

Grievance Mechanisms for Business and Human Rights

Strengths, Weaknesses and Gaps



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GRIEVANCE MECHANISMS FOR BUSINESS AND HUMAN RIGHTS: STRENGTHS, WEAKNESSES AND GAPS

EXECUTIVE SUMMARY

Individuals, workers and communities whose human rights are negatively impacted by corporate operations are becoming ever more vocal and successful in demanding that their grievances be addressed. Some of these grievances are projected through lawsuits under domestic or overseas judicial systems. Others are the subject of major civil society campaigns, nationally or internationally. Yet there is also a growing body of extrajudicial mechanisms in the business and human rights arena to which complainants can take their concerns. This paper aims to provide an assessment of some of the strengths and weaknesses of this group of mechanisms and the gaps they leave uncovered. The analysis is based on a mixture of background research and consultations with representatives of business, NGOs, international organisations, multi-stakeholder initiatives, government, academia, the legal profession and others with experience of these mechanisms in practice.

Section One offers a brief introductory discussion of the situation and role of extrajudicial grievance mechanisms within the context of wider dispute resolution processes. There follows a short overview in **Section Two** of each of the 11 mechanisms, or categories of mechanism, this paper addresses: namely, the Fair Labor Association, Workers Rights Consortium, International Council of Toy Industries, Voluntary Principles for Security and Human Rights, Ethical Trading Initiative, Social Accountability International, National Human Rights Institutions, OECD National Contact Points, the Compliance/Advisor Ombudsman of the World Bank Group, International Framework Agreements and the UN Global Compact. The next four sections offer an analysis of the ways in which these mechanisms tackle barriers to access (Section Three), support local solutions to grievances (Section Four), use different processes to address grievances (Section Five) and present their outcomes (Section Six).

Section Three, considers different kinds of barriers to accessing grievance mechanisms, based on the standards they cover, the eligibility of parties, the scale or gravity of admissible grievances, limits on information and awareness, and questions of trust or confidence. Barriers may be intended or unintended. Constraints on the scope of standards are in part an intentional limit on the mechanism's application. Yet a mechanism linked to a broad reference to rights may also hamper access due to uncertainty over the basis for complaints. Limits on who can use a mechanism and the gravity of abuse it will deem admissible are usually intentional – though not always desirable – barriers; while those that flow from a lack of information about a mechanism are frequently present, but rarely intended. A lack of trust and confidence in a mechanism are the least tangible and measurable of all obstacles to access, but are clearly a factor for certain mechanisms.

Most mechanisms based at the industry, national or international levels seek to encourage locally-based solutions to grievances as a first instance. **Section Four** explores what means they use to achieve this. Some have developed innovations in training and capacity-building to help supply-chain factories develop their own effective

grievance processes. Others support the use of local experts in investigative processes, which may also build capacity. Some organisations provide guidance to companies on the characteristics of the grievance mechanisms they should put in place, but do so only in the briefest of terms. Many mechanisms include a more-or-less mandatory requirement for local dispute resolution before more remote instances are engaged. Yet they do so with varying levels of effectiveness. Certification-based models may face particular challenges in this regard. Finally, many organisations try to exercise leverage over suppliers to encourage them to resolve and remediate complaints at the local level. Those who can engage pressure from corporate members appear to do so with most success.

Section Five explores the different processes the mechanisms use to address complaints, be it conveying information, conducting investigations and adjudicating, engaging in dialogue-based processes, or a combination of the above. Many civil society actors favour investigative processes as a means to vindicate rights and leverage systemic change through campaigns. However, it is unclear in practice whether such processes are always the best path to these outcomes. On the other hand, dialogue-based processes alone may lack leverage, being particularly reliant on the good faith engagement of the company involved. Mechanisms that combine investigative and mediating functions, however, may benefit from a constructive dynamic between the two. The prospect of an investigation reaching – and publicising – a negative assessment may motivate a company to engage in negotiation or mediation as an alternative. This is more likely to result in mutually-accepted outcomes that address the root causes of complaints. Mechanisms combine these two processes in different ways. Yet in some cases the benefits of both dialogue and investigation are lost due to a lack of skills, resources and transparency.

Section Six looks at the outcomes from grievance mechanisms in two regards. First, it considers how far the different mechanisms use, or could use, the outcomes of grievance processes as a basis for wider learning of lessons, in order to achieve more systemic improvements in human rights performance at the industry level or beyond. Second, it takes up the question of transparency. This is not typically a feature of mediation-based mechanisms, yet is important in the realm of human rights, which most actors consider a public good. Experience suggests that while a grievance process may require some confidentiality while it is underway, it can and should aim for transparency with regard to the outcomes it produces.

Section Seven identifies a number of gaps remaining in the existing network of grievance mechanisms. These relate to initiatives that currently have no grievance mechanism and may lose credibility as a result; the lack of guidance for corporations on what makes a grievance mechanism effective; the lack of available and accessible information about existing mechanisms and how to use them; the scope for a more far-reaching role by many national human rights institutions; and the possibility of creating a global ombudsperson, as well as the challenges that would have to be addressed were it to be effective in practice. Finally, the **concluding section** proposes ten recommendations for enhancing the system of grievance mechanisms in the business and human rights arena, based on the foregoing analysis.

I. INTRODUCTION

The context

Recent years have seen a sharp growth in recognition amongst corporations of their actual and potential impact on the human rights of their external stakeholders, be it communities, workers in their supply chains or end-users of their products and services. This has been accompanied by increasing acceptance that they bear a responsibility for avoiding or mitigating negative aspects of that impact.¹ These developments follow a growth in high-profile allegations of corporate abuses of human rights, projected into the public domain through litigation or public campaigns.

The examples over recent years are numerous. The UK courts found against Cape plc in 2001 in a case over compensation for asbestos-related diseases among the work force at its former subsidiary's asbestos mine in South Africa. Unocal was sued in US courts for complicity with the Burmese regime's use of forced labour, eventually settling out of court in 2004. Texaco (now Chevron) is facing a lawsuit in Ecuador over allegations that pollution from its dumping of toxic wastewater in the rain forest has seriously impacted the health and livelihoods of indigenous communities. Nike faced a worldwide public protest in the late 1990s over the use, by its Pakistani suppliers, of child labour to sew footballs. In 2000, Newmont mining was publicly vilified for health damage to indigenous communities due to a mercury spill near its Yanacocha mine in Peru. And Yahoo was subject to an international campaign in 2005, and a U.S. federal lawsuit in 2007, alleging its complicity in human rights violations, after Chinese officials imprisoned and abused a journalist for sending an email to which they objected, having obtained his email and IP Internet address from Yahoo.

These are just a few examples of a growing body of lawsuits and NGO campaigns targeting alleged corporate abuses of human rights. These two default options for addressing grievances sit at opposite ends of a spectrum. Litigation represents the most formalised, regulated form of response with binding outcomes. Public campaigns offer an entirely informal, unregulated alternative with no legal or binding effect. Both have an important role to play in bringing about change.

It is worth stressing here the particular importance of judicial channels for addressing grievances. Effective legal and judicial systems provide clarity and predictability for all actors. They may deter some actors who would otherwise knowingly seek to undermine or abuse human rights for perceived commercial benefit. They provide incentives for

¹ Over 3,500 companies have signed up to the 10 Global Compact Principles, which include principles on the need to support and promote human rights and avoid complicity in human rights violations. The Business and Human Rights Resource Centre has identified 111 companies that have a human rights policy statement that refers to the Universal Declaration on Human Rights and a further 29 companies with a human rights policy with no such reference. (These listings include some Global Compact companies, but only where they have adopted a formal company policy statement explicitly referring to human rights.) Fourteen transnational corporations collaborate on the advancement of business and human rights via the Business Leaders Initiative on Human Rights (BLIHR) and an additional seven francophone transnationals do likewise under the Entreprises pour les Droits de l'Homme. Sixteen of the largest mining and metal companies and twenty-five national mining and global commodities associations that are members of the International Council of Mining and Metals subscribe to a set of principles including a commitment to human rights. Multi-stakeholder initiatives covered in this paper are further examples of companies taking human rights on board in their policies and commitments.

improved and expanded due diligence within companies. And they contribute to the development of jurisprudence that enhances the understanding of how human rights apply to corporate activities in practice. Where grave human rights breaches are concerned, including those that may constitute a breach of international criminal law, judicial systems are the most appropriate avenue to address them. They are also increasingly able to do so in practice. As John Ruggie, the UN Secretary-General's Special Representative on Business and Human Rights, stated in his 2007 report to the UN Human Rights Council,

“corporate responsibility is being shaped through the interplay of two developments: one is the expansion and refinement of individual responsibility by the international ad hoc criminal tribunals and the ICC Statute; the other is the extension of responsibility for international crimes to corporations under domestic law. The complex interaction between the two is creating an expanding web of potential corporate liability for international crimes – imposed through national courts.”²

Yet in many countries legal recourse is not a credible option. Courts may not be accessible, functioning or effective agents of justice. Even in those states where judicial systems provide reasonable or good due process, they may still be financially inaccessible and be so time-consuming as to bring remedies too late to be of use.³ And in some situations those international human rights standards the state has formally adopted are not, or not fully, reflected in domestic law. Similarly, the parallel option of civil society campaigns are typically resource-intensive. Even the largest NGOs can only afford the time and money to pursue a few of the most striking cases. Furthermore, by the time a grievance gains the status and backing to allow it to go to court or be projected through a campaign, it has generally been long-running and become entrenched, making effective resolution and remedy all the harder.

It is not therefore surprising that a growing number of initiatives and organisations engaged with corporate responsibility have developed grievance mechanisms of their own. These include multi-stakeholder initiatives such as the Fair Labor Association, Social Accountability International, the Ethical Trading Initiative, the International Council of Toy Industries and the Voluntary Principles for Security and Human Rights. They include various national human rights institutions around the world, the OECD with regard to its Guidelines for Multinational Enterprises, the World Bank Group, regional development and/or investment banks and the Global Compact.⁴

All of these organisations' grievance mechanisms use approaches that lie between the formality of litigation and the 'ad hocery' of public campaigns. Some of them, such as

² John Ruggie, “Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts: Report of the Special Representative of the Secretary-General (SRSG) on the issue of human rights and transnational corporations and other business enterprises,” (United Nations: New York, 2007), document reference A/HRC/4/035.

³ For more on the common barriers to legal redress for individuals and communities, see Alice Palmer, “Community Redress and Multinational Enterprises,” (Foundation for International Environmental Law and Development: London, November 2003).

⁴ See David Vermijs and Caroline Rees, “Mapping Grievance Mechanisms in the Business and Human Rights Arena,” forthcoming from the CSR Initiative, Kennedy School of Government, Harvard University.

the Global Compact and the Voluntary Principles, have come late to the idea of grievance mechanisms, recognising that the absence of such channels for complaints laid their credibility open to question. As the Global Compact Office states in its note on the Compact's new 'integrity measures', "safeguarding the reputation, integrity and good efforts of the Global Compact and its participants requires transparent means to handle credible complaints of systematic or egregious abuse of the GC's overall aims and principles".⁵ Other organisations, such as the FLA, SAI and the Ombudsman of the World Bank have had grievance mechanisms for a few years, yet have been reassessing the efficacy of their approaches over recent months and revising them to improve their impact.⁶

The aims of this paper

Extrajudicial mechanisms must be careful to complement, not undermine, developments in the legal/judicial arena. Trends in, and prescriptions for, the advancement of judicial mechanisms to address allegations of human rights abuses, are the subject of a number of studies.⁷ It is not the purpose of this paper to duplicate that work. Equally, this paper does not examine grievance mechanisms for complaints against governments regarding the human rights impacts of corporations within their jurisdiction. Such mechanisms include some of the UN human rights Treaty Monitoring Bodies as well as International Labour Organisation mechanisms. They reflect the primary responsibility of government to provide and implement domestic regulation to minimise abuses by non-state actors.

The purpose of this paper is, rather, to consider the different models and practices adopted by extrajudicial mechanisms that engage directly with corporations in an effort to assess and resolve human rights grievances. These mechanisms have a potentially powerful role to play. They are more than just a stop-gap while state regulation or judicial mechanisms develop and mature. They have the scope to identify sustainable solutions to grievances by raising corporations' awareness of their impacts on human rights; structuring incentives for them to reverse or mitigate negative impacts; enabling those whose lives are affected to claim their rights; empowering them to become partners with business in advancing their rights; and providing business with a means to address actual or potential abuses of rights before they escalate into conflict or become subjects of litigation.

This research is based in part on a review of the (limited) literature on some of the mechanisms and the cases they have handled, and in part on an extensive range of consultations with stakeholders who have experience of them in practice. As well as

⁵ Global Compact 'Note on Integrity Measures' available at <http://www.unglobalcompact.org/AboutTheGC/integrity.html>.

⁶ The World Bank Inspection Panel has been in existence for slightly longer (since 1994) and has also gone through review processes, but is not one of the mechanisms on which this paper focuses.

