**Call for inputs: Extractive sector, just transition and human rights**

**Working Group on Business and Human Rights**

**Deadline: 29 May 2023**

*Summary – Input provided by Pogust Goodhead in relation to questions 15, 17 and 18 relating to Access to Remedy.*

**Purpose:** Report to be presented to the 78th session of General Assembly in September 2023.[[1]](#footnote-2)

1. **What measures and mechanisms should be provided by extractive sector legislation, bilateral investment treaties, concessions, and contracts to allow individuals or communities affected by extractive activities to seek effective remedy for business-related human rights abuses? What remedies are best suited for this sector?**

In order to allow individuals and communities affected by extractive activities to seek effective remedy for business-related human rights abuses, effective dispute resolution mechanisms must be provided by extractive sector legislation, bilateral investment treaties, concessions and/or contracts. These mechanisms should address the current challenges faced by individuals and communities affected by extractive activities. These challenges include:

1. **Challenges in relation to access to remedy in litigation proceedings**

Pogust Goodhead represents hundreds of thousands of victims from the global south in civil proceedings brought against companies in the EU and the UK for human rights abuses and environmental harm in their global operations and value chains.

There are several barriers to justice that are currently preventing victims of business-related human rights abuses and environmental harm (particularly victims from the global south) from accessing judicial remedy in European courts. Some of the key obstacles faced by claimants when attempting to hold corporations to account in the courts of the company’s home country and access judicial remedy, include:

1. *Difficulties in establishing parent company liability*

In some legal systems, the parent company will not automatically be held liable for the actions or omissions of its subsidiary merely on the basis that it owns shares in the subsidiary. This can make it difficult to hold parent companies legally accountable for the human rights harms arising out of the activities of their subsidiaries. This difficulty is one of the main hurdles faced by claimants in cases involving business related human rights abuses.

However, even in cases where the applicable law clearly establishes join and several liability of parent companies for the environmental damage caused by their subsidiaries, parent companies operating in the extractive industries often put forward arguments denying any liability for the damages caused by their subsidiaries in the global south while simultaneously making claims and public statements in relation to the sustainability of their operations and their commitments in relation to the just transition.

1. *Barriers to collective representation*

Legal standing tends to be one of the issues discussed at the jurisdictional stage, particularly when the claimants are associations representing victims in foreign countries (usually the country where the damage occurred).

1. *Disproportionate burden of proof on the claimants*

Limited access to evidence, such as internal company documents, make it hard for claimants to substantiate their claim. Under some discovery rules, claimants can only ask for specific documents if they know exactly what they are looking for and how it may help their case.

1. *High legal costs*

Costs are a major barrier to bringing civil proceedings before EU courts, in particular, in transnational cases. The “loser pays” principle (where victims have to bear the opposing party’s costs if the defendant is found not liable) discourages victims from pursuing a lawsuit and restricts the possibility of appeal.

Rules on legal aid should take into account the very high costs that may be incurred in business and human rights transnational cases. Other measures that should also be explored include: (i) introducing a rapid claims mechanism; and (ii) facilitating third-party funding and legal expenses insurance for business and human rights transnational cases.[[2]](#footnote-3)

1. *Applicable law is foreign to the court*

Litigation proceedings regarding business-related human rights abuses and environmental harm often involve transnational facts. For example, Dutch multinational companies may cause damage in third countries where they conduct business activities. In such scenarios, the Dutch courts will apply the relevant foreign law rather than Dutch law (e.g., the law of the place where the damage occurred).​

Interpreting and applying the substantive law of a foreign jurisdiction generally constitutes a barrier to remedy, as courts have to interpret it based on information from experts, without having any previous background. This can be seen by some courts as a reason to consider that transnational litigations regarding business-related human rights abuses and environmental harm can be unmanageable and an abuse of process. However, as recognised by the Court of Appeal in the Mariana case, unmanageability could not in itself justify a finding of abuse of process.[[3]](#footnote-4)

1. *Denial of justice and inability to obtain full redress in local courts*

Significant barriers relating to effective access to justice often arise when victims of corporate human rights abuses bring proceedings in their local courts. Host States are frequently unwilling or unable to hold companies accountable for their human rights impacts due to lack of resources, lack of independence in the judiciary or for fear of losing foreign direct investment.

