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SCHOLARLY ARTICLE

To Waive or Not to Waive: Questioning the Use of Legal Waivers in Business Human Rights

Justin Jos Poonjatt

Essex Law School, University of Essex, United Kingdom
Email: j.poonjatt@essex.ac.uk

Abstract

Legal waivers embedded in corporate settlement agreements are commonly framed as neutral devices of dispute resolution. They promise finality, prevent double recovery and manage litigation risk. Yet in practice, waivers function as structural tools of accountability avoidance. This article examines the use of legal waivers within operational-level grievance mechanisms, focusing on three dimensions: the UNGPs' procedural formalism, the cost dynamics of corporate settlements, and the opacity created by confidentiality provisions. It argues that the UNGPs' emphasis on process legitimacy neglects the substantive consequences of waivers, that cost volatility incentivises their routine use, and that confidentiality provisions entrench information asymmetry while obstructing judicial oversight. The article concludes by advancing a hybrid regulatory model which prohibits blanket confidentiality of terms governing settlement agreements and advocates for greater transparency through a differentiated disclosure regime and increased judicial scrutiny by domestic courts.

Keywords: access to remedy; confidentiality; grievance mechanisms; legal waivers; settlement agreements

I. Introduction

In business and human rights (BHR) scholarship, a legal waiver refers to a clause within a settlement agreement that facilitates compensation to rightholders in exchange for relinquishing the right to pursue future claims, typically civil claims, arising from a human rights dispute with a corporation. Legal waivers serve two functions. First, legal waivers provide finality and predictability to future claims by confirming a full and final settlement, including the waiver of any further rights or actions related to the same subject matter.[1] Second, they prevent double recovery.[2] Double recovery refers to instances where a claimant seeks multiple compensations for the same grievance. It can be argued that the normative basis of waivers aligns closely with Ruggie's approach to the drafting of United

[1] Rae Lindsay, 'Multinational Human Rights Litigation From the Perspective of Business' in Richard Meeran and Jahan Meeran (eds), *Human Rights Litigation Against Multinationals in Practice* (Oxford: Oxford University Press, 2021) 278, 311.

[2] Office of the United Nations High Commissioner for Human Rights (OHCHR), 'Re: Allegations Regarding the Porgera Joint Venture Remedy Framework' https://www.ohchr.org/sites/default/files/Documents/Issues/Business/LetterPorgera.pdf (accessed 29 September 2025).

Nations Guiding Principles on Business and Human Rights (UNGPs):[3] a principled form of pragmatism.[4] Principled pragmatism involves leveraging corporate engagement as a means of addressing complex human rights challenges with 'practical results'.[5] Such an approach encourages companies to integrate human rights considerations into their policy frameworks and daily operations as a strategic and operational priority leading to 'practical action paths'.[6]

It is not unfounded that without waivers, companies may risk facing repeated legal challenges regarding compensation, which could disrupt operations and lead to financial losses. Alternatively, legal waivers come with the risk of corporations being seen as using them to limit rightholders access to judicial remedies as well as a measure to limit exposure to potential legal liability.[7] However, legal waivers are not mere procedural instruments that stem potential claims. They carry substantive legal implications, shaping the contours of corporate accountability and rightholders' access to remedy.

The use of legal waivers was witnessed in the Porgera gold mine settlement in Papua New Guinea, where 119 Indigenous women, who had suffered sexual violence by the mine's security personnel, were required to sign legal waivers in order to receive individual benefits.[8] In many instances, the women did not fully understand the consequences of signing legal waivers.[9] The case was eventually settled out of court, but the final settlement amount was not disclosed publicly. It was an instance that sheds light on how legal waivers hinder access to remedies for vulnerable rightholders.

Understanding legal waivers is relevant as they are currently presented as a neutral tool that gives a choice mitigating the probability of resorting to future claims or jeopardising access to remedies. This creates a false dilemma that pits corporate survivability against corporate accountability. It is further bolstered by the overarching design of nonjudicial mechanisms that presents waivers as part of the 'take-it or leave-it'[10] settlement agreement. Such a binary framing fails to interrogate the systemic power asymmetries that shape settlement processes. For the purposes of this article, the analysis is confined to legal waivers used in operational-level grievance mechanisms, where rightholders and corporations enter into settlement agreements.

[3] Human Rights Council, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework', A/HRC/17/31 (21 March 2011) (UNGPs).

[4] Ruggie defines principled pragmatism as 'an unflinching commitment to the principle of strengthening the promotion and protection of human rights as it relates to business, coupled with a pragmatic attachment to what works best in creating change where it matters most - in the daily lives of people'. Commission on Human Rights, 'Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises', E/CN.4/2006/97 (22 February 2006) 20; Jack Snyder and Leslie Vinjamuri, 'Principled Pragmatism and the Logic of Consequences' (2012) 4 *International Theory* 434, 441.

[5] 'Principled pragmatism views international law as a tool for collective problem solving, not an end in itself. It is about carefully weighing what forms of international legalization are necessary, achievable, and capable of yielding practical results': John G Ruggie, 'The Past as Prologue? A Moment of Truth for UN Business and Human Rights Treaty' (2014) 8 *IHBR Commentary* 5.

[6] Ruggie claims that principled pragmatism has 'helped turn a previously divisive debate into constructive dialogues and practical action paths': Human Rights Council, 'Report of the Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises', A/HRC/14/27 (9 April 2010) 5.

[7] Lindsay, note 1, 311.

[8] Catherine Coumans, 'Global Condemnation of Barrick's Effort to Secure Legal Immunity from Rape Victims', *Mining Watch Canada* (4 October 2018) https://miningwatch.ca/blog/2013/6/4/global-condemnation-barrick-s-effort-secure-legal-immunity-rape-victims (accessed 29 September 2025).

