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Holding European businesses responsible – what role for the EU and member states to govern business conduct in third countries?

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STRADE is an EU-funded research project focusing on the development of dialogue-based, innovative policy recommendations for a European strategy on future raw materials supplies. In a series of policy briefs and reports, the project will offer critical analysis and recommendations on EU raw materials policy.

This policy brief addresses the role of the EU and its member states in ensuring that businesses domiciled in their jurisdiction act responsibly in third countries, where regulation may be weak or poorly enforced and access to justice is hampered. It looks at selected instruments which apply to businesses from all sectors and analyses their potential effect on companies within or with links to the mining industry. The brief concludes with recommendations for the EU and member states.

1. Introduction

Despite increasing global efforts for responsible mining practice, the mining industry remains frequently associated with various adverse social, environmental and human rights impacts, which hamper sustainable development in developing and emerging economies in particular (see policy briefs 4/2016 and 5/2016 for more details). These impacts may be directly caused by a European mining company or its subsidiaries, and European companies may also contribute or be linked to these impacts when sourcing raw materials or products containing the same, providing goods and services to the mining industry or financing mining activities.

In host countries with poor governance, negative environmental and social impacts are oftentimes insufficiently regulated due to lax or weakly enforced laws. While negotiations on a binding treaty on business and human rights are taking place at the UN[1], there currently also exists no legally binding instrument on international level which holds international businesses responsible and provides effective remedy to victims of human rights violation and victims of environmental damage (hereafter "damaged parties"), resulting in a 'governance gap' regarding accountability and implementation. Pressure has therefore increased on the home states, i.e. the states where international businesses are domiciled, to bridge this gap and steer business conduct in a way that allows for the sustainable development of countries supplying raw materials.

This policy brief looks at selected instruments which the EU and European home states can use in regulating, steering and incentivising responsible conduct of European businesses in the mining sector (cf. chapters 2 and 3). The brief hereby focuses on reporting and due diligence requirements – instruments which are neither exclusive to the mining sector nor exclusive to specific environmental and human rights issues, since mining-specific instruments have been broadly discussed in recent and upcoming STRADE policy briefs and reports.[2] It also outlines the barriers damaged parties currently face when seeking judicial redress and compensation for damages in home states (cf. chapter 4) and concludes with recommendations for the EU on how to improve responsible business conduct of companies based in the EU by strengthening existing instruments or introducing new approaches.

[1] See: http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session3/Pages/Session3.aspx (last accessed on 21.11.2017)

[2] See policy briefs 07/2016, 09/2016, 01/2017, 03/2017

2. Reporting requirements on environmental and social impacts

There is increasing pressure on businesses towards more transparency in regard to social and environmental impacts. Pressure is hereby not only applied by civil society and end consumers but increasingly through governmental regulation as well as from financial markets. Regulation and investor demands primarily address large and listed companies. However, since reporting requirements usually include the topic of sustainable supply chain management, SMEs with business relations to larger corporations are in fact impacted by these requirements as well.

The main **regulatory impacts** stem from the EU directive on non-financial reporting (Directive 2014/95/EU[3]), in some member states also commonly known as the EU directive on CSR reporting, and its implementation in member states. According to the directive, large public-interest companies with more than 500 employees have to report on environmental protection, social responsibility and treatment of employees, respect for human rights, anti-corruption and bribery as well as on diversity on company boards. However, a number of countries already had respective regulation in place which either meets the directives requirements or even exceeds them. France is often cited as a frontrunner on this subject. According to Grenelle II Article 225,[4] all French companies with more than 500 employees must provide information on 42 topics[5] on a comply-or-explain basis and the report has to be verified by a third party. Additionally, institutional investors are mandated to report on issues regarding CO_2 Emissions (Article 48, Energy Transition Law). Other examples which go beyond the EU directive are the Swedish case, where state-owned companies are required to submit an independently assured sustainability report in accordance with the GRI guidelines, and Denmark, where the scope of affected companies has been extended considerably in comparison to the EU directive, mandating all companies with more than 250 employees to publish a report.[6]

The EU directive is subject of controversial debate. While business associations tend to claim that reporting costs, especially for small and medium enterprises, remain too high,[7] civil society actors criticise that implementation in some member states is not far reaching enough.[8] Overall, reporting requirements by law are seen as an important step in improving transparency regarding companies' sustainability performance and an incentive to implement respective management systems. It is also expected that requirements will further increase in the future.

