

OHCHR Accountability and Remedy Project

Improving accountability and access to remedy in cases of
business involvement in human rights abuses

Phase III: Enhancing the effectiveness of non-State- based grievance mechanisms

Scope and Programme of Work

1 November 2018*

* The current version includes some minor modifications added since 1 November 2018. Those parts that have been edited are marked by an asterisk in the text below.



Executive Summary

This paper sets out the plans of the Office of the UN High Commissioner for Human Rights (OHCHR) for the implementation of the third phase of its Accountability and Remedy Project (ARP III).

The OHCHR's Accountability and Remedy Project (ARP) is a process aimed at strengthening implementation of the Third Pillar of the UN Guiding Principles on Business and Human Rights (UNGPs) relating to Access to Remedy. The first phase of this project (ARP I) focused on accountability and access to remedy through **judicial mechanisms**.¹ The second phase of this project (ARP II) focused on substantive and practical steps that could be taken to improve the effectiveness of **State-based non-judicial grievance mechanisms** in achieving corporate accountability and access to remedy in cases of business-related human rights abuse.²

The current phase of OHCHR's work, ARP III, focuses on **non-State-based grievance mechanisms**. This phase takes place pursuant to a mandate from the Human Rights Council under resolution 38/13 of 6 July 2018 in which the Council requested the High Commissioner "to identify and analyse challenges, opportunities, best practices and lessons learned with regard to non-State-based grievance mechanisms that are relevant to the respect by business enterprises for human rights."³

This paper marks the beginning of OHCHR's work in response to this mandate from the Council.⁴ It sets out the next steps of ARP III, covering:

- the scope of the research (including a typology of mechanisms);
- priority issues to be addressed in the course of ARP III;
- the research methodologies that will be employed; and
- the timetable and work plan.

In order to expedite the work, and maximize the use of available resources, the work on ARP III will be divided into five work streams, namely:

- **Work stream 1:** Practical steps that mechanisms can take to meet the "effectiveness criteria" of UNGP 31;

¹ A/HRC/32/19 (2016); A/HRC/32/19/Add.1 (2016).

² A/HRC/38/20 (2018); A/HRC/38/20/Add.1 (2018).

³ A/HRC/RES/38/13, at ¶ 9 (2018).

⁴ The Office of the UN High Commissioner for Human Rights has received several mandates from the Human Rights Council in relation to the Accountability and Remedy Project: A/HRC/RES/38/13 (2018); A/HRC/RES/32/10 (2016); A/HRC/RES/26/22 (2014).



- **Work stream 2:** Understanding the interface between the work of non-State-based grievance mechanisms and the powers and functions of State-based institutions;
- **Work stream 3:** Understanding how companies and other organisations can work together through non-State-based grievance mechanisms to improve the prospects for effective remedy;
- **Work stream 4:** Safeguarding rights-holders, human rights defenders and others from retaliation and intimidation resulting from the actual or potential use of non-State-based grievance mechanisms;* and
- **Work stream 5:** Meaningful stakeholder involvement in the design and implementation of remedial outcomes.

To ensure that ARP III outcomes are practical, globally relevant, evidence based and readily implementable, OHCHR's planned activities include a substantial amount of empirical information gathering from a wide range of jurisdictions. In addition to open access survey techniques and focused legal research, a number of workshops and consultations are planned to gather insights and information directly from practitioners (particularly those responsible for designing and administering grievance mechanisms, and representatives of different user groups) and other key stakeholders, including business. As was the case during the ARP I and ARP II processes, regular updates will be provided and stakeholder feedback will be invited on findings as they emerge, as well as on the draft content of key aspects of OHCHR's recommendations to the Human Rights Council which will be submitted to its forty-fourth session pursuant to resolution 38/13.



Table of Contents

I. Introduction	5
II. Scope, methodology and key concepts	7
1. Scope.....	7
2. Methodology	10
III. Role and importance of non-State-based grievance mechanisms	11
IV. Types of non-State-based grievance mechanisms.....	13
V. Work streams for ARP III.....	17
1. Work stream 1: Practical steps that mechanisms can take to meet the “effectiveness criteria” of UNGP 31.....	17
2. Work stream 2: Understanding the interface between the work of non-State-based grievance mechanisms and the powers and functions of State-based institutions (the “public-private” interface)	20
3. Work stream 3: Understanding how companies and other organisations can work together through non-State-based grievance mechanisms to improve the prospects for effective remedy	22
4. Work stream 4: Safeguarding rights-holders, human rights defenders and others from retaliation and intimidation resulting from the actual or potential use of non-State-based grievance mechanisms*	27
5. Work stream 5: Meaningful stakeholder involvement in the design and implementation of remedial outcomes.....	29



I. Introduction

People who have suffered adverse human rights impacts as a result of business activity continue to face multiple and serious barriers to remedy. These include legal, financial and practical barriers to accessing judicial and non-judicial mechanisms.

In recognition of this, the Office of the UN High Commissioner for Human Rights (OHCHR), as part of its mandate to advance the protection and promotion of human rights globally, is leading a process aimed at supporting more effective implementation of the Third Pillar of the UN Guiding Principles on Business and Human Rights (UNGPs) relating to Access to Remedy.

In November 2014, and pursuant to Human Rights Council resolution 26/22, OHCHR launched the **Accountability and Remedy Project (ARP)**. The first phase of this project (ARP I) was carried out between November 2014 and June 2016 and focused on accountability and access to remedy through **judicial mechanisms**. In its final report to the Council,⁵ OHCHR presented recommended actions that could be taken by States, unilaterally and cooperatively, to improve their implementation of the Third Pillar of the UN Guiding Principles with regard to judicial mechanisms. These recommended actions took the form of (i) a series of **policy objectives** relating to access to remedy and (ii) **supporting elements** to illustrate the different ways in which the policy objectives can be achieved in practice.⁶ The policy objectives and supporting elements were drafted in a manner that was deliberately flexible in recognition of the many differences between jurisdictions in terms of legal structures, cultures, traditions and resources.

In resolution 32/10 of June 2016, the Human Rights Council welcomed the work of OHCHR with respect to judicial mechanisms, noted with appreciation OHCHR's report and made a follow-up request to OHCHR to continue its work in the field of access to remedy for business-related human rights abuses.⁷ Pursuant to this request, the second phase of the project (ARP II) focused on substantive and practical steps that could be taken to improve the effectiveness of **State-based non-judicial grievance mechanisms** in achieving corporate accountability and access to remedy in cases of business-related human rights abuse. The Office submitted its report on ARP II to the Council in June 2018.⁸ The recommended action for ARP II adopted a similar format and approach to that used for ARP I.

⁵ A/HRC/32/19 (2016); A/HRC/32/19/Add.1 (2016).

⁶ A/HRC/32/19, Annex (2016). The Office of the UN High Commissioner for Human Rights also released a paper providing illustrative examples of what was said in the report, available at https://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/ARP_illustrative_examples_July2016.docx.

⁷ A/HRC/RES/32/10, at ¶ 13 (2016).

⁸ A/HRC/38/20 (2018); A/HRC/38/20/Add.1 (2018).



In its resolution 38/13 of July 2018, the Council again welcomed OHCHR's work on accountability and remedy, noted with appreciation the High Commissioner's report on ARP II, and requested OHCHR to begin work on phase three of its Accountability and Remedy Project (ARP III), specifically "to identify and analyse challenges, opportunities, best practices and lessons learned with regard to **non-State-based grievance mechanisms** that are relevant to the respect by business enterprises for human rights."⁹

In implementing the mandate for ARP III, OHCHR will adopt a similar process to that followed for ARP I and ARP II. Accordingly, the Project has commenced with a **scoping exercise** to identify (a) the range of issues arising in relation to non-State-based grievance mechanisms and (b) the areas which should be prioritised in the course of the Project. As with ARP I and ARP II, the intention is to focus on areas that require urgent attention and/or that offer realistic prospects of delivering improvements to accountability and remedy in the short to medium term. In light of time and resource constraints, the Project's methodologies will need to be both robust and efficient, drawing on sources of existing information and expertise, while avoiding duplication of other initiatives.

