



Accountability and Remedy Project

Part II: State-based non-judicial mechanisms

**How State-based NJMs respond to
sectors with high risks of adverse
human rights impacts: Sector
Study – Part 1**

May 2017

Executive summary

This short report sets out the findings of the first part of a sector study undertaken by OHCHR for the purposes of a new programme of work called Accountability and Remedy Project part II (or “ARP II”).

OHCHR’s Accountability and Remedy Project aims to help States strengthen their implementation of “Pillar III” of the UN Guiding Principles on Business and Human Rights (“UNGPs”) on “Access to Remedy”. In accordance with the mandate given by the Human Rights Council in resolution 26/22, the Accountability and Remedy Project initially focussed on **judicial mechanisms**. Following a fresh mandate given by the Council under resolution 32/10, the focus of ARP II is **State-based non-judicial mechanisms** (“State-based NJMs”) as potential sources of accountability and remedy for business-related human rights abuses.

OHCHR’s sector study focuses on the historical and potential responses of State-based NJMs to adverse human rights impacts occurring in four “focus” business sectors:

- extractives, mining and natural resources;
- agribusiness and food production;
- infrastructure and construction; and
- textiles and manufacture of clothing.

This report sets out a summary of:

- the work done in the course of OHCHR’s sector study – part 1;
- preliminary observations as to
 - the **types of adverse human rights impacts** arising in these business sectors that are currently being referred to State-based NJMs;
 - the **factors that may currently be driving accountability and remedy choices** by affected individuals and communities; and
 - the **factors that may be deterring or preventing use of State-based NJMs to resolve complaints and disputes** arising from adverse human rights impacts.

Focussing in particular on the **types of remedies** presently available, as well as issues of **policy coherence**, the sector study concludes that domestic systems for responding to adverse business-related human rights impacts through State-based NJMs are presently **haphazard**. While State-based NJMs appear to offer a route to a *partial* remedy in some cases, **States are not, at present, generating sufficient (and sufficiently varied) opportunities for affected individuals and communities to seek and obtain adequate and effective remedies for adverse human rights impacts** arising in these focus business sectors via State-based NJMs. In other words, State-based NJMs are not yet, by and large, fulfilling the role envisaged in the UNGPs of “complementing and supplementing judicial mechanisms”. Instead, affected individuals and communities are making do with a disparate collection of accountability and remedy mechanisms whose ability to deliver an effective remedy in any given case, whether individually or in combination, tends to owe more to luck than to design. While special-purpose regimes clearly have an important role to play (and while policy-makers are beginning to show more innovation in developing linkages between different kinds of mechanisms), we are still some way away from the vision set out in the UN Guiding Principles on Business and Human

Rights with respect to the role, structure, processes and use of State-based NJMs (see esp. Guiding Principle 27, Commentary).

The paper concludes with some remarks about the implications of these observations for the next phase of work on ARP II, and an outline research plan for more detailed research to take place between April and September 2017.

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1. Introduction

This paper sets out the findings of the first part of a sector study undertaken by OHCHR for the purposes of a new programme of work for the Accountability and Remedy Project. The new programme of work is called Accountability and Remedy Project, Part II (or “ARP II” for short).

The Accountability and Remedy Project has been developed by OHCHR to help States strengthen their implementation of “Pillar III” of the UN Guiding Principles on Business and Human Rights (“UNGPs”) on “Access to Remedy”.

In accordance with the mandate given by the Human Rights Council in resolution 26/22,¹ the Accountability and Remedy Project initially focussed on **judicial mechanisms**.² Following a fresh mandate given by the Council under resolution 32/10,³ the focus of ARP II is **State-based non-judicial mechanisms** (“State-based NJMs”) as potential sources of accountability and remedy for business-related human rights abuses.

The OHCHR’s work on ARP II commenced in September 2016 with a scoping exercise, the aims of which were:

- 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.

A draft of OHCHR’s report on its scoping exercise for ARP II 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.

The final version of the ARP II scoping paper was published in February 2017.⁴ This paper sets out a series of recommendations as to future work to be undertaken by OHCHR on State-based

¹ See A/HRC/Res/26/22, para 7. Copy available at

http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/26/22

² This work (“ARP I”) culminated in a report to the Human Rights Council in June 2016 (see See A/HRC/32/19 and explanatory addendum, A/HRC/32/19/Add.1). For more information about ARP I generally see

<http://www.ohchr.org/EN/Issues/Business/Pages/OHCHRstudyondomesticlawremedies.aspx>.

In resolution 32/10 (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.

³ See para 13 of A/HRC/Res/32/10, in which the Council requested the 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*”.

⁴ See OHCHR, “Access to remedy for business-related human rights abuses: A scoping paper on State-based non-judicial mechanisms relevant for respect by business enterprises for human rights: current issues, practices and challenges”, copy available via <https://business-humanrights.org/en/ohchr-accountability-and-remedy-project/accountability-and-remedy-project-ii-enhancing-effectiveness-of-state-based-non-judicial-mechanisms-in-cases-of-business-related-human>.

NJMs in fulfilment of its mandate under resolution 32/10, and an outline work plan. This work plan begins with a sector study to explore how State-based NJMs currently respond to four sectors of business activity identified as posing high risks of severe human rights impacts.⁵

This short paper sets out a summary of:

- the work done in the course of the sector study;
- preliminary observations as to
 - the types of adverse human rights impacts arising in high risk sectors that are currently being referred to State-based NJMs;
 - the factors that may currently be driving accountability and remedy choices by affected individuals and communities; and
 - the factors that may be deterring or preventing use of State-based NJMs to resolve complaints and disputes arising from these adverse human rights impacts.

The paper concludes with some remarks about the implications of these observations for the next phases of work on ARP II, and an outline research plan for more detailed research.

2. Aims, methodology and scope

Aims: The aim of this sector study was to gain a better understanding of the ways in which, and the extent to which, State-based NJMs are currently responding to complaints and disputes arising from adverse human rights impacts occurring in four sectors of business activity identified as posing high risks of severe human rights impacts:

- extractives, mining and natural resources;
- agribusiness and food production;
- infrastructure and construction; and
- textiles and manufacture of clothing.

An illustrative list of the kinds of human rights risks posed by each of these four “focus sectors” is set out in Table 1 below. The choice of these four “focus sectors” for this study is not to imply, however, that these are the only sectors potentially posing high levels of risks of severe human rights impacts. Also, it is acknowledged that, in practice, actual levels of risk will vary from business to business and from context to context and, moreover, will be influenced by mitigation action taken by individual business enterprises.

Methodology and scope: This research was carried out primarily by way of desk-based review of various web-based databases, directories and resources. The principal resources used for the purpose of this sector study were:

- the online library provided by Business and Human Rights Resource Centre⁶ (which acts as a repository of information and opinion about business and human rights-related

⁵ The Commentary to the UN Guiding Principles states that “severity of impacts will be judged by their scale, scope and irremediable character”. Guiding Principle 14, Commentary. See also OHCHR, ‘The Corporate Responsibility to Respect: An Interpretative Guide’, (United Nations, 2012), copy available at http://www.ohchr.org/Documents/Publications/HR.PUB.12.2_En.pdf, p. 8.

cases, legal developments and events arranged by business sector and type of dispute resolution and/or complaints mechanism); and

- the OECD database of specific instances.⁷

Additional material was consulted relating specifically to the work of National Contact Points under the OECD Guidelines (“NCPs”),⁸ National Human Rights Institutions (“NHRI”s),⁹ labour inspectorates,¹⁰ complaints mechanisms attached to domestic development finance initiatives and export credit guarantee schemes¹¹ and State-based environmental dispute resolution bodies.¹² Where possible, the authors of these publications and other experts were contacted for further clarification and updates.

However, it has not been possible, in view of the time constraints relating to this sector study, to carry out a detailed and comprehensive analysis of the work of different types of State-based NJMs relevant to business respect for human rights in different jurisdictions. This will be the main focus of Phase 2 of ARP II which takes place from May to September 2017 (see further Part 7 below).

⁶ See <https://business-humanrights.org/>.

⁷ See <http://mneguidelines.oecd.org/database/>.

