

# “Shadow” National Baseline Assessment (NBA) of Current Implementation of Business and Human Rights Frameworks

## The United States

### Pillar III



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(NBA) of Current Implementation of  
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The International Corporate Accountability Roundtable  
(ICAR)

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The International Corporate Accountability Roundtable (ICAR) is a coalition of human rights, environmental, labor, and development organizations that creates, promotes, and defends legal frameworks to ensure corporations respect human rights in their global operations.

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# INTRODUCTION

## BACKGROUND

In June 2011, the United Nations Human Rights Council unanimously endorsed the UN Guiding Principles on Business and Human Rights (UNGPs).<sup>1</sup> Three years later, in June 2014, the Council called on all Member States to develop National Action Plans (NAPs) to promote the implementation of the UNGPs within their respective national contexts.<sup>2</sup> This development followed similar requests to Member States made by the European Union in 2011<sup>3</sup> and 2012<sup>4</sup> and by the Council of Europe in 2014.<sup>5</sup> Since 2011, and due in part to these initiatives, a number of individual States have developed and published NAPs on business and human rights, and many more are currently in the process.<sup>6</sup>

In August 2013, the International Corporate Accountability Roundtable (ICAR) and the Danish Institute for Human Rights (DIHR) launched a joint project to develop guidance on NAPs in the form of a “toolkit” for use by governments and other stakeholders.<sup>7</sup> This collaboration took place alongside further interventions, by both organizations, highlighting the need for NAPs and for their development in line with a human rights-based approach.<sup>8</sup> This guidance was published in June 2014, in a report entitled *National Action Plans on Business and Human Rights: A Toolkit for the Development, Implementation, and Review of State Commitments to Business and Human Rights Frameworks*.<sup>9</sup>

## THE NATIONAL BASELINE ASSESSMENT (NBA) TEMPLATE

The first component of the joint ICAR-DIHR NAPs Toolkit is the National Baseline Assessment (NBA) Template. The NBA Template provides criteria, indicators, and scoping questions by which to assess how far current law, policy, and other measures at the national level give effect to the State’s duty to protect human rights under the UNGPs and other international business and human rights standards. The NBA Template offers a standardized approach to business and human rights baseline analysis across countries. However, ICAR and DIHR designed the NBA Template to be adapted by local users to ensure that it can be used in a context-sensitive way. The NBA Template itself is found at Annex 4 to the ICAR-DIHR report.<sup>10</sup>

Using the NBA Template to develop a country-specific NBA will help a State coherently and transparently identify and select measures to include in its NAP. It will also facilitate State reporting on the impact of NAPs over time.

## WHAT IS A BASELINE ASSESSMENT?

In general, a baseline assessment is a study conducted at the start of an intervention to analyze current conditions. The results of the baseline assessment can then be used to assess impact. A government can use the baseline to compare future conditions with the initial status after a particular intervention or program has taken place and to provide greater understanding of its effects and results.<sup>11</sup>

The NBA Template primarily uses qualitative indicators, but these could be supplemented with quantitative indicators and benchmarks at the national level and, if resources permit and States and other stakeholders so-desire, at the regional or international levels.

## U.S. NATIONAL ACTION PLAN ON RESPONSIBLE BUSINESS CONDUCT

On 24 September 2014, President Obama announced plans to develop a U.S. National Action Plan (NAP) on Responsible Business Conduct.<sup>12</sup> The NAP will be consistent with the UNGPs and the OECD Guidelines for Multinational Enterprises.

A subsequent White House announcement<sup>13</sup> noted that “[e]xpanding U.S. efforts to promote responsible business conduct is intended to cement the brand of U.S. businesses as reliable and accountable partners internationally and promote respect for human rights.” The announcement also noted that “[t]he U.S. government will work closely with stakeholders throughout the development of the National Action Plan, including U.S. businesses and civil society” and that “[t]here will be a series of open dialogues, hosted by various independent organizations, during which stakeholders will be able to exchange ideas on the National Action Plan process and content.” Moreover, “U.S. officials will attend these events and the public is welcome to participate.” The full list of consultations is available on the White House website.<sup>14</sup>

Throughout this consultation process thus far, the U.S. government has not formally committed to completing a NBA, or similar mapping and gap analysis, of current implementation of business and human rights frameworks in the United States,<sup>15</sup> despite the following statement from the UN Working Group on Business and Human Rights following its 2014 U.S. site visit:

[T]he Working Group considers it imperative for the Government of the United States to undertake an assessment of the current state of overall policy coherence and coordination between Government entities, the effectiveness of the measures taken, identification of good practices and gaps[,] and challenges in the protection of rights and access to remedy. Such an analysis could contribute to a wider national action plan to implement the Guiding Principles.<sup>16</sup>

As strong advocates for this step in the NAP process and in support of the immense value it sees in completing a NBA to inform the eventual content of the U.S. NAP, the International Corporate Accountability Roundtable (ICAR) has completed a “Shadow” U.S. NBA for standards falling under both Pillar I and Pillar III of the UNGPs, the latter of which is presented here. It is important to note that this is a living document, subject to continuous developments in the business and human rights landscape in the United States.

### APPROACH AND STRUCTURE OF THE ICAR “SHADOW” NBA

As stated above, the aim of the NBA Template is to allow for the evaluation of a State’s current implementation of the UNGPs and relevant business and human rights frameworks on a transparent and consistent basis and in line with the general principles of the human rights-based approach and human rights measurement, as set out in the ICAR-DIHR NAPs Toolkit.

Accordingly, the structure of ICAR’s “Shadow” NBA mirrors that of the UNGPs: the NBA is made up of a set of tables, one for each UNGP under Pillars I and III. Only Pillar III is presented here; Pillar I was published in March 2015. A full report, with both Pillars I and III, will be published in July 2015.

Because the UNGPs are wide-ranging in nature, each UNGP is broken down further into a number of elements. Indicators are then defined for each element identified.

Many of the indicators in the NBA Template are derived from relevant international law and standards from intergovernmental organizations. However, because these indicators provide increased clarity and can contribute to the State's duty to protect human rights, some of these indicators are based on or refer to other business and human rights frameworks, such as those devised through multi-stakeholder initiatives and those addressing specific thematic concerns or industry sectors.

The indicators in the NBA operationalize the UNGPs by earmarking a concrete piece of information that can be examined, at the national level, as a marker of the United States' compliance with the UNGP in question. Short sets of scoping questions are included per indicator to provide enhanced clarity.

It should also be noted that, in contrast to human rights indicators in other contexts, a relatively longer list of indicators is included in the NBA. This is because, rather than focusing on a single human right (e.g., the right to water), the UNGPs and many of the business and human rights frameworks captured in this NBA reference a host of human rights and labor rights standards. Thus, a wide variety of national measures will usually be relevant to satisfying a given indicator, and the list of indicators included is not meant to be exclusive or exhaustive.

Moreover, whereas it is advised that the NBA should be as comprehensive as possible, readers will note that the NBA includes indicators in relation to the State remedy aspects of Pillar III only. This is largely because the intent of the NBA process is to capture State practice on human rights. Corporate respect for human rights may be inferred from examining the various voluntary and regulatory mechanisms the State employs, but that is beyond the scope of ICAR's efforts with this NBA and its broader work around business and human rights NAPs.

Finally, it should be reiterated that the analysis and approach that have been adopted in developing the "Shadow" U.S. NBA take inspiration from established approaches to developing human rights monitoring frameworks based on indicators, as well as existing guidance on NAPs.<sup>17</sup>



## KEY RECOMMENDATIONS – PILLAR III

The following is a list of key recommendations for the U.S. government to consider in shaping its commitments in the U.S. National Action Plan (NAP) on Responsible Business Conduct. These recommendations directly draw from the protection and enforcement gaps identified by ICAR in the “Pillar III” section of its “Shadow” National Baseline Assessment (NBA) for the United States.

These recommendations are categorized as either government-wide or as falling under the purview of specific executive departments, independent agencies, government corporations, or Congress. ICAR has organized the recommendations this way to emphasize that the commitments outlined in the U.S. NAP should be delegated, as much as possible, to specific government entities. This will ensure greater clarity, coherence, and accountability.

Key recommendations also accompanied the “Pillar I” section of the NBA, published in March 2015. A complete “Shadow” NBA, including both the Pillar I and Pillar III sections and their respective recommendations, will be published in late July 2015.

### GOVERNMENT-WIDE RECOMMENDATIONS

1. Articulate and communicate a policy that businesses that do not uphold American standards for respect for human rights will be held to account.
2. Articulate and communicate a policy that executive branch agencies will rigorously investigate and prosecute allegations of corporate crimes linked to human rights abuse.
3. Address the fact that many U.S. trade and development agencies do not have non-judicial grievance mechanisms through which victims can seek remedy for business-related human rights harm.
4. Uniformly require that all business-based grievance mechanisms adhere to the UNGPs and the OECD Guidelines.
5. Develop and publish a centralized strategy for funding and support to multi-stakeholder initiatives in order to ensure that they set, monitor, and assess industry-specific standards and metrics around human rights.
6. Pressure American companies to sign the Accord on Fire and Building Safety in Bangladesh, establish a partnership with U.S. companies to improve labor conditions in Bangladesh, support key labor organizations to improve labor conditions in Bangladesh, and inspect actual conditions in Bangladesh or invest resources toward ensuring working safety and improving training.
7. Develop and publicly release listings of factories under investigation for human rights abuses or lists of regions where particular goods may be sourced, produced, or transported with high risks of human rights violations.

8. Support financial or other instruments, such as an international fund, bond, or insurance, to ensure that remedy can be delivered where human rights abuses occur. For instance, OPIC and the international financial institutions (IFIs) do not yet require clients to have insurance or contribute to a fund in case harm occurs.
9. Ensure that international financial institutions (IFIs) have proper procedures and tools in place to ensure access to effective remedy to communities when abuses occur.
10. Raise concerns about the inadequacies of the policy of the Inter-American Development Bank (IDB) Independent Consultation and Investigation Mechanism (ICIM), including the lack of anonymous victim complaints, which deters victims from filing complaints for fear of retaliation.
11. Request that the selection of the ICIM director be transparent and that the selection of members does involve a competitive and public process, such as through a multi-stakeholder committee consisting of individuals from inside and outside the Bank, including civil society.
12. Ensure the effective exercise of freedom of association and strengthen transparency and monitoring in adherence with ILO core labor standards and the UNGPs.
13. Support the UN Human Rights Council's resolution calling on the creation of a working group whose mandate will be to "elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises." Such a binding instrument could potentially address the lack of existing grievance mechanisms at the international level or support for mechanisms at the national level that would keep corporations accountable for violations of human rights.
14. Require all government offices to translate information relevant to access to remedies to ensure that such information is accessible to victims of business-related human rights abuses. For example, the Executive Office for Immigration Review (EOIR) should translate information on where to find free legal representation and on what attorneys are ineligible to practice immigration law, as well as its online sections titled "read this before you take legal action" and "find an immigration court." Also, the Office of Special Counsel for Immigration-Related Unfair Employment Practices should translate its website into, at a minimum, the eight languages that it has translated its charge forms into.
15. Put the highest emphasis on supporting and preserving access to remedies when asked to give an opinion regarding the applicability of U.S. laws or foreign law in human rights cases.

Encourage state-level efforts to ensure access to remedy, including:

16. Adoption of statutes criminalizing international human rights violations outside of human trafficking;
17. Adoption of statutes providing civil remedies for torture, genocide, war crimes, and other international human rights violations;
18. Adoption of the Uniform Act on the Prevention of and Remedies for Human Trafficking (Uniform Act), which includes a section on civil remedy;
19. Extension or abolishment of the statute of limitations for claims of wrongful death, assault, and/or battery where the victim can establish that the abuse also constitutes an act of torture, trafficking, extrajudicial killing, genocide, war crimes, or crimes against humanity;
20. Provision of lawyers' fees and costs to the prevailing party for claims brought under state common law;
21. Adoption of statutes to protect against Strategic Lawsuits Against Public Participation (SLAPP);
22. Amendment of *forum non conveniens* doctrines to provide that special weight should be given to a plaintiff's choice of forum and to ensure that cases are not dismissed in a way that would prevent a remedy, such as where a foreign State has passed "blocking statutes."

## EXECUTIVE OFFICES AND DEPARTMENTS

### Department of Justice

1. Along with other relevant departments and agencies (such as the Department of Homeland Security), investigate why federal prosecutions in the area of corporate crimes related to human rights remain rare, even within the DOJ's Human Rights and Special Prosecutions Section.
2. Along with other relevant departments and agencies (such as the Department of Homeland Security), mandate that all federal law enforcement officials and federal prosecutors are trained on criminal human rights laws.
3. Along with other relevant departments and agencies (such as the Department of Homeland Security), mandate that all federal law enforcement officials and federal prosecutors receive technical training on topics such as evidence gathering relevant to complex corporate cases.
4. Ensure timely State compliance with Mutual Legal Assistance Treaties.

### Department of State

1. Work with U.S. embassies to raise awareness of judicial remedies for human rights abuses committed by businesses among vulnerable groups.
2. Require U.S. embassies to promote and facilitate access to remedy for human rights abuses, such as by meeting with civil society organizations, company representatives, and government representatives to address whether proper grievance mechanisms are available for workers and communities affected by U.S. businesses' operations.
3. Require U.S. embassies to meet with communities and arrange meetings between communities and companies. Such meetings would provide a forum for community members to express their grievances and safety concerns.
4. Provide special litigant visas for victims and witnesses in business-related human rights cases.

### U.S. National Contact Point (NCP) for OECD Guidelines for Multinational Enterprises

1. Make findings of fact or determinations of whether an enterprise has breached the OECD guidelines.
2. Order remedy and ensure that parties adhere to mediated agreements.
3. Issue sanctions, such as prohibiting federal contracting with an enterprise that is deemed to be in breach of the OECD Guidelines or withdrawing support for companies in their overseas operations.
4. Clarify whether the NCP accepts anonymous complaints.
5. Increase the transparency of NCP proceedings.
6. Develop and publish a policy on assessing and, to the extent possible, mitigating the risk of reprisals and other security risks to complainants.
7. Provide translation services, and put a plan in place to reduce barriers for potential complainants who are illiterate.
8. Relocate under the Bureau of Democracy, Human Rights, and Labor, which has the reputation of having more insight into sensitive human rights issues and less perception of "stakeholder capture" by business.

9. Undergo a voluntary peer review to provide the NCP with an opportunity for sharing best practices and strategies to overcome challenges, identifying areas for improvement, and implementing recommendations to ensure the efficient structure and functioning of the NCP.
10. Clarify whether there is a filing fee on the Department of State's NCP website.
11. Provide complainants with financial support to obtain counsel or advisors given that equitability and power imbalance issues arise given that enterprises often have in-house or outside counsel to represent them through the dispute resolution process.
12. Provide travel assistance for complainants to participate in in-person dispute resolution processes.
13. Provide more readily available information regarding how to request assistance from the NCP or what to specifically include in the request.
14. Determine and publicly clarify what procedures the NCP will follow when there are parallel legal proceedings.
15. Conduct outreach within communities overseas that are mostly likely affected by business-related human rights abuses.
16. Provide training to complainants on how to engage in dispute resolution, as OPIC does, in order to improve outcomes, power imbalances, and the overall dispute resolution process.
17. Ensure that, while the NCP utilizes the Federal Mediation and Conciliation Service (FMCS), mediators have specific training related to human rights abuses and addressing concerns of particularly vulnerable groups.

#### Department of the Treasury – Office of Foreign Assets Control (OFAC)

1. Regularly update the Specially Designated Nationals (SDNs) list and increase transparency with regard to the process of adding and removing individuals.
2. Lower the percentage of ownership requirement for prohibitions to extend to entities that are owned by an individual on the SDNs list, depending on the severity of abuses.
3. Request that the selection of World Bank Inspection Panel members take place through a competitive and public process, such as through a multi-stakeholder committee consisting of individuals from inside and outside the Bank, including civil society.
4. Request that the World Bank Inspection Panel establish a formal dispute resolution function with independent, professional mediators.
5. Request that the World Bank Inspection Panel play a role in monitoring remedial measures that Bank management proposes in response to complaints or a Panel investigation.

#### Office of Management and Budget (OMB)

1. Increase funding to the NCP to increase the office's effectiveness, for instance, by ensuring enough funding for at least one full-time staff member.

### **INDEPENDENT AGENCIES AND GOVERNMENT CORPORATIONS**

#### Agency for International Development (USAID)

1. Strengthen the effectiveness and enforcement power of the Operational Guidelines by requiring all contractors to adhere to them.

2. Amend the Operational Guidelines to include requirements similar to those seen in the USAID Counter-Trafficking in Persons (TIP) and Contractor/Recipient Compliance: Agency-Wide Standard Operating Procedure (SOP), which require the following: 1) training for agency personnel on recognizing and reporting TIP, 2) due diligence assessments before awarding contracts, grants, and cooperative agreements, and 3) responding to allegations of abuse. Implementing requirements similar to those in the SOP could increase remedial pathways, contribute to more predictable outcomes in the grievance process, and increase the likelihood of equity when violations occur.

#### Export-Import Bank of the United States (Ex-Im)

1. Establish an independent accountability mechanism dedicated to resolving community grievances and in line with its commitment to the IFC Performance Standards. Such a mechanism would allow the Ex-Im Bank to examine its human rights impacts more directly.

#### Equal Employment Opportunity Commission (EEOC)

1. Reexamine the EEOC's position on remedies for undocumented workers whose rights under anti-discrimination laws have been violated.
2. Address the EEOC's 2014 reported backlog of 73,134 private sector discrimination charges, which poses a serious barrier to access to remedy.

#### Federal Acquisition Regulation (FAR) Council

1. Provide a separate FAR accountability mechanism that allows agencies to use all commercial remedies if a contractor violates human rights, such as the withholding of payments or liquidated damages.

#### Federal Bureau of Investigations (FBI)

1. Ensure that FBI employees have a process to seek corrective action if they experience retaliation based on a disclosure of wrongdoing to their supervisors or others in their chain of command who are not designated officials.

#### Millennium Challenge Corporation (MCC)

1. Clarify whether the MCC assesses the existence of both State and non-State non-judicial mechanisms through which project-affected peoples may seek redress for project-related harm and to what extent those mechanisms comply with Pillar III of the UNGPs, as the MCC's assessment criteria only appears to include consideration of whether there is a judicial ombudsperson and an independent reporting mechanism for complaints about police actions.

#### National Labor Relations Board (NLRB)

1. In addition to providing non-judicial remedy mechanisms addressing labor disputes, employ judicial labor tribunals.

## Overseas Private Investment Corporation (OPIC)

1. Revise the Office of Accountability (OA)'s procedural requirements for filing complaints, which currently bar many people adversely affected by OPIC projects from accessing remedies because complaints are ineligible after an OPIC loan has either been fully paid back or after an insurance contract is terminated, allowing certain OPIC clients to easily escape review.
2. Staff the OA with a Director.
3. Develop separate positions for the OA's problem-solving and compliance review functions for each complaint.
4. Establish a dedicated Office of Inspector General (OIG) to conduct reviews, investigations, and inspections of all phases of the agency's operations and activities. While USAID's OIG currently does this for OPIC, this takes place only after OPIC sets the terms and sign an MOU for USAID's OIG to conduct these activities.
5. Grant remedy, especially where there have been findings of non-compliance.
6. Ensure that parties adhere to mediated agreements.
7. Issue sanctions, such as prohibiting federal contracting with non-compliant companies.
8. Accept anonymous complaints.
9. Establish a policy on assessing and, to the extent possible, mitigating the risk of reprisals and other security risks to complainants.
10. Publicly register all incoming requests for service.
11. Clarify to what extent the agency has addressed barriers for project-affected peoples who are illiterate.
12. Provide complainants with financial support to obtain counsel or advisors given the equitability and power imbalance issues that arise as OPIC clients often have in-house or outside counsel to represent them through the dispute resolution process.
13. Respect complainants' desire to have counsel or advisors present during the dispute resolution process.

## **CONGRESS**

1. Pass legislation clarifying the extraterritorial application of the Alien Tort Statute (ATS) and provide a similar jurisdictional avenue of recourse for U.S. citizens bringing human rights claims.
2. Clarify that corporations can be liable for violations of international law, including human rights violations.
3. Extend the Torture Victim Protection Act (TVPA) to include claims of genocide, war crimes, and crimes against humanity.
4. Extend the TVPA to apply to corporations as legal persons.
5. Clarify that the amendment to the Trafficking Victims Protection Reauthorization Act (TVPRA) that applies the statute extraterritorially applied retroactively and allow for recovery by plaintiffs whose claims originated prior to 2008.
6. Pass the reintroduced Civilian Extraterritorial Jurisdiction Act of 2015 (CEJA) to clarify and expand federal criminal jurisdiction over federal contractors and employees who commit certain crimes outside of the United States while employed by or accompanying any agency of the United States other than the Department of Defense.
7. Codify a clear duty of care for U.S. parent companies over their subsidiaries.

8. Clarify that the standard for aiding and abetting is “knowledge” as opposed to “specific intent” consistent with international law.
9. Ease restrictions on class-action certification created by *Walmart v. Dukes*, to ensure that judicial remedies remain financially accessible for large classes of plaintiffs.
10. Enact a federal anti-SLAPP statute.
11. Amend the Fair Labor Standards Act (FLSA) so that its overtime provision applies to agricultural workers and its minimum wage provision applies to workers on small farms.
12. Amend the Migrant and Seasonal Agricultural Worker Protection Act (MSPA) of 1983 so that it extends to smaller employers.
13. Amend the Immigration and Naturalization Act to provide access to remedy for human rights abuses, it currently does not protect unauthorized aliens, one of the United States’ most vulnerable sectors of society.
14. Pass the Business Supply Chain Transparency on Trafficking and Slavery Act, which includes efforts to provide remedial action to victims, including support for industry and sector driven remedial programs.
15. Ratify the American Convention on Human Rights so that the Inter-American Commission on Human Rights may refer petitions against the United States to the Inter-American Court on Human Rights.
16. Provide sufficient resources to the Legal Services Corporation (LSC) in order to better provide legal aid for low-income plaintiffs in transnational civil claims at either the federal or state level.
17. Ensure that criminal laws that directly or indirectly protect human rights are coherent, apply to business activity, and apply extraterritoriality.
18. Criminalize crimes against humanity.
19. Amend the Tariff Act of 1930 to eliminate the “consumptive demand exception” for imported articles of commerce made with forced labor.
20. Increase appropriations for prosecutions of human rights violations.
21. Establish an independent National Human Rights Institution (NHRI) with a mandate that includes business and human rights, including monitoring implementation of business and human rights frameworks domestically and supporting access to justice for victims of corporate-related human rights abuses.

## JUDICIARY

1. Address barriers in disqualifying a judge based on the appearance of bias, rather than only actual unfair treatment.
2. Require judges to disclose the judicial education seminars that they attend and develop an explicit process for recusal in the event that funders of such seminars are involved in cases that judges later preside over.
3. Eliminate the practice of popular elections of judges and justices.
4. Provide for lawyers’ fees and costs to the prevailing party for human rights claims.
5. Extend personal jurisdiction over a business beyond where a business is incorporated or has its principal place of business to include where a business has a substantial level of business activity.
6. Address conflicts of law challenges in the context of international human rights violations, where the law of the host State does not recognize or limits vicarious or secondary liability, has elements for its torts that are more difficult to prove, or provides for stricter immunity.
7. Bar the use of the political question doctrine and the use of case-specific deference in cases involving corporate defendants.

8. Revise the current rules of civil procedure to allow for depositions by video to ensure cost-effectiveness during the deposition process.
9. Revise the current rules of civil procedure to allow for broader discovery against parent companies instead of requiring a plaintiff to establish that a parent company has information only it knows, show that the plaintiff cannot easily obtain the information through public records, and articulate specifically what she is looking for.
10. Revise the current rules of civil procedure to employ the doctrine of *forum necessitatis*, or forum of necessity, to allow a court to assert jurisdiction over a case when there is no other available forum and the dispute has a sufficient connection with the Forum State.
11. Ensure that the victims' compensation fund under the Office for Victims of Crime provides direct compensation to victims rather than grants funds to U.S. states for distribution to local victims of federal or state crimes only.
12. Lessen judicial discretion in suspending enforcement of foreign judgments, which often forces victims to seek enforcement elsewhere. This is time-consuming and financially burdensome and often leaves victims without remedy.
13. Provide extraterritorial injunctive relief for ongoing human rights violations.
14. Establish a business and human rights training policy in the education of judicial officers in Article III courts and administrative courts.

## PILLAR III

### GUIDING PRINCIPLE 25

As part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy.

#### Commentary to Guiding Principle 25

Unless States take appropriate steps to investigate, punish and redress business-related human rights abuses when they do occur, the State duty to protect can be rendered weak or even meaningless.

Access to effective remedy has both procedural and substantive aspects. The remedies provided by the grievance mechanisms discussed in this section may take a range of substantive forms the aim of which, generally speaking, will be to counteract or make good any human rights harms that have occurred. Remedy may include apologies, restitution, rehabilitation, financial or non-financial compensation and punitive sanctions (whether criminal or administrative, such as fines), as well as the prevention of harm through, for example, injunctions or guarantees of non-repetition. Procedures for the provision of remedy should be impartial, protected from corruption and free from political or other attempts to influence the outcome.

For the purpose of these Guiding Principles, a grievance is understood to be a perceived injustice evoking an individual's or a group's sense of entitlement, which may be based on law, contract, explicit or implicit promises, customary practice, or general notions of fairness of aggrieved communities. The term grievance mechanism is used to indicate any routinized, State-based or non-State-based, judicial or non-judicial process through which grievances concerning business-related human rights abuse can be raised and remedy can be sought.

State-based grievance mechanisms may be administered by a branch or agency of the State, or by an independent body on a statutory or constitutional basis. They may be judicial or non-judicial. In some mechanisms, those affected are directly involved in seeking remedy; in others, an intermediary seeks remedy on their behalf. Examples include the courts (for both criminal and civil actions), labour tribunals, national human rights institutions, National Contact Points under the Guidelines for Multinational Enterprises of the Organisation for Economic Co-operation and Development, many ombudsperson offices, and Government-run complaints offices.

Ensuring access to remedy for business-related human rights abuses requires also that States facilitate public awareness and understanding of these mechanisms, how they can be accessed, and any support (financial or expert) for doing so.

