

ACCESS TO REMEDY IN CASES OF BUSINESS-RELATED HUMAN RIGHTS ABUSE

A Practical Guide for State-Based Non-Judicial Mechanisms



**UNITED NATIONS
HUMAN RIGHTS**
OFFICE OF THE HIGH COMMISSIONER

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INTRODUCTION

BACKGROUND

The right to remedy is a core tenet of the international human rights system, and the need for victims to have access to an effective remedy is recognized in the Guiding Principles on Business and Human Rights.

Since 2013, the Office of the United Nations High Commissioner for Human Rights (OHCHR) has had a dedicated focus on the Access to Remedy Pillar of the Guiding Principles. In response to a series of mandates given by the Human Rights Council, OHCHR has led the Accountability and Remedy Project (ARP) to help strengthen the implementation of that pillar.¹

To promote the lessons learned from the Accountability and Remedy Project, OHCHR has developed a set of publications on access to remedy. The Interpretive Guide on Access to Remedy provides an overview of the Access to Remedy Pillar, and some key issues and misconceptions about it. The guide is complemented by a set of compilations of guidance from the Accountability and Remedy Project, which provide recommended actions for enhancing the effectiveness of the different types of remedial mechanisms relevant to cases relating to business and human rights.

WHAT IS THE ACCOUNTABILITY AND REMEDY PROJECT?

The Accountability and Remedy Project was launched by OHCHR to strengthen accountability and access to remedy in cases of business-related human rights abuse. The Access to Remedy pillar of the Guiding Principles on Business and Human Rights refers to three categories of grievance mechanisms for accountability and remedy in such cases, and the Accountability and Remedy Project has focused on each one:

¹ See Human Rights Council resolutions 26/22, 32/10, 38/13 and 44/15. For more information on the Accountability and Remedy Project, see www.ohchr.org/EN/Issues/Business/Pages/OHCHRaccountabilityandremedyproject.aspx.

- ARP I: Judicial mechanisms
- ARP II: State-based non-judicial grievance mechanisms
- ARP III: Non-State-based grievance mechanisms

The methodology adopted throughout these parts of the project involved an inclusive, multi-stakeholder, evidence-based process to identify good practices for improving rights holders' access to remedy through the relevant grievance mechanism in cases relating to business and human rights.

At the end of each part of the project, a report and addendum were submitted to the Human Rights Council, containing:

- General observations regarding the mechanism
- Guidance for enhancing the effectiveness of the mechanism, drawing upon good practices identified during the project
- Explanatory notes for the guidance
- A model set of terms of reference that States can use as a basis for reviewing the effectiveness of their remedial system

WHAT IS THIS GUIDE?

The present guide compiles the guidance and explanatory notes from the second part of the project (ARP II), which focused on enhancing the effectiveness of State-based non-judicial mechanisms.² This information can be found in the report and the addendum thereto submitted to the Human Rights Council in 2018.³

FOR WHOM IS THIS GUIDE INTENDED?

This guide is aimed primarily at States and State agencies concerned with the design, development, administration and oversight of relevant State-based non-judicial mechanisms. The information in the guide will also be relevant to policymakers and practitioners, law enforcement bodies, national human rights institutions, international bodies with mandates relevant to business and

² For documents and information on ARP II, see www.ohchr.org/EN/Issues/Business/Pages/ARP_II.aspx.

³ A/HRC/38/20, annex and Add.1.

human rights, business enterprises and other stakeholders, such as civil society organizations and trade unions.⁴

HOW TO USE THIS GUIDE

The guidance reproduced below contains:

- A series of **policy objectives** for States
- **Elements** that demonstrate different ways in which the policy objectives can be reached⁵

Informed by the various information-gathering activities during ARP II, these policy objectives and supporting elements are intended to capture lessons from “good practices” with regard to the design and operation of State-based non-judicial mechanisms, and relevant legal and policy issues. To ensure global relevance and applicability, the recommended action is designed to be readily adaptable to different legal systems and contexts while also being practical, forward-looking and reflective of international standards on access to remedy.

Following each policy objective and corresponding set of elements, explanatory notes provide relevant definitions, examples and added context.

⁴ See A/HRC/38/20, para. 19.

⁵ “Elements” are the numbered paragraphs directly following each policy objective. For instance, a reference in this document to “1.1” is a reference to the first element under policy objective 1.



**RECOMMENDED ACTION
TO IMPROVE THE
EFFECTIVENESS OF
STATE-BASED
NON-JUDICIAL
MECHANISMS
RELEVANT TO
BUSINESS AND
HUMAN RIGHTS**

A. IMPROVING THE EFFECTIVENESS OF STATE-BASED NON-JUDICIAL MECHANISMS WITHIN THE CONTEXT OF THE STATE'S BROADER SYSTEM OF LAWS, POLICIES AND REGULATORY INSTITUTIONS

POLICY OBJECTIVE 1: State-based non-judicial mechanisms, individually and in combination, contribute to the effective implementation of the State's international legal obligations and policy commitments with regard to accountability and remedy for business-related human rights abuses in a manner that is consistent with domestic legal structures and constitutional principles, and responsive to local needs and operating conditions, in particular the type, nature and severity of business-related human rights risks.

- 1.1 The State has conducted a comprehensive review process and consulted appropriately with stakeholders to determine (a) the range and types of State-based non-judicial mechanisms established in its jurisdiction that are relevant to respect by business enterprises of human rights; (b) whether their degree of independence, mandates, functions and powers are appropriate and sufficient, when analysed together with relevant laws and policies, to provide a legal and regulatory environment conducive to business respect for human rights; and (c) whether they meet the needs and sufficiently safeguard the rights of the individuals and/or communities for whom those mechanisms are intended.

- 1.2 The State has taken the steps necessary to correct any deficiencies identified with respect to the issues mentioned in paragraph 1.1 above.
- 1.3 Where relevant and appropriate, State-based non-judicial mechanisms are encouraged (and provided with the resources necessary) to engage and cooperate with other relevant State-based non-judicial mechanisms, law enforcement bodies and regulatory agencies for the purposes of improving the effectiveness of communication and coordination between the various mechanisms, bodies and agencies.
- 1.4 The State regularly reviews the effectiveness of the overall contribution of State-based non-judicial mechanisms to accountability and remedy for business-related human rights abuses, taking particularly into account matters such as (a) the extent to which there is policy coherence between the respective roles, policies and practices of relevant State-based non-judicial mechanisms and those of other relevant governmental departments, regulatory agencies and other State-based institutions;⁶ (b) areas where communication and coordination between different mechanisms, bodies and agencies could be improved in the light of their mandates and functions; (c) the degree of awareness and understanding of key personnel of State-based non-judicial mechanisms of the State's international legal obligations with regard to human rights and the role of such mechanisms in meeting those obligations; (d) whether these mechanisms meet the needs and sufficiently safeguard the rights of individuals and/or communities for whom they are intended; and (e) the recommendations of relevant oversight bodies, including peer review mechanisms. The State makes public the findings arising from such review processes and implements the necessary legal, policy and structural reforms and administrative improvements.

⁶ See Guiding Principles on Business and Human Rights, principle 8 and commentary.

EXPLANATORY NOTES

KEY CONCEPTS

“State-based non-judicial mechanisms” are mechanisms by which individuals and/or communities whose human rights have been adversely impacted by business activities can seek a remedy. State-based non-judicial mechanisms are distinguishable from judicial mechanisms (i.e., courts) in that they are administered by and answerable to the executive rather than the judicial branch of government. The involvement of the State in their establishment and at least some aspects of their operation or administration distinguish them from *non-State-based grievance mechanisms*.

“Overlapping proceedings” refers to two or more sets of complaints-handling and/or dispute resolution proceedings or processes being conducted in two or more settings, arising from a single event and/or similar sets of circumstances and which involve the same business enterprises.

“Representatives”, in relation to a rights holder, refers to third parties who are authorized or entitled to represent and/or assist the rights holder in connection with complaints-handling and/or dispute resolution processes of State-based non-judicial mechanisms, such as legal counsel, representatives of civil society organizations or family members.

