

Overview of a Selection of Existing Accountability Mechanisms for Handling Complaints and Disputes



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June 2007 | Working Paper No. 37

A Working Paper of the:

Corporate Social Responsibility Initiative

A Cooperative Project among:

The Mossavar-Rahmani Center for Business and Government

The Center for Public Leadership

The Hauser Center for Nonprofit Organizations

The Joan Shorenstein Center on the Press, Politics and Public Policy

Citation

This paper may be cited as: Rees, Caroline. 2007. "Overview of a Selection of Existing Accountability Mechanisms for Handling Complaints and Disputes." Corporate Social Responsibility Initiative, Working Paper No. 37. Cambridge, MA: John F. Kennedy School of Government, Harvard University. Comments may be directed to the author.

Corporate Social Responsibility Initiative

The Corporate Social Responsibility Initiative at the Harvard Kennedy School of Government is a multi-disciplinary and multi-stakeholder program that seeks to study and enhance the public contributions of private enterprise. It explores the intersection of corporate responsibility, corporate governance and strategy, public policy, and the media. It bridges theory and practice, builds leadership skills, and supports constructive dialogue and collaboration among different sectors. It was founded in 2004 with the support of Walter H. Shorenstein, Chevron Corporation, The Coca-Cola Company, and General Motors.

The views expressed in this paper are those of the author and do not imply endorsement by the Corporate Social Responsibility Initiative, the John F. Kennedy School of Government, or Harvard University.

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The homepage for the Corporate Social Responsibility Initiative can be found at: <http://www.hks.harvard.edu/m-rcbg/CSRI/>

SUMMARY

This paper forms part of the research background to a project of the Corporate Social Responsibility Initiative at Harvard University's Kennedy School of Government. The project is focused on accountability mechanisms for resolving complaints and disputes in the business and human rights arena. It aims to examine the strengths and weaknesses of existing complaints or dispute resolution mechanisms in order to highlight lessons to be drawn from their experience, consider how they might be improved and explore what model mechanisms might look like for the field of business and human rights.

This paper sets out in summary form a range of existing complaints-cum-dispute resolution mechanisms from a variety of different contexts, whether national or international, private or public, based on law or voluntary standards. It includes some mechanisms that involve governments but not business, as these may also contain elements of interest and use in addressing disputes arising in the corporate arena. The aim here is to describe the mechanisms as factually as possible. This provides a platform for further analysis as to how effective these mechanisms are and how well they are implemented, but such judgments are not the purpose of this paper.

The mechanisms could be categorised in a variety of different ways. Here they are ordered roughly along a spectrum from the judicial and quasi-judicial, through binding and non-binding arbitration, investigatory processes linked to specific sanctions, mediation and conciliation, and finally investigatory processes linked to political or public pressure. This should not be taken to imply that mechanisms at one or other end of the spectrum are most effective. Where a mechanism provides for two or more approaches, it is ordered according to its main focus or preferred approach¹. As will be seen, there are considerable variations among mechanisms that fall nominally under the same category. There are also common elements between mechanisms at different points along the spectrum. It is worth touching here on some of the patterns that emerge.

Who can bring a complaint

Some mechanisms allow only members of the same 'club' to bring a complaint (WTO, Forest Stewardship Council (FSC), Ethical Trading Initiative (ETI)). Many others are designed specifically to give avenues for third parties to bring complaints. Most of these require that the complainant be directly affected or authorised to represent those who are (North American Agreement on Environmental Cooperation (NAAEC), UN Human Rights Treaty Bodies, the World Bank Group's Compliance Adviser Ombudsman (CAO), European Court of Human Rights (ECtHR)). The WTO permits the possibility of accepting 'friend of the court' (amicus curiae) NGO briefs, while Bilateral Investment Treaties (BITs) generally exclude NGO participation. The South African Human Rights Commission (SAHRC) allows virtually any person or group to bring a complaint. The International Committee of the Red Cross (ICRC) has to identify complaints through its

¹ Given its confidentiality provisions, it is hard to assess whether the Court of Arbitration for Sport more frequently uses mediation or arbitration. It is listed according to the arbitration provision.

visits to places of detention. The Business and Human Rights Resource Centre (BHRRC) identifies the disputes it publicises through an on-going review of information coming from its network.

Asymmetrical application

Certain mechanisms are binding in asymmetrical ways. The OECD Guidelines bind states to promote the guidelines, including through the complaints mechanism of the National Contact Points, whilst the guidelines do not bind the companies which are their subject. Bilateral Investment Treaties bind states, yet investors may use them to bring a complaint against a state while states cannot use them against investors. The American Convention on Human Rights binds States Parties vis-à-vis their citizens, yet citizens must take complaints to the Inter-American Commission as only states and the Commission can take them to the Inter-American Court.

Local or domestic remedies

Some mechanisms require the pursuit or exhaustion of domestic remedies before resorting to their complaints procedure (UN Treaty Bodies, NAAEC, European Court, Inter-American Commission), where others explicitly (BITs, WTO) or by their nature (ICRC, BHRRC) do not. Typically, labour rights mechanisms based on voluntary standards urge resolution of disputes at the level closest to where they arose (Social Accountability International (SAI), Workers Rights Consortium(WRC), Fair Labor Association (FLA), ETI), as does the FSC.

The nature of complaints

Some mechanisms identify which complaints they will prioritise based on whether they reflect an institutional aim such as the advancement of their wider goals (NAAEC, OECD), whether they could lead to wider systemic change (WRC) or whether they suggest a particularly serious breach affecting more than one individual (FLA, ETI). The UN's 1503 procedure will only proceed with cases that suggest a pattern of gross and widespread violations by a government. The Kenyan National Commission on Human Rights (KNCHR) uses a different mechanism of public enquiry where circumstances suggest a wider pattern or trend of abuse. And the ICRC draws on the evidence of repeated individual abuses to seek systemic changes in places of detention.

Methods of handling a dispute or complaint

The Kenyan National Commission on Human Rights has arguably the widest range of possible dispute resolution tools at its disposal, from mediation/conciliation, to public hearings, to public inquiries, to bringing a case to court. The South African Human Rights Commission's scope of action is almost as varied, while the National Human Rights Commission of India is constrained from using any alternative dispute resolution methods. A number of mechanisms provide for or require efforts at conciliation/mediation prior to more binding processes (WTO, FSC). The Cambodian Arbitration Council allows for moves not just from conciliation to arbitration, but freely

between the two as the process evolves (a method more typical in Asian than western contexts). The KNCHR starts with a thorough investigation before identifying a process for handling the dispute – whether conciliation, public hearing or any other. The CAO has moved away from prior investigations, first seeking to establish what means of resolution to pursue, with the possibility of investigations following later. The SAHRC may begin with either conciliation/mediation or investigation; if the latter, they are able to move back to conciliation or mediation at any time they deem it useful.

Enforceability

Mechanisms based on the direct application of international law have very variable levels of enforcement. Bilateral Investment Treaties and the Court of Arbitration for Sports (CAS) provide for binding arbitration enforceable in national courts; under WTO dispute settlement procedures one party can enact sanctions against the other if the latter does not comply with a ruling; and the UN Human Rights Treaty Bodies produce non-binding recommendations following a purely paper-based examination. The NAAEC provides for the possibility of public exposure if a member state is found in breach of its own environmental laws.

Mechanisms based on national law may be quasi-judicial but have non-binding outcomes (the Indian National Human Rights Commission) or use non-binding dispute resolution methods under which an agreement between the parties can be enforced through the national courts (KNCHR, Cambodian Arbitration Council).

Confidentiality

A number of mechanisms provide for confidentiality during a complaints/dispute process (FLA, SAI, CAO, SAHRC, KNCHR, OECD). Some conduct the entire process openly to the public (INHRC, ECtHR) or to their members (FSC). Others provide for confidentiality throughout (some BITs, CAS). And in the case of the 1503 process, the process and outcome are even confidential from the complainant. By contrast, some mechanisms use the fact (BHRRC) or possibility (NAEEC, IACHR) of publicity as an incentive for engagement or sanction for non-cooperation. Many processes allow for confidentiality of a complainant's identity, if requested; the Indian NHRC precludes such confidentiality bar exceptional cases; the WRC presumes confidentiality of the complainant unless they waive it after having received advice.

Scale

The ICRC handles complaints on the largest scale, albeit they by definition have to go and seek them out. National human rights commissions and UN complaints mechanisms often handle complaints in the hundreds or thousands. Many of the voluntary initiatives addressing labour rights handle less than a dozen complaints per year, while the CAO is in single digits. Taken together, the 39 OECD National Contact Points dealt on average with 16 complaints per year (of an average of 22 complaints submitted) between June 2000 and June 2006.

LIST OF MECHANISMS COVERED

(organized as far as possible in the following order: judicial, quasi-judicial, binding arbitration, non-binding arbitration, investigatory processes linked to specific sanctions, mediation and conciliation, investigatory processes linked to political or public pressure)

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THE MECHANISMS

1. EUROPEAN COURT OF HUMAN RIGHTS

Background

The European Court of Human Rights (ECtHR) was established in the 1950 European Convention on Human Rights, an instrument of the Council of Europe (CoE). The CoE has 46 Member States. Its stated aims are to protect human rights, pluralist democracy and the rule of law; to promote awareness and encourage the development of Europe's cultural identity and diversity; to find common solutions to the challenges facing European society; and to consolidate democratic stability in Europe by backing political, legislative and constitutional reform. Its main decision-making body, the Council of Ministers, is composed of the 46 Foreign Ministers of the Member States (or their Ambassadors). It also has a Parliamentary Assembly and a Congress of Local and Regional Authorities. The European Court consists of one judge from each State Party, elected by the Parliamentary Assembly from at least three candidates.

Registering a complaint

Any private individual, NGO or group of individuals that believes itself to have been 'directly and personally' the victim of a violation of the European Convention on Human Rights by a State Party to the Convention can bring a complaint to the ECtHR. The alleged violation must have been committed by an agent of the state. The complainant need not be linked through nationality to the State Party, but the alleged violation must have been committed by a State Party within its 'jurisdiction'. States Parties may also lodge complaints against other States Parties for an alleged breach of the Convention or its Protocols².

