

THE IMPACT OF STRATEGIC HUMAN RIGHTS LITIGATION ON CORPORATE BEHAVIOUR

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[The Australian Human Rights Institute](#) is based at UNSW Sydney and produces world-leading research and advances debate on critical human rights issues. Our strategic and rigorous research transforms practices to mainstream human rights, with a focus on business, climate, gender and health.

[The Centre for Environmental Law](#) at Macquarie University is Australia's oldest continually functioning environmental law centre. Our mission is to drive transformative change through cutting-edge interdisciplinary research that provides solutions to the triple planetary crisis of environmental pollution, climate change and biodiversity loss. CEL collaborates with UN agencies, governments, universities, think tanks, businesses and civil society organisations to develop effective law and policy tools to support a sustainable common future.

Macquarie University's B&HR [Access to Justice \(A2J\) Lab](#) is an innovative initiative at the Macquarie Law School which brings together leading business and human rights experts, selected law students and external organisations to work together to promote accountability for business-related human rights abuses. We seek to bridge power imbalances between corporations and communities by conducting research, developing practical tools, building capacity and offering pro bono assistance to affected individuals and communities to seek remedies for business-related human rights abuses.

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FOREWORDS

Litigation is always a risky endeavour for all parties to it. Deciding to commence litigation against a corporation requires a range of choices, from jurisdiction to costs, especially when the issue concerns corporate accountability for human rights abuses. Strategic human rights litigation against a corporation requires the additional choice of which rightsholders in which situation are to be the claimants. That choice usually relies on a decision as to which case will have the most positive impacts for the rightsholders and on corporate behaviour.



This report is the first focussed consideration of the impact of strategic litigation on corporate behaviour. To work out what are these impacts (such as direct/indirect, immediate/incremental, and positive/negative), and what influences corporate behaviour (which they call the “corporate ecosystem”), is exceedingly difficult. The authors manage this cleverly through the use of an Impact Framework tool, which they devised, in order to provide stakeholders with a better understanding of the potential positive impacts of litigation on corporate behaviour balanced against the potential negative impacts. The four positive impacts they identify are raising awareness, changing corporate culture, remedying harm, and shaping laws and policies, while the two negative impacts set out are negative impacts on corporate behaviour (such as a disruption of relations between the corporation and the community) and negative impacts on those who brought the litigation (such as increasing security risks).

The authors, who include leading business and human rights experts in the world, analyse these impacts through examining a wide range of relevant cases and prospective cases across many jurisdictions (of which only a few key cases are given in Annex B). They show how litigation can, for example, increase meaningful engagement with communities and other stakeholders, and even that unsuccessful litigation can still have a positive impact on legislation and corporate policies in some instances. In contrast, a successful litigation can lead to, for example, a lack of corporate transparency across a number of sectors. The difficulty of using the United Nations Guiding Principles on Business and Human Rights, the core authoritative document on this area, in domestic litigation is clearly indicated. The authors then draw together this broad sweep of case law and impacts to suggest particular strategies to adopt to maximise the impact of strategic human rights litigation on corporate behaviour.

By taking this approach, the authors have provided an invaluable guidance for litigators everywhere, whether they are acting for rightsholders or corporations, as well as for states and litigation funders, in weighing up the risks of such litigation. At a stage when there is a steady growth of such litigation, as part of a mix of measures, including legislation, to increase corporate accountability for human rights abuses, this report is also very timely.

Robert McCorquodale

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In using strategic litigation to hold companies accountable for their human rights responsibilities, we must recognise power imbalances between different actors. This is especially relevant when litigating alongside indigenous and agricultural communities, collectives of at-risk workers, and courageous human rights defenders, as I have witnessed over the last 30 years of practicing law as a Global South advocate.



The authors of this report invite us to explore the uneven impact of litigation on business, policy/regulatory decision-makers and rightsholders. At the same time, they also provide an analysis of the tension within each of these groups. Companies, governments, and civil society organisations are, of course, very different and have diverse interests. Without careful considerations, each of these groups is at risk of reproducing practices that generate inequality, displacement, or “objectification” of rightsholders.

This is why this report is so important in terms of its focus and timing. It calls us to analyse the inequalities and expectations linked to advocacy strategies and to recognise the need to adopt a holistic approach that is not limited to strategic litigation (as a purely legal action). It also takes into account communications and media strategies, corporate research, and influence on financial or economic actors, among others, to maximise the positive impact of litigation.

The research team offers an interesting tool, the so-called “Impact Framework”, which allows us to assess the effects of litigation not only on the behaviour of companies but on the entire international ecosystem. We know that the link between litigation and systemic change is difficult to establish, but we also have evidence that strategic litigation produces changes and shifts that are substantive, even if incremental. Hence, I believe this enlightening report will be an essential tool for litigators everywhere.

With this report, our friends at The Freedom Fund are once again at the forefront of in-depth analysis of risks and good practices for all stakeholders involved in strategic litigation to drive corporate accountability and regulatory change.

This research is a necessary contribution to the debate on building a new paradigm of social, climate and labour justice. I congratulate The Freedom Fund and the research team for this initiative and invite readers to join the debate on the key findings and recommendations presented in the report.

Alejandra Ancheita

Founder and Executive Director
ProDESC

Image credit: Jittrapon Kaicome/The Freedom Fund





LIST OF ACRONYMS

ATS	Alien Tort Statute
AUC	Autodefensas Unidas de Colombia
AUD	Australian dollars
BHR	Business and human rights
CSOs	Civil society organisations
CSR	Corporate social responsibility
EU	European Union
HRDs	Human rights defenders
HRDD	Human rights due diligence
ICC	International Criminal Court
ISIS	Islamic State of Iraq and al-Sham
OECD	Organisation for Economic Co-operation and Development
OLGMs	Operational-level grievance mechanisms
SLAPP	Strategic litigation against public participation
TVPRA	Trafficking Victims Protection Reauthorization Act
UCC	Union Carbide Corporation
UN	United Nations
UNGPs	United Nations Guiding Principles on Business and Human Rights
USD	United States dollars

EXECUTIVE SUMMARY

For several decades, strategic human rights litigation (litigation) has been a key tool used by affected rightsholders, civil society organisations (CSOs) and human rights defenders to influence corporate behaviour and hold corporations accountable for human rights abuses. Such litigation seeks to bring about systemic change and encourage corporations to operate with greater respect for people and the planet.

But how effective has this strategy been? What are the potential risks of litigation and how can these risks be managed? Under what circumstances has litigation achieved positive changes in corporate behaviour? By drawing on a review of the relevant literature, analysis of selected case studies and insights gained from interviews with diverse stakeholders as well as participants of a workshop, this report seeks to answer these questions and in turn fills an important gap in current understanding about the efficacy of litigation in shaping corporate behaviour.

The report uses the concept of a corporate ecosystem to describe the network of factors and stakeholders that interact with corporations and in turn influence corporate behaviour. The report finds that litigation has direct and indirect impacts on the corporate ecosystem and proposes an original Impact Framework to assess impacts in a holistic and systemic way. These impacts are both positive and negative and are grouped into four positive impact categories and two negative impact categories. These six categories are further broken down into 16 indicators that can be used to assess impact.

Assessing impacts of litigation on corporate behaviour is difficult because impacts are often indirect, incremental and intertwined. The Impact Framework can be used both prospectively (when determining whether litigation is a viable option in a specific case) and retrospectively (when assessing whether a given case produced the intended impacts) by all parties to the litigation as well as other stakeholders.

The report finds that litigation has been used successfully to promote human rights and shape corporate behaviour. The systemic impact on corporate behaviour has, however, been slow and patchy. The report highlights that litigation is generally more impactful when consciously used in conjunction with other complementary strategies – such as civil society advocacy, media campaigns, complaints to regulatory bodies and broader engagement with stakeholders (e.g. investors and consumers) – that can influence the corporation.

The report references seminal business and human rights (BHR) cases to illustrate the application of the Impact Framework.

Positive examples of impact include:

- Raising awareness by enabling CSO advocacy, engaging with the media, triggering consumer or investor action and/or educating key stakeholders, e.g. the enduring shareholder responses to litigation against the construction of a pipeline in Myanmar continued to resonate more than 20 years after the lawsuit was filed.
- Changing corporate culture by triggering changes in BHR approaches, impacting corporate reputation and/or facilitating broader sectoral changes, e.g. the lawsuits filed against Casino Groupe in France, alleging a lack of human rights due diligence, resulted in the corporation revising its risk management practices.
- Remedying harm by encouraging meaningful engagement with rightsholders and/or providing remedy, e.g. the Nkala class action lawsuit in South Africa resulted in a USD \$353 million settlement, and the *Milieudefensie* case against Shell led to €15 million in compensation for the

affected communities and was the first time a Dutch multinational was held responsible for the actions of an overseas subsidiary.

- Shaping laws and policies by developing responsible business standards and/or clarifying legal standards to drive corporate accountability, e.g. the decision of a US court in the *Ratha* lawsuit led to legislative reform to clarify the intent behind the *Trafficking Victims Protection Reauthorization Act*; the decision in the *Vedanta* case in the UK led to solidification of the direct duty of care principle to hold parent companies accountable; and the *Nevsun* case clarified the applicability of customary international law to corporations as well as influenced broader BHR policy reform in Canada.

Negative examples of impact include:

- Inadvertently leading to the establishment of regressive precedent or laws, e.g. the early optimism that attached to litigation brought pursuant to the *Alien Tort Statute* in the US has waned as decisions in subsequent cases have narrowed its potential application.
- Creating unintended adverse impacts on transparency by influencing corporations to take a cautious approach to the release of non-financial information, e.g. effect of the *Vedanta* decision on corporate attitudes to disclosure.
- Disrupting relations between corporations and communities, e.g. when initiating litigation causes a worsening of relationships between the corporation and the communities involved in the litigation.
- Adverse effects on the initiators of litigation by increasing security risks or strategic litigation against public participation (SLAPP) and/or imposing costs in terms of time and resources and creating conflict within communities, e.g. SLAPP cases filed against CSOs have a chilling effect on human rights advocacy and can impact the limited resources CSOs have to file cases.

The report also identifies six key strategies and variables to maximise the impact of litigation on corporate behaviour:

1. Selecting the 'right case' – taking into account variables including the public profile and culture of the corporation, suitability of the forum and access to credible evidence.
2. Evaluating and managing negative risks of litigation.
3. Collaborating with reliable local partners.
4. Managing expectations and competing goals.
5. Employing complementary redress mechanisms.
6. Securing sustainable funding.

The report concludes with some practical recommendations for the four key stakeholders to litigation: initiators of litigation, corporations, funders, and states:

- The initiators of litigation should take care in the selection of cases, keep paramount the interest of affected rightsholders and adopt the 'do no harm' principle. They should also build trusted collaboration with local partners and explore diverse options to secure sustainable funding.
- Corporations should view litigation as an opportunity to engage key stakeholders, rather than ignore or retaliate against them. By doing so, corporations will be able to align their approach with international BHR standards.
- Funders of litigation should be conscious of litigation uncertainties, build in flexibility in funding models and make provision for preparatory funding.
- States should introduce law and policy reforms (such as liberalising *locus standi* requirements, enacting anti-SLAPP laws and expanding legal aid) to create an environment conducive to strategic human rights litigation.

1. INTRODUCTION

Strategic human rights litigation (litigation) has been a key strategy in the business and human rights (BHR) field to bring about changes in corporate behaviour in relation to their human rights responsibilities. This type of litigation¹ generally involves lawsuits being filed with a larger ambition to promote societal and legal change, including in how corporations operate in society. In such cases, plaintiffs and their lawyers often employ innovative arguments to convince courts to develop case law or interpret a law differently to deal with a novel situation. These lawsuits are often brought in conjunction with, or with support from, civil society organisations (CSOs)² and are part of a broader campaign to address corporate human rights abuses and promote corporate accountability.³



This report, commissioned by the Freedom Fund, has three primary objectives. First, it seeks to identify impacts of litigation on corporate behaviour including when, how and why litigation has (or has not) led to changes in corporate behaviour. Second, the report develops a framework to assess impacts (positive and negative) of litigation on corporate behaviour in a holistic way. Third, it identifies strategies and variables to enhance the impact of litigation on corporate behaviour.

Based on a review of the relevant literature and insights gained from 28 interviews with diverse stakeholders as well as from participants in an in-person workshop,⁴ the report finds that litigation has had both direct and indirect impacts on corporate behaviour. These include raising public awareness, influencing a change of corporate policies and practices, addressing power imbalances, remedying harm, opening new pathways of corporate accountability, facilitating investor action and triggering changes in law and policies. The systemic impact on corporate behaviour has, however, been slow and patchy. Moreover, litigation has also resulted in negative impacts, which often receive less attention. These include strategic lawsuit against public participation (SLAPP) cases, increased divisions within communities, corporate hesitations in sharing non-financial information with stakeholders, and adoption of regressive laws and policies.

The research is significant both in terms of its focus and timing. Although to date, there has been some anecdotal evidence and isolated case studies available on this topic, research focusing on a holistic assessment of the impacts of litigation on corporate behaviour is limited. This gap in the existing literature is unsurprising given various challenges in making such an assessment: difficulties in making direct causal connections, disparate views about the impacts of litigation amongst affected rightsholders and communities, and reluctance by corporations to admit and disclose how litigation influenced their business decisions due to confidentiality or competitiveness concerns.

This report seeks to fill this gap and proposes an original Impact Framework to assess the effects of litigation. As momentum is building in the BHR field to convert soft corporate responsibilities into binding obligations, and greater attention is being given to strengthen access to remedy and corporate accountability, this report aims to enhance further understanding of the use of litigation as a lever to influence corporate behaviour.

Section 2 of the report notes what makes litigation 'strategic', acknowledging that such litigation generally pursues goals that go beyond the immediate outcome of the case for the affected rightsholders. Section 3 then elaborates an Impact Framework for analysing the impacts of litigation on corporate behaviour. The Framework proposes a series of indicators grouped under four positive and two negative impacts – all these indicators should be considered together to holistically assess the impact of litigation on the corporate ecosystem. Changes in corporate behaviour can be influenced by a wide variety of factors and multiple factors will be operating in tandem on many occasions.

The report then applies this Impact Framework in Section 4 drawing on seminal cases in the BHR field to illustrate how impacts can be assessed. Section 5 identifies strategies and variables that could be employed to enhance the impact of litigation on corporate behaviour. Finally, Section 6 concludes with recommendations to the four key stakeholders of litigation: initiators of litigation, corporations, funders, and states.

Annex A outlines the research methodology, and Annex B provides a summary of key case studies used in the report.

2. WHAT MAKES HUMAN RIGHTS LITIGATION AGAINST CORPORATIONS STRATEGIC?

Litigation against corporations can be traced to at least the early 1980s.⁵ Early examples in the BHR field include the decision of the Indian government to pursue claims in the United States (US) against Union Carbide Corporation for the Bhopal gas disaster, rather than against its Indian subsidiary in India, and the seminal case of *Doe v Unocal* brought in the US under the *Alien Tort Statute (ATS)*.⁶ Litigation against tobacco corporations⁷ and high profile cases on a range of BHR issues including involvement in sweatshops and exercising a monopoly over AIDS drugs⁸ provide other key examples.

Litigation in the BHR field has used a variety of legal bases to pursue accountability for human rights abuses. Tort law - both common law principles and statutory provisions - has been the main legal basis of such litigation. Torts of negligence and nuisance have been employed to file cases in Canada, France, Germany, the Netherlands, Thailand, the United Kingdom (UK), the US and elsewhere.⁹ One prominent example is the use of the *ATS* in the US.¹⁰ In more recent times, litigation has been pursued relying on constitutional law, administrative law, environmental law, consumer law, advertisement law and labour law.¹¹ Emerging laws addressing the climate crisis¹² and the requirement to conduct mandatory human rights due diligence (HRDD)¹³ are both likely to have a significant impact on the development of litigation in the BHR field in the near future.