“Rights holders” refers to the intended beneficiaries of State-based non-judicial mechanisms, particularly those whose human rights have been (or are at risk of being) adversely impacted by business activities.

“Stakeholders” includes rights holders and their representatives or other persons who have an interest in the effectiveness of State-based non-judicial mechanisms as a means to enhance accountability and remedy in business and human rights cases, such as business enterprises, local communities or civil society organizations.

Systemic effectiveness and policy coherence generally

There is great diversity in State-based non-judicial mechanisms relevant to business and human rights. The information-gathering activities conducted by OHCHR in phase two of the Accountability and Remedy Project identified multiple State-based non-judicial mechanisms relevant to addressing adverse human rights impacts of business activities for each jurisdiction reviewed.⁷

These State-based non-judicial mechanisms play an important role in implementing States' international law obligations and policy commitments with respect to protecting against human rights abuses within their respective territories and/or jurisdictions and ensuring access to remedy when such abuses take place.

As a first step, it is important that States are able to identify the various State-based non-judicial mechanisms operating in their respective jurisdictions that are relevant to business respect for human rights, as not all will express their mandates in explicitly human rights terms.

For this reason, the recommended action begins by focusing on alignment needed between the collective activities of relevant State-based non-judicial mechanisms (each with their own specific mandates and functions) and the State's international legal obligations and policy commitments relevant to business and human rights. The recommended action under policy objective 1 envisages an inclusive, evidence-based process to clarify the types of State-based non-judicial mechanisms operating within the relevant jurisdiction, and whether they are sufficiently robust and appropriate to the local context and meeting the needs of rights holders (1.1). Further suggestions for such a review process can be found in the model terms of reference.⁸ This process could be conducted as part of a national action plan on business and human rights⁹ or as part of strategies to improve access to remedy more generally. The action needed to address any deficiencies identified through the relevant review process (1.2) will vary depending on local legal structures, traditions, human rights risks, and needs.

Few – if any – State-based non-judicial mechanisms operate in isolation. On the contrary, they are integral to well-functioning regulatory systems. Phase two of the Accountability and Remedy Project identified various ways in which the effectiveness of accountability and remedy systems could be improved by enhanced communication, cooperation and coordination between different

⁷ See A/HRC/38/20, paras. 6–10.

⁸ See A/HRC/38/20/Add.1, fig. 1.

⁹ See Working Group on Business and Human Rights, Guidance on National Action Plans on Business and Human Rights, December 2014, available at www.ohchr.org/Documents/Issues/Business/UNWG_%20NAPGuidance.pdf.

State-based mechanisms and agencies relevant to business and human rights. Depending on the mandates and functions of the mechanisms and agencies in question, this interaction can take the form of sharing information that may help to improve the detection of breaches, assisting with investigations, raising awareness about systemic or market-related issues that may be undermining the effectiveness of regulatory initiatives, or sharing lessons learned with a view to improving effectiveness. The extent to which such communication, cooperation and coordination should take place is, however, not always clear. The recommended action encourages States to consider the potential benefits of greater engagement and cooperation between different mechanisms and agencies and to take appropriate steps to facilitate them. This could be both horizontally (i.e., between mechanisms and agencies operating at the same level of government) or between mechanisms and agencies operating at different levels (for example, in a federal system, between the national and regional levels of government) (1.3).

To enable State-based non-judicial mechanisms to continue to fulfil their mandates and to meet the needs of rights holders in evolving circumstances, States should keep the performance of such mechanisms under review. The recommended action provides a list of areas that could be considered as part of such a review, all of which will have a bearing on, and provide valuable insights into, the extent to which these mechanisms are contributing effectively to a coherent and comprehensive State-based system for accountability and remedy in business and human rights cases (1.4). (Note that part I of the recommended action is concerned with the *overall contribution* of State-based non-judicial mechanisms to this system (namely, questions of systemic effectiveness); part II provides further guidance with respect to the effectiveness of individual mechanisms).

POLICY OBJECTIVE 2: Individuals and communities affected by or at risk of business-related human rights abuses have a realistic and readily identifiable pathway to an effective remedy.

- 2.1 Information regarding the various complaint handling and/or dispute resolution options and mechanisms that may be available in different types of contexts and cases are made available to rights holders in a manner that is readily understandable by them.

- 2.2 Advisory and support services are made available to rights holders, which includes advice with regard to (a) the relative advantages and disadvantages of different complaint handling and/or dispute resolution options; and (b) the types of remedial outcomes that may be achieved through different mechanisms (including judicial ones).
- 2.3 The State encourages and provides the resources necessary to enable providers of the information and/or advisory and support services mentioned in 2.1 and 2.2 above to engage in appropriate physical outreach activities among relevant rights holders to promote the widest possible awareness of the various complaint handling and/or dispute resolution options and mechanisms that may be available in different contexts and cases, including through regional offices and service centres, mobile offices and “road shows”.
- 2.4 Where the realization of an effective remedy is likely to require or benefit from the involvement of more than one State-based non-judicial mechanism, law enforcement body and/or regulatory agency, arrangements have been made to facilitate (as appropriate in the light of the mandates, functions and powers of the relevant agencies or mechanisms) the referral or exchange of information, proceedings and/or enquiries between the relevant agencies, bodies or mechanisms in a manner that is equitable, predictable, rights-compatible and transparent; consistent with domestic legal structures and constitutional principles; consistent with the objective of reducing barriers to remedy and not erecting barriers to prevent legitimate cases from being brought before rights holders' preferred mechanisms; takes into due account rights holders' needs and preferences with regard to access to different kinds of mechanisms; and also takes into due account the need for confidentiality in certain circumstances, and particularly with regard to the identity of individuals who may be at risk of threats, harassment or reprisals.

EXPLANATORY NOTES

KEY CONCEPTS

A “period of limitation” refers to the time limit within which a complaint or dispute must have been initiated to be valid. It may run from the time that the abuse was committed, from when the harm materialized, or from when the harm or abuse became known to the affected person.

“Remedy pathway”, in the case of business-related human rights abuse, refers to the various mechanisms and processes that are used to ascertain the relevant facts and to determine, mediate and/or agree upon (depending on the nature of the processes involved) a remedial outcome. A remedy pathway may not be confined to one mechanism; in some cases, it may involve a combination of mechanisms (including judicial mechanisms and non-State-based mechanisms). A remedy pathway includes all steps from the initiation of a complaint and/or dispute to a final determination, agreement or settlement (as provided for by the relevant mechanisms and processes), including any relevant appeal or review processes.

“Remedial outcome” refers to the outcome reached at the conclusion of a remedial process or series of related processes. Remedial outcomes can be divided into two main categories: financial remedies (punitive or compensatory) and non-financial remedies (for example, restitution; measures to assist with rehabilitation of victims and/or resources; satisfaction, including public apologies; or guarantees of non-repetition).

“Standing”, in relation to a State-based non-judicial mechanism, refers to the rules that determine who has the right to initiate a complaint handling and/or or dispute resolution process under that mechanism’s procedures.

The need for realistic and readily identifiable pathways to an effective remedy

States should consider that there may be circumstances and settings in which meeting their obligations to provide access to effective remedies means providing rights holders with a range of remedial options and choices, and providing flexibility for affected individuals and/or communities to decide on a remedial strategy that best meets their needs. Whether individually or in combination,

those options should offer rights holders a pathway to remedy that is both realistic and readily identifiable (policy objective 2).

In order for rights holders and other stakeholders to make effective use of State-based non-judicial mechanisms and to realistically evaluate the different options open to them (including the likelihood of different remedial outcomes), they require easy access to clear and readily understandable information about the existence, mandates, functions and powers of relevant State-based non-judicial mechanisms.

