Zurich University of Applied Sciences –
School of Management and Law

Bachelor Thesis

UN Guiding Principles on Business and Human Rights & Effective Remedies

A state-based non-judicial grievance mechanism for Switzerland

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MANAGEMENT SUMMARY

Parallel to the proliferation of transnational corporations, the corporate impact on human rights has increased. Meanwhile, multinational enterprises are increasingly urged not to violate human rights, regardless of whether they operate far beyond the borders of their home states. However, the regulatory capacities of these corporations' home states have not kept pace. Their judicial systems are often incapable of remedying business-related human rights abuse that occurs outside their frontiers. To canvass how states might complement courts, this thesis answers the UN Guiding Principles on Business and Human Rights' call for effective state-based non-judicial grievance mechanisms.

To begin, it is explored why people whose human rights have been harmed due to extraterritorial business operations are often denied effective judicial remedy. In light of this, the thesis scrutinizes the requirements that a non-judicial grievance mechanism should satisfy to be effective. To this end, by starting from procedural guarantees of human rights treaties, the UN Guiding Principles' effectiveness criteria are interpreted. Based on these findings, a grievance mechanism for Switzerland is ultimately conceived.

The current barriers to justice are found to be many and to range from cost and evidentiary problems to a problematic legal doctrine that regards affiliate companies as different legal entities. Effectiveness therefore involves that access to non-judicial mechanisms is not obstructed by the same obstacles. Moreover, people should be enabled and entrusted to invoke non-judicial mechanisms. This, in turn, requires that information about the availability of such mechanisms is distributed and awareness raised.

Regarding the grievance process itself, it is found that precise procedural rules should apply and equality be assured. A non-judicial grievance mechanism should comply with the human rights duties of the state providing it. Procedural outcomes, in turn, should be determined by corporate human rights responsibilities. Furthermore, a state-based non-judicial grievance mechanism should be transparent and a source of comprehensive and expedient information to enable external bodies to improve corporate human rights impact; though, legitimate confidentiality interests should be preserved.

These theoretical findings are applied to conceive an effective grievance mechanism that should, above all, avouch the balanced satisfaction of three imperatives. First, the mechanism must be apt to come to grips with the issues currently obstructing access to judicial remedies; second, it must be based on and compatible with human rights; and

third, it must not be perceived as a mere “anti-business” initiative. Considering this, a “carrot-and-stick”-approach inciting cooperation while allowing for an objective third party human rights assessment is submitted. It is argued that both victims of corporate-related human rights abuse and transnational corporations could benefit from cooperation. In the case that cooperation is refused, an authoritative process including coercive measures is suggested as a fallback procedure.

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LIST OF ABBREVIATIONS

arb	Arbitration
art.	Article
BGE	FSC Decision
CAT	UN Committee against Torture
CERD	UN Committee on the Elimination of Racial Discrimination
CESCR	UN Committee on Economic, Social and Cultural Rights
ch.	Chapter(s)
CHR	UN Commission on Human Rights
Commission	Swiss Commission for Cross-border Business and Human Rights
CPR	The International Institute for Conflict Prevention & Resolution
diss.	Doctoral dissertation
e.g.	Exempli gratia, for example
ECOSOC	UN Economic and Social Council
ECtHR	European Court for Human Rights
ed.	Edition
Ed./Eds.	Editor/s
f./ff.	And the following page/s, paragraph/s etc.
fig.	Figure
fn.	Footnote
FSC	Federal Supreme Court of Switzerland
GA	UN General Assembly
Gen. Comm.	General Comment no.
HRC	UN Human Rights Committee
ICC	International Chamber of Commerce
i.e.	Id est, this is to say
ILC	International Law Commission
ILO	International Labour Organisation
IOE	International Organisation of Employers
let.	Letter
med	mediation
NCP	National Contact Point for the OECD Guidelines for Multinational Enterprises
NGO	Non-government organization
NHRCK	National Human Rights Commission of Korea

NHRI	National Human Rights Institution
no.	Number
OECD	Organisation for Economic Co-operation and Development
OHCHR	UN Office of the High Commissioner for Human Rights
p./pp.	Page/s
para.	Paragraph(s)
s.	Section
SG	UN Secretary-General
SR	Classified Compilation of Federal Legislation
SRSG	Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises
subs.	Subsection
TNC	Transnational corporation
UK	United Kingdom of Great Britain and Northern Ireland
UN	United Nations
US	United States of America

LIST OF TREATIES, DECLARATIONS AND PRINCIPLES

CAT	United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984, SR 0.105
CED	International Convention for the Protection of All Persons from Enforced Disappearance of 20 December 2006, A/RES/61/177, ratification pending in Switzerland
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women New York of 18 December 1979, SR 0.108
Convention no. 111	Convention concerning Discrimination in Respect of Employment and Occupation of 25 June 1958, SR 0.822.721.1
Convention no. 138	Convention concerning Minimum Age for Admission to Employment of 26 June 1973, SR 0.822.723.8
Convention no. 182	Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour of 17 June 1999, SR 0.822.728.2
Convention no. 29	Convention concerning Forced or Compulsory Labour, 28 June 1930, SR 0.822.713.9
Convention no. 87	Convention concerning Freedom of Association and Protection of the Right to Organise of 9 July 1948, SR 0.822.719.7
Convention no. 98	Convention concerning the Application of the Principles of the Right to Organise and to Bargain Collectively of 1 July 1949, SR 0.822.719.9
Convention no.100	Equal Remuneration Convention of 29 June 1951, SR 0.822.720.0
Convention no.105	Convention concerning the Abolition of Forced Labour of 25 June 1957, SR 0.822.720.5
CRC	Convention on the Rights of the Child of 20 November 1989, SR 0.107
CRPD	Convention on the Rights of Persons with Disabilities of 13 December 2006, A/RES/61/106, ratification pending in Switzerland
ECHR	European Convention on Human Rights of 4 November 1950, SR 0.101
Edinburgh Declaration	The Edinburgh Declaration of 10 October 2010 adopted at the Tenth International Conference of the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights, available at <http://www.ohchr.org/Documents/AboutUs/NHRI/Edinburgh_Declaration_en.pdf>, retrieved on 23 March 2014.
ICCPR	International Covenant on Civil and Political Rights of 16 December 1966, SR 0.103.2

ICERD	International Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965, SR 0.104
ICESCR	International Covenant on Economic, Social and Cultural Rights of 16 December 1966, SR 0.103.1
ICRMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families of 18 December 1990, A/RES/45/158, not ratified by Switzerland
Lugano Convention	Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters of 30 October 2007, SR 0.275.12
Paris Principles	National institutions for the promotion and protection of human rights, 20 December 1993 (A/RES/48/134)
Reparation Principles	Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, 21 March 2006 (A/RES/60/147)
UDHR	Universal Declaration of Human Rights of 10 December 1948 (A/RES/3/217 A)
UN Charter	Charter of the United Nations of 26 June 1945, SR 0.120
UN Guiding Principles	Guiding Principles on Business and Human Rights, Implementing the United Nations "Protect, Respect, Remedy" Framework (HR/PUB/1104), New York/Geneva 2011

LIST OF DOMESTIC CONSTITUTIONS, CODES AND ACTS

AJA	Access to Justice Act 1999, United Kingdom, chapter 22
ATCA	Alien Tort Statute of 1789, 28 United States Code § 1350
BGG	Bundesgesetz über das Bundesgericht [Federal Act on the Federal Supreme Court] of 17 June 2005, SR 173.110
CC	Swiss Criminal Code of 21 December 1937, SR 311.0
CO	Federal Act on the Amendment of the Swiss Civil Code (Part Five: The Code of Obligations) of 30 March 1911, SR 220
CPC	Swiss Civil Procedure Code of 19 December 2008, SR 272
FC	Federal Constitution of the Swiss Confederation of 18 April 1999, SR 101
INHRC-PRA	Indian National Rights Commission (Procedure) Regulations of 1994 as amended by the National Rights Commission (Procedure) Amendment Regulations of 13 March 1997, published in the Gazette of India, Part II, Section I
IPLA	Federal Act of 18 December 1987 on International Private Law, SR 291
KNCHRA	The Kenya National Commission On Human Rights Act of 27 August 2011, no. 14 of 2011
RVG	Rechtsanwaltsvergütungsgesetz [Attorney Remuneration Act] of 5 May 2004, the Federal Republic of Germany, Fundstellennachweis 368-3
SA Constitution	Constitution of the Republic of South Africa of 4 December 1996, No. 108 of 1996
TVPA	Torture Victim Protection Act of 1991, Public Law No. 102 – 256

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ZERK JENNIFER A., Filling the gap: a new body to investigate, sanction and provide remedies for abuses committed by uk companies abroad, A report prepared for the Corporate Responsibility (CORE) Coalition, December 2008, <http://corporate-responsibility.org/wp-content/uploads/2013/11/Filling-the-Gap_dec08.pdf>, retrieved on 2 February 2014.

Introduction

Parallel to the proliferation of cross-border trade and transnational corporations, the corporate impact on human rights has increased. By extension, social expectations that transnational corporations not violate human rights, whether or not they operate far beyond the borders of their home states, have also increased. However, state regulatory capacities have not evolved accordingly, which means that they are currently incapable of preventing home state business from impairing human rights abroad. Moreover, judicial systems are similarly incapable of "healing"[1] such violations. In short, state legal systems have not kept pace with the potential impact of cross-border business operations on human rights.

This thesis addresses the latter issue: the lack of effective remedies for human rights violations caused by extraterritorial business operations. Regarding important background information, some facts concerning corporate-related human rights abuse will be provided first. Namely, it will be shown that a large part of all business-related human rights violations appears to occur in countries other than the home states of most transnational corporations. It will then be explained in legal terms why existent judicial systems have failed to provide effective remedies for such abuse (Part I, Chapter 1).

The most recent, truly global attempt to tackle the lack of effective remedies and to resolve the root causes of the problem – the described mismatch between states and transnational businesses – consists of the UN Guiding Principles on Business and Human Rights. These Principles extensively address the lack of effective remedies and make plain that states have a duty to provide access to effective remedies. As will be explained, state-based non-judicial grievance mechanisms are suggested as a means for complementing customary judicial systems in order to enhance states' capacities in addressing business-related human rights infringements (Part I, Chapter 2).

The present thesis will focus precisely on this instrument. After all, grievance procedures (i.e., the procedural aspect of remedies) and their outcomes (i.e., the substantive aspect of remedies) are paramount, for even the utmost efforts cannot prevent every violation.[2] Yet,

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1 Remedy can be traced back to the Latin term mederi meaning "to heal". See Oxforddictionaries.com, Oxford University Press Dictionaries, Definition of remedy in English, 2014, <http://www.oxforddictionaries.com>, retrieved on 21 March 2014.

2 See to the terms OHCHR, HR/PUB/12/02, p. 6; UNGP, commentary to Principle 25; cf. Garner Bryan A. (Ed.), Black's law dictionary, 9th ed., St. Paul 2009 (definition of remedy).

grievance mechanisms must be not only available, but also capable of providing an effective remedy to individuals who turn to them. To ensure this as regards state-based non-judicial grievance mechanisms, the UN Guiding Principles enumerate seven criteria for effectiveness.[3] However, as far as can be seen, no systematical approach has previously been undertaken to construe these criteria for application to a model grievance mechanism. Therefore, the question as to what effectiveness might imply in the context of a state-based non-judicial grievance mechanism within the meaning of the UN Guiding Principles remains to be answered.

To suggest such an answer, the UN Guiding Principles' effectiveness criteria will be scrutinized in the theoretical body of this thesis. Starting from the traditional understanding of an effective remedy, as mirrored in procedural guarantees of human rights treaties, each pertinent effectiveness criterion will be interpreted (Part II, Chapter 1). A cursory overview of methods to effectively resolve conflicts out of court will conclude these theoretical considerations (Part II, Chapter 2).

Being aware of these different methods is important, since an actual grievance mechanism will ultimately be designed in the practical body of this treatise. The findings regarding effectiveness will be applied to the idea of a state-based non-judicial grievance mechanism. More precisely, an effective state-based non-judicial grievance mechanism for Switzerland, intended to provide relief for individuals who believe to have been affected by extraterritorial operations of Swiss corporations, will be conceptualized (Part III).

[3] Note that eight principles are enumerated whereof one, however, does not apply to state-based grievance mechanisms.

Part I: Background

1. The problem "Business and Human Rights"

Most people are presumably not fully unfamiliar with the problem "Business and Human Rights". After all, it has gained more and more attention during recent years. It seems nevertheless important to recall the extent of the problem to enable the reader to conceive the importance of this thesis adequately. Further, the following facts prove, so to say, the fundamental assumptions underlying this work. This means, they prove that transnational business and human rights really do collide and that a large part of all corporate-related human rights violations seems to occur on occasion of extraterritorial operations. Subsequently, the legal issues resulting in the current lack of effective remedies for such human rights abuse is enlightened. Obviously, being aware of these causes is important, given that this thesis will then turn to alternatives complementing the existent insufficient systems.

1.1. Significance and extent

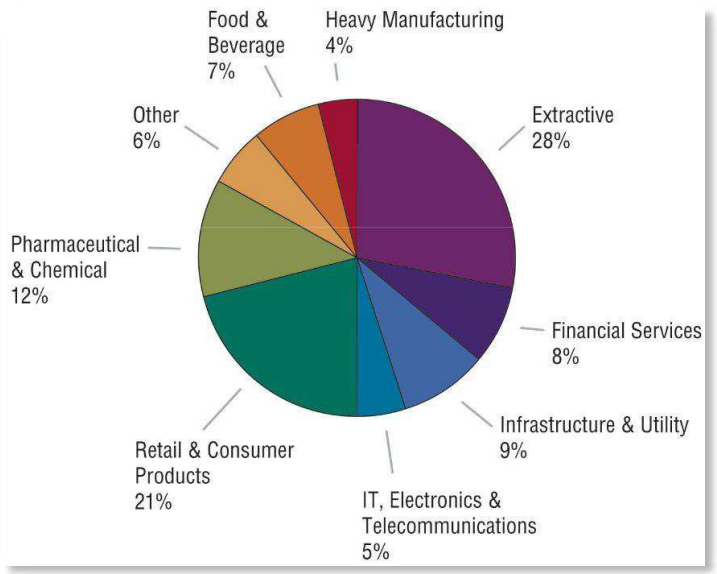
Tens of thousands transnational corporations, supported by hundreds of thousands subsidiaries, take part in international business. Whereas their rights have increased and disputes are settled out of court more often, they are also increasingly perceived as abusing their power.[4] The extractive sector, frequently criticized in Switzerland, is an evident example.[5] However, financial services and the pharmaceutical and chemical industry are also highly relevant. Seven out of the fourteen Swiss transnational corporations ranking among the Fortune Global 500[6] are engaged in either of these sectors. While it is common that organizations that accumulate power increasingly face opposition by groups with different interests, the present situation is more complicated as the transnational corporations' operations reached a scale and pace that trump the capacities of governments and international organizations.[7]

A survey undertaken on occasion of the SRSG's mandate[8] proved that allegations concerning corporate-related human rights abuse are numerous indeed. Based on 320 cases,

4 Cf. SRSG, 2006 Interim report, para. 11 ff.
5 See SCHMID, p. 21.
6 Fortune Global 500 (2013), <http://money.cnn.com/magazines/fortune/global500/2013/full_list/>, retrieved on 12 March 2014.
7 SRSG, 2006 Interim report, para. 14 and 16.
8 See below, ch. 2, pp. 12 ff.

scope and patterns of alleged corporate-related human rights violations were reviewed.[9] Before turning to the findings, it is important to remark that the survey did not concern the merits of the allegations.[10] Indeed, the forthcoming outcomes are allegations only. Judicial proceedings were required to turn them into violations. However, an overview of the allegations must be sufficient for such court proceedings are very rare. After all, this paper would arguably be obsolete otherwise.

Fig. 1: Allegations by sector[11]



With regard to the allegations by sector, the general perception in Switzerland seems right insofar as the extractive sector is responsible for more than a quarter (28 %) of all allegations. It is clearly the sector blamed most often. The retail and consumer products sector comes closest, making up 21 %. With "only" 12 %, the pharmaceutical and chemical sector is ranked third. Then, infrastructure and utility, ranked fourth with 9 %, precedes the financial services sector (8 %). The differences are small at the bottom end: food and beverage (7 %), others (6 %), IT, electronics and telecommunications (5 %) and lastly heavy manufacturing (4 %).[12]

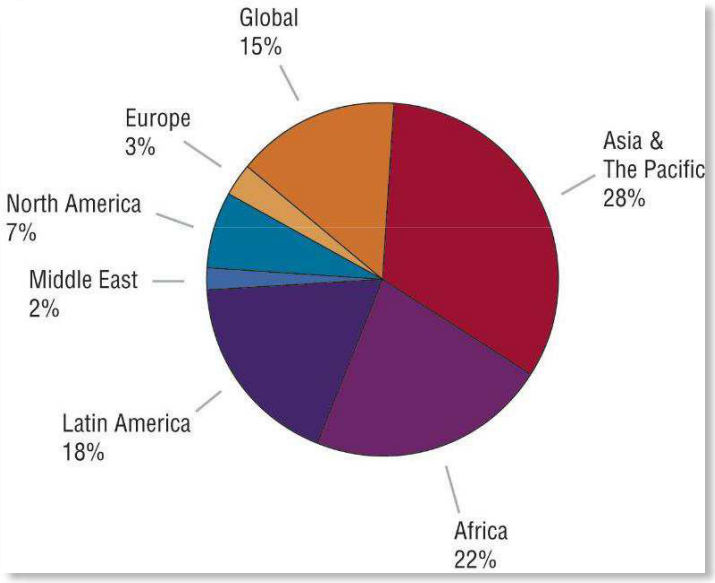
While the company was directly involved[13] in 59 % of the cases, 41 % of the allegations concerned indirect[14] corporate abuses. Supply chains count 18 % of this latter type of abuse.[15]

9 SRSG, Survey of allegations, para. 2.
10 SRSG, Survey of allegations, para. 5.
11 SRSG, Survey of allegations, p. 9, fig. 1.
12 SRSG, Survey of allegations, p. 9, fig. 1.
13 Direct involvement was defined as a case wherein "the company, through its employees or agents, was generally alleged to have committed the abuse, with minimal or no separation between the company and the abuse", SRSG, Survey of allegations, para. 35.
14 In indirect cases, "firms were generally alleged to contribute to or benefit from the abuses of third parties", SRSG, Survey of allegations, para. 36.
15 SRSG, Survey of allegations, para. 35 f.

Moreover, the survey found that civil and political rights, social and cultural rights, and labor rights are impaired.[16] The seriousness of the allegations was proven by the fact that almost 75 % of all non-labor rights claims concerned the right to physical and mental health.[17]

With respect to the persons affected, the study revealed that both workers and communities are concerned in 45 % of the cases. Only 10 % of the allegations referred to affected end-users, whereby most cases relate to pharmaceutical firms obstructing access to important medicines in developing countries.[18] Further, it was found that the vast majority of the incidents affected more than hundred persons.[19]

Fig. 2: Allegations by region[20]



Considering the regional distribution, Asia and the Pacific contribute to 28 % of the allegations, followed by Africa (22 %) and Latin America (18 %). The other regions come off relatively well: global (15 %), North America (7 %), Europe (3 %) and Middle East (2 %).[21] These shares make plain that alleged violations are widespread. This proves likewise that all corporate operations are important regardless of their industry and location.[22]

The findings show clearly that corporate businesses impact a wide range of human rights. While the outcomes prove that problems occur throughout the world, they also indicate that regions with many developing countries are affected above average. In contrast, more

16 SRSG, Survey of allegations, para. 16 ff.; see Appendix 1 f., pp. 91 f., for an overview of (non-) labor rights impacted.
17 SRSG, Survey of allegations, para. 24.
18 SRSG, Survey of allegations, para. 29 f.
19 SRSG, Survey of allegations, para. 34.
20 SRSG, Survey of allegations, p. 10, fig. 2.
21 SRSG, Survey of allegations, p. 10, fig. 2.
22 SRSG, Survey of allegations, para. 9.

affluent regions such as Europe and North America – notably where most transnational corporations are domiciled[23] – are better off.

1.2. Legal issues

In legal terms, most transnational corporate-related human rights abuses remain allegations. Only few ever make it to court and even fewer are ever judged.[24] This observation is attributed to governance gaps between the scope and impact of global business and the regulatory capacities of global societies.[25] As it is beyond the scope of this thesis to (extensively) address all pertinent deficiencies, this sub-chapter is only intended to give an overview of the barriers individuals face when seeking judicial remedy for human rights violations inflicted on them by extraterritorially operating corporations.[26]

1.2.1. Jurisdiction to hear cases alleging extraterritorial violations

In general, courts are likely to hear cases against a transnational corporation domiciled in their jurisdiction.[27] This also holds true for Switzerland, where any person or legal entity, regardless its nationality, may bring a civil claim against a person with Swiss domicile.[28] Moreover, the Federal Act on International Private Law provides for forum necessitatis. The relevant provision strives to provide access to a court where no other forum is competent or where it would be unreasonable to demand from victims to turn to another court. Still, a certain nexus to Switzerland is required.[29] In addition, courts are cautious in admitting cases on that basis.[30] However, altogether jurisdiction to hear cases alleging extraterritorial corporate-related human rights abuse does generally not seem to be the major problem.

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23 Still more than half of the Fortune Global 500 corporations are based in North America and Europe, adding China these regions contribute to slightly more than three-quarter of the companies listed. See Economy Watch, Fortune Global 500: The World's Largest Companies By Revenues In 2013, 8 July 2013, <http://www.economywatch.com/fortune-global-500>, retrieved on 6 May 2014.

24 A study reviewing thirteen jurisdictions found not an only case that had finally be determined in favor of non-national litigants, Oxford Pro Bono Publico (Ed.), p. iv.

25 SRSG, 2008 Framework, para. 3.

26 More extensive analysis is available elsewhere: Oxford Pro Bono Publico (Ed.) provides a deep analysis including thirteen jurisdictions; SKINNER/MCCORQUODALE/DE SCHUTTER reviewed some ten jurisdictions including Switzerland; LOPEZ/HERI and KAUFMANN et al. focused entirely on Switzerland.

27 Oxford Pro Bono Publico (Ed.), p. 354.

28 Art. 2 Lugano Convention; art. 2 IPLA; LOPEZ/HERI, p. 34; SKINNER/MCCORQUODALE/DE SCHUTTER, p. 23; KAUFMANN et al., para. 151, 154; see as an example BGE 131 III 153 dealing with an action filed by the Gypsy International Recognition and Compensation Action against IBM, alleging that IBM would have been complicit in Nazi Killings during World War II.

29 Art. 3 ILPA.

30 SKINNER/MCCORQUODALE/DE SCHUTTER, p. 30.

1.2.2. (Non-) extraterritorial application of laws and regulations

A more significant impediment to remedy might lie in the fact that laws generally do not come with the intention to be applied extraterritorially.[31] Moreover, even the presence of extraterritorial legislation does not suffice because this alone cannot assure enforcement.[32] However, given that transnational corporations usually do dispose of assets in their state of domicile, a home state should normally be in a position to take coercive action.[33] Thus, the latter problem is of less relevance to this paper.[34] Yet, also the lack of extraterritorial legislation does not necessarily impede the access to remedies since states are generally free to have foreign law applied by their courts.[35] Hence, on the assumption of such choice of law rules, a transnational corporation could be held liable in a home state court notwithstanding the absence of a breach of domestic law.

In Switzerland, in a civil liability case filed by an alien against a Swiss transnational corporation lex loci delicti would generally be applicable.[36] The law of the state of work would usually govern claims based on an employment contract.[37] Contracts concerning property rights are subject to the law of the state where the property at stake is situated.[38] Finally, contracts are in general governed by the law of the state with which they are most closely connected.[39] It is presumed that this is the law of the state where the characteristic performance must be effected.[40] Considering these rules, it appears as foreign law would govern most cases filed by an alien against a Swiss transnational corporation.[41] Thus, the law that would apply is essentially beyond Swiss influence. However, Switzerland is free to change its choice of law system in a way that domestic law would govern such cases. Its application on incidents that occur on foreign territory but can be ascribed to Swiss corporations might be justified with the active personality principle.[42] With respect to that, it was argued that the preventive effect of legislative changes might be significant in fighting the problem of business and human rights.[43]

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31 Oxford Pro Bono Publico (Ed.), p. ii; cf. SRSG, 2008 Framework, para. 14.
32 DE SCHUTTER, p. 10.
33 Cf. DE SCHUTTER, p. 10.
34 Some remarks to the enforcement issue can nonetheless be found below in ch. 1.2.7, pp. 11 f.
35 DE SCHUTTER, p. 10.
36 Art. 133 para. 2 IPLA.
37 Art. 121 para. 1 IPLA.
38 Art. 119 para. 1 IPLA.
39 Art. 117 para. 1 IPLA.
40 Art. 117 para. 2 IPLA.
41 Cf. KAUMANN et al., p. 55; according to Oxford Pro Bono Publico (Ed.), p. iii, this seems true for most jurisdictions.
42 DE SCHUTTER, p. 29.
43 See Business & Human Rights: The Role of States in Effective Regulating and Adjudicating the Activites of Corporations With Respect to Human Rights, Consultation in Copenhagen, 8 – 9 November 2007, Summary report,

1.2.3. Causes of action

As a consequence of the foresaid, an admissible cause of action must usually be found in the host state jurisdiction or in international law. However, international human rights law does not provide causes of action against corporations.[44] Neither do domestic constitutional bills of rights provide for direct actions against transnational corporations.[45] This corresponds to the situation in Switzerland, where both the Federal Court[46] and the prevailing doctrine[47] reject the direct horizontal effect of constitutional fundamental rights. Contrary to that, the South African Constitution represents an exception in that it is directly applicable to private persons too.[48] Looking for courses of action beside constitutional and international law, one might find special regulations regarding corporate human rights abuses. Thereby the US Alien Tort Claims Act and its companion the Torture Victim Protection Act stand out.[49] Under the former Act, any non-US citizen may file a suit if he or she suffered a tortious wrong in breach of customary international law or a treaty ratified by the United States. While its application raises complex issues, the Act provides a legal basis for victims of corporate human rights abuses.[50] Whereas the US law system offers very interesting channels to litigation[51], it seems hard to find similar options in other jurisdictions.[52] Thus, beside a possible course of action under the US Acts indicated, a potential plaintiff must most likely rely on the ordinary host state law.

1.2.4. The corporate veil

The legal problems do not end with having found a court that admits the claim. It might happen that the perpetrator – often a host state subsidiary of a transnational corporation – lacks assets what makes it impossible to secure redress for the victim. Moreover, recourse to the parent company or another affiliate may be barred as a consequence of the corporate veil.[53] This legal doctrine regards economically linked corporations (mostly affiliates to a business group [Konzern]) as separate legal entities. This notion is widespread in civil

<www.business-humanrights.org/Documents/Ruggie-Copenhagen-8-9-Nov-2007.pdf>, retrieved on 14 March 2014.

44 Oxford Pro Bono Publico (Ed.), p. 349.
45 Oxford Pro Bono Publico (Ed.), p. 349.
46 E.g. BGE 120 V 312, para. 3. b); BGE 118 Ia 46, para. 4. c).
47 See SCHWEIZER, art. 35 FC, para. 38; BIAGGINI, art. 35 FC, para. 18.
48 SA Constitution, s. 8 subs. 2; see Oxford Pro Bono Publico (Ed.), pp. 227 ff.
49 The former is known as ATCA (or ATS), the latter as TVPA.
50 For more details see Oxford Pro Bono Publico (Ed.), pp. 308.
51 Oxford Pro Bono Publico (Ed.), p. 348.
52 Oxford Pro Bono Publico (Ed.), p. 350.
53 Oxford Pro Bono Publico (Ed.), p. 356; see also SRSG, 2008 Framework, para. 13.

as in common law systems all around the world.[54] As transnational corporations usually conduct extraterritorial operations through subsidiaries, this poses difficulties to possible claimants.[55] However, holding an affiliate liable is not generally precluded.