What makes litigation 'strategic' is that it pursues goals that reach beyond the immediate outcome of the litigation for the affected rightsholders. However, litigation rarely has a singular focus. In any one case, there is likely to be a plethora of goals: some short term, some long term, some probable and some more aspirational. Goals tend to be framed positively and are often the starting point in assessing the strategic benefit of potential litigation. Goals are related to but stand apart from impacts, which focus on the measurable outcomes of the litigation, the results of which may be mixed - with both positive and negative, and intended and unintended, impacts.¹⁴ The choice of goals may differ among stakeholders and the goals of the litigants and of their supporters may shift over time. Goals and impacts are intertwined and both are relevant to how 'success' is assessed in litigation.

An overarching goal of litigation in the BHR field is to change the ecosystem within which corporations are operating and in turn improve corporate respect for human rights, strengthen access to remedy and bring a systemic change to the way corporations operate in society. To achieve this goal, litigation seeks meaningful social change that will influence corporate behaviour.¹⁵ In assessing the impact of litigation, this report focuses on four potential positive impacts that sit beneath this overarching goal.

They are:

1. Raising awareness
2. Changing corporate culture
3. Remedying harm
4. Shaping laws and policies

In addition, the report also considers the potential negative impacts of litigation on corporate behaviour and on the initiators of litigation. We combine all these positive and negative impacts of litigation in the Impact Framework outlined below.



Image credit: Filmatory Nepal/The Freedom Fund

3. IMPACT FRAMEWORK

The Impact Framework offers a tool to assess the impacts of litigation on the corporate ecosystem. Impacts can be both positive and negative, often in the same case.

The Impact Framework offers an analytical model to assess how litigation can influence the corporate ecosystem. The concept of a corporate ecosystem is used in this report to describe the network of factors and stakeholders that functions to regulate corporate behaviour and which has the ability to influence corporations to operate with greater respect for people and the planet. Corporations, state agencies, CSOs, trade unions, shareholders, consumers, rightsholders and other actors all interact, and these relations influence corporate behaviour in direct and indirect ways. Litigation is one factor generating impacts within this corporate ecosystem.

We unpack the Impact Framework by providing an illustrative list of indicators related to rewards (positive impacts) and risks (negative impacts). While not exhaustive, these indicators aim to provide stakeholders with a holistic understanding of the potential positive impacts of litigation on corporate behaviour balanced against the potential negative impacts.

The Impact Framework and the indicators can be used to assess the influence of particular legal proceedings against a given corporation. Although presented in a qualitative manner, the Framework can be employed quantitatively by assigning a value to each of the reward or risk indicators.

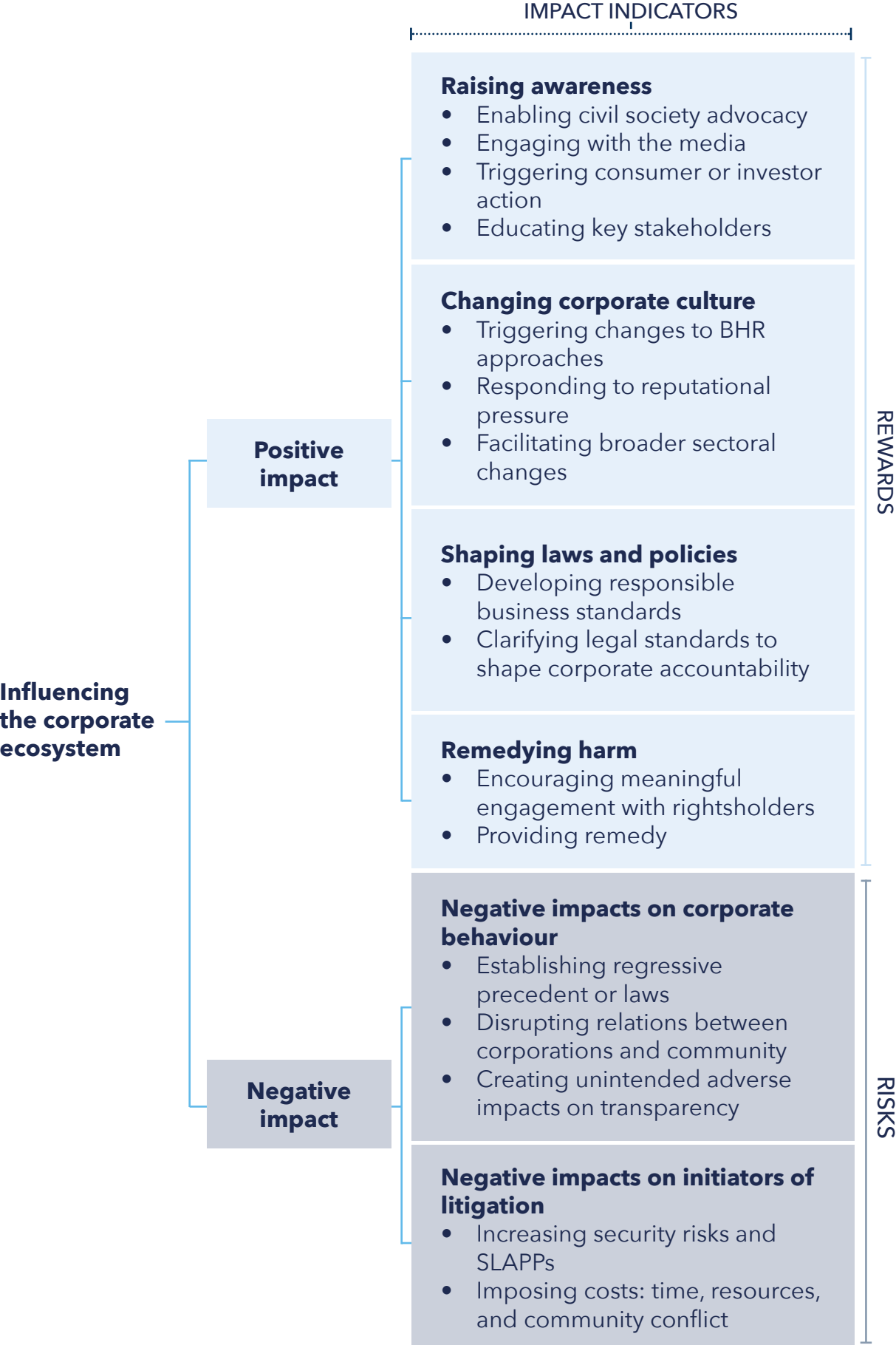
The Impact Framework can be used both prospectively (for example, to assess whether litigation is a viable option in a specific case) and retrospectively (did a given case produce the intended impacts?) by all parties to the litigation as well as by other stakeholders.



When using the Impact Framework, stakeholders should keep in mind that assessing the impacts of litigation on corporate behaviour is challenging for several reasons:

- **Impacts may be direct or indirect** though the distinction between the two is often blurred. The causal connection between litigation and impacts may not always be clear or publicly acknowledged. A compensation payout to victims may be a direct and immediate outcome of litigation. So too may be the development of judicial precedent which shapes future corporate behaviour. However, many more common impacts may be indirect, and it may be difficult to establish a direct causal connection between the litigation and an outcome (such as the enactment or revision of responsible business conduct laws not only in the state where litigation was pursued but also in other states). Similarly, while risks may be direct, that is, for the specific individuals or CSOs pursuing litigation against a particular corporation, they may also indirectly impact other CSOs or human rights defenders (HRDs) not linked to such litigation.
- **Some impacts may be immediate while others are incremental**, which means sometimes the impacts of litigation may be under-documented. The lawsuit itself can progress over many years, and some impacts may only be apparent much later after the closure of litigation.
- **Impacts are likely to be 'multi-dimensional'**¹⁶ and thus the impact indicators in this report should not be seen as watertight compartments. Impacts are interrelated and sometimes interdependent. Impacts lie on a spectrum and are more like shades of grey, rather than pure black or white. Further, litigation can cause both positive and negative impacts on corporate behaviour so both must be considered and balanced against each other. In addition, multiple variables - litigation plus other pressure points - might be at play in contributing to any given impact.
- **Impacts may mean different things for different stakeholders** because they have different goals in mind in relation to the litigation. Moreover, what may be seen as a positive impact by some stakeholders (e.g. a confidential settlement between a corporation and certain victims) may be perceived as a negative impact by others (e.g. because such a settlement did not allow for the evolution of a precedent for corporate accountability).
- **Different stakeholders involved in the same litigation may have different goals** which may complicate an assessment of the litigation. In considering the impact of litigation, it is critical to keep the goals of the rightsholders and their pursuit of remedy at the forefront. Rightsholders are personally impacted by the issues addressed by the litigation, their involvement is required to bring the litigation, and they are put at personal risk of adverse outcomes and costs due to the litigation. It is counterproductive to promote litigation in any particular case as having positive impact on corporate behaviour if that assessment ignores potential negative outcomes suffered by rightsholders.

Figure 1: Impact framework



4. ASSESSING IMPACT: LESSONS LEARNED

4.1. RAISING AWARENESS

Awareness-raising is a critical component of litigation in the BHR field. Litigation has the potential to ‘change ideas, perceptions and collective social constructs’¹⁷ and can be influential in developing a culture of corporations respecting human rights. Additionally, the publicity attracted by litigation makes it a useful platform for rightsholders to reframe narratives concerning the particularities of their litigation, as well as broader human rights issues. As one civil society interviewee for this research suggested: ‘The court of public opinion sometimes gets better results than the court of law’ (Interviewee – CSO 7).

Stakeholders employ a range of strategies to raise awareness of litigation, including civil society advocacy campaigns or strategic engagement with the media. This attention can maximise the pressure on corporations to implement greater respect for human rights and can be a significant factor in changing corporate culture, shaping the regulatory framework and achieving remediation.

Many of the effects of such awareness-raising are *soft*: shifts in public opinion, broader engagement with human rights and education on key BHR developments. However, awareness of litigation – and the issues addressed – can also influence the opinions of key stakeholders who matter to corporations: judges, legal professionals, consumers, investors and even the broader public. Accordingly, these *soft* impacts can have *hard* outcomes such as influencing policy and legislative reform, initiating consumer and investor action and informing peer learning sessions. Therefore, awareness-raising – particularly among key stakeholders – can result in tangible impacts that are influential independently from the discrete legal outcome of litigation.

The Impact Framework proposes four indicators to assess how awareness-raising can have an impact on corporate behaviour:

- A. Enabling civil society advocacy
- B. Engaging with the media
- C. Triggering consumer or investor action
- D. Educating key stakeholders

4.1.A. ENABLING CIVIL SOCIETY ADVOCACY

Litigation can enable various stakeholders to engage in awareness-raising activities that frame a narrative that is favourable to, and reflective of, their specific interests (Interviewee – Funder 7). The potency of social awareness means that rightsholders and the initiators of litigation commonly conduct advocacy campaigns alongside litigation. One interviewee stressed that not only are litigation approaches being formulated to explicitly maximise awareness through structured advocacy campaigns, but such campaigns are now commonly an express condition of litigation funding (Interviewee – Consultant 1). Rightsholders, their representatives and litigation funders are all increasingly viewing complementary advocacy strategies as equally, if not more, important than the litigation proper (Interviewee – CSO 1). As one civil society interviewee stated: ‘sometimes the public strategy and advocacy strategy is the more important piece, and the litigation gives you ... a vehicle for essentially running a massive public campaign to try and compel systemic change’ (Interviewee – CSO 1). An advocacy campaign – and the publicity it attracts – is also seen as a safeguard, ensuring some degree of social impact is achieved even when legal proceedings are unfavourable (Interviewee – CSO 11).

As part of such advocacy strategies, the initiators of litigation commonly engage various stakeholders – like trade unions, academia and CSOs – to share their grievances, mobilise support and raise further awareness (Interviewee – CSO 7). For example, in the case of *Nevsun Resources Ltd v Araya*¹⁸ several CSOs, legal organisations and academic associations acted as *amicus curiae* on the issue,¹⁹ garnering broader public attention. Additionally, such coalitions can raise attention in the pre-litigation stage, utilising formal mechanisms to draw the attention of courts to salient human rights abuses. This is demonstrated by the example discussed below.

Submission to the International Criminal Court

Throughout the late 20th century, Colombia was the site of extreme political division and violence, with large portions of the nation falling out of *de facto* control of the government.²⁰ Despite this, in 1989 Chiquita Brands opted to re-enter the market despite having withdrawn earlier that decade.²¹ The corporation operated in minimally policed regions and, in the 1990s, engaged paramilitary organisations for protection. It is alleged that the corporation engaged Autodefensas Unidas de Colombia (AUC) in 1997.²² This group ‘killed, raped, and disappeared civilians.’²³ It is alleged that Chiquita Brands financed AUC until 2004.²⁴

On 18 May 2017, a group of human rights organisations filed a communication to the International Criminal Court (ICC) under Article 15 of the *Rome Statute*.²⁵ Such communications inform the ICC’s Office of the Prosecutor of alleged crimes that potentially fall under the Court’s jurisdiction. This group included local groups like Corporación Colectivo de Abogados José Alvear Restrepo and international organisations like the International Human Rights Clinic at Harvard Law School.²⁶ The communication contained detailed information alleging Chiquita Brand’s contributions to AUC in particular, and allegations of their knowledge of the crimes being perpetrated.²⁷ Although no ICC case has materialised as of 2023, the threat of litigation operated alongside advocacy strategies to raise awareness of the allegations and bring pressure to bear on corporate behaviour.



4.1.B. ENGAGING WITH THE MEDIA

Advocacy strategies commonly include engaging with the media. Media attention can be beneficial to the initiators of litigation, with one lawyer interviewee stating that they directly pursue it by bringing media representatives to visit the affected community (Interviewee - Lawyer 5). However, corporations can also mobilise the media through press engagements or purchasing advertising space to attempt to control the narrative of a case (Interviewee - CSO 3). The power of media engagement is demonstrated in the litigation against Union Carbide Corporation (UCC) following the Bhopal gas disaster.