For these reasons, the recommended action under policy objective 2 focuses on steps to enable rights holders to identify the remedial options and remedy pathways most suitable to them, in the light of the circumstances. Supporting elements (2.1, 2.2 and 2.3) are concerned with making information and advisory and support services available to rights holders in a proactive manner. Phase two of the Accountability and Remedy Project involved the gathering of information on a range of techniques used to communicate with rights holders on different remedy pathways and options, including regional and local advice centres, toll-free telephone lines, online resources, “plain language” pamphlets, downloadable information packs and the use of dedicated case workers.¹⁰ The most suitable providers of information and advice will vary depending on the legal structures and existing institutions of the State concerned. In many jurisdictions and contexts, however, national human rights institutions and other bodies with mandates expressed in human rights terms are likely to have an important role to play. Physical outreach activities (such as travelling “road shows”, regional offices or partnerships with local civil society organizations) are frequently a key component of effective outreach strategies involving remote communities.

In some cases, and particularly in serious and/or complex ones, more than one mechanism, law enforcement body or regulatory agency may have to become involved. In such cases, “an understanding of the linkages and synergies in play between different bodies and mechanisms will be key.”¹¹ The recommended action therefore includes a provision aimed at enhancing cooperation and coordination between the various mechanisms, bodies and agencies concerned

¹⁰ See the discussion paper prepared by OHCHR for the sixth Annual Forum on Business and Human Rights, 2017, available at www.ohchr.org/sites/default/files/Documents/Issues/Business/DomesticLawRemedies/ARPII_DiscussionpaperonPhase2forUNForum_FINAL.pdf, p. 23.

¹¹ See OHCHR, “Accountability and Remedy Project Part II: How State-based NJMs respond to sectors with high risks of adverse human rights impacts”, available at www.business-humanrights.org/sites/default/files/documents/ARPII_phase1_Sector%20Study_Part%20I.pdf, pp. 20–23.

(2.4) and highlights a number of factors that may be taken into account in deciding the most appropriate and effective modes of cooperation and coordination. It is important that such coordination and cooperation operate as smoothly and seamlessly as possible, and do not introduce further barriers (such as unnecessary delays) to these processes (see p. 24).

POLICY OBJECTIVE 3: State-based non-judicial mechanisms and judicial mechanisms complement and support each other in a manner that promotes accountability and access to remedy for business-related human rights abuses.

- 3.1 There is delineation between the roles and responsibilities of State-based non-judicial mechanisms and judicial mechanisms. This delineation is appropriate to the type, nature and severity of different business-related human rights abuses, and recognizes that there will be cases where judicial recourse is an essential part of gaining access to remedy.
- 3.2 To the extent relevant and appropriate in the light of their mandates and functions, State-based non-judicial mechanisms can readily seek assistance from judicial mechanisms in relation to specific matters, such as the use of powers of investigation, in obtaining injunctive relief or in the enforcement of legally binding remedial outcomes.
- 3.3 Where relevant and appropriate in the light of their mandates and functions, State-based non-judicial mechanisms may (a) seek or recommend the transfer of complaints and/or disputes for adjudication by judicial mechanisms; and/or (b) refer allegations or evidence of business involvement in human rights abuses to judicial mechanisms and/or other law enforcement bodies for investigation and/or further action. The procedures governing such transfers or referrals are equitable, predictable, rights-compatible and transparent, and take into due account rights holders' needs and preferences with respect to different complaint handling and/or dispute resolution options, and the need for confidentiality in certain circumstances, particularly with regard to the identity of individuals who may be at risk of threats, harassment and reprisals.

- 3.4 Rights holders are made aware of (a) the circumstances in which, and the procedural stages at which, judicial mechanisms may become involved in the investigation, adjudication and/or resolution of complaints and/or disputes that have been initiated in or referred to State-based non-judicial mechanisms; and (b) their rights to challenge and/or to request a review of decisions by a State-based non-judicial mechanism with respect to the transfer or referral of proceedings, allegations or evidence to judicial mechanisms and/or other law enforcement bodies.
- 3.5 The procedural rules and practices of judicial mechanisms provide for the participation of State-based non-judicial mechanisms in judicial proceedings to the extent relevant and appropriate (for example, as prosecutors, advocates, representatives, expert witnesses or as persons authorized to intervene on the basis of having a specific interest or relevant expertise).
- 3.6 State-based non-judicial mechanisms and judicial mechanisms have adopted and implemented equitable, predictable, rights-compatible and transparent procedures to be followed in the event that more than one mechanism (whether judicial or non-judicial) has been called upon to investigate, adjudicate upon and/or mediate a set of allegations arising from a single event and/or similar sets of circumstances and involving the same business enterprises.
- 3.7 Rights holders retain the ability to alter a remedial course of action in response to evolving circumstances, including by transferring a complaint and/or dispute from a State-based mechanism to a judicial mechanism in the event that it becomes clear that judicial recourse is an essential part of having access to remedy and/or alternative methods of achieving effective remedy are unavailable.
- 3.8 In cases where both State-based non-judicial mechanisms and judicial mechanisms may have a role in the delivery of an effective remedy, their procedural rules and practices operate in a manner that serves to reduce barriers to remedy for rights holders and does not contribute to the creation of new barriers to remedy.

EXPLANATORY NOTES

Linkages and differentiation between State-based non-judicial mechanisms and judicial mechanisms

In phase two of the Accountability and Remedy Project, OHCHR defined State-based non-judicial mechanisms as mechanisms administered and answerable to the executive (i.e., ministerial) rather than the judicial branch of government (see p. 10). This definition is not, however, always easily applied in practice owing to the growing use, in some jurisdictions, of “hybrid” mechanisms that operate as courts and have financial and/or administrative relationships with judicial mechanisms and/or the judiciary but are also connected in some way to domestic executive agencies.¹²

After reiterating the complementary and supporting role of State-based non-judicial mechanisms in relation to judicial mechanisms¹³ (policy objective 3), the recommended action highlights the need for clear delineation between the roles and responsibilities of these mechanisms (3.1). This is important for several reasons: because of constitutional principles of “separation of powers” (and/or other legal principles aimed at creating checks and balances on the use of governmental authority); because rights holders and other stakeholders require clarity about their respective roles and responsibilities in order to use them effectively; and because of the possibility of overlapping proceedings (see p. 10) in both judicial mechanisms and State-based non-judicial mechanisms.

The recommended action recognizes, however, that there will be circumstances (for example, cases of complicity in international crimes, or causing or contributing to other serious abuses of human rights) in which judicial remedy is the only effective remedy. It is particularly important that State-based non-judicial mechanisms (and their respective processes or procedures) do not prevent or limit access by rights holders or their representatives to judicial mechanisms in such cases (3.1).¹⁴

¹² See OHCHR, *Access to Remedy for Business-Related Human Rights Abuses: A Scoping Paper*, 2017, available at www.business-humanrights.org/sites/default/files/images/ARPII_FINAL%20Scoping%20Paper.pdf, pp. 2, 24, 29.

¹³ See *Guiding Principles on Business and Human Rights*, principle 27, commentary.

¹⁴ See also *Guiding Principles on Business and Human Rights*, principle 26, commentary.

Separation of powers is a constitutional principle applicable in many jurisdictions under which different branches of government – legislative, executive and judicial – are separate from each other to prevent abuses of power. Consequently, interactions between the different types of mechanism (i.e., judicial and non-judicial) that amount to undue interference in their respective functions and powers (and particularly interference by executive agencies in the workings of the judiciary) would be prohibited.

In practice, however, the processes of State-based non-judicial mechanisms and judicial mechanisms can be interlinked, for example where State-based non-judicial mechanisms are granted powers (a) to recommend criminal or quasi-criminal (i.e., administrative) proceedings; (b) to refer evidence of corporate wrongdoing to law enforcement authorities; (c) to act as a prosecutor in a criminal or quasi-criminal case; (d) to give evidence as a witness in judicial processes; (e) to intervene in judicial cases (for example as *amicus curiae*); (f) to undertake public interest civil litigation on the part of claimants or complainants; or (g) to report or refer cases of non-cooperation or obstruction of its processes for further action through judicial mechanisms. The recommended action calls upon States to ensure that such options are available (to the extent relevant to the respective mandates and functions of the relevant mechanisms) (3.5) and that transfers and referrals between State-based non-judicial mechanisms and judicial mechanisms take place in a manner that takes into due account the rights, interests and preferences of rights holders (3.3). These provisions should be read in conjunction with the recommended action relating to remedy pathways (see policy objective 2).

