Richard Meeran, Panel VIII

1. With regard to national mechanisms, there are **interrelated** legal, procedural & practical hurdles facing access to remedy. Some of these are common to all cases, however I am going to focus on the barriers to civil litigation.

2. Key legal hurdles in home state cases are **jurisdiction,** in particular **FNC** and the **liability of parent** co. These issues were discussed yesterday and today.

3. One additional point I would raise is specifically in relation to **security & human rights** cases where it is effectively alleged that the MNC was complicit in human rights violations perpetrated by the state. These cases are difficult to prove factually and also legally because they essentially depend on arguing that the conduct of the police or military was influenced or controlled by the MNC.

4. In addition, an argument that has been raised in such cases is that they contravene the "foreign act of state" principle. This is similar to the principle of state immunity which precludes the courts of one state from exercising jurisdiction in a case against another state, save in commercial matters. The argument is that in order to rule against the MNC the court would first need to decide, for instance in a case involving the police, that the host state police had acted unlawfully, which would then entail the home state court sitting in judgment over the legality of the host state police. This argument has failed so far but in the UK will be determined by the Supreme Court next year.

5. Payment of **damages** by an MNC has the potential to deter bad conduct as well as providing redress for victims. BP will obviously take great care not to pollute the Gulf again. In the EU, the **Rome II Regulation** now applies to choice of law in tort cases. It stipulates that damages will invariably be assessed by reference to local levels. This reduces the deterrent effect. It also reduces the financial viability of cases for victims' lawyers (especially in smaller cases).

6. Regarding **procedural hurdles** the two most important are **access to documents/**discovery, which we discussed yesterday and the availability of **class actions** procedures. Class actions enable a case to be advance by one or a few representatives on behalf of a large group who fall into the class definition. **Opt-out class actions** - under which if someone fulfils the class definition unless they opt out have their downside. However they reduce the expenses and resources required by enabling aggregation of cases and by determination of common issues through representative cases. Opt out class actions are available in the US, Can, Aus and South Africa but not in UK/EU.

7. The ability to pursue such representative actions is also important because it protects claims from becoming time-barred. Without class action legislation it is necessary for individual victims to file court claims within the requisite limitation period.

8. The overriding practical hurdle is unquestionably the availability of funding for legal representation. Without effective legal representation there will be no effective access to remedy. Effective access requires representation at a level that achieves equality of arms.

9. Substantial legal and technical resources - over a protracted period - are invariably required to run a case against a multinational. MNCs will deploy an array of lawyers and experts to try and overwhelm their opponents.

10. The victims obviously cannot afford to pay lawyers & experts.

11. The nature, scale and complexity of cases means **public funding** of cases is **generally unrealistic** save on a modest scale, which will go nowhere near achieving equality of arms.

12. The scale and resources required and the nature of the opposition generally make it unrealistic for public interest law centres to act, save in conjunction with other lawyers

10. Law firms that could afford to act on a contingency basis - ie no win no fee - are invariably large firms which act for business.

11. Consequently, legal representation is rarely available for victims to pursue claims in MNC host courts and is also relatively scarce in MNC home courts.
12. Lawyers acting on a contingency basis - where this is permissible - face substantial financial disincentives.

(a) First there is the risk of losing and not getting paid fees or for expenses that have been incurred

(b) Secondly, the cost of carrying such cases for an uncertain period with an uncertain outcome present serious cash-flow risks

13. Of course, the magnitude of the risk is directly related to magnitude of the legal and procedural barriers. Thus the easier it is to overcome jurisdiction and the corporate veil, the easier it is to obtain documents and to utilise class action mechanisms, then the lower the risk and the greater the incentive will become for lawyers to represent victims. Hence why I pointed out at the outset the interrelated nature of these remedy barriers.

14. In some jurisdictions eg UK, SA, Aus there is a "loser pays" principle which enables victims' lawyers to get paid if case finally succeeds. But this is only at the end and does not entail payment of costs in full. And of course there is a downside of the loser pays principle, namely that the victims could end up liable for the MNC costs! In the UK QOCs has been introduced in injury cases. This stipulates that the defendant pays if it loses but the claimant does not pay if he or she loses.

15. In the U.S. and the UK now lawyers can get paid by taking a percentage of damages if the case succeeds.

16. Low financial value cases involving small numbers of claimants are not generally financially viable under any system. The Rome II Regulation - stipulating damages at local levels - reduces the financial value and hence the viability of cases. Cases are more viable, financially, when there are

large numbers of claimants (translating into larger overall damages) but on the other hand, larger cases entail bigger risk.

17. MNCs threats to make victims' lawyers personally liable for MNC costs creates a further disincentive. In the SA class action, the gold mining defendants threatened to join as co-defs, the US lawyers who are backing the cases, with the express objective of seeking costs from the law firm if the case failed. As the industry well understood, the effect of this tactic, had it succeeded, would have been to cause the US lawyers to withdraw and the class action to collapse. As such it was a direct attack on access to justice, which I am delighted to say failed!

18. Which brings me to my final point **- Capacity building.** I have just mentioned the involvement of US lawyers in the SA Class action, which can probably be characterised more as a collaboration.

19 Since 2003-13 we worked together with the SA LRC on gold miners' silicosis litigation in SA through a series of test cases. I would say that that case entailed a significant amount of capacity building. The LRC has done incredible, groundbreaking work, over the years but this type of case was new territory for them.

20. With modern means of communication, collaboration between lawyers located in different countries is feasible though it does nevertheless entail logistical challenges. For it to work however it does need to be financially viable, which raises the same quandaries that I have just elucidated.

Richard Meeran