Governments and civil society actors however are not the only institutions calling for more transparency. Environmental and social risks are increasingly regarded as relevant investment risks, leading **financial market** actors to request better information on non-financial investment criteria or, more commonly called, KPIs for ESG (Key Performance Indicators for Environmental, Social and Governance). Currently, this mainly applies to CO_2 emissions-related data since investments in sectors that either significantly contribute to climate change or are affected by it are considered high-risk.[9] A growing number of stock exchanges such as the Hong Kong Stock Exchange however demand companies to report on a wider range of ESG criteria annually in order to be listed.[10] The Canadian Toronto Stock Exchange even demands immediate disclosure if environmental or social information is deemed 'material'.[11]

What does this mean for the mining sector?

- **Increased emphasis on transparency and benchmarking of company sustainability performance:** Requirements for businesses of all sectors to provide data on responsible business conduct will most

[3] Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups, OJ L 330, 15.11.2014, p. 1–9.

[4] The Grenelle II Act which was adopted in 2010 encompasses a broad range of environmental legislation.

[5] Those 42 topics include social (employment, labour relations, health and safety), environmental (pollution, and waste management, energy consumption); and societal categories (social impacts, relations with stakeholders, human rights) (Kaya 2016).

[6] See: https://www.accountancyeurope.eu/wp-content/uploads/FEE_position_paper_EU_NFI_Directive_final.pdf (last accessed on 21.11.2017)

[7] See: https://bdi.eu/artikel/news/die-umsetzung-der-csr-richtlinie/ (last accessed on 21.11.2017)

[8] See: https://germanwatch.org/de/13596 (last accessed on 21.11.2017)

[9] See e.g.: DivestInvest.org; Gofossilfree.org (last accessed on 21.11.2017)

[10] Disclosure requirements can also have unintended side-effects as has been the case, argued by some, with the Sarbanes-Oxley Act because they can increase costs and legal risks (Linck et al. 2005). This may encourage companies to be listed in less regulated stock markets or go private altogether. Later research however, indicates that even though costs have been high in the beginning, especially for SMEs, the assumption that the Act harmed the stock markets or had a negative impact on investment cannot be drawn conclusively from available data (Coates und Srinivasan 2013).

[11] See: http://www.sseinitiative.org/ (last accessed on 21.11.2017)

likely increase in the future and widen in scope. Even where only a smaller number of larger or publicly listed companies are affected, requirements will likely get passed on to suppliers and business partners along the value chain.

- **Necessity to install management systems:** In order to be able to meet increasing non-financial reporting demands mining companies and those in related industries will have to implement adequate management systems (e.g. regarding human rights due diligence) to ensure the availability of information and data.
- **Higher reputational risks:** With increasing legal transparency requirements in place, the mining industry and linked sectors will become more transparent and therefore at higher risk of public scrutiny.

3. Institutionalizing due diligence

3.1. National efforts to mandate human rights due diligence

Due diligence or *duty of care* as a legal obligation (or a voluntary commitment) is not a new concept (see also chapter 4.1, civil claims under tort law). For example, anti-corruption legislation such as the US Foreign Corrupt Practices Act and, more recently, the UK Bribery Act mandate businesses to conduct due diligence to manage and minimise the risk of corruption and bribery in connection with their operations worldwide.[12] However, comprehensive human rights due diligence requirements for businesses were first laid out by the voluntary UN Guiding Principles on Business and Human Rights (UNGP) in 2011[13]. Since then, several other voluntary instruments on international level have promoted the concept including the OECD Guidelines for Multinational Enterprises[14] (see policy brief 3/2017).

Human rights due diligence requires companies to have the right policies and processes in place to prevent adverse human rights impacts and address them appropriately should they occur. Responsibility hereby not only applies to the company's own operations, products and services but to any impact the company may cause, contribute to or be directly linked to. A company may, for example, cause an adverse impact if it forces its own workers into involuntary overtime; may contribute to an adverse impact if it provides financing to a project that entails forced evictions; or may be directly linked to an adverse impact if one of its suppliers unknowingly subcontracts work to a company which violates applicable labour laws. Where a company causes or contributes to an adverse impact it should take the required steps to cease or prevent its contribution. Where it is linked to an adverse impact it still has a responsibility to act when made aware of any adverse impact and should use its leverage to effect change. Responsibility therefore extends to its subsidiaries, suppliers and other business partners.[15]

Several countries have recently passed or are planning to pass legislation incorporating the concept of human rights due diligence.[16]

The **United Kingdom passed the Modern Slavery Act**[17] in March 2015. The Act requires companies carrying out business in the United Kingdom and with an annual turnover of at least £36 million to publish an annual statement outlining the steps the company has taken to identify and eradicate modern slavery and human trafficking from its own operations as well as its supply chain. In line with the comply-or-explain principle, the company may also declare that no steps have been taken if that is the case.