Conversely, judicial mechanisms can support the activities of State-based non-judicial mechanisms in a range of ways, including – where permitted under the domestic legal regime – by providing a route through which State-based mechanisms can compel the production of evidence (e.g., the granting of a search warrant) and/or by providing a means of enforcement of remedies awarded or determined through non-judicial processes (3.2). Judicial mechanisms can make an important contribution to the ability of certain State-based non-judicial mechanisms to provide remedial outcomes aligned with principles of adequate, effective and prompt reparations for harm suffered (see pp. 22–24). For instance, some State-based non-judicial mechanisms may have the ability to seek emergency orders from a court to prevent the continuation of a business-related human rights abuse. Moreover, State-based non-judicial mechanisms charged with the enforcement of binding legal standards may be able to seek assistance from judicial mechanisms in the enforcement of remedial outcomes.

Consistent with the approach to remedy pathways generally (see pp. 14–16), and to enable rights holders and stakeholders to make effective use of State-based non-judicial mechanisms, the recommended action highlights the importance of access to information on the different circumstances in which (and the stages at which) judicial mechanisms may become involved in a complaint or dispute, and their rights to challenge decisions about transfers or referrals of complaints or disputes to other bodies (3.4).

Overlapping proceedings can be problematic for several reasons. First, a lack of clarity on treatment of disclosures or admissions beyond the confines of the relevant proceedings may create dilemmas for business enterprises as to whether and how to engage with the relevant mechanism. Second, because the prospect of inconsistent findings and/or remedial outcomes from overlapping processes is not only potentially contrary to the principles of fairness and legal certainty, but can also undermine the effectiveness of remedies in individual cases. For these reasons, the recommended action highlights the need for States to anticipate and make appropriate provision for overlapping proceedings in the procedural rules of both judicial mechanisms and State-based non-judicial mechanisms in line with standards of fairness, predictability, rights-compatibility and transparency (3.6).

The remaining elements under policy objective 3 (3.7 and 3.8) are designed to encourage States to reflect on how the use of legal waivers and procedures for transfer or referral of proceedings between different mechanisms may introduce further barriers to remedy. For instance, the imposition of a period of limitation (see p. 14) that does not take into account the time spent exploring other remedial options, subjecting parties to excessive delays in the course of a transfer or referral process, or the unnecessary duplication of procedural steps are examples of the kinds of potential barriers to remedy that States are encouraged to address.

POLICY OBJECTIVE 4: State-based non-judicial mechanisms, individually and in combination, contribute to the realization of effective remedial outcomes for individuals and communities that have been subjected to business-related human rights abuses.

- 4.1 The State adopts and implements laws and policies with respect to State-based mechanisms that are aligned with the principles of equal and effective access to justice, adequate, effective and prompt reparation for harm suffered, and access to relevant information concerning violations and reparation mechanisms.¹⁵ To this end, laws and policies relevant to the realization of remedial outcomes in cases of business-related human rights abuses draw appropriately from all recognized categories of full and effective reparation (namely, restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition),¹⁶ and wherever possible, provide for choice by rights holders of the type of remedial outcomes most appropriate in the light of the specific circumstances of the case.
- 4.2 The State has made appropriate arrangements to address the risk of non-implementation of remedial outcomes (including non-compliance with the terms of a remedial agreement or determination), which may include (depending upon the mandates and functions of the relevant mechanisms) (a) the use of robust self-executing enforcement powers; (b) the possibility of enforcement through judicial mechanisms; (c) regulatory or administrative follow-up activities (including monitoring); or (d) the imposition of regulatory and/or other consequences. Agencies responsible for enforcement, follow-up, monitoring or other action are appropriately responsive to requests by rights holders to exercise their powers of enforcement and/or supervision (as relevant) and operate in a manner consistent with international standards relating to the prompt implementation of remedial outcomes in cases of human rights abuse.

¹⁵ Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (General Assembly resolution 60/147, annex).

¹⁶ *Ibid.*, sect. IX, para. 18.

EXPLANATORY NOTES

Determination and enforcement of remedial outcomes

The recommended action under policy objective 4 calls upon States to draw from international standards on access to remedy for human rights abuses as they consider how best to make use of State-based non-judicial mechanisms in business and human rights-related cases and their mandates, functions and powers. This should not be taken to imply that every State-based non-judicial mechanism must provide the full range of reparations contemplated in international standards. The types of remedies available and the means by which they are implemented in individual cases will depend on the mandates, functions and powers of the relevant mechanisms. The aim is to encourage States to consider ways in which accountability and remedy systems as a whole (which, as noted above, may include a range of different remedial options and pathways involving both judicial and non-judicial mechanisms), can offer a range of remedial outcomes, maximizing the potential for delivery of effective remedies in individual cases by providing rights holders with the range of options needed to enable them to seek and obtain remedies that meet their needs (4.1).

The extent to which State-based non-judicial mechanisms take responsibility for overseeing the implementation of remedial outcomes varies from one mechanism to another. Some (typically regulatory-type bodies) have self-executing powers of enforcement, whereas others (typically mediation-type bodies) have the ability and/or authority to carry out only minimal (if any) follow-up. The recommended action recognizes that different types of mechanisms have different roles to play, but calls upon States to take appropriate and timely steps to address the risk of non-implementation of remedial outcomes (4.2). This provision should be read in conjunction with the recommended action on the ability of State-based non-judicial mechanisms to seek assistance from, and to transfer and to refer matters to, judicial mechanisms (3.2, 3.3 and 3.4; see also pp. 19–20) and also the recommended action under policy objective 2 (see pp. 14–16) relating to remedy pathways.

B. IMPROVING THE EFFECTIVENESS OF INDIVIDUAL STATE-BASED NON-JUDICIAL MECHANISMS RELEVANT TO THE RESPECT BY BUSINESS ENTERPRISES FOR HUMAN RIGHTS

POLICY OBJECTIVE 5: State-based non-judicial mechanisms are effective mechanisms for dealing with business-related human rights harm.

- 5.1 The State adopts and implements laws and/or policies with regard to the establishment and administration of State-based non-judicial mechanisms that are aligned with the effectiveness criteria set out in Guiding Principle 31.
- 5.2 State-based non-judicial mechanisms operate in a manner that is consistent with the recommendations of relevant oversight bodies, and take into due account the recommendations of other entities concerned with monitoring and evaluating their performance, such as peer review mechanisms.

EXPLANATORY NOTES

Implementing the effectiveness criteria set out in the Guiding Principles for non-judicial mechanisms

Principle 31 of the Guiding Principles lays down seven “effectiveness criteria” applicable to State-based non-judicial mechanisms relevant to business respect for human rights: legitimacy; accessibility; predictability; equitability; transparency; rights-compatibility; and continuous learning.

The recommended action under policy objective 5 highlights the importance of the effectiveness criteria as a benchmark (5.1). It also takes account of the fact that some State-based non-judicial mechanisms are subject to regular review (e.g., performance or effectiveness reviews) by designated oversight bodies (e.g., treaty bodies or parliamentary bodies) or peer review bodies (5.2).

During phase two of the Accountability and Remedy Project, OHCHR gathered information from State-based non-judicial mechanisms operating in a wide range of jurisdictions – representing different geographic regions and different domestic legal structures and traditions – about how they meet different aspects of the effectiveness criteria in practice.

Drawing from this information, the recommended actions under policy objectives 6 to 11 provide States with a series of illustrative examples of practical steps that States can consider to improve the effectiveness of their State-based non-judicial mechanisms in general and their implementation of Guiding Principle 31 in particular.

POLICY OBJECTIVE 6: State-based non-judicial mechanisms are legitimate.¹⁷

- 6.1 The State has made the structural, institutional, administrative and resourcing arrangements needed (a) to provide each State-based mechanism with a degree of operational autonomy from government functions that is appropriate in the light of its specific mandate and functions; (b) to minimize the risk of conflicts of interest for the

¹⁷ Guiding Principles on Business and Human Rights, principle 31 (a) and commentary.

