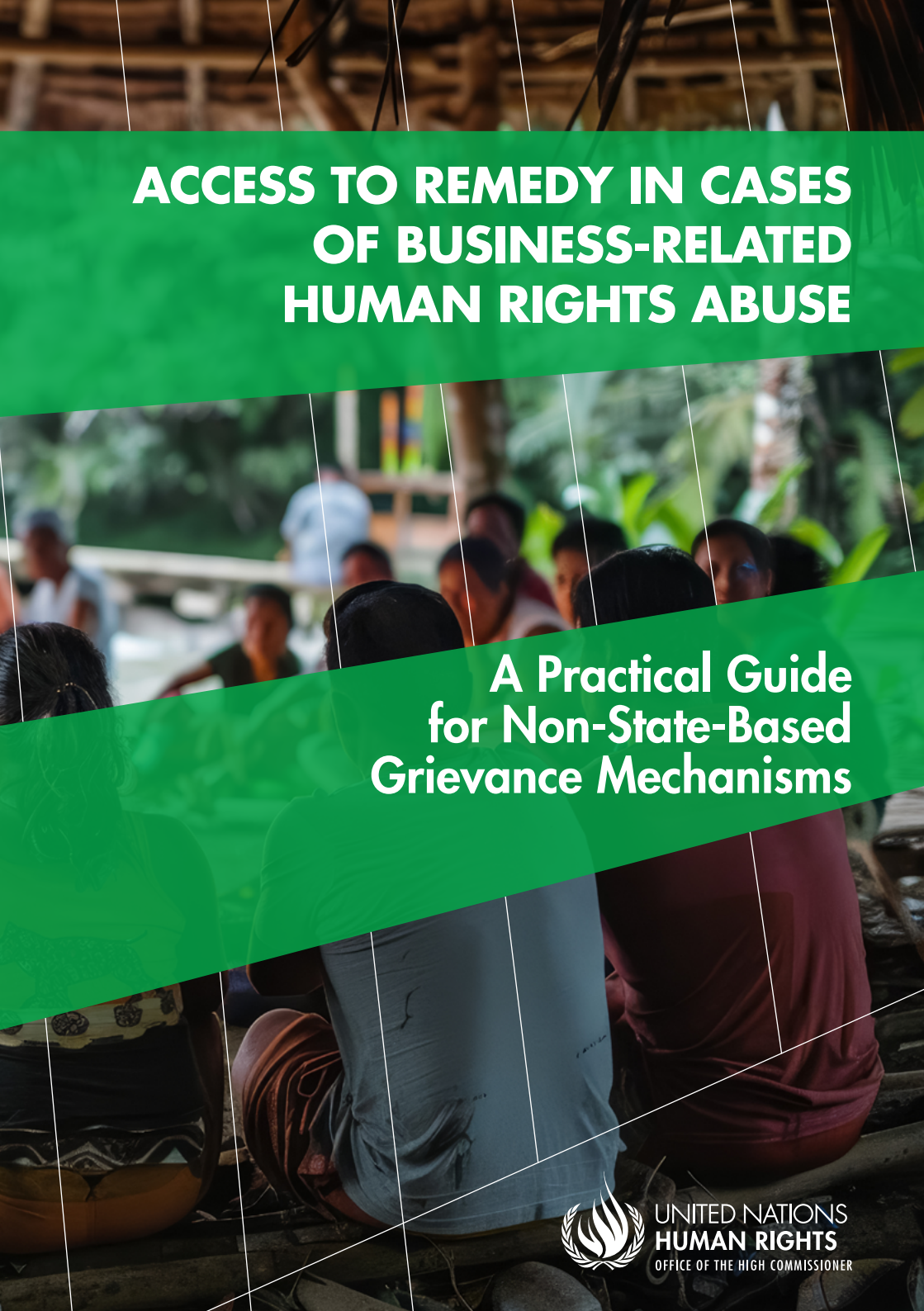


ACCESS TO REMEDY IN CASES OF BUSINESS-RELATED HUMAN RIGHTS ABUSE

A Practical Guide for Non-State-Based Grievance Mechanisms

UNITED NATIONS
HUMAN RIGHTS
OFFICE OF THE HIGH COMMISSIONER

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INTRODUCTION

BACKGROUND

The right to remedy is a core tenet of the international human rights system, and the need for victims to have access to an effective remedy is recognized in the Guiding Principles on Business and Human Rights.

Since 2013, the Office of the United Nations High Commissioner for Human Rights (OHCHR) has had a dedicated focus on the Access to Remedy Pillar of the Guiding Principles. In response to a series of mandates given by the Human Rights Council, OHCHR has led the Accountability and Remedy Project (ARP) to help strengthen the implementation of that pillar.[1]

To promote the lessons learned from the Accountability and Remedy Project, OHCHR has developed a set of publications on access to remedy. The Interpretive Guide on Access to Remedy provides an overview of the Access to Remedy Pillar, and some key issues and misconceptions about it. The guide is complemented by a set of compilations of guidance from the Accountability and Remedy Project, which provide recommended actions for enhancing the effectiveness of the different types of remedial mechanisms relevant to cases relating to business and human rights.

WHAT IS THE ACCOUNTABILITY AND REMEDY PROJECT?

The Accountability and Remedy Project was launched by OHCHR to strengthen accountability and access to remedy in cases of business-related human rights abuse. The Access to Remedy pillar of the Guiding Principles on Business and Human Rights refers to three categories of grievance mechanisms for accountability and remedy in such cases, and the Accountability and Remedy Project has focused on each one:

[1] See Human Rights Council resolutions 26/22, 32/10, 38/13 and 44/15. For more information on the Accountability and Remedy Project, see www.ohchr.org/EN/Issues/Business/Pages/OHCHRaccountabilityandremedyproject.aspx.

- ARP I: Judicial mechanisms
- ARP II: State-based non-judicial grievance mechanisms
- ARP III: Non-State-based grievance mechanisms

The methodology adopted throughout these parts of the project involved an inclusive, multi-stakeholder, evidence-based process to identify good practices for improving rights holders' access to remedy through the relevant grievance mechanism in cases relating to business and human rights.

At the end of each part of the project, a report and addendum were submitted to the Human Rights Council, containing:

- General observations regarding the mechanism
- Guidance for enhancing the effectiveness of the mechanism, drawing upon good practices identified during the project
- Explanatory notes for the guidance
- A model set of terms of reference that States can use as a basis for reviewing the effectiveness of their remedial system

WHAT IS THIS GUIDE?

The present guide compiles the guidance and explanatory notes from the third part of the project (ARP III), which focused on enhancing the effectiveness of non-State-based grievance mechanisms.[2] This information can be found in the report and the addendum thereto submitted to the Human Rights Council in 2020.[3]

FOR WHOM IS THIS GUIDE INTENDED?

This guide is aimed primarily at States and developers and operators of non-State-based grievance mechanisms (including entities or organizations that create, design or host non-State-based grievance mechanisms, such as business enterprises or development finance institutions), non-State-based grievance

[2] For documents and information on ARP III, see www.ohchr.org/EN/Issues/Business/Pages/ARP_III.aspx.
[3] A/HRC/44/32, annex and Add.1.

mechanisms themselves and their personnel. Anyone seeking to reform, study or use such mechanisms may also benefit from this guide.[4]

HOW TO USE THIS GUIDE

The guidance reproduced below contains:

- **A series of policy objectives** for States and developers and operators of grievance mechanisms
- **Elements** that demonstrate different ways in which the policy objectives can be reached[5]

Informed by the various information-gathering activities during ARP III, these policy objectives and supporting elements are intended to capture lessons from "good practices" with regard to the design and operation of non-State-based grievance mechanisms, and relevant legal and policy issues. To ensure global relevance and applicability, the recommended action is designed to be readily adaptable to different legal systems and contexts while also being practical, forward-looking and reflective of international standards on access to remedy.

Following each policy objective and corresponding set of elements, explanatory notes provide relevant definitions, examples and added context.

[4] See A/HRC/44/32, paras. 21–23.
[5] "Elements" are the numbered paragraphs directly following each policy objective. For instance, a reference in this document to "1.1" is a reference to the first element under policy objective 1.



RECOMMENDED ACTION TO IMPROVE THE EFFECTIVENESS OF NON-STATE-BASED GRIEVANCE MECHANISMS RELEVANT TO BUSINESS AND HUMAN RIGHTS

A. FACILITATING ACCESS TO EFFECTIVE NON-STATE-BASED GRIEVANCE MECHANISMS BY STRENGTHENING DOMESTIC LAW AND POLICY

POLICY OBJECTIVE 1: States establish and maintain an enabling legal and policy environment for non-State-based grievance mechanisms dealing with business-related human rights harms.

1.1 The State has conducted a review of, and keeps under review, consulting appropriately and meaningfully with relevant stakeholders:

(a) The different types of non-State-based grievance mechanisms based in or active in its jurisdiction;

(b) The different ways in which non-State-based grievance mechanisms may complement the effective implementation of the State's international legal obligations and policy commitments with regard to accountability and remedy for business-related human rights harm;

(c) The different ways in which non-State-based grievance mechanisms can potentially contribute to the effectiveness of domestic law and policy relevant to the corporate responsibility to respect human rights;

(d) Its policies and priorities as regards the promotion of non-State-based grievance mechanisms through relevant bilateral, regional and multilateral initiatives;

(e) The laws, policies and processes that are relevant to the establishment and effective functioning of non-State-based grievance mechanisms in different sectors and contexts.