In the case of non-state complaints, the complainant must submit an application form to the Registrar of the ECtHR. It must contain a brief summary of the facts; an indication of the Convention rights alleged to have been violated; information on remedies already sought at national level and decisions given³. It must also indicate whether the complaint has been submitted to any other international procedure. If the complainant is seeking compensation ('just satisfaction') they must state this specifically and set out the case for the amount sought. A complainant must have exhausted all relevant remedies in the State concerned and submit the complaint to the European Court within 6 months of any final decision at the domestic level⁴. A complaint can be submitted via

² <http://www.echr.coe.int/ECHR/EN/Header/Applicants/Information+for+applicants/Frequently+asked+questions/>

³ *Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11 with Protocol Nos. 1, 4, 6, 7, 12 and 13* (Strasbourg: Council of Europe, 2003), available at <http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-C9014916D7A/0/EnglishAnglais.pdf>

a lawyer authorised to represent the complainant. In exceptional cases, the Court may allow confidentiality for a complainant.

The process

The ECtHR assesses the admissibility of the case based on the application and any further written submissions and documents it may request from the parties. Any decision of inadmissibility is final and cannot be appealed. If an application is deemed admissible, the Court (generally a Committee of three judges or a Chamber of seven judges) first encourages the parties to reach a friendly settlement through a confidential process. Offers, concessions and communications made in this context cannot be referred to or relied on in any formal court proceedings that may follow. If agreement proves impossible, the Court will proceed to consider the case on its merits. It may adopt any investigative measure it considers would help clarify the facts, including written evidence and public hearings. All documents deposited with the Registrar are generally accessible to the public⁵. The backlog of cases means that it can take a year before the Court begins to examine a case, although urgent cases (eg situations of imminent physical danger for an individual) can be expedited.

The outcome

Decisions and judgements are adopted by a majority of the sitting judges. The Court cannot overrule national decisions or annul national laws. If the Court finds that a violation of the Convention has occurred, it can award financial compensation and may require the State concerned to refund the complainant's expenses. Under the terms of the Convention, States Parties are bound to abide by the Court's final judgments. Once a judgement is delivered, responsibility for monitoring its implementation, including payment of any compensation, passes to the Council of Ministers.

A party can request an interpretation of a decision within one year, or a revision of a decision where a new fact comes to light that could not reasonably have been known previously. Where possible, the original Committee or Chamber will decide on any interpretation or revision. A party may also, within three months of the date of the judgment and in exceptional cases, request that it be referred to the Grand Chamber. A panel of five judges of the Grand Chamber will consider it if it raises a serious question regarding interpretation or application of the Convention or its protocols, or a 'serious issue of general importance'.

⁵ *Rules of Court* (Strasbourg: Registry of the European Court of Human Rights, 2006), available at <http://www.echr.coe.int/NR/rdonlyres/D1EB31A8-4194-436E-987E-65AC8864BE4F/0/RulesOfCourt.pdf>

2. INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

Background

The Inter-American Commission on Human Rights (IACHR) and the Inter-American Court of Human Rights (IACtHR) are the two bodies within the Organisation of American States (OAS) responsible for the promotion and protection of human rights. Following the adoption of the American Declaration of the Rights and Duties of Man in 1948, the Commission was created in 1959. In 1965 it was authorised to examine complaints or petitions regarding specific cases of alleged human rights violations. Since then, it has processed over 11,000 petitions. The American Convention on Human Rights, which was adopted in 1969 and entered into force in 1978, created the Inter-American Court of Human Rights and defined the functions and procedures of both the Commission and the Court. The Commission has seven members elected by the General Assembly of the OAS from a list of candidates proposed by governments. Members are required to act with full independence. The Court consists of seven judges elected by States Parties to the American Convention from a list of candidates proposed by governments. They must be senior, recognised jurists with human rights competence.

Registering a complaint

Individual complaints or petitions can only be submitted to the Commission. Only states or the Commission itself can take complaints to the Court. Any person, group of persons or NGO can present a petition to the Commission alleging that a State Party to the American Convention has violated a right in that instrument or – if the state has not ratified the Convention – that they have violated a right in the American Declaration. Complaints may cover alleged acts of violation by state agents or allegations that a state failed to prevent or follow-up on a violation eg through appropriate investigation, sanction and compensation⁶.

Complaints must be lodged with the Executive Secretariat of the Commission. They must show that domestic remedies have been exhausted except where these do not provide for due process or are unreasonably prolonged or where access is denied. Complaints must be lodged within 6 months of any final decision from domestic procedures and must not be the subject of another international proceeding.

The process

The Commission requests information from the State in question regarding the allegation, setting a deadline for response. On the basis of this information (or a failure to respond) the Commission decides whether the petition is admissible. Any decision that a petition is inadmissible is made public. If it proceeds with the case, the Commission examines the facts and may carry out an investigation, in which the State is required to cooperate. The Commission can request further information and written statements from the parties as well as conducting on-site visits and holding hearings.

⁶ *American Convention on Human Rights*, adopted 22 November 1969, available at <http://www.cidh.oas.org/Basicos/basic3.htm>

The Commission is required to place itself at the disposal of the parties to assist in the reaching of a friendly settlement where possible. If a settlement is reached, this is set out in a report containing a statement of the facts and of the solution reached, transmitted to the parties and to the Secretary-General of the OAS for publication.

The outcome

If there is no settlement, the Commission draws up a report setting out the facts and its own conclusions and attaching the written and oral statements of the parties. If the report is not adopted by unanimity, separate opinions may be attached. This report is transmitted to the state(s) concerned with any proposals or recommendations the Commission sees fit. No party may publish the report. If the matter has not been settled within 3 months, the Commission has two options, to be decided according to the best interests of human rights. It may, by an absolute majority vote, transmit a second report to the state in question, setting out its opinion and conclusions with any recommendations and a deadline for action by the state. Once the deadline passes, the Commission decides by an absolute majority vote whether the state has taken adequate measures and whether to publish its report, publication being the norm in practice⁷. Alternatively, the Commission may decide within three months of submitting its first report to the state concerned to take the case to the Inter-American Court. In such instances the Commission appears in all proceedings of the Court.

3. NATIONAL HUMAN RIGHTS COMMISSION OF INDIA

Background

The Indian National Human Rights Commission (INHRC) was established by the Protection of Human Rights Act of 1993⁸ with the stated aim of providing for the better protection of human rights within India. One of its functions is to receive and handle complaints regarding compliance by the Indian Government and its agents with their human rights obligations under national and international law. In the year 1 April 2004 to 31 March 2005, it dealt with 85,661 cases and had a further 49,548 cases pending. The INHRC's other functions include visiting prisons and other state institutions; making recommendations on how to improve the observance of human rights; research on and awareness-raising of human rights; and intervening in court proceedings involving alleged violations of human rights, with the approval of the court. The Commission is headed by a former Supreme Court Justice and comprised of judges and experts in human rights.

Registering a complaint

Any Indian citizen who believes a public servant has violated their human rights, abetted a violation of their human rights, or been negligent in preventing a violation of their human rights, can lodge a complaint with the Commission, as can anyone acting on their

⁷ <http://www.cidh.oas.org/what.htm>

⁸ Act no. 10 of 1994 The Protection of Human Rights Act.

behalf. Complaints must be submitted in writing. They must provide basic information on the complainant, a summary of the facts or allegations and a statement on whether any similar claim has been filed with a court or a State (ie regional) Human Rights Commission. They must also identify the civil servant against whom the complaint is made and the authorities for which he/she works. Complaints cannot be accepted if they deal with matters that are *sub judice* or relate to events that took place more than one year previously. The process provides for confidentiality only exceptionally, eg in instances involving rape victims, victims of child sexual abuse and those complainants infected / affected by HIV/AIDS.

The process

Once a case is established as admissible, the Commission will enquire into its substance. It may launch an investigation, under which process it has all the powers of a civil court eg summoning witnesses and examining them under oath, requisitioning public records, and entering premises to seize documents where it has reason to believe they relate to the complaint. It can also call for information or a report from the Central Government or any State Government. Depending on the gravity of the alleged violation, cases are considered and decided either by a single member or Division Bench or by three or more members of the Commission. There is no overlap between the person screening the case for admissibility; the person investigating the case; and the person(s) reaching the decision.⁹

The outcome

The Commission may reach a number of conclusions if it finds that a violation has occurred. These can include recommendations to the concerned Government or authority that it initiate prosecution or provide immediate interim relief to the victim. The Commission sends a copy of its inquiry report and recommendations to the concerned Government or authority, which may comment within one month. The Commission publishes the report with any such comments. Decisions are not legally-binding and the Commission does not have a mandate to enforce their implementation. It can call for a compliance report from the authorities concerned and take follow-up action with them. In several instances individual complaints have led the Commission to identify generic issues raised by a violation of rights, and enabled it to secure a systemic improvement beyond the immediate case.

4. BILATERAL INVESTMENT TREATIES

Background

Bilateral Investment Treaties (BITs) date from the late 1950s, but increased dramatically in number in the 1980s and 1990s, now totaling well over 2000. 173 states have entered into at least one such treaty. These treaties vary in content but aim in general to

⁹ *National Human Rights Institution Forum: Case Handling Database* (Danish Institution for Human Rights) available at <http://www.nhri.net/NiChSearch.asp>; Internet; accessed 24 February 2007

protect foreign direct investment flows by elaborating rights and guarantees for investors that are binding on states under international law.

Registering a complaint

Since the mid-1990s, BITs typically provide for dispute settlement through binding state-to-state or investor-to-state arbitration (ie an investor from the state party where it is headquartered against the government of the state where it has invested). BITs do not cover issues that might give rise to complaints against investors. The majority of arbitrations under BITs are now of investor-to-state disputes. In most cases, there is no requirement for exhaustion of domestic remedies before registering a dispute.

