

A proposal for a Global Ombudsman Service

by Justin Malbon

Supply chain workers face considerable obstacles in gaining legal redress for the harm done to them by a global corporation. Often the corporation is able to distance itself from the harm-doing. This is done by deploying sub-contracting and other arrangements. In this way, the corporation can benefit from the harm by obtaining products produced by cheap or non-paid labour without being answerable for it.

The lack of answerability is contributing to an environment which incentivises human rights abuses worldwide. The abuses take various forms, including through: the use of forced labour (sometimes described as modern slavery); the use of child labour; the employment of workers in dangerous and unhealthy workplaces; the underpayment or non-payment of workers; the deprivation of the right to join unions or other associations; and the subjecting of workers to harassment and abuse. The International Labour Organisation conservatively estimated the number of people subjected to forced labour alone during 2002-2011 to be nearly 21 million. These people are trapped in jobs into which they were coerced or deceived and which they cannot leave. They include people who are subjected to human trafficking for labour and sexual exploitation (ILO Global Estimate of Forced Labour, International Labour Office, Special Action Programme to Combat Forced Labour (SAP-FL), Geneva, ILO, 2012) at Part 2.1 <https://downloads.globalslaveryindex.org/GSI-2016-Full-Report-1514872354.pdf>).

This article proposes the establishment of a Global Industries Ombudsman Service (GIOS) to improve access to justice for those adversely affected by a (global) corporation's production or investment activities. The proposed GIOS would be roughly modelled on the industry funded consumer complaints ombudsman services that have successfully operated in many jurisdictions for decades. Under the GIOS the parties entitled to lodge a complaint would be those alleging harm being caused by a corporation's production or investment activities, and not consumers.

Although the GIOS would be no panacea for the harms done throughout the world to those suffering human rights abuses from production processes and investments, it would come some distance towards providing recourse to justice. The GIOS would offer a low cost, relatively speedy and fair means for gaining redress. It would overcome most of the jurisdictional

barriers that face litigants suing global corporations in their home jurisdiction. It would also show that a corporation is serious about taking responsibility for human rights abuses in its production processes or investments.

In proposing the GIOS, this article describes some of the considerable barriers that confront a litigant when taking action against a global corporation. It then outlines the pressures being placed on corporations (that can so easily evade legal liability) to nevertheless take responsibility for the abuses, and the ways some corporations are responding by taking responsibility. The appropriate nature and extent of responsibility are to some extent being framed by international documents such as the "UN Guiding Principles on Business and Human Rights", the "OECD Guidelines for Multinational Enterprises" and the "International Labour Organisation's Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy". These are described below. To some degree, corporations are also being nudged into taking responsibility by transparency laws, such as the Californian Transparency in Supply Chains Act 2010, the UK Modern Slavery Act 2015, and the French Duty of Vigilance legislation 2017. The operations of some of this legislation is also described below.

Disappointingly, in the vast majority of instances where corporations have accepted responsibility, they have not gone so far as to establish or engage with any processes for providing remedies or access to justice for affected people. The proposed GIOS seeks to address that problem.

CORPORATE LEGAL LIABILITY FOR HUMAN RIGHTS VIOLATIONS

A person seeking a remedy for human rights abuses from a global corporation benefiting from the abuse is very unlikely to succeed. If the harm occurred in a country with a weak legal system, recourse is unlikely because of that very fact. Gaining a remedy within the corporation's home jurisdiction, even one with a strong rule of law, will also be extremely difficult. This is in part because global corporations are increasingly able to arrange their activities beyond the scope of any government or regulatory organisation (L Backer, "On the Evolution of the United Nations Protect-Respect-Remedy Project: The State, the Corporation and Human Rights in a Global Governance

Context”, (2011) 9 *Santa Clara Journal of International Law* 37 at 38). A corporation, for example, can easily distance itself from any harmful mistreatment of workers through subcontracting and other arrangements.