While jurisdictions generally know some form of piercing the corporate veil, they generally restrict that instrument to scattered instances. The veil might be lifted in cases of insolvency or where subsidiaries are completely controlled by the parent company. Moreover, to have recourse to the parent company may be possible if the subsidiary was set up as a means to commit illegal activities such as fraud.[56] But the latter gateway seems rather futile, as transnational corporations commonly incorporate subsidiaries in order to facilitate investment, trade and legal matters.[57]

The Swiss doctrine too considers each affiliate as a separate entity. However, jurisprudence has developed exceptions similar to the ones mentioned above.[58] Firstly, it is well established that courts may pierce the corporate veil if two companies are linked in a way that treating them as separate entities would either be contrary to good faith or infringe legitimate third party interests.[59] A corporation deliberately set up to defraud or to commit wrongs would fall within this category.[60] Secondly, a parent company might be held liable in cases where it has established a special bond of trust to a party that was – as a consequence of its faithful expectations – injured by a subsidiary.[61] This theory might be useful in some instances. Conceive for example of a situation where a parent company, during the preliminary negotiations and preparatory work for a new venture, ensures highest environmental protection standards. It then sets up a poorly endowed host state subsidiary to conduct the actual project. It is possible that the subsidiary seriously neglects the agreed upon standards. This may lead to the devastation of the environment and the community's livelihood, leaving behind people in misery. However, this liability theory is used very restrictively.[62] Lastly, the corporate veil can be lifted if the parent

54 Oxford Pro Bono Publico (Ed.), p. 356, reviewed thirteen jurisdictions ranging from traditional common law jurisdictions (the United States, the United Kingdom) and traditional civil law states (Germany, France) to African states (the Democratic Republic of Kongo) as well as to Asian jurisdictions (the People's Republic of China, Malaysia).
55 Oxford Pro Bono Publico (Ed.), p. 356.
56 Oxford Pro Bono Publico (Ed.), p. 356.
57 Oxford Pro Bono Publico (Ed.), pp. 204, 356.
58 LOPEZ/HERI, p. 27 f.; SKINNER/MCCORQUODALE/DE SCHUTTER, p. 61.
59 BGE 121 III 319, para. 5. a) aa); Decision of the FSC, 4A_384/2008, 9 December 2008, para. 4.1.
60 KAUFMANN et. al., para. 162.
61 BGE 120 II 331, para. 5. a) ; KAUFMANN et. al., para. 161.
62 LOPEZ/HERI, p. 27.

company behaves as a de facto body of its subsidiary. If the parent's power is decisive, it might be held responsible insofar it influenced an abuse committed by its affiliate.[63]

1.2.5. Costs

A further problem consists in the costs commonly involved in taking legal action. Legal aid might be available for cases governed by domestic law only[64], limited in amount or to nationals and habitual residents.[65] The problem is aggravated in transnational cases. This is due to the complexity and length of such proceedings[66], the collection of faraway evidence, and the need for lawyers specialized in different jurisdictions[67] as well as for technical experts.[68] Whereas costs will act as an insurmountable obstacle in many cases[69], conditional fee agreements or lawyers acting pro bono may help to overcome that hurdle.[70] Germany for instance introduced contingency fees especially for cases where claimants would otherwise be prevented from taking action.[71]

In Switzerland, legal aid is independent of an applicant's nationality and residency.[72] However, it covers only legal proceeding expenses leaving aside other litigation costs.[73] Legal aid is refused if the authorities consider the case "devoid of any chances of success".[74] Beside legal aid, the plaintiff's costs are (partially) borne by the defendant if the case is won.[75] This provision hardly covers all expenses related to litigation though. And to be sure, this provision equally poses a risk as a claimant losing the case must compensate the opposing party in equal measure.[76] Altogether, costs are in practice clearly the most important obstacle for victims from developing countries.[77]

1.2.6. Evidentiary problems

Another problem lies in the evidentiary burden a claimant must carry. It is especially difficult to satisfy the standard of proof when the defendant controls most evidence.

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63 LOPEZ/HERI, p. 28; see also KAUFMANN et al., para. 163 f.; SKINNER/MCCORQUODALE/DE SCHUTTER, p. 61.
64 This is, for instance, the case in the United Kingdom, s. 19 subs. 1 AJA; see Oxford Pro Bono Publico (Ed.), p. 288.
65 SKINNER/MCCORQUODALE/DE SCHUTTER, p. 47; Oxford Pro Bono Publico (Ed.), p. iii.
66 SKINNER/MCCORQUODALE/DE SCHUTTER, p. 45.
67 Oxford Pro Bono Publico (Ed.), p. 357.
68 SKINNER/MCCORQUODALE/DE SCHUTTER, p. 45.
69 SKINNER/MCCORQUODALE/DE SCHUTTER, p. 45 noting that it might be easier for victims to bring criminal than civil action.
70 Oxford Pro Bono Publico (Ed.), p. 357.
71 § 4a para. 1 RVG (entry into force in 2008); SKINNER/MCCORQUODALE/DE SCHUTTER, p. 48.
72 Art. 11c IPLA.
73 Art. 118 para. 1 CPC.
74 Art. 117 let. b CPC; cf. SKINNER/MCCORQUODALE/DE SCHUTTER, p. 49.
75 Art. 106 para. 1 CPC.
76 SKINNER/MCCORQUODALE/DE SCHUTTER, p. 51; see also, HRC, View, CCPR/C/73/D/779/1997, para. 7.2.
77 LOPEZ/HERI, p. 35; see also in general to the cost issue KAUFMANN et al., para. 122 ff.

Notably, this seems to be the rule for cases of corporate-related human rights abuse.[78] In continental Europe, this issue is particularly significant for discovery or disclosure rules are generally missing.[79] However, even in the existence of disclosure provisions claimants risk not to obtain all relevant documents. This is because they cannot ask for evidence whose existence is unknown to them. Moreover, the disclosure is often at the court's discretion.[80] These problems may be overcome if a victim can claim civil redress in the course of criminal proceedings where the prosecutor bears the burden of collecting evidence.[81] Further problems are more independent of the legal system. It is, as a matter of fact, difficult and expensive to secure testimonies by victims and witnesses who live far away in remote areas.[82] Moreover, potential witnesses and whistleblowers may fear retaliation.[83]

In Switzerland, the provisions governing disclosure are extremely unfavorable. The recent Civil Procedure Code allows a defendant to refuse disclosure not only based on the guarantees against self-incrimination but even if doing so would expose him to civil liability.[84]

1.2.7. Remedies available and enforcement

Access to court is merely valuable if the victim obtains appropriate reparation.[85] This may not only happen through a successful outcome in court, but also through out of court settlement.[86] In fact, the latter seems to occur more often in practice.[87] Victims should nonetheless well consider where they bring action. After all, jurisdictions vary in potential remedies.[88] However, monetary compensation is most common. Injunctive relief may also be provided though.[89] Furthermore, certain circumstances may require a court to make other orders, notably to secure redress.[90]

78 LOPEZ/HERI, p. 35 ; KAUFMANN et al., para. 125.
79 SKINNER/MCCORQUODALE/DE SCHUTTER, p. 43.
80 SKINNER/MCCORQUODALE/DE SCHUTTER, pp. 44 f.
81 SKINNER/MCCORQUODALE/DE SCHUTTER, pp. 43 f.
82 See SKINNER/MCCORQUODALE/DE SCHUTTER, p. 43.
83 LOPEZ/HERI, p. 35.
84 Art. 163 CPC; see LOPEZ/HERI, p. 35; SKINNER/MCCORQUODALE/DE SCHUTTER, p. 45.
85 SKINNER/MCCORQUODALE/DE SCHUTTER, p. 62.
86 SKINNER/MCCORQUODALE/DE SCHUTTER, p. 62; Oxford Pro Bono Publico (Ed.), p. 358.
87 Oxford Pro Bono Publico (Ed.), p. 358.
88 Oxford Pro Bono Publico (Ed.), p. 359.
89 SKINNER/MCCORQUODALE/DE SCHUTTER, p. 62.
90 SKINNER/MCCORQUODALE/DE SCHUTTER, p. 63.

Regarding monetary compensation, damages might be inappropriate; most notably when they do not even cover the costs of litigation.[91] In contrast, some jurisdictions offer punitive damages in addition to mere compensation.[92] As mentioned above, claimants quite often receive monetary compensation by settling out of court. Whereas this benefits the individual claimants, it hinders the development of jurisprudence and precedent. This in turn fosters legal uncertainty what anon deters prospective victims from seeking judicial redress.[93]

As to the enforcement of remedies, it has been mentioned above that this is usually not problematic as long as the order concerns a transnational corporation based in the forum state.[94] However, it must be specified that this holds only true as long as an order may be executed against domestic corporate assets. A state is generally prohibited from intervening and deploying officials on another state's territory without the latter state's consent.[95]

1.2.8. Further barriers to access to effective remedies

The foregoing chapters could by far not seize all relevant issues. In some states immunities as well as doctrines of non-justiciability[96] and forum non conveniens[97] act as further obstacles to justice. In others the legal and judicial systems cannot cope with the complexity and dimensions of business and human rights cases.[98] And again in other states time limitations may deter victims from attaining appropriate relief.[99]

The insights gained hitherto are important for the further work. However, the understanding that business and human rights collide and that courts have often failed to provide effective remedy is not recent. The following chapter delineates the ongoing business and human rights-struggle of the United Nations and leads to the introduction of the UN Guiding Principles of Business and Human Rights.

2. The evolutionary context of the UN Guiding Principles

The UN Guiding Principles on Business and Human rights, which are concerned with the problems described above, did not just appear out of the blue. The history of the United

91 SKINNER/MCCORQUODALE/DE SCHUTTER, p. 62.
92 SKINNER/MCCORQUODALE/DE SCHUTTER, p. 62.
93 Oxford Pro Bono Publico (Ed.), p. 359.
94 See above, ch. 1.2.2, p. 7.
95 Art. 2(4) UN Charter; DE SCHUTTER, p. 9.
96 See SKINNER/MCCORQUODALE/DE SCHUTTER, pp. 39 ff.
97 See Oxford Pro Bono Publico (Ed.), pp. 356 ff.
98 See Oxford Pro Bono Publico (Ed.), pp. 357.
99 See SKINNER/MCCORQUODALE/DE SCHUTTER, pp. 38 f; cf. Reparation Principles, Principles 6 f.

Nations dealing with the issue business and human rights can be traced back to 1972 when the Economic and Social Council requested "the Secretary-General (…) to appoint a study group of eminent persons (…) to study the role of multinational corporations and their impact on the process of development, especially that of the developing countries, and also their implications for international relations".[100] Already at that time, it has been realized that a way must be found to govern large transnational corporations, which may exceed their host states in terms of economic size.[101] The group's work ended with a report wherein the creation of a permanent commission was recommended.[102] As a result, the Economic and Social Council indeed established a Commission on Transnational Corporations. This advisory body was mainly tasked with drafting recommendations that should build the basis for a code of conduct for transnational corporations.[103] Almost twenty years of workshops, expert meetings, seminars and sessions followed.[104] In 1992, the Secretary-General eventually reported to the General Assembly that the delegates of the Commission on Transnational Corporations had not been able to reach a consensus.[105] By virtue of its integration into the Trade and Development Board the Commission on Transnational Corporations ceased to exist.[106]

Only some years later new projects concerning business and human rights were initiated within the framework of the United Nations. In 1999, the idea of a "global compact of shared values and principles, which will give a human face to the global market"[107] was launched by the then Secretary-General Kofi Anan. The UN Global Compact was officially launched on 26 July 2000.[108] More relevant for the present purpose, the UN Sub-Commission on the Promotion and Protection of Human Rights[109] decided in 1998 to establish a Working Group on the Working Methods and Activities of Transnational Corporations. With regard to transnational corporations, the Working Group should "promote the enjoyment of economic, social and cultural rights and the right to development, as well as of civil and political rights". With respect to states it ought to "consider the

100 ECOSOC, E/5209, para. 1.
101 ECOSOC, E/5209, preamble; UN Department of Economic and Social Affairs, E/5144, ST/ECA159, p. 10.
102 UN Department of Economic and Social Affairs, E/5500/Rev.1, ST/ESA/6, para. 10.
103 ECOSOC, E/5570/Add.1, para. 1.
104 A comprehensive overview is provided by UNCTAD, <http://unctc.unctad.org/aspx/UNCTC%20from%201972%20to%201975.aspx>, retrieved on 17 March 2014.
105 GA, A/47/446, Annex, para. 2.
106 ECOSOC, Resolution 1994/1, para. 1.
107 SG, SG/SM/6881.
108 United Nations Global Compact, Overview, UN Global Compact Participants, <http://www.unglobalcompact.org/ParticipantsAndStakeholders>, retrieved on 8 May 2014.
109 Before the renaming in 1999 it was called Sub-Commission on Prevention of Discrimination and Protection of Minorities.

scope of the obligation of States to regulate the activities of transnational corporations" insofar they affect human rights.[110] This work culminated in the Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights.[111] Whereas these so-called Draft Norms were approved by the Sub-Commission in recognizing that they would "reflect most of the current trends in the field of international law, and particularly international human rights law, with regard to the activities of transnational corporations and other business enterprises"[112], they were without a formal vote put aside by the Commission on Human Rights.[113] (Un-) official opposition by several states and business lobby groups[114] led the Commission[115] to observe in 2004 that the norms had no "legal standing".[116]

However, the Commission on Human Rights resumed the issue of transnational corporations and human rights in April 2005 when it requested the Secretary-General to appoint a special representative on the issue of human rights and transnational corporations and other business enterprises.[117] On 28 July 2005, John G. Ruggie was appointed Special Representative of the Secretary General.[118]

Critical towards the approach underlying the wrecked Draft Norms[119], the SRSG John G. Ruggie addressed the problem in a different way. Namely, the focus shifted away from imposing binding legal principles on transnational corporations towards the practical relevance of existing standards and practices for both transnational corporations and states.[120] The final result of the SRSG's work, the UN Guiding Principles on Business and Human Rights, mirrored this change in differentiating between the state duty and the corporate responsibility.[121] The success of his work proved his approach right. It might

110 ECOSOC, E/CN.4/SUB.2/RES/1998/8, para. 4.
111 ECOSOC, E/CN.4/Sub.2/2003/12/Rev.2.
112 ECOSOC, E/CN.4/Sub.2/2003/L.11, p. 53.
113 GIOVANNI, p. 287.
114 See, e.g., ICC/IOE (Eds.), Joint views of the IOE and ICC on the draft "Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights", March 2004, <http://www.reports-and-materials.org/IOE-ICC-views-UN-norms-March-2004.doc>, retrieved on 19 March 2014; OSORIO, p. 3; GIOVANNI, p. 288.
115 OSORIO, pp. 2 f. also citing WILLIAMS FRANCES, Company behavior must be on UN human rights agenda, Financial Times, on 8 April 2004; GIOVANNI, p. 287.
116 CHR, Resolution 2004/116, para. c.
117 CHR, Resolution 2005/69, para. 1.
118 SRSG, 2006 Interim report, para. 2.
119 SRSG, 2006 Interim report, para. 57 ff.
120 SRSG, 2011 Final report, para. 14; SRSG, 2006 Interim report, para. 60.
121 See SRSG, 2010 Further operationalization, para. 55, stating that: "the term 'responsibility' to respect, rather than 'duty', is meant to indicate that respecting rights is not an obligation that current international human rights law generally imposes directly on companies (…) [it] is a standard of expected conduct [widely] acknowledged (…)" (emphasis added).

be said that a "consensus has been achieved from a truly global set of stakeholders representing all sectors of society".[122]

3. Introduction to the UN Guiding Principles

This chapter introduces the UN Guiding Principles in general. Namely, a summary of the idea underlying the Principles is given. Principle 27, which nudged the present thesis, is subsequently introduced in particular.

3.1. In general

In order to reduce the governance gaps discussed above[123], the UN Guiding Principles essentially conflate preexisting norms to an integrated set.[124] The norms are structured as three pillars of equal importance.[125]

The first pillar, containing ten duties to protect, addresses states.[126] The state duty to protect is part of the well-established core of the human rights system.[127] While it seems clear that states are required to protect against any human rights abuses[128] by any non-state actors[129], it is disputed whether this duty extends to include the prevention of extraterritorial abuses by non-state actors based within the state's territory.[130] Indeed UN treaty bodies increasingly encourage the implementation of regulations to prevent such abuses.[131] However, there is no such duty yet.[132] In line with this, the UN Guiding Principles restrict the duty to protect in the first instance to abuses within a state's territory.[133] But nevertheless, states are later incited to draw on the wide range of clearly permissible measures that are likely to lead companies to respect human rights abroad.[134] More specifically, the first pillar includes the duty to enforce relevant laws as well as to

[122] BADER, p. 6.
[123] SRSG, 2008 Framework, para. 17; see above, ch. 1.2, pp. 6 ff., on governance gaps.
[124] SRSG, 2011 Final report, para. 14.
[125] Cf. SRSG, 2008 Framework, para. 9.
[126] UNGP, Principles 1 – 10.
[127] SRSG, 2008 Framework, para. 9.
[128] SRSG, 2008 Framework, para. 18.
[129] SRSG, 2007 Report, para. 10; see for an extensive analysis of respective treaty body commentaries SRSG, 2007 Report, Add. 1.
[130] SRSG, 2008 Framework, para. 12.
[131] See, e.g., ICESCR Gen. Comm. 19, para. 54; CERD, CERD/C/USA/CO/6, para. 30; CERD, CERD/C/CAN/CO/18, para. 17; SRSG, 2008 Framework, para. 19.
[132] GA, Operationalization, para. 15.
[133] UNGP, Principle 1 reads as follows: "States must protect against human rights abuse within their territory and/or jurisdiction (…)" (emphasis added).
[134] UNGP, commentary to Principle 2; cf. BADER, p. 7.

ensure their adequacy[135], the duty to provide guidance to business enterprises and to encourage corporate human rights impact assessments[136] and the duty to ensure policy coherence.[137] Furthermore, states are required to take proactive action with regard to business in conflict-affected areas[138] and whenever they engage themselves in business.[139] Last but certainly not least, states are obliged to live up to these duties when they act as members of international organizations.[140]

The second pillar, including fourteen principles[141], concerns the responsibility of business enterprises[142], which exists independently of states' duties.[143] These principles reflect the basic expectations that the global society has of business enterprises.[144] What is sometimes called "social license to operate" is first and foremost bound to the responsibility not to infringe on the rights of third parties.[145] This implies that there is no exhaustive list of distinct rights for which corporations bear various responsibilities, but rather one main corporate responsibility: namely not to violate any rights of others.[146] In this context, rights of others means at a minimum[147] those rights set out in the International Bill of Human Rights[148] and the ILO Declaration on Fundamental Principles and Rights at Work.[149] Although the responsibility not to violate third parties implies primarily a responsibility to omit abuses (and thus a negative responsibility)[150], this also "requires taking adequate measures for [the] prevention, mitigation, and, where appropriate, remediation [of adverse human rights impacts]".[151] In fact, the UN Guiding Principles focus on what measures, in terms of an ongoing due diligence process[152], companies should un-

135 UNGP, Principle 3(a), see also Principle 9.
136 UNGP, Principle 3(c) and (d).
137 UNGP, Principle 8.
138 UNGP, Principle 7.
139 UNGP, Principles 4 ff.; cf. BADER, p. 6; more extensive SRSG, 2010 Further operationalization, para. 26 ff.
140 UNGP, Principle 10.
141 UNGP, Principles 11 – 24.
142 The UN Guiding Principles do not solely address transnational corporations but any company regardless of its characteristics. See UNGP, General Principles and Principle 14.
143 SRSG, 2009 Operationalization, para. 48; SRSG, 2008 Framework, para. 55.
144 SRSG, 2008 Framework, para. 9; see fn. 121 on the difference between "responsibility" and "duty".
145 SRSG, 2009 Operationalization, para. 46; see also SRSG, 2008 Framework, para. 54.
146 Cf. SRSG, 2008 Framework, para. 51.
147 However, in certain circumstances additional rights may become relevant. See UNGP, commentary to Principle 12.
148 UDHR, ICCPR, ICESCR, see KÄLIN/KÜNZLI, para. 107.
149 The Declaration can be found in the Swiss Federal Gazette 2000 398 ff. and includes the ILO Conventions no. 29, 87, 98, 100, 105, 111, 138, 182 (also known as the ILO Core Conventions).
150 Cf. SRSG, 2008 Framework, para. 55; SRSG, 2009 Operationalization, para. 48; see also BADER, p. 7.
151 UNGP, commentary to Principle 11; SRSG, 2009 Operationalization, para. 59.
152 The SRSG, 2009 Operationalization, para. 71, defines due diligence as "a comprehensive, proactive attempt to uncover human rights risks, actual and potential, over the entire life cycle of a project or business activity, with the aim of avoiding or mitigating those risks"; SRSG, 2010 Further operationalization, para. 79 ff. explains the various aspects of due diligence.

dertake to avoid negative human rights impacts. A statement of policy providing for guidance should serve as the bedrock of these efforts.[153] More specifically, corporations should attempt to assess actual as well as potential risks, address them[154], evaluate the effectiveness of the responses implemented[155], and publicize these efforts through various channels in order to create transparency and to give an account of their endeavors.[156] Finally, the UN Guiding Principles demand corporations to provide remediation whenever they caused or contributed to abuses.[157]

The third pillar, which contains seven principles, covers access to remedy more extensively.[158] This pillar's importance lies firstly in the recognition that even the utmost efforts cannot entirely stop human rights violations.[159] Secondly, the absence of mechanisms to investigate, sanction and rectify may render futile any regulation, which was put in place by virtue of the state duty to protect.[160] Thirdly, the corporate responsibility to respect would equally remain an empty word without a complaint mechanism open to alleged victims.[161] Accordingly, both states[162] and companies[163] are addressed within this pillar.[164] This two-pronged approach appears further reasonable for the different characteristics of judicial and non-state based grievance mechanisms. Non-state based grievance mechanisms, on the one hand, are said to offer more immediate, available and flexible and, at the same time, less costly assistance.[165] Judicial mechanisms, on the other hand, will obviously always retain the distinct power and legitimacy of public authority.[166] To be sure, in practice this holds not true for each situation and every state, which is why non-state based mechanisms may constitute an important substitute for barely functioning judicial processes.[167] For these reasons, state-based judicial mechanisms and non-state based mechanisms can effectively interact.[168] In addition, however, a state may employ the advantages of both types to create a state-based but non-judicial mechanism.[169]

153 UNGP, Principle 16.
154 UNGP, Principles 17 ff.
155 UNGP, Principle 20.
156 UNGP, Principle 21.
157 UNGP, Principle 22.
158 UNGP, Principles 25 – 31.
159 SRSG, 2008 Framework, para. 9.
160 SRSG, 2009 Operationalization, para. 87; SRSG, 2008 Framework, para. 82.
161 SRSG, 2008 Framework, para. 82.
162 UNGP, Principles 25 – 28 and 31 relate to states.
163 UNGP, Principles 29 and 30 as well as 31 relate to companies.
164 Cf. BADER, p. 8.
165 SRSG, 2008 Framework, para. 84.
166 See DAVIS/REES for a further compilation of characteristics of judicial and non-judicial mechanisms.
167 SRSG, 2008 Framework, para. 84.
168 SRSG, 2009 Operationalization, para. 91; DAVIS/REES, p. 1.
169 Cf. SRSG, 2008 Framework, para. 97.

Principle 27 deals with this promising[170] option – as does the forthcoming heart of this thesis.

3.2. In particular: Principle 27

Principle 27, titled "state-based non-judicial grievance mechanisms", reads as follows:

> "States should provide effective and appropriate non-judicial grievance mechanisms, alongside judicial mechanisms, as part of a comprehensive State-based system for the remedy of business-related human rights abuse."[171]

The literal meaning of the Principle's wording ("should") purports that states are encouraged (as opposed to obliged) to establish effective and appropriate non-judicial grievance mechanisms.[172] However, they must ensure access to effective remedy.[173] As states are generally free to choose the means to this end[174], there is – prima facie – no direct obligation to provide non-judicial grievance mechanisms. Yet it has been evident in practice that traditional judicial grievance mechanisms do not sufficiently ensure access to effective remedy.[175] With that said, Principle 27's plea to set up non-judicial grievance mechanisms becomes much more compelling. After all, it seems extremely questionable whether states (are in a position to) fulfill their duty to ensure access to effective remedy without taking steps that go beyond judicial mechanisms.[176] It is suggested therefore that states offer a range of alternative complaint procedures from which alleged victims can choose the most appropriate mechanism.[177] In this regard, the commentary to Principle 27 mentions administrative, legislative and other non-judicial mechanisms. These may be mediation, adjudication or other types of mechanisms.[178] Also combinations of these instruments are conceivable. All circumstances of the conflict at stake should be decisive

[170] "The actual and potential importance of these [state-based non-judicial] institutions cannot be overstated", SRSG, 2008 Framework, para. 97.
[171] UNGP, Principle 27.
[172] "Should" expresses a desirable or expected action respectively an advice or a suggestion, whereas "shall" expresses a command or an obligation and "must" necessity. See Oxforddictionaries.com, fn. 1, Definitions of should, shall and must in English, retrieved on 22 March 2014.
[173] See, e.g., art. 2(3) ICCPR and ICCPR Gen. Comm. 31, para. 16 or ICESCR Gen. Comm. 9, para. 3 and 9; art. 8 UDHR; UNGP, commentary to Principle 1; for a comprehensive analysis of further treaties see SRSG, Treaty Overview.
[174] See, e.g., art. 2(3) ICCPR and ICCPR Gen. Comm. 31, para. 7 or ICESCR Gen. Comm. 20, para. 40; UNGP, commentary to Principle 1; SRSG, Treaty Overview, para. 17.
[175] SRSG, 2010 Further operationalization, para. 103 ff.; SRSG, 2008 Framework, para. 88 ff.; Amnesty International (Ed.), pp. 63 ff.; MACDONALD; Oxford Pro Bono Publico (Ed.); REES, Strengths, Weaknesses and Gaps, p. 4; SKINNER/MCCORQUODALE/DE SCHUTTER.
[176] Cf. SRSG, 2010 Further operationalization, para. 96 ff.; SRSG, 2008 Framework, para. 97; DAVIS/REES, pp. 5 f.; MACDONCALD, p. 44; REES, Strengths, Weaknesses and Gaps, p. 40 all stressing the importance and potential impact of non-judicial mechanisms.
[177] SRSG, 2009 Operationalization, para. 92; cf. SRSG, 2010 Further operationalization, para. 102.
[178] See to the range of mechanisms available Part II: The legal doctrine of effective remedies, ch. 2, pp. 57 ff.

for the exact configuration.[179] Ultimately, the goal is to provide access to effective remedy in order to fight the tensions between business and human rights.

The pertinent commentary[180] and numerous scholars[181] consider NHRIs as one of the most promising means to achieve this end. However, that does not yet say anything about how NHRIs and other state-based non-judicial grievance mechanisms should be conceptualized in order to serve as a gateway to effective remedy for alleged victims. In order to approach a possible answer to this question Part II will analyze what effectiveness means in the present context.

4. Summary

At the beginning of this thesis, the existence and nature of human rights and business conflicts were shown. The first chapter notably demonstrated that most corporate-related human rights violations occur in countries other than those states that host the majority of large transnational corporations. The fact that such cases rarely find their way to courts could be ascribed to several obstacles to access to judicial remedies. If any cause of action is available whatsoever, it was found that victims face most importantly cost barriers. However, evidentiary problems are significant too. The burden of proof weighs heavily on victims given that the corporation complained of commonly controls most evidence. Additionally, the corporate veil and a lack of expedient substantive remedies were found to potentially impede securing redress. The way to the UN Guiding Principles was delineated in the second chapter, before these Principles were briefly introduced. Eventually, Principle 27's idea of state-based non-judicial grievance mechanisms was presented as the basis for the following parts of this treatise.

[179] UNGP, commentary to Principle 27.
[180] UNGP, commentary to Principle 27.
[181] CARVER, p. 32; GÖTZMANN/METHVEN O'BRIEN, p. 6; HAÁSZ, pp. 166, 175 ff.; REES, Strengths, Weaknesses and Gaps, p. 33; CORE (Ed.), pp. 13 f.; cf. AICHELE, p. 199; see also Edinburgh Declaration.

Part II: The legal doctrine of effective remedies

1. Effectiveness

In order to detect the characteristics of an effective state-based non-judicial grievance, Part II scrutinizes the contextual meaning of effectiveness. To begin, this chapter provides a brief outline of what international human rights treaties require of an effective remedy. Both the procedural and the substantive aspect are considered as is the enforcement and the implementation of the outcome. On this basis, it is then extensively reasoned what the UN Guiding Principles require of an effective remedy. For that purpose, Principle 31, which enumerates seven relevant effectiveness criteria, is interpreted.

