



# **Accountability and Remedy Project**

## **Part II:**

### **State-based non-judicial mechanisms**

**State-based non-judicial mechanisms for accountability  
and remedy for business-related human rights abuses:  
Supporting actors or lead players?**

**Discussion paper prepared for the 6<sup>th</sup> UN Annual Forum on Business and  
Human Rights, Geneva, 27-29 November 2017**

**2 November 2017**

## Executive summary

This discussion paper has been prepared as part of an ongoing programme of work convened by OHCHR known as the Accountability and Remedy Project.

The Accountability and Remedy Project has been developed with the aim of helping States strengthen accountability and remedy in the area of business and human rights and to support more effective implementation of “Pillar III” (the “Access to Remedy” Pillar) of the UN Guiding Principles on Business and Human Rights (UNGPs).

Part I of the Accountability and Remedy Project, which focussed on the use of judicial mechanisms (i.e. courts) concluded in June 2016 with the submission of a final report, together with an explanatory addendum, to the Human Rights Council.<sup>1</sup>

This discussion paper is the third<sup>2</sup> in a series of discussion and research papers published by OHCHR pursuant to a request from the Human Rights Council in Resolution 32/10 (30 June 2016) 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).

This discussion paper sets out:

1. An overview of the information gathering activities conducted between April and September 2017,<sup>3</sup> which comprised:

- A **request for information and views** from all UN Member States via a *Note Verbale*;
- A “**Data Mining Exercise**”, involving a review of **over 431 business and human rights-related events, allegations and disputes** pertaining to four “high risk” sectors and reported to the Business and Human Rights Resources Centre website between the beginning of 2014 to mid-2017. The aim of this exercise was to get a better understanding of the extent to which State-based non-judicial mechanisms (NJMs) are presently used in practice, the contexts in which they are used and the kinds of adverse human rights impacts for which remedy is sought;
- An “**Information Gathering Process**” to gain a better understanding of (a) the different models of State-based non judicial mechanisms that have been developed thus far and (b) user experiences with these mechanisms to date. This Information Gathering Process had three main components, i.e.
  - An online “**Open Process Survey**” open to all stakeholders;
  - **Proactive information gathering** comprising

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<sup>1</sup> See [http://ap.ohchr.org/documents/dpage\\_e.aspx?si=A/HRC/32/19](http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/32/19) for the OHCHR’s final report and [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/HRC/32/19/add.1](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/HRC/32/19/add.1) for the accompanying explanatory addendum.

<sup>2</sup> The first two papers can be viewed at <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>.

<sup>3</sup> Information was collected from a total of **44 jurisdictions** through these activities (representing countries from all UN regional groupings), including detailed reviews of over **200 mechanisms** in 23 jurisdictions.

- a **directed process** drawing from the knowledge and expertise of scholars and practitioners from a wide range of jurisdictions; plus
  - **supplementary follow up work** focussing specifically on (i) National Contact Points under the OECD Guidelines on Multinational Enterprises (“NCPs”) and (ii) National Human Rights Institutions (“NHRIs”); and
- A webinar to gather **business views**.

2. **Key observations** arising from those information-gathering exercises relating to the **current “state of play”** with respect to the use of State-based NJMs as a means of improving access to remedy in cases arising from adverse human rights impacts that are business-related;

3. Observations relating to a number of **legal, structural, practical and policy challenges** identified in the course of research;

4. Illustrative examples, drawn from the information-gathering exercises conducted to date, of practical ways that elements of the **effectiveness criteria** set out in Guiding Principle 31 of the UNGPs can be responded to in practice; and

5. Preliminary ideas as to **key elements** to be addressed in the OHCHR’s report to the thirty-eighth session of the Human Rights Council (June 2018).

The observations and ideas set out in this paper will be presented for discussion at a panel-session on State-based NJMs to be convened at the 6<sup>th</sup> UN Annual Forum on Business and Human Rights, 27-29 November 2017. Feedback on the contents of this paper is welcomed from all stakeholders and should be addressed to Ms. Elisabeth Andvig at the OHCHR, via e-mail to [access2remedy@ohchr.org](mailto:access2remedy@ohchr.org) or [eandvig@ohchr.org](mailto:eandvig@ohchr.org).

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## Background

This discussion paper marks the conclusion of the information-gathering phase of Part II of OHCHR's Accountability and Remedy Project ("ARP II"). It has been prepared for the purposes of ongoing stakeholder consultation exercises relating to the use of State-based NJMs as a means of improving access to remedy in cases of business-related human rights abuses. The observations and ideas set out in this paper will be presented for discussion at a panel-session on State-based NJMs to be convened at the 6<sup>th</sup> UN Annual Forum on Business and Human Rights, 27-29 November 2017.

The OHCHR Accountability and Remedy Project has been developed with the aim of strengthening accountability and remedy in the area of business and human rights and to support more effective implementation of "Pillar III" (the "Access to Remedy" Pillar) of the UNGPs.<sup>4</sup>

In June 2016, OHCHR submitted to the Human Rights Council its final report on Part I of the Accountability and Remedy Project, which related to the role and use of judicial mechanisms (i.e. domestic courts), including in cross-border cases.<sup>5</sup> OHCHR then received a follow up request from the Human Rights Council in resolution 32/10<sup>6</sup> 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).<sup>7</sup>

This paper is the third in a series of discussion and research papers published by OHCHR pursuant to this mandate.<sup>8</sup> 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.<sup>9</sup> 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".<sup>10</sup> It identified a number of areas where further research is needed and proposed a work plan to gather further information about the role and scope of activities of State-based NJMs around the world.

This third discussion paper sets 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 (for further discussion at the 6<sup>th</sup> UN Annual Forum) as to key elements to be addressed in the OHCHR's report to the thirty-eighth session of the Human Rights Council (June 2018).

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<sup>4</sup> [http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf).

<sup>5</sup> See [http://ap.ohchr.org/documents/dpage\\_e.aspx?si=A/HRC/32/19](http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/32/19) for the OHCHR's final report and [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/HRC/32/19/add.1](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/HRC/32/19/add.1) for the accompanying explanatory addendum.

<sup>6</sup> [http://ap.ohchr.org/documents/dpage\\_e.aspx?si=A/HRC/RES/32/10](http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/32/10).

<sup>7</sup> 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](http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/32/10).

<sup>8</sup> The first two papers can be viewed at <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>.

<sup>9</sup> [https://business-humanrights.org/sites/default/files/images/ARPII\\_FINAL%20Scoping%20Paper.pdf](https://business-humanrights.org/sites/default/files/images/ARPII_FINAL%20Scoping%20Paper.pdf).

<sup>10</sup> [https://business-humanrights.org/sites/default/files/documents/ARPII\\_phase1\\_Sector%20Study\\_Part%201.pdf](https://business-humanrights.org/sites/default/files/documents/ARPII_phase1_Sector%20Study_Part%201.pdf).

## Methodology

Information-gathering exercises undertaken by OHCHR for this phase of the project have comprised the following (a detailed description of the methodology can be found in the Annex to this discussion paper):

- A **request for information and views** from all UN Member States via a *Note Verbale*;
- A **“Data Mining Exercise”**, involving a review of over 431 business and human rights-related events, news reports, allegations and disputes reported to the Business and Human Rights Resource Centre website relating to four “high risk” sectors<sup>11</sup> between the beginning of 2014 to mid-2017. The aim of this exercise was to better understand frequency and patterns of use of State-based NJMs around the world in cases where business involvement in human rights abuses is alleged, the contexts in which these mechanisms are used and the kinds of adverse human rights impacts for which remedy is sought;
- An **“Information Gathering Process”** to gain a better understanding of (a) the different models of State-based non judicial mechanisms that have been developed thus far and (b) user experiences with these mechanisms to date. The Information Gathering Process had three main components:
  - An online **“Open Process Survey”** open to all stakeholders (and aimed primarily at users of State-based NJMs) to gain information about practical experiences and stakeholder views on effectiveness and possible improvements;<sup>12</sup>
  - **Proactive information gathering** comprising:
    - a **directed process** using scholars and practitioners from a wide range of jurisdictions;<sup>13</sup>
    - **supplementary work** focussing specifically on (i) National Contact Points<sup>14</sup> under the OECD Guidelines on Multinational Enterprises (“NCPs”) and (ii) National Human Rights Institutions (“NHRIs”);<sup>15</sup> and
  - **OHCHR participation in a webinar** for representatives of business enterprises on issues and challenges from a business perspective arising from the use of State-based NJMs in business and human rights cases.