⁸ See, in particular, the Annual Reports of the OECD on the OECD Guidelines, which provide a useful summary of NCP activities and trends. Copies of Annual Reports available from <http://mneguidelines.oecd.org/ncps/>

⁹ See in particular Nora Götzmann and Claire Methven O’Brien “Business and Human Rights: A Guidebook for National Human Rights Institutions” (International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights, Danish Institute for Human Rights, November 2013), copy available https://www.humanrights.dk/sites/humanrights.dk/files/media/dokumenter/udgivelser/bhr_guidebook_for_nhris_2013_eng.pdf

¹⁰ See OHCHR scoping paper, n. 4 above, esp. pp. 16-17. See further Ebisui, Cooney and Fenwick (eds) *Resolving Individual Labour Disputes: A Comparative Overview* (ILO, 2016),

¹¹ See in particular Accountability Counsel, “Accountability Resource Guide; Tools for redressing human rights and environmental abuses in international finance and development”, (Accountability Counsel, 8th edition, August 2015), copy available <http://www.accountabilitycounsel.org/wp-content/uploads/2012/04/ARG-v.8.pdf>.

¹² Pring and Pring, *Environmental Courts and Tribunals: A Guide for Policymakers* (UNEP, 2016) copy available at <http://wedocs.unep.org/bitstream/handle/20.500.11822/10001/environmental-courttribunals.pdf?sequence=1&isAllowed=y>,

Table 1: Examples of human rights risks posed by each of the four “focus sectors” selected for this study (n.b. these lists of examples are intended to be illustrative, not exhaustive).

<p>Extractives and natural resources</p> <p><i>Risks associated with large scale land acquisition and resettlement of people; risks to land and land use; risks of adverse environmental impacts; risks to livelihoods; risks to health; risks to access to water; risks of reduction in water quality; risks associated with use of migrant labour; risks of use of child labour; risks of use of forced labour; risks arising from use of informal working arrangements or disguised employment practices; risks associated with use of private security firms; risks to safety and/or well-being of workers; risks to indigenous peoples; risks to people who may be prone to vulnerability or marginalisation; risks arising from particular operational contexts (e.g. mining in conflict affected areas; artisanal mining operations); risks of complicity in human rights abuses by State agencies.</i></p>	<p>Agribusiness and food production</p> <p><i>Risks associated with large scale land acquisition and resettlement of people; risks to land and land use; risks of adverse environmental impacts; risks to livelihoods; risks to health; risks to access to water; risks of reduction in water quality; risks associated with use of migrant labour; risks of use of child labour; risks of use of forced labour; risks to safety and/or well-being of workers; risks arising from use of informal working arrangements or disguised employment practices; risks to indigenous peoples; risks to people who may be prone to vulnerability or marginalisation; risks of contributing to human rights abuses in the supply chain through pricing and/or purchasing policies; risks of complicity in human rights abuses by State agencies.</i></p>
<p>Infrastructure and construction</p> <p><i>Risks associated with large scale land acquisition and resettlement of people; risks to land and land use; risks of adverse environmental impacts; risks to livelihoods; risks to health; risks to access to water; risks of reduction in water quality; risks associated with use of migrant labour; risks of use of child labour; risks of use of forced labour; risks associated with use of private security firms; risks to safety and/or well-being of workers; risks arising from use of informal working arrangements or disguised employment practices; risks to indigenous peoples; risks to people who may be prone to vulnerability or marginalisation; risks arising from particular operational contexts (e.g. conflict affected areas); risks of complicity in human rights abuses by State agencies.</i></p>	<p>Textiles and clothing production</p> <p><i>Risks to safety and/or well-being of workers; risks to people who may be prone to vulnerability or marginalisation; risks arising from use of informal working arrangements or disguised employment practices; risks associated with use of migrant labour; risks of use of child labour; risks of use of forced labour; risks of contributing to human rights abuses in the supply chain through pricing and/or purchasing policies; risks arising from the presence of home workers in the supply chain.</i></p>

3. What adverse human rights impacts have been referred to State-based NJMs?

While an exhaustive analysis of the types of adverse human rights impacts referred to State-based NJMs has not been possible in the time available, an initial review of the sector-by-sector databases compiled by the Business and Human Rights Resource Centre appears to confirm that many of the adverse human rights impacts mentioned in Table 1 above have given rise to complaints and/or disputes that have been the subject of a referral, in one way or another, to a State-based NJM.¹³

The case studies set out below illustrate the range of adverse human rights impacts that can be alleged and linked together in a single complaint or dispute.

Case study 1: Investigation into allegations of human rights violations in connection with mining activities in Wirikuta, Mexico

Sector: extractives, mining and natural resources

State(s): Mexico

Type of State-based NJM: National Human Rights Commission of Mexico (NHRI)

Nature of dispute/complaint: Complaints regarding adverse human rights impacts from grant of mining licences and conduct of mining activities in Wirikuta, Mexico.

Adverse human rights impacts alleged: breaches of participatory rights, rights of indigenous peoples, rights to a cultural life, rights to a clean and healthy environment.

Outcome: “In September 2012, the National Human Rights Commission of Mexico issued a Recommendation urging the Government to ensure the protection of the Wixárika peoples’ rights, regarding mining activities in Wirikuta, a sacred indigenous site ... The Recommendation is addressed to a number of Government actors, including the Ministry of Economy, the Ministry of Environment and Natural Resources, the General Commission of Development for Indigenous Communities, and to the municipalities of the affected areas. Overall, the Recommendation points to the urgency of reviewing the mining license in Wirikuta, and if necessary the immediate cancelation of the mining activities. It also notes the need for improvement of national law and practice with regard to requirements to consult and negotiate with indigenous communities in relation to any process that can affect their rights and interests. The Recommendation also calls for the creation of conservation and protection programmes incorporating inspection visits and field studies.” (References omitted).

Source: *ICC Guidebook for NHRIs*, p. 35,

https://www.humanrights.dk/sites/humanrights.dk/files/media/dokumenter/udgivelser/bhr_guidebook_for_nhris_2013_eng.pdf

¹³ See Box 1 below for an explanation of the definition of “State-based NJM employed for this review”.

Case study 2: Complaints regarding San Bartolome Mining project in Potosí, Bolivia

Sector: extractives, mining and natural resources

State(s): Bolivia/US

Type of State-based NJM: Office of Accountability of the US Overseas Private Investment Corporation (“OPIC”)

Nature of dispute/compliant: Alleged failure of OPIC to follow its own environmental and social standards with respect to support for the mine.

Adverse human rights impacts alleged: involuntary relocation of people, lack of effective compensation for harm, breaches of environmental rights, breaches of rights of indigenous peoples, breach of rights to a cultural life. Concerns about loss of access to clean water and loss of grazing lands for livestock.

Outcome: Determination that in such cases OPIC should follow World Bank’s policies on Involuntary Resettlement and Indigenous Peoples (as agreed in its 2004 Environmental Handbook) which includes a requirement that the project sponsor prepare and execute a Resettlement Action Plan, to ensure adequate compensation for those that are relocated and for people whose livelihoods are adversely affected, and an Indigenous Peoples Development Plan, to ensure that indigenous peoples share in the benefits from projects on their territories.

Source: <http://www.ciel.org/news/investigation-finds-that-opic-denied-that-project-affected-community-is-indigenous-did-not-comply-with-its-policies/>

Case study 3: A complaint regarding the activities of China Gold International Resources Corp. Ltd operating at the Gyama Valley, Tibet Autonomous Region

Sector: extractives, mining and natural resources

State(s): China/Canada

Type of State-based NJM: Canada’s National Contact Point under the OECD Guidelines for Multinational Enterprises

Nature of dispute/compliant: Alleged breaches by the subject company of provisions of the OECD Guidelines relating to Concepts and principles, Disclosure, Employment and industrial relations, Environment, General policies, Human rights.

Adverse human rights impacts alleged: “It is alleged that the company had: not adequately conducted environmental due diligence which has led to environmental degradation and loss of life, and other health and safety issues; not respected human rights through discriminatory hiring practices, forced evictions, expropriation of land, violations of freedom of expression and information, and the inability to obtain remedy, and; failed to disclose accurate information on the environmental, health and safety risks to local communities.”

Outcome: “The NCP released its final statement on 8 April 2015, assessing that the Company had not prima facie demonstrated its alignment with the OECD Guidelines, and including in the statement six recommendations designed to promote dialogue, disclosure and other actions for implementing the OECD Guidelines. Should the Company wish to be able to access future Government of Canada trade advocacy support, it will need to submit a Request for Review to the NCP, or show the Government of Canada it has engaged in good-faith dialogue with the Notifier. The NCP is of the view that dialogue between the Company, the Notifier, and the individuals the Notifier represents could assist the Parties in moving towards resolution of the issues raised in the Request for Review”.