1.1. Procedural guarantees

This chapter deals with the procedural aspect of the right to an effective remedy. The focus lies on the ICCPR[182] and the ECHR. The ICCPR is highly relevant as its rights are mentioned by the UN Guiding Principles as part of those rights which must be respected at a minimum;[183] the ECHR seems highly relevant as its Court is described as the "crown jewel of the world's most advanced international system for protecting civil and political liberties".[184] Both treaties state that everybody whose rights "are violated shall have an effective remedy".[185]

1.1.1. Institutional requirements

With regard to the nature of the institution, priority is given to a judicial authority.[186] This is clearly the general rule for civil suits that shall be heard by an independent[187] and impartial[188] tribunal.[189] Administrative authorities may satisfy this requirement only under certain circumstances.[190] However, in cases other than civil suits or criminal charges this rule is less restrictive. In fact, organs other than solely political or subordinate administrative bodies may deal with these latter cases.[191] Purely administrative remedies do not

[182] The ICESCR does not contain procedural guarantees.
[183] UNGP, Principle 12; see above, Part I: Background, ch. 3.1 at p. 16.
[184] HELFER, p. 125; cf. KÄLIN/KÜNZLI, p. 260 pointing to reasons for success beside the ECtHR's quality.
[185] art. 2(3)(a) ICCPR; art. 13 ECHR.
[186] NOWAK, art. 2 ICCPR, para. 64.
[187] KÜHNE, para. 296 ff; cf. SCHWEIZER, art. 13 ECHR, para. 64.
[188] KÜHNE, para. 306 ff.
[189] ICCPR Gen. Comm. 13, para. 1.
[190] NOWAK, art. 14 ICCPR, para. 23.
[191] NOWAK, art. 2 ICCPR, para. 64 f.

suffice in cases of especially grave human rights violations though.[192] Finally, it is required that the respective tribunal or court is competent or – more specifically – established by law.[193] This does, however, not exclude the creation of permanent special tribunals.[194] Indeed, certain variations between institutions that are responsible for different types of disputes can even be indispensable.[195]

1.1.2. Equality

The principle of "equality of arms" is of paramount importance to a fair trial.[196] No party must be at a disadvantage.[197] Likewise, both parties must be treated procedurally in the same way.[198] Yet this does not forestall that parties in unlike positions are treated differently according to their situations. This is because "each party must be afforded a reasonable opportunity to present his case - including his evidence - under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent."[199] The purpose of equality is thus to ensure equal opportunities within the process.[200]

1.1.3. The right to be heard

The right to be heard[201] is closely linked to the principle of "equality of arms". Once again, no party shall be at a disadvantage. Here, this condition refers explicitly to the right to present one's case adequately.[202] In addition, both parties must be in an equal position to offer evidence. Conversely, however, there is no right to have all evidence accepted by the court.[203] Further, an interpreter must be provided if a party does not understand the court's language.[204]

1.1.4. Expeditious procedure

To be effective, a remedy requires further that the process is held without undue delay[205] respectively within reasonable time.[206] Whereas the ECHR refers to civil suits and criminal trials, the pertinent ICCPR provision relates to criminal proceedings only. Yet, the

192 HRC, View, CCPR/C/55/D/563/1993, para. 8.2, 10.
193 ICCPR Gen. Comm. 13, para. 1; NOWAK, art. 14 ICCPR, para. 24; KÜHNE, para. 291 ff.
194 KÜHNE, para. 284, 292; NOWAK, art. 14 ICCPR, para. 24; cf. ICCPR Gen. Comm. 13, para. 4.
195 KÜHNE, para. 287.
196 NOWAK, art. 14 ICCPR, para. 29.
197 KÜHNE, para. 365; 373.
198 KÜHNE, para. 373.
199 ECtHR of 27 October 1993, Dombo Beheer B.V. v. The Netherlands, no. 14448/88, para. 33.
200 KÜHNE, para. 372; TRECHSEL, p. 95.
201 KÜHNE, para. 364 f.
202 KÜHNE, para. 364 f.
203 KÜHNE, para. 391 f.
204 KÜHNE, para. 382; cf. art. 14 (3)(a), f; art. 6(3)(a) und (e) ECHR.
205 However, art. 14(3)(c) ICCPR.
206 Art. 6(1) ECHR.

latter treaty's right to a fair trial implicates certain expeditiousness requirements.[207] As gross and systematic human rights violations require criminal investigations[208], the right to an expeditious procedure should arguably at least apply to such cases. Besides, if an ongoing abuse is at stake, the order of an injunctive relief or a guarantee of non-repetition may be urgent.[209]

Whereas it is clear that the denial of justice violates the right to an expeditious procedure[210], it is less clear when to assume an undue delay in justice. Certainly, no time frame has been determined.[211] The period that must be considered generally starts with the submission of the claim or possible preliminary proceedings. An undue delay may then occur throughout the proceedings[212] up to the last or final judgment.[213] In determining whether a process has been unduly delayed the court must take a wide range of criteria into account[214]: the complexity of the facts to be established and the questions of law to be determined[215] as well as the number of instances involved[216], and the conduct of both the parties[217] and the authorities.[218] Lastly, the nature of some proceedings requires heightened expeditiousness. This is the case in child protection proceedings[219], proceedings dealing with the right of access to one's children[220] and arguably in certain labor disputes too.[221]

1.1.5. Publicity

The requirement of publicity is a further core element of a fair trial. It enables transparency and it is a means of democratic control.[222] Transparency refers on the one hand to the publicity of the proceedings (dynamic publicity) and on the other hand to the publicity

[207] See NOWAK, art. 14 ICCPR, para. 30, 52.
[208] See, e.g., HRC, View, CCPR/C/OP/2 at 192 (1990), para. 10.3; Reparation Principles, Principle 4; NOWAK, art. 2 ICCPR, para. 69 citing several HRC views.
[209] See above, Part I: Background, ch. 1.2.7, pp. 11 f.
[210] SCHWEIZER, art. 13 ECHR, para. 78.
[211] KÜHNE, para. 322.
[212] NOWAK, art. 14 ICCPR, para. 55.
[213] NOWAK, art. 14 ICCPR, para. 52; KÜHNE, para. 323 ff.
[214] See KÜHNE, para. 329 ff. discussing the criteria at length and NOWAK, art. 14 ICCPR, para. 54 ff. exemplifying the issue by reference to numerous HRC views.
[215] KÜHNE, para. 331 f.
[216] KÜHNE, para. 333.
[217] Cf. KÜHNE, para. 334 f. mentioning only the conduct of the plaintiff.
[218] KÜHNE, para. 336 ff.
[219] HRC, View, no. 1052/2002, para. 8.9.
[220] HRC, View, no. 514/1992, para. 8.4.
[221] NOWAK, art. 14 ICCPR, para. 30.
[222] NOWAK, art. 14 ICCPR, para. 31; KÜHNE, para. 345; cf. ICCPR Gen. Comm. 13, para. 6.

of the judgment (static publicity).[223] The former is a right of both the parties and the public, what in general means that the parties cannot waive publicity.[224] All parts of the proceedings that deal with the determination of the facts must be public in principle.[225] This implicates the need for oral proceedings.[226] However, dynamic publicity may be restricted on various grounds[227], such as for reasons of morals, public order or national security.[228] In contrast, the right to static publicity is only subject to very few exceptions, namely these related to the interests of juveniles or to matrimonial disputes.[229] Besides, the public pronouncement of judgments is not required.[230] Instead, the static publicity requirement is satisfied whenever the judgment is accessible to everybody interested.[231] Naturally, everyone can claim the right of static publicity.[232] The media, as a part of the public society, have in general the same rights than the general public.[233] By the same token, the media may also be excluded from proceedings if a respective exception is present.[234] In other cases, the courts may just ban visual and/or sound recordings.[235]

1.1.6. Further aspects of the right to a fair trial

The right to a fair trial includes further aspects, namely respect for the principle of adversary proceedings, the preclusion of ex officio reformatio in pejus[236] and the right to have the reasons for the judgment announced.[237] Note with regard to adversary proceedings, that neither pure adversary nor pure inquisitorial systems exist these days.[238] Undoubtedly, traditional inquisitorial systems commonly satisfy the principle of adversary proceedings.[239]

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223 NOWAK, art. 14 ICCPR, para. 31.
224 KÜHNE, para. 347. The right to a public hearing can be waived by the parties if there is no question of public interest at stake. See e.g. ECtHR of 5 June 2012, Keskinen and Veljekset Keskinen Oy v. Finland, no. 34721/09, para. 31.
225 NOWAK, art. 14 ICCPR, para. 33.
226 NOWAK, art. 14 ICCPR, para. 33; KÜHNE, para. 346.
227 NOWAK, art. 14 ICCPR, para. 31.
228 NOWAK, art. 14 ICCPR, para. 34 with examples.
229 Art. 14(1) ICCPR; art. 6(1) ECHR; NOWAK, art. 14 ICCPR, para. 37; cf. ICCPR Gen. Comm. 13, para. 6.
230 Art. 14(1) ICCPR states quite clear "be made public"; art. 6(1) ECHR is misleading: "pronounced publicly" (emphasis added in each case).
231 NOWAK, art. 14 ICCPR, para. 38 f.
232 NOWAK, art. 14 ICCPR, para. 40.
233 ICCPR Gen. Comm. 13, para. 6; KÜHNE, para. 349.
234 NOWAK, art. 14 ICCPR, para. 34.
235 See NOWAK, art. 14 ICCPR, para. 37; KÜHNE, para. 349.
236 NOWAK, art. 14 ICCPR, para. 30.
237 KÜHNE, para. 407.
238 JOLOWICZ, p. 281.
239 See NOWAK, art. 14 ICCPR, para. 30; KÜHNE, para. 356.

1.2. Substantive right to reparation

The finding of a violation in due process rarely helps by itself.[240] Assuming that the complainant has won the case, a right to reparation arises. For a remedy to be meaningful, this substantive aspect of the right to remedy must be effective too.[241] Bearing in mind that traditional human rights instruments address states rather than legal persons, it is important to remark that the Reparation Principles state that remediation should be provided regardless of whether the perpetrator is a business entity.[242] These principles, however, concern only gross human rights violations.

With regard to the substantive aspect of remedies, the ICCPR generally requires effective reparation ex post facto only.[243] Particularly grave violations, for instance concerning the right to life, also require the state to take preventive action though.[244] Regarding ex post facto-redress, a declaratory judgment appears sufficient, given that it has binding effect upon future cases.[245] This seems rather disturbing[246] and does not correspond to the relevant ECHR rule. The latter requires damages or another form of reparation in order to restore the situation before the violation.[247] Likewise, the Reparation Principles state that a victim should "be provided with full and effective reparation" proportionate to the harm suffered.[248]

The form of appropriate reparation may vary considerably according to the individual circumstances[249]: restitution[250] and rehabilitation[251] restore the (physical and mental) condition prior to the violation; compensation[252] covers monetarily quantifiable damage; satisfaction[253] aims for concerns such as open admissions of guilt, public apologies, official declarations and sanctions; guarantees of non-repetition[254] serve the prevention of recurrence.

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240 Cf. art. 14 ICCPR; ICCPR Gen. Comm. 13, para. 18; UNGP, commentary to Principle 25.
241 Reparation Principles, Principle 15.
242 Reparation Principles, Principle 15 in connection with Principle 3(c).
243 HRC, View, CCPR/C/24/D/113/1981, para. 6.2.
244 ICCPR Gen. Comm. 6, para. 3 f.; HRC. View, CCPR/C/OP/2 at 192 (1990), para. 10.3; NOWAK, art. 2 ICCPR, para. 75.
245 NOWAK, art. 2 ICCPR, para. 74 f.
246 Cf. MIEHSLER, para. 73.
247 ECtHR of 29 March 2006, Scordino v. Italy (No. 1), no. 36813/97, para. 93 ff.; KELLER/STONE SWEET, p. 704; see also MIEHSLER, para. 73; VAN DER WILT/LYNGDORF, p. 47.
248 Reparation Principles, Principle 18.
249 UNGP, Principle 25; Reparation Principles, Principle 18.
250 Reparation Principles, Principle 19.
251 Reparation Principles, Principle 21.
252 Reparation Principles, Principle 20.
253 Reparation Principles, Principle 22.
254 Reparation Principles, Principle 23.

1.3. Enforcement and implementation

Again, ordered reparation does not satisfy the needs of victims by itself. Further, enforcement and implementation are required.[255] Whereas this is explicitly acknowledged in the ICCPR provision concerning the right to an effective remedy[256], it is only implied in the respective ECHR provision. Thus, a decision with full legal effect must be enforced properly; otherwise, the winning party's rights may be violated.[257] It stands in a certain contrast to this that the time between the final judgment and its enforcement has not to be taken into account in determining whether a process was expeditious.[258]

1.4. The right to an effective remedy in the other core UN human rights treaties

Not only the ICCPR and the ECHR recognize the right to effective remedy. Quite the contrary is true as such a right is enshrined in most global human rights treaties and declarations. The UDHR acknowledges the right to an effective remedy by a competent court.[259] This right includes a fair and public hearing by an impartial and independent court. Further, equality is guaranteed.[260] It must be noted, however, that the UDHR has no binding force. The ICERD ensures the right to equal treatment by all judicial organs.[261] It provides expressly for both the procedural and the substantive aspect of an effective remedy.[262] The CEDAW guarantees equal treatment of women by the judiciary in all stages of procedure.[263] It further obliges the parties to make use of courts in order to effectively protect women against discrimination.[264] Art. 15 CAT states that information extracted under torture must not be used in any proceedings. The CRC provides for the procedural rights of children. Whereas they are particularly protected, they naturally enjoy all procedural rights outlined above.[265] Similarly, the ICRMW grants migrant workers

[255] NOWAK, art. 2 ICCPR, para. 81.
[256] Art. 2(3)(c) ICCPR.
[257] SCHWEIZER, art. 13 ECHR, para. 78.
[258] KÜHNE, para. 326 f., does opine that the time between the final judgment and its implementation has not to be taken into account for the determination of the question whether the right to an expeditious procedure has been respected; NOWAK, art. 14 ICCPR, para. 52 is of the same opinion; see also above, ch. 1.1.4 pp. 21 f.
[259] Art. 8 UDHR.
[260] Art. 10 UDHR.
[261] Art. 5(a) ICERD.
[262] Art. 6 ICERD reads as follows: "States Parties shall assure (…) effective (…) remedies, through the competent national tribunals (…) as well as the right to seek from such tribunals just and adequate reparation or satisfaction (…)."
[263] Art. 15(2) CEDAW.
[264] Art. 2(c) CEDAW.
[265] Art. 12, art. 40(2) CRC.

additional protection. Also they enjoy all major procedural guarantees.[266] Most importantly, states must grant migrant workers and their families the same rights than nationals.[267] The CED guarantees the right to an effective remedy to victims of enforced disappearances.[268] It expressly acknowledges the need for long limitation periods.[269] The CRPD protects the rights of persons with disabilities. This convention particularly provides for equal recognition before the law.[270] States are required to provide safeguards protecting the rights of persons with disabilities.[271] Not only is their access to justice secured by the CRPD but also their participation at all stages of proceedings is to be facilitated.[272]

1.5. UN Guiding Principles effectiveness criteria for state-based non-judicial grievance mechanisms

The aspects that have been seized hitherto might be called "traditional" procedural guarantees or "traditional" aspects of the right to an effective remedy. However, the UN Guiding Principles further indicate in Principle 31 different effectiveness criteria that a state-based non-judicial grievance mechanism should satisfy.[273] To conceptualize such a mechanism in Part III, it will be important to know the content of these criteria precisely. To assure this comprehension, the following sub-chapters interpret criterion by criterion. Yet beforehand, the intention behind these criteria shall be discussed.

1.5.1. The intent of the effectiveness criteria

The intent of Principle 31 must be enlightened first because the findings will underlie all criteria. Moreover, this helps to assure the effectiveness of the terms interpreted subsequently (effet utile).[274] Conversely, the intent of the drafters constrains the "effective" interpretation because the effectiveness is limited to their intentions.[275] The principle of effet utile in turn is indispensable for an interpretation in good faith.[276] The SRSG John G. Ruggie has also stressed the importance of the imperative of practical effectiveness. At the beginning of his mandate, in an address to the United Nations Human Rights

[266] Art. 18 ff. (particularly art. 18) ICRMW.
[267] Art. 18(1) ICRMW.
[268] Art. 8(2) CED.
[269] Art. 8(1) CED.
[270] Art. 12 CRPD.
[271] Art. 12(4) CRPD.
[272] Art. 13 CRPD.
[273] UNGP, Principle 31.
[274] VILLIGER, p. 110.
[275] See LAUTERPACHT, p. 229.
[276] SBOLCI, p. 160; VILLIGER, p. 108; see further ILC, A/CN.4/167, p. 60, para 27.

Council, he said: "At the end of the day our efforts will be judged by whether they make a difference where it matters most: in the daily lives of people".[277] In light of this, it must be asked what the effectiveness criteria for state-based non-judicial grievance mechanisms shall contribute to this end.

Once again, governance gaps are the origin of the "human rights and business" issue.[278] Disputes are in any case likely to arise. As access to judicial mechanisms is most problematic and since even current non-judicial mechanisms are in bad shape to resolve these controversies, their effectiveness must be improved; therefore the effectiveness criteria.[279] However, as the SRSG John G. Ruggie explained to the Human Rights Council, in the context of the UN Guiding Principles remedies are not only supposed to punish. They are also viewed as a means to prevent and de-escalate.[280] Herein the object of remedies goes beyond the traditional purpose of remedies in international human rights law, which is "to place an aggrieved party in the same position they would have been in had the wrongful act not occurred".[281]

Ergo, non-judicial mechanisms shall enhance the capacities of existing grievance mechanisms in fighting relevant governance gaps. They shall neither only redress individual violations nor only penalize particular abuses. Instead, they shall contribute to a situation wherein corporate operations are less threatening and harmful to people working at or living around operation sites.[282] This is consistent with the overarching objective of the UN Guiding Principles of "contributing to a socially sustainable globalization."[283] As a report by the SRSG John G. Ruggie explains, the effectiveness criteria itself namely preset some minimum standards[284] for the establishment of non-judicial grievance mechanisms. Without such guidelines the operational flexibility that is required of such mechanisms might undermine their credibility.[285] With that said, it seems clear that the criteria

[277] SRSG, Opening Statement to United Nations Human Rights Council of 25 September 2006 in Geneva, <http://www.reports-and-materials.org/Ruggie-statement-to-UN-Human-Rights-Council-25-Sep-2006.pdf>, retrieved on 1 April 2014, p. 6.
[278] SRSG, 2008 Framework, para. 17.
[279] SRSG, 2008 Framework, para. 26.
[280] SRGS, Presentation of Report to United Nations Human Rights Council of 2 June 2009 in Geneva, <http://www.reports-and-materials.org/Ruggie-statement-to-UN-Human-Rights-Council-2-Jun-2009.pdf>, retrieved on 30 March 2014, p. 4.
[281] SRSG, Treaty Overview, para. 8.
[282] In the interests of readability, the above used formulation, naming the most important groups of affected individuals, will be used again on other occasions albeit it is acknowledged that business operations may affect the human rights of further individuals, namely end-users. See SRSG Survey of allegations, para. 89 ff.
[283] UNGP, General Principles.
[284] See UNGP, commentary to Principle 31: "These criteria provide a benchmark (…)."
[285] See SRSG, 2009 Operationalization, para. 104.

are not intended to predetermine any details of the design of non-judicial grievance mechanisms.[286] This view is supported by both the fact that the criteria apply to state-based as well as non-state-based non-judicial grievance mechanisms[287] and the recognition of the variety of types of conflict resolution that state-based non-judicial grievance mechanisms may take on.[288]

1.5.2. Legitimacy

> "Legitimate: enabling trust from the stakeholder groups for whose use they are intended, and being accountable for the fair conduct of grievance processes".[289]

1.5.2.1 The wording

Principle 31(a) requires a non-judicial grievance mechanism to be legitimate. This corresponds in the present context to the noun legitimacy.[290] Legitimacy describes the "popular acceptance of a system of governance".[291] Legitimate thus means being accepted by the people. It may further be interpreted as reasonable, acceptable, justifiable and valid.[292] Also, it describes the state of being according to the law (or of being lawful).[293]

1.5.2.2 The context

In the context of Principle 31, it seems that the legitimacy-criterion does not mainly refer to the lawfulness[294] of a grievance mechanism. This is because the rights-compatibility-criterion, which will be discussed later on, specifically addresses the consistency of the grievance mechanism with international human rights law.[295] Instead this criterion appears as referring to how a mechanism is perceived and accepted. Against this background, it is suggested that the criterion primarily refers to the conspicuous features of a grievance mechanism. Salient features are presumably rather found in a grievance mechanism's basic structure and design than in particular legal questions.

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286 Cf. the range of different types of mechanisms proposed in the UNGP, commentary to Principle 25.
287 UNGP, Principle 31.
288 See UNGP, commentary to Principles 25 and 27 naming institutions such as NHRIs, NPCs, ombudspersons, government-run complaints offices and procedures as diverse as mediation and adjudication.
289 UNGP, Principle 31(a).
290 See SRSG, 2009 Operationalization, para. 99; SRSG Further Operationalization, para. 94; SRSG, Piloting Effectiveness, para. 22 ff.
291 BLATTER JOACHIM, legitimacy, in: Encyclopædia Britannica (online), <http://www.britannica.com>, 8 January 2013, retrieved on 4 April 2014.
292 Cambridge Dictionaries Online, Cambridge University Press, English definition of legitimate, 2014, <http://www.dictionary.cambridge.org>, retrieved on 31 March 2014.
293 Oxforddictionaries.com, fn. 1, Definition of legitimate in English, retrieved on 31 March 2014.
294 Here lawfulness means conformity with international human rights law.
295 See UNGP, commentary to Principle 31(f).

1.5.2.3 Object and purpose

The travaux préparatoires support the view that the legitimacy-criterion's focus lies on a mechanism's easily perceptible structural design: "Legitimate: having a clear, transparent and sufficiently independent governance structure (…)."[296] Hence, it is suggested here that the present criterion aims for the acceptance and the trust that stakeholders have in a mechanism. These stakeholders are, first and foremost, victims of corporate-related human rights abuses and transnational corporations as well as other business enterprises. However, also the civil society as a whole and non-government human rights organizations, business and globalization in particular are of certain relevance since their opposition may be significant. This suggestion finds not only support in the travaux préparatoires but also in the UN Guiding Principles itself. The Principles state that legitimate means "enabling trust from the stakeholder groups for whose use they [non-judicial grievance mechanisms] are intended".[297] The preparatory work stress the importance of faith in the capacity of such mechanisms[298] and the deep mistrust that people in some states have towards the legal system.[299]

1.5.2.4 Good faith and effet utile

After all, state-based non-judicial grievance mechanism can only contribute to the object and purpose found above if they are used. This in turn presupposes trust.[300] In order to effectively achieve this trust, it should be asked what concerns of the aforementioned stakeholders must be allayed. Most likely, victims and accused companies fear unfair interference with a dispute resolution process by the other side or a third party.[301] Against the background of reputational risks, corporate stakeholders may additionally fear male fide complaints.[302] In light of unequal financial power and legal expertise, cost risks, and obstacles to justice, it further seems likely that victims fear the absence of "equality of arms".[303] Additionally, non-government human rights organizations, fighting for a better overall-situation, might dread dispute settlement methods that do not allow for the development of precedents and the evolution of jurisprudence.[304] Lastly, all parties may fear

296 SRSG, Piloting Effectiveness, p. 6, Box A (emphasis added).
297 UNGP, Principle 31(a) (emphasis added).
298 SRSG, 2008 Framework, para. 103.
299 SRSG, 2008 Framework, Add.1, para. 163.
300 Cf. SRSG, Piloting Effectiveness, para. 24. It seems particularly difficult to win the confidence of indigenous communities, see SRSG, Piloting Effectiveness, para. 27.
301 Cf. UNGP, commentary to Principle 31(a).
302 Cf. SRSG, 2008 Framework, para. 82.
303 See to these problems above, Part I: Background, ch. 1.2, pp. 6 ff.
304 See Oxford Pro Bono Publico (Ed.), p. 359.

that the grievance mechanism is biased against the own position; that is either commercial interests or human rights.[305] Establishing appealing – for effectively trustworthy – grievance mechanisms, states ought to disperse these concerns.

1.5.2.5 Conclusion

According to these considerations, legitimate means in principle that stakeholders are entrusted to use the grievance mechanism. More specifically, it means that the stakeholder's qualms are taken seriously. As a result, appropriate safeguards must be implemented when conceptualizing a state-based non-judicial mechanism. With regard to reputational risks, it must be guaranteed to companies that a complaint does not reach the public before it has been scrutinized sufficiently to rule out the possibility of a malicious complaint.[306] Claims fund frivolous must not be entertained.[307] With respect to victims, a state-based non-judicial mechanism must ensure the principle of "equality of arms". This requires appropriate legal instruments and, if necessary, adequate legal aid. Unfair biases within the state-based mechanism can arguably be circumvented or, at least, minimized by locating it neither nearby business and economy departments nor close to agencies responsible for matters such as labor and human rights[308], environmental protection or development aid.[309] Moreover, it has been recognized in the context of soft law mechanisms that generally stakeholder participation, transparency and continuous reviews are pivotal to the credibility of such mechanisms.[310]

1.5.3. Accessibility

> "Accessible: being known to all stakeholder groups for whose use they are intended, and providing adequate assistance for those who may face particular barriers to access".[311]

1.5.3.1 The wording

According to Principle 31(b) non-judicial grievance mechanisms should be accessible. This term has two relevant meanings: first, it refers to something that can be reached or entered; second, it designates something that is easily obtained or used.[312] Its root access

[305] Cf. SRSG, 2008 Framework, Add.1, para. 159.
[306] SRSG, 2008 Framework, para. 91. The Kenyan National Commission on Human Rights allows the accused party to respond within 14 days before further action is taken, REES/VERMIJS, p. 54.
[307] Cf. regulation 9(iii) INHRC-PRA; s. 34(b) KCHRA.
[308] See to the problems accompanied by combining the "arbiter of business and human rights" and the "advocate for human rights" below, ch. 1.5.8, pp. 53 ff.
[309] Cf. SRSG, 2008 Framework, Add.1, para. 159.
[310] SRSG, 2007 Report, para. 57.
[311] UNGP, Principle 31(b).
[312] Oxforddictionaries.com, fn. 1, Definition of accessible in English, retrieved on 31 March 2014.

describes further "the right or opportunity to use or benefit from something".[313] According to the Principles' wording, this criterion aims in a first step for the relevant stakeholders' awareness of the grievance mechanism[314] and in a second step for the provision of the assistance required by victims who face obstacles to justice.[315] Thus, it should not only be easy to file a claim ("reach and enter" the procedure) but also to participate in the proceedings ("use" and "benefit" from the grievance mechanism). This sequence seems logical as it is, on the one hand, not meaningful to file a claim without obtaining a fair procedure thereafter and, on the other hand, impossible to obtain a fair process without being able to file a petition or even knowing of a grievance mechanism. In addition to access to grievance mechanisms, it was suggested in a preparatory workshop that accessibility should also be understood as the possibility to reach lawmakers.[316] However, this seems less important in the present context as it appears very unlikely that foreign victims could directly bring about policy change in the home state of a transnational corporation. In contrast, the observation that information enlightening people on their rights should also be accessible[317] looks more relevant. Claiming one's rights appears after all difficult if not impossible without knowing these rights.

1.5.3.2 The context

In line with international human rights law, the UN Guiding Principles require states to protect human rights and to prevent, investigate, punish and redress violations.[318] To prove that they fulfill their duties, states often refer to their legal systems. However, the SRSG John G. Ruggie showed that substantial obstacles to justice continue to impede access to effective remedy.[319] What is more, these obstacles are an important part of the governance gaps at the very root of the mandate.[320] The context of the UN Guiding Principles thus strongly suggests that these barriers and obstacles represent the main target of the accessibility-criterion. It is suggested here, that this criterion really focuses on

313 Oxforddictionaries.com, fn. 1, Definition of access in English, retrieved on 31 March 2014.
314 The first part of Principle 31(b) reads: "Accessible: being known to all stakeholder groups for whose use they [non-judicial grievance mechanisms] are intended, (…)."
315 The second part of Principle 31(b) reads: "(…) and providing adequate assistance for those who may face particular barriers to access."
316 SRSG, 2007 Report, Add. 2, para. 107.
317 Cf. SRSG, Treaty Overview, para. 43; CAT Gen. Comm. 2, para. 13.
318 See above, Part I: Background, ch. 3.1, pp. 15 ff.
319 SRSG, 2009 Operationalization, para. 93; see above, Part I: Background, ch. 1.2, pp. 6 ff. to the barriers to access to effective remedy.
320 See above, Part I: Background, ch. 1.2, pp. 6 ff.

"entering" the procedure and not on benefiting from the procedure for this latter aspect is addressed by other criteria.[321]

1.5.3.3 Good faith and effet utile

There is, as shown, ample knowledge of states' failure to satisfy their duty to protect by providing access to effective remedies. Not to try genuinely to improve this situation would for that reason be equal to a state's deliberate decision not to fulfill its duties utterly. Escaping from duties arising out of treaties[322] violates the principle of good faith. More profoundly, this may erode the legitimacy of the state[323] and thereby the legitimacy of a state-based grievance mechanism. It is evident that disregarding obstacles to access to remedy would be contrary to the effet utile-principle too. To be meaningful, a grievance mechanism must, after all, be accessible. Thus, an interpretation in view of these principles reinforces the suggestion that the main objective of the accessibility-criterion is to remove the barriers to access to effective remedies.

1.5.3.4 Object and purpose

This understanding is further supported by the commentary to the UN Guiding Principles, which namely mentions the cost barrier. Also, the commentary names obstacles in the form of language and literacy as well as fear of reprisal.[324] Additionally, it is mentioned that victims may struggle with the remoteness of a non-judicial grievance mechanism or that they are not even aware of it.[325] This interpretation corresponds further with the view expressed in the travaux préparatoires wherein it has been stated already that "a major barrier to victims accessing available mechanisms (…) is the sheer lack of information available about them".[326] Finally, it should be borne in mind that these obstacles are often heightened for vulnerable individuals or groups.[327] However, this is not the right place to reconsider these problems in detail. It suffices to find that the accessibility-criterion primarily focuses on the legal issues identified above.[328] Hereinafter it must be asked therefore what this criterion specifically suggests in order to overcome this problem.