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<sup>11</sup> The sectors selected for this review were (i) extractives and mining, (ii) agribusiness and food production, (iii) textiles and clothing manufacture and (iv) infrastructure and construction.

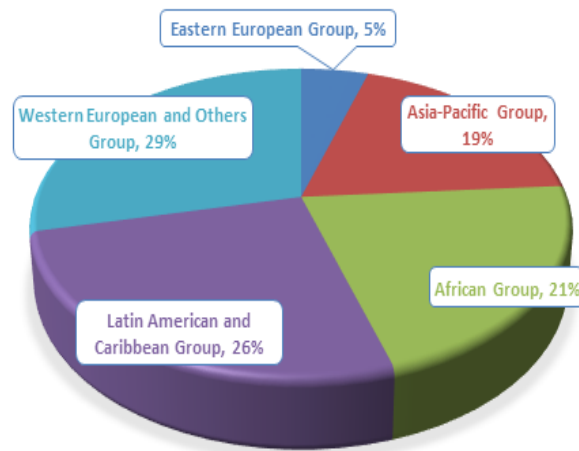
<sup>12</sup> Via this process, 29 contributions were received in respect of the following jurisdictions: Argentina, Austria, Bahrain, Belgium, Cambodia, Cameroon, China, Colombia, Croatia, Denmark, France, Germany, Italy, Kenya, Mexico, Morocco, Namibia, Netherlands, Niger, Palestine, Serbia, Slovakia, South Africa, and Venezuela.

<sup>13</sup> Legal scholars and practitioners from a sample group of jurisdictions (drawn in equal numbers from each UN regional grouping) were asked to identify and submit information, via a standardised online template format, on the key State-based NJMs in their respective jurisdictions that could be relevant to business respect for human rights. Information relating to over 200 State-based NJMs in 25 jurisdictions was received through this process.

<sup>14</sup> Interviews were conducted and input was received from 10 NCPs.

<sup>15</sup> Interviews were conducted and input was received from 16 NHRIs.

**Fig. 1. Distribution of jurisdictions for which information was collected on State-based NJMs via the Information Gathering Process, broken down by UN regional grouping**



## Key observations

### A. Overview and general trends

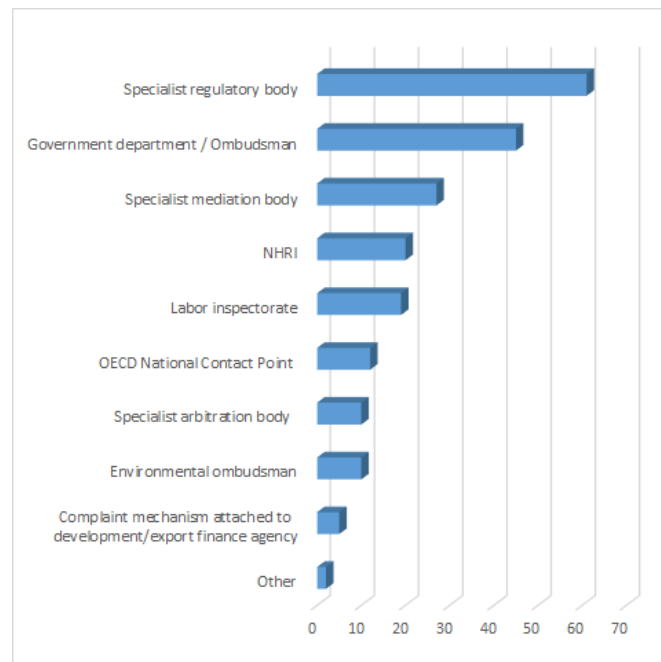
#### A.1 The value of State-based NJMs as a means of helping to resolve complaints and disputes arising from adverse human rights impacts of business activities appears recognised in virtually all jurisdictions

For each of the jurisdictions covered by this research, informants were able to identify multiple State-based NJMs relevant to addressing adverse human rights impacts of business activities. These typically included labour inspectorates, consumer protection bodies (often tailored to different business sectors), mechanisms for resolving environmental disputes, government ombudsman services and complaints mechanisms established under special-purpose or sector-specific regulatory regimes (for instance relating to public health and safety).

Respondents to the Information Gathering Process from a wide range of jurisdictions noted the importance of State-based NJMs as a potentially quicker and cheaper route to resolving business and human rights-related complaints and disputes between individuals and business enterprises than judicial mechanisms.

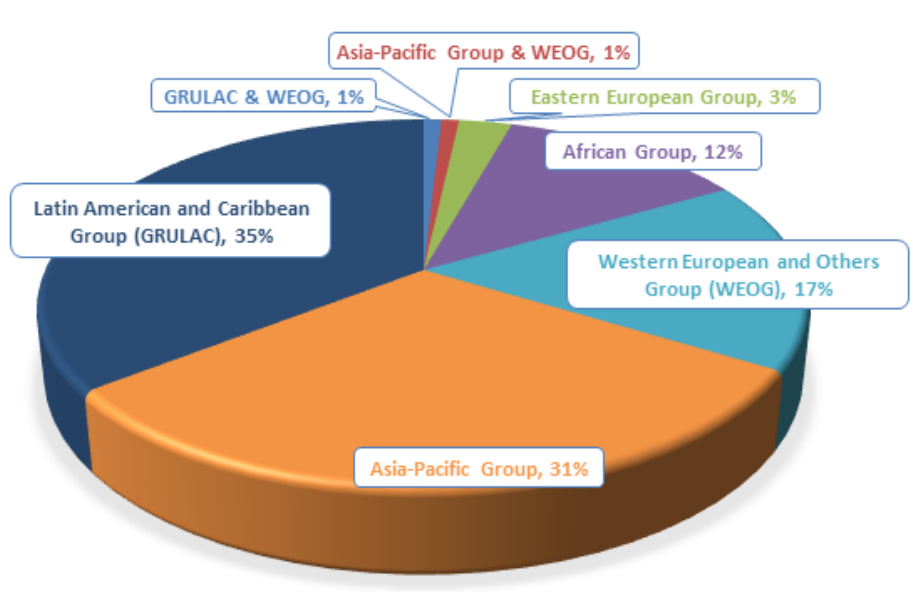


**Fig. 2. Types of State-based NJMs for which data was collected in the course of directed research exercises, and their frequency**



Information collected through the Data Mining Exercise suggests that there is already widespread use of State-based NJMs to help resolve complaints and disputes arising from adverse human impacts of business activities (see Fig. 3 below).

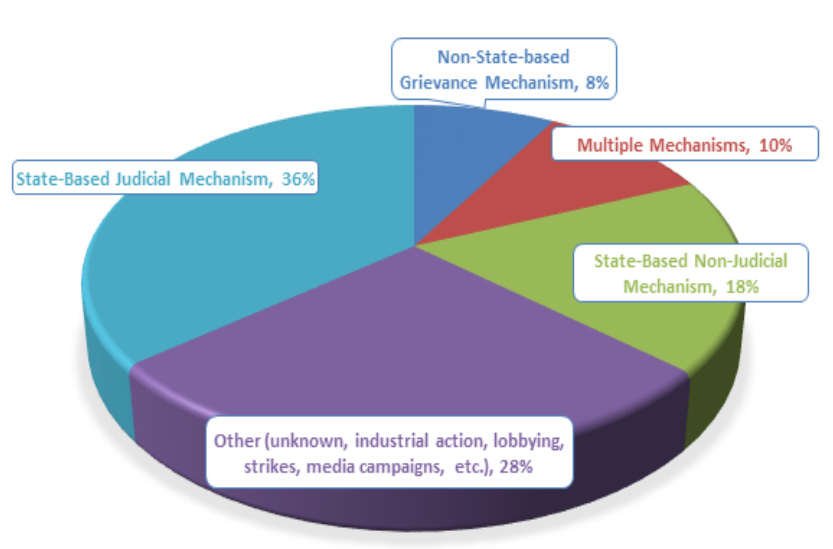
**Fig. 3. Geographic spread of cases identified in Data Mining Exercise as having been referred (in whole or in part) to State-based NJMs (113 in number).**



