CORPORATE RESPONSIBILITY
the corporate responsibility coalition

Protecting rights, repairing harm: How state-based non-judicial mechanisms can help fill gaps in existing frameworks for the protection of human rights of people affected by corporate activities

A briefing paper prepared for the UN Secretary General's Special Representative on Business and Human Rights on behalf of The Corporate Responsibility (CORE) Coalition

November 2010

Executive Summary

Corporations affect the realisation of human rights in a multitude of different ways. Yet victims of human rights violations that arise from corporate activities have limited options when it comes to enforcing their rights. International complaints mechanisms are rarely applicable. While there might be a relevant cause of action under domestic law, accessing the courts is notoriously difficult, especially for people who are poor, vulnerable or who live in remote areas. There may be less formal, less expensive avenues for resolving disputes, but these tend to be over-reliant on the cooperation of companies for their operation, and for the implementation of outcomes. In short, the options that offer the most hope of legally enforceable outcomes – judicial mechanisms – are also the least accessible to those who need them and, moreover, are frequently unsuitable as a way of resolving human rights-related disputes.

There are clearly gaps in the current human rights accountability system. The most serious flaw is the lack of *accessible methods of resolving human rights-related disputes between people and companies that are both fit for purpose and capable of producing legally binding outcomes.*

The aim of this paper is to show how state-based non-judicial mechanisms (or "NJMs") can help to bridge those gaps. Recent years have seen a steady growth in the use of state-based NJMs as a way of providing people with more accessible, more flexible, and less costly ways of resolving disputes than resorting to court action. Some of these mechanisms are designed specifically for cases where human rights may have been infringed, for example cases of discrimination, or breach of privacy. However, where human rights-related complaints against private actors are permitted, such as under procedures administered by National Human Rights Institutions ("NHRIs"), they typically relate only to a narrow range of rights (usually the right to non-discrimination) and, except in a limited range of circumstances and contexts (e.g. employment disputes), they are unlikely to lead to enforceable outcomes. However, there is sufficient agreement as to what constitutes "best practice" in their operation to provide an insight as to how state-based NJMs - (a) designed *specifically* to resolve human rights-related disputes between people and companies and (b) covering the full range of human rights – could work in practice.

The second key gap in the existing accountability framework is the lack of *domestic institutions specifically tasked with responding to the human rights challenges posed by business*. This has contributed to a lack of coherence of government policy at domestic level, inadequate guidance and support for business, and ineffective international co-ordination amongst national institutions that should be addressing business impacts on human rights. While NHRIs could in principle play this role, the ability of many existing NJMs to respond to this challenge is constrained, not just in terms of resources, but also by their legal mandate and powers.

Part 1 of this paper outlines the gaps in the current human rights accountability framework that mean that, all too often, claimants seeking enforceable remedies to human rights-related problems, including the prevention of future harm, have virtually nowhere to go. Parts 2 and Part 3 then consider how state-based NJMs can help fill these gaps – either by extending the mandate of existing NHRIs or by creating new state-based NJMs to help resolve human rights-related disputes (as has been proposed by The Corporate Responsibility (CORE) Coalition for the UK in the form of a UK Commission for Business, Human Rights and the Environment).[1] Part 4 makes some comments on the particular role of home states of multinationals, and the contribution that they could make to address some of the problems outlined in this paper, both in terms of standard-setting and in terms of resolving human rights related disputes. Part 5 then considers the functions and powers that state-based NJMs would need to operate properly, in line with the emerging criteria for NJMs[2] and accepted best practice for NHRIs. Part 6 then looks in more detail at the key relationships that would have to be addressed and maintained. In particular, this Part is concerned with how a state-based NJM could fit within wider domestic legal and administrative structures, and also it's potential role within broader (e.g. regional and international) human rights networks. Additional technical, legal and logistical issues are then briefly discussed in Part 7.

Part 8 concludes this paper with some general observations about the potential role of state-based NJMs in helping to overcome existing barriers to redress. It is acknowledged that state-based NJMs are no "silver bullet" as there are limits to what they can achieve in isolation. Nevertheless, they should be viewed as a vital part of a wider package of possible enforcement options for victims of human rights abuses. In the longer term, they also have the potential to contribute to much more cohesive, cooperative and forward-looking systems for understanding and responding to the human rights impacts of companies.

[1] See Jennifer Zerk 'Filling the Gap: A New Body to Investigate, Sanction and Provide Remedies for Abuses Committed by UK Companies Abroad', CORE Coalition, December 2008, copy available from http://corporate-responsibility.org/wp/wp-content/uploads/2009/09/Filling-the-Gap_dec08.pdf.

[2] See *Protect, Respect and Remedy: A Framework for Business and Human Rights: Report of the Special Representative of the Secretary-General on the issue of and human rights and transnational corporations and other business enterprises, John Ruggie*, A/HRC/8/5, 7 April 2008, copy available at http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf, para. 92.

1. Introduction: How our existing human rights accountability framework fails individuals, communities and businesses

The current framework for holding businesses responsible for their human rights impacts does not serve victims well. International complaints mechanisms are rarely applicable.[3] There are more possible remedial mechanisms at national level. But there are still significant problems with these in practice. While "access to an effective remedy" is the required international law standard, gaps in the accountability framework – both *within* national systems and *between* national systems – make the enforcement of rights an unlikely prospect for many.[4]

Gaps within national systems

At national level, remedies may theoretically be obtainable through the national courts. However, the obstacles to individual claimants are huge. Even assuming that the claimant has a clear and relevant cause of action,[5] judicial mechanisms are usually very costly to access, can be intimidating, and require substantial resources – logistical, technical and psychological as well as financial. These factors alone put judicial mechanisms out of reach of many people, and especially those who are poor, or vulnerable or who live in remote areas.[6]

Added to these problems are the delays and inefficiencies that are a feature of judicial mechanisms in many jurisdictions – delays that can sometimes significantly undermine the usefulness of the eventual remedy to the claimant, or mean that a victim goes without a remedy at all.[7] In some jurisdictions, the efficiency and proper functioning of national courts is further compromised by corruption or the threat of interference from politicians.[8]

---

[3] Mechanisms to allow individuals to bring complaints have been established under a number of international and regional human rights treaties, although these largely concern allegations of violations of human rights by states, not private actors. See further Julie Mertus, *The United Nations and Human Rights* (Routledge, 2005).

[4] Kate MacDonald, *The Reality of Rights*, CORE Coalition/London School of Economics and Political Science, May 2009. Copy available at http://corporate-responsibility.org/reality-of-rights/.

[5] Note that few jurisdictions have created private causes of action to provide for "horizontal" enforcement of human rights, i.e. enforcement as between private (i.e. non-state) actors. The US Alien Tort Claims Act is a possible exception, although its application to corporate defendants is still contested. See, most recently, Second Circuit Court of Appeals judgment in *Kiobel et al v Royal Dutch Shell Petroleum et al* 06-4800-cv, 06-4876-cv, 2010 WL 3611392 (2d Cir. Sept. 17, 2010). In some states, claimants may be able to resort to "tort-based" actions, i.e. private claims for compensation for personal injury, property damage, or harm to other interests. While there is a considerable overlap between the rights protected by tort law and human rights law, tort law is not well equipped to deal with every kind of human rights abuse, especially abuses concerning collective rights. See further Scenario 3 at p. 10 below.

[6] MacDonald, n. 4 above, esp. p. 23.

[7] See Scenario 1, at p. 9 below. A study prepared by Amnesty to mark the twentieth anniversary of the Bhopal disaster illustrates the point well. See Amnesty International, 'Clouds of Injustice', Amnesty International Publications, 2004, <http://www.amnesty.org/library>.

[8] MacDonald, n. 4 above.

