



# Beyond Effectiveness Criteria

The Possibilities and Limits of Transnational  
Non-Judicial Redress Mechanisms

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## About this report series

This report is part of a series produced by the Non-Judicial Human Rights Redress Mechanisms Project, which draws on the findings of five years of research. The findings are based on over 587 interviews, with 1,100 individuals, across the countries and case studies covered by the research. Non-judicial redress mechanisms are mandated to receive complaints and mediate grievances, but are not empowered to produce legally binding adjudications. The focus of the project is on analysing the effectiveness of these mechanisms in responding to alleged human rights violations associated with transnational business activity. The series presents lessons and recommendations regarding ways that:

- non-judicial mechanisms can provide redress and justice to vulnerable communities and workers
- non-government organisations and worker representatives can more effectively utilise the mechanisms to provide support for and represent vulnerable communities and workers
- redress mechanisms can contribute to long-term and sustainable respect and remedy of human rights by businesses throughout their operations, supply chains and other business relationships.

The Non-Judicial Human Rights Redress Mechanisms Project is an academic research collaboration between the University of Melbourne, Monash University, the University of Newcastle, RMIT University, Deakin University and the University of Essex. The project was funded by the Australian Research Council with support provided by a number of non-government organisations, including CORE Coalition UK, HomeWorkers Worldwide, Oxfam Australia and ActionAid Australia. Principal researchers on the team include Dr Samantha Balaton-Chrimes, Dr Tim Connor, Dr Annie Delaney, Prof Fiona Haines, Dr Kate Macdonald, Dr Shelley Marshall, May Miller-Dawkins and Sarah Rennie. The project was coordinated by Dr Kate Macdonald and Dr Shelley Marshall. The reports represent independent scholarly contributions to the relevant debates. The views expressed are those of the authors and not necessarily those of the organisations that provided support.

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## Acronyms

CAO	Compliance Advisor Ombudsman of the International Finance Corporation
CCC	Clean Clothes Campaign
ETI	Ethical Trading Initiative
FoA Protocol	Freedom of Association Protocol, based in Indonesia
HCV	High conservation value
IFC	International Finance Corporation, a part of the World Bank Group
IGO	Inter-governmental organisation
MIGA	Multilateral Investment Guarantee Agency, a part of the World Bank Group
MSI	Multi-stakeholder initiative
NAP	National Action Plan, a plan developed by countries in response to the UN Guiding Principles on Business and Human Rights
NCP	National Contact Point
NGO	non-governmental organization
NHRC	India's National Human Rights Commission
NHRI	National human rights institution
NJM	Non-judicial mechanism
NYU	New York University
OECD	Organisation for Economic Cooperation and Development
REDD+	Reducing emissions from deforestation and forest degradation
RSPO	Roundtable on Sustainable Palm Oil
TNC	Transnational corporations
UK	United Kingdom
UNGP	United Nations Guiding Principles on Business and Human Rights
US	United States

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## Executive Summary

Indigenous land is taken for a mine without consent. Young women work in forced labour conditions in textile mills. Stone quarry workers suffer silicosis, poor conditions and meagre wages. Communities are displaced from their land for the construction of a nickel mine without adequate compensation or shared benefits. Workers face punitive actions for trying to unionise to address unliveable wages and precarious contracts. Workers and communities facing these abuses and violations in parts of India and Indonesia have sought justice and remedy in a variety of ways: blockades, campaigning with the support of international organisations, negotiating with companies, lobbying politicians, using local courts, and taking complaints to transnational non-judicial redress mechanisms.

This report shares insights and findings from a five year research project into the effectiveness of transnational non-judicial redress mechanisms, a growing class of complaints mechanisms based in home country governments, international financial institutions, and multi-stakeholder initiatives that seek to increase access to remedy for victims of business related human rights abuses. These mechanisms are mandated to receive complaints and resolve disputes, but are not empowered to produce binding adjudications. They therefore go beyond corporate self-regulation but stop short of legal regulation.

This research uses a comparative case driven approach to reveal the operation of such mechanisms both in practice and in political context. It focuses on ten cases as affected people and their partners and allies are engaged with a range of strategies and institutions to stop a project, achieve freedom of association and greater wages, or change the terms of a project. The case studies come from agribusiness, garment manufacturing, mining and industrial projects in India and Indonesia where transnational corporations were involved as proponents, investors and brands. The mechanisms include the OECD National Contact Points, the Compliance Advisor Ombudsman for the International Finance Corporation and Multilateral Investment Guarantee Agency of the World Bank Group, National Human Rights Institutions, and multi-stakeholder initiatives such as the Freedom of Association Protocol, the Roundtable on Sustainable Palm Oil and the Ethical Trading Initiative.

As the global debate on business and human rights considers how to improve business respect for human rights, and ensure access to remedy for business related human rights violations – whether this be through the implementation of the United Nations Guiding Principles and/or through negotiation of a binding legal instrument – this research contributes insights about the kinds of effects non-judicial mechanisms produce, under what conditions, and how they contribute to broader systems of redress.

### **What kinds of effects do transnational non-judicial redress mechanisms produce?**

Non-judicial redress mechanisms have an explicit purpose of providing access to a remedy. Individual remedy is understood as redress to specific individuals in a particular case in response to a human rights abuse. The right to an effective remedy in international law combines procedural and substantive elements which include the ‘practical and meaningful access to a proce-

dure that is capable of ending and repairing the effects of the violation’ and ‘where a violation is established, the individual must actually receive the relief needed to repair the harm’ in a timely and affordable way.<sup>1</sup>

Across ten cases we examined, the non-judicial redress mechanisms fell short of delivering an individual remedy both procedurally and substantively. However, in five cases we documented some form of positive result from the perspective of claimants seeking a remedy. National and transnational non-judicial grievance mechanisms can sometimes contribute to problem-solving, and provide access to compensation or a venue in which to mediate a settlement. In our cases, the result of mediation or other non-judicial process largely did not align with the remedy desired by the complainants, or meet the standard of ‘relief needed to repair the harm.’<sup>2</sup>

Beyond individual remedy, the relationships built, evidence gained, and the public exposure of potential human rights violations in a non-judicial redress mechanism process can contribute to other kinds of effects. These effects can be both positive and negative and include building power in communities or worker’s groups, influencing other decision-makers or changing policy, drawing public attention to a problem, and shifting power dynamics between companies, communities and workers.

### Under what conditions are transnational non-judicial redress mechanisms most effective?

There are a range of factors that enable or constrain non-judicial mechanisms in delivering a remedy, or producing systemic change in particular sectors and contexts. The United Nations Guiding Principles on Business and Human Rights articulated one set of ‘effectiveness criteria’ for non-judicial mechanisms. Such mechanisms should be legitimate, accessible, predictable, equitable, transparent, rights-compatible and a source of continuous learning.<sup>3</sup> While not undermining the importance of these factors, this research finds that it is possible to fulfil the UNGP effectiveness criteria in a formal way, yet still fall very short of delivering effective redress or remedy for human rights violations committed in the context of business activities. We identify six critical additional factors that contribute to enhancing the effectiveness of non-judicial redress mechanisms, which include:

- Leverage of the NJM: strong bases and mechanisms for generating change in behaviour in targets;
- Strategic relationship management: skilled staff who are able to broker, maintain and manage a wide set of relationships with political nous skills and sensitivity;

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<sup>1</sup> See, *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 2(3); *UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, UN Doc A/RES/60/147 (21 March 2006) Principles 2(b), 3(c)–(d), 11(a)–(b), 12, 15–23; Committee on Economic, Social and Cultural Rights, *General Comment 9: The Domestic Application of the Covenant*, UN Doc E/C.12/1998/24 (3 December 1998) para 9.

<sup>2</sup> Amnesty International, *Injustice Incorporated: Corporate Abuses and the Human Right to Remedy* (Report, 7 March 2014) 19.

<sup>3</sup> United Nations Office of the High Commissioner for Human Rights (OHCHR), *Guiding Principles on Business and Human Rights* (Report, 2011), guiding principle 31.





Cover: A member of the Dongria tribe, a threatened community in Eastern India.

Source: *Survival International*

- Approaches to redressing power imbalance: an ability to balance where impartiality is required, and where the purpose of the mechanism requires specific efforts to redress existing power imbalances;
- Processes for gathering and verifying evidence: clear approaches to generating or using evidence to inform actions and determinations;
- Resourcing: commitment, skilled staffing, financial and other resourcing is a necessary but not a sufficient condition for effectiveness; and
- Local level engagement: effective non-judicial mechanisms operate effectively between and across local, national and global levels, including with the help of trusted intermediaries.

These factors point to the fact that the effectiveness of a transnational NJM is not myopically reliant on its own institutional design or procedural rules. Rather, it is also the result of its interaction within a broader system which affects its ability to generate leverage, manage relationships at different levels, engender commitments and resourcing. This interaction also affects the NJM's ability to navigate complex power imbalances in a way that serves its purpose of providing access to remedy.

While there are issues of procedural fairness, transparency and consistency that the mechanisms we studied could improve, their ultimate effectiveness in delivering a remedy and influencing the human rights practices of businesses depends upon other kinds of conditions that are harder to resolve. Such conditions concern the commitment, skills, relationships, and leverage of all

parties and stakeholders involved. The same is true of the ability of these mechanisms in influencing the state-based regulatory environment for businesses to respect human rights.

### **What is the role of transnational non-judicial redress mechanisms within the context of broader systems of justice or remedy?**

The guiding principles describe a system of remedy in which non-judicial and judicial channels form part of a coherent hierarchy. This involves firstly taking your case to a company complaints mechanism, and should that not be successful, escalating it to an NJM, and then lastly using the legal system. Our cases clearly reflect that this ‘system of remedy’ does not exist or operate in this form. Instead, people find an opening where they can pursue some form of justice, and these forms are not in a hierarchy similar to that of a national judicial system with an apex. Rather, these avenues are inter-related in a variety of ways, which we explore further below. Our research indicates that NJMs do not (and cannot) operate as effective substitutes for state-based judicial systems, but we find that they can complement such systems in specific ways.

The driving focus of this research, and the broader business and human rights debate on access to remedy is identifying and creating the conditions and mechanisms that are needed for communities to achieve justice or receive remedies for business-related human rights violations. Alongside addressing limitations inherent in the formal design of mechanisms, the more difficult political and relational aspects of how they fit into a system of regulation or remedy require attention by all actors. This research suggests NJMs can provide an important avenue for redress. However, in practice, even in its most robust form non-judicial mechanisms are likely to form only one small aspect of what is needed in terms of providing an effective remedy and redress to victims of business related human rights violations.



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## Introduction

Around the world peoples' lives are affected by the actions of businesses, and to an ever increasing extent by the financing, sourcing, and operations of transnational businesses. The private sector contributes livelihoods, ideas, technologies and products to peoples' lives. However, businesses also engage in significant human rights violations through their activities. Violations include the dispossession and forced resettlement of individuals, the exploitation of workers, environmental damage and harm to peoples' health. Those who suffer business-related human rights violations are frequently already marginalised socially, economically and/or politically.

The focus of this research project is on the ability of these individuals and groups to seek a remedy for the human rights abuses committed or contributed to by businesses using a growing class of non-judicial redress mechanisms. These mechanisms are mandated to receive complaints and resolve disputes, but are not empowered to produce binding adjudications. They therefore go beyond corporate self-regulation but stop short of legal regulation. A subset of these mechanisms operate transnationally through engaging with companies operating out of their home country that may be receiving international development finance, or who are members of a transnational multi-stakeholder initiative through which they voluntarily agree to meet certain standards.

The research on which this report is based paints a rich picture of the complexity, difficulty, and, at times, limited success, of communities and workers seeking remedy or justice. We studied the communities and workers in Indonesia and India, in agribusiness (tea and palm oil), industrial projects (steel, mining, stone quarries), and garment manufacturing (homebased workers and factory workers) who experienced human rights violations with the involvement of transnational corporations as proponents, investors, brands. In the ten cases studied, workers and communities sought justice using a variety of strategies including long term community organising, blockades and protests, transnational campaigning, court cases, negotiation, and making complaints to NJMs at the national and transnational level.