A litigant pursuing her legal rights also faces high legal expenses and drawn out proceedings. These may involve disputes about whether the court dealing with the matter is the appropriate forum, and complex arguments about the admissibility of evidence (see the Report of the Special Representative of the Secretary-General on the “Issue of Human Rights and Transnational Corporations, Business and Human Rights: Towards Operationalizing the ‘Protect, Respect and Remedy’ Framework” (UN General Assembly A/HRC/11/13, 22 April 2009) at paragraphs 94 and 95). As Skinner, McCorquodale and de Schutter observe:

It is incredibly costly to bring transnational litigation in Europe and North America. This is because of the costs associated with gathering evidence in a foreign State to support a claim, the cost of legal and technical experts, and the sheer fact that these cases can take upwards of a decade to litigate. For human rights victims who may have very limited financial resources, the cost of litigation can preclude access to a judicial remedy (G Skinner, R McCorquodale and O de Schutter, “The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business” (2013) at p18).

In addition to the difficulties in suing for human rights abuses in a corporation’s production processes, there are many examples of the immense difficulties litigants face in obtaining remedies in an investor’s home jurisdiction for abuses arising from the investments. These include: *Sarei v Rio Tinto* (2013) (US) 722 F.3d 1109 (2013); *Dooch et al v Royal Dutch Shell* (2015) (Netherlands) Court of Appeal of the Hague (December 18, 2015); *Fidelis Ayoro Oguru v Royal Dutch Shell* (2013) (Netherlands) Court of Appeal of The Hague; and *The Bodo Community v Shell* (2014) UK [2014] EWHC 1973.

The US is proving to be an increasingly difficult jurisdiction for overseas litigants to take action against a US-based parent company. The US Alien Tort Statute once offered litigants better prospects of gaining standing to bring suit than now exist because of the Supreme Court’s decision in *Kiobel v Royal Dutch Petroleum Co* (133 S.Ct. 1659 (2013)). The court reasoned that the general presumption that US law does not apply outside the US extended fully to the Alien Tort Statute.

In sum, as Wallace notes, we are:

slowly confronting the reality that the remedial structures available in national, supra-national, and international courts are incapable of providing effective remedies for victims of human rights abuses perpetrated by businesses within and outside the jurisdiction of the states in which the businesses are domiciled (S Wallace, “Private Security Companies and Human Rights: Are Non-Judicial Remedies Effective”, (2017) 35 Boston University International Law Journal 69 at 71).

A case that runs counter to this trend is *Song Mao v Tate & Lyle Industries Ltd* (Claim No 2013, Folio 451 (EWHC (Comm), 28 March 2013). In 2013, the plaintiff Cambodian villagers filed a complaint with the Queen’s Bench Division of the High Court of England and Wales against the British-based corporation Tate and Lyle Industries Ltd. Somewhat remarkably, the court found it had jurisdiction to hear the matter. *Song Mao* illustrates, however, the kinds of legal ingenuity required to bring suit against a corporation that ultimately benefits from the alleged harm done to litigants in a foreign jurisdiction. In that case over 19,000 hectares of land were allegedly forcibly taken from about 2,000 Cambodian villagers. The land was then used by two Thai companies to grow sugar. These companies entered into a five-year contract to sell the raw sugar produced on the plantation exclusively to the UK based company Tate & Lyle Sugars. The first shipment of 10,000 tons arrived in the UK in 2010. The villagers at first attempted to gain redress through the Cambodian administrative and judicial systems, but to no avail. The essence of their case before the English courts is that their land was wrongly appropriated, and therefore they remain its legal owners. They claim that any sugar grown on their land belongs to them, and the defendant Tate and Lyle therefore wrongly converted the sugar to its own use. The matter had not proceeded to trial at the time of writing, some four years after filing.

The difficulties in gaining redress for human rights violations are not limited to litigants who are individuals, as the Guatemala Arbitration attests (http://legal.un.org/riaa/cases/vol_XV/47-75.pdf). The arbitration arose from a US claim that Guatemala was breaching the terms of the Central America-United States Free Trade Agreement (CAFTA), to which both countries were parties. The US alleged that Guatemala was failing to enforce its domestic labour legislation, and in so doing was adversely affecting trade between the countries. The US further alleged that by producing and exporting goods to the US in circumstances where the workers producing the goods were doing so in exploitative conditions led to a repression of the price of the goods, thereby leading to unfair trade by putting American workers at an unfair competitive disadvantage. The amounts at stake were not trivial, given that Guatemala’s exports to the United States in 2013 were worth \$4.2 billion. Most of the exports were clothing, and agricultural products such as bananas and melons. The alleged human rights abuses were serious. According to the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), 83 trade unionists have been murdered since CAFTA took effect, with most cases being insufficiently investigated and unsolved (<https://aflcio.org/2017/6/26/us-trade-policy-fails-workers>). The International Trade Union Confederation consistently ranks Guatemala as one of the world’s worst countries for workers (https://www.ituc-csi.org/IMG/pdf/survey_ra_2017_eng-1.pdf).