Source: OECD database of specific instances,
<http://mneguidelines.oecd.org/database/instances/ca0012.htm>

Case study 4: Complaints about activities of Thai sugar production companies in Cambodia

Sector: agribusiness and food production

State(s): Thailand/Cambodia

Type of State-based NJM: National Human Rights Commission of Thailand (NHRI)

Nature of dispute/compliant: Complaints of human rights abuses connected with activities of Thai sugar company Mitr Pohl in Oddar Meanchey province in Cambodia (2013).

Adverse human rights impacts alleged: involuntary relocation of people, destruction of property and livestock, lack of effective compensation for harm, harassment and intimidation of protestors.

Outcome: Determination by the National Human Rights Commission of Thailand that the complainants had indeed suffered human rights violations as a result of, and connected with, the activities of the company concerned (2014).

Source : Asia Pacific Forum of National Human Rights Institutions,
<http://www.asiapacificforum.net/news/thailand-nhrc-upholds-complaint-against-sugar-company/>

Case study 5: Concerns about modern slavery practices in the agricultural sector in Cambridgeshire, United Kingdom

Sector: agribusiness and food production

State(s): United Kingdom

Type of State-based NJM: Gangmasters Licensing Authority (“GLA”)

Nature of dispute/compliant: Complaints about abuses of workers by recruitment firms contrary to UK law; allegations of breaches of terms of gangmasters’ licences.

Adverse human rights impacts alleged: non-payment and withholding of wages, poor living conditions, slavery like practices, concerns about intimidation of witnesses.

Outcome: Following joint investigation by GLA and police (known as “Operation Pheasant”), arrests of nine persons and cancellation of licences of two recruitment agencies.

Source : <http://www.gla.gov.uk/whats-new/press-release-archive/15513-three-arrested-on-suspicion-of-trafficking-in-wisbech/>

Case study 6: Complaints regarding alleged mistreatment of migrant workers involved in the construction of stadiums and infrastructure for the FIFA 2022 World Cup.

Sector: infrastructure and construction

State(s): Qatar/Switzerland

Type of State-based NJM: Swiss National Contact Point under the OECD Guidelines for Multinational Enterprises

Nature of dispute/compliant: Alleged breaches by the subject organisation of the chapter on Human Rights in the OECD Guidelines for Multinational Enterprises

Adverse human rights impacts alleged: Violations of rights of migrant workers. “According to the submitting party, the existence of human rights violations of migrant workers in Qatar is uncontested and they result from the Kafala (sponsorship) system, the confiscation of passports, discrimination and unequal remuneration, non-payment of wages, charging of recruitment fees, occupational health and safety issues, restrictions on the freedom of association, alteration of employment contracts, detention of migrant workers, a lack of safe and decent accommodation and issues related to access to remedy.”

Outcome: Pending

Source: Initial Assessment of the Swiss NCP, 13 October 2015, https://www.seco.admin.ch/dam/seco/en/dokumente/Aussenwirtschaft/Wirtschaftsbeziehungen/NKP/Statements_konkrete_F%C3%A4lle/FIFA_2015/Initial_Assessment_FIFA_2015.pdf.download.pdf/Initial%20Assessment%20FIFA%202015.pdf

Case study 7: Complaint regarding the activities of a clothing manufacture group and its supplier located in the Rana Plaza, Bangladesh, before the collapse of the factory on 24 April 2013

Sector: textiles and clothing manufacture

State(s): Bangladesh/Denmark

Type of State-based NJM: Danish National Contact Point under the OECD Guidelines on Multinational Enterprises

Nature of dispute/compliant: Alleged breaches by the subject group of companies of OECD Guidelines chapter II on general policies, chapter IV on human rights and chapter V on employment and industrial relations. In addition, the complainant invoked ILO Conventions nos. 131 (on minimum wage) and 155 (on safety and health at the workplace and working environment), as well the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy.

Adverse human rights impacts alleged: violations of internationally-recognised labour standards; loss of life and injury.

Outcome: Recommendation by the NCP “that the PWT Group:

- Revise its management and risk assessment systems in order to implement processes by which the company can meet the requirement of due diligence in relation to its suppliers, in accordance with chapter II of the OECD Guidelines.
- Ensure that the company’s corporate social responsibility policy complies with the OECD Guidelines.
- Review its suppliers’ self-assessments in conjunction with an analysis of industry and country risks and, on this basis, select what is to be inspected.
- Report and communicate about these efforts and about the measures carried out by the supplier to prevent potential risks.
- Continue its efforts to systematically incorporate the company’s Code of Conduct into management and risk systems.
- Remain up to date on new guides on due diligence within its sector as a means of continuously developing the company’s work in this respect.

The NCP requests that PWT Group, within one year of the publication of the final statement, provide a follow-up report on the above recommendations and on the company’s efforts to develop decision-making and risk management systems that meet the due diligence requirements of the OECD Guidelines.”

Source: OECD Database of specific instances,
<http://mneguidelines.oecd.org/database/instances/dk0015.htm>

Box 1: The many different types and structures of State-based NJMs

The UN Guiding Principles on Business and Human Rights refer to “administrative, legislative and other non-judicial mechanisms” which “play an essential role in complementing and supplementing judicial mechanisms” (see Guiding Principle 27).

OHCHR’s original scoping paper for ARP II¹⁴ defines State-based non-judicial mechanisms 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” (see p. 2).

In order to keep the research tasks reasonably manageable, the scoping paper focussed on State-based NJMs presently active in four specific regulatory areas, namely:

- labour law;
- environmental law;
- consumer law; and
- for comparison purposes, regulatory regimes governing the activities of private security providers.

These are areas where disputes between individuals and companies frequently arise, and where there is a potential business and human rights dimension.

However, this exploration into how State-based NJMs respond to high risk sectors has revealed a wide range of “administrative, legislative and other non-judicial mechanisms” which, in the words of the UNGPs, “play an essential role in complementing and supplementing judicial mechanisms”. These are:

- **Government departments** (especially those with responsibility for issuing grants, approvals and licenses to business enterprises necessary for them to be able to carry on their business activities);
- **Regulatory and/or licensing bodies;**
- **Complaints mechanisms** attached to State agencies responsible for development finance and/or export support;
- **Specialised law enforcement bodies** (e.g. labour inspectorates; regulatory authorities with responsibility for enforcement of labour law standards);
- **National Human Rights Institutions** (including human rights ombudsmen services, and “public human rights defenders”);
- **National Contact Points** under the OECD Guidelines for Multinational Enterprises (i.e. where the relevant State is either an OECD member or has the status of an “adherent State” under the OECD Guidelines);
- **Ombudsmen services** relating to the use of public/governmental authority;
- **Sector-based Ombudsmen-type services** (e.g. the Canadian Extractive’s sector Corporate Social Responsibility (CSR) Counsellor);
- **Sector-based or regulatory theme-based arbitration and dispute resolution services** (e.g. India’s National Green Tribunal, environmental dispute resolution commissions, employment conciliation and arbitration bodies, labour relations commissions); and
- **Ombudsman and mediation services** established to resolve disputes and complaints between individuals and businesses (e.g. environmental ombudsmen, labour mediation services).

¹⁴ See n. 4 above.

4. Which State-based NJM: what factors are driving accountability and remedy choices and strategies by affected individuals and communities?

The list in Box 1 above provides an indication of the types of State-based NJMs that can be relevant to complaints or disputes about adverse human rights impacts in the four focus sectors. However, there is considerable diversity from jurisdiction to jurisdiction in terms of the State-based NJMs that may be available to respond, and the configuration of relationships between them, all of which will have a significant bearing on the extent to which there is accountability and access to remedy in reality. In some jurisdictions affected individuals and communities will have few options at their disposal. In other jurisdictions, there may be a number of different accountability and remedy avenues to explore depending on the particular facts of the case, the human rights impacts complained of and the regulatory institutions involved. In some cases, the presence of State-based NJMs with a cross-border mandate and capability may mean that it is possible to seek assistance from State-based NJMs in States other than where the damage or harm occurred (e.g. the State of domicile of a business enterprise).