Media coverage of the Bhopal gas tragedy

In 1984, 40 tons of toxic methylisocyanate escaped from UCC's pesticide plant (operated by its Indian subsidiary) in Bhopal, India.²⁸ This resulted in the direct deaths of more than 3,000 people, and a further 15,000 deaths attributed to 'exposure to the poisonous gas.'²⁹ The incident was followed by litigation against UCC that resulted in an eventual settlement.³⁰

Following the Bhopal tragedy, sustained media coverage of the incident tarnished the reputation of UCC. Coverage included reports of the harms suffered by victims,³¹ the ongoing plight of survivors,³² the sentences given to corporation employees,³³ and the failure of the corporation to clean up pollution.³⁴ Coverage continues even today regarding ongoing case developments and impacts,³⁵ such as highlighting the heightened 'mortality rate for gas-exposed victims' and how the 'explosion has a particularly adverse effect on women exposed to the gas.'³⁶ While it is difficult to prove direct causation between media coverage of litigation and corporate behaviour, UCC's financial condition deteriorated after the disaster and the corporation was eventually acquired by Dow Chemical³⁷ and the Bhopal factory abandoned.³⁸ A less ambiguous causal link was the degree to which media attention prompted legislative reform, as multiple laws were passed in India to ensure worker safety and prevent recurrence.³⁹

A lack of media attention may be detrimental to the advocacy strategy of rightsholders and facilitate corporate evasion of accountability. Corporations that are not brand focused - particularly overseas suppliers or low-profile subsidiaries - are far less likely to attract the same degree of media scrutiny as public-facing multinational corporations.⁴⁰ For example, one interviewee explained that the degree to which corporations engage with the public will invariably influence their responsiveness to public scrutiny (Interviewee - Lawyer 4). Thus, the impact of media coverage is contextual and likely to vary significantly according to brand recognition, as shown by the Mitr Phol case.⁴¹

Media coverage of Mitr Phol litigation

In 2008, the Cambodian government granted Thai multinational corporation Mitr Phol three long-term land leases (concessions) to cultivate sugarcane in Cambodia's northwest.⁴² The corporation seized the land of farmers from 26 villages with the aid of local authorities.⁴³ Crops, homes and other resources were destroyed in this process, and assaults and arrests were conducted on those who resisted.⁴⁴ In 2014, the affected villagers assisted by CSOs filed a complaint to the Thai Human Rights Commission, following which Mitr Phol was sued in Thailand.⁴⁵ While the case was initially dismissed, a subsequent appeal is ongoing.⁴⁶

In contrast to cases like Bhopal or Unocal, some cases receive more muted international media attention. While the case of Mitr Phol was covered in the *Phnom Penh Post*,⁴⁷ internationally it has received limited attention.⁴⁸ Perhaps related to this limited coverage, any damage to Mitr Phol's reputation has been temporary. Recent coverage of Mitr Phol has shifted to framing the

corporation as a 'leader in sustainable development in the agro-industrial sector in Thailand.'⁴⁹ Mitr Phol is generally considered to be in good financial health, is expanding into other areas⁵⁰ and even sponsored a global event for 'sustainable sugarcane' in 2019.⁵¹

In this case, international attention has focused less on Mitr Phol - as a supplier corporation - and more on its high-profile purchasers. For example, Inclusive Development International pressured major purchasers to declare their ongoing relationship with Mitr Phol and/or the Cambodian sugar industry generally.⁵²

4.1.C. TRIGGERING CONSUMER OR INVESTOR ACTION

Litigation can also influence the conduct of stakeholders with a direct bearing on the commercial success of defendant corporations. For example, consumers and investors are uniquely positioned to act on their concerns regarding corporate human rights abuses. When a human rights issue attracts significant social attention, it can become a reputational risk for corporations, and consequently their business relationships - existing or prospective - may be affected.

Litigation in the BHR field has typically centred on public-facing corporations.⁵³ Consumer action is seen as a potential mechanism to pressure corporations through what one interviewee described as exerting 'commercial leverage' on their brand (Interviewee - CSO 10). Academic literature has emphasised the capacity of consumers to shape corporate behaviour through mechanisms like individual or collective boycotts, albeit conditional on a range of variables.⁵⁴ Despite the complex corporate structures of many multinational corporations, that may legally and technically distance the 'brand' from human rights abuses committed by a subsidiary or supplier, research suggests that once a commercial relationship between a supplier and purchaser, or subsidiary and parent corporation, is identified, the damage to the brand image can be dramatic.⁵⁵ Accordingly, consumers can apply pressure on major purchasers to initiate change, emphasising the legal and financial risks of being associated with suppliers with demonstrable track records of breaching human rights.

An example is litigation against Coca-Cola in 2001, in which it was alleged that workers at a Colombian bottling plant were subjected to human rights abuses (including kidnapping and murder).⁵⁶ The corporation stated that the plants were 'operated under contract' and denied responsibility.⁵⁷ In response, a global boycott of the corporation's products was organised by trade unions, 'calling on consumers to stop drinking Coke.'⁵⁸ These complementary tactics of consumer action can be impactful in supporting the coercive power of litigation to influence social change.

Business interviewees also stressed that investors are increasingly becoming vocal about human rights issues and taking notice not only of litigation but also broader awareness-raising campaigns (Interviewee - Business 3). There has been a general increase in shareholder activism at annual general meetings on issues concerning environmental and social issues⁵⁹ and shareholders are pursuing stronger measures - like lawsuits against board members - to communicate their concerns.

For example, the environmental law organisation ClientEarth, acting as a shareholder in Shell, brought a lawsuit against the corporation's Board of Directors for failing to 'properly prepare the corporation for the low-carbon transition.'⁶⁰ This claim has been supported by a 'group of institutional investors collectively holding more than 12 million shares' in the corporation and highlights that investors are seeking to hold corporations accountable for key human rights concerns.

Enduring shareholder responses to Unocal litigation

The Yadana gas pipeline was constructed in the Tinnasari region of Burma between 1996 and 1998 and associated with several corporations including Unocal (of the US) and TotalEnergies (of France), two major petroleum corporations.⁶¹ The Burmese military was deployed to

'secure the pipeline corridor', which in turn involved intrusion on local communities and corresponding human rights violations.⁶² Villagers filed a lawsuit in a US federal court, arguing that Unocal was responsible for 'forced labour, murder, rape and torture' by the military.⁶³ The litigation settled out of court in 2004.⁶⁴

In January 2022, TotalEnergies – the other major corporation involved in the construction of the pipeline – announced its decision to withdraw from the Yadana field and Moattama Gas Transportation Company as both shareholder and operator.⁶⁵ This was in response to pressure from shareholders,⁶⁶ who were requesting that revenues were no longer directed to the Myanmar Oil and Gas Enterprise from the Yadana field production.⁶⁷ TotalEnergies openly condemned the human rights abuses.⁶⁸ This highlights how awareness-raising of human rights abuses by shareholders can influence corporate behaviour even after a protracted period since litigation.

Investors can use their leverage in different ways, including to divest or sever ties with corporations accused of human rights abuses (Interviewee – CSO 1). Litigation can be both a trigger and consequence of awareness-raising of human rights abuses.

Activist divestment campaign

Following allegations that the Australian government and associated contractors had illegally detained nearly 2,000 asylum seekers and refugees, a class action lawsuit was initiated in 2017 against the government and the corporation managing a detention centre on Manus Island that resulted in settlement of over AUD \$70 million.⁶⁹ Alongside this litigation, activist organisations began to focus on divestment campaigns to apply pressure on investors in Transfield, one of the corporate service providers on Manus. These campaigns contributed to several leading superannuation funds divesting their shares in the corporation.⁷⁰ As one interviewee stated, this prompted some corporations to 'decide not to tender any longer for those detention centre contracts which were incredibly lucrative' (Interviewee – CSO 1).

4.1.D. EDUCATING KEY STAKEHOLDERS

Litigation can be a key educative tool for individuals and groups within the legal profession (lawyers and judges), those representing the interests of rightsholders (CSOs and trade unions), policy makers and the media. Litigation may be driven 'not only for success in the case' but also 'to change the mindset of the judge' (Interviewee – Lawyer 5).

The 'education of judges' can be a key institutional impact of litigation and can serve to overcome 'judicial ignorance' of the particularities of certain human rights claims.⁷¹ Salient cases can operate as a beacon – an example of the importance of certain rights, their substance and application in law.⁷² For example, a report by the Open Society Justice Initiative highlights the importance of such education regarding the development of Indigenous land rights jurisprudence, which often has a close connection to BHR.⁷³ It states that litigating such claims 'requires an extremely high level of comparative legal analysis.'⁷⁴ Similar cases from jurisdictions like Canada or New Zealand have informed emerging decisions in other jurisdictions: 'Both judges and lawyers learn about land rights cases from cases in other jurisdictions and use cases from across the globe to support their legal reasoning.'⁷⁵

Cases being pursued under the 2017 French *Duty of Vigilance Law (Devoir de Vigilance Loi)* are increasing understanding of emerging legal standards concerning HRDD and in so doing, educating the judiciary and the broader public on how corporations can prevent and redress adverse human

rights impacts. The ongoing case against Groupe Casino illustrates the impacts of inadequate HRDD processes in international supply chains.⁷⁶ The spillover effect of litigation supports a broader awareness-raising role that extends to the general public, business and policy makers to educate them about both the importance of securing accountability for corporate human rights abuses and how it can be achieved.

4.2. CHANGING CORPORATE CULTURE

Even before court proceedings have commenced, the spectre of litigation can influence corporate culture. Litigation (or the threat of litigation) can drive change by focusing attention on specific human rights concerns within a corporation, forcing a corporate response ranging from ‘fight and resist’ to meaningful engagement with the relevant rightsholders and CSOs. Determining which response prevails will be influenced by a variety of factors, including the organisational culture of the corporation.

Corporate culture refers to ‘shared customs, beliefs, norms, values and tacit assumptions’ and it can be both ‘a process and a state.’⁷⁷ It may encompass unwritten rules and practices that guide how employees interact with each other and engage with external stakeholders. The culture of the corporation sets the tone for how it approaches business generally, including how it responds to litigation (Interviewee – Business 1). The goal of influencing corporate behaviour may extend beyond the particular corporation concerned, as litigation can have an impact on how business is done more broadly and can engender improvements in the sector and beyond. While the internal culture of a corporation including the ‘tone from the top’ (Interviewee – Business 1) can be difficult to gauge and measure, the Impact Framework proposes three indicators for assessing changes in corporate culture:

- A. Triggering changes to BHR approaches
- B. Responding to reputational pressure
- C. Facilitating broader sectoral changes

4.2.A. TRIGGERING CHANGES TO BHR APPROACHES

Several interviewees noted that litigation can drive internal discussions and changes in corporate approaches to human rights: ‘We often see that particularly sceptical general counsel in the room take notice when you mention that there have been cases brought’ (Interviewee – Business 2). In one study of more than 40 foreign direct liability cases, researchers showed that ‘corporations adjusted their human rights policies and adopted additional measures to cope with human rights issues during or shortly after the legal proceedings.’⁷⁸ For example, the authors note that ‘after ExxonMobil and Chevron were sued for their complicity in human rights violations in Indonesia and Nigeria, respectively, both corporations started introducing human rights policies and other CSR [corporate social responsibility] measures during or shortly after the legal proceedings.’⁷⁹

However, moving from changes in policy to changes in practice can be, as our interviewees noted, difficult to measure and may be more ‘impressionistic than data driven’ (Interviewee – CSO 11). Policy change is a useful, albeit limited, step in changing corporate culture and is susceptible to greenwashing/bluewashing claims. Litigation can impact organisational practices by, for example, encouraging collaboration between different departments within a corporation, or prompting a change in corporate culture from a ‘fight and resist’ approach toward an approach that promotes meaningful engagement with various stakeholders.

Taking the first step: revising policies in response to litigation

In 2003, Occidental Petroleum faced a lawsuit⁸⁰ alleging ‘complicity in extrajudicial killings, torture, crimes against humanity and war crimes’, in relation to an aerial bombing attack by

the Colombian air force on the village of Santo Domingo. The corporation was alleged to have provided strategic information and ground support to the air force. The lawsuit (under the *ATS* and the *Torture Victim Protection Act*) continued for over a decade until its dismissal in 2015. However, in 2004, shortly after the lawsuit was filed, Occidental Petroleum established its first human rights policy which recommended engaging with key CSOs.⁸¹

While policy changes cannot always be directly attributed to litigation, correlation may be drawn between the threat of impending litigation and the responsiveness of the corporation to take an initial step in improving their policies. Moving from policy to practice would then be the ultimate step in showcasing the effectiveness of litigation to influence sustainable change, and for most corporations this remains a work in progress.

4.2.B. RESPONDING TO REPUTATIONAL PRESSURES

Litigation can pose a reputational risk to business. Measuring the direct and indirect impacts of pressure placed on a company's reputation is difficult: for example, media coverage around a lawsuit or a financial settlement may trigger changes in share price which can be both a cause and effect of negative reputational impacts. In addition, impacts may be incremental, influencing a gradual - rather than immediate - change in corporate culture.

In the BHR field, reputation matters, especially for public-facing corporations. Several interviewees noted that a positive human rights response is more likely to ensue where the corporation has a strong public-facing identity (Interviewee - Lawyer 4). The BHR field has long been dependent on public naming and shaming to curate change, and this tactic is most effective when targeted at corporations and sectors that rely heavily on the value of their brand to sell their product. Such corporations are more likely to be susceptible to consumer and media pressure.⁸² Another factor to consider in understanding how reputational pressures may influence corporate behaviour is the gravity of the alleged abuses. For example, human rights abuses such as extrajudicial killings, war crimes, terrorism, torture, and modern slavery are emotive issues and likely to invoke strong public condemnation, potentially increasing the degree of reputational risk.

Reputation matters

Lafarge (a French corporation) had a cement plant near Jalabiya, Syria, near the Turkish border.⁸³ In June 2016, an inquiry into the activities of Lafarge in Syria uncovered financial payments made to an array of armed groups including Islamic State of Iraq and al-Sham (ISIS) and Levant terrorist group to keep the plant operating between 2013-2014.⁸⁴ Lawsuits were filed against the corporation in both France and the US.⁸⁵

Lafarge pleaded guilty in the US case for conspiring to provide material to foreign terrorist organisations and was ordered to pay a substantial fine of USD \$778 million. The impact of the settlement was evident in the drop in share price of some of the subsidiaries. For example, the stock price of Lafarge Africa Plc fell by 2.13% per share.⁸⁶

Lafarge had merged with Holcim, a Swiss-based building materials corporation, in May 2015.⁸⁷ Holcim was careful to separate itself from Lafarge, as the wrongdoing occurred prior to the merger. When the allegations arose in 2016, Holcim conducted an investigation, publicly disclosed the findings in 2017, and fired the former executives involved.⁸⁸

Similarly, following its acquisition of Tahoe Resources in 2019, Pan American Silver was keen to distance itself from allegations previously made against Tahoe. A lawsuit had been filed in 2017 against Tahoe Resources in relation to shootings in 2013 by security guards at the Escobal Mine in Guatemala.⁸⁹ In a press release noting the settlement of the case in 2019, Pan American Silver condemned the use of violence and issued an apology.⁹⁰

The case of Nexa Technologies is another example of litigation generating reputational pressure and influencing a corporate response. Nexa was indicted in 2021 for complicity in torture after supplying surveillance technology to authoritarian regimes in Libya and Egypt.⁹¹ Following the decision, Nexa announced they were unable to manage the 'legal and reputational risks' of providing surveillance technology and therefore will no longer provide such services.⁹²

4.2.C. FACILITATING BROADER SECTORAL CHANGES

Litigation can not only drive change within an individual corporation but can also lead to broader sectoral changes (Interviewee - Business 3). One way to assess this is via the engagement of corporations in multi-stakeholder initiatives that can provide a forum for peer-to-peer discussions and may in turn influence corporate culture.⁹³

Litigation prompting sectoral multi-stakeholder collaboration

In 1999, litigation was brought against several American apparel corporations and Saipan-based garment factories, alleging abusive working conditions, including forced labour, in the production of garments in Saipan factories.⁹⁴ Corporations, including The Gap, were alleged to be producing clothing in sweatshop conditions. The cases were settled in 2004 'with a \$20 million settlement that included 26 retail corporations and 23 Saipan garment factories.'⁹⁵

As part of the settlement, a code of conduct and monitoring process was established for all parties to facilitate systemic change in the sector. The high-profile nature of this lawsuit arguably facilitated the development of the Apparel Industry Partnership (later the Fair Labor Association) which brought together industry and human rights groups to establish and administer a code of conduct and monitoring mechanism that was initially targeted at the apparel and footwear sector.⁹⁶

Multi-stakeholder initiatives may also be responsive to litigation by revising membership criteria or implementing sector-wide peer learning sessions on the impact of a specific lawsuit (Interviewee - Business 3). For example, in 2019 (related to the Mitr Phol lawsuit) a complaint was made against Bonsucro, a multi-stakeholder platform that aims to certify sustainable sugarcane production, using the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises.⁹⁷ In response, Bonsucro updated its code of conduct and grievance mechanism and revised its membership criteria.⁹⁸

Systemic changes may also be observed in a particular sector with the development of new or enhanced BHR practices. For example, in the extractives industry, following some high-profile litigation,⁹⁹ technology corporations publicly raised the need for enhanced HRDD practices to better trace and monitor the sourcing of critical minerals.¹⁰⁰ Changes may also be evidenced by policy changes made by the state and/or regulatory agencies.

