



**In the courtroom & beyond:
New strategies to overcome inequality and
improve access to justice**

Corporate Legal Accountability Annual Briefing

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Executive summary

The rising inequality of power and wealth is now a major global issue. Less well known are its impacts on poor communities' access to justice, and on the accountability of corporations accused of abuse. [Previously](#) we have noted the narrowing of access to remedy, especially for extraterritorial abuses, and the harassment of human rights defenders, as symptoms of a growing inequality in access to justice. This Annual Briefing examines how lawyers, legislators, and their allies are using creativity and innovation to overcome these increasing obstacles and inequalities.

The briefing's key messages are:

- In the courtroom, society's growing inequality is reflected in the challenges victims face in seeking legal redress for business-related human rights abuse. Victims' advocates have counteracted this inequality through creative and innovative use of the law to access legal remedy.
- Beyond the courtroom, lawyers, working with a broad range of stakeholders, are developing new avenues, strategies and tactics that go beyond lawsuits to improve access to remedy and justice.
- Major projects by the United Nations and international groups offer the prospect of some ways forward to address accountability gaps – with opportunities for lawyers and other advocates for affected people to feed their perspectives into the outcomes.

I. Inside the courtroom: Creativity & innovation in the face of inequality. In response to the narrowing of access to justice and inequality of legal resources, advocates and lawyers have to be creative and innovative to find ways to use the law to protect victims of abuse. They are often up against opponents with deep pockets and ready access to the corridors of power. This has involved seeking new avenues for extra-territorial justice; exploring new legal tools to litigate cross-border harms; and increasing access to essential evidence through foreign legal assistance.

- Judicial remedy & extraterritorial abuses. Victims of human rights abuse often suffer harm caused, at least in part, by a business headquartered in another country. This geographic dislocation – which companies often take advantage of to access tax advantages, capital markets and other benefits – can pose multiple obstacles to judicial remedy, requiring innovation by lawyers in their efforts to hold companies accountable. For example, in December 2015 a Dutch appeals court issued a landmark ruling in favour of Nigerian farmers who had filed a lawsuit against Shell, as the parent company of Shell Nigeria, over Shell Nigeria's failure to adequately clean up oil pollution.
- Litigation of cross-border harms. The reach and impacts of companies and industrial projects often go well beyond national boundaries. Lawyers working on business and human rights cases must search for effective legal tools that match this scale, even as national courts are often set up primarily to address domestic issues. Nowhere is this more apparent than in cases related to environmental harm. In Singapore for instance, the government filed a lawsuit under its Transboundary Haze Pollution Act against five Indonesian companies blamed for contributing to the massive haze pollution in Southeast Asia.
- Foreign legal assistance for essential evidence. In many cases, one major hurdle to obtaining remedies in the country where the harm occurs is that "discovery" rules in the courts do not permit victims to obtain necessary information from companies, or that the company is foreign-owned, and necessary information is only available in its home country. The US [Foreign Legal Assistance](#) statute allows foreigners to seek a US court order to obtain relevant evidence from people or companies in USA, to assist a legal case in their home country. In addition to assisting victims in their own country, FLA proceedings can put public pressure regarding the alleged abuse on the company in the US, where its headquarters, business partners or investors may be located. However, FLA does not itself provide any legal remedy.

II. Strengthening legal accountability with legislation and complementary proceedings. Litigation is one potential route to corporate legal accountability, but the gaps in accountability cannot be filled by creative lawyering alone. Improving accountability requires new laws, and the use of non-judicial complaint mechanisms. Where resources allow, lawyers and civil society may act on a number of fronts, and shift between different fora as each becomes more or less useful to their case.

- Legislative efforts. Following dismissals of lawsuits seeking to hold companies accountable for human rights abuses, civil society in France and Switzerland has been pushing for legislative changes to

enhance legal accountability of parent companies for the actions of their foreign subsidiaries. Parent company accountability is an important potential avenue for victims of business-related abuses, especially when these occur in a country with a weak judiciary, but the parent company is headquartered in a country with functional, efficient courts.

- Non-judicial complaint mechanisms. Non-judicial mechanisms can often be more rapid, present fewer procedural hurdles, and in some cases offer more flexible remedies than judicial proceedings. In too many cases they do not ultimately yield effective remedies, but they can sometimes complement and supplement courtroom cases. Two commonly used non-judicial mechanisms are the complaint processes of international financial institutions and complaints filed pursuant to the OECD Guidelines for Multinational Enterprises. For example, tea workers from Assam, India filed a complaint with the Compliance Advisor Ombudsman (CAO) of the International Financial Corporation alleging that they had suffered numerous labour abuses working on tea plantations financed through an IFC project. In response to this complaint, the CAO launched a full public investigation into the abuses.
- Trade agreements & international arbitration. Some companies are increasingly using the arbitration process under investment treaties to evade or challenge government regulations in areas such as environmental protection and public health. Many such disputes go before the International Center for the Settlement of Investment Disputes (ICSID), which has been [widely criticised](#) for [lack of transparency and accused of in-built bias](#). Civil society organizations are seeking new ways to ensure that ICSID arbitration panels are made aware of the human rights dimension of an arbitration through amicus brief and other means, even where they have no official role.

