(1 BHRJ 130 (2020) doi:10.1017/bhj.2019.25; Ekaterina Aristova "The Future of Tort Litigation against

general principles of tort liability which determine whether, on the facts, a parent is liable for the subsidiary's acts.[57] Additionally, the parent may incur responsibility to third parties if, in published materials, it holds itself out as exercising supervision and control of its subsidiaries, even if it does not in fact do so.[58]

- This case has since been followed by the Supreme Court in *Okpabi v Royal Dutch Shell Plc* which established that the claimants had an arguable case against the UK parent for breach of a duty of care arising from numerous oil spills from pipelines operated by its Nigerian subsidiary and so the claim could proceed to trial.[59]

- To date only one English case appears to have accepted UK-based firm liability for the acts of an overseas affiliate. In *Rihan v Ernst & Young Global Ltd & Others* the High Court held that the a UK-based audit firm was under a duty of care towards a whistle-blower employed by their Dubai-based associate firm to ensure that he could carry out an audit on a client firm ethically. The claimant refused to sign off the audit on the grounds that he suspected the client firm of unethical business practices and eventually resigned over the matter after being replaced on the audit.[60] The direct involvement by senior managers in the UK firm with the audit led Kerr J to view the UK-based firm and its Dubai-based associate company as acting in concert and of owing a duty of care over the audit carried

Transnational Corporations in the English Courts: Is Forum [Non] Conveniens Back?" BHRJ First View (2021), pp. 1–24 doi:10.1017/bhj.2021.11.
[57] *Vedanta* ibid para 54.
[58] ibid para 53.
[59] *Okpabi v Royal Dutch Shell Plc* [2021] UKSC 3; L. Roorda and D. Leader "*Okpabi v Shell* and *Four Nigerian Farmers v Shell*: Parent Company Liability Back in Court" (6)2 BHRJ 368 (2021), doi:10.1017/bhj.2021.26.
[60] *Rihan v Ernst & Young Global Ltd & Others* [2020] EWHC 901.

out by the claimant. However, the unique facts of this case suggest that it is an outlier and that it does not set a general precedent.[61] Indeed, the majority of such claims end in a settlement and so final decisions on the merits will be rare.[62]

- Finally, in relation to supply chain liability, the English Court of Appeal in *Begum v Maran* accepted jurisdiction over a claim alleging the liability of a British shipowner for the death of a Bangladeshi ship breakers' yard worker who had been killed while working on the break-up of the shipowners former vessel.[63] Though the British shipowner no longer owned the vessel at the time of its break-up, the vessel having been sold and reflagged through a number of intermediary companies, the claimant, the deceased worker's widow, argued that the shipowner knew that the vessel would go to Bangladesh to a yard with inferior health and safety practices as compared to yards in China or Turkey. Coulson LJ held that in the circumstances there was an arguable, and not fanciful, case that the shipowner "could, and should, have insisted on the sale to a so called "green yard" where proper working practices were in place".[64] This duty could also arise as a result of the shipowner actively, "sending the vessel to Bangladesh knowingly exposing workers (such as the claimant) to the significant dangers which working on this large vessel in Chittagong entailed".[65] Whether this duty of care will be established at any eventual trial remains to be seen, but it is clear that the English courts are willing at least to entertain argument on whether it is legitimate for businesses, trading with third parties knowing that they will ignore the safety of

[61] See Stephenson Harwood "A new duty of care emerges on unusual facts in an audit context" (12 May 2020) at https://www.shlegal.com/news/a-new-duty-of-care-emerges-on-unusual-facts-in-an-audit-context.
[62] See Meeran above n 29 at 267-8.
[63] *Begum v Maran* [2021] EWCA Civ 32.
[64] ibid para 67.
[65] ibid para 64.

> their workers, to avoid liability where they fail to take appropriate measures to avoid or mitigate such harm. It is also arguable that if English law establishes a binding duty to this effect stronger efforts will be made by English businesses to seek enforceable guarantees from third parties concerning their treatment of workers.