Bhopal industrial disaster stimulated broader changes in practice

The settlement concerning the explosion at the UCC factory in Bhopal, which killed more than 3,000 people and harmed thousands of others, has been criticised as failing to meet the harm suffered by the affected rightsholders.¹⁰¹ However, it is also an example of how the fallout from litigation can impact sectoral practices.

Since the tragedy, there has been increased focus on health and safety in the sector. This is crucial, given the cause of the Bhopal disaster was attributed to 'cost cutting methods', 'failure to invest in safety infrastructure' and a 'lack of a safety culture among employees.'¹⁰² As a result of the disaster, changes were made at a sector level, including a reduction in storage inventories, and corporations have begun more rigorous training programs.¹⁰³ The European Union (EU) established the Joint Research Council and the European Centre for Process Safety.¹⁰⁴ The American Institute for Chemical Engineering established the Center for Chemical Process Safety. In the UK, several research networks have focused on process risk and chemistry,¹⁰⁵ and awards commending process safety have been established.¹⁰⁶

4.3. REMEDYING HARM

Providing an effective remedy to rightsholders harmed by business activities is a crucial component of the corporate responsibility to respect human rights. The United Nations Guiding Principles on Business and Human Rights (UNGPs) state that corporations should provide, or cooperate in providing, access to effective remedy through legitimate processes.¹⁰⁷ Litigation has been employed as a key tool to promote access to remedy for corporate human rights abuses. Effective remedy requires not only compensation to affected rightsholders for past harms, but also rehabilitation and guarantees of non-recurrence in the future. Apart from encouraging corporations to meaningfully engage with rightsholders, access to remedy processes are often an important way to positively influence the overall corporate ecosystem.

The Impact Framework proposes two indicators for assessing whether litigation has improved corporate behaviour by promoting access to remedy for rightsholders:

- A.** Encouraging meaningful engagement with rightsholders
- B.** Providing remedy

4.3.A. ENCOURAGING MEANINGFUL ENGAGEMENT WITH RIGHTSHOLDERS

Litigation is a mechanism to counterbalance the power that business has over local communities: litigation can encourage meaningful engagement and ensure that the views of rightsholders are taken seriously. One interviewee explained that in some cases, settlement negotiations have resulted in corporations agreeing not only to establish operational-level grievance mechanisms (OLGMs), but also to set up community projects aiming to benefit the wider community (Interviewee - Lawyer 4). The interviewee reported that these outcomes of litigation were meaningful, but observed that the initiatives had also achieved an enhanced relationship between the business and the community. Another interviewee gave an example of a case where an Indigenous community successfully brought litigation to reclaim their stolen land (Interviewee - Funder 7). When the Indigenous peoples first attempted to claim back their land, they had been perceived as criminals trying to steal land, but with the outcome of the litigation came a shift in narrative and a greater respect as they were now identified as ambassadors of Indigenous land rights.

A report by the Open Society Justice Initiative on Indigenous land rights litigation, with a focus on case studies in Kenya, Malaysia, and Paraguay, notes adverse impacts of litigation such as disillusionment of communities when expectations are unmet or hardening of anti-Indigenous sentiment in some corporations or government officials. However, the report concludes that on balance, litigation has positive effects on attitudes and behaviours.¹⁰⁸ It documents several positive impacts of litigation, including: mapping cultural heritage which re-generates cultural pride within the community; building a sense of legal and political empowerment and greater cohesion in communities; prompting acknowledgement of land rights from corporations or state officials; and contributing toward challenging the power imbalance often felt by communities against corporations or government.¹⁰⁹

Litigation promoting Indigenous land rights

Litigation to promote Indigenous land rights can achieve important recognition for Indigenous communities. In 2021, Indigenous groups from the Brazilian and Colombian Amazon alongside French and American CSOs sued Groupe Casino for allegedly selling beef linked to illegal deforestation, land grabbing and violations of Indigenous Peoples' rights.¹¹⁰ When the Uru-Eu-Wau-Wau People joined the litigation, their spokesperson, Bitaté Uru-Eu-Wau-Wau, explained the community's hope 'that the Casino case will serve as an example to other corporations, and that it will contribute to reducing deforestation in the Amazon as well as guaranteeing the rights of [I]ndigenous people.'¹¹¹ At the time of writing, this case has not yet concluded but is providing a high-profile example of how (not) to engage with Indigenous communities.

While the final outcome of litigation often receives the most media attention, the process of litigation can also positively influence meaningful engagement between corporations and communities. Litigation can force businesses to share information with the local community and the involvement of the courts can encourage transparency surrounding corporate activity. The process of litigation can also improve inclusivity both in terms of how corporations engage with communities and within the community itself.

One interviewee spoke about her experiences of working with communities on litigation and how she has seen the litigation open up opportunities for development of the rights of women and other groups in the community (Interviewee - Funder 3). For example, in one case, at the start of the litigation, women in the community were not permitted to speak in public and therefore women's views were not considered in negotiations with business and in relation to the litigation. As part of the litigation process, surveys were conducted of all segments of the community to properly determine the needs and views of the community. By the end of the litigation process, women in the community were speaking in public, even in front of men, and asking for more rights, education and opportunities. Reflecting on this case, the interviewee noted: 'What a transformative moment that the women in the community are empowered by litigation' (Interviewee - Funder 3).

Litigation thus has a ‘humanising power’¹¹² in telling people’s stories, increasing transparency, contesting truths and establishing facts. Elevating the voices of rightsholders and building agency in these ways encourages corporations to meaningfully engage with rightsholders. As another interviewee said, in human rights litigation ‘we are looking not only to obtain a result: we are also looking at increasing respect for people who were victims of a violation, but who are necessarily – and have to be perceived necessarily – as agents. So, the idea of leadership through litigation is very important’ (Interviewee – Funder 7).

4.3.B. PROVIDING REMEDY

Ensuring rightsholders have access to effective remedy is crucial towards enhancing business respect for human rights and corporate accountability. The United Nations (UN) Working Group on Business and Human Rights has acknowledged that: ‘Rights holders affected by business-related human rights abuses should be able to seek, obtain and enforce a bouquet of remedies: a range of remedies depending upon varied circumstances, including the nature of the abuses and the personal preferences of rights holders.’¹¹³ The provision of remediation should take into account direct and indirect impacts on rightsholders and the UN Working Group’s report highlighted five different forms of remedy: restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.¹¹⁴

Litigation is a unique mechanism that facilitates access to several forms of such remedy for affected rightsholders.

Compensation success

The Nkala class action was brought by ex-miners to seek remedy against 32 gold mining corporations operating 82 mines throughout South Africa.¹¹⁵ The miners had developed silicosis from working in gold mines and alleged that the defendant corporations were aware of the dangers and failed to take adequate measures to protect them from harm.¹¹⁶ In July 2019, the Johannesburg High Court approved a settlement of 5 billion Rand (about USD \$353 million).¹¹⁷ The litigation provided access to remedy in the form of compensation for rightsholders harmed by the mining corporations.

After 2,577 Zambian farmers commenced litigation against UK company Vedanta Resources Ltd and its Zambian subsidiary for ‘damage to their land and waterways from copper mining effluent and emissions’,¹¹⁸ both corporations reached a confidential settlement with the farmers in December 2020.¹¹⁹

Another case that achieved remedy in the form of compensation for rightsholders was brought by four Nigerian farmers and the Dutch environmental group Milieudefensie (Friends of the Earth) against Shell and its subsidiary in Nigeria,¹²⁰ in relation to oil pollution of several villages in the Niger Delta.¹²¹ While the case took 15 years to resolve, it resulted in €15 million in compensation for the affected communities, and the case was reportedly the first time a Dutch multinational was held responsible for the actions of an overseas subsidiary.¹²²

While compensation is a common form of remedy pursued in litigation, other forms of remedy can also be achieved alongside compensation or even instead of compensation. For example, in the case discussed above where Shell paid compensation to Nigerian communities affected by oil pollution, the court additionally ordered that the corporation must install an oil leak warning system to prevent future harm.¹²³ Further, in a different case against Shell, the corporation was ordered to comply with environmental targets set by the Paris Agreement.¹²⁴ Cases such as these, which force corporations to change their conduct, are a creative use of litigation and show clearly that it can directly impact corporate behaviour.

Our research also found that litigation can influence business in establishing operational-level grievance mechanisms (OLGMs), which is another route through which rightsholders can access remedy. Several interviewees provided examples of corporations establishing OLGMs as a result of litigation, such as the Gemfields litigation on behalf of communities in the vicinity of the Montepuez mine in Mozambique, which included the establishment of an independent OLGM as one of the key elements of the settlement agreement.¹²⁵ Corporations have also reportedly established OLGMs as a pre-emptive measure to avoid litigation after observing litigation against other corporations in the sector.¹²⁶

4.4. SHAPING LAWS AND POLICIES

As the BHR regulatory landscape continues to evolve, corporations face ever-increasing pressure to respect human rights. Litigation is a key element shaping the regulatory framework and crafting legal standards. Litigation can influence the development of both soft and hard standards, as the saliency of litigation draws attention of regulators, lawmakers and policy advisors to key BHR issues. It can highlight the limitations and gaps of existing regulation, contribute to the creation of new domestic or international regulations and laws, strengthen the enforcement of current laws and policies and develop new remediation pathways. In assessing this particular impact, it is useful to apply a long lens as while regulatory changes may be immediate, it is more likely they will build over time. Two indicators of such impact are:

- A. Developing responsible business standards
- B. Clarifying legal standards to shape corporate accountability

4.4.A. DEVELOPING RESPONSIBLE BUSINESS STANDARDS

Litigation, and the awareness that it raises, can operate as a powerful instigator for governments to establish or revise regulatory frameworks concerning responsible business conduct. The cause or issue underlying litigation is often indicative of a failure of existing laws and policies. Equally, litigation exposes governance gaps where new laws and policies are required.

Interviewees emphasised many ways in which litigation can influence policy makers and legislators including via 'congressional testimony, parliamentary testimony and key meetings with regulators' (Interviewee - Funder 3). While it is not always possible to directly attribute law and policy developments to a single piece of litigation given the numerous social factors that influence policy makers (Interviewee - Funder 6), in some cases it is straightforward to link the outcome of litigation with the development of new legal standards.

Influence of the *Ratha*¹²⁷ case on legislative reform

Cambodian workers brought claims in the United States under both the *ATS* and the *Trafficking Victims Protection Reauthorization Act (TVPRA)* alleging that they were trafficked into Thailand to work in forced labour at Phatthana Seafood's shrimp processing plant. Allegations included debt bondage, confiscation of identity documents, threats of arrest, and poor living conditions, as well as physical and verbal abuse.¹²⁸

In 2022, the US Ninth Circuit held that civil liability under the *TVPRA* did not extend to those who try to benefit from forced labour, setting a precedent for narrowing the application of the law.¹²⁹ After the court denied review, several CSOs who believed the court had wrongly interpreted the law lobbied Congress to amend the statute to clarify its intent. Nine months after the decision, Congress amended Section 1595 of the *TVPRA* to clarify that it applies to those who 'attempts or conspires to benefit' from forced labour. This legislative reform was a direct response to the Ninth Circuit's decision in the *Ratha* case.

A range of extraneous variables determine whether litigation will be influential, many of which are beyond the control of the litigators. This is often reflected in considerations made by CSOs to partner litigation with a targeted advocacy strategy, drawing on the arguments put forward by the litigation to urge policy makers to take action on reforms.

The impact of litigation on BHR policy reform

*Araya v Nevsun Resources*¹³⁰ involved allegations of slavery, forced labour, cruel, unusual or degrading treatment, and crimes against humanity against Nevsun, a Canadian mining corporation. Although the case settled out of court, ongoing advocacy in Canada, both related to and adjacent to this case, likely contributed to several policy changes that were instituted in Canada concerning abroad actions of Canadian corporations. For example, in early 2018, the Canadian federal government announced that an independent Canadian Ombudsperson for Responsible Enterprises would be created with a mandate to 'investigate allegations of human rights abuses linked to Canadian corporate activity overseas.'¹³¹ Additionally, in late 2018, the *Autorité des marchés financiers* (the Security Regulatory Authority of Quebec) issued a guidance notice on existing disclosure requirements relating to modern slavery.¹³²

Beyond influencing domestic legislation and policy, litigation can be impactful in shaping regulation more broadly and have a ripple effect in influencing regulatory changes in other jurisdictions too. Notably, interviewees highlighted that due to the global nature of the issues at the core of litigation, BHR advocacy is often specifically targeted at multinational corporations operating across multiple jurisdictions.

The ripple effect of litigation

Following the Bhopal tragedy in India and subsequent litigation, the US passed the *Emergency Planning and Community Right-to-Know Act* in 1986.¹³³ The US Congress also gave directions to the Occupational Safety and Health Administration and Environmental Protection Agency and a Process Safety Management System has since been implemented. This policy has had a subsequent impact in the Netherlands, Belgium, the UK and Germany,¹³⁴ where establishments that fall under the Seveso directive¹³⁵ must submit information on major hazard prevention policy.

Cases pertaining to human rights issues in global supply chains are influencing the ongoing development of international labour regulations and due diligence standards.¹³⁶ The emergence of corporate human and environmental rights due diligence laws in Europe is powered in part by the growing array of lawsuits in this field.¹³⁷ Since its establishment in 2017, the French Duty of Vigilance Law has spawned – according to the Duty of Vigilance Radar¹³⁸ – 15 different formal notices against 13 different corporations. The prominence of such initiatives has contributed to increased policy vigilance and subsequent legislation in the Netherlands, Germany and Norway to address BHR issues in global supply chains.

In 2020, the European Parliament published a briefing paper titled ‘Towards a mandatory EU system of due diligence for supply chains’, detailing potential options for an EU law on due diligence.¹³⁹ This followed high profile national cases concerning human rights abuses in supply chains, such as the French case involving the corporation Lafarge pleading guilty to financing terrorist groups at their cement plant in Syria.¹⁴⁰ In May 2023, the European Parliament passed the *Directive on Corporate Sustainability Due Diligence*. Once adopted, the Directive will require all 27 EU member states to implement it by enacting a domestic law within two years.

Litigation has been a push-factor in influencing legislative and policy reforms at national, regional and international levels, and when accompanied by other advocacy measures, can achieve significant impact in shaping regulatory standards.

