Access to remedy for business-related human rights abuses

A scoping paper on State-based non-judicial mechanisms relevant for the respect by business enterprises for human rights: current issues, practices and challenges

Office of the UN High Commissioner for Human Rights

Accountability and Remedy Project II

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Executive summary

People who have suffered adverse human rights impacts as a result of business activity continue to face multiple and serious barriers to remedy. These include legal, financial and practical barriers to accessing judicial and non-judicial mechanisms.

In recognition of this, the Office of the UN High Commissioner for Human Rights ("OHCHR"), as part of its mandate to advance the protection and promotion of human rights globally, is leading a process aimed at helping States strengthen their implementation of the third pillar of the UN Guiding Principles on Business and Human Rights relating to Access to Remedy.

In November 2014, and pursuant to Human Rights Council resolution 26/22, OHCHR launched the Accountability and Remedy Project. Through detailed research, evidence gathering and extensive, inclusive consultations on the legal and practical issues that impact upon the effectiveness of **judicial mechanisms** in achieving corporate accountability and access to remedy in cases of business-related human rights abuses, the Accountability and Remedy Project aimed to identify measures to enhance the effectiveness of judicial mechanisms in such cases.

In its final report on the Project submitted to the Council in June 2016, OHCHR set out a series of suggestions as to the actions that could be taken by States, unilaterally and cooperatively, to improve their implementation of the third pillar of the UN Guiding Principles with regard to judicial mechanisms.[1]

While the first phase of Accountability and Remedy Project ("Accountability and Remedy Project I") was concerned with judicial mechanisms, this in no way diminishes the importance of **State-based non-judicial mechanisms** as a means of achieving accountability and access to remedy in cases of business-related human rights abuses. In its resolution 32/10, adopted in June 2016, the Council requested OHCHR to continue its work in the field of access to remedy for business-related human rights abuses and specifically, to:

"identify and analyse lessons learned, best practices, challenges and possibilities to improve the effectiveness of State-based non-judicial mechanisms that are relevant for the respect by business enterprises for human rights, including in a cross-border context, and to submit a report thereon to be considered by the Council at its thirty-eighth session" (OP 13).

This scoping paper marks the beginning of OHCHR's work in response of the new mandate ("Accountability and Remedy Project II"). It aims to provide a preliminary assessment of current practices and challenges with respect to the use of State-based non-judicial mechanisms as a way of enhancing access to remedy in cases of adverse

[1] See A/HRC/32/19 and explanatory addendum, A/HRC/32/19/Add.1.

human rights impacts that are related to business activities, and to identify areas where there may be a need for further research and/or legal, policy or practical developments.

For the purpose of this initial scoping exercise, four "test areas" were chosen, each of which have raised issues that have clear relevance to business respect for human rights. These are:

- complaints by workers in respect of breaches of internationally recognised labour rights,[2] labour standards under domestic law and/or or other legally binding commitments with respect to working conditions (including under collective agreements or employment contracts);
- complaints by consumers in various contexts (e.g. product safety, healthcare; problems in the provision of essential services, including utilities and privatised and outsourced services);
- complaints about breaches of environmental standards;
- complaints about providers of security services.

This paper considers, in a preliminary way:

- The role and purpose of State-based NJMs within domestic regulatory regimes;
- The various institutional models presently in use;
- Key issues and considerations in the design of State-based NJMs; and
- Issues arising in cross-border cases.

The paper concludes with a proposed outline for a twelve month programme of work to enable OHCHR to respond to the Council's most recent mandate, in light of the resources likely to be available to OHCHR, and mindful of the significant contribution that has already been made to consensus-building in this field by the UN Guiding Principles on Business and Human Rights. The aim of the work programme will be to build upon and further elaborate on the implications of the UN Guiding Principles on Business and Human Rights relating to the use of State-based non-judicial mechanisms, (including the "effectiveness criteria" for non-judicial grievance mechanisms set out at Guiding Principle 31) and, following on from its work relating to judicial mechanisms, to develop further resources to help States identify ways that they can improve the effectiveness of State-based non-judicial mechanisms to address cases of human rights abuse involving business, to the extent that this falls within their respective functions and mandates.

Because of the diversity of possible mandates and structures of State-based NJMs (see Annex), not to mention the fact that needs and challenges will vary from jurisdiction to jurisdiction and from regulatory context to regulatory context, this paper recommends a

[2] The ILO Declaration of Fundamental Rights and Principles at Work (1998) commits Member States to respect and promote principles and rights in four categories: (i) freedom of association and the effective recognition of the right to collective bargaining, (ii) the elimination of forced or compulsory labour, (iii) the abolition of child labour and (iv) the elimination of discrimination in respect of employment and occupation.

programme of work which is organised according to key **functions** of State-based NJMs relevant to business respect for human rights (rather than by reference to different types of institutions). These functions are categorised as follows:

- Complaints handling functions;
- Dispute resolution functions;
- Other functions broadly relevant to access to remedy (such as preventative work with businesses, supervisory functions and regulatory analysis, functions with respect to the promotion of social dialogue, and advice to government).

The project will be split into two parts. Part 1 of the work of the OHCHR will seek to identify lessons learned, good practices, challenges and opportunities across these different (though interconnected) functions. OHCHR will focus in particular on:

- **identifying practical measures for improving access to remedy for people who may be at risk of marginalization or vulnerability, or who may be at risk of intimidation and/or reprisals**.
- **clarifying "good practice" with respect to fact-finding and investigations by State-based NJMs; and**
- **clarifying the elements of "rights-compatible" remedies**.

For this part of the research, OHCHR will not confine itself to the test areas chosen for the purposes of the scoping exercise.[3] Instead, it will take account of a broad range of impacts on internationally recognised human rights, beginning with a particular focus on the impacts that commonly arise in high risk sectors (see further below).

Part 2 will look at two **cross-cutting issues**, namely

- **effective integration of State-based NJMs into wider domestic legal systems (or "policy coherence") and;**
- **cross-border capabilities and opportunities of State-based NJMs.**

Although the Council's request to OHCHR is not limited to specific industries or sectors, it was noted in the course of this scoping exercise that human rights related challenges and risks do vary in nature and severity depending on the business sectors involved. For these reasons, the OHCHR's programme of work (described in more detail in section 7 below) begins with a preparatory "mapping" exercise to gain a better understanding of the availability and practices of State-based NJMs that are presently active in sectors identified in past research as presenting particularly high levels of risk of adverse human rights impacts; namely,

- natural resources and extractives;
- agribusiness,

[3] See p. 3 above.

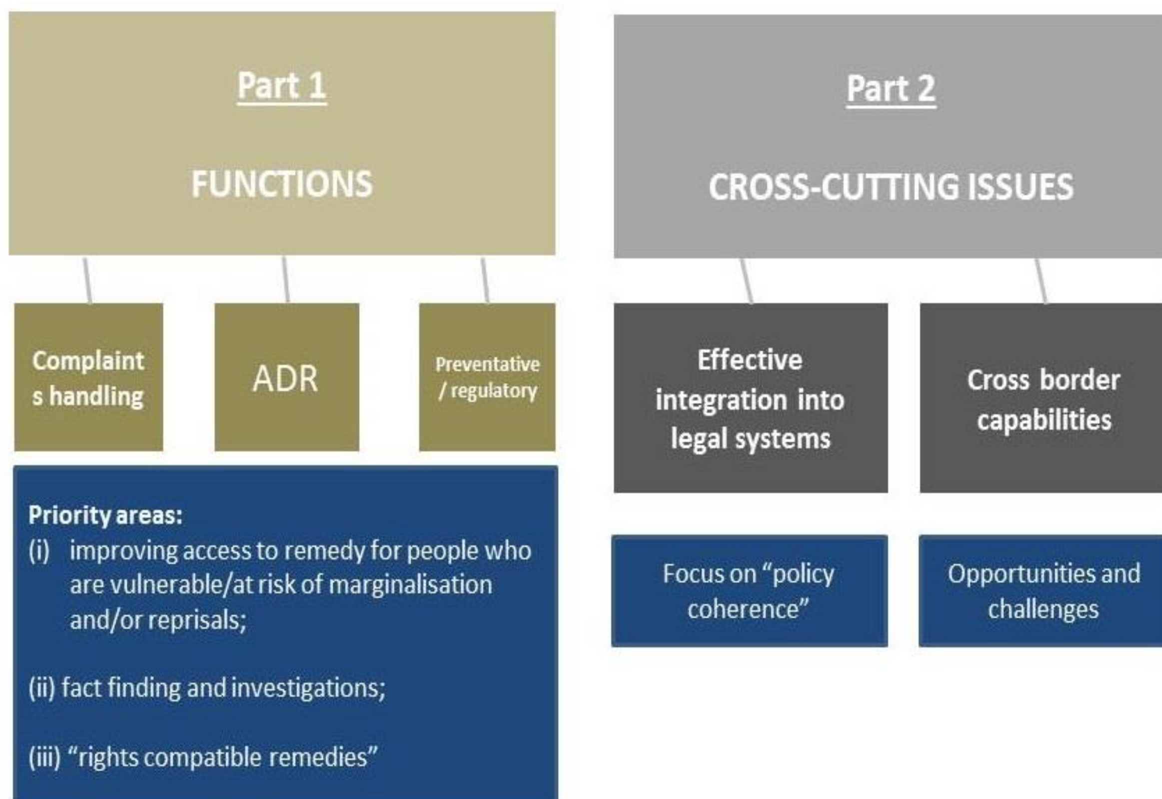
- infrastructure and construction; and
- textiles and clothing manufacture.

The findings of this initial mapping exercise would then be used to inform the remainder of the programme of work.[4]

Throughout this scoping exercise, and in the development of its programme of work in response to the Council's new mandate, OHCHR has been mindful of the many wider social, economic and political challenges that can influence the functioning and effectiveness of State-based NJMs in business and human rights cases. These include problems of weak institutions, lack of respect for the rule of law, lack of capacity and resources, corruption, and the specific challenges that arise in conflict-affected areas. While there are limits to the extent to which OHCHR can address these wider issues and challenges in a project such as this, the intention is to respond to the Council's request in a manner that is relevant to a wide range of circumstances and contexts.

Further details of the OHCHR's proposed programme of work can be found at section 7 of this paper.

Fig.1: Graphic illustration of Project Outline



[4] See further pp. 45-50 below.

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1. Introduction

In virtually every jurisdiction in the world, people face significant, and in many cases insurmountable, barriers to remedy for business-related human rights impacts. In recognition of this, the Office of the UN High Commissioner for Human Rights ("OHCHR"), as part of its mandate to advance the protection and promotion of human rights globally, has initiated work on various aspects of access to remedy for business-related human rights abuses. Access to remedy is the "third pillar" of the UN Guiding Principles on Business and Human Rights,[5] endorsed by the Human Rights Council in June 2011.[6]

In 2013, OHCHR began a process aimed at helping States strengthen their implementation of this third pillar, particularly in cases of severe business-related human rights abuses. In November 2014, and pursuant to a mandate from the Human Rights Council,[7] OHCHR launched the Accountability and Remedy Project.[8]

This first phase of the Accountability and Remedy Project ("Accountability and Remedy Project I") proceeded through 2015 and culminated in a report to the Human Rights Council in June 2016.[9] For strategic and practical reasons, this first phase of work focussed on judicial mechanisms.[10] As the UN Guiding Principles on Business and Human Rights make clear, well-functioning judicial mechanisms are "at the core of ensuring access to remedy".[11] However, evidence collected in the course of the Accountability and Remedy Project I also served to underline the crucial importance of State-based non-judicial mechanisms – working alongside, or as an alternative to, judicial mechanisms – in providing those whose human rights are adversely affected by business activity with an effective, affordable and practical package of options for enforcing their rights and obtaining proper redress.

In its resolution 32/10 of June 2016, the Council welcomed the work of the United Nations High Commissioner for Human Rights on improving accountability and access to remedy for victims of business-related human rights abuse, and noted with appreciation its report on improving accountability and access to judicial remedy for business-related human rights abuse. The Council then requested the OHCHR to continue its work in the field of access to remedy for business-related human rights abuses and specifically, to:

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[5] See A/HRC/17/31. The three "pillars" of the Guiding Principles are the "State duty to protect human rights", the "Corporate responsibility to respect human rights" and "Access to remedy".
[6] See Human Rights Council resolution 17/4.
[7] See Human Rights Council Resolution 26/22.
[8] For further information and for a full set of project papers and other materials see http://www.ohchr.org/EN/Issues/Business/Pages/OHCHRstudyondomesticlawremedies.aspx.
[9] See A/HRC/32/19 and explanatory addendum, A/HRC/32/19/Add.1.
[10] See A/HRC/32/19, para. 3.
[11] Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework (A/HRC/17/31), Guiding Principle 26 and commentary.

"identify and analyse lessons learned, best practices, challenges and possibilities to improve the effectiveness of State-based ***non-judicial*** *mechanisms that are relevant for the respect by business enterprises for human rights, including in a cross-border context, and to submit a report thereon to be considered by the Council at its thirty-eighth session"* (emphasis added).[12]

2. Aims, scope, methodology and key concepts

Aims: The aim of the OHCHR's scoping exercise was a preliminary assessment of current practices and challenges with respect to the use of State-based non-judicial mechanisms as a way of enhancing access to remedy in cases of adverse human rights impacts that are business-related, and to identify areas where there may be a need for further research and/or legal development. Based on these initial findings, a more detailed programme of work has been prepared for the purposes of fulfilling the mandate in resolution 32/10, (see section 7 below) which will then form the framework for more detailed discussions with States, key stakeholders and other experts.

Meaning of State-based non-judicial mechanisms: For the purposes of this scoping exercise, State-based non-judicial mechanisms ("State-based NJMs") have been defined as mechanisms (other than courts) by which individuals (or groups of individuals) whose human rights have been adversely impacted by business activities can seek a remedy with respect to those adverse impacts.

In practice, it is not always easy to distinguish State-based NJMs from *judicial* mechanisms (i.e. general domestic courts). One reason for this is that some judicial mechanisms (and particularly those working in the fields of labour, environmental and consumer law) are increasingly making use of more informal and more flexible methods of complaints handling and dispute resolution. However, certain features make mechanisms more likely to be classed as *non*-judicial (as opposed to judicial) mechanisms; i.e.

(a) they are administered and answerable to the *executive* (i.e. ministerial) rather than *judicial* branch of government.[13]

(b) their decision-making panels can be designed to provide a mix of legal, technical, lay and specialist expertise;

(c) they have been established pursuant to a regulatory regime (e.g. a consumer protection regime, a regime for the protection of employment rights; a regime for the protection of public safety; or an environmental protection regime); and

[12] See A/HRC/RES/32/10, para. 13.

[13] However, as shall be discussed further below (see pp. 40-42), there are important linkages and inter-relationships between judicial mechanisms and State-based NJMs.

(e) they make use of alternative dispute resolution ("ADR") methods such as conciliation or mediation.

State-based NJMs are distinguishable from *non-State* based judicial mechanisms (e.g. site level or operational level grievance mechanisms, or mechanisms operated by organisations such as trade associations) because of the involvement of the State in their establishment and/or some aspect of their operation or administration.

As this paper will explain more fully, State-based NJMs can vary greatly in structure, organisation, powers, functions and levels of formality. Examples of different models of State-based NJMs are provided in section 4 below.

Focus areas: This paper considers, in a preliminary way:

- The role and purpose of State-based NJMs within domestic regulatory regimes;
- The various institutional models presently in use;
- Key issues and considerations in the design of State-based NJMs; and
- Issues arising in cross-border cases.

The paper then concludes with recommendations for a twelve month programme of work to enable OHCHR to respond to the Council's most recent mandate, in a way that makes the best use of resources likely to be available to OHCHR, and mindful of the significant contribution that has already been made to consensus-building in this field by the UN Guiding Principles on Business and Human Rights. The aim of the OHCHR's new work programme will be to build upon the UN Guiding Principles on Business and Human Rights relating to the use of State-based non-judicial mechanisms, (including the "effectiveness criteria" for non-judicial grievance mechanisms set out at Guiding Principle 31) and, following on from its work in the field of judicial mechanisms in the course of Accountability and Remedy Project I, to develop resources to help States identify ways that they can improve their implementation of the "Third Pillar" on Access to Remedy specifically in relation to State-based non-judicial mechanisms.