The process

BITs typically provide for disputes to be handled through arbitration via the World Bank Group's International Centre for Settlement of Investment Disputes (ICSID), another institutional arbitrator, or an ad hoc arbitral tribunal (usually using ICSID or UNCITRAL rules of arbitration). If through ICSID (the most common route), the party requesting arbitration must submit the request to the Secretary-General, setting out the issues in dispute, the alleged breaches of international law under the relevant investment treaty, the identity of the parties and their consent to arbitration in accordance with ICSID rules.

The arbitration process can vary according to whether the BIT states that ICSID rules will be used, or the rules of another arbitration body. Under ICSID rules¹⁰, an Arbitral Tribunal must consist of one sole arbitrator or an uneven number of arbitrators appointed as the parties agree – usually three, with one appointed by each party and the Chair chosen by agreement of the parties. Absent agreement, the Secretary-General appoints the panel members following consultation with the parties. The Tribunal's decision is made in accordance with the rules of law agreed by the parties, or, absent agreement, in accordance with the law of the accused state party together with applicable international law. The Tribunal can call on the parties to produce documents or other evidence and can visit the scene of the dispute if necessary.

The outcome

Decisions of the Tribunal are made by a majority vote of its members. A decision or 'award' must be in writing and signed by those who voted for it. It must cover every question submitted to the Tribunal that is within its competence and give reasoning for the decisions. Dissenting opinions may be attached. The award may not be published without the consent of the parties. The Tribunal assesses the expenses incurred by the parties, including the fees of the Tribunal (which must be within set limits) and decides how they should be paid. This decision forms part of the award.

Most of these arbitrated processes are confidential. Under ICSID practices, the fact that the arbitration is taking place is made public. In other cases, an arbitration is often

¹⁰ *ICSID Convention, Regulations and Rules* (Washington: International Center for the Settlement of Investment Disputes, 2006), 73-128, available at <http://www.worldbank.org/icsid/basicdoc/basicdoc.htm>

completely unregistered and neither the fact nor outcome of the arbitration is public unless the parties agree that it should be. Under more recent US, Mexican and Canadian practice, the arbitrations are recorded, the arbitral documents are available to the public as the case proceeds and proceedings may be held in public.

Appeals based on new facts (emerging within 3 years of the settlement) and disputes over the meaning or scope of an award are handled, where possible, by the same Tribunal. Appeals for annulment of the award on procedural grounds or on the basis that the award manifestly exceeds the jurisdiction of the tribunal, made within 120 days of the award, are considered by a new ICSID Panel of Arbitrators. If annulled, the dispute is submitted to a new Tribunal for reconsideration of the substance. These are the only bases for appeal, apart from which the award is binding. Each contracting state to ICSID is legally bound to recognise the award and enforce it in the same way as any final judgment of a domestic court. More widely, the 142 states who are party to the 1958 New York Convention are required to recognise and enforce the results of arbitrations conducted overseas.

5. COURT OF ARBITRATION FOR SPORT

Background

The Court of Arbitration for Sport (CAS) was established in 1984 by the International Olympic Committee (IOC), after the IOC identified a need for a specialised authority able to settle international sports disputes through a flexible, quick and inexpensive procedure. It was reformed in 1994, when its funding and oversight was removed from the IOC and it was placed under a new International Council of Arbitration for Sport. The ICAS consists of 20 high-level jurists with expertise in arbitration and sports law. It is the supreme organ of the CAS, oversees its financing and aims to safeguard its independence and the rights of the parties to any dispute. It has the status of a Foundation.

The CAS must have at least 150 qualified arbitrators and 50 mediators on its lists. Each of five groups of stakeholders nominate one-fifth of the arbitrators. They are appointed for renewable 4-year terms. Its Court Office provides a secretariat function. Following the 1994 reforms, there are separate divisions handling 'ordinary arbitration' for disputes submitted directly to CAS, and 'appeals arbitration' for appeals of decisions by sports organisations. These functions, plus a mediation procedure and an advisory procedure are set out in the 1994 Code of Sports-related Arbitration. The ICAS can also set up ad hoc divisions of the CAS for major sports events such as the Olympics or European Football Championships, to handle disputes on-site.

Registering a complaint

Generally, a dispute can only be submitted to the CAS if there is an arbitration or mediation agreement between the parties which stipulates this. Disputes may be commercial (eg execution of contracts, sale of television rights, staging of sports events,

player transfers, injury to an athlete during a sports competition) or disciplinary (eg doping, violence on the field of play, abuse of a referee). Disciplinary matters are usually handled first by the relevant sports authorities, and come to the CAS if appealed.

A party seeking mediation must submit a request to the CAS Court Office, copied to the other party, setting out the parties and their representations, a copy of the mediation agreement between them and a brief description of the dispute¹¹. Both parties pay an administrative fee. The CAS Court Office sets a date for the start of mediation. The ICAS draws up a list of mediators from the CAS list or outside. If the parties do not agree on a mediator, the CAS President does so following consultation with the parties. The parties may be represented or assisted in the meetings, but a representative must have full authority to settle the dispute without consulting the party represented.

The process

The mediation is conducted as agreed by the parties or, absent agreement, as decided by the mediator. The mediator establishes a timetable within which he/she will submit to the parties a summary of the dispute, setting out in brief the facts and points of law and issues requiring resolution. He/she can meet with the parties separately or together and make suggestions regarding potential solutions, but may not impose a solution on either party. The mediation can be terminated at any time by the mediator or either party. If a settlement is reached it is signed by the parties and mediator and included in the CAS Court Office records.

If a mediation fails, or if a party does not wish to go to mediation, they can proceed to arbitration provided there is an arbitration agreement between the parties. The request for arbitration must include this contract and the brief facts of the case and legal argument. The Court Office seeks agreement from the parties on the applicable body of law and sets time limits for the responding party to set out its position and its view on the number of arbitrators. An Arbitration Panel normally consists of one or three arbitrators, appointed by the President of the Division if the parties cannot agree. In a multi-party dispute, the parties can agree a larger number.

The arbitration process begins with written submissions – either one or two from each party in turn¹². The parties must produce all the written evidence they intend to rely on at this stage. Written submissions must indicate any witnesses or experts the parties wish to call and include any witness statements. A date for the oral hearing is then set, when the Panel hears the parties, witnesses and experts. The Panel can order production of additional documents, and hear extra witnesses or experts at any time. It may appoint an independent expert after consultation with the parties.

¹¹ *CAS Mediation Rules* (Court of Arbitration for Sport, 1999), available at <http://www.tas-cas.org/en/present/frmpres.htm>

¹² *Statut des organes concourant au règlement des litiges en matière de sport* (Lausanne: Court of Arbitration for Sport, 2004), available at <http://www.tas-cas.org/en/present/frmpres.htm>

The outcome

The panel decides a dispute based on the rules of law chosen by the parties, or, absent their agreement, based on Swiss law. Their decision must be by consensus or majority or, absent a majority, by the President of the Panel alone. The award is reviewed by the CAS Secretary-General (head of the Court Office) who can highlight to the panel any points of fundamental principle. It is then final and binding on the parties. It can be enforced in the courts of States Parties to the Paris Convention.

The President of the Division (before transferring the case to the Panel) or the Panel (once it receives the file) may at any time seek to resolve a dispute submitted to arbitration by conciliation. Any settlement resulting from conciliation can be incorporated in an arbitral award by consent of the parties.

The mediator or arbitrator, the parties and anyone else involved in a mediation or arbitration are prohibited from disclosing to any third party any information they receive during the process, unless required by law to do so. In the case of mediation, the parties must also undertake not to compel the mediator to divulge information or documents from the mediation in any arbitral or judicial proceedings. Information from one party may only be disclosed to the other party with the former's consent. And there is no record of the meetings. In the case of general arbitration, the oral hearing is not public, though minutes may be taken, and the award is generally confidential. In the case of appeals arbitration, the award is usually made public.

6. WORLD TRADE ORGANISATION

Background

The WTO has 150 Member States. Its primary role is as an intergovernmental forum for negotiating international trade rules, with the stated aim of ensuring that trade flows as smoothly, predictably and freely as possible. WTO members have agreed to use the multilateral system of settling disputes, instead of taking unilateral action, if they believe other WTO members are violating trade rules. They are required to abide by the WTO's procedures for dispute settlement and to respect the resulting judgments. The current procedure was created through the Dispute Settlement Understanding, which formed part of the Uruguay Round WTO Agreement (1986-1994). The WTO Agreement precludes recourse to other fora to settle disputes over alleged breaches of the Agreement.

Registering a complaint

Only Member States of the WTO can submit disputes alleging violation of a binding agreement or commitment made in the WTO by one or more Member States. According to WTO jurisprudence, panels and the Appellate Body have the discretion to accept or

reject submissions from NGOs requesting to bring amicus curiae briefs, but they are not obliged to consider them.

The process

Before taking any other actions, the states involved in a dispute are required to enter into consultations with each other to see if they can settle their differences within 60 days¹³. If no settlement is achieved the complaining state may ask the WTO's Dispute Settlement Body (DSB), which consists of all WTO members, to appoint a 'panel' of experts to consider the case. The country against which the complaint is made can veto the creation of a panel once, but thereafter it proceeds unless there is a consensus of states against. The panel must be appointed within 45 days and has six months to reach a conclusion (shortened to three in cases of urgency).

In the panel process each side first presents its case in writing. At the first panel hearing, the states involved make their cases, and at the second hearing, they submit written rebuttals and make oral arguments. The panel can seek expert advice on any scientific or technical issues. The panel then passes a draft of the descriptive and factual sections of its report to the parties, for comment within two weeks. The panel next submits its full interim report, including its findings and conclusions to the parties. The parties have one week to request a review if they wish to. A review can take a further two weeks and may involve further consultations with the parties.

The outcome

If there is no agreed settlement at this stage, the panel issues its final report to the parties, and three weeks later circulates it to all WTO members. If it finds a breach of a WTO agreement or an obligation, it recommends that the measure be made to conform to WTO rules and may suggest how this could be done. The report becomes a ruling of the DSB within 60 days unless a consensus of all the states rejects it. Either or both sides can appeal a panel's ruling.