Influence of KiK lawsuit on German legislation¹⁴¹

A singular piece of litigation may be influential in legislative reform even when the plaintiffs are unsuccessful in the legal proceedings. In September 2012, 258 workers lost their lives and over 50 more were injured in a fire at a textile factory in Baldia, Karachi, Pakistan.¹⁴² The German clothing discounter KiK purchased approximately 70% of the products from the factory.¹⁴³ Following the disaster, KiK agreed to provide USD \$1 million in compensation to the victims.¹⁴⁴

In 2015, four of the victims filed a civil claim against KiK in Germany. In 2019, this claim was dismissed on the grounds that under Pakistani law, the statute of limitations had expired. BHR advocates in Germany had been consistently advocating for new laws regulating business conduct and the KiK ‘failed’ lawsuit was used as a campaigning tool. On 1 January 2023, the German Supply Chain Due Diligence Act came into force.¹⁴⁵ The law requires corporations

with 3,000 or more employees in Germany to establish a due diligence process to prevent and redress corporate abuses of human and environmental rights in their global supply chains. Corporations that violate the law may be 'fined depending on the severity of the violation.'¹⁴⁶

4.4.B DEVELOPING LEGAL STANDARDS TO SHAPE CORPORATE ACCOUNTABILITY

One civil society interviewee stated: 'What I see real value in, from a strategic litigation perspective, is the procedural part of that ecosystem.' Commending the 'phenomenal' impact of cases such as *Vedanta* and *Nevsun* (see below), they stressed the importance of litigation's role in 'laying down the foundations for systems that are more fair and equitable and more accessible' (Interviewee - CSO 10).

Litigation is actively formulating BHR jurisprudence, which is in turn guiding corporate behaviour. Litigation outcomes that generate entirely new possibilities for the promotion of human rights are rare, but when they happen, they can achieve incredibly positive impacts. For example, the seminal case of *Doe v Unocal* held that corporations can be liable for violations of international law under the *ATS*¹⁴⁷ and established a broad precedent and renewed interest in pursuing corporate accountability legal actions (although it has been narrowed in subsequent years - see section 4.5.A below for further discussion).¹⁴⁸ More recently, a similar development occurred in Canada in the *Nevsun* case.

The *Nevsun* case and corporate accountability under customary international law

*Araya v Nevsun Resources*¹⁴⁹ involved a Canadian mining corporation operating in Eritrea. Workers sued *Nevsun* alleging slavery, forced labour, cruel, unusual or degrading treatment, and crimes against humanity. The workers argued *Nevsun* was in violation of customary international law and that Canadian courts can uphold customary international law as it becomes part of Canadian law automatically. *Nevsun* argued that Canadian courts did not have jurisdiction to hear the claims as the events occurred in Eritrea. Further, *Nevsun* argued that it could not be sued for violating customary international law.

In February 2020, the majority of the Supreme Court of Canada ruled that customary international law is automatically part of Canadian law and does not require an act of parliament to pass it into force.¹⁵⁰ The judges did not assess whether *Nevsun* violated the workers' rights, instead remitting the case to a trial judge to determine whether *Nevsun* violated customary international law. The case was settled for an 'undisclosed amount' later that year.¹⁵¹ The precedent set by the *Nevsun* case means that all Canadian corporations will be alert to the risk of being sued for breaches of customary international law.

An emerging area of BHR jurisprudence involves climate litigation. The first judgment in history to hold a corporation accountable for its contribution to climate change was delivered in 2021.¹⁵² *Shell*, the largest polluter in the Netherlands, was ordered to comply with targets set by the Paris Agreement and the court also confirmed that its responsibility for human rights impacts extends not only to the corporation's impacts, but also to its entire global value chain in accordance with the UNGPs.¹⁵³

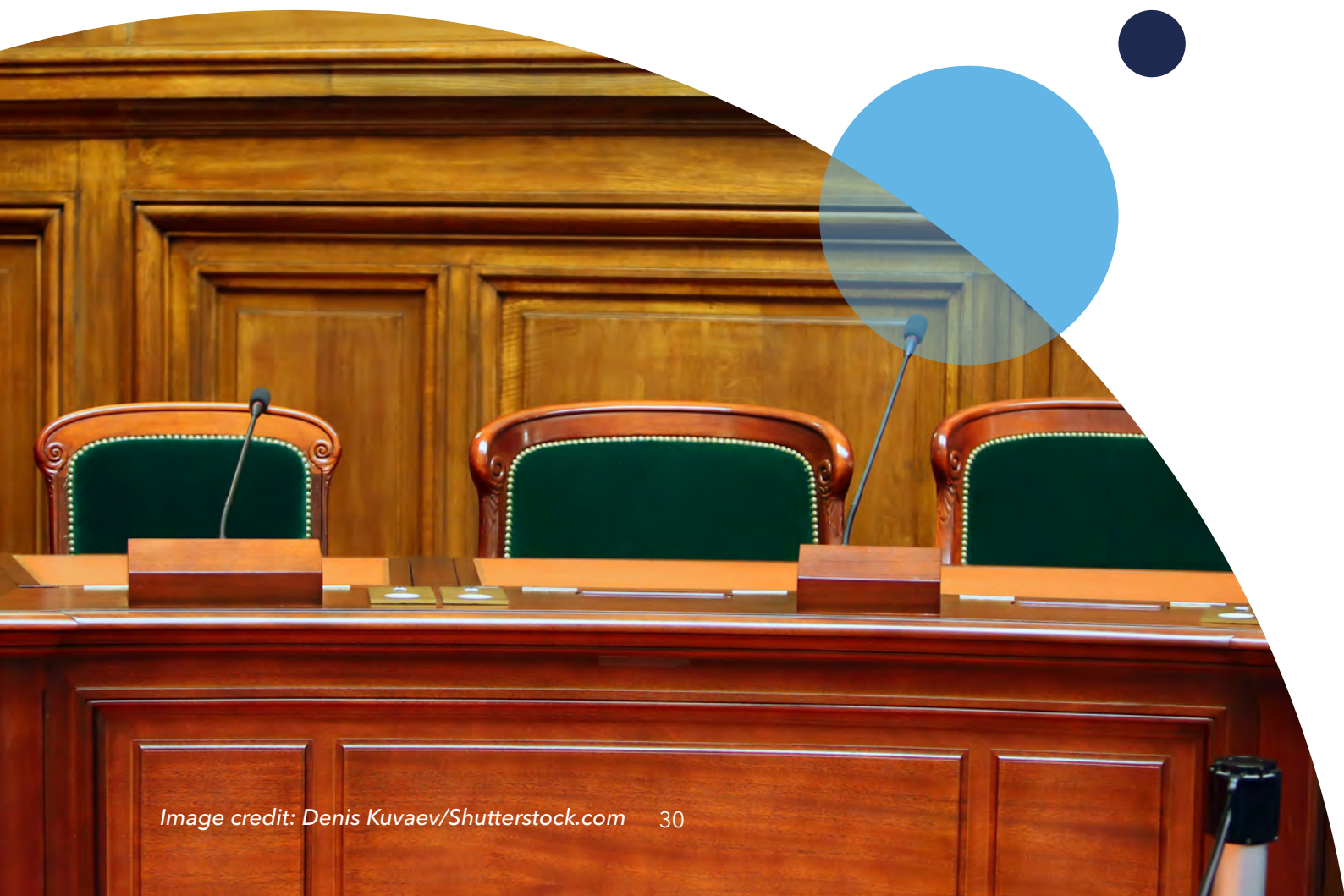
Alongside the development of jurisprudence, litigation has the power to create new pathways for access to remedy. For example, in addition to the precedent set in the *Nevsun* case, the *Vedanta* case is another example of litigation developing a new way to hold parent companies accountable for human rights abuses linked to their subsidiaries.

The Vedanta case and direct duty of care principle

UK courts have developed parent companies' direct duty of care principles in recent years. Zambian villagers brought litigation in the UK against Vedanta Resources, a mining corporation headquartered in London, for harms caused by toxic environmental pollution.¹⁵⁴ The harmful pollution was caused by Vedanta's Zambian subsidiary, Konkola Copper Mines. A central issue in the case was whether Vedanta as the parent company could have a direct duty of care to persons harmed by their subsidiary's actions. The 2019 UK Supreme Court ruling affirmed that a direct duty of care can be imposed on a parent company in certain circumstances. After this ruling, the proceedings were returned to the High Court for trial, and then Vedanta ultimately agreed to settle without admission of liability.¹⁵⁵

There have been other recent UK cases where UK-based corporations have been found to owe a duty of care to persons overseas. *Rihan v Ernst & Young*¹⁵⁶ applied the principles laid down in the Vedanta case and was the first UK case to find a multinational corporation responsible for overseas activities following a full trial.¹⁵⁷ In *Begum v Maran*¹⁵⁸ a UK-based corporation was held to owe a duty of care to a worker in Bangladesh. The corporation sold a ship made from hazardous materials to a third party who arranged for the worker to dismantle the ship. The worker suffered fatal injuries while dismantling the ship. Even though there is a duty of care principle that a defendant is not liable for the actions of a third party, the court found that the corporation created the danger and was therefore liable.¹⁵⁹

While litigation has operated to break boundaries and establish innovative forms of seeking corporate accountability, it can also create precedents that limit legal accountability, which is discussed below.



4.5. NEGATIVE IMPACTS ON CORPORATE BEHAVIOUR

The goal of rightsholders and CSOs in initiating litigation is to achieve positive outcomes such as improving corporate behaviour or securing access to remedy. However, litigation is unpredictable and can have negative consequences too. These negative impacts – on corporate behaviour (discussed below) and on those initiating litigation (see section 4.6) – should be considered for a holistic understanding not just of the potential rewards but also of the risks involved in litigation.

The Impact Framework proposes three indicators for assessing negative impacts on corporate behaviour:

- A. Establishing regressive precedent or laws
- B. Disrupting relations between corporations and communities
- C. Creating unintended adverse impacts on transparency

4.5.A. ESTABLISHING REGRESSIVE PRECEDENT OR LAWS

Each case carries the risk of producing unfavourable legal precedent, which not only results in a negative outcome for the case at hand, but can also have adverse consequences for the interests of affected communities in the future, and reverse elements of change that came before. Unfavourable outcomes can weaken the ecosystem that regulates business and so have a negative impact on corporate behaviour. Negative precedents are not easily reversed and can create an unhelpful narrative that human rights abuses are acceptable, which risks undermining the very human rights values at the core of the case.¹⁶⁰

However, it is worth noting that negative precedents can also open the door to the use of other innovative techniques, including under-applied legislation (such as the *Racketeer Influenced and Corrupt Organizations Act* (RICO) in the US) or prompting BHR lawsuits in other jurisdictions.¹⁶¹

The narrowing of corporate accountability avenues in the US

While BHR cases continue to be filed in the US with mixed results, the early optimism that attached to the *ATS* following *Doe v Unocal* has waned. As mentioned in section 4.4.B, this case held that corporations can be liable for violations of international law under the *ATS*.¹⁶² Since then, several US decisions have narrowed the circumstances where the *ATS* will apply and disrupted the relatively recent trend that was emerging to apply the *ATS* to BHR claims.¹⁶³ For example, early *ATS* cases concerned human rights abuses perpetrated outside of the US, however the 2013 US Supreme Court decision in *Kiobel v Royal Dutch Petroleum*¹⁶⁴ held that the *ATS* is not applicable to allegations unless they ‘touch and concern’ the US.¹⁶⁵

Even if litigation is successful, governments may respond by enacting regressive legislation undermining the court’s decision. For example, several successful cases in Malaysia relating to recognition of Indigenous land rights have been undermined by legislative developments.¹⁶⁶ Due to their widespread power and influence, responses from governments can be particularly damaging to broader social movements. States may also adopt regressive laws and policies to limit civic space.¹⁶⁷ There are instances of governments narrowing availability of legal aid,¹⁶⁸ restricting *locus standi* (the right to appear in a court or before any body on a given question), limiting space for public protests,¹⁶⁹ or limiting foreign funding to local CSOs to support or initiate litigation.¹⁷⁰

For example, following the lawsuit¹⁷¹ against mining corporation BHP regarding pollution at its OK Tedi mine in Papua New Guinea in the 1990s, the Papua New Guinea government responded by legislating to provide BHP with immunity against compensation claims by landholders whose land was affected by pollution flowing from the collapse of the tailings dam inundating waterways, villages

and destroying forests. This immunity was subsequently withdrawn in 2013 with the government asserting it was a bad decision to deny its citizens their right to sue for damages.¹⁷²

4.5.B. DISRUPTING RELATIONS BETWEEN BUSINESS AND COMMUNITY

Our research uncovered that some corporations can react strongly to being sued and this can disrupt their relations with communities. Some corporations may even decide to make the litigation process as difficult as possible for those initiating the litigation and refuse to engage with the process in good faith. In addition, some corporations may follow an unwritten policy of refusing to settle litigation because doing so would set a precedent and encourage more litigation (Interviewee - Business 5).

One business interviewee suggested that litigation can often be counterproductive to resolving the human rights issue at the centre of the case, warning that if a business wants to engage in good faith and negotiate with the rightsholders to come to a solution, commencing litigation can act as a barrier (Interviewee - Business 1). Similarly, a civil society interviewee explained that communities who are negotiating with local managers of the business might have a good chance of coming to practical solutions but as soon as the prospect of litigation is mentioned, the local managers hand the issue over to the business headquarters and legal department, and the community's ability to engage and negotiate is impacted by confidentiality rules and the formal legal processes involved with litigation (Interviewee - CSO 12).

4.5.C. CREATING UNINTENDED ADVERSE IMPACTS ON TRANSPARENCY

It is often difficult to predict how corporations will respond to litigation, and unintended adverse impacts of litigation can arise even when the outcome of the case is viewed as successful. *Nike v Kasky*¹⁷³ (2003) was an early BHR case which sought to establish that public statements on Nike's corporate social responsibility (CSR) practices were subject to California's laws on false and misleading commercial messages or advertising. While the litigation was motivated to promote truthful CSR reporting, Nike initially responded to the litigation by restricting publication of corporate information including their annual CSR report, with corporation officials reporting that the litigation caused a chilling effect on corporate transparency.¹⁷⁴ Similar concerns have arisen in relation to the more recent *Vedanta* case decision in the UK.

The impact of the *Vedanta* case decision on corporate transparency

The direct duty of care principle in the *Vedanta* case (that parent companies can be held directly liable for harm caused by their subsidiaries in certain circumstances, discussed in section 4.4.B above) may make corporations more cautious of what information they disclose.¹⁷⁵ The court suggested that parent companies may be held responsible for actions of subsidiaries, if the parent holds itself out as supervising and controlling the actions of subsidiaries in publications such as reports or policies.¹⁷⁶

There is a potential tension between the UNGPs and judicial decisions like *Vedanta*: the former expects corporations to disclose more information (including damaging information), while the *Vedanta* decision in effect cautions corporations against doing so (Interviewee - Lawyer 4). Our interviews confirmed that corporations have been advised by legal advisors to adapt their policies and practices, and reduce disclosure, in response to the *Vedanta* decision, to avoid litigation that may be prompted by disclosure of corporate information. As one interviewee stated: 'What companies say in their material has now changed a lot because of the understanding of the risk of litigation. So that's a change that doesn't reflect any improvement in human rights standards. It reflects an improvement in legal protection of the company' (Interviewee - Lawyer 4).

However, while businesses may respond to the *Vedanta* decision and seek to restrict the information they provide publicly, other pressures – such as demands for greater transparency from ethical investors or legislation such as the UK and Australian modern slavery laws – may act to counterbalance this to some extent.

4.6. NEGATIVE IMPACTS ON INITIATORS OF LITIGATION

Litigation also involves risks of negative impacts on those involved in initiating litigation such as rightsholders, CSOs and HRDs. The Impact Framework identifies the following two indicators to assess such impacts:

- A. Increasing security risks and SLAPPs
- B. Imposing costs: time, resources, and community conflict

4.6.A. INCREASING SECURITY RISKS AND SLAPPS

When business or other powerful players respond to litigation with hostility, it can have devastating impacts on the initiators of litigation. The risk of rightsholders, CSOs and HRDs facing intimidation, harassment, violence or even murder is a serious potential negative impact of litigation.¹⁷⁷ BHR litigation often relates to human rights abuses occurring in geographic regions which have high rates of violence, underdeveloped justice systems and corruption, all of which make protection of HRDs more difficult.