[9] Columbia Law School Human Rights Clinic & Harvard Law School International Human Rights Clinic, *Righting Wrongs? Barrick Gold's Remedy Mechanism for Sexual Violence in Papua New Guinea: Key Concerns and Lessons Learned* (Massachusetts: Harvard Law School, 2015) 112, https://static1.squarespace.com/static/562e6123e4b016122951595f/t/565a12cde4b0060cdb69c6c6/1448743629669/Righting+Wrongs.pdf (accessed 29 September 2025).

[10] BSR, *In Search of Justice Porgera Gold Mine: Pathways to Remedy at the Porgera Gold Mine*, (San Francisco: BSR, 2018), https://www.bsr.org/reports/BSR_In_Search_of_Justice_Porgera_Gold_Mine.pdf (accessed on 29 September 2025).

Against this backdrop, complex legal and ethical questions arise. Can waivers be 'legitimately'[11] included in settlements, especially in BHR cases, concerning adverse human rights impact irrespective of the harm caused? Should waiver clauses be permitted where there is a demonstrable power imbalance between the parties? Should legal waivers be the default tool irrespective of the nature and context of harm? With few exceptions,[12] existing scholarship largely concentrates on the design and efficacy of non-judicial grievance mechanisms.[13] International law guidance on legal waivers suggests its limited use in resolving BHR disputes.[14] The basis of restricting their use is that legal waivers may conflict with the commentary to Principle 29 of the UNGPs, which emphasises that grievance mechanisms must not preclude access to judicial or other nonjudicial grievance mechanisms.[15] Drawing from this, I contend that there is an emerging need for legal waivers to be governed by stricter substantive standards and subject to greater transparency.

This article will grapple with three fundamental questions. First, why is the current framework of the UNGPs unable to establish legal standards for waivers? Second, what is the need for legal waivers in BHR cases? Third, how does confidentiality hinder the development of comprehensive legal standards governing waivers in BHR disputes? These three questions are interconnected, as each underscores how the absence of clear legal standards has created a grey zone, enabling corporations to draft waivers with limited independent oversight irrespective of associated contextual factors. Taken together, these three lines of inquiry, on need, status and structural opacity of legal waivers address significant gaps in the BHR literature that must be attended to.

The article is structured in five parts. Following this introduction, Part II examines why the current framing of the UNGPs is insufficient to address legal waivers. It shows how the UNGPs' procedural formalism, combined with the post-hoc corporate justification of waivers as practical tools, creates a grey zone exacerbating existing inequality of bargaining power. Part III analyses the financial dynamics of settlement agreements, arguing that corporations deploy waivers to contain litigation risks in the face of volatile and potentially prohibitive costs. Part IV turns to confidentiality, demonstrating how non-disclosure of settlement terms entrenches opacity, reinforces corporate informational advantage and obstructs the development of legal standards on waivers. It introduces a hybrid regulatory model anchored in a differentiated disclosure regime that operationalises transparency and strengthens corporate accountability for settlement of human rights disputes as a response to confidentiality. Part V concludes that legal waivers are not neutral contractual devices but structural instruments that limit rightholders' claims and insulate corporations from accountability.

II. Procedural Formalism and Justifying Legal Waivers

The incorporation of non-state-based grievance mechanisms into the UNGPs marked a significant evolution in access to nonjudicial remedies within the BHR framework.[16]

[11] Sara L Seck, 'Business, Human Rights, and Canadian Mining Lawyers' (2014) 56 *Canadian Business Law Journal* 236.

[12] Tyler Giannini, 'Political Legitimacy and Private Governance of Human Rights: Community-Business Social Contracts and Constitutional Moments' in Silja Voeneky and Gerald L Neuman (eds), *Human Rights, Democracy, and Legitimacy in a World of Disorder* (Cambridge: Cambridge University Press, 2018) 209–233.

[13] Ludwig Boltzmann Institute of Fundamental and Human Rights, *Extrajudicial Complaint Mechanisms for Resolving Conflicts of Interest Between Business Actors and Those Affected by Their Operations* (Vienna: LBI, 2013).

[14] OHCHR, 'Access to Remedy in Cases of Business-Related Human Rights Abuse: A Practical Guide for Non-State-Based Grievance Mechanisms', HR/PUB/22/4, 28 (October 2024).

[15] OHCHR, 'Access to Remedy in Cases of Business-Related Human Rights Abuse: An Interpretative Guide', HR/PUB/24/1, 56 (October 2024).

[16] UNGPs 28–31, note 3, 31–35.

A common observation within BHR scholarship is that remedies have remained 'rare'[17] and that Pillar III, i.e., the access to remedy pillar of the UNGP, is a 'forgotten pillar'.[18] Organisations such as the International Commission of Jurists[19] and the Office of the High Commissioner for Human Rights (OHCHR)[20] have issued reports to strengthen the implementation of access to remedy. These reports became the point of departure for a critical examination of non-state-based grievance mechanisms. But these reports did not discuss legal waivers at length. OHCHR has reaffirmed that effective grievance mechanisms must not require individuals to waive their right to pursue remedies through alternative grievance mechanisms, whether state-based or non-state-based, as a condition for access or participation.[21]

I contend that there are two pointers that highlight the current limitations regarding legal waivers. First, the procedural focus of the UNGPs on the design and effectiveness of grievance mechanisms, and second, the corporate justification of legal waivers as practical measures. As discussed below, these two factors together highlight the inherent power imbalance between rightsholders and corporations in private, company-led processes.