In these cases, the uncertainty as to which entities could properly bring proceedings and the fact that local proceedings could last for decades constitute a real risk that full redress could not be obtained. ​

1. *Difficulties in accessing home State courts*

Establishing jurisdiction in the parent company’s home State can prove difficult for claimants who are faced with multiple jurisdictional challenges.[[4]](#footnote-5) The doctrine of *forum non conveniens*, can prevent a case from moving forward in the parent company’s home State on the basis that another jurisdiction is the more appropriate forum for the case due to the location of the parties, witnesses, evidence, etc. and the fact that local courts are more familiar with the local law (which is often the law applied in the case).

Although the European Court of Justice (ECJ) has ruled out the applicability of the doctrine of *forum non conveniens* in claims against EU domiciled defendants brought before the courts of EU member states,[[5]](#footnote-6) the doctrine of *forum non conveniens* is still applicable in many common law countries such as Canada, the USA and Australia and more recently in cases involving UK domiciled defendants following Brexit.

Taking these challenges into consideration extractive sector legislation should provide for corporate due diligence rules that:

1. Require companies operating in the extractive sector to take adequate and effective measures to ensure respect for human rights and the environment in their value chains (not only supply chains).
2. Include parent company and value chain civil liability for human rights abuses and environmental damage.
3. Establish specific requirements for environmental protection, covering all potential or actual adverse impacts on the environment (i.e., air, soil and water pollution).
4. Provide for collective redress, as well as for representative actions by affected victims, civil society organisations and/or trade unions, in cases of corporate abuse.
5. Establish specific requirements to address negative impacts on indigenous peoples (e.g., regarding Free, Prior and Informed Consent granted by any affected indigenous peoples).
6. Establish specific requirements to conduct effective community engagement (e.g., meaningful and informed consultations with affected indigenous peoples and communities).
7. Establish specific requirements for climate action. It is essential that new extractive sector legislation provides express obligations for companies to reduce and account for their climate change impacts, including their own emissions and their indirect greenhouse gas emissions through their global value chains.
8. Provide specific criteria for corporate climate targets and ensure that companies set and pursue concrete goals to bring them in line with the 1.5-degree target scenario of the Paris Agreement.

 ​

1. *Restrictions to third-party funding, assignment of rights and contingent feee arrangements*

*Certain jurisdictions restrict or limit parties from seeking third-party litigation funding (e.g. France, Belgium) to cover the financial costs related to the litigation or prevent the law firms from charging contingent fees (e.g. Netherlands) from their clients. The unintended consequence of this mechanism is creating a new barrier to access justice. Consequently, it hampers the funding, development and management of human rights and environmental cases where the plaintiffs don't have the means to fund the case by themselves.*

*Third-party funding, assignment of rights and contingent fee arrangements can be a mechanism to overcome most of the barriers herein exposed, other than those that are institutional and legal. Considering the extraordinary costs of national and transnational litigation on business and human rights, particularly those involving intricate sectors as the extractive, limiting access to third-party litigation funding has the unintended consequence of blocking private redress, preventing the parties affected by the corporate wrongdoing and their lawyers to seek an investor to cover the legal costs and financial risks.*

*In this regard, we note the European Union's efforts to regulate litigation funding. Although well intended, the* [*Voss Report*](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32020D2130&from=FR)*, voted in favour by the European Parliament* [*last September*](https://www.europarl.europa.eu/doceo/document/TA-9-2022-0308_EN.html#title1) *to serve as guidance for developing common minimum standards at the Union level on commercial litigation funding, can unintentionally setback collective private redress for human rights abuses.*

*Remedies*

The remedies that are best suited for this sector would be those that would allow for Integral reparation (i.e. Fair and prompt compensation that takes into account pecuniary damage as well as moral damages and action plans to remedy environmental damage where applicable).

1. **Challenges in relation to access to remedy in arbitration proceedings**

When considering what measures and mechanisms should be provided by extractive sector contracts to allow individuals or communities affected by extractive activities to seek effective remedy for business-related human rights abuses, it is important to consider Investment Contracts (i.e., contracts between the State (or a State-owned entity) and the investor or investors, where an investment (often in the extractive sector) will take place in the Host State).

