

Business and Human Rights Movement Spurs Development of Remedial Options

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In the emerging area of business and human rights, the endorsement of the United Nations Guiding Principles on Business and Human Rights (UNGPs) by the U.N. Human Rights Council five years ago marked a watershed event. The UNGPs consist of three pillars, summarized as Protect, Respect and Remedy. Specifically, they recognize: (1) the state's obligation to protect against human rights abuse, (2) the responsibility of business enterprises to respect human rights, and (3) the need for access to effective remedies for human rights abuses.

As noted in the recently published IBA Practical Guide on Business and Human Rights for Business Lawyers, while the UNGPs do not have the force of law and are nonbinding, they "are increasingly reflected in public policy, in law and regulation, in commercial agreement, in international standards that influence business behavior, in the advocacy of civil society organisations, and in the policies and processes of companies worldwide."

With respect to the call for effective remedies, divergent proposals have been advanced, largely independent of one another, and corporate actors and their lawyers should be aware of key developments in this area.

Judicial Remedies

In many instances, national courts have restricted claims by citizens (or groups of citizens) concerning personal injuries and/or violations of basic human rights. As we have noted in previous articles (available [here](#) and [here](#)), the trend in the United States has been to limit the ability of parties to invoke the protections of U.S. courts in lawsuits arising out of alleged tortious activity occurring in another country. In particular, in *Kiobel v. Royal Dutch Petroleum Co.*, the U.S. Supreme Court held that the Alien Tort Claims Act did not have extraterritorial application, and it upheld the dismissal of claims alleging that certain corporations aided and abetted an African government's human rights violations. This trend has led to increased consideration of alternative nonjudicial remedies.

Private Arbitration

One nonjudicial proposal calls for the creation of a private international arbitration system to address disputes relating to alleged business-related human rights abuses.

This system, which would be similar to the one currently used for international commercial business disputes, would include an International Arbitration Tribunal on Business and Human Rights created by the Permanent Court of Arbitration, which is headquartered in the Hague. The tribunal would, among other things, adjudicate claims brought against multinational business enterprises by human rights nongovernmental organizations (NGOs) on behalf of victims.

The proponents of such a Tribunal cite as advantages that (1) proceedings, mutually agreed upon by the parties, could be held throughout the world in a neutral location, before a neutral tribunal with expertise in business and human rights issues; (2) disputes would be resolved in a shorter time frame than available through many national court proceedings and would result in arbitration awards widely enforceable throughout the world; and (3) the parties would have the ability to craft procedures tailored to the needs of the dispute. Submission of a human rights dispute to the Tribunal would, however, require consent of both the business enterprise and the NGO, and proponents recognize that it may take time for both sides to accept such a forum.

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Other Nonjudicial Options

Other nonjudicial mechanisms for addressing business and human rights issues, both state-based and private, are also being explored. The private mechanisms include operational-level grievance procedures allowing affected parties to engage with representatives of the business enterprise. Some companies have also sponsored remediation plans, but such programs have been criticized as not being fully independent or not fully addressing the grievances of local communities.

State-based nonjudicial grievance mechanisms include the National Contact Points (NCP) system, which has been heralded as a “global forum for remedy for corporate human rights abuses” in a June/July 2016 *IBA Global Insights* article. Under this system, in place in more than 40 nations, the NCP for a particular country may accept complaints, provide an opportunity for parties to undergo a mediation process, investigate the

allegations and issue final statements at the end of the process. However, a lack of consistency across the NCP system has been reported resulting in varying degrees of success.

Human Rights Treaty

In July 2014, the U.N. Human Rights Council established an intergovernmental working group to develop a binding treaty to address corporate responsibility for human rights abuses. This effort has generated much controversy and debate, and its future remains uncertain.

In the meantime, as private and corporate actors continue to adopt initiatives to promote compliance with human rights in the countries in which they operate, divergent proposals for a mechanism to remedy alleged violations of those rights will continue to be put forth.