There has been an emphasis on crafting 'effective' grievance mechanisms under Principle 31 of the UNGPs than on wider substantive minimum human rights standards for remedies. The larger debate on how we can hold corporations accountable under international law[22] transformed into how we can 'design'[23] effective grievance mechanisms. Scholarly attention also gravitated towards discussions surrounding the effectiveness of grievance mechanisms in seeking redress.[24] Through generating effective alternative avenues to resolve disputes, the fundamental question of corporate accountability under international law took a backseat. This shift has been criticised as 'elevation of forum over substance'.[25] Owing to this shift, corporations retain significant discretion in defining what constitutes effective remedies, especially for remedies obtained from nonjudicial processes.[26]

To fill the vacuum of substantive minimum human rights standards for remedies, the United Nations Working Group on BHR defined effective remedies as remedies that are 'rightsholders-oriented'.[27] This approach is characterised by positioning 'human solidarity'

[17] OECD Watch, *Remedy Remains Rare*, 9 (Amsterdam: OECD Watch, 2015), https://www.oecdwatch.org/wp-content/uploads/sites/8/2015/06/Remedy-Remains-Rare.pdf (accessed 30 January 2025).

[18] Sarah McGrath, 'Fulfilling the Forgotten Pillar: Ensuring Access to Remedy for Business and Human Rights Abuses', *Institute for Human Rights and Business* (15 December 2015), https://www.ihrb.org/other/remedy/fulfilling-the-forgotten-pillar-ensuring-access-to-remedy-for-business-and (accessed 30 January 2025).

[19] International Commission of Jurists, *Effective Operational-Level Grievance Mechanisms* (Geneva: International Commission of Jurists, 2019) available at https://www.icj.org/wp-content/uploads/2019/11/Universal-Grievance-Mechanisms-Publications-Reports-Thematic-reports-2019-ENG.pdf (accessed 30 January 2025).

[20] Since its official launch in 2014, three substantive phases have been completed, each focusing on one of the three categories of grievance mechanisms outlined in that pillar: Office of the United Nations High Commissioner for Human Rights, 'Accountability and Remedy Project: Improving Accountability and Access to Remedy in Cases of Business Involvement in Human Rights Abuses', https://www.ohchr.org/en/business/ohchr-accountability-and-remedy-project (accessed 29 September 2025).

[21] OHCHR, note 14.

[22] Steven R Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility' (2001) 111:3 *Yale Law Journal* 443.

[23] Nikki Reisch, 'Non-Judicial Grievance Mechanisms: Hardening the Soft Law of Corporate Accountability?' in Daniel Bradlow and David Hunter (eds), *Advocating Social Change Through International Law* (Boston: Brill Nijhoff 2019) 250, 261.

[24] Ibid, 261.

[25] Ibid, 261.

[26] Ibid, 268.

[27] United Nations Working Group on Business and Human Rights, 'Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises', A/72/162 (18 July 2017) 8.

with 'victims of violations of international law'[28] as the central tenet of remedies. The Working Group articulated guidance delineating the constituent elements of effective remedies. An effective remedy:

- is free from fear of victimisation,
- requires a bouquet of remedies,
- provided through judicial or nonjudicial remedial mechanisms should not treat rightsholders merely as recipients of remedy,
- should be judged from the perspective of affected rightsholders,
- should address the existing power imbalance between the affected rightsholders and given enterprise-facing allegations of human rights abuses,
- is available without discrimination,
- is sensitive to the diverse experiences of victims,
- is accessible, affordable, adequate and timely and
- requires that rightsholders have access to information about their rights, the duties of states and the responsibilities of businesses concerning those rights.[29]

Despite the above guidance on effective remedies, legal waivers continue to be problematic and have remained a thorny issue for BHR experts with 'acute' concerns given significant power disparity.[30]

Moreover, legal waivers are seen as practical measures that prioritise predictability of litigation over securing substantive justice. When the late Professor John Ruggie, who had drafted the UNGPs, was asked about his opinion on legal waivers, he indicated that doing away with waivers is an unlikely event.[31] This position was also echoed in OHCHR's advisory, which clarified that there is no international legal prohibition on the use of legal waivers for civil suits.[32] The OHCHR issued a non-legally binding opinion on the inclusion of legal waivers in Barrick's settlement agreement in the Porgera case. The opinion stated that:

> the presumption should be that as far as possible, no waiver should be imposed on any claims settled through a non-judicial grievance mechanism. Nonetheless, and as there is no prohibition per se on legal waivers in current international standards and practice, situations may arise where business enterprises wish to ensure that, for reasons of predictability and finality, a legal waiver be required from claimants at the end of a remediation process.[33]

The OHCHR position analogised using legal waivers to reparations programs driven by states in post-conflict states.[34] The opinion focused on the fact that 'contextual factors play a

[28] Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, A/RES/60/147 (adopted on 16 December 2005) Preamble.

[29] United Nations Working Group on Business and Human Rights, note 27, 8–16.

[30] Columbia Law School Human Rights Clinic & Harvard Law School International Human Rights Clinic, note 9, 92.

[31] In response to a follow-up request that Ruggie provide his own opinion on Barrick's use of waivers in the Porgera mechanism, Ruggie wrote on 23 August 2013: 'If there were a "no waiver" stipulation, how many companies do you think would set up grievance mechanisms? My suspicion is very few'. Catherine Coumans, 'Do No Harm? Mining Industry Responses to the Responsibility to Respect Human Rights' (2017) 38:2 *Canadian Journal of Development Studies / Revue canadienne d'études du développement* 272, 284.

[32] OHCHR, note 2, 2.

[33] Ibid.

[34] Ibid, 8.

significant role'[35] in determining how grievance mechanisms are designed.[36] Moreover, OHCHR suggested that there is 'no consistent practice or jurisprudence from regional and national courts on this issue'.[37] Scholarly opinion on legal waivers also followed OHCHR's advice, but with some caveats. Some scholars have urged 'a very strong presumption against'[38] the use of legal waivers, especially for serious corporate human rights abuses.[39] Others argue that waivers must be used only when there is a 'clear demonstration of equality of arms, fully informed claimant consent and provision of comprehensive legal advice, and strict compliance with human rights principles and the effectiveness criteria'.[40] Experts have also challenged the acceptability of waivers, citing that waivers are only assessed on grounds of rights-compatibility without considering Principle 31 of the UNGPs as a whole.[41] However, a point of consensus seems to have emerged that suggests that legal waivers need to be constructed 'narrowly'.[42] Yet, even the most narrowly constructed waivers must still meet the underlying corporate objective of precluding future claims against the company.