## A.2 There appear to be many cases in which State-based NJMs do not offer an accessible or realistic route to an effective remedy

Information reviewed in the course of the Data Mining Exercise suggests that, while State-based NJMs appear to be playing an important role in helping to resolve certain categories of disputes arising from adverse human rights impacts that are business related,<sup>16</sup> judicial mechanisms (as well as other informal means of resolving disputes, such as lobbying, protests and media campaigns) are the preferred (or indeed the only) option in many cases. As can be seen from Fig. 4 below, involvement of State-based NJMs was reported in around one quarter<sup>17</sup> of the cases reviewed in the Data Mining Exercise. However, the proportion of reported cases recording involvement of judicial mechanisms was somewhat higher.<sup>18</sup>

**Fig. 4. Breakdown of methods used to attempt to resolve complaints and/or disputes in business and human rights cases (431 in number) reported to the Business and Human Rights Resource Centre in four “high risk” areas, between January 2014 and mid-2017, by type of mechanism**



## A.3 While the mandates of State-based NJMs vary from jurisdiction (and within jurisdictions), the mechanisms with the strongest investigative and enforcement powers tend to be the ones that are the most specialised

A clear finding from the Information Gathering Process is that, as a general rule, the more specialised a State-based NJM is, the stronger its investigation and enforcement powers are likely to be and the greater autonomy it will have to devise, enforce and monitor the implementation of remedies on its own initiative. Furthermore, the information collected during these research exercises suggests that,

<sup>16</sup> See section A.3 below.

<sup>17</sup> This value is calculated taking account of cases that were referred to State-based NJMs only (18%), plus cases that were referred to a combination of judicial and non-judicial mechanisms (see further the discussion at B.1 below) (8%) and cases that involved both State-based NJMs and other (non-State-based) non-judicial mechanisms (1%).

<sup>18</sup> It is necessary to be aware of the possible influence of reporting bias here. For instance, cases involving judicial mechanisms may receive greater levels of public and media interest than cases resolved through the use of State-based non-judicial mechanisms.

of these specialised mechanisms, the most robust (in legal terms) are most likely to be found in the fields of labour law, environmental law, consumer protection law and privacy law.

The point is illustrated in Fig. 5 below, in which State-based NJMs reviewed in the course of the directed research activities have been grouped by Type (A, B, C, and D) where:

- **“Type A”** mechanisms = Bodies responsible for enforcement of public law standards with strong fact-finding powers and ability to determine and enforce remedies on their own initiative.

**Illustrative example of a “Type A” mechanism:** A labour inspectorate which has the power to enter premises, seize documents and take statements from witnesses in order to establish whether a breach of the law has occurred. In the event that a breach of the law is determined, it has the power to impose financial sanctions.

- **“Type B”** mechanisms = Dispute resolution bodies with some fact-finding powers and ability to issue binding legal determinations on their own initiative.

**Illustrative example of a “Type B” mechanism:** An environmental tribunal which has the power to determine disputes between people and companies over land use, which can take evidence under oath and/or require the production of expert testimony. It has the power to issue legally binding determinations, subject to any rights of appeal.

- **“Type C”** mechanisms = Enforcement or dispute resolution bodies with some fact-finding powers but which rely primarily on other regulators and/or law enforcement agencies and/or judicial mechanisms for enforcement of human rights-related standards.

**Illustrative example of a “Type C” mechanism:** A National Human Rights Institution with powers to interview witnesses and otherwise gather evidence with respect to alleged business involvement in human rights abuses. While its dispute resolution powers are limited to the formulation of non-binding recommendations as regards the parties concerned, it nevertheless has the ability (and in some cases the obligation) to refer suspected breaches of the law by corporate entities to the appropriate authorities for prosecution.

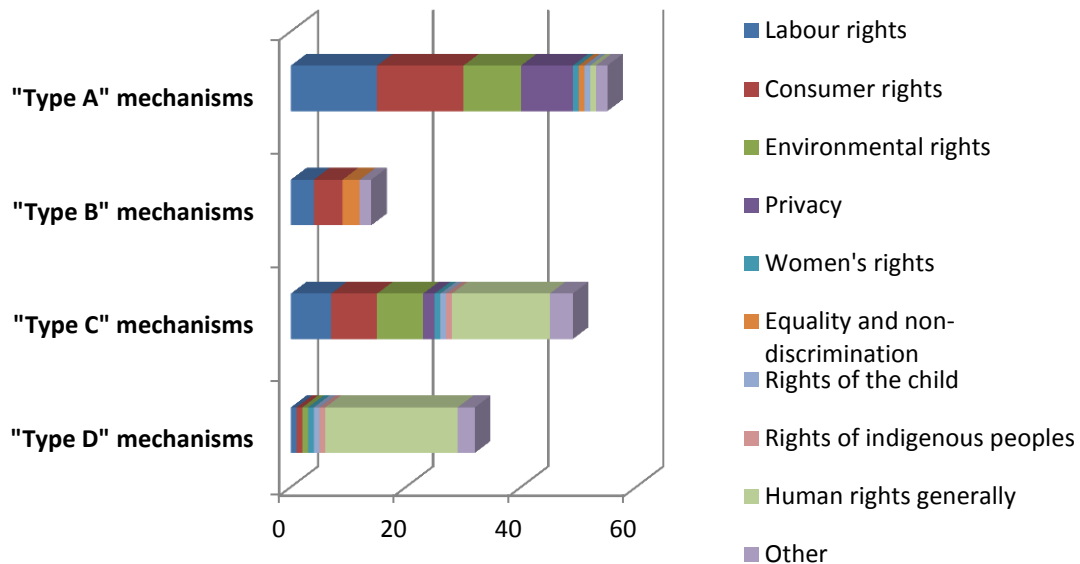
- **“Type D”** mechanisms = Mediation-type bodies which rely for their effectiveness largely on the cooperation and good will of participants, with few (if any) investigative powers and no formal powers to issue legally binding determinations.

**Illustrative example of a “Type D” mechanism:** A sector-specific mediation mechanism established to respond to public concerns about adverse human rights impacts of that specific sector but with no powers to compel participation by any party and no powers to compel the production of information (thus putting the onus on the parties to gather and present information material to the dispute). Its main role is to assist the parties towards an amicable resolution of their dispute if at all possible.

As can be seen in Fig. 5 below, “Type A” mechanisms are dominated by mechanisms with a well-defined legal mandate under specialised regulatory regimes (notably labour, environmental, consumer and privacy regimes). Generally speaking, the more flexible, wide-ranging and open-ended the mandate of a State-based NJM, the less likely it is to be empowered to make legally binding determinations in a business and human rights-related dispute. However, there are exceptions. For instance, this research identified several “Type A” mechanisms whose responsibilities were explicitly framed in human rights (rather than “regulatory”) terms. As can be seen from Fig. 5 below, included among the “Type A” mechanisms are a small number of specialist mechanisms aimed specifically at the protection of women’s rights, the rights of the child and equality rights (including, but not limited

to, rights of non-discrimination at work). Supplementary investigations into the work of NHRIs confirmed the existence of several mediation processes that were closely tied to human rights issues and which had reasonably robust powers of investigation together with, in some cases, the potential to deliver legally-binding outcomes, particularly among jurisdictions in the Asia-Pacific Group.

**Fig. 5. Fields of activity of different types of State-based NJMs reviewed in the course of directed research exercises**



**Notes:**

(i) The mechanisms classified as “Other” in this sample comprise sector specific regulatory mechanisms (3), mechanisms relating to protection of intellectual property rights (1), mechanisms relating to protection of public health and safety (1), mechanisms relating to protection of freedom of expression (1), mechanisms relating to protection of economic and social rights (1), mechanisms concerned with promoting access to justice (1).

The Data Mining Exercise (which, as noted above, was designed to elicit information on how State-based NJMs are used in practice) suggests that the greatest contribution by State-based NJMs in business and human rights cases is presently being made in the fields of labour law and environmental law. As can be seen from Fig. 6 below, most of the cases reviewed in the Data Mining Exercise in which State-based NJMs were involved concerned alleged breaches by business enterprises of laws relating to labour rights, followed by complaints relating to adverse environmental impacts of business activity.