On the other hand, the victim may have some more flexible, less formal, and less costly avenues open to him in the form of "soft law" processes.[9] The claimant's particular complaint may be covered by a corporate grievance mechanism,[10] or by an industry specific or multi-industry complaints mechanism[11] or by some internationally coordinated initiative, such as the National Contact Point processes under the OECD Guidelines for Multinational Enterprises (the "OECD Guidelines").[12] Claimants may decide that, compared to judicial mechanisms, "soft law" processes like these offer a better chance of a quick and fair resolution. However, the lack of transparency and independence of many of the soft law processes that have emerged so far has undermined confidence in these.[13] But a far more serious flaw, from the claimant's perspective, is the general lack of enforceability of these processes as a matter of law. Essentially, they depend on the cooperation of companies for their operation and for the implementation of any final settlement. Some claimants may take the view that lack of legal enforceability may not matter if there is sufficient "moral" or "reputational" pressure on a company to comply. In other cases, claimants have decided that participation in soft law processes is simply not worth the effort.[14]

The essential problem, from the perspective of potential claimants, is that the mechanisms that usually offer the highest levels of enforceability – judicial mechanisms – also involve the most barriers to would-be claimants, especially claimants who are poor, vulnerable, living in remote areas, or a combination of the three. On the other hand, the more accessible, less formal avenues frequently lack independence as dispute resolution bodies, as well as the power and means to ensure effective redress.

Many states have done much to try to improve access to judicial dispute resolution mechanisms, and to relieve some of the common difficulties faced by individual litigants, especially the less well off. Innovations such as legal aid, contingency fees (i.e. "no win no fee" arrangements with lawyers), reforms to rules on standing to allow more public interest litigation, and opening up courts to class actions and representative actions are all designed

---

[9] "Soft law processes", for the purposes of this paper, refer to processes in which the participation of the parties is voluntary (and cannot be compelled by any legal authority) and the final outcomes of which cannot be enforced. They rely, for their effectiveness, on the cooperation and goodwill of all concerned. The NCP processes under the OECD Guidelines for Multinational Enterprises are an example of a "soft law process".

[10] See Caroline Rees and David Vermijs, *Mapping Grievance Mechanisms in the Business and Human Rights Arena*, Corporate Social Responsibility Initiative Report No. 28, January 2008, copy available at http://198.170.85.29/Rees-Vermijs-Mapping-grievance-mechanisms-Jan-2008.pdf.

[11] See for instance, the dispute resolution and complaints mechanisms operated by the US Fair Labour Association, or the UK-based Ethical Trading Initiative. See further, Rees and Vermijs, ibid.

[12] See http://www.oecd.org/document/60/0,3343,en_2649_34889_1933116_1_1_1_1,00.html

[13] See in relation to the NCP processes under the OECD Guidelines, OECD Watch, 'Assessing the Contribution of the OECD Guidelines for Multinational Enterprises to Responsible Business Conduct', June 2010, copy available at http://oecdwatch.org/publications-en/Publication_3550/at_download/fullfile, esp. pp. 7, 11, 23, 54-5.

[14] See OECD Watch, ibid, pp. 10-11. See also MacDonald, n. 4 above.

to make courts more accessible to ordinary people. It is important that this work should continue.

But improving access to existing judicial mechanisms only solves part of the problem. A deeper problem concerns the lack of suitability of judicial mechanisms as a means of resolving many human rights-related disputes between individuals and companies. First of all, *disputes resolution through judicial mechanisms is largely adversarial*, with each party responsible for the collection of evidence to support its own case, which is then presented to the courts. While this places a burden on both parties, it is frequently a burden that is disproportionately felt by the less well-resourced claimant. One way to counter this problem with regard to business and human rights cases would be for dispute resolution bodies to take a more "inquisitorial" role in relation to the matter before them, rather than expecting the victim to investigate and prosecute the case on her own.[15]

Second, as noted above,[16] the *lack of causes of action related specifically to human rights abuses* means that claimants must make do with a cause of action that may not quite fit (for instance, requiring torture to be expressed as an "assault", or widespread and serious environmental damage to be expressed as "nuisance" or "property damage"). Furthermore, in tort-based cases, a claimant must generally show some damage *personal to herself/himself*, which makes tort law problematic as a way of gaining redress for damage to collective interests (e.g. hunting and fishing resources used by indigenous groups under customary or "native" title). In addition, or as an alternative, the claimant may have some recourse to constitutional or administrative courts, for example, in relation to the state permissions (e.g. "licences") that allowed a potentially damaging project to take place in the first place. However, these kinds of claims only relate to the state action that made the corporate abuse possible – not to the corporate abuse itself. And they will not usually be helpful where human rights breaches cannot be attributed to regulatory failures.

A third problem, related to the second problem discussed above, concerns the general *lack of suitable remedies* in private (especially tort-based) claims. Tort law is aimed primarily at financial compensation of a victim of a wrong after the event. But while tort law may be a satisfactory way of compensating victims of past accidents and wrongdoing, it is less good at dealing with ongoing systemic breaches. In these kinds of cases, claimants may be less interested in financial compensation than changes to corporate policies and

[15] Note that the courts of civil law countries are often said to perform more of an "inquisitorial" role than their common law counterparts. This means that judges are involved in actively investigating the facts of a case (e.g. by questioning witnesses, or by seeking advice from court appointed technical experts) as opposed to acting as an impartial "umpire" of the evidence presented. However, some commentators regard this dichotomy as a little misleading. In reality, most jurisdictions incorporate some "adversarial" and some "inquisitorial" elements in civil procedure. Nevertheless, civil trials have remained largely "adversarial" in nature in most (if not all) jurisdictions, though there are differences from jurisdiction to jurisdiction in terms of the amount of assistance that may be given to the claimant in relation to the prosecution of her claim.

[16] See n. 5 above.

operating practices to ensure that such breaches do not happen again.[17] But even if preventative remedies of this kind were a legal possibility, they may not be conducive to effective enforcement, as few national courts would have the technical and administrative capacity to oversee their implementation.

The fourth limitation of judicial mechanisms in relation to the enforcement of human rights concerns the *lack of up front guidance about the substance of the responsibilities of companies to "do no harm"*, specifically as this affects the management of supply chains and multinational groups. While tort law decisions can give some guidance to companies as to the types of cases and circumstances likely to attract legal liability, they provide little insight into the detail of what constitutes best operating and management practice. While there may be relevant external "soft law" guidance in the form of "recommendations" or "codes of conduct", their legal status in the context of judicial proceedings[18] is often unclear. This paper is concerned primarily with problems facing claimants. But the lack of detailed guidance surrounding the responsibilities of companies as regards the management and mitigation of human rights impacts – i.e. the meaning of "due diligence" in practice – does not help companies (particularly parent companies of large multinational groups) manage their litigation risks.

Finally, there is the issue of whether judicial mechanisms presently have the *technical expertise* to provide authoritative and detailed interpretative guidance on the responsibilities of companies with respect to human rights. While courts may be good at applying broad legal principles to a specific accident or incident, resolving cases involving allegations of ongoing human rights abuses by companies arguably require a more specialised set of skills, particularly if remedies are to include recommendations or directions regarding management or operating practices (see above). Intervening in day-to-day company management is not something that many judges would feel comfortable with, for good reasons. But specialised dispute resolution mechanisms – which have access to significant management expertise – could potentially not only resolve disputes more quickly, but could also credibly supervise and assist with the implementation of suitable non-financial remedies.

In some cases – e.g. cases of serious or large-scale damage where financial damages seem appropriate, and where claimants have access to sufficient financial and technical resources – judicial mechanisms can work fairly well. But corporate activities can impact on human rights in a multitude of different ways. No two cases will be the same, in terms of scale of harm, or the rights affected, or the remedies needed to compensate people and to put an end to breaches. It makes sense, therefore, that victims of human rights abuses should have access to a range of options when it comes to enforcing their

[17] See Scenario 2, at p. 9 below and Scenario 3, p. 10 below. While it is possible to obtain preventative (or "prohibitory") injunctions in tort-based cases, these are generally given to prevent further damage *to the claimant*, not further damage to others or at large.

[18] e.g. whether or not compliance will create a "presumption" in favour of the company in judicial proceedings. See further Part 5, "Key functions II", below and Part 6, "Relationships with the domestic civil courts", below.

rights, so they can chose the option that best suits their particular needs. At the moment, however, those options simply do not exist. "Soft law" processes (such as mediation through National Contact Point processes under the OECD Guidelines, or company grievance procedures, or complaints mechanisms under industry-level schemes) can help in some cases. But their reliance on the cooperation of companies, together with the general lack of follow-up and oversight, are major problems. Very often, claimants only use these processes because there is nothing else. On the other hand, the lack of help and remedies for claimants at national level can mean that claimants end up resorting to court action out of sheer frustration. But this is not in anyone's interests if these disputes could be resolved in other, less expensive, less rigid and less time consuming ways.