State-based mechanism (or any of its personnel) with respect to the discharge of its powers and/or functions; and (c) to minimize the risk of any undue influence of any one actor or group of actors.

- 6.2 Where they are vested with powers to investigate allegations and/or complaints on their own initiative, State-based non-judicial mechanisms exercise such powers in an equitable, rights-compatible, predictable, transparent, timely and professional manner.
- 6.3 State-based non-judicial mechanisms have adopted and implemented appropriate procedures in the light of their mandates and functions to enable rights holders and other stakeholders to raise concerns or complaints about the manner in which such mechanisms have discharged specific functions or powers, such as the way they have responded to, investigated, adjudicated or resolved complaints and/or disputes.
- 6.4 The State has made appropriate arrangements to provide for the possibility to review a State-based non-judicial mechanism's decisions, actions or non-action in certain circumstances, such as where there is evidence of a possible conflict of interest, a procedural irregularity or other impropriety.
- 6.5 State-based non-judicial mechanisms are subject to periodic review by a suitable oversight body or peer review mechanism, which can offer advice as to how their performance and effectiveness might be improved.
- 6.6 State-based non-judicial mechanisms have adopted and implemented appropriate policies and procedures to detect, avoid and respond appropriately to conflicts of interest (both actual and potential), including those that may arise where the relevant mechanism has had conferred upon it a range of functions, such as education and awareness-raising, in addition to addressing complaints and resolving disputes.

EXPLANATORY NOTES

Legitimacy (Guiding Principle 31(a))

As already noted (see p. 10), a defining feature of a State-based non-judicial mechanism – as opposed to a judicial mechanism – is its relationship with the executive (rather than the judicial) branch of government. This raises questions

about the appropriate level of independence of operation, in the light of its mandate, functions and powers, to ensure that the mechanism has legitimacy and trust in the eyes of stakeholders.¹⁸

The recommended action under policy objective 6 suggests a number of ways to help to strengthen and build stakeholder trust in State-based non-judicial mechanisms. These include providing the mechanism with sufficient resources and reflecting on the structural, institutional, governance, administrative and staffing arrangements needed to provide an appropriate level of operational autonomy (6.1).

The manner in which a State-based non-judicial mechanism discharges its functions, particularly in the context of contested allegations, is relevant to building and maintaining stakeholder trust and enhancing legitimacy. The recommended action identifies a number of principles to govern the exercise of any powers of investigation that have been conferred (6.2).

The extent to which a mechanism should be able to act independently and proactively, and the steps needed to achieve this, will vary according to the nature of the mechanism and its mandate. Independent appointment panels for board members, stakeholder representation on governing bodies, or the use of independent monitoring or advisory bodies might work well in some settings, but will not necessarily be appropriate in others. The recommended action suggests that, where appropriate, provision should be made for rights holders and other stakeholders to be able to raise concerns or complaints about different aspects of the performance or administration of State-based non-judicial mechanisms (6.3) or to request a review of specific decisions or determinations (6.4). In some settings, the creation of a peer review system to assess the performance of a mechanism has been valuable to drive up standards (6.5).¹⁹ These processes are distinct from the overall systemic review referred to under policy objective 1 (see 1.4 and p. 12).

The recommended action highlights the need for robust policies and procedures for conflicts of interest (6.6). Depending on the structure and activities of the State-based non-judicial mechanism concerned, this could include employment and disciplinary policies and procedures, the internal rotation of key personnel or, in some cases, the need for separation of functions to maintain the objectivity and independence of enforcement personnel.

¹⁸ See Guiding Principles on Business and Human Rights, principle 31 (a), commentary.

¹⁹ See, for instance, the peer review mechanism established for national contact points charged with advising on and promoting the implementation of the Guidelines for Multinational Enterprises of the Organization for Economic Cooperation and Development.

POLICY OBJECTIVE 7: State-based non-judicial mechanisms are accessible.²⁰

- 7.1 State-based non-judicial mechanisms work proactively to raise awareness among rights holders of their mandates, functions and activities, including through targeted outreach activities.
- 7.2 The State takes such steps as are reasonable and appropriate in the light of the mandates and functions of the State-based non-judicial mechanism concerned to enable and to encourage to make complaint handling and/or dispute resolution services of the mechanism available to parties free of charge.
- 7.3 Where possible, financial assistance is made available to rights holders to help to defray the costs associated with assessing the relevant services. Proactive steps are taken to ensure that information about such financial assistance is conveyed to the rights holders for whom it is intended.
- 7.4 Complaint handling and/or dispute resolution processes are designed to be as user-friendly as possible and, where appropriate, allow for the possibility of (a) representation in person (namely, without the need for legal counsel); and/or (b) the assistance of a representative or other third party; and (c) collective redress.
- 7.5 State-based mechanisms take appropriate steps to enable rights holders to have access to and participate in complaint handling and/or dispute resolution processes in ways most convenient to them, including through online forms, telephone reporting, by post or in person.
- 7.6 State-based non-judicial mechanisms make available, free of charge, (a) advisory and support services necessary to promote easy access by individuals and communities to complaint handling and/or dispute resolution processes, including through online resources, such as downloadable pamphlets and videos, paper resources, and telephone helplines; and (b) where relevant and appropriate, suitable advisory or “triage” services to ensure that complaints and/or disputes can be swiftly directed to the place where they can most quickly, efficiently and appropriately be resolved in the light of all relevant circumstances.

²⁰ Guiding Principles on Business and Human Rights, principle 31(b) and commentary.

- 7.7 The materials, resources and advisory services referred to in paragraphs 7.5 and 7.6 above are made available (a) in formats that meet the needs and are consistent with the rights of persons with disabilities, including persons with impairments to hearing, sight or mobility; and (b) to an appropriate extent, in the light of the relevant mechanism's mandate and functions, in the languages of the rights holders for whom they are intended.
- 7.8 Periods of limitations, to the extent that they apply to the complaint handling and/or dispute resolution functions of State-based non-judicial mechanisms, are set in accordance with certain factors, such as the nature and severity of human rights risks addressed by the mechanism, and other issues, such as the remoteness of individuals and communities likely to be at risk and the particular needs of the rights holders for whom the mechanism is designed to help.
- 7.9 State-based non-judicial mechanisms have put in place measures designed to allow access to and use of the mechanisms by rights holders on an equal basis with others, for instance by improving physical and communicational accessibility to premises and by making adjustments to processes and procedures to facilitate their use (and reduce barriers to participation) by persons with disabilities, including deaf persons and persons with intellectual or psychosocial impairments, and older persons.
- 7.10 State-based non-judicial mechanisms adopt and implement procedures and practices to protect confidentiality where the context and circumstances of the case would make it necessary, particularly with respect to the identity of individuals who may be at risk of threats, harassment or reprisals, and appropriate safeguarding arrangements for the protection of rights holders, taking into account the particular needs of persons at greater risk of vulnerability and/or marginalization.
- 7.11 The confidentiality of the private information of users of State-based non-judicial mechanisms is protected by robust domestic law regimes on privacy and the protection of personal data.
- 7.12 The State adopts and enforces laws and takes other measures to protect individuals and communities from the risk of reprisals, harassment and discrimination as a consequence of having referred any business and human rights-related allegation, claim, complaint or dispute to a State-based non-judicial mechanism.

EXPLANATORY NOTES

Accessibility (Guiding Principle 31(b))

The Guiding Principles draw particular attention to the problem of “lack of awareness of the mechanism, language, literacy, costs, physical location and fears of reprisal”.²¹ The recommended action under policy objective 7 sets out practical steps to improve accessibility of individual State-based non-judicial mechanisms, drawing from existing State practice. These include working proactively to raise awareness among rights holders about their mandates, functions and activities (7.1),²² taking steps to reduce, as far as possible, the costs of securing access to such mechanisms (7.2 and 7.3),²³ giving publicity to sources of financial assistance (7.3), and making processes as simple and straightforward as possible to reduce the need for legal counsel, where appropriate,²⁴ while at the same time preserving the possibility of assistance from third parties (such as family members, carers or interpreters) (7.4). Flexible rules on standing (i.e., allowing certain persons or entities to bring a claim on someone else’s behalf) can help to improve access to remedy for persons who fear acts of intimidation and reprisals. Other steps that can be taken to improve accessibility include giving persons a choice on how to engage with mechanisms (such as online, by telephone, in person or by letter) (7.5) and offering special assistance services, such as dedicated case workers, downloadable “self-help” kits or support through “triage” systems (7.6).²⁵ The recommended action stresses the importance of materials and resources being made available in different formats to meet the needs of persons with disabilities (7.7) and adjustments to premises and facilities to improve physical and communicational accessibility (7.9).