III. The year ahead: Actions to follow in 2016. The year ahead holds opportunities to address inequality of access to remedy and justice in the context of corporate legal accountability, both inside and outside the courtroom. Several initiatives promise to show a way forward on access to remedy, including:

- guidance to governments on improving access to remedy, with recommendations
 - proposed by the OHCHR's Accountability and Remedy Project, which will include guidance to governments on their responsibilities in cross-border cases
 - to stem impunity by strengthening criminal prosecutions of companies over human rights abuses, in a project by International Corporate Accountability Roundtable and Amnesty International;
- new forms of strategic litigation, particularly in fighting modern slavery and human trafficking;
- efforts to reform accountability mechanisms of development finance institutions; and
- increased company transparency on non-financial risks: e.g., through the EU Non-Financial Reporting Directive (guidelines to be published in September), and the UK Modern Slavery Act requiring 12,000 companies globally to report on action to eliminate slavery from their operations and supply chains.

Human rights advocates fighting corporate abuse face severe inequality in power and resources. This has consequences for the fair running of markets and companies' social license to operate. There is a grave need to overcome the limitations on access to remedy that result from these inequalities and other obstacles. Governments should reverse the decline in extra-territorial access to justice, and expand Foreign Legal Assistance to support justice and fair trials in other countries. There is also substantial scope for governments to strengthen non-judicial mechanisms such as National Contact Points of the OECD and access to remedy at development finance institutions such as the IFC. Finally, more governments should take bold steps to increase mandatory transparency by companies of their human rights risks and due diligence actions, to clarify for all stakeholders how companies manage these risks, including potential liability for human rights abuses.

Introduction

The rising inequality of power and wealth is now a major global issue. Less well known are its impacts on poor communities' access to justice, and on the accountability of corporations accused of abuse. In our [last Annual Briefing](#) we highlighted the narrowing of access to remedy, especially extraterritorial, and the harassment of human rights defenders, as symptoms of a growing inequality in access to justice. [Danilo Chammas](#), a Brazilian lawyer-activist for Justiça nos Trilhos, notes that one of his greatest challenges is “the asymmetry of power between the private corporation in charge of [a] project and the State that supports it, on the one hand, and the populations impacted by it, on the other.” This Annual Briefing examines how lawyers, legislators, and their allies are using creativity and innovation to overcome these increasing obstacles and inequalities.

For most human rights advocates working on corporate legal accountability, the inequality of financial resources can be a major barrier to attaining legal remedies because companies are able to employ teams of lawyers to use all available procedural hurdles to their clients' advantage – or simply to drag out cases until the resources of victims and their advocates are exhausted. Chevron, for example, has reportedly spent over [\\$1 billion in legal fees](#) fighting environmental claims over pollution in Ecuador, during more than 20 years. The unequal power structure resulting from business' easier access to government, and from governments more interested in protecting investors than their vulnerable communities, is another major barrier.

The briefing's key messages are:

- In the courtroom, society's growing inequality is reflected in the challenges victims face in seeking legal redress for business-related human rights abuse. Victims' advocates have counteracted this inequality through creative and innovative use of the law to access legal remedy.
- Beyond the courtroom, lawyers, working with a broad range of stakeholders, are developing new avenues, strategies and tactics that go beyond lawsuits to improve access to remedy and justice.
- Major projects by the United Nations and international groups offer the prospect of some ways forward to address accountability gaps – with opportunities for lawyers and other advocates for affected people to feed their perspectives into the outcomes.

When company action goes wrong, and is not put right, legal avenues are a vital source of redress. But for these avenues to be open, civil society, governments, and others must tackle the inequality that makes legal accountability an exception rather than the rule. In confronting this task, lawyers and others working for victims of abuse are finding new ways to overcome the inequality of wealth and power.

I. Inside the courtroom: Creativity & innovation in the face of inequality

In response to the narrowing of access to justice and inequality of legal resources, advocates and lawyers have to be creative and innovative to find ways to use the law to protect victims of abuse. They are often up against opponents with deep pockets and often easier access to the corridors of power. This has involved seeking new avenues for extra-territorial justice; exploring new legal tools to litigate cross-border harms; and increasing access to essential evidence through foreign legal assistance.

1. Judicial remedy & extraterritorial abuses. Victims of human rights abuse often suffer harm caused, at least in part, by a business headquartered in another country. This geographic dislocation – which companies often create to access tax advantages, capital markets and other benefits – can pose multiple obstacles to judicial remedy, requiring innovation by lawyers in their efforts to hold companies accountable.

(a) *US courts* – Following restrictions on the Alien Tort Claims Act imposed by the US Supreme Court's 2013 [Kiobel](#) decision, victims' advocates have sought other ways to bring human rights cases involving business.¹ Some have turned to those financial institutions that have invested in projects that led to abuse, while others have turned to California's Transparency in Supply Chains law to hold companies accountable with regard to forced labour and modern slavery in their supply chains.