With those considerations in mind, this paper sets out the key issues that will be explored as part of ARP III, and the methodologies that will be employed in order to respond to the Council's mandate. The overriding aim of ARP III is to build upon and further elaborate on the implications of the UNGPs relating to the use of non-State-based grievance mechanisms (including the "effectiveness criteria" for non-judicial grievance mechanisms set out in Guiding Principle 31). Building on its work relating to judicial mechanisms (ARP I) and State-based non-judicial grievance mechanisms (ARP II) as well as other relevant efforts, OHCHR will develop recommendations to help stakeholders identify ways to improve the effectiveness of non-State-based grievance mechanisms to address cases of human rights abuse involving business enterprises. As with both ARP I and ARP II, the aim will be to deliver **credible, workable and practical recommendations to enable more consistent implementation of the UNGPs** in the area of access to remedy. Implementation of the project will involve **extensive engagement with key stakeholders and with practitioners working with different types of mechanisms** (e.g., operators of mechanisms and past, present and future users) to ensure that their practical experiences are taken into consideration and appropriately reflected in ARP III outcomes.

⁹ A/HRC/RES/38/13, at ¶ 9 (2018) (emphasis added).



II. Scope, methodology and key concepts

1. Scope

Since the adoption of resolution 38/13 in July 2018, OHCHR has conducted a preliminary scoping exercise for ARP III with a view to:

1. gaining an initial understanding of the existing use of non-State-based grievance mechanisms and the practical and legal challenges that have emerged thus far;
2. developing a typology of the different mechanisms used in the organisation of future research; and
3. identifying, in consultation with stakeholders and practitioners,
 - a. the areas that require prioritisation in the course of ARP III; and
 - b. the methodology for the implementation of the project, taking account of time and resource constraints, the current state of research, and the likely availability of external assistance and resources (such as from practitioner organisations, industry bodies and academic institutions).

Box 1: Key Concept: A “family” of accountability and remedy mechanisms with distinct, but also complementary and mutually-reinforcing, roles and responsibilities

The Third Pillar of the UNGPs refers to three distinct types of accountability and remedy mechanisms: State-based judicial mechanisms, State-based non-judicial grievance mechanisms and non-State-based grievance mechanisms. As recognized in the commentary to Guiding Principle 26, “effective judicial mechanisms are at the core of ensuring access to remedy.” However, “administrative, legislative and other non-judicial mechanisms play an essential role in complementing and supplementing judicial mechanisms. Even where judicial systems are effective and well-resourced, they cannot carry the burden of addressing all alleged abuses; judicial remedy is not always required; nor is it always the favoured approach for all claimants.”¹⁰ Furthermore, non-State-based grievance mechanisms “may offer particular benefits such as speed of access and remediation, reduced costs and/or transnational reach.”¹¹

In practice, mechanisms do not always fit neatly in one category or another. The broad definitions adopted for the purposes of ARP I and ARP II are set out below, as well as the description proposed to be adopted of “non-State-based grievance mechanisms” for the purpose of ARP III (see red-highlighted section below). Past research carried out for the Accountability and Remedy Project has highlighted a number of important interrelationships between these different types of mechanism. It is proposed that these relationships will be further explored as part of ARP III.¹²

¹⁰ UNGP 27, Commentary.

¹¹ UNGP 28, Commentary.

¹² See further sections V.2 and V.3 below.



STATE-BASED MECHANISMS (ARP I & ARP II)		NON-STATE-BASED MECHANISMS (ARP III)
<p>Judicial mechanisms comprise the court systems of States. Judicial mechanisms apply the laws of the State to enforce public law offences (e.g., criminal matters) and decide private law claims for remedies by affected individuals and communities (e.g., civil actions).</p>	<p>State-based non-judicial grievance mechanisms are <i>public</i> mechanisms (other than courts) by which individuals (or groups of individuals) whose human rights have been adversely impacted by business activities can seek a remedy with respect to those adverse impacts. While the distinction between these types of mechanisms and judicial mechanisms is not always clear-cut, a key difference is that the former will typically be administered by the executive (i.e., ministerial) branch of government (unlike judicial mechanisms, which are administered by the judicial branch).¹³</p>	<p>Non-State-based grievance mechanisms may encompass company-based or multi-stakeholder based grievance mechanisms, as well as regional and international human rights bodies.¹⁴ However, ARP III will be focussing in particular on <i>private</i> mechanisms which are administered and established by non-State entities, such as a business enterprise alone or with other stakeholders (e.g., trade unions), an industry association or a multi-stakeholder group.¹⁵</p>

The potential scope of ARP III is immense given the many different categories of non-State-based grievance mechanisms that exist and the high degree of diversity within each category (e.g., in terms of aims, coverage and institutional and decision-making structures). Complicating matters further is the fact that many mechanisms which can handle business and human rights-related grievances are not necessarily framed in human rights terms. Over recent years, the role of these types of mechanisms with respect to the resolution of human rights-related claims, complaints and disputes has been much discussed.¹⁶

¹³ Other features which would tend to lead to a mechanism being categorized as “non-judicial” rather than “judicial” include (a) decision-making structures that draw from a mix of legal, technical, lay and specialist expertise; (b) the fact of having been established pursuant to a regulatory regime; and (c) greater use of alternative dispute resolution methods such as conciliation or mediation. ARP II Scoping Paper, at pp. 2-3 (2017), available at https://www.business-humanrights.org/sites/default/files/images/ARPII_FINAL%20Scoping%20Paper.pdf. See also A/HRC/38/20, at ¶¶ 4-12 (2018) for a discussion of the features of State-based non-judicial grievance mechanisms.

¹⁴ UNGP 28, Commentary.

¹⁵ See further section IV below.

¹⁶ See, e.g., Benjamin Thompson, Determining Criteria to Evaluate Outcomes of Businesses’ Provision of Remedy: Applying a Human Rights-Based Approach, 2 BUS. & HUM. RTS. J. 55 (2017); fidh, Corporate



Therefore, the ARP III methodology will need to take account of the large body of research and guidance that has already emerged from the work of different industry bodies, practitioner organisations, civil society organisations and academic institutions with respect to the various different types of non-State-based grievance mechanisms, and the different challenges that have been encountered with respect to each of them.

Because of the breadth of this topic, identifying and analysing all of the non-State-based grievance mechanisms relevant to business-related human rights abuse would be beyond the capacity of OHCHR. The Office's scoping exercise therefore included careful consideration, in consultation with experts and practitioners, of the various ways in which the research could be narrowed and refined, for instance, by focussing on sample groups of mechanisms drawn from each type (see typology discussed in section IV below) or sample jurisdictions (to help with the identification of structural and cultural issues that may have a bearing on the research), or specific types of mechanisms with dispute resolution mandates connected to specific kinds of rights.¹⁷ The conclusion reached was that it will be necessary to confine certain research tasks to sample groups (e.g., of mechanisms and jurisdictions) in order to keep these research tasks to a manageable scope, and to make best use of the resources at OHCHR's disposal and the limited time available.