Non-judicial mechanisms include those that are established by states but do not exercise judicial power. Notably, these include the OECD National Contact Points established in countries such as the United States of America, the United Kingdom, the Netherlands, Australia and France; and National Human Rights Institutions in host countries for investment. Other examples exercising a kind of international public power are accountability mechanisms of international financial institutions such as the Compliance Advisor Ombudsman for the World Bank IFC/MIGA. Lastly, there are a group of transnational redress mechanisms that were established through voluntary multi-stakeholder initiatives (for example, Freedom of Association Protocol, Ethical Trading Initiative, Roundtable on Sustainable Palm Oil). The past 15 years has seen significant research on the rise of these mechanisms with a focus on the politics of their formation, standard setting and operation, and on their institutional structures and processes. The current studies on these mechanisms are now turning to examine how they operate in practice, and whether or not they deliver remedy and other impacts.<sup>4</sup>

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<sup>4</sup> See recent examinations: OECD Watch, *Remedy Remains Rare: An analysis of 15 years of NCP cases and their contribution to improve access to remedy for victims of corporate misconduct* (Report, June 2015) <[http://www.oecdwatch.org/publications-en/Publication\\_4201](http://www.oecdwatch.org/publications-en/Publication_4201)> =; Holly C. Jonas, *A Review of the Complaints System*

A focus on how people can find redress for business-related human rights abuses has been amplified by the third pillar of the *United Nations Guiding Principles on Business and Human Rights*, with its focus on access to remedy. The principles promote the role of a range of mechanisms in ensuring remedy is attained. This ranges from company based or operational grievance mechanisms, to state responsibility to ensure adequate access to judicial processes. This project makes a significant contribution to understanding how communities and workers currently attempt to access remedy, and the challenges of achieving redress. As the debate develops on the creation of a new binding international treaty on business and human rights, this project sheds light on the interplay between hard and soft law, judicial and non-judicial processes, and the conditions under which communities are able to access justice. We believe this is a crucial perspective in a debate that often paints hard and soft law, judicial and non-judicial mechanisms as dichotomous or polarized approaches.

This report summarizes the key findings of over five years of in-depth, empirical, case study driven research in India, Indonesia and other locations of transnational business activity linked to these sites. This research project is funded by the Australian Research Council under a Linkage Project Grant. The report responds to critical questions for anyone concerned with access to remedy for business related human rights abuses such as:

- What kinds of effects do transnational non-judicial redress mechanisms produce?
- Under what conditions are transnational non-judicial redress mechanisms most effective?
- What is the role of transnational non-judicial redress mechanisms within the context of broader systems of justice or remedy?

## The emergence of corporate accountability and the development of non-judicial mechanisms

Transnational corporations (TNCs) now operate through complex value chains that stretch across countries and can involve multiple subsidiaries, sub-contractors, and intermediaries. Their impact on the environment, labour rights, land rights and other social issues is significant. The operations of any one TNC may be subject to multiple jurisdictions, yet simultaneously remain outside the reach of any one national regulator.<sup>5</sup> In many developing countries, regulation remains inadequate to respond to the impacts of TNC activity.<sup>6</sup> Jennifer Zerk's recent study of domestic law remedies for victims of business related human rights abuses in many countries around the world found that they remain 'patchy, unpredictable, often ineffective and fragile.'<sup>7</sup> Until recently, 'home state' legislators and judges have also been averse to applying laws or standards extra-territorially, al-

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of the Roundtable on Sustainable Palm Oil: Final Report (Report, 2014);

<sup>5</sup> Kenneth W. Abbott and Duncan Snidal, 'Taking responsive regulation transnational: Strategies for international organizations' (2013) 7 *Regulation and Governance* 95, 96.

<sup>6</sup> David Graham and Ngaire Woods, 'Making Corporate Self-Regulation Effective in Developing Countries', (2006) 34 *World Development* 868, 869.

<sup>7</sup> Jennifer Zerk, 'Corporate liability for gross human rights abuses: towards a fairer and more effective system of domestic law remedies' (Report prepared for OHCHR, 2013) 7 <<http://www.ohchr.org/EN/Issues/Business/Pages/OHCHRstudyondomesticlawremedies.aspx>>.

though there are signs this may be changing.<sup>8</sup> The mismatch between corporate impacts and their regulation has fuelled the progressive development of a debate on the scope and extent of corporate responsibility, and accountability for human rights and the environment. This has been accompanied by the development of forms of grievance or redress mechanisms by businesses, multi-stakeholder initiatives, governments, and international financial institutions to allow affected peoples to seek remedy in ways other than formal justice systems.

Civil society campaigning and advocacy in the 1970s and 1980s onwards drove heightened attention to the impact of corporate actions and abuses. These campaigns contributed to changes in norms and institutional innovations to increase accountability. Transnational organising and collaboration between local and international NGOs was made possible by new information technologies and the increasing globalisation of social action.<sup>9</sup> Civil society increasingly and effectively used market-based campaigns to target high profile brands or investors.<sup>10</sup> The unwanted attention, drops in shareholder value, loss of customers, and increasing safeguards for financing large-scale projects helped build a business case across diverse sectors for increased attention to sustainability and human rights. As the impacts of controversial projects gained visibility, campaigning also targeted multilateral development institutions such as the World Bank Group.<sup>11</sup> Growing pressure and uptake of the agenda by the US government led to the establishment of the World Bank's Inspection Panel in 1993, which had a mandate to enable people affected by World Bank funded projects to register a grievance, and trigger an investigation into the World Bank's adherence to its own social and environmental safeguards. The innovation to have an accountability mechanism attached to an international financial institution was adopted by other development finance institutions and other parts of the World Bank Group. The Asian Development Bank established the Office of the Special Projects Facilitator and the World Bank Group created the Compliance Advisor Ombudsman of the International Finance Corporation.<sup>12</sup>

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<sup>8</sup> See, Horatia Muir Watt, 'Private International Law Beyond the Schism', (2011) 2 *Transnational Legal Theory* 43. Examples of extra-territoriality include: 'requirements on "parent" companies to report on the global operations of the entire enterprise; multilateral soft-law instruments such as the Guidelines for Multinational Enterprises of the Organization for Economic Co-operation and Development; and performance standards required by institutions that support overseas investments. Other approaches amount to direct extraterritorial legislation and enforcement. This includes criminal regimes that allow for prosecutions based on the nationality of the perpetrator no matter where the offence occurs.' The Guiding Principles on Business and Human Rights make the case for states to set the expectation that 'all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations' for good policy reasons, noting that while it is not required by international law, it is also not prohibited. See, Human Rights Council, *Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie - Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, Advance Edited Version, UN Doc A/HRC/17/31, 17<sup>th</sup> sess (21 March 2011) section I.A.2.*

<sup>9</sup> Ryo Fujikura and Mikiyasu Nakayama, 'Lessons from the World Commission on Dams', (2009) 9 *International Environmental Agreements* 173, 174.; Deborah D. Avant, Martha Finnemore and Susan K. Sell, 'Who Governs the Globe?' in Deborah D. Avant, Martha Finnemore and Susan K. Sell (eds), *Who Governs the Globe?* (Cambridge University Press, 2010) 1, 4.

<sup>10</sup> Michael E. Conroy, *Branded! How the 'certification revolution' is transforming global corporations* (New Society Publishers, 2007) 9-10.

<sup>11</sup> See: Robert O'Brien, Anne Marie Goetz, Jan Aart Scholte, Marc Williams, (2000) *Contesting global governance: Multilateral economic institutions and global social movements* Cambridge: Cambridge University Press; Miles Kahler, (2004) 'Defining accountability up: The global economic multilaterals', *Government and Opposition*, 39 (2), pp.132-158; and Jonathan Fox, (2003). 'Introduction: Framing the Inspection Panel', in Dana Clark, Jonathan Fox, and Kay Treakle, *Demanding Accountability: Civil Society Claims and the World Bank Inspection Panel*. Oxford: Rowman & Littlefield.

<sup>12</sup> Jonathan Fox, (2003). 'Introduction: Framing the Inspection Panel', in Dana Clark, Jonathan Fox, and Kay Treakle, *Demanding Accountability: Civil Society Claims and the World Bank Inspection Panel*. Oxford: Rowman & Littlefield

New attempts to set global standards for and with business first took place within inter-governmental organisations (IGOs), namely the United Nations and the Organisation for Economic Cooperation and Development.<sup>13</sup> The OECD's *Guidelines for Multinational Enterprises* provided one of the first avenues for transnational remedy based in a home country for investment. National Contact Points were to be set up by governments of OECD member states to allow for complaints based on the business activities of companies registered in their state. Increasingly, private sector and civil society actors – often with some engagement with government, academics, IGOs and epistemic communities – have established initiatives collaboratively. Commentators have argued that productive collaborations could emerge even where NGOs and businesses began with goals that could appear to be in tension with one another. For example, Abbott and Snidal argued that 'a firm that prefers self-regulation and an NGO that favours higher standards may find it preferable to work together on a joint standard that will be more effectively implemented than an NGO scheme and more legitimate than a pure self-regulatory code'.<sup>14</sup> The resulting private-hybrid schemes moved beyond corporate self-regulation to include other actors in their formulation, governance and implementation.<sup>15</sup> Increasingly multi-stakeholder initiatives incorporated approaches to dealing with grievances, either regarding business practice or about the scheme itself, into their own schemes.

The progressive development of private-hybrid forms of global governance, and new forms of NJMs tracks shifts in beliefs about how to improve the social and environmental performance of transnational corporations, and beliefs about the extent of their own and their respective financiers' responsibility or accountability. The *UN Guiding Principles* now state that the scope of a company's responsibility is framed not only directly but also indirectly. Specifically, the *UN Guiding Principles* state that responsibility 'is defined by the actual and potential human rights impacts generated through a company's own business activities and through its relationships with other parties'.<sup>16</sup> This is a major advance from the traditional view that only nation-states have human rights obligations, and that fulfilling them entails domestic regulation that may target private actors.<sup>17</sup> The third pillar of the *UN Guiding Principles* focuses on access to remedy for people affected by business-related human rights abuses. This focus builds on the progressive development of new forms of accountability, grievance and redress mechanisms over the pro-

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<sup>13</sup> Luc W. Fransen and Ans Kolk, 'Global Rule-Setting for Business: A Critical Analysis of Multi-Stakeholder Standards' (2007) 14 *Organization* 667, 668; Kenneth W. Abbott and Duncan Snidal, 'Taking responsive regulation transnational: Strategies for international organizations' (2013) 7 *REGULATION & GOVERNANCE* 95, 99.

<sup>14</sup> Kenneth W. Abbott and Duncan Snidal, 'The Governance Triangle: Regulatory Standards, Institutions and the Shadow of the State' in Walter Mattli and Ngaire Woods (eds), *The Politics of Global Regulation* (Princeton University Press, 2009) 44, 80. See also, Virginia Haufler, 'Corporations in zones of conflict: issues, actors, and institutions', in Deborah D. Avant, Martha Finnemore and Susan K. Sell (eds) *Who Governs the Globe?* (Cambridge University Press, 2010) 102.

<sup>15</sup> Errol Meidinger, 'Multi-Interest Self-Governance through Global Product Certification Programmes', in Olan Dilling, Martin Herberg and Gerd Winter (eds), *Responsible Business: Self-Governance and Law in Transnational Economic Transactions* (Hart Publishing, 2008) 259–260; Colin Scott, Fabrizio Cafaggi & Linda Senden, 'The Conceptual and Constitutional Challenge of Transnational Private Regulation' (2011) 38 *Journal of Law and Society* 1, 11; David Vogel, 'The Private Regulation of Global Corporate Conduct', in Walter Mattli and Ngaire Woods (eds), *The Politics of Global Regulation* (Princeton University Press, 2009) 151, 153, 156–7.

<sup>16</sup> Human Rights Council, *Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie - Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, UN Doc A/HRC/17/31, 17<sup>th</sup> sess (21 March 2011)[57-8]

<sup>17</sup> Benedict Kingsbury, Nico Krisch & Richard B. Stewart, 'The Emergence of Global Administrative Law' (2005) 68 *Law and Contemporary Problems* 15, 23-4; Daniel D. Bradlow, 'The World Commission on Dam's Contribution to the Broader Debate on Development Decision-Making' (2001) 16(6) *Amsterdam University International Law Review* 1531.



ceeding decades (detailed above). This project responds to interest in the questions of how non-judicial redress mechanisms contribute to access to remedy in practice, including under which conditions they are most effective.