1.2 The State applies the findings from the review processes mentioned in paragraph 1.1 above:

(a) To inform and continuously improve the State's strategies for a comprehensive State-based system for the remedy of business-related human rights harms, in which administrative, legislative and other non-judicial mechanisms play an essential role in complementing and supporting judicial mechanisms;

(b) To ensure policy coherence as between relevant laws, policies and processes;

(c) To develop and disseminate suitable guidance for the establishment and effective functioning of non-State-based grievance mechanisms;

(d) To identify the further measures which could be taken to encourage the establishment and effective functioning of non-State-based grievance mechanisms, particularly for business enterprises with which the State conducts commercial transactions or when the State contracts with business enterprises to provide services that may impact upon the enjoyment of human rights;

(e) To further its cooperative efforts with other States through relevant bilateral, regional and multilateral initiatives with respect to access to remedy for business-related human rights harms through non-State-based grievance mechanisms.

1.3 The State's laws, policies and processes relevant to the establishment and effective functioning of non-State-based grievance mechanisms are informed by a clear delineation between the roles and responsibilities of non-State-based grievance mechanisms and State-based mechanisms (judicial and non-judicial). This delineation is appropriate to the type, nature and severity of different business-related human rights harms, and recognizes that effective judicial mechanisms are at the core of ensuring access to remedy.

1.4 Laws, policies and processes relevant to the establishment and effective functioning of non-State-based grievance mechanisms are consistent with the objectives of reducing barriers to remedy and not erecting further

barriers to prevent legitimate cases from being brought before rights holders' preferred mechanisms.

1.5 The State sets out a clear policy expectation that relevant State agencies will investigate and take appropriate enforcement action with respect to information concerning business-related human rights harms that has been provided to them by non-State-based grievance mechanisms.

1.6 The State has taken appropriate steps to address legal impediments to cooperation between different entities with respect to the establishment and effective functioning of non-State-based grievance mechanisms.

1.7 State agencies responsible for regulating business activities make appropriate use of information from relevant non-State-based grievance mechanisms for the purposes of identifying, in consultation with relevant stakeholders and other entities:

(a) Regulatory or compliance challenges in specific sectors or operating contexts, including challenges involving systemic or market-related issues;

(b) Instances of retaliation taken in connection with the use of such mechanisms;

(c) The legal or policy interventions and reforms that may be needed in response.

EXPLANATORY NOTES

KEY CONCEPTS

"Non-State-based grievance mechanisms" have been defined for the purposes of the Accountability and Remedy Project as 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.[6]

"Rights holders" refers to the intended beneficiaries of non-State-based grievance mechanisms, particularly those whose human rights have been (or are at risk of being) adversely impacted by business activities.

[6] See www.ohchr.org/Documents/Issues/Business/ARP/ARPIII-PoW.pdf, pp. 11, 13–17.

"Stakeholders" include rights holders and their representatives or other persons who have an interest in the effectiveness of non-State-based grievance mechanisms, such as trade unions, business enterprises, local communities and civil society organizations.

"Affected stakeholders" refers to persons whose human rights have been adversely impacted. "Potentially affected stakeholders" refers to persons whose human rights may have been, or are at risk of being, adversely impacted.

"Meaningful consultation" refers to an ongoing process of interaction and dialogue between the consulting entity and stakeholders that enables the consulting entity to hear, understand and respond to stakeholders' interests and concerns, including through collaborative approaches.

"Retaliation" refers to any harmful conduct undertaken in order to prevent or discourage a person from, or punish a person for, seeking access to, or interacting with, a non-State-based grievance mechanism. Retaliation can include physical, psychological and economic harm, can take place both online and offline and can be perpetrated by either State or non-State actors. Economic forms of retaliation can include negative actions connected with a person's employment, including demotion, disciplinary action, dismissal, salary reduction, job or shift reassignment, anti-union discrimination and blacklisting. The recommended action recognizes that, in addition to rights holders, retaliation may take place against "people who are associated with them", which may include, depending on the context, family members, friends, colleagues, trade union and other representatives, human rights defenders or any other person connected with a rights holder who may be a target for retaliation as a result of the rights holder's actual or potential use of a mechanism. Additionally, retaliation may take place against "people who contribute to the effective functioning of [non-State-based grievance mechanisms]", which may include, depending on the context, mechanism personnel, those providing services to a mechanism in a professional capacity (e.g., mediators, case workers, and interpreters), and others who may be called upon for assistance or information.

"Dialogue-based methods" are communication processes between parties to a grievance aimed at resolving the grievance and/or fostering greater mutual understanding and trust. The outcomes of such processes can include, depending on their objectives, a mutually-agreed set of decisions and actions (as may be the case through more structured processes,

such as mediation) and/or a better understanding of the different perspectives involved (as may be the case through more open-ended approaches).

"Preventive remedies" refers to precautionary or pre-emptive action to mitigate or prevent future harm.

"Adopting a gender perspective" refers to the process of assessing the implications for women, men and others of any policies, processes and practices, and making their concerns and experiences an integral dimension of the design, implementation, monitoring and evaluation of policies, processes and practices so that they benefit equally and inequality is not perpetuated.[7] Being "gender-sensitive" means using respectful and non-discriminatory language and taking into account the different situations, needs and attributes of women, men and others in order to make sure behaviours, mindsets or programmes respect the human rights of all persons.

The legal and policy environment for non-State-based grievance mechanisms

Domestic legal regimes and policies, and the manner in which they are implemented and enforced, can have a profound effect on the effectiveness of non-State-based grievance mechanisms in practice. Thus, the recommended action begins with suggestions for ways that States can work towards creating more enabling legal and policy environments for such mechanisms.[8]

Policy objective 1 envisages an open, inclusive, evidence-based process to clarify the types of non-State-based grievance mechanisms in the jurisdiction, the various contributions they can make to domestic law and policy relevant to the corporate responsibility to respect human rights, and the options that could be considered to improve policy coherence in States' approaches to non-State-based grievance mechanisms so that such mechanisms are better able to fulfil the role envisaged for them in the Guiding Principles (1.1 and 1.2). This process could take place as part of a national action plan on business and human rights[9] or as part of

[7] See www.ohchr.org/EN/Issues/Women/WRGS/Pages/GenderIntegration.aspx.
[8] See Guiding Principles on Business and Human Rights, principle 28.
[9] See www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx.

strategies to improve access to remedy more generally. The task of identifying the laws, policies and processes that are potentially relevant to non-State-based grievance mechanisms in practice (1.1(e)) is complicated by the fact that many of these regimes will not be expressed in human rights terms. Potentially relevant regimes may include contract law, competition law, laws on the recognition of arbitration awards, laws protecting fundamental labour rights, consumer law, environmental law, privacy laws, immigration law, laws on equality and anti-discrimination, laws on whistle-blower protection and laws on freedom of information. Moreover, the legal implications of establishing such mechanisms, for business enterprises in particular, may be shaped by the operation of laws of much broader application, such as those relating to civil liability.[10]

The action needed to address any deficiencies identified through the review process (1.2) will vary depending on local legal structures and needs. States should consider the particular needs of, and challenges facing, small and medium-sized enterprises. In some cases, States may seek to facilitate access to non-State-based grievance mechanisms by issuing suitable guidance (1.2 (c)), which could be sector-specific or responsive to specific human rights-related risks (e.g., as may exist in conflict-affected areas).[11]

Further measures (1.2 (d)) need not necessarily be limited to regulatory controls but may encompass incentives. In some cases, and particularly where there is a State-business nexus,[12] there may be opportunities to craft suitable incentives for business enterprises for instance through (a) licences to operate certain businesses, (b) land concession grants, (c) grants of concessions to develop natural resources or (d) relevant contracts with the State, such as procurement contracts, public-private partnership arrangements, export credit and investment agreements.

Preserving a clear delineation between the roles and responsibilities of non-State-based grievance mechanisms and State-based mechanisms (1.3) is important for providing clarity to rights holders about the remedy pathways[13] that may be available to them (see policy objective 4 and explanatory notes below). There will be circumstances (for example, cases involving international crimes or serious human rights abuses) in which judicial remedy must be available. Non-

[10] See also A/HRC/32/19, annex, policy objective 14 (calling upon States to take steps to ensure that "corporate liability under domestic private law regimes are properly aligned with the responsibility of companies to exercise human rights due diligence across their operations").
[11] Guiding Principles on Business and Human Rights, principle 7.
[12] Ibid., principles 4–6.
[13] See A/HRC/38/20/Add.1, box 3.

State-based grievance mechanisms must not limit access by rights holders to judicial mechanisms in such cases (8.4).[14]

Awareness of the needs and preferences of rights holders, such as the reasons why they may seek to use more than one type of mechanism, may help to highlight barriers that may not be apparent when mechanisms are viewed in isolation (1.4), for instance as regards time limits for seeking access to State-based mechanisms that do not take into account prior efforts by rights holders to resolve grievances using non-State-based grievance mechanisms.

Greater attention could be given to the various ways in which information derived from non-State-based grievance mechanisms might be integrated into other processes, such as those involving law enforcement (1.5) or other State agencies (1.7), including regulators and institutions with mandates relevant to business and human rights, such as national human rights institutions.

Improvements in the effectiveness of non-State-based grievance mechanisms may also be achieved through greater cooperation between business enterprises themselves (see policy objectives 15 and 16 and explanatory notes below). As part of efforts to create an enabling legal and policy environment for these types of mechanisms, the recommended action encourages States to address possible legal impediments to this kind of cooperation (1.6).