⁷ See, for instance, International Council on Human Rights Policy, *Beyond Voluntarism: Human rights and the developing international legal obligations of companies* (ICHRP: Versoix, 2002); also Anita Ramasastry and Robert C Thompson, *Commerce, Crime and Conflict: Legal Remedies for Private Sector Liability for Grave Breaches of International Law* (Fafo: Norway, 2006), which forms part of the Business and International Crimes project of Fafo (<http://www.fafo.no/english/hist/abo-Fafo.html>); and on-going work by the ICJ Expert Legal Panel on Corporate Complicity in International Crimes, which is due to report in 2007.

those who administer them, this has included representatives of business, international NGOs, local NGOs, academics, human rights lawyers, government officials, international institutions and others. As such, the research is necessarily qualitative in nature and does not cover all mechanisms in this field. It has nevertheless revealed some strongly reinforcing patterns of opinion that are reflected in the analysis and recommendations.

II. THE MECHANISMS

The mechanisms addressed here are chosen to represent a cross-section of institutional types and sectoral coverage. They include:

- multi-stakeholder initiatives based on:
 - membership including corporations: Fair Labor Association (FLA – apparel sector); Ethical Trading Initiative (ETI – multiple supply-chain based sectors); Voluntary Principles for Security and Human Rights (VPs – extractives sector);
 - membership excluding corporations: Workers Rights Consortium (WRC – apparel sector)
 - a combination of certification and membership: International Council of Toy Industries (ICTI – toy industry); Social Accountability International (SAI – multiple sectors);
- a financing institution: Compliance/Advisor Ombudsman (CAO) of the World Bank Group;
- bilateral union-company arrangements: International Framework Agreements (IFAs);
- national mechanisms: National Human Rights Institutions (NHRIs);
- multilateral mechanisms: National Contact Points (NCPs) linked to the OECD Guidelines on Multinational Enterprises;
- an international mechanism: UN Global Compact (GC).

A short summary of each is provided below. The paper also touches on the work of the Business and Human Rights Resource Centre and the Clear Voice Hotline Service as additional illustrations.

Multi-stakeholder industry initiatives

Fair Labor Association (FLA)

The FLA⁸ is a multi-stakeholder initiative involving universities, NGOs and 20 affiliated brand-name companies with the aim of promoting adherence to international labour standards. In joining the FLA, companies sign up to implement the FLA Code of Conduct – which focuses on labour rights – including in their supply chains. The Third Party Complaint procedure was established to strengthen the FLA system by serving as a vehicle through which any person or organization can confidentially report to the FLA about any situation of serious non-compliance with the FLA's codes or principles. The process provides for initial investigation by the brand company that sources from the

⁸ www.fairlabor.org.

factory where the complaint arose. If this does not lead to a satisfactory outcome, the FLA can become involved in facilitating or mediating a resolution.

Workers Rights Consortium (WRC)

The WRC⁹ was created by college and university administrations, students and labour rights experts. It does not have corporate members. Member universities are required to have a code of conduct identical to or aligned with the WRC model code. Any workers or interested third parties can submit a complaint to the WRC alleging that a factory supplying apparel and goods to a member college or university has breached the Code of that college/university or of the WRC. If it accepts a case, the WRC builds an investigative team involving WRC staff together with local community representatives and experts who are independent of the factory and workers. The WRC issues a public report of its findings and works with affiliated universities, licensees and NGOs to remediate problems identified at the factory in question.

International Council of Toy Industries (ICTI)

ICTI¹⁰ is an association of toy trade associations from around the world. Its Code of Business Practices provides the basis of its CARE process. Factory compliance with the code is assessed by ICTI-trained and -certified auditors and audit firms. Compliant factories receive the ICTI Seal of Compliance. Under the 'Date-Certain' Program, toy brands, retailers and manufactures commit to a certain date by which they will only contract products manufactured by factories that either have the Seal of Compliance or are actively addressing any outstanding non-compliance issues. The ICTI hotline complaints mechanism was launched in October 2007 and is in an initial trial period in 35 factories. The independent ICTI Care Foundation, which manages the ICTI Care Process (ICP) has oversight of compliance and complaints. Workers can call ICP staff to register complaints. Where these complaints suggest a serious issue or a pattern of non-compliance, ICP staff will conduct independent investigations. If these confirm non-compliance, ICP staff, with the relevant ICTI brand members, will engage with the factory management to seek remediation.

Voluntary Principles for Security and Human Rights (VPs)

The membership of the VPs¹¹ consists of governments, extractive industry companies, NGOs and observers. The Principles address the need for member companies to respect all human rights, but particularly relate to the rights to life, liberty, security, freedom of expression, freedom of association and collective bargaining. Under the VPs' 'participation criteria', members can raise complaints of alleged non-compliance by another member (typically a company) with the Principles. If direct dialogue between the interested members fails to resolve the issue, a member may submit its concerns to the Steering Committee of the VPs. The Steering Committee can in turn agree to pass the matter to the Secretariat to help facilitate formal consultations between the interested members. If still unresolved after 6 months, under specific voting procedures

⁹ www.workersrights.org.

¹⁰ www.icti-care.org.

¹¹ www.voluntaryprinciples.org.

the Plenary can decide on further action, up to and including expulsion of the member in question.

Multi-stakeholder multi-industry initiatives

The Ethical Trading Initiative (ETI)

The ETI¹² is a multi-stakeholder alliance of companies, NGOs and trade unions. Its 39 member companies come from a variety of sectors, with most from apparel and food. The ETI has a Base Code covering various national and international labour standards. Member companies are required to adopt the Base Code or their own equivalent; to take active measures to implement it, including in their supply chains; to monitor and verify that implementation; and to cease using a supplier that persistently commits serious breaches. ETI Members can bring complaints about a corporate member or one of its suppliers for breach of the Base Code. The primary response is an investigation, led by the member company, in line with terms agreed among the parties. If this does not lead to an agreed outcome, the ETI Secretariat itself may become directly involved as a facilitator or mediator to try to resolve the situation.

Social Accountability International (SAI)

SAI¹³ is an international, multi-stakeholder NGO covering 71 industries. It accredits Certification Bodies to certify businesses and other organisations that comply with its SA8000 standard. The standard covers labour rights and related management systems and is based on ILO and UN conventions. Accreditation and monitoring is now managed by its newly-established agency: the Social Accountability Accreditation Services (SAAS). Any person can lodge a complaint about alleged breaches by a certified facility of the SA8000 standard or of local labor laws. The grievance process is primarily one of investigation. If a complaint is unresolved at the level of the certified facility, it can be taken up to the Certification Body. If that body assesses it as admissible, it may then proceed to an investigation, which may include an unscheduled audit of the facility in question. SAAS staff may undertake their own investigations if this process is unsatisfactory or does not lead to a resolution.

National and multilateral institutions

National Human Rights Institutions (NHRIs)

NHRIs¹⁴ are usually created by state legislation or decree and occasionally provided for in a state's constitution. Not all of them are able to handle complaints regarding alleged violations of human rights (eg those in Greece, Germany, Malawi, Malaysia are limited to advisory or consultative roles); and of those that do, not all are able to handle complaints addressed at corporations rather than government authorities. Of those that are empowered to handle complaints against corporations, some can hear complaints regarding any alleged human rights breach against a state-owned enterprise or a

¹² www.ethicaltrade.org.

¹³ www.sa-intl.org.

¹⁴ www.nhri.net.

private company providing a public service, but may not deal with complaints against private companies (eg those in Portugal, Bolivia, Argentina, South Africa and India). Others can address complaints against private as well as public companies, but are limited to certain rights issues, most usually discrimination (e.g. New Zealand, Canada, Hong Kong). However a few are able to address any human rights issues with regard to any type of company (eg Kenya, Nigeria, Paraguay, Egypt, Namibia, Nepal and Ghana). The type and range of grievance processes they can use also vary, including investigation, adjudication, conciliation, mediation, hearings and the right to take issues to court.

OECD National Contact Points (NCPs)

The OECD Guidelines for Multinational Enterprises¹⁵ are a set of non-binding recommendations for responsible business conduct both supplementary and complementary to the law, including a broad reference to human rights and more specific requirements on labour rights, as well as a range of other standards. All 30 OECD Member States, plus 10 non-OECD states, have adhered to the Guidelines. Whilst they are non-binding on business, governments of the 40 adhering states are obliged to set up a National Contact Point (NCP) to promote the Guidelines, handle enquiries and complaints (known as 'specific instances') and act as a forum for discussion of all matters relating to the Guidelines. States have flexibility in the exact form of their NCP and how it operates. However, the OECD provides procedural guidance on complaint-handling, according to which, if an NCP allows the complaint, it must offer good offices to help the parties resolve the issue, including, if the parties agree, through conciliation or mediation. Whether or not an agreement is reached, the NCP issues a statement and may make recommendations.

International initiatives and institutions

Compliance/Advisor Ombudsman for the IFC and MIGA of the World Bank Group (CAO)

The CAO¹⁶ has three functions of which the Ombuds function is the main one. Any individual, group, community or other entity that believes it has suffered or will suffer a negative social or environmental impact from a project financed by the International Finance Corporation (IFC) or guaranteed by the Multilateral Investment Guarantee Agency (MIGA) can lodge that complaint with the Ombudsman. Complaints may include any kind of alleged human rights abuse, but typically relate to labour rights and rights linked to community health, safety and security, land acquisition and involuntary resettlement, indigenous peoples and cultural heritage. The Ombudsman works with the stakeholders to agree a process for addressing the complaint, typically involving dialogue-based processes such as mediation. If she determines that a collaborative resolution is not possible, she passes the issue to the CAO's Compliance function for an assessment of whether it raises compliance concerns with respect to IFC or MIGA standards and policies.

¹⁵ www.oecd.org/document/60/0,3343,en_2649_34889_1933116_1_1_1_1,00.html.

¹⁶ www.cao-ombudsman.org.

International Framework Agreements (IFAs)

IFAs¹⁷ are agreements negotiated between a transnational corporation (TNC) on the one hand and a Global Union Federation (GUF) on the other. They contain agreed standards that the TNC will follow within its company and to varying degrees in its subsidiaries (at least where majority-owned). Most include undertakings to encourage or (occasionally) require the same standards from the company's suppliers and contractors. The standards are usually based on the eight core labour conventions of the International Labour Organisation (ILO) and some also refer to the Universal Declaration of Human Rights. There are currently 59 such agreements across a broad range of around 25 sectors. Most IFAs provide for workers or unions to register complaints of non-compliance with the agreements' terms. Some require that representatives of the TNC and GUF work together to resolve the dispute through consultation. In a few instances, a committee consisting of both union and company representatives is created to receive and handle complaints. In other cases, complaints are to be lodged directly with the company management at local level and then move up the system to the national union and ultimately a combined group involving representatives of both the TNC's head office and the GUF.¹⁸

The UN Global Compact (GC)

The UN Global Compact¹⁹ has over 3,500 member companies from all regions and a wide range of sectors. Member companies commit to align their operations and strategies with the Global Compact's ten principles, which include two on human rights in general and four specifically on labour rights. The Compact also has local and regional networks of member companies and other interested stakeholders, which aim to support implementation of the Principles and provide a forum for learning. Any individual, group or organisation can register a complaint against a member company for systematic and egregious abuse of the Compact's overall aims and principles. If it accepts a complaint, the Global Compact Office (GCO) will first engage with the company in efforts to address the issues of concern. It may offer its own good offices to encourage resolution of the complaint, seek the assistance of the relevant country network or another organisation for assistance to this end; pass it to a relevant UN entity that has guardianship of the principles in question; recommend it be passed to OECD or ILO mechanisms; or refer the matter to the Global Compact Board. However, the Global Compact sees its grievance process as primarily a means of generating a response from a company for a person who raises a concern, rather than as a fully-fledged complaint process that follows a grievance through to resolution.

¹⁷ www.icftu.org/displaydocument.asp?Index=991216332&Language=EN.

¹⁸ Yann Wyss, "International Framework Agreements: beyond self-regulation for companies in the area of human rights?" (unpublished, 2007), shared with the author.

¹⁹ www.unglobalcompact.org.

III BARRIERS TO ACCESS

Constraints linked to the applicable standards

As can be seen from these summaries, extrajudicial grievance mechanisms take varying approaches to human rights standards. Multi-stakeholder initiatives tend to provide the most tailored standards, frequently focused on the labour rights of workers in supply chains, and their grievance mechanisms are therefore similarly tailored to those issues. International Framework Agreements also, unsurprisingly, focus on labour standards in their substance and grievance processes. The standards addressed by the Voluntary Principles cut more widely. And while their application is currently limited to the extractives industry, the Principles are potentially relevant to other sectors, including construction and the private security industry. The Global Compact's two human rights principles are even broader, requiring that member companies support and respect the protection of internationally proclaimed human rights and make sure that they are not complicit in human rights abuses.²⁰ The 'integrity measures' that create the grievance mechanism cover both these and the other eight principles, including the four on labour standards. The OECD guidelines for Multinational Enterprises are also very general in their language on human rights, which forms a small component in a much wider set of voluntary standards, including certain labour rights. They recommend that "companies should respect the human rights of those affected by their activities consistent with the host government's international obligations and commitments".