Beyond the obligation to publish an annual statement, the Act foresees no sanctioning mechanism and imposes no legal obligation to take any substantive measures to combat modern slavery and human trafficking. The Act is however believed to serve as an impetus for companies to publish a statement and introduce steps where necessary in order not to fall behind competitors or face reputational risks.

France passed a law establishing a duty of vigilance[18] for selected large companies which came into force in March 2017. The law applies to French companies headquartered in France and employing at least

[12] The authors acknowledge the nexus between corruption and human rights in that corruption undermines democracy and the rule of law, leads to the violation of human rights and hampers development. Given the topic's complexity anti-corruption efforts and related legislation however cannot be discussed in greater detail in this brief.

[13] See: http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

[14] See: http://www.oecd.org/corporate/mne/

[15] See: http://www.ohchr.org/Documents/Publications/FAQ_PrinciplesBussinessHR.pdf (last accessed on 21.11.2017)

[16] Examples not discussed in greater detail here include the California Transparency in Supply Chains Act and Swiss Responsible Business Initiative

[17] See: http://www.legislation.gov.uk/ukpga/2015/30/contents/enacted (last accessed on 21.11.2017)

[18] Cf. Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, https://www.legifrance.gouv.fr/eli/loi/2017/3/27/2017-399/jo/texte (last accessed on 21.11.2017)

5,000 employees worldwide including through subsidiaries, as well as foreign companies headquartered outside France, with French subsidiaries, employing at least 10,000 employees worldwide including through subsidiaries.[19]

The law establishes a legally binding obligation to establish, publish and effectively implement a due diligence plan to identify and prevent adverse human rights or environmental impacts in connection with their operations. The company plan must hereby not only cover the company's own operations but also those of companies under its control, as well as of suppliers and subcontractors with whom the parent company or any of its subsidiaries has established a commercial relationship. Where companies default on their obligation to establish and implement such a plan, liability would apply.

Damaged parties can hold companies accountable in requiring judicial authorities to order a company to establish and publish a due diligence plan. Companies may also be subject to liability and compensation if a civil claim is brought on the company's alleged failure to establish or implement such a plan, resulting in harm. The requirements of the French law therefore notably differ from laws like the U.K. Modern Slavery Act or the California Transparency in Supply Chains Act[20], which merely require companies to report on their efforts, if any such efforts exist. The French law is also not limited to a specific human rights-related risk or a certain part of the value chain. However, it is limited in that it only applies to few large multinational companies – estimated at around 150. It currently also remains unclear how effective the law will be in changing business conduct and providing relief to damaged parties, or whether companies will merely seek to satisfy the legal requirements and refute liability claims on grounds of compliance.

3.2. Further means to promote due diligence requirements

Due diligence requirements can be promoted by governments in various ways, e.g. by including social, environmental and human rights performance as an exclusion criterion or criterion for preferential treatment. The UK's **export credit** agency UK Export Finance (UKEF) conducts due diligence by reviewing and benchmarking projects or existing operations that seek export credit support with respect to their environmental, social and human rights risks. It bases its approach on the OECD Common Approaches for Officially Supported Export Credits and Environmental and Social Due Diligence ('Common Approaches')[21] as well as the Equator Principles, an environmental and social risk management framework.[22] In addition, statements by the country's OECD NCP regarding the company's human rights record are taken into consideration.[23] Similarly, the German Government conducts a comprehensive risk assessment in line with international standards when granting export credit guarantees for a credit period of more than two years and a contract value of at least EUR 15 million. Where there is a serious environmental or social risk, the risk assessment applies irrespective of the credit period and the contract value involved.[24]

Public procurement presents another significant lever in promoting due diligence requirements. A survey of 20 jurisdictions worldwide however suggests that, at present, procurement laws and practices fail to ensure that social, environmental and human rights criteria are taken up in public contracts and that only few countries apply respective measures.[25] In the Netherlands, since 2013, all tenders by the national government exceeding a certain threshold value must include a set of social criteria. A study by SOMO however found that these criteria are rarely adequately applied or monitored.[26] Sweden's National Agency for Public Procurement included award criteria on conflict minerals in accordance with the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas in a tender for mobile phones but ultimately none of the bidders were able to report such.[27] Under British and