**Fig. 6. Frequency of different rights implicated in cases involving State-based NJMs (113 in number, out of the 431 business and human rights cases reported to the Business and Human Rights Resource Centre in four “high risk” areas, between January 2014 and mid-2017)**



#### **A.4 State-based NJMs may have limitations as mechanisms for resolving complex cases involving multiple parties and systematic and/or widespread abuse**

Several participants in the Information Gathering Process highlighted possible limitations of State-based NJMs in complex cases involving multiple parties and systematic, widespread or egregious abuses. Lack of resources was highlighted by a number of respondents as a key problem, meaning that complex cases may not be prioritised. Identifying a suitable mechanism with both robust investigative powers and a sufficiently broad mandate is also likely to pose a problem in most jurisdictions (as noted in the previous section, the mechanisms most likely to have strong regulatory and law enforcement powers tend to be those with a more narrow regulatory focus). Where there is potentially more room to manoeuvre, the lack of clarity over the extent of a mechanism’s mandate was nevertheless highlighted as a potentially inhibiting factor, as regulators may not feel they have sufficient legal or political “cover” to undertake more complex investigations. A number of informants identified a possible lack of independence as a factor that could inhibit the use of State-based NJMs in more complex and systemic cases, and particularly in cases with connections to government agencies (including military or security agencies).<sup>19</sup>

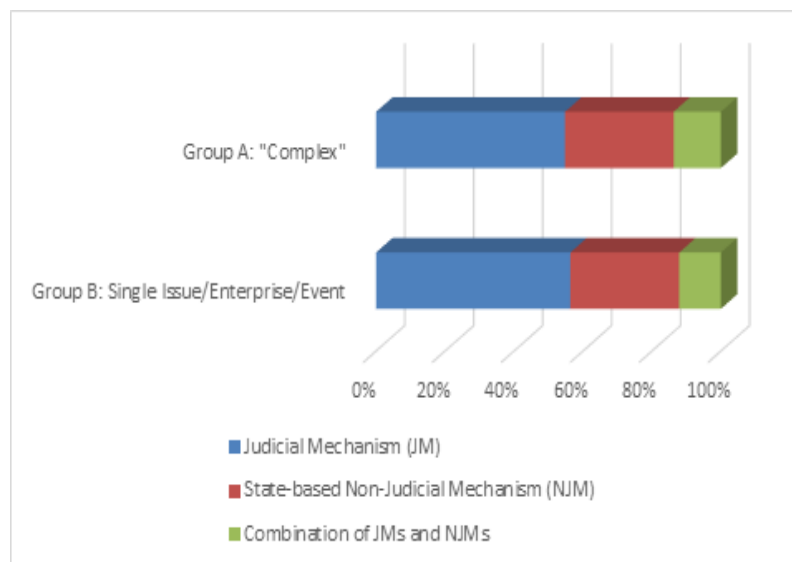
If State-based NJMs are indeed more suited to addressing “single event” issues than more complex and systemic issues, this was not readily apparent from the information collected in the course of the Data Mining Exercise. Neither can it be said for certain that State-based NJMs are presently diverting cases away from judicial mechanisms. As Fig. 7 below shows, when cases are divided according to whether they were potentially “complex” or “systemic” cases (Group A) as opposed to “single

<sup>19</sup> See further discussion at section B.3 below.

issue/enterprise/event” cases (Group B), the proportion of cases referred to judicial mechanisms, compared to non-judicial mechanisms, was roughly the same.<sup>20</sup>

However, differences can be observed between the types of State-based NJMs used for complex or systematic cases (Group A cases) compared to “single issue/enterprise/event” cases (Group B cases). The mechanisms most likely to be used for Group A cases were NCPs or NHRIs, whereas the mechanisms most likely to be used for Group B cases were labour inspectorates and other regulatory agencies. More research would be needed to understand fully the implications of these differences in access to remedy terms.

**Fig. 7. Comparison of use of mechanisms in “complex” versus “single issue/enterprise/event” cases (from business and human rights cases reported to the Business and Human Rights Resource Centre in four “high risk” areas, between January 2014 and mid-2017)**



#### **A.5 “Tried and tested” models are preferred in many jurisdictions, but there is also evidence of innovation in the way that some States have responded to particular human rights challenges**

A comparison of State-based NJMs which are active in specific regulatory fields (e.g. labour law, environmental law and consumer law) suggests a certain amount of replication and peer learning from jurisdiction to jurisdiction in terms of their design and institutional set up. For instance, in the field of labour law, it is not uncommon to find specialist bodies with responsibility for the enforcement of a specific sub-set of standards, such as workplace health and safety standards, or regimes aimed at the protection of vulnerable workers, while disputes arising from breaches of employment contract terms are referred to separate bodies for resolution using mediation and/or conciliation. Similarly, in the environmental sphere, in many jurisdictions complaints about breaches of environmental standards will be directed to an enforcement body, whereas disputes about land use and development are more likely to be dealt with through mediation or other alternative dispute resolution techniques.

<sup>20</sup> Once again, it is necessary to keep in mind the possible influence of a reporting bias giving more publicity to cases involving judicial mechanisms and thus obscuring the real rates of use of State-based non-judicial mechanisms in practice.

However, the information submitted in response to the directed research exercises also included examples of a number of specially tailored State-based NJMs aimed at the protection of the rights of specific groups, including women, children, migrant workers, persons with psycho-social disabilities, victims of modern slavery or bonded labour practices, members of indigenous communities and persons with disabilities (see Fig. 5 above). These mechanisms range from simple grievance processes to more multi-layered agencies with strategic, preventative, government advisory and law reform functions. In contrast to many of the mechanisms with wide-ranging human rights remits, it was noted that these specially targeted mechanisms, with specific thematic priorities, often have explicit powers to conduct investigations and to compel the production of information in documentary form and from witnesses.

Respondents to the Information Gathering Processes also identified several State-based NJMs established specifically to assist with reconciliation following political turmoil and to promote restorative justice. In addition, some jurisdictions have established sector-specific State-based NJMs (especially for sectors seen as “high risk” in terms of adverse human rights impacts, such as mining and extractives, or the private security industry) with a remit relevant to a range of human rights (e.g. environmental rights, rights to property, labour rights) (see further Fig. 6 above).

#### **A.6 Removing or reducing financial barriers to accessing remedies for individual claimants and complainants appears to be a strategic priority of many (if not virtually all) State-based NJMs**

Of the State-based NJMs examined in the course of the directed research exercises, mechanisms representing a significant proportion (39%) were either free to use or only charged a nominal fee to users. None of the mechanisms examined in supplementary research into the work of NHRIs and NCPs in particular made access to the mechanism conditional upon payment of a fee.

Virtually none of the mechanisms reviewed in this study contained any requirements for legal counsel and, in one case, the involvement of legal counsel was prohibited. While many mechanisms make it clear that they cannot offer legal advice to users, support services are frequently made available for those who preferred not to use (or cannot afford) legal counsel. These included helplines, face-to-face or telephone advice on how to lodge a complaint or claim, online templates for complaints or claims, pamphlets, other online resources (including FAQs and videos), and special assistance at hearings. In addition, many mechanisms for which information was collected via the directed research exercises had made procedural accommodations aimed at reducing costs for users, such as provision for representative and group actions.

#### **A.7 The procedures adopted by, or mandated for, State-based NJMs suggest a high degree of consensus globally as to the basic elements of procedural fairness**

Information on the procedural steps adopted by State-based NJMs reviewed in the Information Gathering Process showed virtually universal acknowledgement of the importance of proper, transparent and timely communications with each side, and the need for all interested parties to be given adequate time and opportunity to comment on and respond to allegations and counter-arguments. In some cases (and particularly noticeable in NCP procedures),<sup>21</sup> parties to a dispute are given an opportunity to review and comment on draft determinations before they are finalised.