Procedural and substantive aspects of access to remedy: As the UN Guiding Principles on Business and Human Rights make clear, access to remedy has both procedural and substantive aspects.[14] The procedural aspects refer to the steps that must be gone through before a remedy can be obtained, and the substantive aspects refer to the different types of remedies that may eventually be awarded (e.g. financial compensation, administrative remedies, preventative orders and, in some cases, punitive sanctions). Although the types of substantive remedies that may be offered by a regime are key to whether the outcome of a process is appropriate, adequate and effective, such remedies are only of academic interest if affected individuals are unable, for procedural, financial or practical reasons, to access State-based NJMs in the first

[14] UN Guiding Principles on Business and Human Rights, Guiding Principle 25, Commentary.

place.[15] Therefore, this paper considers procedural features of State-based non-judicial mechanisms as well as the kinds of remedies they are able to offer.

Scope: There are myriad State-based non-judicial mechanisms presently operating at domestic level, and many of these have responsibilities that are relevant to business respect for human rights. National Human Rights Institutions (e.g. Human Rights Commissions and Human Rights Ombudsmen) play a vital role in many jurisdictions in terms of fact-finding, investigating complaints about human rights abuses, driving up standards and advising on regulatory reform. Through these means, they can exert influence across a range of different commercial sectors and business activities. The system of National Contact Points under the OECD Guidelines for Multinationals[16] offers another route through which individuals whose human rights have been adversely affected by business activities can complain directly to State authorities. This system is significant because of its applicability to cross-border (as well as within territory) disputes.[17]

The opportunities offered by these specialist and potentially influential mechanisms in the business and human rights sphere, as well as their limitations as individual-to-business dispute resolution bodies, have already attracted much study and discussion.[18] However, while they play an important role in business and human rights cases, these kinds of mechanisms will not necessarily be the first choice of people seeking to enforce their rights and seek redress. Depending on the nature of the dispute, there may be more targeted enforcement options, perhaps not framed in human rights terms, but which may still offer a potential remedy in a situation where human rights have been adversely affected. The OHCHR's scoping exercise has sought to explore the role and potential of these special-purpose domestic regulatory and dispute resolution bodies, in light of the UN Guiding Principles framework.

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[15] For a graphic representation of the impact of certain practical, financial and procedural issues on access to remedy in the context of *judicial* mechanisms, see A/HRC/32/19, pp. 7-8.

[16] See further http://www.oecd.org/investment/mne/ncps.htm.

[17] See further pp. 43-45 below. For a review of past cases see Ruggie and Nelson, 'Human Rights and the OECD Guidelines for Multinational Enterprises: Normative Innovations and Implementation Challenges' A Working Paper of the Corporate Responsibility Initiative: Working Paper No. 66 copy available at https://www.hks.harvard.edu/index.php/content/download/76202/1711396/version/1/file/workingpaper66.pdf.

[18] On the NCP system under the OECD Guidelines, see Ruggie and Nelson, n. 17 above. For an analysis of performance to date by OECD see 'Implementing the OECD Guidelines for Multinational Enterprises: The National Contact Points from 2000 to 2015, http://mneguidelines.oecd.org/OECD-report-15-years-National-Contact-Points.pdf. For a critique of the functioning of the OECD Guidelines NCP system, see OECD Watch, 'Remedy Remains Rare' June 2015, http://www.oecdwatch.org/publications-en/Publication_4201f. On National Human Rights Institution, see in particular, OHCHR, 'National Human Rights Institutions: History, Principles, Roles and Responsibilities (United Nations, New York and Geneva, 2010), copy available at http://www.ohchr.org/Documents/Publications/PTS-4Rev1-NHRI_en.pdf. See also Methven O'Brien and Pegram, 'Access to remedy for business-related human rights abuses: Understanding and strengthening the role of NHRIs', A workshop paper presented 2-3 March 2016, Rabat, Morocco, copy on file.

Because of the range of possible impacts on human rights that business activities can have, identifying all of the State-based non-judicial mechanisms that could potentially be relevant would be an enormous task and certainly beyond the resources of this initial scoping exercise. To make the task more manageable, this paper confines itself to four areas where disputes between individuals and companies frequently arise, each of which has a potential business and human rights dimension. These are:

- complaints by workers in respect of breaches of internationally recognised labour rights,[19] labour standards under domestic law and/or or other legally binding commitments with respect to working conditions (including under collective agreements or employment contracts);
- complaints by consumers in various contexts (e.g. product safety, healthcare; problems in the provision of essential services, including utilities and privatised and outsourced services);
- complaints about breaches of environmental standards;
- complaints about providers of security services.

Methodology: The information for this scoping paper has been collected primarily by way of desk-based research. This has included an initial literature review of past academic research with respect to alternative dispute resolution in the fields of employment, environmental and consumer law. A draft of this paper was made available for comment by States and other stakeholders in mid-December 2016. The draft scoping paper, including a draft set of work plans, were then reviewed in a two-day expert workshop which took place in Geneva on 19 and 20 January 2017. OHCHR thanks all representatives of States and other stakeholders who took part in this consultation and review process.

3. The role and purpose of State-based NJMs within domestic social, labour, environmental, and consumer protection regimes

Over the past two decades there has been an explosion in both the numbers and use of State-based NJMs, particularly in the areas of consumer and environmental law. While the data is still incomplete for some sectors and geographic areas,[20] a picture is

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[19] See n. 2 above.

[20] A number of regional and theme-based studies have been completed. In relation to the use of State-based NJMs in the field of consumer protection in the European Union, see Civil Consulting, *Study on the use of Alternative Dispute Resolution in the European Union,* 16 October 2009 ('ADR in the EU'), available at http://www.civic-consulting.de/reports/adr_study.pdf. See also Hodges, Benöhr, Creutzfeld-Banda, *Consumer ADR in Europe*, (Oxford, Hart Publishing, 2012). On environmental State-based NJMs see Pring and Pring, *Greening Justice: Creating and Improving Environmental Courts and Tribunals* (Access Initiative; World Resources Institute, 2009), ('Greening Justice') copy available at http://www.law.du.edu/documents/ect-study/greening-justice-book.pdf. See also Pring and Pring, 'Twenty-first Century Environmental Dispute Resolution; Is there an ECT in your future?', in *Journal of Energy and Natural Resources Law,* 2015 ('Twenty-first Century Dispute Resolution"), pp. 10-33, at p. 10 in which the authors estimated that there were, at that time, over 800 specialised environmental courts

emerging of growing interest in exploring the possibilities offered by State-based NJMs as an alternative to judicial routes to remedy. For instance, a 2009 study of alternative dispute resolution of consumer disputes in Europe identified 750 national consumer dispute resolution schemes across the European Union.[21] A global study of environmental courts and tribunals in the same year identified 350 such institutions in 41 jurisdictions, the majority of which were created in the previous decade.[22] There are now thought to be over 1,200 specialised environmental courts and tribunals worldwide.[23]

What factors have driven the growth of State-based NJMs?

The growth of State-based NJMs – both numerically and in terms of range of functions and responsibilities – is being driven by several factors.

The high financial costs of accessing judicial mechanisms: The high financial cost of civil litigation, and the lack of public funding for civil claims,[24] is one factor behind the growth in State-based NJMs in recent years. This trend received added impetus in the aftermath of the 2008 global economic crisis, which saw court budgets cut back in many jurisdictions as part of austerity programmes.[25] High legal costs (and lawyers' fees) means that the use of judicial mechanisms to resolve many claims, and especially claims that are lower in financial value terms, is simply uneconomic. These problems have created a need for quicker and cheaper methods of resolving certain kinds of disputes, which could operate with reduced levels of reliance on legal counsel.

Increasing public awareness of human rights (and particularly environmental, labour and consumer rights): The past four decades have seen a rapid growth in public awareness of environmental issues. Scientific work through the 1970s and beyond drew attention to the links between pollution and human health, and the human contribution to longer term risks such as climate change. This period coincided with increasing trade union

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and tribunals worldwide, including around 320 such institutions in China alone. However, the authors acknowledged that their overall estimate of 800 specialised environmental courts and tribunals was likely to include a number that are not fully operational as yet.

[21] Civil Consulting, *ADR In the EU*, n. 20 above.

[22] Pring and Pring, *Greening Justice*, n. 20 above.

[23] See Pring and Pring, *Environmental Courts and Tribunals: A Guide for Policymakers* (2016) copy available at http://wedocs.unep.org/bitstream/handle/20.500.11822/10001/environmental-courts-tribunals.pdf?sequence=1&isAllowed=y, ('ECTs: A Guide for Policymakers'), p. IV. Note, however, that these figures include specialised environmental courts which are administered by and answerable to the judicial branch of government and therefore are more correctly regarded as *judicial* mechanisms (see further comments at p. 2 above).

[24] See Hodges, Vogenauer and Tulibacka, *The Costs and Funding of Civil Litigation: A Comparative Perspective* (Hart Publishing, 2010). Lack of access to funding for civil claims is a very serious barrier to remedy in virtually every jurisdiction in the world. Because of this, addressing financial obstacles to civil claims in business and human rights cases was a key area of focus and research in the course of the OHCHR's Accountability and Remedy Project, see p. 1 above. See also OHCHR's interim report to the Human Rights Council on the Accountability and Remedy Project submitted in June 2015, A/HRC/29/39, paras. 41-46.

[25] See Hodges et al, *Consumer ADR in Europe*, n. 20 above, p. 400.

activism in industrialised and industrialising economies, and increasing pressure for better protection and enforcement of worker rights. At the same time, consumer organisations, campaigning for better protection of consumers were also growing in number and in influence. These social and political developments helped to generate the momentum for many new regulatory initiatives at domestic level, as well as standard-setting efforts at international level to help to strengthen domestic responses. With growing awareness of these rights came increased demand for accessible mechanisms with which to enforce them. Today, developments in communications technologies, particularly the internet and social media, have helped to spread awareness, and to maintain campaign pressure, which further fuels demands for mechanisms to ensure business accountability for adverse human rights impacts.

The growth of statutory causes of action, leading to pressure on the courts: Increasing levels of consumer, environmental and labour regulation, dating back to the 1970s have created more opportunities for individual, group, representative and community-based complaints against business enterprises. In some regulatory fields, and particularly in the field of labour regulation, new statutory causes of action that could be invoked by individuals (e.g. for discrimination, or unfair dismissal) drastically increased the workload of courts.[26] The costs, delays, inefficiencies and challenges of enforcing new consumer, labour and environmental rights through the general court system added to calls for greater use of alternative and specialised dispute resolution mechanisms.

The growth of specialised regulatory regimes following privatisation of State-owned utilities: From the 1980s onwards, the transfer of publicly owned utilities into private hands – e.g. water, electricity, gas distribution, railways – have created new consumer markets in many jurisdictions. However because of the features of these markets, many of which involve natural monopolies, they require close regulation and supervision to protect the interests of consumers and to maintain adequate levels of competition. Many of these specialised, sectoral, regulatory regimes make use of State-based NJMs such as ombudsmen and complaints mechanisms to enable quick and cheap resolution of problems between service providers and consumers.

Demand for more innovative and preventative responses to cases involving disputes between individuals and business enterprises: This is a particular consideration in areas which require technical and scientific input, such as environmental protection and product health and safety. Studies of environmental NJMs suggest that the lack of ready access by courts to technical expertise, or the costs and inefficiencies associated with that access, has been an important driver in the establishment of alternative and specialist enforcement mechanisms in many jurisdictions.[27]

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[26] See Hepple and Veneziani (eds), *The Transformation of Labour Law in Europe: A Comparative Study of Fifteen Countries, 1945-2004* (Hart, 2009).
[27] See Pring and Pring, *Greening Justice*, n. 20 above.

What are the main advantages and disadvantages of State-based NJMs?

The main advantages and disadvantages of State-based NJMs, compared with domestic judicial mechanisms (i.e. general courts), are set out below. However, as discussed in the next section, *these advantages and disadvantages are not features of, or relevant to, every State-based NJM, nor are they necessarily inherent to State-based NJMs*. The relevance and significance of these in any specific jurisdiction and regulatory context will vary depending on the way that State-based NJMs have been designed, the powers conferred on them, and their ability to exercise these in practice. As will be seen, careful design can help to maximise advantages, while heading off many of the potential drawbacks.

Table 1: Advantages and disadvantages of State-based NJMs (compared to domestic judicial mechanisms)

Note: The list below owes a great deal to the empirical research carried out by George Pring and Catherine Pring with respect to specialist environmental courts and tribunals. See *Greening Justice* n.20 above, Twenty First Century Environmental Dispute Resolution', n. 20 above, and 'ECTs: A Guide for Policymakers', n. 23 above, esp. at p. 13-16.

Advantages of State-based NJMs	Disadvantages of State-based NJMs
Cost savings	Additional costs from duplication of functions
Greater speed of response and possible early intervention	Fragmentation of decision-making processes
Greater efficiency and flexibility	Fragmentation of issues (e.g. removal of issues from wider social and/or legal context; contributes to "sidetracking" rather than "mainstreaming" of issues)
Greater visibility to stakeholders	Adverse impact on trust in general courts
Greater public and stakeholder confidence	Distracts attention from law reform to improve functioning of general courts
Greater access to technical and scientific expertise	Under-use
Greater consistency in decision-making	More resource intensive
Greater ability to prioritise access	Budgetary confusion
Greater accountability (e.g. to government; to the public)	Public and stakeholder confusion as to institutional roles and responsibilities and processes
Greater scope for creativity and innovation (e.g. giving greater emphasis to practical problem solving, within a specific technical and/or commercial context).	Greater risk of "capture" by special interests
Greater integration of issues (i.e. better scope for developing "holistic" solutions)	Lower levels of trust among users
Greater use of ADR	Agenda bias
Greater scope for direct public participation	Greater risk of judicial activism
Greater scope for activism	May suggest a marginalisation, lower prioritisation of certain issues
Greater **flexibility to design remedies to respond to specific parties, contexts and needs**	Recruitment challenges (e.g. if viewed as a career "dead end" for judges)
Ability to act on own initiative.	

Do the roles and approaches of State-based NJMs vary depending on the parties involved or the kind of dispute?

As noted above, there is considerable diversity in the way that State-based NJMs can be structured, the kinds of powers they enjoy and the functions they are required to perform. However, there are some general trends with respect to the models most likely to be used in different types of regulatory contexts. This section describes, in general terms, the different kinds of disputes and complaints that can arise, and the methods commonly employed for resolving them. The main features of these systems, and the key considerations and factors relevant to their design, are considered in more detail in sections 4 and 5 below.

Complaints by workers about breaches of employment standards

Domestic employment law covers a range of work-related issues, from pay and conditions to workplace health and safety. In many, if not most, jurisdictions, there are non-judicial routes to resolving complaints about non-observance by companies of labour law standards which vary, depending on the nature of the dispute. For instance, some problems are considered amenable to mediation and conciliation (being more "private" in nature), whereas others may raise issues of possible criminal or quasi-criminal liability which warrant formal investigation.