<b>GUIDING PRINCIPLE 25</b>	
State-based judicial and non-judicial grievance mechanisms should form the foundation of a wider system of remedy. Within such a system, operational-level grievance mechanisms can provide early stage recourse and resolution. State-based and operational-level mechanisms, in turn, can be supplemented or enhanced by the remedial functions of collaborative initiatives as well as those of international and regional human rights mechanisms. Further guidance with regard to these mechanisms is provided in Guiding Principles 26 to 31.	
<b>25.1. Redress for Business-Related Human Rights Abuses</b> Has the State put in place measures to ensure redress for business-related human rights abuses?	
Indicators	Scoping Questions
Sanctions	Has the State put in place mechanisms that introduce civil liability, criminal sanctions, and administrative sanctions, such as fines or limited access to government funding, for human rights abuses?
Financial or Non-Financial Compensation	Has the State put in place mechanisms that introduce compensation, such as fines or restoration of livelihoods, for human rights abuses?
Prevention of Harm	Has the State put in place mechanisms that introduce processes for the prevention of harm, such as injunctions or guarantees of non-repetition, for human rights abuses?
Apologies	Has the State put in place mechanisms to promote apologies for human rights abuses?
State-Based Mechanisms	Has the State put in place judicial and non-judicial, criminal and civil mechanisms where grievances can be raised and addressed? Has the State identified and removed barriers (financial, legal, practical, and evidentiary) to accessing those mechanisms? Are such mechanisms available to address extraterritorial harms, as permitted by the UNGPs and international human rights law?
Non-State-Based Mechanisms	Has the State supported non-State based mechanisms?
Other Measures	Has the State put in place other measures to ensure redress for business related human rights abuses?
Implementation Status	Gaps

## GUIDING PRINCIPLE 25

In relation to the first, second, and third indicators above, the U.S. legal system predetermines the approach to sanctions, compensation, and harm prevention for business-related human rights claims with regard to judicial mechanisms: redress in criminal and civil cases is a matter for the judge's discretion; it is highly fact-dependent; and parties often settle before a final judgment is rendered, ensuring that settlement terms remain private.<sup>18</sup> The case-by-case approach to redress in the United States requires paying greater attention to process over outcome in evaluating implementation status.

The first indicator and corresponding scoping questions request information about the sanctions available under U.S. law for business-related human rights abuses, including mechanisms that introduce civil liability, criminal sanctions, and administrative sanctions, such as fines or limited access to government funding.

Below is a non-exhaustive overview of **sanctions** available under U.S. law for business-related human rights abuses:

1. Examples of civil liability and criminal sanctions, including in relation to the Alien Tort Statute (ATS); criminal prohibitions against genocide, torture, and war crimes; and other federal and state-level sanctions are addressed in Section 26.1 and Section 26.2.
2. Examples of administrative sanctions include:
  - a. Economic Sanctions: The United States regularly employs economic sanctions as a foreign policy tool, including when it feels that human rights violations are at issue. These sanctions necessarily bar business activity with or in target nations.<sup>19</sup> The Office of Foreign Assets Control (OFAC), the agency within the U.S. Department of the Treasury charged with administering trade sanctions,<sup>20</sup> keeps a list of Specially Designated Nationals (SDNs) with

Despite ways in which the general laws of the United States provide redress for business-related human rights abuses, as explained under "Implementation Status," gaps remain.

Below is a brief explanation of gaps in the provision of **sanctions** for business-related human rights abuses:

1. For gaps in civil liability and criminal sanctions, see Section 26.1.
2. Examples of gaps in administrative sanctions include:
  - a. Economic Sanctions: Broad economic sanctions on Burma have been lifted and replaced with reporting requirements for investors. However, there is not yet a clear statement of the penalties that will apply to companies that fail to report as required, and the requirements may allow some investors to avoid full disclosure.<sup>32</sup>
  - b. OFAC: The SDN list has been criticized for not being updated regularly.<sup>33</sup>
  - c. The Federal Acquisition Regulation (FAR): While the FAR offers crucial corrective actions to remedy human rights abuses, many of these enforcement mechanisms require "considerable investigation and agency resources[;] . . . interrupt the government's flow of goods, services[,] and downstream work[;]"<sup>34</sup> and "require the government to restart the procurement process," discouraging their use as remedies.<sup>35</sup> While the FAR does offer less severe remedy options, these options are not available for all contract obligations.<sup>36</sup> In general, the FAR's procurement rules were not designed to protect human rights or provide relief to victims, but instead to enable the government to enforce its contracts and protect taxpayer dollars.<sup>37</sup> The FAR relies on prosecutors, enforcement agencies, and courts that can award damages for

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whom financial transactions are prohibited. Prohibitions extend to entities that are majority-owned by an individual on the list.<sup>21</sup> OFAC has brought actions against companies for violations of U.S. sanctions and OFAC regulations.<sup>22</sup> OFAC provides information about settlements and civil penalties on its website.<sup>23</sup>

- b. The Federal Acquisition Regulation (FAR): The FAR includes remedies, such as suspension, debarment, termination, and stopping work, for certain violations of existing human rights standards.<sup>24</sup> If a contractor is suspended, debarred, or proposed for debarment, it may not seek federal contracts or subcontracts, and agencies cannot evaluate or award the contractor anything.<sup>25</sup> Grounds for suspension or debarment relating to human rights include: judgment for fraud or a criminal offense regarding a public contract, serious violation of a government contract, and commission of an unfair trade practice.<sup>26</sup> The FAR also offers some mid-range remedies that do not interrupt an agency's work or require extensive due process, including suspension, reduction, withholding of payments, reduction of an award fee, and liquidated damages.<sup>27</sup>

The second indicator and scoping questions above request information about financial or non-financial compensation available under U.S. law for business-related human rights abuses, including fines or restoration of livelihoods.

For a non-exhaustive overview of **financial or non-financial compensation** available under U.S. law for business-related human rights abuses, see Section 26.1.

The third indicator and scoping questions above request information

negligence to respond if a contractor violates the law or hurts people.<sup>38</sup> The FAR does not yet have an accountability mechanism.

Below is a brief explanation of gaps in the provision of **financial or non-financial compensation** for business-related human rights abuses:

1. Victim Compensation: The Department of Justice houses the Office for Victims of Crime,<sup>39</sup> which has a victims' compensation fund. However, this fund does not provide direct compensation to victims; instead, it provides grants to U.S. states to distribute to local victims of federal or state crimes,<sup>40</sup> leaving no apparent avenue for victims of human rights crimes outside of these territories to benefit from the fund.<sup>41</sup>
2. ATS Awards: Only one award has been entered against a corporation so far, which reflects continuing uncertainty post-*Kiobel* among the circuits as to whether corporations should be held liable under the ATS.<sup>42</sup>
3. Enforcement of Foreign Awards: U.S. judges have significant discretion in deciding whether to suspend enforcement of foreign judgments, forcing victims to seek enforcement elsewhere where the business has assets or leaving victims without remedy.<sup>43</sup> Collection of awards is time-consuming and financially burdensome and may be beyond the capacity of some plaintiffs.
4. State Law Civil Claims:
  - a. Few U.S. states have statutes providing civil remedies for torture, genocide, war crimes, or other international human rights violations.
  - b. Fifteen states do not provide access to civil damages for trafficking survivors.<sup>44</sup>
5. See the section on Guiding Principle 26 for further discussion of gaps in the provision of financial or non-financial compensation.

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about mechanisms under U.S. law for the prevention of harm from business-related human rights abuses, including injunctions or guarantees of non-repetition.

1. Equitable remedies, for example those requiring that property be returned, defendants cease operating, or assets be frozen, are available to plaintiffs bringing claims of business-related human rights abuses at the judge's discretion.<sup>28</sup>
2. For a non-exhaustive overview of mechanisms under U.S. law for the **prevention of harm** from business-related human rights abuses, see the Pillar I section of the "shadow" NBA.

The fourth indicator and scoping questions above request information about State promotion of apologies by businesses for human rights abuses.

Below is a non-exhaustive overview of State mechanisms to promote **apologies** for business-related human rights abuses:

1. Several companies have issued public apologies for human rights-related impacts caused by or connected with their business. For example, BP issued several public apologies in the wake of the 2010 Gulf Oil Spill.<sup>29</sup> While there is no direct evidence of the U.S. government requiring apologies by business for such harms, the promotion and encouragement of such apologies has been evidenced during congressional hearings in particular, where corporate executives have been questioned.<sup>30</sup>
2. Apologies have been included as part of plea agreement requirements in cases addressing environmental harm.<sup>31</sup>

The fifth indicator and scoping questions above request information about State-based mechanisms, including judicial, non-judicial, criminal, and civil mechanisms, where business-related human rights grievances

Below is a brief explanation of the gaps in State **prevention of harm** for business-related human rights abuses:

1. Extraterritorial injunctive relief for an ongoing human rights violation has not been awarded despite the fact that international comity and due process concerns have not precluded the issuing of extraterritorial injunctions in the areas of antitrust and patent infringement.<sup>45</sup>
2. For a thorough overview of gaps in State **prevention of harm** from business-related human rights abuses, see the Pillar I section of the "shadow" NBA.

Below is a brief explanation of gaps in the State promotion of **apologies** for business-related human rights abuses:

1. There is no formal program for U.S. government promotion of apologies by businesses for human-rights related impacts.
2. Apologies by businesses are typically related to environmental and consumer health impacts and are made in response to public pressure.<sup>46</sup>
3. The majority of U.S. states have passed laws making expressions of sympathy inadmissible as evidence of admission of liability,<sup>47</sup> but apologies for human rights abuses specifically, partially, or in full are not protected and could be used to incriminate businesses in U.S. state courts.

Gaps in **State-based mechanisms** where business-related human rights grievances can be raised and addressed are discussed in significant detail in the sections on Guiding Principles 26, 27, and 31.

Gaps in State support of **non-State-based mechanisms** where business-related human rights grievances can be raised and addressed are discussed in significant detail in the section on Guiding Principle 28.

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<p>can be raised and addressed.</p> <p><b>State-based mechanisms</b> where business-related human rights grievances can be raised and addressed are discussed in significant detail in the sections on Guiding Principles 26, 27, and 31.</p> <p>The sixth indicator and scoping questions above request information about State support of non-State-based mechanisms where business-related human rights grievances can be raised and addressed.</p> <p>State support of <b>non-State-based mechanisms</b> where business-related human rights grievances can be raised and addressed are discussed in significant detail in the section on Guiding Principle 28.</p>	
25.2. Roles and Responsibility Within States	
Has the State defined clear roles and responsibilities within the State on access to effective remedy?	
Indicators	Scoping Questions
Competent Authorities	Has the State defined competent authorities to investigate allegations of business-related human rights abuse? If so, are these authorities equipped with the knowledge necessary in order to attribute the abuses to the relevant redress mechanism?
Implementation Status	Gaps
<p>The indicator and scoping questions request information about whether the State has defined competent authorities to investigate allegations of business-related human rights abuse, including whether such authorities are equipped with the knowledge necessary in order to attribute the abuses to the relevant redress mechanism.</p> <p>See the sections on Guiding Principle 26, 27, and 31 for steps that the U.S. government has taken to define <b>competent authorities</b> to investigate allegations of business-related human rights abuse.</p>	<p>Despite the ways that the U.S. government has defined clear roles and responsibilities within the State on access to effective remedy, as explained under “Implementation Status,” gaps remain.</p> <p>See the sections on Guiding Principles 26, 27, and 31 for gaps in the U.S. government’s efforts to define <b>competent authorities</b> to investigate allegations of business-related human rights abuse.</p>

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<b>25.3. Public Information-Sharing and Accessibility</b> Has the State developed measures through which to inform about grievance mechanisms available, grievances received, and relevant processes?	
Indicators	Scoping Questions
Public Information on the Mechanism	Has the State made efforts to promote public awareness and understanding of remediation mechanisms, including how they can be accessed and their accessibility? Does the State inform about the outcome of grievances and actions for follow-up when systemic issues are identified?
Accessibility	Does the State ensure that the mechanisms are available to all affected stakeholders (including, for example, women, peoples with disabilities, children, and indigenous peoples)? This includes providing services such as legal aid and legal counseling, as well as support to, for example, the NHRI, CSOs, or trade unions that work to ensure greater accessibility within grievance mechanisms.
Implementation Status	Gaps
<p>The first indicator and scoping questions above request information about whether the State has made efforts to promote public awareness and understanding of remediation mechanisms, including how they can be accessed, outcomes of grievances, and actions for follow-up when systemic issues are identified.</p> <p>Steps that the U.S. government has taken to provide <b>public information on remediation mechanisms</b> are addressed under the section on Guiding Principles 31.</p> <p>The second indicator and scoping questions above request information about whether the State ensures that the mechanisms are available to all available affected stakeholders, including providing services such as legal aid and legal counseling.</p>	<p>Despite the ways that the U.S. government has developed measures through which to inform about grievance mechanisms available, grievances received, and relevant processes, as defined under “Implementation Status,” gaps remain.</p> <p>Gaps in the U.S. government’s efforts to provide <b>public information on remediation mechanisms</b> are addressed in the section on Guiding Principle 31.</p> <p>Gaps in the U.S. government’s efforts to ensure the <b>accessibility</b> of remediation mechanisms to all affected stakeholders are also addressed in the section on Guiding Principle 31.</p>

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Steps that the U.S. government has taken to ensure **accessibility** of remediation mechanisms are addressed in the section on Guiding Principles 27 and 31.

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States should take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses, including considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy.

### Commentary to Guiding Principle 26

Effective judicial mechanisms are at the core of ensuring access to remedy. Their ability to address business-related human rights abuses depends on their impartiality, integrity and ability to accord due process.

States should ensure that they do not erect barriers to prevent legitimate cases from being brought before the courts in situations where judicial recourse is an essential part of accessing remedy or alternative sources of effective remedy are unavailable. They should also ensure that the provision of justice is not prevented by corruption of the judicial process, that courts are independent of economic or political pressures from other State agents and from business actors, and that the legitimate and peaceful activities of human rights defenders are not obstructed.

Legal barriers that can prevent legitimate cases involving business-related human rights abuse from being addressed can arise where, for example:

- The way in which legal responsibility is attributed among members of a corporate group under domestic criminal and civil laws facilitates the avoidance of appropriate accountability;
- Where claimants face a denial of justice in a host State and cannot access home State courts regardless of the merits of the claim;
- Where certain groups, such as indigenous peoples and migrants, are excluded from the same level of legal protection of their human rights that applies to the wider population.

Practical and procedural barriers to accessing judicial remedy can arise where, for example:

- The costs of bringing claims go beyond being an appropriate deterrent to unmeritorious cases and/or cannot be reduced to reasonable levels through Government support, “market-based” mechanisms (such as litigation insurance and legal fee structures), or other means;
- Claimants experience difficulty in securing legal representation, due to a lack of resources or of other incentives for lawyers to advise claimants in this area;
- There are inadequate options for aggregating claims or enabling representative proceedings (such as class actions and other collective action procedures), and this prevents effective remedy for individual claimants;
- State prosecutors lack adequate resources, expertise and support to meet the State’s own obligations to investigate individual and

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business involvement in human rights-related crimes.

Many of these barriers are the result of, or compounded by, the frequent imbalances between the parties to business-related human rights claims, such as in their financial resources, access to information and expertise. Moreover, whether through active discrimination or as the unintended consequences of the way judicial mechanisms are designed and operate, individuals from groups or populations at heightened risk of vulnerability or marginalization often face additional cultural, social, physical and financial impediments to accessing, using and benefiting from these mechanisms. Particular attention should be given to the rights and specific needs of such groups or populations at each stage of the remedial process: access, procedures and outcome.

### 26.1. Judicial Mechanisms

Has the State put in place a judicial mechanism with the competency to adjudicate business-related human rights abuses within the national jurisdiction of the State? If so, are these mechanisms in line with the criteria of impartiality, integrity, and ability to accord due process?

Indicators	Scoping Questions
National and Regional Courts	Do the national and regional courts have the competency to adjudicate business and human rights abuses, including for abuses that take place outside of their territorial jurisdiction, as permitted by the UNGPs and international human rights law? If so, do they do so in a way that is impartial and with integrity and ability to accord due process?
Labor Tribunals	Do national labor tribunals have the competency to adjudicate business and human rights abuses? If so, do they do so in a way that is impartial and with integrity and ability to accord due process?
Other Mechanisms	Do other judicial mechanisms have the competency to adjudicate business related human rights abuses? If so, do they do so in a way that is impartial and with integrity and ability to accord due process?
Implementation Status	Gaps

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The first indicator and scoping questions above request information about the ability of national and regional courts to adjudicate business-related human rights abuses, including those abuses that take place outside of the territorial jurisdiction of the United States.

Below is a non-exhaustive overview of the ability of **national and regional courts** to adjudicate business-related human rights abuses:

1. Alien Tort Statute (ATS):
  - a. The Alien Tort Statute (ATS) gives U.S. courts “original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”<sup>48</sup> Since the 1990s, the ATS has been used to hold businesses accountable for violations of customary international law, including for human rights violations.<sup>49</sup>
  - b. The ATS has been applied in cases arising out of extraterritorial harm,<sup>50</sup> though the extent of this application is now unclear, as discussed further in the “Gaps” section.
  - c. Compensatory and punitive damages are available and have been awarded under the ATS.<sup>51</sup>
2. Torture Victim Protection Act (TVPA):
  - a. The TVPA allows victims of torture ten years to bring a federal cause of action against individuals “acting under actual or apparent authority, or color of law, of any foreign nation.”<sup>52</sup>
  - b. Although the TVPA does not apply to legal persons, business executives and employees can be liable for violations of the TVPA.<sup>53</sup>
  - c. The TVPA applies to extraterritorial violations.<sup>54</sup>
  - d. Compensatory and punitive damages are available.
3. Trafficking Victims Protection Reauthorization Act (TVPRA):

Despite the ways that the general laws of the United States provide protection against business-related human rights violations explained under “Implementation Status,” gaps remain.

Below is a brief explanation of the gaps in the ability and efficacy of **national and regional courts** to adjudicate business and human rights abuses:

1. Alien Tort Statute (ATS):
  - a. While the ATS has proven to be an invaluable tool for transnational human rights litigation, the statute is only available to non-citizens bringing human rights claims.<sup>95</sup> This limitation represents a substantial gap in available remedies, as there is no comparable remedy available to U.S. citizens bringing these claims.
  - b. The extraterritorial application of the ATS is unclear following the 2013 Supreme Court decision in *Kiobel v. Royal Dutch Petroleum*.<sup>96</sup> The Courts of Appeal have applied the “touch and concern” test differently, with varying results for plaintiffs.<sup>97</sup> The Supreme Court recently declined to settle this issue when it denied certiorari in *Cardona v. Chiquita Brands International*<sup>98</sup> and *Does 1-144 v. Chiquita Brands International*.<sup>99</sup>
2. Torture Victim Protection Act (TVPA):
  - a. The Torture Victim Protection Act only applies to claims for torture and extrajudicial killing.<sup>100</sup> A proposal to expand the law to also include claims of genocide, war crimes, and crimes against humanity, passed the Senate in 2014 but

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- a. The TVPRA creates both civil and criminal liability for human trafficking offenses.<sup>55</sup>
  - b. The TVPRA applies to private business enterprises as well as individuals.<sup>56</sup>
  - c. The TVPRA applies to extraterritorial violations.<sup>57</sup>
  - d. Compensatory and punitive damages are available under the TVPRA, and in some states treble damages can also be awarded.<sup>58</sup>
4. The Foreign Corrupt Practices Act of 1977 (FCPA):
    - a. The FCPA makes it illegal for businesses to bribe foreign officials in order to keep or obtain new business; it also sets standards for company recordkeeping.<sup>59</sup>
    - b. The FCPA applies to both legal and natural persons.<sup>60</sup>
    - c. The FCPA applies to extraterritorial violations.<sup>61</sup>
    - d. Penalties for violations of the FCPA include fines of up to \$2 million for corporations and business entities and up to \$100,000 for individuals. Individuals may also be sentenced to imprisonment for up to five years. Injunctive relief may also be granted. Additional fines are possible if the attorney general or the SEC brings a civil action.<sup>62</sup>
  5. The Military Extraterritorial Jurisdiction Act of 2000 (MEJA):
    - a. MEJA gives courts extraterritorial jurisdiction over certain Title 18 crimes committed by those who are “employed by or accompanying the armed forces.”<sup>63</sup>
    - b. This includes contractors and sub-contractors, including businesses, that contract with the Department of Defense.<sup>64</sup>
    - c. MEJA applies to extraterritorial violations.<sup>65</sup>
    - d. In April, four Blackwater guards were sentenced in federal court under MEJA’s jurisdiction, with three given thirty years and the fourth sentenced to life in prison for their roles in a Baghdad shooting that killed 14 Iraqi

did not progress in the House.<sup>101</sup>

- b. Although the TVPA applies to individuals such as executives and employees, it does not yet apply to corporations as legal persons. Specifically, the Supreme Court held in *Mohamad v. Palestinian Authority* that TVPA claims may only be brought against individuals, and that the law does not apply to legal persons.<sup>102</sup> Because of this, claims against businesses are now foreclosed, although business executives and employees may still be liable.

3. Trafficking Victims Protection Reauthorization Act (TVPRA):

- a. While the 2008 reauthorization explicitly amended the TVPRA to apply extraterritorially, this provision has been held not to apply retroactively, barring recovery for plaintiffs whose claims originated prior to 2008.<sup>103</sup>

4. The Military Extraterritorial Jurisdiction Act of 2000 (MEJA):

- a. MEJA only applies to crimes committed by contractors and sub-contractors of the Department of Defense, and excludes jurisdiction over crimes committed by contractors and sub-contractors of other agencies.<sup>104</sup> The proposed Civilian Extraterritorial Jurisdiction Act of 2011 (CEJA) aimed to address this gap by clarifying and expanding federal criminal jurisdiction over federal contractors and employees who commit certain crimes outside of the United States while employed by or accompanying any agency of the United States other than the Department of

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- civilians and wounded 17 others.<sup>66</sup>
6. The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (Patriot Act):
    - a. The Patriot Act amended the federal criminal code to make portions of it applicable to crimes committed by American nationals within federal facilities and residences overseas.<sup>67</sup>
    - b. This statute applies to corporations as well as individuals.<sup>68</sup>
    - c. The statute applies extraterritorially, though its application is limited to violations committed on U.S. facilities abroad.<sup>69</sup>
  7. Anti-Discrimination Laws:
    - a. Title VII of the Civil Rights Act of 1964,<sup>70</sup> the Americans with Disabilities Act,<sup>71</sup> and the Age Discrimination in Employment Act<sup>72</sup> prohibit discrimination against several protected classes in the employment context.
    - b. These laws apply to corporations.<sup>73</sup>
    - c. These statutes apply to any corporation employing U.S. citizens, regardless of whether they operate domestically or extraterritorially.<sup>74</sup>
    - d. Monetary compensation and equitable remedies are available.<sup>75</sup>
  8. Criminal Prohibition on Genocide:
    - a. Federal criminal law prohibits acts of genocide, punishable by death or life in prison and fines up to \$1,000,000.<sup>76</sup>
    - b. This statute applies to corporations as well as individuals.<sup>77</sup>
    - c. This statute applies to extraterritorial human rights violations, as well as domestic violations.<sup>78</sup>
  9. Criminal Prohibition on Torture:

- Defense (DOD).<sup>105</sup> The CEJA bill was introduced on June 3, 2011<sup>106</sup> and reintroduced on June 23, 2014, but was not enacted.<sup>107</sup> It was reintroduced on May 19, 2015.<sup>108</sup>
5. Federal Criminal Prohibitions:
    - a. United States courts apply the presumption that criminal laws do not apply extraterritorially unless that intent is clearly specified in the legislation.<sup>109</sup> Under this doctrine, many criminal provisions, including those in the Securities Exchange Act,<sup>110</sup> have been held not to have extraterritorial effect.<sup>111</sup>
  6. Crimes Against Humanity
    - a. The United States has not criminalized crimes against humanity. In 2009, Senator Dick Durbin (D-IL) introduced a Crimes against Humanity Act of 2010 in the Senate.<sup>112</sup> The bill was reported out of committee, but was never enacted.<sup>113</sup> Some human rights groups criticized the bill's definitions as inconsistent with international law.<sup>114</sup> In April 2015, Senator Durbin announced plans to re-introduce it in this Congress.<sup>115</sup>
  7. State Criminal Law:
    - a. Few states have statutes criminalizing international human rights violations outside of human trafficking.
  8. State Law Civil Claims:
    - a. Few states have statutes providing civil remedies for torture, genocide, war crimes, or other international human rights violations.
    - b. Fifteen states do not provide access to civil damages for trafficking survivors.<sup>116</sup>
  9. Impartiality, Integrity, and Due Process:

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- a. Federal criminal law prohibits acts of torture, punishable by death or life in prison and fines up to \$1,000,000.<sup>79</sup>
- b. This statute applies to corporations as well as individuals.<sup>80</sup>
- c. This statute applies to extraterritorial human rights violations, as well as domestic violations.<sup>81</sup>

### 10. Criminal Prohibition on War Crimes:

- a. Federal criminal law prohibits acts of war crimes, punishable by fines, life imprisonment, and in cases of death to the victim, death.<sup>82</sup>
- b. This statute applies to corporations as well as individuals.<sup>83</sup>
- c. This statute applies to extraterritorial human rights violations, as well as domestic violations.<sup>84</sup>

### 11. Criminal Prohibition on Forced Recruitment of Child Soldiers:

- a. Federal criminal law prohibits acts of forced recruitment of child soldiers (under 15 years of age), punishable by life in prison and fines.<sup>85</sup>
- b. This statute applies to corporations as well as individuals.<sup>86</sup>
- c. This statute applies to extraterritorial human rights violations, as well as domestic violations.<sup>87</sup>

### 12. State Criminal Law:

- a. Forty-five states and the District of Columbia have criminalized sex trafficking, criminalized labor trafficking, and established a lower burden of proof for a conviction of sex trafficking minors.<sup>88</sup>

### 13. State Law Civil Claims:

- a. Corporations can be liable in state court for human rights abuses under state common law (tort) or under the law of the state in which the harm occurred, depending on the state's choice of law rules, discussed in more detail in Section 26.2. State claims may also be

- a. In the majority of jurisdictions, there is no constitutional ground to disqualify a judge.<sup>117</sup> In other jurisdictions, where the grounds to disqualify are implicitly read into the right to fair trial, only actual unfair treatment – rather than the appearance of bias – generally result in disqualification.<sup>118</sup> In practice, motions to disqualify are costly and risky with little chance of success, and most recusal decisions are made without providing a detailed written opinion.<sup>119</sup>
- b. Thirty-eight states hold judicial elections, and twenty-two of these states hold competitive elections for members of their highest court.<sup>120</sup> Judges in these jurisdictions must raise money to ensure that they remain on the bench.<sup>121</sup> From 1990 to 2008, total funds raised by state judicial candidates have increased nearly nine-fold.<sup>122</sup>

Below is a brief explanation of the gaps in the ability and efficacy of **labor tribunals** to adjudicate business and human rights abuses:

1. The United States does not employ judicial labor tribunals. Gaps in non-judicial labor tribunals are discussed in Section 27.1.