Hypothetical scenarios

The possibilities are illustrated by the hypothetical scenarios set out in the Boxes immediately below. These have been based in large part on the facts of cases reviewed for the purposes of this sector study. Table 2 below then sets out a list of the State-based NJMs that could potentially be relevant to different issues raised by these hypothetical scenarios. As was noted in the initial scoping paper,¹⁵ there are many ways in which human rights abuses caused or contributed to by businesses may amount to breaches of domestic law (e.g. criminal law, anti-discrimination law, privacy, occupational health and safety and other labour law requirements). Such breaches may be the subject of complaints against business enterprises or may result in regulatory action and, as such, may offer potential routes to at least partial remedy of adverse human rights impacts even if the complaint or regulatory action is not explicitly framed in human rights terms. [Note: The list of mechanisms in Box 2 below should not be taken to imply that all or indeed any of these options will be available in any one jurisdiction. The purpose is simply to encourage thinking about the different possibilities that *might* exist within domestic legal frameworks].

Hypothetical scenario 1: An extractives sector case

The inhabitants of Area X in State Y are growing increasingly concerned about the social and environmental impacts of a plan to expand a mine (and associated processing facilities) in the vicinity of their village. Local representatives have claimed that adverse environmental effects have already been detected as a result of mining operations, particularly a reduction in water quality which is beginning to have an affect on local agricultural and fishing resources. News that homes would be demolished to make way for transport infrastructure associated with the expansion plans resulted in protests by local residents.

¹⁵ See n. 4 above.

Hypothetical scenario 2: An agriculture/food production sector case

In State X, large swathes of land have been cleared to make way for crops for vegetable oil production despite the opposition of local communities who have claimed that the land clearance not only threatens the viability local small scale agricultural activity in the area (because of loss of communal grazing lands), it has also resulted in damage to sites of special significance to local indigenous people. Moreover, irrigation systems for the new agricultural enterprise have disrupted water supplies to local communities. Several protests against the new agricultural developments have taken place already, one of which ended violently when security operatives hired by the owners of the enterprise began assaulting protestors.

Hypothetical scenario 3: A construction sector case

Union leaders are becoming increasingly concerned about the working practices and unsafe working conditions at the site of a large development in City X of State Y. These concerns have been raised further by recent media reports that refugees from the neighbouring State of Z (in which a civil war has been in progress for several years) have been working at the site. In addition, local communities have been complaining about dust and noise emanating from the local site, which, on some days, have made necessary the closure of local facilities, including schools. Hospitals have reported an increase in respiratory illnesses among children, which they say are linked to poor air quality resulting from the development.

Hypothetical scenario 4: A textile and clothing manufacture case

Child labourers have been discovered working on a cotton plantation in State X. These cotton plantations supply raw materials to Company X which then manufactures cotton fibres into fabric for several well-known clothing brands. Workers on the plantation (including children) are required to handle harmful chemicals and protective equipment is not always provided. In addition, local environmental groups say they have evidence that these chemicals have been leaching into local rivers and streams, and may be responsible for the severe reduction in numbers of several types of fish.

Table 2: State-based NJMs that could potentially be relevant in the hypothetical scenarios above, by regulatory theme

General	Regulatory issues/ planning and development	Regulatory issues/ public safety	Environmental issues	Labour issues	Issues relating to exercise of public authority
*NCPs *NHRIs (including “public human rights defenders”)	*Complaints mechanisms attached to relevant government departments *Environmental regulatory authorities *Sectoral regulatory authority (e.g. mining licensing board)	*Sectoral regulatory authority (e.g. mining licensing board) *State agencies responsible for the licensing of business providing services under contract (e.g. construction contractors) *Regulatory bodies responsible for licensing and monitoring of private security providers *Government departments responsible for child welfare	*Environmental regulatory authorities *Sectoral regulatory authority (e.g. mining licensing board) *Environmental dispute resolution commission/ arbitration body *Environmental ombudsman	*Labour inspectorates *Labour relations commissions; employment conciliation and arbitration bodies *State agencies responsible for the licensing of recruitment and labour service providers *State agencies responsible for the licensing of business providing services under contract (e.g. construction contractors) *Government departments responsible for child welfare	*Government ombudsman *Mining ombudsman *Complaints mechanisms attached to development finance and export credit guarantee mechanisms. *Public “human rights defenders” (e.g. ombudsman services specialising in human rights implications of exercises of public authority)

The range of State-based NJMs that could potentially have an interest in the hypothetical scenarios above highlights the considerable challenges for affected individuals and communities (and their representatives) in developing effective strategies for achieving accountability and remedy for adverse human rights impacts through State-based NJMs in complex cases. In many complex cases involving “high risk” sectors there will be a combination of potentially interested State bodies and mechanisms. Theme-based regulatory bodies (such as environmental regulators or labour inspectorates) would clearly have a role to play, but this would be limited in each case by their respective mandates and powers. In practice, developing an effective accountability and remedy strategy in a specific case demands awareness, not only of the types of remedies available from these different mechanisms but the various ways in which they may be linked.

Types of remedies that may be available

As Table 3 below indicates, there is considerable variety between these different mechanisms in how they operate and what they can offer in terms of remedy. As can be seen, some offer the prospect of financial compensation to affected individuals and communities; others are more focussed on aspects of legal compliance and/or future prevention. A number (and especially so-called “non-binding” mechanisms such as the NCP system under the OECD Guidelines) place considerable reliance on goodwill and/or commercial and/or reputational pressures to achieve a mediated or negotiated settlement.

Table 3: A comparison of mandates and remedies available from different kinds of State-based NJMs

[**Note:** The information in this table is general in nature. It seeks to identify what different kinds of State-based NJMs that are potentially relevant to “high risk” sectors are *typically* able to offer by way of remedy. Obviously, in practice, there will be variations from jurisdiction to jurisdiction, and from mechanism to mechanism].

Type of State-based mechanism	Scope of dispute resolution and complaints handling mandate/ activities/ jurisdiction	Types of remedies typically available
NHRIs	Concerned with effective implementation of international human rights standards at domestic level. In addition they may have a mandate to carry out investigations into systematic, structural and/or industry-wide problems relevant to human rights, may respond to complaints by affected individuals and/or groups about breaches of human rights standards.	Declarations; recommendations; facilitation of an agreed settlement; publication of findings; recommendations as to measures for future prevention of harm. Where appropriate, referral of matter to law enforcement agencies and/or prosecutors. May have power to commence public interest litigation on behalf of affected persons.
NCPs	Concerned with resolving allegations of non-compliance by companies with the OECD Guidelines on Multinational Companies. To be valid, complaints must cite breaches of specific provisions of the Guidelines.	Facilitation of agreed settlement. Where no agreed settlement, recommendations “as appropriate on the implementation of the guidelines”.

Labour inspectorates	Concerned with instances of breaches of domestic labour standards.	A range of legally binding orders including preventative orders (e.g. formal warnings; improvement notices; “stop work” orders; prohibition orders). Punitive sanctions and/or prosecution of breaches of labour standards and/or referral to other domestic prosecution bodies.
Government departments/government ombudsman	Relates to the exercise of statutory powers and functions.	Review; determination, reversal of previous decision(s).
Environmental ombudsman	Relates to exercise of public authority with respect to the environment.	Review; determination, reversal of previous decision(s); possibly financial compensation (often up to a statutory maximum).
Specialist regulatory bodies	Concerned with allegations of non-compliance with regulatory standards and/or breach by business enterprises of licence conditions.	Various administrative measures in the event of a breach of standards, including removal or suspension of a licence, forfeiture of bonds or securities and/or financial penalties; possibly financial compensation (often up to a statutory maximum).
Complaints mechanisms attached to development finance and/or export support agencies	Concerned with allegations of non-compliance with agency’s own policies with respect to, for example, environmental, social and human rights screening and impact assessment, and stakeholder consultation. Must concern projects for which the relevant agency has provided support.	Determination as to whether the agency has complied with the relevant policies and procedures in making a decision to provide development finance and/or export credit guarantee support to a project.
Specialist sector-based and/or theme-based	Resolution of specific types of disputes between individuals,	Agreed settlement. Terms of settlement may include