Appeals cannot reexamine the substance, but only review points of law and legal interpretation. Appeals are heard by three members of a permanent seven-member expert Appellate Body established by the DSB. Meetings and deliberations of the panel or Appellate Body are confidential, as are any expert documents submitted to them. Parties may release their own pleadings to the public.

If a country found to have violated an agreement does not comply with the panel's recommendations within a 'reasonable period of time', it must enter into negotiations with the complaining country/countries to agree compensation (eg through tariff reductions in areas of interest to them). If there is no agreement within 20 days, the complaining side can ask the DSB to authorise it to impose limited retaliatory trade sanctions against the other side. The DSB may do so unless there is consensus

¹³ 'Understanding on Rules and Procedures Governing the Settlement of Disputes', *Legal Texts: The WTO Agreements: A Summary of the Final Act of the Uruguay Round* (Lausanne: WTO) at http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm

against. The DSB monitors how rulings are implemented, and cases remain on its agenda until resolved.

Arbitrators – individually or in groups – can be used as an alternative to panels and the Appellate Body, but this possibility has rarely been used. Arbitration can also be used for specific issues of implementation: for establishing what is a ‘reasonable period of time’ for the state to implement the panel’s recommendation; and if the state objects to the level or form of the retaliatory sanctions imposed.

7. ILO DISPUTE RESOLUTION PROJECT IN CAMBODIA

Background

The ILO’s Dispute Resolution Project in Cambodia is linked to its Better Factories Cambodia project, which aims to improve working conditions in Cambodia’s export garment factories through a combination of independent monitoring, finding solutions, working with management, training, advice and information. The stated aims of the Dispute Resolution Project are to develop a strategy for labour dispute prevention and resolution; to establish and implement dispute resolution procedures that are transparent, fair and expeditious; and to build capacity to resolve disputes at the earliest possible stage¹⁴. Under Cambodian labour law, there are two kinds of labour dispute: individual disputes (involving an employer and one or more of their workers individually) and collective disputes (involving one or more employers and a group of workers). Complainants in individual disputes may choose first to use conciliation provided by the Ministry of Labour, and if this fails may then take their case to court within 2 months. The focus here is on collective disputes.

The process

After a collective dispute is submitted to the Ministry, a conciliator must be appointed within 48 hours. The conciliation process has a deadline of 15 days unless the parties agree to an extension. The parties are required to attend the conciliation meetings though not obliged to accept any outcome. If they reach agreement, they sign a written record of it, which is certified by the conciliator and is then binding on the parties, including workers they legally represent. If the conciliation fails, the conciliator submits a ‘non-conciliation report’ to the Minister of Labour, noting the unresolved issues. The dispute must then go to an arbitration procedure as set out either in an applicable Collective Bargaining Agreement or in Cambodia’s Labour Law, or to another procedure agreed by the parties.

Under the Labour Law, disputes reaching this stage are heard by a panel of the Arbitration Council. The Arbitration Council was established in 2002 with technical assistance from the ILO. It is a tripartite body consisting of at least 15 members with one third each nominated by the unions, employer associations and government. Once

¹⁴ *The Arbitration Council and the Process for Labour Dispute Resolution in Cambodia: Law and Commentary* (Phnom Penh: Community Legal Education Center, 2004)

selected, its members are independent and required to decide disputes in line with the law and the merits of the case. An arbitration panel consists of 3 members of the Arbitration Council, one chosen by each of the parties and the third by the two arbitrators so selected. If there is no agreement, the Secretariat chooses an arbitrator by lots.

The panel can only examine issues specified in the 'non-conciliation report' and issues arising after that report that flow directly from the same dispute. The panel can decide both what are described as 'rights issues' (ie issues related to rights set out in laws, regulations, contracts or collective bargaining agreements) and 'interests issues' (ie issues that relate to desired future benefits or outcomes not required by law/contracts/agreements etc). The panel conducts a hearing at which the parties may be represented by a lawyer or other person they authorise in writing. The hearings are confidential unless the parties agree to allow observers. The parties may provide documentation and the panel can require the production of relevant documents, call on the assistance of experts, and examine witnesses who the parties can also question. Documents provided by one party or obtained by the panel, must be passed to all parties.

The arbitration panel can at any point move from the hearing back into conciliation mode to help the parties reach their own settlement. If such moves into conciliation are successful, the agreement may be issued as a 'consent order' by the Arbitration Council. Regardless, the arbitration must be completed within 15 days of the Arbitration Council receiving the case unless both parties agree to an extension. During the arbitration process the parties must not take any hostile action such as a strike or lock-out.

The outcome

The arbitration panel must adopt its decision by consensus or a two-thirds majority. It has wide discretion regarding remedies, including reinstatement of terminated workers, orders for workers to cease strikes, issuing a collective bargaining agreement, disciplinary procedures and compensation to workers. The decision must include the panel's reasoning. An award is enforceable on the parties through the courts unless a party submits an opposition to the Secretariat within 8 days. In cases involving interests disputes, the award has the status of a collective bargaining agreement between the parties and remains valid for at least one year unless the parties agree a replacement in the interim.

If a party objects to an award in a rights dispute, they may take the issue to court or proceed with non-violent action such as strikes and lock-outs. If the objection is with regard to an interests dispute, the courts have no powers to hear it and the parties must seek their own solutions, including the possibility of non-violent action such as legal strikes or lock-outs.

8. FOREST STEWARDSHIP COUNCIL

Background

The Forest Stewardship Council (FSC) is a multi-stakeholder initiative designed to promote responsible management of forests. It sets international standards for forest management, accredits independent third party bodies to certify forest managers and forest product producers to FSC standards, and provides a product label for certified producers. The standards include environmental provisions, indigenous rights, use and tenure rights, workers' rights and management practices. The 654 members include companies, suppliers, certification bodies, environmental NGOs, social NGOs and academics.

Registering a complaint

Any member of the FSC can submit a complaint alleging a violation of the FSC's standards by another member¹⁵. The system requires that complaints be handled at the level closest to the alleged violation if possible. Complaints about management practices in a certified forest should be raised with the forest manager; if no resolution is found, they can be raised with the certification body. Only complaints not resolved at these more localized levels should rise to the level of the FSC itself.

Complaints to the FSC must be submitted in timely fashion (generally within 30 days of the decision or action in dispute) to the Secretariat. They must be in the form of a short letter describing the basis of the dispute, summarizing proceedings and results to date, identifying the parties to the dispute and how the complainant is involved, and suggesting a solution. There is a 'duty of reasonable participation' on all potential parties to a dispute.

The process

The FSC's Interim Dispute Resolution Protocol sets up a two-stage 'informal' and 'formal' process. In the informal process the Chair of the Board of Directors tries to facilitate negotiation to resolve the dispute and can decide what processes to use to this end. This process can operate on limited background information and has a deadline for resolution of 30 days, with the possibility of extending by 45 days if the Chair assesses a reasonable chance of agreement in that time. Any further extension requires the consent of all parties. The Chair must either report to the Board that a solution has been negotiated, or authorise the parties by letter to move to the formal complaint process. The parties can decide what parts of an agreement, if any, to make public.

The formal stage requires that the complaint goes forward with the support of at least one 'primary complainant' (playing a full part in proceedings) and two other FSC members, who may be primary or secondary complainants (that latter just observing and receiving documentation). Complainants must deposit funds towards any award that

¹⁵ *Forest Stewardship Council Interim Dispute Resolution Protocol* (Oaxaca: Forest Stewardship Council, 1998), available at http://www.fsc.org/en/about/accreditation/disp_resol

may result against them. There is an initial written briefing cycle in which the FSC Secretariat forwards an admissible complaint to the member(s) against which it is made, who have 30 days to submit a response according to set criteria, followed by the option of a further round of responses from each side within 15-day deadlines.

On the basis of this briefing, the Board decides whether to hear the complaint. If it proceeds, the Chair consults with the Board in deciding what procedures to use. He/she may handle the process personally or appoint a sub-committee of 3 Board members to do so. In either case, they can seek further information in writing, hold inspections, evidentiary hearings, make visits, hear oral arguments or use any other procedure deemed useful.

The outcome

On the basis of recommendations resulting from this process, the Board must make a decision on the resolution of the complaint and transmit a written 'statement of decision' to the parties. Board decisions can be appealed to the Dispute Resolution Committee but can only be overturned if there is a clear error of judgment or a clear and substantial abuse of discretion. Costs of the proceedings are allocated among the parties.

9. SOCIAL ACCOUNTABILITY INTERNATIONAL

Background

Social Accountability International (SAI) administers and oversees the SA8000 standard – a labour rights standard devised through a consensus, international multi-stakeholder process involving trade unions, human rights organizations, academics, retailers, manufacturers, contractors, consulting, auditing and certification firms. The standard was published in 1997 and revised in 2001. SAI accredits certification bodies (monitoring organizations) to audit factories for compliance with SA8000 and grant certification to those that meet the standard.

Certified facilities are required to have internal systems for addressing anonymous or open worker complaints. Both SAI and accredited auditors are also required to have in place complaints systems to handle complaints and appeals, including procedures to resolve them and inform the complainant of any corrective action taken. The procedures for handling complaints regarding both certified facilities and accredited certification bodies are currently being revised. This summary reflects the draft, revised 'Procedure 304' for making a complaint or appeal, as of March 2007.¹⁶ Under the revised system, Social Accountability Accreditation Services (SAAS) is responsible for the handling of complaints processes. There is a separate complaints procedure regarding facilities which are not SA8000 certified, but which are suppliers of companies in SAI's Corporate Involvement Program.

¹⁶ *SAI Social Accountability Accreditation Services Procedure 304 for Making a Complaint or Appeal* (March 2007: draft version), as provided by SAI to the author.

Registering a complaint

Any person can lodge a complaint about alleged breaches by a certified factory of the SA8000 standard or of local labour laws. In addition, certified facilities or other interested parties can make complaints about the performance of SAAS accredited certification bodies; and accredited or applicant certification bodies can lodge complaints about SAAS audit, surveillance or other services. The stated aim of a complaint investigation is 'to ascertain whether or not the allegation is accurate, and if accurate, to elicit root cause analysis, corrective action and action to prevent recurrence'. The focus here is on complaints about certified facilities.