The US formally launched its trade violation case in 2010 and an arbitral panel was formed in 2013 to hear the dispute.

The US alleged that Guatemala's failures to enforce its own labour laws constituted a sustained or recurring course of action or inaction in a manner affecting trade, thus violating the agreement's labour provisions. The arbitral panel published its decision in July 2017, finding against the US. Although there was evidence that the Guatemalan government had failed to enforce its own labour laws, the panel was not satisfied that its actions or inactions occurred on a sustained basis. Nor was the panel satisfied that the government's failures affected trade with the US. The case illustrates the evidential difficulties faced by a complainant. The US collected witness statements from affected workers, however it was unable to present them to the tribunal. If the names of the witnesses were given to the tribunal, it would have been compelled under due process requirements to pass them onto the Guatemalan government. This would have risked the witnesses being seriously harassed or even killed. The absence of this crucial evidence made it difficult for the US to mount its case. The dispute raises a number of thorny issues for the future, particularly regarding how due process requirements about witness evidence can be or should be met in circumstances where the provision of the evidence puts them at risk.

CORPORATE RESPONSIBILITY FOR HUMAN RIGHTS ABUSES

In light of the difficulties of establishing the *legal liability* of global corporations for human rights abuses arising in their production processes and from their investments, a consensus is developing that corporations nevertheless bear *responsibility* for the abuses. This responsibility extends beyond the limits of corporate legal liability. Increasing pressure is being exerted by civil society, which is demanding that corporations accept responsibility for the abuses (see for example, Human Rights Watch; <https://www.hrw.org>). The pressure becomes particularly intense after scandals such as the Rana Plaza factory collapse that killed 1,134 people. In 2013 H&M, Primark, Zara, and PVH (the owner of Tommy Hilfiger and Calvin Klein) signed an Accord on Fire and Building Safety in Bangladesh as a result of the collapse.

More recent examples of human rights abuses have been revealed by a BBC investigation that found that Turkish textile factories were exploiting child labour by asking seven and eight-year-old children to work 60-hour weeks, and were underpaying Syrian refugees. Ross Dress for Less, Forever 21 and TK Maxx have also been found to have close ties to suppliers that owed \$1.1 million in unpaid wages to their workers (<https://charterforcompassion.org/human-rights-in-supply-chains-human-rights-watch-cci>). These instances of abuse are far from isolated (see <https://waronwant.org/>).

Legal liability has relatively distinct boundaries compared to the highly dynamic and evolving boundaries of corporate responsibility for human rights violations. The normative frameworks for corporate responsibility, however, are taking shape. This is partly due to the publication of some

key international documents, including the "UN Guiding Principles on Business and Human Rights" (Office of the High Commissioner, United Nations Human Rights, "Guiding Principles on Business and Human Rights" (HR/Pub/11/04, United Nations, New York and Geneva, 2011)). The guiding principles seek to enhance standards and practices concerning business and human rights (guiding principles, p 1).

The principles appear to draw a distinction between the responsibilities of a corporation and its legal liabilities. It states, for instance, that the principles should not be read as creating new international law obligations, or as limiting or undermining any existing legal obligations (guiding principles, p 1). Corporate responsibility, on the other hand, extends to business enterprises respecting human rights. This means that they should "avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved" (principle 11). These principles appear to implicitly propose that corporate responsibility should extend beyond a corporation's legal liability.

The term "human rights" as used in the principles refers to internationally recognised human rights, and at a minimum includes those set out in the International Bill of Human Rights, and the International Labour Organisation's Declaration on Fundamental Principles and Rights at Work (principle 12). According to principle 13, a business is required to:

avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur; and, seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.

Another key document is the OECD Guidelines for Multinational Enterprises (OECD, 2011) <http://dx.doi.org/10.1787/9789264115415-en>, which state that enterprises should respect human rights. This is stated to mean that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved (para IV.1). The guidelines add that: "Within the context of their own activities, [enterprises should] avoid causing or contributing to adverse human rights impacts and address such impacts when they occur" (para IV.2).