2.5.2. The Netherlands

In January 2021, the Hague Court of Appeal held that Shell's Nigerian subsidiary was liable to compensate the claimants for damage suffered as a result of oil spills from an underground pipeline and oil well while its Anglo-Dutch parent was bound to work with its subsidiary to put in place a system of detection to prevent future spills.[66]

Another recent development concerns the link between global heating and violations of human rights. In *Milieudefensie et.al. v Royal Dutch Shell*, the Hague District Court held that Royal Dutch Shell was obliged to reduce the group's CO_2 emissions by a net 45% by the end of 2030 relative to 2019. Shell was found to have a legal duty of care to do so based on,

> "Book 6 Section 162 Dutch Civil Code on the basis of the relevant facts and circumstances, the best available science on dangerous climate change and how to manage it, and the widespread international consensus that human rights offer

[66] "Shell Nigeria liable for oil spills in Nigeria" The Hague 29 January 2021 at https://www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Gerechtshoven/Gerechtshof-Den-Haag/Nieuws/Paginas/Shell-Nigeria-liable-for-oil-spills-in-Nigeria.aspx

> protection against the impacts of dangerous climate change and that companies must respect human rights."[67]

This linkage between climate change and human rights is a major step towards acknowledging that fossil fuel-based industries are a significant threat to human rights in the current climate emergency.[68]

2.5.3.France

In the French courts a principle of group liability for human rights abuses has also been considered:

Example:

> *The Total Case* In an order issued on 11 February 2021 the Nanterre civil court accepted jurisdiction in a claim brought by 14 local authorities and 5 associations, including French NGOs Notre Affaire à Tous and Sherpa, against French oil multinational Total based on its major contribution to climate change and the inadequacy of the measures taken by the company to prevent the resulting human rights, health and safety, and environmental damage throughout its transnational group.[69] The claimants relied on the Duty of Vigilance Law, but also on the judge's

[67] *Milieudefensie et.al. v Royal Dutch Shell* ECLI:NL:RBDHA:2021:5339, Rechtbank Den Haag, C/09/571932 / HA ZA 19-379 (engelse versie) Para 4.1.3. at https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2021:5339

[68] See Tessa Khan "Shell's historic loss in The Hague is a turning point in the fight against big oil" *The Guardian* 1 June 2021 at https://www.theguardian.com/commentisfree/2021/jun/01/shell-historic-loss-hague-fight-big-oil

[69] See Lucie Chatelain "First court decision in the climate litigation against Total: a promising interpretation of the French Duty of Vigilance Law" Business and Human Rights Resource Centre "Opinion" (25 March 2021) at https://www.business-humanrights.org/en/blog/first-court-decision-in-the-climate-litigation-against-total-a-

power to order measures to stop or prevent environmental damage under Article 1252 of the Civil Code.

As in a previous claim against it, Total argued that the case should be transferred to a commercial court as it concerned a dispute related to commercial companies.[70] However, unlike in the previous claim where Total's argument succeeded, the judge was unpersuaded and accepted that the civil court had jurisdiction.

The decision was based on two principal reasons:

- first, by reason of its legal duty to draw up a vigilance plan, Total was bound to "integrate into its strategic orientations the risks of human rights and environmental violations, and, in fact, in view of the nature of its activity, proceed to substantial abandonment or reorientation" and to do so throughout its relations with affiliates, sub-contractors and suppliers;[71]
- secondly, although the vigilance plan thus undoubtedly affected the operations of Total, its purpose and the risks it was intended to prevent went beyond the strict framework of the management of a commercial company and went to matters that, according to the nature of the duty of vigilance and the legislative intent behind it, required a form of judicial review that was wider than merely commercial. Thus the commercial court could not have exclusive jurisdiction

promising-interpretation-of-the-french-duty-of-vigilance-law/ on which this summary draws; original French decision: *Association Notre Affaire à Tous, et.al. v S.A. Total* Tribunal Judiciaire De Nanterre 1ère Chambre Ordonnance De Mise En Etat Rendue le 11 Février 2021 available at https://www.asso-sherpa.org/wp-content/uploads/2021/02/110221-MINUTE-Total-climat-compe%CC%81tence.pdf.

[70] See *L'Association "Les Amis de la Terre France v S.A. Total* Tribunal Judiciaire De Nanterre Referes Ordonnance De Refere Rendue Le 30 Janvier 2020 summarised in English: Friends of the Earth International "Total abuses in Uganda: French High Court of Justice declares itself incompetent in favour of the Commercial Court" 30 January 2020 at https://www.foei.org/no-category/total-abuses-uganda-french-high-court-of-justice-declares-itself-incompetent-duty-vigilance-law

[71] English translation taken from Chatelain above n 69 see, for original French, *Association Notre Affaire à Tous, et.al. v S.A. Total* above n 69 at 8-9.

and the claim could proceed in the civil court. Total has decided to appeal the case.