[19] A company is considered a subsidiary if another company owns more than 50% of its capital

[20] See: https://oag.ca.gov/SB657 (last accessed on 21.11.2017)

[21] See: http://www.oecd.org/tad/xcred/oecd-recommendations.htm (last accessed on 21.11.2017)

[22] See: http://www.equator-principles.com/ (last accessed on 21.11.2017)

[23] See: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/604438/UKEF-statement-on-how-it-addresses-human-rights-march-2017.pdf (last accessed on 21.11.2017)

[24] See: https://www.agaportal.de/en/main-navigation/exporte-exportkreditgarantien/verfahren-exportkreditgarantien/umwelt-sozialpruefung-exportkreditgarantien (last accessed on 21.11.2017)

[25] See: http://www.hrprocurementlab.org/wp-content/uploads/2016/06/Public-Procurement-and-Human-Rights-A-Survey-of-Twenty-Jurisdictions-Final.pdf (last accessed on 21.11.2017)

[26] See: https://www.somo.nl/wp-content/uploads/2014/03/A-review-of-Dutch-policy-for-socially-responsible-public-procurement.pdf (last accessed on 21.11.2017)

[27] See: http://www.hrprocurementlab.org/wp-content/uploads/2016/06/Public-Procurement-and-Human-Rights-A-Survey-of-Twenty-Jurisdictions-Final.pdf (last accessed on 21.11.2017)

Italian public procurement rules, for example, tenderers may be excluded from bidding for human rights abuses and other grave misconduct.[28]

State-owned enterprises may be required to satisfy special requirements and expectations with respect to sustainable business. The Swedish Government requires wholly state-owned companies to observe the UNGP, the OECD Guidelines and other international frameworks and integrate sustainability into their business strategy. All state-owned companies are also required to annually report in line with the GRI Sustainability Reporting Guidelines (G4).[29] The Guidelines reflect the key elements of the UNGP on human rights due diligence.

What does this mean for the mining sector?

Trend to legally mandate human rights due diligence: There is a growing trend among European and other countries to legally mandate either the establishment of human rights due diligence processes and/or reporting on the same. These requirements apply irrespective of the sector but are currently mostly limited to larger companies or companies of great public interest. However, since due diligence requirements encompass (parts of) the company's value chain they are likely to be handed down to suppliers and business partners not directly affected by the law.

Trend to include due diligence requirements: Many export credit agencies already conduct comprehensive due diligence when reviewing projects and transactions including in the mining sector. There also appears to be a gradual trend in addressing social and environmental criteria in public procurement which may indirectly affect the mining sector whenever products containing raw materials are procured by authorities in the EU. Procurement authorities may require businesses to adhere to a certain certification scheme or put in place and provide documentation on due diligence processes. Operational requirements may prove especially suited where traceability in global supply chains presents a challenge.

Emergence of good practices: Taking into account current developments, awareness on human rights due diligence will further rise and lead to the emergence and consolidation of good and best practices across sectors. Information on companies' due diligence efforts is already widely shared, e.g. in annual sustainability reports or as part of the statement required from British companies under the Modern Slavery Act.

4. Access to remedy

4.1. Judicial mechanisms

National states have the primary responsibility to ensure that damaged parties have access to effective remedy. And while economic globalisation has led to an unprecedented increase in transnational (corporate) activities, damaged parties can usually only seek judicial redress and compensation for damages through national courts. Given that host states with weak governance oftentimes offer little to no prospect of remedy, damaged parties thus increasingly turn to the states in which businesses are domiciled. Increasing pressure has also been applied on home states to take responsibility for regulating unlawful acts by their businesses in third countries.

4.1.1. Country-specific examples

Corporate violations in third countries have been dealt with both under criminal and civil law. However, the majority of cases have been brought as civil action under common law jurisdictions.

In the United States, the 1789 Alien Tort Claims Act (ATCA) is a statute that permits non-U.S. citizens to bring civil lawsuits before US courts for violations of public international law or a treaty of the United States. Since the 1990s, it was increasingly used to sue transnational corporations for violations in third countries. However, in April 2013 the U.S. Supreme Court held that the 'presumption against extraterritoriality', i.e. the presumption that US laws shall not apply to other sovereign countries, also holds valid for the ATCA.[30] Therefore, claims involving human rights abuses or other violations of international law alleged to have occurred in foreign countries will generally not be allowed under the Act. Since the Supreme Court's decision, the vast majority of pending cases have been dismissed on grounds that the alleged violation occurred outside the United States. The statute has thus been greatly limited in scope.