Additionally, the International Labour Organisation's "Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy", 5th ed (Geneva, Switzerland 2017) states that enterprises "should take immediate and effective measures within their own competence to secure the prohibition and elimination of forced or compulsory labour in their operations" (at para 25).

In summary, the circumstances to which corporate responsibility extends includes abuses that occur:

- within the corporation's own competence (ILO);
- with which it is involved (OECD);

- within the context of its own activities (OECD and UN Guiding Principles); and
- within its operations (ILO).

These international documents tend to define the scope of corporate responsibility in somewhat generalised terms. Their use of broad language might be designed to avoid the setting of narrow and technical boundaries for establishing a corporation's responsibilities. The upside of this is that responsibility cannot be avoided through the kinds of artifice that the law sometimes either allows or tolerates. The downside is that it side-steps more precise questions about how far responsibility should extend. To illustrate the complexities involved in answering such questions, consider the position of a global apparel brand that purchases cotton t-shirts from an overseas buyer in one country. Should the apparel brand be responsible for the working conditions of cotton growers in farms in yet another country, where the cotton in the t-shirt came from the farms? The supply chains for apparels can be very extensive. The apparel company Gap, for example, has over 1,000 first tier factories that supply its products. (<http://www.gapincustainability.com/sites/default/files/Gap%20Inc%20Factory%20List.pdf>)

The supply chains for products such as cars and smart-phones are even more complex than those for apparels, which adds further difficulties in determining the reasonable limits of corporate responsibility. Nevertheless, as Backer observes:

Companies realize they must comply with laws for their legal license to operate, but some realize that it is not enough to maintain their social license to operate, especially with weak local law. Social license emerges from prevailing social norms which may be just as important as legal norms. Social norms vary, but the one with near universal recognition is the corporate responsibility to respect human rights, or to not infringe on the rights of others (Backer, above, at p 61).

An increasing number of corporations are voluntarily expressing acceptance of responsibility for human rights abuses in their codes of conduct. Taking one of many such codes of conduct to illustrate the nature of this acceptance of responsibility, Nike's Code of Conduct states that it "lays out the minimum standards we expect each supplier factory or facility to meet" (https://s3.amazonaws.com/nikeinc/assets/74579/Nike_Code_of_Conduct_2017_English.pdf?1506532815). The code goes on to say that it expects "all our suppliers to share our commitment to the welfare of workers and to using resources responsibly and efficiently". It adds that Nike seeks partners who show leadership in corporate responsibility and who seek to move beyond minimum standards. The code lists a number of issues of concern, including ensuring that: employment is voluntary; employees are 16 years and older; there is respect for freedom of association and collective bargaining; work premises are properly managed and provide a safe workplace; there is no harassment or abuse; and working hours are not excessive.

Sectorial commitments to protecting human rights also exist. For instance, the Dutch banking sector has an agreement on human rights (Sociaal-Economische Raad, Dutch Banking Sector Agreement on International Responsible Business Conduct Regarding Human Rights, The Hague, The Netherlands, 2016). It links the scope of corporate (including banking) responsibility to the responsibilities set out in the OECD Guidelines and the UN Guiding Principles, along with the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization's Declaration on Fundamental Principles and Rights at Work (at para 3). The agreement also states that the parties agree to work towards "the effective prevention, mitigation and, where appropriate, remediation of adverse human rights impacts" (at para 7).

More broadly still, over 9,500 organisations from more than 160 countries have committed themselves as participants to the United Nations Global Compact, which supports companies in doing business responsibly by aligning their strategies to principles regarding human rights, labour, environment and anticorruption (<https://www.unglobalcompact.org/>).

Legislative nudging

Often global corporations accept responsibility because of concerns that to do otherwise risks tarnishing their brand's image. The trend towards acceptance of responsibility for human rights abuses, however, might not necessarily be prompted only by pressure from civil society groups and public outrage at scandals such as the Rana Plaza factory collapse. Corporations are also being nudged along by transparency legislation. These include the Californian Transparency in Supply Chains Act 2010, the UK Modern Slavery Act 2015, the French Duty of Vigilance legislation 2017, and the Netherlands Child Labour Due Diligence legislation, 2017. Other countries, including Australia have indicated they will follow suit with similar transparency legislation.