POLICY OBJECTIVE 2: Domestic legal regimes and policy operate in such a way that rights holders can access non-State-based grievance mechanisms without fear of retaliation against themselves, persons who are associated with them and persons who contribute to the effective functioning of such mechanisms.

2.1 The State has adopted and implemented the laws, policies and processes necessary to ensure that there is effective deterrence from, investigations of allegations of, and appropriate legal redress in the event of, conduct that may amount to retaliation against rights holders, persons who are associated with them and persons who contribute to the effective

[14] See Guiding Principles on Business and Human Rights, principle 26, commentary; A/HRC/32/19, annex, 1.2; A/HRC/32/19/Add.1, para. 3.

functioning of non-State-based grievance mechanisms as a result of the use of, or interaction with, such mechanisms.

2.2 Relevant State agencies have taken steps to increase their institutional awareness of, and their ability to respond quickly and effectively to, the different forms of retaliation that persons may face as a result of the use of, or interaction with, non-State-based grievance mechanisms.

2.3 The State has adopted and implemented the laws, policies and processes necessary to ensure that persons affected by, or who may be at risk of, retaliation as a result of the use of or interaction with non-State-based grievance mechanisms have access to appropriate assistance and support, including medical assistance, counselling, legal advice and other advisory services.

EXPLANATORY NOTES

Protection from retaliation

Fear of retaliation is a serious barrier to remedy. Protection from human rights abuses associated with the use (or intended use) of non-State-based grievance mechanisms is encompassed by the State's duty to protect human rights.

The recommended action highlights the importance of effective legal regimes to combat retaliation associated with the use of, or interactions with, non-State-based grievance mechanisms (2.1). For these purposes, retaliation is defined broadly, recognizing that rights holders may be deterred from interacting with non-State-based grievance mechanisms out of concern for the well-being or safety of others.

Robust criminal law regimes and law enforcement have a key role to play in deterring and punishing retaliatory behaviour.[15] States should not, however, neglect other potentially relevant regimes, such as civil liability regimes,[16] privacy laws, laws protecting fundamental labour rights, whistle-blower protection and freedom of expression.

[15] See A/HRC/32/19, annex, part I.
[16] Ibid., part II.

Neither should States overlook the domestic legal regimes that may hamper the ability or undermine the confidence of rights holders in their access to and interaction with non-State-based grievance mechanisms, without fear of retaliation. Strategic lawsuits against public participation are important to mention in this regard. A comprehensive and coherent strategy to address the risk of retaliation in this context will seek to address the tensions between different areas of law (such as may exist between laws on freedom of expression and laws on defamation) to find an accommodation that prevents the use of legal processes as a means of retaliation.

Human rights defenders will require additional legal protection due to the nature of their work. For instance, while safeguards to protect the identity of persons raising grievances may help to address the risk of retaliation in many contexts, they will not necessarily assist trade union representatives who work openly and in full view of employers and others.

Retaliatory behaviour (and the risks thereof) may not be obvious to law enforcement agencies, a fact that highlights the need for greater institutional awareness of the different forms that retaliation can take in practice (2.2). Institutional awareness can be raised through the establishment of specialist units,[17] ongoing engagement with affected stakeholders (and particularly those who may be at heightened risk of vulnerability or marginalization), risk assessments and training. Such efforts should promote a proper appreciation of the structural, sociocultural and economic issues that can underpin or exacerbate risks and the risks that arise in challenging operating contexts, such as conflict-affected areas or areas in transition from conflict.

Legal regimes and their enforcement (2.1), efforts to raise institutional awareness of relevant institutions (2.2) and measures to provide access to assistance and support (2.3) should take into account the particular risks that women may face and the way that entrenched social attitudes and discrimination can serve to exacerbate the physical, psychological and economic harm caused by retaliatory acts.[18] The importance of engaging directly with, and drawing from the knowledge of, persons who have experienced retaliation first hand as a result of their interactions with such grievance mechanisms cannot be overstated.

[17] See A/HRC/32/19, annex, policy objective 6.
[18] See A/HRC/41/43, paras. 11–21.

POLICY OBJECTIVE 3: Domestic legal regimes and policy operate in such a way that persons affected by or at risk of business-related human rights harms have realistic and readily-identifiable pathways to an effective remedy, which include appropriate use of non-State-based grievance mechanisms.

3.1 The State, through its relevant agencies, works to raise awareness among relevant stakeholders about:

(a) The types of non-State-based grievance mechanisms that may be relevant in different contexts and the relative advantages and disadvantages of different courses of action;

(b) The value of dialogue-based methods in certain contexts;

(c) Strategies and resources to help address imbalances in power that can undermine the ability of rights holders to engage fairly in non-State-based grievance mechanisms;

(d) The different ways in which State-based mechanisms may, in appropriate cases, provide support for the effective implementation of the outcomes of grievance processes;

(e) Opportunities that may exist in different contexts to transfer or escalate a grievance from a non-State-based grievance mechanism to a relevant State-based mechanism.

EXPLANATORY NOTES

The need for realistic and readily-identifiable pathways to an effective remedy

In many cases, the remedies obtainable from non-State-based grievance mechanisms are only partial (for instance, because they can address only the future conduct of the company concerned, or because the mechanism has insufficient leverage over the company in question). In such cases, rights holders benefit from having the flexibility to pursue different remedies through different mechanisms, perhaps in combination, as part of a remedial strategy that best meets their needs.

State agencies can play a useful role in raising awareness of the availability and advantages of different courses of action to rights holders (3.1 (a)). It may be relevant to highlight, for instance, the circumstances in which dialogue-based methods may yield better remedial outcomes than adjudicative processes (3.1 (b)), while also noting the utility of adjudicative processes in cases where a more formal process, perhaps with binding outcomes, may be needed.

The most suitable providers of information and advice will vary, depending on the legal structures and existing institutions of the State concerned; however, in many jurisdictions and contexts, national human rights institutions and other bodies with mandates expressed in human rights terms are likely to have an important role to play. Such bodies may be able to help to address the imbalances in power that frequently exist between parties to grievances (3.1 (c)).

In cases where there may be routes through which a remedial outcome might be legally enforced (e.g., by constructing it as a binding contract), rights holders should be made aware of this through the appropriate channels (3.1 (d)). Similarly, in cases where a grievance (or aspects of a grievance) can be referred to a State-based mechanism, rights holders should have ready access to the necessary information to be able to engage with the relevant processes as easily and efficiently as possible, and in such a way as to avoid unnecessary duplication of efforts (3.1 (e)).

POLICY OBJECTIVE 4: Domestic legal regimes and policy operate in such a way that non-State-based grievance mechanisms, individually and in combination with each other and relevant State-based mechanisms, can contribute to the realization of effective remedies for those affected by business-related human rights harms.

4.1 The State's laws, policies and processes relevant to the establishment and effective functioning of non-State-based grievance mechanisms recognize:

(a) The need for remedies to be adequate, effective and prompt;

(b) That an effective remedy will vary, depending on the circumstances of the case and the needs of affected stakeholders, and may comprise financial remedies (and similar forms of reparation) and non-financial remedies (including acknowledgements, apologies and

other symbolic remedies), as well as timely preventive remedies to mitigate or prevent future harm;

(c) The importance of meaningful consultation with affected stakeholders on the type of remedy and the manner in which it should be delivered, adopting a gender perspective and with a particular focus on the needs of persons who may be at heightened risk of vulnerability or marginalization.

EXPLANATORY NOTES

The concept of "effective remedies" and the contribution of non-State-based grievance mechanisms

Policy objective 4 focuses on the substantive (as opposed to the procedural) aspects of remedy. Although States will not generally be in a position to prescribe the remedial outcomes of non-State-based grievance processes, and while specific mechanisms may be individually limited in what they can provide by way of remedy in any event,[19] to the extent that the State is able to influence the work of such mechanisms (individually and in general), this should be aligned with applicable international standards (4.1 (a)), drawing appropriately from all relevant categories of remedy (4.1 (b)) and appropriately responsive to the context, particularly the needs and perspectives of affected stakeholders (4.1 (c)).

POLICY OBJECTIVE 5: States seek ways to promote the establishment and effective functioning of non-State-based grievance mechanisms through international cooperation.

5.1 The State works through relevant bilateral, regional and multilateral initiatives:

(a) To identify opportunities to enhance access to remedy for business-related human rights harms through the use of non-State-based grievance mechanisms, as appropriate, recognizing that effective judicial mechanisms are at the core of ensuring access to remedy;

[19] See Explanatory Notes on p. 17.

(b) To actively engage with other States that are party to such initiatives to promote the use of non-State-based grievance mechanisms in appropriate cases, including through awareness-raising activities, technical assistance and capacity-building;

(c) To exchange information relating to (i) the contributions of non-State-based grievance mechanisms to access to remedy for business-related human rights harm in different sectors and operating contexts; (ii) the opportunities, successes and challenges associated with their use (including in a cross-border context); and (iii) the legal and policy interventions that may contribute to enhancing their effectiveness in different sectors or contexts;

(d) To gather and analyse information on the nature and patterns of grievances referred to non-State-based grievance mechanisms in practice, in order to strengthen cooperative efforts by States to address business-related human rights harms, particularly in a cross-border context.

5.2 The State has made appropriate arrangements for relevant stakeholders to be able to call upon their embassies and consular services for information, advice and assistance with regard to the establishment and effective functioning of non-State-based grievance mechanisms in other States in different operating contexts and/or resolving grievances in specific cases.