¹ The 2013 [Kiobel v. Shell](#) decision restricted the application of the Alien Tort Claims Act in cases involving allegations of abuse outside the United States, holding that there is a presumption against extraterritorial application of US law. To overcome this presumption, the facts of the case must “touch and concern” the United States with “sufficient force”. Five circuit courts have ruled on Alien Tort cases regarding extraterritorial human rights abuses, but their interpretations of *Kiobel* have indicated a split amongst the circuit courts.

In April 2015 [Indian fishermen filed a lawsuit against the International Finance Corporation](#) (IFC), the private-lending arm of the World Bank, in Washington, DC – the site of the IFC headquarters. They allege that by funding the Tata Mundra coal power plant in Gujarat, India, the IFC caused the loss of their livelihoods by reducing fish stocks, damaged the environment and caused health problems. The IFC's accountability mechanism, the Compliance Advisor Ombudsman (CAO), [found that](#) with the Tata Mundra project, the IFC had failed to abide by its own standards and policies, and the CAO continues to monitor the IFC's progress on its action plan developed in response to the investigation. Unable to obtain relief through the CAO process, the plaintiffs filed this lawsuit. This is the first case of this kind, and the IFC has asked for the case to be dismissed, claiming immunity. The lawsuit seeks compensation and injunctive relief for harm to property, health and economic livelihoods, and asks the court to order the IFC to enforce the provisions of the loan agreement that were intended to protect local communities and the environment. If the plaintiffs succeed, those affected by IFC projects will have a new avenue to seek enforcement of the IFC's own standards.

The [California Transparency in Supply Chains Act](#) requires companies with over US\$100 million in annual revenues to disclose the specific actions they undertake to eliminate slavery and human trafficking from their supply chain. The disclosures required by this law have been used in several lawsuits brought under California consumer protection and unfair competition laws. In August 2015, one lawsuit was filed against [Nestlé](#) and another against [Costco and CP Foods](#). In September, consumers filed a class action against [Mars](#). The focus of each of these lawsuits is the fishing industry in Southeast Asia and allegations of forced labour on fishing boats supplying the defendant companies. The lawsuits against Nestlé and Mars have been dismissed, but the lawsuit against Costco and CP Foods continues. These lawsuits have also been criticised for potentially perverse outcomes as they use the fuller disclosure by more transparent companies to launch court cases, while companies that disclose only the strict minimum required enjoy impunity, highlighting the need for full enforcement of the transparency requirements.

(b) *Netherlands* – In 2005 a group of Nigerian farmers filed a [series of lawsuits in Dutch court](#) against Shell over the impact of oil pollution, which they allege Shell Nigeria failed to adequately clean up; the farmers allege that Shell, as the parent company of Shell Nigeria, shares in responsibility for the failed clean-up. In December 2015 a Dutch appeals court ruled that the farmers and Friends of the Earth Netherlands (a co-claimant) may go ahead with their case against Shell and also ruled that Shell must give the claimants access to certain internal documents related to the case. This ruling has major implications for litigation in the Netherlands, particularly regarding parent company liability for the actions of a subsidiary abroad. In addition, it represents a major shift in access to information by granting the claimants access to company documents.

(c) *Brazil* – In March 2014, the Brazilian Government notified Odebrecht, a Brazilian-headquartered multinational, of allegations of slave labour conditions in its Angola operations related to the construction of a biofuel plant for Biocom, an Angolan company jointly owned by Odebrecht, Sonangol, and Damer Indústria. The company denied the allegations. In June 2014, a [Brazilian prosecutor filed a lawsuit](#) against Odebrecht in the labour court of Araraquara, Brazil, accusing the company of human trafficking and of maintaining Brazilian workers in slave labour conditions. In September 2015, the court convicted Odebrecht Group and ordered the company to pay 50 million reais (US\$13 million) in damages to 500 workers. This case represents one of the first times a Brazilian company has been held liable for extraterritorial abuses, and thus sets an important precedent for Brazilian companies' accountability for their global operations.

2. Litigation of cross-border harms. The reach and impacts of companies and industrial projects often go well beyond national boundaries. Lawyers working on business and human rights cases must search for effective legal tools that match this scale, even as national courts are often set up primarily to address domestic issues. Nowhere is this more apparent than in cases related to environmental harm. Recently, lawyers in Southeast Asia have brought cases in national courts, seeking corporate legal accountability for transnational harms, via novel legal theories to overcome territorial limitations.

(a) *The Xayaburi lawsuit in Thailand* – A small Thai NGO, [Community Resource Centre](#), spearheaded this case on behalf of Thai communities affected by the construction of the Xayaburi dam in Laos. The case is against several Thai government agencies as the purchasers of the electricity generated by the new dam in Laos; the defendants' power purchase agreement with the dam construction company is a key element of the project's financing. The Thai villagers claim that the cross-border power purchase agreement is illegal under Thai and international law because it was concluded without the necessary notification and impact assessments.