Disputes about pay, contract terms and breaches of legal standards relating to the employment relationship (e.g. standards relating to unfair dismissal, discrimination, or maternity leave entitlements) are typically dealt with through a dedicated system of mediation and adjudication (e.g. labour courts and employment tribunals) which are analogous to civil law (or "private law") processes for resolving disputes. In many jurisdictions, these are handled by specialised judicial mechanisms (e.g. specialist labour courts). However, the legal process may include a mediation and/or conciliation phase in which court appointed mediators will be made available to the parties to the dispute, or there may be access to special court-annexed conciliation services.[28] In some jurisdictions, this mediation and/or conciliation stage is compulsory. Alternatively, there could be penalties (e.g. in the form of subsequent adverse cost orders, or adjustments to financial remedies) attached to the non-use of these services.[29]

Complaints about workplace health and safety, on the other hand, are more likely to be handled by the relevant public enforcement bodies (e.g. a labour inspectorate, or a health and safety enforcement agency). The action taken by the enforcement body on

[28] See further, in relation to EU member states, European Foundation for the Improvement of Living and Working Conditions, 'Individual disputes at the workplace: Alternative Dispute Resolution', (2010) ("Eurofound report") copy of report available at
http://www.eurofound.europa.eu/sites/default/files/ef_files/docs/eiro/tn0910039s/tn0910039s.pdf.
[29] Ibid, p. 5.

receipt of such a complaint, and the subsequent relationship and interaction between the enforcement body and the original complainant, are governed by the body's own internal policies and procedures. For instance, the complaint may be subject to a "triage" process that results in the allocation of a level of prioritisation (e.g. "red, green or amber") and helps to define an appropriate procedural and investigatory track. Under these kinds of processes, the complainant may not be treated as a party to a "private" dispute between herself and her employer, but rather as a witness to a possible breach of public law standards. In such a case, the object may not be conciliation and a settlement, but rather to determine whether a breach of the law has occurred and the appropriate legal response, which could include criminal or administrative sanctions.

There is a range of possible options for fielding and processing complaints. For instance, some jurisdictions have set up a single point of contact (perhaps via a helpline or dedicated on-line complaints system), which processes the initial complaint, provides initial advice and then transmits it downwards or sideways to the appropriate agency. However, in some jurisdictions, the system is more fragmented in that there may be different points of entry into the system, depending on the nature of the complaint (e.g. whether it is seen as "private" or "public" in nature).

Steps have been taken in a number of jurisdictions to improve access to information for workers with work-related concerns, so that workers know what their rights are, what enforcement options are available to them and the processes that will apply. Institutions responsible for enforcing employment standards and adjudicating disputes may offer advisory services over the telephone, and/or a dedicated "whistleblowers" line for reporting concerns or problems, and/or on-line resources including downloadable information packs, "self-help" kits and complaints forms. These can help improve the efficiency of processes, and enable people to access the help they need more quickly and efficiently.

Complaints by consumers about breaches of consumer protection standards

State-based NJMs are a common feature of consumer protection regimes, providing consumers with a quick and inexpensive alternative to court enforcement. These NJMs can take the form of "arbitration-like boards",[30] or, increasingly commonly, ombudsman systems of dispute resolution. They can be set up to deal with a wide range of consumer-trader disputes, or they may cover a specific subject matter (e.g. product safety, or misleading advertising) or a specific sector (e.g. financial services, transport, utilities, legal services, telecommunications or tourism services).

State-based NJMs relevant to consumer protection fall into two main groups; alternative dispute resolution mechanisms and public law enforcement mechanisms. The first operates as a quick and inexpensive alternative to civil litigation, and the second

[30] Hodges, 'The Design of Consumer ADR and Ombudsmen Systems in Europe' (copy on file), p. 1.

operates in manner more akin to police investigation following a criminal complaint. The main objective of the first will be to arrive at some kind of settlement between the consumer and trader; however the outcome of the second could be punitive sanctions if the complaint is upheld.

Consumer dispute resolution mechanisms will frequently have close links with, or be a key institutional part of, wider regulatory regimes. Where natural monopolies exist, or where there are some other features of a market that operate to hamper fair and open competition, State-based NJMs have a crucial role to play in ensuring that consumers are fairly treated within that market. For these reasons, both kinds of mechanisms frequently provide advisory services as an adjunct to, or a precursor of, their main services and functions. In addition, consumer NJMs may collect market-related data (e.g. arising from complaints-related work and investigations) and make periodic investigations into, and issue periodic reports on, sectoral and/or systemic problems.[31]

Complaints in relation to breaches of environmental standards

In many jurisdictions, disputes about environmental impacts of business activities (including planning disputes) are handled by specialist environmental courts or tribunals. There is no "typical" environmental court or tribunal. These vary from jurisdiction to jurisdiction depending on a number of structural, cultural, legal and economic factors, including the type and levels of governmental commitment to environment protection and development controls.[32] For the reasons explained in the introduction, this paper will be focussing on *non-judicial* environmental dispute resolution mechanisms, i.e. those mechanisms which are located within, administered by, or answerable to the *executive* rather than the judiciary. Nevertheless, it is worth noting that, as with labour dispute resolution mechanisms (see above), specialised environmental courts will often include a mediation and/or conciliation stage as part of procedural requirements. Furthermore collaboration is increasingly needed to resolve environmental disputes, given the complexity of environmental issues, the diversity of actors (the public, industries, governments, and civil society) and the multiplicity of political boundaries (ex. shared conservation projects involving water and transboundary wetlands).

There are many differences from institution to institution, and from jurisdiction to jurisdiction in terms of the kinds of functions given to environmental State-based NJMs. For instance, some are established primarily for the resolution of private disputes. Others have functions that are more "administrative" or "quasi-criminal" in character. Some may be empowered to review and pronounce upon the legality of government decisions (e.g. a decision to award planning permission, or a licence to undertake some commercial activity). Some may enjoy a combination of these different powers and functions.

[31] Ibid.

[32] See Pring and Pring, 'Twenty-first Century Dispute Resolution', n. 20 above.

However, as shall be discussed further below, there are a number of common features of "successful" environmental State-based NJMs.[33] These include relative informality, generous rules on standing, minimal (or no) user fees, systems for ensuring that decision-makers have ready access to technical expertise (such as expertise in ecology, engineering, land use planning, forestry management, water management), aggressive case management (to expedite cases and avoid delays), an emphasis on alternative dispute resolution approaches, and use of technological innovations.[34] In addition, these kinds of specialised mechanisms may be more proactively involved in public outreach than general courts. This can take the form of public information campaigns, production of films and videos, and even educational resources for children.[35]

A sectoral case study: Complaints about providers of private security service providers

The case for tight regulation of private security service providers centres around the risks posed to the public, especially where weapons are carried and employed. The risk of abuse of authority, as well as possible connections with criminal activities and corruption, demands high professional standards from participants in this sector.[36]

The regulatory model in this sector is typically a licensing system, overseen and implemented by a special purpose regulator. The model may make use of a mix of binding regulation and self-regulatory approaches, in which, for example, eligibility for a licence may be tied to compliance with a "self-regulatory" code of conduct.[37]

Many such systems have a dedicated complaints mechanism attached, whereby members of the public can raise issues of non-compliance with a code of conduct, or licence conditions, or legal standards. These complaints may be handled by the licensing body itself (perhaps with the possibility of appeal) or they may be referred immediately to an independent body for review. The outcomes of such a procedure will depend on the enforcement powers conferred. These could include an order for corrective steps by the company concerned or a recommendation for (or imposition of) some form of sanction (e.g. suspension or termination of an operating licence). In extreme cases, the matter may be referred for formal criminal investigation.

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[33] See especially, Pring and Pring, 'ECTs: A Guide for Policymakers', n. 23 above. See also Peston, 'Characteristics of Successful Environmental Courts and Tribunals', *26 Journal of Environmental Law (2014)*, pp. 365-393.

[34] E.g. video-conferencing (rather than in-person hearings) and the use of internet "cloud" technology for document filing and discovery. See further Pring and Pring, 'Twenty-first Century Dispute Resolution', n. 20 above, p. 30.

[35] Ibid.

[36] UN Office on Drugs and Crime ("UNODC"), *State Regulation Concerning Civilian Private Security Services and their Contribution to Crime Prevention and Community Safety*, Criminal Justice Handbook Series, (United Nations, New York, 2014), https://www.unodc.org/documents/justice-and-prison-reform/crimeprevention/Ebook0.pdf.

[37] For further information regarding international coordination of standards for private security service providers see International Code of Conduct Association (ICoCA), http://www.icoca.ch/,

A distinctive feature of State-based NJMs in this particular sector is the close relationship between complaints and licensing/regulatory functions (these, in many cases, being carried out by the same body). While this raises issues in terms of independence and accountability,[38] it arguably increases the likelihood that recommendations for corrective action in individual cases will ultimately inform the licensing body's preventative work (e.g. training programmes, or ongoing performance and compliance reviews of licensed companies).

Public outreach is an important part of the NJM's work to raise standards, enforce legal requirements and facilitate access to justice. This is often done via the internet, though additional steps are recommended in places where internet use or access is low.[39]

Oversight of the licensing body itself may take the form of regular review by government committees. As part of this process, the licensing body may be required to make periodic reports (to the government, the public, or both) of its regulatory activities and performance.

4. Existing institutional models

State-based NJMs around the world take many different forms. This section describes in more detail the five main types that have emerged so far that are most relevant for business respect for human rights, namely

- complaints mechanisms;
- inspectorates;
- ombudsman services;
- mediation or conciliation services; and
- arbitration and specialised tribunals.

The boxes below outline the key features of the different models, the kinds of remedies that may be awarded under these procedures, common variations in structure and approach, and where they are most likely to be found. It is important to remember, though, that *State-based NJMs will not always fall neatly into these different categories*. Some jurisdictions have developed mechanisms which are actually hybrids of these, and there may also be connections and/or regulatory cooperation between the different types of mechanisms. For instance, some labour inspectorates will make use of simple complaints mechanisms (e.g. whistleblower schemes) to gain timely and firsthand information about potential breaches which may then precipitate a formal investigation and/or surprise inspection. Labour inspectorates may also make use of mediation techniques to resolve employee-employer disputes.[40] Employment and environmental

[38] See further pp. 33-36 below.
[39] See UNODC, n. 36 above, chapter III.
[40] See Eurofound report, n. 28 above, p. 9.

tribunals may have procedural rules that require that parties first attempt to resolve their differences through mediation and/or conciliation; only if that process fails does the matter move to the more formal stage (see further Box 4 below).

Box 1: Complaints mechanisms

Key features: The mechanism is typically operated by a State-appointed, State-supported and/or State-approved body with public regulatory and enforcement responsibilities. Complaints relating to matters within the mandate of the regulator are activated using a simple procedure (typically, submission of written complaint in an agreed format either on-line or by post). The receiver of the complaint then has a prescribed time period within which to investigate and/or respond. In certain cases (e.g. where allegations of criminality are made, or where the regulator lacks the necessary investigation powers), the matter may be passed on to other bodies (e.g. law enforcement agencies). Complaints mechanisms are often free to access by claimants and rules of standing (e.g. who can bring a claim) may be very flexible. Free advice on making a complaint (e.g. in the form of internet resources or a telephone hotline) is often available. To resolve the complaint, the mechanism will generally make use of informal contacts with the complainant and the subject of the complaint, rather than arranging a formal hearing.

Remedies: Financial remedies may be compensatory or punitive. Financial remedies may be subject to a prescribed limit. Administrative sanctions could include remedial orders, suspension or cancellation of a certification or licence to operate. The complaints body may carry out an inspection of the subject of the complaint and make recommendations for a remedial course of action which, in regulated industries, can be enforced through the licensing system. Alternatively, the matter may be passed to another body for investigation and enforcement.

Variations: These mechanisms vary in terms of the extent to which they are empowered to carry out independent investigations (e.g. interviewing witnesses, obtaining documents). They also vary in the extent to which they can take formal enforcement action against the subject of the complaint.

Where found: Consumer protection regimes of various kinds (including financial services, public utilities, health care provision), no-fault compensation schemes; workplace health and safety regimes; public health and safety regimes; National Human Rights Institutions (e.g. human rights commissions).

Illustrative examples:

Consumer Protection Council of Nigeria http://cpc.gov.ng/

Health and Safety Executive of the United Kingdom (workplace health and safety) http://www.hse.gov.uk/contact/complaints.htm

Public Utility Commission of Texas (handles complaints about providers of electricity, telephone and water providers) https://www.puc.texas.gov/consumer/complaint/Complaint.aspx

Ontario Ministry of Community Safety and Correctional Services (complaints about private security providers) http://www.mcscs.jus.gov.on.ca/english/PSIS/PublicComplaints/PSIS_complaints.html

Comisión Nacional de los Derecho Humanos (Mexico) http://www.cndh.org.mx/

Box 2: Inspectorates

Key features: *"Labour inspectors examine how national labour standards are applied in the workplace and advise employers and workers on how to improve the application of national law in such matters as working time, wages, occupational safety and health, and child labour. In addition, labour inspectors bring to the notice of national authorities loopholes and defects in national law. They play an important role in ensuring that labour law is applied equally to all employers and workers. Because the international community recognizes the importance of labour inspection, the ILO has made the promotion of the ratification of two labour inspection conventions (Nos. 81 and 129) a priority. To date, more than 130 countries (over 70% of ILO member states) have ratified the Labour Inspection Convention, 1947 (No. 81), and more than 40 have ratified Convention No. 129."*
ILO , *International Labour Standards on Labour Inspection*

http://ilo.org/global/standards/subjects-covered-by-international-labour-standards/labour-inspection/lang--en/index.htm

General: The labour inspection conventions noted above prescribe the main areas of responsibility for labour inspectorates. These include "the enforcement of the legal provisions relating to conditions of work and the protection of workers while engaged in their work, such as provisions relating to hours, wages, safety, health and welfare, the employment of children and young persons, and other connected matters, in so far as such provisions are enforceable by labour inspector". (ILO Labour Inspection Convention No. 81 (1947), Article 1(a)).

Occupational health and safety: In the field of occupational health and safety, their main activities are the carrying out of inspections of commercial and industrial facilities (e.g. offices, factories, mines). Their powers will typically include investigation into causes of accidents, diseases or other threats to health or safety. Additionally, they may be given responsibility for the inspection and licensing of new premises or facilities. Increasingly, inspectorates take a proactive "compliance" approach. This can include examining management processes (i.e. to assess the ability of the business enterprise to anticipate and deal with risk); review of employee and management training; technical advice to workers and employers; awareness-raising activities; and development of health and safety resources and campaigns. The inspectorate may also collect and analyse information (e.g. about workplace accidents) and promulgate "best practice" guidance in relation to occupational health and safety issues. Inspectorates are generally required to liase closely and report regularly to government. They frequently have a role in shaping future law and regulation. For example, they may be required to conduct regulatory reviews and consultations, and to make formal recommendations for law reform.

Remedies: Inspectorates will often have the power to issue preventative orders and may also have the power to levy punitive sanctions directly. Preventative orders include formal warnings, improvement notices, "stop work" orders; prohibition orders. As far as sanctions are concerned, these may include the imposition of an administrative fine. In serious cases, inspectorates may undertake prosecutions themselves or refer the matter to another authority (e.g. public prosecution authority) for criminal prosecution.

Variations: Many variations, in terms of scope of jurisdiction, inspection powers, and sanctioning powers. For instance, they may operate nationally or only with respect to a particular geographic region. They may operate sector-wide, or with respect to the welfare of particular kinds of individuals or risks. Depending on the relevant regime and the powers conferred, inspections may be regular and routine, ad hoc, unannounced, and/or in response to a complaint (see Box 1 above) or emergency.

Where found: Occupational health and safety regimes; regimes protecting the welfare of specific groups of workers, e.g. child or young adult workers, vulnerable or migrant workers.

Illustrative examples:

Equal Employment Opportunity Commission (United States) https://www.eeoc.gov/

State Labour Inspectorate of Latvia http://vdi.gov.lv/en/About%20us/state-labour-inspectorate/

Directorate General of Mines Safety (India) http://www.dgms.net/

Box 3: Ombudsman systems

Key features: Fundamentally, the role of the Ombudsman is to defend the public against wrongful acts or breaches of legal rights by public authorities and/or commercial entities. (Note that, although Ombudsmen appear in many contexts, including within government departments, private organisations or as part of voluntary schemes, this summary focuses on the role of the Ombudsman as a regulator of private commercial activities). As regulators of private commercial activities, Ombudsmen frequently have specialised mandates associated with a specific interest group, regulatory theme or commercial sector. Their powers may be derived from general "umbrella" regulation or from a bespoke regime. The (State-based) Ombudsman will normally be appointed by the State (or a State agency) but with safeguards to ensure independence. Ombudsmen are charged with receiving, investigating and resolving disputes between people and companies. To resolve disputes, Ombudsmen may draw on mediation and conciliation techniques.