For many, the *UN Guiding Principles* still fail to sufficiently establish an enforceable global standard for corporate responsibility, and debate has returned to the potential for negotiation of a legally binding treaty at the Human Rights Council.<sup>18</sup> In 2014, the UN Human Rights Council passed two resolutions<sup>19</sup> that signal different approaches to advancing business respect for human rights. One reaffirms the *UN Guiding Principles* and calls on States to develop National Action Plans to fulfill them. The other resolution was to establish an inter-governmental process on the human rights obligations of transnational corporations, including the potential for a legally enforceable right to remedy.

These two resolutions reflect broader divergence within those engaged in debates on how to improve state protection and business respect for human rights, as well as how to ensure access to remedy. OECD Watch considers ‘the widespread support for a binding treaty...[as] evidence that the current system is not working.’<sup>20</sup> John Ruggie has raised questions about the form the legislation should take at the international level, while noting that further legalisation is both inevitable and necessary.<sup>21</sup> Ruggie rehearses the history of failed negotiations on a binding treaty, and notes that the current votes reflect a sharply divided Human Rights Council.<sup>22</sup> Even if a treaty does emerge, negotiations will likely take at least a decade during which progress to improve business practice and access to a remedy must continue. Claire Methven O’Brien and her co-authors point out that while ‘views remain sharply divided on the merits and even legal viability of [a treaty], scarcely any voice has been raised to suggest that the UNGPs should be abandoned entirely.’<sup>23</sup>

This research project responds directly to a paucity of in-depth examinations of the effects of different forms of non-judicial grievance mechanisms in delivering an individual remedy and systemic change in business practices. By examining cases across sectors and contexts, this research provides significant insight into the factors that condition the effects of NJMs. It goes beyond an analysis of the formal rules and structures to look at the complex reality of NJMs’ operations over the course of individuals or communities seeking access to a remedy through

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<sup>18</sup> See discussion of arguments for the juridification of corporate responsibilities in Kate Macdonald, ‘Global democracy for a partially joined-up world: Toward a multi-level system of public power and democratic governance?’, in Daniele Archibugi, Mathias Koenig-Archibugi and Raffaele Marchetti (eds) *Global Democracy: Normative and Empirical Perspectives* (Cambridge University Press, 2011) 183, 202, and discussion of critiques of the Guiding Principles in Robert C. Blitt, ‘Beyond Ruggie’s Guiding Principles on Business and Human Rights: Charting an Embrasive Approach to Corporate Human Rights Compliance’, (2012) 48(1) *Texas International Law Journal* 33, 52-6.

<sup>19</sup> Human Rights Council, *Resolution adopted by the Human Rights Council: 26/22 Human rights and transnational corporations and other business Enterprises*, 26<sup>th</sup> sess, UN Doc A/HRC/RES/26/22 (15 July 2014); and Human Rights Council, *Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights*, 26<sup>th</sup> sess UN Doc A/HRC/26/L.22/Rev.1.

<sup>20</sup> OECD Watch, *Remedy Remains Rare: An analysis of 15 years of NCP cases and their contribution to improve access to remedy for victims of corporate misconduct* (Report, June 2015) 51 <[http://www.oecdwatch.org/publications-en/Publication\\_4201](http://www.oecdwatch.org/publications-en/Publication_4201)>.

<sup>21</sup> John Ruggie, ‘Regulating Multinationals: The UN Guiding Principles, Civil Society, and International Legalization’, in Cesar Rodrigue-Garavito (ed.), *Business and Human Rights: Beyond the End of the Beginning* (forthcoming).

<sup>22</sup> *Ibid.*

<sup>23</sup> Claire Methven O’Brien, Amol Mehra, Sara Blackwell and Cathrine Bloch Poulsen-Hansen, ‘National Action Plans: Evaluating current status and charting future prospects for an important new governance tool on business and human rights’ (Paper presented at International Corporate Accountability Roundtable, 2015) 2.



a range of strategies and institutions. It provides important answers to questions about what effects non-judicial redress mechanisms produce, under what conditions they are effective, and what role they play within broader systems of redress.

As actors seek to implement the *UN Guiding Principles*, and as the Human Rights Council debates a legally binding treaty, this research provides significant evidence of both the benefits and constraints of judicial and non-judicial pathways to redress for people whose human rights have been abused by corporations operating transnationally.

## Case studies

The project studied ten cases over a five-year period between 2011-14. A brief summary of each case is provided below.



Footwear homemaker, Tamil Nadu.

Photo: Annie Delaney

### Footwear homeworkers in Tamil Nadu, India

This case study predominantly focuses on female homeworkers engaged in the footwear supply chain in Tamil Nadu, India. Companies found to be sourcing in this area at the time of research include major global brands and retailers such as Marks and Spencer, Asda/Walmart, Base London, Next, Pentland and Clarks.

**Issues:** Homebased workers in this industry encounter the issues of low wages, insecure and precarious work, and lack of freedom of association. There are numerous governance gaps identified in relation to the implementation of national legislation, international standards, and vol-

untary codes of conduct, that are contributing to the barriers workers face to raise complaint and to seek redress. Leather footwear homeworkers face multiple barriers with respect to organising themselves and asserting their rights, and the international NGOs interested in supporting them have faced challenges in coordinating with each other and with local civil society partners. This case study highlights the barriers that prevent homeworkers making effective claims and seeking redress through the various parties and companies engaged in the global footwear supply chain.

**Non-judicial redress mechanisms:** Homeworkers have not been party to any formal complaint process. However, directly and indirectly, their association with social movement campaigns through NGOs has drawn them into contact with transnational footwear corporations. This case follows the responses of transnational businesses to the social movement campaigns on child labour in the Indian footwear sector; a homework program in North India by the ETI; and a recent campaign on leather footwear homework in Tamil Nadu.

We find that businesses at the transnational and operational levels discussed in relation to the homework case have vague and ambiguous grievance management strategies that are not known to workers. NGOs and unions are not aware of mechanism grievance processes, and even when they are, they question the legitimacy of such mechanisms because they believe that pursuing complaints is not likely to be taken seriously or conducted in a timely manner. An overall finding from this report is that a lack of recognition and dialogue with unions and civil society by corporations around accountable and transparent grievance processes perpetuates barriers to lodging complaints for workers in the footwear supply chain. This case also highlights the potential for adverse effects from international campaigns that are not embedded in, or reflect the specific interests of workers in a particular part of the supply chain.

- [corporateaccountabilityresearch.net/njm-report-xii-leather-footwear-homeworkers](http://corporateaccountabilityresearch.net/njm-report-xii-leather-footwear-homeworkers).

### **Bonded and forced labour in the garment and textile sector in South India**

This case study examines the grievances of young women, predominantly Dalit, who are recruited from remote villages to work in textile mills and garment factories in the districts of Tamil Nadu in South India. Companies sourcing in this industry from Tamil Nadu include major global brands and ETI members such as Marks & Spencer, Sainsbury, Asda/Walmart, Tesco, Mothercare, Zara, Primark, C&A and H&M.

**Issues:** Women work under bonded and forced labour conditions, have low pay and poor conditions, and suffer other various human rights violations. Existing power imbalances have the effect of making the women more vulnerable due to their poverty, gender and caste. It can also make them more isolated due to employers preventing them from accessing unions and other individuals who could assist the workers to make claims directly to their employer, or through the judicial process.

**Non-judicial redress mechanisms:** A number of initiatives have been taken by local and international NGOs to tackle this issue, including using media and campaign strategies to raise awareness of the issue, initiating claims through legal and non-judicial national institutions,

and raising concerns in the UK ETI. These actions have been effective in influencing public opinion, improving understanding of the problems in the mills within the affected rural communities, and shifting judicial and government responses to be more responsive to the workplace and labour rights challenges faced by the female workers. The various claim-making strategies, while effective in having raised awareness of the Sumangali scheme and forced labour arrangements in the textile and garment sector, have had limited impact on improving conditions for these workers.



Meetings with female textile workers in Tamil Nadu.

*Photo: Annie Delaney*

Regarding the complaint to the ETI, the ETI's response to these human rights grievances took several years to design. Further, the key elements of the ETI's intervention were primarily negotiated and agreed among ETI staff and member organisations in London, rather than agreed through close negotiation with civil society groups in India. The design of that intervention reflects the power imbalance between the ETI's corporate and civil society members, which (while complex) tends to favour member companies. That is, the ETI's intervention has been based more on the steps that ETI corporate members sourcing from the area are collectively willing to support, rather than on the preferred strategies of ETI civil society members in the UK and allied civil society groups in South India. As a result, the ETI's intervention has been relatively indirect, focusing on raising awareness of labour rights issues in the villages from which the workers were recruited, among recruiting agents, and among the textile and mill workers themselves. Arguably, the ETI would have greater impact on reducing the ongoing rights violations if its member companies used their collective buying power to persuade the mill and factory owners to allow trade unions and other local advocacy organisations to have regular contact with the workers. This would allow those organisations to support those workers to pursue complaints of human rights violations. However, such a strategy is likely to be more effective if



ETI member companies were willing to reward mills and factories that cooperated. For example, this could include offering higher purchase prices. The unwillingness of global companies (from the UK and other countries) to offer their suppliers genuine incentives to cooperate in human rights initiatives (as opposed to threats to cut orders), significantly limits the effectiveness of voluntary non-judicial redress mechanisms, including the ETI.

- [corporateaccountabilityresearch.net/njm-report-xiii-sumangali](http://corporateaccountabilityresearch.net/njm-report-xiii-sumangali)



A sports shoe factory.

Source: Clean Clothes Campaign

### Global Footwear and Apparel Supply Chains, Indonesia

This case study describes how Indonesian garment and footwear workers, and allied organisations have used a combination of strategies to pursue their rights, which includes engaging with local and international non-judicial mechanisms. The case study analyses their efforts to influence the local and global forces that determine their working conditions. Major footwear brands who sell their goods globally produce the factories under study.

**Issues:** Although Indonesia's labour laws are relatively progressive, its enforcement strategy and industrial dispute resolution remains weak. Workers who collectively organise and take industrial action in pursuit of improved wages and conditions can face significant intimidation and threats to their job security. The underlying commercial model of the global manufacturing sector does not promote improved working conditions. Suppliers are under pressure to minimise the cost and speed of production while still meeting quality requirements, and these pressures are frequently passed on to workers.

**Non-judicial redress mechanisms:** The Indonesian trade unions we interviewed generally use a combination of strategies to pursue rights grievances, including strikes and protests; engaging

the media; collaborating with global campaign networks to influence the reputation of brands in consumer and investor markets; reporting rights violations to local police and other law enforcement agencies; and lodging complaints with multiple local and international non-judicial redress mechanisms.

The expectations the trade unions have of a non-judicial redress mechanism is based on their previous experiences with it. Unions often use mechanisms to achieve purposes that would not necessarily have been envisaged by those who designed the mechanism's grievance handling procedure. In order to understand how non-judicial redress mechanisms can contribute to the resolution of rights-based grievances, it is therefore necessary to look beyond their role as discrete processes and consider how they interact with other judicial and non-judicial mechanisms and other claim-making strategies. Our research suggests that, considered from this perspective, non-judicial redress mechanisms can play a more useful role than is apparent when they are considered in isolation. Arguably, this should be taken into account when non-judicial redress mechanisms are designed or reformed, so that each mechanism can play the most useful role it can within the array of possible means of seeking redress.

However, while we found evidence that combining strategies in this way can result in improved respect for workers' rights, in those cases where some form of human rights redress was achieved, it was generally partial and in some cases the improvements in respect for human rights proved to be temporary. As such, while strategically pursuing simultaneous complaints and other claim-making strategies through multiple grievance mechanisms operating at different scales can enhance Indonesian garment workers' chance of achieving meaningful redress, this enhancement should not be overstated.

- [corporateaccountabilityresearch.net/njm-report-xiv-indo-footwear](http://corporateaccountabilityresearch.net/njm-report-xiv-indo-footwear)

### Rajasthan Quarry Mine, India

This case study examines attempts by stone workers in quarries in Rajasthan to gain redress for poor labour conditions, death and injury caused by silicosis and asbestosis. Rajasthan's stone is exported around the world.