Box 2: Key Concept: What is “remedy?”: Procedural and substantive aspects of access to remedy explained

Access to remedy has both procedural and substantive aspects.¹⁸ The procedural aspects refer to the steps that must be gone through before a remedy can be obtained, and the substantive aspects refer to the different types of remedies that may eventually be

Accountability for Human Rights Abuses: A Guide for Victims and NGOs on Recourse Mechanisms (3d ed. 2016); EarthRights International & SOMO, Community-Driven Operational Grievance Mechanisms: Discussion Paper for a New Model (2015); MiningWatch Canada & RAID, Privatized Remedy and Human Rights: Re-thinking Project-Level Grievance Mechanisms (2014); Tebello Thabane, Weak extraterritorial remedies: The Achilles heel of Ruggie's 'Protect, Respect and Remedy' Framework and Guiding Principles, 14 AHRLJ 43 (2014); CSR Europe, Assessing the effectiveness of Company Grievance Mechanisms: CSR Europe's Management of Complaints Assessment (MOC-A) Results (2013). Note that a literature review for the purposes of this scoping exercise has been carried out by the Business and Human Rights Catalyst at the University of Manchester, Alliance Manchester Business School in a study entitled "Non-state based non-judicial grievance mechanisms (NSBGM): An exploratory analysis" (2018) [hereinafter "Manchester Study"], available at <https://www.ohchr.org/Documents/Issues/Business/ARP/ManchesterStudy.pdf>.

¹⁷ See, for instance, the Manchester Study which identified non-State-based grievance mechanisms that are particularly relevant to certain sub-groups of human rights-related disputes, namely complaints and disputes with respect to (a) labour rights, (b) consumer rights, (c) environmental standards, and (d) social and community rights. Manchester Study, *supra* note 16, at p. 7. See section II.2 below on methodology, which discusses the Manchester Study in more depth.

¹⁸ UNGP 25, Commentary. For an in-depth description of the meaning of access to remedy, see generally the 2017 report of the Working Group on Business and Human Rights submitted to the UN General Assembly. A/72/162 (2017).



obtained (e.g., apologies, restitution, rehabilitation, financial compensation, administrative remedies and preventative action). Although the types of substantive remedies that may be obtained at the conclusion of a process are key to whether the outcome of that process is appropriate, adequate and effective, such remedies are only of academic interest if affected individuals are unable, for procedural, financial or practical reasons, to access a grievance mechanism in the first place.¹⁹ Therefore, the methodology adopted for ARP III will take account of procedural features of non-State-based grievance mechanisms as well as the kinds of remedies they are able to offer.²⁰

2. Methodology

In carrying out the scoping exercise for ARP III, OHCHR benefited from research carried out in support of ARP III by the Business and Human Rights Catalyst at the University of Manchester, Alliance Manchester Business School.²¹ Their research paper (the “Manchester Study”) took the form of an exploratory analysis of issues and challenges that have emerged so far with respect to the use of non-State-based grievance mechanisms in business and human rights cases and comprised:

- a literature review (covering dozens of publications by academics, NGOs, users of non-State-based grievance mechanisms, development finance institutions, multi-stakeholder initiatives and trade unions) to ascertain the current status of research in this area and to identify where there may be gaps in the research carried out to date;
- a mapping exercise to ascertain the key features of different types of non-State-based grievance mechanisms based on information currently available (which was used to highlight broad trends, available sources of information, areas where further research may be needed and potential research challenges); and
- a series of interviews with key stakeholders knowledgeable about how non-State-based grievance mechanisms work in practice.

A copy of the Manchester Study can be accessed on the ARP III online portal.²²

¹⁹ For a graphic representation of the impact of certain practical, financial and procedural issues on access to remedy in the context of State-based judicial mechanisms, see A/HRC/32/19, at pp. 7-8 (2016).

²⁰ See sections V.1 and V.5 below.

²¹ OHCHR is grateful for the extensive and well-researched work of those involved in the study, in particular Dr. Stefan Zagelmeyer, Dr. Lara Bianchi and Ms. Andrea Shemberg.

²² Manchester Study, *supra* note 16.



This exploratory analysis, and subsequent OHCHR desk research and discussions prompted by it, informed a set of draft proposals discussed with a multi-stakeholder group of experts as part of the process of developing the present report.²³

Box 3: Key concepts: “Grievances” and “grievance mechanisms”

Non-State-based grievance mechanisms vary in formality. For instance, while some mechanisms may prescribe a series of formal steps which must be followed before dispute resolution processes can commence, others may take a less formal, more flexible approach. Less formal, more flexible processes for dispute resolution (including ad hoc processes) can play a vital role in enhancing access to remedy. For this reason, ARP III will not be restricted to the more formal types of mechanisms offered by companies and multi-stakeholder initiatives, and associated with development finance institutions.* Instead, the Project will adopt a wide definition of **grievance mechanism** to take account of less formal (including ad hoc) processes. Drawing from the definitions provided in the Commentary to UNGP 25, “**grievance mechanism**” will be understood, for the purposes of ARP III to include any routinized, non-State-based, non-judicial process through which grievances concerning business-related human rights abuse can be raised and remedy can be sought, but this will not necessarily exclude certain *ad hoc* or *informal* processes. Further, a “**grievance**” will be understood to be “a perceived injustice evoking an individual’s or a group’s sense of entitlement, which may be based on law, contract, explicit or implicit promises, customary practice, or general notions of fairness of aggrieved communities.”²⁴

III. Role and importance of non-State-based grievance mechanisms

While effective judicial mechanisms are at the core of ensuring access to remedy,²⁵ other kinds of grievance mechanisms (including administrative, legislative and other non-judicial mechanisms such as company-based grievance mechanisms, and those operated by industry, multi-stakeholder or other collaborative initiatives) play an essential role in complementing and supplementing judicial mechanisms.²⁶

Depending on the circumstances involved, non-State-based grievance mechanisms may offer advantages over State-based mechanisms (including judicial mechanisms) for those

²³ All relevant ARP III materials, including the initial draft of this paper and details of the expert meeting, may be found on the online portal at: https://www.ohchr.org/EN/Issues/Business/Pages/ARP_III.aspx.

²⁴ UNGP 25, Commentary.

²⁵ UNGP 26, Commentary.

²⁶ UNGP 27, Commentary.



seeking accountability and remedy for business-related human rights abuses. For instance, non-State-based grievance mechanisms:

- may be quicker, cheaper and easier to access,²⁷ and may resolve grievances in situations where a dispute does not amount to a legal cause of action;
- may offer a greater range of potential remedies, and greater potential to tailor remedies to the needs of rights-holders;²⁸
- may aid the early resolution of grievances and thus help to avoid the escalation of human rights-related conflicts;²⁹
- may have greater scope and capacity to act on their own initiative (e.g., they may not have to wait until an issue amounts to an alleged human rights abuse or a breach of other standards before they can act to address it);³⁰
- may be able to offer remedy in circumstances where an effective remedy is not available through State-based channels, for instance in areas with weak governance;³¹
- may have a greater ability to contribute to future prevention (e.g., in the case of company-based grievance mechanisms, by identifying adverse human rights impact in a timely manner and tracking the effectiveness of responses to impacts raised through the mechanism, thus reinforcing aspects of human rights due diligence);³² and
- may contribute to efficient and effective regulation of companies (e.g., by reducing the need for regulatory interventions and sanctions due to the early resolution of disputes, or by highlighting areas where closer regulatory supervision may be necessary).

However, there are challenging issues surrounding when and how non-State-based grievance mechanisms should be used. They may not be sufficiently independent, transparent and predictable for rights-holders to have confidence in them as a potential route to an effective remedy. Moreover, there may be circumstances (for example, situations involving serious abuses of human rights), in which judicial remedy would be more appropriate.³³ Additionally, challenges arise where more than one business

²⁷ In relation to operational-level grievance mechanisms, see OHCHR, *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide*, at p. 64 (2012) [hereinafter OHCHR Interpretive Guide], available at https://www.ohchr.org/Documents/Publications/HR.PUB.12.2_En.pdf.