Complaints about SA8000 certified facilities must first be raised at the factory level, and then, if unresolved, with the relevant certification body. If these processes prove unsatisfactory the complaint can then be taken to SAAS for review. Complaints must be in writing and include objective evidence of non-conformance with SA8000, such as witness testimony or documented violations. Complaints can be lodged anonymously.

The process

Certified SA8000 facilities must have a management representative with responsibility for ensuring workers can lodge complaints about non-compliance with the SA8000 standard confidentially. They must also have an elected SA8000 worker representative who can assist with complaints and protect the anonymity of those complainants who do not wish to be identified. Complaints are generally channeled via the worker representative or a trade union representative. The management has flexibility in how it structures its own system for response, but must respond within a reasonable time period decided by the management representative. Where a breach of the SA8000 standard is identified, the response should include a 'root cause analysis', corrective action with any remediation, and action to prevent recurrence of the problem.

If this process does not provide the complainant with satisfaction, they or an interested party (eg NGO, community group, teacher, trade union) can take the complaint to the relevant certification body, of which the contact details must be posted in the factory and available through the worker or management representatives. The certification body is required to protect the identify of the complainant and any witnesses unless they choose for it to be known. The certification body must review the complaint to assess its relevance to SA8000 standards and the evidentiary basis. If they proceed to an investigation, this may include an unscheduled audit of the facility in question. The Certification Body must report to the complainant on its conclusions, with a copy to the SAAS. The SAAS reviews the results to see whether the Certification Body followed proper procedures. If they consider this was not the case, they work with the Body to identify a further course of action, which may include an investigation by the SAAS.

Any interested party can appeal an SAAS decision within 30 days. If the Director of Accreditation considers it justified, he/she informs the appellant and takes action to address the shortfall. If he/she considers it unjustified, it is passed to the SAAS

Accreditation Review Panel, and the appellant is informed of this further review. If the Review Panel accepts the appeal, an investigation is begun and the appellant informed of its outcome. If not, no further action is taken.

The outcome

If major breaches of the SA8000 standard are found and, a remediation plan is identified and its implementation monitored. If the necessary corrective and preventive action is not taken, then SAAS must ensure that the certification body suspends or withdraws the facility's certification. If the complaint relates to the certification body, SAAS must take appropriate measures to seek corrective actions. If these corrective actions are not implemented, SAAS may suspend or withdraw the body's accreditation.

10. FAIR LABOR ASSOCIATION

Background

The Fair Labor Association (FLA) is the successor to the Apparel Industry Partnership initiated under the Clinton Administration in 1997. Its Charter was amended in 2003. It is a multi-stakeholder initiative involving universities, NGOs and 20 affiliated brand-name companies. In joining the FLA, companies sign up to implement the FLA Code of Conduct, which focuses on labour rights. They also agree to conduct internal and external monitoring, and to pursue remediation where code breaches are identified. They must require suppliers, licensees and contractors in their supply chain also to abide by the Code. This includes providing confidential mechanisms for workers to make complaints directly to them, with the aim of building capacity so supplier factories can handle grievances on their own. Where these mechanisms do not resolve a complaint, the FLA's Third Party Complaint Procedure can be used as a last resort.

Registering a complaint

Any person, group or organization outside a factory workforce (including a community organization, NGO, union or relative of a worker) can make a confidential 'third party complaint' to the FLA on behalf of one or more workers employed at a factory producing for FLA companies¹⁷. Complaints can be made with regard to any FLA member company or one of its suppliers, licensees or contractors, for an alleged case of serious non-compliance with the FLA Code of Conduct or Principles of Monitoring. Complaints can be submitted in writing or (initially) by phone. Information must include details of the factory involved; an explanation of the alleged Code violation; details of any prior report of the complaint to the factory or another body and names of FLA companies known to contract production from the factory. If requested, the FLA can keep the complainant's identity confidential from the FLA company member.

The process

¹⁷ *Third Party Complaint Procedure: English Fact Sheet* (Fair Labor Association), available at <http://www.fairlabor.org/all/complaint/#8>

FLA staff review the complaint to consider whether it appears there has been a verifiable violation of the FLA Code of Conduct. If the complaint is accepted, the FLA member company or companies involved are notified of the complaint and have 45 days to investigate the complaint and report to the FLA's Executive Director with conclusions and any plan of action for remediation. The FLA may then decide to send in an auditor to investigate and verify the report's findings and monitor progress towards remediation. When necessary, the FLA can initiate steps involving all relevant actors in the factories (FLA companies, factory management, monitors, unions, NGOs) as well as relevant governmental authorities to try to facilitate a resolution to the dispute. There is broad flexibility in the approaches they can employ, depending on the situation. These frequently involve mediation, with the role of neutral mediator taken either by the FLA President or Executive Director or by local experts. The Third Party Complaint procedure is explicitly not intended to replace or undermine existing internal channels for relaying grievances at a factory.

The outcome

Where an agreement is reached on a remediation programme, the FLA member company or companies involved are responsible for helping ensure its implementation by their suppliers.

11. ETHICAL TRADING INITIATIVE

Background

The Ethical Trading Initiative (ETI) is a multi-stakeholder alliance of companies, NGOs and trade unions, established in 1998. It is designed to work with companies to identify and promote effective implementation of codes of conduct covering supply chain working conditions. The 39 member companies come from a variety sectors, with most from apparel and food. The ETI has a Base Code covering various national and international labour standards. Member companies are required to adopt the Base Code or their own equivalent; to take active measures to implement it, including in their supply chains; to monitor and verify that implementation, in line with ETI's 'Principles of Implementation'; and to cease using a supplier that persistently commits serious breaches. They must report annually on progress in implementation of the code. Poor performance can lead to disciplinary proceedings and ultimately the loss of membership.

Registering a complaint

One of the Principles of Implementation provides for member companies to ensure a confidential means for workers in supplier factories to complain if the company code is not being observed. ETI also has a complaints mechanism where members can raise complaints about another members' suppliers should they believe the code is not being implemented. This process, currently under review, is governed by ETI's Alleged Code

Violation Investigation Guidelines¹⁸. These guidelines provide a framework for members to engage in order to resolve a complaint either independently of the ETI Secretariat or involving the Secretariat as a facilitator. They set out criteria for raising complaints and a process for investigation.

A complaint must rise to the level of being a) specific and very serious, requiring an instant response, or (b) specific and on-going, requiring prompt investigation. Complaints should include key information on the alleged breach, its scale, whether it is being pursued on other channels, whether the workers have identified a potential solution and the state of relations between the parties. They should also identify other relevant organisations and local complexities that could affect investigation and remediation. Copies of the complaint must be copied to the ETI Secretariat, which forwards them to the relevant Global Union Federation to have the opportunity to participate. The overall process aims to place emphasis on building the capacity of the local actors – government, employers and workers' organisations.

The process

Under the ETI's guidelines, the preferred mode of handling complaints is through consultation and cooperation among the stakeholders. Once the elements of a viable complaint are deemed present, the parties should meet as soon as possible to discuss the nature of the allegation and how to address it, setting out any agreement in a memorandum of understanding. This should include what methods will be used, the scope of the dispute, the timeframe for handling it, any provisions for confidentiality and resource implications. The parties are encouraged to maintain continuity of representation throughout the process of investigation and remediation.

The ETI company should then proceed swiftly to an investigation aimed at finding the facts using competent investigators – internal or external – and checking all sources. The process should include off-site interviews with employees of the supplier where appropriate. The investigation should lead to a written report detailing the process and the findings, which should be shared with all concerned parties.

If the parties cannot come to agreement either on the mode of investigating a complaint or on the remediation plan, the ETI itself may become directly involved as a facilitator of dialogue or as mediator to try to resolve the situation. The ETI Chair may take that role personally, particularly in instances involving multiple brands or suppliers or entrenched positions. Alternatively, ETI may use external mediators and take an observer or advisory role.

The outcome

Where a code breach is confirmed, ETI members are advised to negotiate a remediation plan with the supplier, which should then be shared with the employees, the source of the complaint, the ETI members involved and the Global Union Federation. The

¹⁸ *ETI Alleged Code Violation Investigation Guidelines* (Ethical Trading Initiative, 2001), available at <http://www.ethicaltrade.org/Z/lib/2001/11/codeviolguid/index.shtml>

guidelines propose that costs should be born by the companies involved (including suppliers) and that the ETI member company should monitor the supplier's compliance with the remediation plan. As noted, ETI member companies are required to cease using a supplier that persistently commits serious breaches.

12. SOUTH AFRICAN HUMAN RIGHTS COMMISSION

Background

The South African National Human Rights Commission (SAHRC) is provided for in the 1994 Constitution of South Africa and established through the Human Rights Commission Act of the same year¹⁹. The investigation of complaints vis-à-vis governmental authorities is one of the principal ways in which the Commission discharges its functions. It also conducts information programmes, carries out research and can take action in the courts. The Commission's complaints process is designed as an alternative to litigation, but not as a substitute where litigation is deemed more appropriate. The Commission may mediate, conciliate or negotiate in order to address any violation of human rights. It also has wide powers of investigation, including the power to enter and search premises, though this has rarely been used. And it may bring proceedings in a competent court or tribunal in its own name, or on behalf of a person or a group or class of persons.

Registering a complaint

Any person or group may bring a complaint, whether acting in their own interests, on behalf of someone who cannot act in their own name, as a member of or in the interest of a group or class of persons, in the public interest, or as an association acting in the interest of its members. Complaints must address alleged violations by an agent of the state regarding 'fundamental rights' set out in the South African Constitution and which occurred after the entry into force of the Constitution in 1994. The Commission will not consider matters that are before a court and complaints generally have to be made within 3 years of their occurrence. While complaints must be submitted in writing, in some instances, the SAHRC can provide assistance to illiterate complainants.