EXPLANATORY NOTES

International cooperation

The use of non-State-based mechanisms for dealing with business related human rights harms has been discussed in bilateral, regional and multilateral settings.[20] States have also participated in multi-stakeholder initiatives that have led to the creation of sector-specific mechanisms.[21] States should build on these efforts and identify areas where non-State-based grievance mechanisms

[20] See for example Council of Europe, recommendation CM/Rec(2016)3; and ILO, *Social Dialogue, Collective Bargaining and Responsible Business Conduct: Promoting the Strategic Use of International Instruments for Trade Unions' Action* (2019).
[21] See for example the International Code of Conduct Association.

may help to address business-related human rights risks, including in a cross-border context (5.1 (a) and 5.1 (b)).

The recommended action highlights the potential value of such mechanisms as a source of information for regulators (5.1 (c) and 5.1 (d)), particularly with regard to issues that may require collaborative action (e.g., as between State parties to trading agreements).

Embassies and consular services can play a role as a source of advice and assistance for rights holders, business enterprises and other relevant stakeholders (5.2). This type of assistance can be particularly important where there are social and economic challenges that may undermine the effectiveness of remedial mechanisms (whether State-based or non-State-based), including with regard to lack of respect for the rule of law, lack of resources for and capacity of key institutions, or in conflict-affected areas. In the latter context, embassies and consular services have a particularly important role to play in disseminating information on the security risks that rights holders may face, which can be drawn upon to help to inform risk assessments and risk management strategies, for instance in relation to retaliation.

B. IMPROVING THE EFFECTIVENESS OF NON-STATE-BASED GRIEVANCE MECHANISMS

POLICY OBJECTIVE 6: Non-State-based grievance mechanisms are effective in dealing with business-related human rights harm.

6.1 The mechanism's mandate, objectives and operations are aligned with internationally recognized human rights.

6.2 The effectiveness criteria set out in principle 31 of the Guiding Principles on Business and Human Rights are used as a benchmark for designing, operating, tracking the effectiveness of and improving the mechanism.

EXPLANATORY NOTES

KEY CONCEPTS

"Effectiveness criteria" means the criteria applicable to non-judicial grievance mechanisms found in Guiding Principle 31.

"Remedial outcome" refers to the outcome reached at the conclusion of a grievance process or series of parallel, overlapping or consecutive processes.

General comments about effectiveness

The effectiveness criteria found in Guiding Principle 31 provide the benchmark for assessing the effectiveness of non-State-based grievance mechanisms dealing with business-related human rights harms (6.2).

OHCHR has gathered information from non-State-based grievance mechanisms operating in a wide range of jurisdictions (representing different geographic regions, domestic legal structures and traditions) about how they meet different aspects of the effectiveness criteria in practice. The recommended action under policy objectives 7 to 14 encapsulates the insights gained from that research.

Non-State-based grievance mechanisms will not be effective mechanisms for dealing with business-related human rights harms if they are not themselves aligned with internationally recognized human rights (6.1). This is a natural extension of the corporate responsibility to respect human rights.[22] Developers and operators of grievance mechanisms[23] should have regard to relevant internationally recognized human rights standards[24] and the statements of international human rights bodies. Thus, for instance, mechanisms designed for rights holders that include indigenous peoples should respect the right to self-identify as indigenous peoples, in accordance with international standards and consistent with the right to self-determination.[25]

POLICY OBJECTIVE 7: Non-State-based grievance mechanisms are legitimate.

7.1 The mechanism publishes and proactively disseminates information necessary for a proper understanding by rights holders and other relevant stakeholders of its mandate, objectives and operations.

7.2 There is meaningful consultation with relevant rights holders and other stakeholders with regard to the optimal design of the mechanism and its processes, and as part of regular evaluation exercises for the purposes of identifying ways in which the mechanism's design and/or operations can be improved.

[22] Guiding Principles on Business and Human Rights, principles 11–24.
[23] See p. 48.
[24] Guiding Principles on Business and Human Rights, principle 12 and commentary.
[25] See United Nations Declaration on the Rights of Indigenous Peoples (General Assembly resolution 61/295, annex); and ILO Convention 169, art. 1 (2).

7.3 Where relevant and appropriate, business enterprises and other relevant entities engage proactively with those seeking to develop and implement worker-driven and community-driven grievance mechanisms, contributing constructively to all stages of the design process.

7.4 The mechanism adopts and implements the policies and processes needed to address the needs of persons who may be at heightened risk of vulnerability or marginalization, drawing on relevant internal and/or external expertise, including through meaningful consultation with relevant rights holders and other stakeholders, and adopting a gender perspective.

7.5 The mechanism has been provided with an appropriate degree of independence from the business enterprise(s) and other actors whose activities may be the subject of grievances, and has adopted and implemented the policies, processes and practices needed to maintain that independence in its day-to-day operations and at all stages of the grievance process.

7.6 The necessary arrangements have been made:

(a) To minimize the risk of conflicts of interest for the mechanism (or any of its personnel) with respect to the discharge of its mandate and functions;

(b) To minimize the risk of any undue influence of any actor(s);

(c) To address power imbalances between relevant actors, including by adopting a gender perspective and paying special attention to persons who may be at heightened risk of vulnerability or marginalization.

7.7 Personnel employed by or assigned to the mechanism are suitably qualified for the tasks they are required to carry out and are held to high standards of personal and professional conduct.

7.8 The mechanism adopts and implements the policies and processes needed to ensure that personnel engaged in the handling of grievances:

(a) Are cognizant of (i) the rights and needs of the persons for whom the mechanism is intended (including by adopting a gender perspective and paying special attention to those at heightened risk of vulnerability or marginalization); (ii) the

social, economic, structural and cultural issues that can affect the ability of the mechanism to meet those needs; and (iii) the manner in which different sources of discrimination can combine to exacerbate inequalities in society;

(b) Relate to rights holders in a culturally appropriate and sensitive manner.

EXPLANATORY NOTES

Policy objective 7 suggests ways how stakeholder trust in non-State-based grievance mechanisms can be strengthened. Fostering a proper understanding among relevant stakeholders of the work of the mechanism is central to this (7.1). To that end, it is vitally important that the mechanism clearly explains what the mechanism can and cannot offer, recognizing that managing stakeholder expectations is a key aspect of gaining and retaining stakeholder trust. Developing and disseminating robust policies on safeguarding against retaliation, internal investigations and ethical matters (e.g., conflicts of interest) can also help to build stakeholder confidence in the mechanism.

Meaningful consultation with rights holders, as an ongoing endeavour (see p. 46), is fundamental to the legitimacy of the mechanism in general and gaining and retaining stakeholder trust in particular (7.2). The extent to which stakeholder consultation is possible, and the form it should take, will depend on the type of mechanism and its scope of activities. In some cases, such as where prospective users are geographically widely spread, difficult to identify or locate, or otherwise difficult to reach, it may be necessary to consider reasonable alternatives, such as consulting civil society organizations, trade unions or other advocates. In some contexts, and particularly where the intended users of mechanisms are readily identifiable, close at hand and willing to assist, developers and operators may benefit from highly interactive "user-centred" and "co-design" models of engagement to better understand the needs and priorities of different rights holders.[26] Whatever format the consultation takes, developers and operators should seek out, in particular, persons with lived experience of the human rights harms the mechanism seeks to address,

[26] See www.ohchr.org/Documents/Issues/Business/ARP/ARPIII_Discussion_Paper_Nov2019.pdf, pp. 12–13.

and ensure that the content of relevant international standards is appropriately reflected.[27]

Where suitable opportunities present themselves, developers and operators should be open to discussing and participating in grievance mechanisms that originate from rights holders themselves (7.3), such as "worker-driven" mechanisms (as have been gaining traction in the agricultural sector) and "community-driven" models (in which potentially affected communities take on responsibility for at least the initial design of grievance mechanisms).[28]

Legitimate mechanisms address the needs of rights holders who may be at heightened risk of vulnerability or marginalization (7.4), and mechanisms should draw from relevant international standards with respect to addressing the needs of particular groups where relevant.[29] Furthermore, mechanisms should adopt a gender perspective in order to understand and address the structural, sociocultural and economic barriers that may prevent women from participating in grievance processes on an equal basis with men.

Non-State-based grievance mechanisms vary greatly in terms of their proximity to the business activities they address. The extent to which a mechanism must be independent from relevant business activities in order to be legitimate will depend on the mechanism's mandate and objectives. Various structural, institutional, administrative and resourcing issues may need to be addressed to ensure that the mechanism is able to discharge its functions fairly (7.5 and 7.6). Independence from the relevant business activities and/or enterprises is particularly important for mechanisms that make use of adjudication (as opposed to dialogue-based methods).[30] Strategies for a mechanism to enhance independence can include transparent hiring processes and appropriate reporting lines, control over a predictable budget, autonomy over policies and procedures, the ability to accept and handle grievances independently of management, and the use of an independent, multi-stakeholder advisory panel that is gender-balanced and properly representative of anticipated user groups and interests. Strategies for addressing conflicts of interest include open and competitive recruitment; restrictions on movements of personnel from the mechanism to relevant business operations (and vice versa); rotation of personnel; declaring and responding to conflicts of interest in specific cases; and delegation

[27] For example, ILO recommendation 130, art. 6.
[28] See www.ohchr.org/Documents/Issues/Business/ARP/ARPIII_Discussion_Paper_Nov2019.pdf, p. 13.
[29] For example, see Committee on the Rights of the Child, general comment No. 12 (2009) on the right of the child to be heard (CRC/C/GC/12).
[30] See Guiding Principles on Business and Human Rights, principle 31 (h) and commentary.

of dispute resolution and decision-making to legitimate, independent third-party mechanisms in appropriate cases.