Gaps <u>between</u> national systems

Clearly there are gaps within national systems. But there are also gaps *between* national systems that arise essentially from the difficulties of applying a state-based regulatory system (in which each state has sovereignty within its own territory) to cross-border activities. So while many states may have jurisdiction over a particular activity or commercial transaction, they may differ substantially in the way an activity should be regulated, or the approach that should be taken to enforcement, or in the will or capacity to enforce the law at all. Differences between developed states and developing states in regulatory standards (and perhaps more commonly the capacity to enforce those standards) have led to concerns about social and environmental "dumping" by multinational companies to take advantage of weaker regulatory regimes, usually in developing countries.

Judicial mechanisms have not done much so far to bridge these gaps. Through various legal doctrines (including that of *forum non conveniens*, or "inconvenient forum", and the doctrine of "international comity"), as well as rules on "choice of law",[19] judicial mechanisms still give priority to the state where the damage occurred when it comes to determining legal rights. Under doctrines of *forum non conveniens*, and "international comity", jurisdiction over a dispute is frequently transferred to the "host state", even where decisions (or omissions) in the "home state" of a multinational may have played a considerable part in the circumstances or behaviour that led up to a breach. In too many cases, this has meant that the chance of an "effective remedy" has been lost.[20]

One state-based dispute resolution mechanism that does place more emphasis on the role of the "home state" as an overseer of multinational activity is the complaints process administered by NCPs under the OECD Guidelines. But, here, a lack of consistency between states both in the

[19] Under EU law, for instance, the law governing liabilities in the case of a tort will generally be the law of the place where the harm occurred, regardless of the forum in which the case is eventually heard.

[20] See, for instance, Amnesty International, 'Clouds of Injustice', n. 7 above.

interpretation of the guidelines and in their approach to the complaints processes has undermined confidence in the system as a whole.[21]

These gaps could be bridged to some extent, however, by greater emphasis, at national level, on the role of the parent company as ultimate direction-setter and overseer of multinational groups and supply chains *provided that* there was also substantial agreement between the national dispute resolution bodies of different states as to the underlying standards to be applied, and broad similarity in procedure and approach (see further Part 4 below). While this may be difficult to achieve for existing general-purpose judicial mechanisms, it should be the goal of any new specialist institutions (see further Part 6, "Relationships with other state-based NJMs and NHRIs", below). Coherence and cooperation between states with regard to dispute resolution procedures addressing business impacts on human rights would lead to better outcomes for claimants.

Protect, respect and remedy: the problem restated

There are presently gaps in every part of the "Protect, Respect and Remedy" framework.[22] There are gaps in the state's ability to *protect*, caused by differing interpretations of standards, differences in regulatory priorities and enforcement capacity, and a lack of recognition in national regulatory systems of the significance of cross-border control relationships between different parts of an enterprise. There are still significant gaps in understanding of the substance of the corporate responsibility to *respect* human rights, and what this means as a practical management issue for different companies, groups of companies, sectors and supply chains. Existing accountability mechanisms have so far provided little forward-looking guidance on the nature and extent of corporate obligations to "do no harm" under domestic law,[23] let alone the wider responsibilities of companies under the "Protect, Respect and Remedy" Framework.[24] Finally, there are serious and obvious gaps in *access to remedies*, caused by the general lack of accessibility of judicial mechanisms to ordinary people – especially those who are poor, vulnerable or isolated – a lack of suitable remedies in some cases, and the lack of legal enforceability of most non-judicial alternatives.

The following scenarios illustrate what these gaps can mean in practice:-

[21] See OECD Watch, n. 13 above, in which the handling by NCPs of specific complaints is described as "erratic, unpredictable and ineffectual", p. 11.
[22] See *Protect, Respect and Remedy*, n. 2 above.
[23] As noted above (see n. 5 above), the lack of causes of action for human rights breaches themselves means that, to obtain a remedy, claimants using judicial mechanisms must usually show that the breach actually constituted a "tort" or "delict" under domestic law. But the consequence of this is that the question of whether human rights were violated, and in what way, is not directly addressed.
[24] Although, here, guidance is now emerging. Note in particular the "Guiding Principles for the operationalization of the UN 'Protect, Respect and Remedy' Framework," forthcoming. For on-line consultation see http://www.srsgconsultation.org/index.php/.

Scenario 1: No remedy. A leak of a toxic substance from a factory in State X causes death and serious injury to many employees. The factory is owned by Company B, a majority owned subsidiary of Parent Company A. Parent Company A is incorporated in State Y. As well as being unable to work, the injured employees require expensive long-term medical treatment. The families of the victims are aware that the processes used by the factory are subject to strict health and safety regulation in State Y, but not in State X. The families believe that the disaster at the factory was the result of the negligence of either Company B or Parent Company A (or both) and wish to start legal proceedings against Company B and Parent Company A for financial compensation for the losses they have sustained. The courts of State X are notoriously slow and unreliable – some say corrupt – so the families decide, on legal advice, to commence proceedings in State Y instead. After a long search, they eventually find a lawyer willing to act on a contingency fee basis in State Y, although they are not entitled to legal aid. The case works its way through the procedural stages. The discovery process yields an enormous volume of corporate documents, which requires numerous lawyers and experts to investigate and evaluate, at considerable expense. The jurisdiction of the courts of State Y is then challenged by the defendant companies, and the decisions of the lower courts regarding jurisdictional matters are the subject of several appeals. During this time, there are unfortunately further deaths from injuries sustained in the disaster. After some delay, the High Court of State Y decides, in a split decision, that the matter would be better heard in the alternative jurisdiction of State X. Among other reasons for dismissing the claim, the court expresses doubts about the viability of the families' case against Parent Company A. After further years of argument and delay, the national court of State X eventually decides in favour of the families, but holds that the damages to which the workers are entitled is limited by national laws on workers' compensation. In the meantime, Company B has been declared insolvent and is wound up.

Scenario 2: No enforcement. Agricultural workers in State X are required to work long hours for inadequate financial remuneration. Workers at a particular group of farms (under common ownership) have also been suffering from illnesses that they suspect is a result of exposure to pesticides. None of the workers is a member of any trade union, having been discouraged by farm management from joining. Supported by a local NGO, a complaint is made to a local labour inspectorate, but the workers are told that because of resource constraints, it will be many months, possibly more than a year, before any action is taken. The local NGO discovers that most of the produce from this group of farms is purchased by a single supermarket in State Y. Workers consider that their poor working conditions are at least partly due to the purchasing practices of the supermarket which has been putting pressures on the farms to reduce costs. On further enquiry, the NGO establishes that, while the supermarket has adopted its own "ethical code of conduct", it is not party to any wider industry or multi-industry human rights initiatives, and indeed has a generally poor record of treatment of suppliers. The NGO considers an approach to State Y's NCP to investigate the matter and recommend a solution, but is advised that previous similar complaints have not been taken up on the grounds that there is no "investment nexus" between State Y and the relevant farms in State X. In any event, the NCP's recommendations would not be enforceable and, based on the supermarket's past record, the NGO is concerned that any recommendations would not be implemented. In the meantime, the NGO learns that disciplinary action has been taken against some of the workers who were party to the labour inspectorate complaint, and that several have had their employment contracts terminated, and others (female staff in particular) have reportedly been subject to threats and intimidation by farm supervisors. Remaining workers are concerned about the implications of further action, as there are few other employment opportunities in the area. The health problems of the workers are presently fairly minor, but they are worried about the long-term effects. They are advised that any financial compensation from court action would be minimal. The local NGO has asked to meet representatives of the supermarket, but has not yet received any response.