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[28] See: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/236901/BHR_Action_Plan_-_final_online_version_1_.pdf (last accessed on 21.11.2017)

[29] See: http://www.government.se/49b750/contentassets/539615aa3b334f3cbedb80a2b56a22cb/sustainable-business---a-platform-for-swedish-action (last accessed on 21.11.2017)

[30] See: https://www.asil.org/insights/volume/17/issue/12/supreme-court-holds-alien-tort-statute-does-not-apply-conduct-foreign

In other common law jurisdictions such as the United Kingdom and Australia, civil claims on alleged violations by businesses in third countries have been brought under general tort law (regulating liability such as product liability). In tort law, the *duty to care* may impose a legal obligation on parent companies to control its subsidiaries to the effect that acts or omissions likely to cause harm to others are avoided.[31]

4.1.2. General obstacles in accessing judicial remedy

The transnational context in general presents various political, legal and practical obstacles which combined make it very difficult and oftentimes impossible for damaged parties to seek compensation.

Political obstacles: Plaintiffs may face repressive or even criminal action where the government of the respective "host state" is keen to protect economic interests of the extractive industries, the government or other parties who benefit from mining activities. Legal and administrative institutions of the "host state" will also need to possess a minimum degree of functionality in order to conduct research, hand over evidence to the home state or otherwise support the proceedings abroad.[32]

Legal obstacles: Home states' courts may consider the jurisdiction of the host state or another jurisdiction as the more appropriate venue for the case and prevent it from moving forward under the *forum non conveniens* doctrine. According to this common law legal doctrine, courts may refuse to take jurisdiction over matters where there is a more appropriate forum available to the parties. As a doctrine of the conflict of laws, *forum non conveniens* applies between courts in different countries and between courts in different jurisdictions in the same country. In the European Union, however, the Brussels I Regulation (Art. 2ff, 60, Brussels I) mandates member states to hear cases on alleged human rights violations in third countries committed by multinational corporations domiciled in the European Union.[33]

Where jurisdiction has been established, courts must nevertheless choose which law to apply. Applying the law of the host state may prevent damaged parties from receiving effective remedy. In the European Union, as per the Rome II Regulation (Art. 4, Rome II) the law of the state in which the damage occurred is generally applicable (cf. Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II, OJ L 199/40)).[34] In many jurisdictions, damaged parties are also limited in their legal options and can only bring a civil but no criminal claim. Legal systems may also not provide for criminal liability for corporate entities, instead limiting liability to natural persons (e.g. representatives of a corporate entity), as is the case for Germany. Difficulties in obtaining and admitting evidence presents another major challenge since in most legal systems the burden of evidence lies with the victim. In continental European legal systems particularly, the defendant company is usually not obliged to disclose information in its possession that could be used as evidence against it.[35]

Another major obstacle is the way corporate groups are usually organised into multiple legal entities and subsidiaries with varying degrees of influence. The principle of limited liability, common in most legal systems, means that parent companies will not be automatically held legally responsible for alleged violations by their subsidiary merely because of the fact of ownership or control, and even less so for alleged violations by suppliers or business partners (Featherby 2011). Parent companies may however be held liable where the legal system imposes a *duty of care,* as outlined above. The ways in which the concept of human rights due diligence as laid out by the UNGP could inform the application of criminal or civil law and hold companies responsible not only for actions of their subsidiaries but possibly also suppliers and other business partners currently remains unclear (see also chapter 3.1).[36] Moreover, legal systems may not provide for class action mechanisms, i.e. lawsuits where a group of damaged parties is collectively represented and legal costs can therefore be significantly reduced.[37]

Practical obstacles: Transnational litigation proves challenging for various logistical and financial reasons. It can be extremely costly due to the costs of legal and technical experts, the costs associated with gathering evidence and the sheer length of litigation processes. Legal aid is usually limited or not available to foreign damaged parties who typically have very limited financial resources and find themselves opposed by powerful law firms. Claimants thus often rely on the support from pro bono law firms, "no win no fee" lawyers or suitably qualified and experienced local civil society organisations. The problem is exacerbated by the fact