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- brought under the theory that state common law has historically incorporated customary international law.<sup>89</sup>
- b. State common law tort claims can generally involve extraterritorial violations, as long as the forum state can exercise personal jurisdiction over the defendant<sup>90</sup> and the conduct would give rise to an action in the host State where the conduct occurred.<sup>91</sup>
  - c. Thirty-five states and the District of Columbia provide access to civil damages for trafficking survivors.<sup>92</sup>

### 14. Impartiality, Integrity, and Due Process:

- a. Under federal law, judge must disqualify themselves in any proceeding in which their impartiality might reasonably be questioned, including where they has a personal bias or prejudice or personal knowledge of disputed facts, where they served as a lawyer in the matter in controversy, or where they knows that they has a financial interest in the subject matter, among other reasons.<sup>93</sup> Judges must also disqualify themselves when there is evidence of actual bias or prejudice.<sup>94</sup>

The second indicator and scoping questions above request information about the competency of **labor tribunals** to adjudicate human rights abuses by businesses, including those that take place outside of the tribunals' territorial jurisdiction.

### 1. National Labor Relations Board (NLRB):

- a. Non-judicial remedy mechanisms addressing labor disputes are available through the NLRB, as discussed in GP Section 27.1. Though the United States does not have any judicial labor tribunals, all decisions made by the NLRB are appealable to federal courts.

The third indicator and scoping questions above request information

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<p>about the competency of <b>other mechanisms</b> to adjudicate business and human rights abuses. However, in the U.S. context, there appear to be no other relevant judicial mechanisms employed in such cases. Non-judicial mechanisms, such as the OECD National Contact Point, are considered in Section 27.1.</p>	
26.2. Barriers for Access to Judicial Remedy	
Has the State taken measures to ensure that there are no barriers to access to judicial remedy for addressing business-related human rights abuses?	
Indicators	Scoping Questions
<p>Legal Barriers</p>	<p>Has the State taken measures to ensure that there are no legal barriers to prevent legitimate cases from being brought before the courts? This includes: (1) ensuring that it is possible to hold corporations accountable under domestic criminal and civil laws, meaning that liability exists under the law; (2) ensuring that all members of society can raise complaints, including indigenous peoples, migrants, women, and children, and are afforded the same legal protection as for the wider population; (3) ensuring that extraterritorial harms can be addressed within the courts, as permitted by the UNGPs and international human rights law; and (4) ensuring that issues such as conflicts of law, statutes of limitation, parent company liability, and standards of liability do not result in barriers to victims of business-related human rights harms in accessing the courts?</p>
<p>Practical and Procedural Barriers</p>	<p>Has the State taken measures to ensure that there are no practical or procedural barriers to prevent legitimate cases from being brought before the courts? This includes: (1) ensuring financial support, (2) providing legal representation or guidance, (3) providing opportunities for class-actions and multi-party litigation; (4) allowing for recovery of attorneys' fees; (5) preventing retaliatory actions against claimants; (6) reforming access to evidence; and (7) providing training for prosecutors and judges.</p>

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Social Barriers	Has the State taken measures to ensure that there are no social barriers to prevent legitimate cases from being brought before the courts? This includes: (1) addressing imbalances between the parties, (2) targeted awareness-raising among vulnerable groups (for example, women, indigenous people, and children), (3) availability of child-sensitive procedures to children and their representatives, (4) legal aid and other type of assistance, (5) efforts to combat corruption, and (6) protection of human rights defenders.
Implementation Status	Gaps
<p>The first indicator and scoping questions above request information about measures the State has taken to ensure there are no legal barriers to prevent legitimate cases from being brought before the courts. This includes ensuring that liability exists under the law, that all members of society can raise complaints, that extraterritorial harms can be addressed, and that other issues addressed below do not result in barriers to judicial access.</p> <p>Below is a non-exhaustive overview of measures the U.S. has taken to ensure there are no <b>legal barriers</b> to prevent legitimate cases from being brought before the courts:</p> <ol style="list-style-type: none"> <li>1. Corporate Criminal and Civil Liability: <ol style="list-style-type: none"> <li>a. In general, corporations may be liable for both violations of criminal and civil law, with some exceptions addressed in Section 26.1. Under federal criminal law, corporations may be held vicariously liable for acts of their employees, provided they are carried out within the scope of their employment.<sup>123</sup> The “aggregation” approach also allows prosecutors to aggregate the knowledge of a group of individuals within a corporation to meet the relevant culpability standard.<sup>124</sup> Federal civil</li> </ol> </li> </ol>	<p>Although the U.S. government has numerous judicial mechanisms in place that suggest victims of human rights abuses will be able to access an appropriate remedy, there are gaps in these measures that serve as legal, practical, and procedural barriers.</p> <p>Below is a brief explanation of the gaps in U.S. government activities’ to combat <b>legal barriers</b> to access to judicial remedy:</p> <ol style="list-style-type: none"> <li>1. Corporate Criminal and Civil Liability: <ol style="list-style-type: none"> <li>a. In its 2010 <i>Kiobel</i> decision, the Second Circuit held that businesses cannot be liable under the ATS because there is little consensus that businesses can be held liable under international law for human rights violations.<sup>151</sup> While the Supreme Court refrained from so holding when it could have done so in <i>Kiobel</i>,<sup>152</sup> and the majority’s questioning whether “mere presence” satisfies their “touch and concern” standard strongly suggests that the Supreme Court accepted the notion that businesses can be liable under the ATS,<sup>153</sup> the Second Circuit’s</li> </ol> </li> </ol>

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statutes addressing business and human rights are discussed in Section 26.1.

2. Ensuring All Members of a Society Can Raise Complaints:
  - a. Except for the Alien Tort Statute, all of the statutes discussed in Section 26.1 are legally accessible to all members of a society.
3. Ensuring Extraterritorial Harms can be Addressed within the Courts:
  - a. All of the statutes discussed in Section 26.1 were drafted to apply extraterritorially – with the partial exception of the Patriot Act, the application of which is limited to violations committed on U.S. facilities abroad.<sup>125</sup>
4. Eliminating Other Legal Barriers:
  - a. Statutes of Limitation: There is no statute of limitation for criminal charges of genocide,<sup>126</sup> torture where death results,<sup>127</sup> or war crimes where death results<sup>128</sup> in the United States. There is also no statute of limitations for federal crimes punishable by death,<sup>129</sup> but prosecutions for most other federal crimes must begin within five years of the commitment of the offense.<sup>130</sup> The Torture Victims Protection Act (TVPA) and Trafficking Victims Protection Reauthorization Act carry statutes of limitations of ten.<sup>131</sup> Although the Alien Tort Statute has no statute of limitations, some federal courts have imputed the TVPA's ten-year statute of limitations to ATS claims.
  - b. Parent Company Liability:
    - i. Criminally, under the Foreign Corrupt Practices Act, eight prosecutions successfully targeted U.S. and foreign corporations operating through subsidiaries between 1998 and 2008.<sup>132</sup>
    - ii. Civilly, incorporation law guidelines, which govern limited liability of parent companies,

2014 decision in *Mastafa v. Chevron Corp.* suggests it still considers the issue of corporate liability under the ATS unresolved.<sup>154</sup>

2. Ensuring All Members of a Society Can Raise Complaints:
  - a. As discussed in Section 26.1, the Alien Tort Statute is only available to non-citizens bringing human rights claims,<sup>155</sup> and there is no comparable remedy available to U.S. citizens bringing these claims.
3. Ensuring Extraterritorial Harms Can be Addressed within the Courts:
  - a. See Section 26.1 for a discussion of gaps in the extraterritorial application of statutes addressing international human rights harms.
4. Eliminating Other Legal Barriers:
  - a. Personal Jurisdiction: In *Bauman v. DaimlerChrysler*, the Supreme Court held that personal jurisdiction over a business is limited to where a business is incorporated or has its principal place of business.<sup>156</sup> Justice Sotomayor noted in her concurring opinion that while “Americans have grown accustomed to the concept of multinational corporations that are supposedly ‘too big to fail’; today the Court deems Daimler ‘too big for general jurisdiction.’”<sup>157</sup>
  - b. Conflict of Law: Typically, courts will apply the substantive law of the host State or locality where the injury occurred, unless the forum state has a greater interest in determining a particular issue, or if it has a more significant relationship to what occurred and to the parties.<sup>158</sup> In the context of international human

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differ from state to state. Plaintiffs can seek to overcome limited liability by proving the active involvement of parent companies, or can seek to “pierce” the corporate veil.<sup>133</sup> In order to hold a parent company liable by piercing the corporate veil, a plaintiff must show that the parent and subsidiary have a close relationship, suggesting that the two structures are essentially alter egos of each other.<sup>134</sup> A plaintiff may do this by showing that the two companies have similar boards of directors, common policy makers, common policies, or common decision-making.<sup>135</sup>

- iii. U.S. corporations can also be held responsible for the behavior of their subsidiaries based on theories of actual or constructive fraud, agency, joint and several liability, strict liability, and imputed negligence.<sup>136</sup> The Racketeering Influenced and Corrupt Organizations Act (RICO) may also be applicable, albeit with limitations.<sup>137</sup>

The second indicator and scoping questions above request information about measures the State has taken to ensure there are no practical or procedural barriers to prevent legitimate cases from being brought before the courts. This includes ensuring financial support, providing legal representation, providing opportunities for class actions, allowing recovery of attorneys’ fees, preventing retaliation, and providing training for prosecutors and judges.

Below is a non-exhaustive overview of measures the United States has taken to ensure there are no **practical and procedural barriers** to prevent legitimate cases from being brought before the courts:

rights violations, choice of law analysis can present additional barriers to litigation when the law of the host state does not recognize or limits vicarious or secondary liability, has elements for its torts that are more difficult to prove, or provides for stricter immunity.<sup>159</sup>

- c. Statutes of Limitation:
  - i. Many States on the international stage now recognize that genocide, crimes against humanity, and war crimes are subject to no statutory limitations, given their particularly severe nature.<sup>160</sup> In the United States, the statutes of limitation have only been abolished in war crimes or torture prosecutions where death results.<sup>161</sup>
  - ii. Statutes of limitations are frequent barriers to cases brought under state law. When survivors of human rights abuses bring their claims in state court, they plead civil torts such as assault, battery, and wrongful death, which carry two to three year statutes of limitation in most states. However, given the time it takes for cases to be investigated and for victims to secure affordable legal representation, these short time bars often prevent state claims from being filed at all in state courts.<sup>162</sup> Legislation introduced in California<sup>163</sup> and Massachusetts<sup>164</sup> would extend the statutes of limitations to ten years for claims of wrongful

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1. Ensuring Financial Support:
    - a. Courts can usually waive filing fees when plaintiffs establish that they lack the financial resources to cover the fee, even if they are not U.S. citizens.<sup>138</sup>
  2. Providing Legal Representation or Guidance:
    - a. The Legal Services Corporation (LSC) is charged by Congress with the administration of the federally-funded civil legal assistance program for plaintiffs who are unable to afford adequate legal counsel.<sup>139</sup>
  3. Class Action Mechanisms:
    - a. Procedural rules currently allow for “opt out” class actions, enabling remedies to reach greater groups of victims.<sup>140</sup> Some human rights cases have been certified as class actions.<sup>141</sup>
  4. Recovery of Attorneys’ Fees:
    - a. In the United States, each litigant generally pays their own lawyers’ fees, but there are exceptions. The most notable exception is that if a judge determines a party acts in bad faith, they can order that the party to pay the other side’s costs, including lawyers’ fees.<sup>142</sup>
    - b. Roughly two hundred statutes – primarily in the civil rights, environmental abuse and consumer protection arenas – provide precedent for attorney fee provisions which serve to “equalize contests between private individual plaintiffs and corporate or governmental defendants.”<sup>143</sup>
  5. Preventing Strategic Lawsuits Against Public Participation (SLAPP suits):
    - a. Twenty-eight states and the District of Columbia have enacted anti-SLAPP statutes, which bar retaliatory claims brought by businesses against victims, NGOs, and plaintiffs’ lawyers.<sup>144</sup>
- death, assault, and/or battery where the victim can establish that the abuse also constitutes an act of torture, trafficking, extrajudicial killing, genocide, war crimes, or crimes against humanity.
- d. Parent Company Liability:
    - i. Criminally, outside of the Foreign Corrupt Practices Act (FCPA), there is limited authority for the application of parent company liability.<sup>165</sup>
    - ii. Civilly, some of the largest barriers to a judicial remedy are limited liability statutes, which exempt parent companies from liability for its subsidiary’s actions.<sup>166</sup> There is no codified, unified, or clear duty of care in the United States for parent corporations over their subsidiaries.<sup>167</sup>
    - iii. The combined effect of the principles of legal personality and limited liability, limitations on extraterritorial jurisdiction, and evidentiary burdens serve as a barrier to plaintiffs.<sup>168</sup> Though human rights practitioners have had some success in piercing the corporate veil or in overcoming the limited liability of parent companies, this success has been limited.<sup>169</sup> Where plaintiffs are unable to establish direct participation, pierce the corporate veil, or otherwise prove sufficient facts to hold the parent company liable, victims are often left without a remedy for human rights

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The third indicator and scoping questions above request information about measures the State has taken to ensure there are no social barriers to prevent legitimate cases from being brought before the courts. This includes addressing imbalances between parties, raising awareness among vulnerable groups, offering child-sensitive procedures, legal aid, efforts to combat corruption, and protection of human rights defenders.

Below is a non-exhaustive overview of measures the United States has taken to ensure there are no **social barriers** to prevent legitimate cases from being brought before the courts:

1. Imbalances Between Parties:
  - a. The doctrine of veil-piercing often functions as a measure to counteract imbalances between the parties in business and human rights cases by removing barriers against legal liability for principals, along with theories of actual or constructive fraud, agency, joint and several liability, strict liability, and imputed negligence. Veil piercing is discussed more fully in the preceding section.
  - b. On a practical and procedural level, measures to lower the cost of bringing transnational claims (including attorneys' fees provisions) and class action mechanisms also serve to help counteract the imbalance of power between corporations and victims of human rights abuses. These measures are discussed more fully in the preceding section.
2. Child-Sensitive Procedures:
  - a. The Child Victims' and Child Witnesses' Rights Statute<sup>145</sup> was enacted as part of the Crime Control Act of 1990<sup>146</sup> to provide protection for children who are victims of physical or sexual abuse, exploitation, or who witnessed a crime. The Statute offers two alternatives to live, in-

abuses.<sup>170</sup>

e. Standards of Liability:

- i. The standard of aiding and abetting liability is not settled, which creates uncertainty for plaintiffs and defendants alike. The D.C. Circuit applies the knowledge standard, requiring the plaintiff to establish that the business had knowledge, and with such knowledge, gave substantial assistance.<sup>171</sup> The Second Circuit, however, has held that a plaintiff must show that a business acted with the purpose of aiding the government's unlawful conduct.<sup>172</sup> This gap could have great implications for cases against businesses, which are most often sued under vicarious liability theories. Requiring a plaintiff to prove that a business had the specific intent to purposefully violate a given human rights abuse, rather than a "knowledge" requirement, may be difficult, as it requires more than the general domestic civil law standard requires.<sup>173</sup>

f. Non-Justiciability Doctrines:

- i. Corporate defendants working with governments often argue, and courts sometimes agree,<sup>174</sup> that a court should not adjudicate the merits of a case under the political question doctrine or due to "case specific deference," as suggested by the Supreme Court in *Sosa*

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court testimony: live testimony by two-way closed-circuit television and videotaped depositions.<sup>147</sup> In *United States v. Garcia*, the Ninth Circuit found that the former procedure does not violate a defendant's Constitutional right to confront witnesses against him.<sup>148</sup> The Statute further restricts disclosure of the child's name and allows for closing the courtroom during a child's live, in-court testimony, as well as appointment of a guardian ad litem.<sup>149</sup> Finally, it affirms the right of a child to be accompanied by an adult while testifying.<sup>150</sup>

3. Efforts to Combat Corruption:
  - a. See Section 27.3 for a more thorough discussion of efforts to combat corruption.
4. Protection of Human Rights Defenders:
  - a. See Section 27.3 for a more thorough discussion of efforts to protect human rights defenders.

*v. Alvarez-Machain*.<sup>175</sup> As such, several courts have dismissed cases involving corporate defendants under the political question doctrine<sup>176</sup> or due to case specific deference,<sup>177</sup> meaning that these doctrines remain a hurdle in some cases against businesses, especially where it is alleged the business assisted the government in the conduct at issue.<sup>178</sup>

- ii. In some cases, the State Department has asked the court not to adjudicate a matter due to foreign policy considerations, by filing a "Statement of Interest" with the federal court hearing an ATS or TVPA case.<sup>179</sup> While courts generally recognize that such statements do not bind them, most courts give them some deference, resulting in an additional hurdle in bringing these types of cases.<sup>180</sup>

Below is a brief explanation of the gaps in U.S. government activities' to combat **practical and procedural barriers** to access to judicial remedy:

1. Ensuring Financial Support:
  - a. The cost of bring transnational claims is a significant barrier to victims obtaining an effective judicial remedy. Plaintiffs can alleviate some of this financial burden by finding a lawyer willing to represent them on a contingency fee basis. However, these cases are seen as so risky

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and unlikely to result in any award of fees or costs that few lawyers will take them.<sup>181</sup>

2. Providing Legal Representation or Guidance:
  - a. The United States does not provide legal aid in civil claims at either the federal or state level.<sup>182</sup> The Legal Services Corporation (LSC) is tasked with helping fill this void. However, in recent years, for every client served by an LSC-funded program, one person who seeks help is turned down due to insufficient resources.<sup>183</sup> On average, only one legal aid attorney is available for every 6,415 low-income people nationally.<sup>184</sup>
3. Class Action Mechanisms:
  - a. Class action litigation has become significantly more difficult after the 2011 Supreme Court decision in *Wal-Mart v. Dukes*.<sup>185</sup> The Court held that the only way to establish commonality was to prove the existence of a general policy treating a group of people the same way.<sup>186</sup> *Wal-Mart* suggests that where there *may be* differences in the way individuals are treated, a class action cannot survive.<sup>187</sup>
  - b. Congress is currently considering a bill which would require plaintiffs to prove all members suffered identical injuries before a class can be certified.<sup>188</sup>
4. Recovery of Attorneys' Fees:
  - a. Claims brought under the ATS or under state common law do not provide for lawyers' fees or costs to the prevailing party.<sup>189</sup>
5. Preventing Strategic Lawsuits Against Public Participation (SLAPP suits):
  - a. There is currently no federal anti-SLAPP statute.

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In addition, twenty-two states lack an anti-SLAPP statute.<sup>190</sup>

### 6. Reforming Access to Evidence:

- a. The current rules of civil procedure do not allow for depositions by video, which would make the process of securing testimony by deposition much less costly.<sup>191</sup> The United States also does not provide special litigant visas for victims and witnesses.<sup>192</sup>
- b. Courts will generally refuse any discovery order against a parent company unless a plaintiff can establish that the parent company has information only it knows, show that the plaintiff cannot easily obtain the information through public records, and articulate specifically what he or she is looking for.<sup>193</sup>

### 7. Providing Training for Judges and Prosecutors:

- a. There appears to be no business and human rights training policy in the education of judicial officials in Article III courts and administrative courts.
- b. However, between July 2008 and 2012, 185 federal judges attended more than 100 judicial education seminars sponsored by conservative foundations and multinational corporations, including ExxonMobil, Pfizer, and British Petroleum (BP).<sup>194</sup> Many judges who attended seminars sponsored by private funders later presided over cases involving these groups and issued rulings in their favor.<sup>195</sup>
- c. In practice, prosecutions of corporate human rights crimes have been rare.<sup>196</sup> Prosecutorial discretion in the United States is very wide, can

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be difficult to challenge, and often leaves victims out of the process.<sup>197</sup>

Below is a brief explanation of the gaps in U.S. government activities' to combat **social barriers** to access to judicial remedy:

1. Imbalances Between Parties:
  - a. Gaps in veil piercing doctrine are discussed in Section 26.1.
2. Targeted Awareness-Raising:
  - a. There appear to be no significant measures taken to raise awareness of judicial remedies for human rights abuses committed by businesses among vulnerable groups.
3. Legal Aid and Other Types of Assistance:
  - a. The United States does not provide legal aid in civil claims at either the federal or state level.<sup>198</sup>
  - b. As discussed in Section 25.1, although a court can order equitable relief to victims (e.g., that property be returned), the criminal statutes discussed in Section 26.1 do not provide civil remedies for victims of such abuses.
  - c. As also discussed in Section 25.1, the Department of Justice houses the Office for Victims of Crime,<sup>199</sup> which has a victims' compensation fund. However, this fund does not provide direct compensation to victims; instead, it provides grants to U.S. states to distribute to local victims of federal or state crimes,<sup>200</sup> leaving no apparent avenue for victims of human rights crimes outside of these territories to benefit from the fund.<sup>201</sup>
4. Efforts to Combat Corruption:

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	<ul style="list-style-type: none"> <li>a. See Section 27.3 for a more thorough discussion of efforts to combat corruption.</li> </ul> <p>5. Protection of Human Rights Defenders:</p> <ul style="list-style-type: none"> <li>a. See Section 27.3 for a more thorough discussion of efforts to protect human rights defenders.</li> </ul>
26.3. Remedy for Abuses Taking Place in Host-States	
Has the State taken measures to address the issue of access of victims to judicial remedy for abuses by domiciliary companies in host States?	
Indicators	Scoping Questions
Remedy of Extraterritorial Effect	Has the State put in place measures to promote access to remedy of claimants (including vulnerable groups such as indigenous peoples, women, and children) that have been denied justice in a host State, enabling them to access home State courts?
Forum Non Conveniens	Does the State allow a court considering a <i>forum non conveniens</i> motion to consider factors against dismissal in addition to factors in favor of dismissal?
Implementation Status	Gaps
<p>The first indicator and scoping questions above request information about measures the State has put in place to promote access to remedy of claimants who have been denied justice in a host State. This includes vulnerable groups such as indigenous peoples, women, and children.</p> <p>Below is a non-exhaustive list of mechanisms put in place to promote <b>remedies of extraterritorial effect</b> for claimants of abuses that have been denied justice in a host State:</p> <ul style="list-style-type: none"> <li>1. Alien Tort Statute (ATS): <ul style="list-style-type: none"> <li>a. See Section 26.1 for a more thorough discussion of the</li> </ul> </li> </ul>	<p>Despite the measures the United States has taken to address the issue of access of victims to judicial remedy for abuses by domiciliary companies in host States explained under “Implementation Status,” gaps remain.</p> <p>Below is a brief explanation of the gaps in U.S. government activities’ to promote <b>remedies of extraterritorial effect</b> for claimants of abuses that have been denied justice in a host State:</p> <ul style="list-style-type: none"> <li>1. Alien Tort Statute (ATS):</li> </ul>

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Alien Tort Statute as a remedy of extraterritorial effect.

### 2. State Law Civil Claims:

- a. See Section 26.2 for a more thorough discussion of state law civil claims as remedies of extraterritorial effect.

The second indicator and scoping question above request information about whether the State allows a court to consider factors against dismissal in deciding a *forum non conveniens* motion.

Below is a non-exhaustive list of mechanisms put in place to allow a court to consider factors against dismissal in a **forum non conveniens** motion:

#### 1. *Forum Non Conveniens* Doctrine:

- a. Courts have held that dismissal of claim based on *forum non conveniens* is appropriate where: 1) an adequate alternate forum exists which possesses jurisdiction over the whole case, including all parties; 2) all relevant factors of private interest favor the alternate forum, weighing in balance a strong presumption against disturbing plaintiffs' initial forum choice; 3) if the balance of private interests is nearly equal, the court further finds that factors of public interest tip the balance in favor of trial in the alternate forum; and 4) the trial judge ensures that plaintiffs can reinstate their suit in the alternate forum without undue inconvenience or prejudice.<sup>202</sup>

- a. See Section 26.1 for a more thorough discussion of gaps in the ATS as a remedy of extraterritorial effect.

### 2. Torture Victim Protection Act (TVPA):

- a. See Section 26.1 for a more thorough discussion of gaps in the TVPA as a remedy of extraterritorial effect.

### 3. State Law Civil Claims:

- a. See Section 26.2 for a more thorough discussion of state law civil claims as remedies of extraterritorial effect.

Below is a brief explanation of the gaps in U.S. government activities' to allow a court to consider factors against dismissal in a **forum non conveniens** motion:

#### 1. *Forum Non Conveniens* Doctrine:

- a. While the federal common law doctrine explained under "Implementation Status" allows judges to consider factors against dismissal, it requires that they weigh them against factors favoring dismissal.
- b. The United States does not employ the doctrine of *forum necessitatis*, or forum of necessity, to allow a court to assert jurisdiction over a case when there is no other available forum and the dispute has a sufficient connection with the Forum State.<sup>203</sup>
- c. In at least one state (Florida), courts have expanded *forum non conveniens* to hold that "no special weight should [be] given to a foreign plaintiff's choice of forum."<sup>204</sup> Florida has also applied its *forum non conveniens* doctrine in

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dismissing cases even where a foreign State has passed “blocking statutes,” which prevent the State’s courts from hearing cases dismissed for *forum non conveniens* in the United States.<sup>205</sup>

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States should provide effective and appropriate non-judicial grievance mechanisms, alongside judicial mechanisms, as part of a comprehensive State-based system for the remedy of business-related human rights abuse.