At first sight, the broad references to human rights in the Global Compact principles and in the OECD Guidelines might suggest an ease of access to their grievance mechanisms, as complaints are perhaps less likely to be excluded on the basis that they do not fall under specific, limited provisions. In practice, it is far from clear that this is the case. The Global Compact limits its complaints procedure to instances that illustrate systematic or egregious abuses. As will be discussed below, this is not an unreasonable means of preventing an inundation of complaints to the mechanism. At the same time, the very broad language of the principles may, paradoxically, make it harder to pin down whether a breach has occurred; that is, whether a company has failed to 'support and protect internationally proclaimed human rights' or is complicit in human rights abuses.²¹

These difficulties are arguably even greater in the case of the OECD Guidelines and the NCP grievance mechanisms (called 'specific instance' procedures). The Guidelines'

²⁰ The labour standard principles relate to the core ILO conventions on freedom of association and the right to collective bargaining, the elimination of all forms of forced and compulsory labour and the abolition of child labour, and the elimination of discrimination in employment and occupation.

²¹ The UN Global Compact's own guidance on this second human rights principle states that, "Many agree that "complicity" is a difficult concept to appreciate and categorise, and understanding complicity in order to avoid complicity in human rights violations, represents an important challenge for business". The International Council on Human Rights Policy states that "As yet international legal rules have not been agreed that determine when a company is complicit in human rights violations committed by others. Different branches of law – public international law, domestic criminal law, tort law, contract law, consumer law or company law – apply different tests. Further, complicity includes notions of political or moral responsibility. Even where legal complicity cannot be proved, public opinion may attach blame." International Council on Human Rights Policy, *Beyond Voluntarism: Human rights and the developing international legal obligations of companies* (ICHRP: Versoix, 2002).

call for companies to “respect the human rights of those affected by their activities” could hardly be broader. Furthermore, procedural guidance to the NCPs suggests that when deciding whether to take up a case, they consider issues such as whether the complaint is “material” and “substantiated” as well as the “relevance of applicable law and procedures”. A recent review of the Canadian NCP concluded that, “It is problematic that neither this document [the procedural guidance] or [sic] the procedures set down by the Canadian NCP discuss *how* these factors are to be taken into account. For example, if a party using the specific instances procedure does not understand what level of interest is required, what the NCP considers “material” or “substantiated”, or how the NCP might rule with respect to the relevance of applicable law or procedures it is difficult for the party making a complaint to know what information to include...or even to proceed with a complaint.”²²

The Compliance/Advisor Ombudsman adopts an interestingly asymmetrical approach to standards in the context of its grievance processes. The grievance mechanism provided through the CAO’s Ombudsman function does not restrict complainants to matters covered in the IFC’s and MIGA’s performance standards and policies. It allows them to raise any negative social or environmental impact they feel they have directly suffered as a result of an IFC-financed or MIGA-guaranteed project. So in this phase of the process, which focuses on dialogue and mediation, any human rights concerns can form the basis of a complaint. However, if the complaint is not resolved by the Ombudsman and moves over to the Compliance function, which operates on the basis of an investigative audit, the process is then limited to assessing whether the IFC and MIGA complied with those institutions’ policies and standards.

Restrictions on the parties to the process

Constraints on access to a grievance mechanism may also lie in restrictions on who can bring a complaint; or in restrictions on the range of companies against which a complaint can be brought. In the case of the ETI and the Voluntary Principles, only members can complain against other members. The CAO allows any directly impacted individual or group to lodge a complaint, but not third parties unless they are the authorised representative of that individual. The FLA mechanism is focused on complaints from third parties acting for workers. SAI, ICTI and the WRC allow complaints from workers or third parties on their behalf. The NCPs allow complaints from both trade unions and from NGOs who may or may not be formally acting on behalf of an impacted group. These are conscious choices that any initiative or institution has to make in establishing its grievance mechanism. Certain implications of these different approaches are reflected in the discussions below.

Restrictions of scale

Constraints related to the applicable standards or to the parties who can lodge complaints are to some extent a logical outflow of the organisations’ type and purpose. They also place some natural constraints on the number of complaints that will be admissible for consideration. Handling complaints is resource-intensive. Fact-finding

²² “Canada’s Extractive Industry Ombudsperson: Background and Recommendations for an Ombudsperson for Canadian Extractive Companies Operating Abroad” (University of Ottawa Faculty of Law: Ottawa, 2006), p. 73.

investigations take considerable money and time. And multi-layered processes add to the complexity and resource implications. Many of these organisations have other primary functions on which they wish to focus their resources, and to which their grievance mechanism is an adjunct. The Workers Rights Consortium is unusual in that its core mission is to respond to grievances. Yet as a small organisation with thousands of suppliers covered by its code, it too faces challenges of scale.

It is not surprising, therefore, that most organisations have created additional means to control what could in theory become an overwhelming flow of complaints. Some use barriers of threshold. The Workers Rights Consortium, with its very open policy as to who can bring complaints, and the ETI, with its more constrained intra-membership approach, both have limitations in this regard. The WRC decides whether to pursue an investigation based on a number of factors, including the severity and credibility of the allegation; the presence of active unions or civil society in the area; and the likelihood that an investigation could lead to remediation and wider systemic change. The ETI mechanism is only triggered where a complaint is a) specific and very serious, requiring an instant response, or (b) specific and on-going, requiring prompt investigation. The Global Compact, with its small office of around 15 staff, requires that complaints reflect systematic or egregious abuses in order to be deemed admissible. By contrast, the CAO, which also has a large and disparate pool of potential complainants, places no such limitations of scale or gravity on the complaints it admits under the Ombudsman function. However, the number of complaints it receives remains low, perhaps reflecting other barriers to access.

Barriers of information and awareness

Barriers may also relate to information and awareness. The more focused the group that is eligible to bring complaints, the easier the task of ensuring they are informed about it. Both ETI and the Voluntary Principles allow only for complaints from members and can readily ensure that they know of the process and how to access it. Any workers at ICTI-certified factories will be able to use their hotline mechanism. While that represents a large pool of individuals, they are located together in some 1,240 supply factories (and only 35 in the pilot stage), where ICTI Care Process staff can fairly easily ensure they receive information on the mechanism. It may be more of a challenge to ensure that their awareness is maintained over time. One company representative noted with regard to their own hotline that surges in complaints happened not when problems were greatest but whenever they recirculated information on the mechanism's availability.

National Human Rights Institutions face a challenge of scale in ensuring that their existence and dispute resolution services are known. Ideally, their authoritative status within a national system, their relative geographical and linguistic accessibility (many have sub-offices in different regions) should facilitate this. And media coverage of their work can help keep awareness high. Yet even some of the most respected institutions face challenges in this regard.²³

²³ NGOs in Argentina noted that while they respected the work of the national human rights Ombudsman, they expected that his function was little known in many of the regions where communities were being impacted by business (consultation in Buenos Aires, May 2007). The Chief Commissioner of the South African Human Rights

Ensuring awareness of mechanisms such as the CAO or the NCPs is an even greater challenge, these being more remote from potential complainants and the pool of potential complainants being vast. The NCPs are explicitly tasked with promotion of the OECD Guidelines for Multinational Enterprises, presumably including the complaints mechanism. Yet these activities are focused within the countries where the NCPs and the corporations covered by the Guidelines are located. Most complaints are likely to be generated in third states where those corporations have their overseas operations. One recent study in Canada proposed that the government should take a proactive role through its overseas Embassies to ensure the existence of the Guidelines and the NCP was more widely known,²⁴ and a few NCPs report that they have done training and promotion work on the Guidelines for Embassy staff.²⁵ Meanwhile, NGOs such as OECD Watch have taken the lead in providing information for other NGOs on the Guidelines, the role of NCPs and how to prepare complaints so as to maximise their chance of being considered.

Barriers to trust and confidence

Barriers to access to grievance mechanisms may also relate to trust and confidence – complainants may be afraid or uncertain about remote or complicated mechanisms, distrust the institutions where they're located and/or fear retaliation. Confidence is one of the hardest factors to measure. Yet surprisingly low numbers of complaints entering a mechanism may be one indicator that this is a problem. The Kenyan National Commission on Human Rights received 2,274 complaints alleging human rights violations between July 1 2006 and June 30 2007, of which around 400 related to business. This was despite the Commission's own concerns that they were inaccessible to many people in rural areas.²⁶ By contrast, National Contact Points from countries with hundreds, if not thousands, of transnational corporations covered by the OECD Guidelines have received between zero and six complaints per year, averaging just 22 complaints annually across 39 NCPs between June 2000 and June 2006. There may be various access barriers responsible for this very low usage rate, including a lack of awareness that NCPs exist. Judging by views expressed by various observers – both NGOs and companies – a lack of confidence in many NCPs' effectiveness is almost certainly another reason.²⁷ Some possible reasons for this are addressed in the course of this paper.

Commission noted the difficulties in a country the size of South Africa in ensuring they were known, particularly in rural areas. Besides opening local offices in remoter locations, they sought to inform the population through local NGOs, paralegal services and local broadcasting (Interview, June 2007).

²⁴ "Canada's Extractive Industry Ombudsperson: Background and Recommendations for an Ombudsperson for Canadian Extractive Companies Operating Abroad," (University of Ottawa Faculty of Law, Ottawa, 2006), p. 73.

²⁵ "2007 Annual meeting of the National Contact Points: Report by the Chair" (OECD: Paris, 2007), p.10.

²⁶ Kenya National Commission on Human Rights, "Public Accountability Statement for 2006-7: statement of successes and challenges," (KNCHR: Nairobi, 2007) available at <http://www.knchr.org>.

²⁷ In addition to critical comments in private interviews with the author from a number of civil society actors regarding the credibility and capacity of various NCPs, and from business representatives as well as NGOs regarding the UK NCP prior to its recent restructuring, the reports of the Canadian National Roundtables on Corporate Social Responsibility and the Canadian Extractive Industry in Developing Countries reflect similar views of the Canadian NCP (see eg Second Meeting Summary, page 32; Fourth Meeting Summary, page 7). Comparable concerns about the credibility of a range of NCPs are set out in the OECD Watch 2005 report on NCPs: OECD

IV. SUPPORTING LOCAL SOLUTIONS TO GRIEVANCES

The majority of grievance mechanisms considered here include provisions designed to encourage local solutions to complaints and disputes.²⁸ Indeed, the FLA, ETI, WRC and SAI all require that facilities covered by their codes have their own grievance mechanisms in place and encourage the use of these as a first resort to settle complaints. (ICTI's code does not include this requirement.) The Performance Standards of the International Finance Corporation also require that corporate clients put in place grievance mechanisms for their workers and communities affected by their projects. And the Equator Principles reflect similar requirements vis-à-vis communities.

The rationale is clear. Localised solutions tend to be most attuned to local culture, the concerns of those whose rights are impacted, and opportunities for sustainable solutions. External investigations of complaints by brand companies or multi-stakeholder initiatives can be an important and necessary back-stop to these processes, not least in supply chain situations. But, if relied upon too often, they risk adding to excessively top-down approaches to complaints. As one commentator notes, "There is growing recognition that civil regulation has been driven primarily by northern actors and interests that have paid insufficient attention to certain developing country realities, while some initiatives have assumed paternalistic overtones. Southern workers are often seen as 'victims' that need help rather than as actual or potential agents of change."²⁹ Striking the right balance between locally-owned processes and the check and leverage provided by more remotely-managed processes is crucial to the overall effectiveness of a grievance mechanism. This section considers the different approaches taken towards this goal and how effective they appear to be in practice.

Supporting mechanisms in supply chains

Providing assessment and training

SAI and the FLA have long provided training to factories to build their capacity for code compliance, including in areas that support grievance mechanisms, such as worker-management relations. ETI also provides training programmes, many of which appear focused on sourcing companies, but some of which are relevant also to suppliers. Building local capacity in this manner is clearly important. But training programmes also face limitations of scale and resources. They are costly to provide – a cost which either falls on the institution providing them or on the supply company and/or sourcing company involved. They are also difficult to elevate to a scale that would cover all the suppliers covered by the codes of these organisations.³⁰

Watch, "Five Years On: A Review of the OECD Guidelines and National Contact Points," (OECD Watch: Amsterdam, 2005).

²⁸ The obvious exceptions are the integrity measures of the Global Compact and the National Contact Points of the OECD, which focus on the 'macro' level.

²⁹ Peter Utting, "Regulating Business via Multistakeholder Initiatives: a preliminary assessment," (UNRISD: Geneva, 2001), p.96.

³⁰ For example, there are approximately 1,400 SA8000 certified facilities; around 1,300 suppliers certified under the ICTI code and over 3,700 covered by the FLA's code via its member companies.