This is the first community-filed lawsuit in the region to challenge a large infrastructure project – an important precedent considering the ten other dams currently being planned for several countries along the Lower Mekong River. The communities argue the dam will displace hundreds of thousands of people in Laos and Thailand and will threaten their food security by blocking migration routes for dozens of fish species. EarthRights International's [Maureen Harris](#) noted that this case represents “the only legal mechanism in the region currently available to affected communities to challenge decision-making on Mekong dams on the basis of their detrimental impacts on local people.” In addition to these impacts, the [lawyer for the claimants, Sor Rattanamanee Polkla](#), noted that companies often file lawsuits against local communities to silence their protests. This makes the Xayaburi lawsuit even more important: with communities' grievances out in the open, companies can less easily ignore or silence the opposition. At the end of December the lawsuit was dismissed, but the claimants have appealed. Our [Southeast Asia Researcher & Representative](#), Bobbie Sta. Maria, noted: “When communities take state agencies and corporations to court on the basis of sound though untested legal arguments, the impacts go beyond the final verdict.” Richard Cronin of the Stimson Center has said, “Regardless of what the [Thai] Court ultimately decides it will be very difficult for...[the Thai authorities and power company]...to enter into a future Power Purchase Agreement with any foreign company or country without credible transboundary...impact assessments.”

(b) [Southeast Asian haze](#). Recently Southeast Asia has been battling major haze pollution caused primarily by the burning of forested land in parts of Indonesia to make way for commercial agriculture, especially for paper pulp and oil palm plantations. This haze has caused a public health crisis for people living in the region; 20 deaths in Indonesia have been attributed to the haze, and it has caused thousands in the region to suffer from respiratory illnesses. The haze is also a climate crisis – on many days in 2015, the [greenhouse gasses emitted](#) by Indonesia's forest fires exceeded what is emitted on average by the entire United States. There have been efforts to bring lawsuits in Indonesia to hold the companies accountable for the impact of the haze, but to date they have not been successful. The [Indonesian Government filed a lawsuit](#) against a pulp and paper company alleging it had failed to prevent forest fires on its plantation and contributed to the toxic haze pollution. On 31 December 2015, a Sumatran court dismissed the case finding that the government did not have sufficient evidence.

In September 2015 [Singapore filed a lawsuit](#) against five Indonesian companies blamed for contributing to the massive haze outbreak. Under Singapore's 2014 Transboundary Haze Pollution Act, the Singaporean Government has the power to take legal action against those companies contributing to the haze and fine them. Following this act's passage, Dr Nigel Sizer of the World Resources Institute [noted](#): “Singapore's transboundary haze law marks a new way of doing business for governments and companies...It sends a powerful message that those who burn land and forests illegally will be held accountable. In particular, any companies caught...now face the massive reputational risk of being dragged into court in Singapore.” Through this legal action, the Singaporean National Environmental Agency demanded that the defendant companies submit information on their plans to put out the fires causing the haze. Local communities in Malaysia and [Indonesia](#) are also planning class action lawsuits against those companies sourcing from the plantations that are burning.

(c) [Climate change & the Philippines](#). In September 2015 [Greenpeace Southeast Asia and a number of other Philippine civil society organizations](#) filed a claim with the Commission on Human Rights of the Philippines against 50 “[Carbon Majors](#)”² asking the Commission to investigate the companies' role in climate change and resultant harms to communities via flooding and other related extreme weather events. This is the first legal action against the Carbon Majors seeking to hold them accountable for human rights impacts of climate change.³ The petition asked the Commission to request carbon mitigation plans from the Carbon Majors and to request that the Philippine Government provide remedial mechanisms for victims of climate change. In December the Commission announced that it would accept the petition and commence an investigation into the Carbon Majors. While the Commission does not have power to order the companies to pay compensation to victims, its investigation and conclusions could have significant precedential value in future legal actions. Zelda dT Soriano

² The “Carbon Majors” are 90 companies that have produced nearly two-thirds of the greenhouse gas emissions generated since the beginning of the industrial age, according to a study published in 2013 by Richard Heede of the Climate Accountability Institute.

³ Another important case linking climate change with human rights was filed in Dutch court in April 2015 by a group of about 900 [Dutch citizens suing](#) their government. The plaintiffs sought to compel the government to reduce emissions and take action against climate change. This case used human rights as a legal basis to protect against harmful climate impacts – a novel approach. In June the court ruled for the plaintiffs. The Dutch Government has appealed this decision.

of Greenpeace Southeast Asia [noted](#) that the “Philippines has a unique opportunity to take its human rights legacy one step further and set a precedent by holding polluters accountable for climate impacts.”