### Commentary to Guiding Principle 27

Administrative, legislative and other non-judicial mechanisms play an essential role in complementing and supplementing judicial mechanisms. Even where judicial systems are effective and well-resourced, they cannot carry the burden of addressing all alleged abuses; judicial remedy is not always required; nor is it always the favored approach for all claimants.

Gaps in the provision of remedy for business-related human rights abuses could be filled, where appropriate, by expanding the mandates of existing non-judicial mechanisms and/or by adding new mechanisms. These may be mediation-based, adjudicative, or follow other culturally appropriate and rights-compatible processes—or involve some combination of these—depending on the issues concerned, any public interest involved, and the potential needs of the parties. To ensure their effectiveness, they should meet the criteria set out in Principle 31.

National human rights institutions have a particularly important role to play in this regard.

As with judicial mechanisms, States should consider ways to address any imbalances between the parties to business-related human rights claims and any additional barriers to access faced by individuals from groups or populations at heightened risk of vulnerability or marginalization.

### 27.1. Types of Non-Judicial Mechanisms

Has the State provided effective and appropriate non-judicial grievance mechanisms?

Indicators	Scoping Questions
Mediation-Based Mechanisms	Does the State provide access of claimants to mediation-based non-judicial mechanisms such as National Contact Points under the OECD Guidelines? Can these mechanisms be used for remedying business-related human rights abuses? Do these mechanisms meet the effectiveness criteria set out in UNGP 31?
Adjudicative Mechanisms	Does the State provide access of the claimant to adjudicative mechanisms such as government-run complaints offices? Can these mechanisms be used for remedying business-related human rights abuses? Do these mechanisms meet the effectiveness criteria set out in

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	UNGP 31?
Other Mechanisms	Does the State provide access to other types of non-judicial mechanisms? Can these mechanisms be used for remedying business-related human rights abuses? Do these mechanisms meet the effectiveness criteria set out in UNGP 31?
Implementation Status	Gaps
<p>The United States must prioritize strengthening <b>non-judicial mechanisms</b> to provide access to effective remedy to victims of human rights abuses. Non-judicial mechanisms ensure that victims have an alternative avenue for relief if judicial remedies are unavailable.</p> <p>The first and second indicators inquire about mediation-based and adjudicative mechanisms that the State provides. Such mechanisms demonstrate the United States’ commitment to providing victims with a means of remedying the harm done to them. Below is a non-exhaustive list of <b>mediation-based mechanisms</b>:</p> <ol style="list-style-type: none"> <li>1. U.S. National Contact Point (NCP) for the OECD Guidelines for Multinational Enterprises <ol style="list-style-type: none"> <li>a. The U.S. NCP is located in the Department of State’s Bureau of Economic and Business Affairs.<sup>206</sup> The NCP offers a “specific instance” procedure by which interested parties (typically NGOs and labor unions) can bring a complaint against an enterprise that has allegedly violated the norms of the OECD Guidelines for Multinational Enterprises. If the complaint is accepted, the NCP provides a “forum to assist” enterprises and complainants to reach a resolution regarding the enterprise’s alleged misconduct.<sup>207</sup></li> <li>b. The current U.S. NCP has reached out to other dispute</li> </ol> </li> </ol>	<p>Although the U.S. government has adopted <b>non-judicial mechanisms</b> discussed under the “Implementation Status” section that provide access to remedies, gaps are nonetheless present in several of these measures.</p> <p>Below is a brief explanation of the gaps in the U.S. government’s <b>mediation-based mechanisms</b>:</p> <ol style="list-style-type: none"> <li>1. U.S. National Contact Point (NCP) for OECD Guidelines for Multinational Enterprises: <ol style="list-style-type: none"> <li>a. As discussed under Section 1.4 of ICAR’s “Shadow” National Baseline Assessment of Pillar 1, the U.S. NCP is currently only given limited resources, which limits the NCP’s effectiveness.<sup>247</sup></li> <li>b. The NCP has no authority to make findings of fact or determinations of whether an enterprise has breached the OECD guidelines.<sup>248</sup> As such, the NCP has no ability to order remedy of any kind or form nor enforcement authority to ensure that parties adhere to mediated agreements. Furthermore, the U.S. NCP does not issue sanctions, such as prohibiting federal contracting with an enterprise that is deemed to be in breach of the OECD Guidelines.<sup>249</sup></li> <li>c. Although the U.S. NCP accepts confidential complaints,</li> </ol> </li> </ol>

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resolution mechanisms, such as the International Finance Corporation's Office of the Compliance Advisor Ombudsman (CAO) and the UN Development Program (UNDPs)'s Social and Environmental Compliance Unit (SECU) and Stakeholder Response Mechanism (SRM), to share lessons learned and strategies for better performance and outcomes.<sup>208</sup>

### 2. Overseas Private Investment Corporation (OPIC)

- a. OPIC is the U.S. government's development finance institution, which partners with the private sector to help U.S. corporations reach emerging markets and support development abroad. OPIC uses the IFC Performance Standards, which incorporate aspects of the UNGPs, as part of the criteria in evaluating and selecting projects to finance.<sup>209</sup>
- b. OPIC has an Office of Accountability, which can receive complaints about social and environmental impact from individuals affected by OPIC-supported projects.<sup>210</sup> The Office of Accountability has two functions—problem solving and compliance review. In its problem solving role, it helps mediate disputes, although it “does not take a position” on allegations. In its compliance review role, it reports on implementation of OPIC policies and may issue recommendations for future projects.<sup>211</sup> Communities and other parties affected by OPIC-supported projects can request either function.<sup>212</sup>
- c. If another financial institution is financing an OPIC project, the Office of Accountability will coordinate with that financial institution's grievance mechanism.
- d. The Office of Accountability does not address complaints of fraud and corruption.<sup>213</sup>

it is unclear if she accepts anonymous ones.<sup>250</sup>

- d. Inadequate transparency is also a gap in the U.S. NCP.<sup>251</sup> Unlike the NCP process in other countries,<sup>252</sup> proceedings in the United States are confidential and may not be made public.<sup>253</sup> A breach of confidentiality is deemed to be bad faith and may result in the U.S. NCP discontinuing her involvement in the specific instance.<sup>254</sup> Labor unions have reported that this limits their use of the U.S. NCP, because they must be able to disclose their activities to their members.<sup>255</sup>
- e. The U.S. NCP also does not appear to have an explicit policy on assessing and, to the extent possible, mitigating the risk of reprisals and other security risks to complainants.<sup>256</sup>
- f. There may also be a language barrier for potential complainants seeking relief whose primary language is not English, as it does not appear that the U.S. NCP is required to provide translation services.<sup>257</sup> There is also no plan in place to reduce barriers for potential complainants who are illiterate.<sup>258</sup>
- g. The fact that the U.S. NCP is housed within the Department of State's Bureau of Economic and Business Affairs at least optically undermines the independence and objectivity that that NCP seeks to project. The U.S. NCP's current placement runs the risk of a perception of “single stakeholder capture” in regard to business.<sup>259</sup> Moreover, calls for the U.S. NCP to be placed under the Bureau of Democracy, Human Rights, and Labor or the U.S. Commission on Civil Rights, both of which have the reputation of having more insight into sensitive human rights issues, have not been yet been taken up.<sup>260</sup>

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- e. OPIC also requires that companies have their own grievance mechanisms.<sup>214</sup>

U.S. Agencies also have dispute mechanisms that may touch upon human rights in business practices. Examples of relevant federal agencies' **adjudicative mechanisms** include, but are not limited to:

1. The National Labor Relations Board (NLRB)
  - a. The NLRB enforces the National Labor Relations Act (NLRA), which applies to most private employees and "grants employees the right to form or join unions; engage in protected, concerted activities to address or improve working conditions; or refrain from engaging in these activities."<sup>215</sup>
  - b. An unfair labor practice charge may be filed with the Regional Director, who may then file a complaint if she determines the formal action appropriate. An administrative law judge then hears the case and issues findings. If there are no timely exceptions to the judge's decision, it becomes the decision of the NLRB. Otherwise, the case goes to the NLRB, which decides the case; its decision is appealable in federal court.<sup>216</sup>
  - c. The NLRB General Counsel took a recent positive step to address a gap surrounding undocumented workers' access to remedy for workplace abuse. In February 2015, an undocumented worker issued a memorandum to regional NLRB offices, which clarified that the immigration status of a complainant was not to be enquired about when considering whether the NLRA was violated. Even if the employer asserts as a defense the need to comply with immigration laws, the only inquiry is whether this was in fact the reason for the

- h. Furthermore, despite agreeing to the NCP peer review process during the 2011 update of the OECD Guidelines, the U.S. NCP has yet to undergo a voluntary peer review.<sup>261</sup> Peer reviews provide NCPs with an opportunity for sharing best practices and strategies to overcome challenges, identifying areas for improvement, and implementing recommendations to "ensure the efficient structure and functioning of an NCP."<sup>262</sup>

2. The Overseas Private Investment Corporation (OPIC)
  - a. The UN Working Group on Business and Human Rights found that OPIC's "Office of Accountability [OA] and its implementation might not be fully consistent with the criteria for an effective grievance mechanism under Guiding Principle 31," and recommended that a review be undertaken.<sup>263</sup>
  - b. An internal review in September 2014 revealed that OPIC has serious institutional deficiencies and accountability gaps that cause harm on the ground and lead to failed projects.<sup>264</sup> For example, the OA's procedural requirements for filing complaints effectively bar many people adversely affected by OPIC projects from accessing remedies because complaints are ineligible after an OPIC loan has either been fully paid back or after an insurance contract is terminated, allowing certain OPIC clients to easily escape review.<sup>265</sup> This is especially concerning as many communities do not fully realize the harm of OPIC projects until after an OPIC loan has been repaid.<sup>266</sup>
  - c. Furthermore, the same person conducts both the OA's problem-solving and compliance review functions for each complaint. This raises concerns in terms of the

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adverse action.<sup>217</sup> The memo further detailed that in the case that one's immigration status should result in the curtailing of remedies available or impact litigation, the agency should determine whether the complainant or witness is eligible for U or T visas or deferred action, as well as whether the agency can assist her or him with obtaining a visa, *inter alia*.<sup>218</sup> Also, if awarding back pay and reinstatement is not possible, the agency is to consider alternative remedies, including rights trainings for employees and employers.<sup>219</sup>

2. The Occupational Safety & Health Administration (OSHA)
  - a. OSHA focuses on work-related safety and health.<sup>220</sup> OSHA investigates complaints and issues findings, including citations and proposed penalties.<sup>221</sup>
  - b. Workers can only challenge the deadline OSHA puts in place for when the problem must be addressed.<sup>222</sup> However, if OSHA does not issue a citation, the complainant may request a review.<sup>223</sup> Employers can contest appeal fines and penalties through the Occupational Safety and Health Review Commission (OSHRC), which adjudicates disputes between employers and the Department of Labor.<sup>224</sup> Workers can be involved in the employer's appeals process if they notify OSHA.<sup>225</sup>
3. U.S. Equal Employment Opportunity Commission (EEOC)
  - a. The EEOC addresses discrimination on the basis of religion, race, ethnicity, gender, age, national origin, or sexual orientation.<sup>226</sup>
  - b. An individual who believes s/he has been discriminated against must first meet with an EEOC counselor before a formal complaint can be filed. Individuals may "elect between pursuing the matter in the EEOC process

problem-solver being neutral as he or she is more likely to be biased and thus, lack objectivity during proceedings and when reaching a resolution.<sup>267</sup>

- d. The OA has been completely unstaffed since September 2014, as the OA's Director left OPIC after completing his term and has yet to be replaced.<sup>268</sup>
- e. OPIC also does not have its own dedicated Office of Inspector General (OIG) to conduct reviews, investigations, and inspections of all phases of the agency's operations and activities.<sup>269</sup> While USAID's OIG currently does this for OPIC, this takes place only after OPIC sets the terms and signs an MOU for USAID's OIG to conduct these activities.<sup>270</sup>
- f. Moreover, OPIC does not order remedy of any kind, even where there have been findings of non-compliance. Nor does it have enforcement authority to ensure that parties adhere to mediated agreements.<sup>271</sup> Furthermore, OPIC does not issue sanctions, such as prohibiting federal contracting with non-compliant companies.<sup>272</sup>
- g. Although OPIC's OA will maintain confidentiality of the identities of complainants when explicitly requested, it does not accept anonymous complaints. OPIC also does not appear to have a policy on assessing and, to the extent possible, mitigating the risk of reprisals and other security risks to complainants.<sup>273</sup>
- h. Despite language in Section 8.2 of the OA's Operational Guidelines on disclosing information about complaints, the OA has not publicly registered all incoming requests for service.<sup>274</sup> For example, in OPIC's Buchanan Renewables project in Liberia, the OA received a human resources complaint, but did not register it

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under part 1614 and a grievance procedure (where available) or the Merit Systems Protection Board appeal process (where applicable).<sup>227</sup> Under the EEOC process, an individual may request a hearing with an EEOC administrative judge or may elect to have a final agency decision issued after the EEOC conducts an investigation on the matter.<sup>228</sup>

- c. The EEOC has the authority to hear several types of appeals,<sup>229</sup> including “the final decision of the agency, the arbitrator or the Federal Labor Relations Authority (FLRA) on the grievance when an issue of employment discrimination was raised in a negotiated grievance procedure that permits such issues to be raised.”<sup>230</sup> After exhausting the administrative process, the individual may file a civil action.<sup>231</sup>

### 4. Immigration Related Processes

- a. The Bureau of Immigration and Customs Enforcement of the Department of Homeland Security (DHS) enforces immigration laws, including investigating human trafficking<sup>232</sup> and prosecuting asylum cases before the Executive Office for Immigration Review (EOIR).<sup>233</sup> The United States Citizenship and Immigrations Services of DHS adjudicates asylum applications, and cases that are not approved are sent to the EOIR.<sup>234</sup> EOIR decisions may be appealed to the Board of Immigration Appeals (BIA), and then to federal court.<sup>235</sup>
- b. Asylum cases may touch upon human rights in business. In 2009, the Ninth Circuit recognized in *Grava v. INS* that whistleblowers who expose corrupt government officials may qualify for political asylum. The Court stated: “Whistleblowing against one’s

because the company did not want to engage in dispute resolution.<sup>275</sup> It is therefore unclear how many complaints the OA actually receives.

- i. Although OPIC has translated its materials into a number of languages and may offer training to parties to improve their ability to participate in problem solving, it is unclear to what extent the agency has addressed barriers for project-affected peoples who are illiterate.<sup>276</sup>

### 3. Export-Import Bank of the United States (Ex-Im Bank)

- a. The Ex-Im Bank is an independent agency, providing financing for transactions that would not otherwise take place commercially.<sup>277</sup> In its governing law, the Ex-Im Bank is allowed to deny financing based on human rights considerations, but this determination must be approved by the Ex-Im Bank’s President.<sup>278</sup> The Ex-Im Bank also has an Office of Inspector General (OIG) to review certain products and perform investigations.<sup>279</sup>
- b. The Ex-Im Bank regularly consults the Department of State, including the Bureau for Democracy, Human Rights, and Labor, on human rights concerns as well as other foreign policy considerations.<sup>280</sup> Unfortunately, this has not stopped the Ex-Im Bank from financing projects that advocacy groups allege violate human rights.<sup>281</sup>
- c. The Ex-Im Bank has yet to develop a non-judicial grievance mechanism that is both dedicated to addressing community complaints and in line with the Ex-Im Bank’s commitment to the IFC Performance Standards.<sup>282</sup> Establishing such an independent accountability mechanism would allow the Ex-Im Bank to examine its human rights impacts more directly.<sup>283</sup>

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supervisors at work is not, as a matter of law, always an exercise of political opinion. However, where the whistle blows against corrupt government officials, it may constitute political activity sufficient to form the basis of persecution on account of political opinion.”<sup>236</sup>

As such, the asylum process may help protect whistleblowers who blew the whistle in projects involving business and corrupt officials.

- c. The Office of the Chief Administrative Hearing Officer hears three types of cases under the Immigration and Naturalization Act,<sup>237</sup> including charges of unfair immigration-related employment practices, such as discrimination in hiring or firing based on national origin.<sup>238</sup> Those filing an immigration-related employment complaint must first file a charge with the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC).<sup>239</sup> Individuals who allege they have experienced discrimination can call OSC’s toll-free Worker Hotline. One can also file a charge via mail, fax, or e-mail. There is also a hotline for the hearing impaired.<sup>240</sup>

**Other mechanisms** that are relevant to human rights complaints:

1. The federal government has established whistleblower programs that encourage individuals to report abuse.
  - a. For example, the Department of Commerce has an Office of Inspector General (OIG) Hotline. People are encouraged to call this hotline to report abuse by agency employees, contractors, and others involved with the Department’s projects.<sup>241</sup> The Department of Commerce also provides protection for whistleblowers

Below is a brief explanation of the gaps in the U.S. government’s **adjudicative mechanisms**:

1. Equal Employment Opportunity Commission (EEOC)
  - a. Although the National Labor Relations Act (NLRA) applies to undocumented workers, they have limited access to remedies for human rights violations after *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board* (2002).<sup>284</sup> In that case, the Supreme Court found that undocumented workers are not entitled to back pay or reinstatement under the NLRA.<sup>285</sup> This decision led to the Equal Employment Opportunity Commission (EEOC)’s rescission of its directive titled “Enforcement Guidance on Remedies Available to Undocumented Workers Under Federal Employment Discrimination Laws.”<sup>286</sup>
  - b. While the rescission directive assured that federal employment discrimination laws continue to apply to undocumented workers and that investigative authorities would need to inquire about immigration status, it stated that the EEOC needed to “reexamin[e] its positions on remedies for undocumented workers,” who previously were “entitled to all forms of monetary relief—including post-discharge backpay.”<sup>287</sup>
  - c. It thus remains unclear what remedies are available to undocumented workers whose rights under anti-discrimination laws have been violated. The National Labor Relations Board (NLRB) General Counsel has taken positive steps to address this remedial gap (see 27.1 “Implementation Status”); however the EEOC has yet to follow suit.

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through an ombudsperson.<sup>242</sup>

- b. The Department of Defense (DoD) also has a hotline where anyone can report certain abuses in DoD programs, including human trafficking and health and safety problems.<sup>243</sup> Complaints may also be made to the offices of local or command-level inspector generals.<sup>244</sup> The DoD has a whistleblower protection ombudsperson, as well.<sup>245</sup>
- c. Unlike the adjudicative mechanisms, the resolution of hotline complaints may not be appealable. For example, the DoD specifies that the results of an Inspector General investigation or inquiry are not appealable, although a request for reconsideration can be made if new information becomes available.<sup>246</sup>

There are also gaps in laws, such as loopholes and exemptions, which can leave individuals without adequate legal protections by inhibiting access to remedies.

### 1. The Tariff Act of 1930

- a. The Tariff Act of 1930 allows private parties to launch “litigation style-investigations” as a means of remedying unfairness surrounding imported articles of commerce to the United States.<sup>288</sup> If a complainant prevails, the remedies available are the barring of the offending articles, as well as a “cease and desist order restricting U.S. activities regarding such articles.”<sup>289</sup> Despite the Tariff Act of 1930 providing clear procedures to access remedies, it provides significant exceptions for imported articles of commerce made with forced labor.
- b. For example, although the Tariff Act of 1930 prohibits goods made with forced labor from being imported,<sup>290</sup> it also provides a “consumptive demand exception.”<sup>291</sup> Such an exception permits an individual outside of the Customs Service to file information about a potential use of forced labor with a port director of the Commissioner of Customs *only if* the imported product is produced domestically in sufficient amounts to meet consumptive demand.<sup>292</sup> Since most products produced abroad are not made domestically in sufficient amounts to meet consumptive demand, such an exception cuts off a significant number of cases of abuse.<sup>293</sup>

### 2. Federal worker protection laws

- a. Although agricultural workers are particularly vulnerable to workplace abuse, they are left out of several federal worker protection laws. For example,

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despite the fact that parts of the Fair Labor Standards Act (FLSA) apply to agricultural workers, its overtime provision does not. Furthermore, its minimum wage provision also does not apply to workers on small farms.<sup>294</sup> Agricultural workers are also provided minimal legal protections under the Migrant and Seasonal Agricultural Worker Protection Act (MSPA) of 1983, as it does not extend to smaller employers.<sup>295</sup> This inequitable application of the FLSA and MSPA causes considerable sectors of agricultural workers to have minimal legal protection through a lack of access to remedies for human rights abuses.

### 3. Immigration and Naturalization Act

- a. The Immigration and Naturalization Act gives authority to the Office of the Chief Administrative Hearing Officer to hear cases,<sup>296</sup> including charges involving unfair-immigration-related employment practices.<sup>297</sup> Despite the fact that this statute provides access to remedy for human rights abuses, it does not protect one of the United States' most vulnerable sectors of society – unauthorized aliens.<sup>298</sup>

There is also room for improvement with the **other mechanisms** that serve as non-judicial dispute resolution mechanisms, as described below.

1. There are a number of U.S. trade and development agencies that have no non-judicial mechanisms, whether in the form of mediation or adjudication, through which project-affected peoples can seek remedy for project-related harm.
2. For the Millennium Challenge Corporation (MCC), it is unclear whether the agency assesses the existence of both State and

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non-State non-judicial mechanisms through which project-affected peoples may seek redress for project-related harm and to what extent those mechanisms comply with Pillar III of the UNGPs. Rather, the MCC's assessment criteria only appears to include consideration of whether there is a judicial ombudsperson and an independent reporting mechanism for complaints about police actions.<sup>299</sup>

3. U.S. Commission on Civil Rights:
  - a. The Commission's mandate only includes civil rights, despite efforts to expand its mandate to include human rights more broadly and to house the National Contact Point for the OECD Guidelines due to the fact that the Commission arguably has better insight into sensitive human rights issues and less of a perception of bias than the Department of State's Bureau of Economic and Business Affairs, where the U.S. NCP currently sits. Because national civil rights overlap with the enforcement of some international human rights, however, its work is relevant to a business and human rights assessment.<sup>300</sup>
  - b. Although the Commission offers a complaint information referral system that connects the public with the proper federal office with which to file a complaint, where one exists, it lacks a complaint or dispute resolution mechanism of its own.<sup>301</sup>
4. Although several federal agencies have ombudspersons that address specific issues and "often act[] as the link between private citizens and corporations"<sup>302</sup> (i.e. the Department of Homeland Security, Environmental Protection Agency, Department of Education, the Food and Drug Administration, and the Internal Revenue Service<sup>303</sup>), the UN Working Group on Business and Human Rights notes that the United States has yet

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	to establish a single federal ombudsperson.
<b>27.2. Role of the NHRI</b> Has the State provided specific competency to the national human rights institution (NHRI) to perform the role as a non-judicial mechanism for addressing grievances?	
Indicators	Scoping Questions
Complaints-Handling Role	Has the State given the NHRI the mandate that allows it to receive and handle complaints relating to corporate human rights abuses?
Supportive Role	Has the State given the NHRI the mandate that allows the NHRI to be in a supportive role to claimants, such as through mediation, conciliation, expert support, or legal aid?
Awareness-Raising	Has the State given the NHRI the mandate to promote awareness on remedy to and redress for corporate human rights abuses?
Training	Has the State given the NHRI the mandate to provide training of relevant stakeholders on their access to remedy for corporate human rights abuses?
Counseling	Has the State given the NHRI the mandate to provide counseling on which remedy to access?
Implementation Status	Gaps

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	<p><b>Role of the NHRI</b></p> <p>The United States has yet to establish an independent National Human Rights Institute (NHRI) with a mandate that includes business and human rights, including monitoring implementation of business and human rights frameworks domestically and supporting access to justice for victims of corporate-related human rights abuses. In fact, the U.S. government even failed to implement a NHRI after the 2010 Periodic Review recommended that it institute a NHRI.</p> <p>The United States does, however, have an OECD National Contact Point. For further discussion, see Section 27.1 of this Assessment, as well as Section 1.3 of ICAR’s “Shadow” National Baseline Assessment of Pillar 1.<sup>304</sup></p> <p>The United States also has a Commission on Civil Rights whose mission is to inform the development of national civil rights policy and enhance enforcement of federal civil rights laws. For further discussion, see Section 27.1 of this Assessment, as well as Section 1.6 of ICAR’s “Shadow” National Baseline Assessment of Pillar 1.</p>
<p><b>27.3. Barriers for Access to Non-Judicial Remedy</b>            Has the State taken measures to ensure that there are no barriers to access to non- judicial remedy for addressing business-related human rights abuses?</p>	
Indicators	Scoping Questions

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Practical and Procedural Barriers	<p>Has the State taken measures to ensure that there are no practical or procedural barriers to prevent legitimate cases from being heard by non-judicial mechanisms? Measures to prevent procedural barriers include:</p> <ol style="list-style-type: none"> <li>1. Financial support;</li> <li>2. Providing guidance;</li> <li>3. Ensuring that the information on the mechanism is provided in a language that is understandable to potential complainants;</li> <li>4. Ensuring accessibility despite geographical issues or difficulties (for example, long distances).</li> </ol>
Other Barriers	<p>Has the State taken measures to ensure that there are no other barriers to prevent legitimate cases from being heard by non-judicial mechanisms? Measures to prevent other barriers include:</p> <ol style="list-style-type: none"> <li>1. Addressing imbalances between the parties;</li> <li>2. Targeted awareness-raising among vulnerable groups (such as women, indigenous peoples, or children);</li> <li>3. Expert advice or type of assistance;</li> <li>4. Efforts to combat corruption;</li> <li>5. Protection of human rights defenders.</li> </ol>
Implementation Status	Gaps
<p>The United States has taken measures to remove barriers that prevent legitimate cases from being heard by non-judicial mechanisms.</p> <p>Efforts made by the U.S. Government to ameliorate <b>practical and procedural barriers</b> to access remedies in the mechanisms listed in Section 27.1 are detailed below.</p> <ol style="list-style-type: none"> <li>1. OECD National Contact Point (NCP) for the OECD Guidelines for Multinational Enterprises <ol style="list-style-type: none"> <li>a. <b>Providing guidance:</b> The U.S. NCP webpage on the</li> </ol> </li> </ol>	<p>The “Gaps” column of Section 27.1 and the “Gaps” column of Section 31 detail areas for improvement in U.S. non-judicial grievance mechanisms. The U.S. government could also take additional measures to reduce barriers for access to non-judicial remedies. A non-exhaustive description of some of the current barriers is provided below.</p> <p>Provided below is a list of <b>practical and procedural barriers</b> to access non-judicial remedy for addressing business-related human rights abuses:</p> <ol style="list-style-type: none"> <li>1. OECD National Contact Point (NCP) for the OECD Guidelines for</li> </ol>