A distinctive feature of Ombudsmen systems is their mix of dispute resolution and regulatory functions. The Ombudsman may have wider responsibilities with respect to the fair and proper functioning of markets. For instance, the Ombudsman may be required to investigate and report on systemic problems or broader consumer protection issues within a market and make recommendations for law reform.

Remedies: At the conclusion of the process, the Ombudsman will issue recommendations to resolve the dispute. Some Ombudsmen have the power to make order of financial compensation, perhaps up to a financial limit.

Variations: Some regimes may confer upon the Ombudsman the power to make binding recommendations (which can then be enforced in a court of law if necessary). Other regimes only extend to "advisory" or non-binding recommendations, but with the ability of the parties to pursue alternative methods of dispute resolution if these cannot be implemented. Some Ombudsman systems provide advisory as well as dispute resolution services. Some have the ability to provide collective redress.

Where found: In a wide range of consumer-related and public services-related contexts, including financial services, energy, communications, legal services, pensions and general consumer trading where the claims are relatively low in financial value [source: Hodges, 'The Design of Consumer ADR and Ombudsmen Systems in Europe' (copy on file with author). They may also, though less commonly, be used as a way of resolve certain employment-related disputes (see Swedish and Australian examples below).

Illustrative examples:

The Banking Ombudsman of New Zealand https://www.bankomb.org.nz/

The Office of the Insurance Ombudsman of India
https://www.irda.gov.in/ADMINCMS/cms/NormalData_Layout.aspx?page=PageNo233&mid=7.1

The Motor Industry Ombudsman of South Africa http://www.miosa.co.za/

The Equality Ombudsman of Sweden http://www.government.se/government-agencies/equality-ombudsman-do/

Defensoría del Pueblo (DDP) (Peru) http://www.defensoria.gob.pe/ (handles complaints about exercise of government power, including complaints by indigenous peoples relating to land use decisions and extractives projects).

Public Complaints Committee on Environment (Kenya) http://www.environment.go.ke/?p=783

Box 4: Mediation and conciliation services

Key features: Mediation and conciliation mechanisms make use of an independent and impartial third party to resolve disputes between individuals (e.g. workers and consumers) and companies. Mediation and conciliation are similar in that both are seen as non-adversarial processes, aimed at finding a mutually acceptable outcome rather than necessarily the apportionment of blame. Both can usually be discontinued at either party's request. They are both inherently flexible processes. However, there are subtle differences between the two dispute resolution methods. In mediation, the mediator works through a structured series of steps to help the parties come to a mutually acceptable settlement. A conciliator, by comparison, is seen as more of an authority figure, and

tends to play a more proactive role in the settlement of the dispute and will actively suggest solutions for settlement.

Further variations: include "counselling", "neutral evaluation" and informal discussions.

Where found: In many jurisdictions, as an adjunct to, or a preliminary process in, more formal settlement of disputes, particularly in consumer, employment and environmental disputes. In many jurisdictions, mediation or conciliation is a required (or encouraged) first step before more formal dispute resolution proceedings can be commenced (e.g. in a specialised labour tribunal, environmental tribunal or regular court). Alternatively, courts may have the discretion to refer certain disputes to mediation and/or conciliation as a way of improving access to remedy and managing judicial workload. However, mediation and conciliation are not always regarded as an appropriate response to alleged breaches of the law that require formal investigation (e.g. breaches of environmental standards or consumer safety standards that are subject to criminal sanctions).

Illustrative examples:

The Lagos Multi-Door Courthouse (Nigeria) http://www.lagosmultidoor.org.ng/home/

Court annexed conciliation-arbitration procedures of the Land and Environment Court of New South Wales (Australia) http://www.lec.justice.nsw.gov.au/

Delhi Mediation Centre (India) http://delhimediationcentre.gov.in/

Environmental Dispute Coordination Commission (Japan)
http://www.accessfacility.org/environmental-dispute-coordination-commission-japan

Advisory, Conciliation and Arbitration Service (United Kingdom)
http://www.acas.org.uk/index.aspx?a

Conciliation Board and Dispute Resolution Board (Norway) https://www.domstol.no/en/The-Courts-of-Justice/Administrative-bodies-similar-to-a-court-of-law/Conciliation-Board/

Labour Mediation Service ((Sistema de Mediação Laboral) (Portugal)
http://www.dgpj.mj.pt/sections/gral/mediacao-publica/sistema-de-mediacao5560

National Contact Points for the OECD Guidelines on Multinational Enterprises
http://www.oecd.org/investment/mne/ncps.htm

Box 5: Arbitration; specialised tribunals

Key features: Adversarial procedures. Final decisions are legally binding. Procedural formality. Those at the more formal end of the spectrum may function in a manner similar to judicial mechanisms. However, with respect to matters such as standing, costs, procedure and the remedies that can be awarded (see below), they will often enjoy more flexibility than general courts.

Remedies: These vary, and may in some cases mirror those that may be imposed or awarded by the general courts. However, these specialised bodies may enjoy more flexibility in terms of the kinds of remedies that can be offered.

(i) Environmental tribunals: Remedies may include injunctions, orders for monetary damages, orders for restitution, mandamus, declaratory relief, sanctions for contempt, and in some cases, criminal and quasi-criminal or "administrative" sanctions. They will often have the power to make orders as to apportionment of costs, similar to courts.

(ii) Employment tribunals: Remedies are typically financial compensation; reinstatement of employment.

Variations: While some of these mechanisms operate in a manner akin to civil processes (in that they exist to resolve disputes between private individuals and business entities) some have more public enforcement functions and some operate as a hybrid of the two. Some have additional powers of judicial review (e.g. of local planning decisions or licensing decisions). They may act in an adversarial or inquisitorial manner, or both. Some also have investigative powers that can be used on their own initiative. Different tribunals have different ways of ensuring access to "non-legal" technical expertise. For instance, some permit (or require) the inclusion of technical experts on the decision-making panel, while others may have permanent technical advisers on staff.

Where found: Employment regimes, where they are seem as a way of providing quick and affordable access to justice. They are also fairly common in the sphere of environmental law, where cases often demand specialist expertise, such as engineering know-how and scientific understanding.

Illustrative examples:

Administrative Law Judges of the US Environmental Protection Agency (United States)
https://www.epa.gov/alj

Planning Inspectorate (United Kingdom) https://www.gov.uk/government/organisations/planning-inspectorate

Workplace Relations Commission (Ireland)
http://www.citizensinformation.ie/en/employment/enforcement_and_redress/rights_commissioner.html

5. Key considerations in the design of State-based NJMs

This section examines the key considerations that influence the design of State-based NJMs in practice. It takes as its main reference point the "effectiveness criteria" for non-judicial mechanisms laid out in Guiding Principle 31 of the UN Guiding Principles on Business and Human Rights (see Box 6 below). It also considers, in a preliminary way, a number of important issues relating to the interface between, on the one hand, the work of State-based NJMs and, on the other hand, other relevant law enforcement and dispute resolution bodies, e.g. national human rights institutions ("NHRIs"), other regulatory bodies, judicial mechanisms and private dispute resolution initiatives (referred to in the UN Guiding Principles as "non-State-based grievance mechanisms").[41] As will be seen, the features of State-based NJMs are (and should be) driven to a large extent by the regulatory purposes they are required to serve. To help draw these differences out more clearly, the information set out in this section is summarised in tabular form in the Annex to this report.

Box 6: "Effectiveness criteria for non-judicial grievance mechanisms

" In order to ensure their effectiveness, non-judicial grievance mechanisms, both State-based and non-State-based, should be:

(a) Legitimate: enabling trust from the stakeholder groups for whose use they are intended, and being accountable for the fair conduct of grievance processes;

(b) Accessible: being known to all stakeholder groups for whose use they are intended, and providing adequate assistance for those who may face particular barriers to access;

(c) Predictable: providing a clear and known procedure with an indicative time frame for each stage, and clarity on the types of process and outcome available and means of monitoring implementation;

(d) Equitable: seeking to ensure that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair, informed and respectful terms;

(e) Transparent: keeping parties to a grievance informed about its progress, and providing sufficient information about the mechanism's performance to build confidence in its effectiveness and meet any public interest at stake;

(f) Rights-compatible: ensuring that outcomes and remedies accord with internationally recognized human rights;

(g) A source of continuous learning: drawing on relevant measures to identify lessons for improving the mechanism and preventing future grievances and harms …"

UN Guiding Principles on Business and Human Rights, Article 31.

[41] On the question of "policy coherence", see UN Guiding Principles on Business and Human Rights, Guiding Principle 8.

Why is the mechanism needed?

A key advantage of State-based NJMs over the general courts is that they can be tailored to meet different regulatory and access to justice needs. As discussed in the previous section, there is considerable flexibility in the way that State-based NJMs can be structured, although there are discernible patterns in the uses to which different models are put.

Choices about the design of a State-based NJM are defined, first and foremost, by the regulatory, law enforcement and access to justice needs that the mechanism must fulfil. These could be one of more of the following:

- **compensation** for those affected;
- **reconciliation** of parties in dispute;
- **restoration** of a previous state of affairs or rectification of harm;
- **detection** of breaches of the law;
- law **enforcement** and **sanctioning** of wrongdoers;
- **prevention** of future harm (including through **deterrence** and the **promotion of social dialogue**); and
- **review** of administrative (i.e. governmental) decisions.

A key factor in the choice of model for a State-based NJM will be the position and purpose of the mechanism within the context of a wider regulatory regime. In consumer protection regimes, the key to an effective settlement between individual and company may simply be **compensation,** for example for any financial loss associated with purchase of defective goods or services, and/or for inconvenience. In the employment law context, compensation may be an effective remedy, or there may a greater emphasis on **reconciliation** or **restoration**. However, for regimes designed to safeguard the public, workers, consumers or the environment from serious threats to health and safety, the regime is more likely to be designed, first and foremost, to facilitate **detection** and **future deterrence** and **prevention.** In this setting, complaints mechanisms offer a means (though not necessarily the only means) by which a regulator will become alerted to a possible breach of standards.

Enforcement of legal standards can be carried out in a number of different ways. The regulator may have the ability to award compensation, or to take administrative action (e.g. warning notices, or cancellation or suspension of licences), or to issue public law **sanctions** (e.g. financial penalties or fines).[42] In the alternative (or in addition), some State-based NJMs also have the power to prosecute cases or bring legal claims on behalf of affected individuals in specialised tribunals or general courts.[43]

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[42] See further discussion of remedies at pp. 30-33 below.

[43] On the inter-relationship between labour enforcement mechanisms and judicial mechanisms in a range of jurisdictions, see further Ebisui, Cooney and Fenwick (eds) *Resolving Individual Labour Disputes: A Comparative Overview* (ILO, 2016), ("ILO Comparative Study")

Increasingly, regimes such as these contain a strong focus on **prevention** (as well seeking to ensure remedy for past wrongful behaviour). Working within such regimes, regulators are likely to be required or empowered, as part of their regulatory responsibilities, to provide advice to regulated companies as to risk minimisation and prevention measures and to supervise implementation of the same. As well as working at the level of individual companies, regulators may also be asked to gather and analyse information on systematic problems in a regulated market. For this kind of exercise, data relating to complaints and disputes can be an important source of information.

Some State-based NJMs offer individual claimants or petitioners the ability to complain about governmental as well as corporate action (**administrative review**). This is the case with some State-based NJMs with responsibilities for environmental protection and is of particular importance in cases of land expropriation, cases relating to indigenous peoples' rights (such as taking of or interference with cultural heritage properties) and disputes over land use or planning.

Example 1: Kenyan State-based NJMs with administrative review functions in the field of environmental law

Kenya has more than one mechanism by which individuals can raise complaints about governmental or administrative action affecting the quality of the environment.

The **National Environment Tribunal** can hear and decide appeals from decisions of the Kenyan National Environment Management Authority on issuance, denial or revocation of environmental impact assessment licenses for major developments ("such as roads, industries, housing facilities, hazardous waste, tourist facilities and marine activities". See Pring and Pring, n. 20 above). As Pring and Pring explain, "[d]evelopers can appeal adverse EIA decisions, and individuals, NGOs and others can appeal approvals. It is also authorized to hear appeals of forestry decisions and to advise the government when requested, but these are rarely used".

http://net.or.ke

In addition, the **Public Complaints Committee** was established in 2001 under Section 31 of the Environmental Management and Co-ordination Act 1999 to investigate complaints regarding the condition of the environment. It can also, on its own motion, investigate suspected cases of environmental degradation and to make reports of its findings and recommendations to the National Environment Council (NEC).

http://www.environment.go.ke/?p=783

http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_488469.pdf, pp. 18-21. On the interface between State-based NJMs and judicial mechanisms generally see further pp. 40-42 below.

What would be the best procedural model (or mix of models) to choose?

If the primary purpose of a mechanism is to achieve a settlement between two parties in dispute then the mechanism is more likely operate in a manner akin to civil processes. This is likely to be the case in regimes that are designed to provide less costly alternatives to judicial processes for cases of personal injury or damage to property, or where the intention is to regulate the terms of contractual relationships between individuals and companies (e.g. between consumer and trader, or employee and employer). Where the aims are **reconciliation, restoration** and/or **compensation,** the favoured models are **ombudsmen systems, mediation and conciliation,** and **arbitration and specialist tribunals**.

Example 2: The "multi-door courthouse" model used in Nigeria

The "multi-door courthouse" concept is based on the idea that there may be more than one way of resolving a dispute, and different methods may be appropriate for different kinds of disputes. The multi-door courthouse is essentially a mediation and conciliation centre. It may be set up to handle a wide range of different cases (including civil cases) or it may have a particular specialism (e.g. environmental cases). It may exist independently of the court system, or there may be formal links between the two types of disputes resolution processes, e.g. in the form of court procedures that mandate referral of certain types of disputes for "alternative dispute resolution" (or "ADR") prior to commencement of judicial processes. Cases will usually be screened at the outset by court-house staff (or "facilitators") and then recommendations will be made for a settlement process.

The Lagos Multi-Door Courthouse ("LMDC") was established in 2002. It has a legal mandate from the Lagos State Government and is funded by State government grants. The Chief Justice of Lagos State acts as Chairman of the Governing Council of the organisation. The LMDC uses a range of ADR methods to resolve disputes referred to it by the general courts. In addition, parties to disputes are free to approach the Centre directly. Parties are given advice about how best to settle their claims, and are appointed a mediator, whose, role, according to LMDC procedural rules is "*to assist the parties in an impartial manner in their attempt to reach an amicable settlement of their dispute*". However the mediator has no authority to impose a final settlement on the parties.

However, private dispute resolution using ADR methods will not necessarily be suitable to all law enforcement contexts. There will be cases, serious abuses amounting to crimes for instance, where the involvement of the relevant law enforcement authorities will be required. Where the primary objective of a regime is **detection, enforcement** and **sanctioning** of breaches of legal standards (as is the case in most regimes relating to public safety, protection of consumers from dangerous products, occupational health and safety, or environmental health) then engagement with affected stakeholders is more likely to be through a **complaints mechanism and/or inspectorate**. In such a case, the matter may not be approached as a dispute between private parties but, instead, as a question of public law enforcement.

Example 3: The United Kingdom Health and Safety Executive

The UK Health and Safety Executive was established under the 1974 Health and Safety at Work Act. Its primary responsibility under this legislation is the prevention of death, ill health and injury in workplaces in Great Britain. To achieve this, HSE enforcing authorities have both advisory and enforcement functions. They "may offer duty holders information and advice, both face to face and in writing". In addition, "they may warn a duty holder that in their opinion, they are failing to comply with the law. Where appropriate, they may also serve improvement and prohibition notices, withdraw approvals, vary licence conditions or exemptions, issue formal cautions (England and Wales only), and they may prosecute (or report to the Procurator Fiscal with a view to prosecution in Scotland." The HSE is authorised to receive, investigate and take action in respect of complaints about workplace health and safety issues. The HSE's policy is to investigate (with only limited exceptions) "every complaint that either has caused or has potential to cause significant harm, or alleges the denial of basic employee welfare facilities, or appears to constitute a significant breach of law for which HSE is the enforcing authority". If a breach of legal standards is detected, this will result in enforcement action being taken, in line with the HSE's enforcement policy.

http://www.hse.gov.uk/index.htm

Public law enforcement has a particularly important role to play where those affected by adverse business-related human rights impacts are individuals from groups or populations that may be at heightened risk of becoming vulnerable or marginalized. As a recent publication by the ILO puts it, "[i]rrespective of the various services that may exist to promote access to dispute resolution mechanisms, there are many workers who will not bring claims themselves, even when they work in abusive and inhumane conditions".[44] For this reason, labour inspectorates often have functions that enable them to both receive and resolve complaints, to investigate allegations of corporate wrongdoing, and to pursue legal action (including prosecution action) on behalf of affected individuals.[45]

Example 4: Austria's environmental Ombudsman

Austria has an environmental Ombudsman with statutory duties to represent the interests of nature conservation and can receive complaints relating to non-compliance with environmental law. The Ombudsman cannot issue enforceable decisions itself, but it has the power to bring complaints before Austria's superior courts.