Investment Contracts, together with domestic law and any applicable Bilateral Investment Treaties, set out the rights and responsibilities of the State and the investor regarding the development, construction and operation of an investment project. Moreover, in an Investment Contract, the parties may effectively agree a large part of the legal framework that will govern the investment project in the Host State which means that the negotiations between the parties may directly influence the applicable legal framework for the project.

Investment Contracts tend to relate to investment projects of significant public importance in the extractive sector and in most cases include arbitration clauses that govern how the parties should resolve any disputes that may arise in relation to the contract. These contracts, however, do not tend to include dispute resolution mechanisms that would allow individuals or communities affected by the extractive project to seek effective remedy for business-related human rights abuses. Since the individuals or communities affected by the project are not part to the Investment Contract they cannot access effective remedy using the arbitration proceedings.

In order to address this challenge a measure that could be considered is the inclusion of a Human Rights undertaking by the Investor in Investment Contracts. This undertaking could include a provision recognising that human rights victims would be able to seek remedy for human rights violations either in the domestic courts or through arbitration (see answer to question 18 below).

1. **Are you aware of any cases submitted to judicial and/or non-judicial instances (e.g., national human rights institutions, national contact points, mediation, etc.) regarding business-related human rights abuses in the extractive sector, particularly in the context of energy transition projects?**

Pogust Goodhead represents hundreds of thousands of victims from the global south in civil proceedings brought against companies in the EU and the UK for human rights abuses and environmental harm in their global operations, including:

1. *Municipality of Mariana & Ors v BHP plc & BHP Ltd*

This litigation proceedings relate to the worst environmental disaster in Brazilian history when the Fundão Dam in South East Brazil collapsed on 5 November 2015, releasing around 40 million cubic metres of tailings from iron ore mining.[[6]](#footnote-7)

In this action, approximately 700,000 claimants seek compensation for losses caused by the disaster from the first respondent (now BHP Group (UK) Ltd), which is incorporated in England and Wales and from the second respondent which is incorporated in Australia. The claimants comprise individuals (including some members of the indigenous Krenak community who have particular community rights, and for whom the river plays a unique part in their spiritual traditions); businesses (ranging from large companies to sole traders); churches and faith based institutions; and municipalities.

In a judgment handed down on 12 May 2023, the High Court dismissed BHP’s request to delay the trial until 2025. A new trial date has been set for 7 October 2024, which is the first possible date after the two-month long summer recess. The trial is set to last 11 weeks.

1. *Maria R F da Silva & Ors v Braskem S.A. & Ors*

This litigation proceedings relate to damage arising from an environmental disaster caused by mining activities in Brazil. In 2018, cracks, sinkholes and earthquakes linked to rock-salt mining activities caused huge damage to streets, houses and buildings in several neighbourhoods in Maceió, the capital of the State of Alagoas in northeast Brazil.

A report by the Brazilian geological service released in May of 2019 blamed nearby salt mining by Braskem for damage to the structural integrity of property in Maceio. ​Affected victims started collective litigation against Braskem SA and Braskem NL entities.

On 21 September 2022, the Dutch courts issued a ruling rejecting all of Braskem’s arguments against jurisdiction in the Dutch Courts – and an application to appeal.[[7]](#footnote-8) The court held that: “*The Braskem group, and therewith Braskem SA as top-holding of the group, has chosen to locate the entities that take the financial decisions, and its European headquarters, in Rotterdam. Against this background, Braskem SA could reasonably foresee that, if not only these entities but also herself – as top-holding – were to be sued, this could happen before this Court.*”[[8]](#footnote-9)

1. *Cainquiama & Ors v Norsk Hydro Holland B.V & Ors*

This litigation proceedings relate to damage arising from environmental damage caused by aluminium production, e.g., forest degradation and water contamination, as well as detrimental effects upon the health of local communities – especially the *quilombola* traditional communities. The local communities of Barcarena and neighbouring populations were exposed to toxic residues from the processing of aluminium, which can cause various health problems, including cancer and skin diseases.