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[321] See especially below, ch. 1.5.4, pp. 35 ff. referring to a predictable procedure and ch. 1.5.5, pp. 39 ff., referring to an equitable procedure.
[322] It must be remembered that the UN Guiding Principles base namely on the International Bill of Human Rights and the ILO Declaration on Fundamental Principles and Rights at Work, see above, Part I: Background, ch. 3.1 at p. 16.
[323] Fulfilling its human rights duties can be seen as a legitimation of a state. See, e.g., BUCHANAN, pp. 233 ff.
[324] SRSG, 2007 Report, Add. 2, para. 70 records concerns about transnational corporations intimidating victims.
[325] UNGP, commentary to Principle 31(b).
[326] SRSG, 2009 Operationalization, para 107.
[327] SRGS, Operationalization, para. 97.
[328] See above Part I: Background, ch. 1.2, pp. 6 ff.

1.5.3.5 The preparatory work

With regard to the lack of knowledge about and awareness of non-judicial grievance mechanisms it seems natural that states and therewith their bodies and institutions should improve information flows.[329] On the occasion of a multi-stakeholder consultation held during the SRSG's mandate several participants stressed the need for awareness-raising. It was suggested that all parties should be addressed by states in order to spread knowledge about the mechanisms available and their functioning.[330] Grievance mechanisms should be publicized through various channels to those for whose use they are intended. Yet it was also realized that a grievance mechanism which is publicized is not necessarily known.[331] In this regard, pilot projects suggested that information must be available at the time when unjust practices occur because people do not give much attention to informative materials as long as everything works smoothly. Likewise, information should be spread continuously.[332] Special consideration should be given to vulnerable groups such as women, children and indigenous communities.[333] With respect to the last mentioned group, it may be advisable, for instance, to provide information in their native language.[334] Alternatively, with regard to migrant workers, it is recommended that they are allowed to stay within the country until the end of the grievance procedure.[335]

Once potential victims are aware of the mechanism, their access must be secured. This is particularly important in the context of state-based non-judicial mechanisms for their very purpose is to circumvent courts unable to provide effective remedy and to offer a more immediate alternative to the often somewhat slow judicial systems. According to the initial framework proposed by the SRSG John G. Ruggie, non-judicial mechanisms should be "more immediate, accessible, affordable and adaptable point[s] of initial recourse"[336] than judicial processes. The example of the South African Commission for Conciliation, Mediation and Arbitration[337] suggests that one promising way to establish a first contact to a grievance mechanism may consist of a telephone hotline. Its call center registered

329 SRSG, 2008 Framework, para. 102.
330 SRSG, 2008 Framework, Add.1, para. 172.
331 SRSG, Piloting Effectiveness, p. 13, Box.
332 Cf. SRSG, Piloting Effectiveness, para. 32.
333 SRSG, 2009 Operationalization, para. 97.
334 Cf. SRSG, Piloting Effectiveness, para. 31.
335 GA, A/61/120, para. 17.
336 SRSG, 2008 Framework, para. 84.
337 See for further information Commission for Conciliation, Mediation and Arbitration, <www.ccma.org.za>, retrieved on 18 April 2014.

more than 150'000 calls in one year.[338] The Indian National Human Rights Commission[339] in turn provides an online complaint registration.[340] Both systems seem speedy and inexpensive. Moreover, state-based non-judicial mechanisms may provide relief to people suffering from grievances which do not amount to a legal cause of action.[341] After a complaint has been submitted, it was stressed by the SRSG, governments play a crucial role in mitigating imbalances between victims and companies since victims will probably not benefit from any procedure otherwise.[342]

1.5.3.6 Conclusion

The above reading of the accessibility-criterion might be summarized in two points. Firstly, states should spread information about and raise awareness of their non-judicial grievance mechanisms considering particular circumstances and special needs of the addressees. Secondly, states should take measures to assure that non-judicial grievance mechanism really are an alternative to judicial systems and thus that access to the former is not obstructed by the same obstacles than access to the latter. At the stage of accessing a mechanism, mainly cost and language assistance is required as well as measures dealing with difficulties arising from the likely distance between the victims and the perpetrator's home state. Obviously, all this entails big efforts. It seems that states presently lack the infrastructure, resources and capacities needed to satisfy these demands. This leads to the suggestion, made in a legal workshop held in the frame of the SRSG's mandate, that local and international non-government organizations play a key role in this regard.[343] Indeed, it appears inevitable that states acknowledge these organizations' capacities and networks in order to combine forces. This has already been done in several cases by the Indian National Human Rights Commission.[344] On the other side, states should also use the unique possibilities that come with roping companies in, for instance by imposing statutory requirements as to relevant information business enterprises must provide to their employees.

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338 REES/VERMIJS, p. 64, the number refers to the year 2006 – 2007 (indications that are more recent could not be found).
339 See for further information Indian National Human Rights Commission, <http://www.nhrc.nic.in>, retrieved on 18 April 2014.
340 See Indian National Human Rights Commission, Complaints, <http://164.100.51.57/HRComplaint/pub/NewHRComplaint.aspx>, retrieved on 18 April 2014.
341 SRSG, 2009 Operationalization, para. 91.
342 See on this issue below, ch. 1.5.5, pp. 39 ff.
343 SRSG, 2007 Report, Add. 2, para. 69.
344 REES/VERMIJS, p. 51.

1.5.4. Predictability

> "Predictable: providing a clear and known procedure with an indicative time frame for each stage, and clarity on the types of process and outcome available and means of monitoring implementation".[345]

1.5.4.1 The wording

Principle 31(c) expects a non-judicial grievance mechanism to be predictable. In general, something is predictable if it occurs "in a way or at a time that you know about before it happens"[346] respectively "in a way that you expect and [that is] not unusual".[347] The noun predictability denotes "the state of knowing what something is like, when something will happen, etc."[348] The term predictability is very close to the term of art legal certainty for this latter expression means first, in a formal sense, that laws as well as decision-making must be predictable. In the legal context, everyone should be able to anticipate with relative accurateness the consequences of his or her actions and the outcome of proceedings. This requires that law "is immobile, independent, and pre-established as well as pre-settled".[349] Legal certainty means in a second, substantive, sense that judgments are – within the respective legal system – acceptable. This requires, in a certain contrast to the aforesaid, "reflexivity, fluidity, and context-sensitivity"[350] of laws as well as of decision-making.[351]

This abstract interpretation of the key terms seems to correlate with the further wording of Principle 31(c) and its commentary. There, the provision of public information about the procedure is highlighted as a means to make it clear and known. Thus, possible parties must know what they ought to expect and what will happen. Further, each stage of the procedure should take place within an indicated time frame. This assures that parties know when a procedural step must be performed. In consistence with the definition of substantive legal certainty given above, the commentary recognizes that flexibility may be needed in certain situations. Lastly, the criterion states that clarity as to the outcomes available and the monitoring of their implementation should be provided. This again shall assure that the parties know what to expect.[352]

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345 UNGP, Principle 31(c).
346 Cambridge Dictionaries Online, fn. 292, English definition of predictable, retrieved on 3 April. 2014.
347 Cambridge Dictionaries Online, fn. 292, English definition of predictable, retrieved on 3 April. 2014.
348 Cambridge Dictionaries Online, fn. 292, English definition of predictability, retrieved on 3 April. 2014.
349 PAUNIO, p. 1469.
350 PAUNIO, p. 1469.
351 PAUNIO, p. 1469.
352 UNGP, Principle 31(c); UNGP, commentary to Principle 31(c).

Considering the wording of the present criterion, it seems as that aspect of predictability (or legal certainty in more technical terms) which refers to a predictable individual outcome is completely disregarded.[353] The system of Principle 31 might suggest, however, that the rights-compatible-criterion deals with this aspect. But considering this criterion's wording, it does neither refer to a consistent judicature[354]; although it aims for the applicable law and its correct application.[355] Yet a further alternative to accommodate the concern for a consistent case law is offered by the transparency-criterion. Its commentary indeed suggests that it deals, at least, with the release of decisions[356] and thus, with a fundamental prerequisite for a predictable, comprehensible and consistent judicature. It is assumed here that the transparency-criterion was most likely designated for embracing the need for a consistent case law. One may question this grouping because it leads to a somewhat incoherent separation between predictable types of outcomes and predictable outcomes. Also, traditional legal doctrine would probably classify the need for a consistent case law under legal certainty – and thereby in the present context under predictability. Anyhow, it will be dealt with the concern for predictable outcomes below.[357]

1.5.4.2 The preparatory work

Before turning to the travaux préparatoires of the predictability-criterion, an important clarification must be made. That is, predictability and legal certainty shall not guarantee a certain procedural outcome. What shall be guaranteed is essentially the "procedural setting". This means basically the possibility of having a case heard before a certain tribunal or institution which is bound to apply predetermined and known rules.[358] This, of course, shall prevent arbitrary and capricious decision-making.

Looking through the travaux préparatoires, few meaningful clues relating to the substance of the predictability-criterion can be found. Essentially, it is clarified that the focus of this criterion lies on the requirement of an indicative time frame and clear procedures.

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353 UNGP, Principle 31(c): "(…) clarity on the types of process and outcome available (…)" seems as referring only to the types of outcomes available.

354 UNGP, Principle 31(g) reads as follows: "Rights-compatible: ensuring that outcomes and remedies accord with internationally recognized human rights".

355 The application of the same (the right) law in the same (the correct) manner results, of course, also in a consistent judicature.

356 UNGP, commentary to Principle 31(e) reads as follows: "Providing transparency (…) through statistics, case studies or more detailed information about the handling of certain cases can be important to demonstrate its legitimacy and retain broad trust."

357 The transparency-criterion is addressed below in ch. 1.5.6, pp. 45 ff.

358 PAUNIO, p. 1474; cf. HABERMAS, p. 220.

Both aspects are quite frequently touched, though without much further guidance.[359] However, considering these references it can be noted that they mostly refer to international human rights treaties.[360] On this ground, it is proposed here that other human rights instruments might serve as guidelines for the further interpretation. With regard to the indicative time frame issue this inevitably leads back to the insight gained above: strict time limits for distinct procedural stages or the overall-length of proceedings can hardly be prescribed. The circumstances of individual cases simply vary too much and cannot be neglected.[361] Considering the issue of a clear procedure, the whole range of procedural rules seems relevant. Thus, this means most likely that a state-based non-judicial grievance mechanism should be governed by a comprehensive set of precise procedural rules dealing with all relevant procedural guarantees.[362] Construed like that, this criterion might indeed be denoted as a highly imprecise catch-all term. But its *raison d'être* might be found in the illegitimacy of grievance mechanisms similar to ad hoc tribunals. After all, a state-based non-judicial grievance mechanism without predetermined rules and standards, and previously appointed arbiters[363] could easily be associated with such tribunals, which are established for a distinct case and generally deemed prohibited.[364]

1.5.4.3 The context

In line with this catch-all idea, the preparatory materials create the impression that the predictability-criterion overlaps with several others of the effectiveness criteria. There appears firstly an intersection with the accessibility-criterion. It is argued that a grievance mechanism must be predictable so that parties know what to expect with regard to the type of mechanism available and accessible. Particularly, it is noted that care has to be taken to avoid confusion as to whether a mechanism was set up to deliver a judgment on compliance or to mediate a settlement. In order to choose an instrument, parties should know all their options plainly.[365] Thus, this is similar to the point that victims must be

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359 See to the indicative time frame-requirement SRSG, 2008 Framework, para. 98; SRSG, Piloting Effectiveness, p. 6, Box A and p. 24, Box C; SRSG, Treaty Overview, p. 5, para. 20, 24, 33, 63, 76, 83; SRSG, 2007 Report, Add. 1, para. 51, 57.
See to the fair and clear procedure-requirement SRSG, Piloting Effectiveness, p. 6, Box A and p. 24, Box C; SRSG, Treaty Overview, para. 34; SRSG, 2007 Report, Add. 1, para. 58; GA, A/HRC/8/5/Add.1, para. 176 see also SRSG, 2008 Framework, Add.1, para. 171.

360 This is of course particularly true for the references in SRSG, Treaty Overview.

361 See above, ch. 1.1.4, p. 21 f.

362 For a brief overview see above, ch. 1.1, pp. 20 ff.

363 An arbiter is a broad term referring to someone with the power to decide disputes whereas an arbitrator is someone chosen to settle a controversy. See Garner Bryan A., Garner's Dictionary of Legal Usage (online), arbitrator; arbiter, 2014, <http://www.oxforddictionaries.com/browse/garner_dict_legal_usage/>, retrieved on 4 April 2014.

364 NOWAK, art. 14 ICCPR, para. 24; KÜHNE, para. 291; see also ICCPR Gen. Comm. 13, para. 3 and 5.

365 GA, A/HRC/8/5/Add.1, para. 171 f.

informed in order to be able to access a (or, if there is a choice, the most appropriate) mechanism.[366] Again closely related to the accessibility-criterion, it is viewed important that the requirements for lodging a complaint are clearly defined.[367] For companies, on the other hand, it is important to know which human rights and standards apply. However, they must not only know what is expected from them, but also what they should expect from a grievance mechanism.[368] Notably, companies are said to be ready to accept more binding rules given that they benefit from greater certainty.[369] Such rules are obviously closely related to the rights-compatibility-criterion.[370] Further, it might be argued that predictability requires that decisions are made public. This is thus linked to the transparency-criterion.[371] Transparency in turn bolsters the legitimacy of an institution since trustworthiness and acceptance are generally strengthened by information. Equally, certainty and predictability about the implementation and its monitoring contribute to the legitimacy of a grievance mechanism.[372]

1.5.4.4 Object and purpose

In light of the above considerations, states seem to be urged to create detailed rules ensuring their non-judicial mechanisms' predictability.[373] Overall, it might be suggested that the predictability-criterion has quite few content of its own. Rather it asks for the establishment of precise rules governing a mechanism in order to make the procedure known, to demonstrate the other effectiveness criteria's observance and to assure this compliance. Thus, the predictability-criterion purposes a generally known grievance procedure, which satisfies the other criteria.

1.5.4.5 Conclusion

Thus, the predictability-criterion is essentially limited to the requirement that a state-based non-judicial grievance mechanism "should provide public information about the procedure it offers".[374] The content of this information, however, is predominantly determined by the other criteria. Providing this information evidently requires extensive pro-

366 See above, ch. 1.5.3, pp. 30 ff.
367 GA, A/HRC/8/5/Add.1, para. 176.
368 See GA, A/HRC/8/5/Add.1, para. 176.
369 GA, A/HRC/8/5/Add.1, para. 63.
370 See below, ch. 1.5.7, pp. 49 ff. to the rights-compatibility-criterion.
371 See below, ch. 1.5.6, pp. 45 ff. to the transparency-criterion.
372 See above, ch. 1.5.2, pp. 28 ff. to the legitimacy-criterion.
373 Cf. GA, A/HRC/8/5/Add.1, para. 176.
374 UNGP, commentary to Principle 31(c).

cedural guidelines. As long as all effectiveness criteria are satisfied, states seem principally free in drafting these guidelines. Without restricting this latitude, it appears advisable to evaluate the setting of a state-based non-judicial mechanism by comparison with well-established procedural standards endorsed by institutions such as human rights treaty bodies. UN work such as the Paris Principles[375] or the Reparation Principles may constitute further benchmarks.[376]

1.5.5. Equitability

> "Equitable: seeking to ensure that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair, informed and respectful terms".[377]

1.5.5.1 The wording

Principle 31(d) requires a non-judicial grievance mechanism to be equitable. Equitable and equitability correspond in ordinary language with the noun equity. In this sense, the expressions relate to the quality of being fair, right, impartial and evenhanded.[378] In other terms, this means treating everyone in the same manner.[379] Equity relates further to the interpretation of law consistent with its reason and spirit[380] and similarly to the technique of decision-making by the intent of the law-makers in cases where the applicable positive law is unclear.[381] In Anglo-American law it also refers to a body of legal principles ensuring equitability in cases where statutory and common law are not equitable in fact or do not apply.[382] The wording of the criterion reveals that the former, ordinary, meaning applies here primarily: "Equitable: seeking to ensure (…) a grievance process on fair, informed and respectful terms".[383]

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375 See further International Coordinating Committee for National Human Rights Institutions, Sub-Committee on Accreditation, General Observations of May 2013, available at <http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Documents/ICC%20SCA%20General%20Observations.pdf>, retrieved on 30 April 2014.

376 Some consideration could also be given to the Principles of Transnational Civil Procedure adopted in April 2004 by the International Institute for the Unification of Private Law and in May 2004 by the American Law Institute.

377 UNGP, Principle 31(d).

378 Garner Bryan A., fn. 363, equity, retrieved on 4 April 2014; Oxforddictionaries.com, fn. 1, Definition of equitable in English, retrieved on 5 April 2014.

379 Cambridge Dictionaries Online, fn. 292, English definition of equitable, retrieved on 4 April 2014.

380 Garner Bryan A., fn. 363, equity, retrieved on 4 April 2014 quoting COKE EDWARD, Institutes of the Laws of England, 1628.

381 This seems a Continental European and Latin American notion, see Garner Bryan A., fn. 363, equity, retrieved on 4 April 2014 quoting LUNDSTEDT VILHELM, The Relation Between Law and Equity, Tulane Law Review 25 (1950) 59 ff., p. 59.

382 The Editors of Encyclopædia Britannica, in: Encyclopædia Britannica (online), fn. 291, equity, retrieved on 4 April 2014; Garner Bryan A., fn. 363, equity, retrieved on 4 April 2014.

383 UNGP, Principle 31(d) (emphasis added).

Disassembling this wording makes clear that the first part might be called the "means" to the "end", which is stipulated in the second part of the phrase. Following this interpretation, the criterion aims at ensuring that both parties are able to litigate on an equal basis (end) by ensuring that they dispose of the necessary resources (means). Moreover, "informed terms" signifies that both parties should be enabled to make their decisions on an understanding of the facts underlying the conflict and of the consequences their decision have.[384] "Respectful terms" specifically asks for deference and thus for a certain politeness which should be demonstrated by carrying the conflict out without inconveniencing or harming the other party.[385] Eventually it is important to note that the wording "seeking to ensure that the aggrieved parties have (…)"[386] acknowledges that the victim will normally be the party at a disadvantage.

1.5.5.2 The context

The idea of litigating on an equal basis recalls the principle of "equality of arms", a concept that must commonly be ensured by state parties to international human rights treaties in order to satisfy the duty to provide an effective remedy. As seen above, the purpose of this idea is to ensure both parties equal opportunities within the process.[387] With regard to the notion that both parties should have a sufficient understanding of the circumstances of the case, the evidentiary problem outlined above resurfaces. The burden of presenting sufficient evidence weighing often heavily on the aggrieved party was found to be one of the fundamental causes of the current lack of effective remedies. It is also important to repeat that the difficulty to satisfy the standard of proof is aggravated when the perpetrator, who in the present context will normally be a corporation, controls most evidence.[388] As the equitability-criterion expressly requires states to ensure that victims have "reasonable access to sources of information"[389], this understanding apparently had some influence in the drafting process. Other problems contributing to the rise of the SRSG's mandate might be related to the plea for respect and deference. There are, for instance, cases reported where transnational corporations allegedly intimidated victims deliberately in order to suppress resistance.[390] Cases of "disappearing corporations" where it is made

[384] Cf. Oxforddictionaries.com, fn. 1, Definition of informed in English, retrieved on 5 April 2014.
[385] Oxforddictionaries.com, fn. 1, Definitions of respectful, deference, polite and considerate in English, retrieved on 5 April 2014.
[386] UNGP, Principle 31(d) (emphasis added).
[387] See above, ch. 1.1.2, p. 21.
[388] See above, Part I: Background, ch. 1.2.6, p. 10.
[389] UNGP, Principle 31(d).
[390] See, e.g., the Vedanta case in India, People's Union for Civil Liberties Bhubaneswar and Rayagada, A fact-finding report on attack on the villagers' agitating against their displacement due to the proposes Sterlite Alumina Project

nearly impossible for victims to figure out against whom to take action were also brought up.[391] States should clearly prevent such incidents under their duty to provide grievance processes on respectful terms. With regard to the problem of the identification of the perpetrator[392], the National Contact Points, responsible for complaints related to the OECD Guidelines for Multinational Enterprises, seem interesting. In order to be consistent with these Guidelines, National Contact Points are bound to understand the term "multinational enterprise" broad in order to embrace all entities (parent companies and local subsidiaries) within a transnational corporation.[393]

What was previously labeled the "means" to achieve a grievance process on fair, informed and respectful terms can also be put into the context of the governance gaps that gave rise to the SRSG's mandate. In the case of reasonable access to sources of information it can be referred to the aforementioned. The need for reasonable access to information is linked to the burden of collecting evidence. Similarly, the need for advice and expertise is related to the aforesaid. The "equality of arms"-principle, which requires equal opportunity, obviously implies equal access to advice and expertise. By way of example, a grievance process involving a defendant with and a victim without counsel clearly illustrates how the lack of legal expertise may foreclose the equal opportunity to present one's case.[394] Likewise, it is evident that an aggrieved party without professional assistance is far more likely discouraged from taking action by "disappearing corporations" than a victim who can draw on legal experts on transnational law and business.

1.5.5.3 The preparatory work

Of course, this imbalance has been recognized in the travaux préparatoires too.[395] It was further understood that this inequalities result mainly from a lack of financial means.[396] According to these findings and in the light of the state duty to protect, it was acknowledged that states play a key role in correcting these imbalances in resources.[397] However, it was also pointed to the fact that some transnational corporations even dwarf certain

in Lanjiharh Block of Kalahandi district, July 2003, <http://www.pucl.org/Topics/Industries-envirn-resettlement/2003/sterlite.htm>, retrieved on 4 April 2014; NYSTUEN et al., p. 29; MACDONALD, p. 37; see also SKINNER/MCCORQUODALE/DE SCHUTTER, p. 46 on so-called Strategic Lawsuits Against Public Participation (SLAPP suits).

391 SRSG, 2007 Report, Add. 2, para. 70.

392 Recall also the corporate veil-problem, above, Part I: Background, ch. 1.2.4, pp. 8 f.

393 See OECD (Ed.), p. 17, para. 4.

394 See above, ch. 1.1.2, p. 21.

395 SRSG, 2008 Framework, para. 95; SRSG, 2008 Framework, Add.1, para. 160.

396 UNGP, commentary to Principles 26 and 31(d); SRSG, 2010 Further operationalization, para. 109 f.; see above, Part I: Background, ch. 1.2.5, p. 10 for more information to the cost problems.

397 UNGP, commentary to Principle 27; SRSG, 2008 Framework, para. 95; SRSG, 2008 Framework, Add.1, 160.

states.[398] It was argued that states may simply be under-resourced to cope with large transnational business and human rights conflicts.[399] Another argument qualifying the role which states should play relates to the fact that governments are not always entirely impartial but rather, depending on the circumstances, defend business interests or social values.[400] Notwithstanding these caveats, it is undisputed that states must undertake steps to redress the disparities between alleged victims and transnational corporations.[401]

The preparatory work reveals several possibilities in that regard. One group of suggestions focuses on the state itself as well as its administration. Generally, states should avoid that some departments interfere unduly with the process. Similarly states should assure that clear findings are not thwarted for illegitimate "economy friendliness".[402] To ensure this, the Dutch NCP, earlier a ministerial body, was revised in 2006 and thereby made (largely) independent from the government.[403] It now consists of four independent members with various backgrounds. Four advisors, who work for four different government ministries closely related to the subject matter of the NCP, support the members.[404] More generally, government lawyers could be trained specifically to develop a better appreciation of risks to and opportunities for the international human rights cause. Arbiters could be equipped with sound human rights knowledge and relevant amicus briefs could be allowed.[405] Moreover, governments could implement measures to alleviate the mismatch of information between corporations and individuals affected. In this regard, the UK NCP may itself carry out far reaching examinations. This includes gathering evidence from both parties and seeking advice from government agencies, diplomatic missions, overseas Department for International Development offices as well as from private actors such as

398 SRSG, 2008 Framework, para. 12, 34 f.; SRSG, 2010 Further operationalization, para. 108; see further SRSG, 2006 Interim report, para. 18.
399 But cf. SRSG, 2008 Framework, Add.1, 16 arguing that states sometimes lack rather willingness than power.
400 See SRSG, 2008 Framework, Add.1, para. 160.
401 See, e.g., SRSG, 2008 Framework, Add.1, para. 200.
402 See SRSG, 2008 Framework, Add.1, para. 160.
403 Explanatory notes on Decree of the Dutch State Secretary for Economic Affairs, Agriculture and Innovation of 24 March 2011, no. WJZ/11037742 (Instellingsbesluit NCP 2011), in: Staatscourant 2011 no. 5571.
404 See Dutch Ministry of Foreign Affairs, National Contact point OECD Guidelines, NCP Members, <http://www.oesorichtlijnen.nl/en/national-contact-point/ncp-members>, retrieved on 18 April 2014.
405 SRSG, 2008 Framework, Add.1, para. 34 ff., these proposals were made with regard to instances where states themselves appear as economic actors but it seems that these ideas could similarly be applied in the present context (this also seems to be the opinion of HAÁSZ, Appendix 6, pp. 98 ff., p. 100).

non-government organizations and business associations.[406] Even field visits may be undertaken in certain circumstances.[407]

Other ideas aim at weakening corporate power. The financial situation of corporations could be made more dependent on their human rights impact by making official export credit support subject to a satisfying human rights record.[408] A similar result could also be achieved by requiring corporations to report more extensively on and to disclose more profound information about their human rights impacts. Considerate investors can, after all, only punish companies for wrongdoings that are known. Equally, financiers cannot take unknown financial human rights risks into account.[409] In line with this, the present situation where non-judicial processes are commonly governed by strict confidentiality could be changed in favor of increased transparency.[410]

A third group of proposals embraces ways to strengthen the position of aggrieved parties. The position of victims might be improved by providing expert advice and professional mediators. This could be done directly through the state or alternatively by requiring corporations to offer such assistance.[411] The financial position of victims could be strengthened by effective legal aid systems, apt fee rules, innovative litigation funding approaches and insurances covering legal expenses.[412] And the victims' level of information might be improved by enacting more rigorous discovery rules.[413] Moreover, there are alternatives to equipping the aggrieved party with a means to discover evidence held by corporations. It is namely worth considering to enact a presumption of breach of duty of care for situations where companies disregard certain due diligence standards.[414] This reversed burden of proof would force business enterprises to provide relevant evidence.

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406 UK Department for Business Innovation & Skills, UK NCP procedures for dealing with complaints brought under the OECD guidelines for multinational enterprises, January 2014, <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/270577/bis-14-518-procedural-guidance.pdf>, retrieved on 18 April 2014, para 4.6.4.

407 UK Department for Business Innovation & Skills, fn. 406, para. 4.6.6.

408 SRSG, 2008 Framework, para. 39 f.; cf. UNGP, commentary to Principle 4.

409 SRSG, 2008 Framework, para. 30; SRSG, 2008 Framework, Add.1, para. 47; see Socially Responsible Investors, Statement to the eight session of the Human Rights Council on the third report of the Special Representative of the UN Secretary-General on Business and Human Rights, 3 June 2008, <http://www.reports-and-materials.org/SRI-letter-re-Ruggie-report-3-Jun-2008.pdf>, retrieved on 5 April 2014.

410 SRSG, 2008 Framework, para. 37.

411 Cf. SRSG, 2008 Framework, para. 94.

412 SRSG, 2010 Further operationalization, para. 110.

413 SRSG, 2008 Framework, Add.1, para. 98; see also BRODIE, pp. 250 f.; LOPEZ/HERI, p. 35.

414 SKINNER/MCCORQUODALE/DE SCHUTTER, p. 71; see also ZERK, p. 12; International Council on Human Rights Policy (Ed.), p. 80.

1.5.5.4 Good faith and effet utile

It has already been mentioned above that victims need a fair process once they submitted a claim.[415] Initiating proceedings that are then conducted on unequitable terms would seem futile to an aggrieved party as such a process will most likely be fruitless. By the same token, a company will not be constrained to improve its human rights impact by a grievance mechanism that is notoriously never instigated. Against this background, ensuring equitability in business and human rights processes is a paramount duty of states. If this is not taken seriously, any grievance mechanism established in the wake of the UN Guiding Principles will be rendered ineffective and deprived of its purpose, which is to contribute to a situation where business activities are compatible with the human rights of the people working at or living around the operation sites.[416]

1.5.5.5 Conclusion

The equitability-criterion aims to assure fair, informed and respectful terms. Thereby it targets some of the issues at the heart of the business and human rights problem: costs and hence access to legal advice and professional expertise, the possibility of companies to harass and intimidate victims and evidentiary problems resulting from the corporation's sole control over relevant documents. These issues are manifestly pivotal to the effectiveness of grievance mechanisms: Unless a process takes place on equitable terms, there is most likely no process at all.