Example 5: A United Kingdom licensing body for the protection of vulnerable workers

The UK Gangmasters Licensing Authority ("GLA") was set up in 2004 pursuant to the Gangmasters (Licensing) Act. It regulates (through a licensing scheme) businesses that provide workers to the

[44] See Ebisui, Cooney and Fenwick, 'ILO Comparative Study', (ILO, 2016), n. 43 above, pp. 13-14.
[45] Ibid.

fresh produce supply chain and horticulture industry within the UK, to make sure they meet the employment standards required by law. The GLA carries out assessments of labour providers to make sure they meet GLA licensing standards (which cover health and safety, accommodation, pay, transport and training). In cooperation with other law enforcement agencies, the GLA engages in intelligence gathering to identify potential risks of exploitation and illegal activity. As part of its intelligence gathering it encourages the reporting (on-line or by telephone) of concerns about mistreatment of workers or labour providers operating without a licence. The GLA has the power to carry out inspections unannounced. Where there is a suspicion of an offence under the Act, the GLA has the power to carry out a criminal investigation, including powers to interview witnesses under caution. Following the investigation, a decision is then taken whether to refer the matter on to the central prosecuting body for criminal prosecution.

Source: http://www.gla.gov.uk/

Although "private" dispute resolution and public law enforcement may have different aims, objectives and methodologies, there are many examples of State-based NJMs that perform a mix of these services.[46] Where disputes between individuals and companies also raise issues of breaches of public law standards (e.g. workplace health and safety standards, or consumer safety standards or pollution of public health standards), it may be desirable for public enforcement processes to take place in parallel, or as part of a coordinated, staged process. Two illustrative examples from the field of labour law are given below.

Example 6: Canadian practice in the field of labour law

"Under both Ontario and Canadian federal jurisdiction, labour inspectors function as both enforcement officers and mediators with the same parties. Voluntary settlement is encouraged through all stages. In Ontario, a complaint can in general only be assigned to an employment standards (enforcement) officer if an employee has taken steps to inform their employer that they believe the Employment Standards Act has been violated, by reference to a "self-help" kit. Employers are legally required to post a summary of employment standards in all workplaces and to give copies to all workers. At the investigation stage, in the majority of cases labour standards officers attempt to achieve settlement through mediation. Where non-compliance is found and the employer refuses to make the required payment, officers issue various enforceable orders, such as compliance orders, payment orders and notices of contravention. These can still be appealed to the Ontario Labour Relations Board, a specialised labour tribunal, whose labour relations officers also provide mediation."

Extract from Ebisui, Cooney and Fenwick, 'ILO Comparative Study', (ILO,, 2016), n. 43 above, p. 15.

[46] A recent ILO publication notes the frequent "dovetailing" of public law enforcement with "informal" dispute resolution in the labour law field; "such approaches include the use of conciliation/mediation, further blurring the demarcation between enforcement and dispute settlement", see Ebisui, Cooney and Fenwick, 'ILO Comparative Study', (ILO2016), n. 43 above, p. 14.

Example 7: Australian Fair Work Ombudsman
"Most requests for assistance we receive from people who have a workplace dispute are resolved through our voluntary processes such as mediation.

We investigate a small number of requests and are more likely to investigate if we decide:

- the claims are very serious;
- the issue is widespread; and
- the people affected are vulnerable."

Australian Fair Work Ombudsman web-site. https://www.fairwork.gov.au/about-us/our-role/enforcing-the-legislation/workplace-investigations#wheninvestigate

What additional functions should the mechanism perform?

As will be clear from the examples given in section 3 above, many State-based NJMs provide additional services to government and to the public, beyond dispute resolution and law enforcement in individual cases. These can include:

Group 1 (public information and advisory type functions)

- public information and awareness raising (e.g. about the rights protected under a regime and how to assert and protect them);
- advisory services to the public and different stakeholder groups (e.g. employers, consumers, communities, prospective complainants).

Group 2 (market and regulatory analysis type functions)

- data collection;
- reporting;
- analysis of systemic issues and problems;
- market and regulatory reviews;
- liaison with law enforcement bodies;
- promotion of social dialogue;
- advice to government regarding effectiveness of legislation, compliance issues and law reform.

Functions listed in Group 1 above appear to be performed, to some degree, by virtually all State-based NJMs operating in the regulatory areas covered by this paper. A number of recent studies have pointed to a clear trend in favour of a greater emphasis on information, consultation, and advice in State-based NJM services, as part of a push for companies to adopt better preventive strategies.[47]

[47] See Ebisui, Cooney and Fenwick, 'ILO Comparative Study', (ILO, 2016), n. 43 above, pp. 17-18.

It is not uncommon for State-based NJMs working in the field of consumer, labour, or environmental law to offer advice to those likely to be affected by corporate activities as well as to the regulated companies themselves. A particular need to reach out to vulnerable individuals appears well recognised, especially among State-based NJMs working in the field of labour law. For instance, a recent ILO study details a number of domestic initiatives by State-based NJMs to target and provide assistance to potentially vulnerable migrant workers, including through trade unions, migrant resource networks, ethnic minority business groups, community legal centres.[48] Inspections may be targeted at specific sectors where risks of abuse are high (e.g. clothing manufacture, or agriculture).[49]

On the other hand, the market intelligence gathering and analytical services listed in Group 2 are more likely to be performed by State-based NJMs connected with bespoke regulatory regimes (i.e. complaints handlers, regulators, ombudsmen and labour inspectorates) than by mediation services and specialised tribunals.[50]

What fact-finding powers should the mechanism have?

The powers conferred on State-based NJMs vary depending on the regulatory aims and needs. At a minimum, these should be sufficient to enable the mechanism to fulfil its mandate effectively. For instance, the greater the responsibilities of the mechanism for criminal law enforcement, and the more serious the crimes and criminal sanctions covered by the regime, the stronger and more extensive the mechanism's investigatory powers will need to be. At the more robust end of the spectrum, fact-finding powers would include:

- powers to search premises;
- powers to examine and/or seize documents;
- powers of arrest; and
- powers to interview witnesses under caution.[51]

Labour inspectorates, for instance, are typically given powers to enter premises, to interview staff, to inspect and take copies of documents, and to discuss compliance issues with employers. State-based NJMs responsible for ensuring compliance by regulated companies (e.g. utility providers, private security contractors) will often have powers pursuant to a regulatory regime, or licence conditions (or both) to compel information from regulated companies, and to carry out inspections of offices and other facilities if necessary.

[48] Ibid, pp. 16-17.
[49] Ibid, p. 17.
[50] Hodges notes the increasing tendency to blend dispute resolution (i.e. Ombudsman) and other regulatory functions in consumer protection regimes in Europe. See Hodges, 'The Design of Consumer ADR and Ombudsmen Systems in Europe', p. 2.
[51] See Example 5, p. 25 above, for an example of a regulatory body with strong powers of investigation.

On the other hand, State-based NJMs that use a more adversarial model – e.g. certain specialised environmental or consumer tribunals – may not need to rely on investigative powers so extensively in practice. In such settings, responsibility for information gathering falls largely on the parties pursuing and defending the claim. However, these mechanisms may still require some scope for carrying out their own investigations into the circumstances underlying a dispute. Some environmental tribunals, for instance, allow the evidence of the parties to be supplemented or challenged by their own specially appointed technical experts.[52]

Additionally, State-based NJMs with powers to issue binding awards (e.g. arbitration bodies or other specialised tribunals) will need the means to ensure that proper procedure is complied with, which may include the power to compel attendance at court, or to compel production of testimony or to ensure that proper discovery of documents is made.

Example 8: National Green Tribunal of India

The National Green Tribunal was established in 2010 under the Indian National Green Tribunal Act. It is a specialist environmental tribunal, designed to provide speedy environmental justice and help reduce the burden of litigation in the higher courts. It is empowered to hear complaints under several significant pieces of Indian environmental legislation (including the Forest (Conservation) Act, Biological Diversity Act, Environment (Protection) Act, Water and Air (Prevention and Control of Pollution) Act). It has the power to make enforcement orders and to award compensation for damage to human health and damage to property. Its powers are similar to those of a civil court, including the power to summons, order discovery, receive evidence, and requisition public records. It is not limited by judicial procedural rules, but has the power to develop its own procedure, based on principles of natural justice.

http://www.greentribunal.gov.in/history.aspx

See further Pring and Pring 'ECTs: A Guide for Policymakers' (UNEP, 2016), n. 23 above, p. 34.

Example 9: Spanish practice in relation to pre-court conciliation in labour disputes

"In Spain, pre-court administrative conciliation is mandatory for individual labour disputes in the private sector, with some exceptions for certain jurisdictions. Unjustifiable non-attendance on the part of either party incurs a fine".

Ebisui, Cooney and Fenwick, 'ILO Comparative Study', (ILO, 2016), n. 43 above, p. 13.

The degree to which other dispute resolution mechanisms, such as Ombudsmen, will have powers to investigate complaints independently will usually be driven by the extent to which the mechanism has enforcement or other regulatory functions beyond the amicable resolution of private disputes. For instance, where an ombudsman has the

[52] See Peston, n, 33 above.

power to make binding determinations, or to hand down recommendations with respect to market reforms, or to criticise administrative action, or to issue sanctions, the investigatory powers conferred are typically more robust and wider ranging than would be available to a mechanism that is only permitted to carry out non-binding mediation.

What remedies should the mechanism be able to provide?

In discussing the different kinds of remedies that may be offered by State-based NJMs, two distinctions need to be borne in mind; first, the distinction between binding and non-binding mechanisms and, second, the distinction between "private" dispute resolution functions and public law enforcement functions. For each case, the track that is eventually taken (e.g. binding vs non-binding; dispute resolution vs enforcement) will have a bearing on the eventual remedial package that is arrived at.

Public law enforcement (binding): State-based NJM*'s* will often have more latitude than general courts to fashion a suitable package of remedies, which will be guided by whether the primary aim of the remedial package is deterrence, compensation, remediation, future prevention of harm, or a combination of these.[53]

Depending on the underlying regime and the powers conferred, sanctions may include fines, requirements to put in place a remediation plan, disqualification from government contracts or services, or requirements to publish apologies. Sanctions regimes may include options for additional (or increased) punitive penalties in cases of non-cooperation by the defendant company, or for repeat offenders. Not all State-based NJMs will have the ability to impose sanctions (e.g. fines) on their own initiative; however, they may have the ability to pursue further prosecutorial action on behalf of affected individuals, or the discretion to refer the matter to other law enforcement agencies.

In addition to punitive sanctions, there may also scope for a range of administrative-type sanctions, particularly if the company concerned is subject to a licensing regime or similar. These could include suspension or cancellation of licenses, or continual monitoring of preventative action, e.g. through probationary schemes, or additional licence conditions, or additional reporting requirements.

Example 10: Good practice with respect to enforcement of standards relating to private security providers

"To encourage compliance, regulators often have a wide range of sanctions as tools … States should consider giving regulators the power to apply sanctions and publicize the breaches which may lead to them. Some of the most common sanctions are listed below; they may relate to individual operatives and/or providers: • Issue a warning • Suspension of a licence • Restrictions on a licence • Revocation of a licence • Confiscation of a bond • Imposition of a fine • Criminal prosecution".

[53] For examples of the kinds of remedies that have been developed by State-based NJMs in the field of environmental law, see further Pring and Pring, *Greening Justice*, n. 20 above.

UNODC, *State Regulation concerning Civilian Private Security Services and their Contribution to Crime Prevention and Community Safety*, (2014), https://www.unodc.org/documents/justice-and-prison-reform/crimeprevention/Ebook0.pdf pp. 54-55.

Labour law breaches are often dealt with through a system of warnings, escalating to formal enforcement if appropriate remediation action is not taken. As a recent publication by the ILO explains "the ultimate purpose of the labour inspectorates is not generally to punish bona fide employers who are unaware of their legal obligations but willing to abide by protective labour law. Their overall aim is to promote compliance, and enforcement action is used primarily where necessary to pursue this goal".[54]

Example 11: Remedial powers of the New Zealand Labour Inspectorate

"Depending on the outcome of an investigation and the circumstances of the particular case Labour Inspectors can:

- agree to an enforceable undertaking with an employer;
- issue an improvement notice
- issue an infringement notice for breaches of record-keeping obligations …
- take actions against employers who breach employment standards …
- apply to the Employment Court for a declaration of breach for a serious breach of minimum entitlements. … Following a declaration of breach (or at the same time) inspectors can apply for:

- a monetary penalty [up to specified limits] …
- a compensation order to pay workers who have or are likely to have suffered a loss or damage resulting from the breach (eg lost wages)
- a banning order (stopping people from being employers) …

- apply to the Employment Relations Authority for a penalty …
- apply to the Employment Relations Authority to recover from the employer (or people involved in a breach), wages or other money owed as a result of the breach of minimum entitlements …
- recover any penalty due to be paid to the Crown in the District Court …
- apply for sanctions against a person who doesn't comply with an order …"

Extracted from the web-site of Employment New Zealand, https://employment.govt.nz/resolving-problems/steps-to-resolve/labour-inspectorate/

An interesting development noted in recent comparative research into public safety regimes in European jurisdictions is the emergence of regimes that prioritise future prevention over the apportionment of blame for past conduct. These regimes have made use of no-fault liability concepts, together with regulatory incentives for companies to encourage quick reporting, quick resolution of complaints and constructive dialogue with regulators towards better prevention in future.[55]

[54] Ebisui, Cooney and Fenwick, 'ILO Comparative Study', (ILO, 2016), n. 43 above, pp. 13-14.
[55] See further Hodges, *Ethical Business Regulation: Understanding the Evidence*, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/497539/16-113-ethical-business-regulation.pdf, pp. 5-7.

A number of consumer protection regimes (e.g. relating to utilities), many labour regimes (especially those relating to the protection of vulnerable workers) and certain environmental protection regimes provide for the possibility of an element of compensation for those affected by corporate breaches, as well as more penal and administrative sanctions.

Finally, it is reasonably common practice by State-based NJMs to publish the outcomes of enforcement action. This can be viewed as a form of "naming and shaming"[56] or it can be a spur to better compliance by others, or both. As noted above,[57] this information has proved useful, particularly in various branches of consumer law, in helping to identify systematic, legal or structural problems with particular markets or industrial sectors.

Example 12: A creative approach to remedies by a specialist environmental court in Brazil

"In lieu of jail and/or fines, the state [environment court] judge in Manaus, Brazil, has the enforcement flexibility to give convicted defendants the alternative to go to his "environmental night school," polluting bus companies to carry environmental ads, poachers to do "volunteer" work for wildlife organizations and illegal developers and loggers to renovate public parks and replant forests, with great success and little recidivism."

Extracted from Extracted from Pring and Pring 'ECTs: A Guide for Policymakers' (UNEP, 2016), n. 18 above, p. 52.

Settlement of private disputes (binding): Not all State-based NJMs will have the ability to determine private disputes with binding orders; however for those that do, compensation and/or some form of remediation appear to be the most common form of remedy. A financial order by a State-based NJM (such as a labour inspectorate for a breach of employment law standards; or by a consumer regulator for a breach of utilities customer service standards) may not be directly enforceable; however it may create a debt which can then be enforced in the general courts.[58] While the role of the Ombudsman is primarily one of mediation, some of these bodies have the ability to make binding financial orders for compensation, although this may be subject to a financial limit.