[31] See: https://www.ciaonet.org/attachments/8443/uploads

[32] See: https://www.ecchr.eu/en/documents/publications/ecchr-publications/studies-and-reports/articles/holding-companies-accountable.html

[33] See: http://corporate-responsibility.org/wp-content/uploads/2015/02/eu_business.pdf

[34] Ibid

[35] See: https://www.ecchr.eu/en/documents/publications/ecchr-publications/studies-and-reports/articles/holding-companies-accountable.html

[36] See: https://www.ecchr.eu/en/documents/publications/ecchr-publications/studies-and-reports/articles/holding-companies-accountable.html

[37] Ibid

that in many European and other jurisdictions the “loser pays principle” applies, meaning the unsuccessful party must pay the other party’s costs.[38]

Overall, the home states’ legal systems mostly allow for companies to avoid liability, even in cases of grave misconduct. The majority of claims either fail or are settled out of court.[39] In addition, international trade agreements provide for mechanisms such as investor-state dispute settlements which allow businesses to pursue their economic interests while constraining the host states in legislating in the public interest and implementing stricter social, environmental and human rights laws or putting them at risk of international arbitration in case they do.[40] No such venue exists for states or civil society to hold businesses responsible. While this may appear convenient to the individual company it can have serious consequences for political stability and societies’ trust in democratic systems. It can also be detrimental to free trade when this increasing lack of trust in democratic institutions results in severe opposition to new trade agreements as has been the case with TTIP.

4.2. Non-judicial grievance mechanisms

Non-judicial grievance mechanisms (NJGM) are meant to complement judicial options in granting claimants alternative access to remedy when alleged abuses by businesses have occurred. Non-judicial processes may be used to avoid judicial processes, in parallel, or may even take effect where a legal case has already been filed and a resolution is sought prior to the court’s decision.

Non-judicial grievance mechanisms vary in scope and form. They may be based on law or voluntary standards; adjucative or mediation-based; public or private; at national or international level; company or industry-specific; and address corporations directly or indirectly when a complaint is filed against a government for allegedly failing to protect its citizens against the company’s human rights violations. They also follow different procedures. For example, claims may have to be made by the damaged parties or a representative.

However, according to principle 31 of the Guiding Principles on Business and Human Rights, all NJGM should meet certain **effectiveness criteria**: they should be legitimate, accessible, predictable, equitable, transparent and rights-compatible. Additionally they are supposed to be a source of continuous learning and be based on engagement and dialogue (United Nations 2011, S. 33–34).

The most established NJGM is part of the OECD’s Guidelines for Multinational Enterprises institutional framework – the **OECD National Contact Points**. All governments adhering to the OECD Guidelines for Multinational Enterprises are required to set up a National Contact Point (NCP), with the purpose of resolving issues stemming from an alleged non-compliance with the guidelines by national companies. While the Contact Points’ impartiality has been criticised among other things, there is a significant number of cases where so-called “specific instances” have been resolved in favour of the damaged parties, or where a mediated agreement between both parties could be agreed. Their institutional and financial backing also allows for continuous improvement, and it is expected that the OECD National Contact Points will gain further relevance in future.[41] Another interesting example of a state-sponsored NJGM is the Canadian CSR Counsellor. Upon the Counsellor’s suggestion, a company which has been involved in human rights violations and is not willing to participate in the Counsellor’s investigation or mediation schemes may be penalised by the withdrawal of diplomatic support in foreign markets by the Government of Canada.[42][43]

Other NJGMs are connected to **voluntary sector initiatives** such as the Round Table on Palmoil[44], the Fair Wear Foundation[45] or the EITI`s grievance procedure[46]. Other well established NJGMs can be found in the

[38] See: http://corporate-responsibility.org/wp-content/uploads/2015/02/eu_business.pdf

[39] For an overview on selected lawsuits, see: https://www.ciaonet.org/attachments/8443/uploads (last accessed on

[40] See: http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16031 (last accessed on 21.11.2017)

[41] There is ample literature on the evaluation of the OECDs National Contact points. See for example: the Annual Reports on the OECD Guidelines for Multinational Enterprises (http://mneguidelines.oecd.org/annualreportsontheguidelines.htm (last accessed on 21.11.2017)), the National Contact Points Peer Reviews (https://mneguidelines.oecd.org/ncppeerreviews.htm (last accessed 21.11.2017)) or for a more critical perspective: https://www.oecdwatch.org/ (last accessed 21.11.2017). Additionally it is possible to search the Database of Specific Instances: http://mneguidelines.oecd.org/database/ (last accessed 21.11.2017).