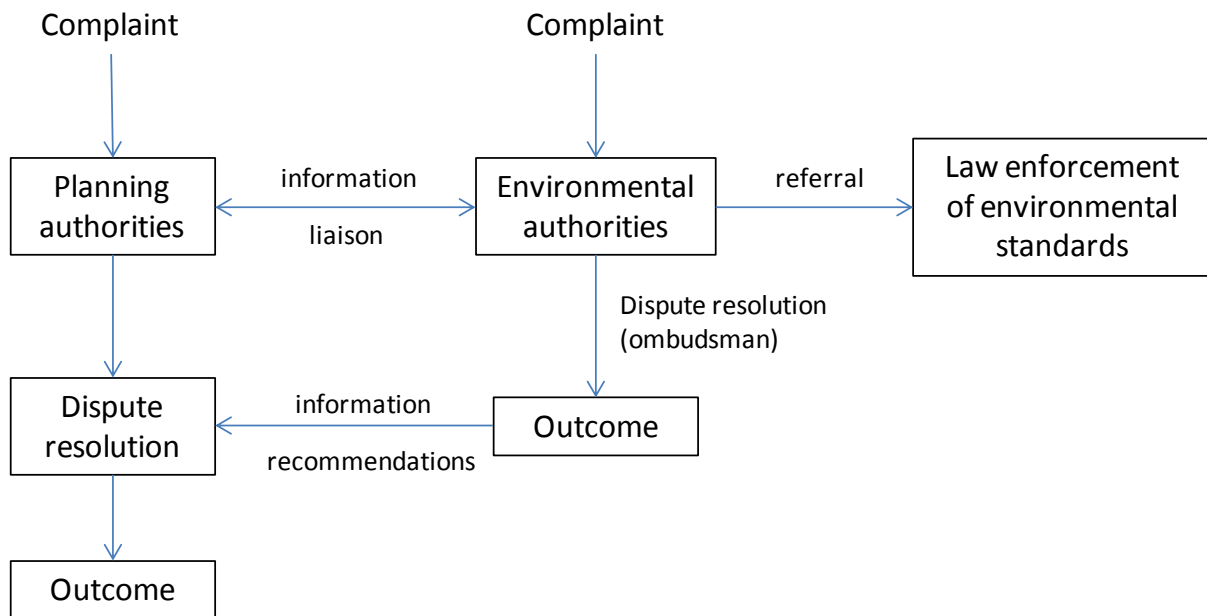
mediation bodies (e.g. environmental mediation bodies; labour mediation bodies).	between business enterprises, or between individuals and business enterprises (e.g. environmental disputes; labour disputes)	financial compensation and/or preventative action.
Specialist arbitration bodies (e.g. environmental dispute resolution bodies; labour conciliation and arbitration bodies)	Resolution of specific types of disputes between individuals, between business enterprises, or between individuals and business enterprises (e.g. environmental disputes; labour disputes).	Determination as to the rights and duties as between the parties under domestic law; possibly financial compensation; possibly other restorative and/or preventative orders.

Linkages and synergies between different State-based NJMs (and other State agencies and bodies)

In complex cases involving high risk sectors (see for example the hypothetical scenarios above) the best prospects for achieving an effective remedy for adverse human rights impacts may lie in coordinated approaches to different bodies to achieve a “package” of complementary remedies. In such cases, an understanding of the linkages and synergies in play between different bodies and mechanisms will be key. It may be, for instance, that regulatory systems have been designed with coordinated action in mind (e.g. where a State-based NJM with no or limited formal powers of its own is nevertheless given powers to refer investigations, companies or individuals named in a complaint to law enforcement agencies for sanction through judicial mechanisms, see case study 5 above). In other cases, linkages may have developed over time, for instance as regulators have recognised opportunities for increased efficiency through cooperative approaches, or where formal linking of outcomes with other initiatives or incentives is seen as a way of strengthening or giving “teeth” to otherwise non-binding processes (see case study 3 above).

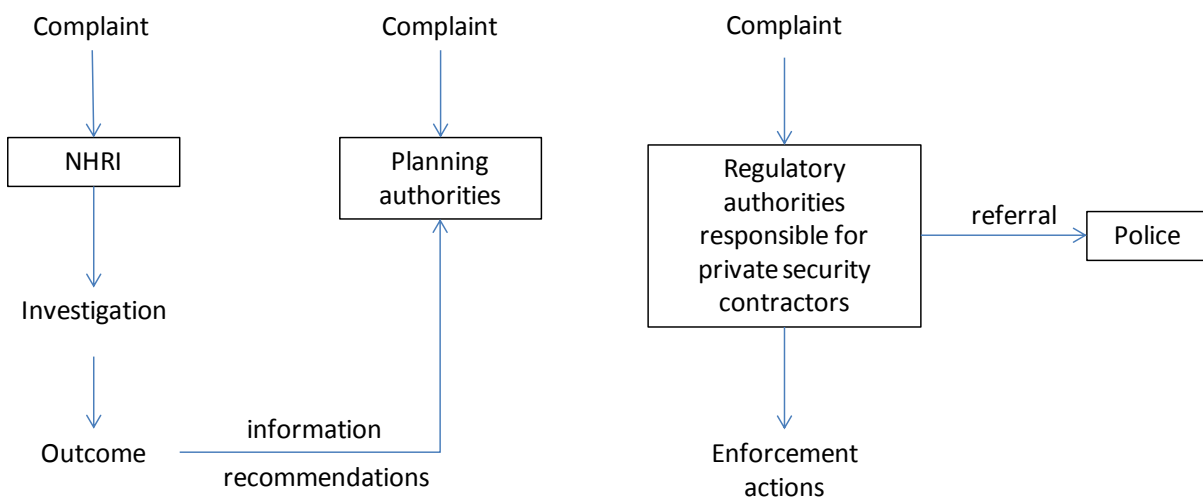
The figures below are an attempt to illustrate graphically the different kinds of linkages between different State-based NJMs (and other domestic bodies and agencies) that could be material to the prospects of affected individuals and communities of achieving accountability and remedy in each of the hypothetical scenarios described above. **[Note:** These diagrams are provided for illustrative purposes only. For ease of reference, and to promote discussion, these are greatly simplified to illustrate *possible* rather than *actual* responses. At the same time, it is not suggested that any of these strategies would necessarily provide a route to an effective remedy. Moreover, the figures below do not indicate the only linkages and/or potential routes to remedy that could exist in a real-life case, nor are they intended to suggest, at this stage, that these specific linkages will necessarily be applicable or beneficial in all jurisdictions. In reality there are many possible linkages between different State-based NJMs (and other domestic bodies and agencies) that will be potentially significant].

Fig 1: Potentially important linkages in hypothetical scenario 1: an extractives sector case



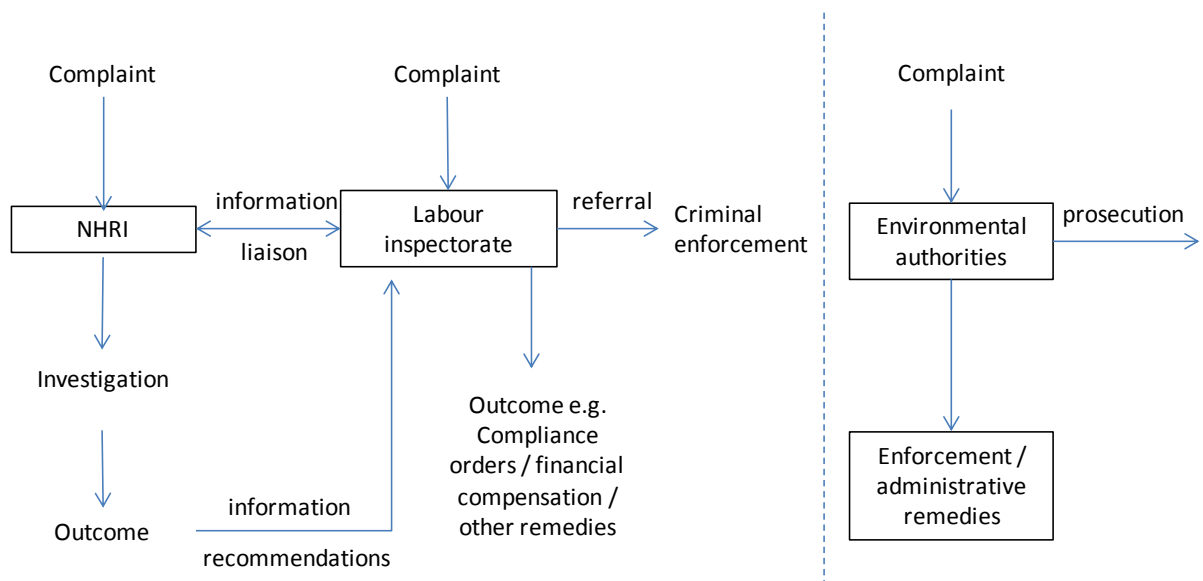
Notes: In this example, the recommendations of environmental authorities are taken into account in the review processes carried out by the relevant planning authorities. In addition, there is a certain amount of liaison between environmental and planning State-based NJMs as part of fact-finding exercises. Although the environmental ombudsman does not in this case have the ability to enforce public legal standards on his/her own initiative, the matter can be referred to a specialised law enforcement body.