The procedural emphasis of the UNGPs on the design and effectiveness of grievance mechanisms, combined with the normative post-hoc business justification of legal waivers as a practical tool, reveals the inherent power imbalance between rightholders and corporations in operational-level grievance mechanisms. There is a disconnect between the intent of the UNGPs (substantive justice and reparations) and the actual implementation of nonjudicial grievance mechanisms (focused on process and conflict management).[43] Remedies arrived at without a 'participatory parity'[44] of the rightholders risks allowing power imbalances to skew the outcomes against the marginalised. Given the power imbalance between rightsholders and corporations, issues such as legal waivers are often reduced to technical minutiae, falling outside the scope of meaningful scrutiny. Rightholders, often operating with limited legal support, under financial duress, or in contexts of institutional and informational disadvantage, may feel compelled to accept waivers as the only viable pathway to any form of remedy.[45] This tension is most clearly illustrated by examining one of the key drivers why corporations push for waivers: the cost of settlements.

III. Corporate 'Settlement Mill'[46]

Settlements of claims can arise in various contexts. Some settlements are reached after litigation has been initiated but before adjudication is complete; others occur post-

[35] Ibid, 8.

[36] Lisa J Laplante, 'The Wild West of Company-Level Grievance Mechanisms: Drawing Normative Borders to Patrol the Privatization of Human Rights Remedies' (2023) 64 *Harvard International Law Journal* 311, 358.

[37] OHCHR, note 2, 8.

[38] Sarah Knuckey and Eleanor Jenkin, 'Company-Created Remedy Mechanisms for Serious Human Rights Abuses: A Promising New Frontier for the Right to Remedy?' (2015) 19:6 *The International Journal of Human Rights* 816.

[39] Ibid, 817.

[40] Ibid, 816.

[41] Benjamin Thompson, 'Determining Criteria to Evaluate Outcomes of Businesses' Provision of Remedy: Applying a Human Rights-Based Approach' (2017) 2:1 *Business and Human Rights Journal* 82.

[42] OHCHR, note 14, 28; International Commission of Jurists, note 19, 73; Columbia Law School Human Rights Clinic & Harvard Law School International Human Rights Clinic, note 9, 109–116.

[43] Ben Grama, 'Lost in Translation: Company Grievance Mechanisms and Human Rights' (2025) 17 *Journal of Human Rights Practice* 1, 17.

[44] Alysha Kate Shivji, 'Theorizing Effective (Preventative) Remedy: Exploring the Root Cause Dimensions of Human Rights Abuse & Remedy' (2025) 198:2 *Journal of Business Ethics* 226.

[45] Knuckey and Jenkin, note 38, 812.

[46] I borrow this phrase from the investigation on mass settlement programs: Dana A Remus and Adam S Zimmerman, 'The Corporate Settlement Mill' (2015) 101:1 *Virginia Law Review* 192.

adjudication after determination of liability. In some instances, settlements result from direct negotiations between the parties prior to any formal legal proceedings. The settlements that are achieved from direct negotiations reflect a market function where the 'individual rights of harmed become secondary to the market efficiencies'.[47] These settlements are not necessarily justice-oriented but instead serve the instrumental purpose of resolving grievances quickly. However, publicly available data on settlement reached because of direct negotiations for BHR linked disputes remains limited. This opacity presents a significant obstacle to confidentiality for BHR research in the coming decade (discussed in the next part). In the absence of publicly available data, meaningful insight can nonetheless be derived through an analysis of publicly disclosed settlements involving corporate-human rights violations. While these figures are not reflective of outcomes reached via direct negotiations, they serve to approximate the scale of financial liability borne by corporations and underscore patterns of monetary redress in well-known cases of corporate wrongdoing.

Existing scholarship suggests that only a small number of cases are settled.[48] In a 2012 study, a selection of 36 tort-based cases revealed that settlements were achieved only in around 6 cases.[49] Furthermore, dismissal of claims against companies has become common, especially when litigated in courts.[50] The Business and Human Rights Resource Centre's (BHRRC) global lawsuit database tracker shows that most cases against corporations were closed or dismissed.[51] The number of cases that were dismissed was higher than those settled.[52] Even though settlements are rare and dismissals of cases against corporations high, some cases can put both parties in a 'lose-lose situation'.[53]

An empirical review of 151 cases (1994–2018) in the BHRRC database, published in the *Good Business* report, shows that settlements can impose significant financial burdens on corporations, in some instances amounting to billions of dollars.[54] Table 1 presents the financial costs incurred by defendant companies to settle cases between 1996 and 2018, including only settlements where the amounts were publicly disclosed.[55] These cases span a

[47] Hassan M Ahmad, 'Against Settlement in Transnational Business and Human Rights Litigation', Osgoode Hall Law School Working Paper (2023), 37, https://commons.allard.ubc.ca/fac_pubs/740/ (accessed 29 July 2025).

[48] 'Since the 1980s, more than 120 foreign direct liability cases have been filed worldwide against MNCs for their alleged complicity in human rights abuses. Judged solely by their outcome, the cases indeed present a rather disillusioning record: No corporation has been found guilty and most human rights litigation cases were dismissed. Less than a handful of cases were settled'. Judith Schrempf-Stirling and Florian Wettstein, 'Beyond Guilty Verdicts: Human Rights Litigation and Its Impact on Corporations' Human Rights Policies' (2017) 145 *Journal of Business Ethics* 545, 548.