Although it is admitted that states cannot redress all these disparities entirely, there are numerous measures available to tackle these mischiefs, some of which might be implemented in a state-based non-judicial grievance mechanism. It is assumed here that it is probably easier for states to increase the procedural capacities of victims than to restrain the ones of companies.[417] Legal assistance and expertise should preferably be provided free of charge. In line with this, the cost risks of victims must be minimized. Also, with regard to the burden of collecting evidence, states should find a way to support the victims of corporate-related human rights abuses. This might happen through a shift of the onus of proof or by means of adequate discovery rules. State investigators with extensive rights to inspect might be a further alternative. Additionally, states should seek ways to prevent that victims who defend themselves are harassed and intimidated. Eventually, states have

[415] See above, ch. 1.5.3, pp. 30 ff.
[416] See above, ch. 1.5.1, pp. 26 ff.
[417] This is not to say that such measure ought not to be taken at all.

a duty to ensure that none of their agencies infers unduly with the grievance mechanism or thwarts its outcome for illegitimate reasons.

1.5.6. Transparency

> "Transparent: keeping parties to a grievance informed about its progress, and providing sufficient information about the mechanism's performance to build confidence in its effectiveness and meet any public interest at stake".[418]

1.5.6.1 The wording

Principle 31(e) requires transparency. Something transparent is easy to detect or to perceive.[419] The term also refers "to political openness and accessibility to public scrutiny."[420] That means more specifically that the general public obtains in due time valid information about both governmental and private organizations. Transparency relates further to "governance ideas such as accountability, openness, and responsiveness."[421] According to that, this criterion has implications for the parties in a process as well as for stakeholders and interested people in general. The phrasing suggests that parties involved in proceedings have a particular interest in the proceedings' progress whereas the public interest concerns mainly the effectiveness and performance of a mechanism. To be sure, (prospective) parties have an interest in the overall viability of a mechanism too since they are not interested in a grievance mechanism that functions poorly. The wording "providing sufficient information about the mechanism's performance to (…) meet any public interest"[422] might imply that everybody could ask for whatever information she or he would like to receive. However, "information about the mechanism's performance"[423] suggests strongly that only such information should be made accessible to everyone that is necessary to scrutinize the general viability of the mechanism.

1.5.6.2 The preparatory work

The reading that everyone could ask for every piece of information seems disturbing for excessive transparency may lead to unreported decision-making and expose organizations

[418] UNGP, Principle 31(e).
[419] Oxforddictionaries.com, fn. 1, Definition of transparent in English, retrieved on 5 April 2014.
[420] Pocket Fowler's Modern English Usage (online), "transparent", 2014, <http://www.oxforddictionaries.com/secondary/pocket_fowlers_modern_eng_usage/>, retrieved on 5 April 2014.
[421] JOHNSTON MICHAEL, Transparency, in: Bevir Mark (Ed.), Encyclopedia of Governance, Vol. II, Thousand Oaks/London/New Delhi 2007.
[422] UNGP, Principle 31(e) emphasis added).
[423] UNGP, Principle 31(e) (emphasis added).

and their staff to pressure and reprisals.[424] Moreover, certain business interests are legitimately protected and claimants too might need some confidentiality.[425] Against this background, the commentary to the transparency-criterion states that confidentiality must be maintained where "necessary".[426] In light of this, the first reading applied above cannot be upheld. The decisive question is therefore where to draw the line between transparency and confidentiality. Or, in other terms, which pieces of information are necessary to scrutinize the performance of a grievance mechanism.

With respect to this question, it was suggested that transparency should be "the governing principle, without prejudice to legitimate commercial confidentiality".[427] Following this concept, transparency is the rule, confidentiality the exception. Accordingly, not access to information must be requested but instead confidentiality of certain material. The travaux préparatoires, however, lack in overt indications as to how to differ between justifiable and illegitimate confidentiality requests.

1.5.6.3 The context

In order to figure out what should not remain unrevealed, the transparency-criterion shall briefly be put in its context. As repeatedly stated, effective state-based non-judicial grievance mechanisms shall first and foremost contribute to a situation wherein corporate operations are less threatening and harmful to people.[428] Transparency is one feature of an effective state-based non-judicial grievance mechanism. It is important for the perceived legitimacy of the instrument, and to create and retain trust of stakeholders and the broad public.[429] This in turn requires that stakeholder's qualms, which relate mostly to equitability issues[430], are taken seriously because a grievance mechanism will not be instigated otherwise. One way to prove such anxieties unfounded is to enact corresponding procedural rules, which govern the grievance process.[431] But this does not suffice. It must additionally be proven that these rules are more than a formal exercise.

[424] See JOHNSTON, fn. 421.
[425] Particularly to prevent retaliation, see SRSG, Piloting Effectiveness, para. 54.
[426] UNGP, commentary to Principle 31(e).
[427] SRSG, 2008 Framework, para. 37.
[428] See above, ch. 1.5.1, pp. 26 ff.
[429] UNGP, commentary to Principle 31(e).
[430] For more details see above, ch. 1.5.2.5, p. 30.
[431] See above, ch. 1.5.4, pp. 35 ff.

1.5.6.4 Object and purpose

This finding leads to the object and purpose of the transparency-criterion. The main purpose of transparency, it is suggested here, consists of demonstrating that the grievance mechanism in question is legitimate and equitable in practice. That view is supported by the commentary to the transparency-criterion. By stating "providing transparency about the mechanism's performance (…) through statistics, case studies or more detailed information about the handling of certain cases"[432] it refers expressly to sources documenting the "life practice" of a mechanism. Thus transparency revolves around proving that legitimacy, as opposed to arbitrariness, and equitability, as opposed to inequity, are indeed realized.

In line with this, transparency must prove that cases are handed down in consistence with each other[433] for inconsistent decision-making would exactly be the opposite of legitimate and equitable: arbitrary and unjust. It must be noted though, that equitability has a slightly different meaning in this context than in the context of the equitability-criterion. This is because a consistent judicature is part of a somewhat different concept of equitability than the one discussed previously. In this context, equitability appears to refer to the relation between different cases (principle of treating like cases alike; ius respicit aequitatem) whereas it related above to the relation between the two (or more) parties to one particular dispute.

1.5.6.5 Conclusion

In light of the finding that the transparency-criterion should demonstrate that a grievance mechanism is legitimate and equitable in fact, a possible answer to the question as to what information must be accessible (transparent) and which information may remain inaccessible (confidential) shall now be offered.

It is important that the number of cases (submitted, admitted, dismissed, handed down) and the average duration of proceedings are publicized so that the capacity and the efficiency of the grievance mechanism can be analyzed.[434] Moreover, this allows for an understanding of how legitimate submitted complaints are on the average. Individual decisions (including the facts, reasoning and verdict) ought to be released too. That permits

[432] UNGP, commentary to Principle 31(e) (emphasis added).
[433] See for a brief discussion as to under which criteria a consistent judicature should be seized above, ch. 1.5.4.1, pp. 35 f.
[434] Scrutinizing the performance of a mechanism implies measuring its capacities.

interested stakeholders to ascertain that judgments correspond to international human rights law[435] and that the judicature is consistent. Further, it allows for the development of precedents and a settled body of case law.[436] This in turn seems important to induce permanent change.[437] Judgments should name a perpetrator for "naming and shaming" is considered an effective means to compliance.[438] By the same token, it should be informed about the implementation of measures ordered. Reporting commendable compliance on the other hand, offers an incentive to observe decisions and to improve human rights compliance. This proves additionally that orders are monitored and judgments more than mere formalities.[439] In order to rebut biases and prejudices, the selection of arbiters as well as their appointment to decision panels should be transparent too. This includes that sufficient information about all individual arbiters and investigators, their backgrounds, intérêts particuliers[440] and relationships is made available. The funding and supervision of the grievance mechanism ought to be transparent for the same reason. Eventually, it should be informed about the assistance provided to parties and the conditions applicable.[441] The same holds true, of course, for protection that was granted in order to prevent intimidation or harassment. If one party receives support by third parties, this should also be revealed.[442] Further, it should be informed about discovery procedures and investigations that are conducted in order to prove that companies cannot withhold evidence.[443]

Having arrived at corporate documents, the area of confidentiality is reached too. There is certain information that ought not to be published. If records of a corporation are produced as evidence, care must be taken not to expose any information that is of no legitimate public interest.[444] That is to say, as a rule nothing must be revealed that is unnecessary to understand the facts, the reasoning and the verdict of the case.[445] With regard to the identity of a company, it should not be revealed if the allegation is found wrong. Yet this might be difficult in practice. Thus, if a false allegation reached the public, it must be

435 Cf. SRSG, 2008 Framework, Add.1, para. 204.
436 Cf. Oxford Pro Bono Publico (Ed.), p. 359.
437 The UN Guiding Principles understand remedies as a means to bring about a change in the overall human rights and business situation, see above, ch. 1.5.1, pp. 26 ff.
438 HAÁSZ, p. 170; Oxford Pro Bono Publico (Ed.), p. 358.
439 Measures which are ordered but not implemented are certainly not effective and undermine the authority and legitimacy of a grievance mechanism.
440 As opposed to the intérêt général or general will, see MUNRO ANDRÉ, general will, in: Encyclopædia Britannica (online), fn. 291, 4 March 2013, retrieved on 6 April 2014.
441 This assures that, with regard to assistance and support, like cases are treated alike.
442 This relates to the disclosure of intérêts particuliers which might have an influence on the outcome of a grievance.
443 This relates to the requirement of a grievance process on informed terms.
444 Primarily, valid manufacturing and trade secrecies must be respected.
445 Cf. SRSG, 2009 Operationalization, para. 34, reasoning that enough should be published not to prohibit consistent rulings, predictable and legitimate outcomes, and improvement on the side of business.

assured that the falsely blamed company is extensively relieved in public as soon as the claim was proved wrong. Lastly, no reason for publishing the identity of (allegedly) aggrieved parties is apparent.[446] As (alleged) victims may fear retaliation, a standard of anonymity might be advisable. However, neither will it always be feasible to take part in a grievance process in anonymity, nor will it always be required.[447]

1.5.7. Rights-compatibility

> "Rights-compatible: ensuring that outcomes and remedies accord with internationally recognized human rights".[448]

1.5.7.1 The wording

Principle 31(f) requires that a non-judicial grievance mechanism is rights-compatible. Compatible denotes the state wherein "two things are able to exist or occur together without problems or conflict"[449] or even the state where two things are "able to exist, live together, or work successfully"[450] together. The former meaning appears to imply that outcomes and remedies of a grievance mechanism should be consistent with internationally recognized human rights so that there is no conflict. The latter meaning appears to implicate more. Namely, that outcomes and remedies of a grievance mechanism should work together with internationally recognized human rights in order to accomplish a desired result.[451] "Outcomes and remedies" seems to embrace both, the process and the results of a grievance mechanism. "Internationally recognized human rights" refers certainly to the International Bill of Human Rights and the ILO Declaration on Fundamental Principles and Rights at Work as at least these treaties' rights must not be abused by corporations.[452] However, in the case of a state-based non-judicial grievance mechanism, the state acts itself by providing the grievance mechanism. Thereby the state is, in principle, bound to all its human rights duties in the same way than in every other context too. Therefore, the procedure itself must live up to all human rights applying to

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446 Male fide complaints may be prevented otherwise too, for instance by attaching costs to frivolous claims as it is done by the South African Commission for Conciliation, Mediation and Arbitration. See CCMA fees and costs, April 2012, <http://www.ccma.org.za/UploadedMedia/CCMA%20FEES%20AND%20COSTS%20-%20April%202012.pdf>, retrieved on 18 April 2014.

447 The Indian National Human Rights Commission does not entertain anonymous complaints, regulation 9(ii) INHRC-PRA, whereas the Kenyan National Commission on Human Rights probably does, see s. 30 ff. KNCHRA and REES/VERMIJS, p. 54.

448 UNGP, Principle 31(f).

449 Oxforddictionaries.com, fn. 1, Definition of compatibility in English, retrieved on 6 April 2014.

450 Cambridge Dictionaries Online, fn. 292, English definition of compatible, retrieved on 6 April 2014 (emphasis added).

451 See Oxforddictionaries.com, fn. 1, Definition of successful in English, retrieved on 6 April 2014.

452 See above, Part I: Background, ch. 3.1, pp. 15 ff.

the state providing it. Rights-compatible outcomes, conversely, refer to the corporation. In an outcome, it is decided upon the legitimacy of a complaint and corporate conduct is judged. Thus, any outcome must be guided by corporate responsibilities, which essentially expect not more from business than not to violate human rights.[453]

Against this background, the first definition of compatible might suit better to companies. Outcomes should be rights-compatible by measuring corporate operations against the responsibility not to conflict with human rights. If enterprises ceased to harm people, the breeding-ground for pertinent conflicts and grievances would already be largely removed. This does, however, not amount to "work successfully together". This second definition of compatible implies taking a more active part in accomplishing the (illusive) ultimate goal of completely realized human rights. Working actively towards the best possible realization of human rights is rather the task of states, which in the present context should strive for it by providing effective non-judicial grievance mechanisms.

Hence, a state-based non-judicial grievance mechanism is rights-compatible if the procedure provided complies with state human rights duties and the outcomes reflect corporate human rights responsibilities. However, while state duties are relatively well-founded and clear, corporate human rights responsibilities have been and still are vague.[454]

1.5.7.2 The context

With regard to states, the effective remedy-context underlines the relevance of procedural guarantees as stipulated in human rights treaties.[455] If states attempt to provide an effective remedy in form of a non-judicial grievance mechanism, they must respect these standards. This view is supported by the UN Guiding Principles' effectiveness criteria. Although framed in different terms, many similarities can be found between these criteria and the traditional procedural guarantees.[456]

Regarding companies, the rights-compatibility-criterion should be put into the context of the second pillar of the UN Guiding Principles as corporate responsibilities are addressed therein.[457] It is spelled out at the very beginning that corporations ought not only to omit but also to take action. However, this is restricted to measures that make it possible in the

[453] See above, Part I: Background, ch. 3.1, the remarks to the second pillar at pp. 16 f.
[454] See above, Part I: Background, ch. 3.1, pp. 15 ff.
[455] See above, ch. 1.1 – 1.3, pp. 20 ff.
[456] See, e.g., equality and equitability or publicity and transparency.
[457] UNGP, Principles 11 ff.; see above, Part I: Background, ch. 3.1, the remarks to the second pillar at pp. 16 f.

first place to omit infringements, to mitigation and to remediation.[458] The responsibility to omit is twofold: companies are not only responsible for not violating human rights but also for not obstructing state efforts directed towards fulfilling human rights.[459] For the responsibility to remediate includes cooperation with legitimate processes offered by other actors[460], companies should engage constructively in effective state-based non-judicial grievance mechanisms.

1.5.7.3 The preparatory work

The travaux préparatoires shed further light on corporate responsibilities. It is made plain that it is not in the latitude of the individual company to single out[461] and interpret certain human rights which it believes relevant to its business. That means corporations cannot depart from their business operations in considering which measures they deem necessary to sufficiently respect human rights. Instead, precise and generally accepted standards, comprising all human rights, must build the starting point for determining corporate responsibilities. Whether a company fulfills these responsibilities is then measured against "generally recognized boundaries around 'what counts' as recognition of any particular right".[462] Put more simply, neither is it relevant what a company considers as its responsibilities. Nor is it relevant what societal expectations a company believes to face. And even less relevant is a company's willingness to respect human rights. In short, human rights are in no way flexible, but clear, commonly agreed upon standards.[463]

Further, the question as to the relation between human rights and domestic law arose on occasion of multi-stakeholder consultations. With regard to the situation where national law is absent, it was indicated that international norms should be respected.[464] Regarding situations where domestic law is simply not enforced, it was stated that companies ought to obey the law nonetheless.[465] No clear guidance was provided for the more difficult

458 UNGP, Principle 11, its commentary states: "Addressing adverse human rights impacts requires taking adequate measures for their prevention, mitigation and, where appropriate, remediation."
459 UNGP, commentary to Principle 11.
460 UNGP, Principle 12 and its commentary.
461 The idea that the range of human rights relevant to business is limited is considered to be wrong. See above, Part I: Background, ch. 1.1, pp. 3 ff.
462 SRSG, 2007 Report, Add. 3, para. 102.
463 Human rights are regarded as a universal, interdependent and indivisible set of rights. Variations in recognized human rights are highly doubtful since that contradicts this idea; see SRSG, 2007 Report, Add. 3, para. 101.
464 SRSG, 2008 Framework, Add.1, para. 149; see IOE (Ed.), Business and human rights: The role of business in weak governance zones, Business proposals for effective ways of addressing dilemma situations in weak governance zones, December 2006, <http://www.reports-and-materials.org/Role-of-Business-in-Weak-Governance-Zones-Dec-2006.pdf>, retrieved on 6 April 2014, para. 15.
465 SRSG, 2008 Framework, Add.1, para. 149.

situation where international human rights law and domestic law collide. At least, companies are advised under such circumstances to take measures in support of human rights, outline appropriate steps, disclose as much information about the situation as possible and consult experts.[466]

1.5.7.4 Object and purpose

It is firstly important that corporate human rights responsibilities are framed appropriately because state-based non-judicial grievance mechanisms are conceived as alternatives to judicial remedies.[467] In order to fulfill this role, non-judicial grievance mechanisms should review corporate conduct at least against the similarly precise standards than courts do. Indeed, state-based non-judicial mechanisms shall purpose even more. They are believed to be particularly suitable[468] for narrowing the governance gaps that cause the ongoing tensions between business and human rights.[469] By appropriately defining corporate responsibilities, one could possibly come closer to the objective of filling these gaps. For instance, the problem that neither international human rights law nor national human rights bills provide causes of action against corporate-related human rights abuses[470] might be alleviated through novel grievance mechanisms which allow for such complaints.

In light of these considerations, an interpretation of corporate responsibilities that does improve the position of aggrieved parties in terms of prospects of access to an effective remedy seems compelling by virtue of the principle of effet utile.

1.5.7.5 Conclusion

The procedural aspect of a state-based non-judicial mechanism must be compatible with all human rights duties of the state providing it. The duties states must obey are laid out relatively clearly in human rights treaties. In providing grievance mechanisms, procedural guarantees seem most relevant. The substantive aspect of a state-based non-judicial mechanism mirrors the degree to which a private business entity respected its human rights responsibilities and should therefore be compatible with corporate human rights responsibilities. Whereas the relevant state duties can be found in international human rights law, corporate responsibilities are much less clear. As a starting point, the relevant context

466 SRSG, 2008 Framework, Add.1, para. 149 f.
467 See, e.g., above, ch. 1.5.3.5, pp. 33 f.
468 Cf. above, Part I: Background, ch. 3.2, pp. 18 f.
469 See above, ch. 1.5.1, pp. 26 ff.
470 See to this problem above, Part I: Background, ch. 1.2.3, p. 8.

indicates that business enterprises are prohibited to violate human rights. This includes actively taking measures to prevent abuses. Moreover, they must not obstruct state efforts to promote human rights. Additionally, companies have a responsibility to redress violations. Based on the object and purpose as well as on the effet utile-principle, it is argued that these responsibilities must be read in favor of aggrieved parties. In light of this, it is suggested that the responsibility to redress abuses includes cooperating constructively with state-based non-judicial grievance mechanism. Eventually, it was found that the definition of the meaning and the relevance of human rights is not in the latitude of companies, but determined by clear, commonly agreed standards.

1.5.8. Source of continuous learning

> "A source of continuous learning: drawing on relevant measures to identify lessons for improving the mechanism and preventing future grievances and harms".[471]

1.5.8.1 The wording

Lastly, Principle 31(g) requires a state-based non-judicial grievance mechanism to be a source of continuous learning. This wording implies that a grievance mechanism should be a place where knowledge is steadily obtained[472] through analysis and experience.[473] This shall make it possible to refine the mechanism and to prevent further violations and disputes.[474]

It seems that this criterion differs in a significant way from all the other criteria. All previous criteria are formulated adjectivally (legitimate, accessible and so on) what indicates that they describe properties of a grievance mechanism (i.e. they modify a grievance mechanism).[475] That is to say, they describe characteristic qualities a grievance mechanism should feature[476], or in other terms how a grievance mechanism should be. In contrast, a continuous source of learning is a noun and hence a concrete entity[477] (i.e. something that exists distinctly and independently[478]). This indicates that the last criterion does not simply describe how a grievance mechanism should be. Instead, it denotes an actual component of a grievance mechanism. Put it differently, it prescribes what a grievance

[471] UNGP, Principle 31(g).
[472] Oxforddictionaries.com, fn. 1, Definition of source in English, retrieved on 8 April 2014.
[473] Oxforddictionaries.com, fn. 1, Definition of learning in English, retrieved on 8 April 2014.
[474] UNGP, commentary to Principle 31(g).
[475] P. H. Matthews (Ed.), The Concise Oxford Dictionary of Linguistics (online), 2nd ed., 2007, adjective, <http://www.oxfordreference.com>, retrieved on 8 April 2014.
[476] Oxforddictionaries.com, fn. 1, Definition of properties in English, retrieved on 8 April 2014.
[477] P. H. Matthews (Ed.), fn. 475, noun, retrieved on 8 April 2014.
[478] Oxforddictionaries.com, fn. 1, Definition of entity in English, retrieved on 8 April 2014.

mechanism should be, besides simply being a complaint handling process. This means for the present purpose that the interpretation of the continuous source of learning-criterion does not attempt to describe the complaint mechanism further, but to work out what this particular component of a grievance mechanism should "do" or contribute. However as will be shown below, this contribution is – following the understanding sponsored here – fairly limited.

1.5.8.2 Object and purpose

In consistence with what was found above, the object and purpose of the continuous source of learning-component of a grievance mechanism should be comprehended first. Concerning this, the commentary to Principle 31(g) is instructive: "Regular analysis of the frequency, patterns and causes of grievances can enable the institution administering the mechanism to identify and influence policies, procedures or practices that should be altered to prevent future harm".[479]

According to this comment, the purpose of a grievance mechanism goes far beyond reconciliation, arbitration or quasi-adjudication. On the one hand, certain research activities are conferred on grievance mechanisms. On the other hand, and this seems to be even further beyond complaint handling functions, such an institution should actively influence policies as well as practices and procedures. Notably, it does not appear as "policies, procedures or practices" would essentially refer to standards within the state-based grievance mechanism. In contrary, for future harm shall be prevented, external set of rules are in the focus.

Against this background, it is suggested that the continuous source of learning-component is intended to be an interface between some kind of a "dispute resolution board" with a focus on individual grievances and some type of a research and/or advisory body with a broader and more long-term orientation.[480]

1.5.8.3 The context

Intertwining the research and advice function, and the dispute resolution function seems not unproblematic. All criteria considered so far describe primarily an actual grievance mechanism (i.e. one which deals with complaints). In line with the traditional procedural guarantee of equality, it was argued on various occasions that such an institution should

[479] UNGP, commentary to Principle 31(g) (emphasis added).
[480] See for typologies of national human rights institutions AICHELE, pp. 110 ff. and Centre for Human Rights, HR/P/PT/4, para. 41 ff.

be impartial and independent, un-biased, and equal.[481] Admittedly, this was mostly said with concern of disadvantaged victims of corporate-related abuse. Yet, this must equally be relevant as regards companies. They may equally fear prejudice. It seems therefore precarious to entrust one body with the competence to handle business-related human rights complaints and, at the same time, with the task to promote and protect human rights against corporate-related abuse. Considering what this latter assignment may include (reviewing and assisting in drafting legislative acts, submitting general policy advice to the government, assisting in the implementation of international standards[482]), it seems possible that corporations would perceive an institution charged with both functions as a partisan human rights promoter. To put it bluntly, it could be argued that such a setting would combine the "arbiter of business and human rights" with the "advocate for human rights" somehow wiping out the doctrine of separation of powers. This might be formulated to the extreme, yet the point to be made really is that it seems better to sidestep such a dual mandate in order not to jeopardize the perceived, and possibly also the factual, equality of a grievance mechanism.

1.5.8.4 Good faith and effet utile

On the assumption that the aforesaid is true and a double mandate would hamper corporate willingness to cooperate with state-based grievance mechanisms, this might have a negative influence on the objective of a grievance mechanism to contribute to a situation wherein corporate operations are less threatening and harmful to people working at or living around operation sites. If so, it would be more effective to interpret source of continuous learning in a more figurative manner. This is to say it could be understood as a spring with an outflow, the source being the grievance mechanism and the outflow being information running in the form of bare facts to a separate institution. However, this reading seems not to be consistent with the commentary to Principle 31(g). The commentary implies that the same institution that handles grievances and that sources information should also make use of this information.[483]

1.5.8.5 The preparatory work

One way out of this "dilemma" could be offered by the assumption that the precise formulation of this criterion made its way into the final version of the UN Guiding Principles

[481] See above, especially pp. 29 and 30 (on legitimacy), 42 (on transparency), 48 (on equitability).
[482] See Centre for Human Rights, HR/P/PT/4, para. 181 ff.
[483] UNGP, commentary to Principle 31(g) reads as follows: "enable the institution administering the mechanism to identify and influence policies, procedures or practices (…)" (emphasis added).

by accident only. Based on the travaux préparatoires, it must be assumed that the effectiveness criteria were initially drafted as "draft principles for the design of rights-based grievance mechanisms at the company level".[484] It was apparently during a multi-stakeholder consultation that the idea emerged that non-judicial grievance mechanisms on a state-level could also be meaningful.[485] Accordingly, it was suggested that the principles should apply to states too.[486] Hence, this criterion too was probably formulated with a view only to operational-level grievance mechanism.

Assuming this, it might be reasoned that the wording fits quite well with the object to achieve a situation wherein corporate operations are less threatening and harmful to people working at or living around operation sites.[487] An operational-level grievance mechanism shall be a tool to monitor human rights compliance, a channel through which to receive early warning of grievances and to recognize systemic problems as well as a means to prevent escalation. This shall enable a company to change its practices in order to prevent future grievances.[488] Thus, an operational-level grievance mechanism is really a source of continuous learning. To be sure, it shall also be a way to address individual grievances.[489] However, by definition a company-based mechanism cannot take on the role of an independent and impartial "neutral third party". While that is not to say that this is unproblematic, a company-based grievance mechanism can logically not gain its legitimacy from the independence of the interests of both parties. Consequently, the objection that the dispute resolution mechanism should not be intertwined with another function which potentially appears impartial seems invalid with regard to operational-level grievance mechanisms.

1.5.8.6 Conclusion

Based on the finding that the "arbiter of business and human rights" should not be combined with the "advocate for human rights" and on the assumption that the criteria were initially drafted with a view to company-based grievance mechanisms only, it is suggested here that the wording of Principle 31(g) unintendedly became too extensive. Therefore, an interpretation that constrains the wording is promoted here. According to

[484] These draft principles were provided for discussions on the occassion of a Multi-Stakeholer Workshop in 2007, see REES, 2nd Multi-Stakeholder Workshop, without page numbers (emphasis added).
[485] See REES, 2nd Multi-Stakeholder Workshop, without page numbers (emphasis added).
[486] SRSG, 2008 Framework, Add.1, para. 191.
[487] See above, ch. 1.5.1, pp. 26 ff.
[488] SRSG, 2009 Operationalization, para. 100.
[489] See UNGP, commentary to Principle 22.

that, a state-based non-judicial grievance mechanism should neither actively participate in changing policies, procedures and principles nor vigorously take part in the prevention of abuses of and the promotion of human rights. Its function should, in contrast, be restricted to handling grievances and administering case data. This does, however, not forbid preprocessing the facts underlying these disputes. Quite the opposite is sponsored here. For transparency is – alike the functional separation – essential to the perceived legitimacy of a state-based grievance mechanism[490], defending the former whilst denying the latter would be inconsistent. A certain separation of functions exists, for instance, within the National Human Rights Commission of Korea. There, the Director of the Policy Coordination Team, which is part of the Human Rights Policy Bureau, is responsible for analyzing human rights policies, improving legislations and practices as well as reporting to the executive and legislative branch.[491] The Investigation and Remedy Bureau, consisting of three teams, is responsible for investigations.[492] The Plenary Committee, the Standing Commissioners' Committee, and other subcommittees are responsible to deliberate on findings and render decisions.[493]

Conclusively, a state-based non-judicial grievance mechanism should be the source of information by means of providing as much information as possible in a form as comprehensive and as expedient as possible.[494] The decision as to what to learn from these data and how to implement the lessons learned should be left to a separate body though.

Upon the conclusion of the foregoing interpretation, it can be observed that the effectiveness criteria do not indicate how to actually resolve conflicts. However, it seems important to provide a brief account of possible methods of conflict resolution before turning to the practical part of this work. After all, a grievance mechanism, whose ultimate goal is to solve conflicts by definition, will be designed there.

2. Cursory overview of conflict resolution methods

Hitherto, the characteristics of an effective state-based non-judicial grievance mechanism have been discussed. However, nothing has been said as to the practices employed to resolve conflicts. A brief overview of the methods that are commonly distinguished is

490 See above, ch. 1.5.6, pp. 45 ff.
491 Art. 11(3) Organization of the NHRCK and its affiliates, Presidential Decree No. 20098 of 21 June 2007.
492 Art. 13 Organization of the NHRCK and its affiliates, fn. 491.
493 See NHRCK (Ed.) pp. 22 f.
494 See concerning the information which should be provided above, ch. 1.5.6.5, pp. 47 ff.

provided hereinafter.[495] But note that there are neither precise definitions, nor clear dividing lines.