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Department of State’s website provides information about the “specific instance process,” including procedures for filing<sup>305</sup> and a detailed timeline of the process.<sup>306</sup> The U.S. NCP has also conducted outreach events to invited stakeholders, in conjunction with consultations on the U.S. National Action Plan on Responsible Business Conduct, in order to increase awareness about the NCP’s services and activities.<sup>307</sup>

- b. **Language considerations:** The U.S. NCP page on the Department of State’s website provides a document with a description of the specific procedures process, in Spanish and French.<sup>308</sup>
  - c. **Accessibility:** The U.S. NCP currently offers to conduct dispute resolution via teleconference.
2. The Overseas Private Investment Corporation (OPIC)
- a. **Financial support:** Unless otherwise agreed, OPIC is responsible for the costs incurred by the tools it uses in its problem solving capacity, such as convening a multi-stakeholder roundtable.<sup>309</sup>
  - b. **Providing guidance:**
    - i. OPIC’s Office of Accountability (OA), which handles environmental and human rights complaints (referred to as a request for service), provides guides to both affected communities and to OPIC clients. These guides provide information about the complaint system, including what to include in the request.<sup>310</sup>
    - ii. OPIC may offer training to parties to improve their ability to participate in problem solving.<sup>311</sup>
  - c. **Language considerations:**
    - i. The OA’s guide on its complaint system, which

Multinational Enterprises

- a. **Financial support:**
  - i. Information regarding whether there is a filing fee does not appear to be available on the Department of State’s NCP website.<sup>351</sup>
  - ii. The U.S. NCP does not provide complainants with financial support to obtain counsel or advisors, despite the equitability and power imbalance issues that arise given that enterprises often have in-house or outside counsel to represent them through the dispute resolution process.<sup>352</sup>
  - iii. The U.S. NCP does not provide travel assistance for complainants to participate in in-person dispute resolution processes.<sup>353</sup>
- b. **Providing guidance:**
  - i. The U.S. NCP webpage does not provide information regarding how to request assistance from the NCP or what to specifically include in the request.<sup>354</sup> The U.S. NCP also fails to lay out what procedures it will follow when there are parallel legal proceedings.<sup>355</sup>
  - ii. Although the U.S. NCP has conducted outreach events, these events have not always been open to the public.<sup>356</sup> The U.S. NCP does not currently have the resources to conduct outreach within communities overseas that are mostly likely affected by business-related human rights abuses.<sup>357</sup>
  - iii. The U.S. NCP does not appear to provide training to complainants on how to engage in dispute resolution, as OPIC does, in order to improve outcomes, power imbalances, and the overall

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- details its functions and how to file a complaint, is available in the following languages: Arabic, English, French, Hindi, Portuguese, Russian, Spanish, Turkish, and Urdu.<sup>312</sup>
- ii. Furthermore, requests may be made to the OA in either English or in the filer's native language.<sup>313</sup> The OA will also provide translations of its communications with the requestor, as well as case-related summaries and reports, to the requestor in his or her native or locally understood language.<sup>314</sup>
3. U.S. Commission on Civil Rights
    - a. **Providing guidance:** The U.S. Commission on Civil Rights provides guidance on its website, such as information on anti-discrimination laws and guidance on when and how to file a complaint. It also refers people to the appropriate resources for further action.<sup>315</sup>
    - b. **Language considerations:** The Commission provides guidance in Spanish, but it is not equivalent to the English-language guide.<sup>316</sup>
  4. The Occupational Safety & Health Administration (OSHA)
    - a. **Financial support:** A complaint may be submitted online, via fax, mail, or phone, and in person.<sup>317</sup> While it is not explicitly stated on OSHA's website, the online application does not mention a fee for filing a complaint.<sup>318</sup>
    - b. **Providing guidance:**
      - i. OSHA provides guidance on its website on how to file a complaint, including when a complaint must be filed by, what rights workers have, and who may file a complaint.<sup>319</sup>
- dispute resolution process.<sup>358</sup>
- c. **Language considerations:** As noted in Section 27.1, there may be a language barrier for potential complainants seeking relief whose primary language is not English, as it does not appear that the NCP is required to provide translation services.<sup>359</sup> There is also no plan in place to reduce barriers for potential complainants who are illiterate.<sup>360</sup>
2. The Overseas Private Investment Corporation (OPIC)
    - a. **Financial support:** OPIC does not provide complainants with financial support to obtain counsel or advisors, despite the equitability and power imbalance issues that arise given that OPIC clients often have in-house or outside counsel to represent them through the dispute resolution process.<sup>361</sup>
    - b. **Providing guidance:** As stated in Section 27.1, although OPIC's OA will maintain confidentiality of the identities of complainants when explicitly requested, it does not accept anonymous complaints.<sup>362</sup> OPIC also does not appear to have a policy on assessing and, to the extent possible, mitigating the risk of reprisals and other security risks to complainants.<sup>363</sup>
    - c. **Language considerations:** As stated in Section 27.1, although OPIC has translated its materials into a number of languages and may offer training to parties to improve their ability to participate in problem solving, it is unclear to what extent the agency has addressed barriers for project-affected peoples who are illiterate.<sup>364</sup>
  3. Immigration-related processes
    - a. **Language considerations:**
      - i. Although the Executive Office for Immigration

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- ii. OSHA also provides information specifically for whistleblowers.<sup>320</sup> As detailed in that guidance, if OSHA finds that a whistleblower’s complaint is supported and no resolution is reached with the employer, OSHA will usually order remedies such as reinstatement, payment of back wages, and restoration of benefits.<sup>321</sup>
  - c. **Language considerations:** There is a link for information on filing a complaint in Spanish,<sup>322</sup> and a complaint may be made in any language.<sup>323</sup>
- 5. The National Labor Relations Board (NLRB)
  - a. **Financial support:** There is no fee for filing a charge.<sup>324</sup> After a complaint is issued, the agency acts as a representative of the charging party before the NLRB Administrative Law judge and in settlement negotiations.<sup>325</sup>
  - b. **Providing guidance:**
    - i. The NLRB has a mobile application that provides information to employers and employees about rights under the National Labor Relations Act.<sup>326</sup>
    - ii. The NLRB provides guidance about different stages of the process on its website, such as the filing and investigation of charges, the facilitation of settlements, and the adjudication of cases. Regarding the filing of a charge, the form on its website contains instructions on and provides information about how to seek additional guidance or drafting assistance.<sup>327</sup>
  - c. **Language considerations:** The NLRB provides a version of its website and guidance in Spanish,<sup>328</sup> as well as guidance materials in Spanish<sup>329</sup>

Review (EOIR) provides information on where to find free legal representation and on what attorneys are ineligible to practice immigration law, as well as a sections titled “read this before you take legal action”<sup>365</sup> and “find an immigration court,”<sup>366</sup> none of these resources are available in foreign languages.

- ii. Although the Office of Special Counsel for Immigration-Related Unfair Employment Practices provides charge forms in eight non-English languages on its website, the website itself is only available in English.<sup>367</sup> As such, it would be difficult for a non-English speaker to access these forms.
- 4. U.S. Equal Employment Opportunity Commission (EEOC)
  - a. **Ensuring Access:** At the end of 2014, the EEOC disclosed that its backlog of 73,134 private sector discrimination charges poses a serious barrier to access to remedy.<sup>368</sup> In fact, in its FY 2015 budget justification, the Occupational Safety & Health Administration (OSHA) stated it was seeking additional funds to hire more investigators, since “[a]s the backlog decreases and the inventory of whistleblower investigations is reduced to a more manageable level, the agency will be able to resolve whistleblower cases more quickly.”<sup>369</sup>

**Other barriers** also exist in terms of communities’ access to non-judicial grievance mechanisms.

- 1. **Imbalances between parties:**
  - a. Access to affordable legal services continues to be an obstacle in access to remedy. Although in most

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### 6. U.S. Equal Employment Opportunity Commission (EEOC)

- a. **Financial support:** There is no fee for filing a charge with the EEOC.<sup>330</sup> The EEOC also provides free outreach and education programs,<sup>331</sup> and provides technical assistance for a fee.<sup>332</sup> Discovery may also be conducted, with each party bearing its own cost unless the judge assigns costs to the agency due to inadequate investigation or failing to conclude its investigation in a timely matter.<sup>333</sup>
- b. **Providing guidance:**
  - i. The EEOC has an online assessment system to determine whether it is the proper agency for a particular complainant.<sup>334</sup>
  - ii. The EEOC has brochures addressing specific groups and subject matters, including immigrant workers rights, human trafficking, and gender stereotyping.<sup>335</sup>
  - iii. Some EEOC offices provide a list of attorneys.<sup>336</sup>
- c. **Language considerations:**
  - i. The EEOC provides publications in languages other than English, including its publication "Filing a Charge of Job Discrimination."<sup>337</sup>
  - ii. It also has a Spanish version of its website, and provides additional information in other languages.<sup>338</sup>
  - iii. Complainants may bring interpreters to meetings with the EEOC, or the EEOC will arrange for interpretation services with advance notice.<sup>339</sup>

### 7. Immigration-related processes

- a. **Financial support:** When an administrative law judge

proceedings, such as those under the Administrative Procedure Act, appellants may have counsel present, most public assistant appellants are not represented by counsel<sup>370</sup> because it may be difficult for those appealing to the federal courts to get access to affordable legal services.<sup>371</sup> For example, neither the U.S. NCP nor OPIC provide complainants with financial support to obtain counsel or other advisors, despite the fact that enterprises often have in-house or outside counsel to represent them during the dispute resolution process.

- b. Although the U.S. NCP uses the Federal Mediation and Conciliation Service (FMCS), it is unclear if mediators have specific training related to human rights abuses and addressing concerns of particularly vulnerable groups.<sup>372</sup>
  - c. Moreover, it is unclear if OPIC will respect complainants' desire to have counsel or advisors present during the dispute resolution process.<sup>373</sup>
  - d. Difficulty in securing counsel may discourage individuals from pursuing appeals or may result in pro se appearances.<sup>374</sup>
2. **Targeted awareness-raising among vulnerable groups:** As stated in above, it is unclear to what extent the U.S. NCP and OPIC has addressed barriers for potential complainants who are illiterate.<sup>375</sup>
  3. **Expert advice or type of assistance:** As stated above, there is currently no financial support for the provision of counsel or advisors in the U.S. NCP and OPIC processes. Moreover, there is no dispute resolution training available to complainants through the U.S. NCP.<sup>376</sup>
  4. **Efforts to combat corruption:** Although OPIC has an

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hears an unfair immigration-related employment practice complaint, the judge may award attorney's fees to the prevailing party if she finds that the other side's claims were "without reasonable foundation in law and fact."<sup>340</sup> Financial provisions were not otherwise discussed in the information about filing a complaint.

b. **Providing guidance:**

- i. The Executive Office for Immigration Review (EOIR) website provides information about how to find legal representation. For example, it includes a list of free legal service providers for each state, a list of attorneys and representatives who are currently ineligible to practice immigration law, and a "read this before you take legal advice" section.<sup>341</sup> There is also a "find an immigration court" section of the website that includes the contact information for immigration courts in each state.<sup>342</sup>
- ii. Information is available online about filing a charge with the Office of Special Counsel for Immigration-Related Unfair Employment Practices, including the expected timeline and appeals procedures.<sup>343</sup> Information is also available online about filing a complaint with the Office of the Chief Administrative Hearing Officer.<sup>344</sup>

c. **Language considerations:**

- i. EOIR has a Language Access Plan for Limited English Proficient Persons (LEP). The plan requires EOIR to provide interpretation services

arrangement with USAID's OIG to conduct inspection activities, the agency itself does not have a dedicated inspector general.<sup>377</sup>

5. **Lack of protection for human rights defenders:**

- a. There is considerable room for improvement regarding protection for whistleblowers. For example, the Government Accountability Office (GAO) reported that some Federal Bureau of Investigation (FBI) whistleblowers were left without protection, as "[u]nlike employees of other executive branch agencies, FBI employees do not have a process to seek corrective action if they experience retaliation based on a disclosure of wrongdoing to their supervisors or others in their chain of command who are not designated officials."<sup>378</sup> Disclosure must be made to officials designated in Department of Justice (DOJ) regulations, and all supervisors and others in the chain of command are not included in this list.<sup>379</sup> As such, FBI whistleblower protections under the DOJ regulations lack clear guidance regarding reporting, such as that whistleblowers must report to certain designated officials.<sup>380</sup> Further, it can take up to ten years for the DOJ to adjudicate the complaints that are not dismissed.<sup>381</sup>
- b. As discussed in Section 27.1, neither the U.S. NCP nor OPIC has a policy in place to assess and mitigate risks of reprisal and retaliation against complainants.

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- both inside and outside of the courtroom. In 2010, 66% of EOIR court proceedings were conducted in Spanish.<sup>345</sup>
- ii. The Office of Special Counsel for Immigration-Related Unfair Employment Practices provides a hotline to discuss possible instances of discrimination and how to submit a charge form; the hotline also provides access to interpreters. Furthermore, the charge forms are available in eight non-English languages.<sup>346</sup>
  - iii. The Office of the Chief Administrative Hearing Officer requires parties to submit documents in English or to be accompanied by a certified translation.<sup>347</sup>

**Other barriers** may exist, such as **corruption** and **retaliation against whistleblowers and other stakeholders**, which inhibit access to non-judicial remedies. The United States has implemented the following measures to address these potential barriers:

1. **Imbalances between parties:** The U.S. NCP uses the Federal Mediation and Conciliation Service (FMCS) as neutral third parties to facilitate dispute resolution.
2. As provided in Sections 27.1 and 27.2, the United States does not have one central ombudsperson or a National Human Rights Institution. However, measures such as **targeted awareness-raising** of vulnerable populations and other assistance programs appear to be performed independently by each agency.
3. The federal government has put in place measures that **combat corruption**, which include:
  - a. The Theft or Bribery Concerning Programs Receiving Federal Funds Act, which prohibits an agent of an

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organization, government, or agency from “corruptly solicit[ing] or demand[ing] for the benefit of any person, or accept[ing] or agree[ing] to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of \$5,000 or more.” This applies to organizations, governments, and agencies that receive over \$10,000 under a federal program in a year.<sup>348</sup>

- b. Whistleblower programs, hotlines, and other complaint filing mechanisms encourage people to report agency abuse. For example, an individual can submit a complaint with EOIR against immigration judges, immigration attorneys and representatives, and immigration court interpreters.<sup>349</sup> See Section 27.1 for further information about these programs.
  - c. The federal courts of appeals, in reviewing agency decisions that are appealed, act as watchdogs against corruption in non-judicial mechanisms.
4. The United States has implemented measures to **protect** those who blow the whistle on government abuse.
- a. Approximately twenty-two federal laws protect whistleblowers from retaliation.<sup>350</sup> For further information, see the discussion on whistleblowers at Section 27.1.

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States should consider ways to facilitate access to effective non-State-based grievance mechanisms dealing with business-related human rights harms.

### Commentary to Guiding Principle 28

One category of non-State-based grievance mechanisms encompasses those administered by a business enterprise alone or with stakeholders affected by its operations, by an industry association or a multi-stakeholder group. They are non-judicial, but may use adjudicative, dialogue-based or other culturally appropriate and rights-compatible processes. These mechanisms may offer particular benefits such as speed of access and remediation, reduced costs and/or transnational reach.

Another category comprises regional and international human rights bodies. These have dealt most often with alleged violations by States of their obligations to respect human rights. However, some have also dealt with the failure of a State to meet its duty to protect against human rights abuse by business enterprises.

States can play a helpful role in raising awareness of, or otherwise facilitating access to, such options, alongside the mechanisms provided by States themselves.

### 28.1. Facilitating Access to Mechanisms

Has the State supported access to effective non-State-based grievance mechanisms dealing with business-related human rights harms?

Indicators	Scoping Questions
Business-Based Grievance Mechanisms	Has the State supported access to business-based grievance mechanisms (such as whistleblower mechanisms or project-level and operational-level grievance mechanisms) through efforts such as dissemination of information and support for access (for example, through guidance documents and tools)?
Multi-Stakeholder Grievance Mechanisms	Has the State supported access to multi-stakeholder grievance mechanisms through efforts such as dissemination of information and support for access?
Organizational-Based Grievance Mechanisms	Has the State supported access to organizational-based grievance mechanisms (including the union systems) through efforts such as dissemination of information and support for access?

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International Grievance Mechanisms	Has the State supported access to international grievance mechanisms through efforts such as dissemination of information, support for access (for example, through legal aid) as well as support for establishing contact between the claimant and the international system?
Regional Grievance Mechanisms	Has the State supported access to regional grievance mechanisms through efforts such as dissemination of information and support for access (for example, through legal aid)?
Other Grievance Mechanisms	Has the State supported access to other grievance mechanisms through efforts such as dissemination of information and support for access?
Implementation Status	Gaps
<p>Access to <b>non-State-based grievance mechanisms</b> grants remedies where States may lack capacity. In some cases, they provide a speedier and more cost-effective alternative to judicial remedies or State-based non-judicial remedies.</p> <p>Below is a brief explanation of the implementation status in the U.S. government’s support of <b>business-based grievance mechanisms</b>:</p> <ol style="list-style-type: none"> <li>1. Counter Trafficking in Persons and Contractor/Recipient Compliance <ol style="list-style-type: none"> <li>a. USAID employees are responsible for reporting all suspected trafficking-in-persons violations to USAID’s Office of Investigations (OIG). OIG investigates allegations and may take the following remedial actions: 1) referral for criminal or civil prosecution in the United States or in the host State where the violation occurred; 2) contract remedies, including issuing a bill of collection or canceling the contract; and 3) suspension and disbarment.<sup>382</sup></li> </ol> </li> </ol>	<p>Although the U.S. government has supported <b>non-State-based grievance mechanisms</b>, the United States could take further steps to encourage access to these remedies.</p> <p>Below is a brief explanation of the gaps in the U.S. government’s support of <b>business-based grievance mechanisms</b>:</p> <ol style="list-style-type: none"> <li>1. Overall, there is no coordinated policy or requirement among U.S. trade, export finance, and development agencies about the use of business-based grievance mechanisms. In the event that the U.S. government chooses to promote and require business-based grievance mechanisms, there is not yet a uniform requirement to ensure that all such grievance mechanisms adhere to the UNGPs and the OECD Guidelines.</li> <li>2. H.R. 4842 – Business Supply Chain Transparency on Trafficking and Slavery Act of 2014 <ol style="list-style-type: none"> <li>a. The Business Supply Chain Transparency on Trafficking and Slavery Act was introduced in the House of Representatives on 11 June 2014.<sup>441</sup> If passed, the bill</li> </ol> </li> </ol>

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2. Operational Guidelines for Responsible Land-Based Investment (Operational Guidelines)
  - a. USAID developed the Operational Guidelines for Responsible Land-Based Investment (Operational Guidelines) in part to help companies identify practical steps to align their grievance mechanisms with those in the relevant instruments such as Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries, and Forests in the Context of National Food Security (VGGT) and the Principles for Responsible Investment in Agriculture and Food Systems (PRAI). For further discussion on the VGGT and the PRAI, see the section on organizational-based grievance mechanisms below.
  - b. The Operational Guidelines recommend that investors develop grievance and dispute resolution processes at the project operations level. The “best practices” section incorporates characteristics of the International Finance Corporation (IFC) Standards as the basis of its ideal grievance mechanism.<sup>383</sup> The Operational Guidelines allow companies to establish a clear and known procedure that will enable trust from the stakeholders involved. The Operational Guidelines also cite the UNGP’s effectiveness criteria for non-judicial grievance mechanisms.<sup>384</sup>

Below is a brief explanation of how the U.S. government has facilitated access to **multi-stakeholder grievance mechanisms**:

1. The International Code of Conduct for Private Security Service Providers (ICoC)<sup>385</sup>
  - a. The United States has been a member of the ICoC

would legally mandate companies to disclose measures taken to identify and combat “the use of forced labor, slavery, trafficking in persons, or the worst forms of child labor.”<sup>442</sup> These disclosures include efforts to provide remedial action to victims, including support for industry and sector driven remedial programs.<sup>443</sup> Congress has not passed the bill, and as of the publication of this NBA, a similar bill has not been introduced in the new Congress.

2. USAID’s Operational Guidelines for Responsible Land-Based Investment
  - a. USAID does not currently require private investors to adhere to the USAID Operational Guidelines it established in March 2015.<sup>444</sup> The lack of applicable guidelines is concerning because many U.S. companies and their suppliers still do not acquire large-scale land in a responsible, transparent, and participatory manner that respects the human rights of affected communities and provides remedy for human rights abuses.<sup>445</sup>
  - b. USAID has not strengthened the effectiveness and enforcement power of the Operational Guidelines by requiring all contractors to adhere to them. Alleged land grabs remain prevalent throughout leading U.S. companies’ supply chains and there is lack of evidence that U.S. companies and suppliers provide remedy for land grabs.<sup>446</sup>
  - c. The Operational Guidelines exclude requirements similar to those seen in the USAID Counter-Trafficking in Persons (TIP) and Contractor/Recipient Compliance: Agency-Wide Standard Operating Procedure (SOP), which requires the following: 1) training for agency personnel on recognizing and reporting TIP, 2) due

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Association (ICoCA) since 20 September 2013 and is currently involved in the development of the ICoCA's remedial process. It has representatives on ICoCA committees and in its working groups.

- b. The DoD (Department of Defense) supports the promotion of the ICoC and states that the ICoC applies to private security contractors (PSCs), serving as a useful reference for private sector purchasers of PSC services.<sup>386</sup> The DoD further encourages companies to commit to ICoC principles to support DoD strategic goals for private security functions.<sup>387</sup>
2. The Accord on Fire and Building Safety in Bangladesh (Accord)
  - a. The Accord works in collaboration with companies to address apparel factory grievances. Each company must develop a Corrective Action Plan (CAP) with remedial actions, timelines, and a financial plan. The Accord provides support for CAP development and implementation; it also provides technical guidance and conducts verification visits to ensure grievances are addressed.<sup>388</sup>
  - b. The Obama Administration suspended Generalized System of Preferences (GSP) tariff breaks for Bangladesh. This suspended privileges for 5,000 non-apparel products in an effort to pressure the Bangladeshi government to improve working conditions and to take steps toward affording internationally recognized worker's rights.<sup>389</sup>
  - c. Ranking members of the Education & the Workforce, Ways & Means, and Foreign Relations committees of Congress met with Bangladeshi delegates to discuss the suspended trade privileges.<sup>390</sup> Thereafter, they wrote a letter expressing shock at the lack of

diligence assessments before awarding contracts, grants, and cooperative agreements, and 3) responding to allegations of abuse.<sup>447</sup> Implementing requirements similar to those in the SOP could increase remedial pathways, contribute to more predictable outcomes in the grievance process, and increase the likelihood of equity when violations occur.