Mechanisms should have suitably qualified personnel (7.7) who can discharge their responsibilities in a manner that fosters stakeholder trust (7.8). "Suitably qualified" is context-dependent but could mean (depending on the role in question) a knowledge of human rights and the corporate responsibility to respect human rights, expertise with respect to assessing and responding to risks of retaliation, experience with trauma counselling, and mediation and language skills. Mechanisms should invest in appropriate training to ensure that personnel stay up to date with relevant standards and best practices.

POLICY OBJECTIVE 8: Non-State-based grievance mechanisms are accessible.

8.1 The mechanism:

(a) Works proactively to raise awareness among relevant rights holders and other stakeholders of its existence, objectives and processes, including through targeted outreach activities;

(b) Is operated in a manner that is consistent with the rights of equality and non-discrimination.

8.2 The mechanism's criteria with regard to eligibility to initiate grievance processes are clear, minimal and consistently and fairly applied.

8.3 Procedures for receiving grievances and for engaging with relevant rights holders are designed, to the extent appropriate in the light of the mechanism's mandate and functions:

(a) To be as user-friendly as possible, making (i) appropriate use of both formal and informal channels of communication, with multiple entry points and modes of communication; and (ii) the necessary adjustments to address the barriers that persons may face due to gender-based discrimination, or because they may be at heightened risk of vulnerability or marginalization;

(b) To promote dialogue-based methods for resolving grievances;

(c) To allow sufficient time, in the light of all circumstances, for persons to identify, raise and respond to issues;

(d) To enable rights holders to represent themselves, if they prefer, while making appropriate provision for the possibility of representation by a third party.

8.4 The mechanism does not require any person to waive their rights to seek a remedy using an alternate grievance mechanism (whether State-based or non-State-based) as a condition of access or participation.

8.5 The mechanism makes appropriate provision for rights holders to collaborate and seek collective redress for business-related human rights harms.

8.6 The mechanism has put in place measures designed to allow safe access to and use of the mechanism on an equal basis with others, for instance by improving physical and communicational accessibility and by providing procedural, age-appropriate and gender-sensitive accommodations to eliminate barriers to participation, including by persons with disabilities.

8.7 The mechanism does not charge a fee for access to it and, furthermore, takes such steps to minimize the financial costs thereafter as may be appropriate in the light of its mandate, objectives and operations.

8.8 Materials, resources and advisory services provided in order to enhance the accessibility of the grievance mechanism are made available:

(a) In formats that meet the requirements, and are consistent with the rights, (i) of children, (ii) of persons people facing challenges with respect to literacy, and (iii) of persons with disabilities, including persons with hearing, sight or mobility impairments;

(b) In the languages of the people for whom they are intended.

8.9 The mechanism adopts and implements policies and processes appropriate to its mandate, objectives and operations:

(a) To preserve an appropriate degree of confidentiality with regard to the identity of the person raising a grievance and the grievance process itself, taking into account the particular needs of persons who may be at heightened risk of vulnerability or marginalization;

(b) To ensure that risks of retaliation against rights holders, persons who are associated with them and persons who contribute to the effective functioning of the mechanism as a result of the use of, or interaction with, the mechanism are properly assessed and addressed.

EXPLANATORY NOTES

Policy objective 8 sets out suggestions as to practical steps that can be taken to improve accessibility of non-State-based grievance mechanisms.

As part of raising awareness of its existence and procedures (8.1), the mechanism may need to inform stakeholders about their rights and the role of the mechanism in helping to realize them. Any outreach (or other training) should be based on a proper appreciation of the structural, sociocultural and economic barriers that may exist to seeking remedies for business-related human rights harm, especially in settings where human rights abuses may have become entrenched.

Effective awareness-raising activities will vary, depending on the type of mechanism and context. Many mechanisms have, however, drawn attention to the importance and usefulness, in various contexts, of face-to-face engagement (such as meetings and discussion groups); leaflets; prominently displayed notices (offline and online); social media; and education sessions delivered in a culturally- and gender-sensitive manner and by persons to whom rights holders can readily relate (such as peers, union representatives or community members).

The accessibility of mechanisms is often marred by overly restrictive or complicated eligibility criteria (8.2). Although mechanisms may have to balance competing considerations relating to eligibility, criteria should always be properly disseminated (see policy objective 9 and explanatory notes below) and consistently applied. Time limits on access to the mechanism should be flexible enough to take into account the length of time that abuses may take to become apparent or for the rights holders to become aware of the mechanism, or other barriers that affected stakeholders may face. To help to overcome these problems, some mechanisms have the flexibility to commence investigations on their own initiative.

Ways that the "user-friendliness" of grievance handling processes can be enhanced (8.3 (a)) include providing templates and model submissions, ensuring that these and other documents are available in the languages spoken by potentially affected stakeholders, and allowing rights holders to engage with the mechanism in their own language. Procedures are unlikely to be user-friendly, however, without meaningful consultation with rights holders about their needs and preferences. Mechanisms that are intended to benefit specific communities should be informed by an understanding of local methods of decision-making,

and should be designed to work in a manner that is complementary to established practices, wherever possible.

In many cases, accessibility is best served by providing rights holders with a variety of communication options (8.3 (a)), which could include the use of toll-free telephone lines, electronic or regular mail, or other online and in-person communication methods. Adopting a gender perspective will help mechanisms to identify specific barriers that women face (8.3 (a) and 8.6), which may be cultural in nature and/or related to physical security, job security, costs of arranging childcare and the times of day during which they can participate. Grievance mechanisms should not overlook the economic barriers (such as lost wages) faced by persons who may have to take time off to defend their rights and seek remedies for harm.

Non-State-based grievance mechanisms must not be used to impede rights holders' access to judicial mechanisms or relevant State-based non-judicial mechanisms; they should therefore never demand that rights holders give up their rights to seek remedies elsewhere as a condition of access to or participating in grievance processes (8.4). On the contrary, non-State-based grievance mechanisms should anticipate and respond appropriately to the possibility of parallel, overlapping or consecutive proceedings, especially in cases where they can provide only a partial remedy.[31]

Providing for collective action by rights holders can be an important way to enhance accessibility, for instance by allowing them to share costs and representation (8.5).

Mechanisms should take steps to reduce financial barriers that may be associated with their use (8.7). Examples include making available, free of charge, appropriate advisory and support services (such as helplines or designated case workers), offline and online resources (e.g., pamphlets and videos), or assistance with translation of documents and other information. Furthermore, appropriate adjustments should be made to improve access to different groups of rights holders (8.8), such as through the provision of resources in braille and audio formats.

Mechanisms should act responsibly to address rights holder concerns about the possibility of retaliation, and to reduce risks of harm (8.9). Where confidentiality has been requested by a rights holder, or the circumstances of a case would otherwise make it necessary or appropriate, policies and processes

[31] See policy objective 3 and explanatory notes above.

should be in place to guard against the disclosure of personal information (and any information that might be used to identify a person) without the relevant person's explicit consent (ensuring that such consent will not be deemed to have been given unless the person concerned has been fully informed of the risks to them). In some cases, and especially where there are risks of retaliation, the need for accessibility may be best served by providing for the possibility of anonymous complaints, provided that due process concerns are properly addressed (see p. 36).

The strategies needed to address the risks of retaliation (8.9 (b)) will be context-dependent, though could comprise suitable organizational policies (e.g., "zero tolerance" policies), case-specific risk assessment and mitigation plans, and providing advice about steps that persons may take for their own personal safety.

POLICY OBJECTIVE 9: Non-State-based grievance mechanisms are predictable.

9.1 The mechanism adopts and implements appropriate policies and processes for resolving grievances, with well-defined, reasonable and suitably flexible time frames for each stage, designed to ensure that grievances are addressed and concluded without undue delay.

9.2 The mechanism publishes accurate and realistic information through a range of user-friendly formats and multiple channels of communication, sufficient to foster a clear understanding among rights holders and other relevant stakeholders about:

(a) Its mandate, objectives, operations, policies and processes;

(b) The legal and operational capacity of the mechanism to address different types of harm (including information about relevant constraints);

(c) The criteria for eligibility to initiate and participate in the grievance process;

(d) The rights of parties and what they can expect at each stage of the grievance process, including indicative time frames within which key decisions will be taken and milestones reached;

(e) The nature and kind of remedies that the mechanism can provide in different cases, and the extent to which remedies can be enforced and implementation monitored;

(f) The extent to which the mechanism can assist rights holders in cases where there may be a risk of retaliation, and the form such assistance may take.

9.3 The mechanism consults meaningfully with relevant right holders prior to:

(a) Joining together similar grievances, or grievances raising similar issues of fact;

(b) Appointing a third party to investigate, mediate or adjudicate a grievance or issue; or

(c) Undertaking any joint investigations with any third party.

9.4 The mechanism adopts, implements and appropriately communicates clear policies and processes with regard to the circumstances in which and the terms upon which the mechanism may seek to cooperate with other non-State-based grievance mechanisms, State-based mechanisms and/or State agencies with respect to a grievance (or the subject matter of a grievance), which clearly set out:

(a) When and how prior consent will first be sought from affected stakeholders;

(b) Appropriate safeguards relating to protecting people from the risk of retaliation.

9.5 To the extent appropriate in the light of its mandate and functions (and with due regard for applicable laws and appropriate safeguards relating to protecting people from the risk of retaliation, and for legitimate requirements of commercial confidentiality), the mechanism publishes readily understandable information relating to grievances received by the mechanism and their outcomes for the purposes of enhancing understanding by rights holders of the operation and performance of the mechanism in practice.