The FLA has developed a new web-based set of assessment and training tools designed to tackle both this challenge of reaching thousands of suppliers and the particular need to improve the quality of their grievance mechanisms. The typical factory approach to grievance mechanisms is to provide a complaints box or designated individual to whom workers can submit their complaints. There is rarely any clarity (and sometimes no information) on what then happens with them. At best, the complainants are informed of the outcome. It is rare for them to be involved in discussing what that outcome should be. Recent research the FLA commissioned, involving a survey of workers in eight Chinese factories, concluded that, “A relatively consistent opinion of the employees is [that]...the workers could have more participation in the process of grievance treatment”.³¹

The FLA’s new web-based assessment tool on grievance mechanisms treats them as an integral part of a supply factory’s management systems and business potential. The introduction to the tool states that, “although there are alternatives to formal dispute procedures, a good grievance procedure is considered a first and absolutely necessary step to establish a functioning dispute management system. In return, good dispute management has a positive impact on labour-management relations, turn-over rates and production efficiency”.³² The factory begins by completing a web-based self-assessment providing information that leads to an appraisal of their grievance processes. This includes questions on the extent of communications with workers about grievance procedures; of training on grievance procedures for workers and management; and of worker representatives’ involvement in identifying solutions to grievances. These assessments are then compared with information gained through an independent survey of a representative group of workers, which may corroborate or contradict the self-assessment. Completion of this process leads to a diagnosis by the FLA of strengths and weaknesses in the supplier’s grievance mechanisms and is linked to targeted feedback and web-based training tools. This process is in its infancy. It will be interesting to see how far it can help scale-up the rate of improvement in local grievance processes, including through increased worker involvement.

Using local investigators

The WRC is more of an advocacy or campaign-based organisation. It gets involved in investigating complaints where they indicate a particularly serious problem and where the WRC estimates that their intervention could lead to remediation and wider systemic change. As in the investigation processes of most multi-stakeholder initiatives focused on labour rights, the investigating team conducts off-site interviews with workers, as well as with local managers, experts and labour officials, and seeks the constructive engagement of the factory, licensees and contractors. Differently from most, their investigations are not carried out by commercial auditors, but by teams composed of local community representatives and experts, who are independent of the factory and workers, as well as WRC staff. Since WRC has no corporate members, they often have limited ability to engage directly with factory management in support of dispute resolution. But by providing opportunities for local representatives and experts to take a strong role in the investigations and perhaps build new skills in this area, they may

³¹ Internal FLA research report, shared privately with the author.

³² Tools accessible, with registration, at www.ap.fairlabor.org.

nevertheless increase the prospects for effective locally-led grievance processes in the future.

Providing guidance

Both the IFC standards and the Equator Principles seek to promote the effectiveness of these grievance mechanisms through the guidance they provide as to how they should function. The IFC states that they should be free, culturally appropriate, readily accessible, without retribution for complainants, understandable and transparent, and that they should in no way impede remedies available under the law. The Equator Bank Principles require that, in proportion to the risks and adverse impacts of the project, the borrower should, “establish a grievance mechanism as part of the management system. This will allow the borrower to receive and facilitate resolution of concerns and grievances about the project’s social and environmental performance raised by individuals or groups from among project-affected communities. The borrower will inform the affected communities about the mechanism in the course of its community engagement process and ensure that the mechanism addresses concerns promptly and transparently, in a culturally appropriate manner, and is readily accessible to all segments of the affected communities”.

This is more direct guidance than most standards provide. However it remains extremely general. The Equator Principles provide for no check on the quality of this process once a project is underway, nor for a grievance process at the level of the Equator Principle banks themselves, to which unresolved complaints could be referred. In the case of the IFC, there is equally no systematic check on the quality of the local mechanism after a project begins, other than any information provided in reporting from the company concerned. However, the CAO acts as a point of recourse in the event that complaints are not addressed satisfactorily at the company level.

Linking different levels of grievance mechanism

Different organisations place their grievance mechanisms at different degrees of removal from the point of complaint. This can affect whether and how local grievance mechanisms are supported. The ICTI’s new hotline complaints procedure provides for direct involvement by ICP staff at the first step. (This may in part reflect the absence of any requirement in their code for certified factories to have their own grievance processes.) They distribute pocket-sized cards to factory workers, setting out workers’ rights and a hotline number for them to call with any grievances. In the pilot stage the focus is on factories that are on probation due to non-compliance concerns. ICP staff in China, where the majority of toy manufacturers and 90% of ICTI-accredited factories are located, will receive the calls directly. Where complaints indicate a widespread and systemic problem of non-compliance, ICP staff will conduct their own investigations and then raise these directly with the factory management, in concert with their brand members. While the process has the potential to be effective in itself, it may risk undermining – or at least failing to support and enhance – factory-based mechanisms unless it builds in safeguards to avoid this outcome or can graduate to a more locally-owned model over time.

The FLA has positioned itself at one removed from the front line of local grievance mechanisms, at least in part to allow space for the directly interested parties to find a solution. Where complaints have not been resolved at the factory level and are raised with the FLA under its Third Party Complaints procedure, the FLA will usually turn first to the company member that sources from the factory in question. The company has a period of 45 days to use its leverage, investigations and good offices to seek a solution with the factory management. Only if that proves unsuccessful (or if the company deems it fruitless or there is a particular urgency) will the FLA President or Executive Director get directly involved. This may involve them mediating between workers and management, inviting a respected third party to take this role, engaging with local or national authorities responsible for labour standards to seek their intervention, or other actions suited to the context.

Social Accountability International have taken a slightly different approach as regards the nature of their involvement. Like the FLA, this is at one step removed from the original complaint, but does not provide for SAI's active engagement in dispute resolution. Where internal procedures in a certified facility don't resolve a complaint, the next point of recourse is the body that certified that facility as SA8000 compliant. This certification body should investigate the complaint and promote its resolution. If that fails, the complaint can then rise up to the Accreditation Services of the SAI (SAAS). Their approach is focused first on reviewing whether the Certification Body has followed the appropriate steps in its own investigation. If this points to problems, or if the dispute remains unresolved, SAAS may also undertake their own investigation and take a direct decision on the facility's actions and its continued certification. But they do not engage in a facilitation or mediation role in this regard. Their practice also appears more rigid than that of the FLA in typically requiring that the intermediate step involving the Certification Body is observed, regardless of the nature or scale of the problem. A number of observers have expressed the view that this can amount to a deferral or abdication of responsibility, in particular given concerns that Certification Bodies themselves can face a conflict of interests in handling complaints against factories they certified – a point discussed further below. But the approach of SAI perhaps reflects their strong desire to remain a point of last resort or appeal and a resistance to being drawn earlier into the grievance process, fearing this will trigger an unmanageable burden.

By contrast, the Compliance/Adviser Ombudsman of the World Bank Group is concerned precisely that it is too often seen as a point of appeal or last resort. Part of the CAO's goal is to improve relations between conflicting parties – to build their capacity to resolve problems themselves. For this reason, the CAO sees it as problematic to be perceived as a body that will sit in judgement on more local processes if one party rejects the outcome. Nor do they believe that the most optimal results will come from engaging the CAO only when disputes are most entrenched and intractable. They take the view that a more constructive outcome can often be achieved if the CAO is brought in – even if initially just as an observer – at earlier stages in a dispute, when the problem is more amenable to a negotiated or mediated resolution.³³ This position can in part be explained by their focus on dialogue-based, rather than investigation-based or adjudicative dispute resolution. The push for earlier involvement may also

³³ Interviews with Amar Inamdar, Senior Specialist at the Ombudsman's office, 2007.

compensate to some extent for the lack of formal checks on the quality of the local mechanisms put in place by IFC/MIGA corporate clients. However the lack of any systematic approach – be it by the IFC, MIGA or the CAO – towards ensuring that local mechanisms are supported and local dispute resolution capacity is built and maintained, may lead to missed opportunities for sustainable dispute handling and community empowerment.³⁴

Much like the FLA and ETI, one purpose of International Framework Agreements (IFAs) between Global Union Federations (GUFs) and transnational corporations (TNCs) is to provide a higher level at which worker complaints can be handled, in part to create a space and impetus for local solutions between the local union affiliated to the GUF and the subsidiary or affiliate of the TNC. In the words of one expert, “the purpose of an IFA is not to substitute international collective bargaining to local or national level bargaining, but to open up spaces at national and local level to facilitate and protect bargaining at that level.”³⁵

Creating and using leverage in support of local solutions

It is this balance between supporting local solutions and leveraging them via the institution or members of the more remote mechanism that seems particularly important in the design of many of these mechanisms. In part this leverage comes from the influence of the actors involved.

International Framework Agreements attempt to strike this balance. On the one hand, they rely on the local and national unions in different countries being effective enough to take advantage of the space provided for them by the international-level agreement. On the other hand, where this is not the case, or where a local subsidiary of the transnational corporation is particularly problematic, they can leverage change via the parent entity. In the words of another observer, “An ongoing relationship between the TNC and the GUF is established. In effect, this means that there is an increased capacity for intervention *during* a given dispute. Workers and their representatives are already inside and can therefore raise the issues with central management and potentially solve a dispute as it is occurring. This strategy may provide a potential route around recalcitrant local or even national management.”³⁶ However, it appears that this

³⁴ This is not to say that such capacity-building is never part of the process. For example, when the CAO was brought in to address disputes between the Cajamarca community in Peru following a mercury linked to Newmont’s Yanacocha mining site, the CAO identified a local desire for a more comprehensive approach to addressing disputes between the mine and community and convened a dialogue roundtable – ‘mesa de dialogo’ – in response. The CAO website notes that, “The Mesa de Dialogo y Consenso functioned for over four years with over 50 public and private institutions participating. The Mesa’s main objectives were to address and resolve conflicts between the community of Cajamarca and the mine and promote transparency and dialogue among its members. To this end, the Mesa oversaw a series of mediation training workshops in 2002, an independent and participatory study of water quality and quantity in the region in 2002-2003, and independent and participatory water quality monitoring during 2004 and 2005 (below are links to these studies). It also participated in an aquatic life study in 2005 and 2006.” See www.cao-ombudsman.org/html-english/complaint_yanacocha.htm

³⁵ Interview conducted by Euan Gibb with Dan Gallin of the Global Labour Institute, cited in Euan Gibb: “International Framework Agreements: Increasing the Effectiveness of Core Labour Standards,” (GLI: Geneva, 2005), p.19; available at www.global-labour.org/euan_gibb.htm.

³⁶ Ibid.

balance is hard to translate into practice. While studies of the usage and efficacy of IFAs are limited, the International Metalworkers' Federation reported in 2006 that implementation of their own IFAs was "somewhat patchy", and that in the majority of instances nothing had been done towards their implementation beyond distributing the IFA's text among employees.³⁷

The FLA, ICTI and the ETI bring the leverage of their brand company members to bear in these processes. The member companies must ensure that their suppliers are code-compliant. While the primary focus is on assisting suppliers to meet the applicable standards through training and capacity-building, a failure to comply can ultimately mean that the brand company ceases to source from a facility or (in the case of the ICTI) that the supplier is decertified.

In the case of SAI, their public grievance mechanism does not require the involvement of their brand company members that source from a certified facility that is subject to a complaint. The requirement that complaints unresolved at the facility level go first to the Certification Body for investigation generally keeps a lower profile on the process, which may also reduce the leverage brought to bear. This said, the prospect of potential decertification should be powerful. However, various observers question whether there is a conflict of interest in asking a Certification Body to assess whether a facility it has already certified warrants that certification.³⁸ So it may well be, in practice, that the leverage to resolve disputes is not fully realised in this model unless or until the complaint rises to higher levels.

V. DIFFERENT PROCESSES FOR ADDRESSING GRIEVANCES

The processes provided by the extrajudicial complaints mechanisms reviewed here are various. They include conveying information about grievances to other end-users; active investigation leading to findings, recommendations or adjudication; a combination of investigation and dialogue (including mediation or conciliation); or dialogue alone. This section explores the choices different mechanisms have made and how they have been implemented in practice.

Conveying information

The Clear Voice Hotline is a new mechanism established in October 2007 as an independent and confidential communications channel for workers. It offers the familiar concept of a hotline as an externally-managed, yet local service available to multiple factories. Its purpose is to provide a potentially trusted and accessible channel through

³⁷ Yann Wyss, "International Framework Agreements: beyond self-regulation for companies in the area of human rights?" (unpublished, 2007), shared with the author.