There are some ways to mitigate these risks, such as protecting the identity of the rightsholders initiating the litigation through the use of a pseudonym or having key people removed from the country for witness protection. However, in some circumstances this risk will be a barrier to pursuing litigation: several interviewees reported that they had ceased case investigations because the security risk was too high. One civil society interviewee stated: 'Risk is always a big issue. Depending on the kind of case we are talking about, sometimes the potential plaintiffs or potential witnesses would be at too high of a security risk for bringing a case and pursuing it all the way through to be viable' (Interviewee – CSO 5).

SLAPPs are a type of litigation initiated by corporations to weaponise the risks and costs of the court process against HRDs with the aim of discouraging criticism or opposition.¹⁷⁸ There has been an increase in SLAPPs in the global south, including in Thailand, India, Indonesia, the Philippines, and South Africa.¹⁷⁹ The cases often feature corporations targeting local activists that are opposed to certain business activities or targeting journalists who are reporting on issues of public interest. Research has identified 152 cases in the US in the 10 years up to 2022 where the fossil fuel industry used SLAPPs 'and other judicial harassment tactics' to attempt to silence critics.¹⁸⁰

Our research found that initiators of litigation are concerned about the risk of SLAPPs. Interviewees explained that before commencing any litigation, the risk of SLAPPs will be assessed and considered. SLAPPs have been used in direct response to litigation but also in cases where HRDs have made public statements about the conduct of a corporation which may (or may not) lead to litigation. In both cases, SLAPPs have a chilling effect on human rights advocacy and litigation.

Retaliatory SLAPP suits

In 2016, 14 migrant workers filed a complaint with the National Human Rights Commission of Thailand alleging a chicken farming corporation, Thammakaset Co. Ltd., was responsible for labour violations. The complaint was resolved in the workers' favour with an order made for Thammakaset to pay 1.7 million baht in compensation. In the following four years, Thammakaset filed more than a dozen SLAPPs against at least 20 of the workers, activists and journalists involved in uncovering the labour violations. These SLAPPs resulted in at least one criminal conviction and prison sentence.¹⁸¹

Another example is the litigation initiated by the Thai pineapple processing operation Natural Fruit Company against a human rights activist, Andy Hall.¹⁸² Following the publication of a research report exposing alleged labour rights breaches, co-authored by Hall,¹⁸³ Natural Fruit Company launched four separate retaliatory cases.¹⁸⁴ These cases involved various criminal defamation and computer crimes charges, or accusations of civil defamation.¹⁸⁵ Following protracted and costly legal proceedings and multiple appeals, the cases have all been dismissed or found in favour of Hall.¹⁸⁶

SLAPPs have also been brought against the CSO Sherpa in France.¹⁸⁷ Sherpa has been an early adopter of using litigation as a tool to hold corporations accountable under the French *Duty of Vigilance Law*. In 2015, Sherpa filed a criminal complaint to a French Tribunal alleging that VINCI Construction was using forced labour in their construction of Qatar World Cup infrastructure.¹⁸⁸ Following statements made by Sherpa's President in a published interview in relation to the criminal complaint,¹⁸⁹ VINCI Construction filed a defamation suit in a Paris court against Sherpa and its employees.¹⁹⁰ In 2017, this SLAPP was dismissed on appeal.¹⁹¹

Interviewees explained hostile corporations may also engage in other strategies such as 'smear campaigns' which aim to frustrate HRDs and undermine community cohesiveness.

4.6.B. IMPOSING COSTS: TIME, RESOURCES, AND COMMUNITY CONFLICT

Litigation is a costly and unpredictable exercise. Stakeholders initiating litigation must carefully consider the risk of investing large amounts of time and resources into pursuing the litigation and the opportunity cost involved. Further, in some jurisdictions, there can be a risk to stakeholders initiating litigation of being exposed to adverse costs orders if the case fails.¹⁹² Litigation may not always be worth the investment: 'there may be reason to question how much really changed beyond the confines of the courtroom, while lengthy and resource-intensive proceedings were depleting resources that could perhaps more effectively have been channelled elsewhere.'¹⁹³

For example, victims in Arica, a port city in northern Chile, sued Boliden Mineral AB in a Swedish Court for dumping toxic waste in their region which allegedly caused widespread serious disease. In 2019, after six years before the courts, the case was dismissed as time barred, leaving the plaintiffs to pay €3.2 million in litigation costs.¹⁹⁴

Even if a case is successful, in some circumstances the result may still not meet expectations. Rightsholders may be disillusioned when some of their compensation amount is eaten away by legal costs; or the case may provide compensation but not guarantee the cessation of the human rights abuse at the core of the case; or the compensation amount may not be sufficient to effectively remedy the harm; or in some cases court judgments can go unenforced.

The Bhopal gas tragedy and subsequent litigation provides a poignant example of a 'successful' case which has left rightsholders disillusioned. It is now several decades after the tragedy and the community is still suffering ongoing repercussions to people's health and wellbeing. Survivors report that the litigation has left them without proper justice as the compensation payment was insufficient and/or misdirected.¹⁹⁵

Similarly, CSOs may be frustrated if a case delivers compensation for rightsholders but does not guarantee wider systemic change to corporate behaviour. One civil society interviewee provided an example of a well-known oil spill case that is widely considered a successful case because the community were provided compensation, however oil leaks in that region continue which seems to undermine the success of the case (Interviewee - CSO 5).

Frustrations may also arise due to the protracted nature of litigation. Communities commonly have to wait years for the court process to run, and while they wait, rightsholders are often struggling to survive without relief for the abuses they have suffered. For example, four Nigerian farmers, together

with Milieudefensie (Friends of the Earth Netherlands), sued Shell in a Dutch court for compensation regarding oil spills in Nigerian villages.¹⁹⁶ Whilst the litigation was ultimately successful, the case ran for a long 15 years. All four farmers passed away during the legal process with the cases continued by family members.¹⁹⁷

Finally, another cost of litigation is potential community conflict. Litigation in the BHR field is often initiated on behalf of a community of rightsholders rather than individual litigants. In litigation brought on behalf of a group of people, there are several ways that the litigation can cause conflicts or divisions. While the litigation is in process, there can be disparate views amongst the community about the litigation and this can lead to conflicts or divisions. If there is a positive outcome resulting in compensation, some within the group can feel the distribution of any damages achieved is unfair, or if some within the group were not awarded damages at all this can cause divisions and unrest. Individuals or communities receiving compensation can be targeted by bad actors who prey on vulnerable people who may not have experience of handling significant sums of money. One interviewee explained that in regions where communities share collective ownership of property and rights, if individuals (rather than the community as whole) receive compensation, they may be ostracised and viewed as being in the pocket of the business (Interviewee - Lawyer 4).



5. STRATEGIES TO MAXIMISE THE IMPACT OF STRATEGIC HUMAN RIGHTS LITIGATION ON CORPORATE BEHAVIOUR

A review of literature and case studies as well as insights gained from interviews reveal several strategies and variables that could enhance the chances of litigation making an impact on corporate behaviour. While some of these strategies and variables will be relevant before initiating litigation, others will be at play during and after litigation.

5.1. SELECT THE RIGHT CASE

The importance of selecting the 'right' case cannot be over-emphasised. Whether a case is right or not will depend upon the purpose behind commencing a particular case as well as the organisation's goals for initiating litigation. A few common variables should be considered:

Does the defendant have a public face?

Given that litigation also unfolds outside the court setting, it matters whether the defendant corporation has a public image and whether it cares to safeguard this image. Reputation matters and consumer-facing brands are likely to be more wary of public pressure and exposure linked to litigation (Interviewees - Business 3; Business 6; Lawyer 4). Irrespective of the outcome, litigation creates a reputational risk, especially for public facing corporations (Interviewee - Business 5). This perhaps explains why litigation in the apparel and automobile industries has brought more changes compared to litigation in the extractive industries where consumers are in a different proximity to the product (Interviewee - CSO 8).

Are the allegations of abuses perceived to be serious?

The more serious the allegations of human rights abuses are perceived to be, the higher are the chances of litigation raising public attention and in turn putting pressure on the relevant corporations to meaningfully address the allegations. The perception of seriousness on the part of the public, the media or defendant corporations may depend on the nature of a given abuse - for example, a corporation being 'in court to be accused of contributing to crimes against humanity' (Interviewee - CSO 6). Corporate human rights abuses may also be perceived as serious when they involve a large number of victims (e.g. the Bhopal gas disaster or the Rana Plaza collapse) or cause irreversible harm (e.g. deaths, environmental pollution, destruction of a historical site).

Is credible evidence accessible?

If credible evidence of alleged abuses is accessible with relative ease, this will enhance the chances of litigation's success in court (Interviewee - CSO 8) or encourage the corporation to settle the case outside of court. Moreover, the presence of credible evidence will allow organisations pursuing litigation to leverage such evidence in public advocacy and the media. Another relevant factor, even with credible evidence, is who is alleged to be at fault. If the allegations relate to 'direct linkages' (as opposed to causation or contribution), some corporations may see limited fallout from litigation and defend themselves more vigorously (Interviewee - Business 5).



Is the forum the most suitable?

Initiators of litigation should make an initial assessment of whether the proposed forum is the most suitable. Apart from the facts of a given case, various external factors (e.g. applicable law, court's approach, cost apportionment, risk of reprisals against witnesses) will have a bearing on this determination. For example, the litigation against Mitr Phol for land grabbing and forced displacement of Cambodian farmers was initiated in Thailand because the lawyers concluded that it would be more difficult to pursue the case in Cambodia (Interviewee – Lawyer 5). Availability of legal aid (or the lack of it) may be another factor to consider in determining the suitability of a given forum (Interviewee – Lawyer 4).¹⁹⁸



Is an enforcement of court orders likely?

Lawyers and organisations pursuing litigation should evaluate the feasibility of enforcing court orders due to practical legal barriers or governance issues, especially if the primary goal of litigation is to seek access to remedy for the affected rightsholders. Non-enforceable court orders have limited utility for victims of corporate human rights abuses (Interviewee – CSO 10). While National Contact Points (established under the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct) are not judicial institutions, it should be considered whether the non-binding nature of their recommendations will raise similar concerns for affected rightsholders.¹⁹⁹



Does the defendant have a responsive culture?

Corporate culture has a direct bearing on how a business deals with allegations of human rights abuses – whether the corporation is dismissive, defensive or responsive to the allegations. If it is possible to know beforehand (e.g. by looking at how it dealt with similar litigation in the past or how it responds to outreach from CSOs (interviewee – Business 3) that the defendant corporation has a culture of taking human rights allegations seriously and being responsive to them, that may enhance the prospects of success (Interviewee – CSO 8).

5.2. EVALUATE AND MANAGE NEGATIVE RISKS OF LITIGATION

Apart from entailing significant financial cost, litigation may create multiple risks. It may, for example, create additional risks to the affected individuals and communities as well as HRDs and organisations supporting them.²⁰⁰ Lawyers and organisations pursuing litigation should therefore evaluate and reduce these risks as far as possible.



Is the proposed litigation likely to cause harm to the relevant parties?

Organisations pursuing litigation should assess and proactively reduce, on an ongoing basis, risks of litigation to the affected rightsholders as well as HRDs or organisations supporting them. Failure to do so might not only worsen the situation but also create distrust with partners on the ground. It is therefore critical to follow the 'do no harm' principle throughout the litigation (Interviewee – CSO 8). For instance, digital safety and security should be a priority in relation to communication with affected rightsholders, witnesses and CSOs due to ongoing surveillance of HRDs by states and/or corporations. Plans should also be put in place on how to deal with SLAPP cases and persecution of HRDs. Litigation initiators should assess on an ongoing basis if litigation is creating or worsening divisions and conflicts within communities and adapt their strategies accordingly.



Will litigation create regressive corporate practices?

If litigation results in corporations diverting assets to less responsible corporations or disclosing less non-financial information due to further litigation risks, that will be counterproductive (Interviewee – Business 6). Moreover, due to litigation, lawyers might advise defendant corporations to discontinue or pause human rights programs and limit engagement with partners (Interviewee – Business 5). Although a prior assessment may not always be possible or

easy, initiators of litigation should consider in advance how corporations are likely to adapt to court determinations. For example, they may ask whether litigation relying on information shared in annual reports or during stakeholder engagement may result in decreased transparency.

 **Will litigation set unfavourable legal precedents or bring a regressive change in laws and policies?**

Litigation is a double-edge sword in the sense that courts may use cases to limit the legal basis of litigation in future cases against corporations or to curtail public support for such litigation. Therefore, organisations pursuing litigation should make a holistic and long-term assessment of the pros and cons of litigation. Past decided cases, argumentation of defendant corporations and public statements of government officials may give some indication of these risks.

5.3. COLLABORATE WITH RELIABLE LOCAL PARTNERS

Most litigation will involve a transnational dimension - victims, defendants, witnesses, adverse impacts or evidence may be in a different jurisdiction to that where a case is filed. The applicable local laws may be very different from the jurisdiction in which the case is being pursued, again requiring collaboration with local lawyers and legal experts. This means that collaboration with reliable partners on the ground in relevant jurisdictions is often critical for the success of litigation. Such transnational collaboration may exist prior to litigation or may be triggered by a common desire to pursue corporate accountability through litigation. In either case, it will assist lawyers initiating cases in connecting with victims, collecting necessary evidence and conducting advocacy on the ground (Interviewee - CSO 9).

 **Is there sustainable collaboration with reliable local partners?**


A long-term collaboration with local partners, which will enable collection of evidence, facilitate witness testimony and contribute to financial resources, is needed to ensure the success of litigation (Interviewee - Lawyer 5). In fact, litigation is often built in collaboration with local partners (Interviewee - CSO 8). Achieving sustainable collaboration requires a partnership among equals and mutual trust and recognition of different partners and potentially different values.

 **Do partners know the applicable local laws?**

Since the applicable local laws may be different from the jurisdiction in which litigation is being pursued, it is vital to have a sound understanding of such local laws (Interviewee - Lawyer 4). A partnership with local lawyers and legal experts will be crucial in this context too. For example, the case against KiK in Germany was dismissed on limitation grounds, at least partially based on the testimony of a legal expert who did not disclose the possibility of courts in Pakistan having the discretion to allow a time-barred case to proceed (Interviewee - CSO 8).²⁰¹

5.4. MANAGE EXPECTATIONS AND COMPETING GOALS

Litigation often involves many affected individuals and communities who might have very different needs and expectations from litigation. For instance, communities are often divided about litigation: while some victims may look for compensation for harm suffered, others may be interested in stopping a project completely (Interviewee - Lawyer 5). The affected individuals and communities may also have different levels of tolerance of the costs associated with litigation or of delays (e.g. the longer the litigation, the lower are the chances of people supporting it) (Interviewee - Lawyer 6). Then there are potential challenges about divergent goals of affected victims and local or international organisations pursuing litigation (Interviewee - CSO 9). Managing competing expectations and goals of multiple parties is vital to the success of litigation.

 **Are there some common goals?**

It will be critical to find common ground between the affected communities and the CSOs supporting them. This will ensure that the rightsholders do not merely become 'collateral' to the agenda of CSOs pursuing litigation; rather, the focus of litigation should be on the interest of the 'ultimate beneficiaries' (Interviewee - CSO 10).

