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ACCESS TO REMEDY: DEVELOPMENTS AND TRENDS

Improving access to remedy for business-related human rights impacts is a core component of operationalising both the State duty to protect and the corporate responsibility to respect as set out in the UN Guiding Principles on Business and Human Rights (UNGP). We provide a short summary of some key recent developments relating to the three categories of grievance mechanism mapped in the UNGP and identify emerging trends in efforts to improve access to remedy.¹

KEY DEVELOPMENTS

State-based judicial grievance mechanisms

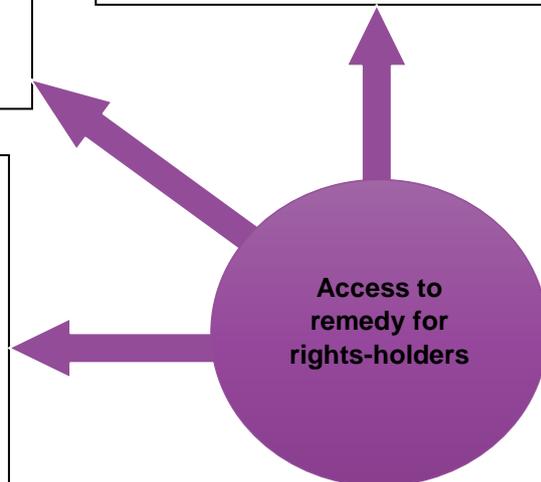
- The Council of Europe [recommends](#) that States examine how to reduce barriers to access to remedy.
- The EU Agency for Fundamental Rights (FRA) issues an [opinion](#) on access to remedy.
- The EU [consults](#) on the effectiveness of collective redress mechanisms.
- The English Court of Appeal examines the scope of the parent company duty of care.
- The US Supreme Court considers whether corporations can be liable under the Alien Tort Statute (ATS) for violations of international law (including human rights).
- Claims against human rights defenders by corporates.

State-based non-judicial grievance mechanisms

- The Council of Europe also [recommends](#) that States examine how to reduce barriers to accessing remedy through State-based non-judicial grievance mechanisms.
- The Office of the High Commissioner on Human Rights (OHCHR) conducts extensive research on non-judicial grievance mechanisms in selected jurisdictions and releases an initial [discussion](#) paper.

Non-State-based grievance mechanisms

- The Working Group on International Arbitration of Business and Human Rights Disputes issues [FAQs](#) clarifying its proposal for the promotion of "BHR Arbitration".
- An arbitral tribunal rules [admissible](#) two claims by trade unions against unnamed global brands for breaches of the Accord on Fire and Building Safety in Bangladesh (Bangladesh Accord).
- [ICJ Initiative on Operational Grievance Mechanisms](#) established to consider the effectiveness of operational-level grievance mechanisms for business-related human rights abuses and provide guidance for lawyers and human rights defenders.



¹ This publication is intended to provide an overview of certain key recent developments and is not intended to be comprehensive. Our previous joint briefing, 'Access to Remedy: the Next Frontier?', March 2017, is available [here](#). This provides background information on a number of the initiatives discussed in this publication. The contents of this publication have been determined by the GBI Secretariat and Clifford Chance and any views expressed in this briefing do not necessarily reflect those of GBI member companies, or of Clifford Chance's clients. All links to websites embedded or referred to are accurate as of 22 November 2017.



KEY DEVELOPMENTS AND EMERGING TRENDS

The following section discusses some of the key developments set out in the graphic and identifies emerging trends in efforts to improve access to remedy for business-related human rights abuses.

1. Understanding the aims of access to remedy in the UNGP and mapping the landscape

In July 2017, the UN Working Group on Business and Human Rights (the Working Group) issued a [report](#) unpacking the concept of access to remedy in the UNGP. The Working Group advocates the need to move away from compartmentalising the UNGP's three "pillars" and articulates how remedy features across each pillar. The report also underlines the importance of an approach to remedy centred around the rights-holder with the aim of providing affected persons with a menu or "bouquet" of remedial options. The Working Group makes eight recommendations to businesses, including that the understanding of remedy is broadened beyond the payment of compensation, and that businesses do not take action which reduces or removes access to remedy. The second phase of the Accountability and Remedy Project led by the OHCHR focuses on mapping State-based non-judicial grievance mechanisms, with a view to developing recommendations to improve their effectiveness. A [discussion paper](#) was published in November 2017. The European Commission continues to investigate the use and effectiveness of collective redress mechanisms across the EU, and concluded initial [consultations](#) in August 2017.

2. Strengthening States' obligations in respect of access to remedy

In October 2017, the third session of the Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with respect to Human Rights (IGWG) considered the [Elements for the Draft Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with respect to Human Rights](#). The proposals include that States take measures to reduce barriers to remedy, for example, relating to the collection of evidence for business-related human rights claims and the adoption of protective measures to prevent "chilling effect" strategies by multinational enterprises to discourage claims against them. A draft [report](#) of the session has been produced.