The French law applies to companies headquartered in France that employ more than 5,000 people in France, or are headquartered in France or abroad and employ more than 10,000 employees worldwide. These companies must each publish a vigilance plan. The plan must set out the company's measures for identifying risks and its steps for preventing serious violations of human rights and fundamental freedoms. The plan must also set out measures for protecting the health and safety of people and the environment for which the company is responsible. Responsibility extends to the activities of the company and of any companies it controls, either directly or indirectly, as well as the activities of subcontractors or suppliers with whom an established business relationship is maintained.

Section 54 of the UK Modern Slavery Act requires a commercial organisation that supplies goods or services within the UK (regardless of whether it is registered in the UK), and has a global turnover of at least £36 million in any financial

year, to prepare a slavery and human trafficking statement for each financial year. The statement must either set out the steps the organisation is taking to ensure that slavery and human trafficking is not taking place in any of its supply chains or in any part of its business, or state that the organisation is taking no such steps. The statement may include information about the organisation's supply chains, policies relating to slavery and human trafficking, its due diligence processes, the parts of the business that are at risk of slavery and human trafficking and its staff training.

The obligations being placed on companies by the Modern Slavery Act are not particularly stringent. Although the legislation requires an organisation to disclose and report on its voluntary efforts to address and prevent forced labour in global supply chains, it places no obligation upon it to do anything about the issue. Indeed, a company will be in compliance with the Act if it reports that it is not taking any steps regarding slavery and human trafficking. The legislation does not establish extraterritorial liability, nor does it set binding standards or sanctions for non-compliance. LeBaron and Ruhmkorf analysed the impact of the Act on 25 FTSE top 100 companies, and expressed scepticism about claims that section 54 will improve matters for affected parties (G LeBaron and A Ruhmkorf, "Steering CSR Through Home State Regulation: A Comparison of the Impact of the UK Bribery Act and Modern Slavery Act on Global Supply Chain Governance" (2017) 8 *Global Policy* 15). In sum, the Act arguably invites, or at least is satisfied with, a situation where corporations say fine things about their responsibilities but actually do little or nothing about them.

VOLUNTARY CORPORATE GRIEVANCE MECHANISMS

The acceptance of responsibility by global corporations for human rights violations is of little consequence if aggrieved parties are unable to obtain any meaningful redress, just as laws are of little consequence if no action can be taken if they are breached. As outlined above, in practice formal legal proceedings, at best, offer only very limited possibilities for redress. The only realistic hope for victims is for the establishment of alternative means for gaining justice. An industry funded system that is independent, accessible and fair can offer the prospect of providing victims such effective means for redress. Indeed, principle 29 of the UN Guiding Principles states that "business enterprises should establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted". In addition, the principles propose that a grievance mechanism be one administered by a business enterprise alone or with other stakeholders.

A study undertaken by MSI Integrity and the Duke Human Rights Center at the Kenan Institute for Ethics investigated the nature of multi-stakeholder initiatives (MSIs) that govern corporate or government conduct, and have transnational reach.

MSIs are initiatives undertaken collaboratively by a number of stakeholders, including corporations, civil society, government, and affected populations for addressing issues that often relate to corporate accountability. The research by MSI Integrity et al involved mapping the MSI claims made, which affect over 9,000 companies, including 65 Fortune Global 500 businesses (*The New Regulators? Assessing the Landscape of Multi-Stakeholder Initiatives* (2017), at pp 2-19. <https://msi-database.org/data/The%20New%20Regulators%20%20MSI%20Database%20Report.pdf>).

The researchers found that about 90 per cent of the MSI's they identified were clustered in three industries: consumer goods; agriculture, forestry, and fishing; and mining and energy. Of the surveyed MSI's, 40 per cent had some kind of complaints process for enabling communities or individuals to report human rights or environmental standards violations. However, the researchers noted that most of these processes failed to meet even basic requirements for a remedial system as set out in the UN Guiding Principles, such as being legitimate, accessible, predictable, equitable, transparent, rights-compatible, and a source of continuous learning.

As an example of one set of "commitments" for engaging with non-judicial redress mechanisms, the Dutch banking sector has agreed that "when enterprises identify through their human rights due diligence process or other means that they have caused or contributed to an adverse impact they should provide for or cooperate in their remediation through legitimate processes" (Dutch Banking Sector Agreement on International Responsible Business Conduct Regarding Human Rights, above, at p 26). This is a noticeably non-committal undertaking.