3. Foreign legal assistance for essential evidence

In many cases, one major hurdle to obtaining remedies in the country where a harm to human rights occurs is that “discovery” rules in the courts do not permit victims to obtain necessary information from companies, or that the company is foreign-owned, and necessary information is only available in its home country. The US [Foreign Legal Assistance](#) statute (FLA) allows “interested parties” to an action in a legal proceeding in another country to ask a US federal court for assistance in obtaining relevant testimony and documents from people or companies located in the United States. This powerful tool is particularly useful to foreign claimants whose cases get mired by procedural barriers in their domestic courts, and cannot obtain information necessary to protect their rights. Accessing this information could be a deciding factor in moving the legal proceedings in the victims’ home country forward. Paradoxically, until recently, this statute had been primarily used by multinational corporations, most notably Chevron in its efforts to defend itself against attempts to enforce the oil pollution judgment issued by an Ecuadorian court in February 2011.

EarthRights International has used FLA several times to assist on-going litigation in Tanzania, Nigeria and Peru. For example, in 2014 EarthRights filed a FLA request on behalf of a Peruvian national who is a plaintiff in a case against [Newmont Mining regarding police repression](#) of protestors at the site of the proposed Conga mine in northern Peru. The plaintiff had been paralysed from the waist down after being shot in the back while peacefully protesting. The plaintiff alleges he was shot by Peruvian National Police officers who were under contract with Minera Yanacocha, a joint venture that is majority-owned by Newmont. In March 2015 the court ordered Newmont to turn over the requested documentation related to the shooting and security arrangements at the mine. In addition, in a Nigerian [lawsuit against Chevron](#) over the negative impacts of gas flaring on neighbouring communities, EarthRights’ FLA filing sought documents from Chevron regarding the company’s gas flaring practices in Nigeria. The communities ultimately reached an out-of-court agreement with Chevron regarding the documents, but the Nigerian lawsuit is on-going. Finally, in a [lawsuit brought by Maasai pastoralists](#) in Tanzanian court over alleged land grabbing and violence, EarthRights’ FLA filing sought, and received, information from [Thomson Safaris](#) related to tourism activities in the disputed area. In October 2015, the Tanzanian court dismissed the case, but the plaintiffs intend to appeal.

‘Bargaining in the shadow of the law’: When ‘bargaining in the shadow of the law’ lawyers and victims’ advocates have an opportunity to improve legal accountability inside the courtroom through activities outside the courtroom, and vice versa.¹ Any lawsuit is part of a much larger story involving the power of people in affected communities, the company, government, and their histories – all of which may have as much of an impact on the outcome as the evidence presented, legal doctrines applied, and judicial decisions reached. For example, Justiça nos Trilhos and Environmental Defender Law Center are working together on a series of lawsuits seeking the relocation of 27 communities affected by pollution from Vale’s operations in [Açailândia in northeastern Brazil](#). In 2005 communities in Açailândia started to file formal complaints seeking reparations because the pollution had made it impossible to continue inhabiting the area. These legal complaints have taken almost a decade to reach a conclusion. While the case has been languishing in the court system, the communities’ residential association has gotten stronger and better organized through regular meetings to strategize on these issues and through Justiça nos Trilhos’ support of the association’s work. This association has been able to push for change, specifically resettlement, both through the legal process but also through pressure from global media exposure of the problem. Lawyers and human rights advocates can develop a litigation strategy integrating the legal arguments with what happens in the shadows of the law to achieve remedy and accountability as expeditiously as possible. The Resource Centre also has a [blog series](#) from lawyers describing their experiences in seeking corporate legal accountability, including one from Danilo Chammas of Justiça nos Trilhos and others that set out not only what happened in the courtroom, but how this has played out for affected workers and communities on the ground.

[Bargaining in the shadow of the law](#)” is phrase used to note the impact of a lawsuit (or the legal system generally) on negotiations and bargaining occurring outside the courtroom. We thank César Rodríguez Garavito, Executive Director of Dejusticia in Colombia for introducing us to this concept in the context of corporate legal accountability and business and human rights

II. Strengthening legal accountability with legislation and complementary actions

Litigation is one potential route to achieve corporate legal accountability, but the gaps in accountability cannot be filled by creative lawyering alone. Improving accountability requires work beyond the courtroom to encourage legislators to pass new laws, and through the use of non-judicial complaint mechanisms of finance institutions, and under the OECD Guidelines and trade agreements. Where resources allow, lawyers and civil society may act on a number of fronts, and shift between different fora as each becomes more or less useful to their case.

1. Legislative efforts. Following dismissals of lawsuits seeking to hold companies accountable for human rights abuses, civil society in France and Switzerland has been pushing for legislative changes to enhance legal accountability of parent companies for the actions of their foreign subsidiaries. Parent company accountability is an important potential avenue for victims of business-related abuses, especially when these occur in a country with a weak judiciary, but the parent company is headquartered in a country with functional, efficient courts.