 **Is it possible to achieve a tactical convergence?**

If different parties to litigation have competing (if not conflicting) goals, some creativity may be needed to ensure some broad convergence or tactical sequencing of remedial strategies. For example, in the KiK case, achieving compensation was key priority for the victims, while unions wanted to pursue litigation for corporate accountability. A compromise was reached by delaying the filing of litigation until the corporation agreed to pay compensation.²⁰²

 **Are rightsholders central to the litigation?**

The role of rightsholders in legal proceedings is likely to vary throughout a case. While they may be central to the instigation of the case, the role they play may wax and wane as the lawsuit continues. To achieve meaningful engagement between corporations and communities, it is essential to ensure that rightsholders' input remains central to the proceedings rather than an afterthought.

5.5. EMPLOY COMPLEMENTARY REDRESS MECHANISMS

Litigation should be seen and utilised as part of a wider ecosystem of multiple and parallel pathways to both prevent and remediate corporate human rights abuses. This entails not only continuously assessing the efficacy of other options compared to litigation but also employing other mechanisms to enhance the success of litigation. In fact, complementary strategies should be employed consciously because litigation cannot address all the structural issues behind corporate human rights abuses (Interviewee - CSO 8).

 **Is litigation the best option to resolve a grievance or change corporate conduct?**

A fundamental question should be asked whether litigation will benefit the rightsholders (Interviewee - CSO 9). Initiators of litigation should consider whether public awareness about corporate human rights abuses could be raised and/or root causes of such abuses addressed without litigation (Interviewee - Business 5). While litigation may be an optimal way to address certain human rights abuses, the relevance of non-judicial, administrative or corporate mechanisms should not be ignored. At the end of the day, 'it is really about giving the matter the best platform to be resolved' (Interviewee - CSO 10). For example, a withhold release order issued by the US Customs and Border Protection might change corporate behaviour in a shorter span of time and with less investment than litigation in relation to forced labour or modern slavery supply chain practices (Interviewee - CSO 10). Some of these alternative mechanisms might be utilised before initiating litigation or in parallel to litigation. In some cases, litigation may also be withdrawn or delayed or slowed to allow other mechanisms to operate.

 **Can the role of other complaint mechanisms be leveraged?**

A 'holistic approach' to litigation should be adopted, as litigation alone can only rarely systemically change corporate behaviour (Interviewee - Lawyer 5). Complaints to UN Special Procedures,²⁰³ National Contact Points or national human rights institutions can be used strategically to enhance the success of litigation. Complaints to national human rights institutions may be used to generate and gather evidence which could then be used for litigation (Interviewee - Lawyer 5). Complaints to National Contact Points using the OECD Guidelines can sometimes influence change in corporate behaviour in some cases (Interviewee - Business 3),²⁰⁴ while an intervention by UN Special Procedures may elevate the status of cases (Interviewee - Lawyer 4).

Should public advocacy be pursued in tandem?

Litigation is often more effective when combined with public advocacy directed against a given corporation or sector, or for changes in certain laws and policies. Some organisations explicitly make this connection as part of their litigation strategy (Interviewee - CSO 9). Media exposure can also be used as an effective tool in public advocacy; and if the media investigates and reports on certain human rights abuses, these media outputs may be presented to the court as well as evidence (Interviewee - Lawyer 5). Social media is also starting to have an impact on the functioning of corporate boards (Interviewee - Business 3). Raising awareness through public advocacy and media exposure are therefore necessary complementary strategies to litigation (Interviewee - CSO 10).²⁰⁵

5.6. SECURE SUSTAINABLE FUNDING

Litigation is expensive, and it is difficult to set clear budgets and funding plans for litigation in advance due to unexpected twists and turns. Moreover, corporate defendants are generally much more well-resourced in comparison to the affected communities or CSOs supporting them. The 'financial viability' of a case is therefore a key consideration in whether to pursue litigation or not (Interviewee - Lawyer 4), though this may be of lesser importance to some organisations (Interviewee - CSO 9).

Is there reliable access to stable funding?

Initiators of litigation should consider whether they have access to sustainable funding for litigation. In many cases, they may face a 'chicken or egg' dilemma: funding may not be available unless there is a ripe case, whereas a case may not ripen until someone provides necessary resources to do background work.²⁰⁶ Therefore, all available options to secure sustainable funding should be explored, including small contributions from victims, support from foundations, pro bono assistance by lawyers and law firms, and third-party funding. It would also be ideal to secure long-term commitments from funders to support litigation (Interviewee - Lawyer 5).

Do funders understand uncertainties around litigation?

Doing background work to prepare for litigation may take significant time and resources (and some cases may never get off the ground despite considerable preparatory work). Furthermore, it is not always possible to estimate costs accurately in advance of litigation or to rely on a precisely itemised budget which might have limited flexibility to move budget items if needed (Interviewee - CSO 8). However, not all funders may understand this and consequently have misaligned expectations. Funders should therefore be made aware of all litigation-related uncertainties - including that, despite investment of funds, a potential case may never reach the court, take much longer than expected or not result in the desired outcome.

Image credit: Xavier Lorenzo/Shutterstock.com



6. CONCLUSION

Litigation has been used in the BHR field worldwide to influence corporate behaviour in relation to their human rights responsibilities, hold corporations accountable for human rights abuses and shape law and policies. What has been less clear is the actual impact of litigation – direct or indirect, positive or negative – on how corporations operate in society and on the regulatory ecosystem governing corporate behaviour generally.

The Impact Framework set out in this report can be used by all stakeholders to assess holistically the impact of litigation on corporate behaviour both prospectively and retrospectively. The Impact Framework combines a range of positive and negative indicators, and the report notes that litigation has had mixed impacts on corporate behaviour in terms of promoting respect for human rights, empowering rightsholders or remedying harms. The impact depends, among other factors, on the public profile of corporate defendants, the organisational culture of corporations, the availability of long-term funding and the extent to which a given jurisdiction is conducive to litigation against corporations. Moreover, systemic changes in corporate behaviour have been patchy and incremental. Litigation can also have negative impacts on the affected rightsholders and organisations supporting them, or on the corporate ecosystem more broadly, such as by triggering regressive laws and policies.

The report highlights several strategies and variables to maximise the impact of litigation on corporate behaviour. For example, litigation is generally more impactful when consciously used in conjunction with other complementary strategies such as civil society advocacy, media campaigns and engagement with investors and/or policy makers to put pressure on corporations.

7. RECOMMENDATIONS

The report offers recommendations for the four key stakeholders to litigation: initiators of litigation, corporations, funders, and states.

Initiators of litigation (law firms, CSOs and HRDs) should treat as paramount the interests and litigation goals of the affected individuals and communities. They should not give priority to the strategic goals of their organisations compared to those of the rightsholders, adopt the 'do no harm' principle and make a holistic assessment of pros and cons prior to initiating litigation. The initiators of litigation should also build long-term collaboration with local partners and secure adequate resources to sustain litigation.

Corporations should view litigation as an opportunity to adopt necessary changes to their policies and practices to discharge their responsibility to respect human rights under the UNGPs and in turn meet the expectations of individuals and communities impacted by their activities. They should refrain from hostile and retaliatory responses to litigation such as filing SLAPP cases, as doing so might attract social media backlash and cause significant harm to their image.

Funders of litigation (whether CSOS, foundations or third parties) should recognise the uncertainties inherent in litigation in their funding models and allow as much flexibility as possible to organisations pursuing litigation. They should also consider allocating seed funding to do preparatory work for litigation, which may or may not result in actual litigation.

States should create an environment conducive to pursuing legitimate litigation as part of their duty to protect against human rights abuses by corporations. They can do so, for example, by making available legal aid, liberalising rules regarding *locus standi* and class actions, enacting anti-SLAPP laws and establishing cross-border cooperation to deal with transnational litigation.

ANNEX A: METHODOLOGY

The report combines doctrinal and empirical research methods and adopts a case study approach. We used the Business & Human Rights Resource Centre lawsuit database²⁰⁷ with 219 cases from all world regions as a starting point. We selected only completed cases, bringing the number of relevant cases down to 121. Out of these 121 cases, the following variables were used to compile a shortlist of 11 cases to ensure diversity in case selection:

- Nature of proceedings: civil, criminal, administrative
- Subject matter of proceedings: modern slavery, labour rights abuses, human rights abuses, environmental pollution, climate change
- Place of proceedings: civil law jurisdiction, common law jurisdiction, hybrid systems
- Basis of litigation: common law of tort, Alien Tort Statute, statutory provisions, HRDD law, constitutional provisions
- Standing: class action, individual action
- Nature of defendant: local corporations, multinational corporations
- Funder of litigation: philanthropic foundations, for-profit funders, private law firms, pro bono support
- Industry focus: agriculture, fishing, food, construction, extractive, garment, finance and banking, manufacturing, etc.
- Timing of litigation: pre-1990, 1990-2000, 2001-2010, 2011-2020, 2021 onwards
- Typology of impact: access to remedy, criminal liability, firing or resignation of corporate executives, change of policies, etc.

From this shortlist, we selected 11 representative cases as 'deep dive' case studies for qualitative insights (see Annex B). The use of these case studies allowed us to unpack complexities and strategic trade-offs inherent in litigation and apply the Impact Framework in a practical manner.

In addition to analysing the existing literature and case studies, we also conducted 28 virtual one-to-one interviews with key stakeholders of litigation: CSOs and HRDs; lawyers and law firms (representing both victims and corporations); business consultants advising corporations; and business representatives (both individual corporations and industry associations). An in-person workshop of about 20 experts was held on 7 June 2023 on the sidelines of the UN Responsible Business and Human Rights, Asia Forum, which provided feedback on our initial findings and the draft Impact Framework.

Ethics approval was obtained from the Ethics Committee at Macquarie University (confirmed by UNSW Sydney) for conducting the interviews and an in-person workshop in Bangkok.

ANNEX B: SELECTED SEMINAL CASES

BHOPAL (US/INDIA)²⁰⁸

Background

In the 1970s, American corporation Union Carbide Corporation (UCC) built a pesticide plant in Bhopal, India, which was operated by Union Carbide India Limited.²⁰⁹ In December 1984, 40 tons of toxic gas escaped from the plant causing catastrophic loss of life, with estimates of deaths occurring in the first week as high as 10,000 people, and estimates of related deaths over the next two decades as high as 20,000 people.²¹⁰ Estimates also suggest over 200,000 people were injured.²¹¹

Legal claim and procedural history

Initially many victims sued UCC in the US individually, but all actions were consolidated into a single claim after the Indian Government enacted in March 1985 the *Bhopal Gas Leak Disaster Act*, making it the sole representative of all legal proceedings, including litigation within and outside India.²¹² In 1986 (and reaffirmed in a subsequent judgment in 1987)²¹³ the claim was dismissed by a US court according to the doctrine of forum non conveniens, which means that the court decided that the most appropriate forum to hear the matter was India and not the US.²¹⁴ The Indian Government subsequently brought a case against UCC in the District Court of Bhopal.

Outcome

In February 1989, a settlement was reached between UCC and the Indian Government for USD \$470 million as full and final settlement to be distributed to the victims.²¹⁵ The settlement amount is controversial, with reports that it was calculated using underestimated numbers for people injured or killed,²¹⁶ and campaigners for victims arguing that the settlement was 'insulting' and only represented 15% of the amount sought on behalf of victims.²¹⁷ UCC refute these claims and resist calls for the corporation to do more to support the Bhopal community.²¹⁸

From 1999 to 2016, three unsuccessful claims were brought in the US seeking to force UCC to clean the contaminated Bhopal site, which continues to harm the local community.²¹⁹ In addition to civil claims, criminal proceedings were brought against several former executives of UCC's Indian subsidiary.²²⁰ In July 2010, eight Indian nationals were convicted by an Indian court of negligence and received two-year sentences alongside a fine.²²¹ These followed multiple attempts to prosecute high-ranking employees of UCC.²²²

UNOCAL (US/BURMA)²²³

Background

The Yadana gas pipeline was constructed in the Tinnareim region of the then Burma²²⁴ between 1996 and 1998 by Unocal (US) and Total (France).²²⁵ The pipeline was valued at USD \$1.2 billion²²⁶ and the Burmese military was deployed to 'secure the pipeline corridor', intruding on the livelihood of local communities affecting approximately 35,000 people, with forced relocations and displacement and corresponding human rights violations.²²⁷

Legal claim and procedural history

The villagers from these communities alleged that Unocal was responsible for forced labour, murder, rape and torture at the hands of the Burmese military.²²⁸ The case was filed in the US under the *ATS*,²²⁹ which allows foreign nationals to bring cases for tortious acts committed outside the US.

In March 1997, the case was approved to proceed by the District Court for the Central District of California.²³⁰ In 2000, the court held that whilst it was possible for corporations and executives to

be liable under the *ATS*, Unocal was not liable for the specific claims in the suit as the plaintiffs had failed to prove that the defendants had control over the military who perpetrated the abuses.²³¹ This decision was appealed to the Ninth Circuit Court, and separately the plaintiffs filed a different claim under state law heard before the California State Court. The former case was reheard before an 11-judge en banc panel in 2003, and the latter was listed to commence trial in June 2005.²³²

Outcome

In December 2004, Unocal and the plaintiffs reached a confidential settlement in resolution of both claims.²³³

RATHA (CAMBODIA/THAILAND/US)²³⁴

Background

The plaintiffs in this case were seven Cambodian residents who were recruited to work in seafood processing factories in Thailand.²³⁵ According to the plaintiffs' complaint, an agent of a third party recruitment agency (not a party to the case) promised the individuals 'good jobs at good wages.'²³⁶ Under these auspices, the plaintiffs borrowed money and travelled overseas, leaving behind families in Cambodia, and worked at the factories in Thailand between 2010 and 2012.²³⁷ Although the particulars differ amongst plaintiffs, it was alleged that the Cambodian workers faced conditions of forced labour (including passport confiscation and the payment of recruitment fees) along with deductions of wages and unsanitary housing.²³⁸ The plaintiffs managed to return to Cambodia by repaying their loans, reporting themselves to the police, and/or using adverse media attention to pressure the corporation to release them.²³⁹

Legal claim and procedural history

The plaintiffs brought claims under both the *ATS* and the *TVPRA*.²⁴⁰ The former allows non-US nationals to sue in US courts for a tort (a wrongful act) committed in violation of international law.²⁴¹ The *TVPRA* is a statutory scheme aimed at combatting human trafficking, providing survivors access to justice by enabling civil claims against the perpetrators.²⁴²

In 2017, the US District Court found against the plaintiffs,²⁴³ and the case was appealed to the US Ninth Circuit Court, becoming the first corporate global supply chain trafficking case to reach a US appellate court.²⁴⁴

In 2022, the US Ninth Circuit Court again found against the plaintiffs.²⁴⁵ In regard to the foreign-based defendants, the court found they lacked contact with the US, which is a requirement to establish jurisdiction in *TVPRA* claims. In regard the US-based defendant Rubicon, the court found that while they *attempted to benefit* from the alleged labour violations given they attempted to sell the seafood in the US, they did not actually benefit as the products were rejected and were never sold in the US. Therefore, the court held the *TVPRA* did not extend to those who *attempt to benefit* from forced labour, setting a precedent for narrowing the application of the *TVPRA*.²⁴⁶

Outcome

After the Ninth Circuit narrowing of the *TVPRA*, several CSOs who believed the court had wrongly interpreted the law lobbied Congress to amend the statute to clarify its intent. Nine months after the decision, Congress amended Section 1595 of the *TVPRA* to clarify that it applies to those who 'attempts or conspires to benefit' from forced labour.²⁴⁷ At the time of writing, reports suggest that in response to the *TVPRA* amendment, the plaintiffs have sought to reopen the case before the Ninth Circuit Court.²⁴⁸