Example 13: Japan's Environmental Dispute Coordination Commission

The Environmental Dispute Coordination Commission was established in 1972. It offers mediation and conciliation services for a range of environmental disputes (primarily disputes over pollution). Its approach is a "settlement system" based on investigations and alternative dispute resolution methods, rather than adversarial processes. Pring and Pring (2016), n. 23 above, note "*the EDCC and the prefecture and local units do not have power to review or overturn decisions of government*

[56] See further Ebisui, Cooney and Fenwick, 'ILO Comparative Study', (ILO, 2016), n. 43 above, pp. 16-17.
[57] See pp. 25-26 above.
[58] See Example 11 above. On the interface between State-based NJMs and the general courts, see further pp. 40-42 below.

agencies. Traditionally their major role has been the award of compensation to individuals for harm done by industry pollution and development (with the government largely paying the compensation rather than the violator)."

http://www.soumu. go.jp/kouchoi/english/index.html

Settlement of private disputes (non-binding): For obvious reasons, parties seeking to use *non-binding* dispute settlement procedures in the context of an individual-to-business dispute will generally be seeking remedies that are compensatory and/or restorative, rather than punitive. However, it is worth recalling that proceedings that begin in a mediation setting can become the subject of formal public law enforcement.[59] Also, as noted above, non-binding dispute resolution techniques may be used as a first stage in a wider dispute resolution process, which can culminate in formal procedures using judicial mechanisms if the initial, informal and non-binding procedures are unsuccessful.

What features are needed to ensure that the mechanism is legitimate, transparent, equitable, predictable and rights compatible?

Legitimacy: The starting point will be a clear legislative mandate. However, further steps and safeguards are needed to ensure that the State-based NJM has an appropriate degree of independence from the Ministry to which it is ultimately responsible. Independence will be particularly important for State-based NJMs with administrative review functions. State-based NJMs which are under the financial, policy or administrative control of the same department whose decisions they are expected to review may not be legitimate or credible.[60]

Example 14: The National Green Tribunal of India

The Indian National Green Tribunal (see further Example 8 above) "*incorporates a number of best practices. It is independent of the Ministry of the Environment and is supervised by the Ministry of Law and Justice, giving it formal independence from the agency whose actions it reviews*."

Pring and Pring 'ECTs: A Guide for Policymakers' (UNEP, 2016), n. 23 above, p. 34

Other ways to improve the independence of State-based NJMs includes the creation of a separate managerial board to be responsible for day to day operations, and delegating responsibility for selection of board members and key personnel to a separate body. In addition, the body could be given responsibility for the development of its own rules and procedures. Care is needed in appointment criteria to ensure that board members

[59] See Example 7, pp. 26-27 above.

[60] Although, as Pring and Pring point out, there are examples of "captive" environmental tribunals who do appear to exhibit sufficient independence and professionalism to be legitimate and credible. See Pring and Pring 'ECTs: A Guide for Policymakers' (UNEP, 2016), n. 23 above, p. 38.

and other decision-makers are independent from the businesses whose cases they will be expected to adjudicate on, and to avoid potential conflicts of interest.

The legitimacy and credibility of State-based NJMs can be enhanced by ensuring ready access to technical and scientific expertise where this is likely to be important to fact-finding. In the environmental law sphere, this is achieved in a range of ways which, depending on the technical needs of the body concerned, could include having permanent technical experts on staff, a technical advisory board, technical experts on decision-making panels (either permanently or on an ad-hoc basis), specially appointed technical experts to provide expert testimony in individual cases, and other methods of managing expert witnesses in an inquisitorial or adversarial setting, including requirements for joint expert reports.[61] The creation of multi-disciplinary panels (i.e. involving a mix of legal and technical expertise) is not confined to the environmental law field. Increasingly labour tribunals and other dispute resolution mechanisms include "lay" members on decision-making panels, chosen for their technical or sectoral expertise.

Example 15: Ireland's multi-disciplinary environmental board

"Ireland's An Bord Pleanála … is a lay tribunal, composed of 10 members, with none of the members required by law to be attorneys (although some are from time to time). The board relies on a combination of member expertise and staff/consultant expertise in its decisions. The chairman is appointed by the Minister of the Environment based on recommendations by a statutory committee, and does have an environmental background. The other nine "ordinary" members are appointed from five expertise clusters representing (1) planning, engineering, architecture; (2) economic development, infrastructure, construction; (3) local government, farming, trade unions; (4) environment, voluntary bodies, others; and (5) civil servants …. In addition, the board employs 49 inspectors, who are experts in planning, plus additional consultants chosen based on the specific expertise needed in a case…"

Extracted from Pring and Pring, *Greening Justice*, n. 20 above, p. 58.

Overall performance of these mechanisms can be further enhanced in a number of ways. Methods that have been used in the field of consumer regulation include peer review, regulatory quality assurance systems and assessment of performance by publicly available criteria. Methods that have been used in the environmental field include gathering feedback from user groups, self evaluation and regular reporting (see further "transparency" below); and external oversight and evaluation systems.[62]

Example 16: Public oversight of regulatory bodies with responsibility for upholding standards in the private security industry

"Oversight can also include parliamentary inquiry committees and an ombudsman, who often have far-reaching powers to conduct independent research into complaints and scandals. Oversight may

[61] See Peston, n. 33 above.
[62] Pring and Pring 'ECTs: A Guide for Policymakers' (UNEP, 2016), n. 20 above, p. 52.

also derive from other bodies, such as labour standards, health and safety, or human rights bodies. For example, in the United States, a House Committee on Homeland Security covers a wide range of security-related issues that touch upon civilian private security services. In the United Kingdom, the Home Affairs Select Committee of the House of Commons considers a wide range of policing and criminal-justice-related issues which include civilian private security services. It has regularly conducted inquiries into aspects of the sector and made recommendations to the Government."

Extracted from UNODC, *State Regulation concerning Civilian Private Security Services and their Contribution to Crime Prevention and Community Safety*, (2014), https://www.unodc.org/documents/justice-and-prison-reform/crimeprevention/Ebook0.pdf, p. 54.

Transparency: The publication of information about policies and procedures for resolving disputes is now widely regarded as "good practice" among State-based NJMs operating in the consumer, labour and environmental fields. This information is typically made available on-line, via the body's web-site, and in hard copies (usually in the form of pamphlets). As noted above, many State-based NJMs publish details of outcomes of investigations, dispute resolution and enforcement activity. This transparency serves a number of purposes; in addition to inspiring confidence in the mechanism, it can help inform other businesses as to their responsibilities and legal obligations; and can operate as a deterrent. This kind of information can also serve wider purposes in terms of diagnosis of structural or behavioural problems within a market or sector and highlighting areas where future law reform may be needed.

Equitability: The importance of proactive outreach towards those at risk of vulnerability or marginalisation is discussed above.[63] Potential users of a State-based NJM should all have ready access to clear, easily understandable information necessary for them to be able to engage with complaints and dispute resolution processes as easily and cost-effectively as possible. Other ways of reaching stakeholders include identifying and working proactively with relevant community groups and civil society organisations.

Example 17: Working with civil society to publicise a State-based NJM

"In British Columbia, Canada, an example of good practice is the website "Security and you: know your rights". This provides information on the role of security guards, people's rights in relation to them and how to make a complaint, including the necessary forms. This website is run by the British Columbia Human Rights Coalition, rather than the regulator, which also provides a positive example of the role of civil society in ensuring the accountability of civilian private security firms and workers."

Extracted from UNODC, *State Regulation concerning Civilian Private Security Services and their Contribution to Crime Prevention and Community Safety*, (2014), https://www.unodc.org/documents/justice-and-prison-reform/crimeprevention/Ebook0.pdf, p. 53.

[63] See pp. 25 above.

Predictability: Well-functioning State-based NJMs will include, among their web resources, downloadable complaints forms, "self-help" guides and further information about stages of the disputes resolution or complaints process and likely timescales. Predictability and consistency of decision-making is also aided by published policies on conduct of investigations, enforcement strategy and the body's approach to formal sanctioning of breaches of standards (if relevant).

Rights compatibility: As the commentary to the UN Guiding Principles notes, *"[g]rievances are frequently not framed in terms of human rights 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 recognised human rights*".[64] Further clarification is needed on the practical implications of "rights compatibility" in the context of the remedies offered (or which could be made available) by State-based NJMs, and the extent to which State-based NJMs relevant to business respect for human rights are presently working towards "rights compatibility" in practice.

Example 18: The 2013 EU directive on alternative dispute resolution in consumer disputes

Directive 2013/11/EU aims to establish an EU-wide framework for alternative dispute resolution in consumer-to-business disputes. Articles 6-11 of the Directive lay down a series of quality criteria for consumer ADR mechanisms, including independence, impartiality, transparency, fairness, access to expertise, and legality.

http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:165:0063:0079:en:PDF

What features are needed to ensure that the mechanism is accessible?

The Commentary to the UN Guiding Principles on Human Rights reminds us that "[b]arriers to access may include a lack of awareness of the mechanism, language, literacy, costs, physical location and fears of reprisal."

Promoting awareness and outreach: As noted above, many State-based NJMs use web-based resources to communicate with potential users; however, alternatives need to be developed for those without ready access to on-line facilities. Environmental State-based NJMs have developed a number of innovative ways to improve outreach, including working with community groups and civil society organisations.[65] Labour inspectorates, regulators and dispute resolution bodies are (or ought to be) entitled to check, as part of on-going work, that information for workers on their rights and how to enforce them is properly displayed and effectively communicated to workers in an understandable format and in appropriate languages.[66] Consumer complaints bodies have used a range of techniques to improve outreach, including through trade

[64] UN Guiding Principles on Business and Human Rights, Guiding Principle 31, Commentary (f).
[65] See p. 32 above.
[66] See further Ebisui, Cooney and Fenwick, 'ILO Comparative Study', (ILO, 2016), n. 43 above, p. 15.

associations, on-line trading platforms, media outlets and advertising, and consumer protection groups.

Example 19: Outreach techniques used by the Australian Fair Work Ombudsman

"In Australia, the [Fair Work Ombudsman] engages in compliance activities targeted at vulnerable workers, including young workers and overseas workers, as well as educational campaigns focusing on specific sectors. During 2013-14, for example, the FWO targeted cleaning services, and the child-care and hospitality sectors. The FWO also works with trade unions and other organizations, including migrant resource networks, ethnic minority groups, community legal centres, training providers and others in raising awareness of minimum employment rights, so as to reach out to vulnerable workers."

Extracted from Ebisui, Cooney and Fenwick, 'ILO Comparative Study', (ILO, 2016), n. 19 above, p. 16.

Costs: Previous OHCHR work has confirmed that the financial cost of bringing claims remains one of the most significant (if not *the* most significant) barrier to access to justice in cases of business-related human rights abuse. As noted above, the cost of litigation in the general courts has been a key driver behind the growth in number and use of alternative dispute resolution mechanisms around the world.[67] Different ways that State-based NJMs have helped to reduce the costs of access to remedy have included no (or minimal) user fees,[68] advisory services (to help users make the most effective and appropriate use of NJMs),[69] filtering and redirection processes,[70] procedures which allow (and encourage) self-representation, innovative use of IT and communications technologies,[71] close case management, techniques for managing expert testimony,[72] and flexibility with respect to costs awards.

Example 20: French practice with respect to allocation of mediation costs

"In France, free-of-charge in-tribunal conciliation at the [Employment Tribunal] is mandatory before adjudication, but is conducted by the same lay judges who adjudicate … Newly introduced judicial mediation has also been used at some [employment tribunals] and in the civil courts, including appeals. Judges may propose voluntary mediation, which is provided by a private third party and paid for by the parties. Mediation fees are, however, regulated so as to adjust the financial power balance between the parties. In principal they can agree how to share the cost, but in the absence of

[67] See pp. 6-7 above.
[68] Many simple consumer-related, labour-related and environmental-related complaints mechanisms are free to access.
[69] Again, much used in the field of consumer law, and also in employment law.
[70] These are much used among consumer-related NJMs. See Hodges et al , *Consumer ADR in Europe*, n. 20 above.
[71] For instance, e-filing and video-conferencing.
[72] The cost of expert testimony is a particular issue in environmental cases, where scientific and/or engineering evidence can be key to outcomes. The different techniques used for reducing the costs of expert testimony in environmental cases, and for making the best possible use of scientific and technical expertise, are discussed in Pring and Pring 'ECTs: A Guide for Policymakers' (UNEP, 2016), n. 23 above.

agreement it is split equally, unless the judge considers this unfair in view of the respective economic circumstances of the parties."

Extracted from Ebisui, Cooney and Fenwick, 'ILO Comparative Study', (ILO, 2016), n. 43 above, p. 26.

Provision for collective redress: Collective redress mechanisms are an extremely important way of reducing individual costs of litigation by allowing individuals affected by mass problems to pool their resources and pursue legal action collectively.[73] Without such mechanisms, victims may be left without any effective remedy, especially in cases where individual legal costs would outweigh each victim's potential recovery. Collective redress mechanisms are now widely used within judicial mechanisms around the world,[74] and are increasingly a feature of alternative dispute resolution mechanisms too.[75] In 2013, the European Commission adopted a Recommendation on common principles for collective redress mechanisms across EU member States which calls on Member States to ensure that judicial collective redress mechanisms are accompanied by appropriate means of collective alternative dispute resolution available to the parties before and throughout the litigation".[76] The Recommendation relates to a number of different areas of EU law and regulation, including consumer protection, competition, environment protection, protection of personal data, financial services legislation and investor protection.

No-fault concepts and approaches: The complexities (and therefore the costs) of pursuing cases against business enterprises can be reduced by the use of strict (or "absolute") liability[77] concepts in regulatory regimes and the use of "no-fault" compensation schemes. Strict liability concepts are used in environmental regimes in a number of jurisdictions. The advantage of this approach is that it removes the need for complainants to prove any intent on the part of the business enterprise to cause the

[73] See Zerk, 'Corporate liability for gross human rights abuses: Towards a fairer and more effective system of domestic law remedies', prepared for the Office of the High Commissioner for Human Rights, February 2014,http://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/StudyDomesticeLawRemedies.pdf, at pp. 82-83.

[74] See national reports collected by the Stanford-Oxford Global Network on Class Actions at www.globalclassactions.stanford.edu.

[75] I. Benöhr, "Collective Redress in the Field of European Consumer Law' (2014) 41 *Legal Issues of Economic Integration*, Issue 3, pp, 243-256. See also Hodges, 'Current Discussions on Consumer Redress: Collective Redress and ADR', Conference Paper given at the Academy of European Law, Annual Conference on European Consumer Law, Trier, 31 October 2011.

[76] Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, Article 26.

[77] "Offences of "absolute liability" do not require proof that the defendant intended the relevant acts or harm, or that it was negligent, in order to establish legal liability. Instead, liability flows from the occurrence of a prohibited event, regardless of intentions or negligence. However, the relevant domestic public law regime may permit the company to raise a defence on the basis of its use of "due diligence" to prevent the prohibited event. Where this is the case, the offence may be described as one of "strict liability" (rather than absolute liability)." OHCHR, 'Improving accountability and access to remedy for victims of business-related human rights abuse: explanatory notes for guidance'. A/HRC/32/19/Add.1, pp. 5-6.

damage, merely the fact that the pollution occurred. In the field of consumer protection, no-fault compensation schemes have been developed in Nordic jurisdictions for the health care sector; however, as Hodges notes, there are cultural, structural and financial aspects to these schemes that may make them difficult to replicate elsewhere.[78]

User fees: State-based NJMs in the focus areas covered by this paper appear to be largely State-funded, although some (particularly those operating at the more formal end of the spectrum) may charge a fee to users to help defray costs. However, as Pring and Pring observe in the context of environmental cases, planners should not assume the [body] will be completely or even substantially "self-funding" from charging litigants fees, which incentivizes … revenue rather than client service and access to justice.[79]

Example 21: Strategies used by environmental courts and tribunals to reduce costs of cases

"A number of successful strategies for reducing or eliminating time and costs have been adopted by effective [environmental courts and tribunals] including • Permitting self-representation without lawyers • Consolidating similar complaints into one adjudication process • Setting reasonable or no court fees for litigants • Adopting and aggressively employing ADR • Not making the losing party pay crippling costs to the winner (the so-called British rule of "costs follow the event"), except in cases of court abuse or extreme behaviour • Issuing temporary restraining orders and preliminary injunctions to preserve the status quo, without requiring the plaintiff to pay a security bond • Providing court-appointed experts • Case-managing the process efficiently • Providing support for indigent parties and [public interest litigation]." **xtracted from Pring and Pring 'ECTs: A Guide for Policymakers' (UNEP, 2016), n. 18 above, pp. 56-57.**

Physical location: In the environmental field, some jurisdictions make use of "travelling" tribunals or panels to improve accessibility of State-based NJMs to certain groups, especially people living in remote areas. Other techniques, also noted above, include e-filing of documents and videoconferencing. In the field of consumer law (and in environmental law too) some jurisdictions have de-centralised NJMs into smaller bodies with regional or specific sectoral competence. In the employment law field, the inspection practices of labour inspectorates can create opportunities for access by workers to the advice and help of law enforcement bodies.