³⁸ For instance, in a 2004 report, Maquila Solidarity Network reported concerns regarding an SA8000-certified facility in Indonesia, where the body that certified the factory investigated complaints and maintained the view that the facility was in compliance with the standard. The report notes that, "The case has raised serious concern about whether such a lengthy and complicated process could produce useful and timely outcomes for the workers involved, and serious reservations about the practice of having an auditing organization investigate a factory certification in which it acted as the certifying body." (Maquila Solidarity Network, "2003 Year end review: Emerging trends in codes and their implementation," (Periodic memo No. 16, January/February 2004)]. Similar concerns about conflicts of interest were raised by a number of individuals interviewed by the author.

which to gather information about grievances, collate the resulting information, identify trends and patterns in grievances, as well as urgent situations, and relay this to the factory management and/or to a sourcing company seeking assurance on a supplier's compliance.³⁹ Its goal is to take the friction and manipulation out of information flows and leave it to recipients of the information to judge the action necessary. In parallel, the service offers training for managers to address deficits identified through the complaints gathered.

The Business and Human Rights Resource Centre works on a similar philosophy of information provision, but with different end-users. It identifies media and NGO reports around the world that contain information about alleged human rights abuses by companies and passes these on to the companies in question with an opportunity to respond to the allegations. Both sets of information are then posted on their website and circulated in their regular updates to subscribers (including international organisations, government representatives, media, investors and others). It is then up to those actors who receive the information to decide what, if anything, to do with it. This provides a forum for interested parties to find out about alleged corporate human rights breaches around the world, and also provides a vehicle for companies to set out their positions, including any counter-evidence, in unedited form. In some instances, it has also led to dialogue between the company and civil society actors over the issues behind the allegations.

The Global Compact also sees its integrity measures as largely aimed at facilitating exchanges between a company and complainant by relaying communications and engaging other bodies that can support resolution of the complaint. The measures in fact state that the Global Compact Office may “use its own good offices to encourage resolution of the complaint,” which could suggest a more direct and active mediation role in addition. However, the Office are clearly reluctant – no doubt due to very real resources constraints they face – to exercise the full potential of this provision as it is written.

Investigation/adjudication

Many NGOs – particularly international NGOs - express a preference for processes that involve investigations and lead to findings, recommendations or adjudication. This predisposition appears to be based on two factors.

One factor is that evidence that demonstrates a clear ‘wrong’ can be important in vindicating a victim’s rights and legitimising their complaints. Findings of wrong-doing are also most amenable to use as a basis for campaigning and persuading other actors (governments, investors etc) to take action. Communicating persuasive messages via networks and media is a challenge for any actor. Clear, simple messages make it immeasurably easier than do complex assessments with pros and cons. A message that a company has been judged wrong to become, or remain, a major investor in a country where gross and systematic human rights violations are prevalent is clear and simple. A message that a company has various programmes in place aimed at addressing human rights problems, but argues that these are ineffective or insufficient

³⁹ The hotline launched in October 2007 and will initially be available in certain countries of Central America.

to justify remaining there, is more difficult to convey and less likely to be taken up by the media. (This is not to judge here which message is more appropriate or effective, merely to register the distinction.)

The second consideration appears to be a concern that piecemeal settlements of grievances are failing to achieve systemic improvements. Disputes that are resolved quietly at the local level often fail to lead to systemic lesson-learning by the company in question, whether at that particular site or across its corporate network, let alone at industry level. The frustration of some observers over such outcomes is compounded where the particular settlement is seen as inadequate to the demands and rights at stake. The feeling is that investigations and adjudicated outcomes, particularly through courts or international mechanisms, provide a better tool for leveraging systemic change.

These views are supported by accounts from some company representatives who have led innovative and seemingly effective grievance processes at project level in one country, yet report a lack of means to spread this experience up to headquarters and across to other sites that might be able to learn from it. Equally, some company representatives agree with civil society actors that systemic changes in corporate practices are most frequently the result of a major exogenous shock from a high-profile court case over serious alleged abuses or wide-spread condemnation resulting from a major, hostile campaign.⁴⁰

It is important to recall that while some grievances will raise systemic problems embedded in a company's business practices or culture, many are not of this nature and can readily be resolved at a local level without raising wider considerations. However, there is a legitimate concern that where more fundamental and far-reaching concerns are at stake, grievance processes should have the capacity to engender systemic change. This helps avoid their recurrence and may also provide wider incentives for other companies in an industry or country to change problematic operating practices. Whether the only means for achieving this is through investigative or adjudicative processes that fuel campaigns is open to question. Some suggest that, outside of catastrophically dire instances, the better means to obtain changes in corporate systems is to engage with the company management in identifying the underlying reasons for grievances and the lessons that need to be learned. The limitation, in turn, on this point of view is the prerequisite that the company is ready to engage in that dialogue.

A number of the mechanisms considered here include an investigative function. Some focus investigations locally to the site of the complaint. As we have seen, the Workers Rights Consortium, itself largely an advocacy and campaigning organisation, focuses its work on investigation, no doubt partly for the reasons described above. It deliberately involves local experts on the investigation team. Some National Human Rights Institutions such as those in Kenya and Ghana can also provide for investigation and adjudication - even with binding enforcement provisions - as part of a wider array of processes. The Commissions' location in the countries where the complaints arise

⁴⁰ Private interviews with the author, January – October 2007

may assist in ensuring an appropriate and effective investigation, albeit there may still need to be sensitivity to cultural, ethnic and linguistic variations.

By contrast, National Contact Points are usually dealing with complaints over actions in third countries. There is no expectation of any on-the-ground investigation or fact-finding; nor is this usual. Indeed the governmental nature of the mechanism is likely to raise considerable sensitivities about such activities, absent the cooperation of the state where the alleged abuse occurred. There also appears to be a general lack of resources for proactive investigations, which can be costly and time-consuming (one exception being the recently reconfigured Dutch NCP, which can draw on fact-finding capacity within government ministries). The investigative process is therefore usually conducted remotely and based on information provided by the interested parties.

Hybrid investigation–mediation models

The NCPs are one of a number of mechanisms that combine an investigative function with a dialogue-based process, providing alternative means to seek a settlement⁴¹. According to the OECD's guidance to NCPs, if they allow a complaint, they must offer good offices to help the parties resolve the issues, including, where the parties agree, the options of conciliation or mediation.

Many NCPs appear to take on this mediation role themselves. This raises questions as to the ability of a government official to provide this function from two perspectives: first, whether they have the training and expertise to perform a complex mediation role; and second whether they can be, and be seen to be, sufficiently neutral with regard to the issues in dispute. There have clearly been successes. Particularly notable is the 2005-06 case in Australia, where a UK-controlled multinational, Global Solutions Limited, was accused by four NGOs of breaching the Human Rights and Consumer Interests provisions of the Guidelines in relation to immigration detention services that the company's Australian subsidiary was providing to the Australian Government. The Australian NCP gained the agreement of the parties to a mediation, which he led. The final statement of the NCP on the outcome observes that:

"The mediation session was conducted in a spirit that promoted the wellbeing of the detainee population whose care is currently entrusted to GSL Australia. A significant outcome was the value both parties gained in engaging openly on the human rights aspects of GSL Australia's operations. The discussion was frank and robust and enabled consideration of potential solutions. GSL Australia committed to upholding the human rights of those in its care. GSL Australia's Managing Director, Mr Olszak, summed up the company's position by pledging to always consider the question of 'Is it right?' within the framework of human rights and embedding this approach within the company's policy and procedures, including training of its officers. The complainants acknowledged the difficult and changing environment of immigration detention services and offered practical suggestions to assist GSL

⁴¹ Whilst this combination of approaches is provided for in the procedural guidance for NCPs, it is not always applied in practice.

Australia in utilizing human rights experts to interpret human rights standards and in training staff.”⁴²

However, other appraisals of NCPs unfortunately suggest that this kind of success has been more the exception than the rule. Considerable concerns about objectivity, efficiency and expertise – from business as well as civil society – led to a recent review and restructuring of the UK NCP.⁴³ The Canadian Standing Committee on Foreign Affairs and International Trade of the Canadian Parliament called in 2005 for the government to “clarify, formalize and strengthen the rules and the mandate of the Canadian National Contact Point (NCP) for the OECD Guidelines for Multinational Enterprises, and increase the resources available to the NCP to enable it to respond to complaints promptly, to undertake proper investigations, and to recommend appropriate measures against companies found to be acting in violation of the OECD Guidelines”.⁴⁴ And in its 2005 report on the performance of NCPs, the NGO OECD Watch stated that:

“OECD Watch acknowledges that, in a handful of cases, NCPs have sought to issue useful or meaningful recommendations that could guide and improve corporate behaviour. Even in cases where there has been disagreement over an NCP’s final determination on a case, NGOs have appreciated recommendations that at least addressed the ethical problems highlighted by the complaint. However, in the overwhelming majority of cases, the outcomes have been disappointing. NGOs increasingly view the process as arbitrary, unfair and unpredictable. The cumbersome and vague manner in which many NCPs have dealt with specific instances is detrimental to the credibility of the Guidelines. There is a general perception among NGOs involved in Guidelines cases that OECD governments are principally concerned with cultivating and reassuring the business sector rather than curbing corporate misconduct.”⁴⁵

As the opening of this quotation indicates and the example of GSL illustrates, clearly some NCPs do perform well. However, there appear to be certain structural problems with NCPs that may constrain what the best of them can achieve and allow for poor practice by others.

The CAO of the World Bank Group went through a rigorous review of its processes in 2006 as a result of some problems and concerns with its own effectiveness. The findings were interesting. One of the upshots was a recognition that expectations were out of kilter with what the CAO could offer. Many local complainants and the organisations supporting them expected the CAO first and foremost to adjudicate whether there had been a breach of rights, of appropriate behaviour or of the applicable standards and procedures. By contrast, the Ombudsman’s primary function is one of supporting dispute resolution through dialogue, not one of adjudication. Secondly, the

⁴² Statement by the Australian National Contact Point: ‘GSL Australia Specific Instance’ (April 2006), available at www.ausncp.gov.au/content/docs/298_343_Final%20Statement.pdf

⁴³ The new NCP has only recently received its first cases under the revised system, so the effect of the changes remain to be seen.

⁴⁴ Standing Committee on Foreign Affairs and International Trade (SCFAIT), “Fourteenth Report: Mining in Developing Countries—Corporate Social Responsibility, 38th Parliament, 1st Session,” (Canada, June 2005), p. 2-3.

⁴⁵ OECD Watch, “Five Years On: A Review of the OECD Guidelines and National Contact Points,” (OECD Watch: Amsterdam, 2005)

CAO had traditionally begun with an investigation of the merits of the complaint before offering the option of mediation. Experience showed that this led at times to a feeling by one side or the other that the Ombudsman was biased by the time it came to mediation, placing the office's neutrality – or at least objectivity – in question. Thirdly, it had been up to the Ombudsman to assess whether an unresolved dispute should be passed to the Compliance function for an audit of the project's compliance with the IFC Performance Standards or MIGA procedures and safeguards. This placed her under lobbying pressure from all sides and led to criticism for the decisions she made in some instances.

As a result of these insights, the new structure of the process provides for the CAO to limit initial investigations solely to the aim of understanding the issues and viewpoints before seeking parties' views as to how they wish to proceed. The Ombudsman's objectivity is then less open to question. Furthermore, any unresolved complaint is now automatically transferred to the Compliance function for assessment, removing pressures on the Ombudsman in this regard. Finally, the Ombudsman seeks to set out clearly to the parties at the start of any process its focus on dialogue-based solutions in order to avoid creating misunderstandings. Complaints now going through the CAO process will provide an initial indication of whether these adjustments prove effective in practice.

The FLA and the ETI also combine investigation and dialogue to a certain extent in their own processes, with dialogue coming to the fore in cases that rise to the level of the institution itself. Under the ETI's system, the aim is for those ETI members with an interest in the case to agree on a process of investigation, leading to a written report with findings. But if the parties do not reach agreement on the process or substance, the ETI's Chair may then get involved as a facilitator or mediator, or use external mediators and remain an observer or advisor to the process. The FLA follows a similar pattern, first aiming for investigation by the brand company involved, in contact with the supplier in question. Where remedies are not achieved through this process, the FLA promotes mediated solutions where appropriate, either with the President or Executive Director in the role of mediator, or using an appropriate, respected, local individual for that role, with FLA support or leverage in the background.

This hybrid approach perhaps partially reflects the limitation on how far an investigation is likely to address complex problems and their root causes, particularly where it involves little more than a repeat audit. It is often only through engaging in dialogue that underlying problems can be identified and addressed. Furthermore, many commentators question the credibility of the investigative auditing work done by commercial auditors, often financed by the companies being audited or by those sourcing from them. As one writes:

“The methods used... have been questioned for their superficiality and inability to assess accurately and objectively workplace conditions, labour relations and factory community relations... [T]he WRC Principles point out that: ‘experience has shown that factories are often ‘cleaned up’ for short periods of time, but then return to significantly violating the Code. One-time investigations

*often just cover up poor working conditions. Hence, certifying 'compliance' of an entire corporation or factory is ultimately impossible...*⁴⁶

Perhaps corroborating this, an increasing number of companies that run their own audit/investigation processes at their supply factories are finding that factory commitments to remediate are not leading to a significant and sustainable decline in the number of breaches. Companies such as Nike and Gap are increasingly seeking closer dialogue with the management of their supply factories to identify root causes of non-compliance and address them through training and other capacity-building.⁴⁷ It is unclear whether and how far this increased focus on dialogue will actually extend beyond factory management to the workers and their union or other legitimate representatives. Without extending the circle of dialogue to these actors, it might fail to achieve its full potential for bringing a step change in compliance.