Below is a brief explanation of the gaps in the U.S. government's support of **multi-stakeholder grievance mechanisms**:

1. Currently, the U.S. government does not have a centralized strategy for funding and support to multi-stakeholder initiatives in order to ensure that they function in setting, monitoring, and assessing industry-specific efforts at addressing human rights requirements.<sup>448</sup>
2. The Accord on Fire and Building Safety in Bangladesh:
  - a. The U.S. government has yet to impose trade limitations with economic impact, in addition to symbolic impact.<sup>449</sup> Current trade limitations cover only about \$35 million of exports to the U.S., and do not apply to the roughly \$4.5 billion in goods the U.S. imports annually from Bangladesh's garment industry.<sup>450</sup>
  - b. The U.S. government has not applied pressure on American companies to sign the Accord.<sup>451</sup> More U.S. companies and industry leaders are part of the weaker Alliance for Bangladesh Worker Safety than the Accord on Fire and Building Safety in Bangladesh.<sup>452</sup> This is concerning because the Alliance is significantly weaker than the Accord for the following reasons: 1) worker representatives are not part of the agreement and

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| <p>improvement in working conditions in Bangladesh.<sup>391</sup></p> <ul style="list-style-type: none"> <li>d. The U.S. House of Representatives voted to require that all military-branded garments made in Bangladesh and sold at base retail stores owned by the DoD (exchanges) comply with the Accord.<sup>392</sup></li> <li>e. The Chairman of the Foreign Relations Committee, Senator Robert Menendez, publicly criticized companies that have not signed on to the Accord. Because American and European companies make up two-thirds of Bangladeshi garment production, he urged them to use their extreme market influence and power to ensure workers' rights.<sup>393</sup></li> </ul> <p>3. The Voluntary Principles on Security and Human Rights (VPs)</p> <ul style="list-style-type: none"> <li>a. The VPs are non-binding principles that offer guidance to oil, gas, and mining companies in maintaining the safety and security of their operations while ensuring respect for human rights and humanitarian law.<sup>394</sup> The VPs work with companies to establish or use existing processes for community members to raise grievances or concerns about human rights and for the company to proactively identify and respond to concerns.<sup>395</sup></li> <li>b. The United States assumed the Chairmanship of the VPs Initiative in March, 2015. In the VPs Initiative, governments, companies and non-governmental organizations work together to guide oil, gas, and mining companies in minimizing the risk of human rights abuses involving security providers when companies extract resources in some of the toughest parts of the world.<sup>396</sup> The VPs Initiative consists of 28 oil, mining, and gas companies; nine governments; and 10 non-governmental organizations.<sup>397</sup></li> <li>c. The United States worked with other members of the</li> </ul> | <ul style="list-style-type: none"> <li>have no governance control; 2) brand and retailers are not obligated to pay for repairs; 3) brands and retailers control factory inspections; 4) companies can walk away whenever they so decide; 5) members are only accountable to themselves; and 6) workers are not given the explicit right to refuse dangerous work.<sup>453</sup></li> <li>c. The U.S government has yet to follow positive examples of state action in support of the Accord.             <ul style="list-style-type: none"> <li>i. The government has not established a partnership with U.S. companies for the purpose of improving labor conditions in Bangladesh.<sup>454</sup></li> <li>ii. The government has not signed agreements with key labor organizations to improve labor conditions in Bangladesh.<sup>455</sup></li> <li>iii. The government has not inspected actual conditions in Bangladesh or invested resources into ensuring working safety and improving training.<sup>456</sup></li> </ul> </li> <li>3. The ISO Standard 26000             <ul style="list-style-type: none"> <li>a. The United States did not support the publication of ISO Standard 26000. To develop the standard, working group members were drawn from about 80 countries and international organizations. Despite wide consensus for the standard, the U.S. was one of only five countries to vote against ISO Standard 26000.<sup>457</sup></li> </ul> </li> <li>4. Worker Rights Consortium (WRC):             <ul style="list-style-type: none"> <li>a. The U.S. government has not released any reports on apparel factories under investigation for human rights abuses for failure to comply with WRC recommendations.<sup>458</sup></li> <li>b. The U.S. government has not yet supported the WRC in</li> </ul> </li> </ul> |
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VPs Initiative to launch verification frameworks that will provide a credible and practical system to assess implementation of the VPS.<sup>398</sup>

- d. The U.S. Government has prepared a public report to help make the VPs Initiative as transparent as possible for three years in a row.<sup>399</sup>

### 4. ISO Standard 26000

- a. ISO Standard 26000 for Social Responsibility reflects the best-practice standard to assist businesses in contributing to sustainable development through socially responsible business practices.<sup>400</sup> ISO Standard 26000 provides practical guidance on how to recognize responsibility, adopt principles of responsibility, and engage with stakeholders.<sup>401</sup>
- b. The American National Standards Institute (ANSI) is the U.S. member body to ISO. ANSI is comprised of businesses and industrial organizations, trade associations, labor unions, professional societies, consumer groups, academia, and government organizations for the purpose of enhancing global business competitiveness and improving the quality of life for the world's citizen.<sup>402</sup> ANSI launched ISO Standard 26000 in 2010 as an American National Standard (ANS).<sup>403</sup>
- c. U.S. government agencies representatives participate in the activities of ANSI and its accredited bodies. Through ANSI, the U.S. participates in ISO technical programs and administers many key committees and subgroups.<sup>404</sup>
  - i. The U.S. Congress passed the National Technology Transfer and Advancement Act in support of the ANS process.<sup>405</sup> As such, federal

conducting a report on the U.S. supply chain. Such a report is important because it would detail labor conditions and risk concerns in countries where products are sourced and could illuminate potential risk concerns.<sup>459</sup>

Below is a brief explanation of the gaps in the U.S. government's support of **organizational-based grievance mechanisms**:

1. Overall, there is no financial or other instrument such as an international fund, bond, or insurance to ensure that remedy can be delivered, in whatever form it takes. For instance, OPIC and the international financial institutions (IFIs) do not yet require clients to have insurance or contribute to a fund in case harm occurs.
2. Independent Accountability Network
  - a. Ex-Im and other U.S. trade and development agencies have yet to establish grievance mechanisms and therefore are not a part of this network.<sup>460</sup>
  - b. Recently enacted FY2015 Appropriations legislation does not ensure that IFIs have the proper procedures and tools in place to ensure access to effective remedy to communities when abuses occur. A lack of guidance from the U.S. government is concerning because IFI grievance mechanisms are not fully developed, leaving communities that have suffered harms without a legitimate or accessible grievance mechanism.<sup>461</sup>
3. World Bank Inspection Panel
  - a. The World Bank's Inspection Panel was intended to create a means for directly expressing business-related human rights complaints and having them addressed.<sup>462</sup> As such, financial institutions around the world have

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agencies are required to increasingly rely upon and participate in the voluntary consensus standards and conformity assessment systems.

Below is a brief explanation of how the U.S. government has facilitated access to **organizational-based grievance mechanisms**:

### 1. Independent Accountability Network

- a. The Independent Accountability Network consists of organizational-based grievance mechanisms, or accountability mechanisms, housed within international financial institutions (IFIs) and national export-finance agencies to assess complaints and seek a response to complainants concerns. The network includes, among others, the World Bank Inspection Panel, IFC's CAO, the Inter-American Development Bank (IDB) Independent Consultation and Investigation Mechanism (ICIM), and the UNDP's Office of Audit and Investigations.<sup>406</sup>
- b. Congress has passed legislation to ensure that the Department of Treasury and associated U.S. director offices at the major IFIs promote strong and independent accountability mechanisms at the IFIs.

### 2. The World Bank Inspection Panel

- a. The World Bank Inspection Panel (Panel) is an independent body of the World Bank that acts as an accountability mechanism, receives complaints, and addresses grievances from individuals or communities adversely affected by Bank-financed projects.<sup>407</sup>
- b. The U.S. government issues statements on the Panel's Investigation reports. The statements support thorough Panel investigations and urge the Panel to report

established similar mechanisms, referred to as Independent Accountability Mechanisms. The Export Import Bank of the United States is not yet amongst the network of financial institutions to implement such mechanisms.<sup>463</sup>

- b. The selection of Inspection Panel members is not transparent to the public or even to Bank board members, which undermines the independence and legitimacy of the Panel.<sup>464</sup> The selection of members does not yet take place through a competitive and public process, such as through a multi-stakeholder committee consisting of individuals from inside and outside the Bank, including civil society.
- c. The Panel currently only conducts compliance reviews. Unlike other mechanisms within the Independent Accountability Network, the Panel does not have a formal dispute resolution function with independent, professional mediators.<sup>465</sup> The Panel also currently lacks a role in monitoring remedial measures that Bank management proposes in response to complaints or a Panel investigation.<sup>466</sup>

### 4. The Inter-American Development Bank (IDB) Independent Consultation and Investigation Mechanism (ICIM)

- a. The U.S. government participated in consultations that led to the establishment of the IDB's Independent Consultation and Investigation Mechanism (ICIM).<sup>467</sup> However, civil society has expressed concern that recent changes to ICIM policy leave the mechanism dependent on IDB and unable to provide full access to remedy.<sup>468</sup> The U.S. government did not issue a statement or otherwise raise concern on the policy's inadequacies after the draft policy was released and

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clearly when investigations reveal noncompliance by the World Bank that resulted in harm to communities.<sup>408</sup> The U.S. government urges the Panel to remain independent, avoid ambiguity in its findings, and continue to illuminate noncompliance that potentially or actually violates individuals or communities' rights.

3. The Compliance Advisor Ombudsman (CAO):
  - a. The CAO is an independent accountability mechanism that allows local communities to bring forth complaints when they are adversely affected by Multilateral Investment Guarantee Agency (MIGA) and International Finance Corporation (IFC) developed (IFC) projects.<sup>409</sup> The CAO is available to hear grievances directly and works with complainants and other stakeholders to remedy social and environmental complaints.<sup>410</sup> The CAO's objective is to help parties identify and implement their own solutions through assisted negotiation methods – including conflict assessment, mediation and dispute resolution, consensus building, multi-stakeholder problem solving, and interest-based facilitation and negotiation.<sup>411</sup>
  - b. The United States has been an IFC member since 20 July 1956.<sup>412</sup> It is the largest contributing member of the World Bank Group (which includes the IFC) and its contributions are used in part to establish accountability mechanisms such as CAO. Specifically, USAID, the Department of the Treasury, the Department of Energy, and the Department of State are donors to the IFC.<sup>413</sup>
4. The Inter-American Development Bank (IDB) Independent Consultation and Investigation Mechanism (ICIM)

prior to IDB approving the policy in December 2014.<sup>469</sup> Inadequacies in the policy include the lack of anonymous victim complaints, which deters victims from filing complaints for fear of retaliation.

- b. Moreover, the selection of the ICIM director is not yet transparent, and the selection of members does not yet involve a competitive and public process, such as through a multi-stakeholder committee consisting of individuals from inside and outside the Bank, including civil society.<sup>470</sup>
2. ILO and IFC Better Work Programme
  - a. The U.S. government does not yet ensure the effective exercise of freedom of association nor strengthen transparency and monitoring in adherence with ILO core labor standards and the UNGPs.<sup>471</sup> Such assistance, similar to that seen in the Better Work Programme, could improve protection of labor rights for workers in the garment sector and other sectors in line with the U.S. policy of ensuring access to remedy for all laborers.<sup>472</sup>

Below is a brief explanation of the gaps in the U.S. government's support of **international grievance mechanisms**:

1. United Nations Human Rights Council (UN HRC)
  - a. The UN HRC has adopted a resolution calling on the creation of a working group whose mandate will be to "elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises."<sup>473</sup> Although the resolution

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- a. ICIM is the IDB independent accountability mechanism that investigates allegations of project noncompliance with the IDB's operational policies.<sup>414</sup> The policies address environmental safeguards, involuntary resettlement, gender equality, protection of indigenous peoples, and disaster risk management.<sup>415</sup>
  - b. The Department of State, the Department of Treasury, the Senate Foreign Relations Committee, and members of Senate and the House of Representatives participated in public consultations regarding the establishment of ICIM.<sup>416</sup> The consultations addressed the following grievance topics: access, independence, impact, scope, and transparency.<sup>417</sup>
  - c. The U.S. government - through the U.S. Overseas Private Investment corporation (OPIC) - collaborates with ICIM when requests involve co-financed projects.<sup>418</sup>
5. The Food and Agriculture Organization (FAO) Voluntary Guidelines for the Responsible Governance of Tenure of Land, Fisheries, and Forests (VGGT):
- a. The VGGT is an internationally negotiated document of the FAO, which calls for access to grievance mechanisms.<sup>419</sup> Overarching values for the implementation of the VGGT include: human dignity, equity and justice, gender equality, holistic and sustainable approach, consultation and participation, the rule of law, transparency, accountability, and continuous improvement.<sup>420</sup>
  - b. The VGGT states that businesses should both provide and cooperate in non-judicial grievance mechanisms capable of remedying human rights and land tenure disputes, including at the operational level.<sup>421</sup>

passed, the United States voted against the creation of the working group. U.S. support for such resolutions is important in relation to access to remedy because such a binding instrument could potentially address the lack of existing grievance mechanisms at the international level or support for mechanisms at the national level that would keep corporations accountable for violations of human rights.<sup>474</sup>

Below is a brief explanation of the gaps in the U.S. government's support of **regional grievance mechanisms**:

1. Inter-American Commission on Human Rights (IACHR)<sup>475</sup>
  - a. Although the U.S. is a member of the IACHR, this commission does not yet have a mechanism in place whereby complaints can be lodged unless a State is involved.<sup>476</sup>
2. American Convention on Human Rights
  - a. The United States signed the American Convention on Human Rights but never ratified it.<sup>477</sup> Therefore, the IACHR cannot refer petitions against the United States to the Inter-American Court on Human Rights, which closes an additional avenue of seeking relief at the regional level.<sup>478</sup> Victims' options for remedy are limited because the IACHR- encouraged friendly settlement<sup>479</sup> and issue proposals and recommendations.<sup>480</sup> Beyond this, victims have no additional options for redress within the organs of the OAS.

Below is a brief explanation of the gaps in the U.S. government's support of **other mechanisms**:

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- c. The U.S. government chaired the VGGT negotiations<sup>422</sup> and USAID is committed to implementing the VGGT.<sup>423</sup> USAID lists the VGGT on its Land Tenure and Property Rights Portal as a “best practice.”<sup>424</sup>
  - d. As a G-8 country, the United States has established a number of partnerships with developing countries to support the implementation of the VGGT. Policy Initiative. These partnerships aim to garner the support of businesses, civil society and farmers. The United States is in a partnership with Burkina Faso.<sup>425</sup>
  - e. USAID developed the aforementioned Operational Guidelines to provide greater clarity for investors for implementing the VGGT. For more information about the Operational Guidelines, see the preceding section on business-based grievance mechanisms.<sup>426</sup>
6. Committee on World Food Security (CSF) Principles for Responsible Investment in Agriculture and Food Systems (PRAI):
- a. The PRAI describe responsible investment in agriculture and food systems and call for universally accessible grievance mechanisms.<sup>427</sup> Similarly to the VGGT, the RAI states that responsible investments in agriculture must incorporate inclusive, accessible, and transparent grievance mechanisms—especially for the most vulnerable sectors of society.<sup>428</sup> Overarching values for the implementation of the PRAI include: human dignity, equity and justice, gender equality, holistic and sustainable approach, consultation and participation, the rule of law, transparency, accountability, and continuous improvement.<sup>429</sup>
  - b. The U.S. government expressly committed to implementing the PRAI.<sup>430</sup>
  - c. USAID developed the aforementioned Operational
- 1. Embassy-Based Grievance Mechanisms
    - a. U.S. embassies do not yet directly facilitate access to remedy for human rights abuses.<sup>481</sup> They do not meet with civil society organizations, company representatives, and government representatives to address whether proper grievance mechanisms are available for workers and communities affected by U.S. companies’ business operations.<sup>482</sup> U.S. embassies similarly do not meet with communities and arrange meetings between them and responsible companies. Such meetings would provide a forum for community members to express their grievances and safety concerns.<sup>483</sup>

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Guidelines to provide greater clarity for investors for implementing the PRAI. For more information about the Operational Guidelines, see the preceding section on business-based grievance mechanisms.<sup>431</sup>

Below is a brief explanation of how the U.S. government has facilitated access to **international grievance mechanisms**:

1. United Nations Human Rights Council (UN HRC)
  - a. The UN HRC Complaint Procedure addresses complaints from individuals, groups, or non-governmental organizations that claim to be victims of human rights violations or that have direct, reliable knowledge of such violations.<sup>432</sup> The UN HRC Complaints Procedure may request a State to provide further information about the human rights violations and it may appoint an expert to monitor the situation and report findings.
  - b. Special Procedures of the HRC address either specific country situations or thematic issues and the UN HRC. Special Rapporteurs take actions on situations where there have been violations of human rights. Among the mandated Special Procedures is the Working Group on the issue of human rights and transnational corporations and other business enterprises.<sup>433</sup>
  - c. The United States is a member of the UN HRC and its nationals fulfill the mandates of the special procedures established and defined by the resolution creating them.

Below is a brief explanation of how the U.S. government has facilitated access to **regional grievance mechanisms**:

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1. Inter-American Commission on Human Rights (IACHR)
  - a. The IACHR is an independent organ of the Organization for American States (OAS).<sup>434</sup> The IACHR allows any individual or nongovernmental entity to submit petitions against OAS States regarding alleged human rights violations.<sup>435</sup> The IACHR is empowered to facilitate friendly settlement<sup>436</sup> and issue recommendations and proposals.<sup>437</sup>
  - b. The United States is a Member State of the OAS, which means it has ratified that OAS Charter<sup>438</sup> and thus, recognizes the IACHR.<sup>439</sup> An American national currently serves as one of the seven commissioners; Americans have also served as commissioners since the IACHR's establishment.<sup>440</sup>

In the U.S. context, there appear to be no relevant **other grievance mechanisms** the government has facilitated access to.

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In order to ensure their effectiveness, non-judicial grievance mechanisms, both State-based and non-State-based, should be:

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

Operational-level mechanisms should also be:

- (i) Based on engagement and dialogue: consulting the stakeholder groups for whose use they are intended on their design and performance, and focusing on dialogue as the means to address and resolve grievances.

### Commentary to Guiding Principle 31

A grievance mechanism can only serve its purpose if the people it is intended to serve know about it, trust it and are able to use it. These criteria provide a benchmark for designing, revising or assessing a non-judicial grievance mechanism to help ensure that it is effective in practice. Poorly designed or implemented grievance mechanisms can risk compounding a sense of grievance among affected stakeholders by heightening their sense of disempowerment and disrespect by the process.

The first seven criteria apply to any State-based or non-State-based, adjudicative or dialogue-based mechanism. The eighth criterion is specific to operational-level mechanisms that business enterprises help administer.

The term "grievance mechanism" is used here as a term of art. The term itself may not always be appropriate or helpful when applied to a specific mechanism, but the criteria for effectiveness remain the same. Commentary on the specific criteria follows:

- (a) Stakeholders for whose use a mechanism is intended must trust it if they are to choose to use it. Accountability for ensuring that the parties to a grievance process cannot interfere with its fair conduct is typically one important factor in building stakeholder trust;

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- (b) Barriers to access may include a lack of awareness of the mechanism, language, literacy, costs, physical location and fears of reprisal;
- (c) In order for a mechanism to be trusted and used, it should provide public information about the procedure it offers. Time frames for each stage should be respected wherever possible, while allowing that flexibility may sometimes be needed;
- (d) In grievances or disputes between business enterprises and affected stakeholders, the latter frequently have much less access to information and expert resources, and often lack the financial resources to pay for them. Where this imbalance is not redressed, it can reduce both the achievement and perception of a fair process and make it harder to arrive at durable solutions;
- (e) Communicating regularly with parties about the progress of individual grievances can be essential to retaining confidence in the process. Providing transparency about the mechanism's performance to wider stakeholders, through statistics, case studies or more detailed information about the handling of certain cases, can be important to demonstrate its legitimacy and retain broad trust. At the same time, confidentiality of the dialogue between parties and of individuals' identities should be provided where necessary;
- (f) Grievances are frequently not framed in terms of human rights and many do not initially raise human rights concerns. Regardless, where outcomes have implications for human rights, care should be taken to ensure that they are in line with internationally recognized human rights;
- (g) Regular analysis of the frequency, patterns and causes of grievances can enable the institution administering the mechanism to identify and influence policies, procedures or practices that should be altered to prevent future harm;
- (h) For an operational-level grievance mechanism, engaging with affected stakeholder groups about its design and performance can help to ensure that it meets their needs, that they will use it in practice, and that there is a shared interest in ensuring its success. Since a business enterprise cannot, with legitimacy, both be the subject of complaints and unilaterally determine their outcome, these mechanisms should focus on reaching agreed solutions through dialogue. Where adjudication is needed, this should be provided by a legitimate, independent third-party mechanism.

### 31.1. Alignment with the Effectiveness Criteria

Does the State ensure that State-based non-judicial grievance mechanisms meet the effectiveness criteria?

Indicators	Scoping Questions
1. Legitimate	Has the State taken measures to ensure that the mechanisms enable trust from the stakeholder groups for whose use they are intended (including that it has a firm mandate, is independent and transparent, includes ensuring non-interference with fair conduct, and includes feedback mechanisms for when foul play is detected)?

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2. Accessible	Has the State taken measures to ensure that the mechanisms are accessible (including language and literacy issues, cost associated with raising complaints, geographical issues, fear of reprisal, and vulnerability of claimant, for example, due to gender, age, religion, or minority status)?
3. Predictable	Has the State taken measures to ensure that the mechanisms are predictable (including clear and public information about the procedure, timeframes for the procedure, and information on the process and outcome of the mechanism)?
4. Equitable	Has the State taken measures to ensure that the mechanisms are equitable (including access of all parties to information, advice, and expert resources)?
5. Transparent	Has the State taken measures to ensure that the mechanisms are transparent (including regular communication about grievance resolution progress as well as wider public information on cases received and in process in order to identify and address societal trends)?
6. Rights compatible	Has the State taken measures to ensure that the mechanisms are rights-compatible (including that grievances are framed in terms of human rights when they do raise human rights concerns and that the institutions and authorities managing the mechanisms are aware of human rights and how these relate to the cases dealt with)?
7. A source of continuous learning	Has the State taken measures to ensure that the mechanisms are a source of continuous learning (including State support for regular analysis of the frequency, patterns, and causes of grievances to promote a strengthening of the mechanism)? Has the State incorporated lessons learned through operation of the mechanisms to improve the mechanisms' effectiveness?
<b>Implementation Status</b>	<b>Gaps</b>

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For a **non-judicial mechanism** to be an effective vehicle for remedying human rights abuses, it must comply with a set of rigorous criteria reflecting that it is trusted and able to determine remedies impartially, transparently, and equitably. The extent to which the U.S.'s non-judicial mechanisms meet the effectiveness criteria is discussed below.

Regarding **legitimacy**, federal agencies have offices of inspectors general that accept complaints regarding agency misconduct including corruption. For further information on efforts to combat corruption, see the discussion in Section 27.3.

For information regarding ways the United States has tried to ensure **accessibility** and **predictability** of non-judicial mechanisms, see Section 27.3. Generally, information about non-judicial mechanisms is available online, including how to file and what happens after the complaint is filed, including timelines. Further, information is generally available at least in Spanish, although availability of information in other languages varies between mechanisms.

Regarding **equitability**, information about the complaint process is available online. As referred to in Section 27.3. OPIC, for example, provides information geared to employers and employees, respectively. OPIC also provides training to help increase the quality of participation in its problem solving mechanism. This type of training can help build capacity of parties and equalize power differentials, particularly for individuals without legal counsel.

Regarding **transparency**, most non-judicial mechanisms make final decisions publicly available, including:

1. The U.S. National Contact Point (NCP) makes her assessments and statements on specific instances publicly available, pursuant to the 2011 amendments to the NCP procedure. These assessments

Below is a brief summary of existing gaps in the effectiveness (as described by GP 31 indicators) of State-based mediation-based grievance mechanisms.

1. Overall, none of the non-judicial grievance mechanisms at the above listed IFIs, OPIC, or the U.S. NCP require remedy for harm nor do they enforce dispute resolution agreements. Moreover, there is no financial instrument in place, such as a fund, bond, or insurance, to ensure that remedy can be delivered, nor is there yet a system in place to ensure this delivery. As noted in Section 28.1, IFIs and OPIC, for example, do not require clients to contribute to a fund or take out insurance in case harm occurs.
2. The U.S. National Contact Point (NCP) for OECD Guidelines for Multinational Enterprises:
  - a. Gaps in accessibility and transparency of the U.S. NCP are addressed in Sections 27.1, 27.2, and 27.3
3. The Overseas Private Investment Corporation (OPIC)
  - a. Sections 27.1 and 27.2 address gaps related to accessibility and legitimacy of the OPIC.
4. The Export-Import Bank of the United States (Ex-Im Bank)
  - a. Sections 27.1 and 27.2 address gaps in the legitimacy, accessibility, and equitability of Ex-Im Bank.
5. Whistleblower programs
  - a. Section 27.1 and 27.3 addresses gaps in accessibility of whistleblower programs, particularly at the Federal Bureau of Investigation.

Below is a brief explanation of the gaps in effectiveness in the U.S. government's adjudicative mechanisms:

1. U.S. Equal Employment Opportunity Commission (EEOC)

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and statements are available on the NCP page of the Department of State's website.<sup>484</sup>

2. Overseas Private Investment Corporation's Office of Accountability (OA) clearly states in the "confidentiality and disclosure" section on its website that it will make problem-solving and compliance review reports accessible to the public, subject to its disclosure policy. Additional information, such as the number of requests received, will also be available in OA's annual reports.<sup>485</sup> In line with this policy, the OA provides a public registry of cases on its website, with information regarding which OA function was involved (problem solving or compliance review, or both). Information about the case status, including links to relevant documents in the cases, such as initial and final problem-solving reports, is also available.<sup>486</sup>
3. The National Labor Relations Board (NLRB) provides a "Cases and Decision" webpage, which provides links to searchable databases for board decisions, including unpublished decisions, administrative law judge decisions, and appellate court motions and briefs filed with the court of appeals in support of the NLRB. Further increasing transparency and accessibility, the NLRB provides the option to subscribe for email delivery of these documents. Additionally weekly summaries of NLRB and administrative law judge (ALJ) decisions, as well as NLRB-related federal appellate decisions, are available.<sup>487</sup>
4. The Occupational Safety & Health Review Commission provides a searchable database on its website of final ALJ and Commissioner decisions, as well as links to ALJ decisions pending review by the Commission.<sup>488</sup>
5. Executive Office of Immigration Review maintains a "case highlights" page that includes files detailing notable cases in terms of historical significance and general importance. For more cases, it advises visitors to see the web pages of attorneys' offices, special prosecutors, and litigating divisions.<sup>489</sup>

- a. Gaps in the EEOC's effectiveness in terms of accessibility and equitability are addressed in Section 27.1 and 27.3.
2. There also effectiveness gaps in laws. Section 27.1 addresses gaps in effectiveness related to accessibility and equitability of the remedial and adjudicative measures in the Tariff Act of 1930, the Fair Labor Standards Act (FLSA) and Migrants and Seasonal Agricultural Workers Protection Act of 1983 (MSPA).

Gaps in effectiveness also exist in the **other mechanisms** listed in Section 27. 1 that serve as non-judicial dispute resolution mechanisms. Below is a brief summary of the gaps in effectiveness of these mechanisms:

1. U.S. Commission on Civil Rights
  - a. Gaps in the effectiveness of the U.S. Commission on Civil Rights, particularly with regard to its accessibility, are addressed in Section 27.1.
2. Ombudspersons stationed at federal agencies including, the Department of Homeland Security, Environmental Protection Agency, Department of Education, the Food and Drug Administration, and the Internal Revenue Service.
  - a. Gaps in effectiveness of ombudspersons stationed at federal agencies are addressed in Section 27.1.

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6. Links to Board of Immigration Appeals precedent decisions are available on the Department of Justice's website.<sup>490</sup>
7. The Office of Special Counsel for Immigration-Related Unfair Employment Practices also maintains a database of complaints, settlement agreements, and letters of resolution summaries online.<sup>491</sup>

**Transparency** in government is also increased by the Freedom of Information Act and whistleblower statutes and hotlines.