EXPLANATORY NOTES

The need for clarity about procedures and relevant time frames is addressed in a series of elements under policy objective 9 (9.1 and 9.2). The methods for communicating such information will depend on the mechanism, but may include both offline and online resources, disseminated through the above-mentioned communication channels (see p. 30), and should be in the languages of relevant rights holders. Information should be sufficiently detailed for rights holders to understand the grievance process and to make an informed assessment of the mechanism's capacity to respond to the issues at hand (9.2 (a) and 9.2 (b)). It is important that such information is accurate and avoids overpromising with respect to the types and likelihood of remedies that might be delivered.

There may be circumstances where a mechanism seeks to cooperate with another mechanism (whether State-based or non-State-based) or a State agency. It is important that rights holders are informed of the circumstances in which this might take place, when and how they will be consulted, and their rights (if any) to object (9.4 (a)). The mechanism should take into account the risks of retaliation from both State and non-State actors (9.4 (b)) as a result of any such cooperation (see also 12.4).

Publishing information about, or databases including, past cases (such as types of claims, and related remedial outcomes and time frames) can improve the predictability of grievance processes (9.5). Mechanisms will, however, be subject to legal and other constraints, including with respect to protecting people from the risk of retaliation (see also 8.9).

POLICY OBJECTIVE 10: Non-State-based grievance mechanisms are equitable.

10.1 The mechanism works proactively to address problems arising from imbalances in power between rights holders and business enterprises so that rights holders can participate fairly and confidently in grievance processes, including through:

(a) The provision of, and raising awareness about external sources of, appropriate advisory, technical, financial and other support;

(b) Appropriate, gender-sensitive adjustments to grievance processes to accommodate the particular needs of persons who may be affected by injury or trauma or who may be at heightened risk of vulnerability or marginalization.

10.2 To the extent appropriate in the light of its mandate and functions (and with due regard for applicable laws and appropriate safeguards relating to protecting persons from the risk of retaliation, and for legitimate requirements of commercial confidentiality), the mechanism seeks to ensure that parties to a grievance can obtain, in a timely fashion:

(a) Copies of information submitted to or obtained by the mechanism in connection with, or which is relevant to, the grievance;

(b) Information concerning the outcomes of any investigation.

10.3 The mechanism has adopted and implemented the policies and processes necessary to ensure that parties to a grievance receive adequate opportunities to verify the accuracy of, and to comment on and respond to, relevant information pertaining to a grievance prior to any material decision on the basis of such information (including with respect to decisions regarding admissibility or whether a matter should be deemed closed).

10.4 The mechanism has adopted and implemented the policies and processes necessary to ensure that relevant rights holders receive at the conclusion of the grievance process in accessible and readily understandable formats, and to the extent appropriate in the relevant case:

(a) A proper record of the process, outcomes and reasons for any decisions made;

(b) A full record of any agreement between the parties about remedial action;

(c) Information concerning (i) the steps to be taken, and the time limits that apply, should a party wish to seek to review or challenge a grievance process or its outcomes; and (ii) options for further action, including on the steps that could be taken in the event of non-compliance by a party with the terms of a determination by the mechanism or an agreed remedial outcome.

10.5 The mechanism preserves the ability of rights holders to withdraw from grievance processes if they are dissatisfied with those processes, and in such circumstances does not preclude access by rights holders to an alternate grievance mechanism (whether State-based or non-State-based).

10.6 The mechanism has adopted and implemented appropriate procedures to enable parties to challenge the manner in which the mechanism has responded to a grievance or the outcomes of grievance processes, which may include the possibility of a referral and/or appeal.

10.7 The mechanism adopts and implements policies and processes to ensure that technologies used in connection with grievance processes (for instance, in the collection and communication of information or the handling of grievances):

(a) Comply with all relevant laws, policies and standards with regard to privacy and data protection, have been properly piloted prior to their introduction and have had cybersecurity risks addressed effectively;

(b) Seek to address, as far as is possible, barriers due to gender-based discrimination and that may be experienced by persons who may be at heightened risk of vulnerability or marginalization.

10.8 The mechanism takes appropriate steps, in the light of its mandate and functions and the relevant circumstances, to seek the views of relevant rights holders with regard to claims by third parties to be acting on their behalf in connection with a grievance, and the preferred means and methods of engagement.

EXPLANATORY NOTES

Policy objective 10 highlights the importance of access to information, advice and assistance to enable rights holders to participate fairly and confidently in grievance processes.

In many cases, rights holders will likely need some form of advisory or financial support to help to raise a grievance (10.1 (a)). Cases where rights holders have experienced serious injury or trauma require particularly careful handling (10.1 (b)), and it can be helpful for them to have access to specialist "navigators"

with first-hand experience of the harm and/or relevant grievance process who can help them find their way through the remediation process and provide necessary support along the way.

The recommended action makes suggestions for the observance of due process, highlighting the importance of adequate and timely provision of information (10.2), opportunities to verify and comment on information before material decisions are made (10.3), a proper record of the process, outcomes and reasons for any decisions made, and information about next steps, including options for reviewing or challenging processes or outcomes (10.4).

It is particularly important that rights holders have access to reports that have been created for the purpose of the grievance process (e.g., investigation reports) or that may be personal to them, such as medical reports.

The recommended action takes into account the increasing use of new technologies in connection with grievance processes, for instance with respect to helping to document abuse, receiving or communicating information, and case management (10.7). Such technologies can help to empower rights holders, increase the accessibility of mechanisms, enable more efficient grievance processes, and help developers and operators of mechanisms to analyse trends and patterns in complaints with a view to identifying systemic problems that require addressing in order to prevent future harm (see 13.2). Such technologies have, however, limitations, as they may be inappropriate in certain cases (such as in complex or nuanced situations where specialist, personal interaction and support are required), may exacerbate inequalities with respect to access to remedy for those with low digital literacy levels, and may present serious risks for privacy, data protection and digital security. Mechanisms should therefore take certain measures to ensure that technologies are used responsibly (10.7 (a) and 10.7 (b)).

While it is often conducive to access to remedy (and equitability in particular) for mechanisms to adopt a flexible approach to representation, mechanisms should not overlook the risk of coercion and manipulation of rights holders in some cases. The recommended action calls upon mechanisms to seek the views of relevant rights holders if in doubt of the legitimacy of a claim to representation (10.8), recognizing that rights holders should ultimately decide who will represent them, not the mechanism or another party.

POLICY OBJECTIVE 11: Non-State-based grievance mechanisms are transparent.

11.1 The mechanism adopts and implements policies and processes to ensure that there is ongoing and proactive engagement between the mechanism and parties to a grievance with respect to the status of each step in the grievance process (including engagement for next steps, decision points, available options and the pathway to completion of the process), using channels of communication that are reflective of the needs and preferences of relevant rights holders, and taking into particular account the needs of persons who may be at heightened risk of vulnerability or marginalization.

11.2 To the extent appropriate in the light of its mandate and functions (and with due regard for applicable laws and appropriate safeguards relating to protecting persons from the risk of retaliation, and for the legitimate requirements of commercial confidentiality), the mechanism regularly communicates through a range of different channels, statistics, case studies and/or other detailed information relevant to the mechanism's performance with a view to providing readily accessible information to the public on matters such as:

(a) The types and nature of grievances referred to the mechanism;

(b) The number of requests for initiation of grievance processes;

(c) The number of requests that were rejected by the mechanism, and on what grounds;

(d) The number of completed grievance processes, including by type of grievance;

(e) The outcomes of grievance processes (including the outcomes of any follow-up activities undertaken by the mechanism);

(f) Stakeholder satisfaction with the performance of the mechanism in general and in specific cases;

(g) Any other data, information or analysis relevant to the goal of improving the understanding of rights holders of the operation and performance of the mechanism in practice.

11.3 The mechanism's policies and processes with respect to the disclosure of information relevant to the mechanism's performance have been developed in consultation with relevant stakeholders, and:

(a) Reflect an appropriate balance between the need for transparency and the need for confidentiality to be observed in some cases with respect to the exchange of information between the parties in order to facilitate successful remedial outcomes;

(b) Provide clarity on the terms on which and the circumstances in which such confidentiality will be observed;

(c) Are consistently implemented, taking into due account the views of rights holders and their representatives, both in general and with respect to specific grievance processes.

EXPLANATORY NOTES

Policy objective 11 concerns promoting transparency for parties to grievances and the public. This policy objective and its supporting elements have numerous links with other parts of the recommended action.[32] With respect to ongoing grievances, mechanisms should ensure continuous and proactive engagement with the parties to inform them about each step of the process, making use of communication methods referred to above (see pp. 30 and 33) (11.1).

The mechanism's communications with the public (11.2) should aim for the maximum degree of transparency regarding its performance that is consistent with the protection of rights holders and others from any risks to themselves (particularly from retaliation), and respecting commitments to ensure confidentiality (including with respect to the legitimate requirements of commercial confidentiality).

The recommended action recognizes that there may be cases in which confidentiality of the dialogue between parties may be most conducive to achieving a successful remedial outcome (11.3). In such cases, mechanisms should consider presenting information in redacted or aggregated formats, such as anonymized case summaries. Whatever solution is adopted, it is important that stakeholder input be sought and taken properly into account.

[32] See for example elements 7.1, 8.1, 8.8, 8.9, 9.2, 9.4, 9.5, 10.2, 10.4, 13.2, 15.1 and 16.1.