Leverage from hybrid approaches

One of the strengths of an investigative mechanism that can produce an authoritative or even binding finding with regard to an alleged breach of standards is the leverage this creates. The potential application of some form of sanction creates an incentive for a company that realises it may be in the wrong to engage in finding a remedy.

This incentive to engage is particularly important in mechanisms that wish primarily to encourage dialogue-based, mutually-agreed outcomes. Dialogue and mediation must generally be voluntary.⁴⁸ Enlightened companies with good traditions of stakeholder engagement will often engage of their own volition in such processes. Or pressure from an influential actor may encourage them to do so. (There is much potential for NCPs to play this role, as some do.) But less enlightened companies are less likely to volunteer to engage with a stakeholder they deem antagonistic.

Combining these dialogue-based processes with an investigatory function creates an incentive for such companies to reevaluate their options. It is the sequencing that is often particularly important: the opportunity for dialogue should generally come before the beginning – or at least the closing – of an investigation/adjudication, but with the certainty that the latter will follow if the former fails. The prospect of reaching a mutually-agreed resolution to a dispute is frequently more appealing than seeing whether an investigative/adjudicative process will criticise or vindicate one's actions.

⁴⁶ Peter Utting, "Regulating Business via Multistakeholder Initiatives: a preliminary assessment," (UNRISD: Geneva, 2001), p.87.

⁴⁷ See, for instance, Gap Inc's 2005-2006 Social Responsibility Report, which states that: "In 2006, we piloted new guidelines to help our VCOs [Vendor Compliance Officers] better analyze the root causes of recurring issues and build more effective remediation plans. In 2007, we will integrate these guidelines into our new monitoring protocol as well as our broader initiative to help factory managers take more responsibility for the conditions on their own production floors. This initiative, called the Vendor Ownership Program, not only encourages factories to establish management systems to integrate compliance into business processes, but also provides factory managers with advice on relevant training sessions, appropriate consultants and other tools to manage compliance more effectively". [Gap Inc, "2005-2006 Social Responsibility Report: What is a Company's Role in Society?," available at <http://www.gapinc.com/public/socialresponsibility/socialres.html>.

⁴⁸ In some contexts parties can be required to attempt mediated settlements, but they can never be required to accept any particular outcome from it. And many experts argue against compulsion to enter the process, since the resolution of complaints relies to a good degree on the willing participation of the parties.

This paradigm is familiar from the judicial system where companies are often motivated to settle cases rather than have them go to judgment in the court. It is also familiar from many national systems for handling labour disputes, which frequently provide for mediation prior to resort to a binding tribunal process. Where a company believes it is likely to be found in breach of labour law in the tribunal, it is more likely to seek settlement in a mediated process. Equally, a complainant who discovers through dialogue that his/her complaint is of questionable merit may reevaluate the benefit of pursuing a higher profile, win-lose option.⁴⁹

This positive relationship between dialogue-based and investigative/adjudicative processes is seen in the work of some national institutions like the Kenya National Commission on Human Rights, which offers conciliation and mediation functions alongside its more adjudicative roles. Similarly, under the CAO, the automatic transfer of unresolved disputes to the Compliance function to some extent provides the incentive for companies to engage with the Ombudsman. The limitation on this is the asymmetry in the standards each function addresses. The Compliance function only addresses compliance with the IFC's and MIGA's specific standards, while the Ombudsman can receive complaints on wider issues of social and environmental impact. If a company is satisfied it will be found compliant with the former, there may be less incentive for it to engage with a credible complaint that goes to wider issues.

In a similar vein, many observers recognise a constructive tension between the work of the WRC and that of the FLA. The WRC conducts respected investigations that it uses for public pressure and campaigning purposes. But it has no corporate members who can help it leverage constructive engagement from a supply factory in breach of its code. By contrast, the FLA has corporate members who can bring some degree of pressure to bear on a recalcitrant supplier. Where both organisations take up the same case, the additional pressures created by the WRC's public campaigning can play a positive role in further motivating the supplier to seek a resolution. In this case, it is not a sequencing of dialogue and investigation that creates the impetus for resolution, but a separation and parallelism between the two.⁵⁰

At first sight, the procedural guidance for NCPs suggests there would be constructive synergies between its role of offering conciliation and that of providing findings and recommendations. Yet in practice this model lacks the rigour to deliver on its potential. The Guidelines are not binding on companies and corporate participation in the process is optional. So the potential sanction of delisting or decertification does not pertain. Secondly, the process does not require a finding of breach or non-breach of the Guidelines, where an agreed solution is not reached between the parties. Instead, the Guidance states that "If the parties involved do not reach agreement on the issues raised, [the NCP will] issue a statement, and make recommendations as appropriate, on

⁴⁹ See, for instance, Gill Dix: "Operating with style: The work of the ACAS conciliator in individual employment rights cases," in Towers, B., Brown, W. (Eds) *Employment Relations in Britain: 25 Years of the Advisory, Conciliation and Arbitration Service* (London, 2000) pp.93-122.

⁵⁰ For example, in the BJ&B factory severance case in the Dominican Republic, where in the FLA was centrally involved in dialogue efforts involving local unions and the factory management, the WRC was engaged in parallel lobbying and publicity and was an observer to the dialogue process. The Secretary-General of the ITGLWF, Neil Kearney, also played a leading role in facilitating the final settlement.

the implementation of the Guidelines”.⁵¹ This can – and in many cases does – lead to NCPs avoiding pronouncing on whether there was a breach and focusing instead on action ahead. These factors, in combination, have tarnished many NCPs in the eyes of the NGOs that engage most actively with their work.⁵² It would be worth further study to assess whether they also reduce the incentive for all parties to engage in the search for agreement, absent the certainty that corporate breaches of the Guidelines will be announced as such by the NCPs.

Dialogue-centred models

International Framework Agreements (IFAs), unlike most other mechanisms, provide for dialogue but no other type of process. This is a natural product of their status as voluntary, negotiated agreements between a Global Union Federation on the one hand and a Transnational Corporation on the other. The content of these agreements varies widely in the level of detail and commitments included. The procedures for handling grievances are typically brief and simple, some focusing on dialogue between local/national unions and the TNC’s subsidiaries; others providing also for dialogue at the international level between the parties to the IFA.⁵³ One expert noted that there would be little value in having an adjudicative option for breaches of these agreements, since they were based on bilateral, voluntary undertakings. As such, they differed from national labour rights systems, where all companies were obliged to abide by local labour laws and could therefore be taken to arbitration or court where a breach was alleged and no agreed settlement reached.⁵⁴

In practice, the companies entering these agreements see merit in doing so and are typically vested in their success. They are likely to consider it in their interest to make the IFA dialogue process work as a means to settle specific complaints, if the more complex, hybrid processes at national level fail to do so. However, If a company wishes to walk away from an IFA, it is free to do so without any formal sanction and there is little that the GUF can do other than criticise them publicly. Were there a desire to address this deficit, it would be interesting to consider whether the IFAs could include an agreement to resort to mediation or arbitration through an institution such as the International Chamber of Commerce’s Court of Arbitration or the Permanent Court of

⁵¹ OECD, *The OECD Guidelines for Multinational Enterprises, Revisions 2000* (OECD: Paris, 2000), p. 36

⁵² See, for example, the draft consultation document for a Model European NCP developed by OECD Watch following regional consultations with NGO stakeholders, which noted that “Mediation that is carried out properly will resolve most complaints provided it is underpinned by an adjudication phase as a ‘last resort’. Otherwise, there is not enough incentive for the parties to take the matter seriously enough to ensure mediation is a success...If NCPs refuse to differentiate between acceptable and unacceptable behaviour in the specific instance process, they are rendering the Guidelines’ ‘distinctive follow-up mechanism’ meaningless”: “The Model European NCP: Working Draft – For Comment,” (OECD Watch, March 2007).

⁵³ Examples include:

Accor/IUF agreement: “Both parties agree that any differences arising from the interpretation or implementation of this agreement will be examined jointly, for the purpose of making recommendations to the parties concerned.”

Ikea/IFBWW agreement: “Should the IFBWW become aware of any contravention of “The IKEA Way on Purchasing Home Furnishing Products”, IFBWW will report this to the group which will review the matter and propose appropriate measures.”

Anglo Gold/ICEM agreement: “A sub-committee will be established to consider plans and proposals placed before it by either party following any alleged breach of accepted standards of conduct that could not be resolved at the level of local and national operation.”

⁵⁴ Interview with Dan Gallin, Global Labour Institute, September 2007

Arbitration.⁵⁵ Alternatively the ILO might set up an institution to provide this function. Clauses providing for this kind of recourse would be similar to those that transnational corporations typically include in the agreements they reach with governments of foreign states where they invest (known as Host Government Agreements).

VI. OUTCOMES FROM GRIEVANCE MECHANISMS

Systemic solutions

A number of issues related to the outcomes of grievance mechanisms have already been raised in the course of this paper. These include the challenge of ensuring that systemic lessons are learned, not just within the company concerned, but, where applicable, across an industry or multiple industries. As noted, many grievances will relate to issues that do not reflect systemic problems. But where they do, there is a legitimate and important interest in capturing the wider lessons.

Industry or multi-industry initiatives such as the FLA, SAI, ETI and ICTI have a major role to play in sharing learning in this regard. All exercise this function to some extent, with ETI placing particular emphasis on their role as a learning forum. The Global Compact and NCPs are perhaps particularly well-placed to achieve these benefits of scale and information exchange, yet it is less clear that they do so in practice. Both appear more focused on sharing *best practice* than lessons learned from complaints processes (which may reveal poor practice). This may reflect the concern of the Global Compact to cast a wide net and encourage more companies to put a foot on the bottom rung of the corporate responsibility ladder and a fear that highlighting lessons from negative experiences might scare them off. As for the NCPs, the optional nature of engagement by corporations in all aspects of their grievance mechanism encourages them to focus on the positives, also to avoid deterring participation.

The achievement of systemic solutions requires not only corporate learning, but also learning and empowerment for those stakeholders whose rights are impacted and who may wish to register grievances. Training that seeks also to empower these actors is important. SAI, FLA and others are increasingly focusing on worker/management relations and communication in their capacity-building work. This can in turn encourage more dialogue between management and workers in addressing specific grievances. As the FLA-commissioned research in China concluded, “Even...in the factories with employee representatives, these representatives...have few chances of participation in the grievance work. Therefore, it is necessary for us to emphasize the importance of employee participation for the enterprises, so as to enable them to attach importance to employee participation during the process of continuous construction and perfection of a grievance mechanism”.⁵⁶

Transparency

⁵⁵ This might require an adjustment of the rules of procedures of these organisations in order to address disputes between a company and union, but inquiries suggest that there is no *prima facie* reason why this should not be possible, if there were the will.

⁵⁶ Internal FLA research report, shared privately with the author.

Traditional mediation processes, as well as some investigative and adjudicative processes (including arbitration) have insisted that there be confidentiality of the outcomes unless the parties involved agree otherwise. Yet human rights are in many respects a public good, suggesting that a principle of confidentiality is inappropriate. Furthermore, where outcomes are confidential, they cannot contribute to a public body of knowledge regarding how rights are being interpreted and implemented in practice.

There are therefore strong arguments that some transparency of outcome is essential in grievance processes that relate to human rights. This should not be viewed in absolute terms – a balance will need to be struck that does not jeopardise the achievement of outcomes that achieve justice for individuals. But practice suggests that it should be possible for mechanisms to base themselves on a presumption of transparency, rather than confidentiality. The experiences of many of the organisations reviewed here indicates the viability of this approach. The SAI makes public on its website the name of a factory that has been subject to a complaint, the content of the complaint and a summary of the key points in the outcome. The FLA publishes a summary report of each complaint indicating the factory involved, the complaint(s), the core elements of the process and the outcome. The CAO publishes updates on its website regarding the stage any complaint has reached. Where it can, it makes public the key elements of the outcome. In other instances, where essential to the agreement, it simply indicates that a settlement was reached, without giving details.