## ENDNOTES

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- <sup>1</sup> John Ruggie, Special Representative of the Sec'y-Gen. on the Issue of Human Rights & Transnational Corps. & Other Bus. Enters., *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, U.N. Doc. A/HRC/17/31 (2011), available at <http://www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf> [hereinafter Ruggie].
- <sup>2</sup> Human Rights Council Res. A/HRC/26/L.1. Rep. of the Human Rights Council, 26th Sess., June 10-27, 2014 (June 27, 2014) available at <http://www.norway-geneva.org/EFTA1/Statements/26th-Session-of-the-Human-Rights-Council/Item-3-Promotion-and-protection-of-human-rights/Business-and-Human-Rights-Resolution-/#.U63LWGSxPgJ>.
- <sup>3</sup> *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Renewed EU Strategy 2011-14 for Corporate Social Responsibility*, COM (2011) 681 final (October 25, 2011), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0681:FIN:EN:PDF>.
- <sup>4</sup> European Parliament, Committee on Foreign Affairs, *Report on the Review of the EU's Human Rights Strategy*, EUR. PARL. DOC. A7-0378/2012 (November 19, 2012), available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A7-2012-0378+0+DOC+PDF+V0//EN>.
- <sup>5</sup> Eur. Consult. Ass., *Declaration of the Committee of Ministers on the UN Guiding Principles on Business and Human Rights* (Apr. 16, 2014), available at <https://wcd.coe.int/ViewDoc.jsp?id=2185745&Site=CM>.
- <sup>6</sup> See DANISH INST. FOR HUMAN RIGHTS & INT'L CORPORATE ACCOUNTABILITY ROUNDTABLE, NATIONAL ACTION PLANS ON BUSINESS AND HUMAN RIGHTS: A TOOLKIT FOR THE DEVELOPMENT, IMPLEMENTATION, AND REVIEW OF STATE COMMITMENTS TO BUSINESS AND HUMAN RIGHTS FRAMEWORKS (2014), available at <http://accountabilityroundtable.org/analysis/napsreport> (summaries of recent business and human rights NAPs developments in Chapter 2 and Annex 2) [hereinafter DIHR & ICAR NAPs Toolkit].
- <sup>7</sup> *Launch of the National Action Plans (NAPs) Project*, INT. CORPORATE ACCOUNTABILITY ROUNDTABLE (August 26, 2014), <http://accountabilityroundtable.org/analysis/launch-of-the-national-action-plans-nap-project/>; National Action Plans on Business and Human Rights, DANISH INST. FOR HUMAN RIGHTS, <http://www.humanrights.dk/projects/national-action-plans-business-human-rights> (last visited June 10, 2014).
- <sup>8</sup> See, e.g., Statement from the Int'l Corporate Accountability Roundtable (ICAR) to U.S. State Dep't on UN Framework and Guiding Principles Implementation (July 31, 2012), available at <http://www.scribd.com/doc/101638952/ICAR-Statement-to-State-Department-on-UN-Guiding-Principles-Implementation>; ICAR et al., Global Civil Society Letter to Governments on the Development and Implementation of National Action Plans (NAPs) on Business and Human Rights (May 1, 2014), available at <http://accountabilityroundtable.org/analysis/global-civil-society-letter-to-governments-on-the-development-and-implementation-of-national-action-plans-naps-on-business-and-human-rights/>; EUROPEAN GROUP OF NATIONAL HUMAN RIGHTS INSTITUTIONS, IMPLEMENTING THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS: DISCUSSION PAPER ON NATIONAL IMPLEMENTATION PLANS FOR EU MEMBER STATES (2012), available at [http://www.ohchr.org/Documents/Issues/Business/NationalPlans/ClaireMethvenOBrien\\_EuropeanGroupofNHRIs.pdf](http://www.ohchr.org/Documents/Issues/Business/NationalPlans/ClaireMethvenOBrien_EuropeanGroupofNHRIs.pdf) [hereinafter European Group of NHRIs Discussion Paper].
- <sup>9</sup> DIHR & ICAR NAPs Toolkit, *supra* note 6.
- <sup>10</sup> *Id.* at Annex 4.
- <sup>11</sup> See, e.g., FAO Integrated Food Security Support Service, M&E Technical Advisory Notes Series: Overview of Methods for Baseline Assessments, [http://www.ideas-int.org/documents/docs/Methods\\_Baseline\\_Assessments.pdf](http://www.ideas-int.org/documents/docs/Methods_Baseline_Assessments.pdf).
- <sup>12</sup> *Fact Sheet: The U.S. Global Anticorruption Agenda*, WHITE HOUSE (Sept. 24, 2014), <http://www.whitehouse.gov/the-press-office/2014/09/24/fact-sheet-us-global-anticorruption-agenda>.

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- <sup>13</sup> *Announcement of Opportunity to Provide Input into the U.S. National Action Plan on Responsible Business Conduct*, WHITE HOUSE (Nov. 20, 2014), <http://www.whitehouse.gov/blog/2014/11/20/announcement-opportunity-provide-input-us-national-action-plan-responsible-business->
- <sup>14</sup> *Id.*
- <sup>15</sup> *USG National Action Plan on Responsible Business Conduct: Frequently Asked Questions*, HUMANRIGHTS.GOV (Feb. 12, 2015), <http://www.humanrights.gov/dyn/2015/usg-national-action-plan-on-responsible-business-conduct/>.
- <sup>16</sup> Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Addendum 4: Visit to the United States of America ¶ 18, 26th Sess., June 10-27, 2014, A/HRC/26/25/Add.4 (May 6, 2014), *available at* [http://ap.ohchr.org/documents/dpage\\_e.aspx?si=A/HRC/26/25/Add.4](http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/26/25/Add.4) [hereinafter Working Group U.S. Visit Report].
- <sup>17</sup> *See, e.g.*, Office of the United Nations High Comm’r for Human Rights, *Professional Training Series No. 10: Handbook on National Human Rights Plans of Action*, U.N. Doc. HR/P/PT/10 (Aug. 29, 2002), *available at* <http://www.ohchr.org/Documents/Publications/training10en.pdf> [hereinafter OPIC OA Handbook]; European Group of NHRIs Discussion Paper, *supra* note 8; UN WORKING GROUP ON THE ISSUE OF HUMAN RIGHTS AND TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES, DRAFT: GENERIC COUNTRY VISIT TEMPLATE (2013).
- <sup>18</sup> *See, e.g.*, *Historic Advance for Universal Human Rights: Unocal to Compensate Burmese Villagers*, EARTHRIGHTS INTERNATIONAL (April 5, 2005), <http://www.earthrights.org/legal/historic-advance-universal-human-rights-unocal-compensate-burmese-villagers>.
- <sup>19</sup> *Sanctions Programs and Country Information*, DOT, <http://www.treasury.gov/resource-center/sanctions/Programs/Pages/Programs.aspx> (last updated Jan. 16, 2015); *Economic Sanctions Policy and Implementation*, DOS, <http://www.state.gov/e/eb/tfs/spi/> (last visited Jan. 21, 2015).
- <sup>20</sup> PROF. OLIVIER DE SCHUTTER, PROF. ANITA RAMASASTRY, MARK B. TAYLOR & ROBERT C. THOMPSON, ICAR, HUMAN RIGHTS DUE DILIGENCE: THE ROLE OF STATES 23 (Dec. 2012), *available at* <http://accountabilityroundtable.org/analysis/hrdd/> [hereinafter ICAR Due Diligence Report].
- <sup>21</sup> *Id.*
- <sup>22</sup> *U.S. Treasury Department Announces \$619 Million Settlement with ING Bank, N.V.*, DOT (June 12, 2012), <http://www.treasury.gov/press-center/press-releases/Pages/tg1612.aspx>.
- <sup>23</sup> *Civil Penalties and Enforcement Information*, DOT, <http://www.treasury.gov/resource-center/sanctions/CivPen/Pages/civpen-index2.aspx> (last updated Nov. 21, 2014).
- <sup>24</sup> PROF. ROBERT STUMBERG, PROF. ANITA RAMASASTRY, & MEG ROGGENSACK, ICAR, TURNING A BLIND EYE?: RESPECTING HUMAN RIGHTS IN GOVERNMENT PURCHASING 38-39 (Sept. 2014), *available at* <http://accountabilityroundtable.org/analysis/procurementreport/> [hereinafter ICAR Procurement Report].
- <sup>25</sup> FAR Subpart 9.4 (Debarment, suspension); FAR 9.405 (Effect of listing).
- <sup>26</sup> FAR 9.406-2 (Causes for debarment); FAR 9.407-2 (Causes for suspension).
- <sup>27</sup> ICAR Procurement Report, *supra* note 24, at 40-41.
- <sup>28</sup> *See In re Est. of Ferdinand Marcos, Human Rights Litig.*, 25 F.3d 1467 (9th Cir. 1994).
- <sup>29</sup> *See, e.g.*, *BP chief to Gulf residents: 'I'm sorry'*, CNN NEWSWIRE, (May 30, 2010), <http://www.cnn.com/2010/US/05/30/gulf.oil.spill/>.
- <sup>30</sup> *See, e.g.*, John Broder, *BP’s Chief Offers Answers, but Not to Liking of House Committee*, NYTIMES (June 17, 2010), <http://www.nytimes.com/2010/06/18/us/politics/18spill.html>.
- <sup>31</sup> *See, e.g.*, *Duke Energy Apologizes for Environmental Crimes, Will Pay \$102 Million*, CORPORATE CRIME REPORTER (May 19, 2015), <http://www.corporatecrimereporter.com/news/200/duke-energy-apologizes-for-environmental-crimes/#sthash.b7Rk3Buv.dpuf> A Public Apology from Duke Energy.

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- <sup>32</sup> See *Joint Comment on the Reporting Requirements on Responsible Investment in Burma*, HUMAN RIGHTS WATCH (Oct. 4, 2012) <http://www.hrw.org/news/2012/10/03/joint-comment-reporting-requirements-responsible-investment-burma>.
- <sup>33</sup> See *Joint Letter to President Obama Re: Updating the Specially Designated Nationals (SDN) List*, HUMAN RIGHTS WATCH (Nov. 7, 2013), <http://www.hrw.org/news/2013/11/07/joint-letter-president-obama-re-updating-specially-designated-nationals-sdn-list>.
- <sup>34</sup> *Id.* at 39.
- <sup>35</sup> *Id.* at 40.
- <sup>36</sup> *Id.*
- <sup>37</sup> *Id.* at 24.
- <sup>38</sup> *Id.*
- <sup>39</sup> Office for Victims of Crime, *Victim Compensation*, OFFICE OF JUST. PROGRAMS, <http://ovc.ncjrs.gov/topic.aspx?topicid=58> (last visited Mar. 20, 2015).
- <sup>40</sup> *Crime Victim Compensation*, CATALOG OF FED. DOMESTIC ASSISTANCE, <https://www.cfda.gov/?s=program&mode=form&tab=step1&id=64527cda3113be6597c4cd105368de71> (last visited Mar. 20, 2015).
- <sup>41</sup> The only exception is for victims of international terrorism who are U.S. contractors. Int'l Terrorism Victim Expense Reimbursement Program, *WHO IS ELIGIBLE?*, OFFICE OF JUST. PROGRAMS, <http://www.ojp.usdoj.gov/ovc/itverp/eligibility.html> (last visited Mar. 20, 2015).
- <sup>42</sup> See *Licea v. Curacao Drydock Co.*, 584 F. Supp. 2d 1355 (S.D. Fla. 2008).
- <sup>43</sup> See, e.g., *Yaiguaje v Chevron Corporation*, 2013 ONCA 758.
- <sup>44</sup> POLARIS PROJECT, *2014 State Rankings on Human Trafficking Laws*, available at <http://www.polarisproject.org/what-we-do/policy-advocacy/national-policy/state-ratings-on-human-trafficking-laws> (last visited Apr. 29, 2015).
- <sup>45</sup> See Sarah Light, *The Human Rights Injunction: Equitable Remedies under the Alien Tort Claims Act*, 9 *Transnat'l L. & Contemp. Probs.* 653, 666-668 (1999) (discussing how courts with personal jurisdiction may issue injunctions with extraterritorial effects).
- <sup>46</sup> See Barbara Kellerman, *When Should a Leader Apologize—and When Not?*, *HARV. BUS. REV.* (Apr. 2006), available at <https://hbr.org/2006/04/when-should-a-leader-apologize-and-when-not>.
- <sup>47</sup> See Jeffrey S. Helmreich, *Does Sorry Incriminate? Evidence, Harm, and the Protection of Apology*, 21 *CORNELL J.L. & PUB. POL'Y* 567, 575-579 (2011) (discussing varying approaches among states to “apology laws”).
- <sup>48</sup> 28 U.S.C. § 1350.
- <sup>49</sup> PROF. GWYNNE SKINNER ET AL., ICAR, *THE THIRD PILLAR: ACCESS TO JUDICIAL REMEDIES FOR HUMAN RIGHTS VIOLATIONS BY TRANSNATIONAL BUSINESS* 11-12 (Dec. 2013), available at <http://accountabilityroundtable.org/wp-content/uploads/2013/02/The-Third-Pillar-Access-to-Judicial-Remedies-for-Human-Rights-Violation-by-Transnational-Business.pdf> [hereinafter ICAR Third Pillar report].
- <sup>50</sup> See, e.g., *Filártiga v. Pena Irala*, 630 F.2d 876 (2d Cir. 1980); *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 95 (2d Cir. 2000); *Al Shimari v. CACI Premier Tech., Inc.* 758 F.3d 51 (4th Cir. 2014).
- <sup>51</sup> See *Licea v. Curacao Drydock Co., Inc.*, 584 F.Supp.2d 1355, 1357 (S.D. Fla., 2008).
- <sup>52</sup> The Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (codified at 28 U.S.C. § 1350 (1992)). The TVPA provides that, “An individual who, under actual or apparent authority, or color of law, of any foreign nation—(1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or (2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual’s legal representative, or to any person who may be a claimant in an action for wrongful death.” *Id.* The TVPA also has an exhaustion requirement, and a statute of limitations of 10 years. *Id.*
- <sup>53</sup> *Id.*

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- <sup>54</sup> *Id.*
- <sup>55</sup> The Trafficking Victims and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (codified at 22 U.S.C. § 7101 (2000)).
- <sup>56</sup> *Id.*
- <sup>57</sup> *Id.*
- <sup>58</sup> POLARIS PROJECT, *supra* note 45.
- <sup>59</sup> Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified at 15 U.S.C. § 78dd-1 *et seq.* (1977)).
- <sup>60</sup> *Id.* at (h)(1)(B).
- <sup>61</sup> *Id.* at (i)(1).
- <sup>62</sup> *Id.*
- <sup>63</sup> Military Extraterritorial Jurisdiction Act of 2000 (MEJA), Pub. L. No. 106-523, 114 Stat. 2488 (codified at 18 U.S.C. § 3261 (2012)).
- <sup>64</sup> *Id.*
- <sup>65</sup> *Id.*
- <sup>66</sup> *United States v. Slough*, No. CR 08-360 (RCL), 2015 WL 1638703, AT \*1 (D.D.C. APR. 13, 2015).
- <sup>67</sup> The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 15 Stat. 272.
- <sup>68</sup> 18 U.S.C. 3286 § 814(d)(12) (“the term ‘person’ means any individual, firm, corporation, educational institution, financial institution, governmental entity, or legal or other entity.”)
- <sup>69</sup> 22 U.S.C. 7211 § 807(2).
- <sup>70</sup> Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified at 42 U.S.C.A. §§ 2000e *et seq.* (1964)).
- <sup>71</sup> Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat 327 (codified at 42 U.S.C. §§ 12101 *et seq.* (1990)).
- <sup>72</sup> The Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (codified at 29 U.S.C. § 621 through 29 U.S.C. § 634 (1967)).
- <sup>73</sup> ICAR Due Diligence Report, *supra* note 20, at 53.
- <sup>74</sup> *Id.*
- <sup>75</sup> Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified at 42 U.S.C.A. §§ 2000e *et seq.* (1964)).
- <sup>76</sup> 18 U.S.C. § 1091.
- <sup>77</sup> 18 U.S.C. § 1091(e)(2).
- <sup>78</sup> 18 U.S.C. § 1091(e)(2).
- <sup>79</sup> 18 U.S.C. § 2340A.
- <sup>80</sup> 18 U.S.C. § 2340A(b).
- <sup>81</sup> 18 U.S.C. § 2340A(b).
- <sup>82</sup> 18 U.S.C. § 2441.
- <sup>83</sup> 18 U.S.C. § 2441.
- <sup>84</sup> 18 U.S.C. § 2441(a).
- <sup>85</sup> 18 U.S.C. § 2442.
- <sup>86</sup> 18 U.S.C. § 2442(c).
- <sup>87</sup> 18 U.S.C. § 2442(c).

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<sup>88</sup> POLARIS PROJECT, *supra* note 45.

<sup>89</sup> *See, e.g.*, Julian G. Ku, *Customary International Law in State Courts*, 42 VA. J. INT'L L. 265 (2001); Curtis A. Bradley & Jack Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 834, 870 (1997). State courts throughout the 1800s applied certain aspects of the law of nations to cases before them, typically cases that arose out of the law of war. Many of these cases were brought under state tort law, however, the courts looked to customary international law—typically the law of war—in determining rights and defenses of the defendant, demonstrating that such was seen as part of their common law. *See, e.g.*, *Cochran v. Tucker*, 43 Tenn. (3 Cold.) 186 (1866) (court looked to the law of war with regard to belligerent rights finding that such rights did not allow attacks on civilians); *Hedges v. Price*, 2 W. Va. 192 (1867); *Caperton v. Martin* 4 W. Va. 138 (1870); *Johnson v. Cox*, 3 Ky. Op. 559 (1869); *Ferguson v. Loar*, 68 Ky. 689 (1869); *Bryan v. Walker*, 64 N.C. 141 (1870); *Koonce v. Davis*, 72 N.C. 218 (1875). As another example, the Oregon Supreme Court has said, “When our nation signed the Charter of the United Nations we thereby became bound to the following principles (art. 55, subd. C, and *see* art. 56): ‘Universal respect for, and observance of human rights and fundamental freedoms for all distinction as to race, sex, language, or religion.’” *Namba v. McCourt*, 204 P.2d 569, 579 (Or. 1949).

<sup>90</sup> *See Burnham v. Superior Court*, 495 U.S. 604, 611 (1990) (“[B]y the common law[,] personal actions, being transitory, may be brought in any place, where the party defendant may be found . . .,” quoting JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS §§ 554, 543 (1846).

<sup>91</sup> ICAR Third Pillar report, *supra* note 50, at 29.

<sup>92</sup> POLARIS PROJECT, *supra* note 45.

<sup>93</sup> 28 U.S.C. § 455 (a)-(b).

<sup>94</sup> 28 U.S.C. § 144.

<sup>95</sup> 28 U.S.C. § 1350 (“The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”).

<sup>96</sup> *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S., 133 S.Ct. 1659 (2013).

<sup>97</sup> *See, e.g.*, *Al Shimari v. CACI Premier Tech., Inc.* 758 F.3d 51 (4th Cir. 2014) (held that plaintiff’s claims “touched and concerned” the territory of the United States with sufficient force to rebut *Kiobel*’s presumption against the extraterritorial application of the ATS); *Cardona v. Chiquita Brands International*, 760 F.3d 1185 (11th Cir. 2014) (holding that victims’ claims under the ATS lacked sufficient connection to the United States under *Kiobel* despite the fact that decisions to fund paramilitary death squads were made in the United States).

<sup>98</sup> *Cardona v. Chiquita Brands Int’l, Inc.*, No. 14-777, 2015 WL 1757186 (U.S. Apr. 20, 2015).

<sup>99</sup> *Does 1-144 v. Chiquita Brands Int’l, Inc.*, No. 14-1011, 2015 WL 1757187 (U.S. Apr. 20, 2015).

<sup>100</sup> *The Torture Victim Protection Act of 1991*, Pub. L. No. 102-256, 106 Stat. 73 (codified at 28 U.S.C. § 1350 (1992)).

<sup>101</sup> S. 744 (113th) – Border Security, Economic Opportunity, and Immigration Modernization Act (113th Congress, 2013-2014).

<sup>102</sup> The language of the TVPA refers to “individuals,” which in 2012 the Supreme Court clarified includes only natural persons. *See Mohamad v. Palestinian Authority*, 132 S. Ct. 1702.

<sup>103</sup> *See, e.g.*, *Adhikari v. Daoud & Partners*, 994 F.Supp.2d 831, 835-36 (S.D. Tex. 2014).

<sup>104</sup> Military Extraterritorial Jurisdiction Act of 2000 (MEJA), Pub. L. No. 106-523, 114 Stat. 2488 (codified at 18 U.S.C. § 3261 (2012)).

<sup>105</sup> H.R. 2136 (112th) — Civilian Extraterritorial Jurisdiction Act of 2011 (112th Congress, 2011-2012).

<sup>106</sup> *Id.*

<sup>107</sup> S. 2598 (113th) – Civilian Extraterritorial Jurisdiction Act of 2014 (113th Congress, 2013-2014).

<sup>108</sup> S. 1377 (114th) – Civilian Extraterritorial Jurisdiction Act of 2015 (114th Congress, 2014-2015).

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- <sup>109</sup> See *Morrison v. National Australia Bank*, 561 U.S. 247 (2010); see also Danielle Ireland-Piper, *Prosecutions of Extraterritorial Criminal Conduct and the Abuse of Rights Doctrine*, 9 UTRECHT L. REV. 68 (2013), available at <http://www.ilsa.org/jessup/jessup14/Prosecutions%20of%20Extraterritorial%20Criminal%20Conduct%20and%20the%20Abuse%20of%20Rights%20Doctrine,%20Danielle%20Ireland-Piper.pdf>.
- <sup>110</sup> Securities Exchange Act of 1934, Pub. L. No. 73-291, 48 Stat. 881 (codified at 15 U.S.C. § 78a et. Seq. (1934)).
- <sup>111</sup> *Morrison v. National Australia Bank*, 130 S. Ct. 2869, 2883 (2010) (holding that there is no “affirmative indication” that the Securities Exchange Act of 1934 (Exchange Act) applies extraterritorially). Congress responded by adding Section 929P(b)(2) of Title IX of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 to allow the Exchange Act to apply extraterritorially if the fraud involves conduct within the United States that constitutes a “significant step in furtherance of the violation” or conduct occurring outside the United States that has a “foreseeable substantial effect” within the United States. 15 U.S.C. § 80b-14(b).
- <sup>112</sup> S. 1346 (111th) – Crimes Against Humanity Act of 2010 (111th Congress, 2009-2010).
- <sup>113</sup> 156 Cong. Rec. S6078-01, 156 Cong. Rec. S6078-01.
- <sup>114</sup> See, e.g., *No Safe Haven: Accountability for Human Rights Violators, Part II*, AMNESTY INT’L (Oct. 2009), <http://www.hrw.org/news/2009/10/06/no-safe-haven-accountability-human-rights-violators-part-ii>.
- <sup>115</sup> Paige Leskin, *Durbin Seeks Support from Northwestern Law Students for New Human Rights Bill*, DAILY NORTHWESTERN (Apr. 9, 2015), available at <http://dailynorthwestern.com/2015/04/08/campus/durbin-seeks-support-from-northwestern-law-students-for-new-human-rights-bill/> (last visited Apr. 10, 2015).
- <sup>116</sup> POLARIS PROJECT, *supra* note 45.
- <sup>117</sup> Gabriel D. Serbulea, *Due Process and Judicial Disqualification: The Need for Reform*, 38 Pepp. L. Rev. 1109, 1119 (2011).
- <sup>118</sup> See, e.g., *State v. Hollingsworth*, 467 N.W.2d 555, 560 (Wis. Ct. App. 1991); *Margoles v. Johns*, 660 F.2d 291 (7th Cir. 1981).
- <sup>119</sup> Deborah Goldberg, James Sample & David E. Pozen, *The Best Defense: Why Elected Courts Should Lead Recusal Reform*, 46 Washburn L.J. 503, 524 (2007).
- <sup>120</sup> James Sample, et al., *The New Politics of Judicial Elections 2000-2009: Decade of Change*, 99 (2010).
- <sup>121</sup> Charles R. Raley, *Judicial Independence in the Age of Runaway Campaign Spending: How More Vigilant Court Action and Stronger Recusal Statutes Can Reclaim the Perception of an Independent Judiciary*, 62 Case W. Res. L. Rev. 175, 182 (2011).
- <sup>122</sup> *Id.* at 183-84.
- <sup>123</sup> Jennifer Zerk, OHCHR, CORPORATE LIABILITY FOR GROSS HUMAN RIGHTS ABUSES 72 (May 2014) 72, available at <http://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/StudyDomesticLawRemedies.pdf>.
- <sup>124</sup> *Id.*; see, e.g., *United States v Bank of New England* (1987) 821 F2d 844.
- <sup>125</sup> 22 U.S.C. 7211 § 807(2).
- <sup>126</sup> 18 U.S.C. § 1091.
- <sup>127</sup> 18 U.S.C. 2340A.
- <sup>128</sup> 18 U.S.C. 2441.
- <sup>129</sup> Charles Doyle, CONGRESSIONAL RESEARCH SERVICE, STATUTES OF LIMITATION IN FEDERAL CRIMINAL CASES: AN OVERVIEW 2 (Oct. 2012), available at <http://fas.org/sgp/crs/misc/RL31253.pdf>.
- <sup>130</sup> 18 U.S.C. 3282.