[49] Jennifer Zerk, *Corporate Liability for Gross Human Rights Abuses* (Geneva: OHCHR, 2012) available at https://www.ohchr.org/sites/default/files/Documents/Issues/Business/DomesticLawRemedies/StudyDomesticeLawRemedies.pdf (accessed 20 January 2025).

[50] LFH Liesbeth Enneking, 'Judicial Remedies: The Issue of Applicable Law', in Katerina Yiannibas and Juan José Álvarez Rubio (eds), *Human Rights in Business: Removal of Barriers to Access to Justice in the European Union* (London, New York: Routledge, 2017) 38, 41.

[51] Business Human Rights Resource Centre's Lawsuits Database shows that out of the 282 lawsuits tracked, 145 were closed. BHRRC, 'Business Human Rights Resource Centre's Lawsuits Database', *Business & Human Rights Resource Centre* (2020), https://www.business-humanrights.org/en/latest-news/?&content_types=lawsuits&operator=1 (accessed 9 January 2025).

[52] Ibid, 94.

[53] John Gerard Ruggie, *Just Business: Multinational Corporations and Human Rights*, 1st edn. (New York: W. W. Norton & Company, 2013) 137.

[54] Most cases 'either dismissed or ruled in favour of the defendant companies'. Başak Bağlayan et al, 'Good Business: The Economic Case for Protecting Human Rights', 43 (December 2018), https://www.undp.org/sites/g/files/zskgke326/files/2024-04/4-%20Good-business-report%20-%20Case%20for%20protecting%20human%20rights.pdf (accessed 9 January 2025).

[55] Ibid, 44–46.

Table 1. Sample Costs of Out-of-Court Settlement[56]

No.	Year	Case	Settlement Cost	Approximate Settlement Cost in Millions USD
1	1996	BHP lawsuit (re Papua New Guinea)	AUD40 million	26.3
2	1998	Mitsubishi lawsuit (re sexual harassment in USA)	$34 million	34
3	2000	Coca-Cola lawsuit (re racial discrimination in USA)	$192 million	192
4	2001	DuPont lawsuits (re PFOA pollution in USA)	$235 million for medical monitoring for over 70,000 people	235
5	2003	Nike lawsuit (Kasky v Nike, re denial of labour abuses)	$1.5 million	1.5
6	2003	Cape/Gencor lawsuits (re South Africa)	Settlement in three parts: (1) Gencor established and now administers a £35 million trust in South Africa. (2) Cape settled with its 7500 claimants for £7.5 million. (3) Gencor settled with the 7500 claimants for approximately £3 million	61.7
7	2004	US apparel companies lawsuit (re Saipan)	$20 million	20
8	2009	Nishimatsu lawsuit (re World War II forced labour)	¥250 million	1.7
9	2009	Pfizer lawsuit (re Nigeria: Nigerian proceeding)	$75 million	75
10	2009	Trafigura lawsuits (re Côte d'Ivoire: UK lawsuit)	Trafigura agreed to pay each of the 30,000 claimants approximately $1500 (i.e., $ 45 million)	45
11	2012	Trafigura lawsuits (re Côte d'Ivoire: Netherlands lawsuit)	Trafigura agreed to pay €300,000 compensation and paid a €67,000 fine.	0.3
12	2012	US Deepwater Horizon explosion and oil spill lawsuits (BP)	BP settled for $4.5 billion with the US Department of Justice and Securities and Exchange Commission. BP agreed to plead guilty to 14 criminal charges and to pay a $1.26 billion fine to the Department of Justice.	4535

(*Continued*)

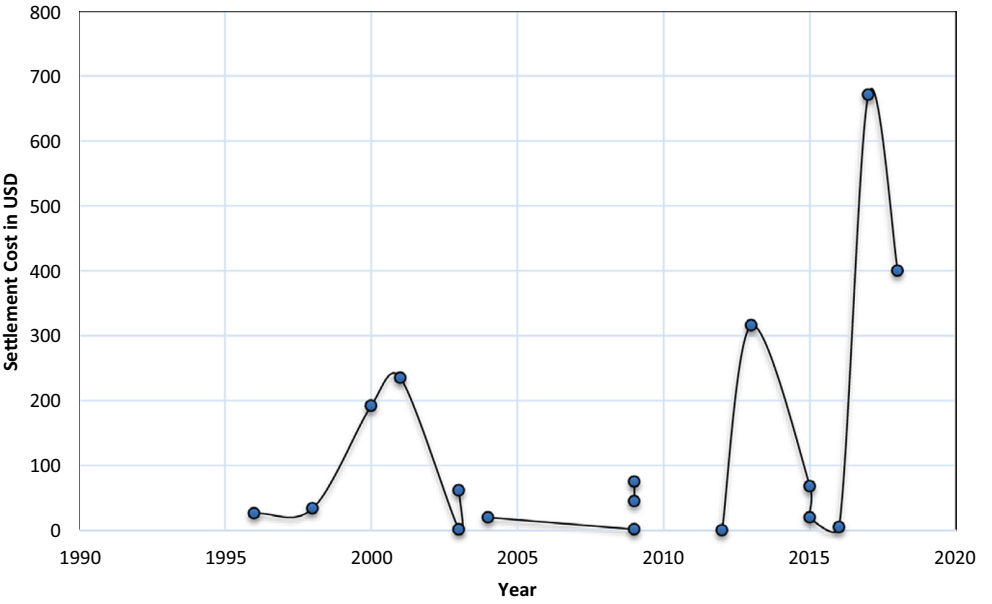
[56] Ibid, 44–46.