On 18 November 2021, the Versailles Court of Appeal confirmed the jurisdiction of the civil court and rejected Total's argument that the case should go to the commercial court.[72]

2.5.4. Implications

These recent cases represent a revision of earlier scepticism about direct parent company liability for acts of overseas subsidiaries.[73] Though they concern environmental damage, and are characterised primarily as personal injury cases, the connection with human rights arises from the threats to human health and life that the corporate activities in question create. The cases accept that there is a functional connection between the operations of a parent and subsidiary in the multinational group enterprise and that formal legal separation between individual companies, and their presence in distinct legal jurisdictions, does not bar claims.

3. Non-Judicial State-based Remedies

According to Principle 27 of the UNGPs,

[72] Sherpa 'Climate litigation against Total: the Versailles Court of Appeal confirms the jurisdiction of the judicial court' (Paris, 18 November 2021) at https://www.asso-sherpa.org/climate-litigation-against-total-the-versailles-court-of-appeal-confirms-the-jurisdiction-of-the-judicial-court .
[73] On which see further Muchlinski above n 4 at 306-14.

"States should provide effective and appropriate non-judicial grievance mechanisms, alongside judicial mechanisms, as part of a comprehensive State-based system for the remedy of business-related human rights abuse."

Human rights remediation requires not only judicial remedies but informal methods of dispute settlement including mediation and conciliation services, informal arbitration and human rights ombudspersons.[74] Existing national human rights institutions could have their mandate extended to deal with business and human rights issues.[75] Equally specialised business and human rights institutions could be developed.

3.1. Canada: Ombudsperson and a Multi-stakeholder Advisory Body on Responsible Business Conduct

In January 2018, Canada announced the creation of an Ombudsperson and a Multi-stakeholder Advisory Body on Responsible Business Conduct responsible for advising the Canadian government on business and human rights issues.

- The Canadian Ombudsperson for Responsible Enterprise (CORE), currently Sheri Meyerhoffer, is the first position of its kind in the world.[76]
- The CORE is, "mandated to review allegations of human rights abuses arising from the operations of Canadian companies abroad. Recommendations made by the Ombudsperson will be reported publicly, and companies that do not cooperate could

[74] See further International Federation for Human Rights (FIDH) *Corporate Accountability for Human Rights Abuses: A Guide for Victims and NGOs on Recourse Mechanisms* (Paris, FIDH, 3rd ed, 2016) at https://www.fidh.org/IMG/pdf/corporate_accountability_guide_version_web.pdf
[75] On national human rights agencies see further Humberto Cantu Rivera "National human rights institutions and their (extended) role in the business and human rights field" in Deva and Birchall (eds) above n 4 ch 23.
[76] See CORE website at https://core-ombuds.canada.ca/core_ombuds-ocre_ombuds/index.aspx?lang=eng

face trade measures, including the withdrawal of trade advocacy services and future Export Development Canada support. While serving in this role, the new Ombudsperson will focus on the mining, oil and gas, and garment sectors and is expected to expand to other sectors in the first year of operation. This appointment underlines the importance of inclusive trade and respect for the fundamental rights of people abroad, as part of Canada's trade diversification strategy, and reflects Canada's commitment to responsible business around the world." [77]

- The CORE was originally meant to exercise extensive investigative powers. Their eventual omission led to the resignation of all fourteen civil society and labour union representatives of the Multi-Stakeholder Advisory Body.[78] Despite these concerns the new Human Rights Responsibility Mechanism came into force on 15 March 2021 amid continuing concerns about the lack of investigative and subpoena powers meaning that corporate executives cannot be compelled to appear or to release evidence to the Ombudsperson.[79]

3.2. The OECD Guidelines National Contact Points

A widely adopted state-based non-judicial method is the National Contact Point (NCP) system under the OECD *Guidelines for Multinational Enterprises* (OECD *Guidelines*) which

[77] Global Affairs Canada "Minister Carr announces appointment of first Canadian Ombudsperson for Responsible Enterprise (CORE)" News Release (April 8, 2019 - Ottawa, Ontario) at https://www.canada.ca/en/global-affairs/news/2019/04/minister-carr-announces-appointment-of-first-canadian-ombudsperson-for-responsible-enterprise.html

[78] See Canadian Network on Corporate Accountability "Government of Canada turns back on communities harmed by Canadian mining overseas, loses trust of civil society"(11 July 2019) at https://aboveground.ngo/government-of-canada-turns-back-on-communities-harmed-by-canadian-mining-overseas-loses-trust-of-canadian-civil-society/.