²⁸ Manchester Study, *supra* note 16, at p. 5.

²⁹ *Id.* at p. 6.

³⁰ See OHCHR Interpretive Guide, *supra* note 27, at p. 68.

³¹ See Manchester Study, *supra* note 16, at p. 5.

³² *Id.*

³³ In some cases (e.g., cases involving allegations of criminal misconduct), judicial recourse will be an essential part of accessing an effective remedy. See UNGP 26, Commentary. Even so, non-State-based grievance mechanisms can nevertheless play an essential role in alerting authorities to occurrences of abuse, in bringing an end to business-related abuses before they escalate into more serious situations and in dealing with underlying causes of harm. It is proposed to examine the interface between non-State-based grievance mechanisms and State-based institutions more closely as part of ARP III. See section V.2 below.



enterprise has caused or contributed to abuses,³⁴ or where a State-based proceeding is already underway,³⁵ or where crimes have been alleged.³⁶ Where there are different potential pathways to a remedy, it is important that parallel procedures do not operate in such a way as to create additional barriers to remedy for those seeking to use them,³⁷ and that rights-holders can make informed decisions about how they wish to proceed based on an understanding of the alternatives.³⁸

IV. Types of non-State-based grievance mechanisms

As the Manchester Study observes, there is presently huge diversity in the types of non-State-based grievance mechanisms that are potentially relevant to the resolution of grievances arising from business-related human rights harms. The range of potential human rights impacts that a business enterprise can have, and the range and numbers of non-State-based grievance mechanisms that have been established to deal with them, mean that it will not be possible to examine all kinds of mechanisms in detail. To make the task manageable, it is necessary to organize the work by reference to a few emblematic types that are particularly relevant to business and human rights grievances and that are particularly influential in this space. Thus, while the UNGPs reference “regional and international human rights bodies” as a category of non-State-based grievance mechanisms,³⁹ OHCHR has decided to exclude such bodies from the ambit of ARP III.

This section sets out a provisional typology of the main categories of non-State-based grievance mechanisms OHCHR will analyse for the purposes of ARP III, although it should be noted that the experiences and lessons learned from some innovative types of

³⁴ OHCHR Interpretive Guide, *supra* note 27, at p. 64.

³⁵ *Id.* (“For instance, if a court process or some other State-based proceeding is under way, it may be necessary or appropriate for the enterprise to defer to that process rather than pursuing direct remediation.”).

³⁶ *Id.*; see also UNGP 22, Commentary (“Some situations, in particular where crimes are alleged, typically will require cooperation with judicial mechanisms.”).

³⁷ In relation to parallel proceedings between judicial mechanisms and State-based non-judicial grievance mechanisms, see OHCHR’s report on ARP II, A/HRC/38/20, Annex, at ¶ 3.8 (2018) (“In cases where both State-based non-judicial mechanisms and judicial mechanisms may have a role in the delivery of an effective remedy, their procedural rules and practices operate in a manner that serves to reduce barriers to remedy for rights holders and does not contribute to the creation of new barriers to remedy.”).

³⁸ The Office’s report on ARP II recommends that “State-based non-judicial mechanisms and judicial mechanisms have adopted and implemented equitable, predictable, rights-compatible and transparent procedures to be followed in the event that more than one mechanism (whether judicial or non-judicial) has been called upon to investigate, adjudicate upon and/or mediate a set of allegations arising from a single event and/or similar sets of circumstances and involving the same business enterprises.” *Id.* at ¶ 3.6. Furthermore, the OHCHR’s report recommends that “[r]ights holders retain the ability to alter a remedial course of action in response to evolving circumstances, including by transferring a complaint and/or dispute from a State-based mechanism to a judicial mechanism in the event that it becomes clear that judicial recourse is an essential part of having access to remedy and/or alternative methods of achieving effective remedy are unavailable.” *Id.* at ¶ 3.7.

³⁹ UNGP 28, Commentary.



mechanisms not falling squarely into these categories (e.g., worker- or community-driven mechanisms) will be analysed for particular work streams.⁴⁰ In the boxes below, each broad type is described by reference to key features and aims, along with further details to help build up a picture as to where and how these different types of mechanisms may be found and used, such as information relating to the types of remedial outcomes that are potentially obtainable and variations that may be observed as to structure and approach.

Box 4: Company-Based Grievance Mechanisms

Key Features: Company-based grievance mechanisms are mechanisms established and administered by companies (ideally designed through consultation with the stakeholder groups for whose use they are intended⁴¹). They can be administered by enterprises (alone or in collaboration with others, including relevant stakeholders) or provided through recourse to a mutually-acceptable external expert or body. This category includes, but is not limited to, operational-level grievance mechanisms⁴² (i.e., mechanisms at the level where business enterprises interface with the individuals or groups they may impact).

Grievances can usually be filed anonymously and through a range of different channels, including drop boxes, email, hotlines, and through webpages. Little information is available about how decisions are taken, although the UNGPs note that: “Since a business enterprise cannot, with legitimacy, both be the subject of complaints and unilaterally determine their outcome, these mechanisms should focus on reaching agreed solutions through dialogue. Where adjudication is needed, this should be provided by a legitimate, independent third-party mechanism.”⁴³ Although some of these mechanisms allow appeals against adverse decisions, it is unclear how common this is.

Remedial Outcomes: It is difficult to make any general comments about the types of remedial outcomes that may be available through these kinds of mechanisms. The details of mediated settlements tend not to be publicised, and there may be disadvantages (from the perspective of both the company and potential users) in being too prescriptive about the types of remedies that might be obtainable. However, one company in the Manchester Study revealed that when a grievance relates to the harm caused by a

⁴⁰ OHCHR has identified key issues for further study, which are categorized in a series of work streams. See section V below. Innovative types of mechanisms will be particularly considered for work streams 4 and 5. See sections V.4 and V.5 below.

⁴¹ See UNGP 31(h).

⁴² See UNGP 29, Commentary (“Operational-level grievance mechanisms can be important complements to wider stakeholder engagement and collective bargaining processes, but cannot substitute for either. They should not be used to undermine the role of legitimate trade unions in addressing labour-related disputes, nor to preclude access to judicial or other non-judicial grievance mechanisms.”).

⁴³ UNGP 31(h), Commentary.



supplier, the company could impose sanctions on the supplier, review orders, and send warning letters leading to the termination of contracts.⁴⁴

Variations: These mechanisms can be at the operational level where workers and communities interface with a company, as well as at the corporate level, more removed from those impacted by business activities. While workers are usually covered by the mechanisms, there is variation as to the extent to which affected communities and others are permitted to file grievances. Additionally, the types of grievances that each mechanism covers can differ, with some accepting all kinds of complaints, and others only focusing on human resources and labour issues, environmental complaints or community issues.

Box 5: Grievance Mechanisms Developed By Industry, Multi-Stakeholder, or Other Collaborative Initiatives

Key Features: These types of mechanisms are external to companies themselves and administer a set of commitments that companies have agreed to adhere to. The commitments could be in the forms of codes of conduct, a set of principles, certification schemes, or by way of an agreement between a business enterprise and an organisation with a mandate to protect the rights of specific groups of stakeholders.⁴⁵ Multi-actor mechanisms can operate at the level of individual members, or at the level of the collaborative initiative, or both, and may cover multiple corporations and jurisdictions. They may be designed to function as a mechanism of last resort when local mechanisms have failed to settle grievances. Most often, these mechanisms deal with labour-related disputes, although some address other types of adverse human rights impacts, such as community impacts, or those relating to public health and safety.