Fear of reprisals: Flexible rules on standing, as well as representative actions, can improve access to remedy by those who may otherwise be deterred from seeking help because of fear of reprisals (e.g. from government agencies, or from the business enterprise complained of). This is a particular concern in labour cases (especially where vulnerable workers are involved), but it can also be a concern in environmental cases, or cases concerning complaints about private security providers. For these reasons, State-based NJMs should have policies on preserving anonymity in certain cases. In sensitive cases there is also likely to be a need for anonymity when it comes to publishing outcomes. Outreach to potentially vulnerable groups should stress the

[78] Hodges, et al, *Consumer ADR in Europe*, n. 20 above, pp. 392-393

protections that will be available, and management policies should be in place to ensure that these are observed. As noted above, the ability of State-based NJMs to take enforcement action on behalf of individuals as a result of allegations raised in a complaint or mediation can be an important route to a remedy for people who lack the resources to pursue enforcement action themselves; however law enforcement bodies need to be sensitive to the needs, concerns, and indeed fears, of the individuals concerned.

What features are needed to ensure that there is policy coherence between the mechanism and the work and policies of other government and judicial bodies?

State-based NJMs do not exist in isolation. They exist within a framework of regulation, a wider legal system and constitutional structure, and society itself. To ensure that they are able to operate efficiently, effectively, in accordance with legal requirements and in a human rights-respecting way, there are a number of important issues that must be taken account of in the way they are designed.

Interface with other regulatory bodies and functions: Some State-based NJMs offer a "one stop shop" in which the standard setting, policy making, complaints and enforcement are handled by a single body (as is often the case with domestic labour inspectorates). Alternatively, the State-based NJM may operate as an enforcement arm of another regulator (or regulators). In such a case, it is important that there is appropriate liaison, communication and coordination between the various institutions to ensure "policy coherence" on business and human rights-related issues.

This is particularly the case where different State-based NJMs may have overlapping jurisdiction over a particular case (e.g. a complaint about the operating standards of a private security provider may also have workplace health and safety implications). This can give rise to a number of practical and legal challenges. On the practical side, there is the risk of confusion and "buck-passing" between different State agencies. On the legal side, there may be procedural issues about proper sequencing, and whether it is possible or strategically advantageous to lodge claims with more than one institution at the same time.

Interface with law enforcement: As will be clear from the discussion above, there is a great deal of variety in the kinds of enforcement powers that State-based NJMs enjoy. In some cases State-based NJMs may have the ability to impose sanctions themselves (e.g. regulators with responsibility for licensing, or labour inspectorates); however in some cases responsibility for law enforcement must be passed to other investigatory and/or enforcement bodies such as the police authorities or prosecutors. On the other hand, ss noted above, there are instances of State-based NJMs with prosecutorial as well as mediation powers. Well-functioning State-based NJMs will have clear policies and procedures governing when it is appropriate to continue with private resolution of a

matter and when it is appropriate to pursue a formal prosecution and/or refer a matter to the police.

Interface with judicial mechanisms: Some State-based NJMs have the power to make binding determinations of disputes between individuals and companies; however these may not be directly enforceable. In the consumer and labour context, it is often the case that compensation orders by State-based NJMs must then be enforced as a debt in the courts if the order is not complied with. In practice, enforcing the financial orders of labour inspectorates (e.g. for recovery of back wages and fines) can be enormously difficult.[80] While some jurisdictions have introduced sanctions such as penalties for late payment, further work is needed on ways to make enforcement of State-based NJM financial orders more straightforward for claimants.

A more fundamental and potentially controversial issue concerns the extent to which individuals should be prevented from seeking judicial remedies prior to attempting alternative dispute resolution using a State-based NJM, or while a State-based NJM procedure is in progress. As noted above, it is becoming increasingly common in many jurisdictions to refer litigants to court-annexed mediation and/or conciliation as a pre-requisite to access to judicial mechanisms.

There is a further question as to whether access to a State-based NJM should preclude a litigant's ability to access judicial mechanisms altogether. Some consumer protection regimes provide for the possibility of binding arbitration as an option for the parties in dispute; however these tend not to popular with individual litigants in practice, who prefer to preserve their rights to access judicial remedies should the arbitration not produce a desirable outcome.[81]

While there may be an efficiency and effectiveness case for directing as many cases towards alternative dispute resolution by State-based NJMs as possible, further work is needed in relation to the human rights implications of compulsory use of State-based NJMs. There are pressing questions about whether such requirements are consistent with human rights of citizens to access their courts, and the safeguards that may be needed, consistent with internationally recognised human rights, to ensure that such requirements are not unfair, discriminatory or oppressive. This would include any special safeguards needed to protect the rights of people at heightened risk of vulnerability and/or marginalization, recognising the specific challenges that may be faced by indigenous peoples, women, LGBTI persons, national or ethnic,, religious and linguistic minorities, children, persons with disabilities, and migrant workers and their families. Finally, there is a need to explore more fully the question of whether there are business and human rights-related cases or issues for which resolution by State-based

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[80] "In the United Kingdom, nearly half of tribunal awards had not been paid fully in 2013, with a further third seeing no compensation paid at all, after extensive filtering out of claims through both legislative hurdles and ACAS conciliation." See Ebisui, Cooney and Fenwick, 'ILO Comparative Study', (ILO, 2016), n. 43 above, pp. 30.

[81] See Hodges, n. 20 above, pp. 12-13.

NJMs will rarely, if ever, be appropriate - in other words, cases that, by their nature, require judicial resolution – and, if so, what these might be.

Interface with NHRIs: NHRIs may have jurisdiction to hear and decide complaints about business-related human rights issues, such as complaints about adverse impacts to environmental rights as a result of commercial activity. However, in most cases they will not have the ability to make binding decisions; rather recommendations to government. They may refer matters to specialised State-based NJMs, however (e.g. NJMs with responsibility for labour rights, or environmental protection). In either case, NHRIs clearly have a vital role to play in ensuring that governmental institutions conduct themselves in accordance with internationally recognised human rights, both in terms of their procedure and the principles they apply to substantive decision-making.

Example 22: The role of Mexico's NHRI with regard to environmental disputes

"[Mexico's NHRI], Comisión Nacional de Derechos Humanos (CNDH) … has the power to receive and investigate complaints about human rights violations and give its findings and recommendations to the government. The 2012 addition in Mexico's Constitution of a right to a healthy environment legitimizes CNDH's accepting and acting on environmental complaints, thus providing a non-judicial mechanism for increasing citizen participation, highlighting environmental issues and achieving environmental justice."

Extracted from Pring and Pring 'ECTs: A Guide for Policymakers' (UNEP, 2016), n. 23 above, p. 42.

Interface with non-State-based (i.e. "private" or "operational level") grievance mechanisms: Just as access to judicial mechanisms may be made subject to the pre-requisite that the parties to a dispute first try to resolve the matter using alternative dispute resolution (see above), it is not uncommon for regulatory complaints mechanisms (such as mechanisms for resolution of consumer complaints or complaints about non-observance of labour standards) to insist that the parties first attempt to resolve their dispute by private means. These processes may draw on the skills of other organisations or initiatives, such as trade unions, trade associations, mediation organisations, or operational grievance mechanisms. Again, while it is important not to undermine the role of such organisations, further work is needed on the question of whether, and in what circumstances, these additional procedural requirements could themselves become oppressive and pose a barrier to remedy, and safeguards may be needed to protect the rights of participants, including the participants' rights to access both judicial mechanisms and State-based NJMs.

What features are needed to ensure that the mechanism is a source of continuous learning?

The work of State-based NJMs can be a vital source of intelligence about market trends and emerging regulatory problems, as well as about the success (or otherwise) of existing regulatory initiatives and strategies. As Hodges puts it, writing in the context of consumer dispute resolution:

"the best ADR systems can also provide regulatory information and effects, if designed properly. The dispute resolution procedures can deliver valuable information on types of claims, trends and issues, and how well sectors and individual businesses are performing, both in relation to substantive issues such as breach of law, or commercial information on how to improve products and services, as well as whether there is a need to improve the dispute handling process itself. This can improve standards and provide a powerful mechanism for behaviour control. The requirement is that the dispute resolution system should capture the data, and make it transparent and available to the market, customers and regulators. Economies of scale can also be achieved in combining dispute resolution systems within quality control and regulatory systems. Hence, the dispute resolution system can operate also as a Quality Management System, reinforcing and improving virtuous behaviour."[82]

Other ways of learning lessons from past measures and practices include user feedback systems, self-evaluation and reporting, independent review panels, peer review of effectiveness, impact assessment and performance tracking.[83]

6. Issues arising in cross-border cases

As experience with the NCP system under the OECD Guidelines for Multinational Enterprises shows, State-based non-judicial mechanisms (at least those which operate relatively informally and which do not rely on extensive powers of investigation and compulsion) are capable of working in a cross-border context.

However, in this respect the NCP system under the OECD Guidelines appears to be an exception. Most State-based NJMs working in the regulatory fields that form the focus of this scoping paper have a predominantly (if not exclusively) domestic remit. For instance, environmental NJMs have jurisdiction over environmental issues within territorial boundaries but rarely beyond. Employment NJMs tend to be concerned with the welfare of workers and workplaces within the jurisdiction of the relevant State. However, this domestic focus raises questions as to whether the present array of State-based NJMs are adequately responding to business and human rights challenges that are cross-border, or even global, in nature.

One area where policy-makers have needed to confront cross-border challenges directly is consumer protection. Developments such as the growth of cheap air travel, mobile communications services, and the explosion in on-line buying and selling (much of which takes place across national borders) have given rise to a number of regulatory challenges. These include problems relating to;

[82] Hodges, n. 76 above, p. 17.
[83] See further Pring and Pring 'ECTs: A Guide for Policymakers' (UNEP, 2016), n. 23 above, p. 58.

- identifying the correct State-based NJM to handle the consumer complaints in specific cases;
- differences in procedure and substantive law, creating inequalities for consumer and lack of a level playing field for sellers;
- cross-border access to regulatory information;
- enforcing decisions of State-based NJMs in different jurisdictions.

Within the EU, policy-makers and regulatory institutions have responded to these challenges with a number of regulatory innovations. These include, as noted above, a series of regulatory instruments aimed at achieving greater convergence of approaches to consumer-related dispute resolution,[84] and alternative dispute resolution more generally.[85] EU practice also shows how regulatory networks can be developed to help guide complainants to the correct forum in different kinds of cross-border disputes (of which complaints arising from on-line transactions or air transport have been among the most prevalent).[86]

Cross-border enforcement of binding decisions of State-based NJMs is likely to be particularly problematic given the present jurisdictional constraints of these bodies. For financial orders, the normal procedure is to have the amount recognised by a domestic court (e.g. a small claims court) as a debt, and then have the debt recognised in the relevant foreign jurisdiction. However, even in the EU, which has automatic foreign recognition of small claims, foreign enforcement can be complex and costly for claimants.[87]

Example 23: EU regulators networks to help consumers resolve cross-border disputes

"In 2001, an Extra-Judicial Network (EEJ-Net) was launched and a consumer claim form promulgated to facilitate consumers' access to ADR providers. The EEJ-Net consists of national 'clearing houses' that assist consumers to settle possible cross-border disputes with companies, by guiding them towards alternative dispute resolution mechanisms …

… A separate network of national ADR bodies was established in 2001 for financial services, called FIN-NET (Financial Services Complaints Network). FIN-NET links 50 out-of-court schemes that deal with complaints in the area of financial services and covers the European Union, Norway, Iceland and Liechtenstein. In 2009, FIN-NET handled 1,523 cross-border cases, of which 884 were in the banking sector, 244 in the insurance sector, 410 in the investment services sector, and 4 that could not be attributed to one sector."

[84] Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC.
[85] Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters.
[86] See Hodges, n. 76 above, at p. 11. See further Example 23 below.
[87] Ibid, p. 12.

Extracted from Hodges, 'Current Discussions on Consumer Redress: Collective Redress and ADR', n. 73 above, p.p. 11-12.

In light of pressing business and human rights-related concerns arising out of cross-border investment, differences between jurisdictions in terms of enforcement capability, and the challenges arising out of management of human rights risks in global supply chains, there would seem to be potential for greater innovation in the use of State-based NJMs to offer remedies in cases concerning abuses taking place in more than one State, and which may entail investigation of systemic, structural or behavioural problems in markets and sectors as well as individual cases. Further work is needed to gain a better understanding of the factors that could be holding back development, the future contribution that State-based NJMs could potentially make, and the best forms of international cooperation to facilitate this.

7. OHCHR's programme of work

OHCHR has been requested, pursuant to Council resolution 32/19, to *"identify and analyse lessons learned, best practices, challenges and possibilities to improve the effectiveness of State-based non-judicial mechanisms that are relevant for the respect by business enterprises for human rights, including in a cross-border context,* (emphasis added).[88]

This mandate raises an array of access to remedy issues and there are many possible angles of approach. Extensive comparative work has already been carried out by experts working in academic institutions and international organisations on the models and features of State-based NJMs in different regulatory fields. This research draws from experiences in a diverse range of jurisdictions, reflecting different legal structures, traditions and regulatory methodologies.[89] As a result of this past work, a clearer picture is developing of the kinds of functions and features found in effective State-based NJMs, and the advantages and disadvantages of different regulatory models and approaches. However, this scoping exercise has also highlighted a number of potential challenges for OHCHR in responding to the Council's mandate. These include:

[88] See A/HRC/32/L.19, para. 12.

[89] See, in relation to consumer law, Hodges et al, *Consumer ADR in Europe*, (Oxford, Hart Publishing, 2012); and see further Hodges, *Ethical Business Regulation: Understanding the Evidence*, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/497539/16-113-ethical-business-regulation.pdf. On labour law, see in particular, Ebisui, Cooney and Fenwick (eds) 'ILO Comparative Study', n. 43 above. On environmental NJMs, see especially Pring and Pring, 'Greening Justice', n. 20 above and Pring and Pring 'Environmental Courts and Tribunals: A Guide for Policymakers' n. 23 above See also Pring and Pring, 'Twenty-first Century Environmental Dispute Resolution', n. 20 above Peston, 'Characteristics of Successful Environmental Courts and Tribunals', n. 33 above. , On regulation of private security providers see especially UNODC, *State Regulation concerning Civilian Private Security Services and their Contribution to Crime Prevention and Community Safety*, (2014), https://www.unodc.org/documents/justice-and-prison-reform/crimeprevention/Ebook0.pdf.

- the sheer numbers, range and diversity of State-based NJMs relevant to business respect for human rights, and the fact that few are framed in explicitly human rights terms (but rather by reference to regulatory themes);
- the need to take account of different legal, regulatory, structural and cultural settings (including the inter-connectedness of many State-based NJMs with wider regulatory systems and objectives); and
- the fast pace at which new State-based NJMs are being created;
- the rapid evolution of regulatory methods and approaches (including the growth of highly specialised State-based NJMs and sectoral State-based NJMs,);
- the range of possible adverse human rights impacts related to business activity that could potentially be addressed by State-based NJMs (e.g. spanning issues ranging from consumer protection to privacy; from labour rights violations to land-grabbing and adverse impacts on the rights of indigenous peoples, to name just a few).