**Issues:** Human rights issues in the stone sector in India include bonded labour, child labour, and unhealthy and unsafe work environments resulting in injury and death by silicosis and asbestosis. The quarry sector is largely unregulated and most workers are undocumented and unorganised. Supply chains are extremely difficult to map and connect to any particular quarry with the diffuse buyers who sell stone in a wide array of countries around the world. Unlike some industries, where a concentration of buyers exists which allows supply chains to be traced to large multi-national companies, in the stone industry there are thousands upon thousands of small buyers and importers. National regulation of work by state labour departments is weak with high levels of confused and overlapping authority, as well as under-resourcing.

**Non-judicial redress mechanisms:** Some redress was attained through the National Human Rights Commission of India ('NHRC') by interacting with the High Court of Rajasthan and the state government to provide compensation for thousands of victims of silicosis. The NHRC

has addressed systemic problems and individual grievances through its coordinating models. Workers were able to access the NHRC compensation with considerable assistance from supporting NGOs.

The international multi-stakeholder initiatives attempts to address the issue – the ETI’s ‘Sandstone from Rajasthan, India’ programme of action, and the Forest Trust’s ‘Responsible Stone Program’ certification scheme had made little or no progress in improving conditions for workers or engaging with local players over the course of our field work (2012-2013). However, progress may have been made since then. This case study highlights the need for intensive engagement at the local level if any transnational mechanism is to address compound barriers to redress that are the consequence of local and international dynamics.

- [corporateaccountabilityresearch.net/njm-report-xi-rajasthan](http://corporateaccountabilityresearch.net/njm-report-xi-rajasthan)



Rajasthan marble quarry.

Source: Reuters

### Vedanta Bauxite Mine, India

This case study provides an examination of the interaction between international and local judicial and non-judicial redress mechanisms in the work of the Dongria Kondh and Kutia Kondh to protect their land rights and the environment. The Vedanta Aluminium Complex project was proposed and partially initiated by subsidiaries of Vedanta Resources Ltd, a UK-listed company that operates in many countries around the world.



**Issues:** The complex involved a proposal to establish a Bauxite mine at the top of Niyamgiri Hills in Kalahandi and Rayagada districts, an alumina refinery in Lanjigarh at the bottom of the Niyamgiri Hills and by one of Odisha's most important rivers, and a smelter in Northern Odisha. The Niyamgiri Hills constitute the only traditional home to the Dongria Kondh and the Kutia Kondh. The Dongria Kondh and Kutia Kondh aimed to claim their right to control over their lands, and to exercise free and informed consent concerning any transfer of their lands.

**Non-judicial redress mechanisms:** Survival International lodged a complaint to the UK National Contact Point. At the same time, a complex set of administrative reviews and court cases were being lodged and heard in India, backed by an incredibly committed network of local supporters.

A determination against Vedanta by the UK National Contact Point ('NCP') led to the disinvestment of a number of shareholders and reputational damage for Vedanta on the international stage. At home, the pursuit of legal means of redress resulted in a process of self-determination for tribal people underwritten by constitutional law, rather than soft international norms. There is little evidence that the NCP determination influenced administrative and judicial decisions in India, although interviews indicate that the Environment Minister was aware of the determination and that it may have bolstered his resolve to block the mine. Ultimately, the mine was stopped by a Supreme Court of India judgment to send the decision regarding the mine back to the lowest level of government in India - the Gram Sabha. This process can act as an international model for a democratic means of free and prior informed consent.

- [corporateaccountabilityresearch.net/njm-report-ix-vedanta](http://corporateaccountabilityresearch.net/njm-report-ix-vedanta)



20th Gram Sabha, Vedanta.

Source: *The Hindu*

## Wilmar, Indonesia

This case study examines communities lodging complaints against Wilmar, one of the world's biggest palm oil companies. Wilmar produced palm oil is used in a range of products through global company supply chains.

**Issues:** Communities affected by palm oil operations have raised multiple environmental and human rights issues. Most of these complaints are oriented towards efforts to protect the land rights of local people in Sumatra, Riau and West Kalimantan in Indonesia.

**Non-judicial redress mechanisms:** Communities pursued complaints through the Compliance Advisor Ombudsman ('CAO') for the International Finance Corporation ('IFC') and Multilateral Investment Guarantees Agency ('MIGA'), and the Roundtable on Sustainable Palm Oil ('RSPO'), among other judicial and non-judicial mechanisms.



Ecological destruction in Jambi province, Indonesia.

Source: Greenpeace

This case study includes examination of mediations facilitated by the CAO between local communities and Wilmar subsidiaries in Sumatra, Riau and West Kalimantan in Indonesia. The RSPO played only a marginal role in the management of these disputes. Mediations in Riau and Sambas (West Kalimantan) resulted in agreements whereby the Wilmar subsidiary company relinquished some land, mostly planted with palm, to communities who now use it to support their livelihoods, but with capacity difficulties. Mediations with a number of communities in Jambi were complex and protracted, and the CAO's attempts to facilitate mediation was brought to an abrupt close when Wilmar sold the subsidiary, PT Asiatic Persada, to companies that had no relationship to the IFC, and were not members of the RSPO.

In addition to the CAO facilitating these individual mediations, these complaints have led to two separate audits of IFC lending practices in the palm oil sector conducted by the CAO's compliance arm. The first, which was completed in 2009, identified significant non-compliance by the IFC with its standards and led to a temporary moratorium on palm oil investment, a review by the institution of its involvement in the sector, and subsequent development of a new framework to govern the World Bank Group's investment in palm oil. The second compliance audit, pertaining to a 2010 disbursement to Wilmar, also found significant failings in IFC procedure.

- [corporateaccountabilityresearch.net/njm-report-viii-wilmar](http://corporateaccountabilityresearch.net/njm-report-viii-wilmar)



## Tea, India

This case study focuses on the working and living conditions of tea plantation workers in India. A range of transnational companies are linked through supply chains to Indian tea plantations, including major food processing companies and retailers such as Unilever. Most individual tea plantations are Indian owned and managed. These plantations operate across several locations in India. Our research focused on plantations in Tamil Nadu, Darjeeling and Assam. Darjeeling and Assam tea is amongst the best known in the world, and is enjoyed by consumers globally linking the conditions in these plantations with tea lovers everywhere.

**Issues:** Tea plantation workers face a number of issues concerning low wages, insecurity of employment, health and safety concerns, and poor quality of social infrastructure and services available to workers on plantations.



Tea pluckers, the Nilgiris District, Tamil Nadu.

*Photo: Souparna Lahiri*

**Non-judicial redress mechanisms:** A large range of grievance mechanisms are available in the tea sector and one of the questions examined in this case is why so few grievances have been brought through transnational non-judicial grievance mechanisms. A key focus is therefore on barriers of access to redress, including entrenched informal barriers based on the structure of social relations and organisation at the local level. The case study also examines the operation of formal transnational complaint handling mechanisms including the Rainforest Alliance certification system and the International Finance Corporation's Compliance Advisor Ombudsman ('CAO'), and their interaction with local grievance mechanisms operated by government, trade unions or plantation management. Where transnational grievance mechanisms have been used, their relatively weak leverage has meant that they have had little impact on facilitating individual remedy. However, where involvement of transnational non-judicial grievance mechanisms has provided visibility, legitimacy or other forms of indirect support to organising grassroots workers, the case suggests that engagement with these mechanisms can sometimes have a small, positive effect on reinforcing wider pressures for improvements to working and living conditions in the sector.

- [corporateaccountabilityresearch.net/njm-report-vi-indiantea](http://corporateaccountabilityresearch.net/njm-report-vi-indiantea)

## REDD/Forestry in Indonesia

This case study focuses on transnational business activity in the form of investment in a forest conservation project developed by private sector investors in partnership with the NGO Fauna & Flora International under the international REDD+ framework. This case study differs from other cases examined in this series of reports as it involves both private sector and not-for-profit organisations as joint project proponents.



Kapuas Hulu district, West Kalimantan.

*Photo: Sindhunata Hargyono*

**Issues:** At the time of our research the project had not formally commenced operation, though preliminary activities surrounding project development and community consultation had been undertaken. During these preparatory phases of the project, several prospective impacts of the project on social and human rights received particular attention. One important issue related to the implications on community livelihoods for proceeding with the REDD+ project, versus endorsing a range of alternative scenarios for the zoning and licensing of land in the designated project area. Another cluster of issues related to the proposed terms of the REDD+ project, such as community access to land, and the sharing of prospective REDD+ revenues.

**Non-judicial redress mechanisms:** The only mechanisms that had actually been used by communities at the time of our research were project-based consultation and informed consent processes, together with informal grievance channels associated with the project development process. International grievance mechanisms linked to project funders were available, but had not been utilised. Dispute handling mechanisms available at national and sub-national levels had also not been used. A number of local and transnational grievance systems linked to the REDD+ framework have been undergoing development in recent years, but these were not operational at the time of our research.



**Outcomes and lessons:** This case offers a number of constructive lessons regarding how project-level consultation and grievance handling can support community rights. However, it also highlights the limits of what can be achieved by consultation and grievance handling mechanisms at the project level, even when internal systems established by project proponents are strong. Despite very strong project-level consultation processes, the communities' express wishes were ultimately not followed. Specifically, the project was not in the end able to go ahead on the terms to which communities expressed their consent. The project became stalled for an extended period and was ultimately discontinued, largely due to political obstacles surrounding the granting of the required Ecosystem Restoration License by the Indonesian government. Such external constraints highlight the value of project level processes of consultation and grievance handling that are clearly engaged with grievance handling processes at national and sub-national levels, and sufficiently flexible to respond to changing external circumstances.

- [corporateaccountabilityresearch.net/njm-report-vii-redd](http://corporateaccountabilityresearch.net/njm-report-vii-redd)

## What kinds of effects do transnational non-judicial redress mechanisms produce?

The ten cases described above all engaged NJMs alongside other avenues and strategies to achieve remedy or justice. As such, they reveal a range of possible effects of non-judicial grievance mechanisms and strategies. These effects include problem-solving, achieving a mediated settlement, influencing systemic change, through to having no effect and even resulting in negative impacts for the marginalised groups that such processes are meant to benefit. Beyond an assessment of access to individual remedy, this research also highlights other effects produced by non-judicial redress mechanisms. These institutions can have normative influence on other actors or contribute to particular outcomes, which are often in combination with other factors and strategies, such as political mobilisation. This section discusses the effects below which are grouped into two broad categories: (i) 'individual remedy' (predominantly through problem-solving and mediated settlement), and (ii) 'other' (incorporating normative and systemic effects). This section also considers the implications of this analysis for our assessment of the relationship between judicial and non-judicial mechanisms.

NJMs can generate multiple effects and to different degrees, depending on the actions of other actors and institutions. Effects may even diverge between different aspects of a particular case, where some parts of a complaint are addressed and others ignored, or even made worse. Taking a long-term view, effects are not set in stone, and may be overturned by a variety of circumstances.

### Individual remedy

Individual remedy is understood as redress for specific individuals in a particular case in response to a human rights violation. The right to an effective remedy in cases where human rights have been violated is a tenet of international law that is enshrined in all the core interna-

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<sup>24</sup> For example, see International Covenant on Civil and Political Rights, Article 2 (3); principles 2(b), 3(c)-(d), 11(a)-(b), 12, 15-23: *UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, UN Doc A/RES/60/147 (21 March 2006); . Committee on Economic, Social and Cultural Rights, *General Comment 9: The Domestic Application of the Covenant*, UN Doc E/C.12/1998/24 (3 December 1998) [9].