2.1. Information facilitation and investigation

Information facilitation describes a process that collects and spreads information on grievances. However, further action is left to the addressees of the information.[496] Investigation is restricted to gathering facts and views relevant to a grievance in order to analyze and assess it.[497] Mere information facilitation or investigation is of less relevance in the present context as this method could hardly allow for all effectiveness criteria.

2.2. Negotiation

Negotiation is a process wherein the parties to a conflict negotiate a (contractual) solution bi- or multilaterally. There is commonly no third party involvement.[498] As this method could not address the common imbalances between the parties to business and human rights conflicts, it is of little significance in this context.

2.3. Mediation

Mediation and conciliation denote the same process. As in negotiation, a mutual agreement shall be achieved. However, contrary to negotiation, a neutral third party is involved in order to facilitate an agreement. [499] Thereby, the parties retain more control over the process. At the same time, they are coached and encouraged to obey to some fundamental rules. Moreover, the mediator may undertake separate meetings with the parties and collect information. Notably, the mediator can take divergences in negotiation capacities into account and support the weaker party additionally.[500] The degree of involvement and engagement of the facilitator may vary.[501] Different mediation techniques are available.[502] This method might be useful in the present context as a mediator obtains much flexibility and may take account of imbalances between the parties.

[495] This account closely follows REES/VERMIJS. CAROLINE REES chaired the UN negotiations that created the mandate of the SRSG John G. Ruggie and contributed with extensive research to the business and human rights debate.
[496] REES/VERMIJS, p. 3.
[497] REES/VERMIJS, p. 3.
[498] REES/VERMIJS, p. 3.
[499] REES/VERMIJS, p. 3.
[500] CASSIDY/GUTTERMAN/PHAM, p. 8.
[501] REES/VERMIJS, p. 3.
[502] CASSIDY/GUTTERMAN/PHAM, p. 8.

2.4. Arbitration

Arbitration has often been used to resolve commercial disputes as it is faster and less costly than adjudication.[503] In arbitration, a neutral third party that is elected by the disputants hears each party's case, conducts interviews and/or investigations and renders a decision.[504] The fact that the parties determine the arbiter may be an advantage for an expert on the relevant field can be chosen.[505] A judgment is commonly binding, though not always.[506] In most instances, it cannot be appealed. However, limited grounds that allow for a challenge of the judgment may exist.[507] Since arbitration is said to be pretty immediate and inexpensive, it might be a method to address some of the problems germane to human rights and business conflicts. It may also be relevant hereinafter as a binding third party decision may objectively review the human rights-compatibility of business activities.

2.5. Adjudication

In adjudication, a judgment is rendered. It determines rights and wrongs and may impose sanctions. Equally to arbitration, this judgment may be binding or non-binding. Unlike arbitration, the parties do normally not elect the adjudicator themselves. Adjudication further differs from arbitration in that it does mostly not include formal hearings. Instead, decisions commonly results from investigations.[508] Adjudication is potentially relevant in the present context as the arbiters of a state-based non-judicial grievance mechanism would probably not be elected by the parties and because investigations could be a means to address evidentiary problems.

2.6. Hybrids

Hybrid processes integrate components of different types of grievance process into one process. The probably most common hybrid process combines mediation with arbitration, mediation being the first step ("med-arb"). Though the opposite, "arb-med" is also a possibility.[509]

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503 CASSIDY/GUTTERMAN/PHAM, p. 7.
504 REES/VERMIJS, p. 3.
505 CASSIDY/GUTTERMAN/PHAM, p. 7.
506 REES/VERMIJS, p. 3.
507 CASSIDY/GUTTERMAN/PHAM, p. 7.
508 Cf. REES/VERMIJS, p. 3.
509 Cf. CPR, ADR Primer: An Introduction to ADR Terms and Processes, ADR Terms: Definitions (Hybrid Processes, Med/Arb, Arb/Med), <http://www.cpradr.org/Resources/ADRPrimer.aspx>, retrieved on 4 May 2014.

3. Summary

Starting from procedural guarantees enshrined in human rights treaties Part II scrutinized the requirements of an effective state-based non-judicial grievance mechanism. It was found that a grievance mechanism should entrust its stakeholders to employ it. However, people can only turn to a grievance mechanism they know about. States should therefore spread information about and raise awareness of their mechanisms. Further, states ought to ensure that those obstacles that obstruct access to courts do not hamper access to non-judicial mechanisms. Regarding the process itself, it was found that precise procedural rules should apply. Notably, equality should be ensured. This is to say states ought to mitigate cost issues, evidentiary problems and possible harassment of victims. However, legitimate confidentiality interests should equally be safeguarded. Yet, this should be brought in line with the requirement of a transparent process. Providing such a mechanism, states must obey to their human rights duties. Human rights responsibilities should, in turn, determine the outcomes. State-based non-judicial grievance mechanisms should lastly provide comprehensive and expedient information about their work to enable other bodies to protect and promote human rights in the context of business activities. A cursory overview of methods that may be used for conflict resolution revealed that mediation, arbitration and adjudication might be relevant hereinafter in conceptualizing a state-based non-judicial grievance mechanism.

Part III: A state-based non-judicial grievance mechanism

1. Introducing the proposition

On the basis of the previous elaborations, a state-based non-judicial grievance mechanism for Switzerland[510] is drafted in the remainder of this thesis. It has often been argued that NHRIs conform to the Paris Principles were very suitable institutions to host such a grievance mechanism. However, the Paris Principles require that a NHRI's mandate to promote human rights is as broad as possible.[511] A quasi-judicial competence is in fact merely seen as an optional additional remit.[512] In short, the Paris Principles do not allow for NHRIs with exclusively quasi-judicial competences. In contrast to that, it was found above that it does not seem appropriate to unify the national human rights promoter with the national human rights arbiter.[513] Confident of the accuracy of this finding, conformity with the Paris Principles is not attempted hereinafter.

The grievance mechanism[514] shall provide a remedy for people who were allegedly affected by extraterritorial operations of Swiss corporations. Therefore, it must certainly cope with the current obstacles to access to effective remedy. In addition, however, the mechanism should also be human rights based and must not be perceived as a mere "anti-business" initiative.[515] Cost and evidentiary problems are approached by seeking business' cooperation as this is believed a means to reduce the effort of investigations. The lack of causes of action and the problem of the applicability of law, which is beyond the reach of Switzerland, are approached with enshrining corporate responsibilities in precise standards. Alike, responsibilities for affiliates could be imposed upon parent companies. Eventually, the problem of providing expedient outcomes is approached with the idea of allowing for substantive remedies customized to an individual case. With regard to rights-compatibility, the importance of a third party assessment of the business operations in question is stressed. Cooperation again is believed to be a promising means to assure that the grievance mechanisms is not merely perceived as hostile to business.

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510 Note that such a grievance mechanism would have to be based on a legal foundation, preferably the Federal Constitution.
511 Paris Principles, para. 2; see para. 3 where desirable competences are enlisted.
512 See Additional principles concerning the status of commission with quasi-jurisdictional [sic] competence, Paris Principles, p. 5.
513 Cf. the finding above, Part II: The legal doctrine of effective remedies, ch. 1.5.8, pp. 53 ff.
514 The grievance procedure is shown as a flowchart in Appendix 3, p. 93.
515 ZERK, p. 6.

2. Organization

2.1. Name

> The Swiss non-judicial grievance mechanism for transnational human rights and business cases is called Swiss Commission for Cross-border Business and Human Rights.

A non-judicial the grievance mechanism could for obvious reasons not be called court or tribunal. The term committee would neither fit as this implies that a group of people votes some of its own members on the committee.[516] Commission, in contrast, would be adequate since this term[517] describes a group of people vested with certain authorities by another official body.[518] Further, the name should of course contain a reference to the issues the institution is concerned with. Though, it ought not to imply a bias towards business or human rights.[519] In light of these deliberations, the name Swiss Commission for Cross-border Business and Human Rights is considered appropriate.[520]

2.2. Legal form

> The Commission is an institution under public law with its own legal personality.

The Commission should be an administrative unit of the peripheral federal administration. This is to assure independence from governmental departments and agencies what is important for a legitimate and trustworthy mechanism.[521]

2.3. Resources

> The Commission is allocated its own funds. It directs namely its financial and human resources autonomously and reports on the application of its funds.

In line with its organizational independence, the Commission should be located in own premises and given its own resources. To safeguard the perceived as the factual independence and legitimacy, the Commission should be allocated its own funds by the Federal Parliament. It ought to have complete financial autonomy and report on the application

[516] Oxforddictionaries.com, fn. 1, Definition of committee in English, retrieved on 30 April 2014.
[517] See Oxforddictionaries.com, fn. 1, Definition of commission in English, retrieved on 30 April 2014.
[518] It is suggested that the Federal Parliament would appoint the commissioners, see below, ch. 2.4.1, p. 63.
[519] Cf. CASSIDY/GUTTERMAN/PHAM, p. 12.
[520] Schweizerische Kommission für grenzüberschreitende Wirtschaftstätigkeit und Menschenrechte/Commission suisse pour l'activité commerciale transfrontière et les droits humains/Commissione svizzera per l'attività economiche transfrontaliere e i diritti umani.
[521] See above, Part II: The legal doctrine of effective remedies, ch. 1.5.2.5, p. 30.

of its funds to maintain transparent accountability.[522] The salaries should be comparable to the remuneration of civil servants with similar tasks.[523]

2.4. Organizational structure

2.4.1. Commissioners

> The Commission consists of experts in transnational business and human rights law as well as in conflict resolution and other relevant fields. The commissioners are appointed by the Federal Parliament on proposal of the Judicial Committee.

Assigning the commissioners' posts to experts seems most important for rights-compatibility. For the commissioners must not just find any solution suitable to both parties but a solution compatible with certain rights or standards, it would be difficult for lay people to assume this function. This is accentuated by the complex nature of transnational business and human rights conflicts and the current stadium of this field, which is clearly still a development stage.[524] In addition, people appointed based on their merits seem more legitimate than, for instance, people elected on the basis of their former roles and positions or their personal network and interests. Mandating the Parliament with the appointments bolsters their legitimacy additionally. After all the delegates are directly elected and represent a variety of interests and lines of thought.

2.4.2. Stakeholder observers

> A comprehensive right of information and inspection is granted to stakeholder observers. The Federal Council appoints three observers of the profit and three observers of the non-profit sector. Further observers may be appointed if necessary and appropriate.

Based on the assumption that the business and human rights problem cannot be solved without the cooperation of states, business and civil society organizations, the procedure suggested below incentivizes corporations to cooperate.[525] This approach is likely more promising if the Commission itself exhibits some participative features.

2.4.2.1 Potential source of learning

It is suggested therefore that certain business as well as non-profit organizations are granted some kind of observer status.[526] A delegate of each of these organizations should

[522] See Commonwealth Secretariat (Ed.), pp. 13 ff.
[523] Cf. Commonwealth Secretariat (Ed.), pp. 13 f.
[524] See above, Part II: The legal doctrine of effective remedies, ch. 1.5.7, pp. 49 ff.
[525] See below, ch. 3.3, pp. 71 ff.
[526] Suitable observers might be proposed by competent units of the federal administration and appointed by the Federal Council.

obtain a comprehensive right of information and inspection in order to follow the Commission's work thoroughly.[527] This would enable them to recognize perceived or factual problems such as concerns regarding the equitability of the Commission. Based on these insights, the observers should draft an annual report wherein pressing issues could be taken up and suggestions as to possible improvements submitted.[528] Provided the observers draft this report jointly, so to say as a panel, this work might contribute to finding consensus between business and civil society. In line with this, a joint-report would assure that the observers do not just lobby for their unilateral interests but really do work together to advance the Commission and, thereby, the business and human rights case in general. However, this report must not do more than highlighting areas for improvement and suggesting pertinent while non-binding measures. A more authoritative and legitimate instance should then deliberate on these proposals and decide whether to follow up some of them.[529]

Indeed, such an observer system might take the role of a source of continuous learning. The proposed arrangement would provide a gateway to information virtually from the inside of the Commission. Yet at the same time, the observers would not be actual staff of the Commission and could not unduly interfere with an ongoing process.[530] Likewise, their joint-reports would not impartially advocate human rights or the business interests. These reports would instead only serve as an information base for truly external thirds responsible for further steps. Moreover, this observer system might bolster the Commission's legitimacy as the involvement of stakeholders is likely to enforce their trust. For the transparency that would come with these reports, the legitimacy of the Commission might also rise among the broad public.

2.4.2.2 Potential deadlock

To be sure, such a panel of observers might also end up in a stalemate if the observers reach a deadlock. However, under the condition that the Commission continues with its work in any case, the observers would have the choice either to undertake constructive

[527] The observers would have to be subject to an obligation of secrecy.
[528] Such submissions could address the grievance procedure itself or the Human Rights and Business Standards (see to the latter below, ch. 3.1.3, pp. 68 f.).
[529] Chief features must be amended by the Parliament, whereas details might be adjusted by ordinance by the Federal Council.
[530] Cf. above, Part II: The legal doctrine of effective remedies, ch. 1.5.8.6, pp. 56 f.

efforts to improve it or to turn a blind eye to a possibly not yet completely mature mechanism. A strong political will behind the Commission indicating that it is not simply abrogated again would be a prerequisite to this, though.

2.4.3. Victim support service

> The Commission maintains a service center offering support to prospective and current petitioners in order to ensure their access to the Commission and their participation in the grievance process on fair, informed and respectful terms.

As explained above, people allegedly harmed by business activities must be able to access a grievance mechanism that then must guarantee their equal participation in the process. The procedure suggested below exhibits certain arrangements for that purpose. However, the commissioners themselves should not assist one particular party since this would most likely impair their legitimacy. A victim support service should therefore assume the task of supporting petitioners in need.

2.4.3.1 Access assistance

The support center should first assist prospective petitioners with information concerning the grievance procedure, namely as to how to file a petition. It should further assist them with issues such as language difficulties, illiteracy or framing the petition in adequate terms.[531] Additionally, it might connect prospective petitioners with non-governmental organizations that could act on behalf of them or simply assist them more extensively.

2.4.3.2 Decision-making support

Certainly, some petitioners would need permanent support. Those should ideally be represented throughout the procedure by organizations acting on their behalf. However, others might only require occasional assistance. Such ad hoc help would namely be important when momentous decisions must be made. The service's decision-making support should assure that all petitioners are in a position to render their decisions on an informed basis.[532] They would therefore be informed about the options available and their consequences.

[531] See below, ch. 3.1.3, pp. 68 f., where it is noted that petitioners are more likely to frame their submission in terms of harm suffered than standards breached.

[532] See KOVICK, Appendix 8, pp. 102 ff., p. 104 f.

2.4.3.3 Mediation assistance

At the mediation stage of the cooperative procedure[533], transnational corporations would likely be represented by professional mediators. To assure equality of arms, the victims support center should ensure that the petitioners too are assisted by experts.

2.4.3.4 Litigation services

Even though judicial mechanisms shall be circumvented by means of the Commission, they become inevitable when it comes to compulsory enforcement measures. Most likely certain outcomes would have to be enforced judicially.[534] To be sure, the process suggested below tries to avoid situations where alleged victims must turn to courts themselves. However, the occurrence of such a situation cannot entirely be ruled out. Therefore, the victim support center should also be available in such occasional instances.

3. The grievance procedure

3.1. First stage: petition

> A petition may be submitted by an individual, a group of individuals, or on behalf of an individual or a group of individuals by any institution or individual authorized to do so, or any government. It may be submitted in written form or through the Commission's online form or helpline and must concern the extraterritorial operations of a Swiss transnational corporation. A petition must allege a violation of any civil or political right, or any economic, social or cultural right, or any right of a vulnerable group as defined in the Human Rights and Business Standards.

3.1.1. The petitioner

Anybody who believes to have been affected by extraterritorial business operations of a Swiss corporation should be allowed to file a petition. However, individuals directly affected may live in faraway places, be illiterate or only capable of an indigenous language. To secure their access to the Commission, it is important that petitions may be submitted on their behalf.[535]

It should be allowed to authorize any close individual, such as a family member. Further, any authorized non-government organization should be permitted to submit cases on behalf of people allegedly aggrieved. This might also be important where individuals fear

[533] See below, ch. 3.6.1 pp. 79 ff.
[534] See below, ch. 3.7.2, p. 83.
[535] Note that it would further be possible to authorize the Commission to initiate investigations suo moto. This could ultimately result in essentially the same procedure.

reprisals and wish to remain anonymous. In addition, it was suggested that governments should be allowed to submit petitions because a weak state might lack the capacities to resolve a grievance itself.[536] While such situations might occur indeed, it appears rather unlikely that a government would choose this way to address another state. Yet it seems possible that a foreign government offers support services to its citizens aggrieved by operations of a foreign corporation. However that may be, there are no obvious reasons why to bar governments from using the Commission as a channel to address grievances brought by foreign actors to their territory and citizens.

Note that it might seem important for the legitimacy of a grievance mechanism to allow corporations to file petitions too[537], for instance against non-government organizations that have damaged their reputation. However, corporate petitions are not addressed herein for three reasons. First, such complaints would clearly take another form and require a different procedure. Second, the idea that transnational corporations are in need of a mechanism other than judicial seems doubtful. Presumably, they normally dispose of the means necessary to take another organization to court if they wish to do so. And third, this thesis does simply not address remedies for companies.

3.1.2. The subject

The Commission shall ultimately provide effective remedies for human rights violations committed in a foreign country by Swiss corporations. The subject of the claim must hence be a Swiss transnational corporation. The actual question to be answered is though, how to define a transnational corporation as regards its subsidiaries, sub-contractors and suppliers or, in other terms, how to deal with the corporate veil.[538] Whereas it might be difficult to abandon this widely recognized concept, Switzerland could and should impose certain responsibilities concerning the various types of affiliates on Swiss parent companies.[539]

A broadly recognized definition of such responsibilities is not yet apparent. Nonetheless, predictability and legal certainty require reasonably clear standards providing guidance to business.[540] The determination of such standards would most likely ground on the human rights impact a company has through its operations and relations as well as on the

[536] CASSIDY/GUTTERMAN/PHAM, p. 13.
[537] Cf. CASSIDY/GUTTERMAN/PHAM, p. 13.
[538] Cf. ZERK, p. 12; above, Part I: Background, ch. 1.2.4, pp. 8 ff. addresses the corporate veil.
[539] Cf. ZERK, pp. 12 f.
[540] See above, Part II: The legal doctrine of effective remedies, ch. 1.5.4, pp. 35 ff.

leverage a corporation can exert on affiliate companies through equity participation and contractual relationships. According to the UN Guiding Principles a transnational corporation must take into account all "adverse human rights impacts that [it] may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships".[541] In light of this, it was stressed that the responsibilities of parent companies should not be based on "control" but rather on "linkage", what entails a broader area of responsibility. It was further argued that determining "control" could give rise to extensive discussions and, in turn, to strong opposition of the business community.[542] Certainly, further work has to be done in order to define the responsibilities of a transnational corporation for its subsidiaries, sub-contractors and suppliers.[543]

3.1.3. The subject matter

The rights-based approach implicit in the rights-compatibility criterion implies the universality, interdependence, inter-relatedness, and indivisibility of human rights.[544] Accordingly, the subject matter should include civil and political rights, economic, social and cultural rights as well as the rights of vulnerable groups.[545] Again legal certainty and predictability require more precise standards as to what is expected from companies. It is suggested therefore that Human Rights and Business Standards would clarify corporate responsibilities.[546] The Standards should be developed in light of the rights-compatibility criterion and, hence, turn around a no harm-standard.[547] A petition would then have to concern a breach of these standards.

With respect to this, a caveat was issued. It was argued that people affected would often express their distress in terms of harm and instead of framed in claims concerning the violation of human rights.[548] The importance of informing people about their rights has

[541] UNGP, Principle 17(a).
[542] KOVICK, Appendix 6, pp. 98 ff., p. 103. It seems however unclear if this problem could really be dodged by using a "linkage"-concept for this term too is very loose insofar as there are many different types of linkages which notably vary largely in their intensity (this range may span wholly owned subsidiaries as much as minor contractors).
[543] See the SRSG's attempt to clarify the terms "sphere of influence" and "complicity", GA, HRC/8/16; ZERK, p. 12.
[544] Cf. Commonwealth Secretariat (Ed.), p. 18.
[545] Vulnerable groups include namely women and children, minorities, indigenous persons, persons with disabilities and aged people, see Commonwealth Secretariat (Ed.), p. 20.
[546] See KOVICK, Appendix 6, pp. 98 ff., p. 106.
[547] See for more details above, Part II: The legal doctrine of effective remedies, pp. 20 ff.
[548] KOVICK, Appendix 6, pp. 98 ff., p. 106.

already been mentioned.[549] It seems probable, however, that even people who were educated on their rights would not frame their petitions in legal terms, let alone people who have never enjoyed human rights education. It is indispensable therefore that petitions are translated into legal claims; something that could possibly often not be completed without discussing the incidents in question with the petitioners. Unless this "translation" is assured, legitimacy, accessibility and equitability would likely remain hollow words in many cases.[550]

3.1.4. Filing a petition

As seen above, accessibility is paramount. Unless people are enabled to file complaints, the Commission is naturally futile. In order to make the grievance mechanism known, the Commission itself should undertake efforts to spread information. Note that also rather unorthodox means, such as radio announcements, should truly be considered.[551] Further, non-government organizations should be equipped with informative material that can be distributed. Another option might be to stipulate an information obligation in the Human Rights and Business Standards. This way, business enterprises itself would be harnessed for making the grievance mechanism known.[552] Of course, all information must be available in numerous languages.

In line with this, submissions should be accepted in several languages. Considering that the ten most spoken languages still cover less than half of the global population[553], this is the minimum that should be offered. However, whereas it might be feasible to receive written complaints in ten languages[554], it seems hardly practicable to offer a helpline in ten or more languages.

Hard facts question the possible ways of filing a complaint too. Indeed it is estimated that more than 89 % of the developing countries' population have subscribed a mobile-cellular, but only some 19 % of this subscriptions are active. Internet is used by approximately 28 % of the inhabitants of developing countries. Notably, the regions with least

549 See above, Part II: The legal doctrine of effective remedies, ch. 1.5.3.1, pp. 30 f.
550 See above, Part II: The legal doctrine of effective remedies, ch. 1.5.3.1, pp. 30 f.
551 E.g., radio announcements are believed to be an effective means in developing countries, Commonwealth Secretariat (Ed.), p. 23.
552 See fn. 568 for a further idea as to how corporations might be harnessed for spreading information.
553 See, for a compilation of several studies Saint Ignatius High School, The World's Most Widely Spoken Languages, 26 March 2014, <http://www2.ignatius.edu/faculty/turner/languages.htm>, retrieved on 25 April 2014.
554 External translators might be used on a contractual order basis (assuring confidentiality through a corresponding obligation).

mobile-cellular subscriptions are also the ones where the internet is least used.[555] Notwithstanding these numbers, online forms and helplines, which should be toll-free, are the only apparent alternatives to written submissions. There are simply no other options to file a submission obvious. Evidently, this again underlines the importance of accepting complaints submitted by non-government organizations on behalf of allegedly aggrieved parties.

3.2. Second stage: preliminary investigations

> On receipt of a petition, the Commission notifies the concerned corporation without delay. The notification gives the opportunity to comment. Equally considering this comment and the petitioner's argument, the Commission conducts preliminary investigations into the allegations in order to decide whether investigations shall be initiated. Namely petitions of frivolous nature or outside the subject matter are dismissed.

3.2.1. Notification

Equitability, or equality, demand an immediate notification of the subject of a complaint. The subject cannot participate on equal terms without knowing of an investigation in its business and the opportunity to take a stand. Likewise, a concealed process will never obtain legitimacy.

3.2.2. Preliminary investigations

Preliminary investigations should ensure that the petition is not groundless or spurious. The reputation of the corporation concerned is likely unduly harmed elsewise. Prejudgments would straightaway render the Commission illegitimate. Of course, it must further be verified that all admission requirements are satisfied. Namely, the petition must fall within the subject matter of the Commission. It has already been mentioned that this may necessitate translating the petition into legal terms. With regard to the admission of minor claims[556] or petitions concerning circumstances that are unamenable to the Commission, certain latitude should be given to the commissioners. Admitting cases that cannot be investigated for country specific reasons, war for instance, would amount to a squandering of resources. Similarly, dismissing minor claims could – provided a high case load – free resources for more serious allegations.

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[555] See International Telecommunication Union, Key 2006 – 2013 ICT data, 2014, <http://www.itu.int/en/ITU-D/Statistics/Documents/statistics/2013/ITU_Key_2005-2013_ICT_data.xls>, retrieved on 25 April 2014.

[556] Cf. CASSIDY/GUTTERMAN/PHAM, p. 17.

3.3. Third stage: choice of procedure

> Both parties are informed about the decision on admission. Provided investigations are initiated, the corporation concerned may acknowledge the need for conflict resolution and, by signing a full cooperation commitment, decide to cooperate without any reservations in the investigations. Otherwise sovereign investigations are initiated.

By providing non-judicial grievance mechanisms, home states of transnational corporations should – as seen above – offer more accessible and immediate but also less costly alternatives to judicial mechanisms. In line with this, they should be less formal and more flexible. At the same time, such an institution should be legitimate so that both parties trust it. However, unless both parties cooperate, it seems hardly possible to ensure all these imperatives. Authoritative and coercive measures such as witness orders, search warrants or orders requiring relevant documents and materials are necessarily formal and time-consuming. Thus, costs are likely to increase too. In transnational business and human rights cases this will often be more accentuated as legal assistance of foreign states is commonly inevitable at this rate.[557]

In light of these considerations, it seems compelling to strive for the cooperation of both parties. In fact, cooperation has been found to be a component of the corporate responsibility to redress harm caused by business operations.[558] And yet whereas petitioners are generally expected to cooperate, business enterprises are not likely to do so readily. Certainly, cooperation cannot be enforced. Having said that, the basis whereupon the decision (not) to cooperate is made, can be arranged in a way that favors cooperation.

In light of the aforesaid, it is suggested here that corporations should be incentivized to choose committing themselves to what shall be called full cooperation hereinafter.[559] However, in order to enjoy the advantages germane to full cooperation, the company must observe the obligations that come with it.[560] Unless it does so throughout the process, the procedure shifts to the path that applies to corporations which decide not cooperate. With this shift, it is assured that the advantages related to cooperation are withdrawn from companies that do not sufficiently cooperate.[561]

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[557] Cf. Haász, Appendix 6, pp. 98 ff., p. 99 pointing to the high caseload of many courts as a further reason why state-base non-judicial mechanisms are often speedier than courts.

[558] See above, Part II: The legal doctrine of effective remedies, ch. 1.5.7, pp. 49 ff.

[559] Cf. KOVICK, Appendix 6, pp. 98 ff., p. 98, who refers to "the 'stick' to encourage and incentive the parties to participate in a voluntary, consensual process in good faith."

[560] See below, ch. 3.4.1, pp. 74 f. for an explication of cooperative investigations.

[561] With this safeguard ELIADIS', Appendix 5, p. 97, fear that the petitioners are irreversibly barred from speaking publicly is forestalled.

It was proposed not to design the grievance mechanism with these two interdependent procedural paths. Instead, it was suggested that the cooperative path should be followed as a rule. A distinct coercive mechanism should take over if cooperation is refused.[562] This might work in cases such as domestic labor disputes. If labor standards are disregarded, employees may call upon court-like labor tribunals or ombudsmen in order to find an amicable solution. If these procedures fail, lawsuits can be filed at courts. However, as seen above, in transnational business and human rights conflicts turning to the courts is all too often either not possible or not effective. In the present context, there is simply no distinct coercive system that could kick in.

3.3.1. Advantages of full cooperation

The following advantages shall incentivize corporations to cooperate.

3.3.1.1 No shift of burden of proof

As will be shown below, establishing the facts is likely impossible without tremendous efforts unless the involved corporation cooperates. Therefore, in the case of an uncooperative corporation a shift of onus of proof should occur as soon as the commissioners tend to believe that the petitioners' human rights were harmed.[563] It follows that the efforts of establishing the precise facts would rest with the company then. Put another way, in this situation it would no longer be the Commission that must prove a breach, but the corporation that must present proof of exoneration. Cooperative companies in contrast would not have to fear this burden since their cooperation permits the Commission to keep the efforts of establishing the facts to a minimum.

3.3.1.2 Time- and moneysaving

In line with this last point, a corporation would also benefit from the cooperative procedure as it is likely to take less time and money in general. The sooner a process is concluded, the sooner it is forgotten. This is to say, the longer a process takes, the longer the corporation risks to be negatively in the focus of interests. Further, it is suggested that a cooperative process should be free for both parties. A cooperative corporation should not be seen as the "accused" party but rather as a "partner". After all, it acknowledges that its operations possibly harmed human rights and, if so, recognizes the need for remedy.

[562] ELIADIS, Appendix 5, p. 97.
[563] In other words, a presumption of breach of the Human Rights and Business Standards eventuates.

