

REMEDY MECHANISMS FOR CORPORATE HUMAN RIGHTS ABUSE

By Tricia Olsen

KEY TAKEAWAYS

- When alleged victims of corporate human rights abuse seek remedy—judicial or non-judicial mechanisms to redress past atrocities—data show that states protect industries that (a) contribute significantly to states' revenue and rent extraction and (b) firms that are more profitable than their peers.
- Institutional strength and rule of law is a robust predictor of access to judicial remedy mechanisms while alleged victims are more likely to have access to non-judicial remedy mechanisms in states with weak institutions.
- Finally, while NGOs can play a positive role for specific outcomes (criminal trials and non-judicial remedy), international NGOs negatively affect access to judicial remedy. INGOs may help raise awareness about specific issues, but ultimately do not have the capacity or resources to help alleged victims achieve remedy.

INTRODUCTION

Claims against companies for human rights abuses persist, despite major advances in human rights around the world, including the spread of global human rights protections, increased corporate social responsibility, and industry-specific agreements that seek to improve business conduct. These efforts, in addition to today's guiding document on business and human rights—the United Nations Guiding Principles on Business and Human Rights (UNGPs)—have sought to reduce the likelihood of abuse and ensure that victims have access to remedy.

Yet, when abuses do occur, why do victims of corporate human rights abuse have access to remedy in some cases and not others?

THE EVOLUTION OF A “GOVERNANCE GAP”

Answering this question first requires understanding the broader context of what scholars and policymakers call the “governance gap,” which recognizes the difficulty states face in regulating large, powerful, and increasingly global corporate entities.

There are multiple drivers of the growing governance gap. First, multinational enterprises have more power and influence today than ever before. Some companies' assets are larger than the GDP of the countries in which they work. The largest 44 companies in the world, for example, generate over eleven percent of global GDP. General Motors (GM) produces more revenue (\$135.59 billion) than the GDP of Hungary (\$129 billion) where GM opened a plant in 1991. In 2013, Wal-Mart's revenues exceeded the GDP of 174 of the 193 UN member states.

Second, this trend is exacerbated by the fact that states, in turn, are thought to have weakened in the face of increased corporate power. Numerous scholars lament the fact that governments, in an increasingly globalized market economy, are weaker and are less capable (or willing) to regulate business. While some states are unwilling to challenge foreign companies upon which their economies depend, jurisdictional

Business leaders should recognize that there is a growing effort to hold private actors accountable for wrongdoing.

issues also become quickly overwhelming. It is often unclear how to regulate companies that are domiciled in one country, have operations in a number of others, and may hold financial assets in yet another country. Existing legal tools, some argue, are anachronistic in today's increasingly mobile and globalized economy. These factors, combined, are referred to as the governance gap.

Today, the UNGPs, which was unanimously passed by the Human Rights Council in 2011, is the principal document guiding business conduct with regards to human rights. It encourages states and firms to begin filling the governance gap by ensuring "access to remedy" when a human rights violation occurs. The UNGPs stipulate that firms, states, and civil society actors should ensure that "those affected have access to effective remedy through judicial, administrative, legislative or other appropriate means" (UNGP 2011). States must take "appropriate steps to investigate, punish and redress business-related human rights abuses" (Guiding Principle 25). And, states should address barriers "[w]here claimants face a denial of justice in a host State and cannot access home State courts regardless of the merits of the claim" (Guiding Principle 26). For firms, the UNGPs suggests that "where business enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate process" (Guiding Principle 22).

While the UNGPs have made important strides in terms of outlining the responsibilities of states, firms, and civil society, there is a dearth of empirical work in this arena. We know very little, for example, about when alleged victims are more or less likely to access remedy mechanisms.

WHAT IS REMEDY?

Remedy, as described in the UNGPs, falls into two, basic camps. First, judicial remedy includes any formal processes initiated in the court of law. Second, non-judicial remedy can be state-sponsored (e.g., remedy processes established through the National Contact Points (NCPs) or claims made through ombudsperson offices or government-run complaints offices, for example). Non-judicial remedy can also be created through non-state mechanisms. Such mechanisms may be "mediation-based, adjudicative or follow other culturally-appropriate and rights-compatible processes—or involve some combination of these—depending on

the issues concerned, any public interest involved, and the potential needs of the parties." Non-judicial remedy efforts—especially in states with weak institutions—may be more timely; they also require firms to formulate processes that facilitate their engagement with local communities.

WHAT IMPROVES ACCESS TO REMEDY?

Drawing from the Corporations and Human Rights Database (CHRD), this section presents key findings about access to remedy. The CHRD includes data on allegations of corporate human rights abuses in Latin America from 2000-2014. The unit of analysis for this study is an allegation included in the CHRD, of which there are over 1,300 between 2000-2014. Yet, there is variation in access to remedy across the sample of allegations, which is the heart of the empirical analysis. Of these, over thirty percent (425 allegations) have some type of trial activity and nearly twenty-five percent (329 allegations) have a non-judicial remedy. Below are the key findings:

- The economic concentration of a state's economy, specifically in the extractive industry, creates perverse incentives to not hold corporations accountable when allegations of corporate human rights abuse are made. When a larger proportion of a state's rents originate from the extractive industry—both oil and minerals—the data show that, in general, firms are less likely to face any type of formal, judicial activity. In Figure 1, we can see that as mineral rents vary from zero percent of GDP up to twenty percent, we see that the likelihood of trial activity drops from about 0.25 to approximately 0.10. There is broad support for this finding for oil rents, as well.
- Governments are less likely to begin criminal proceedings or deliver guilty verdicts against profitable firms, relative to their less profitable peers.
- Institutional strength (Figure 2), however, may counter the effects discussed above, which may shelter those firms that are profitable or that are from key industries. Rule of law explanations highlight the importance of