The processes and outcomes

The Head of the Commission's Legal Department assesses complaints, their admissibility and where they should be allocated²⁰. If a complaint does not fall within the Commission's jurisdiction or could be more effectively or expeditiously dealt with by another appropriate body, it is referred. If the Commission accepts a complaint, the complainant has to provide the Commission with a full statement on oath or affirmation, including details of all witnesses. A fully detailed account of the complaint is then communicated to the person against whom it is made. The Commission then decides

¹⁹ Human Rights Commission Act 54 of 1994

²⁰ *Complaints Handling Manual* (South African Human Rights Commission, 2005) available at <http://www.ethicaltrade.org/Z/lib/2001/11/codeviolguid/index.shtml>

whether to handle it through mediation, conciliation, negotiation or investigation, and in what particular form.

If the nature of the complaint allows and the parties agree, conciliation or mediation may be proposed. Conciliation may particularly be used in relatively simple disputes and/or where the respondent is working cooperatively and the complainant has reasonable expectations of the outcome. It may mean that no further investigation is needed beyond the facts gathered in the process of admitting the complaint. If the Commission decides that mediation is the best process, the parties may lodge an objection within 45 days. The Commission is unlikely to proceed with this approach in the face of clear objections from a party. A qualified mediator may be internal or external to the Commission.

If the SAHRC decides that a formal investigation is required, it informs the person or body complained against of the complaint and of the SAHRC's powers of investigation, with the opportunity to respond by a deadline. Throughout an investigation, the Commission may return to the options of conciliation, negotiation or mediation if the circumstances suggest these approaches useful. If the investigation still does not lead to clarity on whether a violation has been committed, and other means of resolution are unfruitful, the Commission's Complaints Committee may refer the case to a public hearing. All accepted complaints must be handled within 3 months of receipt bar those that go to litigation or public hearing.

The Commission's founding legislation does not dictate how confidentiality should be handled, so this remains in their gift. However, processes of mediation, conciliation or negotiation are generally handled confidentially. The SAHRC may publicise the outcomes in the interests of public education and promoting respect for human rights. In such instances, the identity of the parties can be kept confidential, if appropriate. Investigations are usually conducted confidentially, but the findings must be communicated to the parties and may be made public.

The SAHRC lacks resources to follow up on implementation, though it may keep a file open and monitor implementation. A refusal to implement outcomes may lead the Commission to refer the case for litigation.

13. KENYA NATIONAL COMMISSION ON HUMAN RIGHTS

Background

The Kenya National Commission on Human Rights (KNCHR) was established by an Act of Parliament in 2002²¹. It consists of 9 Commissioners, including one Chair. Its functions include the investigation of complaints regarding violations of any human rights; visiting prisons to assess conditions; informing and educating the public on human rights; making recommendations to Parliament on measures to promote human

²¹ The Kenya National Commission on Human Rights Act, 2002

rights; and cooperating with other institutions for the purpose of promoting and protecting human rights.

Registering a complaint

Any individual or group of persons who feel their rights have been violated by a government agent or a non state actor can lodge a complaint with the Commission, as can a person acting on their behalf²². Complaints can be submitted orally or in writing. If orally, then a member of the Commission will set the complaint down in writing and confirm the written version with the complainant. The complaint must include details of the complainant and the person complained against; and a summary of the nature and manner of the complaint. The Commission may not disclose or publish information it receives in confidence without the prior consent of the party or informant.

The processes and outcomes

The Legal Service Department of the Commission assesses whether to admit a complaint or refer it to another body or institution. If admitted, the National Commission conducts Preliminary Investigations. The person against whom the complaint is made has an opportunity to comment on the complaint. If appropriate, the Commission may then summon documents or individuals, record statements from witnesses and make investigatory field visits. On completion, the Commission can dismiss the complaint if it assesses there has been no violation; make recommendations to the relevant government department or to a private body that is better placed to address the complaint; seek the consent of the parties to move to conciliation (defined as mediation, negotiation and/or arbitration); refer the complaint to the Commission's Complaints Hearing Panel for determination; establish a Public Inquiry; or file a suit in the High Court.

If the Commission recommends conciliation, a Conciliation Panel is appointed, consisting of at least one designated Commissioner, a member of the Legal Services Department and, where necessary, an expert in the issues under consideration. During the meeting, the panel may use any conciliation procedures it deems fit (ie from arbitration to mediation), in the interests of the parties. If successful, a conciliation agreement is signed by the parties and the Commissioner, including any conciliation award.

Where the Commission opts for a Hearing Panel, it becomes a quasi-judicial process. The Panel consists of a number of Commissioners and legal members of the Commission. It can require the parties to appear before it. It can conduct the hearing as it deems most suitable; parties are heard and can give evidence, call witnesses, question witnesses and address the Panel. The Panel makes a decision on conclusion of the hearing based on a balance of probabilities and identifies any remedy.

²² 'The Kenya National Commission on Human Rights (Complaints Procedures) Regulations 2005', *Kenya Gazette Supplement No. 67*, (Nairobi: The Government Printer, 2005)

Decisions of both the Hearing Panel and the Conciliation Panel are enforceable in the High Court of Kenya.

The KNCHR may resort to a Public Inquiry where it judges that the nature of a complaint is widespread (affecting several people, communities etc), historic (long held grievances), involves multiple actors (several alleged perpetrators, state and non-state actors), and may require several people to be interviewed to build a case by establishing patterns and trends of abuse. A Public Inquiry panel is appointed by the Commission consisting of Commissioners, experts in the field of inquiry and several assistants. Its proceedings are public and any citizen with a grievance is given an opportunity to be heard. Institutions whose evidence is required are summoned to give both written and oral evidence. On completion, the Commission is empowered by law to recommend the prosecution of persons suspected of violating human rights or recommend to the petitioners another judicial or non-judicial course for settling the complaint.

14. WORLD BANK GROUP COMPLIANCE ADVISER OMBUDSMAN FOR THE IFC AND MIGA

Background

The Compliance Advisor Ombudsman (CAO) has three functions of which the Ombudsman function is the main one. Others are the Compliance function - overseeing audits of compliance by the International Finance Corporation (IFC) and Multilateral Investment Guarantee Agency (MIGA) with their environmental and social policies and procedures; and the Advisor function - advising the IFC, MIGA and Bank President on environmental and social policies and procedures, with the aim of improving systemic performance. The stated aim of the Ombudsman function is 'to help resolve issues raised about the social and environmental impact of IFC/MIGA projects and improve outcomes on the ground'. Their system aims to achieve this by identifying problems, recommending remedial actions, and addressing systemic causes, rather than by finding fault. The CAO is set up to be independent within the World Bank Group, reporting directly to the Bank's President.

The CAO was reviewed in 2006 to address identified weaknesses, including the need for more clarity about CAO processes and the distinction between its three functions and the need to ensure the Ombudsman function remains neutral and unbiased and can achieve procedural fairness for all involved parties. The following reflects the revised operating guidelines, adopted on 1 May 2007²³.

²³ *CAO Operational Guidelines* (Washington DC: Office of the Compliance Advisor/Ombudsman International Finance Corporation/Multilateral Investment Guarantee Agency, 2007) at http://www.cao-ombudsman.org/html-english/documents/CAO_OpGuide_April07.pdf

Registering a complaint

Any individual, group, community, entity, or other party affected or potentially affected by the social and environmental impacts of IFC or MIGA projects can submit a complaint, as can anyone acting with explicit authority on their behalf. A complainant from outside the country where the project is located must lodge the complaint jointly with a local entity. Complaints must address the planning, implementation or impact of an IFC- or MIGA-funded project, which may include arrangements for the involvement of affected communities, minorities and vulnerable groups in the project. They should be submitted in writing and cover the nature of the project in question, how the complainant is affected by its social or economic impacts and any request for confidentiality. Complainants are encouraged also to indicate what has been done to resolve the problem, what points remain unsettled, what policies, guidelines or procedures they think have been breached, and what outcome they wish to see.

The process

When a complaint is received, the CAO acknowledges receipt and reviews its eligibility within 15 days against basic criteria, including whether the complaint relates to an active or prospective IFC/MIGA project, is within the CAO's mandate to address environmental and social impacts, and whether such impacts could affect the complainant. Malicious, trivial or anti-competitive complaints are ineligible. If the complaint is eligible, it is assessed, looking at the stakeholders and their views, their incentives to resolve the issues, and what process might be most useful to them in seeking to do so. This phase can include research of IFC/MIGA files, meetings with all stakeholders, site visits and public meetings in the project area. The assessment focuses on whether or how the stakeholders could resolve the dispute; it does not aim to judge the merit of the complaint. The Ombudsman then reverts to the complainant and other principal parties with suggestions on how to move forward. Based on the assessment and the parties' responses, the Ombudsman can either work with the stakeholders to agree a clear process for addressing the complaint or determine that a collaborative resolution is not possible and pass the issue to the CAO's Compliance function. The assessment process has a time limit of 120 days.

If the complainant agrees to seek resolution of the issues, the CAO and stakeholders can use a range of 'problem-solving' tools including facilitation and information-sharing, joint fact-finding, dialogue and negotiation or – if the parties consented - conciliation and mediation. Either the CAO or third-party specialists can mediate. The stated objective of all problem-solving approaches is to 'address the issues raised in the complaint and any other significant issues relevant to the complaint identified in the assessment or the problem-solving process in a way that is acceptable to the parties affected'.

The outcome

Agreements resulting from problem-solving processes may include proposals for future action, including remediation, and should be specific. Where possible they should provide for implementation, review and monitoring within set timelines. The CAO

monitors whether agreements or recommendations have been implemented. The CAO cannot support agreements that are coercive, contrary to IFC or MIGA policies, to the domestic law of the parties or to international law. The CAO does not have powers to enforce its recommendations on external actors, but aims to use its leverage via the IFC and MIGA to urge relevant parties to implement them.

If the Ombudsman believes at any stage that resolution of the complaint is unlikely or is an inefficient use of resources, the complainant is advised of the reasons for this decision, the case is transferred to the Compliance function for appraisal and that decision is reported publicly. When receiving a complaint from the Ombudsman function, the Compliance function audits the project based on the issues raised in the complaint, but looking specifically at whether it met the IFC's/MIGA's own policies, standards, guidelines, procedures and conditionality.