CAINQUIAMA (Associação dos Caboclos, Indígenas e Quilombolas da Amazônia) and Brazilian individuals filed a lawsuit in the Netherlands against Hydro’s Dutch entities and Norsk Hydro ASA (Hydro). Among the claimants are a significant number of Afro-Brazilian Quilombolas, descendants of African slaves brought to Brazil, who escaped plantations, towns, and cities, and established quilombo settlements. Many depend on the waterways of the Amazon and its tributaries, with 1,831 officially recognised quilombo settlements in the Amazon, and 528 of those in the state of Pará.[[9]](#footnote-10)

On 19 October 2022, the Rotterdam Court ruled that the case brought forward by Cainquiama and Brazilian individuals against Hydro’s Dutch entities and Norsk Hydro ASA can continue in the Netherlands.

1. **Are current dispute resolution provisions and frameworks in the extractive sector “fit for purpose” to address complaints related to human rights abuses linked to extractive activities and energy transition projects? If not, what are the alternatives for a legitimate, transparent, and effective dispute resolution system to address such complaints?**

Current dispute resolution provisions and frameworks in the extractive sector are not “fit for purpose” to address complaints related to human rights abuses linked to extractive activities and energy transition projects.

In relation to **litigations related to human rights abuses** **linked to extractive activities**, as explained above there are several barriers to justice that prevent victims of business-related human rights abuses and environmental harm (particularly victims from the global south) from accessing judicial remedy. These barriers include: (i) difficulties in establishing parent company liability; (ii) barriers to collective representation; (iii) disproportionate burden of proof on the claimants; (iv) high legal costs; (v) difficulties in cases where the applicable law is foreign to the court; (vi) denial of justice and inability to obtain full redress in local courts; and (vii) difficulties in accessing home State courts.

In order to provide an effective dispute resolution system to address claims related to human rights abuses linked to extractive activities it is necessary to identify and remove the obstacles to judicial remedy and enable private enforcement of corporate due diligence requirements. Other possible measures to consider include:

1. Proposing rules on legal aid that take into account the very high costs that may be incurred in business and human rights transnational cases.
2. Introducing a rapid claims mechanism for business and human rights transnational cases
3. Adopting measures to facilitate third-party funding and legal expenses insurance for business and human rights transnational cases.
4. Promoting legislation for collective redress and representative actions by affected victims, civil society organisations and/or trade unions, in in business and human rights transnational cases.

In relation to **arbitration proceedings related to human rights abuses linked to extractive activities** some measures that could address the challenges in relation to access to remedy in arbitration proceedings under Investment Contracts include: (i) incorporating environmental and sustainable development obligations in Investment Contracts; and (ii) using international arbitration to improve access to justice for local communities.

For example, Including Human Rights undertakings by the Investor in Investment Contracts could be a good way incorporating environmental and sustainable development obligations in Investment Contracts. This undertaking could include: (i) a commitment by the Investor not to challenge any regulation adopted by the Host State to protect human rights or the environmental; (ii) express acknowledgement that human rights and environmental standards are dynamic and are allowed to evolve; and (iii) a provision recognising that human rights victims would be able to seek remedy for human rights violations either in the domestic courts or through arbitration.

Regarding the use of international arbitration to improve access to justice for local communities it should be noted that arbitration could potentially serve as a legal mechanism for holding companies to account. An example of this were the Bangladesh Accord arbitrations started by trade unions against two global fashion brands.

For example, if a local group or population is directly impacted by a project in an environmentally protected area, which is likely to have a negative impact on their livelihoods and on their access to natural resources, arbitration could offer them access to justice in two scenarios:

* + 1. In an *ex-ante* scenario, an arbitration clause could be included in license agreements or environmental permits. This clause would allow local authorities to trigger arbitration proceedings in cases where companies do not comply with the terms of the license or permit.
		2. In an *ex-post* scenario, where all participating parties in a dispute validly consent to be bound, a submission agreement could be used to prevent multiple, multi-jurisdictional, court proceedings with inconsistent outcomes and provide certainty, enforceability and finality within a more attractive time frame than might be available through the courts.

Using arbitration to resolve environmental and human rights disputes can significantly reduce the impediments that victims of human rights violations often face in litigation proceedings (e.g., jurisdictional issues and access to full redress).