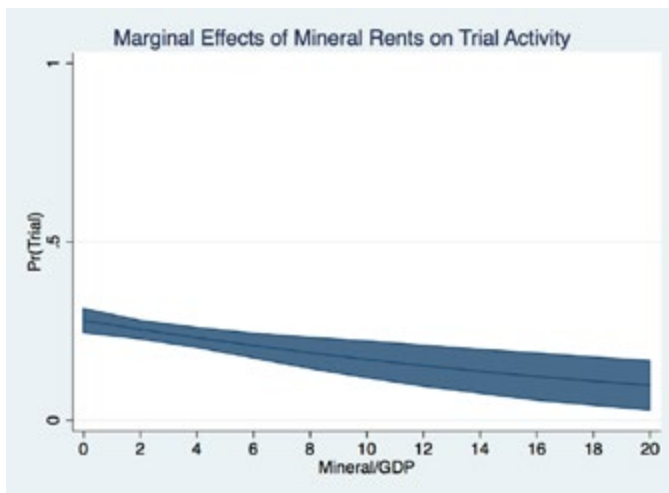


Figure 1: Marginal Effects of Mineral Rents on Trial Activity

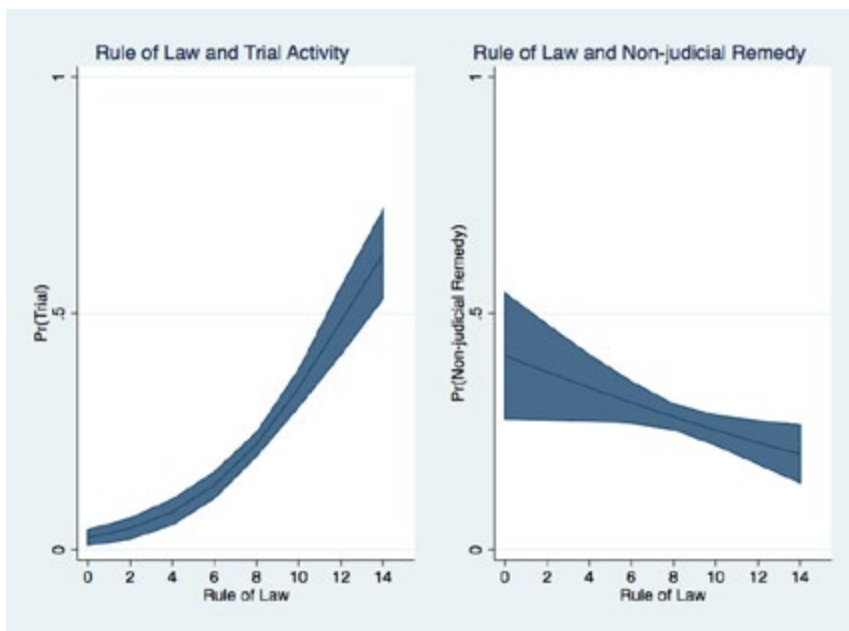


Figure 2: Marginal Effects of Rule of Law on Trial Activity and Non-Judicial Remedy

strong, independent political institutions in holding firms accountable. Allegations in states with strong rule of law, as the literature suggests, will be more likely to be met with judicial remedy. States with weak rule of law, however, are more likely to employ non-judicial remedy mechanisms.

WHAT DOES IT MEAN?

The findings presented here are preliminary, but there are important takeaways for policymakers and business leaders, alike. First, global policymakers seeking to address

the “governance gap” should be careful not to assume the gap exists, or indeed is the same, across all emerging and developing economies (Ruggie 2013; Scherer and Palazzo, 2007; 2011). In contrast, those states with strong rule of law are seeking to hold companies accountable, in spite of economic incentives to do otherwise (e.g., avoid accountability mechanisms for firms in industries upon which the state relies or for those firms which are profitable). Global policymakers, however, should support existing efforts in those states. Where rule of law is weak, global policymakers can encourage non-judicial remedy efforts more freely while simultaneously helping to strengthen institutions.

Second, business leaders should recognize that there is a growing effort to hold private actors accountable for wrongdoing. Firms may respond defensively by bolstering their legal council. As global norms around corporate conduct solidify, however, firms should be prepared to address such allegations in a more meaningful way.

In 2001, for example, Carbones del Cerrejón (owned by Anglo American, BHP Billiton y Xstrata-Glencore) was accused of forcing the resettlement of Afro-Colombian and Wayuu indigenous communities living in the town of Tabaco. After continued conflict, Cerrejón commissioned an independent review panel (the Social Capital Group, based in Peru) to assess the company’s past and present social engagement with the community in August 2007. In February 2008 the panel submitted its report to Cerrejón and two months later the company

published its own report, which included a commitment to meet with members of the Tabaco community (Tabaco Relocation Committee). Cerrejón and the community held meetings between August and December 2008, and the final agreement was signed in December 2008, with the goal of reconstruction, on adequate agricultural land, a new community of Tabaco for those who wish to live there. Rather than engaging in a long, costly lawsuit, it may be more beneficial, for example, to incorporate internal processes and mechanisms to redress, and ideally reduce, allegations of corporate human rights abuse.

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Professor Olsen is currently engaged in a collaborative research project to systematically collect data on corporate human rights violations, the Corporations and Human Rights Database. This project aims to understand the patterns associated with allegations of corporate human rights abuse, state involvement, and both judicial and non-judicial remedy.