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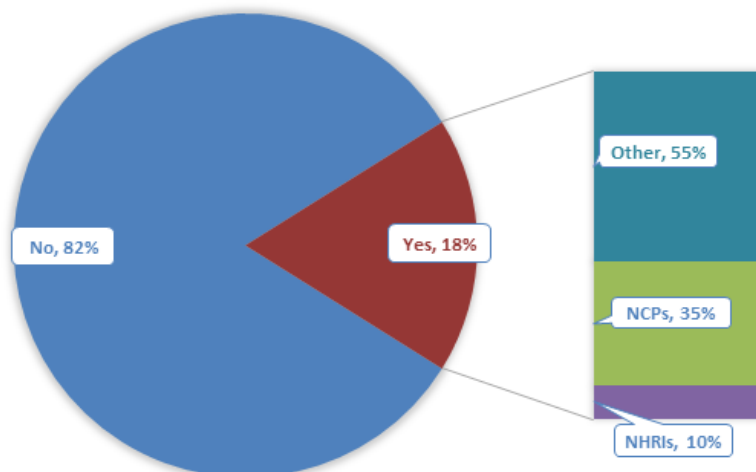
<sup>21</sup> See <http://www.oecd.org/investment/mne/ncps.htm>.

However, some respondents to the Open Process suggested that, in practice, effective engagement by users of State-based NJMs can be undermined by (a) a lack of independence of the mechanism concerned, or perceptions of an underlying political agenda<sup>22</sup> or (b) a lack of resources on the part of the mechanism.

#### **A.8 Only a tiny fraction of State-based NJMs have functions or mandates in relation to extraterritorial business entities or activities**

As Fig. 8 below clearly shows, the majority of the mechanisms for which data was collected have a strictly territorial focus. Those mechanisms that do have a potential role in relation to cross-border activities tend to be those that use mediation techniques (i.e. the mechanisms referred to as “Type D” in Fig. 5 above), rather than regulatory or enforcement mechanisms

**Fig. 8. Proportion of review sample of State-based NJMs identified as having a mandate in respect of extraterritorial business entities’ activities**



However, for several State-based NJMs (especially in the field of consumer law and privacy law), it was noted that there may be cases where a mechanism takes action in respect of foreign business enterprises whose activities are impacting on legal compliance within the territory of the mechanism concerned.

Moreover, in a number of submissions it was noted that, even if the mechanism did not have any extraterritorial powers or mandate of its own, it may share information with other regulators, or participate in cooperative initiatives (i.e. regulators’ networks) for regulatory and law enforcement purposes.

<sup>22</sup> See further discussion at section B.3 below.



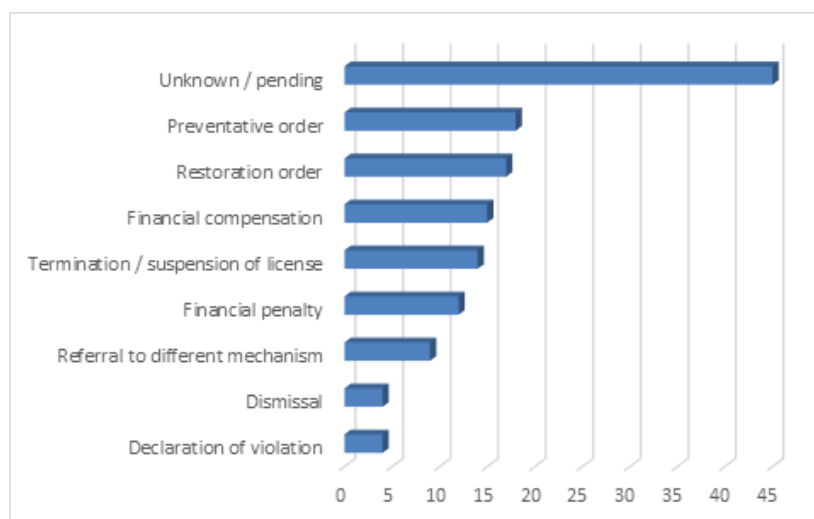
**A.9 Although the remedies that can be awarded in any case will be constrained by each State-based NJM’s regulatory role and mandate, the multi-faceted role of many State-based NJMs creates opportunities for preventative and restorative (as well as compensatory and punitive) remedies**

Few State-based NJMs relevant to business respect for human rights perform an exclusively complaints handling or dispute resolution role. Many are attached to, or have close relationships with, other regulatory agencies.<sup>23</sup> Thus, the outcomes of complaints and dispute resolution processes may be of an administrative or regulatory character as well as (or instead of) compensation or punitive sanctions.

Common forms of administrative or regulatory action noted in submissions to the Information Gathering Process included cancellation or suspension of licences to operate, cancellation of planning permits or formulation of an agreed programme of remedial action (implementation of which is monitored by a supervisory body). In addition, the advisory and policy-making functions of many such mechanisms create opportunities for “lessons learned” from individual cases to be fed into future law reform initiatives.

As can be seen in Fig. 9 below, preventative and restorative remedies were the remedies most commonly recorded in the sample of cases reviewed in the Data Mining Exercise that involved State-based NJMs, followed by financial compensatory orders. This creates a striking contrast to cases involving judicial mechanisms for which, as noted in the final report to the Human Rights Council on Part I of the Accountability and Remedy Project,<sup>24</sup> financial remedies (either in the form of compensatory awards or fines) are by far the most commonly awarded remedy.

**Fig. 9. Summary of remedies outcomes in cases involving State-based NJMs (113 in number, out of the 431 business and human rights cases reported to the Business and Human Rights Resource Centre in four “high risk” areas, between January 2014 and mid-2017)**



<sup>23</sup> See further discussion at section B.5 below.

<sup>24</sup> See [http://ap.ohchr.org/documents/dpage\\_e.aspx?si=A/HRC/32/19](http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/32/19) for the OHCHR’s final report and [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/HRC/32/19/add.1](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/HRC/32/19/add.1) for the accompanying explanatory addendum.

## **B. Further significant legal, structural, and policy issues emerging from research**

### **B.1 Interface between State-based NJMs and judicial mechanisms**

The responses to the Information Gathering Processes provide plenty of examples of the different ways in which State-based NJMs and judicial mechanisms may be interlinked in practice. For instance:

- The State-based NJM may be empowered to recommend criminal or quasi-criminal (i.e. administrative) proceedings;
- The State-based NJM may be empowered or required to refer evidence of corporate wrongdoing to law enforcement authorities;
- The State-based NJM may be empowered to act as a prosecutor in a criminal or quasi-criminal case;
- The State-based NJM may be empowered to give evidence as a witness in judicial processes;
- The State-based NJM may be empowered to intervene in judicial cases (e.g. as *amicus curiae*);
- The State-based NJM may be empowered to undertake public interest civil litigation on the part of complainants;
- The State-based NJM may be empowered to report or refer cases of non-cooperation or obstruction of its processes for prosecution through judicial mechanisms;
- Financial determinations of the State-based NJM may only be enforceable through the courts (e.g. as a debt owed to the individual concerned); and
- Judicial processes may include an opportunity for referral of a dispute for early settlement through mediation using a State-based NJM.

In addition, many regimes establishing State-based NJMs relevant to business respect for human rights provide for the possibility of appeal from the decisions of the mechanism to the courts.<sup>25</sup> This may be made possible either because of the terms of the relevant regulatory regime or under more general rights to challenge administrative action (e.g. under laws relating to judicial review).

Although State-based NJMs play a valuable role in many jurisdictions as a quick and affordable alternative to judicial mechanisms, these links to judicial mechanisms can be key to their effectiveness in practice. However, the possibility of overlapping proceedings or the possibility that issues raised in non-judicial proceedings could subsequently be referred to judicial processes, can create dilemmas for users as to whether and how to engage with different mechanisms. Some State-based NJMs are prohibited from considering cases that are subject to judicial proceedings.

### **B.2 Interface between State-based NJMs and non-State-based (e.g. company level) grievance mechanisms**

Many State-based NJMs require users first to access the relevant company level grievance mechanisms before approaching governmental or regulatory agencies to resolve a complaint or dispute with a company. This is particularly the case for those operating in the fields of consumer law and privacy law (and also, to a lesser extent, labour law).

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<sup>25</sup> See further discussion on “independence and accountability” at section B.3 below.

Screening of complaints (or “triage”) is a common way to ensure that complaints are directed to the place where they can be dealt with most effectively and efficiently, which may include referral to a company level mechanism. While these kinds of procedures are often justified as a means of ensuring efficient allocation of public resources, care is needed to ensure an appropriate balance between these considerations and ensuring access to remedy for business-related harms.

Compulsory referrals to company level dispute mechanisms (as a precondition to accessing State-based NJMs) risk creating further barriers to remedy if there is no prospect of receiving an effective remedy through that route or if there are unacceptable delays. However, this risk is reduced if there is alignment between the aims and standards applied by complementary mechanisms at company and then regulatory level.