**Table 1: Effects of Non-Judicial Mechanisms**

Effect	Definition or example
No effect	The NJM produces no remedy and has no effect on ongoing business practice.
Problem-solving/ mediated settlement	Parties agree on a negotiated settlement that may provide some kind of remedy, and to a certain degree, address the harm suffered by people affected by the business activity.
Normative effects	The NJM creates knowledge or enforces norms that condition or are adopted by other actors in their decision-making.
Systemic change	The mechanism contributes to influencing a change in broader business practice or the government's regulation of a sector. These changes would need to have wide (e.g. sectoral) coverage and ongoing effect.
Negative effects	The NJM produces perverse results by further entrenching the marginalisation of project affected peoples or workers.

tional and key regional human rights treaties.<sup>24</sup> This right to an effective remedy combines procedural and substantive elements including: ‘practical and meaningful access to a procedure that is capable of ending and repairing the effects of the violation’, and ‘where a violation is established, the individual must actually receive the relief needed to repair the harm’ in a timely and affordable way.<sup>25</sup>

The concept of what constitutes an effective remedy is not always straightforward. The concept can become unclear in a number of ways:

- Where the ‘harm’ is more or less clear: e.g. the difference between a clear forcible eviction from land, compared to where there was an agreement to give up land and the dispute relates to different interpretations of what was agreed upon versus what was delivered;
- The possibility of ‘repair’: e.g. there are cases where restitution is possible, and others where the situation cannot be returned to before the human rights violation occurred. Further, what constitutes ‘repair’ is subjective;
- The result of mediation may include some concessions, and claimants may consider these inadequate and/or they may be objectively lesser than what was claimed. In other

<sup>25</sup> Ibid.



cases, claimants may have divergent views on the adequacy of the concessions made;

- There were also cases in this study in which claimants were pleased with concessions that did not match what they had claimed. They perceived them as better than what they otherwise would have achieved.

In these cases, we have largely judged individual remedy based on the distinction between what project affected peoples were claiming and the end result. Through this understanding of remedy, the NJMs studied fall short of the definition of remedy in significant ways, both procedurally and substantively. Procedurally, many marginalised groups suffering from serious human rights violations face multiple, intersecting barriers to accessing these mechanisms, including lack of knowledge, distance to the NJM, the financial cost of pursuing a remedy, intimidation from businesses, and procedural barriers.

Substantively, individual remedies in the ten cases included the following:

- The Dongria Kondh had the Vedanta Bauxite Mine halted by a legal decision after a decade of resistance. By the time of that decision, other communities around the refinery had already been displaced. The role of the NJM in this case, the UK NCP, was marginal, although it potentially provided an additional normative boost for the societal actors engaged in sustained, long-term and organised resistance, with some normative influence on those state actors engaged in decision-making.
- In Rajasthan Quarry Mine, the National Human Rights Commission of India (a NJM) interacted with the High Court of Rajasthan and the state government to provide compensation to thousands of widows due to their husbands' silicosis. This provided reparations for harm. However, the pay and working conditions within the quarry mines remain unchanged.
- In the Wilmar palm oil case, CAO mediations led to some agreements and concessions in some communities in two plantation sites (West Kalimantan and Riau), but failed to achieve mediated outcomes in other complex and protracted disputes. However, it is worth noting that without CAO engagement, some communities may have been evicted three years earlier.
- For community members in Weda Bay, their ability to access redress regarding the future of the proposed nickel mine and their desire for conditions such as higher levels of compensation; retention of farming land; and assurances of employment and trading opportunities with the mining company were stymied by the inability of the CAO to assure them they would be safe within the mediation process or other dispute resolution tools offered. There was also an underlying divergence of aims between the community members with their NGO representatives.
- Some sportswear and sport shoe workers in Indonesia saw some outcomes for workers which included increased space to engage in organisational activities, increased recognition of workplace unions and better access to facilities through the Freedom of Association Protocol. However, maintenance of these wins depends on the continued focus of holding each other to account by stakeholders.

- In India, for the homeworkers in the footwear industry and the young girls and women employed in textile mills in Tamil Nadu under forced labour arrangements, there was little evidence of individual access to remedy and often extremely limited access to seek a remedy. Some women who have previously been involved in forced labour in textile mills have been able to access compensation through unions and NGOs negotiating on their behalf. However, they are in the minority and none of these negotiations have benefitted current workers. Of 116 homeworkers interviewed, only one had ever been visited by an audit team from a brand, none had previously participated in a complaints mechanism, or an NGO campaign. Their marginalised position within the supply chain, and their social marginalisation exacerbates the inaccessibility of a remedy.

These ten case studies are not formal individual cases with a start and an end. They implicate multiple strategies, including formal legal processes, political mobilisation, transnational campaigning and non-judicial grievance mechanisms. Moreover, most include multiple communities and grievances with varied outcomes. For individual communities or complainants 'results' are not set in stone or guaranteed to last. They may be overturned by political or legal circumstances, as projects can be revived under new names and mediated settlements can be undermined by regulatory decisions. However this also works in the other direction as a new strategy can draw renewed attention to a project and lead to the divestment or cancellation of a proposed project.

Informal processes also produced some results. In both the garment and palm oil industries in Indonesia, we found one case of companies undertaking investigations under their own code in response to a grievance, or addressing subsidiary or supplier practices based on information from civil society. In each of these examples, this was enabled by relationships created through multi-stakeholder initiatives that house NJMs (the Freedom of Association Protocol and RSPO respectively).

Accessing the limited extent of remedy achieved in the cases above involved significant costs, not only in terms of financial cost and time, but also the capacity to sustain action in the face of significant hurdles, hardship and, in some cases harassment. The success of halting the project in the Vedanta case was born from a long struggle and involved significant costs to the Dongria Kondh in their struggle against it.

## Other Effects

Beyond the results of formal mediations or settlements, the relationships formed between stakeholders, evidence gained, public exposure of practices, and experience gained in a non-judicial redress mechanism process can contribute to other kinds of positive effects. This includes empowering communities or worker's groups; influencing other decision-makers to precipitate a change in policy; drawing public attention to a problem; and shifting power dynamics between companies and communities or workers. Engaging with non-judicial redress mechanisms can also have negative effects. This includes reinforcing existing power dynamics and further disenfranchising workers or communities; entrenching existing business positions and practices (e.g., allowing a project to go ahead) which can lead to perverse responses (e.g. withdrawal of orders rather than helping a supplier fix a problem); and taking significant resources and time away from other organising strategies. In the case of both positive and negative effects, the

causality can be difficult to establish empirically, as NJMs are just one type of institution in a complex set of relationships in each instance.

The long term effects of engaging with non-judicial redress mechanisms can be subtle. It includes empowering communities and shifting the power dynamics (even slightly) which can contribute to different outcomes regardless of more short term access to redress. However, these kinds of effects are, by their nature, uncertain and rely heavily on arduous work by communities and their allies. These kinds of shifts in power were more visible in our case studies in the garments industry where workers are progressively empowered over time, especially through the long-term foundation of union and worker organising. In tea plantations and stone quarries, we did not find the same effects on the longer-term power of the workers from engaging with a NJM. In cases that concern whether or not a mining or industrial project with potentially irreversible consequences for people and the environment goes ahead, success, which was contingent and at times minor, depended on direct organising and influencing at key decision points. In those cases, engagement with non-judicial redress mechanisms did not produce the same long-term shifts in community empowerment.

One significant effect of non-judicial grievance mechanisms are that actors and institutions involved can affect each others' perceptions, evidence base and decision-making. These kinds of interactive effects can be both intended and unintended, positive and negative. Significant categories of effects include:

- **Normative influence between actors and institutions:** Producing research or adjudication that may be used as evidence in the decision of another body (e.g. Vedanta NCP Final Statement, New York University and the ESCR-Net POSCO report), or contribute to the longer-term development of norms around an economic activity that may condition the decision-making of another actor or institution (e.g. Wilmar affecting the approach to palm oil by the World Bank Group). Normative influence can also be superficial – e.g. POSCO adopted the language of human rights and accountability without a concomitant change in business practice.
- **Governments constraining the influence of NJMs:** There can be cases where what is agreed within a mediation, or within the standard of a multi-stakeholder initiative is dependent on the acceptance or understanding of government actors. The agreement may also be precluded by misaligned government action or decision-making. For example, concerns were expressed by some participants in one negotiated land settlement between Wilmar and a local community that agreed community land rights would not be secure, because of a lack of legal backing for the negotiated concessions, and weak government involvement in the negotiation process. This mediation was facilitated by the CAO. In other cases, RSPO efforts to help prevent recurring conflict by placing special protections on high conservation value ('HCV') land have sometimes been impeded by local governments who do not recognize HCV status, and have threatened to take such land back from RSPO member companies who fail to clear it for palm oil production.
- **Empowerment through coalitions:** the establishment of strong networks by highly experienced activists over time has meant that groups were able to access and pursue multiple avenues of remedy (e.g. Vedanta and POSCO)

The choice to engage in a transnational non-judicial process is not without costs, nor without risk. While individual remedy remains uncertain and unlikely based on the evidence above, there are a range of other possible positive and negative effects.

## Under what conditions are transnational non-judicial redress mechanisms most effective?

The section above demonstrates the mixed record of NJMs in terms of providing access to a remedy to those affected by human rights abuses, and in influencing or triggering systemic changes that may prevent future harm.

There are a range of factors that enable or constrain NJMs in delivering a remedy or producing systemic change in particular sectors and contexts.

The *UN Guiding Principles* established a set of effectiveness criteria for non-judicial redress mechanisms: Guiding Principle 31- In order to ensure their effectiveness, non-judicial grievance mechanisms, both state-based and non-state-based, should be:

- a) Legitimate: enabling trust from the stakeholder groups for whose use they are intended, and being accountable for the fair conduct of grievance processes;
- b) Accessible: being known to all stakeholder groups for whose use they are intended, and providing adequate assistance for those who may face particular barriers to access;
- c) Predictable: providing a clear and known procedure with an indicative time frame for each stage, and clarity on the types of process and outcome available and means of monitoring implementation;
- d) Equitable: seeking to ensure that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair, informed and respectful terms;
- e) Transparent: keeping parties to a grievance informed about its progress, and providing sufficient information about the mechanism's performance to build confidence in its effectiveness and meet any public interest at stake;
- f) Rights-compatible: ensuring that outcomes and remedies accord with internationally recognised human rights;
- g) A source of continuous learning: drawing on relevant measures to identify lessons for improving the mechanism and preventing future grievances and harms.

These effectiveness criteria have been widely adopted and used in assessments of existing non-judicial grievance mechanisms, for example, in the recent review of the RSPO complaints mechanism.<sup>26</sup>

This research finds that it is possible to fulfil these effectiveness criteria in a formal way, yet still fall very short of delivering an effective redress or remedy for human rights violations committed in the context of business. We find that there are *additional factors* that provide a fuller analysis of what determines the effectiveness of NJMs than is currently articulated in the *UN Guiding Principles*' effectiveness criteria. These factors are intertwined in various ways, but for the purposes of this report, we will explore them as six separate sections:

- Leverage of the NJM;
- Strategic relationship management;
- Approaches to redressing power imbalances;
- Processes for gathering and verifying evidence;
- Resourcing and Commitment; and
- Local level engagement or reach.

The evidence and analysis presented here points to the fact that the effectiveness of a transnational NJM is not reliant on its own design. Rather, it is also the result of its interaction within a broader system in a variety of ways that are discussed below. This means that institutional fixes through the reform of procedures, while important, will continue to be inadequate to create effective non-judicial redress mechanisms.

## Leverage

Leverage is the means by which a mechanism exerts forms of authority or influence over relevant targets. To have a baseline level of effectiveness, a NJM needs forms of leverage that give it the best chance of: influencing the development of fair terms; the subsequent implementation of any mediated settlement or determination; or of influencing business practice and policy in other ways. An accessible and transparent mechanism with procedural integrity will still frequently lack efficacy in achieving redress or a remedy without leverage in relation to the businesses it is seeking to influence.

### What kinds of leverage do mechanisms exercise?

The main forms of leverage exercised by NJMs studied in this project are:

- **Reputation and branding:** This is the most common form of leverage used in non-judicial redress mechanisms. It draws on corporate concern for reputation and the po-

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<sup>26</sup> See for example, Holly C. Jonas, *A Review of the Complaints System of the Roundtable on Sustainable Palm Oil: Final Report* (Report, 2014) Natural Justice: Sabah, Malaysia.

tential costs of brand damage that results in loss of consumers and investors, or decreases in share value (e.g. the divestment from Vedanta following the UK NCP determination). This can play out as an inducement to join a MSI (e.g. the ETI, RSPO or FoA), or engage in a process (e.g. such as in the CAO or NCP). Ongoing leverage over brands relies on the extent to which the scheme can deliver or withhold reputational benefits based on results. Even without engagement, mechanisms can damage brands through their evidence or assessments, which can then be used by other decision-makers. This was the case with some determinations by the CAO and NCP.