3.3.1.3 Waiver of future judicial proceedings

The following idea should also be seen in light of this notion of "partnership". Cooperating businesses should be assured that judicial proceedings concerning the same subject matter are foreclosed. It is suggested here that it should even be proscribed to handover voluntarily provided evidence to other authorities for the purpose of initiating proceedings concerning other issues. Such evidence is entrusted to the Commission with the specific intention of assisting in examining the circumstances of a particular case. This should be respected for the sake of the gains of full cooperation. Exceptions should be made though, if grave or systematic human rights violations are discovered. Such incidents commonly tend also to be serious criminal acts or even international crimes.[564]

3.3.1.4 Confidentiality

Corporations fear not only future proceedings but also other disadvantages that might be induced by information they may provide on the occasion of cooperating.[565] It is therefore important to assure confidentiality of sensitive material.[566] In principle, this is however unproblematic because the Commission conducts the investigation itself which is why confidential evidence must generally not be disclosed to a third party.

3.3.1.5 Prevention of naming and shaming

Confidentiality is closely linked to naming and shaming. This is a tool quite powerful and accordingly feared by corporations. In a cooperative procedure such "litigation tactics" must be omitted. Obviously, this pertains first and foremost to negative campaigning by the opposing party and its proxies, representatives and advisors. Essentially, this would be a cooperation duty of petitioners. Besides, omitting destructive behavior should be in the best interests of both parties as petitioners too would benefit from a smooth, cooperative process.

Certainly, the absence of deliberate campaigns by the opposing party is valuable. However, it could admittedly not be guaranteed that no single negative voice reaches the public. After all, third parties might take a stand too if they learn about the process. The

[564] CORE (Ed.), p. 20, opines that a grievance mechanism should not impact on the permissibility of parallel judicial proceedings; see also KOVICK, Appendix 6, pp. 98 ff., p. 105, issuing certain caveats as to the waiver of prospective claims.

[565] Cf. KOVICK, Appendix 6, pp. 98 ff., p. 105.

[566] This is not to say that sensitive material forcibly obtained from an uncooperative company should be released. However in the authoritative procedure, confidentiality must not in the same way be expressly assured for relevant evidence is compelled anyway.

Commission should at least try actively to forestall such prejudgments by releasing neutral and objective statements which clarify that a process is running and appreciate the cooperation of the corporation.[567] Indeed it might be argued that a cooperative company does not attempt to obscure its possible misconduct and is willing to take an active part in rectifying harm and improving its human rights impact. The company itself may even make us of this arguably commendable behavior by speaking about it.[568]

3.3.2. The full cooperation commitment

As a basis for the cooperative procedure a full cooperation commitment, which is of contractual nature, should be concluded between the Commission and the concerned corporation.[569] Such a commitment should firstly contain provisions governing the cooperative procedure, mainly the cooperation duties. Secondly, it should state the procedural rules applicable, inter alia to assure the advantages a cooperative company has. And thirdly, there should be provisions in favor of a third party, namely the petitioners, concerning the outcome of the process. This is addressed later on.[570] The cooperative procedure – as opposed to the authoritative procedure applying to uncooperative companies – is hereinafter addressed continuously by explaining the further stages of the procedure.

3.4. Fourth stage: investigations

3.4.1. Cooperative procedure: participatory investigations

> Given the corporation concerned signed the full cooperation commitment it is bound to the duty to fully participate in the investigations. Before commencing with the investigations, the Commission outlines the steps it deems necessary and informs the parties giving them the opportunity to comment. The methods of investigation include namely interviews, collecting material and documents, expert consultations and site visits.

Provided a company signs the full cooperation commitment, the commissioners could draw on its collaboration. Accordingly, no coercive measures should be necessary. In turn, a cooperative and participatory investigation implicates that the parties have an opportunity to comment on the steps the commissioners deem important to undertake.

[567] Cf. CASSIDY/GUTTERMAN/PHAM, p. 19, suggesting the release of short press statements at the beginning and the end of the process, and of the publication of interim reports.

[568] Note corporations might be offered the option to commit themselves to full cooperation detached from a specific case. Corporations doing this would likely be willing to spread information about the grievance mechanism among their employees and around their operation sites. Such a general full cooperation commitment could for instance be honored with a label.

[569] CASSIDY/GUTTERMAN/PHAM, p. 17, use the term "commitment contract" to designate an agreement for participation between the parties to a dispute.

[570] See below, ch. 3.7.2.1, p. 83.

Hence, both parties should, on the one hand, be offered the opportunity to suggest further steps. And on the other hand, they should equally be in a position to reason why they consider certain inquiries not conclusive or unreasonable. For that purpose, the Commission should inform the parties about the course of action intended and let them comment on it. In line with this, the Commission should keep the parties informed about the advancement of the investigation.[571] Such a way of proceeding ensures the parties' equal right to be heard and makes the progress of the process predictable. This in turn, is likely to foster the perceived legitimacy.

Certainly, investigations vary from case to case. Yet, there are some techniques which are likely to be applied in many cases. These methods include firstly the collection of instructive material and documents. Further, interviews should be conducted and statements obtained. Certainly the Commission must draw on materials from and interviews with the parties. This is both required by legitimacy and equitability, and a promising means of receiving instructive information. In addition, information may arise from business associations, non-government organizations, governments or other institutions.[572] Expert consultations may be helpful too. Specialists may assist in technical questions and provide independent evaluations.[573] In consistence with the cooperative nature of the procedure, such experts should be chosen consensually. Last but not least, site visits may be essential to accurately assess contentious circumstances. It has been suggested that at least one site visit should be undertaken in any case.[574] This is clearly too general. Alike the other methods, field visits should not be conducted for their own sake but whenever necessary. By virtue of cooperation, visits should be announced by the Commission. The attendance of both parties might be appropriate too. This ensures transparency and equitability. However, confidentiality of sensitive facilities and information is to be ensured likewise. Therefore it might for instance be necessary to bar the opposing party from taking photos. In any case, both parties should at least receive a summary report on the site visit.[575]

[571] Cf. UK Department for Business Innovation & Skills, fn. 406, para. 4.6.3.
[572] Cf. UK Department for Business Innovation & Skills, fn. 406, para. 4.6.4.
[573] CASSIDY/GUTTERMAN/PHAM, p. 18.
[574] CASSIDY/GUTTERMAN/PHAM, p. 18.
[575] Cf. FEENEY, pp. 17 f. with numerous suggestions on site visits.

3.4.2. Authoritative procedure: sovereign investigations

> If cooperation is refused, the Commission undertakes all necessary investigations sovereignly. For that purpose, it may make use of coercive measures. The methods of investigation include namely interrogations, obtaining material and information, expert consultations and the search of premises.

As mentioned above, cooperation cannot be enforced. If a corporation does not cooperate, the evidentiary problem discussed above must be recalled. The fact that most evidence is presumably under the control of the company becomes important here as a way must be found to obtain this evidence.[576] It is of course possible to achieve this with coercive measures. While the actual methods remain largely the same than those just described, they would have to be enforced: interviews would require summons, documents would be obtained by issuing enforceable orders and premises would be searched based on corresponding warrants. This involves obviously not only domestic courts. A need for international mutual legal assistance is likely for it must be assumed that relevant evidence is repeatedly located on foreign territory and controlled by host state subsidiaries.

Quite clearly, the conduct of profound investigation based on these methods would not be possible unless staggering efforts are undertaken.[577] It is therefore suggested that the Commission should only deepen its preliminary investigations. Once the commissioners tend to believe the operations in question did actually harm the petitioners in their human rights[578], a breach of the Human Rights and Business Standards should be assumed.[579] With this presumption, the corporation would have to provide proof of exoneration.[580]

3.5. Fifth stage: conclusion of investigation

3.5.1. Cooperative procedure: appraisal of results

> The Commission concludes participatory investigations with an appraisal of results wherein any deviations from the Human Rights and Business Standards are observed.

[576] See above, Part I: Background, ch. 1.2.6, p. 10.
[577] See KOVICK, Appendix 6, pp. 98 ff., p. 106.
[578] I.e. sufficient evidence must be found which indicates with a certain probability that the business activities at stake harmed the petitioners in their human rights.
[579] Cf. Part II: The legal doctrine of effective remedies, ch. 1.5.5.3, pp. 41 ff.
[580] Cf. ZERK, p. 12.

3.5.1.1 The importance of a third party assessment

Cooperative conflict resolution mechanisms, such as mediation, are normally not concluded with a third party assessment. Contrary to contractual rights and obligations, however, human rights are not negotiable. As seen above, there is no such thing as "discretionary human rights".[581] Consequently, a process cannot be rights-compatible absent an objective appraisal. Moreover, corporate human rights responsibilities are still at an early stage and must therefore be refined. While Human Rights and Business Standards would already substantially specify these responsibilities, there would still be need for defining these Standards more precisely. For that purpose it seems inevitable that the commissioners itself deliver an appraisal of results upon the conclusion of an investigation. There is no other way leading to the evolution of precedents and a body of "jurisprudence".

Further, an appraisal of results may address another pertinent issue. The evidentiary problems germane to transnational business and human rights conflicts appear to require less strict rules of evidence regarding the question whether an allegation shall be treated as proved or not.[582] It is argued here that an appraisal of results may take this need better into account than a formal (quasi-) judicial decision. Admittedly, this plea for flexibility stands in a certain contrast to the former point linked to predictability. Yet, this contrast may also be described as the two sides of the same coin. After all, it has been found above, that legal certainty features predictability as well as context-sensitivity.[583] Ultimately, both aspects are important for adequate adjudication and must be balanced in each case anew in order to do justice to the individual circumstances of a case.

3.5.1.2 The importance of refraining from condemnations

In a cooperative procedure, it is likely that corporations oppose a third party appraisal of their operations.[584] Yet, precedents enable business to better understand the standards that are to be observed. That in turn, enables companies to take suitable measures to circumvent further petitions concerning their activities. Hence, it might be argued that businesses benefit from the Commission's appraisals in a longer term insofar as they clarify relevant standards.[585] Nonetheless, the qualms related to a third party appraisal should be taken seriously in order that the mechanism is perceived legitimate.

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[581] See above, Part II: The legal doctrine of effective remedies, ch. 1.5.7.3, pp. 51 f.
[582] Cf. CORE (Ed.), p. 25.
[583] See to this (false) dichotomy above, Part II: The legal doctrine of effective remedies, ch. 1.5.4.1, pp. 35 f.
[584] See KOVICK, Appendix 6, pp. 98 ff., p. 105.
[585] Cf. CORE (Ed.), pp. 12 and 18.

It is therefore suggested here that cooperative corporations should not be condemned. This is why the Commission should deliver an appraisal of results instead of a verdict.[586] Note that this difference should be mirrored in the statements' formulations too. The dangerous emission of sulfur might admonished as follows: "The corporation X's mine Y ought urgently to be upgraded with a new particulate filter in order to satisfy the Human *Rights and Business Standards."*, as opposed to: "The corporation X was found to gravely breach the Human Rights and Business Standards by harming the human right to health of the employees of its mine Y". The former version appears much more favorable to a company, which may then state for instance that it acknowledges the appraisal and will immediately address the problem.

Note while the Commission would deliver an appraisal of results, wherein the concerned corporation's operations are measured against the Human Rights and Business Standards, it would not determine a substantive remedy at that stage.

3.5.2. Authoritative procedure: findings and verdict

> The Commission concludes authoritative investigations with findings whereupon it renders an enforceable verdict.

In contrast to cooperative corporations, uncooperative companies are subject to an authoritative procedure. Non-cooperative mechanisms, such as arbitration, conclude with a decision rendered by a neutral third party. These decisions are commonly binding. In accord with this, the Commission should conclude with finding a breach of the Human Rights and Business Standards, unless the proof of exoneration was provided. A verdict awarding a substantive remedy should be rendered at the same time.[587]

[586] Note that the terms appraisal of results and verdict were deliberately chosen to express a strong contrast; cf. Haász, Appendix 6, pp. 98 ff., p. 99.

[587] See for possible remedies above, Part II: The legal doctrine of effective remedies, ch. 1.2, p. 24.

3.6. Sixth stage: substantive remedy

3.6.1. Cooperative procedure: mediation of an arrangement

> Assisted by a mediator, the parties are given time to mutually find an arrangement regarding how to address the conflict as assessed in the appraisal of results. An arrangement the parties agree upon must be approved as adequate by the Commission. Otherwise, the Commission intervenes imposing an authoritative award. Either way, the outcome becomes an integral part of the full cooperation commitment.

In accord with the cooperative nature of this procedure, wherein the corporation concerned should not be condemned, the parties should be given the opportunity to agree on a customized way to remedy the grievance. However, it might be that the parties cannot find a solution in due time. If so, the commissioners should intervene and authoritatively determine an appropriate remedy. They may impose a customary remedy such as pecuniary damages. Yet, they might also be inspired by the preceding mediation and impose a remedy more innovative and bespoke to the particular circumstances of the case.

Note that final-offer arbitration[588] might be an alternative. This is to say, the commissioners would be bound to choose an arrangement offered by one of the parties instead of imposing a remedy of their own. This procedure is believed to bring the parties' positions closer together as both would try to suggest solutions which appeal to the neutral third party.[589]

Regardless of this alternative, it is reasoned hereinafter that both parties may better benefit from a mutually agreed arrangement customized to the individual conflict.

3.6.1.1 A bespoke outcome

Pure pecuniary damages seem hardly expedient in certain cases. Imagine, for instance, a situation where a Swiss transnational corporation (revenue US$ 120 billion) harmed some employees in a least developed country (GDP per capita US$ 500). If the petitioners were awarded a sum that is significant to the corporation, they would likely be lifted to an anomalous level of wealth. If, in turn, this situation were circumvented by awarding much lower amounts of money, the corporation would hardly worry about the consequences of a process.

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588 Also called "Baseball Arbitration", see CPR, fn. 509, Baseball Arbitration.

589 COLLETT, p. 269 with further references to MARBURGER DANIEL R., Bargaining power and the structure of salaries in major league Baseball, Managerial and Decision Economics 15 (1994) 433 ff. and CHELIUS JAMES R./DWORKIN JAMES B., An Economic Analysis of Final-Offer Arbitration as a Conflict Resolution Device, The Journal of Conflict Resolution 24 (1980) 293 ff.

At least in some cases, one might bypass such problems with innovation remedies. Imagine a transnational corporation would support the health systems of a region (e.g. building a hospital) where it harmed the human right to health. This might constitute a significant expense to the company on the one hand and valuable relief to the petitioners as well as to their whole community on the other. Besides, this example demonstrates that such customized agreements could be particularly apt for remedying grievances that affect whole communities, what is quite often the case.[590]

However, it is assumed that the commissioners itself would not be in a position to determine such innovative remedies suitably. It seems inevitable to involve the petitioners and maybe experts assisting them. Non-government organizations might take an important role in that regard. Their involvement could also contribute to ensuring equitability and rights-compatibility. This is to say, making sure that the petitioners are truly informed about the consequences of the process and its possible outcome. Equitability, of course, also requires equal participation of the concerned corporation. Equality would further be warranted by the engagement of a mediator.[591] Indeed the Commission should avouch for mediation on fair terms as well as for an acceptable outcome. For the latter purpose, the commissioners ought to approve any mediated solution. This is not to say that each and every detail should be scrutinized, but merely that objectively unfair arrangements must be prevented.

3.6.1.2 A face-saving deal

It might be argued that such customized outcomes would primarily be tailored to the petitioner's needs. Whereas this might be true with regard to the substance of an arrangement, this seems not necessarily exact as regards its form. It is supposed that a mediated and innovatively customized arrangement is potentially less harmful to a corporation's reputation than the court-like imposition of a customary remedy such as pecuniary damages. After all, the achievement of a mediated arrangement truly proves that the corporation cooperated throughout the process. In line with this, the public appeal of an agreement to contribute to the health care of a region, for instance, seems much more favorable as that of an imposed order to pay damages.

[590] See above, Part I: Background, ch. 1.1, pp. 3 ff.
[591] Mediators may balance inequalities between the parties' mediation capacities. See above, Part II: The legal doctrine of effective remedies, ch. 2.3, p. 58.

3.6.1.3 Justifying "arb-med-arb"

As just explained, a mediated arrangement may come with some advantages. However, the model suggested here was criticized[592] as it is akin to a reversed "med-arb" model.[593] The argument that hybrids wherein mediation follows arbitration would not work well, seems widespread.[594] Albeit it was also shown that this skepticism is not uncontroversial and very much depending on legal cultures[595], this critique should briefly be addressed. But note beforehand that the proposed model would precisely have to be called "arb-med-arb" as opposed to "arb-med" the simple inversion of "med-arb".[596]

The most common fear regarding "arb-med-arb" seems to be twofold. The first concern relates to the fact that the parties might not confide sufficient information to a mediator-arbitrator. This is because they may worry about possibly impairing their position regarding a later arbitration phase. The second concern relates to the fact that information which was provided by one party but could not be refuted by the other might be decisive in a later arbitration stage. Such a situation may occur as a result of private caucus sessions common to mediation.[597] However, both concerns seem hardly relevant, in the present context. In the procedure suggested here, mediation and arbitration are based on an appraisal of results drafted by the commissioners. This in turn results from investigations wherein the Commission determines which information it deems worth considering. Thus, problems arising out of the parties' decisions (not) to disclose information are in principle forestalled.

Another concern relates to the belief that mediation would – compared to arbitration – better facilitate an ongoing relation between the parties.[598] This again is not uncontroversial. For instance, it is thought that the impact of mediation on a relationship is positive (negative) if it does (not) lead to a mutual arrangement. This variation is obviously not possible in arbitration since there a decision is rendered in any case. In light of this, it

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592 ELIADIS, Appendix 5, p. 97.

593 This is basically a combination of mediation and arbitration where the parties mediate as many contentious points as possible before the remaining differences are arbitrated. See e.g., CORE (Ed.), p. 12.

594 See as an example ELIADIS, Appendix 5, p. 97.

595 See GOODRICH, p. 4 f. providing a brief overview with further references.

596 After all, the Commission first delivers its appraisal; then the parties mediate a resolution; and then the Commission may step in again, given that the mediation failed. Cf. GOODRICH, p. 1, fn. 3, stressing that "arb-med" is in fact mostly "arb-med-arb". Moreover, the use of the abbreviation for arbitration is, technically speaking, in any case not correct here as arbitration implies that the parties elect the neutral third party. See above Part II: The legal doctrine of effective remedies, ch. 2.4, p. 59.

597 SUSSMANN, p. 71.

598 An ongoing relation between the corporation and the petitioner is quite possible, for instance in situations where the former's operations are nearly the only place to work for the latter.

seems as "arb-med-arb" would be as favorable to continuing relations as "med-arb". Further both appear more favorable to ongoing relations than mere arbitration. This is because pure arbitration, where a consensus is excluded from the outset, precludes a corresponding possible positive impact on the relations. By contrast, both hybrids leave room for a consensus benefiting the parties' relation, before the conflict is, if necessary, settled by an arbitrator.[599] Lastly, mere mediation indeed allows for a mutual agreement favorable to the parties' relation, but it also carries with it the danger of no outcome at all.

Finally, it must be recalled that the present procedure simply cannot start with mediation for the first question to determine relates to non-negotiable human rights compliance. Hence, "med-arb" is inherently precluded. This is to say, unless mediation is completely left out, it must follow arbitration in "arb-med" or "arb-med-arb".

3.6.2. Authoritative procedure: imposing a remedy

Contrary to the cooperative procedure, the parties do not participate in the authoritative procedure. In line with this, the parties do not have a say in determining the outcome. As seen above, the commissioner award an enforceable remedy already at the time when it delivers its findings.[600] This verdict takes the form of an official order so that contempt can be criminally persecuted.[601]

3.7. Seventh stage: monitoring and enforcement

> The Commission monitors the implementation of outcomes and reports its observations. It can follow third party reports recording non-compliance. The Commission enforces compliance in courts.

3.7.1. Monitoring

As any remedy is futile unless it is implemented, monitoring is of paramount importance. Non-compliance would render the grievance mechanism illegitimate. More general, the remedy would be ineffective insofar as there would be no change for the better in petitioners' lives. Therefore, the Commission should monitor compliance. For that purpose it should undertake its own follow-up checks and draw on reports from third parties.[602] To be legitimate, these latter reports should not be taken for granted but rather be verified.

[599] See COLLETT extensively discussing the different impacts of mediation and arbitration on ongoing relations.
[600] See above, ch. 3.5.2, p. 78.
[601] See art. 292 CC.
[602] Cf. CASSIDY/GUTTERMAN/PHAM, p. 20.

Reports recording implementation ought to be released. Thereby transparency is assured and compliance incentivized: obedience is acknowledged, non-compliance blamed.[603]

3.7.2. Enforcement

To be sure, monitoring may not suffice to bring about a change for the better in people's lives. If disobedience is recorded, enforcement action should be taken.

3.7.2.1 Cooperative procedure

As indicated above, in the cooperative procedure the remedy mediated or imposed, respectively, should ipso jure become an integral part of the full cooperation commitment. Note that this provision would be in favor of a third party.[604] This contractual construct enables the Commission to turn to civil courts in order to claim the remedy on behalf of the petitioners. Thereby, it is assured that victims who turned to the Commission because of barriers to judicial remedies do not ultimately end up facing exactly those obstacles they dodged in the first instance.[605]

Indeed, a Swiss court would generally not be able to enforce specific performance abroad. However, it may adjudge damages for breach of contract. The Commission could then for instance mandate a non-government organization to use the means obtained according to the original intention.[606]

3.7.2.2 Authoritative procedure

As indicated above[607], an official order can be enforced by means of criminal law. However, this requires that certain agents of a transnational corporation are asked by name and under threat of punishment to comply with the order.[608]

3.8. Eighth stage: appeal

Awards imposed by the Commission are subject to objection to the Federal Supreme Court.

It was said that "consideration would need to be given to whether there should be some formal basis of appeal".[609] An appellate instance seems even compelling considering common procedural guarantees[610] and the finding that a state providing a non-judicial

[603] Cf. Part II: The legal doctrine of effective remedies, ch. 1.5.6.5, pp. 47 ff.
[604] The so-called third party beneficiary.
[605] See Appendix 5, p. 97.
[606] E.g. Swiss authorities cannot directly enforce that a transnational corporation builds a hospital abroad.
[607] See above, ch. 3.6.2, p. 82.
[608] PEYER, pp. 141 f.
[609] CORE (Ed.), p. 26.
[610] See notably art. 13 ECHR.

grievance mechanism must respect all its obligations in doing so.[611] Of course, no appellate body is necessary where the parties could mutually agree on remedial action. However, given the failure of mediation, the remedy imposed by the commissioners must be appealable. Naturally, the same holds true for a remedy imposed upon the conclusion of the authoritative procedure.

It seems not possible to furnish the Commission with an appellate body as it would lack independence and hence legitimacy and equitability. Administrative bodies, such as governmental agencies, are, as discussed above, neither legitimate.[612] This is for obvious reasons equally true for parliamentary committees. Establishing a further independent body for that purpose only, such as a human rights tribunal, would arguably be overinflated. Genuine courts are actually inappropriate as this grievance mechanism should offer a way to circumvent the difficulties linked to them. Yet it is nevertheless suggested here that an objection to the Federal Supreme Court should be possible, as it is the case for arbitral awards.[613] It appears easier to cope with the difficulties linked to judicial appeal than with possible dependencies and biases related to the other alternatives considered.

Indeed, the disadvantages and impediments of the judicial appeal could be addressed by means of granting assistance to the initial petitioners. Namely, the victim support service should support them; regardless whether they take the role of the appellant or the appellee. In addition, it might be appropriate or even necessary to adopt specific procedural rules accounting for issues such as costs or evidentiary problems. For instance it might be deviated from the general principle of cost allocation.[614] Moreover, a distinct division could be established in order to assure that sufficient expertise in business and human rights law, and transnational conflicts is unified in the judges.[615]

4. Time frames

4.1. Limitation period

> A petition becomes time-barred two years from the date on which a petitioner became aware of having been violated in its human rights and of the identity of the corporation responsible.

[611] See above, ch. 1.5.7, pp. 49 ff.
[612] See above, Part II: The legal doctrine of effective remedies, ch. 1.5.2, pp. 28 ff.
[613] See art. 389 CPC.
[614] See art. 106 CPC; art. 66 BGG.
[615] The judges sitting in this division could still sit in another division primarily.

Predictability and legal certainty require a period of limitation. However, appreciating the difficulties related to business and human rights conflicts, such a period should be longer than those applicable to domestic cases.[616] A limitation period of two years might be appropriate.[617] An alternative to a long limitation period might be to give the Commission discretion in setting the limitation aside under precisely defined circumstances.[618] Illegitimate procrastination must also be forestalled, though.

4.2. Time limit for appeal

> An appeal must be submitted within sixty days after the Commission issued its last decision and the corresponding reasoning.

A time limit for appeal is equally inevitable for satisfying the requirements of predictability and legal certainty. Both parties must know when the conflict is determined without further legal recourse. For the reason mentioned just above, this time limit should also be prolonged compared to customary time limits.[619]

4.3. Expeditiousness

> Recognizing the particular need for expeditiousness, the Commission conducts each process within a time appropriate to the individual circumstances of each case. It sets adequate deadlines for the parties to lodge submissions and to undertake procedural acts.

The right to an expeditious procedure is a traditional procedural guarantee. However, it is also commonly recognized that precisely defined time frames are not feasible.[620] Here, the need for an expeditious procedure is accentuated given that non-judicial grievance mechanism should be more immediate than courts. In line with this, but contrary to the traditional understanding, time frames should be indicated.[621]

Hereinafter it is attempted to propose an indicative time frame for each procedural stage. The determination of a reasonable overall duration that must not be exceeded seems virtually impossible unless one hazards the consequences of an early abandonment of the

[616] Cf. ZERK, p. 13.
[617] This is twice as long as the time limit applicable to general tort law claims under Swiss law, see art. 60 para. 1 CO.
[618] Commonwealth Secretariat (Ed.), p. 22.
[619] An appeal to the Federal Supreme Court is generally possible within 30 days, see art. 100 para. 1 BGG.
[620] See above, Part II: The legal doctrine of effective remedies, ch. 1.1.4, pp. 21 f.
[621] See the wording of UNGP, Principle 31(c); but cf. above, Part II: The legal doctrine of effective remedies, ch. 1.5.4.2, pp. 36 f.

investigations.[622] Clear is however that the Commission should impose deadlines on the parties. Otherwise, proceedings might easily be unduly delayed.

4.3.1. Initial response

The notification informing the subject about the petition might include a fourteen day term for the submission of an initial response. The term should not be too long as a corporation should be able to comment on its own operations within short time. Moreover, the process could already be significantly delayed otherwise. After all, the response must be given the same weight than the petition in deciding on the admission of a case.

4.3.2. Decision on admission

Once a petition is lodged, the Commission should soon decide on its admission. The petitioners must know whether they should approach another grievance mechanism. Equally, the subject of the petition has a legitimate interest in knowing whether the process continues. However, even preliminary investigations need some time, especially for the cases' transnational nature. Two months might be a target time.

4.3.3. Choice of procedure

At the stage of the decision on admission, the transnational corporation concerned would have had already some two or three months to consider how to proceed. Therefore, a short period of around two weeks seems enough to choose whether to cooperate or not.

4.3.4. Investigations

The time spent on investigations largely depends on whether the parties cooperate as well as on the specific circumstances of a case. Assuming cooperation, it might take six to nine months until investigations could be concluded. It must be expected that this would take considerably longer if cooperation is refused.

4.3.5. Mediation of a remedy

The time that is given to the parties to mediate an outcome should be determined by their progress. If reaching an agreement appears illusive after one week, the Commission should intervene. If achieving a consensus is still likely after two months, the mediation should continue.

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[622] Cf. CASSIDY/GUTTERMAN/PHAM, p. 24; but different FEENEY, p. 16, suggesting that NCP proceedings should last no longer than one year.

5. Information policy

> The Commission maintains transparency over its work. Namely, it ensures that its work contributes to the refinement of the Human Rights and Business Standards.

The Commission's information policy should be aligned with the need for transparency as discussed above.[623] An annual report should be published wherein an overview of the Commission's work would be given. Equally, it should inform about the Commission and its composition. Regarding ongoing cases, short press statements should keep the broad public informed. To allow for a refinement of the Human Rights and Business Standards appraisal of results and verdicts should be published, albeit without details which would impair the parties. Whereas it seems not compelling to inform about the content of mediated outcomes, this might give some guidance as to what constitutes an appropriate remedy. Remedies which were imposed must, in contrast, certainly be made transparent in order to ensure predictability and consistency. It has already been indicated that the Commission should refer to cooperative corporations in a somewhat different language than to uncooperative companies. To account for this, the Commission might for instance determine certain Sprachregelungen.

[623] See above, Part II: The legal doctrine of effective remedies, ch. 1.5.6, pp. 45 ff.

Conclusion

In Part I, at the very beginning of this thesis, it was demonstrated that business and human rights conflicts are numerous, widespread, and diverse. As explained, the cause of this permissive environment can be seen in governance gaps resulting from transnational corporations' gain in power, as well as the states' loss of such power, concomitant with ongoing globalization. Those gaps that compromise the provision of effective remedies for human rights violations caused by extraterritorial business operations were introduced in more depth. Given that any cause of action is available whatsoever, high litigation costs, difficulties in collecting evidence, separate legal identities of affiliate companies, and deficient substantive remedies were found to obstruct effective remediation in courts. The thesis then turned to the UN Guiding Principles' idea of addressing these problems with effective state-based non-judicial grievance mechanisms. Previously, little research had been conducted regarding what effectiveness might mean in this context. The actual aim of the thesis has therefore been to offer a possible answer to this question, first in theoretical terms and then in terms of a practical proposition.