Table 1. *Continued*

No.	Year	Case	Settlement Cost	Approximate Settlement Cost in Millions USD
			The company will also pay $2.4 billion to the National Fish and Wildlife Foundation and $350 million to the National Academy of Sciences. BP will also pay $525 million to the Securities and Exchange Commission	
13	2013	Shell/BASF lawsuit (re Brazil)	$316 million	316
14	2015	Shell lawsuit (re oil spills and Bodo community in Nigeria)	£55 million	68
15	2015	US Deepwater Horizon explosion and oil spill lawsuits (BP)	BP agreed to pay about $18.7 billion in damages for water pollution caused by the spill, settling claims with the US Government and Louisiana, Mississippi, Alabama, Texas and Florida	18,700
16	2015	Signal International lawsuits (re trafficking of Indian workers in USA)	Signal settled the David lawsuit and 11 other cases for $20 million	20
17	2016	KiK lawsuit (re Pakistan)	$5.15 million. An agreement facilitated by the ILO	5.15
18	2017	DuPont lawsuits (re PFOA pollution in USA)	DuPont settled over 3550 PFOA lawsuits for $671 million	671
19	2018	Gold miner silicosis litigation (re South Africa)	Six companies targeted in the lawsuit have set aside approximately $400 million to settle	400
20	2018	BHP Billiton and Vale lawsuit (re dam collapse in Brazil)	$5.3 billion	5300

wide range of claims, including environmental damage, employment discrimination, labour rights violations and transnational tort litigation. While such a comparative analysis, spanning different categories of human rights violations and instances beyond direct negotiations, is not conclusive, it is methodologically justified in light of the structural similarities in the harms addressed and the corporate actors involved. For analytical consistency, all monetary values were converted into approximate United States dollars using indicative historical exchange rates at the time of settlement. This allowed for meaningful comparison across different legal systems and currencies.

A closer scrutiny of the sample reveals a small number of exceptionally high-value settlements. These include BP's Deepwater Horizon settlements in 2012 and 2015, as well as the 2018 settlement arising from the BHP and Vale dam collapse in Brazil. Graph 1 converts the table into a visualisation and shows the standardised data on 20 major settlements



Graph 1. Approximate Settlement Cost in Millions USD.

between 1996 and 2018 (minus the 3 exceptionally high settlements). This is done to see whether there is a generalisable pattern in year-on-year settlement costs.

When the big settlement outliers are excluded, a more stable pattern emerges. Most settlements fall within a range of US$20 million to US$300 million. Smaller-scale settlements continue to appear throughout, even post-2010. This suggests that high-profile disasters attract exceptionally large payouts, but that is the case in minority of cases. The observed increases are case-specific, often influenced by a wide array of factors including the severity of harm, media attention, legal complexity, jurisdiction or the political and reputational pressures facing the defendant. Considering the financial implications of settlements on corporations, settlements can become a costly affair.

It will be incorrect to assume that all BHR lawsuits worldwide result in high-value settlements. Settlement rates vary markedly across jurisdictions. Existing research highlights that common law systems such as the United States, the United Kingdom and Australia display significantly higher rates of settlement than civil law countries, particularly those influenced by the French legal tradition.[57] Several factors account for this divergence. Legal origin, case type and procedural rules play a decisive role. Mechanisms such as early evidence disclosure and the pace of court proceedings affect the likelihood of settlement.[58] Settlement rates are higher in tort actions, especially in the United States.[59]

In this context, legal waivers operate as a tool for cost management. Where settlements are substantial, legal waivers function to bar further litigation, thereby providing finality. Even where settlement amounts are more modest, legal waivers serve to minimise the

[57] Yun-chien Chang and Daniel Klerman, 'Settlement Around the World: Settlement Rates in the Largest Economies' (2022) 14:1 *Journal of Legal Analysis* 80–175.

[58] Ibid, 101.

[59] Ibid, 82.

diversion of corporate resources and reinforce closure of the dispute. Corporations are thus overall incentivised to employ them as a means of foreclosing future proceedings.

IV. Confidentiality

Confidentiality manifests in BHR settlements in different ways. These include confidentiality over the terms of settlement agreements, nontransparent grievance processes and the protection of rightholders' identities. For the purposes of this article, the focus will be on one of the most significant challenges to public accountability: confidentiality over the terms of settlement agreements. When rightholders accept settlements that contain legal waiver clauses, confidentiality provisions imposed by corporations often prevent public scrutiny of these agreements. This raises critical concerns about compatibility of the practice of confidentiality by corporations with the transparency requirement embedded in the UNGPs. Specifically, Principle 31(e) of the UNGPs, which outlines transparency in grievance mechanisms, is limited to defining transparency as keeping parties informed about the development and operation of grievance mechanisms.[60] This limited definition creates a normative gap that arguably legitimises corporate reliance on confidential settlements including legal waivers, thus undermining the effectiveness of these mechanisms. It also raises a fundamental question: can remedial outcomes secured through grievance mechanisms with confidential terms and conditions be reconciled with the right to an effective remedy under Pillar III?[61]

A particularly illustrative case about confidentiality of terms emerged when civil society organisations challenged African Barrick Gold (subsequently renamed Acacia Mining) regarding their implementation of legal waivers in North Mara, Tanzania.[62] The company articulated three principal justifications for maintaining confidentiality in settlement agreements containing legal waivers. First, the company argued that 'providing information about specific grievances to the public at large'[63] does not align with the definition of transparency under the UNGPs. Second, the company added that fear for the women's safety, who could be affected by disclosing the amount received as compensation in exchange for legal waivers, might create 'heightened concerns about abuse and re-victimization of the women'.[64] The company claimed that rightholders 'have asked that that fact not be publicized because they fear for their own safety from members of the community seeking to appropriate their remediation benefits'.[65] The company further argued that it was because 'revealing levels of financial compensation would compromise individuals and legitimate processes'.[66] The company also claimed that confidentiality provided a 'safe space for engagement', 'protected the privacy of users' and 'prevented reprisals'.[67] Third, 'local views and preferences' and the

[60] UNGPs, note 3, Principle 31.