[42] See: http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/csr-strat-rse.aspx?lang=eng (last accessed on 26.01.2018)

[43] In January 2018 the Canadian government announced that the previous position of CSR Counsellor will be transformed into an “Ombudsman”, responsible for the mining as well as other sectors and granted additional investigative power (See: http://www.hilltimes.com/2018/01/16/champagne-announce-new-ombudsman-corporate-responsibility-wednesday-years-long-campaign-human-rights-groups/131079 (last accessed on 26.01.2018)). However, there is currently no official document available and the exact terms cannot be assessed.

[44] See: https://www.rspo.org/members/status-of-complaints (last accessed on 21.11.2017)

development finance sector – with most development finance institutions (DFI) having their own institutionalised processes as well as cooperating in the IAMnet (Independent Accountability Mechanisms Network)[47]. Additionally, **company or operational-level** NJGM exist, such as the Adidas complaint system[48] or the BASF Community Advisory Panel[49].

NJGMs can have certain **advantages** for both the complainants and the company concerned vis-à-vis judicial procedures. First, they can save time and costs on both sides and be more easily accessible for the person or group seeking remedy. Secondly, there can be positive effects inherent in the process which is usually non-adversarial and instead relies on mediation, dialogue and relationship-building. This means conflicts can be addressed at an earlier stage or even preventively, potentially avoiding escalation. Additionally, the possibility of reaching a solution providing effective remedy may be higher. For one, legal proceedings can last many years at which point even when the outcome is in favour of the complainants compensation for damages might come too late, for example when communities are evicted from their land. Cases involving communities or larger groups of individuals usually also require more complex solutions since interests and grievances differ within the group or community itself.

However, NJGMs have also been the subject of **criticism**. General complaints refer to a lack of transparency, impartiality or effectiveness. Others claim that hurdles for complainants remain too high and that the power imbalance is not sufficiently addressed (Miller-Dawkins et al. 2016; SOMO 2014). Certain companies have even been accused of using NJGM to exclude any legal claims (Coumans 2017).

What does this mean for the mining sector?

Judicial mechanisms mostly fail to provide remedy: Mining activities often take place in developing countries with poor rule of law and high corruption. When harm occurs damaged parties are offered little to no prospect of effective judicial remedy in those countries. Access to judicial remedy in the home states of multinational corporations is also greatly limited if not impossible. In any case, a corporation's liability would not extend to its suppliers or business partners and only under certain circumstances to its subsidiaries.

Growing pressure to reflect the reality of transnational business: There is growing pressure on businesses to take responsibility for the benefits they reap from their operations worldwide including activities they may only be linked to via suppliers or business partners. "Home states" have also been pressed to find ways to legally mandate responsible business conduct, e.g. by imposing due diligence requirements (compare chapters 2, 3.1 and 3.2).

Reputational risk: Legal cases and non-legal grievances may always pose a reputational risk for the company in question as well as other companies that can be linked to its operations, products or services. Regarding only the OECDs National Contact Points 72 cases in relation to mining activities have been filed worldwide (EU: 29) to date.[50]

Non-judicial grievance mechanisms on a sectoral or company level: Non-judicial grievance mechanisms may provide effective remedy and should complement judicial mechanisms. When designing such mechanisms, mining companies and related industries should consider existing guidelines on the design of effective mechanisms as well as best practices. It has to be emphasised, however, that beneficial results will only occur where grievance mechanisms are aligned with a general business strategy which respects the interests of employees, communities and other stakeholders affected by the company's operations.

5. What role for the EU?

Pressure on international businesses across all sectors is growing to act more responsibly and be more transparent on the social and environmental impacts they may cause, contribute to or be linked to. Consequently, businesses in the mining sector will have to meet these requirements and implement adequate management systems (e.g. regarding human rights due diligence), accordingly.

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[45] See: https://www.fairwear.org/resource/fwf-complaints-procedure-2014/ (last accessed on 21.11.2017)

[46] See: https://eiti.org/voicing-concerns (last accessed on 21.11.2017)

[47] See: http://independentaccountabilitymechanism.net/ (last accessed on 21.11.2017)

[48] See: https://www.adidas-group.com/media/filer_public/3a/a8/3aa87bcf-9af9-477b-a2a5-100530e46b19/adidas_group_complaint_process_october_2014.pdf (last accessed on 21.11.2017)

[49] See: https://www.basf.com/us/en/company/sustainability/responsible-partnering/community-advisory-panels.html (last accessed on 21.11.2017)

[50] See: http://mneguidelines.oecd.org/database/searchresults/?q=(Sector:(Mining%20and%20quarrying)) (last accessed on 21.11.2017)

However, at present no legally binding instrument exists on international level which can hold international businesses (including those in the mining sector) responsible and provide effective remedy to damaged parties. There is thus a clear role for the EU and national governments to promote responsible conduct in third countries of businesses located within their jurisdiction, including support to overcome the various political, legal and practical obstacles which the transnational context currently presents to damaged parties seeking judicial redress.