Remedial Outcomes: Little information is available on the exact types of remedial outcomes possible using these mechanisms, both in relation to potential remedies for victims as well as penalties for wrongdoers. For certification bodies, the initiative can refuse to certify or revoke the certification of a company's products or activities. For membership-based initiatives, some mechanisms can decide to revoke the company's membership.

Variations: There are several different types of mechanisms that fall into this category, including industry and sectoral mechanisms, international certification bodies, and multi-stakeholder mechanisms. Some are membership-based initiatives while others

⁴⁴ Manchester Study, *supra* note 16, at p. 25.

⁴⁵ *E.g.*, international framework agreements “concluded between a multinational business enterprise and organisations representing employees and workers, for example global trade unions, international works councils and/or their counterparts at national level.” *See id.* at pp. 30-35.



may carry out inspections in response to complaints to verify whether certain practices are being observed. There is considerable variation with respect to powers and process; mechanisms can focus on communication channels and training programmes, structured investigation, mediation/conciliation, negotiation or adjudication. Some mechanisms were designed with input from the companies adhering to them while others (like certification bodies) present a pre-determined mechanism for companies to sign up to. There is also diversity with respect to who is allowed to file grievances, ranging from workers of a company to any person or organisation that wants to raise an issue.

Box 6: Grievance Mechanisms Associated with Development Finance Institutions⁴⁶

Key Features: The aim of these types of grievance mechanisms is to provide a means by which a person (or group of people) whose human rights have been adversely affected by an institution-financed project can raise a complaint with the financial institution itself, either through an independent accountability mechanism or through other means.⁴⁷ The precise grounds for the complaint will vary from case to case but may include (depending on the mechanism's terms of reference) a complaint that the financial assistance had breached the institution's own human rights standards, and/or that the response of the company in receipt of finance was inadequate (e.g., in failing to set up a suitable company-based mechanisms of its own). The mechanism will usually check the eligibility of the claim, collect and analyse relevant information and then decide on a non-binding recommendation which is usually passed on to higher-level decision makers, for example the management board, where, ultimately, the case is decided.⁴⁸

Remedial Outcomes: The various remedial outcomes possible depend on each financial institution's mechanism. Some engage in mediation but do not have authority to stop or otherwise sanction projects. Other mechanisms have the authority to block continued disbursements of funding.

⁴⁶ Note that State involvement in development finance institutions raises a number of specific issues that will need to be considered as part of ARP III. These types of mechanisms are to be considered under ARP III (rather than ARP II, which covered State-based non-judicial mechanisms) because of the similarity of some of these mechanisms with the other non-State-based grievance mechanisms that will be analysed (i.e., in terms of structure, methods and scope).

⁴⁷ This should be differentiated from the work development finance institutions do in relation to company-based grievance mechanisms, for instance with respect to requiring companies receiving financing to set up operational-level grievance mechanisms or work dedicating to improving the effectiveness of these mechanisms.

⁴⁸ *Id.* at p. 28.



Variations: Different mechanisms have different eligibility requirements and allow different kinds of complainants. Some require at least two individuals to file a grievance, whereas others accept grievances from individuals, groups or organisations affected by projects.⁴⁹

V. Work streams for ARP III

Based on the analysis above, OHCHR's work on ARP III will focus on five main areas (or "work streams").

1. Work stream 1: Practical steps that mechanisms can take to meet the "effectiveness criteria" of UNGP 31

Non-judicial mechanisms can play an essential role in complementing and supplementing judicial mechanisms so that, where business-related human rights abuses have occurred, an effective remedy is available.⁵⁰ However, people often struggle in practice to access an effective remedy through this means. Guiding Principle 31 sets out a set of effectiveness criteria for non-judicial grievance mechanisms.⁵¹ The Manchester Study included some preliminary analysis as to how different types of non-State-based grievance mechanisms respond to different aspects of the UNGP effectiveness criteria, while noting that there are a number of areas where information is presently lacking (particularly relating to issues such as how the impacts of mechanisms are evaluated and how the outcomes of grievance processes contribute to human rights due diligence and continuous learning).

ARP III provides an opportunity to consider how different kinds of non-State-based grievance mechanisms can meet these criteria *in practice* with a view to encouraging further innovation and cross-fertilisation of "good practice" ideas. This work stream will provide the evidential basis for recommended action, similar to what is contained in the ARP II report,⁵² about the practical steps that can be taken to implement UNGP 31 in different contexts and scenarios, while recognising that, because of the diversity of these

⁴⁹ *Id.*

⁵⁰ UNGP 28.

⁵¹ For a description of the effectiveness criteria, see UNGP 31 and its Commentary, as well as Corporate Social Responsibility Initiative, *Piloting Principles for Effective Company-Stakeholder Grievance Mechanisms: A Report of Lessons Learned* (2011).

⁵² See A/HRC/38/20, Annex, Part II (2018).

types of mechanisms (not to mention the range of legal, structural, cultural and economic factors to take account of),⁵³ there are no “one size fits all” solutions.

The key themes to be explored with practitioners and stakeholders as part of this work are set out below.

UNGP 31(a): Legitimate: Examination of the various ways in which mechanisms can build trust with stakeholders, including issues relating to stakeholder involvement in the design and management of mechanisms, the recruitment and training of key personnel, and the advantages and disadvantages of collaboration and “outsourcing.”

UNGP 31(b): Accessible: Information-gathering on the various practical steps, strategies, and technologies used to enhance the accessibility of mechanisms for different groups of affected stakeholders, with particular emphasis on the needs of people who may be at a heightened risk of vulnerability or marginalization, such as women, children, migrant workers, persons with disabilities, victims of modern slavery or bonded labour practices, or members of indigenous communities.

UNGP 31(c): Predictable: Examination of the practical steps taken to raise awareness with respect to procedural matters, as well as awareness of the range of possible outcomes.

UNGP 31(d): Equitable: Examination of the steps that can and should be taken to ensure that rights-holders have access to advice and expertise from a trusted source, and a reasonable opportunity to comment on allegations, counterclaims and proposed outcomes.

UNGP 31(e): Transparent: Information-gathering to uncover the various ways in which mechanisms can and should communicate information about their work and performance to affected stakeholder groups and the public at large, and the appropriate balance between transparency and confidentiality in different contexts.

UNGP 31(f): Rights compatible: Seek insights from practitioners and stakeholders as to the practical steps needed to ensure that “outcomes and remedies accord with internationally recognized human rights.”

UNGP 31(g): A source of continuous learning: Research will challenge practitioners to identify the practical steps that can be taken, and the managerial structures and arrangements that need to be in place, to ensure that lessons are learned, and that grievance mechanisms contribute effectively to human rights due diligence and thus to prevention of future harm, both internally (i.e., within an organization) and as part of collaborative processes.

⁵³ OHCHR will take special note here of grievance mechanisms in situations involving a State-business nexus. See UNGP 4.



UNGP 31(h): Operational-level mechanisms should also be based on engagement and dialogue: This part of the work will gather information and insights from practitioners and stakeholders about the different ways in which stakeholders can and should be involved in the design, review and day-to-day operation of grievance mechanisms and the key components of “good practice” in this regard, with particular emphasis on the needs of people who may be at a heightened risk of vulnerability or marginalization.