- **Market-based incentives or penalties:** Market-based incentives or penalties operate where a NJM can take or influence actions that have market or financial effects. This includes the withdrawal of finance (e.g. in the case of CAO cases); loss of market share due to loss of certification; or loss of contracts. Formal sanctioning, such as de-certification or expulsion, can have market effects on a company's access to the market for a certified product. However, these are dependent on consumer or investor action, or on external market conditions (e.g. levels of demand for certified product).
- **Relational, learning and dialogue:** These forms of leverage are premised on the soft power that actors can shift their positions through learning, seeing new perspectives and developing relationships that create new forms of accountability, reciprocity or understanding. MSIs are often premised on the idea that actors in a sector can learn collectively and be in a better position to solve problems together. Underpinning this is the assumption that actors are motivated to problem solve together, including the desire of corporate actors to avoid further public campaigning or conflict. Mediation can be premised on a similar basis in that it can assume that all actors come to the table in good faith to find a solution.
- **Hierarchical:** Hierarchical leverage operates where a mechanism has authority within an institution to change policy or direct the actions of staff, or exercise forms of public power backed by the state authority. The CAO's compliance function exercises a form of hierarchical power as it checks on the actions of World Bank Group staff (albeit without the capacity to directly enforce findings). NCPs have the potential to exercise hierarchical state power by linking corporate participation in their processes, or results of their determinations, to other incentives or penalties (e.g. such as export credit or trade financing).

### What factors affect the leverage of a non-judicial redress mechanism?

#### *Supply chain dynamics*

Using leverage over global brands to achieve changes in conditions within value chains, or to realise redress, relies on brands using their market power to change the behaviour of suppliers or partners. This is built into MSIs such as RSPO, ETI and FoA. A critical challenge in the use of this down-the-line market power is that, frequently, while suppliers will be required to make changes to align with new standards, transnational brands will not carry the costs of those changes and will still make their ultimate sourcing decisions based on the dominant criterion of cost. As such, suppliers that make changes may be penalised by losing business due to increased prices that reflect the costs of increasing wages, upgrades in facilities and other im-



improvements in conditions. Companies may use their membership in a scheme as a signal of their commitment, but not deliver results in terms of actual changes in the conditions or workers. This kind of green-washing is difficult to mitigate where schemes rely on corporate membership dues for their ongoing institutional survival, as staff may prioritise keeping a company within the scheme, rather than expelling them for failing to reach a standard. Similarly, where mediation is not backed up by the potential for reputational harm or market penalties if it fails, companies may participate in bad faith or take no heed of the outcome.

### *Leverage is highly dependent on other actors, beyond the companies*

The different forms and the extent of leverage is affected by a number of factors. This includes the local political and judicial systems in the host and home country, the economic structure of the industry, and inter-relations with other institutional actors. For example, very little of the stone quarried in Rajasthan is exported, limiting the market power of buyers from overseas over the sector as a whole. The lack of transparency in garment supply chains means that market-based leverage tends to only be exercised in the first tier. In the case of POSCO, a lack of transparency on the stock exchange delayed identifying relevant investor targets for campaigning.

CAO processes can and have (such as in Wilmar), led IFC or MIGA to withdraw financing. In the case of Wilmar, the withdrawal was at a sectoral level through a temporary moratorium on new lending in response to a CAO compliance audit, and not from companies with existing loans. If applied to specific loans, this leverage can be undermined by how much the project proponent needs the funds, and how easily it can exit the process by pre-paying the loan.

### *Confidentiality and other rules may undermine leverage*

Campaigning groups' membership of MSIs can also involve trade-offs, such as the chance for relationships to influence brands, but often under the condition that they raise issues within the mechanism or keep grievances confidential rather than using public modes of campaigning. This means that the mechanism's appeal to companies to resolve problems privately and collectively is conditional on muting the reputational leverage of campaigning groups that often led corporations to join the MSI in the first place.

### *Relationships can create informal problem-solving and undermine formal processes*

We have evidence of informal problem solving through MSIs including the RSPO and FoA based on relationships between actors that were previously in conflict. In these cases, new trusted relationships enabled individuals to raise problems and share information directly with brand representatives who addressed them directly with suppliers, or undertook their own investigations under their own codes of conduct. This has led to some direct results. The development of relationships of trust can lead to reliance on informal problem solving, and undermine the development of a reliable, fair, transparent and effective complaints mechanism by diverting potential complaints through informal problem solving.

### *Limits on the scope of leverage*

Non-judicial redress mechanisms tend not to have the authority or the mandate to address whether or not a project or investment goes ahead. This relates both to the nature of redress

mechanisms (to varying degrees these are judging action after the fact, or after some action has taken place); the basis of authority (applying existing standards, removing certification, withdrawing investment, or recommending other sanctions); and the fact that none of these mechanisms are set up as project or business level decision-makers. Therefore, most mechanisms focus on *how* a project goes ahead or an economic activity continues, and not *if* the project or activity happens.

This also relates to the subject-matter of non-judicial grievance mechanisms as well as their authority. Within MSIs, standards are negotiated amongst the multiple stakeholders, and the resulting standards or accepted subjects may not align with those that affected people consider the most important. We found consistent misalignment between affected peoples' priority issues, and the coverage of grievance mechanisms including:

- Lack of focus on piece rate price and the minimum or living wage (Home based workers);
- FoA Protocol remains limited to freedom of association and issues of wages, and conditions cannot formally be raised despite the fact that FoA disputes are intertwined with contractual, wage or condition disputes around which organising occurs. Participating companies have resisted union calls to also negotiate parallel Protocols on wages and job security (e.g. Indonesian factory workers);
- Stopping production or shifting to alternative forms of land use is outside the scope or ethos of the RSPO scheme, aside from in relation to protecting high conservation value land by the sector itself. This reflects the focus on improving the way in which palm oil production occurs (e.g. RSPO);
- Compensation was received by widows for the silicosis suffered by their husbands. However, issues of wages and conditions in the sector continue to not be addressed (e.g. Rajasthan Quarry Mining);
- Local and indigenous groups wanting to prevent large scale industrial or mining projects from going ahead can only hope to access compensation or changes to how projects go ahead They are not directly able to address if they go ahead through NCP complaints. (e.g. Vedanta and POSCO).<sup>27</sup>

The constrained subject-matter scope and its mismatch to concerns and aspirations of affected peoples highlight the limited scope of NJMs to provide redress or justice.

One of the most significant findings of this research was that the conditional and circumscribed forms of leverage NJMs exercise are not operating as effective substitutes for direct authority of government (e.g. to remove licenses or prevent projects going ahead) or judicial remedies. NJMs that operate well can complement the authority of government by using different kinds

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<sup>27</sup> Although Vedanta did not go ahead, this was not a direct result of the NCP determination, which played a small role in the overall process.

of leverage to generate new commitments and changes. This includes through brands, the potential pressure (and support) to supplier and partners to change within their value chains, the effects of mediated agreements, and changes in policy in some financial institutions. They can also, in certain limited circumstances, operate to bring corporate practice in line with international and local laws in contexts where state institutions are failing to do so. However, their capacity to do is so narrow and limited, to the extent that they should never be represented as having the capacity to replace the need for effectively operating state institutions.

Notwithstanding the current limits of leverage of NJMs, there is potential for greater creativity in approaches to leverage. Specifically, this would be through the use of contract and positive incentives by financial and market actors, greater coordination and coherence in the exercise of public authority across governments by linking engagement in a NJM; or the outcome of a determination with access to government export credit or trade financing; and the use of market leverage in consumer country governments through public procurement provisions or regulatory recognition of private standards.<sup>28</sup> This link between willingness to engage and the ability to access public financing could also be extended to provide a link between adverse outcomes and access to public support. Nonetheless, this is a critical example of the potential of mechanisms to better use available forms of leverage in ways that can change the incentives for companies to engage in good faith in these processes.

### Strategic management of relationships

As discussed in “Effects” above, we have collected a range of examples in which actors and institutions involved in these mechanisms affect each other’s perceptions, evidence base, decision-making and impact. A major implication of this is that non-judicial grievance mechanisms cannot be effective if they are inwardly focused institutions that hear specific grievances, and do not have any broader relationships with affected stakeholders, their intermediaries, and other regulatory actors.

A NJM needs to work with a range of other actors if there is to be a strong likelihood that negotiated settlements or determinations will have an effect. For example, agreements that implicate land require informing and engaging with government officials; the implementation of agreements often requires brands to use their leverage within their own supply chain; and enabling access and effective engagement of affected people often requires intermediation by various organisations. The creation and strategic management of these relationships is a core function of NJMs that exists alongside (and sometimes in tension with) their quasi-judicial functions of investigation and dispute resolution.

These two functions – quasi-judicial and relationship or political management – have distinct sources of legitimation, and require different staff roles and skills. At times, these may come

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<sup>28</sup> An example of a more coherent exercise of leverage is the Canadian NCP’s recent linking of non-participation in an NCP process to consideration of future support from government bodies: ‘As the Company did not respond to the NCP’s offer of its good offices, the Company’s non-participation in the NCP process will be taken into consideration in any applications by the Company for enhanced advocacy support from the Trade Commissioner Service and/or Export Development Canada (EDC) financial services, should they be made’. *CanadaNCP Final Statement on the Request for Review regarding the Operations of China Gold International Resources Corp. Ltd., at the Copper Polymetallic Mine at the Gyama Valley, Tibet Autonomous Region* (Report, 12 May 2015) <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/statement-gyama-valley.aspx?lang=eng>>.

into tension and may endanger the levels of commitment to the mechanism by stakeholders. For example, strong relationship or political management may or may be perceived to delegitimise the impartiality of the quasi-judicial functions in the eyes of some stakeholders, thereby reducing those stakeholders' willingness to engage and impact on the resulting leverage of the mechanism. However, if a mechanism focuses only on its quasi-judicial functions, it can reduce its likelihood of generating effects by not having the relationships or engagement at the local level that can be required for actors to act upon its findings, or at least not act contrary to mediated settlements. The reality of navigating these tensions may place limits on what we expect non-judicial redress mechanisms to be able to achieve.

A network of relationships also provides a critical infrastructure to support outreach: 'a grievance mechanism can only serve its purpose if the people it is intended to serve know about it, trust it and are able to use it.'<sup>29</sup> Most mechanisms have limited budgets and capacity for outreach to affected peoples, and rely upon civil society organisations as intermediaries. Even then, the barriers to affected peoples accessing a non-judicial redress mechanism are so significant in terms of distance, language and marginalisation amongst other issues, that the broader the network of actors and institutions who have the capacity to accurately describe what an institution may be able to do, is a necessity for any level of effective outreach.

A view of the system of remedy that seriously considers the way in which other actors enhance and constrain the effects of a single mechanism can better inform our understanding of the current state of access to remedy for project affected peoples.

### Approaches to redressing power imbalances

Mechanisms engage parties with significant power and resource differentials. The commentary to the effectiveness criteria notes that '[i]n grievances or disputes between business enterprises and affected stakeholders, the latter frequently have much less access to information and expert resources, and often lack the financial resources to pay for them. Where this imbalance is not redressed, it can reduce both the achievement and perception of a fair process and make it harder to arrive at durable solutions.'<sup>30</sup> The effectiveness criteria seek to incorporate this analysis in their requirement that a mechanism be equitable, such that it 'seek[s] 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'.<sup>31</sup> We agree that this is fundamentally important. However, the analysis of the effectiveness criteria leaves out other power dynamics that are at play - particularly in a mediation context due to the asymmetry of the hierarchical unity of a company, and the diversity of a community. Before discussing that additional perspective on power differences, and how NJMs engage in redressing power dynamics, it is useful to consider the related issue of the impartiality of a mechanism.

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<sup>29</sup> *United Nations Guiding Principles*, commentary to principle 31.

<sup>30</sup> *United Nations Guiding Principles*, commentary to principle 31 (d).

<sup>31</sup> *United Nations Guiding Principles*, commentary to principle 31 (d).

## Does a non-judicial redress mechanism need to be impartial?

NJMs that are established to realise human rights and provide access to an effective remedy are not ‘apolitical’ bodies administering an impartial procedure. If a NJM cannot be impartial all the time, when does a NJM need to be impartial in order to be effective? In our view, impartiality is critical for investigations to ensure credibility and rigor. However, in negotiations or mediations, an ability to judge how existing power dynamics are operating may be needed to ensure that some level of fairness or justice is achieved. Impartiality as fairness does not mean treating all parties the same, particularly under conditions of significant asymmetry of power. Equally, building leverage in an institution requires an ability to find ways to strategically motivate companies to come on board, including by using their competitors to make it difficult for large companies to remain outside the process.<sup>32</sup> This role of building the institution and engaging actors in the process is not impartial in the strict sense.