(a) *France:* In March 2015, some French NGOs and members of parliament presented a legislative proposal to [hold parent companies accountable](#) for any abuses occurring as a result of their, and their subsidiaries', operations abroad. The French National Assembly, the lower chamber of the Parliament, adopted a law requiring big companies to set up a due diligence framework to prevent human rights and environmental abuse resulting from their and their suppliers' activities. Failure to do so could lead companies to be fined and face civil liability. However, the French Senate [rejected](#) the proposed law in November, with Senators opposing the law arguing that it would be a burden for French companies and decrease their competitiveness. The National Assembly is set to examine the text at a second reading this year.

(b) *Switzerland:* In March 2015 the lower chamber of the Swiss Parliament first accepted, then [narrowly rejected, a motion for increased corporate accountability](#) requiring Swiss companies operating overseas to carry out mandatory human rights and environmental due diligence. A month later, the [Swiss Coalition for Corporate Justice](#) launched a [public initiative](#) for legal reforms to hold Swiss companies accountable for human rights abuses committed abroad. The initiative seeks mandatory human rights due diligence requirements for all Swiss companies. If it reaches 100,000 signatures, the proposal will be put forward in a referendum.

2. Non-judicial complaint mechanisms. Non-judicial mechanisms can often be more rapid, present fewer procedural hurdles, and in some cases offer more flexible remedies than legal proceedings. They can therefore “play an essential role in complementing and supplementing judicial mechanisms”, as the commentary to the UN Guiding Principles on Business and Human Rights states. Two commonly used non-judicial mechanisms are the complaint processes of development finance institutions and complaints filed pursuant to the OECD Guidelines for Multinational Enterprises.

(a) *Development finance institutions (DFIs).* NGOs have been using the complaint mechanisms of DFIs to push for greater accountability in the financing of large international development projects. For example, [Accountability Counsel](#) works with local communities and their advocates by using DFI dispute resolution mechanisms.

For example, Accountability Counsel has supported a [complaint filed in 2013 with the accountability office](#) of the International Finance Corporation (IFC) on behalf of tea workers in Assam, India. The workers had suffered numerous labour abuses such as denial of freedom of association, excessive working hours, and failure to pay a living wage while working on tea plantations financed through an IFC project with Tata Global Beverages. This complaint resulted in the CAO conducting a [full public investigation](#) into the abuses, and the company agreed to conduct its own independent inquiry into the labour abuses. The CAO's report is expected to be released in the first half of 2016.

(b) *OECD Guidelines for Multinational Enterprises.* The OECD Guidelines incorporate human rights standards, and a complaint mechanism allowing people who have been harmed by non-compliance with the Guidelines to file complaints with the National Contact Point (“NCP”) in OECD countries. NGOs use this non-judicial remedy as a way to add pressure for remedy on companies accused of human rights abuse. As an official proceeding, they can garner more attention for a public campaign. An OECD Guidelines complaint often has lower procedural hurdles than a legal claim, and may cover a wide range of human rights and related issues for which there simply is no legal remedy. For example, in November 2015, a coalition of US and Mexican

labour and civil society organizations took an unprecedented step to protect worker rights by filing [two complaints simultaneously](#) – one under the OECD Guidelines and the other under the North American Free Trade Agreement (NAFTA). The groups filed the complaints against the Mexican retailer Chedraui Commercial Group alleging unfair labour practices and denial of freedom of association. The claimants hope that the two complaints together will bring international public and government pressure to protect workers in the company’s retail operations in both the United States and Mexico.

Victims of abuse, however, must have realistic expectations of what an OECD Guidelines complaint can accomplish. OECD Watch’s June 2015 report, [Remedy Remains Rare](#), analysing NCP performance in handling complaints over the last 15 years, finds that “the overwhelming majority of complaints have failed to bring an end to corporate misconduct or provide remedy for past or on-going abuses, leaving complainants in the same or worse position as they were in before they filed their complaint.” The report concludes that the OECD Guidelines complaint system “has the potential to be a powerful tool to affect real change in corporate behaviour” but is in need of reform. There are nevertheless opportunities for human rights advocates to use these complaints to push for corporate accountability in conjunction with other measures – including litigation. OECD Watch [notes](#) that, despite the very limited evidence of effective remedy resulting from OECD Guidelines procedures, victims might file an OECD Guidelines complaint in parallel with legal proceedings because: (i) “legal proceedings may be ‘stuck’ – i.e. indefinitely delayed or unreliable due to court corruption or incompetence – and therefore not a viable means of resolving the dispute”; (ii) the OECD Guidelines are broader in the range of human rights, social and environmental impacts covered than most legal frameworks, and the proceedings can therefore address aspects of a dispute that courts cannot; and (iii) the NCP may have more flexibility than a judge to act as a facilitator to resolve the dispute.