The Rana Plaza Accord on Fire and Building Safety in Bangladesh provides for a dispute settlements process for any alleged breaches of the accord. Paragraph 3 of the accord provides for any dispute between the parties about the agreement to be presented to and decided by the agreement's steering committee, which is subject to an agreed dispute resolution process. The process adopts an arbitration process model. In addition, the accord provides for the establishment of a worker complaint process and mechanism "that ensures that workers from factories supplying signatory companies can raise in a timely fashion concerns about health and safety risks, safely and confidentially, with the Safety Inspector" (http://bangladeshaccord.org/wp-content/uploads/the_accord.pdf, para 18). The accord, however, does not provide access to justice mechanisms for affected workers.

The Fair Labor Association (FLA) has operationalised a mechanism that receives complaints from affected parties and investigates them where appropriate. The aim of the mechanism is to identify whether an association member is non-compliant with agreed membership workplace standards. These standards comply with human rights standards. If a member is found to be non-compliant, the association will seek to work with the

member to develop a remediation plan, or to propose some other safeguard mechanism to be put in place. The system aims at prodding members to comply with the workplace standards rather than to directly provide remedies to affected workers or other affected parties.

The association's members include (mainly US) universities, "civil society organizations and socially responsible companies" (www.fairlabor.org). University members include Princeton, Washington, Pennsylvania State, the University of Texas, and the Georgetown and Yale Law Schools. Participating corporations include Patagonia, New Balance, Nike, Nestle, Adidas, Hugo Boss and Puma. The members are required to monitor their own supply chains and ensure they meet the FLA's labour standards. They are also subject to the FLA's assessments of a random sample of the members' supplier factories. In 2016, the association conducted 149 assessments of facilities owned or contracted by its members. As mentioned, the mechanism is not designed to compensate affected parties or provide them any other form of remedy.

An instance of a voluntary corporate grievance mechanism that did provide monetary compensation to affected parties is one established by the Canadian miner Barrick Gold Corporation for its Papua New Guinea mine. The miner established the Olgeta Meri Igat Raits (All Women Have Rights) Framework of Remediation Initiatives in 2012 to deal with allegations that local women had been subjected to over 100 cases of sexual violence, including numerous gang rapes by the company's security guards and other employees. By mid-2015, 137 claims were deemed eligible, and 119 claims were settled, with the provision of a business grant and services valued at an average \$US8,900 per claimant and an additional payment of \$US10,905 per claimant (see S Knuckey and E Jenkin, "Company-created Remedy Mechanisms for Serious Human Rights Abuses: A Promising New Frontier for the Right to Remedy?" (2015) 19 *International Journal of Human Rights* 801).

A PROPOSAL FOR A GLOBAL OMBUDSMAN SERVICE

There is, then, an increasing number of global corporations that accept responsibility for human rights abuses occurring in their production processes and in relation to their investments. Some corporations actively engage in practices designed to minimise or remove the occurrences of abuse, including through their monitoring processes, and through the requirements they set in their sub-contracting arrangements. Very few corporations, however, have processes for providing remedies to those people who have suffered abuse. There are some instances where corporations do this, but they tend to be sporadic and ad hoc. For corporate responsibility for human rights abuses to have more meaningful impact than is presently the case, a broader and deeper industry-wide approach needs to be taken.

The so-called "Third Pillar" of the UN Guiding Principles proposes that corporations adopt alternative redress mechanisms that are non-judicial and are speedy, low cost and have transnational reach (guiding principles, p 31). The principles further propose that grievances be resolved by means of a "mutually acceptable external expert or body". In terms of the underlying elements of a "non-judicial grievance mechanism", principle 31 states that the mechanism should be:

- (a) *legitimate: enabling trust from the stakeholder groups for whose use they are intended, and being accountable for the fair conduct of grievance processes;*
- (b) *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;*
- (c) *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;*
- (d) *Rights-compatible: ensuring that outcomes and remedies accord with internationally recognized human rights;*
- (e) *A source of continuous learning: drawing on relevant measures to identify lessons for improving the mechanism and preventing future grievances and harms.*

In terms of the operation of the mechanism, the principles state that it should be based on engagement and dialogue, so that stakeholders are consulted and the focus be on dialogue as the means to resolve grievances. The mechanism should also be equitable so that all the parties have reasonable access to sources of information and advice. The operation should also be transparent.