Some State-based non-judicial mechanisms impose periods of limitation on complaints or disputes. The recommended action draws attention to the potential for such procedural rules to undermine the accessibility of State-based

²¹ See Guiding Principles on Business and Human Rights, principle 31, commentary.

²² See also 2.1, 2.2 and 2.3 above, which concern the need for rights holders to have access to information about the different remedial courses of action potentially open to them, and the advantages and disadvantages of each.

²³ Such as user fees, costs of legal counsel, translation costs, costs of expert witnesses, travel and accommodation costs, and costs associated with the preparation and submission of documents and testimony.

²⁴ Note that for regulatory or enforcement-type cases (as opposed to dispute resolution type processes), prosecution of the matter will often be in the hands of the mechanism itself, in many cases precluding the need for rights holders to retain their own legal counsel.

²⁵ Note that this part of the recommended action is distinct from, though related to, the elements under policy objective 2 (2.1, 2.2 and 2.3) relating to information, advice and support for rights holders to help in the identification of potential remedy pathways.

non-judicial mechanisms, and suggests issues to be taken into account in setting a period of limitation (7.8).

The recommended action highlights the importance of taking steps to protect confidentiality in certain cases and of appropriate policies to ensure the physical safety and well-being of rights holders (particularly those who may be at heightened risk of vulnerability or marginalization) as they engage with the relevant mechanism and its personnel (7.10). Such policies should be clearly communicated to all relevant personnel, and appropriately linked to relevant complaints and disciplinary procedures, in accordance with the law and good management practice. Robust background legislation and enforcement regimes relating to confidentiality, privacy, safeguarding and whistle-blower protection can contribute to the accessibility of State-based non-judicial mechanisms in practice (7.11 and 7.12).

POLICY OBJECTIVE 8: State-based non-judicial mechanisms are predictable.²⁶

- 8.1 In addition to the steps described in paragraph 7.1 above, State-based non-judicial mechanisms work proactively to raise awareness among rights holders about the stages of relevant complaint handling and/or dispute resolution processes, including information about (a) any preliminary requirements that must be met; (b) what parties can expect at each stage, the time frames within which key decisions will be taken and milestones reached; (c) the rights of parties to withdraw from complaint handling and/or dispute resolution processes once commenced; (d) the legal consequences of remedial outcomes; (e) procedures for monitoring remedial outcomes of complaint handling and/or dispute resolution processes; and (f) the contents of any regulatory standards, codes of conduct or policies relating to any of the above.
- 8.2 To the extent relevant and appropriate in the light of their mandates and functions, permitted by applicable laws, standards and policies with respect to confidentiality and protection of whistle-blowers and individuals who may be at risk of threats, harassment or reprisals, and appropriate for the purposes of enhancing public understanding of complaint handling and/or dispute resolution processes and

²⁶ Guiding Principles on Business and Human Rights, principle 31(c) and commentary.

methodologies used in practice, State-based non-judicial mechanisms publish readily understandable information relating to past cases and/or determinations, such as case histories and/or aggregated information relating to the types of claims, complaints or disputes referred, the types of remedial outcomes and the time taken to achieve them.

EXPLANATORY NOTES

Predictability (Guiding Principle 31(c))

OHCHR research into the “best practices” of State-based non-judicial mechanisms suggests that the need for clarity with respect to procedure and relevant time frames is already widely recognized. Many such mechanisms make use of a variety of means to inform rights holders and other stakeholders about processes and procedures, including through online resources, videos and “what to expect” leaflets. The recommended action under policy objective 8 makes a number of suggestions with regard to information that should be conveyed to rights holders and other stakeholders in the interests of predictability (8.1).

In some contexts, the publication of information about past cases (such as how they were handled and the remedial outcomes) can help to improve predictability and trust in the processes of State-based non-judicial mechanisms. This will not, however, be appropriate to all kinds of State-based non-judicial mechanisms (e.g., mediation-type mechanisms that rely for their effectiveness on the willingness of parties to participate based on assurances of confidentiality). In some contexts and circumstances, publication of information identifying the complainant or witnesses may be inappropriate, counter-productive or even unlawful. The recommended action is designed to encourage States to reflect on the level of publication (e.g., using redacted information or aggregated information) that may be appropriate and desirable to enhance public understanding of the complaints handling and/or dispute resolution processes and methodologies in use, and to make this information available in a readily understandable format (8.2).

POLICY OBJECTIVE 9: State-based non-judicial mechanisms are equitable.²⁷

- 9.1 In addition to the steps described in paragraphs 7.1 and 8.1 above, State-based non-judicial mechanisms work proactively to raise awareness among rights holders about sources of further information, advice and assistance available to enable them to participate fairly and effectively in the relevant processes.
- 9.2 State-based non-judicial mechanisms have adopted and implemented the procedures and practices necessary, in the light of their mandates and functions, to ensure that parties to a complaint and/or dispute receive (a) adequate and timely information concerning the arguments, allegations and evidence provided by the other party; (b) copies of or access to documentary or other evidence; (c) adequate opportunity to comment on each and all of the items mentioned in points (a) and (b) prior to any final decision or determination; (d) sufficiently detailed written reasons for decisions; and (e) readily understandable information concerning the steps to be taken, and the time limits that apply, should a party wish to seek review of or challenge a final decision or determination.
- 9.3 The procedural rules, policies and practices of State-based non-judicial mechanisms respect the rights of rights holders to withdraw from complaint handling and/or dispute resolution processes if they are dissatisfied with those processes and do not unfairly preclude access by rights holders to judicial recourse.
- 9.4 State-based non-judicial mechanisms have adopted and implemented policies, procedures and practices to ensure that its personnel disclose promptly any possible conflict of interest with respect to any complaint or dispute that they are asked to handle or resolve, and that following such a disclosure, the person concerned has no further involvement with the matter and is suitably replaced.

²⁷ *Ibid.*, principle 31 (d) and commentary.

EXPLANATORY NOTES

Equitability (Guiding Principle 31(d))

As noted in the Guiding Principles, “in grievances or disputes between business enterprises and affected stakeholders, the latter frequently have much less access to information and expert resources, and often lack the financial resources to pay for them”.²⁸ The recommended action in policy objective 9 highlights the importance of access to information about sources of advice and assistance to enable rights holders to participate fairly and effectively in mechanism processes (9.1).

Research conducted during phase two of the Accountability and Remedy Project suggested that there is a high degree of consensus from jurisdiction to jurisdiction about the basic elements of procedural fairness. The recommended action draws from these findings and highlights the need for procedures to provide for adequate and timely information, opportunities to comment before decisions are made, written reasons for final determination and the rights of parties to challenge decisions (9.2).

Procedural rules that commit rights holders to pursuing remedies through non-judicial mechanisms and that remove the option of judicial recourse can present serious barriers to effective remedy. The recommended action highlights the need for rights holders to have the flexibility to withdraw from non-judicial mechanisms in certain circumstances and to retain the right to seek remedies using judicial mechanisms (9.3).²⁹ This provision should be read in conjunction with the recommended action under policy objective 3 (particularly 3.6, 3.7 and 3.8).

Fairness can be undermined if decision-makers within State-based non-judicial mechanisms are faced with conflicts of interest. The recommended action draws attention to the need for suitable policies, procedures and practices to ensure that any such conflicts are identified and declared, and that the mechanism responds appropriately (9.4).

²⁸ *Ibid.*, principle 31 (d), commentary.