The Voluntary Principles mechanism is designed to be entirely private between members of the initiative. Its ‘participation criteria’, which set out the grievance mechanism, state that, “To facilitate the goals of the Voluntary Principles and encourage full and open dialogue, Participants agree that all proceedings of the Voluntary Principles process are on a non-attribution and non-quotation basis and no distribution of documents to non-participants is permitted except as required by valid legal process or otherwise required by law.”⁵⁷ Whilst it will therefore become known if a member is expelled from the initiative for non-compliance, very little about other outcomes from grievance processes is likely to be public. It remains to be seen whether this is sufficient to secure the mechanism’s credibility.⁵⁸

The OECD procedural guidance to NCPs provides that “broadly speaking the proceedings associated with implementation will normally be confidential; the results will normally be transparent”. However, OECD Watch reported in 2005 that: “the Business and Industry Advisory Committee (BIAC) has lobbied ceaselessly to extend the confidentiality clause to all phases of the process, including objecting to NGOs publicising that a complaint has been filed. This position has been supported in practice by some NCPs (US, Canada, Finland and Germany) who withhold company names and details of the complaints they have received in their annual reports, even for those cases that have been concluded”.⁵⁹ By contrast, the Dutch and Australian NCPs have

⁵⁷ <http://www.voluntaryprinciples.org/participants/participation-criteria.php>.

⁵⁸ The ‘Participation Criteria’, including the grievance process, were only agreed in May 2007. The first complaint has recently (and confidentially) been registered.

⁵⁹ OECD Watch, “OECD Five Years On: A Review of the OECD Guidelines and National Contact Points,” (OECD: Amsterdam, 2005), p.25.

been praised for their efforts at transparency. The varying practices of NCPs illustrate the best of what is possible as well as some unnecessarily opaque approaches. The balance provided for in the OECD guidance seems appropriate and in line with other mechanisms. The flexibility allowed in its interpretation seems unhelpfully broad and damaging.

VII. GAPS IN THE EXISTING NETWORK OF GRIEVANCE MECHANISMS

The grievance mechanisms explored in this paper are illustrative of a wider set of mechanisms that relate in part or whole to the business and human rights arena. However, even taking all of them together, there are substantial gaps in the system, leaving many individuals whose rights are impacted by corporate operations without any means to have their concerns fairly addressed – or at least without knowledge of how to do so. This section considers what some of those gaps are and how they might be addressed.

Coverage of existing codes

This paper has focused on initiatives and organisations that both promote certain standards of corporate responsibility with regard to human rights *and* provide a mechanism for complaints to be heard. The Voluntary Principles on Security and Human Rights and the Global Compact only recently joined the group of those initiatives that offer some form of grievance mechanism. Some others remain without any such mechanism. In some instances, this may place their future credibility in question, as was the case with the Voluntary Principles prior to final agreement in May 2007 on their ‘participation criteria’, including their complaints process. The author understands that NGOs are now starting to raise serious questions about the Equator Principles in this regard. The Electronic Industry Code of Conduct may also be vulnerable in this regard.

This is not to suggest that every multi-stakeholder or other corporate responsibility initiative should necessarily devise its own grievance mechanism. It may be redundant or excessive for organisations that are an alliance of other entities to add a further layer of recourse. And it may be possible to share access to a single, external mechanism rather than add to the further proliferation of grievance structures. A recent proposal by Natalie Bridgeman and David Hunter for a Foreign Investor Accountability Mechanism (FIAM) aims to offer this kind of shared infrastructure for addressing grievances. The proposal suggests creating a single body with multi-stakeholder oversight mechanisms that could be used by individual transnational corporations or organisations and could eventually “supplant, complement or harmonize other accountability mechanisms.”⁶⁰

Guidance on designing effective human rights-based grievance mechanisms

As discussed in the previous analysis, a number of existing mechanisms are looking at means to strengthen the quality of locally-based grievance processes, through guidance, assessment tools, training and capacity-building. Many of these place

⁶⁰ Natalie L Bridgeman and David B Hunter, “Narrowing the Accountability Gap: Toward a New Foreign Investor Accountability Mechanism,” forthcoming 20 Geo. Int’l Envtl. L. Rev. (2008).

increasing emphasis on the importance of involving the aggrieved parties directly in the complaints or dispute resolution process. This is to be welcomed. Yet the scale of the challenge is considerable. There would be benefit for many actors – companies, organisations that require companies to have their own grievance mechanisms and those assessing corporate performance (investment funds, NGOs and others) – in some clearer guidance as to what makes company-based grievance mechanisms effective and compatible with human rights.⁶¹

Available and accessible information and resources

Many observers have commented that the proliferation of corporate responsibility codes of conduct and standards is confusing to companies. The proliferation of associated grievance mechanisms – whilst an essential corollary – risks being equally confusing to their potential end-users. Indeed the challenge is all the greater since these end-users usually have limited information and resources to help them understand how to access these processes. There would appear to be benefit in a more coordinated – though not necessarily centralised – approach to the dissemination of information about grievance mechanisms: how they work, who can access them and how, and what local resources (advisory, mediation, legal, financial) exist to support complainants. There is also a deficit of information on the outcomes of grievance processes. As discussed, this knowledge can contribute towards a growing understanding for companies and civil society as to how certain rights are being interpreted and implemented in practice by companies as a result of dispute resolution processes. It can also contribute towards conflict prevention as companies learn from past disputes and the means found to resolve them.

A small number of linked points where all this information is gathered, assessed and made available could assist with access to this knowledge for many actors. This would provide a means of navigating the maze of existing mechanisms, and a resource where trends, patterns and key challenges could be identified and disseminated to facilitate learning.

However, macro-level resource hubs of this kind risk reinforcing current imbalances in knowledge and information, as they would be least accessible to those who may wish to lodge complaints – often poorer individuals and communities in more remote locations, without internet access, who may not speak a major international language. To be fully effective, resource hubs would therefore need to be linked into networks that can reach down closer to these groups in societies. This might be done via international NGOs with national chapters, via national human rights institutions and ombudsman functions, via parliaments and parliamentarians, and via local NGO networks. It should involve organisations such as the Business and Human Rights Resource Centre that already provide a related resource function and have established networks. A combination of resource hubs that can collate and analyse information, linked into resource networks that can push it down to the levels where it is most needed, could go some way to filling this important gap. To be successful, this could not be a single, centrally-masterminded structure without serious risks of ignoring diversity and local needs, challenges and

⁶¹ The author is engaged in a multi-stakeholder consultation process that aims to develop some key principles that could meet this gap.

opportunities. A much more organic, networked approach is more likely to be effective, albeit there would be benefit in ensuring certain clear and easy points of access into the system.

Extending National Human Rights Institutions and ombuds functions

The standing and impact of many National Human Rights Institutions is growing. They have important potential in this arena. One role they can play is as a conduit for information about the array of grievance processes available to aggrieved parties, such as those reviewed in this paper. This is a function that any NHRI could provide, whether or not it is empowered to handle complaints against companies.

There is also scope for these institutions to become more substantively involved in the area of business and human rights. Where they are not able or ready to handle grievances with regard to companies, they can nevertheless provide a forum for dialogue on how to tackle the challenges raised by corporate impacts on communities and workers. This could bring companies as well as impacted groups or NGOs into dialogue in order better to understand the issues on both sides. While not a formal dispute resolution process, it could go some way towards identifying generic problems and possible solutions through dialogue. The South African Commission on Human Rights is currently looking to expand its work as a convening forum in this regard.

More NHRIs might also consider whether they have the latitude under their existing mandates to take on specific complaints that relate to business. Those that address complaints but only in limited circumstances (eg particular rights such as discrimination; or particular companies, such as state-owned enterprises) might consider expanding their work. In some instances this will require a change to their statutory basis – something governments and legislatures will need to consider. These institutions should not replace the functions that national and local courts should be providing. But they may provide alternative and complementary means to address grievances through a vehicle that provides for local ownership of the process.

Equally, it may be possible and necessary to create new national institutions that can address human rights grievances in relation to companies. In response to a request from the Danish NHRI (the Danish Centre for Human Rights) together with the Confederation of Danish Industries and the Industrialization Fund for Developing Countries, an academic group at Princeton University submitted a proposal on how to structure a Danish Human Rights and Business Commission to take on this role.⁶² In a brief to the Canadian Government's Roundtables on Corporate Social Responsibility in the Extractive Sector, a group at the University of Ottawa proposed a Canadian Extractive Industry Ombudsperson with similar functions.⁶³ Oxfam Australia has established its own Mining Ombudsman process in Australia to handle community

⁶² Joseph Cassidy, Glenn Gutterman, Minh-Thu Pham, "The Promise of a Human Rights and Business Commission," (Princeton University: Princeton, 2003)

⁶³ "Canada's Extractive Industry Ombudsman: Background and Recommendations for an Ombudsperson for Canadian Extractive Companies Operating Abroad," (University of Ottawa: Ottawa, 2006)

grievances and proposes that this role should ideally transfer to an independent, official ombudsman.⁶⁴

A Global Ombudsperson

This discussion inevitably raises the question of whether there is also a need for a global-level ombudsperson. It is clear that many complaints and disputes currently have no accessible point of recourse. It is equally clear that those companies involved with the kind of voluntary initiatives covered here are the ones which are already most committed to addressing their impact on human rights. They have typically recognised the benefits of matching their commitments with accountability mechanisms, not just to demonstrate that they are responsible actors, but also to have effective ways to identify problems and adjust their own management systems in order to remain efficient, manage risk and innovate. Yet these companies are therefore often the ones in the spotlight, while many of the companies implicated in serious human rights abuses provide no vehicles for grievances either through their own mechanisms or through external ones. A global ombuds function could go some way to leveling the playing field in this regard. It could address any human rights-based complaint against any company anywhere in the world. It could also provide other services, such as those of a resource hub, as described earlier in this section. Yet the creation of any such function, if it is to be effective, will also face severe challenges.

Standards

The first obvious question would be what human rights standards should apply. Attempts to apply the same standards across the board may lead to an outcry by governments who have not ratified certain human rights treaties and therefore reject their applicability. It could equally be controversial to apply different standards according to the location of an alleged breach of rights, given the mantra that human rights are universal. However Bridgeman's and Hunter's proposal for a new Foreign Investment Accountability Mechanism suggests embracing just such a variegated approach. The FIAM would include in its consideration of any one complaint not only the national and international law obligations of the state where the grievance arises and of the home state of the corporation, but also any standards attached to the project's financing (such as IFC Performance Standards or Equator Bank Principles) and any voluntary standards the company has adopted or commitments it has made. As the authors observe:

“Although this approach to norms may result in a ‘crazy quilt’ of different standards applying to each project, that crazy quilt already exists today. The standards mentioned above apply to the project independent of this Mechanism, and the Mechanism neither creates nor requires any new norms.

⁶⁴ Oxfam Australia describes a number of objectives for this mechanism, established in 2000, including assisting women and men from local and Indigenous communities whose human rights are threatened by the operations of Australia-based mining companies; assisting women, men and Indigenous communities that are, or might be, affected by a mining operation to understand their rights under international law; and helping ensure that the Australian mining industry operates in such a way that the rights of local and Indigenous communities affected by mining are better protected. They also articulate a goal of seeing the development of an independent, *official* ombudsman to take on this ombuds role. <http://www.oxfam.org.au/campaigns/mining/ombudsman/>

*Of course, the Mechanism would force MNEs and others to take these normative frameworks more seriously, because there would now be a compliance mechanism looking at their application”.*⁶⁵

Scale

The second challenge for a global ombuds function is scale. The barriers to access linked to standards, membership, or financing that are a natural and necessary constraint on the potential number of complaints going to bodies like the ETI, SAI, VPs or CAO, would be absent in the case of a truly global ombudsperson. And were it located in the UN, it is unlikely that a lack of awareness of the mechanisms would significantly limit the number of complaints it received. Any complaint addressed to the UN in general, and which related to corporate activities, would be channeled automatically in the direction of the Ombuds function (always presuming it did not overlap with the Global Compact's integrity measures). Ironically, this welcome ease of access would pose serious challenges in the potential number of complaints it would draw.

A comparison may be useful in this regard. The five-person UN Working Group on Enforced Disappearances has handled over 50,000 allegations of enforced disappearance since its creation in 1980.⁶⁶ This excludes complaints it has deemed inadmissible. And it relates to one single human right with regard to 192 governments. If a global ombuds function were indeed to address all human rights in relation to all corporations, the number of complaints would be potentially enormous. Indeed, even if it just covered the operations of all transnational corporations (a demarcation that would be both difficult and inappropriate in practice) these now number over 77,000 with some 770,000 subsidiaries and millions of suppliers, so the scope for complaints would remain overwhelming.⁶⁷ And without sufficient staff to handle complaints in the quantities that could reasonably be expected, the body would risk becoming swamped, leading to frustration and disillusionment among its users.

Credibility/legitimacy

This in turn plays into the challenge of establishing credibility and legitimacy for any such institution. Unless it could build an early track record of successfully addressing a range of legitimate grievances, this would quickly be placed in question. The legitimacy of its home institution would also be a factor. It might be located within the United Nations and benefit from the international legitimacy that organisation enjoys with many parties, not least potential end-users of the complaints system. But this would require various safeguards to avoid it becoming an object of manipulation by governments who might be unhappy when faced with criticism of state-owned enterprises or implicit criticism of the failure of their domestic courts to deal effectively with certain abuses. Achieving a firewall to protect the independence of the Ombudsperson would be

⁶⁵ Natalie L Bridgeman and David B Hunter, “Narrowing the Accountability Gap: Toward a New Foreign Investor Accountability Mechanism,” forthcoming 20 Geo. Int'l Envtl. L. Rev. (2008).