A number of State-based NJMs reviewed as part of the Information Gathering Process have, as part of their regulatory mandate, responsibility for raising standards and performance of operational grievance mechanisms of regulated companies.<sup>26</sup> Thus, there would appear to be scope in many cases for State-based NJMs that wish or need to encourage the use of company level grievance mechanisms as a first resort, to ensure policy coherence and good coordination between the two types of mechanism. In any case, there is a need for clear and transparent criteria governing the transfer of cases (whether as a result of an appeal or otherwise) from company level mechanisms to State-based NJMs.

### **B.3 Independence and accountability**

Concerns about the independence and impartiality of State-based NJMs were raised in a number of submissions to the Information Gathering Process, especially in relation to those State-based NJMs that operate out of, or under the supervision of, governmental departments.

On the other hand, the State-based NJMs reviewed in the directed research exercises provide numerous examples of the techniques that can be used to improve independence and enhance accountability. These include:

- Independent appointments panels to recruit and appoint key personnel;
- Periodic rotation of board level personnel;
- Public commitment to operate according to named “good practice” policies and procedures (including conflicts of interest policies) which are publicly available;
- Annual reports to government on activities and performance against measurable targets and budgets, which is then made available to the public;
- Obligations to disclose information under Freedom of Information regimes;
- Complaints mechanisms whereby members of the public (including users of grievance mechanisms) can complain about decision-making;
- Rights of appeal to government ombudsman, other regulatory authorities or tribunals, or courts; and
- Oversight and/or “quality control” boards.

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<sup>26</sup> This is the case, for instance, for companies operating under a licence which have, as part of their licence conditions, an obligation to operate a grievance mechanism according to certain prescribed standards.

#### **B.4 Balancing transparency and confidentiality**

As stated in the Commentary to the UNGPs (GP 31), “[p]roviding transparency about the mechanism’s performance to wider stakeholders, through statistics, case studies or more detailed information about the handling of certain cases, can be important to demonstrate its legitimacy and retain broad trust.”

Data collected through the Information Gathering Process highlighted the many different ways that State-based NJMs can (and do) publicise their activities and decisions. A small number of the mechanisms reviewed in the directed research exercises conducted hearings in public. Virtually all mechanisms reviewed in this study, however, were found to publish, to a greater or lesser degree, the outcomes of complaints handling or dispute resolution processes, for instance in newspapers, circulars, online and in annual reports. Some mechanisms publish, in addition, some details of allegations, evidence presented and deliberations; however, this is less likely to be the case for mechanisms in which participation is voluntary and which rely on the cooperation of users.

The need to provide confidentiality in some cases (especially where the affected person or persons may be at risk of intimidation or reprisals) and to guard against disclosure, in certain circumstances, of the identity and personal details of persons bringing allegations against businesses, appears widely recognised. Some mechanisms observe confidentiality as a matter of course, and some agree to abide by an individual’s specific requests (e.g. as to non-disclosure of the person’s name or contact details). Some State-based NJMs operate to a set of internal rules on user confidentiality whereas others refer, in their outreach literature, to the protections offered pursuant to other regulatory regimes relating to privacy, data protection and whistle-blower protection.

#### **B.5 Informality, predictability and expectation management**

State-based NJMs operate to varying degrees of informality and flexibility, with some (employment tribunals and some environmental tribunals, for instance) adopting a court-like approach to procedure and evidence and some, at the other end of the spectrum, providing only light-touch procedural guidance. For many of the mechanisms reviewed, procedures appeared fairly streamlined (only 2 or 3 main stages), with assistance and information offered to individual users to help them to engage with the relevant processes confidently and effectively.

“What to expect” pamphlets and videos, presented in an accessible style, are widely used, especially by complaints handling mechanisms. As noted above,<sup>27</sup> the practice of publishing outcomes of complaints handling or dispute resolution processes is fairly widespread.

Although State-based NJMs tend not to be bound by precedent in a formal way, the gradual development of a body of “case law” can be important for building confidence in the mechanism, and for ensuring that parties do not approach these mechanisms with wildly different expectations of what can be achieved. Building predictability into processes can be more of a challenge, however, for ad-hoc bodies<sup>28</sup> and mediation-type mechanisms responsible for assisting parties (often in a private and confidential setting) towards a negotiated settlement.

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<sup>27</sup> See section B.4 above.

<sup>28</sup> E.g. Special, sector-specific or event-specific bodies of inquiry.

## B.6 Regulatory cooperation and policy coherence

Few State-based NJMs operate in isolation. The State-based NJMs reviewed as part of the directed research exercises demonstrate the importance of regulatory cooperation in many cases, and the vital role played by these mechanisms in the context of wider regimes designed to guard against adverse human rights impacts that are business related. Regulatory cooperation is institutionalised in various ways including;

- Obligations to share information with other regulatory agencies;
- Obligations to pass information relating to possible criminal wrongdoing or breaches of quasi-criminal legal standards to the relevant law enforcement authorities;<sup>29</sup>
- Obligation or discretion to share information with regulatory agencies with similar or overlapping mandates (e.g. in a federal system, between different levels of government);
- Obligation or discretion to present specific or aggregated information relating to proven cases of corporate wrongdoing (including systematic issues) to State agencies (e.g. in the context of governmental or parliamentary inquiries);
- Participation in cross-border regulatory initiatives (e.g. international or regional regulator networks);<sup>30</sup> and
- Information-sharing pursuant to governmental advisory functions.

The Data Mining Exercise also highlighted the importance of cooperation between regulatory agencies in practice, having identified a number of cases involving multiple agencies (see Fig. 4 above) and some which involved State-based NJMs in more than one jurisdiction working in cooperation.

On the other hand, for some State-based NJMs, sharing of information with other regulatory agencies was identified as a possible concern, for reasons of user confidentiality. For instance, as noted above,<sup>31</sup> some mechanisms give claimants and/or complainants the right to demand confidentiality with respect to their identity and the subject matter of their case. In such a case, the mechanism may be legally constrained with respect to what and how much information can be shared with other agencies. Some mediation type mechanisms regard guarantees of privacy and confidentiality as key to encouraging participation by corporate subjects of complaints, and a constructive negotiation on a suitable settlement to the dispute.

Supplementary investigations into the work of NHRIs and NCPs highlighted differing approaches, from jurisdiction to jurisdiction, with respect to the sharing of information by these types of mechanisms with other regulatory and law enforcement agencies. It was suggested that NHRIs would generally not share information with law enforcement agencies (exceptions being cases where there is legal compulsion to share information, or where there was an immediate threat to security or safety). On the other hand, information would be shared with other regulatory agencies more readily (e.g. where there is a specialised agency with better resources for dealing with the complaint). National Contact Points under the OECD Guidelines for Multinational Enterprises would generally not share information with regulatory agencies as a matter of course (the mediation process being private as between the parties concerned) although in some cases certain information-sharing channels are built into the NCP administrative structure.

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<sup>29</sup> See also discussion at section B.1 above.

<sup>30</sup> See further discussion at section B.7 below.

<sup>31</sup> See section B.4 above.

Broadly speaking, specialised, regulatory, enforcement-type mechanisms appear to place more importance on regulatory cooperation than mediation-type mechanisms. This is likely to be at least partly because of the desirability of avoiding competition between different mechanisms with potentially overlapping mandates.<sup>32</sup> Not only is this unlikely to be an efficient use of public resources, it has the potential to yield inconsistent enforcement strategies (as well as outcomes) in individual cases.

Effective communication between the different regulatory agencies with mandates that touch on different kinds of business and human rights-related issues (e.g. labour rights, environmental rights, consumer rights, privacy rights) is also important for ensuring policy coherence.<sup>33</sup> In a number of the jurisdictions for which information was collected, NHRIs play a key role in gathering information on adverse human rights impacts, liaising with the relevant regulatory agencies and providing recommendations to government. As noted above,<sup>34</sup> a number of State-based NJMs provide vital feedback to government on the functioning of regulatory regimes in practice, including compliance, enforcement and systemic problems, as part of their ongoing information-gathering and analytical work. However, as noted in section B.4 above, finding an approach to user confidentiality that both encourages participation and supports wider regulatory and law enforcement goals can pose legal, policy and strategic challenges for State-based NJMs in practice.