## How can mechanisms redress power imbalances in mediation?

Mediation and dialogue approaches have advantages of being able to provide flexibility in the form of redress. However, mediation and dialogue can also present disadvantages and further entrench existing inequality, including:

- A lack of consequence for bad faith which allows a party to effectively undermine a process without safeguards (e.g. this claim was made by some organisations supporting complainants to the CAO in the Assam tea sector);
- Leaving communities feeling unable to participate in a key step in the mechanism’s operation due to fear of reprisal or feeling threatened (e.g. Weda Bay);
- Companies are advantaged by their high levels of skilled and experienced representation, even though they may not have much capacity within the company to engage in mediation; and
- Companies can benefit from being able to present themselves as good corporate citizens, while bargaining away very little (e.g. POSCO).

Beyond the differences in access to information, expert resources and financing mentioned in the *United Nations Guiding Principles* effectiveness criteria, an additional power difference that has a significant bearing on the equal footing of parties to mediation is that a company has greater capacity for internal coherence compared to the diversity of a community. Where dialogue requires compromise on both sides, it is easier for a corporate entity to decide what to trade away, whereas such decisions within a community are difficult, complex and may lead to conflict. This can also allow space for a kind of divide and conquer strategy by companies en-

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<sup>32</sup> In one mechanism, we studied a change of leadership. This meant a change in the attitude of staff who had been previously motivated to achieve outcomes with a human rights focus. For example, they would strategically take up issues raised by civil society organisations and unions, and be creative in engaging companies. The new leadership directed staff specifically that they were to be impartial. In this context, it became easy for companies to stall progress, in part due to the lack of creative engagement by the mechanism’s staff due to their attempts to be impartial.

gaged in mediation. An institution's approach to facilitating interaction between these parties can reinforce or mitigate existing power differences. Of particular importance in our cases were three aspects: (i) holding actors accountable within mediation; (ii) not requiring parties to give up power to participate in the process; and (iii) approaches to representation.

### *Accountability within the process*

A critical challenge in mediation-based NJMs is that they operate on the voluntary participation of the company. The problem is that the company has a variety of techniques to prevent a bad outcome from their perspective through engaging in stalling tactics, attempts to create conflict within the community, providing inaccurate information and paying people off. In the case of recalcitrant participants to mediation, mechanisms may not have much leverage to hold them to account when they show bad faith in the negotiation. For the staff of a mechanism, it is critical to remain attentive to this dynamic and find ways to try to push the recalcitrant party, rather than prioritising their participation in the process above all else, or behaving 'impartially' in the face of recalcitrance or bad faith. The steps towards linking participation in an NCP process to future access to trade and export financing and support by the Canadian NCP is a good step for increasing accountability around participation in good faith. In these cases, a government-based NJM has more potential levers to ensure accountability than a voluntary MSI.

### *Not removing power from the less powerful*

Some mediation processes require commitments from claimants or civil society not to speak out publicly (e.g. through the media or direct campaigning) while the process is ongoing. This directly undermines the existing power of the less powerful group in the process, and can remove a key mechanism to hold the company accountable if they do not negotiate in good faith. While this requirement serves two purposes: (i) to encourage companies to be willing to engage in the process; and (ii) to create an environment where parties can negotiate privately in good faith, it can ultimately undermine the core purpose of achieving a remedy. Mechanisms that require this should consider its removal, or adding clear rules for complainants and civil society to be able to speak out if the other party is clearly acting in bad faith.

### *Approaches to representation*

Rules requiring direct representation by affected peoples reflect a commitment to communities speaking for themselves. However, these can also reinforce power differences when companies are operating with greater access to legal representation. The reality is that it is virtually impossible for affected peoples to engage without some form of intermediation or support from civil society or trade union groups. Even mechanisms that facilitate easy to access them (e.g. CAO), are geographically distant and culturally foreign institutions which are complex and have administrative processes that require specific linguistic and bureaucratic skills to navigate. Effective engagement with these institutions requires intensive and on-going attention, scrutiny and strategizing.

NJMs may facilitate or effectively block relevant representative structures where they exist (e.g. trade union structures), or facilitate or prevent culturally appropriate forms of representation or mediation. Even where seemingly appropriate and representative structures exist, it remains difficult for a mechanism to judge if real representation is occurring. For example, in the Suman-



gali case, some interviewees questioned whether traditional male-dominated unions operating in the garment and textile sector in that part of India were able to effectively represent the interests of young women working in the textile mills under forced labour conditions. In cases such as Weda Bay, and some of the Wilmar sites, there were significant divisions within communities around their attitudes to companies. This included what they wanted to achieve from utilising grievance procedures, which made community representation difficult. There are no clear-cut and simple rules for representation that can overcome these challenging dynamics. Although, a good rule of thumb may be to work through existing representational structures, while allowing complainants to change representation as they wish.

Much of the dynamics of representation are out of the mechanism's control. Such dynamics come down to the relationship between civil society organisations, trade union groups, affected peoples, and within the community representative structures that exist. These dynamics are complex. There are often overlapping layers of representation from the community, and with civil society actors who form part of transnational campaigning coalitions - all of which may affect what information is received and processed by whom when making such decisions. These dynamics of representation can also be underpinned by certain principles or beliefs. For example, in people's movements involved in Vedanta and POSCO, who had well-developed anti-displacement ideological foundations, meant that they related to outsiders only through an ethic of solidarity. This allows the movement to retain autonomy over decision-making, and requires outsiders to act in the interests of the people, as articulated by the movement.

If the purpose of a NJM is to provide access to remedy for those affected by business related human rights abuses, then a balance must be struck between the following factors: impartial evidence gathering; considering relevant information; and paying attention to preventing unequal power relations between companies and workers or communities, particularly in mediations.

## Evidence

NJMs require appropriate processes for gathering and verifying evidence on which both mediations and determinations can be made. These processes can include adversarial ones in which parties provide information; inquisitorial ones through which the institution itself investigations; and procedures for accepting existing evidence from parties or third parties (e.g. research reports or inputs analogous to amicus curiae briefs).

In the cases studied, effective fact-finding, evidence gathering or the use of evidence played a key positive role where NJMs were more effective, including:

- In Indonesia, a prolonged grievance related to a specific sportswear factory, the Worker's Rights Consortium, which had a staff person on the ground investigating the working conditions and was therefore able to influence specific improvements at the factory. By comparison, the German NCP mediation between Adidas and the Clean Clothes Campaign concerning the same case did not do any investigation. The mediation failed to produce any improvements in the factory. In May 2004, the German government's NCP for the OECD guidelines issued a statement indicating that differing views could not be reconciled in the complaints procedure. The German Clean Clothes Campaign (CCC) subsequently released a statement expressing disappointment that

the ‘existing role of NCP mediation offered no mechanism to validate the truth or untruth of the evidence presented by the two parties’<sup>33</sup>

- In the case of POSCO, there was common knowledge of certain harmful practices, but the only evidence presented in early phases was from the company. Later on, an ESCR-Net and NYU report presented further evidence in the NCP case. It seems clear that independent fact-finding in this case would have supported a better determination. However, this case also highlights a critical challenge - with government approval for a large industrial development, it could be difficult to get approval for such a mission; or a public body (e.g. NCP) may also decline to investigate based on concerns for respect of state sovereignty.
- The CAO compliance investigation enables a panel of independent experts to examine whether or not IFC or MIGA followed its own rules. This includes document review, interviews and site visits. Such an investigation led to a temporary moratorium on IFC palm oil investments by clearly demonstrating that the IFC was not adhering to its own safeguards.

Effective information gathering has in-built independence, and is significantly based on research in the affected community to ensure that those affected are heard. In the case of PT Weda Bay, our research suggests that the investigative function of the CAO yielded a deep and complex understanding of the nature of the problems faced by the communities. Community members voiced respect for the IFC CAO representatives who visited. These representatives not only visited the seaside villages, but also went to the inland forest areas to interview members of an indigenous nomadic tribe called the Tobelo Dalam. Few mechanisms conduct research with this level of breadth and effort.

In a broader sense, as described in the effects section above, the evidence produced by a mechanism (if it does produce evidence), can influence decisions and actions by other actors. This was true in some of our cases, albeit with intermediation by actors other than the NJM. Compelling evidence exists that the UK NCP determination against Vedanta was a reputational blow for the company, leading to disinvestment by a small number of Vedanta’s shareholders. This was primarily due to campaigning conducted by high profile UK NGOs to highlight the NCP’s final statement, and convince shareholders to disinvest on ethical grounds. The effectiveness of the NCP would have been much stronger if co-ordination or communication had occurred with relevant Indian actors, and the decision had been more widely communicated to stakeholders.

This holds true for campaigning. The production of credible evidence can be highlighted in a public campaign and subsequently trigger investigations or grievances. For example, an investigation by NGOs in West Kalimantan helped to propel community grievances to a CAO complaint; and in one RSPO case, a Greenpeace report was used to trigger a complaint without action by a complainant.

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<sup>33</sup> German Clean Clothes Campaign, ‘Outcome of OECD complaint case of German Clean Clothes Campaign against adidas disappointing: OECD Guidelines for Multinational Corporations under examination’ (2004), 3.

Lack of investigatory powers can also impede effectiveness as in the POSCO and German NCP cases mentioned above. Additionally, the RSPO has relied on passing information back and forth between parties in its grievance mechanism due to a lack of independent investigation, and the difficulties of verifying evidence from parties.

## Resourcing and commitment

Resourcing is a necessary, but not sufficient condition in itself for the effectiveness of a mechanism. A critical part of resourcing is the very authority and mandate of the mechanism (e.g. World Bank Group, RSPO etc), and the commitment and support of that institution's stakeholders (e.g. member states, or member companies and civil society organisations). Resourcing with certain kinds of authorities enables or constrains different forms of leverage, such as the ability to financially resource and staff, and to be able to conduct independent investigations.

Due to the very different constitutions of the institutions that house NJMs (governments, inter-governmental bodies, MSIs), the method of mandating and authorising varies significantly. For MSIs, mandating and authorising is constantly subject to renewal and can become unstable as the membership and political balance within an initiative shifts. For inter-governmental institutions, mandating takes significant time, and mechanisms once set up may prove enduring or require significant processes to revise.

Levels of commitment are also reflected in financial and human resourcing. Such resourcing is required to allow for outreach and fact-finding. It also ensures that the mechanism has highly skilled staff able to develop the necessary relationships, apply political analysis to situations, and have the nous to navigate complex situations involving conflicting parties.

Adding financial resources to a NJM that lacks an underlying mandate and commitment, clear sources of leverage, and effective management relationships will not improve effectiveness on its own. However, it is difficult for a mechanism with a base level of leverage, skilled staff and good procedures to realise its effectiveness without sufficient and long-term financial resourcing.

It is important that the form of resourcing of a NJM does not undermine its leverage or skew its relationships, and ability to redress power imbalances. Some MSIs are built on the membership dues of corporate members. Under certain conditions, this can skew decision-making and undermine the effectiveness of the mechanism.

## Local level reach and engagement

Most of the factors discussed in this section – leverage, evidence gathering and strategic relationship management – rely on transnational NJMs being able to link between the local, national and international level. In this research, an ability to build relationships, gather information, monitor implementation, and exert levels of influence at the local level was vitally missing in some cases (e.g. NCP case POSCO), or central to effectiveness in others (e.g. garments cases in Indonesia). Local connections are able to provide connections, insight, and legitimacy that can increase the chances that a grievance mechanism will be able to deliver a remedy, or contribute to positive changes in respect for human rights within business practices over time.