[61] Lindsay, note 1, 293.

[62] Mining Watch, 'African Barrick's Confidential Compensation Agreements Questioned at Troubled Tanzania Mine' *Mining Watch* (17 December 2013), https://miningwatch.ca/news/2013/12/17/african-barrick-s-confidential-compensation-agreements-questioned-troubled-tanzania (accessed 29 September 2025).

[63] Response Letter from Deo Mwanyika- ABG VP, 'RE: African Barrick Gold's Non-Judicial Remedy Programs at North Mara, Tanzania' *African Barrick Gold* (11 March 2014), https://miningwatch.ca/sites/default/files/abg_response_to_mwc_and_raid_11_march_2014.pdf (accessed 29 September 2025).

[64] African Barrick Gold, 'Update on the North Mara Sexual Assault Allegations', *BHHRC* (20 December 2013), https://www.business-humanrights.org/fr/derni%C3%A8res-actualit%C3%A9s/pdf-update-on-the-north-mara-sexual-assault-allegations/ (accessed 29 September 2025).

[65] Mwanyika, note 63, 10.

[66] Caroline Rees, *Piloting Principles for Effective Company-Stakeholder Grievance Mechanisms: A Report of Lessons Learned* (Cambridge: Harvard Kennedy School, 2011) 22.

[67] Ibid, 11.

'needs of vulnerable populations' made a case to favour confidentiality.[68] Based on these reasons, the company assumed the agreement's confidentiality to be a 'consensually agreed norm'.[69] The company, however, revised the agreement and later made confidentiality of the agreement optional in 2014, as it accepted the criticism that its confidentiality requirement was 'unnecessarily strict'.[70] Whereas the confidentiality provision was revised, the company decided to 'continue to honour the confidentiality provision' and said that it would 'not object if complainants choose to share their Grievance Resolution Agreements'[71] even when someone has accepted the confidentiality provision.

Another relevant case concerning the use of legal waiver is that of the Solai Dam burst in Kenya.[72] In this case, local media in Kenya reported that 'a small group of people were asked to sign waivers and received compensation in a way that seemed inappropriate'.[73] When the rightholders decided to sue the government and the dam operator for infringement of their constitutional rights, the use of waiver was also reported by other media outlets.[74] The use of waiver and its role in providing remedies was later detailed in a report by the Working Group, where waivers tantamounted to 'obstruction of access to an effective remedy for victims'.[75] The report highlighted that

> During its visit in situ, the Working Group met with members of affected communities and was concerned to hear that during a meeting convened by some company managers with the presence of local authorities, cheques had been handed to people who had lost family members, housing and/or business, in exchange for their signing an indemnity form that would absolve the company of any responsibility for the disaster. This could amount to an obstruction of access to an effective remedy for victims.[76]

Unlike the Porgera and North Mara cases, the Solai Dam case did not generate the same debate in the BHR field, possibly because it has limited public information for informed analysis. The case was recently reported to have settled out of court at 57 million Kenyan Shillings (US$441,000).[77]

Confidentiality has an adverse impact on rightholders. First, confidentiality over terms, including that of legal waivers, risks creating an information asymmetry where corporations maintain detailed records of settlements while affected communities are put in a 'take-it or leave-it' position.[78] This information asymmetry fundamentally

[68] Mwanyika, note 63, 11.
[69] Ibid, 11.
[70] Ibid, 11.
[71] Ibid, 11.
[72] *Perry Mansukh Kansagara & 3 others v Director of Public Prosecutions* [2021] KECA 941 (KLR).
[73] Agatha Ngotho, 'UN rights body questions skewed Solai Dam', *The Star Kenya* (8 August 2018), https://perma.cc/6Z7V-9W2T (accessed 29 September 2025).
[74] Richard Munguti, 'Solai dam victims sue govt, Kansagra for compensation', *The Daily Nation* (28 June 2020).
[75] United Nations Working Group, 'Statement at the End of Visit to Kenya by the United Nations Working Group on Business and Human Rights' (11 July 2018), https://www.ohchr.org/en/statements-and-speeches/2018/07/statement-end-visit-kenya-united-nations-working-group-business-and (accessed 30 September 2025).
[76] United Nations Working Group, *Visit to Kenya: Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises* A/HRC/41/43/Add.2 (21 May 2019), https://documents.un.org/doc/undoc/gen/g19/143/56/pdf/g1914356.pdf (accessed 30 September 2025).
[77] Joseph Openda, 'Solai dam owner to pay Sh57m in out-of-court deal for tragedy that left 48 dead' *Daily Nation* (11 August 2023), https://nation.africa/kenya/counties/nakuru/kins-of-solai-dam-tragedy-victims-in-sh57m-out-of-court-deal-4427260 (accessed 28 September 2025).
[78] Maximilian J L Schormair and Lara M Gerlach, 'Corporate Remediation of Human Rights Violations: A Restorative Justice Framework' (2019) 167:3 *Journal of Business Ethics* 480.

undermines the ability of rightholders to seek higher settlements. Second, confidentiality of terms, including legal waivers, limits the opportunities for developing solidarity amongst different groups of rightholders who are involved in the settlement. The lack of free flow of information within rightholders' communities may stem the development of community resistance against accepting whatever compensation is awarded. Third, confidential settlements in the BHR field do not contribute to the development of legal precedent. The absence of a public judgment diminishes the potential deterrent effect on future misconduct and reduces the chance for structural change. By embedding waivers within routine contractual settlement agreements, corporations can effectively insulate themselves from legal and reputational consequences. This opaqueness is particularly problematic in jurisdictions with weak regulatory oversight, where rightholders may have limited access to independent legal advice or alternative avenues for redress.