3. Trade agreements & international arbitration. Some companies are increasingly using the arbitration process under investment treaties to evade or challenge government regulations in areas such as environmental protection and public health. Many such disputes go before the International Center for the Settlement of Investment Disputes (ICSID), which has been [widely criticised](#) for [lack of transparency](#) and accused of in-built bias. This is particularly problematic in investor-state disputes that touch on public interest matters such as environment, health and labour. Civil society organizations are seeking new to ensure that ICSID arbitration panels are made aware of the human rights dimension of an arbitration, even where they have no official role. For example, in a dispute filed by Pac Rim Mining against El Salvador, the company filed a dispute under the Central American Free Trade Agreement claiming that the Salvadoran Government’s mining moratorium left them with a US\$77 million lost investment. In an effort to give a voice to the communities who would be affected by Pac Rim’s mining activities, [a consortium of Salvadoran organizations](#) with international support from CIEL filed an amicus brief with the arbitration panel. The brief argued that El Salvador’s mining moratorium is supported by the state’s assessment that increased mining activity would pose unacceptable risks to the population’s human rights and to the environment. The use of an amicus brief in an ICSID proceeding does not guarantee that it will be considered by the arbitration panel, but it has the benefit of adding transparency to an opaque dispute resolution process by publicly outlining the human rights arguments associated with the investment arbitration.

III. The year ahead: Actions to follow in 2016

In the year ahead there will be a number opportunities to address inequality of access to remedy and justice in the context of corporate legal accountability, both inside and outside the courtroom. Several initiatives promise to show a way forward on access to remedy, including through:

- guidance to governments on improving access to remedy;
- greater cooperation amongst advocates working on access to remedy in judicial and non-judicial realms;
- new forms of strategic litigation, particularly in fighting modern slavery and human trafficking; and
- efforts beyond the courtroom to increase transparency in non-financial reporting and reform accountability mechanisms of development finance institutions.

1. Inside the courtroom

(a) *Office of the UN High Commissioner for Human Rights (OHCHR) Accountability and Remedy project.* OHCHR’s [Accountability and Remedy Project](#) will provide guidance to states on good-practice policy standards

regarding access to remedy. States implementing the policies set out in this guidance will ensure better access to effective legal remedy in cases of business-related abuse, in order to fulfil their obligations under the “third pillar”, on access to remedies, of the UN Guiding Principles on Business and Human Rights. OHCHR’s [revised draft guidance and recommendations](#)⁴ present policy objectives and elements of good state practice adaptable to different legal systems. The draft guidance addresses the following areas:

- Domestic law tests for corporate legal liability
- The roles and responsibilities of interested states in cross-border cases
- Overcoming financial obstacles to legal claims
- Criminal and administrative sanctions
- Civil law (or private/tort law) remedies
- Domestic prosecution bodies

This guidance could drive major improvement in legal accountability provided by governments, including in cases of company complicity in abuses by third parties.

(b) *Commerce, Crime and Human Rights Project*. This joint [project](#) by Amnesty International and the International Corporate Accountability Roundtable (ICAR) aims to provide recommendations to states to help close the prosecution gap – between companies’ demonstrated involvement in human rights abuses on one hand, and the extreme rarity of government prosecutions of companies and their managers for these abuses, on the other. After consultations with practitioners, the final framework is expected in May 2016. These recommendations should provide powerful frameworks that human rights groups can use at the national level to press governments to adopt laws and policies to ensure criminal actions are equally punished when they are committed by a business entity.

(c) *Righting Remedy*. ICAR and SOMO’s [Righting Remedy](#) seeks to link practitioners working on judicial and non-judicial remedies, to improve access to remedy for victims of corporate abuses. The aims include co-strategising on how to break down current barriers to remedy, and combining research efforts. The project plans to issue a set of recommendations for practitioners to move forward with the key issues identified, based on workshops in 2015-16. By bridging the knowledge gap between the judicial and non-judicial fields, the project seeks to enable practitioners to provide more complete counsel. Many victims seeking remedy for business-related human rights abuses face limited resources and time constraints. They need advocates who can provide them comprehensive advice about their available options and the necessary resources to pursue each possible strategy.

(d) *Modern slavery & strategic litigation*. New efforts this year will seek to hold companies legally accountable for modern slavery that they benefit from, via their supply chains, amid increased global attention to slavery and legislative efforts to improve transparency. We have seen some lawsuits against companies in the [United States](#), [Canada](#) and the [United Kingdom](#). With increased disclosure under the [UK Modern Slavery Act](#) as well as the [California Transparency in Supply Chains Act](#) (as described above), it will become clear which companies are leading in efforts to improve supply chain transparency, and which are the laggards. In a recent report, [Ending Impunity, Securing Justice](#), the Human Trafficking Pro Bono Legal Center and the Freedom Fund outline how strategic litigation may be used to combat modern slavery and human trafficking. It calls on lawyers and advocates to build an international network to help get the right cases to the right courts. The report notes that “strategic litigation greatly increases the risks to those involved in human trafficking” and that it is a “direct challenge to the impunity” traffickers currently enjoy. Another recent report by Liberty Asia and Freedom Fund, [Modern Slavery and Corruption](#), explores the ways in which the US [Foreign Corrupt Practices Act](#) (FCPA) may be used in litigation to fight modern slavery because “slavery and other forms of exploitation are facilitated and thrive by the use of corruption.” The FCPA is an exceptionally powerful statute in that it provides for criminal liability for corrupt action taken by a business and its employees and it has extraterritorial reach.