### **B.7 Reconciling educational and advisory roles with enforcement responsibilities**

As noted above,<sup>35</sup> few State-based NJMs relevant to business respect for human rights are concerned exclusively (or even primarily) with enforcement. Many of the mechanisms reviewed as part of the Information Gathering Process also have educational, awareness-raising and preventative functions that require them to work closely with, and build positive and constructive relationships with, their corporate regulatory “clients”.

However, this can create conflicts and dilemmas for State-based NJMs in their decision-making about when, and by what means and methods, to undertake enforcement action. To ensure that decision-making about enforcement matters is robust and fair, many of these mechanisms have developed compliance and enforcement policies which are then, in the interests of transparency, made publicly available. Some mechanisms have taken steps to give more independence and autonomy to its enforcement functions, which can help to overcome problems of “regulatory capture”.<sup>36</sup> In addition, decisions made by many State-based NJMs are potentially appealable through Parliamentary Ombudsman mechanisms, or mechanisms for judicial review of administrative action.

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<sup>32</sup> For instance, in some jurisdictions it is possible to find specialised environmental protection mechanisms with responsibility for maintaining environmental standards in a particular business sector in addition to environmental agencies with responsibility for enforcing environmental law breaches more generally. Or, to give another example, there may be multiple agencies with responsibility for enforcement of equalities legislation in a single jurisdiction, such as NHRIs (responsible for ensuring compliance with equalities legislation in general) and labour inspectorates or employment tribunals (responsible for enforcement of rules on non-discrimination and equality of opportunity at work).

<sup>33</sup> See further UNGPs, Guiding Principle 8 and Commentary.

<sup>34</sup> See section A.7 above.

<sup>35</sup> See section A.7 above.

<sup>36</sup> “Regulatory capture” refers to the situation where a regulatory agency, instead of acting in the public interest, begins to act at the behest of the companies, industries or sectors it is supposed to be regulating.

## C. Observations relevant to the practical implementation of the UNGPs Effectiveness Criteria for Non-Judicial Mechanisms

This section identifies, for illustrative and discussion purposes, some of the features of State-based NJMs around the world that appear relevant to the “effectiveness criteria” for NJMs set out in Guiding Principle 31 of the UNGPs.

These examples have been drawn from submissions made to the OHCHR under all of the information gathering activities covered by this paper, including information provided directly by NHRIs and NCPs.

**Table 1: Illustrative examples of features of State-based NJMs around the world potentially relevant to implementation by States of “effectiveness criteria” for NJMs**

Effectiveness criteria (UNGP 31)	Illustrative examples from information gathering exercises
<p><b>(a) Legitimate:</b> enabling trust from the stakeholder groups for whose use they are intended, and being accountable for the fair conduct of grievance processes.</p>	<ul style="list-style-type: none"> <li>• Publication of enforcement and compliance procedure;</li> <li>• Publication of policies for engagement with different stakeholder and user groups;</li> <li>• Online and hard copy resources (in plain language) explaining processes and key stages (e.g. “what to expect” literature);</li> <li>• Publication of outcomes of processes (subject to confidentiality commitments);</li> <li>• Clear and transparent appeals process from decision-making;</li> <li>• Properly resourced;</li> <li>• Independent recruitment and appointment process;</li> <li>• Regular rotation of key personnel;</li> <li>• Annual reports to government on performance against targets, activities and financial situation.</li> </ul>
<p><b>(b) Accessible:</b> 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.</p>	<ul style="list-style-type: none"> <li>• Well-resourced outreach programmes with clearly specified goals and targets against which to measure performance;</li> <li>• “Road-shows” (i.e. travelling exhibitions to educate the public about the roles and responsibilities of State-based NJMs);</li> <li>• Regionalisation of services;</li> <li>• Multiple entry points for users (e.g. toll-free telephone, e-mail, in person, post);</li> <li>• Provision of designated complaints handlers;</li> <li>• Ensuring that literature relating to policies and processes is available in a range of different languages relevant to needs of groups for which they are intended;</li> <li>• Provision of translation resources or services at no charge or minimal cost;</li> <li>• Child-friendly facilities;</li> <li>• Special provisions for disabled users, witnesses, and visitors;</li> <li>• Provision of resources in different formats to ensure accessibility by people with disabilities (e.g. Braille, audio</li> </ul>

	<p>format, etc).</p> <ul style="list-style-type: none"> <li>• Making complaints handling and/or dispute resolution processes available at no cost (or nominal cost);</li> <li>• Where there are costs associated with use of mechanism, ensuring that there is financial assistance available for those who need it, and that the availability of such assistance is clearly and widely publicised.</li> </ul>
<p><b>(c) Predictable:</b> 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.</p>	<ul style="list-style-type: none"> <li>• Online (including video) and hard copy resources (in plain language) explaining processes and key stages (e.g. “what to expect” literature);</li> <li>• Publication of details of past decisions/determinations;</li> <li>• Publication of annual reports;</li> <li>• Well-publicised appeal processes.</li> </ul>
<p><b>(d) Equitable:</b> 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.</p>	<ul style="list-style-type: none"> <li>• Ensuring that staffing arrangements for mechanisms include staff highly familiar with the needs and cultural preferences of the different user groups for which they are intended;</li> <li>• Provision of a telephone helpline;</li> <li>• Provision of readily accessible online and paper resources to assist different user groups to engage with processes effectively;</li> <li>• Provision of readily accessible information on relevant community resources and other sources of expertise that could be approached for assistance by different user groups.</li> </ul>
<p><b>(e) Transparent:</b> 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.</p>	<ul style="list-style-type: none"> <li>• Putting in place procedural rules that ensure that each party is properly informed of the allegations made and information provided by the other side and that there is adequate opportunity to comment;</li> <li>• Publication of procedural rules;</li> <li>• Publication of enforcement and compliance procedure;</li> <li>• Publication of policies for engagement with different stakeholder and user groups;</li> <li>• Ensuring proper training for staff on how to implement procedural rules and policies correctly;</li> <li>• Online and hard copy resources (in plain language) explaining processes and key stages (e.g. “what to expect” literature);</li> <li>• Publication of outcomes of processes (subject to confidentiality commitments);</li> <li>• Clear and transparent appeals process from decision-making;</li> <li>• Annual reports to government on performance against targets, activities and financial situation.</li> </ul>



<p><b>(f) Rights-compatible:</b> ensuring that outcomes and remedies accord with internationally recognized human rights.</p>	<ul style="list-style-type: none"> <li>• Provision of human rights training and cultural awareness training for staff;</li> <li>• Thematic services (e.g. specially-designed services for particular groups);</li> <li>• Prioritisation of cases involving individuals or groups who appear to be particularly vulnerable in the circumstances or are deemed to be “at risk” of physical harm;</li> <li>• Ensuring proper training for staff on how to implement procedural rules and policies correctly;</li> <li>• Special arrangements for vulnerable users and/or witnesses (e.g. child witnesses).</li> </ul>
<p><b>(g) A source of continuous learning:</b> drawing on relevant measures to identify lessons for improving the mechanism and preventing future grievances and harms.</p>	<ul style="list-style-type: none"> <li>• Annual reports to government on performance against targets, activities and financial situation;</li> <li>• Contribution to public inquiries and legal development (e.g. through analysis and recommendations);</li> <li>• Fostering relations with representatives of civil society and interested stakeholders.</li> </ul>

## Next steps

The issues raised in this paper will be discussed in a dedicated panel session on State-based NJMs to take place during the 6<sup>th</sup> UN Forum on Business and Human Rights, 27-29 November 2017.

In light of the feedback to this discussion paper at the panel session at the UN Annual Forum, and also any submissions received in writing, OHCHR will prepare and publish a consultation draft of its report to the Human Rights Council **mid-January 2018**.

In keeping with the approach adopted in the OHCHR’s report to the Human Rights Council on the outcomes of the Accountability and Remedy Project with respect to judicial mechanisms,<sup>37</sup> it is envisaged at this stage that this report will include a set of suggested **policy objectives**, supplemented by a series of **elements** intended to demonstrate the different ways in which States can work towards meeting those objectives in practice.