²⁹ See also comments above on remedy pathways and the need to offer some degree of choice to rights holders (see pp. 14–16) and also the need to take into account the fact that there will be cases in which judicial remedy is the only effective remedy (see p. 19).

POLICY OBJECTIVE 10: State-based non-judicial mechanisms are transparent.³⁰

- 10.1 In addition to the steps described in paragraphs 7.1, 8.1 and 9.1 above, State-based non-judicial mechanisms work proactively to raise awareness among rights holders with respect to (a) procedural rules, policies, codes of conduct or standards that will govern complaint handling and/or dispute resolution processes, including liaison with parties and/or any investigation or fact-finding activities; (b) the adherence of the mechanism to performance standards and the status of relevant certifications; and (c) other information likely to be important to rights holders, such as information about the average duration of complaint handling and/or dispute resolution processes and the likely costs in different scenarios.
- 10.2 State-based non-judicial mechanisms have put in place procedures to ensure that parties to a complaint and/or dispute are kept informed of key developments and requirements, including through online accounts, telephone helplines or dedicated case workers, as appropriate.
- 10.3 State-based non-judicial mechanisms publish and take proactive steps to disseminate periodic reports on their activities and performance that set out in a readily understandable format information likely to be useful to relevant rights holders, such as (a) the types of complaints and/or disputes referred to the mechanism in a given period; (b) the percentage of cases successfully resolved, and in what time period; (c) the percentage of cases rejected by the mechanism, and on what grounds; and (d) common challenges.
- 10.4 Information with respect to the activities and performance of State-based non-judicial mechanisms that are overseen by or operate within government departments is accessible to members of the public pursuant to domestic regimes on freedom of access to governmental information.

³⁰ Guiding Principles on Business and Human Rights, principle 31 (e) and commentary.

EXPLANATORY NOTES

Transparency (Guiding Principle 31(e))

In practice, State-based non-judicial mechanisms can take a number of different steps to improve transparency not just in handling specific complaints and/or dispute resolution processes but also with respect to their operating policies, procedures and wider performance and impact. Some such mechanisms make use of new technologies to improve the speed, effectiveness and communications between themselves and relevant stakeholder groups. Innovations include e-filing systems, videoconferencing and password protected online accounts to enable participants in complaints handling or dispute resolution processes to track the progress of procedures and to respond more easily to requests for information.

The recommended action in policy objective 10 highlights steps to enhance the transparency of State-based non-judicial mechanisms. These include working proactively to ensure that information useful to rights holders and their representatives is conveyed to the relevant individuals and communities in a readily understandable format (10.1), keeping participants in processes informed of key developments and requirements (10.2) and publishing periodic (typically annual) reports on activities and performance (10.3).

The recommended action also highlights the importance of domestic legal regimes relating to freedom of access to government information as a means of enhancing transparency of State-based non-judicial mechanisms in general (10.4).

POLICY OBJECTIVE 11: State-based non-judicial mechanisms are rights-compatible.³¹

11.1 The State adopts and implements laws and/or policies with regard to the administration of State-based non-judicial mechanisms that are consistent with the State's obligations under international human rights law, including the rights to equality of treatment and to non-discrimination.

³¹ Ibid., principle 31 (f) and commentary.

- 11.2 State-based non-judicial mechanisms exercise their mandates and functions in a manner that promotes (a) equal and effective access to justice; (b) adequate, effective and prompt reparation for harm suffered; and (c) access to relevant information concerning violations and reparation mechanisms.³²
- 11.3 State-based non-judicial mechanisms have, with a view to achieving prompt, adequate and effective remedial outcomes for business-related human rights abuses, adopted and implemented procedures and practices designed to ensure, within the framework of and subject to their mandates and functions, that (a) complaints and/or disputes are addressed and concluded without undue delay; (b) in cases of severe or irremediable harm, the mechanism can take pre-emptive action to mitigate the harm; (c) rights holders are properly consulted with regard to the elements of an adequate and effective remedy in their specific case; (d) rights holders are properly consulted about and given an opportunity to comment on (and, where appropriate, provided with opportunities to take further or corrective action prior to) any decision by the mechanism to reject, defer, abandon or settle a complaint or dispute; and (e) following conclusion of a complaint handling and/or dispute resolution process, rights holders are provided with information regarding their options for further action, including on the steps that they should take in the event of non-compliance by a party with the terms of a remedial outcome of a non-judicial process.
- 11.4 In deciding whether to reject, defer, abandon or settle a complaint handling or dispute resolution process, State-based non-judicial mechanisms give due regard to the availability (or non-availability) of remedies under alternative mechanisms (including judicial mechanisms).
- 11.5 State-based non-judicial mechanisms take steps to ensure that members of their staff with responsibility for receiving and/or handling complaints and/or adjudicating and resolving complaints and/or disputes arising from adverse human rights impacts that are business-related and/or providing advice or support to rights holders with respect to the same (a) are familiar with the needs and rights of the rights holders (whether individuals or groups) for whom the relevant mechanism is intended, with due consideration for the particular needs of individuals or groups at a

³² Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, para. 18.

greater risk of vulnerability and/or marginalization, and (b) have access to the human rights expertise needed to discharge their responsibilities in a non-discriminatory way and in a manner consistent with the international legal obligations and policy commitments of the State with respect to business and human rights.

EXPLANATORY NOTES

Rights compatibility (Guiding Principle 31(f))

According to the Guiding Principles, “grievances are frequently not framed in human rights terms and many do not initially raise human rights concerns. Regardless, where outcomes have implications for human rights, care should be taken to ensure that they are in line with internationally recognized human rights”.³³ The recommended action under policy objective 11 therefore reminds States of the need for State-based non-judicial mechanisms to be administered, and to be given mandates and functions, that are consistent with international human rights standards (11.1), and aligned with internationally recognized procedural and substantive components of an effective remedy (11.2).

In addition, it reflects elements of good practice identified in the course of phase two of the Accountability and Remedy Project that are relevant to the international standard of “prompt, adequate and effective” remedy in cases of human rights violations. There is a need to ensure that requests by rights holders and their representatives are responded to in a timely fashion (11.3). Where relevant, in accordance with the mandate, functions and powers of the mechanisms in question, there should also be provision for the prioritization of responses and/or preventative action in cases posing a risk of severe or irremediable harm (11.3).

Depending on their mandate and functions, State-based non-judicial mechanisms may be able to offer a range of remedies, including regulatory, restorative and/or preventative remedies, as well as financial ones (punitive and/or compensatory). The recommended action recognizes that the eventual realization of a remedy both “adequate” and “effective” is more likely with the active and meaningful involvement of the affected rights holders and their representatives (11.3).

³³ Guiding Principles on Business and Human Rights, principle 31 (f), commentary.

The recommended action also encourages States to reflect on the different ways in which creating opportunities for consultation with rights holders can enhance accountability and access to remedy. For instance, State-based non-judicial mechanisms that may abandon, defer or settle claims and/or disputes at their own initiative (including subject to terms) should be prepared to consult rights holders and their representatives in advance of a decision not to proceed with a complaints handling or dispute resolution process (e.g., because of an agreement between the mechanism and the business enterprise concerned to defer proceedings pending an attempt to achieve compliance) (11.3). The recommended action moreover suggests that the availability of effective remedies through other means should be considered in a decision whether or not to bring an end to, or defer, a process (11.4).

Not all relevant State-based non-judicial mechanisms have mandates that are explicitly framed in human rights terms. Within such mechanisms, there may not be the necessary levels of awareness among key personnel and decision-makers of the mechanism's role and responsibilities with respect to human rights. Some State-based non-judicial mechanisms have, however, taken steps to raise awareness among staff about relevant human rights standards (e.g., obligations with respect to non-discrimination, or indigenous peoples' rights) and the practical steps that can be taken to ensure that complaints and disputes are handled and progressed in a rights-compatible way. The recommended action highlights the importance of staff training programmes on human rights issues generally and the cultural needs and preferences of the communities served by the relevant mechanisms, as well as the need to ensure that personnel have access to relevant human rights expertise as required (11.5). National human right institutions have a potentially important role to play in this regard.