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- <sup>131</sup> *The Torture Victim Protection Act of 1991*, Pub. L. No. 102-256, 106 Stat. 73 (codified at 28 U.S.C. § 1350 (1992)); *The Trafficking Victims and Violence Protection Act of 2000*, Pub. L. No. 106-386, 114 Stat. 1464 (codified at 22 U.S.C. § 7101 (2000)).
- <sup>132</sup> Jonathan Clough, *Punishing the Parent: Corporate Criminal Complicity in Human Rights Abuses*, 33 *Brooklyn Journal of Int'l Law* 899, 928 (2008).
- <sup>133</sup> *See* *Bestfoods*, 524 U.S. at 54 (“But there is an equally fundamental principle of corporate law, applicable to the parent-subsidiary relationship as well as generally, that the corporate veil may be pierced and the shareholder held liable for the corporation’s conduct when, inter alia, the corporate form would otherwise be misused to accomplish certain wrongful purposes, most notably fraud, on the shareholder’s behalf.”); *see also* *IDS Life Ins. Co.* 136 F.3d 537.
- <sup>134</sup> Alter ego liability exists when a parent or owner uses the corporate form “to achieve fraud, or when the corporation has been so dominated by an individual or another corporation (usually a parent corporation), and its separate identity so disregarded, that it primarily transacted the dominator’s business rather than its own . . .” *Gartner v. Snyder*, 607 F.2d 582, 586 (2d Cir.1979) (interpreting New York law).
- <sup>135</sup> *See Bridgestone/Firestone, Inc. v. Recovery Credit Servs., Inc.*, 98 F.3d 13, 18 (2d Cir.1996) (In deciding whether to pierce the corporate veil, “[c]ourts look to a variety of factors, including the intermingling of corporate and [shareholder] funds, undercapitalization of the corporation, failure to observe corporate formalities such as the maintenance of separate books and records, failure to pay dividends, insolvency at the time of a transaction, siphoning off of funds by the dominant shareholder, and the inactivity of other officers and directors.”).
- <sup>136</sup> Eric Engle, *U.S. Corporate Liability for Torts of (Foreign) Subsidiaries 2*, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1655983](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1655983) (published in 23 *CORP. COUNS. REV.* 15 (May 9, 2004)).
- <sup>137</sup> *Id.* at 21.
- <sup>138</sup> While the filing fees vary by state, the filing fee for opening a civil action in a United States District Court is \$400.00. *See* D. S.C., *Fee Schedule*, <http://www.scd.uscourts.gov/Resources/fee.asp> (last visited Nov. 22, 1963); D. CONN., *FEE & PAYMENT INFORMATION*, <http://www.ctd.uscourts.gov/fee-payment-information> (last visited Nov. 22, 2013).
- <sup>139</sup> *The Legal Services Corporation Act*, Pub.L. No. 93–355, 88 Stat. 378 (codified as amended at 42 U.S.C. §§ 2996–2996 (1974)).
- <sup>140</sup> N.D. R. Civ. P. 23(b)(3).
- <sup>141</sup> *See, e.g., In re South African Apartheid Litigation*, 617 F.Supp.2d 228 (S.D.N.Y., 2009); *Sarei v. Rio Tinto PLC*, 221 F.Supp.2d 1116 (C.D.Cal., 2002).
- <sup>142</sup> Federal Rule of Civil Procedure, Title VII, 54(d).
- <sup>143</sup> CRS REPORT FOR CONGRESS, *AWARDS OF ATTORNEY FEES BY FEDERAL COURTS AND FEDERAL AGENCIES* (June 20, 2008), *available at* <http://www.fas.org/sgp/crs/misc/94-970.pdf>.
- <sup>144</sup> PUBLIC PARTICIPATION PROJECT, *State Anti-SLAPP Laws*, *available at* <http://www.anti-slapp.org/your-states-free-speech-protection/> (last visited May 1, 2015).
- <sup>145</sup> 18 U.S.C.A. § 3509.
- <sup>146</sup> *Crime Control Act of 1990*, Pub. L. No. 101–647, Title II, Subtitle D, § 225(a), 104 Stat 4798 (1990).
- <sup>147</sup> 18 U.S.C.A. § 3509.
- <sup>148</sup> *United States v. Garcia*, 7 F.3d 885 (9th Cir. 1993).
- <sup>149</sup> 18 U.S.C.A. § 3509.
- <sup>150</sup> *Id.*
- <sup>151</sup> *Kiobel v. Royal Dutch Petroleum*, 621 F.3d 111, 145 (2010).
- <sup>152</sup> *Kiobel v. Royal Dutch Petroleum, Co.*, 133 S.Ct 1659, 1663 (noting that the Court granted certiorari to consider the corporate liability question, and acknowledging it answered a different question regarding the extraterritorial application of the ATS).
- <sup>153</sup> *See id.* at 1669.

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- <sup>154</sup> *Mastafa v. Chevron Corp.*, 770 F.3d 170, 177 (2014) (“[The Supreme Court’s decision in *Kiobel*] did not address, much less question or modify, the holding on corporate liability under the ATS that had formed the central conclusion in the Second Circuit’s *Kiobel* opinion.”)
- <sup>155</sup> 28 U.S.C. § 1350 (“The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”).
- <sup>156</sup> *See Daimler AG v. Bauman*, 134 S. Ct. 746, 187 (2014).
- <sup>157</sup> *Id.* (Sotomayor, J., concurring).
- <sup>158</sup> *See, e.g.*, *DP Aviation v. Smiths Industries Aerospace and Defense Systems Ltd.*, 268 F.3d 829, 845 (9th Cir. 2001).
- <sup>159</sup> ICAR Third Pillar report, *supra* note 50, at 51.
- <sup>160</sup> *See, e.g.*, Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, Nov. 26, 1968, 754 U.N.T.S. 73; Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/Conf. 183/9 (1998).
- <sup>161</sup> Charles Doyle, *Statutes of Limitation in Federal Criminal Cases: An Overview*, CONGRESSIONAL RESEARCH SERVICE, (Oct. 2012) 2 available at <http://fas.org/sgp/crs/misc/RL31253.pdf>.
- <sup>162</sup> ICAR Third Pillar report, *supra* note 50, at 47.
- <sup>163</sup> Assembly Bill 15, introduced by Majority Floor Leader, Assembly Member Holden (D-Pasadena), available at [http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill\\_id=201520160AB15](http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160AB15) (last visited April 9, 2015).
- <sup>164</sup> Senate Bill 877, introduced by Assistant Majority Leader, Senator Mark Montigny (D-New Bedford), available at <https://malegislature.gov/Bills/189/Senate/S877> (last visited May 1, 2015).
- <sup>165</sup> Jonathan Clough, *Punishing the Parent: Corporate Criminal Complicity in Human Rights Abuses*, 33 BROOKLYN JOURNAL OF INT’L LAW 899, 916 (2008). One rare exception to this was the prosecution of Exxon for the grounding of the Exxon Valdez oil tanker, wherein the District Court accepted agency and enterprise theory as grounds for Exxon’s criminal liability for the conduct of its subsidiary when it denied Exxon’s motion to dismiss.<sup>165</sup> Ultimately, this case holds little precedential value because Exxon entered into a plea agreement for fines and restitution.<sup>165</sup> *United States v. Exxon Corp.* No. A90-015 CR, 1990 U.S. Dist. LEXIS 1821 (D. Alaska 1990); *In re Exxon Valdez*, 270 F.3d 1215, 1245-46 (9th Cir. 2005).
- <sup>166</sup> ICAR Third Pillar report, *supra* note 50, at 67.
- <sup>167</sup> *Id.* at 67.
- <sup>168</sup> *Id.* at 76.
- <sup>169</sup> *See, e.g.*, *Bowoto v. Chevron Texaco Co.*, 312 F. Supp. 2d 1229, 1235-40 (N.D. Cal. 2004) (refusing to pierce the corporate veil, but holding that the case could proceed under agency law) (A jury trial subsequently resulted in a verdict for defendants). *Bowoto v. Chevron Corp.*, 2009 U.S. Dist. LEXIS 21944 (N.D. Cal. 2009); *In re South African Apartheid Litigation*, 633 F.Supp.2d 117 (S.D.N.Y. 2009) (Classes of South Africans failed to state a claim against a parent company for acts of its subsidiary; although parent allegedly maintained a preferential supply agreement with subsidiary and monitored the use of parent’s technology, a principal-agent relationship was not sufficiently alleged with respect to the design and maintenance of computer systems that predated parent’s collaborative relationship with the subsidiary, and plaintiffs did not allege that parent had the right to command subsidiary to sever subsidiary’s long-term preexisting relationship with the South African government); *Exxon Mobil Corp.*, 573 F.Supp.2d at 30 (finding Exxon Mobile could be liable under an agency theory, but rejecting other theories of liability); *Sinaltrainal v. Coca-Cola Co.*, 256 F. Supp. 2d 1345, 1354 (S.D. Fla. 2003), *aff’d*, 578 F. 3d 1252 (11th Cir. 2009) (rejecting agency theories on the grounds that the parent company had nothing more than a franchise-type relationship with the Colombian entity accused of wrongdoing).
- <sup>170</sup> ICAR Third Pillar report, *supra* note 50, at 67.

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- <sup>171</sup> See, e.g., *Doe v. Exxon*, 654 F.3d 11, 32 (D.C. Cir. 2011), vacated on other grounds in light of *Kiobel*; *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983).
- <sup>172</sup> See *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 259 (2d Cir. 2009);
- <sup>173</sup> ICAR Third Pillar report, *supra* note 50, at 46.
- <sup>174</sup> See, e.g., *Whiteman v. Dorotheum GmbH & Co. KG*, 431 F.3d 57, 74 (2d Cir. 2005) (dismissing Nazi-era case against an Austrian business to recover property on basis of both political question and case-specific deference doctrines).
- <sup>175</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004) (“Another possible limitation that we need not apply here is a policy of case-specific deference to the political branches.”). In *Sosa*, the Court pointed to an ATS case involving corporate complicity in South Africa’s earlier apartheid policy as an example of a case where the doctrine might preclude the courts from adjudicating a case otherwise properly before them. 126
- <sup>176</sup> See *Corrie v. Caterpillar*, 503 F.3d 974, 979–80, 983–84 (9th Cir. 2007); *Saldana v. Occidental Petroleum Corp.*, No. CV 11-8957 PA, at \*2-4 (C.D. Cal. Feb. 13, 2012); *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1195 (C.D. Cal. 2005); *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 483–85 (D.N.J. 1999); *Burger-Fischer v. Degussa AG*, 65 F. Supp. 2d 248, 285 (D.N.J. 1999).
- <sup>177</sup> See, e.g., *Whiteman v. Dorotheum GmbH & Co. KG*, 431 F.3d 57, 74 (2d Cir. 2005) (dismissing Nazi-era case against an Austrian business to recover property on basis of both political question and case-specific deference doctrines).
- <sup>178</sup> See, e.g., *Corrie*, 503 F.3d 974.
- <sup>179</sup> See, e.g., *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 89 (D.C. Cir. 2011) (discussing Statement of Interest asserting that “adjudication of this lawsuit at this time would in fact risk a potentially serious adverse impact on significant interests of the United States” and could “diminish our ability to work with the Government of Indonesia” in a case alleging that a U.S. oil company used Indonesian soldiers to commit human rights violations); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, No. 01 Civ.9882(DLC), 2005 WL 2082846, at \*1 (S.D.N.Y. Aug. 30, 2005) (discussing Statement of Interest raising concerns about potential impact on foreign relations in a case alleging that the defendant Canadian oil company aided and abetted human rights violations committed by the Sudanese government); *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1134, 1140 (C.D. Cal. 2005) (discussing Statement of Interest opposing the litigation and attaching an objection to the suit by the Colombian government in a case alleging that a U.S. oil company committed human rights abuses in cooperation with Colombian armed forces).
- <sup>180</sup> ICAR Third Pillar report, *supra* note 50, at 49.
- <sup>181</sup> *Id.* at 54.
- <sup>182</sup> *Lassiter v. Dept. of Soc. Servs.*, 452 U.S. 18, 24-27, 31-32 (1981) (holding that the due process clause of the Fourteenth Amendment, insofar as it guarantees representation, only applies to criminal trials not civil litigation).
- <sup>183</sup> LEGAL SERVS. CORP., *Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-Income Americans*, 1 (2009), available at [http://www.lsc.gov/sites/default/files/LSC/pdfs/documenting\\_the\\_justice\\_gap\\_in\\_america\\_2009.pdf](http://www.lsc.gov/sites/default/files/LSC/pdfs/documenting_the_justice_gap_in_america_2009.pdf).
- <sup>184</sup> *Id.*
- <sup>185</sup> *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541 (2011).
- <sup>186</sup> 131 S.Ct. at 2550-57.
- <sup>187</sup> *Id.*
- <sup>188</sup> H.R. 1927 (114th) — Fairness in Class Action Litigation Act of 2015 (114th Congress, 2015-2016).
- <sup>189</sup> ICAR Third Pillar report, *supra* note 50, at 15.
- <sup>190</sup> PUBLIC PARTICIPATION PROJECT, *supra* note 146.
- <sup>191</sup> ICAR Third Pillar report, *supra* note 50, at 83.

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<sup>192</sup> *Id.* at 83.

<sup>193</sup> Gwynne Skinner, *Beyond Kiobel: Providing Access to Judicial Remedies for Violations of International Human Rights Norms by Transnational Business in a New (Post-Kiobel) World*, 46 Colum. Hum. Rts. L. Rev. 158, 244 (2014).

<sup>194</sup> Chris Young, *Justice Obscured: Corporations, Pro-Business Nonprofits Foot Bill for Judicial Seminars*, CTR. FOR PUBLIC INTEGRITY (May 27, 2014), available at <http://www.publicintegrity.org/2013/03/28/12368/corporations-pro-business-nonprofits-foot-bill-judicial-seminars> (last visited May 22, 2015).

<sup>195</sup> *Id.*

<sup>196</sup> As of December 2012, the only conviction of a specific human rights violation thus far was against Chuckie Taylor for torture. See U.S. DEP'T. OF JUSTICE CRIMINAL DIV., HUMAN RIGHTS & SPECIAL PROSECUTIONS SECTION 2, available at <http://www.justice.gov/criminal/hrsp/additional-resources/2012/HRSP-Brochure-HRV-Rev-912.pdf> (last modified Sept. 2012).

<sup>197</sup> In other States, prosecutors are sometimes required to involve and engage with victims and their representatives to some extent. For example, in Argentina, victims may be joined as parties to criminal proceedings and are given the right to cross-examine defendants. See Zerk, *supra* note 125, at 41.

<sup>198</sup> *Lassiter v. Dept. of Soc. Servs.*, 452 U.S. 18, 24-27, 31-32 (1981) (holding that the due process clause of the Fourteenth Amendment, insofar as it guarantees representation, only applies to criminal trials not civil litigation).

<sup>199</sup> Office for Victims of Crime, *Victim Compensation*, OFFICE OF JUST. PROGRAMS, <http://ovc.ncjrs.gov/topic.aspx?topicid=58> (last visited Mar. 20, 2015).

<sup>200</sup> *Crime Victim Compensation*, CATALOG OF FED. DOMESTIC ASSISTANCE, <https://www.cfda.gov/?s=program&mode=form&tab=step1&id=64527cda3113be6597c4cd105368de71> (last visited Mar. 20, 2015).

<sup>201</sup> The only exception is for victims of international terrorism who are U.S. contractors. Int'l Terrorism Victim Expense Reimbursement Program, *WHO IS ELIGIBLE?*, OFFICE OF JUSTICE PROGRAMS, <http://www.ojp.usdoj.gov/ovc/itverp/eligibility.html> (last visited Mar. 20, 2015).

<sup>202</sup> See, e.g., *Aldana v. Del Monte Fresh Produce N.A., Inc.*, 578 F.3d 1283 (11th Cir. 2009). With regard to relevant factors, the courts consider the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of the premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive; and the enforceability of a judgment if one is obtained in the United States. The burden is on the defendant to establish an adequate, alternate remedy is possible in the home State.

<sup>203</sup> Canada and some parts of Europe employ *forum necessitatis*. See Michael Goldhaber, *Corporate Human Rights Litigation in Non-U.S. Courts: A Comparative Scorecard*, 3 U.C. IRVINE L.REV. 127, 137 (2013).

<sup>204</sup> *Ciba-Geigy Ltd. v. Fish Peddler, Inc.*, 691 So. 2d 1111, 1118 (Fla. Dist. Ct. App. 1997).

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- <sup>216</sup> *Unfair Labor Practice Process Chart*, NATIONAL LABOR RELATIONS BOARD, <http://www.nlr.gov/resources/nlr-process/unfair-labor-practice-process-chart> (last visited Mar. 19, 2015); *Cases & Decisions*, NATIONAL LABOR RELATIONS BOARD, <http://www.nlr.gov/cases-decisions> (last visited Apr. 8, 2015).
- <sup>217</sup> Richard F. Griffin, Jr., General Counsel, NATIONAL LABOR RELATIONS BOARD, Memorandum GC – 15- 03, at 1-2, Feb. 27, 2015, *available at*: <http://www.nlr.gov/reports-guidance/general-counsel-memos>.
- <sup>218</sup> *Id.* at 2.
- <sup>219</sup> *Id.* at 2-3.
- <sup>220</sup> *Occupational Safety & Health Administration*, OSHA, <https://www.osha.gov/workers/index.html> (last visited Apr. 7, 2015).
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- <sup>223</sup> *Id.*
- <sup>224</sup> *About OSHRC: The Occupational Safety and Health Review Commission*, OSHRC, <http://www.oshrc.gov/about/how-oshrc.html> (last visited Mar. 19, 2015); *Occupational Safety & Health Administration*, *supra* note 222.
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- <sup>231</sup> *Federal EEO Complaint Processing Procedures*, *supra* note 229.
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- <sup>248</sup> *Id.* at ¶ 61; Letter from Kindra Mohr, Policy Dir., Accountability Counsel, to The Honorable John Kerry, Sec'y of State 4 (Jan. 15, 2015), <http://www.accountabilitycounsel.org/wp-content/uploads/2012/05/1.15.2015-Accountability-Counsel-NAP-submission.pdf> [hereinafter Mohr Letter]. Other countries empower their NCP with the ability to make findings of fact and conclusions. *Id.* at 4.
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- <sup>449</sup> <https://www.whitehouse.gov/the-press-office/2013/06/27/technical-trade-proclamation-congress-regarding-bangladesh>

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- <sup>450</sup> <https://ustr.gov/countries-regions/south-central-asia/bangladesh>
- <sup>451</sup> [http://www.gbophb.org/assets/1/7/Bangladesh\\_letter\\_6-19-2013.pdf](http://www.gbophb.org/assets/1/7/Bangladesh_letter_6-19-2013.pdf)
- <sup>452</sup> *Members*, ALLIANCE FOR BANGLADESH WORKER SAFETY, <http://www.bangladeshworkersafety.org/about/members> (last visited Mar. 31, 2015); *Signatories*, ACCORD ON FIRE AND SAFETY IN BANGLADESH, <http://bangladeshaccord.org/signatories/> (last visited Mar. 31, 2015).
- <sup>453</sup> *Frequently Asked Questions (FAQ) about the Bangladesh Safety Accord*, *supra* note 360, <http://www.cleanclothes.org/issues/faq-safety-accord/> - 17---do-governments-support-the-accord-on-fire-and-building-safety-in-bangladesh-
- <sup>454</sup> By contrast, the Danish government has already signed a partnership agreement with Danish companies to improve labor conditions in Bangladesh. *See id.*
- <sup>455</sup> By contrast, the Norwegian Minister of International Development signed such an agreement with the International Labor Organization (ILO). Press Release, Norwegian Embassy in Bangladesh, Norwegian Minister of International Development Heikki Eidsvoll Holmås visits Bangladesh 3 – 5 June (Jun. 6, 2013), [http://www.norway.org.bd/News\\_and\\_events/press/Norwegian-Minister-of-International-Development-Heikki-Eidsvoll-Holmas-visits-Bangladesh-3--5-June/](http://www.norway.org.bd/News_and_events/press/Norwegian-Minister-of-International-Development-Heikki-Eidsvoll-Holmas-visits-Bangladesh-3--5-June/) - .VRLaaDryBll (last visited Mar. 25, 2015).
- <sup>456</sup> By contrast, U.K. Minister of State, Alan Duncan, visited Bangladesh to inspect labor conditions first hand and thereafter announced a plan to invest 18 million pounds in worker safety and training. *Visiting UK Minister Alan Duncan calls on Bangladesh Prime Minister Sheikh Hasina, political leaders*, DFID BANGLADESH, Jun. 4, 2013, *available at*: <https://www.gov.uk/government/world-location-news/visiting-uk-minister-alan-duncan-calls-on-bangladesh-prime-minister-sheikh-hasina-political-leaders> (last visited Mar. 25, 2015).
- <sup>457</sup> Adrien Enriques, *What are standards for? The case of ISO 26000*, THE GUARDIAN (5 January 2012 09:58 EST), <http://www.theguardian.com/sustainable-business/blog/iso-26000-social-impact-sustainability>.
- <sup>458</sup> <http://www.workersrights.org/Freports/index.asp#freports>
- <sup>459</sup> *Id.*
- <sup>460</sup> <http://ewebapps.worldbank.org/apps/ip/Pages/Related%20Organizations.aspx>
- <sup>461</sup> Mohr Letter, *supra* note 250, at 9-10 (quoting U.S. Consolidated Appropriations Act, 2014 (Pub.L. 113-76, § 7029(e)(2014) (emphasis added)).
- <sup>462</sup> <http://ewebapps.worldbank.org/apps/ip/Pages/Related%20Organizations.aspx>
- <sup>463</sup> *Id.*
- <sup>464</sup> <http://ewebapps.worldbank.org/apps/ip/Pages/AboutUs.aspx>
- <sup>465</sup> <http://ewebapps.worldbank.org/apps/ip/PanelMandateDocuments/2014%20Updated%20Operating%20Procedures.pdf>
- <sup>466</sup> *Id.*
- <sup>467</sup> IDB, *Inter-American Development Bank Proposal to establish the Independent Consultation and Investigation Mechanism Input received during the public consultation process*, May 6 - Sep. 30, 2009, 1, *available at*: <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=2206830>.
- <sup>468</sup> *See generally* Sarah Singh et al., *Comments on the Draft of the Revised Policy of the Independent Consultation and Investigation Mechanism (ICIM)*, ACCOUNTABILITY COUNSEL (Sept. 2014) *available at* <http://www.accountabilitycounsel.org/wp-content/uploads/2012/05/15.09.14-Public-Consultation-Phase-2-Comments-on-the-draft-of-the-revised-policy-of-the-ICIM-English.pdf>.
- <sup>469</sup> For information regarding the passage of the policy, *see The IDB Approves the ICIM's New Policy, a Weaker and Less Reliable Mechanism*, THE FOUNDATION FOR THE DEVELOPMENT OF SUSTAINABLE POLICIES (FUNDEPS), <http://www.fundeps.org/en/news/idb-approves-icim%E2%80%99s-new-policy-weaker-and-less-reliable-mechanism> (last visited May 21, 2015).
- <sup>470</sup> <http://www.iadb.org/en/mici/structure-of-governance,1790.html>
- <sup>471</sup> Working Group U.S. Visit Report, *supra* note 16, at ¶ 53.

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- <sup>472</sup> *Id.*
- <sup>473</sup> <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=14798&LangID=E>
- <sup>474</sup> <http://blog.unwatch.org/index.php/2014/06/26/resolutions-and-voting-results-of-26th-hrc-session/>
- <sup>475</sup> Letter from Amol Mehra, Director, International Corporate Accountability Roundtable, to Inter-American Commission on Human Rights, 1, *available at*: <http://accountabilityroundtable.org/wp-content/uploads/2014/09/ICAR-letter-to-President-Obama-on-launch-of-U.S.-National-Action-Plan-on-responsible-business-conduct.pdf>
- <sup>476</sup> <http://www.oas.org/en/iachr/docs/pdf/HowTo.pdf>
- <sup>477</sup> *Signatories and Ratifications*, Organization of American States (OAS), [http://www.oas.org/dil/treaties\\_B-32\\_American\\_Convention\\_on\\_Human\\_rights\\_sign.htm](http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_rights_sign.htm) (last visited Mar. 25, 2015).
- <sup>478</sup> ORGANIZATION OF AMERICAN STATES, RULES OF PROCEDURE OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, art. 45(1), *available at*: <http://www.oas.org/en/iachr/mandate/Basics/rulesiachr.asp> (last visited March 31, 2015).
- <sup>479</sup> *Id.* at art. 40.
- <sup>480</sup> *Id.* at art. 44.
- <sup>481</sup> Letter from Moira Birss, Peace Brigades International, to the Honorable Barack Obama, President of the United States (Oct. 10, 2014), 5, [http://www.mypbi.net/fileadmin/user\\_files/projects/colombia/files/press\\_kits/1410\\_PBI\\_Letter\\_US\\_NAP](http://www.mypbi.net/fileadmin/user_files/projects/colombia/files/press_kits/1410_PBI_Letter_US_NAP).
- <sup>482</sup> *Id.*
- <sup>483</sup> If proper grievance mechanisms are not available, U.S. embassies should discuss and advise on the importance of access to remedy. U.S. embassies can look to European and Canadian embassies in Mexico for guidance. For example, in December 2013, several European embassies in Mexico visited a community in Oaxaca that received threats and attacks for opposing the construction of a wind farm. After this visit was publicized on embassy websites and incorporated in embassy reports, the threats and attacks declined. In addition, European embassies in Mexico have met with human rights organizations and Mexican government officials to discuss human rights concerns in Mexico and the designing of their NAP. Letter from Moira Birss, Peace Brigades International, to the Honorable Barack Obama, President of the United States (Oct. 10, 2014), 5, [http://www.mypbi.net/fileadmin/user\\_files/projects/colombia/files/press\\_kits/1410\\_PBI\\_Letter\\_US\\_NAP](http://www.mypbi.net/fileadmin/user_files/projects/colombia/files/press_kits/1410_PBI_Letter_US_NAP).
- <sup>484</sup> *Specific Instance Process: Specific Instances Addressed by the U.S. NCP*, DOS, <http://www.state.gov/e/eb/oeed/usncp/specificinstance/assessments/index.htm> (last visited Apr. 8, 2015).
- <sup>485</sup> *Confidentiality and Disclosure*, OPIC, <https://www.opic.gov/who-we-are/office-of-accountability/confidentiality-disclosure> (last visited Apr. 8, 2015).
- <sup>486</sup> *Public Registry of Cases*, OPIC, <https://www.opic.gov/who-we-are/office-of-accountability/public-registry-cases> (last visited Apr. 8, 2015); *See, e.g., Mexico Cerro de Oro Hydroelectric*, OPIC, <https://www.opic.gov/who-we-are/office-of-accountability/mexico-cerro-de-oro-hydroelectric> (last visited Apr. 8, 2015).
- <sup>487</sup> *Cases & Decisions*, NLRB, <http://www.nlr.gov/cases-decisions> (last visited Apr. 8, 2015).
- <sup>488</sup> *Decisions*, OCCUPATIONAL SAFETY & HEALTH REV. COMM'N, <http://www.oshrc.gov/decisions/> (last visited Apr. 8, 2015).
- <sup>489</sup> EOIR, *Case Highlights*, <http://www.justice.gov/publications/case-highlights> (last visited Apr. 10, 2015)
- <sup>490</sup> *Attorney General and BIA Precedent Decisions*, DOJ, [http://www.justice.gov/eoir/vll/intdec/lib\\_indecitnet.html#charts](http://www.justice.gov/eoir/vll/intdec/lib_indecitnet.html#charts) (last visited Apr. 8, 2015).
- <sup>491</sup> *OSC Enforcement*, DOJ, <http://www.justice.gov/crt/about/osc/htm/Enforcement.php> (last visited Apr. 9, 2015).