Part of this can be achieved through strengthening existing EU regulations and directives on responsible business conduct starting with a revision of the **CSR strategy** which has expired in 2015 and not been renewed since. The results of a public consultation on the EU's CSR strategy, which was carried out in 2014 and was supposed to feed into the development of the successor CSR strategy 2015-2020, show that stakeholders want the EU to take a leadership and standard setting role in CSR. Concrete measures recommended herein include capacity building for SMEs and an alignment of the CSR strategy with other policies of relevance.

Other steps could include the **establishment of human rights due diligence requirements** across sectors, the **strengthening of the EU directive on non-financial reporting** and making the consideration of **social and environmental criteria in public procurement** not only possible but mandatory. Policies should hereby always be part of a holistic approach, one that reflects the local realities of the workers and communities who are impacted both positively and negatively by international businesses activities and whose situation it ultimately seeks to improve. Only when an increase in transparency is accompanied by local engagement and consultation will it lead to positive change on the ground.

Regarding **access to judicial remedy in European countries** by damaged parties abroad, the EU should start a process in which clear expectations towards member countries are formulated and a strategy to implement those expectations is developed. Relevant issues to address include the introduction of effective collective redress mechanisms, the provision of corporate criminal liability, reversing the burden of evidence and clarifying (human rights) due diligence requirements as part of civil claims, as well as procedural aspects like improved access to legal aid.

Member states should be assisted in implementing EU directives and strategies regarding responsible business conduct through guidance and appropriate capacity building. Clear review processes should be established by the EU and within member states to monitor the effectiveness of the current EU directive on non-financial reporting as well as future recommendations and directives. Both the implementation itself as well as the social and environmental impacts resulting thereof should hereby be monitored.

Additionally, the EU should adopt measures to strengthen the importance of responsible business conduct in the international arena. It should improve the mainstreaming of human rights in international **trade agreements** by making sure that human rights have primacy over economic considerations, an issue that should also be taken into account when redesigning the current investor-state dispute settlement system. Basic principles for this are already laid down in the EC paper "Trade for All" e.g. the Commission's declaration that it will "support the implementation of the UN's Guiding Principles for Business and Human Rights, the UN Global Compact and the ILO Tripartite Declaration on Multinational Enterprises and Social Policy and encourage the EU's trading partners to comply with these international principles and in particular the OECD Guidelines for Multinational Enterprises".[51]

In the same line the EU should augment its efforts to **strengthen the rule of law and its enforcement in host countries** by providing financial and technical assistance and taking a clear stand against companies domiciled within the EU which are undermining the respective legal systems e.g. through bribery or disinvestment threats.

Finally, the EU and its member states are encouraged to take a proactive and constructive role in the ongoing negotiations around a binding **UN Treaty on business and human rights** (see chapter 1).

[51] See: http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153846.pdf

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Project Background

The Strategic Dialogue on Sustainable Raw Materials for Europe (STRADE) addresses the long-term security and sustainability of the European raw material supply from European and non-European countries.

Using a dialogue-based approach in a seven-member consortium, the project brings together governments, industry and civil society to deliver policy recommendations for an innovative European strategy on future EU mineral raw-material supplies.

The project holds environmental and social sustainability as its foundation in its approach to augmenting the security of the European Union mineral raw-material supply and enhancing competitiveness of the EU mining industry.

Over a three year period (2016-2018), STRADE shall bring together research, practical experience, legislation, best practice technologies and know-how in the following areas:

1. A European cooperation strategy with resource-rich countries
2. Internationally sustainable raw-material production & supply
3. Strengthening the European raw-materials sector

Project Identity

Project Name	Strategic Dialogue on Sustainable Raw Materials for Europe (STRADE)
Coordinator	Oeko-Institut; Doris Schueler, Project Coordinator, d.schueler@oeko.de
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Website	www.STRADEproject.eu

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