OHCHR Accountability and Remedy Project II

State Consultation 22 and 23 February 2018

Summary

1. Introduction

The Accountability and Remedy Project is aimed at helping States strengthen their implementation of the third pillar of the UN Guiding Principles on Business and Human Rights, which relates to access to remedy for business-related human rights abuses. The Accountability and Remedy Project was initiated by OHCHR in 2013 and proceeds pursuant to mandates provided by the Human Rights Council in Resolutions 26/22 (2014) and 32/10 (2016).

Part I of the Accountability and Remedy Project focused on the use of State-based judicial mechanisms. In June 2016, OHCHR submitted to the Human Rights Council its final report pursuant to resolution 26/22. OHCHR then received a follow up request from the Human Rights Council in resolution 32/10 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"[1] which lead to part II of the Accountability and Remedy Project.

State-based non-judicial mechanisms are defined for the purposes of this project as State-based mechanisms (other than courts) through which affected people can seek to resolve complaints or disputes arising as a result of adverse human rights impacts of business activity. In practice, they can take many forms (e.g. labour inspectorates, consumer bodies, environmental agencies, national human rights institutions, specialised regulatory bodies and mediation services).

OHCHR has conducted various research and consultation exercises to date. The first was a scoping paper which set out a preliminary assessment of current practices and challenges with respect to the use of State-based NJMs as a way of enhancing access to remedy in cases of adverse human rights impacts that are business related. The second discussion paper explored the different ways in which State-based NJMs may respond to complaints and disputes arising in four sectors of business activity identified as "high risk". It identified a number of areas where further research was needed and proposed a work plan to gather further information about the role and scope of activities of State-based NJMs around the world. The third discussion paper set out an overview of the information-gathering activities conducted between April and September 2017, key observations arising from those information-gathering exercises; and preliminary ideas as to key elements to be addressed in the OHCHR's report to the thirty-eighth session of the Human

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[1] Resolution adopted by the Human Rights Council on 30 June 2016, A/HRC/RES/32/10, http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/32/10.

Rights Council (June 2018). Based on this, the OHCHR prepared a consultation draft with a set of policy objectives that will appear as the Annex of the OHCHR's main report on the project. This draft was sent out to stakeholders in January 2018.

States were invited to respond to the following consultation questions:

i)   Are the policy objectives and the elements of good State practice set out in this consultation document in accordance with observations within your jurisdiction? If not, please explain why and provide suggestions as to how they should be set out?

ii)   Are there any further suggestions for elements of good State practice?

OHCHR also invited States to provide illustrative examples of good practice to include in the OHCHR's final report under any of the elements of good State practice.

On 22 and 23 February 2018 the OHCHR organized a consultation with States, encouraging States to have participation of practitioners from State-based NJMs within the State's jurisdiction. The aim of the consultation was to receive comments and feedback on the policy objectives in the consultation draft. The consultation had 25 participants, with representatives from various Permanent Missions to the UN in Geneva, ministries of foreign affairs and ministries of labour, national human rights institutions (NHRIs), representatives from OECD national contact points, and academics with specific expertise on NJMs. The agenda followed the outline of the policy objectives (POs) in the consultation draft. Some discussion was focused on the specific wording of the different POs, whilst other parts addressed the more global approach of the draft. Taking into account the comments from the first day of consultation, a revised version of the policy objectives dealt with so far was presented to the participants, and well received. This feedback, in addition to oral and written comments received will feed into the final report that will be presented to the Human Rights Council, at its thirty-eight session in June 2018.

Ensuring policy coherence between NJMs and regulators

Session 1: Improving policy coherence between the work of NJM and judicial processes

There seemed to be an agreement that there are many interconnections between State-based NJMs and State-based judicial mechanisms as they are all part of an overarching system which together should be able to provide access to effective remedy. There are many examples of NJMs and judicial mechanisms supporting each other. The advantages to NJMs are that they have lower costs, greater accessibility and flexibility with regards to process and the potential remedies provided.

The examples of OECD national contact points (NCP) and national human rights institutions (NHRI) often come up, but the challenge is to deal with all the NJMs that exist beyond these two categories, where there is also existing good practice. Some NJMs may not have a legal legislative mandate and referring to domestic law regimes might in this sense be excluding certain NJMs. Using too much judicial language was by some seen as

confusing when we are talking about non-judicial mechanisms. There also seems to be a confusion where some States and institutions are still referring to corporate social responsibility, others now use business and human rights and the UN Guiding Principles (UNGPs), whilst the OECD refers to Responsible Business Conduct (RBC). It was underlined that the guidelines on RBC have been aligned with the UNGP since 2011 and they should therefore be converging.