This article proposes the establishment of an industry-funded Global Industry Ombudsman Scheme (GIOS). It could provide an industry-wide means for giving effect to the Third Pillar objectives. A GIOS would enable complaints to be dealt with in a more structured and systematic way than the present ad hoc approaches allow. It would also enable the Ombudsman to build knowledge, expertise and a reputation for integrity and fairness that would benefit corporate members and complainants alike. It would also allow greater cost efficiency by distributing the costs of running a grievance mechanism amongst corporate members. An industry-wide GIOS could also build to a sufficient size to enhance its public visibility. This in turn could mean that corporate membership of a widely respected scheme that deals with human rights abuses will enhance the reputations of those members.

The proposed GIOS could be loosely modelled on the industry funded consumer complaints schemes that have successfully operated in a number of countries for a few decades (See N Creutzfeldt, "Ombudsman Schemes — Energy Sector in Germany, France, and the UK" in *The New Regulatory Framework for Consumer Dispute Resolution* P Cortés (ed) (Oxford

University Press, UK 2016). The proposed GIOS would fundamentally differ from the consumer ombudsman schemes in that those entitled to bring complaints to the GIOS would be people who claim to have suffered human rights abuses within the responsibility of members of the scheme, and not consumers.

Industry-funded consumer ombudsman schemes have successfully operated for more than three decades in the Europe, Canada, Australia and other countries. One of the oldest schemes is the UK Insurance Ombudsman Bureau (IOB), formed in 1981 (P Tyllesley, “The Insurance Ombudsman Bureau - the early history” (working paper, Centre for Financial Regulation Studies, London Metropolitan University)). It subsequently merged with the Financial Ombudsman Scheme. The IOB was established and funded by a number of UK insurance companies. The model developed by the IOB evolved over time, and was adopted by a range of industries including financial services, telecommunications, and water and energy services (see G Howells and S Weatherill, *Consumer Protection Law*, 2nd ed, (Routledge, UK 2005) at para 11.6). The dominant form of alternative dispute resolution process for complaints by consumers regarding financial products and services is by means of an ombudsman scheme in many European countries, including Austria, Belgium, France, Germany, Ireland, Italy, the Netherlands, Switzerland and the United Kingdom (D Thomas and F Frizon, “Resolving Disputes Between Consumers and Financial Businesses: Fundamentals for a Financial Ombudsman, A Practical Guide based on Experience in Western Europe”, *The World Bank Global Program on Consumer Protection and Financial Literacy*, 2012, at p 24).

The typical attributes of an industry-funded consumer complaints scheme include the following:

- The scheme operates as a separate company.
- The company’s board has an equal number members nominated by the scheme’s member corporations, and by consumer and community organisations. The board has an independent chair.
- The scheme operates under a charter requiring the ombudsman to deal with complaints fairly and in an unbiased way.
- The charter sets due process requirements for dealing with a complaint, without the ombudsman being bound by strict legalism.
- The dispute resolution process is inquisitorial, and not adversarial. The ombudsman is usually permitted to provide some assistance to the complainants in presenting their case, so long as it does not compromise the ombudsman’s impartiality. Other elements of these schemes are that:
- A corporate member agrees as a condition of

membership of the scheme to abide by a decision of the ombudsman.

- There is a minimum amount of formality involved in lodging a complaint.
- Assuming the ombudsman has jurisdiction to hear the complaint under the terms of the charter, he or she can – after receiving evidence from the parties (the consumer complainant and the member who the consumer makes the complaint about) – decide that the complaint is not made out, or that the member must compensate the consumer.
- There are limits on the amount of compensation that can be ordered, which are set out in the charter.
- The member has only very limited rights of appeal to a court or tribunal.
- The member is required to pay for the costs of the complaint regardless of its outcome.
- No costs or fees can be imposed on a complainant.
- The consumer does not forgo her legal rights if his or her complaint is unsuccessful. However, if an order of compensation is made, the complainant must sign a waiver of her legal rights against the member before receiving the compensation.
- Complaints are invariably dealt with “on paper”, which is to say the parties do not appear in person before the ombudsman, nor is any oral evidence provided. One exception is that videoed evidence provided by an insurer of a complainant making a disability claim that shows the complainant undertaking physical tasks can be admitted.
- The ombudsman is usually required to publish the reasons for her decision. The publicly available published reasons must remove any mention of the identity of the parties.