Investment in local engagement by politically savvy and sensitive staff has produced enhanced access, better evidence, and a greater likelihood of longer-term sectoral change:

- **Local engagement can enable access to the process, accounting for particularities of the context:** The FoA Protocol has provided local union officials with access to negotiation standards, governance, and direct interaction with brand representatives. The mechanism was designed taking into consideration the fragmentation of union bodies in Indonesia, and can therefore achieve greater reach through multiple unions.
- **Local links can provide the possibility to create momentum and reform through coalitions of reform minded actors:** In Central Kalimantan, productive coalitions were produced between some RSPO NGOs, corporate actors and members of the Central Kalimantan Provincial government with the specific aim of strengthening practices in relation to the protection of designated high conversation value land. This was not triggered by particular cases. It depended on the ability of certain RSPO members to build coalitions with reform minded actors within the RSPO, and sympathetic actors within relevant government agencies. Such forms of local political engagement are facilitated in part by the RSPO's location in Malaysia and Indonesia.
- **Engaging locally over time creates a greater possibility for long-term sector wide change:** According to participants, a significant advantage of establishing a local forum through the FoA Protocol is the potential to achieve long-term sector wide change, and sustained improvements for workers. Previously, cases handled by brands or via third parties may have resulted in positive outcomes. However, without permanent local monitoring and an effective feedback system, these results were often not sustained. The FoA Protocol allows the ongoing scrutiny of conditions through the more direct participation of local worker representatives. According to a national union representative, this has meant that factories producing for brands that have signed the Protocol are taking a more cautious attitude towards workers' rights, as workers at the factory level have more courage to directly communicate grievances to the brands and the buyers. Unions engaged in the FoA process see all judicial and non-judicial mechanisms in a connected way. For some of the workers' representatives, there is an express strategy of engaging with NJMs as part of efforts to bolster the judicial system.

A lack of local engagement can limit the possibility of implementation of an agreement or programme:

- **Lack of political support from local government can undermine the effectiveness of private safeguards:** For example, there are reported instances where the Indonesian government has removed high conversation value land from palm oil companies under the assumption that the land was being left unused, when in fact, those companies were conserving it to comply with RSPO standards.
- **A lack of engagement can limit the information available to a mechanism:** Many NCPs do not undertake independent investigation, partly due to concerns about sovereignty. This can prevent or stall progress in a case due to a lack of credible information, such as in the case of POSCO or the German NCP's Clean Clothes Campaign case.
- **A lack of engagement can reduce the credibility and effectiveness of attempts at local programming:** The international MSI programs for sandstone workers in Rajasthan

have developed extremely slowly, with the main focus of discussion in the home countries of international companies who order and sell the stone to Northern consumers. We found low levels of input in the development of these programs by civil society organisations or unions in India. So far, the programs have had little effect.

For home-country based mechanisms, distance can be overcome in a number of ways: requesting evidence from interested parties in the host country; conducting investigations in the host country; coordinating with relevant government and non-government agencies in the host country; and communicating determinations to stakeholders in the complaint beyond those specifically named. Currently, only six NCPs conduct in-host country fact-finding, or are willing to do so where necessary. Enhanced engagement with host country governments can include: information sharing; facilitating fact-finding missions to feed into mediation processes; shared discussion of findings; and greater communication and coordination around final statements with relevant government agencies. This could increase the potential for impact of NCP proceedings, while respecting sovereignty through using diplomatic and inter-governmental channels.

In the development and promotion of the *UN Guiding Principles*, significant attention has been paid to the development of company or project-based complaints mechanisms under a principle of subsidiarity. The *UN Guiding Principles* commentary to principle 25 states that within a system of remedy, ‘...operational-level grievance mechanisms can provide early stage recourse and resolution.’ While engagement with a company or project-based mechanism may provide one avenue for local engagement, our research highlights a much broader local engagement – including with local communities, civil society, governments, and trade unions – as highly beneficial. Our case studies highlight the crucial role of engaging locally to ensure that a grievance results in a remedy or change by having the connections, insight and legitimacy to operate effectively. Navigating who and how to engage, requires skilled staff that are politically savvy and sensitive, and are operating in the service of respecting and promoting human rights.

## Beyond institutional design

The effectiveness of a transnational non-judicial redress mechanism is not myopically reliant on its own design, but also the result of factors including its leverage, relationships, approaches to redress power balance, evidence, resourcing local level engagement and commitment. This means that a focus on a purely institutional fix to increase the effectiveness of mechanisms will remain inadequate. While there are clearly elements of procedural fairness, transparency and consistency that the mechanisms we studied could improve, their ultimate effectiveness in delivering a remedy and the ability to influence the human rights practices of business and the regulatory environment for business to respect human rights, relies upon other kinds of conditions. These conditions are harder to resolve and include the issues of commitment, skills, relationships, leverage and power.

The *UN Guiding Principles* include a set of effectiveness criteria for non-judicial grievance mechanisms: that they are legitimate, accessible, predictable, equitable, transparent, rights-compatible, and a source of continuous learning.

This project’s analysis of the effects of NJMs does not undermine the value and potential benefit of realising these criteria. However, while the effectiveness criteria are an aspirational list of qualities, or aspects of institutional design and practice that are desirable in any NJM, our research



does not conclude that these are the factors that most condition the manner in which, and the extent to which NJMs contribute to an individual remedy or systemic changes in business practice. In particular, as discussed above, one aspect that the effectiveness criteria do not cover is the relationship of a mechanism with other actors who may not be party to a specific grievance, but may form part of the ‘system of remedy’, or have a role to play in the implementation of any agreed outcome through a mechanism. Attention to this broader context, and effective engagement within it may turn out to be as critical to the ultimate effect of a NJM as its internal design.

## What is the role of transnational non-judicial redress mechanisms within the context of broader systems of justice or remedy?

The *UN Guiding Principles* articulate relationships between parts of the system of remedy as providing different aspects or entry points for remediation or resolution:

State-based judicial and non-judicial grievance mechanisms should form the foundation of a wider system of remedy. Within such a system, operational-level grievance mechanisms can provide early stage recourse and resolution. State-based and operational-level mechanisms, in turn, can be supplemented or enhanced by the remedial functions of collaborative initiatives as well as those of international and regional human rights mechanisms.<sup>34</sup>

This reflects a view that non-judicial and judicial channels are part of a coherent system with a kind of hierarchy: that you take your case to a company complaint mechanism, and then escalate to an NJM, and then to the legal system. Our cases clearly reflect that this ‘system of remedy’ does not exist or operate in this form. Instead, people find an opening where they can to pursue some form of justice. These avenues for potential redress are not in a hierarchy, such as a national judicial system with an apex, but inter-related in a variety of ways.

The limited scope of NJMs to provide significant remediation in the cases examined here reinforce that access to state based judicial mechanisms remains crucial. This is despite the many shortcomings in domestic legal remedies for business-related human rights abuses.<sup>35</sup> However, in the ten case studies in this project, transnational non-judicial redress mechanisms were more often used as a substitute for the potentially valid perception that state-based judicial systems would not work, and that transnational NJMs were the best avenue in the absence of an operational level mechanism, or in the case of distrust of existing operational level mechanisms. In most cases, the NJMs were the only means of redress available to communities due to the failure of other local mechanisms. Therefore, they were not supplementing or enhancing problem-solving that had already occurred through company-based or operational mechanisms. In cases where claimants were engaged in multiple mechanisms across the ‘system of remedy’, the result was a patchwork of concessions negotiated at different levels. The effects are both lesser,

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<sup>34</sup> *United Nations Guiding Principles, commentary to principle 25.*

<sup>35</sup> A recent review across 11 jurisdictions of the effectiveness of domestic judicial mechanisms in cases of alleged business involvement in gross human rights abuses commissioned by OHCHR found that current domestic law remedies are ‘patchy, unpredictable, often ineffective and fragile’. See, Jennifer Zerk, *Corporate liability for gross human rights abuses: towards a fairer and more effective system of domestic law remedies*, (Report prepared for OHCHR, 2013) 7.



and more varied and significant than one would imagine from reading about the ‘system of remedy’ represented in the *United Nations Guiding Principles*.

## Complements, not substitutes

NJMs are not a substitute for formal justice processes. However, they can complement and do interact with formal justice processes in diverse ways depending on the existing state of the legal framework, judicial system and politics in particular countries and sectors. NJMs are **not a substitute** for a judicial process in the sense that a) *descriptively*, NJMs do not have the same powers as judicial processes and cannot enforce decisions in the same manner (i.e. they cannot do the same things); and b) *normatively*, while under certain conditions NJMs can investigate and remedy human rights violations, NJMs’ capacity to provide such remedy is limited. Providing access to remedy is also contingent on the alignment of many variables, which in practice rarely align. Therefore, NJMs should never be represented as replacing the need for effective state-sanctioned justice systems.

It can be valuable and credible for a NJM to address human rights issues that local people, for whatever reason, are unwilling to take to a state entity. Further, NJMs offer other benefits such as greater flexibility, lower costs, and greater accessibility. There is some evidence that, in certain limited circumstances, they can operate to bring corporate practice in line with international and local laws in contexts where state institutions are failing to do so. However, it was clear from our research that NJMs’ capacity to achieve this is not only narrow in scope, but also highly contingent. In addition to a limited capacity to investigate human rights violations and put pressure on businesses to improve their practices, NJMs can be complementary to formal justice systems in an analogous way to alternative dispute settlement or mediation processes. They provide for alternative paths to resolving a dispute that may be less time and resource intensive than a court system, and certainly, by providing an option where it is currently impossible to use the formal justice system effectively.

Within mediation or dialogue-based mechanisms, the scope of decision-making between those involved can be wide. The CAO Ombudsman team is willing to facilitate any kind of problem-solving process, and monitor any kind of remedy that all parties agree to. For example, the Senujuh, Sajingan Kecil and Riau mediated agreements in the Wilmar case all provided for different variations on the return of some indigenous land to its original inhabitants. Meanwhile, the Senujuh and Sajingan Kecil agreements also included novel remedies, such as one of the subsidiaries assisting one of the communities in resolving a side dispute with a neighbouring plantation company (also a Wilmar supplier). These kinds of practical solutions will not always be available through a typical judicial process within the same timeframes.

Even where NJMs are used instead of formal justice systems due to the system’s existing inadequacy, parties to the mechanism and staff of the mechanism would be well advised to not interpret or articulate that role as replacing the need for effective state institutions. This is a second-best situation for all concerned. Under these conditions, individuals or communities seeking access to a remedy and leverage in the threat of potential litigation can motivate a company to negotiate in good faith in a NJM.

Engagement around justice systems is therefore highly **contextual**. The same applies to the relationship of an NJM to the government. Here, both the receptiveness and capacity of the government, and the political judgment and skill of the NJM come into play. NJM staff require skills and judgment to be able to understand the political dynamics of relating to governments in particular contexts, in part by their skilful management of relationships with other actors who can provide insight and advice. Some NJMs demonstrate some skill in this process (e.g. FoA Protocol by being locally embedded, and CAO by the skill and judgment of its staff), while others currently lack the orientation and staffing to do so (e.g. most NCPs are oriented away from constructive engagement with host country governments).

The description of the ‘system of remedy’ within the *United Nations Guiding Principles* both oversells the remedial capacity of many NJMs, while also underplaying their capacity to complement a formal judicial remedy, and their broader and more varied effects.

### Systems of regulation, not just systems of remedy

Transnational non-judicial redress mechanisms do not only form part of a ‘system of remedy’, but also part of broader regulatory systems that interact and affect each other, and various actor’s perceptions of norms, rules, and consequences. In this way, judicial and non-judicial systems, or hard and soft law, are not dichotomous. They exist at the same time in most regulatory systems – national and international. They condition each other’s form and performance in a range of ways: the shadow of law can encourage participation in non-judicial means of conflict resolution; and soft law norms can influence the content of future hard law. In the current debate about a business and human rights treaty, it is important to not fall into seeing these forms of law or redress as dichotomous or in opposition to each other. The choice is not to have a treaty or to invest in NJMs.

In fact, what is the crucial but currently missing in the treaty debate, is a consideration of the range of conditions and mechanisms that are needed for communities to access remedy or seek justice. This research has found that these conditions include the relationships between different mechanisms and institutions, resourcing, commitment, local level engagement, evidence, approaches to redressing power imbalances, and leverage. These elements are likely also required for hard law to be effective, or for institutions to provide access to remedy. Therefore, it is important not to reify what either hard or soft law, judicial or non-judicial processes can achieve, but to grapple with the complexity of how institutions develop in certain places, sectors and time to make sure that communities who are most affected by business-related human rights abuses have some chance to achieve remedy or justice.

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