Scenario 3: No claim. Indigenous communities in State X are concerned about the potential impact to their livelihoods and traditions by an infrastructure project planned by Company B. In particular, they are concerned that sufficient safeguards have not been put in place to guard against serious environmental harm. They are also concerned that a proposed relocation programme will put hunting and fishing resources out of their reach, seriously affecting their ability to continue their traditional way of life. Company B is a joint venture between State X (through a state-owned vehicle) and Parent Company A. Parent Company A is incorporated in State Y. Given State X's involvement in the project, indigenous communities are also concerned about the possible role of the military in preparing the area for the new project, as elements of the military are known to have been abusive towards their communities in the past. The communities have considered the possibility of legal proceedings alleging breaches of constitutional and administrative law, but are concerned about the repercussions. In the meantime, State X has passed laws prohibiting any legal action in respect of the project, and stating that the only redress for any losses suffered as a result of the project will be through a specially constituted compensation scheme. Having examined the terms of the scheme, the communities are concerned that it may not assist them, as they cannot prove "ownership" (as defined in the scheme) of the resources they wish to protect. In any event, the potential amounts of compensation under the scheme are very small. The communities consider legal action against Parent Company A, but are advised that there is no relevant cause of action they can rely on under the laws of State Y as they have not – as yet – sustained any actual damage. Even if they did suffer harm, they are advised that a legal action against Parent Company A would be risky, as it is not clear in law whether or not Parent Company A owed them a duty of care in the first place. The communities' main objective is not, in any event, financial compensation but to ensure that Company B has put proper environmental and human rights impact assessment and amelioration systems in place. State Y is not an OECD member, although is an adherent to the OECD Guidelines. Therefore, a complaint under the NCP processes is theoretically possible, although the groups are concerned about the lack of enforceability of any outcome, especially given the financial involvement of State X in the project, and the legislative steps that the government of State X has already taken to protect the project. Neither Parent Company A nor Company B operate in the extractive sector, and are therefore not party to the "Voluntary Principles". There is no company level grievance mechanism that the communities are aware of.

2. How state-based non-judicial mechanisms ("NJMs") can help

These scenarios, with their lack of viable options for those affected, are all possible under the current accountability framework. Of course, the scenarios are hypothetical, and are written from the perspective of the claimants in each case, but readers familiar with the legal issues will readily spot parallels with real life cases.

But there is much that can be done at national level to help alleviate many of these problems. Many states around the world have already developed new institutions to provide alternative means of dispute resolution and, specifically, to make it easier and cheaper for individuals (especially less well-off people) to enforce their rights. The last few decades have seen a steady growth in state-based NJMs, used in a variety of different regulatory areas, through which people can air their complaints, reconcile their differences, resolve their disputes and receive some form of satisfaction without the need to resort to expensive and uncertain court action. While the type of dispute resolution

mechanism and institutional set up can vary greatly from context to context,[25] some common themes emerge. First, it is no accident that many (if not most) of these NJMs are designed to help solve problems in relationships where there is likely to be a power imbalance between the parties concerned; employer/employee, police/citizen, banking institution/customer, public service provider/disabled person are all relationships for which alternative methods of dispute resolution have been made available under state-based NJMs. Frequently, the claimant has access to special forms of assistance from the body, such as free advice, assistance in the presentation of a claim, or the right to request an investigation.

Box 1: Methods of non-judicial (or "alternative") dispute resolution

Negotiation: The parties to a dispute arrange to come together to explore ways to resolve the dispute and to negotiate a solution. The process is private and voluntary, although the negotiated outcome may be able to made legally binding by agreement (e.g. in the form of a binding contract). The process is usually managed by the parties to the dispute, although it may be facilitated by a third party.

Mediation: (Also known as "conciliation"). An informal method of dispute resolution that can take many forms. Similar to negotiation, although a third party will play a role in facilitating discussions and an agreed settlement ("facilitative" mediation). Sometimes, the mediator may be asked to advise on a suitable outcome ("advisory" or "evaluative" mediation). Outcomes are not usually legally binding in their own right although, as with negotiation, they may be converted into a binding result (e.g. through a contract).

Adjudication: Again, this can take many forms and can vary in formality from informal investigations (e.g. by an ombudsman) to a formal arbitration (see below). Adjudication will often take place according to a pre-arranged procedure, and, depending on her mandate and powers, the adjudicator may play a role in investigating the facts underlying the dispute. At the conclusion of the procedure, a legally binding outcome (or "decision" or "determination") is imposed on the parties. This outcome may or may not be subject to appeal, depending on the context and legislative setting.

Arbitration: A type of "adjudication" (see above), though at the more "formal" end of the spectrum of formality. An arbitrator (or panel of arbitrators or "tribunal") reviews the case in consultation with both sides, and imposes a legally binding decision on the parties. Arbitration can either be voluntary or mandatory. "Mandatory" arbitration usually comes about as a result of the terms of a contract (under which the parties agree to submit their disputes to arbitration), or as a result of legislation (e.g. in the context of employment law).

Additional note: While these methods are discussed separately above, it is quite common for dispute resolution systems to mix aspects of different methods. For instance, mediation could be a required pre-cursor to adjudication, where arbitration is then used only to resolve those issues not resolved by mediation (i.e. "med-arb").

A second common aim of state-based NJMs is to provide more flexibility in dispute resolution, so that rather than having to pass through a fixed set of formal steps, a process can be developed that fits the particular case and is more in tune with the particular needs of the parties concerned. Depending

[25] For a UK study of different state-based NJMs and how and when they are used, see Zerk, n. 1 above.

on the regulatory context, state-based NJMs may also have a wider range of remedies at their disposal, such as the ability to make recommendations, to obtain binding undertakings as to future compliance, and to order a public apology, as well as the ability to award financial compensation in some cases.

Thirdly, the mandate of state-based NJMs frequently extends beyond dispute resolution to the evaluation, development, explanation and amplification of government policy on the matters covered by its mandate. So in addition to receiving complaints, the body may also be developing guidance (e.g. in the form of "codes of conduct") for companies, investigating systematic problems within specific sectors, and making recommendations for law reform. In this way, lessons learned from real life case and disputes can be fed back into wider policy discussions and debates. This wider role for state-based NJMs, and how it can work in practice, is discussed in more detail in Parts 5 and 6 below.

Of the three scenarios set out in Part 1 above, only Scenario 1 is a likely candidate for resolution via judicial mechanisms, being concerned with a past event for which there is at least an arguable tort-based cause of action against the companies concerned, and for which substantial financial compensation is an appropriate (though not perfect) remedy. (It is worth noting that the claimants in Scenario 1 still face substantial challenges accessing a national court and then getting the remedies they need). Scenarios 2 and 3, however, require a more tailored, proactive, forward-looking approach, with proper guidance and advice, and assistance in the development of a workable and enforceable solution, that accommodates the needs of different stakeholders but which is aimed, fundamentally, at protecting the human rights of affected groups.

3. What new institutions and powers are needed?

As will be clear from the discussion in Part 1 above, the key features missing from the current accountability framework for business and human rights include *accessible methods of resolving human rights-related disputes between people and companies that are fit for purpose and capable of producing legally binding outcomes.* But, there is also a wider, organisational need for *domestic institutions specifically tasked with responding to the human rights challenges posed by business* to ensure "vertical" and "horizontal" policy coherence at domestic level.[26] There is an additional need for such institutions to offer guidance and support to business to enable them to integrate human rights into their management systems across all their global operations. At international level, there is the need for these institutions to contribute to greater consensus on addressing corporate harm and to assist in capacity-building processes that will enable effective NJMs to be developed worldwide.

[26] See *Business and human rights: Towards operationalizing the "protect, respect and remedy" framework* ; Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, A/HRC/11/13, 22 April 2009, copy available at http://www2.ohchr.org/english/bodies/hrcouncil/docs/11session/A.HRC.11.13.pdf, para. 18

National Human Rights Institutions (or "NHRIs") already perform functions that resemble the advisory, educational, policy-making, and liaison roles outlined above. Under the best practice guidance set out in the Paris Principles,[27] NHRIs are to be given "as broad a mandate as possible", with responsibilities that include advising government on "any matters concerning the promotion and protection of human rights" (including advice on legislation), investigating cases of human rights violations and then publishing reports, ensuring that domestic legislation is consistent with international human rights standards, cooperating with the United Nations and regional and foreign domestic human rights institutions, and education.[28] However, in practice, the legislative mandate of NHRIs to deal with the human rights impacts *of companies* is often limited, if it exists at all, to a narrow range of issues (usually discrimination).