Other trends to be aware of include:

- growing awareness of the importance of State-based NJMs as a means of collecting information about recurring regulatory challenges, and systemic problems, which can be used to inform effective law reform;
- the growth of multi-functional State-based NJMs with supervisory, analytical and preventative functions, and functions relating to the promotion of social dialogue, as well as functions relating to complaints handling and disputes resolution;
- the growing use by judicial mechanisms of alternative dispute resolution methods and institutions.

In light of past comparative legal research, and with these specific challenges and trends in mind, (and mindful also of the clear business and human rights focus of Council's request), OHCHR proposes the following programme of work in response to the Council's mandate in resolution 32/19.

Note: *The proposed programme of work set out below is subject to OHCHR obtaining the necessary funding and resources.*

a. Project outline

The project will be split into two parts.

Part 1 of the work of the OHCHR will focus on "lessons learned, best practices, challenges and possibilities to improve the effectiveness of State-based non-judicial mechanisms" by using, as its reference point, the various key **functions** performed by State-based NJMs relevant to business respect for human rights (see further below).

Part 2 will focus on two important **cross-cutting issues**; namely

- effective integration of NJMs into legal systems (i.e. “policy coherence”); and
- cross-border capabilities and opportunities.

Part I: Functions

Key aim: to identify the practical steps that States can take to improve the performance of State-based NJMs and thereby implement the “Third Pillar” of the UNGPs more effectively, with respect to:

- **Complaints handling functions;**
- **Alternative disputes resolution;** and
- **Other key functions of State-based NJMs relevant to access to remedy** (*including preventative work with businesses, supervisory functions and regulatory analysis, functions with respect to the promotion of social dialogue, and advice to government*).

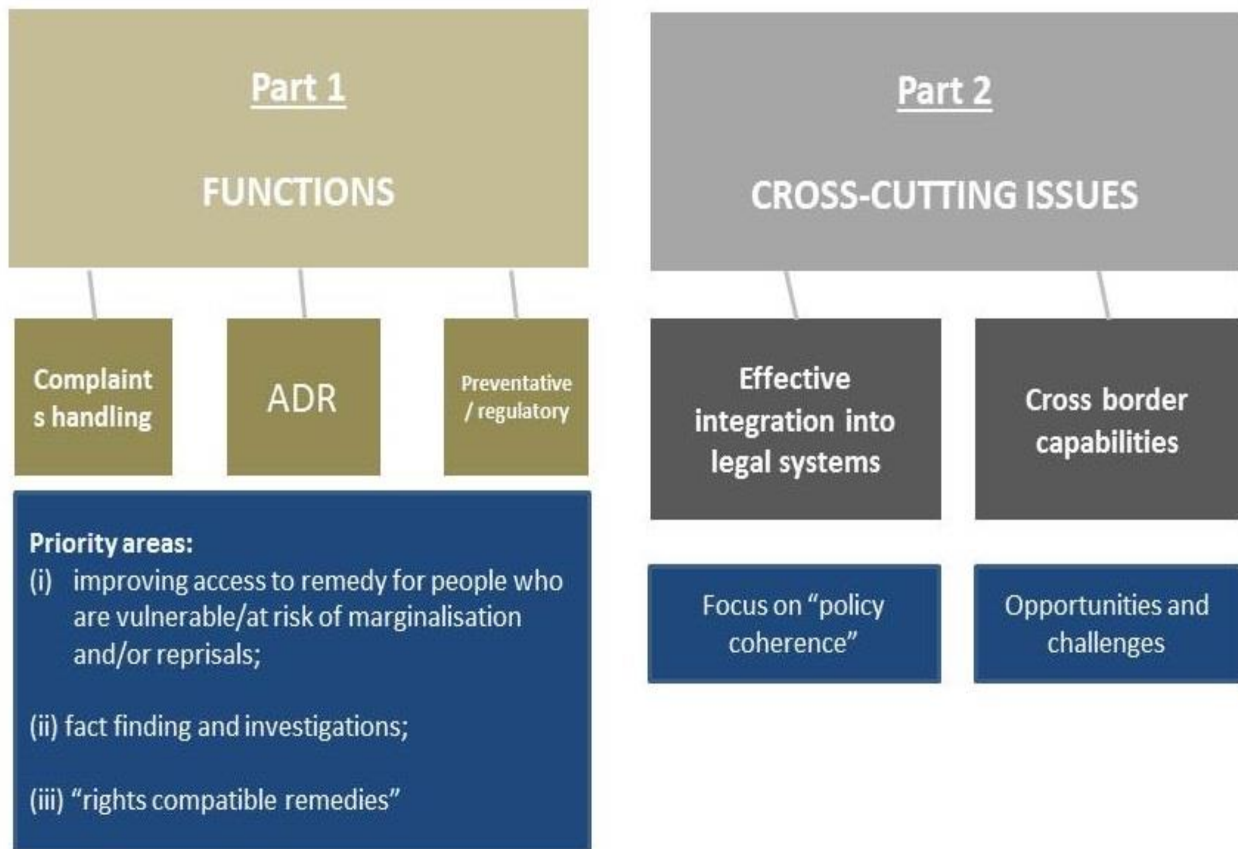
Because of time and resource limitations it will be necessary to prioritise research efforts. Based on the findings of the OHCHR's scoping exercise for this project, three priority areas have been identified for this part of the work, namely:

- **identifying practical measures for improving access to remedy for people who may be at risk of vulnerability or marginalisation** (including women, children, indigenous peoples, lesbian, gay, bisexual, transgender and intersex (LGBTI) persons, people belonging to ethnic or other minorities or persons with disabilities)**, or who may be at risk of intimidation and/or reprisals**.
- **clarifying “good practice” with respect to fact-finding and investigations** by State-based NJMs;
- **clarifying the elements of “rights-compatible” remedies** in different regulatory settings, with a particular focus on how remedies can respond to the needs of those who are particularly vulnerable and marginalized within society..

Part II: Cross-cutting issues

- **Effective integration of State-based NJMs into wider domestic legal systems** (Key aim: *to identify different ways that States can ensure that there is policy coherence between the mandates and work of State-based NJMs and other State institutions and agencies relevant to business respect for human rights, including courts and regulators).*
- **Cross border capabilities** (Key aim: *to identify opportunities and challenges, including the potential for greater innovation in the structure, mandates and use of State-based NJMs to offer remedies in cases concerning abuses taking place in more than one State*).

Fig 1: Graphic illustration of Project Outline



b: Timetable and methodology

Phase 1: Introductory mapping exercise: how do State-based NJMs respond to high risk sectors?

Aim of exercise: To gain a better understanding of the numbers, types and scope of activities of State-based NJMs presently in operation in different jurisdictions which have either a complaints handling and/or dispute resolution role in respect of adverse impacts of business activities on internationally recognised human rights in the following sectors;

- extractives and natural resources;
- agribusiness;
- infrastructure and construction; and
- textiles.

Key research activities: Initial information-gathering through desk-review on high-risk sectors and the involvement of NJMs.

Timing*:* mid-February to mid-March 2017.

Outputs: A short paper setting out findings (and any adjustments or refinements to the OHCHR's programme of work in light of those findings), to be published on project-website.

Phase 2: Evidence gathering for Parts 1 and 2

Note: This may be subject to adjustment in light of the findings arising from the preparatory mapping exercise outlined above.

Aim of exercise: To gain a better understanding of:

- levels of awareness among State-based NJMs relevant to business respect for human rights of the "**effectiveness criteria**" set out in the UNGPs;
- different ways that State-based NJMs relevant to business respect for human rights can respond in practice to the various elements set out in UNGP 31;
- steps that can be taken to improve **policy coherence** between State-based NJMs and wider domestic legal systems;
- extent of, and use of, **fact-finding** and **investigation powers**;
- the range of **remedies** that can be offered, the processes used and the considerations taken into account in developing those remedies; and
- the measures that can be taken to assist claimants or complainants who may be at risk of (a) **vulnerability** and/or **marginalisation** or (b) **intimidation** and/or **reprisals**.

Key research activities:

Call for input and practical examples with regards to specific questions on NJMs, their functions and accessibility will be published on a dedicated project web-site and responses invited from all interested stakeholders, and from all jurisdictions.

Timing: mid-February to mid-May 2017

NHRIs and academic institutions in [20] focus jurisdictions will be approached for guidance as to (a) local legal and regulatory structures (b) the most suitable NJMs to approach for the purposes of this research, and (c) the best methods of information gathering (e.g. whether short questionnaire or face to face/telephone interview). Information-gathering will proceed in a manner that takes account of this guidance. In each case, questions will be tied closely to various aspects of the effectiveness criteria under the UNGPs, and will be designed to elicit information relating to each of the bullet points above.

This information-gathering will be supplemented by interviews with practitioners, civil society organisations and other experts working in (or with experience in) the [20] focus jurisdictions with respect to project themes 1, 2 and 5 in particular. These interviews would focus in particular on (a) measures

taken to assist claimants or complainants who may be vulnerable or at risk of marginalisation and/or threats or reprisals and (b) elements of an effective remedy.

Timing: April to September 2017

Output: Draft discussion paper to be published on project website

Phase 3: Consultations

Aim of exercise: Gather feedback from different stakeholders and State representatives to findings gathered during the previous phase and identify elements for final report.

Key activities:

1. One consultation with multi-stakeholders

Timing: End of November 2017

2. A workshop with representatives of States and State regulatory agencies which would review and discuss findings in draft discussion paper (see above).

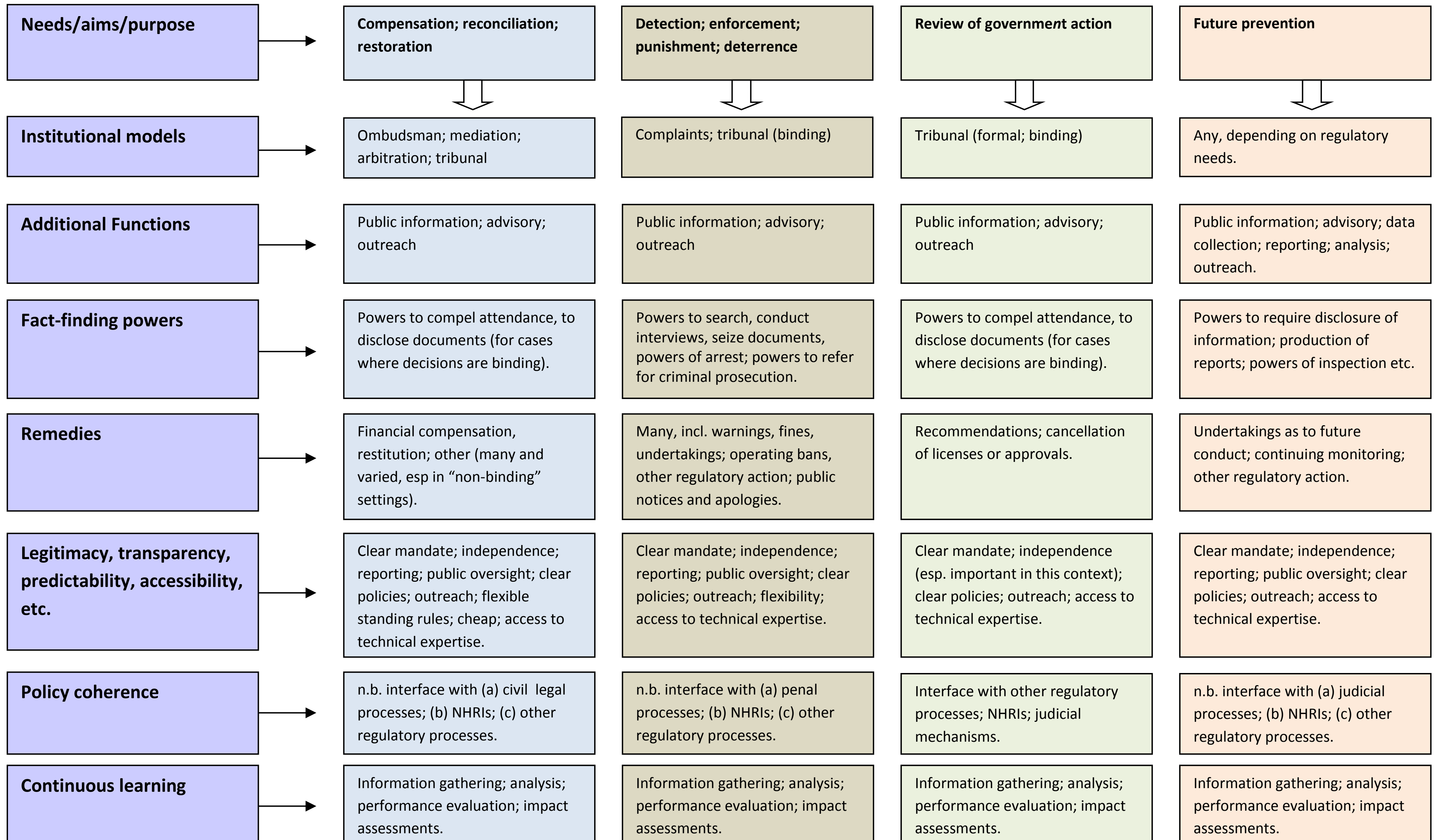
Timing: January 2018

Phase 4: Analysis and reporting

Review, mapping and analysis of information collected with a view to publish findings and draft report. Followed by a consultation gathering final comments from stakeholders with a view to submission of report to Council under 32/19 for consideration at the Council's thirty eighth session in June 2018.

Fig. 2: Timeline of ARP II

Annex 1: Baskets of issues and options relevant to the design of State-based NJMs



Needs/aims/purpose	**Compensation; reconciliation; restoration**	**Detection; enforcement; punishment; deterrence**	**Review of government action**	**Future prevention**
Institutional models	Ombudsman; mediation; arbitration; tribunal	Complaints; tribunal (binding)	Tribunal (formal; binding)	Any, depending on regulatory needs.
Additional Functions	Public information; advisory; outreach	Public information; advisory; outreach	Public information; advisory; outreach	Public information; advisory; data collection; reporting; analysis; outreach.
Fact-finding powers	Powers to compel attendance, to disclose documents (for cases where decisions are binding).	Powers to search, conduct interviews, seize documents, powers of arrest; powers to refer for criminal prosecution.	Powers to compel attendance, to disclose documents (for cases where decisions are binding).	Powers to require disclosure of information; production of reports; powers of inspection etc.
Remedies	Financial compensation, restitution; other (many and varied, esp in "non-binding" settings).	Many, incl. warnings, fines, undertakings; operating bans, other regulatory action; public notices and apologies.	Recommendations; cancellation of licenses or approvals.	Undertakings as to future conduct; continuing monitoring; other regulatory action.
Legitimacy, transparency, predictability, accessibility, etc.	Clear mandate; independence; reporting; public oversight; clear policies; outreach; flexible standing rules; cheap; access to technical expertise.	Clear mandate; independence; reporting; public oversight; clear policies; outreach; flexibility; access to technical expertise.	Clear mandate; independence (esp. important in this context); clear policies; outreach; access to technical expertise.	Clear mandate; independence; reporting; public oversight; clear policies; outreach; access to technical expertise.
Policy coherence	n.b. interface with (a) civil legal processes; (b) NHRIs; (c) other regulatory processes.	n.b. interface with (a) penal processes; (b) NHRIs; (c) other regulatory processes.	Interface with other regulatory processes; NHRIs; judicial mechanisms.	n.b. interface with (a) judicial processes; (b) NHRIs; (c) other regulatory processes.
Continuous learning	Information gathering; analysis; performance evaluation; impact assessments.	Information gathering; analysis; performance evaluation; impact assessments.	Information gathering; analysis; performance evaluation; impact assessments.	Information gathering; analysis; performance evaluation; impact assessments.