Some of these elements of these schemes may seem unreasonably burdensome on the corporate member, and unduly favourable to the complainant, at least in terms of the payments of costs aspect. Nevertheless, these elements are commonly found in the schemes that have operated successfully for a number of decades. The benefits of the scheme for members are that it provides a predictable and systematic way of dealing with complaints that have escalated beyond being able to be dealt with internally by the member. The process is cheaper and generally faster than a court process. The parties know their dispute is being heard by a neutral umpire who understands the way the industry operates. The existence of an industry funded scheme can enhance the industry’s reputation, or at least mitigate bad publicity arising from unresolved grievances against the industry. The ombudsman schemes can also operate as a signalling mechanism for individual members. If, for example, a member receives a number of adverse

decisions, it can be an indicator of a systemic problem to which the member needs to attend.

Many of the key elements of the consumer ombudsman schemes can be adopted by a GIOS, with the obvious exception that the complainants would be those affected by human rights abuses, and not consumers. The key elements of the consumer ombudsman schemes are consistent with the Third Pillar proposals under the UN Guiding Principles. The GIOS would have a particular advantage over domestic court systems in that jurisdictional issues present much less of a barrier to complainants. Membership of the scheme establishes a contractual relationship between the member and the ombudsman in which the member agrees to comply with the ombudsman's decisions. It is therefore of little consequence that the member and the complainant are located in different jurisdictions.

The GIOS charter would be a crucial document because it would set out the types of complaints the ombudsman can deal with, who has standing to bring a complaint, and the way the dispute process is to be handled, including how the evidence is to be dealt with. The sorts of issues that arose in the Guatemala arbitration regarding protecting the interests of witnesses would need to be taken into consideration in drafting the charter. It would also set limits on the amounts of compensation that can be ordered, and the nature of any other remedies and recommendations that the ombudsman can make. Given how crucial the charter would be, its drafting should involve key stakeholders, including nominees from potential corporate members and non-government organisations and relevant community groups.

Finally, it might be asked as to what would prompt reforms leading to the establishment of a GIOS? Changes could take place in much the same way as was the case with the establishment of the UK Insurance Ombudsman Bureau in the early 1980s. It took a champion for change in an insurance company to spur its establishment. An employee of the insurance company was concerned that the insurance industry was constantly facing bad press for its refusal of claims, and so he felt that the industry needed to be proactive by introducing an independent complaints mechanism. He actively advocated for the proposal within his company, and after receiving its support, advocated for an industry operated scheme amongst other insurance companies. After initial resistance from some

other insurers, the scheme was established and flourished (see P Tyldesley, above).

A GIOS, like the IOB, is not a panacea for all of the problems within an industry, and should never purport to do so. A GIOS will not rid the world of slavery and other human rights abuses within an industry, and it is unrealistic to expect as much. A GIOS can, however, make a contribution towards dealing with this intractable problem.

The establishment of a GIOS might also arise from pressure from non-government organisations and other members of civil society. It could also be prompted, or required, by governments. It is not all that difficult to envisage legislation such as the Modern Slavery Act being amended to require industries to establish and fully fund a GIOS in conformity with requirements set out in the Act. Alternatively, a government, or co-operative arrangements between governments, could lead to the one or more governments establishing the GIOS, which would be required by legislation to be funded by corporations.

CONCLUSION

Corporate accountability for human rights abuses in their production processes and investments, if it is to be taken seriously, needs to provide access to justice to those affected. For the most part court systems are inadequate for the task of providing access to justice, in part because of jurisdictional issues and the enormous time and expense involved. The Third Pillar of the UN Guiding Principles proposes that businesses engage in establishing non-judicial grievance mechanisms. Consistent with the Guiding Principles, this article proposes the establishment of a GIOS.

The next steps towards achieving the establishment of a GIOS would entail interested corporations, non-government organisations, community groups and other interested parties in accepting that the provision of effective access to justice is a necessary component of corporate responsibility for human rights abuses. A second step is to gain in-principle agreement as to the type of non-judicial grievance mechanism that is likely to be effective. This article, of course, proposes the establishment of a GIOS. If that was accepted in principle as a likely effective mechanism, the next and most demanding task would be to draft the charter for the service.

Professor Justin Malbon

Monash Law School, University of Monash, Australia