2. Beyond the courtroom

(a) *The UK’s Modern Slavery Act*. The new Modern Slavery Act has brought increased attention to slavery in the supply chains of businesses operating in the UK. It will apply to an estimated 12,000 companies

⁴ OHCHR is seeking stakeholder comments until 18 March 2016 before submitting the final report to the UN Human Rights Council for its consideration in June.

around the world – any company operating in the UK with a total global turnover of £36 million. These companies must produce [annual statements](#) detailing the steps they have taken to avoid modern slavery in their own company and supply chains. Businesses are now beginning to publish their first statements under the Act and during 2016 many more will be issued. While there will be no financial or criminal penalties for failing to comply, the UK Government may seek a High Court injunction to require companies to comply. This enhanced transparency provides the opportunity for peer learning on due diligence across companies; greater scrutiny by investors on reputation risks; action by civil society and consumers to reward leading companies and pressure laggards. The implications for legal cases is yet to be explored, but the cases in California using Transparency in Supply Chain Act will provide pointers.

(b) *Accountability mechanisms in development finance institutions (DFIs)*. Some victims' advocates have used the accountability mechanisms of DFIs to push for corporate accountability outside the courtroom, as discussed above. In January 2016, a new report, [Glass Half Full? The state of accountability in development finance](#), analysed data from 758 complaints before DFI accountability mechanisms since 1994, to determine the extent to which these mechanisms address human rights complaints. The report concludes that, while complainants are generally better off than without any complaint procedure, the remedy is rarely adequate. The report presents recommendations aimed at radically reforming accountability mechanisms including by expanding their mandates to permit them to compel action to enforce their rulings and creating a DFI remedy fund to compensate victims. Recently, the US Overseas Private Investment Corporation (OPIC) recently initiated a review of its Environmental and Social Policy Statement, and civil society organizations have noted that OPIC must use this opportunity to resolve systemic weaknesses identified by [civil society reports](#) and the US Government Accountability Office. Without addressing these problems, OPIC risks repeating past mistakes which left vulnerable communities worse off as a result of its investments.

(c) *The European Union Non-Financial Reporting Directive*. The European Union will publish its Guidelines for [this Directive](#) in September 2016. These are expected to require around 6,000 European companies to disclose their assessment of human rights, social and environmental risks in operations, and their business relationships “if relevant and proportionate”. The Directive and Guidelines effectively ask companies to place human rights and environmental issues alongside financial performance. Companies' compliance statements will give them a far better understanding of their risks, and the risks of their stakeholders. The statements will also be used to encourage and press companies to reduce these risks.

Conclusion & Areas for action to promote access to justice & remedy

Human rights advocates fighting corporate abuse face severe inequality in power and resources. This has consequences for the fair running of markets and companies social license to operate. There is a grave need to overcome the limitations on access to remedy that result from these inequalities and other obstacles. This briefing illustrates constructive initiatives around the world of lawyers, law-makers, and their allies to sustain poor communities and workers' access to remedy and justice in the face of more ruthless companies' drive for impunity.

Governments can strengthen access to justice and remedy by:

- Passing, enforcing and defending laws that provide effective remedies for victims of human rights abuses involving companies headquartered in the government's territory. This includes:
 - Legislation and regulatory action to address cross-border harms; parent company responsibility for the extraterritorial acts of subsidiaries; and exemption of companies from criminal prosecution
 - Permitting class action lawsuits and contingency fee arrangements
 - Providing for legal aid for victims of corporate abuse
 - Providing assistance for foreign legal actions as the Foreign Legal Assistance Act does in the United States
 - Reforming National Contact Point offices to ensure that they are an effective tool for non-judicial remedy
 - Implementing recommendations of expert bodies such as national human rights institutions, the Office of the UN High Commissioner for Human Rights, and academic and NGO projects based on extensive consultations
 - Working collectively to reform accountability mechanisms at the DFIs to provide affected communities with meaningful recourse when negatively impacted by a DFI's project.
 - Legislation to increase the transparency of companies' supply chains with regard to modern slavery and human trafficking

Civil society can enhance support to victims by:

- Breaking down barriers – working together across borders and across sectors to share information and develop comprehensive strategies to promote legal accountability.
 - Victims' advocates from the human rights, environmental and labour communities, as well as those working on judicial and non-judicial remedies, should come together to support each other, sharing limited resources to make the best use of them.
- Steering greater funding from foundations and other donors to public interest litigation, including for victims seeking to hold companies legally accountable for abuse.

Companies and their lawyers can keep from harming human rights, while they legitimately pursue legal defenses, by:

- Avoiding litigation strategies that undermine the rule of law and seek to eradicate [existing judicial remedies](#) for human rights abuses, or that use financial pressure to drain the victims' resources, thereby restricting victims' access to remedy.
- Not pursuing tactics that leave victims without access to remedy by opposing jurisdiction of one court, if other available courts are weak and do not provide effective remedies.