Drawing from the research carried out thus far, and the comments of stakeholders, these policy objectives and elements are expected to cover the practical steps that all States could consider

- to improve their implementation of the effectiveness criteria for State-based NJMs, as set out in Guiding Principle 31 of the UNGPs;
- to improve, where relevant and appropriate, the effectiveness of State-based NJMs in cross-border cases;
- to ensure that State-based NJMs function as part of a “comprehensive State-based system for the remedy of business-related human rights abuse” (see Guiding Principle

<sup>37</sup> See n.1 above.

27), including elements relating to the interrelationships between State-based NJMs and judicial mechanisms, and between State-based NJMs and other regulatory bodies.

Comments will be sought from all interested stakeholders on the consultation draft until **the end of February** following which a final version of the draft report will be prepared for submission to the Human Rights Council and presented at its 38<sup>th</sup> session.

## Annex 1: Further details regarding the methodology for ARP II information gathering phase

### Part 1: Request for information and views from all UN Member States via *Note Verbale*

**Aim:** To provide States with the opportunity to comment and provide information directly on the use of State-based NJMs within their jurisdictions for the resolution of complaints and disputes arising from adverse human rights impacts connected with business activities.

**Questions:** States were invited via a *Note Verbale* issued on 17 February 2017 to respond to the following questions:

1. 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? Explanatory notes: (i) For the purposes of this call for input, State-based NJMs are State agencies, other than courts, which (a) handle complaints by individuals about business activities and/or (b) resolve disputes between individuals and business enterprises). (ii) Examples could include labour inspectorates, consumer dispute resolution bodies, environmental ombudsmen, equality bodies, NHRIs, and other specialist agencies.

2. 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?

3. 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?

4. 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?

5. 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?

**Responses:** 3 responses were received.

### Part 2: Data Mining Exercise

**Aim:** To gain a better understanding of the use of State-based NJMs in practice, focussing on four sectors identified as having a high risk of adverse human rights impacts; i.e. (i) extractives and mining, (ii) agribusiness, (iii) textiles and clothing manufacture and (iv) infrastructure and construction. To ascertain whether there are any discernible patterns (geographic or sectoral) of type of mechanisms, availability and use. To ascertain the extent to which complaints and disputes raise cross-border issues in practice.

**Method:** Reviewers examined cases reported to the Business and Human Rights Resources Centre website relevant to the above sectors from the beginning of 2014 to mid-2017 and answered questions with respect to each of those cases (to the extent that the relevant information was available) with regards to the rights affected; States and companies involved; whether this occurred in a conflict-affected area; which type of grievance mechanisms were used, if any; and what was the outcome of the process.

**Responses:** A total of 431 cases were reviewed using this method.

## Part 3: Information Gathering Process

### a. Open Process Survey

**Aim:** To give all stakeholder groups from any jurisdiction the opportunity to comment on the role and functioning of State-based NJMs relevant to business respect for human rights. This information-gathering exercise was aimed primarily at users of State-based NJMs to gain information about practical experiences and stakeholder views on effectiveness and possible improvements.

**Method:** Individuals and organisations were invited to answer a series of questions on State-based NJMs and to submit further information from practical experiences to the extent that they wished. The Business and Human Rights Resources Centre provided assistance with outreach. Information was gathered via a facility provided by Google Forms available in English, French and Spanish. Questions were asked with regards to the available NJMs in the jurisdiction at hand; the procedural stages involved in a dispute; the powers of the relevant mechanisms with regards to investigations and ordering disclosure of information; the possible remedies at the outcome of a process; cross-border mandate; user experience; and measures in place to ensure accessibility as well as protection for vulnerable groups and people at risk.

**Responses:** A total of 33 responses were received, covering 27 jurisdictions.

### b. Proactive Information-gathering

#### Directed Research Exercises

**Aim:** To gain a greater understanding of the nature and types of State-based NJMs relevant to business respect for human rights presently in use around the world. To gain a better understanding of the different kinds of models used, and the extent to which there may be regional or sectorial variations. To gain a better understanding of the extent to which these are presently addressing (and legally capable of addressing) cross-border regulatory and compliance issues. To identify practical examples of the different ways in which States can implement (and are already implementing) the “effectiveness criteria” set out in Guiding Principle 31 of the UNGPs.

**Method:** The information set out in Box 1 below is an extract from the instruction sheet sent to volunteers. Information was gathered via a facility provided by Google Forms.

**Box 1: Extract from instruction sheet sent to volunteers.**

**Step 1**

*Make a list of State-based non-judicial mechanisms in [name of State] that are potentially relevant to the resolution of complaints or disputes arising from adverse human rights impacts of business activities.*

**Notes:**

(i) For the purposes of this research project, 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.

(ii) State-based NJMs can be relevant to business respect for human rights even if their activities are not framed explicitly in human rights terms. For this research exercise we are interested in State-administered institutions or agencies that could potentially be helpful in resolving complaints or disputes 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

**Example:** This is a list of State-based NJMs that has been prepared for State X. As you can see, some potentially cover a wide range of sectors and impacts, and some are targeted at specific sectors and/or specific types of harm.

- Employment tribunals
- Health and Safety Authority
- Information Commissioner’s Office
- Gangmasters Licensing Authority
- Security Industry Authority
- NCP under the OECD Guidelines
- Parliamentary and Health Service Ombudsman
- Office of the Independent Anti-Slavery commissioner

**Step 2**

Complete and submit one of these specially prepared forms for each of the State-based non-judicial mechanisms that you have identified for [name of State].

A few lines of response to each of the questions (or as many of the questions as you can answer – in some cases the information will not be available) will be plenty.

**Questions:** For each of the State-based NJMs identified, volunteers were invited to answer questions with regards to the different NJM to the best of their knowledge. Each NJM was mapped separately. Questions related to the functions of the specific NJM; which types of rights-violations it would be most relevant to; whether it could handle disputes or complaints; the specific procedural stages of the NJM; power of the NJM to conduct its own investigation; cross-border mandate; types of remedies;

accountability mechanisms; and cooperation and sharing of information with other mechanisms within its jurisdiction.

**Responses:** A total of 212 State-based NJMs were reviewed using this method, covering 23 jurisdictions.

### **Supplementary work focussing specifically on (a) NHRIs and (b) NCPs**

**Aim:** To gather information directly from NHRIs and NCPs working in a smaller sample group of jurisdictions, in order to supplement the information gathered through the Directed Research Exercises.

**Method:** For **NHRIs**, OHCHR is grateful to the Danish Institute of Human Rights for its assistance in the development and administration of a survey of a sample of NHRIs relating to their roles with respect to complaints handling and dispute resolution in cases involving allegations of business involvement in human rights abuses. Researchers from the Danish Institute for Human Rights collected information from nine jurisdictions through both a series of telephone interviews and written responses to questions. This work was carried out between July and September 2017. The questions put to representatives of NHRIs in the course of this survey were broadly related to the types of business-related disputes or complaints the NHRI could receive or be involved in; the procedural stages for dispute resolution; if legal representation of complainant was required; powers of the NHRI to order discovery of facts and materials or to conduct proper investigations; the types of remedies offered; accountability mechanisms; sharing of information with other mechanisms in its jurisdiction; accessibility and protection measures; cross-border mandate; and functions with regards to advocacy and awareness raising.

**Responses:** A total of 16 responses were received to the NHRI survey.

For **NCPs**, OHCHR is grateful to staff of the OECD secretariat for their assistance with the development of a suitable set of survey questions, plus assistance with outreach to NCPs working in different jurisdictions. Information was collected via both telephone interview and written responses to questions (according to the preferences of individual respondents). The questions put to representatives of NCPs in the course of this survey were broadly with regards to procedural stages or receiving specific instances; how the NCP deals with cross-border cases or cases involving adverse human rights impacts in other states; information sharing and publicizing of processes and activities of the NCP; practical assistance provided to parties involved in a specific instance; and the consultation with other stakeholders during the process of a specific instance.

**Responses:** A total of 10 responses were received to the NCP survey.

### **c. A webinar to gather business views on the role and functioning of State-based non-judicial mechanisms**

**Aim:** To gather views and information directly from business enterprises on the role and functioning of State-based NJMs relevant to business respect for human rights. To supplement the information gathered through the Open Process about practical experiences and stakeholder views on effectiveness and possible improvements.

**Method:** The webinar was convened by the Global Business Initiative and Clifford Chance and took place on 12 September 2017.