In addition, while almost all NHRIs now possess the power to hear individual complaints about human rights breaches, they differ greatly from jurisdiction to jurisdiction in terms of the types of complaints they can hear and the action they can take in response. To the extent that these complaints may relate to corporate activities, most jurisdictions do not currently provide for human rights complaints against companies to be heard directly, unless the company is state-owned, or unless the complaint relates to a specific type of breach, most frequently discrimination in employment.[29] In many cases, the decisions of NHRIs are not enforceable in any event, but consist of non-binding recommendations to the parties concerned, or on points of policy. In some cases, however, binding financial compensation orders may be a possibility, although, again, these are usually confined to a narrow band of cases.[30]

In summary, the capacity of NHRIs to respond to the human rights impacts of companies is still constrained, not just by the financial and human resources available to them, but by the legislative mandate and powers they are typically given. Their role in relation to corporate behaviour tends to focus on a narrow range of issues, and, while they may be given dispute resolution functions, they generally lack the power to impose legally binding remedies. Nevertheless, this particular mix of functions – advisory, liaison, educational

---

[27] Principles relating to the Status and Functioning of National Institutions for the Protection and Promotion of Human Rights, adopted by UNGA Resolution 48/134 of 20 December 1993, ('Paris Principles') copy available at http://www2.ohchr.org/english/law/parisprinciples.htm.

[28] Ibid, see "Competence", paragraph 3.

[29] See generally, *Business and Human Rights: A Survey of NHRI Practices: Results from a Survey distributed by the Office of the United Nations High Commissioner for Human Rights,* 2008 ('NHRI survey'), copy available at http://www.business-humanrights.org/SpecialRepPortal/Home/Materialsbytopic/Nationalhumanrightsinstitutions.

There are numerous possible permutations. This report divides complaints mechanisms into the following categories, (a) no complaints mechanisms with regard to companies (b) complaints mechanisms available with regard to any rights, but only certain types of companies, (c) complaints mechanisms available with regard to any kind of company, but only certain types of rights and (d) complaints mechanisms available with regard to any kind of company and all rights.

[30] Again, discrimination in the workplace and unfair dismissal seem to be the cases that are the most likely to be resolved with an order for financial compensation, see NHRI survey, ibid.

and non-judicial dispute resolution – makes NHRIs potentially useful models for future regulatory initiatives relating specifically to corporate impacts. In addition, international discussions on the constitution and functions of NHRIs have yielded a good deal of useful "best practice guidance", which can potentially be applied to the constitution and administration of multi-purpose NJMs.[31]

Of course, at an abstract level, there is no reason why the mandates of existing NHRIs could not be extended by legislation to expressly cover the human rights impacts of companies, and to permit those bodies to receive complaints about corporate activities directly, as well as in relation to state and public entities. Indeed, some NHRIs do this already (although admittedly very few and, where they do, the remedies they can provide are usually confined to non-binding recommendations rather than binding orders).[32] In some cases, extension of the mandate of an existing NHRI could be the simplest and most efficient option. Some states would undoubtedly find this option preferable, on the basis that it would avoid unnecessary duplication of functions, staff and other resources.

On the other hand, extending the mandate of NHRIs to explicitly cover corporate human rights impacts and to provide for additional dispute resolution capabilities could carry the risk that existing NHRI programmes and priorities may be undermined. To avoid this, there would have to be, in virtually all cases, a substantial injection of additional financial, human and technical resources to reflect the extended mandate and new functions and responsibilities. But the end result may be that the NHRI is given too many functions and responsibilities to be able to manage effectively. Given the particular complexities of international business and human rights issues, the range of business sectors and the range of human rights impacts involved, some governments may well conclude that a specialised institution is both justified and necessary.[33]

Regardless of what approach is taken, it should be recognised there can be significant financial as well as reputational damage caused when any business operating overseas is linked to human rights abuses that have a high profile. This can also damage the state hosting the investment in so far as its international standing is affected and its perceived suitability as a recipient of foreign investment.

---

[31] See Commonwealth Secretariat: National Human Rights Institutions: Best Practice, 2001 ('Commonwealth Best Practice Guidance'). Copy available at http://www.asiapacificforum.net/members/international-standards/downloads/best-practice-for-nhris/nhri_best_practice.pdf. See further Parts 5 and 7 below.

[32] See NHRI survey, n. 29 above.

[33] See, for example, the proposal in the UK for a specialised institution, A "UK Commission for Business, Human Rights and the Environment." See Zerk, n. 1 above.

Box 2: The Corporate Responsibility (CORE) Coalition proposal for a UK Commission for Business, Human Rights and the Environment

The Corporate Responsibility (CORE) Coalition has proposed the establishment of a new institution in the United Kingdom, a "UK Commission for Business, Human Rights and the Environment". This institution would be responsible for

- providing accessible legally binding remedies for victims of human rights abuse committed by UK companies when operating abroad;
- giving advice and providing clarity on human rights standards expected of business when operating abroad; and
- working together with similar institutions overseas to build capacity, share learning and work together more co-operatively to enhance the global oversight of multinational corporations.

In its December 2009 report to the UK parliament, the UK Joint Committee on Human Rights said "[we] are sympathetic to the argument that there should be a Commission for Business, Human Rights and the Environment". See *Any of our Business?: Human Rights and the UK Private Sector*, November 2009, copy available at http://www.publications.parliament.uk/pa/jt200910/jtselect/jtrights/5/5i.pdf, at para. 305. The Joint Committee also noted that the proposal had the support of a "significant number of other witnesses to the inquiry" (see para. 301). The Joint Committee recommended that the UK Government "works with NGOs, business and business organisations to explore the proposal for a UK Commission for Business, Human Rights and the Environment" (see para. 305). In addition, the creation of "a UK Commission on Business, Human Rights and the Environment, to advise British companies and act as a conduit for complaints" is a policy objective of the UK Liberal Democrats, one of the partners in the UK coalition government. See Liberal Democrats, *Accountability to the Poor, Policies on International Development*, Policy Paper No. 97, September 2010, copy available at http://www.libdems.org.uk/siteFiles/resources/PDF/conference/Accountability%20to%20the%20Poor_Clear%20Print.pdf.

Clearly, it is for individual governments to decide where business and human rights disputes resolution, standard setting and advisory functions are best housed, based on their own legal structures, resources and aims. The remainder of this paper expresses no view as to whether either institutional option is preferable, as this will depend on the circumstances. The aim, instead, is to present an overview of the key functions that would need to be provided in a state-based NJM, and the regulatory and logistical issues that need to be considered, in order to develop workable new domestic level mechanisms, regardless of whether these are overseen by a NHRI or a new specialist body (or bodies).

4. Additional considerations for "home states" of multinationals

As indicated by the discussion above, "home states" have a particular role to play in human rights regulation and dispute resolution because of their regulatory rights and because of the emerging responsibilities of parent companies of corporate groups operating from, and incorporated within, their respective jurisdictions. While it may not yet be possible to point with certainty to a general international law obligation on home states to regulate the human rights impacts of companies abroad, UN treaty bodies (which are the main point of reference for interpreting the meaning and scope of international conventions) have, in a series of recommendations, expressed support for the idea that home states should indeed use their influence, where possible, to prevent human rights breaches in other countries, especially by their own citizens and companies.[34] This provides a good indication of where the law on the obligations of home states may be heading. But aside from the question of what home states are *obliged* to do under international law, there is clearly much home states are already *permitted* to do (and certainly ought to consider doing) to reduce the human rights impacts of companies in other states. This "regulatory capacity" of home states comes about by virtue of the regulatory influence they can exert over parent companies incorporated within their jurisdictions.

International law imposes limits on the extent to which home states can control the behaviour of corporate groups in other states. For instance, home states cannot generally impose prescriptive regulatory standards on foreign subsidiaries directly, as these are treated as "foreign nationals" for jurisdictional purposes. On the other hand, setting standards for parent companies vis-à-vis their foreign operations (e.g. a requirement for companies to have proper human rights "due diligence" systems in place, or to report regularly on global human rights impacts, or to operate suitable human rights grievance mechanisms) does not necessarily involve the use of extraterritorial jurisdiction. Nevertheless, this mode of regulation can still create regulatory conflicts and compliance difficulties for companies, which will need to be weighed up and analysed as part of the process of regulatory design.