⁶⁶ OHCHR, Fact Sheet No.6 (Rev.2), Enforced or Involuntary Disappearances, available at <http://www.unhchr.ch/html/menu6/2/fs6.htm>

⁶⁷ UNCTAD, *World Investment Report*, 2006, at: www.unctad.org/wir.

extremely difficult in practice and constantly subject to encroachment. An alternative would be to create a new, self-standing body outside any existing institution and try to build up credibility over time. The Global Reporting Initiative has arguably managed well to do just this. But this also implies starting small and expanding, which is hard to marry with an 'open door' for all complaints.

Resources

Challenges related to the number of complaints and institutional housing quickly bring one to the challenge of resources. It is clear that any such ombuds process must be free of charge for those bringing complaints. So it requires a budget. Within the UN, most budget allocations are hotly-negotiated political processes. Outside the UN, absent an extremely generous benefactor, they require continual fundraising and a lack of predictability. Were companies to be major funders, particularly on a case-by-case basis, this would raise potential conflicts of interest for the mechanism. However, there might be ways of addressing this difficulty through blind trusts and other such arms-length funding vehicles. Most desirable would be to work on the basis of an endowment, but this would require such a significant initial injection of capital as to make it almost inconceivable.

An earlier attempt to create an Ombudsman for environmental disputes illustrates how difficult raising funds can be, even with very credible institutions involved. The 1992 UN Conference on Environment and Development (also known as the Earth Summit) saw discussion of the idea to create an international ombuds function for the environment and development. According to the UN University for Peace in Costa Rica, a consensus emerged "as to the need for an objective, international mechanism for investigating grievances and anticipating, preventing and mediating contentious issues outside the formal international legal system which is often a tedious and costly process, not in the last place [sic] for the poor. It was concluded that existing international environmental and development organisations are not adequately structured or disposed to deal expeditiously, equitably and effectively with actual or potential conflictive situations of issues pertaining to sustainable development through non-adversarial and non-judicial action involving all stakeholders. On that basis IUCN and the Earth Council Institute decided to assume that function, creating [the Ombudsman Center for Environment and Development]."⁶⁸ The Center (OmCED) was to be located on the campus of the UN University for Peace, which announced this agreement in late 1999, prior to a formal launch of the initiative in 2000. However, there is little trace of the Center ever having become operative. Research via the IUCN suggests that the IUCN's agreement was subject to funds being made available. It would appear that, despite the political support of these three institutions, they never were.

Engagement

A further challenge is whether companies would engage with such a mechanism. The ombuds function would not carry the force of law (although states could legislate, if they

⁶⁸ UN University for Peace press announcement "*UPEACE, IUCN and Earth Council to create Ombudsman Center*," following the 21-23 November 1999 meeting of the University's Council.

so wished, to make its decisions binding in national courts). This paper has reviewed a number of other ways to provide incentives for engagement in a mechanism, depending on the type of process it provides.

The Foreign Investor Accountability Mechanism proposed by Bridgeman and Hunter would be based on membership. Companies, banks and export credit agencies could sign up, and pay, to use it as an external grievance mechanism. The incentive to do so would be to gain the adjudication services provided while sharing overhead costs with others. Company members would also have the right to participate, along with NGO members, in the selection of the mechanism's Executive Committee, which would oversee and take policy decisions for the Mechanism.⁶⁹ Complaints would be eligible so long as they related to a company that had accepted the mechanism's procedures and jurisdiction and related to an alleged breach of the environmental or social standards that applied in that instance. This model would require a critical mass of companies, banks and export credit agencies to sign up to it in order to have any breadth of impact. The question is whether they would do so. This is impossible to judge here, but the example of the International Court of Environmental Arbitration and Conciliation (ICEAC) may be instructive.

The ICEAC was established in 1994 by 28 environmental lawyers from 22 countries. It can accept any environmental dispute submitted by states, natural or legal persons. It offers conciliation and arbitration services as well as the possibility of Consultative Opinions "in relation to any legal matter on request of any kind of entity whether public or private, national or international." Such opinions could be "1. Preventive - in order to ascertain whether a proposed project is compatible with Environmental Law; 2. Confirmatory - in order to confirm that an action has been carried out in compliance with Environmental Law; [or] 3. Denunciatory - in order to enquire whether an action by another person complies with Environmental Law and if not to make that information available to the international community".⁷⁰ The body's website indicates that to date it has handled just six cases, every one of them a Consultative Opinion, suggesting that in no single case has a corporation decided to cooperate in using their services.

No innovative mechanism ever got off the ground by focusing on all the challenges in its path. This appraisal of the difficulties that would face the creation of a global ombudsperson for business and human rights is not intended to suggest that no such function is possible or desirable, but merely to highlight the issues that would have to be addressed and choices and compromises that would have to be made if it were to succeed in practice.

VIII. CONCLUSIONS AND RECOMMENDATIONS

⁶⁹ Natalie L Bridgeman and David B Hunter, "Narrowing the Accountability Gap: Toward a New Foreign Investor Accountability Mechanism," forthcoming 20 Geo. Int'l Env'tl. L. Rev. (2008).

⁷⁰ International Court of Environmental Arbitration and Conciliation: *Foreword*, available at <http://iceac.sarenet.es/Ingles/fore.html>

Based on the foregoing analysis, a number of conclusions and recommendations can be drawn for enhancing the network of existing grievance mechanisms in the business and human rights arena. The following suggests a few.

1. Develop guidance for companies on designing effective rights-based grievance mechanisms for their external stakeholders.

Numerous initiatives and organisations, including many of those reviewed in this paper, require companies covered by their standards to put in place a grievance mechanism. They provide little or no guidance as to what form this should take or what criteria it should fulfil. Clear guidance should be developed that can provide companies with a practical tool in developing their grievance mechanisms in order to ensure they are both effective and rights-compliant. Bodies assessing the extent to which companies are responsible in their business practices, in particular socially responsible investment funds, should include benchmarks that address the existence, appropriateness and efficacy of corporate grievance mechanisms as part of their assessment processes.

2. Standards-based initiatives that currently lack a grievance mechanism should create one.

Some existing multi-stakeholder initiatives related to business and human rights have not created any grievance mechanism for those whose rights they purport to support, and are either already coming under fire from NGOs for this deficit, or are likely to do so with time. They should engage in a dialogue with their stakeholders to identify whether a grievance mechanism is appropriate to their structure and mission and, if so, whether it should be self-standing or link into an existing mechanism, should that be possible. They should review the experiences of other organisations with different models of grievance mechanism in order to help them identify the model for their own purposes, as well as the appropriate oversight structures.

3. Initiatives/institutions with grievance mechanisms should provide as far as possible for aggrieved parties or their representatives to be involved in the resolution of disputes.

Some organisations working with supply chain-driven industries focus their grievance mechanisms exclusively on investigative/audit processes or on dialogue between the organisation (including its members or certification bodies) and the *management* of the supply company. They should consider how they can encourage the engagement of the aggrieved parties – ie the *workers* - in the grievance process, either directly or via their legitimate representatives. Developing this engagement is crucial to empowering individuals to understand and claim their rights and to encouraging the management of companies to view grievance mechanisms as a collaborative rather than paternalistic process.

4. All initiatives or institutions with grievance mechanisms should continue actively to innovate in an effort to improve their effectiveness.

It is beyond the scope of this research to compare the efficacy of different types of grievance mechanism in quantitative terms. The predominant focus here has been on understanding the perspectives of stakeholders through qualitative,

interview-based research. However, this process, combined with quantitative evidence of continued high levels of non-compliance with standards, is sufficient to demonstrate that most grievance processes continue to face considerable challenges. There is clearly a need for mechanisms to continue to innovate in order to understand what processes are best suited to addressing grievances in what contexts. Some grievance mechanisms (eg the CAO) have taken efforts to review and assess their strengths and weaknesses from the perspectives of their stakeholders. Others have sought to develop new approaches and tools (eg the FLA and the Clear Voice Hotline). It is too early to tell what the successes of these new or updated approaches will be. But it is fairly certain that those mechanisms that rest with the status quo and fail to innovate will be left behind. All organisations with grievance mechanisms should engage in an on-going process of assessment, learning and development to improve the quality of the process they provide.

5. Certification-based initiatives should consider ways, within the scope of this model, to mitigate conflicts of interest and strengthen leverage in their grievance processes.

The certification model is well-established in a number of different areas of corporate responsibility. With respect to grievance mechanisms, it poses particular challenges if the same institution or individual that certified a facility (and was paid by the facility to do so) is used to investigate a complaint against it. First, this raises a potential conflict of interests. Second, if neither the parent organisation that runs the initiative nor its brand sourcing companies get directly involved in the grievance process, it loses opportunities to bring leverage to bear in persuading a facility to comply with standards. Initiatives structured on this model should consider using independent assessors to review complaints and/or becoming more involved in leveraging successful outcomes.

6. The OECD should consider ways to enhance the mediation skills available to NCPs, to protect their independence from government interests and to enhance their transparency.

OECD procedural guidance to National Contact Points has enabled some of them to innovate and try new approaches to improve their efficacy in handling grievances. But it also reflects certain structural problems. First, it leads to a presumption that the mechanism should be rooted partially or wholly within government, despite potential conflicts of interest this may pose for the officials involved. Second, it devolves a potentially complex role of mediation onto individuals whose training and expertise is likely to be very different. There will be happy coincidences where it works. But the instances where it has not are sufficiently numerous for many of their stakeholders (business as well as NGOs) to call into question the credibility of many NCPs. The OECD, and in particular the Committee for Investment that oversees the NCPs, should consider the possibility of requiring that NCPs be created as autonomous structures with a statutory basis, under Parliaments, or as part of a national human rights institution. It should also consider proposing that NCPs engage qualified mediators wherever the parties to a dispute agree to a facilitated dialogue. In

addition, it should consider the merits of requiring NCPs to make clear, public statements when the OECD Guidelines have been breached.

7. Some global and academic institutions might consider developing linked hubs for information and other resources on grievance mechanisms and tying these into grass-roots, organic networks to enhance information flows to and from local levels.

There is a substantial deficit of information about extrajudicial grievance mechanisms: what mechanisms exist, how they function, who can use them and what they can achieve. Various institutions might consider and coordinate how they can play a role in filling this gap. Global institutions such as the UN and the World Bank have a potential role to play, as do academic institutions and networks. To meet the needs of the potential end-users of grievance mechanisms, information sources need to be linked not just in horizontal networks but also in vertical networks reaching down to local communities. National human rights institutions have a potentially powerful role to play in this regard by linking up to national NGO networks.

8. Governments should strengthen the role of national human rights institutions to handle complaints against business.

Governments should consider expanding the mandates and resources of those national human rights institutions that are currently limited to receiving complaints against companies that are state-owned or provide public services, or constrained to a focus on certain rights. Where an existing institution is unable to assume this role, governments should consider developing new national commissions or ombuds functions that can provide a forum for complaints regarding business and human rights, separate and complementary to judicial processes. These might use processes focused on dialogue or on adjudication, or providing both, depending on the culture and needs of the society in question.

9. Stakeholders should engage in dialogue to explore options for designing an effective, manageable global ombuds function for business and human rights.

The possibility of developing a global ombuds function should be further explored, in discussion with all interested stakeholders. There will be many challenges to ensure that such an institution can be effective in practice. Stakeholders should consider the possibility of limiting the institution's focus to those complaints that suggest a pattern of gross or systematic abuse – whether across a company, across a sector or within a country. It might also, or alternatively, take on a capacity-building role: it could review complaints with a view to identifying areas where local grievance mechanisms – judicial or extrajudicial – are absent or manifestly ineffective, and work with the government authorities or other institutions to develop their capacity. An ombuds function might be located within the UN, perhaps under the Office of the High Commissioner for Human Rights and with a link to the Global Compact, or vice

versa. It would need predictable funding and staffing and probably some sui generis status to achieve the necessary independence. Alternatively, it could be established independently of existing institutions, but with a formal link to the network of existing national human rights institutions, assisting and encouraging the growth of their role in this area.

10. The ICC's Court of Arbitration and the Permanent Court of Arbitration should consider expanding their roles to include mediation/arbitration in business and human rights disputes.

Where companies have disputes with other companies, or with governments under the terms of investment agreements, they typically are able to turn to international mediation and arbitration services to help resolve them. It would be worth exploring whether any of these international institutions – for instance the Court of Arbitration of the International Chamber of Commerce, or the Permanent Court of Arbitration – could use or adapt its rules to handle disputes also between companies and civil society groups over human rights issues where these fail to achieve resolution through local mechanisms. An extension of ICC or PCA services in this regard is most likely to be taken up where recourse to them is foreseen in a contract or formal agreement. Such clauses could be included in International Framework Agreements as a fallback process, or in agreements between a company and community stakeholders at an operational site.