VEDANTA (UK)²⁴⁹

Background

Since 2004, Vedanta Resources Ltd (a multinational mining corporation) owned Konkola Copper Mines Plc operating in Zambia.²⁵⁰ This subsidiary operated the Nchanga Copper Mine and it was alleged that effluent from the mine caused serious environmental damage to nearby farming

communities.²⁵¹ Members of the communities claimed that pollutants ‘damaged land and waterways’²⁵² and contaminated farming land to the extent that it was no longer usable.²⁵³ As agriculture constituted many community members’ core form of income, their livelihoods were jeopardised.²⁵⁴ Additionally, the villagers claimed discharge contaminated local drinking water sources causing serious injury.²⁵⁵

Legal claim and procedural history

In September 2015, Zambian villagers filed a lawsuit in the UK against Vedanta Resources (headquartered in London) as well as its Zambian subsidiary.²⁵⁶ Those affected claimed personal injury, damage to property and loss of income due to contamination and environmental destruction.²⁵⁷ In April 2019, the UK Supreme Court ruled that the case could proceed, affirming the principle that a UK parent company can owe a direct duty of care to people affected by its subsidiaries’ operations in certain circumstances.²⁵⁸

Outcome

Proceedings returned to the High Court and in 2021 the parties settled all claims without admission of liability.²⁵⁹

MILIEUDEFENSIE ET AL. V SHELL (NETHERLANDS)²⁶⁰

Background

Four Nigerian farmers and a Dutch environmental group, Milieudefensie (the Dutch branch of Friends of the Earth) sued Royal Dutch Shell and its subsidiary in Nigeria, Shell Petroleum Development Company of Nigeria, in the Dutch courts over pollution of villages in the Niger Delta.²⁶¹ Oil pollution from the pipeline devastated the nearby lands and waters of the affected communities.²⁶²

Legal claim and procedural history

The farmers were from the villages of Goi, Oruma and Ikot Ada Udo and requested compensation for oil spills destroying their farmland.²⁶³ In late 2009, the court ruled that the claims in relation to the Oruma village could proceed in a Dutch court, despite the defendants’ contention that the cases should be conducted in Nigeria.²⁶⁴ In January 2021, the Hague Court of Appeal decided that in the instances of the Oruma and Goi cases, Shell Petroleum Development Company of Nigeria was ‘strictly liable for the damage’ resulting from the oil spills and determination of damages was delayed for a future hearing.²⁶⁵ The case relating to Ikot Ada Udo was not determined at that time, as the court had further questions to investigate.²⁶⁶ This was the first time a Dutch court had found a Dutch corporation responsible for the actions of its overseas subsidiaries.²⁶⁷

Outcome

In December 2022, Royal Dutch Shell agreed to pay €15 million in compensation to affected communities without admission of liability.²⁶⁸ The court also ordered Shell to install a leak warning system.²⁶⁹

KiK (GERMANY)²⁷⁰

Background

In September 2012, a fire at the Ali Enterprise textile factory in Baldia, Karachi, Pakistan, claimed the lives of 258 workers.²⁷¹ More than 50 workers were injured.²⁷² The German clothing retailer KiK purchased approximately 70% of the products from the factory.²⁷³ Following the disaster, KiK provided USD \$1 million as per a Memorandum of Understanding between KiK and the Pakistan Institute of Labour Education & Research signed in December 2012.²⁷⁴ The Sindh High Court established an independent commission to distribute this relief.²⁷⁵ Additionally, during the proceedings following the court case (September 2016), the International Labour Organisation assisted in arranging an additional compensation sum of over USD \$5 million for affected victims and families.²⁷⁶

Legal claim and procedural history

In March 2015, representatives of four victims of the factory fire initiated a civil case seeking compensation from KiK in Dortmund, Germany.²⁷⁷ The plaintiffs sought German jurisdiction over

the case, with specific provisions in the German Code of Civil Procedure and Brussels 1 Regulation permitting 'proceedings of international civil cases in the courts of the home state of the defendant.'²⁷⁸ However, the court would still apply Pakistani tort law.²⁷⁹ The Dortmund court accepted jurisdiction the following year.²⁸⁰

Outcome

In January 2019, the court dismissed the lawsuit on the basis that Pakistani law has a two-year statute of limitations for tort cases.²⁸¹ According to the European Centre for Constitutional and Human Rights (a CSO), the corporation initially offered to 'waive potential statutory limitations', but this was later withdrawn.²⁸²

MITR PHOL (THAILAND)²⁸³

Background

In 2008, the Cambodian government granted Thai multinational corporation Mitr Phol three long-term land leases (concessions) to cultivate sugarcane in Cambodia's northwest.²⁸⁴ Despite laws prohibiting the acquisition of a concession of a greater size than 10,000 hectares, the corporation – in concert with two other corporations – acquired three separate concessions totalling nearly 20,000 hectares.²⁸⁵ The operators of these other corporations were current or former employees of Mitr Phol and all corporations applied on the same day, indicating they were likely shell corporations created to bypass regulations.²⁸⁶ Through alleged collusion with local authorities and security forces, the corporation seized the land of 2,000 farming families.²⁸⁷ Crops, homes and other resources were destroyed in this process, and assaults and arrests were conducted on those who resisted.²⁸⁸ Compensation was severely limited and many were forced to migrate.²⁸⁹

Legal claim and procedural history

In 2014, the affected villagers and CSOs filed a complaint to the Thai Human Rights Commission.²⁹⁰ The investigation found multiple human rights violations, and petitioned Mitr Phol to remediate the damage.²⁹¹ Mitr Phol subsequently cancelled their concessions and withdrew from Cambodia, but failed to remediate any harm.²⁹² Eventually, the affected parties filed a class action lawsuit in Thailand alleging negligence on the part of Mitr Phol.²⁹³ At first instance, the trial judge ordered mediation, but Mitr Phol refused to engage.²⁹⁴ The motion for class status was dismissed in 2019 due to logistical issues surrounding language and the remote location of plaintiffs.²⁹⁵ The plaintiffs appealed this dismissal in 2020, and it was determined that the case could proceed as a class action.²⁹⁶

Outcome

In May 2022, Mitr Phol sought to have the lawsuit dismissed by the Thai Court of Appeals.²⁹⁷ However, this motion was unsuccessful and the Court ruled that the case can proceed to trial.²⁹⁸ At the time of writing, the trial has not yet commenced.

LAFARGE (FRANCE/US)²⁹⁹

Background

Lafarge SA (a French corporation) had a cement plant near Jalabiyeh (Jalabiya), Syria, near the Turkish border.³⁰⁰ The plant was owned and operated by Lafarge Cement Syria, a corporation in which Lafarge (the parent company) had an indirect holding of over 98%.³⁰¹ In June 2016, an inquiry into the activities of Lafarge in Syria uncovered financial payments made to an array of armed groups including ISIS and Levant terrorist group to keep the plant operating between 2013-14.³⁰²

Legal claim and procedural history

In 2018, Lafarge and several of the corporation's executives and employees were charged in France with complicity in crimes against humanity, financing of a terrorist organisation and endangering the lives of its employees in Syria.³⁰³ Lafarge contested these charges arguing that it could not be held responsible for actions of its subsidiary and further that the funds were paid in support of commercial operations and not in support of terrorist activity.³⁰⁴ In 2021, the French Supreme Court confirmed the charge for financing of a terrorist organisation, meaning that the charge will now proceed to a

criminal trial.³⁰⁵ In May 2022, the Paris Court of Appeal confirmed the charges against Lafarge of endangering the lives of its employees in Syria and complicity in crimes against humanity, meaning those charges will also now proceed to a criminal trial.³⁰⁶

Separate to the French litigation, in the US, an investigation by the US Department of Justice led to charges being filed against Lafarge and its Syrian subsidiary (Lafarge Cement Syria) for conspiring to provide material support to foreign terrorist organisations. It was alleged that the corporations had paid ISIS and the al-Nusrah Front, both US-designated foreign terrorist organisations, for permission to operate the cement plant between 2013-14.

Outcome

At the time of writing, the litigation in France concerning criminal charges against Lafarge is ongoing. In the US case, Lafarge entered a guilty plea to charges of 'conspiring to provide material support to foreign terrorist organisations.'³⁰⁷ The outcome was fines and forfeiture totalling USD \$778 million.³⁰⁸

NEVSUN RESOURCES (CANADA)³⁰⁹

Background

In Eritrea, all citizens must do military or other public service when they turn 18.³¹⁰ However, some people in the program are forced to work for extended periods of time on projects sponsored by the military or military parties. Nevsun owned the majority of the Bisha Mining Share Company in Eritrea,³¹¹ and was the first foreign company to develop an Eritrean mine.³¹² The plaintiffs were workers at the mine who sued Nevsun alleging they were responsible for slavery, forced labour, cruel treatment and crimes against humanity.³¹³ The workers arrived at the mine from 2008 to 2010 and were forced to work at least 12 hours a day for six days a week in exceedingly high temperatures.³¹⁴

Legal claim and procedural history

The plaintiffs argued that their treatment at the mine was a violation of the peremptory norms that are part of international law. In October 2016, the British Columbia Supreme Court granted the plaintiffs' representative action and dismissed the defendant's actions concerning the appropriateness of the legal forum.³¹⁵ Appeals by the defendant were dismissed by the Court of Appeal for British Columbia in November 2017.³¹⁶

Outcome

Following earlier judgments, in February 2020 the majority of the Supreme Court of Canada ruled that customary international law is automatically part of Canadian law and does not require an act of parliament to pass it into force.³¹⁷ The judges did not assess whether Nevsun violated the workers' rights: they stated the trial judge must decide if it did violate customary international law and if it should be held responsible. The case was settled for an 'undisclosed amount' later in 2020.³¹⁸

NKALA (SOUTH AFRICA)³¹⁹

Background

Throughout the South African gold mining industry's history, many current and former workers have suffered from debilitating and incurable silicosis and pulmonary tuberculosis, and many have also died from the diseases.³²⁰ Diseases like silicosis were caused by breathing non-visible silica dust while mining and caused 'shortness of breath, persistent cough, and chest pains.'³²¹ These mines historically evaded remediating such harms as many miners returned to rural communities and nearby countries without knowledge of or the means to treat their illness.³²²

Legal claim and procedural history

On 21 December 2012, a class action lawsuit was filed by Bongani Nkala with fellow ex-miners against 32 gold mining corporations³²³ operating 82 mines throughout South Africa.³²⁴ The plaintiffs alleged that the defendant corporations were aware of the dangers and failed to employ precautions to prevent exposure.³²⁵ In early March 2016, Anglo American and AngloGold Ashanti (two of the defendant corporations) reached a USD \$30 million settlement (464 million rand) with the gold miners

who worked for the company for at least two years.³²⁶ On 13 May 2016, the Johannesburg High Court granted permission for the class action lawsuit to be launched,³²⁷ and subsequently rejected a later appeal of this certification.³²⁸

Outcome

On 3 May 2018, the parties reached a settlement providing compensation for all workers employed since March 1965 who were suffering from silicosis as well as compensation for the families of deceased miners.³²⁹ In July 2019, the Johannesburg High Court approved a settlement of 5 billion rand (about USD \$353 million).³³⁰

GRUPE CASINO (FRANCE)³³¹

Background

According to a report published by a French CSO Envol Vert in 2020, Groupe Casino dominates the cattle ranching industry in Brazil and Colombia. Constituent corporations of the group, Grupo Pão de Açúcar and Éxito, constitute '15 percent market share in Brazil' and '43 percent in Colombia' respectively.³³² The report also found evidence of 'illegal deforestation' linked to products that were in turn retailed in Casino outlets throughout France. Furthermore, such deforestation occurred – in part – on Indigenous land. This is despite commitments made by Casino against deforestation.

Legal claim and procedural history

In March 2021, Indigenous groups from the Brazilian and Colombian Amazon alongside French and American CSOs sued Casino for allegedly retailing beef linked to deforestation.³³³ The plaintiffs allege Casino's supply chains involved 'systemic violations of human rights and environmental laws',³³⁴ resulting from a failure to conduct adequate due diligence of its supply chain, resulting in deforestation and human rights abuses.³³⁵ They allege that Casino's suppliers regularly purchased beef from slaughterhouses involved in deforestation and land grabbing.³³⁶

The suit was filed in the Sant-Etienne court in France.³³⁷ The plaintiffs contested that Casino had contravened French Duty of Vigilance Law (*Le devoir de vigilance*; article L. 225-102-4 of the *Code de commerce*).³³⁸ The dispute alleges that 'all agents in the production chain are responsible for environmental damage caused with their consent.' The plaintiffs seek an order to compel Casino to publish a plan identifying 'risks associated with its activities' to comply with the law.³³⁹ Casino maintains that their actions were 'in line with the law.'³⁴⁰

Outcome

At the time of writing, a judgment has not been issued.

Image credit: David Brickner/Shutterstock.com



ENDNOTES

- 1 This report uses 'litigation' as shorthand for strategic human rights litigation unless otherwise specified and is focused on claims pursued in the BHR field.
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- 3 Burkhard Hess, 'Strategic litigation: a new phenomenon in dispute resolution' (2022) 3 *MPILux Research Paper* 1, 3.
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- 6 Upendra Baxi, 'Taking suffering seriously: social action litigation in the Supreme Court of India' (1985) 4(6) *Third World Legal Studies* 107; Joseph (n 5); Meeran and Meeran (n 5).
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- 14 Duffy (n 2) 47.
- 15 Scott L Cummings and Deborah L Rhode, 'Public interest litigation: insights from theory and practice' (2009) 36 *Fordham Urban Law Journal* 603, 606; 609.
- 16 Duffy (n 2) 39.
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- 18 *Nevsun Resources Ltd v Araya* [2020] SCC 5. See Annex B: 9. *Nevsun Resources (Canada)*.
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- 20 Virginia G Maurer, 'Corporate social responsibility and the "divided corporate self": the case of Chiquita in Colombia', (2009) 88(4) *Journal of Business Ethics* 595.
- 21 *Ibid.*
- 22 Maurer (n 20); International Human Rights Clinic: Harvard Law School, Corporación Colectivo de Abogados José Alvear Restrepo (CAJAR), and Fédération Internationale des Ligues des Droits de l'Hommes (FIDH), 'The contribution of Chiquita corporate officials to crimes against humanity in Colombia', Article 15 Communication to the International Criminal Court, May 2017.
- 23 International Human Rights Clinic: Harvard Law School, Corporación Colectivo de Abogados José Alvear Restrepo (CAJAR), and Fédération Internationale des Ligues des Droits de l'Hommes (FIDH) (n 22).
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- 25 *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002); International Human Rights Clinic: Harvard Law School, Corporación Colectivo de Abogados José Alvear Restrepo (CAJAR), and Fédération Internationale des Ligues des Droits de l'Hommes (FIDH) (n 22).
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- 41 Bangkok South Civil Court, '*Mrs. Hoy Mai and Mr. Smin Tet v. Mitr Phol Co. Ltd*', Judgment, Black Case No. Por. 718/2561, 28 March 2018; Bangkok South Civil Court, '*Mrs. Hoy Mai and Mr. Smin Tet v. Mitr Phol Co. Ltd*', Judgment, Black Case No. Por.718/2561, 4 July 2019; Appeal Court, '*Mrs. Hoy Mai and Mr. Smin Tet v. Mitr Phol Co. Ltd*', Judgment, Black Case No. Por.293/2563 and Red Case No. 3606/2563, 16 March 2020. See Annex B: 7. Mitr Phol (Thailand).
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