There are issues of "sovereignty" to weigh up here too. Under international law, states are under a general obligation not to interfere "unreasonably" in

[34] In its General Comment No 3, the UN Committee on Economic, Social and Cultural Rights (CESCR) drew attention to the obligation of all States parties to take steps, individually and through international assistance and cooperation, especially economic and technical, towards the full realization of the rights recognized in the Covenant. Similarly, in relation to the rights to water and social security, the CESCR has recommended that steps should be taken by States parties to prevent their own citizens and companies from violating these rights in other countries, and that "[w]here States parties can take steps to influence other third parties to respect the right, through legal or political means, such steps should be taken in accordance with the Charter of the United Nations and applicable international law". In elaborating States' duties in relation to the right to health, the UN CCESCR commented that to comply with their international obligations, States parties "must prevent third parties from violating the right in other countries if they are able to influence these third parties by way of legal or political means, in accordance with the Charter of the United Nations and applicable international law".

the domestic affairs of other states. What constitutes "unreasonable interference" is not entirely clear, but it seems likely that home state regulatory requirements of parent companies would be less prone to challenge on this basis if they are (a) based on, and designed to realise, international standards and (b) designed, as far as possible, in consultation with potentially affected states.[35]

As mentioned above, the particular responsibilities of parent companies *as parent companies* to respect human rights (including the human rights of those affected by the activities of their subsidiaries, suppliers and other companies with which they have relationships) are at present only tentatively defined.[36] Giving substance to these responsibilities, e.g. though management standards and advice, explaining their practical consequences for different industries and sectors, and giving this guidance some legal force at domestic level are all areas where home states could make a significant contribution, provided this is done sensitively and with the legitimate interests of affected stakeholders and other affected states in mind.

5. Functions and facilities: what powers and features would state-based non-judicial mechanisms need to have?

In his 2008 report, the UN Special Representative on Business and Human Rights ("UN Special Representative") identified a number of minimum requirements for non-judicial grievance mechanisms. At a minimum, according to the UN Special Representative, these mechanisms must be legitimate, accessible, predictable, equitable, rights-compatible, and transparent.[37] The remainder of this paper aims to respond to the UN Special Representative's criteria with some practical ideas, based on accepted best practice,[38] for a possible model for future state-based NJMs with specific responsibility for business and human rights.

Wide mandate. The state-based NJM should have a mandate that addresses all human rights and which recognises the "universality, interdependence, inter-relatedness, and indivisibility of human rights".[39] This is needed to help avoid the "selection" of rights by national institutions that results in gaps in coverage. As noted above, complaints regarding corporate activities and impacts can only be made at present in a limited number of states and in relation to a select group of rights (usually concerning discrimination and, in some cases, workplace practices).[40] New mechanisms would be narrower, in the sense that they would only relate to the corporate sector, but also wider, in the sense that they would cover *all* rights.

[35] Though obviously conflict zones and areas of weak governance present particular challenges here.
[36] But n.b. "Guiding Principles", forthcoming. See n. 24 above.
[37] See n. 1 above, para. 92.
[38] See Paris Principles, n. 27 above; Commonwealth Best Practice Guidance, n. 31 above.
[39] Commonwealth Best Practice Guidelines, n. 31 above, para. 3.1
[40] See NHRI survey, n. 29 above.

Legal foundation: The state-based NJM should be entrenched in legislation that clearly stipulates its mandate, functions and powers and which guarantees sufficient resources to carry out its mandate and to discharge its functions effectively. The founding legislation should stipulate who is entitled to make complaints (see further Part 7, "Accessibility", below) which should obviously not discriminate between people on any basis (including race, sex, gender, sexual preference, employment status etc). The founding legislation should set out the subject matter of admissible complaints which should include "civil, political, economic, social and cultural rights and the rights of women, children, minorities and indigenous persons, the disabled, the aged, and other particularly vulnerable groups".[41]

Key functions I: Dispute Resolution: The state-based NJM would provide dispute resolution services in relation to the human rights impacts of companies. This could include disputes arising in other jurisdictions where there was an appropriate connection between the dispute and the relevant state (most obviously, a possible causal connection between the harm and the practices or policies of a company based in, or incorporated in that state). Dispute resolution could take the form of facilitated negotiation, or mediation (with a view to achieving a legally binding settlement), or mandatory adjudication (or "determinative") process, depending on the circumstances of the case and the preferences and needs of claimants.

Key Functions II: Advice, education and standard-setting: Consistent with existing NHRI "best practice" and with commitments of the International Co-ordinating Committee of NHRIs,[42] the state-based NJM should have an advisory, educational and standard setting role, as well as a dispute resolution function. Its work would include the translation of international human rights standards (including emerging guidance relating specifically to business and human rights)[43] into "best practice" guidelines and codes of conduct for companies, which would be done in consultation with companies, NGOs, trade unions and other interested stakeholder groups. These standards could be generally applicable, or relate to a particular sector or industry. They could be legally binding, or, alternatively, they could provide a point of reference for the NJM in the resolution of disputes.[44] The NJM would also offer advice to government departments and play a key role in addressing the problem of "horizontal incoherence"[45] between government departments on business and human rights issues.

***Investigatory powers*:** In accordance with best NHRI practice guidelines, state-based NJMs should have the power to initiate investigations into individual and systematic abuses of human rights on their own initiative, as

[41] See Commonwealth Best Practice Guidelines, n. 31 above, para. 3.2.
[42] See the Edinburgh Declaration arising from the October 2010 conference of NHRIs, http://www.scottishhumanrights.com/content/resources/documents/ENG_Sep_2010_Edinburgh_Declaration_FINAL_101010_1417h.doc.
[43] See, in particular, the "Guiding Principles", n. 24 above.
[44] For example, proof of compliance with a code of conduct could provide a legal presumption in favour of the company concerned, although this may not be conclusive as to liability.
[45] See *Business and human rights: Towards operationalizing the "protect, respect and remedy" framework*, n. 26 above, para. 18.

well as in response to individual petitions and complaints. It is critical that state-based NJMs be adequately resourced to do this, and that they proactively pursue this role, rather than relying on third parties (e.g. NGOs, and trade unions) to investigate and bring forward information about human rights breaches. Investigatory powers should include powers to enter premises, to compel production of documents and witnesses, and to request help from regulatory bodies and NHRIs in other countries (see Part 6, "Relationships with other state-based NJMs and NHRIs").

Remedies: The body should have the power to hand down a wide range of remedies, which should be legally enforceable (see further Part 7, "Enforceability", below). Remedies should include not only financial compensation, but also material remediation, directions aimed at achieving recognition and respect for rights, and binding commitments as regards future compliance (e.g. in the form of enforceable undertakings, or an agreed compliance plan), and public apologies. Financial penalties for non-compliance with a final determination of the NJM could also be a possibility in addition to, or as an alternative to, civil enforcement of an adjudicated outcome or settlement agreement (see further Part 7, "Enforceability", below). The body should have the power to make public statements as to its findings (e.g. non-compliance with human rights standards) in appropriate cases (see further Part 7, "Confidentiality" below). In addition, the body should also have the power to make further (non-binding) recommendations in appropriate cases. The body would need the power to oversee the implementation of future compliance commitments, for instance through reporting requirements, interviews and inspections. In addition, in very serious cases, it should be possible for the body to order appropriate punitive measures, e.g. in the form of exemplary damages.

6. Not an island: key linkages and relationships

The fundamental aim of any new state-based NJMs should not be to supersede existing rights enforcement mechanisms, but to complement and add to them. As noted above, there will still be cases that are most appropriately dealt with by the courts, but where this is not the case – for example where judicial mechanisms cannot provide the necessary remedies (or cannot provide them in a useful timeframe) – then state-based NJMs could be used to help fill this regulatory and enforcement gap. Moreover, as these bodies will be interpreting and administering international standards, sometimes in relation to cross-border problems, they should not be operating in isolation. Instead, they should be viewed as part of a network of domestic and international initiatives, comprising both legally binding and soft law processes.

This section briefly explains how new state-based NJMs could fit into the overall regulatory picture, identifies the key relationships relevant to their functioning, and makes some suggestions as to how these relationships could best be managed.

***Relationships with the executive*:** The body would be "sponsored" by a government department, which would be responsible for the appointment of board or panel members (or "Commissioners"). However, it would need to be constituted in such a way as to ensure its independence (see Part 7, "Independence, credibility and balance", below). Day to day, the body would have the power to determine how its budget and internal resources are allocated. The body would be required to submit regular reports on its activities and performance. Its functions would include advice and assistance to government departments on the development of coherent policy on business and human rights across government (see Part 5, "Key Functions II", above). The body would also provide assistance to the Executive in fulfilling reporting obligations under relevant treaties or other international initiatives relating to business and human rights issues.