The CAO has established systems to protect the confidentiality of the complainant, if so requested, but will not accept anonymous complaints. Material submitted on a confidential basis is not released without the consent of the party that submitted it. Confidentiality is provided for during a conciliation and mediation process, including the confidentiality of information provided by the stakeholders. In cases where the Ombudsman transfers a complaint to the Compliance function of the CAO, confidential information received under the Ombudsman role is not shared with the Compliance function. The CAO makes public its assessment reports (bar any business information protected under IFC disclosure policies), reports on agreements reached, reports on monitoring and follow up and decisions to refer an issue to the Compliance function.

15. OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES

Background

The Organisation for Economic Cooperation and Development (OECD) was established to help foster good governance in public service and corporate activity through processes focused on dialogue, consensus, peer review and pressure. It has 30 member states with a declared commitment to democracy and the market economy. The Guidelines for Multinational Enterprises were agreed in the 1976 Declaration on International Investment and Multinational Enterprises and subsequently revised in 2000. The stated aim of the Guidelines is to 'encourage the positive contributions that multinational enterprises can make to economic, environmental and social progress and to minimise the difficulties to which their various operations may give rise.'

The Guidelines represent a set of non-binding recommendations for responsible business conduct both supplementary and complementary to the law. Besides OECD member states, 9 other states have adhered to them (Argentina, Brazil, Chile, Estonia, Israel, Latvia, Lithuania, Romania and Slovenia). Whilst they are non-binding on business, Governments of the 39 adhering states are obliged to set up a National Contact Point (NCP) to promote the Guidelines, handle enquiries and complaints (known as 'specific instances') and act as a forum for discussion of all matters relating to the

Guidelines. NCPs meet annually to share experience and report to the OECD Investment Committee. States have flexibility in the exact form of their NCP and how it operates. The following is drawn from the core criteria and procedural guidelines of the OECD for NCPs²⁴.

Registering a complaint

Trade unions and NGOs can submit a complaint against a company headquartered in or operating in a Member State of the OECD, regarding alleged non-compliance with the OECD Guidelines. Complaints must be submitted to the NCP of the state where the grievance occurred or of the home state of the MNE in question. The dispute resolution process is normally confidential while its outcome is normally public (unless preserving confidentiality is in the 'best interests of effective implementation of the Guidelines'). If there is no agreement, the parties can publicly raise the issues in dispute, but must maintain confidentiality of information and views provided by the other party during the proceedings, unless they agree otherwise. Companies cannot be required to engage with the NCP when a complaint is raised.

The process and outcome

The NCP must make an initial assessment of whether a complaint merits further examination, based on whether it appears to be 'bona fide', taking into account the identity and interests of the complainant, the materiality and substantiation of the complaint, the relevance of applicable law and procedures, precedents in other domestic or international proceedings and whether consideration of the issue would contribute to the purposes and effectiveness of the Guidelines. The NCP must explain any decision to reject a complaint. If the complaint relates to issues in a non-member state of the OECD, NCPs still have to try to understand the issues involved, make contacts and engage in other fact-finding where possible.

If the NCP allows the complaint, it then has some considerable flexibility in how to handle it. It must offer good offices to help the parties resolve the issue, including, as appropriate and if the parties agree, by facilitating access to consensual, non-adversarial means of resolution, such as conciliation or mediation. If no agreement is reached following these efforts, the NCP issues a statement of its view of whether there is a breach of the Guidelines, and may make recommendations. The NCP can monitor the outcome if it wishes and the parties agree.

There is no formal appeals process under the Guidelines, but OECD member states or OECD business or trade union advisory bodies (BIAC and TUAC) can request the Investment Committee's views on whether an NCP has correctly interpreted the Guidelines' text and implementation procedures.

²⁴ 'Commentary on the Implementation Procedures of the OECD Guidelines for Multinational Enterprises', *The OECD Guidelines for Multinational Enterprises: Revision 2000* (Paris: OECD, 2000), available at <http://www.oecd.org/dataoecd/56/36/1922428.pdf>

16. UN HUMAN RIGHTS TREATY BODIES

Background

Each of the UN's seven human rights treaties has a dedicated Treaty Body that monitors States Parties' compliance with the Treaty's provisions. The Treaty Bodies are comprised of between 10 and 23 experts nominated and elected by Governments and intended to act with independence. States are required to report to relevant Treaty Bodies and be examined on a periodic basis (usually every 4 or 5 years) on their implementation of their obligations. Four of the seven treaties (those on civil and political rights, torture, racial discrimination and discrimination against women) provide for their Treaty Bodies to handle complaints or 'individual petitions' against states parties if the state in question has accepted the specific treaty provision or protocol that provides for this mechanism. The resulting body of decisions forms a source of guidance for States, NGOs and others in interpreting the contemporary meaning of the texts concerned.

Registering a complaint

Any individual who believes that his or her rights under one of the four treaties have been violated by a state that is party to the treaty's provision for individual petitions, can submit a complaint²⁵. A third party can also bring a petition on behalf of any such individual, where the alleged victim has given his/her written consent or where that person is incapable of giving such consent.

Complaints are submitted to the Secretariat of the relevant Treaty Body, at the Office of the UN High Commissioner for Human Rights. They must include basic information about the complainant, as full a set of facts as possible about the complaint, details of steps taken to exhaust remedies within the complainant's state, and why the complainant thinks the situation amounts to a violation under the Treaty in question.

The process

The Secretariat passes the complaint to the State party concerned to comment within a set time frame (between 3 and 6 months). The complainant has either 6 or 8 weeks to respond to the State's comments in writing. The Treaty Body then considers the case. In urgent cases, a Treaty Body may – before the complaint is considered – request the State party to take 'interim measures' to prevent irreparable harm.

The Treaty Body first assesses the admissibility of the complaint against various criteria, including whether domestic remedies have been exhausted (provided these would not be unreasonably prolonged or clearly ineffective) or whether it is before a regional court. If accepted, the Treaty Body considers the merits of the case. It does so in closed session on the basis of the written information supplied by the parties. Its decision is

²⁵ <http://www.ohchr.org/english/bodies/petitions/index.htm>; Internet; accessed 12 March 2007

transmitted to the complainant and State party at the same time and subsequently made public as part of the Treaty Body's jurisprudence. There is no appeal.

The outcome

If the Treaty Body finds there has been a violation by the State party, it invites the State party to supply information within three months on the steps it has taken to give effect to its findings and may specify what it considers effective remediation. The state's response is transmitted to the complainant. The process can take several months or, under some treaties, years.

17. UN '1503' PROCEDURE

Background

The so-called '1503 Procedure' is the oldest human rights complaints mechanism in the UN system, established by resolution 1503 of the Economic and Social Council in 1970 and revised in 2000. It is a mechanism of the former UN Commission on Human Rights, now UN Human Rights Council – an intergovernmental body. Whilst it can receive individual complaints, it is designed to identify and address patterns of gross and systematic violations. Only when an individual complaint or group of complaints suggest such a pattern will they proceed beyond the early stages of the process. The 1503 procedure is currently under review by the Human Rights Council.

Registering a complaint

A complaint can be submitted by any individual or group claiming to be the victim of a human rights violation; by any person or group with direct and reliable knowledge of such violations; or by an NGO 'acting in good faith' and with direct evidence of violations.²⁶ Complaints must address alleged violations of human rights by a government or its agents. Reasonable domestic remedies must have been exhausted and the complaint must not be under consideration by another part of the UN system.

Complaints must be submitted in writing to the Office of the UN High Commissioner for Human Rights. They must set out the rights alleged to have been violated, with as much factual detail as possible. There must be reasonable grounds to infer from the material that an alleged pattern of gross human rights violations exists.

The process and outcome

The Secretariat screens all complaints. In liaison with the Chair of the Working Group on Communications (a body of five experts drawn from the Sub-Commission on the Promotion and Protection of Human Rights), it weeds out those that are manifestly ill-founded. Those admitted are passed to the Government concerned for comment. The Working Group on Communications meets annually to examine complaints and any

²⁶ <http://www.unhchr.ch/html/menu2/8/1503.htm>; Internet; accessed 12 March 2007

replies received from Governments, based on written submissions alone. It may decide to keep a complaint pending while it seeks further information from the Government. If it identifies an apparently consistent pattern of gross and reliably attested violations of human rights, it passes these complaints to the Working Group on Situations (a body of five state representatives - usually Ambassadors - from different regions). Most complaints do not go beyond the Working Group on Communications.

The Working Group on Situations meets annually to consider whether complaints referred to it indicate a consistent pattern of gross and reliably attested human rights violations. It may close a file, keep it open pending further action or information from the Government concerned; or forward the case to the Human Rights Council with recommendations on action. In the latter instance, the Human Rights Council meets in closed session of its 47 members with representatives of the Government concerned in order to ask the Government questions about the case. It can then decide to discontinue the case; to keep it pending for more information from the Government; to keep it pending and appoint an Independent Expert to examine the issues and report back; or to move the issue into the public arena for further consideration. The President of the Council announces publicly the names of the states that have been examined and those no longer under consideration. Complainants are informed if their complaints are deemed admissible, but receive no further information about the process.

18. NORTH AMERICAN AGREEMENT ON ENVIRONMENTAL COOPERATION

Background

The North American Agreement on Environmental Cooperation (NAAEC) is a side agreement to the 1994 North American Free Trade Agreement (NAFTA). The Commission for Environmental Cooperation is responsible for its implementation. The Council, the governing body of the CEC, is composed of the Environment Ministers (or the equivalent) of each country. The 15-member expert Joint Public Advisory Committee (JPAC) provides independent advice to the Council and the Secretariat provides it with technical and operational support.

Registering a complaint

Under the NAAEC's 'Citizen Submissions on Enforcement Matters' mechanism any person or nongovernmental organization established or residing in a NAFTA state (US, Mexico, Canada) can submit a complaint alleging failure by the government of a NAFTA state to enforce its own environmental laws²⁷. If a matter is pending before the courts or an administrative proceeding it cannot be considered by this mechanism.