Box 7: Preliminary programme of work for work stream 1⁵⁴

- Open process survey to gather views from a range of stakeholders on the various questions related to the UNGP “effectiveness criteria” listed above [Q4 2018 to Q1 2019].
- Consultations with
 - (i) representatives of a sample group of companies; and
 - (ii) representatives of civil society organisations

(e.g. through a workshop or webinar, or series of workshops or webinars) to gather views on the various questions related to the UNGP “effectiveness criteria” listed above [Q2 2019].
- Interview representatives of grievance mechanisms administered by
 - (i) companies (see Box 4 above);
 - (ii) industry, multi-stakeholder, or other collaborative initiatives (see Box 5 above); and
 - (iii) independent accountability mechanisms or development finance institutions (see Box 6 above)*

to gather views about “effectiveness” against the background of the effectiveness criteria set out in UNGP 31 [Q2 to Q3 2019].
- Carry out a case study (or series of case studies) to build understanding of practical ways in which different stakeholder groups and/or organisations representing the interests of different stakeholder groups can contribute to the design and administration of different kinds of mechanisms, focussing in particular on practice surrounding the development of international framework agreements [Q2 to Q4 2019].

⁵⁴ This proposed programme of work (as well as those for all other work streams) is preliminary only; it is subject to revision depending on the manner in which the work on this and other work streams progresses, and available resources.



2. Work stream 2: Understanding the interface between the work of non-State-based grievance mechanisms and the powers and functions of State-based institutions (the “public-private” interface)

Research in the course of ARP I and ARP II highlighted many points of intersection between different remedial systems relevant to business and human rights (both State-based and non-State-based). For instance, judicial mechanisms may be available to enforce contracts entered into following a private mediation process, or may be called upon to pronounce upon the validity of waivers of liability obtained in the course of a non-judicial (including non-State-based) process. As observed in the course of work carried out for ARP II, a number of regulatory regimes (e.g., in the field of labour or consumer protection regulation) may make prior reference to a company-based grievance mechanism a condition of access to State-based non-judicial grievance mechanisms. And State-based bodies may, and in many cases do, provide advice and support to companies in the establishment of company-based grievance mechanisms. On the other hand, States may adopt laws and policies that can have the effect of undermining the effectiveness of non-State-based grievance mechanisms in practice, for instance policies that have implications for the ability of non-State-based grievance mechanisms to ensure the safety of those who wish to access these mechanisms and their families (see also work stream 4 below).

These many and multi-faceted relationships – the “regulatory ecosystem” in which the non-State-based grievance mechanism is located – can have a profound influence on the effectiveness of non-State-based grievance mechanisms and their ability to ultimately deliver an effective remedy to affected individuals and groups. The aim of this work stream is to uncover the key components of well-functioning “regulatory ecosystems” for non-State-based grievance mechanisms with a view to identifying good practices and lessons that may be replicated in different settings. Drawing from State practice from a range of different legal systems and structures (e.g., both civil and common law systems) and from all geographic regions, it will focus on the following key questions:

- How can State-based bodies facilitate access to non-State-based grievance mechanisms in practice?⁵⁵
- What is the appropriate role of non-State-based grievance mechanisms in areas of weak governance? What are the limits to this role?
- When and in what circumstances should non-State-based grievance mechanisms refer matters to State-based bodies for resolution (e.g., cases alleging criminal wrongdoing)? What legal and safeguarding issues are raised by rules and policies relating to referrals?
- How can State-based bodies (including judicial mechanisms) contribute to the delivery of effective remedies through non-State-based grievance mechanisms (e.g., through enforcement of settlements)?

⁵⁵ See UNGP 28.



- In what circumstances is regulatory oversight of the establishment, design and/or performance of non-State-based grievance mechanisms desirable and justified?
- What added considerations arise where a non-State-based grievance mechanism is part of an entity that is owned or controlled by the State, or that receives substantial support and services from State agencies?
- What policy justifications are given for “exhaustion of remedies” type requirements (e.g., where rights-holders are required to first seek remedy from company-based grievance mechanisms before approaching State-based mechanisms)? Where such requirements exist, what exceptions are permitted?
- What difficulties arise from the treatment of dispute resolution between individuals and companies (and the settlements that may arise from them) as private arrangements between private parties?⁵⁶ For instance, what are the implications for access to remedy of requests for waivers of rights to access State-based mechanisms (including judicial mechanisms) either (a) as a pre-condition of using non-State-based grievance mechanisms, or (b) as a condition of accepting a settlement proposed by a non-State-based grievance mechanism?
- What kinds of communication and liaison between different types of remedial systems (i.e., State-based and non-State-based) are needed for a well-functioning “regulatory ecosystem?”

Box 8: Preliminary programme of work for work stream 2

- Desk-based legal research and discussions with policy and legal experts in a range of jurisdictions, drawn from all geographic regions [Q4 2018 to Q1 2019].
- Inclusion of questions drawn from the above list of issues (no more than five) in the ARP III open process survey [Q4 2018 to Q1 2019].
- Consultations with
 - (i) representatives of a sample group of companies;
 - (ii) representatives of civil society organisations; and
 - (iii) company/commercial lawyers (both external and in-house counsel)(e.g. through a workshop or webinar, or series of workshops or webinars) to gather views about the various public-private interface issues listed above [Q1 2019].

⁵⁶ This is referred to in some jurisdictions as the legal doctrine of “privity.”



- Discussions with representatives of a sample of State-based non-judicial grievance mechanisms (drawn from the focus jurisdiction study completed for the purposes of ARP II) about the different ways in which they support, and encourage access to remedy through, non-State-based grievance mechanisms [Q1 2019].
- One “States only” workshop to gather views about the various public-private interface issues listed above [Q3 2019].

3. Work stream 3: Understanding how companies and other organisations can work together through non-State-based grievance mechanisms to improve the prospects for effective remedy

The flexibility enjoyed by companies and other organisations with respect to the design and implementation of grievance mechanisms creates the chance of both overlaps and gaps in the possibilities available to rights-holders to seek remedy in situations where multiple companies or grievance mechanisms are relevant for business-related human rights harm. Even where arrangements between the relevant companies and other organisations are coherent and well implemented, allocation of remedial responsibilities between different interested entities in complex cases can present many practical and legal challenges. The aim of this work stream is to gain a better understanding of the different ways in which non-State-based grievance mechanisms cooperate in practice and the implications of this cooperation for access to remedy in specific cases, with a view to identifying good practices and lessons that may be replicated in different settings. The key questions to be addressed as part of this work stream are:

- What are the advantages and disadvantages of coordination and collaboration between different non-State-based grievance mechanisms from an access to remedy perspective?
- What are the main forms of cooperation that are used in practice? For instance, to what extent do these include cooperation with respect to dissemination of information and outreach?
- What conditions must be in place for successful cooperation?
- What are the arrangements for referrals between different mechanisms? Where referrals are appropriate, what considerations need to be taken into account (see also work stream 4 below)?
- What are the main legal challenges posed by cooperation between non-State-based grievance mechanisms (e.g., confidentiality, management of legal risk, safeguarding of vulnerable complainants or witnesses) and how are these addressed in practice?
- How can cooperation between non-State-based grievance mechanisms contribute to future prevention of business-related human rights harms?

In order to keep the scope of the research focussed and manageable, the intention is to focus on four scenarios which have current, practical significance for companies, various multi-stakeholder initiatives relevant to the corporate responsibility to respect, and development finance institutions, namely:

Scenario 1: Within a group of companies or a supply chain, there are mechanisms operated by different companies which may be relevant to a single business and human rights-related grievance or a series of related grievances. In this scenario, there are several companies linked by business relationships (either contractual or equity-based), each of which (or some of which) operate grievance mechanisms that may be relevant to a grievance arising from business-related human rights harm. This can occur in several different ways, for instance:

- in a supply chain (see Fig. 1 below);
- in a corporate group (see Fig. 2 below); or
- in a case where a company has received financial support from a development finance institution (DFI) and both the company's grievance mechanism and the DFI's independent accountability mechanism can receive complaints about business activities supported by the DFI (see Fig. 3 below).*

Note: ● indicates presence of grievance mechanism within the relevant company or organisation.