Relationships with the legislature: MPs would be kept informed about the activities of the body, primarily through the tabling of an annual report. MPs would have the opportunity to debate the annual report and budget proposals.[46] In addition, the body would develop appropriate working relationships with relevant parliamentary committees. The body could also, in appropriate cases, offer assistance to individual MPs (e.g. in responding to complaints from constituents relevant to the mandate of the body).

***Relationships with the domestic civil courts*:** As noted above, one of the main functions of state-based NJMs would be to provide more flexible and accessible methods of dispute resolution than national courts. In many cases, claimants may prefer a non-judicial to a judicial route, because of the lower costs, because the more informal procedures are less intimidating, or perhaps because of the additional assistance they could expect where the body takes a more "inquisitorial" role. In some cases, claimants may have a choice between judicial processes on the one hand, and non-judicial processes on the other. In these cases, the body should not be obliged to take on a case that is before a court. And the body should not be asked to resolve disputes between a claimant and a company that has already been the subject of a final judicial determination. On the other hand, individuals should not be required to "exhaust their remedies" before a state-based NJM in order to access a national court.

Of course there will still be cases, large-scale class actions, for example, where it is more appropriate that remedies be sought through the courts. If the aim of the NJM is quick and cheap resolution of smaller scale disputes, then one way of achieving this is to impose a monetary limit on the financial compensation that can be recovered using the NJM.

It is important to remember, though, that not all human rights breaches are actionable under existing national law. While there is a substantial overlap between human rights law and tort law, for instance, there are also gaps.[47]

[46] Commonwealth Best Practice Guidelines, n. 31 above, para. 4.2.
[47] See n. 5 above, and also Scenario 3 at p.10 above.

Therefore there will be many cases which are referred to state-based NJMs simply because there is no other remedy.

In some cases, the civil courts may be needed to enforce remedies handed down by the NJM (see further Part 7, “Enforceability”, below).

Finally, state-based NJMs should have the power to intervene in civil proceedings (e.g. as *amicus curiae*) in relation to matters and points of law that are covered by, or relevant to, their mandate.

***Relationships with national criminal processes*:** As discussed above (see Part 5, “Key Functions I and II”, above), The body would operate primarily as an advisory and dispute resolution body, not a criminal enforcement body. In some cases, though, investigations into corporate conduct may yield evidence of criminal wrongdoing. In these cases, the body would be obliged to pass the relevant information on to the relevant authorities (whether located within that jurisdiction or in other states).

The processes and decisions of state-based NJMs can and should be supported by criminal law systems in appropriate cases. For instance, the criminal law system provides a means by which witnesses can be compelled to give evidence (e.g. though the law of “contempt”) and a system through which regulatory decisions and remedies (e.g. enforcement notices, undertakings and compliance plans) can be enforced (see further Part 7, “Enforceability”) below.

Relationships with other domestic law enforcement bodies: As part of the task of ensuring “horizontal coherence”, state-based NJMs should forge links with other domestic regulators and law enforcement bodies (e.g. in the fields of employment law, consumer safety, or trade and competition) whose, mandates relate, directly or indirectly, to business and human rights.

***Relationships with other state-based non-judicial mechanisms and NHRIs*:** State-based NJMs should liase closely with their counterparts in other states and other NHRIs to (a) share experiences and build capacity and expertise and (b) develop consensus on international regulatory standards. NJMs of prominent “home states” of multinationals will have a particular responsibility to ensure that liaison with NHRIs of developing and transition host states is part of their outreach programmes, so that those bodies are aware of the home state NJM’s functions and responsibilities, and generally to help build regulatory capacity and know-how in those host states. Liaison is also important generally to help create consistency of approach, especially in relation to areas where lack of consistency has the potential to undermine confidence, create loopholes for companies and distort markets in favour of under-performing companies and jurisdictions. The body would need to be given, in its founding legislation, the necessary powers to cooperate and enter into agreements (e.g. MOUs concerning liaison and cooperation) with state-based NJMs and NHRIs of other states.

Relationships with law enforcement bodies of other states: In the event of a complaint concerning abuse in a third country (e.g. in the context of a complaint against a parent company in relation to the activities of a foreign subsidiary) it may be necessary to gather information from that third country in order to establish the relevant facts, and/or to determine a suitable remedy. Under international law, the permission of the third state would be needed before investigators from the state-based NJM could carry out an official investigation in that third country. Alternatively, foreign regulatory bodies could agree to assist the state-based NJM with information gathering. Either way, powers to cooperate with foreign regulatory authorities would need to be provided for in the body's founding legislation.

***Relationships with international human rights bodies*:** There will need to be close cooperation between state-based NJMs and international treaty bodies with responsibility for business and human rights related issues. As noted above, it is likely that state-based NJMs would be expected to take a role in fulfilling their state's reporting obligations under treaty-based initiatives. They should also ensure that relevant treaty bodies are generally kept informed of their activities, and the outcomes of inquiries and complaints procedures. In turn, the state-based NJM would take a crucial role in ensuring that decisions and recommendations of treaty bodies are passed on to the relevant government department and authorities and fed into government policy, and that the public is generally kept informed about their work as part of their educational functions (see further "Relationships with the public" below).

***Relationships with NCP/OECD Guidelines processes*:** The NCP processes have particular relevance for "home states" of multinationals, having been invoked on a number of occasions in relation to allegations of involvement by parent companies in human rights abuses *though* foreign companies (e.g. subsidiaries and suppliers).[48] Consequently, there should be liaison between state-based NJMs and NCPs as part of the general task of ensuring horizontal "policy coherence" (see Part 5, "Key Functions II", above).

In cases where specific, enforceable remedies are sought, it is likely that, for the reasons explained above, claimants would favour access to the kind of state-based NJM envisaged by this paper, over the existing NCP processes. While a case involving human rights abuses could theoretically give rise to a complaint under both a state-based NJM and that state's NCP, the NCP and the NJM would have separate jobs to do, even where there is overlap of subject matter. Whereas it would be the NCP's job to consider the multinational's behaviour in light of a voluntary and broad set of *international* guidelines, the NJM is likely to be interpreting and applying a more detailed set of *domestic* regulatory standards and guidance. Moreover, it is important to remember that the OECD Guidelines are concerned with a much broader range of issues than just human rights impacts, so issues such as tax and corruption would remain covered by the NCP, but be outside the scope of the state-based NJM.

[48] OECD Watch, n. 13 above.

Relationships with business: The state-based NJMs would need to consult closely with businesses in the development of guidance and standards (e.g. in the form of recommendations or "codes of conduct") and in the context of inquiries into systemic and sectoral problems. Appointing a business advisory board would be a useful way of gaining access to business expertise (see further, Part 7, "Independence, credibility and balance", below). Regular contact and consultation will also be necessary to ensure that regulatory standards and guidance relating to matters such as human rights due diligence processes and company-level grievance mechanisms continue to reflect "best practice".

Relationships with claimants: Because of the nature of the disputes that would be brought before the body, many claimants will require some degree of support, in the form of advice and some practical help. A claimants liaison unit could be established to help prospective claimants weigh up their options, and to give general advice on the submission of a claim. This should include the provision of web-based resources (e.g. downloadable complaints forms and guidance). See further Part 7, "Accessibility", below.

Relationships with trade unions and NGOs: State-based NJMs will need to cooperate closely with trade unions and NGOs in all areas of its work, especially in relation to standard setting and in the context of inquiries into sectoral and systematic problems. NHRIs frequently refer to NGOs for help in drawing up appropriate terms of reference for inquiries, and rely on them for help in gathering information from affected communities. Based on experience with the NCP processes under the OECD Guidelines, and also in the use of judicial mechanisms, trade unions and NGOs are likely to play a significant role in bringing complaints to the attention of the body, and in assisting claimant groups (although note comments at Part 5, "Investigatory powers", above). Therefore it is critical that these organisations (including trade unions and NGOs based in other jurisdictions where violations are possible or likely) are contacted as part of the NJM's outreach exercises, to ensure that information regarding the work of the NJM, and especially its dispute resolution capabilities and processes, is widely dispersed. Trade unions and NGOs are also likely – individually and through their networks – to play a crucial role in education and training.