Notably, there are arbitration rules specifically tailored to the resolution of business and human rights disputes (i.e., The Hague Rules on Business and Human Rights Arbitration (the “**Rules on BHR Arbitration**”)). For example, Article 19 of the Rules on BHR Arbitration allows parties to consolidate claims and join mass claims of human rights violations.[[10]](#footnote-11)

In addition, the Annex to the Rules on BHR Arbitration provides examples of arbitral clauses than can be used in a variety of contexts, involving different combinations of parties, subject matters, agreements and other instruments (e.g., Model clauses for pre-dispute submission to arbitration; Model submission agreement for existing disputes; and Model clause to grant third party arbitration rights).[[11]](#footnote-12)

1. See <https://www.ohchr.org/en/calls-for-input/2023/call-inputs-extractive-sector-just-transition-and-human-rights>. [↑](#footnote-ref-2)
2. In relation to the need for States to give effect to equality of arms within the meaning of Article 6 of the ECHR see EU Fundamental Rights Agency, Business and human rights – access to remedy, October 2020. Opinion 5. Available at <https://fra.europa.eu/en/publication/2020/business-human-rights-remedies#TabPubFRAopinions2> . [↑](#footnote-ref-3)
3. *Municipality of Mariana & Ors v BHP plc & BHP Ltd* [2022] EWCA Civ 951, paras 184-188. [↑](#footnote-ref-4)
4. *Municipality of Mariana & Ors v BHP plc & BHP Ltd* [2022] EWCA Civ 951. [↑](#footnote-ref-5)
5. *Owusu v Jackson and Others*, C-281/02 [2005] ECR I-1383. [↑](#footnote-ref-6)
6. *Municipality of Mariana & Ors v BHP plc & BHP Ltd* [2022] EWCA Civ 951, at para. 1: “*The collapse and flood killed 19 people, destroyed entire villages, and had a widespread impact on numerous individuals and communities, not just locally but as a result of the damage to the River Doce system over its entire course to the sea some 400 miles away. The Brazilian public prosecutor has estimated the cost of remediation and compensation at a minimum of R$155 billion, about £25 billion at today’s exchange rates.”* [↑](#footnote-ref-7)
7. In the judgment the Court stated: “*The claims against both Braskem SA and the Braskem NL entities have a delictual basis. In the main proceedings, in addition to Braskem SA, the Braskem NL entities, as part of the Braskem group, were held jointly and severally liable for the (same) damaging consequences of the earthquakes (as a result of mining activities) on the basis of the environmental liability law in general and the doctrine of indirect polluter’s liability in particular, according to plaintiffs in Brazil. In this sense, the claims against the Braskem NL entities on the one hand and Braskem SA on the other are inextricably linked.*” [↑](#footnote-ref-8)
8. See [Victims of Brazil’s ‘sinking city’ receive positive news to have case heard in the Netherlands](https://pogustgoodhead.com/victims-of-brazils-sinking-city-receive-positive-news-to-have-case-heard-in-the-netherlands/). [↑](#footnote-ref-9)
9. See [Barcarena and Abaetetuba toxic waste pollution](https://pogustgoodhead.com/barcarena-and-abaetetuba-toxic-waste-pollution/). [↑](#footnote-ref-10)
10. Article 19 of the Rules on BHR Arbitration: 1. In so far as possible, claims with significant common legal and factual issues shall be heard together. The arbitral tribunal may adopt special procedures appropriate to the number, character, amount and subject matter of the particular claims under consideration. 2. The arbitral tribunal may allow one or more third persons to join in the arbitration as a party provided such person is a party to or a third party beneficiary of the underlying legal instrument that includes the relevant arbitration agreement, unless, after giving all parties and the person or persons to be joined the opportunity to be heard, the arbitral tribunal finds that joinder should not be permitted. Third persons so joined shall become parties to the arbitration agreement for the purposes of the arbitration. The arbitral tribunal may make a single award or several awards in respect of all parties so involved in the arbitration. 3. Notwithstanding paragraph 2, where a third person is a party to or a relevant third party beneficiary of the arbitration agreement, the arbitral tribunal shall not deny the joinder solely on the basis that such joinder might prejudice other parties. (see <https://www.cilc.nl/cms/wp-content/uploads/2019/12/The-Hague-Rules-on-Business-and-Human-Rights-Arbitration_CILC-digital-version.pdf>) [↑](#footnote-ref-11)
11. See Annex - Model Clauses at p. 101 (<https://www.cilc.nl/cms/wp-content/uploads/2019/12/The-Hague-Rules-on-Business-and-Human-Rights-Arbitration_CILC-digital-version.pdf>) [↑](#footnote-ref-12)