For that purpose, the characteristics of an effective state-based non-judicial grievance mechanism were canvassed in Part II. Starting from the traditional understanding of effective remedies, as mirrored in procedural guarantees of human rights treaties, the UN Guiding Principle's effectiveness criteria were interpreted. It was found that a state-based non-judicial grievance mechanism (1) should entrust its stakeholders to employ it (legitimacy); (2a) should be widely made known and (2b) accessible without having to overcome the same obstacles that obstruct access to courts (accessibility); (3) should be governed by precise procedural rules (predictability); (4) should assure equality of arms, namely by offsetting common disadvantages on the victims' side (equitability); (5) should be transparent yet not unnecessarily affect legitimate confidentiality interests (transparency); (6a) should, regarding its procedural aspects, comply with the human rights duties of the state providing it and (6b), regarding its outcomes, be guided by corporate human rights responsibilities (rights-compatibility); and (7) should provide comprehensive and expedient information that can be deployed by external bodies to prevent abuse of and promote human rights. This theoretical foundation for the subsequent practical part was concluded with a cursory overview of methods that may be used for resolving human rights and business conflicts.

In Part III, this theory was applied to conceive an effective grievance mechanism for the remediation of human rights abuse caused by Swiss corporations' extraterritorial operations. Doing so, it was primarily strived for the balanced satisfaction of three imperatives. First, the mechanism must be apt to come to grips with the issues currently obstructing access to judicial remedies; second, it must be based on and compatible with human rights; and third it must not be perceived as a mere "anti-business" initiative. Considering these necessities, a "carrot-and-stick" approach to incite cooperation was suggested. A corporation would be incentivized to cooperate with advantages, including a waiver of future proceedings, no presumption of fault to shift the burden of proof, and the prevention of adverse campaigning. The corporation's cooperation would in turn contribute to address cost-related and evidentiary problems, as well as offer a way to find innovative, more expedient substantive remedies. It was further put forward that a cooperative procedure would not foreclose rights-compatibility, since an objective assessment of the operations in question could still occur. Notably, it was assumed that these elements would interact: Collaborative investigations would reduce the efforts necessary for conducting investigations under coercion and, hence, make the process swifter and less costly. Namely, corporate participation would facilitate the collection of evidence and consequently obviate an early shift of the burden of proof to the disadvantage of the corporation. Upon the conclusion of investigations, the human rights-compatibility of the business operations at stake could still be objectively assessed by a third party. Presuming that the activities are found to have caused harm, the accountable corporation would be given time to agree with the petitioners on a customized and therefore expedient way of remediation. If successful, the corporation would escape the quasi-judicial imposition of pecuniary damages.

Though it is conceivably possible to design a grievance mechanism to reduce obstacles to justice and assess misbehavior without giving rise to the idea of hostility towards business, several questions remain unanswered. To begin, any cooperative process would, in practice, have to be sufficiently appealing to encourage corporate participation. Obviously, corporations would trade-off being cooperative against the consequences of being uncooperative. Regarding the latter, it was suggested that a process including extensive coercive measures – and thus largely similar to judicial mechanisms – should apply to uncooperative corporations. The exact obligations for cooperation and precise consequences of insufficient participation would also have to be considered in more depth. Further proposals for fostering sincere corporate cooperation throughout the process are

certainly welcome. It would be particularly interesting to devise ideas after consultations with business representatives.

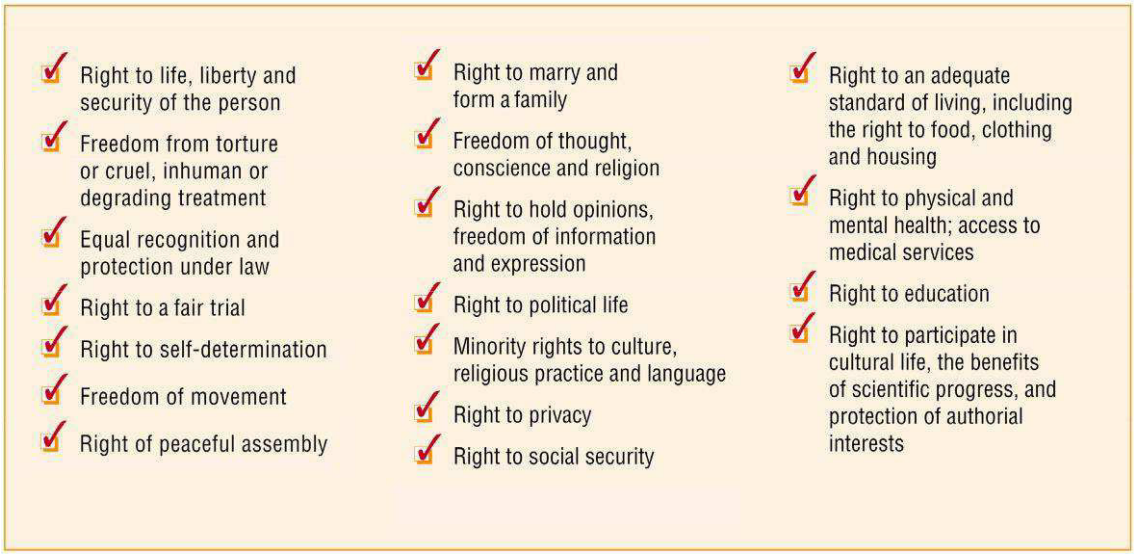
Another block of questions relates to the rights-compatibility of such a grievance mechanism. If business operations are to be assessed for their conformity with human rights, then human rights and business standards must be precisely defined. This substantive law question could not be addressed herein due to the procedural focus of this thesis.

Yet another set of questions concerns possible outcomes and their enforcement. It was proposed that the substantive outcome of a grievance process could take the form of a third party beneficiary clause in a contract between the corporation concerned and the institution in charge of the grievance mechanism. Such a construct would enable the institution to enforce the outcome in civil courts in order to prevent victims from having to embark on this thorny path by themselves. Clearly, there is still much room for answering the question how corporate-related human rights violations, once found to have occurred, can be remediated.

A fortiori, this is true for the much larger question how states can manage to catch up again with cross-border trade and transnational corporations. States must reconquer a position to prevent and remedy corporate-related human rights abuse, regardless of where such abuse occurs. A further contribution to this global struggle may be concluded by recalling Ruggie's oft-repeated but ever-accurate dictum:

"There is no single silver bullet."

Appendix 1 Non-labor rights impacted by business[624]

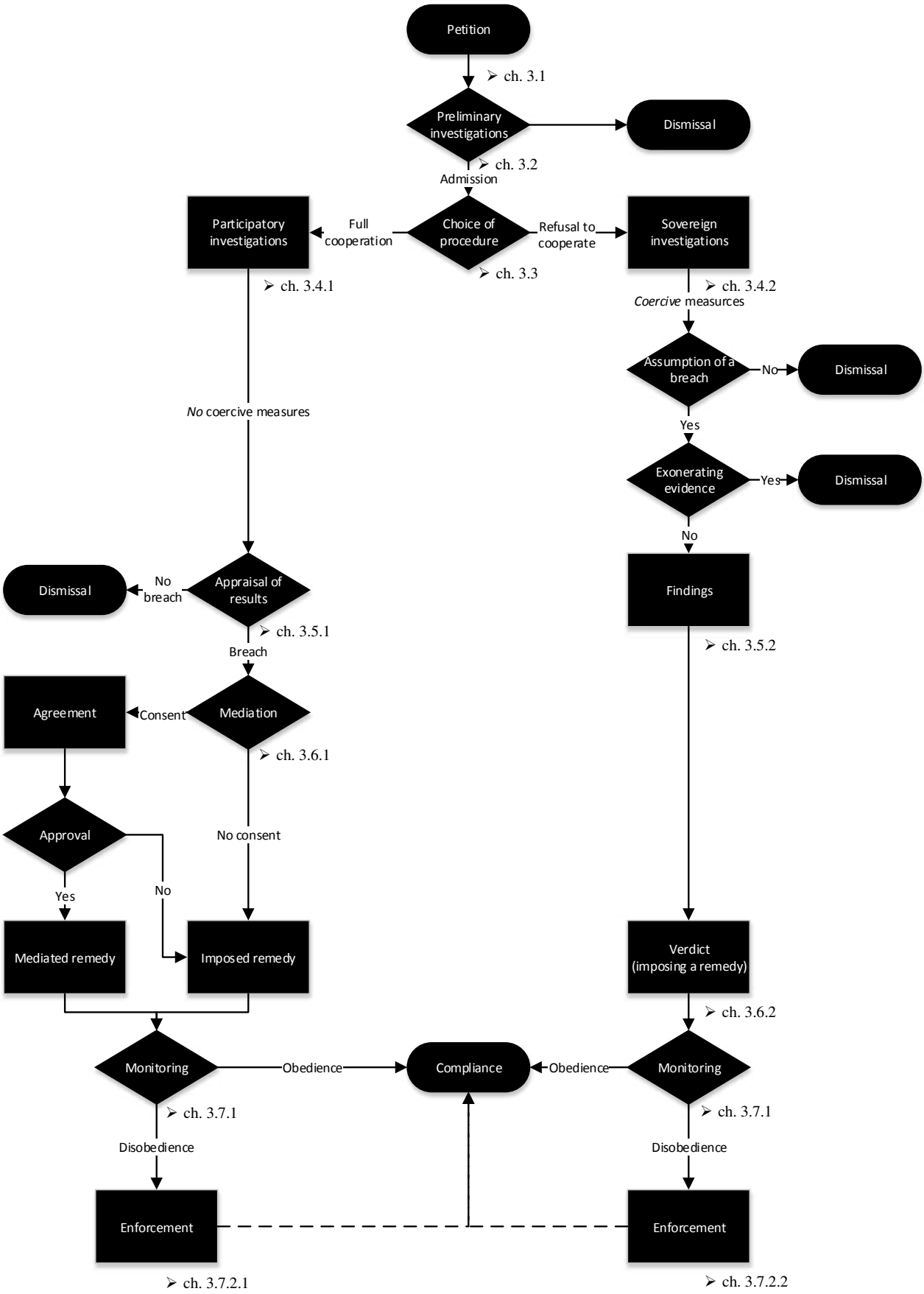


[624] SRSG, Survey of allegations, p. 13, fig. 4.

Appendix 2 Labor rights impacted by business[625]

[625] SRSG, Survey of allegations, p. 12, fig. 3.

Appendix 3 Grievance procedure (flowchart)



Appendix 4 Outline of a state-based non-judicial grievance mechanism

The following outline of a state-based non-judicial grievance mechanism was sent to several experts with the request for some constructive remarks. The few answers received can be found in the following appendices.

Human Rights and Business: Outline of a state-based non-judicial grievance mechanism

Introduction

The institution shall provide a remedy for people who were allegedly affected by extraterritorial operations of Swiss TNCs. In order to remove existent barriers to judicial remedies, the process takes costs, evidentiary problems and difficulties as to the possible distance between likely claimants and the institution into account. For the same reason, it addresses issues concerning standing, the corporate veil, extraterritorial investigation and enforcement. Recognizing that the process should seek not to be perceived as a mere "anti-business" initiative, TNCs shall benefit from a cooperative attitude.

First phase: filing and accepting a complaint

People who were allegedly affected may submit a complaint as individuals or as groups. They may equally authorize third parties (e.g. a family member or a NGO) to act on their behalf. The subject of the complaint has to be a Swiss TNC. The parent's responsibility for "subsidiary and supply-chain abuse" will be determined by means of a definition of "control". This definition takes equity participation as well as contractual relationships into account. The subject matter includes civil and political rights, economic, social and cultural rights and the rights of vulnerable groups.[1] An allegation must concern precise Human Rights and Business Standards (HRBS), which are yet to be defined. **- to be continued**

[1] Namely women, children, minorities and indigenous persons, disabled and aged people.

In the wake of a submission, the institution gives notice to the TNC, which may comment on the allegations within 14 days. The institution undertakes preliminary investigations resulting in the admission or the dismissal of the complaint. In the former case, the subject is notified and given a 30 days term within which it must choose between Full Cooperation and No Cooperation. This determines the applicable procedure. Full Cooperation leads to a Full Cooperation Commitment that is of contractual nature. It is this procedure that is mainly outlined hereinafter.

Second phase: Participatory Investigation

In the Full Cooperation-procedure the institution conducts a Participatory Investigation wherein the parties participate voluntarily (e.g. materials are submitted, interviews take place, investigators are invited to inspect premises, experts to consult are jointly chosen). In line with this amicable process, adverse measures must be omitted (no adverse statements in public, waiver of future judicial proceedings[2]). As no formal, time-intensive coercive measures are necessary, the process is relatively speedy and cost-effective. It should last no longer than six months. Accordingly, it shall generally be entirely free for both parties. However, if the TNC does not entirely meet cooperation standards, a shift to Authoritative Investigations may be induced. This implies not only costs but also coercive measures and the rejection of the procedure's amicable character.

Authoritative Investigations apply from the beginning if the TNC choses No Cooperation.

Third phase: Appraisal of Results

At the end of the process, both parties may give their view within 30 days. Within the next 60 days, the institution delivers its Appraisal of Results. Therein the outcomes of the investigation are described and it is stated whether certain HRBS were disregarded.

In a No Cooperation-case the institution delivers its Findings and Verdict. This includes both, observations regarding the compliance with the HRBS and, possibly, the award of an appropriate remedy. **- to be continued**

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[2] Save grave human rights violations are found.

Fourth phase: Mediated Remedy Negotiations

As there is neither a quasi- nor a judicial verdict, the parties are – in the first instance – free to negotiate how to proceed with the Appraisal of Results. However, the Full Cooperation Commitment includes the pledge to genuinely attempt to negotiate a mutually satisfying outcome which takes the Appraisal of Results into account. The parties are assisted by a mediator. A Negotiated Remedy may take a more innovative and suitable form (e.g. persistent pay raise) than mere (punitive) damages in form of simple nonrecurring payments to each aggrieved individual. A TNC might prefer such a face-saving deal (conceive of, e.g., building a new school) over an authoritatively imposed duty to compensate. However, an outcome is paramount. Therefore, the institution may undertake an Intervention by Contingent Award after a 60 day term or as soon as the Mediated Remedy Negotiations appear to have lost any prospect of success. This means, the institution steps in with an appropriate solution.[3]

The entire Full Cooperation-process should be concluded within 14 months. A No Cooperation-process likely takes longer as formal coercive measures are probably necessary.

Fifth phase: Implementation and monitoring

Regardless whether the outcome was negotiated or the institution had to step in, the outcome does not take the form of a (quasi-) judicial decision. Rather, it becomes ipso jure an integral part of the Full Cooperation Commitment. If needed, it can hence be enforced through civil courts. The institution monitors the correct implementation and publicly reports on it. In the case of non-compliance, it assists the aggrieved party in the civil procedure.

In the case of a No Cooperation-procedure, the Findings and Verdict takes the form of an official order. By virtue of this, contempt can be criminally persecuted.

Reto Walther, April 2014; contact: walthret@students.zhaw.ch

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[3] This may either be an innovative award (e.g. incentivized by the negotiations) or a simple nonrecurring payment to each aggrieved individual.

Appendix 5 Feedback from Pearl Eliadis

The following feedback was provided by Pearl Eliadis. She is a human rights lawyer whose practice focuses on national institutions (mainly human rights, ombudsperson and transitional justice institutions), democratic governance, and strategic advice to organizations on public interest litigation (see PEARL ELIADIS, human rights law, <http://www.rights-law.net>, retrieved on 25 April 2014.

Note: The following text was in no way changed or revised.

Walther,

Unfortunately, my time is somewhat limited, but I had a couple of brief reactions.

Even in summary pieces, you should define your terms. I assume - perhaps incorrectly - that by TNC you mean transnational corporations. And if so, that you are dealing with claims brought by non-Swiss nationals as a result of activities of TNCs overseas? Most supply chains will not be covered by a traditional understanding of corporate control, so you may want to think about that.

Second, I am not sure the voluntary/non-voluntary distinction will work as described because ultimately, the sanction of the state will apply, so it might be easier to create one path (which is the case for most ordinary human rights mechanisms) whereby parties normally cooperate, but if they don't the coercive mechanisms exist. If the cooperative method is chosen and the Swiss corporation reneges on its commitment, the plaintiffs, who are likely to be disadvantaged non-nationals, with then have to sue in contract in Swiss courts, with all the costs that this entails. Further, they would be barred from speaking publicly unless exceptions are built in. This is highly defendant-oriented.

You characterization of damages is problematic. Most human rights tribunals treat punitive damages as the exception, and pecuniary damages, including reinstatement and compensation for wages, as the norm.

Finally, mediation tends to work best at the front end of the process, not the back end. I see that you want to favour rights-based mediation, but mediation is shown to work best as early as possible.

Hope this helps

PE

Appendix 6 Feedback from Veronica Haász

Veronica Haász is a PhD candidate at the University of Pécs. Her research focuses on NHRIs, notably their contribution to the United Nations human rights system and the transformation of ombudsperson into NHRIs. Further, she works with the National Human Rights Bodies of the European Union Agency for Fundamental Rights (see <http://haasz.org/de/author/>, retrieved on 5 May 2014)

Note: This feedback was provided in form of comments within a .pdf-document. Therefore, it had to be process in order to include it hereinafter. However, Haász' remarks were in no way changed or revised.

Remark: institution / mechanism / process > I would suggest to use only one of these expression for better understanding

Reference: —

Remark: Since this is an important attribute of this mechanism, I would expand this a bit more already here.

Reference: Recognizing that the process should seek not to be perceived as a mere "anti-business" initiative, TNCs shall benefit from a cooperative attitude.

Remark: Why is this preliminary notice needed?

Reference: (…) the institution gives notice to the TNC (…).

Remark: Based on the sample of other judicial and non-judicial grievance mechanisms, I would suggest the following order of procedure:

1. checking admissibility

2. notifying the parties with setting clear deadlines for response

Reference:—

Remark: Instead of or beside emphasizing the voluntary nature of participation, I would list the exact powers which characterizes this Participatory Investigation, e.g. freely considering any questions falling within its competence; hearing any person; obtaining any information and any documents necessary for assessing situations falling within its competence; entering any premises etc.

Reference: (…) a Participatory Investigation wherein the parties participate voluntarily (e.g. materials are submitted, interviews take place, investigators are invited to inspect premises, experts to consult are jointly chosen).

- to be continued

Remark: I would argue with the sensitive nature of business.

Reference: In line with this amicable process (…).

Remark: Primarily not because of this are non-grievance mechanisms speedy. They are not so time consuming as judicial procedures, whereas courts are often burdened with cases and the formal nature of their procedures also requires more time.

Reference: As no formal, time-intensive coercive measures are necessary (…).

Remark: Free in which regard?

Reference: (…) entirely free (…).

Remark: What are these cooperation standards?

Reference: (…) entirely meet cooperation standards (…).

Remark: When does the process end?

Reference: At the end of the process (…).

Remark: I would formulate this differently: "an assessment is made in line with HRBS".

Reference: (…) it is stated whether certain HRBS were disregarded.

Remark: Instead of "Verdict", I would use another expression, which fits better to non-judicial grievance mechanisms, like decision or recommendation.

Reference: (…) Verdict (…).

Remark: I would expand it in a couple of words what this intervention means.

Reference: (…) Intervention by Contingent Award (…).

Remark: Why is this opportunity in foot note? I would put it in the main text.

Reference: This may either be an innovative award (e.g. incentivized by the negotiations) or a simple nonrecurring payment to each aggrieved individual.

Remark: This is too vague. How can a civil court procedure initiated?

Reference: If needed, it can hence be enforced through civil courts.

- to be continued

Remark: as amicus curiea

Reference: In the case of non-compliance, it assists the aggrieved party in the civil procedure.

Remark: How is it possible? If this non-judicial grievance mechanism is empowered to take legally binding decisions, I would emphasize this in the beginning, because this is a very important feature of the mechanism.

Reference: (…) the Findings and Verdict takes the form of an official order.

Remark: Similarly to the civil court procedure above, I would expend a bit more what the mechanism does in this regard. How the criminal procedure follows its procedure.

Reference: (…) contempt can be criminally persecuted.

Appendix 7 Feedback from Jonas Grimheden

The following feedback was provided by Jonas Grimheden. He is the Head of Sector Access to Justice, Freedoms and Justice Department, European Union Agency for Fundamental Rights. The focus of his work lies on international procedures and mechanisms including NHRIs (see European Union Agency for Fundamental Rights, 2013, <http://fra.europa.eu/en/person/grimheden-jonas-0>, retrieved on 28 April 2014).

Note: The following text was in no way changed or revised.

Dear Reto,

Thanks for sending this to the Director of FRA. He is however not able to respond to your request but I offer my humble views:

- Concise and seemingly rather realistic model you are suggesting
- Detailed suggestions by Ruggie and other such authorities are not referenced
- The cooperative incentives are positive but the right to access justice must exist and is not so clear with the no cooperation-path
- Disabled should be ‘persons with disabilities’

Kind regards,

Jonas

Appendix 8 Feedback from David Kovick

The following feedback was provided by David Kovick. He is a senior advisor with Shift Project non-profit center for business and human rights practice. He also supported the work of the SRSG John G. Ruggie (see Shift Project, 2012, <www.shiftproject.org>, retrieved on 25 April 2014.

Note: The following text was in no way changed or revised.

Dear Walther -

Many thanks for your message, and for sharing your 2-page draft. I'm a Senior Advisor at Shift, a former mediator that specialized in international company/community conflicts, and our resident 'expert' on grievance mechanisms.

I read your 2-pager with great interest, as this is indeed a very hot topic in the international public dialogue around the third pillar of the UNGPs. I was just last week at a conference in The Hague on issues related to non-judicial grievance mechanisms, and I regularly do work with all types of actors across the grievance mechanism landscape with respect to business and human rights (multi-national companies, international financial institutions, the National Contact Points of the OECD Guidelines, supplier factories, multi-stakeholder initiatives, etc).

I offer the following feedback below with a constructive intent -- as ideas for your consideration as you further develop your research. I also appreciate that what you've provided is an initial 2-page brief outline, and some of the points below might already be part of your thinking in a more robust explanation of how the mechanism would be designed, structured and function, or I may have misunderstood what is intended… But I hope these thoughts below do add to your thinking as you develop the ideas further. This is a challenging space, and you are brave to wade into it!

First, as a former mediator, and based on my experience in the field, the emphasis that your proposed mechanism places on dialogue-based approaches rings very true and appropriate. And the effort to strengthen the 'shadow of the law' within which parties would engage in such a process is important -- the 'stick' to encourage and incentive the parties to participate in a voluntary, consensual process in good faith.

- to be continued

That said, it is often much harder to achieve this in practice. So this begs the question, where does the authority and compulsory or sanctioning measures come from? I know your paper is focusing on the 'Full Cooperation' side of the equation… but its effectiveness (and differentiating it from a mechanism like the NCPs) depends to a large extent on that compulsory authority -- to initiate authoritative investigations, to issue binding findings and a verdict -- should a company choose not to cooperate. So in many ways, it's a bit far of a leap to assume that this can be easily achieved. It would clearly require the power of the state behind it (with enabling legislation/statutes), and judicial-style penalties or sanctions that would compel a company to turn over information, allow an investigation, comply with a verdict that it did not consent to.

So, first, a comment about 'alignment with the GPs:

- The definition you offer in the second paragraph about determining whether a parent's responsibility exists for "subsidiary and supply-chain" is based on the concept of "Control". This is in fact much narrower than the definition of responsibility for an impact articulated in the UNGPs, which can be based on 'cause, contribute, or linkage'. The idea of 'control' eliminates the concept of 'linkage', which is one of the really important contributions of the UNGPs in moving the dialogue around business impacts forward. You may be doing this deliberately, as there are different implications for remedy if the impact is 'caused' or 'contributed to', as opposed to 'directly linked to' a company's operations, products or services… But it is an important narrowing, that is likely to end up producing important (and perhaps lengthy and technical) determinations and arguments at the front-end of a case -- and likely to produce substantial push-back from companies if they disagree with that determination of 'control'.

- to be continued

Second, some comments on the 'Effectiveness Criteria', on paper and in practice, with the proposed mechanism:

- The first is with respect to Accessibility: One of the biggest challenges these types of 'home country' (as opposed to 'host country') mechanisms face is that people on the ground, the ones who suffer impacts from business activities, often simply don't know that they exist. That's the first barrier. The second is that even if they know some mechanism exists in Switzerland, they may have no idea that the company that has caused the impact is connected to (or parented by) a company in Switzerland. The third is that impacted individuals and communities often face barriers in terms of understanding how to file a complaint, the rules/procedures of a particular institution or mechanism, etc. They often face initial barriers of knowing how to file a complaint (both in technical terms, what the complaint should look like, and in practical terms -- they may not have access to the technologies needed to file a complaint, like internet connections). This could potentially be addressed by enabling third-parties (NGOs and family members) to file complaints on their behalf… but they first need to find these parties who can help them.

- the second is with respect to Equitability: The parties in these types of disputes are often very unequal in terms of access to information, legal advocacy or support, capacity to engage in negotiations, etc. This comes into play in particular when it comes to evaluating potential remedies in a negotiated context-- what's fair, what's appropriate, what else might be possible. So one question would be whether and how the process can ensure that parties (particularly communities or individuals) have access to these types of capacities, in order to make informed decisions and participate effectively in the process.

- to be continued

- the third is with respect to Rights-Compatibility: The mention of 'adverse measures being omitted' -- and specifically, the waiver of future judicial proceedings, is very tricky ground, and very much at the center of current debates. Some sort of waiver of future claims (with the exception of cases of gross human rights violations) clearly needs to be possible -- otherwise, why would a company agree to a mediated settlement? However, requiring that waiver up-front, before a process has resulted in a remedy, is definitely questionable, and would be very much challenged by NGOs currently participating in international discussions about this topic (See the Barrick examples from Papua New Guinea and Tanzania)… and making sure people know what they're signing, so that it is truly informed consent, is another challenge. And I've also heard NGOs question even the process of requiring waivers after a remedy has been agreed to, on the grounds that in so many instances, parties may not be making truly 'informed' decisions -- because they do not have the same level of legal understanding or capacity about what other options might exist (in terms of other mechanisms or opportunities for remedy) or access to advocates or expertise to help them make those decisions in a truly informed way.

Third, some observations from practice:

- In practice, I think you would be unlikely to find too many companies who would be willing to sign a 'Full Cooperation Commitment' up front… where that process includes the power of a third party to impose a remedy if the parties do not reach consensual agreement on one, which could then be enforced in civil court. And related to that, where they would be required to turn over information (some of which may be deemed sensitive and disadvantageous to their cause/case). This is particularly true where there is a 'twin' process -- of dialogue/mediation on the one hand, and quasi-adjudication on the other. The NCPs, for example, often face this challenge, and they don't even have any real sanctioning power or ability to impose remedy. Form what I've seen in practice, companies are simply reluctant to share information that could eventually be used against them, unless required by a judicial process to do so. In many ways, the specific aspects of this process that might address some of the challenges of existing processes (like the NCPs), are the same aspects that are going to provide challenges in providing the right incentives for parties to participate.**- to be continued**

- In practice, addressing the evidentiary problems and distance between this mechanism and the location of the impacts is likely to be tremendously resource-intensive. The mechanism sits in Switzerland, while impacts may occur on the other side of the world. It's certainly possible for investigations and interviews to be conducted in remote locations -- and indeed, mediations with affected parties as well, unless they're being flown to Switzerland, which might raise other issues -- but both expensive and challenging in practice to find third parties that would be perceived as credible by all relevant involved parties.

- The requirement that an allegation much concern a Human Rights and Business Standard (still to be defined) is not at all unreasonable -- indeed, there has to be some basis of standards and some clear expectation of corporate conduct for the process to be legitimate. And yet, in so many cases, those who are impacted do not frame their complaints in terms of a human rights issue… but rather, in terms of the impact they have felt or the harm they have suffered. Again, this can be addressed by lowering the threshold for submission, and providing assistance to the parties (or interpretation by the mechanism) which translates those impacts that are felt and suffered into a human rights issue…

Lastly, a comment about Legitimacy and the connection to design processes. Designing effective grievance mechanisms which work in practice, which identify and address potential barriers to accessibility, and which are perceived as legitimate and credible by the stakeholders for whose use they are intended is often *best* achieved through a process of participatory design -- involving those stakeholders in the process of designing the mechanism. That means Trans-National Companies from Switzerland, and it means impacted communities and/or those who would represent them. So, in practice, this is a different approach from 'designing the ideal mechanism on paper' -- it requires stakeholder engagement even from the design phase.

You also might consider some kind of stakeholder oversight body -- which has a responsibility to review how the mechanism is performing, whether it is providing effective remedy in practice, etc...

Best of luck in your continuing work -

David.