Fig 2: Potentially important linkages in hypothetical scenario 2: an agriculture/food production sector case



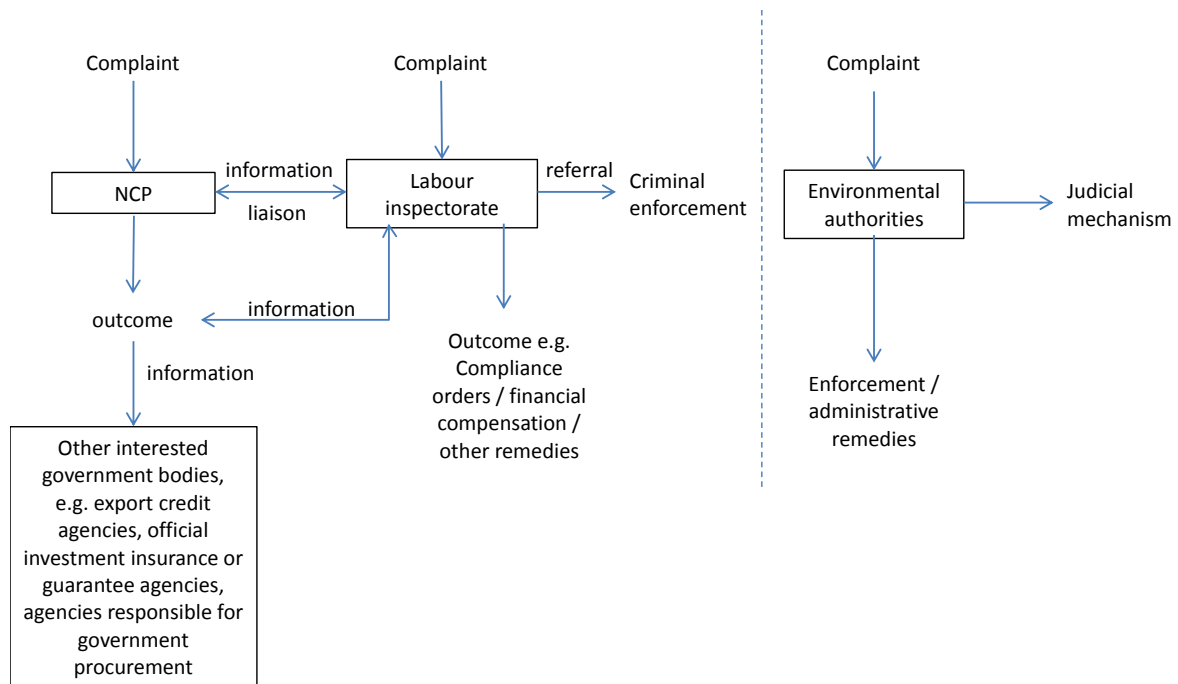
Notes: This example highlights the complementary roles of NHRIs both as receivers and investigators of complaints about thematic and/or systematic issues and as advisors to government departments on the formulation and maintenance of human rights respecting policies and processes. In addition, the presence of a specialised regulatory body responsible for the activities of private security contractors gives affected individuals and communities a further potential avenue to seek remedy specifically for adverse human rights impacts suffered as a result of the conduct of security operatives hired by the business enterprises concerned. In this example, the regulatory body has used the regulatory powers at its disposal and has referred possible breaches of the criminal law to the police.

Fig 3: Potentially important linkages in hypothetical scenario 3: a construction sector case



Notes: The facts outlined in this hypothetical scenario suggest a number of serious abuses of labour rights. In this example, complaints about working practices and unsafe working conditions have been referred to labour inspectorates, while concerns about the treatment of refugees have been referred to the NHRI for investigation. Separately, complaints about adverse environmental impacts have been made to the relevant environmental authorities, which have resulted in both administrative action against the companies concerned and referral of certain serious breaches for prosecution and adjudication, using judicial mechanisms.

Fig 4: Potentially important linkages in hypothetical scenario 4: a textile and clothing manufacture case



Notes: In this example, a complaint has been made to the NCP under the OECD Guidelines of the home State of Company X regarding the presence of child labour in Company X's supply chain. The NCP has been in contact with the local labour inspectorate to help it to substantiate allegations made against the local cotton suppliers. Information regarding Company X's engagement with the NCP process has been passed to other interested State agencies in Company X's home state. The local labour inspectorate has responded with a series of compliance orders and remedial measures, and has referred the allegations of serious breaches for criminal prosecution. Separately, complaints about environmental impacts have been referred to the relevant environmental authorities, which have resulted in both administrative action against the companies concerned and referral of certain serious breaches for prosecution and adjudication, using judicial mechanisms.

Other factors influencing accountability and remedy strategies using State-based NJMs

The types of remedies available from different State-based NJMs and the extent to which State-based NJMs can mobilise other State agencies to take action (whether restorative, preventative or punitive) will be important considerations when it comes to devising accountability and remedy strategies involving the use of State-based NJMs (see above). However, the following factors will also be significant in many cases:

- available **financial and legal resources**: Some State-based NJMs are more expensive to access than others. Available financial and legal resources will also often determine whether it is feasible to approach a State-based NJM in another jurisdiction, such as another State's NCP, as opposed to focussing on more local (and therefore theoretically more accessible) mechanisms;
- **accessibility**: e.g. in terms of ready availability of clear and easily understandable information about the mechanism and processes; flexible language requirements for lodging of complaints (the sector study identified, for instance, complaints mechanisms requiring applications to be lodged in English); provision of alternative arrangements for complainants unable to travel to meetings and/or hearings; willingness of investigators to travel, to carry out site visits and interview complainants personally (see case study 4); availability of alternative means of communication (e.g. for complainants who may have a disability) and ready access to assistance from staff at the relevant State-based NJM (e.g. in the form of a telephone help-line or web-chat facility).
- levels of **confidentiality** that the complainant can expect to receive: e.g. where a witness has faced threats, intimidation and especially where the complainant fears for his or her physical safety.

5. What factors may be deterring or preventing the use of State-based NJMs?

This sector study identified many cases in which human rights-related disputes have arisen in high risk sectors but no steps to commence any action with either judicial or non-judicial mechanisms appear to have been taken. Instead, affected individuals and communities have taken other action, including (depending on the circumstances), campaigning, contacting journalists, working with NGOs to publicise the event or dispute, writing to parliamentarians, lobbying and/or engaging in demonstrations and protest. While further research would be needed to discover the precise reasons why different tactics were adopted in different cases, it is possible that a number of factors may be deterring or preventing the use of State-based NJMs in many cases involving these "high risk" sectors (assuming such State-based NJMs exist). These are likely to include:

- the lack of any viable alternative to judicial mechanisms able to offer the **remedies** required; as noted above, very few of the State-based NJMs identified in this study offer the prospect of financial compensation, and the limits on financial compensation that bodies such as Ombudsmen can award will make these bodies an unlikely destination for large, complex claims;
- the tendency of certain State-based NJMs **not to frame and describe their work in human rights terms**, and hence a lack of understanding and clarity as to how the work of different State-based NJMs responds to human rights challenges;
- the **limited scope and mandate** of many State-based NJMs which may make them ill-equipped to analyse and respond to **complex, large-scale and/or systematic issues**; as illustrated in the scenarios in Part 4 above, many State-based NJMs will only have a

mandate in relation to a limited range of (usually regulatory) issues, whereas a dispute about human rights impacts of business may raise a range of interconnected issues and problems, some of which may fall within the scope of the State-based NJM's mandate, and some of which may not. The inability of a State-based NJM to address wider, systemic issues or causes may mean that any remedies obtained are only partial or, worse, ineffective. While mechanisms such as NCPs and NHRIs have a potentially broader mandate, these may not be available to the complainant, or may be unsuitable for other reasons (see bullet points above and below);