[79] Bennett Jones LLP "Canadian Ombudsperson for Responsible Enterprise Launches Human Rights Complaints Process" 30 March 2021 at https://www.jdsupra.com/legalnews/canadian-ombudsperson-for-responsible-7257586/ . See too "Liberal MP confronts minister over new watchdog to oversee Canadian companies abroad" CBC News 24 March 2021 at https://www.cbc.ca/news/politics/mckay-ng-ombudsperson-responsible-enterprise-1.5961607.

can review the corporate due diligence responsibilities included in the *Guidelines* since their 2011 revision.[80]

- NCPs interpret the OECD *Guidelines* through their provision of good offices when dealing with specific issues raised before the NCP by worker organisations, other non-governmental organisations, the business community and other interested parties.[81]
- This "specific instance" procedure involves five steps: [82]
    - deciding to file a complaint requiring an assessment of whether and how the standards in the OECD *Guidelines* apply to a given case;
    - preparing and filing the complaint; initial assessment by the NCP in accordance with the required assessment criteria in the *OECD Guidelines Procedural Guidance*,[83] which usually results in a written assessment sent to all the parties to the complaint upon which they can comment;
    - if the complaint is accepted the NCP will provide good offices to help resolve the complaint amicably;
    - after the good offices stage the NCP will draft a final statement explaining why the complaint merits no further consideration, any agreement reached by the parties or, in the absence of such agreement, provide an overview of the issues and procedures followed.

[80] See Mariette van Huijstee and Joseph Wilde-Ramsing "Remedy is the reason: non-judicial grievance mechanisms and access to remedy" in Deva and Birchall (eds) above n 4 ch 22.
[81] See OECD *Guidelines for Multinational Enterprises* "Amendment of the Decision of the Council on the OECD Guidelines for Multinational Enterprises I "National Contact Points"" para 1 at https://www.oecd.org/daf/inv/mne/48004323.pdf. (OECD *Guidelines*)
[82] See OECD Watch "How to file a complaint?" at https://www.oecdwatch.org/how-to-file-a-complaint/ ; UK Government "UK NCP complaint handling process" (7 January 2020) at https://www.gov.uk/guidance/uk-ncp-complaint-handling-process.
[83] OECD *Structures and Procedures of National Contact Points for the OECD Guidelines for Multinational Enterprises* (Paris, OECD, 2018) at https://mneguidelines.oecd.org/Structures-and-procedures-of-NCPs-for-the-OECD-guidelines-for-multinational-enterprises.pdf.

- Alternatively, the final statement may find that a corporation has not complied with aspects of the OECD *Guidelines* and make compliance recommendations.
- Parties may be asked to provide comments on a draft final statement. Where compliance recommendations have been made, there might then be a post-final assessment review of whether these have been followed.

The NCP procedure has been used successfully in some states but it remains a patchy process with NCPs themselves stressing that they are not designed to offer remedies but only to act as mechanisms facilitating dialogue.[84]

According to OECD Watch, the leading NGO concerned with making the NCPs an effective tool for corporate accountability,

- In 2020, 14 cases were filed by civil society and communities and were concluded by NCPs.[85] Only one case reached agreement. NCPs rejected 5 cases at the initial assessment phase. The Slovenian NCP concluded its first complaint in 2020 by rejecting it. Seven complaints were accepted, but concluded without resolution. One case was withdrawn by the complainants due to concerns with the NCP's procedures and failures to address security risks for rightsholders. Eight complaints took two or more years to reach a conclusion representing at least double the timeframe prescribed by the OECD *Guidelines*.

[84] See van Huijstee and Wilde-Ramsing above n 80 at 478-9.
[85] OECD Watch *State of Remedy 2020* (OECD Watch briefing paper, June 2021) at https://www.oecdwatch.org/wp-content/uploads/sites/8/2021/06/OECD-W-State-of-Remedy-2020.pdf from which these statistics are taken.