Fig 1. Supply chain relationships

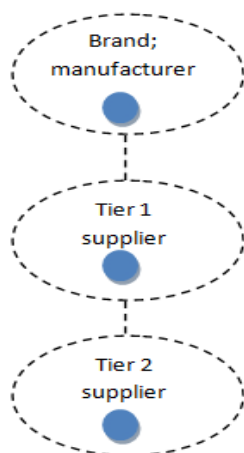


Fig 2. Parent-subsidary relationships

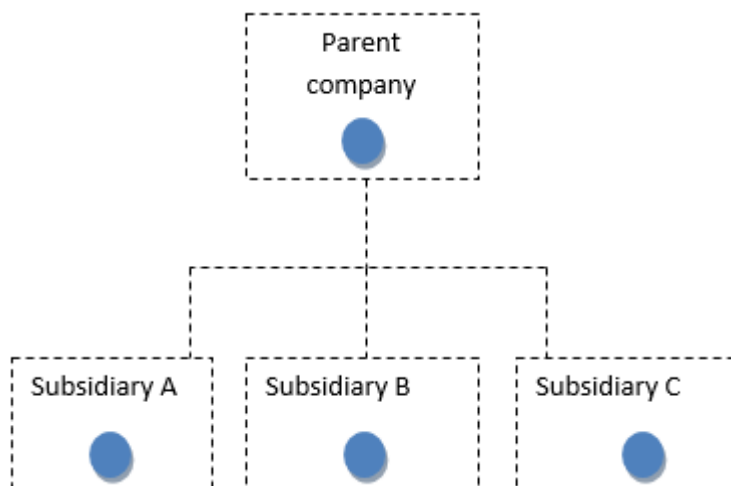
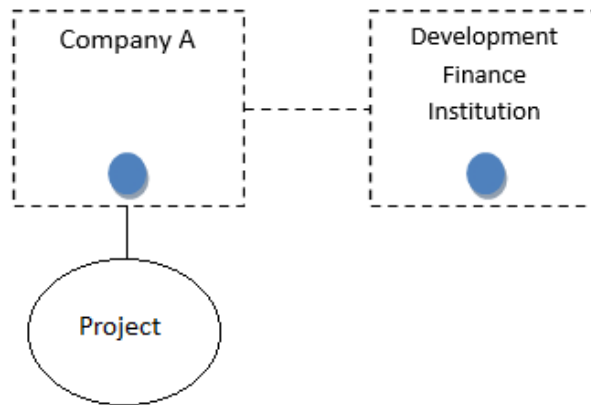


Fig 3. Relationships between DFIs and corporate recipients of financial support and advice



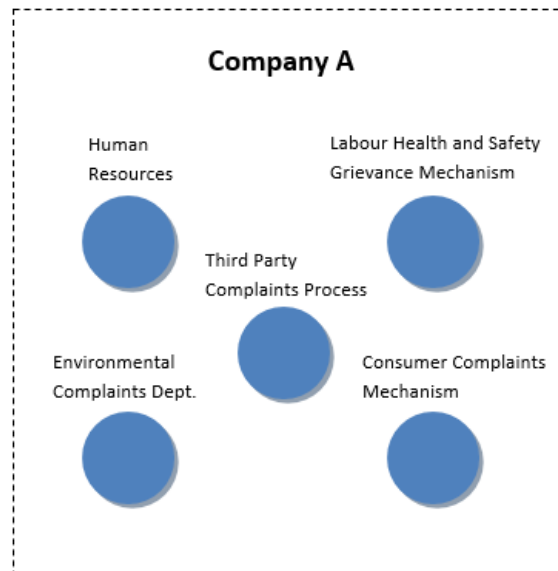
The interaction between grievance mechanisms of different entities which are in a business relationship can raise both practical and legal issues for people seeking to access these mechanisms, as well as for the companies themselves. For instance, a person whose human rights have been adversely affected by business activities taking place in the context of a global supply chain may be able to make use of grievance mechanisms of various companies (e.g., a manufacturer as well as the ultimate buyer, such as a brand owner in a clothing supply chain).⁵⁷ In such cases, questions arise as to whether and how the relevant mechanisms should coordinate with respect to the dissemination of information about the relevant standards and processes, the investigation of claims, and how associated costs and resulting remedial responsibilities should be allocated between them.

Scenario 2: Multiple mechanisms are operated by a single company. Companies sometimes have multiple grievance mechanisms, each dealing with separate, but sometimes overlapping, issues.⁵⁸ For instance, a company may have one grievance mechanism to handle complaints from workers related to employment issues and a different grievance mechanism to handle broader human rights issues, including from affected communities outside of the company itself (see Fig. 4 below). When a grievance could conceivably fall under multiple mechanisms, issues of coordination and institutional coherence arise.

⁵⁷ See Manchester Study, *supra* note 16, at p. 20.

⁵⁸ See *id.*, at pp. 9, 23.

Fig 4. Multiple grievance mechanisms operated by single company

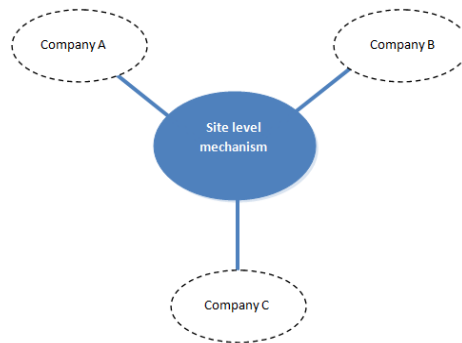


Scenario 3: Circumstances where companies may find it desirable to cooperate with respect to the resolution of grievances arising from business-related human rights abuses at a single location or facility. A specific set of challenges arise with respect to site-level mechanisms where the site acts as a supplier to a number of different buyers or brands. In some cases, the relevant companies may choose to collaborate with respect to the design and operation of grievance mechanisms (see Fig. 5 below) rather than duplicating such mechanisms between themselves.⁵⁹ Collaborations between companies with respect to grievance mechanisms potentially provide opportunities for sharing of know-how (including relevant technological developments), “good practice” updates and the promotion of peer-learning.⁶⁰ However, these forms of collaboration also raise potential legal and practical challenges with respect to matters such as the allocation of responsibilities for publicizing and funding the mechanism, for investigating claims, and for devising suitable tests to help determine “causation” or harm in specific cases and hence the techniques used to allocate remedial responsibilities between the companies involved.

⁵⁹ See *id.* at p. 22.

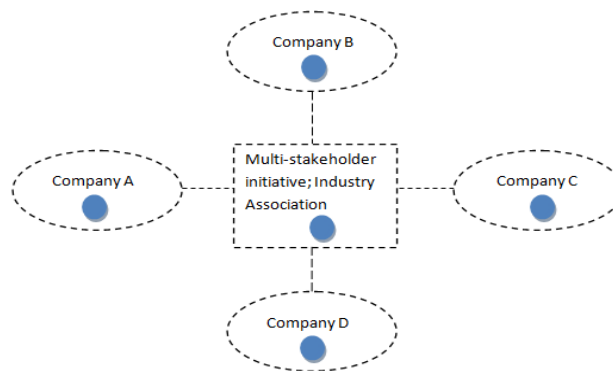
⁶⁰ In relation to independent accountability mechanisms, see for example, the Independent Accountability Mechanisms Network, available at <http://independentaccountabilitymechanism.net/>.