- related to the bullet point above, a **lack of confidence** in State-based NJMs (e.g. because they are perceived to be lacking in resources and/or status);
- inability of some State-based NJMs to respond to **cross-border** challenges;
- reluctance to approach State-based NJMs in cases of **human rights abuses in which State agencies (e.g. law enforcement agencies) are alleged to be involved**; again, trust in State-based NJMs may be undermined when they are perceived to lack independence;
- lack of **financial and/or legal resources** for affected individuals and/or communities; although State-based NJMs are frequently cheaper to access than judicial mechanisms, they can still involve substantial financial outlay, especially where mechanisms are accessed in States other than the place(s) where the damage occurred;
- concern about the risk of prejudicing prospects in **future legal action using a judicial mechanism**;
- **difficulties accessing the relevant information and personnel** necessary to prove a claim if State-based NJMs do not have sufficient powers to either investigate on their own initiative or to compel production of documents and/or witnesses. This is a problem for many of the State-based NJMs identified above and especially those which do not have the benefit of formal enforcement powers under statutory regimes;
- fears of **threats, intimidation** and **reprisals** in cases and processes where confidentiality cannot be guaranteed;
- general lack of **accessibility**, for instance where all correspondence and submissions must be prepared and presented in a certain language, or where travel and appearances in person are required, or where insufficient provision has been made for people who face particular barriers, such as by reason of disability.

6. Implications for future research

The sector study confirms that the system addressing adverse human rights impacts in certain “high risk” sectors is presently haphazard. While State-based NJMs appear to offer a route to a *partial* remedy in some cases, States are not, at present, generating sufficient (and sufficiently varied) opportunities for affected individuals and communities to seek and obtain *adequate* and *effective* remedies for adverse human rights impacts arising in these “high risk” sectors via State-based NJMs. In other words, State-based NJMs are not yet, by and large, fulfilling the role envisaged in the UNGPs of “complementing and supplementing judicial mechanisms”.¹⁶ Instead, complainants are making do with a disparate collection of accountability and remedy mechanisms whose ability to deliver an effective remedy in a given case, whether individually or in combination, tends to owe more to luck than to design. While special-purpose regimes clearly have an important role to play (and while policy-makers are beginning to show more innovation in developing linkages between different kinds of mechanisms), we are still some way away from the vision of coherent domestic systems, with minimal gaps, and which respond efficiently, effectively and appropriately to the issues concerned, the public interests involved and the potential needs of the parties.¹⁷

Issues highlighted by the sector study which have the potential to emerge as significant in future research include:

- the importance of **good working relationships** between different regulatory bodies and State-based NJMs relevant to business respect for human rights and the conditions necessary to ensure that these function well and in a manner that responds to the legitimate needs of the parties;
- issues arising from the possibility of **parallel proceedings** between State-based NJMs and judicial mechanisms (e.g. legal implications of engaging with State-based NJMs for future court action);
- the steps needed to **identify and address gaps** in coverage of State-based NJMs;
- options available to **strengthen legal enforceability** of, and/or **improve the chances of compliance** by business enterprises of, decision-making and outcomes of State-based NJM processes;
- issues arising from powers and duties of State-based NJMs to **refer matters to judicial mechanisms** (e.g. standards with respect to gathering of evidence);
- issues relating to the **accountability of State-based NJMs** for their decision-making (e.g. rights of appeal to other State agencies, such as a government ombudsman);
- issues relevant to the **design of a “rights compatible” remedy**, (e.g. in the context of a negotiated settlement, to what extent must a State-based NJM take account of the interests of non-parties?);

¹⁶ See UN Guiding Principles on Business and Human Rights, Guiding Principle 27, Commentary.

¹⁷ *Ibid.*

- practical steps needed to improve **accessibility** of State-based judicial mechanisms; and
- finding an appropriate balance between **transparency, accountability, fairness and the need for confidentiality** in some circumstances.

7. Outline research plan for more detailed research to take place during Phase 2

Project outline

The project will be split into two parts.

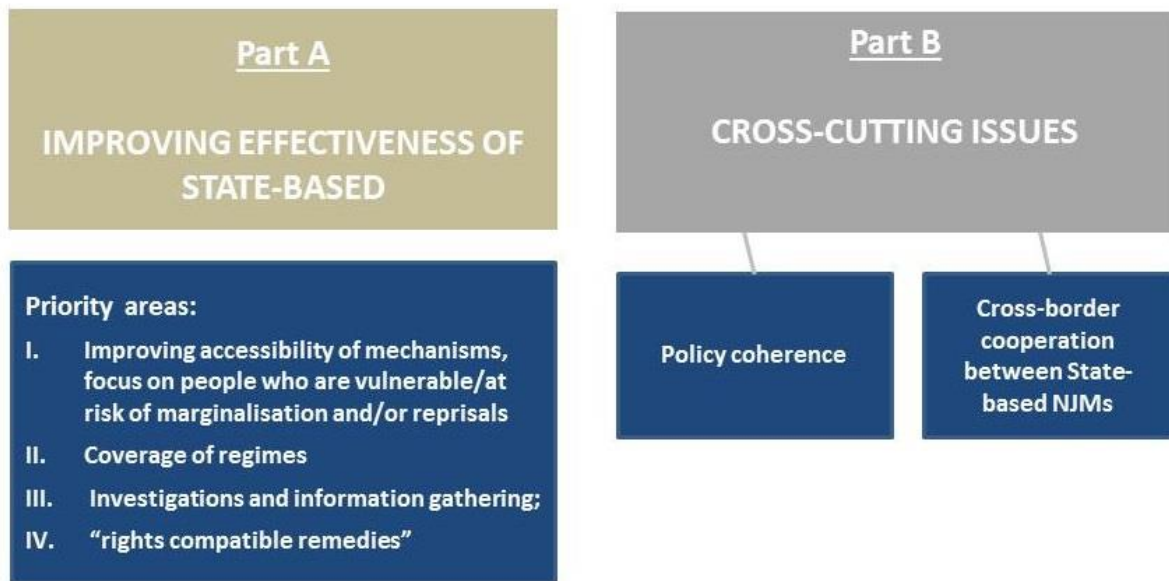
Part A of the work will focus on the practical steps that can be taken by States to improve the effectiveness of State-based NJMs focussing particularly on:

- coverage of regimes;
- investigations and information gathering (in both “binding” and “non-binding” legal settings);
- improving accessibility of mechanisms (with a particular focus on the needs of people who may be at risk of vulnerability or marginalisation, including women, children, indigenous peoples, lesbian, gay, bisexual, transgender and intersex persons, people belonging to ethnic or other minorities or persons with disabilities, or who may be at risk of intimidation and/or reprisals); and
- clarifying the various routes to “rights-compatible” remedies for adverse human rights abuses using State-based NJMs, both individually and in combination with other mechanisms (including judicial mechanisms) bearing in mind the various different roles that can be performed by State-based NJMs with respect to:
 - complaints handling;
 - alternative disputes resolution; and
 - preventative work with businesses, supervisory functions and regulatory analysis, functions with respect to the promotion of social dialogue, and advice to government.

Part B will focus on two important cross-cutting issues; namely:

- **policy coherence:** i.e. exploring the different ways in which greater coherence and coordination between the activities of State-based NJMs relevant to business respect for human rights can improve accountability and access to remedy, the practical steps that States can take to improve coherence and coordination and the different forms that such coordination and cooperation can take; and
- **cross-border cooperation between State-based NJMs:** 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 2: Graphic illustration of Project Outline



Methodology

Phase 2: Detailed evidence gathering

Evidence gathering for Part A and Part B would proceed simultaneously and would involve the following:

(i) A short questionnaire issued to all States in the form of a **Note Verbale** (February 2017) and inviting a response on the following:

- Q1. What State-based non-judicial mechanisms (“State-based NJMs”) have been established within your State’s jurisdiction that are potentially relevant to business respect for human rights?
- Q2. What practical measures have these State-based NJMs taken to (a) improve their accessibility to persons who may be at risk of vulnerability or marginalisation or (b) ensure the safety of people who may be at risk of threats and/or intimidation?
- Q3. What kinds of fact-finding and investigatory powers do these State-based NJMs have? To what extent can these State-based NJMs investigate complaints and disputes on their own initiative?
- Q4. Do these State-based NJMs have any functions or powers in respect of adverse business-related human rights impacts in other States? Or is their jurisdiction limited to impacts within the territory of the State in which it is based?
- Q5. What kinds of remedies can these State-based NJMs offer to people whose human rights have been adversely impacted by business activities? Are these remedies legally binding? In deciding which remedies are appropriate, to what extent do these State-based NJMs take account of the needs of (a) people who may be at risk of

vulnerability or marginalisation or (b) people who may be at risk of threats and/or intimidation?