OECD Watch believes that gaps in the standards for MNEs and expectations for NCPs generate poor outcomes in NCP complaints.[86] It proposes a number of improvements to the existing procedure.[87] This approach is preferred to abandonment of NCPs as, in the view of OECD Watch,

> "the Guidelines' various strengths, their widespread and ongoing use by all stakeholders as a leading [responsible business conduct] norm and vital path to remedy, and the fact that they are increasingly being adopted into national laws on corporate accountability, justify civil society and governments taking action to ensure they remain up-to-date and effective."[88]

OECD Watch proposes a range of substantive reforms to the OECD *Guidelines*, and a range of procedural reforms to the NCPs, in line with the UNGPs.[89]

- Among the substantive changes,
    - new provisions are proposed for extending MNE responsibility to respect land rights of indigenous peoples and other marginalised and disadvantaged groups and to undertake due diligence tailored to meet their needs.
    - In addition, MNEs should address their carbon impacts by setting and achieving targets in line with the Paris Agreement.
- The main procedural changes include:

[86] ibid at 3.
[87] See OECD Watch *Get Fit. Closing gaps in the OECD Guidelines to make them fit for purpose* (June 2021) at https://www.oecdwatch.org/wp-content/uploads/sites/8/2021/06/OECD-Watch-Get-Fit-Closing-gaps-in-the-OECD-Guidelines-to-make-them-fit-for-purpose-1.pdf.
[88] ibid at 12.
[89] ibid. For a summary of recommendations see OECD Watch *State of Remedy 2020* above n 85 at 3 on which this paragraph draws.

- proceeding with investigations and findings even when companies refuse to join in good offices;
- issuing determinations when companies breach the OECD *Guidelines*; promoting the OECD *Guidelines* applicability to all MNEs, including by accepting all complaints that state a plausible claim against a company;
- applying the OECD *Guidelines* to states acting as economic actors, requiring clarification of the definition of MNEs in Chapter I of the Guidelines in this respect;
- engaging professional mediators or internal mediation training as one of several steps to promoting impartiality in complaint handling;
- developing procedural rules that prioritise transparency over corporate confidentiality; and
- adopting policies and procedures to address security risk to human rights defenders.

4. Corporate Level Operational Grievance Mechanisms

The UNGPs and the OECD *Guidelines* recommend that where enterprises have identified, through due diligence, any adverse human rights human rights impact that they have caused, or contributed to, they must provide processes to enable remediation.[90] In some situations, recourse to judicial or state-based non-judicial mechanisms is preferable, but in many cases

[90] UNGPs above n 1 Principle 22; OECD *Guidelines* Guideline IV "Human Rights" above n 81 para 6. See further Office of the United Nations High Commissioner for Human Rights *The Corporate Responsibility to Respect Human Rights: An Interpretative Guide* (New York and Geneva, United Nations, 2012) at 63-7 available at http://www.ohchr.org/Documents/Publications/HR.PUB.12.2_En.pdf (*Interpretative Guide*); Shift, *Remediation, Grievance Mechanisms, and the Corporate Responsibility to Respect Human Rights* (New York, 2014) at https://shiftproject.org/wp-content/uploads/2014/05/Shift_remediationUNGPs_2014.pdf . This section draws upon and updates Muchlinski above n 4 at 597-99.

an operational-level grievance mechanism (OGM) established by the business enterprise may be effective.[91] According to the Commentary to Principle 29 of the UNGPs, OGMs

> "make it possible for grievances, once identified, to be addressed and for adverse impacts to be remediated early and directly by the business enterprise, thereby preventing harms from compounding and grievances from escalating."[92]

The main question raised is whether OGMs will offer functional, fair and effective remediation.

- This may be true in weak governance zones where legal remedies are non-existent, but
- in states with effective legal systems OGMs may in fact replace more effective judicial remedies and give the corporation control over remediation to the possible detriment of local communities.[93]
- To avoid this, OGMs should be administered in collaboration with local stakeholders and must focus on their needs and not those of the corporation. Otherwise the OGM may become a process of self-interested local dissent management.[94]
- Equally, states should not rely on OGMs to avoid their regulatory responsibilities for upholding human rights and environmental justice.