One participant stated that there has been an increase in the number and activities of NJM due to regionalization and specialization, they have gained a more important role in a globalized world. The issue is rather how to manage the plurality of mechanisms and their cooperation.

Another participant put forward the issue of lack of resources given to NJMs which again undermines their role. In addition to this there is the issue of managing expectations with regards to users of NJMs and the potential outcome of the process. It is important to highlight the specificities of NJMs to explain why they are important and should be used, but also what are their limits. Sometimes there needs to be certain conditions in place in order for NJMs to be a real alternative to judicial mechanisms. Participants pointed out the need to recognize that NJMs and judicial processes have different limitations because of their different tasks or mandates. Some participants referred specifically to the constitutional doctrine of "separation of powers", which is designed to achieve separation between judicial and executive functions of government. Judicial and non-judicial mechanisms have separate, but complementary and supporting goals and functions. Thus, it is not always accurate to talk in terms of State-based non-judicial mechanisms being *alternatives* to judicial processes. However, in some situations an NJM is the only alternative, because there are no other venues for access to remedy. One participant highlighted that an NJM might sometimes only be able to provide a recommendation to parties, but no real compensation or imposing of sanctions.

Session 2: Improving policy coherence between NJMs and wider regulatory regimes and processes relevant to business respect for HR

It was highlighted that the concepts of "prevention" and "precaution" have become increasingly important, and can be observed particularly within the environmental sphere. This can be relevant for businesses with regards to human rights due diligence and should be considered by NJMs. Another participant said that NJMs must be cautious not to get into the regulatory space, although it was countered that some NJMs indeed have this specific role in their mandate. The use of "policy space" was explained by one participant as being involved in the judicial sphere, contributing to improving implementation of human rights obligations, but not taking over the role of the policy makers. The interaction between prevention and enforcement is important and there needs to be room for interaction with all stakeholders. One participant expressed caution as to the use of the wording "policy space".

Improving effectiveness of NJMs in cross-border cases

Session 3: Cross-border issues

In general very few NJMs have a cross-border mandate or extra territorial jurisdiction. The NCPs and the NHRIs dominate in this area, but other NJMs can have mechanisms to share information across borders. For some NJMs, such as the NCPs, there is coordination with regards to cross-border cases and experiences are shared annually to enhance their effectiveness in this area. One participant stated that these POs are important because they push NJMs to reach out to different NJMs and jurisdictions, but coordination will continue to be a challenge in cross-border collaboration. Several participants agreed that sharing of experiences is important. NJMs must also ensure that they are safe places for victims, civil society and other stakeholders. It was mentioned that States should look to their embassies and networks abroad to facilitate information exchange and processes involving cross-border cases, as they are already involved in economic diplomacy and should be aware of business and human rights issues.

Effectiveness of individual mechanisms

Session 4 - Focus on effectiveness criteria for non-State-based grievance mechanisms (Guiding Principle 31): legitimacy, accessibility and predictability

The impartiality aspect is crucial for NJMs because many are run and supervised by parts of the government. To be legitimate it is important that parties know that the NJM is impartial. The institutional position of an NJM can be a tool to contribute to the legitimacy and independence of the institution. It is not all about mandate and functions, if the NJM is put in the wrong place it might not work. An issue was also raised with regards to the languages that an NJM should be able to interact in and how this affects accessibility of the victims or affected stakeholders. Predictability and information on process is important to manage expectations of users, and information should also be provided to users on their different options so that they can choose the best venue for access to remedy.

Session 5 - Focus on effectiveness criteria for non-State-based grievance mechanisms: equitability, transparency, rights-compatibility, and a source of continuous learning.

In some cases disclosure of claims, process and outcome might undermine the parties' willingness to engage. This can interfere with the transparency requirement according to some participants. Outcomes from NJMs need to be compatible with business and human rights standards and international obligations. An NJM does not necessarily have the ability to decide a financial penalty, but there might be different options and pathways to effective remedy.

Session 6 – Model Terms of Reference for review of effectiveness of State-based NJMs.

Whether NJMs are provided with sufficient resources is a recurrent theme and should be part of the review. One participant pointed out that this review should not create the need for a separate mechanism to review NJMs, which would represent additional work.