Relationship with the public: State-based NJMs will need to keep the public informed of their activities and objectives, through a range of outreach programmes. They should contribute generally to education programmes relating to the ethical and legal responsibilities of business, and they should work to enhance public awareness about the responsibilities of businesses in relation to human rights using all avenues reasonably open to them.

7. Other technical, logistical and legal issues

The remainder of this paper is a brief discussion of some additional technical, logistical and legal issues relevant to NJMs.

***Independence, credibility and balance*:** The appointment of the members of the main panel (or "board", or "commission") should be done in such a way as to provide a "clear signal"[49] of independence. Appointments should be done only after a proper, transparent process involving stakeholder consultation, and should be for a fixed term (with limited grounds for removal). Members of the panel should reflect a range of expertise and backgrounds, and ideally be comprised of a balance of representatives from the legal, business, NGO, and trade union backgrounds. Another way a state-based NJM could potentially bring different expertise and viewpoints into its structure would be to make use of independent advisory committees, for example, a "business advisory committee", and a "NGOs/trade unions advisory committee".

Accessibility: The need for remedies to be accessible to the poor, disadvantaged and vulnerable has been a constant theme of this paper. Many people most in need of help through state-based NJMs will be the most difficult to reach, and therefore it is vital that state-based NJMs be proactive in terms of education and outreach (see Part 6, "Relationships to trade unions and NGOs", above). Access to complaints and dispute resolution mechanisms should be free, and claimants should have access to a reasonable amount of assistance and advice as regards the preparation and submission of a claim, e.g. in the form of a help-line and web-based resources, with the availability of translation where feasible. NJMs should have the flexibility to tailor dispute resolution processes to the circumstances, which should be as informal and non-intimidating for participants as possible. Complaints should be able to be transmitted using a variety of means – letter, facsimile, e-mail etc. It should be possible for families, friends, unions and other representatives or campaigning groups to bring complaints on behalf of affected individuals and communities. Where possible, representatives of the NJM ought to be prepared to travel to investigate a complaint, and to interview affected individuals "at home" rather than putting them to the expense of travelling to hearings.

***Exhaustion of remedies*:** As one of the key aims of state-based NJMs is to create more enforcement options for people, there should be no requirements that claimants "exhaust other remedies" before accessing complaints or dispute resolution mechanisms. Specifically, they should not be required to investigate or access other options – e.g. national courts, corporate grievance mechanisms, industry grievance mechanisms – before accessing the state-based NJM. However, to avoid conflicts, it is usual for NJMs to be entitled to refuse to adjudicate disputes that are also before the civil courts. (See also, Part 6, "Relationships with domestic civil courts", above).

[49] Commonwealth Best Practice Guidelines, n. 31 above, para. 2.2.

***Due process*:** Although informality and flexibility will be key, dispute resolution processes must still abide by standards of procedural fairness. This requires that (a) proper notice is given of the complaint and proposed action to be taken in relation to it (b) advance notice is given of submissions to be made and the evidence to be relied on in support (c) opportunities are given to rebut submissions and to make representations before any final decision is made (subject to time limits) (d) parties receive a chance to comment before any adverse information is published (again, subject to time limits), and (e) that decision-making is generally transparent and fair. It would be usual for there to be a procedure for early screening of groundless or frivolous complaints.

***Evidence and burden of proof*:** Whereas many judicial mechanisms are characterised by an "adversarial" approach, state-based NJMs ought to have more flexibility in how they approach a complaint or dispute. As noted above, state-based NJMs should have the power to carry out their own investigations in appropriate cases. With regard to the question of "standard of proof", it is to be expected that NJMs would, in practice, operate broadly to the "balance of probabilities" yardstick used by many courts in civil cases. However, one advantage of state-based NJMs over judicial mechanisms is that it would not be constrained by the same rigid rules of evidence in deciding whether or not a particular allegation is "proved".

***Limitation periods*:** Part of procedural fairness (see "Due process", above) is ensuring that complaints are bought in a timely fashion. Commonwealth best practice guidance for NHRIs suggests that, as a general rule, a time limit of one year should apply "due to the difficulty of obtaining reliable evidence" after that time. However, according to the same guidance, complaints bodies "should have the discretion to accept complaints that fall outside this time period under well-defined circumstances".[50]

***Confidentiality*:** In some cases, steps will need to be taken to protect the anonymity of a claimant, most obviously in cases where the claimant fears reprisals or some prejudicial treatment as a result of having made the complaint. While much of the discussions and negotiations may well take place in private, in the interests of transparency the NJM ought to publish at least basic details of the complaint and the outcome, i.e. the name of the parties (unless the claimant's anonymity is required, see above), the nature of the complaint, the outcome, reasons for the outcome and any follow-up action to be taken. In some cases, some greater degree of publicity for the case (e.g. in the form of a public apology, or a public compliance plan) may ultimately be part of the package of remedies awarded by the NJM.

***Enforceability of outcomes*:** As noted above, the state-based NJM will need the power to determine enforceable remedies where necessary, which could include orders for financial compensation, financial penalties, material remediation, recognition and restoration of rights, or obtaining binding commitments as regards future performance. Enforceability can be achieved

[50] Commonwealth Best Practice Guidance, n. 31 above, para. 3.3 (commentary).

in a number of ways, depending on the legal traditions and structures of the state concerned. One method would be for the outcome to take the form of a "debt" (in the case of financial remedies) or binding contract, which could then be enforced through the civil courts. Another option would be to make non-compliance with the NJM's decisions a criminal offence, or subject to further civil (i.e. financial) penalties (see Part 5, "Remedies", above). Either way, the enforceability of outcomes would need to be provided for in legislation.

***Appeals*:** Consideration would need to be given to whether there should be some formal basis of appeal, or whether the state-based NJM's decisions should be final. In any event, it must be remembered that, as administrative bodies, the decisions of state-based NJMs are likely to be subject to review (i.e. "judicial review") under general administrative law. Grounds for review vary from legal system to legal system, but could include grounds of "irrationality", or contravention of natural justice.

***Costs*:** Parties would usually be expected to bear their own costs (e.g. legal, travel costs etc.). However, costs can potentially be awarded using other criteria (e.g. as a sanction against non-compliance with obligations during the course of the dispute resolution procedure).

8. Concluding comments

At present, people who are adversely affected by corporate activity have limited options when it comes to enforcing their human rights. Judicial mechanisms may work well in some cases, but for the poor, disadvantaged, vulnerable or isolated, they are frequently out of reach. On the other hand, the more accessible and flexible "soft law processes" have some serious flaws, not least of which is their general lack of enforceability.

Neither route necessarily offers the prospect of "effective remedy". Claimants seeking enforceable, future-oriented remedies to human rights-related problems still have virtually nowhere to go. But there is much that states can do to improve the situation – either by extending the mandate of existing NHRIs or by creating new state-based NJMs, for example, along the lines of the CORE Coalition proposal for a UK Commission for Business Human Rights and the Environment.[51]

Given the right mandate, functions and powers, state-based NJMs can do much to fill the most serious gaps in our current accountability framework for business and human rights. They can potentially help to overcome some of the main challenges to the state's capacity to protect, by working together with other national and international institutions to build expertise and consistency, and by contributing to a new approach in which responsibilities for regulating cross-border problems are shared, rather than divided along strictly territorial lines. They can also help solve the problem of "policy incoherence" within national governments through their advisory and policy-making functions. They can help build consensus about the substance of the Corporate

[51] See Zerk, *Filling the Gap*, n. 1 above.

Responsibility to Respect Human Rights within different industries, sectors and contexts, by acting as a hub of expertise, advice and guidance for business. And, most importantly, state-based NJMs can help address gaps in access to remedy by providing an accessible, inexpensive, flexible and enforceable alternative to court action.

State-based NJMs are no “silver bullet”, particularly as there are limits to what they can achieve in isolation. However, if they are viewed as part of a package of possible enforcement options for victims of human rights abuses, then they can make a significant contribution towards improving access to remedies. By taking as a starting point the best practice guidance that has already been developed in relation to NHRIs, it is possible to visualise ways in which new bodies like this could potentially contribute to much more cohesive, cooperative and forward-looking systems for understanding and responding to the human rights impacts of companies. There is currently considerable momentum and opportunity for this to happen.