[91] *Interpretative Guide* ibid at 68. See too OECD *Guidelines* above n 81 Human Rights Guideline Commentary para 46. See further Shift ibid at 5-6.
[92] UNGPs above n 1 Principle 29 and Commentary to Principle 29; Shift ibid; van Huijstee and Wilde-Ramsing above n 80 at 475.
[93] For an instructive study see Rajiv Maher, David Monciardini and Steffen Böhm "Torn between Legal Claiming and Privatized Remedy: Rights Mobilization against Gold Mining in Chile" 31(1) Business Ethics Quarterly 37 (2021), DOI:10.1017/beq.2019.49.
[94] ibid.

In addition to the hearing of complaints, OGMs can act as conduits of information through feedback from affected stakeholders.[95] According to the UNGPs,

- they provide a channel to raise concerns when stakeholders believe they are being, or will be, adversely impacted. [96]
- The resulting information supports the identification of adverse human rights impacts as a part of an enterprise's on-going HRDD and
- can indicate trends and patterns in complaints, allowing business enterprises to identify systemic problems and adapt their practices.

OGMs resemble existing company programmes aimed at reducing and resolving workplace conflicts as well as business to business conflict resolution including alternative dispute resolution (ADR).[97] Of relevance will be existing "whistleblower" systems within the company, corporate works councils and compliance officers.[98]

Ensuring that outside stakeholders have adequate access to OGMs is key.[99] The Commentary to the OECD *Guidelines* Human Rights Guideline notes, in addition, that OGMs,

[95] OECD *Guidelines* above n 81 Human Rights Guideline Commentary para 46.
[96] UNGPs above n 1 Commentary to Principle 29 on which this paragraph draws.
[97] Shift, Oxfam and Global Compact Network Netherlands *Doing Business with Respect for Human Rights: A Guidance Tool for Companies* (2016) 106 at https://www.shiftproject.org/resources/publications/doing-business-with-respect-for-human-rights/ (Shift et al) and see for detailed discussion ibid ch 3.8 "Remediation and grievance mechanisms". See too John Sherman "Embedding a Rights Compatible Grievance Processes for External Stakeholders with Business Culture." Corporate Social Responsibility Initiative Report No. 36. (Cambridge, MA: John F. Kennedy School of Government, Harvard University, 2009) available at https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/programs/cri/files/report_36_sherman_grievance.pdf.
[98] Shift et al ibid at 105. An illustrative example of such a system is The Siemens "Tell Us" reporting channel: see https://new.siemens.com/global/en/company/sustainability/compliance.html. See too Katharina Hausler, Karin Lukas and Julia Planitzer "Non judicial remedies: Company-based grievance mechanisms and international arbitration" in Juan Jose Alvarez-Rubio and Katerina Yannibas (eds) *Human Rights in Business: Removal of Barriers to Access to Justice in the European Union* (Abingdon, Routledge, 2017) ch 3 at 86-104 covering Siemens and Statoil's grievance mechanisms.
[99] Shift et al above n 97 at 107.

"should not be used to undermine the role of trade unions in addressing labour-related disputes, nor should such mechanisms preclude access to judicial or non-judicial grievance mechanisms, including the National Contact Points under the Guidelines."[100]

Corporate level grievance mechanisms should be distinguished from other forms of non-judicial grievance mechanisms. These can be state-based mechanisms such as the OECD NCPs, discussed above, or industry-level schemes.

Example:

The complaints mechanism of the Roundtable on Sustainable Palm Oil (RSPO):

- This is a multi-stakeholder initiative which, "unites stakeholders from the 7 sectors of the palm oil industry: oil palm producers, processors or traders, consumer goods manufacturers, retailers, banks/investors, and environmental and social non-governmental organisations (NGOs), to develop and implement global standards for sustainable palm oil."[101]
- To this end the RSPO established its complaints mechanism.[102] This follows closely the procedural principles recommended by the UNGPs.[103]

[100] OECD *Guidelines* above n 81 Human Rights Guideline Commentary para 46.
[101] Roundtable on Sustainable Palm Oil "About" at https://rspo.org/about
[102] RSPO, 'Complaints and Appeals Procedures' (17 September 2019) at https://rspo.org/resources/complaints
[103] See further Mark Wielga and James Harrison "Assessing the Effectiveness of Non-State-Based Grievance Mechanisms in Providing Access to Remedy for Rightsholders: A Case Study of the Roundtable on Sustainable Palm Oil" 6(1) BHRJ 67 (2021) doi:10.1017/bhj.2020.33.