I advance the argument that two key principles may assist in recalibrating the relationship to address the issue of confidentiality over terms in BHR settlements. First, a pragmatic solution to the challenge of confidentiality in settlement agreements is to differentiate between commercial terms (e.g., settlement amounts) and rights-affecting terms (e.g., concessions by rightholders). By categorising various clauses in a settlement agreement, we can better calibrate the extent of disclosure needed without entirely compromising legitimate business interests. Such a framework avoids the reductive all-or-nothing transparency approach. I term this a differentiated disclosure regime. It attempts to balance rightholders' informational needs and decisional autonomy while securing corporate interests. The concept of differentiated disclosure derives from legal design theory in consumer law scholarship.[79] It rejects the prevailing 'one-size-fits-all' approach to contractual transparency.[80]

The bifurcation between commercial and rights-affecting terms must rest on clear, justiciable standards. Otherwise, there may be a risk of corporations using the cover of commercial terms to not disclose rights-affecting terms. The primary standard should be public interest. Commercial terms such as settlement amounts typically concern the private economic arrangements between parties. While not irrelevant to public accountability, their confidentiality does not fundamentally undermine the effectiveness of grievance mechanisms under Principle 31 of the UNGPs. By contrast, rights-affecting terms engage broader public interests. These include waivers of future legal claims, non-disparagement clauses, confidentiality provisions that prevent disclosure of harmful corporate practices, and indemnification clauses that shift legal liability. These provisions shape rightholders' ongoing legal capacities and their ability to participate in public discourse about corporate accountability.

Secondly, courts must subject settlement agreements to substantive scrutiny under domestic legal systems, especially those accompanying legal waivers. This principle addresses a critical gap in current practice. Courts often treat confidentiality provisions as presumptively enforceable absent extraordinary circumstances. By subjecting legal waivers to greater local scrutiny, domestic courts can develop further specific standards for BHR settlements. The legal basis for such scrutiny already exists in various forms across jurisdictions. For instance, in Papua New Guinea, the Fairness of Transaction Act 1993 in PNG serves as the primary legal framework that can scrutinise legal waivers in settlement agreements used by Barrick Gold.[81] The Act includes provisions that regulate conduct

[79] J Luzak et al, 'ABC of Online Consumer Disclosure Duties: Improving Transparency and Legal Certainty in Europe' (2023) 46:3 *Journal of Consumer Policy* 307.

[80] Joasia Luzak, 'Tailor-Made Consumer Protection: Personalisations Impact on the Granularity of Consumer Information' in *Legal Design* (Cheltenham, UK: Edward Elgar Publishing, 2021) 122.

[81] Fairness of Transactions Act 1993 (Papua New Guinea).

between two parties in unequal bargaining positions. Moreover, the Act emphasises the role of the state in reviewing unfair contractual obligations as part of remedial processes. However, such application of domestic contract law to legal waivers has not been examined in BHR scholarship.

These two principles together point towards a possibility of a hybrid regulatory model for settlement of human rights claims: one that advocates for scaffolded disclosure of settlement terms while allowing for contextual flexibility. The hybrid model would operate on two levels. At the foundational level, it would establish bright-line prohibitions against certain categories of provisions. These include waivers that extend to criminal claims, non-disparagement clauses or sharing of information about personal harm suffered with others and indemnification clauses that shift liability for indirect breaches to rightholders. These core prohibitions would be non-waivable. They would apply regardless of the parties' consent. This recognises that severe inequality of bargaining power undermines the voluntariness of settlement agreement. At the second level, the hybrid model would incorporate contextual factors that influence the permissibility and enforceability of other settlement terms. Key contextual considerations would include: the relative sophistication and resources of the parties, whether rightsholders had access to independent legal advice and whether the settlement provides for ongoing remediation. This contextual layer acknowledges that not all power imbalances are equally severe. It recognises that some corporate confidentiality interests may be legitimate. For instance, information protected as trade secrets may remain confidential when disclosure would compromise legitimate commercial interests. By combining core protections with contextual flexibility, this hybrid model recognises that inequality of bargaining power is not a binary condition but exists on a spectrum.

V. Conclusion

This article has shown that the procedural formalism of the UNGPs, the prohibitive cost of settlements, and the opacity surrounding settlement terms collectively enable corporations to use legal waivers as shields against future accountability. The absence of standardised frameworks governing legal waivers introduces significant risks to achieving remedies that are 'authentically dialogic … morally expansive [and] victim centric'.[82] The debate over legal waivers has too often been framed in binary terms: should they be permitted or prohibited? This dichotomy is unproductive.

A more constructive way forward lies in the development of a differentiated disclosure regime coupled with domestic legal scrutiny. Such a framework would reject blanket confidentiality, distinguish between commercial terms and rights-affecting terms and mandate disclosure where public interest demands it. In parallel, domestic courts should subject settlement agreements containing waivers to substantive review, ensuring that freedom to contract does not validate provisions that undermine access to remedy.

Taken together, these principles point towards a hybrid regulatory model: one that establishes bright-line prohibitions against the most harmful practices (such as waivers of criminal liability, non-disparagement clauses, or indemnification of corporate wrongdoing), while allowing contextual flexibility for less harmful provisions. The differentiated disclosure framework is therefore not a cosmetic adjustment but a structural recalibration of how confidentiality and waivers operate in BHR settlements. It ensures that confidentiality

[82] Lara Bianchi, Robert Caruana, and Alysha Kate Shivji, 'Engaging Marginalized Stakeholders: Towards a Dialogical Theorization of Effective Corporate-Rightsholder Remedy' (2024) *Journal of Business Ethics*. https://link.springer.com/article/10.1007/s10551-024-05879-6 (accessed 30 September 2025).

serves its protective function without eroding accountability. Unless such reforms are pursued, legal waivers risk entrenching a system in which corporate accountability is sacrificed for efficiency. The stakes for the credibility of the BHR framework, and for the right to effective remedy under Pillar III, could not be higher.

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