The mechanism's website will likely be an essential means of communication with the public and should be regularly updated; however, other offline methods of communication should be used to ensure effective outreach (e.g., annual reports and public meetings) (see p. 30). It is important that the information has sufficient detail to provide relevant stakeholders with a sound understanding of the mechanism's functioning and performance.

POLICY OBJECTIVE 12: Non-State-based grievance mechanisms are rights-compatible.

12.1 The mechanism operates in a manner that is aligned with the need for remedies for business-related human rights harm to be:

(a) Adequate, effective and prompt;

(b) Culturally appropriate and gender-sensitive.

12.2 The mechanism has adopted and implemented the policies and processes needed to ensure that:

(a) Affected stakeholders are meaningfully consulted about the type of remedy and the manner in which it should be delivered, recognizing that an effective remedy will vary, depending on the circumstances of the case and the needs of the rights holders in question, and may comprise financial remedies (and similar forms of reparation) and non-financial remedies (including acknowledgements, apologies and other symbolic remedies), as well as timely preventive remedies to mitigate or prevent future harm;

(b) The grievance process is an empowering experience for the rights holders concerned;

(c) The human rights implications of outcomes and remedies (including the manner in which remedies are implemented) are properly assessed, and that risks of any adverse human rights impacts arising from the remedy or its implementation are fully addressed, taking into due account relevant legacy issues and drawing on relevant internal and/or external expertise, including through meaningful consultation with affected stakeholders;

(d) The effectiveness of outcomes and remedies in addressing the relevant adverse human rights impacts is properly evaluated, drawing on feedback from both internal and external sources,

including affected stakeholders, and that, where necessary, appropriate corrective action is taken.

12.3 The mechanism has made appropriate arrangements to address non-implementation of, or non-compliance with the terms of, remedial outcomes, which may include (depending on its mandate and functions):

(a) The possibility of enforcement through mechanisms with the power to compel performance;

(b) Establishing or facilitating suitable arrangements for monitoring implementation or compliance, whether on its own or through a third party; or

(c) Referral of the grievance to another mechanism (whether State-based or non-State-based) in accordance with applicable rules, policies and agreements with regard to confidentiality and consent.

12.4 The mechanism has adopted and implemented the policies and processes needed to ensure that engagement with State agencies with respect to matters raised or information obtained in the course of a grievance process is undertaken in a manner that:

(a) Accords with the human rights of the rights holders concerned;

(b) Takes into due account relevant legacy issues;

(c) Is best calculated to reduce the risk of retaliation against relevant rights holders, persons who are associated with them and persons who contribute to the effective functioning of the mechanism, informed by a thorough risk assessment;

(d) Complies with policies, and commitments or undertakings given to relevant rights holders, with respect to confidentiality and the protection of the personal safety and well-being of the rights holders concerned.

EXPLANATORY NOTES

Policy objective 12 recognizes that, in many cases, remedial outcomes of non-State-based grievance mechanisms may only contribute to effective remedies rather than constitute effective remedies on their own.[33] Nevertheless,

[33] See A/72/162, paras. 38–54.

mechanisms should take whatever steps are needed to ensure that the outcomes and remedies of its grievance processes, even if these serve as part of a wider remedy, make a positive contribution in human rights terms.

To ensure this, remedies should align with international human rights standards (12.1). While noting various types of remedies that could be relevant, the recommended action recognizes that "adequate" and "effective" remedies are more likely with the active input of all affected stakeholders as to the appropriate remedy and its manner of delivery (12.2 (a)) (see pp. 19 and 25–26).

Processes that empower rights holders are an important part of remedy (12.2 (b)) and also help to engender trust (see policy objective 7 and explanatory notes above). The steps needed to ensure that a process is empowering are context-dependent, though proper stakeholder consultation can help mechanisms to identify and correct aspects of grievance processes that may be patronizing, culturally insensitive or otherwise not sufficiently respectful of rights holder needs. In contexts where there are pre-existing structures for decision-making, mechanisms should work with rights holders to identify ways to appropriately and respectfully reflect those structures in grievance processes rather than seek to impose unfamiliar and potentially disempowering alternatives.

Poor design of remedies can worsen human rights outcomes for rights holders, for example by exacerbating community tensions (e.g., as between younger and older persons), further entrenching inequalities in society (such as between men and women) or contributing to a loss of autonomy and dignity. It is important that the human rights implications of remedies be properly assessed and addressed (12.2 (c)) so that the mechanism does not contribute to further harm. This requires a thorough understanding of the sociocultural and economic context within which remedial outcomes will be implemented, including an understanding of legacy issues (e.g., past human rights violations by State actors, such as in the context of the forcible removal of people from land) and problems of entrenched gender or other forms of discrimination. Critically evaluating the effectiveness of remedial outcomes in practice (12.2 (d)) can help mechanisms to capture and properly implement "lessons learned" about ensuring rights-compatibility of remedial outcomes (see policy objective 13 and explanatory notes below).

The recommended action highlights the importance of building in systems for accountability of mechanisms for their remedial outcomes as an important aspect of rights compatibility (12.3). If the mechanism engages with State agencies, precautions should be taken to avoid increasing the risk of retaliation against rights holders and others (12.4; see also 9.4). In this regard, there is a particular need for clear, considered and suitably robust policies and practice relating to actions taken in areas of weak governance, such as conflict-affected areas or areas in transition from conflict.

POLICY OBJECTIVE 13: Non-State-based grievance mechanisms are a source of continuous learning.

13.1 The mechanism takes steps to ensure that lessons for strengthening its own effectiveness and improving its performance are identified and acted upon (as appropriate in the light of its mandate and functions), by:

(a) Proactively seeking feedback from rights holders and relevant stakeholders at the conclusion of cases and at regular intervals thereafter about their experiences with the mechanism and ways that it (and the interoperability of grievance mechanisms) could be improved;

(b) Keeping proper records, such as databases on the frequency, patterns and causes of grievances, which can be disaggregated (i) to show patterns of use by different genders and stakeholder groups; and (ii) to assist in the identification of barriers to access and their causes, particularly barriers due to gender-based discrimination and those facing rights holders who may be at heightened risk of vulnerability or marginalization;

(c) Establishing systems to track the performance and effectiveness of its management and its grievance handling processes;

(d) Critically evaluating the human rights impacts of remedial outcomes from specific grievance processes;

(e) Drawing, as appropriate, on relevant internal and/or external expertise;

(f) Drawing from the findings of the above activities to develop and implement strategies to improve the effectiveness of the mechanism and its management.

13.2 The mechanism contributes to the prevention of future business-related human rights grievances and harms, as appropriate in the light of its mandate and functions and with due regard for applicable laws and appropriate safeguards relating to protecting persons from the risk of retaliation, and for legitimate requirements of commercial confidentiality, by:

(a) Contributing to and influencing the human rights due diligence activities of relevant business enterprises by acting as an authoritative and credible source of expertise as to (i) the nature of adverse human rights impacts that such business enterprises may cause or contribute to through their own activities, or which may be directly linked to their respective operations, products or services by their business relationships; (ii) how such impacts affect different groups in society, adopting a gender perspective and paying special attention to persons who may be at heightened risk of vulnerability or marginalization; and (iii) the appropriate action to take in response, including the steps needed to subsequently verify whether risks of adverse human rights impacts are being properly addressed;

(b) Collating and disseminating information in aggregated formats (including through industry, multi-stakeholder and other collaborative initiatives) relating to (i) the nature and patterns of grievances that may tend to reveal the possibility of sector-specific or systemic issues which may contribute to or exacerbate business-related human rights harms; (ii) the human rights implications of these issues for different groups in society, adopting a gender perspective and paying special attention to persons who may be at heightened risk of vulnerability or marginalization; and (iii) examples of good practices that can be adopted by business enterprises to enhance existing human rights due diligence processes.

EXPLANATORY NOTES

Policy objective 13 begins by focusing on the steps that can be taken to ensure that lessons learned from a mechanism's activities are applied to continuously improve the mechanism (13.1). The recommended action also draws attention to the possible need for mechanisms to consider questions of interoperability with other grievance mechanisms (such as the extent to which there should or could be referrals or arrangements for escalations between mechanisms) as part of efforts towards continuous learning (13.1 (a)) (see policy objectives 15 and 16 and explanatory notes below).

Keeping meticulous records about grievances referred to the mechanism should support the necessary analytical work (13.1 (b)). Provided appropriate safeguards are in place (see 10.7), technological solutions to manage this large amount of data can help to reduce associated administrative burdens (see p. 36).

Mechanisms should consider suitable arrangements for drawing from external sources of expertise (such as independent advisory panels, civil society organizations, trade unions or national human rights institutions) (13.1 (e)) to ensure that the activities envisaged in 13.1 are methodologically rigorous from a human rights perspective and are implemented correctly.

The second part of policy objective 13 focuses on the various ways in which lessons learned from specific grievances handled by the mechanism can be used to inform human rights due diligence processes of business enterprises (including, though not necessarily limited to, the business enterprises whose activities have been the subject of grievance processes) (13.2). The routes that will be taken to convey the necessary information to the companies concerned will vary, depending on the type of mechanism. For instance, a company-based mechanism might have a direct line of communication with relevant management bodies, and ultimately the board, with respect to adverse impacts with which the company may be involved either through its own activities or as a result of its business relationships. A mechanism operated by an industry, multi-stakeholder or other collaborative initiative, on the other hand, will have its own routes for communicating with business enterprises associated with the initiative, for instance via meetings, guidance, online resources or reports. In addition to providing recommendations with respect to specific business enterprises, such a mechanism should be in a position to provide information relevant to human rights due diligence more broadly, such as through sector-specific guidance (13.2 (b)).