POLICY OBJECTIVE 12: State-based non-judicial mechanisms are a source of continuous learning.³⁴

12.1 The State makes appropriate use of the expertise of State-based non-judicial mechanisms with regard to the development of regulatory and enforcement policy relevant to the respect by business enterprises for human rights. To this end, the mechanisms are given appropriate opportunities to make recommendations for reforms to institutions,

³⁴ Ibid., principle 31 (g) and commentary.

initiatives and operating practices aimed at improving the effectiveness of State-based non-judicial mechanisms, and enhancing their contribution to accountability and remedy in cases of business-related human rights abuses.

- 12.2 Periodic and/or annual reports by State-based non-judicial mechanisms include, to the extent possible and relevant, information about (a) regulatory or compliance challenges in specific operating or industrial contexts, or on systemic or market-related issues that may be impeding the effectiveness of regulatory strategies or agencies, and (b) legal or policy interventions that may help to address these challenges, together with information about their effectiveness, if available. The State draws from this know-how and the recommendations in developing policies, legislation, regulation and guidance aimed at addressing business-related human rights risks and protecting against business-related human rights abuses.
- 12.3 The State has made arrangements to allow for the sharing of know-how among State-based non-judicial mechanisms, and between the mechanisms and other regulatory agencies, to the extent appropriate in the light of their mandates and functions, with a view to improving the capacity and effectiveness of all domestic bodies and initiatives that, directly or indirectly, monitor respect by business enterprises for human rights.

EXPLANATORY NOTES

Continuous learning (Guiding Principle 31(g))

Not all State-based non-judicial mechanisms have policy making and advisory functions. Nevertheless, the recommended action under policy objective 12 reminds States that State-based non-judicial mechanisms can be a vital source of information with respect to the effectiveness or otherwise of different regulatory strategies and techniques, in different sectors and operating contexts. They are also a potentially important source of expertise in the formulation of law reforms aimed at improving the effectiveness of State-based mechanisms and enhancing their contribution to accountability and remedy in business and human rights cases (12.1). In light of this, the recommended action suggests that State-based

non-judicial mechanisms be asked, where relevant and appropriate, to report upon and make recommendations with respect to compliance-related issues apparent in their various activities (12.2). States are also encouraged to take steps to enable greater dissemination of know-how and lessons learned by State-based non-judicial mechanisms among other domestic bodies and regulatory agencies that play a part in raising standards of business enterprises with respect to human rights.

C. IMPROVING THE EFFECTIVENESS OF STATE-BASED NON-JUDICIAL MECHANISMS IN CROSS-BORDER CASES

POLICY OBJECTIVE 13: State-based non-judicial mechanisms have access to information, advice and assistance from relevant State agencies in other jurisdictions to the extent and in the manner required for the fulfilment of their mandates and functions.

- 13.1 The State sets out a clear policy expectation that State-based mechanisms will respond to cross-border cases to the fullest extent permitted in the light of their mandates and functions, and considers making appropriate adjustments to such mandates and functions where this is necessary to respond to business-related human rights risks that are cross-border in nature.
- 13.2 The State has made arrangements to enable State-based non-judicial mechanisms, to the extent appropriate and relevant in the light of their mandates and functions, to seek assistance from, and to respond to requests for assistance from, State agencies in other jurisdictions for the purposes of (a) gathering information relating to complaints and/or disputes, (b) informing complaint handling and/or dispute resolution processes, (c) adjudicating and resolving complaints and/or disputes, and/or (d) delivering an effective remedial outcome.
- 13.3 State-based non-judicial mechanisms, to the extent appropriate and relevant in the light of their mandates and functions, participate in and contribute to the development of initiatives and networks of State agencies and practitioners from different jurisdictions with the aim of (a) improving the ease with which and speed at which requests for information, advice and assistance can be made and addressed;

(b) creating opportunities for joint and/or coordinated responses to complaints and/or disputes arising from business involvement in human rights abuses that have, or appear to have, a cross-border element; and
(c) promoting peer learning among State agencies about regulatory, complaint handling and dispute resolution best practices.

- 13.4 The State has made arrangements for State-based non-judicial mechanisms, to the extent appropriate and relevant in the light of their mandates and functions, to be able to call upon their embassies and consular services for assistance with research and information-gathering for the purposes of investigating, adjudicating and resolving claims, complaints or disputes arising from adverse human rights impacts that are business related.
- 13.5 States work through their embassies and consular services to raise awareness and to publicize information about the activities and procedures of relevant State-based non-judicial mechanisms, including information about their mandates and functions in investigating, adjudicating and resolving complaints and/or disputes arising from business involvement in human rights abuses that have, or which appear to have, a cross-border element.
- 13.6 State-based non-judicial mechanisms have access to the information, support, training and resources necessary to enable personnel to make effective use of the arrangements referred to in paragraphs 13.2, 13.3, 13.4 and 13.5 above.
- 13.7 The State works through relevant bilateral, regional and multilateral forums and bodies to strengthen methods, systems and domestic law regimes and initiatives relevant to investigating, adjudicating and resolving complaints or disputes arising from business involvement in human rights abuses.

EXPLANATORY NOTES

KEY CONCEPTS

“Cross-border cases” refers to complaints and/or disputes arising from business-related human rights abuses in which the relevant actors, evidence, facts, harms, and/or witnesses are located in more than one State.

Issues relevant to cross-border cooperation between State-based non-judicial mechanisms

Few State-based non-judicial mechanisms have a mandate relating to extraterritorial business-related human rights abuses. A notable exception is the national contact point (“NCP”) system established to promote and assist with the implementation of the Organization for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises. National contact points based in the jurisdictions of adhering States to the OECD Guidelines have been called upon to handle complaints on allegations of business involvement in human rights abuses in other States (including non-adhering States) on a number of occasions.³⁵

There have, however, recently been instances in which State-based non-judicial mechanisms (and particularly national human rights institutions) have entered into ad hoc arrangements with regulatory agencies from other States to address business and human rights challenges that appear to be cross-border in nature.

The recommended action under policy objective 13 encourages States to support the involvement of State-based non-judicial mechanisms in cross-border cases where their mandates and functions permits, and to make appropriate adjustments to the mandates and functions of these mechanisms to enhance their ability to respond to cross-border human rights risks in the future (13.1).

While cross-border cooperation in judicial cases is typically formal in nature (for instance, when it makes use of diplomatic channels of communication or relies on international mutual legal assistance regimes),³⁶ cross-border cooperation by State-based non-judicial mechanisms carries the possibility of greater flexibility, for instance in the use of informal and ad hoc arrangements.

In the comparatively limited circumstances in which State-based non-judicial mechanisms can and do involve themselves in cross-border cases, they can face significant practical and logistical challenges when it comes to gathering evidence about extraterritorial business-related human rights abuses. Much depends on the level of cooperation of the authorities in the State where the harm has occurred. In such cases, some national contact points under the OECD

³⁵ See OECD, *Annual Report on the OECD Guidelines for Multinational Enterprises 2016, 2017*, available at <https://mneguidelines.oecd.org/2016-Annual-Report-MNE-Guidelines-EN.pdf>.

³⁶ See A/HRC/32/19/Add.1, paras. 32–38.

Guidelines have found foreign embassies to be a useful source of information and support in practice.

Experience within the NCP system has shown that good working relationships between personnel working within State-based non-judicial mechanisms and their counterparts in other States can be promoted through the use of regulatory networks and other regional or multilateral initiatives aimed at encouraging the sharing of know-how on regulatory, complaints handling and dispute resolution best practices, and the dissemination of information to stakeholders.

For these reasons, the remaining elements under policy objective 13 focus on actions that could enhance the quality and effectiveness of informal contacts between practitioners working within State-based non-judicial mechanisms in different States with a view to creating cultures and relationships that are more supportive of, and provide more opportunities for, joint and/or coordinated responses to cases of business-related human rights abuses that are, or appear to be, cross border in nature (13.2, 13.3, 13.6 and 13.7). The potential importance of embassies and consular services as a source of assistance (13.4) and as a means of awareness-raising about the complaints handling and dispute resolution options that may be available (13.6) is also recognized.



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