3. Policy developments aimed at lowering barriers to access

Regional organisations, particularly in Europe, have been active in identifying ways that States may lower barriers to accessing remedy for business-related human rights abuse. The Council of Europe's 2016 [recommendations](#) to member States have been bolstered by an April 2017 [opinion](#) by the FRA which provides options for lowering barriers within the EU consistently with the Council of Europe's recommendations and with the UNGP. In a [statement](#) to the IGWG in October 2017, the Working Group emphasised the need to use national action plans on business and human rights (NAPs) to further effective access to remedy. To date, [19 countries](#) have issued NAPs. These are examined in a [report](#) issued by the International Corporate Accountability Roundtable (ICAR) and the European Coalition for Corporate Justice (ECCJ) in August 2017. Some NAPs now make reference to access to remedy, including those of the UK (as revised in 2016), the Netherlands, Switzerland,



Colombia, Italy, and Norway, although the report concludes that the limited extent of States' commitments is a significant weakness.²

4. Use of legal proceedings to pursue corporate accountability

In a trio of cases this year, the English courts considered the potential scope of a parent company's duty of care in claims arising from the operation of subsidiaries based abroad. Of these, only [Lungowe and others v Vedanta Plc and Konkola Copper Mines Plc \[2017\] EWCA Civ 1528](#) has been permitted to proceed to trial. In [His Royal Highness Emere Godwin Bebe Okpabi and others v Royal Dutch Shell Plc and Shell Petroleum Development Company of Nigeria Limited \[2017\] EWHC 89 \(TCC\)](#) and in [AAA and Ors v Unilever Plc and Unilever Tea Kenya Limited \[2017\] EWHC 371 \(QB\)](#) the court concluded that the facts did not support an arguable case against the parent company, and that it had no jurisdiction over the foreign subsidiary. These latter two decisions have been appealed. Claims by 22 Peruvian individuals against Xstrata Limited and its Peruvian subsidiary are currently being heard in the English court. In September 2017, the US Supreme Court considered whether corporations can be liable under the ATS for breaches of international law. Judgment in that case, [Arab Bank v Jesner PLC, No. 16-499 \(S. Ct.\)](#), is expected in 2018. On 21 November 2017, it was reported that the Court of Appeal of British Columbia has allowed claims by three Eritrean refugees against Nevsun Resources Limited to proceed to trial. The claims involve alleged breach of the duty of care in negligence and violations of customary international law as incorporated into Canadian law. In September 2017, an arbitral tribunal [admitted](#) two claims against unnamed brands by Swiss non-governmental labour union federations under the Bangladesh Accord, alleging that the brands failed to require and facilitate the improvement of facilities by their suppliers within mandatory deadlines in the agreement. Hearings are scheduled for March 2018.

5. Claims involving human rights impacts of climate change

There has been a notable rise in attempts to establish liability against corporations in respect of human rights-related climate change impacts. These include a series of cases in California in 2017 against oil and gas majors alleging liability for losses associated with sea level rises attributed to the respondent companies' carbon emissions. In November 2017, the Center for International Environmental Law (CIEL) summarised the developments in this type of litigation in an extensive report, [Smoke and Fumes: The Legal and Evidentiary Basis for Holding Big Oil Accountable for the Climate Crisis](#). On 14 November 2017, a [complaint](#) against ING Bank was [accepted](#) by the Netherlands' Organisation for Economic Co-operation and Development (OECD) National Contact Point. It is alleged by a number of NGOs that ING Bank is in breach of provisions of the OECD's Guidelines for Multinational Enterprises by failing to have a plan in place to disclose the volume of the greenhouse gasses emitted as a result of its financing activities, and has failed to set a goal to reduce the greenhouse gas emissions resulting from those activities. It was [reported](#) in October 2017 that the Commission for Human Rights in the Philippines has called on 47 carbon producers to attend a preliminary meeting in its investigation into the alleged breach of the responsibility to respect human rights by the companies in relation to climate change-related loss and damage suffered by Filipino typhoon survivors. The meeting takes place in December 2017.

² See generally our first joint briefing, 'National Action Plans on Business and Human Rights', October 2015, available [here](#).



6. Increase in litigation against human rights defenders

Efforts by companies and other stakeholders to improve access to remedy in line with the UNGP should be considered alongside reported instances of companies suing human rights defenders. One notable case in 2017 is the [claim](#) for racketeering brought by companies in the Energy Transfer group against Greenpeace, BankTrack and others, for allegedly manufacturing and disseminating materially false and misleading information about Energy Transfer and the Dakota Access Pipeline project.

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