Complaints must be submitted in writing to the CEC Secretariat. The complaint or 'submission' must specify the law or regulation that is allegedly not being enforced and

²⁷ *Bringing the Facts to Light: A Guide to Articles 14 and 15 of the North American Agreement on Environmental Cooperation* (Montreal: Commission for Environmental Cooperation or North America, 2000), available at http://cec.org/pubs_docs/documents/index.cfm?ID=242&varlan=english

provide sufficient factual background for an assessment. It must indicate whether further study of the matters raised would advance the goals of the NAAEC; must show that the issue has been referred to the relevant government agencies; and state the remedies that have been pursued and the response received. A submission must be clearly aimed at promoting enforcement, not harassing industry, and must indicate the extent to which it is drawn from mass media reports.

The process

If a submission meets these criteria, the CEC Secretariat further considers whether it merits a response from the party complained against. If so, it requests this response within 30 (exceptionally 60) days. In light of that response, the CEC assesses whether to proceed with the development of a 'factual record' on the substance of the issue. If it decides against, it informs the parties and the Council and the case is closed. If it decides in favour, it passes this recommendation, with reasoning, to the Council for decision by a two-thirds majority.

If the Council decides in favour of a 'factual record', the CEC proceeds, drawing on any relevant technical, scientific or other information that is publicly available; that is submitted by interested NGOs or persons or the CEC's Joint Public Advisory Committee; or that is developed by the Secretariat or independent experts. This process may take months. The stated aim is to 'outline, in as objective a manner as possible, the history of the issue, the obligations of the Party under the law in question, the actions of the Party in fulfilling those obligations, and the facts relevant to the assertions made in the submission of a failure to enforce environmental law effectively'. The Council receives the 'factual record' and decides, by a two-thirds majority, whether to make it public or not. Information designated by an NGO or person as confidential or proprietary is not made public and a complainant's identity can be kept confidential by the Secretariat if they so request.

The outcome

The Secretariat keeps a public registry with summary information on the stage any submission has reached. When the Secretariat recommends to the Council that a 'factual record' be prepared on a case, both the recommendation and its reasoning are made public. The Council decides whether the 'factual record' itself is made public, this being the ultimate sanction.

19. INTERNATIONAL COMMITTEE OF THE RED CROSS

Background

The International Committee of the Red Cross (ICRC) was established in 1863. It is an impartial, neutral and independent organization and has a permanent mandate – assigned to it by States through the various international humanitarian law instruments – to protect and assist persons affected by armed conflicts. This includes taking impartial

action for prisoners, the wounded and sick, and civilians affected by conflict. The ICRC aims to prevent suffering by promoting and strengthening humanitarian law and universal humanitarian principles on the basis of the Geneva Conventions. And it directs and coordinates the international relief activities conducted by the International Red Cross and Red Crescent Movement in situations of conflict, including water, sanitation and construction projects, support for hospitals and health-care facilities and the provision of food aid and the means to sustainable food production. The ICRC has offices in around 80 countries.

Registering a complaint

One of the ICRC's core protection tasks is to visit people deprived of their freedom in connection with conflict – whether prisoners of war or those held as 'security' or 'political' detainees during internal conflicts and strife. This is not a classic complaints process as it is aimed to benefit a group of people who by definition are usually not able to submit a complaint, yet are at serious risk of being maltreated. The ICRC seeks access to persons detained to ascertain whether they are being treated in line with humanitarian principles as set out in the Geneva Conventions, to restore contact with their families and to prevent disappearances and extra-judicial killings. Where there are problems, the ICRC urges the detaining authorities to take the appropriate measures to improve the situation. The ICRC concludes from their experience that respect for basic humanitarian rules in war-time not only limits or prevents atrocities but also helps restore trust and eases reconciliation in the post-conflict stage. In 2005, ICRC delegates visited over 528,000 people deprived of their freedom in 2,594 places of detention in 76 countries, of whom 25,831 detainees were registered and visited in 2005 for the first time²⁸.

The process

The ICRC's standard practice for prison visits involves registration of all the prisoners; an overview of all facilities used by, or intended for, them; a private talk with any or all of them to discuss problems they might have over their treatment or conditions (ie identification of complaints); and the provision of standard forms for them to write brief messages to their families (which the ICRC tries to deliver, following their approval by the detaining authorities)²⁹. The ICRC delegate informs the prisoners of the purpose of his/her visit but if a prisoner appears uncomfortable or wary the delegate may refrain from probing detention conditions initially. Repeat visits are the norm, both to build relationships of trust with the prisoners and of cooperation with the authorities, and to make clear that prisoners must not be ill-treated for talking to the ICRC, as this will be found out. ICRC delegates are also clear with prisoners that they offer no promises, but are working with the authorities to try to secure improvements, which may take some

²⁸ *Annual Report 2005* (Geneva: ICRC, 2006), available at http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/section_annual_report_2005?opendocument

²⁹ 'ICRC visits to people deprived of their freedom: Purpose and conditions of ICRC visits', at <http://www.icrc.org/Web/Eng/siteeng0.nsf/html/detention-visits-010407> (ICRC, 2004); Internet; accessed 28 March 2007

time. They report that in most cases they secure improvements in line with their demands, but this can take years.

The outcome

If the prisoners agree, their problems or complaints are taken up with the detaining authorities, with the aim of trying to solve them. The reports written by the ICRC after each visit are given to the detaining authorities and are not intended for publication. The ICRC works on the principle of confidentiality. They focus on fostering dialogue and seeking to influence the behaviour of the relevant authorities in line with humanitarian law and principles, through long-term and sustained contacts that build a climate of confidence. In exchange, the ICRC expects the authorities to show that they are willing to take the steps required to improve the situation. If the authorities abuse the confidentiality principle by publishing ICRC reports only selectively, then the ICRC will publish them in full. And if serious and repeated violations occur and the ICRC's confidential approaches are in vain, or if the ICRC finds that the authorities clearly have no intention of respecting international humanitarian law, it may decide to speak out publicly after warning the authorities that it will do so.

20. WORKERS RIGHTS CONSORTIUM

Background

The Workers Rights Consortium (WRC) was created by college and university administrations, students and labour rights experts. Its stated purpose is to assist in the enforcement of manufacturing codes of conduct adopted by colleges and universities to ensure clothing and other goods bearing their names respect the rights of workers. The WRC does not have corporate members. It monitors labour rights and conducts investigations into working conditions in the factories producing collegiate apparel and other goods, issues public reports on factories and works with affiliated universities, licensees and NGOs to remediate problems. Member universities are required to have a code of conduct identical to or aligned with the WRC model code of conduct.

Registering a complaint

Workers or interested third parties can submit a complaint to the WRC alleging that a factory supplying apparel and goods to a member college or university has breached the Code of that college/university or of the WRC³⁰. Complaints may be submitted by any means of communication. They should set out the complaint in sufficiently specific terms to ensure the WRC can evaluate whether to proceed with an investigation. If such information is lacking, WRC staff may contact the complainant to seek further background. The WRC protects the confidentiality of complainants and those who contribute to investigations, unless they waive such a right in writing after receiving advice.

³⁰ *Workers Rights Consortium Investigative Protocols*, at http://www.workersrights.org/wrc_protocols.asp; Internet: accessed 17 March 2007

The process

The WRC decides whether to pursue an investigation based on a number of factors, including the severity and credibility of the allegation; the presence of active unions or civil society in the area; and the likelihood that an investigation could lead to remediation and wider systemic change. If it accepts a case, the WRC builds an investigative team involving WRC staff together with local community representatives and experts who are independent of the factory and workers. It does not use commercial auditors. The team conducts off-site interviews with workers, as well as with local managers, experts and labour officials. It seeks the constructive engagement of the factory, licensees and contractors.

The outcome

The team reports its findings, including any findings of violations and recommendations for remediation. This report goes to the affiliated universities, who are expected to pressure the factory for change in line with the remediation plan. The reports are then made public, including the names of the factories involved. The WRC explicitly aims to pressure licensees to improve conditions in a factory rather than shut it down, in order to avoid creating disincentives for workers to report abuses. The WRC continues to monitor conditions until remediation is completed, and reports on progress. WRC investigations are also required to report findings of compliance and particularly good practices by licensees and contractors.

21. BUSINESS AND HUMAN RIGHTS RESOURCE CENTRE

Background

The Business and Human Rights Resource Centre is a non-profit organisation that provides the world's leading independent information resource on business and human rights issues via its website³¹. The site tracks reports on over 3,500 companies and is updated hourly. The Centre is in a collaborative partnership with Amnesty International sections and leading academic institutions. It has an International Advisory Network of over 80 experts and 20 Academic Partners: institutions recognised internationally for their expertise in business and human rights issues. The Centre's stated purpose is to encourage companies to respect human rights, avoid harm to people and maximise their positive contribution; to provide easy, one-stop access to information for companies, NGOs and others; and to facilitate constructive, informed decision-making and public discussion.

The process

³¹ www.business-humanrights.org

The Centre has developed a 'business response' process for its Weekly Updates (an email newsletter sent to several thousand recipients worldwide, including journalists, international organisations, investment groups and others). Through its network of information sources, it identifies key cases and concerns to feature in the update. When it plans to include an article or report that contains specific allegations about a particular company, it invites the company to provide a response to be posted alongside the allegations. The Resource Centre informs the company that if it does not reply, the update will indicate that the company was invited to respond but has not yet done so. Where a company indicates a wish to respond but an inability to do so in the time given, a short delay may be allowed.

The outcome

This system elicits responses from around 80% of those businesses contacted. Since the updates were launched in February 2005, over 300 companies have provided responses, ranging from well-known multinationals to small companies based in Africa, Latin America and Asia. In cases that involve more than one company, not all of them necessarily respond, and those that do may respond in different terms. In many instances the initial company response has led to further dialogue and follow-up. In some cases the Centre has been notified of specific changes in company policy or practice as a result of this process.