Time frame: February-May 2017

(ii) **Data-mining exercise:** Sectoral databases maintained by the Business and Human Rights Resource Centre will be examined and data compiled on business and human rights-related complaints and disputes for the years 2014-2016 (inclusive) along the lines of the headings in Box 3 below.

Box 3: Suggested headings for data-mining exercise

General Information

- Facts
- State(s) where incident(s) occurred
- UN Regional Group(s) of above State(s)
- Sector
- Company or companies involved in incident
- Rights affected
- Grievance mechanisms used

Specifics on State-based NJMs

- Name(s) of NJM(s)
- Type(s) of NJM
- State(s) of NJM(s)
- Outcome / remedy from NJM process
- Additional details regarding NJM process or outcome

Specifics on State judicial mechanisms

- Brief details regarding any judicial mechanism used

Specifics on non-State mechanisms

- Brief details regarding any non-State-based grievance mechanism used

Aim: To provide OHCHR with a reliable global dataset on use (and non-use) of State-based NJMs in certain high risk sectors in the recent past in the widest possible range of jurisdictions which can then be interrogated for statistics and background information on matters such as:

- Distribution of different kinds of State-based NJMs in different sectors and different regional groupings;
- Trends and patterns of use;
- Diversity of mechanisms with respect to different sectors;
- Possible gaps in availability and use;
- Links to other mechanisms (including judicial mechanisms);
- Incidence and nature of cross-border arrangements; and
- Case studies and scenarios that merit further investigation.

The information collected will be used to inform the final report to the Human Rights Council under 32/19 for consideration at the Council's thirty eighth session in June 2018.

Time frame: May- June 2017

(iii) Open Process Questionnaire: A short survey will be published on the Business and Human Rights Resources Centre website, allowing all stakeholders to respond and provide feedback. The survey will invite information from stakeholders on:

- names and sources of relevant State-based NJMs;
- coverage of relevant regimes and functions of State-based NJMs within those regime;
- methods of investigations and information gathering (in both “binding” and “non-binding” legal settings);
- steps taken by State-based NJMs to ensure and improve accessibility;
- the range of remedies offered by State-based NJMs;
- working relationships and operational and other links between State-based NJMs and other relevant bodies and mechanisms (including judicial mechanisms);
- issues relating to policy coherence and “embeddedness” of State-based NJMs into domestic legal and regulatory frameworks;
- presence of cross-border links between State-based NJMs; and
- capacity (legal and practical) in cross-border bases.

A draft of the questionnaire is shown in the Annex to this report. As can be seen, the questions posed to stakeholders are reasonably open-ended, with only minimal guidance provided.

To encourage wide participation from contributors from a range of different jurisdictions, it is proposed that the questionnaire be publicised and made available via the Business and Human Rights Centre website in the following languages: English, French and Spanish.

Time frame: May-September 2017

(iv) Focus jurisdiction exercise: Further, more detailed inquiries into practice with respect to the use of State-based NJMs in 20 focus jurisdictions using, as a starting point, the information gathered for the purposes of the sector study (Phase 1) and other case histories emerging through the data mining exercise (see (ii) above). This exercise will take the form of telephone and face to face interviews with:

- OHCHR country desks/resources;
- NHRI contacts;
- Researchers active in the field;
- Stakeholders with experience using State-based NJMs;
- Other recommended contacts.

These interviews will gather additional, more detailed information regarding:

- distribution and use of State-based NJMs in the jurisdiction in human rights-related cases;
- processes used and outcomes in specific case histories; and
- opportunities/obstacles with respect to use of State-based NJMs (to probe further the hypotheses set out at part 5 above as to why State-based NJMs are *not* being used in many cases).

This will be used to supplement the information gathered in the Open Process Questionnaire (see (iii) above). Where appropriate, additional assistance will be sought from regional researchers based within the Business and Human Rights Resources Centre.¹⁸

The 20+ focus jurisdictions would be selected to reflect a balance of members of all five UN regional groupings, as well as a range of different legal cultures, traditions and structures. A preliminary, indicative list of 20+ jurisdictions appears below (n.b. subject to change depending on the outcomes of the data-mining exercise, see above).

FOCUS JURISDICTIONS

Africa	Asia and Pacific	Latin America and Caribbean	Eastern Europe	Western Europe and Others
South Africa	China	Brazil	Russia	Canada
Nigeria	Indonesia	Colombia	Poland	France
Morocco	India	Mexico	Azerbaijan	Norway
Kenya	Qatar	Chile	Lithuania	Australia
Uganda	Bangladesh	Argentina	Slovak Republic	Greece
	Thailand			United Kingdom

Output: Draft discussion paper to be published on project website in early October.

Time frame: July-August 2017

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

Time frame: 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).

Time frame: January 2018

¹⁸ <https://www.business-humanrights.org>

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 the Human Rights Council under resolution 32/19 for consideration at the Council's thirty eighth session in **June 2018**.

Annex

Draft text for Questionnaire for Open Process

WELCOME to the OHCHR's Open Process questionnaire for stakeholders about State-based non-judicial mechanisms relevant to business respect for human rights ("State-based NJMs"). **THANK YOU** for taking the time to complete this short survey. Your contribution is a vital part of our information-gathering exercises for our programme of research on accountability and access to remedy using State-based NJMs ("ARP II"), which has been mandated by the Human Rights Council [resolution 32/10](#).

There are six questions below, together with some guidance notes.

We value all contributions and you can answer as few or as many questions as you like.

Q1. Which State would you like to provide information about?

Q2. If a person wishes to complain about, or resolve a dispute about, business activities that they believe have had an adverse impact on their human rights, what kinds of State institutions or agencies **other than judicial mechanisms (i.e. courts)** could they approach?

Note: State-based NJMs can be relevant to business respect for human rights even if their activities are not framed explicitly in human rights terms. Therefore, in answering this question you might consider State institutions or agencies that could potentially be helpful in resolving complaints about breaches of:

- labour rights;
- consumer rights;
- environmental rights;
- privacy rights;
- public safety standards;
- standards of service to the public;
- decision-making procedures (e.g. relating to grants of licences by domestic regulatory bodies, development approvals, etc.); or
- rights of people to be consulted and informed about business activities or plans.

Q3. Please provide any comments you may have about how the State institutions and agencies you have identified in Q2 could be improved.

Notes: In your response, you could consider issues such as:

- the **structure** and/or **governance** and/or **regulatory oversight** of the body;
- the **accessibility** of the relevant complaints or dispute resolution mechanism (e.g. In terms of the costs of accessing the mechanism, or the location of the mechanism, or the efforts made to encourage participation by affected people

and communities, including those at risk of vulnerability or marginalisation or those who may be at risk of threats, intimidation or other forms of reprisal);

- the legal powers of the mechanism to investigate the allegations brought before it;
- **linkages and relationships** between the mechanism and other domestic regulatory and/or enforcement bodies or agencies;
- the **remedies** the mechanism is able to offer.

Q4: Do any of the institutions or agencies you have identified have the power to receive complaints or resolve disputes in relation to business-related human rights impacts in other countries? If so, which?

Q5: Please discuss your own experiences in using State-based non-judicial mechanisms (i.e. State institutions and agencies other than courts) to seek remedies for adverse business-related human rights impacts.

Note: We would be particularly interested to know about:

- the **background** to your complaint or dispute;
- the **factors that influenced your choices** about how best to resolve your complaint or dispute (e.g. costs, location, the resources available to you, confidentiality needs, and the remedies the mechanism was available to offer).
- the **eventual outcomes** (i.e. What remedies did you obtain? Did you achieve the outcome you were hoping for?).

Q6: Would you be happy for us to contact you, if needed, for research purposes? If so, please could you complete the contact form below:

Name of stakeholder: _____

Type of stakeholder (State, Government agency, NGO, Business enterprise, other.):

Contact:

e-mail: _____

phone no: _____

skype: _____