POLICY OBJECTIVE 14: Operational-level mechanisms are based on engagement and dialogue.

14.1 The operational-level grievance mechanism engages effectively with relevant stakeholders by:

(a) Developing a thorough understanding of the operational context, including rights holders' needs and perspectives and, where applicable, any existing structures for dialogue and decision-making, and drawing on this understanding in its design;

(b) Meaningfully consulting with relevant stakeholders about their needs and expectations when designing grievance processes, and regularly thereafter in order to ensure that their needs and expectations are being properly met;

(c) Providing multiple opportunities and avenues for relevant stakeholders to contribute their views about the design and performance of the mechanism, ensuring participation on an equal basis, adopting a gender perspective, and paying special attention to the needs of persons who may be at heightened risk of vulnerability or marginalization;

(d) Using these activities as a source of continuous learning for improving the mechanism and for preventing future grievances and harm.

14.2 The operational-level grievance mechanisms focuses on the use of dialogue as the means of addressing and resolving grievances by:

(a) Drawing from mediation best practice;

(b) Making appropriate use of joint investigations and joint problem-solving techniques;

(c) Investing in adequate training and support for relevant personnel in the legal and technical aspects of dialogue-based methods of resolving human rights-related grievances (including appropriate responses to situations of conflict);

(d) Adopting and implementing the policies and processes needed to ensure that, in cases where adjudication is needed or circumstances would otherwise make it appropriate, grievances can be referred to third-party adjudicators or mediators who are able to carry out their duties independently and objectively.

EXPLANATORY NOTES

Policy objective 14 shows how operational-level grievance mechanisms can implement Guiding Principle 31 (h) in practice. While this effectiveness criterion is concerned with operational-level grievance mechanisms, many of the elements under this policy objective have broader relevance, and could usefully be drawn upon by other types of non-State-based grievance mechanisms.

To ensure that operational-level grievance mechanisms are based on engagement, it is important that stakeholder needs and perspectives are understood and incorporated into the design of mechanisms (14.1). Seeking to build upon any relevant decision-making structures to which people are already accustomed (e.g., indigenous institutional and decision-making processes) can serve to increase a mechanism's legitimacy, and provide a basis for more equitable processes. When appropriate, relevant sources of local expertise (such as trade unions or civil society organizations) should be drawn upon for advice on the most effective and appropriate ways to engage with rights holders. Developers and operators should draw from relevant international standards with regard to stakeholder engagement processes (see pp. 25–26) (14.1 (b) and 14.1 (c)). The types of design-related issues on which it will be important to consult will typically include the scope of the mechanism, methods of communication, methods for raising grievances, language, locations of and timings of meetings, and involvement of independent mediators or adjudicators.

The elements relating to dialogue begin by recognizing the importance of mediation techniques (14.2 (a)) and joint problem-solving (14.2 (b)) for resolving grievances through operational-level grievance mechanisms. Mechanisms should invest in training and advisory support to ensure that personnel keep pace with developments in mediation best practices in the context of business and human rights grievances (14.2 (c)). The recommended action recognizes that, while dialogue-based processes may be an appropriate way of resolving grievances in many cases, situations may arise (for example, complex cases or cases where the dispute is entrenched) where adjudication by independent third parties may be necessary (14.2 (d)).

C. ENHANCING ACCESS TO EFFECTIVE REMEDY USING NON-STATE-BASED GRIEVANCE MECHANISMS THROUGH GREATER COOPERATION AND COORDINATION

POLICY OBJECTIVE 15: Developers and operators of non-State-based grievance mechanisms cooperate proactively and constructively with each other in order to raise standards and promote good practice with respect to the resolution of grievances arising from business-related human rights harms.

15.1 Developers and operators of non-State-based grievance mechanisms proactively seek out opportunities to work collaboratively with their peers, including through relevant industry, multi-stakeholder and other collaborative initiatives:

(a) To share information, lessons learned, technical expertise and good practice with respect to the handling and resolution of grievances;

(b) To promote the alignment of their policies and processes with the Guiding Principles on Business and Human Rights;

(c) To promote complementarity, where appropriate, among different non-State-based grievance mechanisms with a view to enhancing access to remedy for affected stakeholders;

(d) To enhance leverage to help mitigate the adverse human rights impacts of business enterprises with which they have a business relationship;

(e) For the purpose of engaging constructively and effectively with relevant State agencies, for instance in identifying sector-specific or systemic issues that may contribute to or exacerbate business-related human rights harms.

EXPLANATORY NOTES

KEY CONCEPTS

"Developers and operators of non-State-based grievance mechanisms" include entities or organizations that create, design or host non-State-based grievance mechanisms (such as business enterprises or development finance institutions), non-State-based grievance mechanisms themselves and their personnel.

"Peers" among developers and operators of non-State-based grievance mechanisms refers to persons, entities or organizations with similar functions or objectives in relation to similar mechanisms. For instance, in the case of company-based mechanisms, this includes those responsible for developing or operating other company-based mechanisms (whether within the same business enterprise or from other businesses). For multi-stakeholder initiatives, it encompasses individuals and organizations responsible for developing and operating mechanisms with similar structures and objectives. For an independent accountability mechanism, peers would include independent accountability mechanisms associated with different development finance institutions.

Policy objectives 15 and 16 highlight the different ways in which access to remedy through non-State-based grievance mechanisms may be improved through greater cooperation and coordination. This part of the recommended action focuses on many different types of cooperation among developers and operators of non-State-based grievance mechanisms, including cooperation among mechanisms themselves, but also cooperation among entities responsible for creating non-State-based grievance mechanisms (such as

multi-stakeholder initiatives or business enterprises) and cooperation among these various actors.

Policy objective 15 sets out the areas in which, and the reasons why, cooperation between the developers and operators of non-State-based grievance mechanisms may prove beneficial from the perspective of raising standards and promoting good practices generally.

Forms of cooperation will vary, depending on the mechanism concerned, but could include sharing of lessons learned, for instance as a source of collective continuous learning or to foster a common understanding of the components of effective remedies in different cases and contexts (15.1 (a)). Developers and operators of mechanisms are encouraged to work together to promote complementarity between different mechanisms that may be relevant to the same grievance (e.g., by developing a means of referring grievances from a site-level mechanism of a supplying factory to a brand-level mechanism of a buyer, or vice versa) (15.1 (c)). Additionally, there may be opportunities for business enterprises to enhance their leverage with respect to other entities,[34] and thus contribute to the mitigation of harm, by working collaboratively on grievance mechanisms and processes (e.g., where multiple business enterprises purchase goods from a single site (15.1 (d)).

POLICY OBJECTIVE 16: Developers and operators of non-State-based grievance mechanisms cooperate proactively and constructively with each other, and with relevant partners and institutions, to enhance outreach and to promote coherent and effective systems of accountability and access to remedy for business-related human rights harms, including in a cross-border context.

16.1 Developers and operators of non-State-based grievance mechanisms proactively seek out opportunities to work collaboratively with other mechanisms, business enterprises and entities, including through relevant industry, multi-stakeholder and other collaborative initiatives:

[34] See Guiding Principles on Business and Human Rights, principle 19, commentary.

(a) To enhance outreach and awareness-raising among relevant rights holders about the existence, objectives and processes of the mechanisms for which they are responsible by developing effective working relationships with trusted partners, including, where relevant, trade unions;

(b) To pool resources to improve the quality, accessibility and delivery to rights holders of relevant support and services, such as training, financial support, advice and counselling services;

(c) To improve the effectiveness of grievance mechanisms with which they are associated that are operated by business enterprises or by industry, multi-stakeholder and other collaborative initiatives;

(d) To respond to rights holders' expressed preferences for more streamlined and coordinated functions and services;

(e) For the purposes of collaborating in the resolution of grievances in specific cases, such as through information-sharing, joint investigations, joint problem-solving or joint monitoring exercises;

(f) To gain access to specialist expertise needed to resolve a grievance;

(g) To provide relevant rights holders with the information and navigational tools needed to readily identify and assess possible pathways to an effective remedy in cases where more than one non-State-based grievance mechanism may be relevant.

EXPLANATORY NOTES

Policy objective 16 is directed towards cooperation with a view to creating more coherent systems of remedy for rights holders, including in a cross-border context. It recognizes the vital importance of collaborating with partners, such as civil society organizations, trade unions and others for the purpose of enhancing outreach (16.1 (a)) (see p. 29). In recognition of the challenges that small and medium-sized enterprises in particular might face, the recommended action highlights the potential benefits of pooling resources to better deliver services to rights holders (see pp. 30, 35–36 and 46) (16.1 (b)). Often, it is advantageous for such cooperative arrangements to be formally recorded, for instance through a memorandum of understanding.

In order to provide more streamlined processes and services for rights holders (16.1 (d)), developers and operators of mechanisms can consider shared outsourced service centres providing triage assistance, information hubs or jointly operated, site-specific mechanisms (see also p. 33). The recommended action also highlights the possible value of cooperation as a way of increasing access to specialist expertise in specific cases (16.1 (f)), which in this context could include assistance with translation or interpretation and identifying suitable independent facilitators of dialogue-based processes. Furthermore, different organizations and mechanisms are encouraged to work together to provide rights holders with more useful and less fragmented information about the options that may be open to them (16.1 (g)), for instance by pooling and disseminating information regarding the various non-State-based grievance mechanisms that may be relevant in different cases, and the relevant advantages and disadvantages of different courses of action.



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