- In this regard the UNGPs require certain core qualities for an effective non-judicial grievance mechanism, whether state-based or non-state based, grouped around two principles of good practice: due process and accessibility.[104]
    - On due process, UNGPs Principle 31 requires that the mechanism is
        - legitimate by being accountable for the fair conduct of grievance processes which enable trust from the stakeholder groups for whose use they are intended.
        - The mechanism must be predictable, by providing, "a clear and known procedure with an indicative time frame for each stage, and clarity on the types of process and outcome available and means of monitoring implementation",
        - and equitable, by seeking to ensure that aggrieved parties have, "reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair, informed and respectful terms."
        - A third element is transparency, achieved by keeping parties to a grievance informed about its progress, and providing, "sufficient information about the mechanism's performance to build confidence in its effectiveness and meet any public interest at stake."
        - Finally, the procedure must be, "rights-compatible: ensuring that outcomes and remedies accord with internationally recognised human rights."
    - On accessibility, UNGPs Principle 31 requires that

[104] UNGPs above n 1 Principle 31 on which the next two paragraphs draw. See too OECD *Guidelines* above n 81 Human Rights Guideline Commentary para 46.

- the procedure be known to all stakeholder groups for whose use it is intended and provide adequate assistance for those who may face particular barriers to access.
- Stakeholder groups should be consulted on the design and performance of OGMs and the focus should be on dialogue as the means to address and resolve grievances.
- In this way OGMs should become a source of continuous learning by drawing on relevant measures to identify lessons for improving the mechanism and preventing future grievances and harms.

The UNGPs approach stresses procedural effectiveness. However, to be useful, an OGM must also offer effective remediation for complainants. This is the subject of a continuing scholarly debate.[105] There is evidence showing that such mechanisms do not always offer effective remedies.

- For example, in a recent study, the RSPO mechanism was found to perform well when judged according to the UNGPs' effectiveness criteria, but performed poorly when individual cases were assessed to ascertain the outcomes that were achieved for rightsholders. In particular,
    - in a number cases where the complaint against a company was upheld no remedy was forthcoming and the company concerned simply exited the RSPO rendering it outside the complaint mechanism's reach;

[105] See further Fiona Haines and Kate Macdonald "Nonjudicial business regulation and community access to remedy" 14 Regulation & Governance 840 (2020), doi:10.1111/rego.12279.

- in other cases the company used the procedure to delay the provision of any remedy by the complaints panel while the alleged infringement continued and in only one case had the company accepted the ruling and acted upon it.[106]
- The most common criticism of the procedure was that it took an inordinate amount of time.[107]
- The study concludes that non-judicial grievance mechanisms will remain severely limited due to their voluntary nature and the duration of procedures suggests little immediate advantage over judicial proceedings.[108]

In relation to corporate level OGMs, a study by the International Commission of Jurists (ICJ) echoes these findings.[109] This points out the difficulties experienced by stakeholders in accessing OGMs and the dangers of the corporation acting as both defendant and judge in a complaint. In addition, problems arise regarding the transparency and publicity of claims, the imbalance of resources between the corporation and outside stakeholders and the relationship between the procedure and judicial proceedings especially where the complainant is required to waive their right to go to court.[110] A further difficulty is that OGMs are not well suited to dealing with egregious violations of human rights which should be dealt with by the public authorities and courts of the host state. Where this is not possible the OGM will prove to be an unsuitable alternative. In the light of its report the ICJ has issued a guide to performance standards in OGMs.[111]

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[106] See Wielga and Harrison above n 103 at 82-8.
[107] ibid.
[108] ibid at 88-91.
[109] International Commission of Jurists *Effective Operational Grievance Mechanisms* (Geneva, November 2019) at https://www.icj.org/wp-content/uploads/2019/11/Universal-Grievance-Mechanisms-Publications-Reports-Thematic-reports-2019-ENG.pdf
[110] On which see further Lindsay above n 7 at 310-11.
[111] International Commission of Jurists *Proposed Performance Standards for Operational-level Grievance Mechanisms* (Geneva, November 2019) at https://www.icj.org/wp-content/uploads/2020/01/Universal-Proposed-performance-standards-Publications-2019-ENG.pdf