Fig. 5. Cooperation between companies with respect to a single site-level grievance mechanism



Scenario 4: Interrelationships between company-based grievance mechanisms and other grievance mechanisms “external” to the company. This could cover instances where a company is a member of a multi-stakeholder mechanism, and both entities have a grievance mechanism that could potentially handle a single grievance (see Fig. 6 below). The multi-stakeholder mechanism may administer a code of conduct for companies, which includes a requirement for companies to provide a grievance mechanism to resolve specific types of grievances. In such a scenario, rights-holders may be offered a choice of grievance mechanisms, or there may be sequencing requirements (e.g., where the multi-stakeholder mechanism acts as a mechanism of last resort). In either case, potential practical and legal challenges arise with respect to matters such as (a) the allocation of responsibilities for outreach and awareness raising, (b) ensuring that company-based mechanisms (i.e., under the supervision of a multi-stakeholder initiative) operate to the desired standards, (c) ensuring effective implementation of remedial outcomes and (d) the role of the multi-stakeholder initiative with respect to enforcement in cases of non-compliance by a company with the terms of a settlement or a determination by the multi-stakeholder mechanism.

Fig 6. Membership-based organisations which offer a grievance mechanism as a way of supplementing or reinforcing company-based grievance mechanisms





Box 9: Preliminary programme of work for work stream 3

- Work with partner organisations to identify examples of good practice relating to each of the above scenarios drawn from a range of jurisdictions, and prepare (with the help of the companies and organisations concerned) case studies on each [Q2 2019].
- Consultations with
 - (i) representatives of a sample group of companies; and
 - (ii) representatives of civil society organisations(e.g., through a workshop or webinar, or series of workshops or webinars) to gather views on the key questions listed above [Q4 2019].

4. Work stream 4: Safeguarding rights-holders, human rights defenders and others from retaliation and intimidation resulting from the actual or potential use of non-State-based grievance mechanisms*

Protecting actual and potential users of non-State-based grievance mechanisms, their friends and family, and human rights defenders from retaliation and intimidation, as well as threats of the same, when such mechanisms are or will be used is of paramount importance for such mechanisms to be effective.⁶¹ Thus, work stream 4 will look at the policies and practices in place that ensure the protection of those at risk of retaliation when non-State-based grievance mechanisms are to be used. The effectiveness criteria of Guiding Principle 31 (and therefore work stream 1) address many aspects of this work stream: for instance, to be legitimate, mechanisms should enable trust from the stakeholder groups for whose use they are intended; to be accessible, mechanisms should reduce barriers to access, such as fears of reprisal; to be equitable, mechanisms should seek to ensure that aggrieved parties are treated fairly and respectfully; and to be a source of continuous learning, mechanisms should help influence institutional policies and practices so as to prevent future harm. If those seeking to use a grievance mechanism are threatened or retaliated against for attempting to vindicate rights, then many of these criteria will not be met.

This work stream will cover more than just those seeking to use a grievance mechanism. The effectiveness of grievance mechanisms can suffer when others beyond users are intimidated or retaliated against, such as users' friends and family, their representatives, civil society organisations working on behalf of complainants, and other human rights

⁶¹ See A/72/162, at ¶¶ 35-37 (2018).



defenders. Additionally, attention will be had to the particular needs of people who may be at a heightened risk of vulnerability or marginalization, such as women, children, migrant workers, persons with disabilities, victims of modern slavery or bonded labour practices, or members of indigenous communities.

This work stream will also consider the different actors that could be responsible for protection and retaliation, including grievance mechanism staff, companies themselves, individuals working for the companies, their associates, as well as States and State officials. With respect to these latter actors, there is also a linkage between this work stream and work stream 2. Potential things to look at include what States do to fulfil their duty to protect against abuse (including how State-based mechanisms address instances of retaliation), as well as what States do to cause or contribute to retaliation, such as through passing and enforcing anti-union legislation, facilitating strategic lawsuits against public participation, or directly acting against rights-holders. The proper role of company-based mechanisms in areas of weak governance will be part of this inquiry (see also work stream 1 above).

Special attention will be given to innovative practices and new technologies which increase safeguarding. Many grievance mechanisms allow complaints to be issued anonymously and seek to ensure confidentiality in the process. While important, this may not be sufficient in itself to ensure that rights-holders are not further abused. Further, in some cases, greater publicity surrounding a case may in fact increase protection of those involved (e.g., on the basis that this can make it more difficult to identify an individual complainant or informant, or because of greater levels of publicity can increase the level of public scrutiny on the company (or companies) concerned). Thus, other forms of protection, beyond merely ensuring confidentiality of complaints and complainants, should be explored. Keeping in mind other research and processes dedicated to the protection of human rights defenders, more research is needed to identify the range of practical steps that could potentially be taken to protect people from the risk of retaliation, harassment, intimidation and threats as a result of having resorted to non-State-based grievance mechanisms.

Box 10: Preliminary programme of work for work stream 4

- Call for views via an “open process” survey [Q4 2018 to Q1 2019].
- Hold a workshop on these issues with representatives of civil society organisations, trade unions, legal advisers and human rights defenders [Q1 to Q4 2019].
- Conduct a comparative study of different practices in place, and checking their effectiveness through interviews with rights-holders [Q1 to Q4 2019].



- Case studies of innovative models (e.g., market-based enforcement of no retaliation provisions) [Q3 to Q4 2019].

5. Work stream 5: Meaningful stakeholder involvement in the design and implementation of remedial outcomes

Non-State-based grievance mechanisms relevant to business respect for human rights must be capable of ensuring “rights-compatible” outcomes and remedies to affected persons.⁶² In many cases there will be limitations with respect to the kinds of remedial outcomes that such grievance mechanisms can deliver in practice, perhaps because of a limited mandate or a lack of leverage with respect to other parties. Even so, such mechanisms should not lose sight of the importance of meaningful stakeholder engagement and dialogue, not only with respect to the design of remedial outcomes, but with respect to their implementation (including any follow-up activities, for instance with respect to impact monitoring or performance tracking)⁶³ to ensure that they have the desired effect. This will have implications for several effectiveness criteria (see work stream 1 above), in particular with respect to “legitimacy” (see Guiding Principle 31(a)).

The need for stakeholder engagement and dialogue in the design of operational-level grievance mechanisms is addressed in Guiding Principle 31(h). However, further research is needed with respect to the ways that meaningful stakeholder engagement can and should inform the substantive (and procedural) aspects of remedy,⁶⁴ including for a wider range of mechanisms. Numerous practical challenges exist with respect to representational, structural, cultural, power imbalance, and other aspects of ensuring meaningful stakeholder engagement. Particular challenges exist with respect to large transnational enterprises with complex supply chains (see work stream 3 above) or with a large and widespread customer base (e.g., large media organisations). This work stream aims to assess these different challenges and uncover different ways of overcoming them in order to ensure that remedial outcomes are “rights-compatible,” meet the needs of those affected and constitute an effective remedy for human rights-related harms that have occurred.

⁶² UNGP 31(f) and Commentary.

⁶³ The Manchester Study notes a general lack of available data with respect to the extent to which this kind of follow-up work is carried out at the moment by company-based mechanisms, suggesting a need for further research. See Manchester Study, *supra* note 16, at p. 25.

⁶⁴ See the Key Concept in Box 2 above for an explanation of the differences between substantive and procedural aspects of remedy.



Box 11: Preliminary programme of work for work stream 5

- Send targeted surveys out to rights-holders and civil society organisations, followed up by interviews [Q4 2018 to Q1 2019].
- Identify, with the help of partner organisations, potential examples of good practice with respect to stakeholder engagement on the design and implementation of remedial outcomes and prepare a case study on each [Q1 to Q3 2019].
- Hold a workshop on best practices in relation to meaningful stakeholder engagement [Q4 2019].