

# Better Access to Remedy in Company-Community Conflicts in the Field of CSR

## A Model for Company-Based Grievance Mechanisms

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In the last decades, the role of business in society has been in constant change. Businesses have been given increasingly greater freedom, while at the same time they have been held responsible for issues that were previously considered responsibility of the state.<sup>1</sup> In the 1960s, many companies based in industrialized countries began to expand by establishing manufacturing subsidiaries in less developed countries. This relocation allowed them to overcome high trade barriers and to take advantage of cost factors such as cheap labour, and in some cases, local resources.<sup>2</sup>

Although industrialization and transnational economic activity have brought great benefits to humanity, the adverse impacts that they have also caused to society and the environment have not gone unnoticed. With the emergence of the idea that businesses should have certain responsibilities towards society, the concept of corporate social responsibility (CSR) began to develop in the early 1950s.<sup>3</sup> Particularly, it can be said to have been originated in 1953 with Howard R. Bowen's book *Social Responsibilities of the Businessman*. Bowen advanced the idea that the social responsibility or 'social consciousness' consisted of making decisions that are "desirable in terms of the objectives and values of our society".<sup>4</sup> The definition of CSR has evolved and expanded ever since Bowen's work.<sup>5</sup> Yet, despite various decades of scholarly interest on this concept, there is no universally agreed definition of CSR. However, there appears to be a consensus that the concept comprises a call for business to enhance value on three dimensions: profit, people and

planet.<sup>6</sup> Whether CSR is (or should be) voluntary or not has been very much debated. Some scholars ascertain that the concept of CSR is experiencing an evolution where a shift away from voluntariness is taking place, and CSR norms are gradually shifting from social norms that businesses are expected to observe to multiple forms of regulation.<sup>7</sup> This development has caused the EU Commission recently to change its 2001 definition, in which CSR was characterized as a voluntary concept, and adopt a new definition of CSR: "the responsibility of enterprises for their impacts on society", which according to the Commission's Communication reflects the regulatory pluriformity of CSR norms.<sup>8</sup>

An important impetus for this paradigmatic change by the EU Commission has been the introduction, in 2008, of the United Nations (UN) 'Protect, Respect and Remedy' Framework<sup>9</sup> developed by the UN Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises, John Ruggie. This Framework consists of three pillars: the state duty to protect against human rights abuses by third parties (including business) through appropriate regulation and policy measures; the corporate responsibility to respect human rights; and better access for victims to effective remedy of judicial and non-judicial nature. This Framework was further developed with 'Guiding Principles for the Implementation of the UN "Protect, Respect and Remedy" Framework' (Guiding Principles), which were also unanimously endorsed in 2011 by the UN Human Rights Council.<sup>10</sup> In order to ensure that businesses respect the rights of their stakeholders (*i.e.* employees, suppliers, consumers, and communities) Ruggie envisioned the implementation of rights-compatible company-based grievance mechanisms. These mechanisms are aimed at being vehicles for "addressing grievances – whether or not they raise substantive human rights issues – in a manner

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1. Gølborg 2009, p. 605.

2. See Narula & Dunning 2009. Available at <[www.merit.unu.edu/publications/wppdf/2009/wp2009-023.pdf](http://www.merit.unu.edu/publications/wppdf/2009/wp2009-023.pdf)> (last accessed 31 July 2013).

3. Carroll 1999. See also Carroll 2008.

4. Bowen 1953, p. 6.

5. See Dahlsrud 2008.

6. The phrase 'profit, people, planet', also known as the 'triple bottom line', was developed by John Elkington in his publication of 1997 *Cannibals With Forks: The Triple Bottom Line of 21st Century Business* to illustrate that companies should take in consideration three different and separate bottom lines. See also in general Lambooy 2010.

7. See Lambooy 2010 and Eijssbouts 2011.

8. EU Commission Communication of 25 October 2011 on its CSR Strategy 2011-2014.

9. UNHRC 2008, A/HRC/8/5.

10. UNHRC 2011, A/HRC/17/31.

that respects and supports human rights”.<sup>11</sup> The objective of company-based grievance mechanisms should be providing an early-stage recourse and possible resolution, which can be supplemented with collaborative initiatives or being followed up by judicial instances in case of dissatisfaction.<sup>12</sup> They give the opportunity to complainants of directly engaging the company in assessing the issues and seeking their remediation.<sup>13</sup>

Research conducted by the Corporate Social Responsibility Initiative at Harvard University’s Kennedy School of Government reveals that “the recognition of the need for effective grievance mechanisms is nothing new in the context of corporate responsibility.”<sup>14</sup> Indeed, according to Rees and Vermijs there are several grievance mechanism models that have been implemented on a wide range of levels: company, industry, multi-industry, national, regional and international levels, either of private or public nature.<sup>15</sup>

The private sector’s enthusiasm to develop and implement company-based grievance mechanisms is a positive development. However, there still is vast space for improvement. When reviewing the survey of existing grievance mechanisms gathered by Rees and Vermijs, it becomes evident that company-based grievance mechanisms often have a limited scope of issues that mechanisms can address (usually non-discrimination issues or other labour-rights standards), and, in some cases, they appear to be significantly ineffective or even absent when it comes to impacts on more remote stakeholders, like in the case of workers in the supply chain, indigenous peoples or communities around corporate operations.<sup>16</sup> These are in part consequences of the lack of appropriate guidance on company grievance mechanisms and on the multiplicity of business initiatives, the lack of understanding of the possible conflict scenarios that companies might encounter (depending on their industry or the socio-political conditions of the place of operations), and the lack of understanding of the functions and structure of grievance mechanisms.<sup>17</sup>

The present research will contribute to the current literature on CSR and will propose a model for company-based mechanisms that can aspire to solve disputes in a non-judicial, anticipated and CSR-conscious way. Hence, the mechanism should be designed to solve disputes related to all kind of CSR issues – human rights-, labour- and environment-related concerns. The design of the CSR grievance mechanism will be based on the third pillar of Ruggie’s UN ‘Protect, Respect and Remedy’ Framework on access to effective remedy of non-judicial mechanisms, as well as on Ruggie’s Guiding Principles to implement the Framework.

11. Corporate Social Responsibility Initiative 2008, p. 7.

12. UNHRC 2011, A/HRC/17/31, Guiding Principle 29, p. 25.

13. UNHRC 2011, A/HRC/17/31, Principle 29, pp. 31-32.

14. Corporate Social Responsibility Initiative 2008, p. 1.

15. Rees & Vermijs 2008.

16. *Ibid.*

17. See Wilson 2009. Available at <<http://pubs.iied.org/pdfs/G02510.pdf>> (last accessed 31 July 2013).

Building on Ruggie’s work in the field of human rights, this article aims at developing a grievance mechanism model that addresses a broader scope of issues including all elements of CSR. It will do so by complementing Ruggie’s work with insights and best practices found in alternative conflict-resolution literature. Whereas the Framework and Guiding Principles focus only on human rights, the model proposed here will aim at including also labour and environmental issues. This is based on the fact that business activities not only can have adverse impacts on stakeholders’ human rights, but also can damage the environment and affect stakeholders’ lives and livelihoods in ways that cannot be framed as human rights. Moreover, it can also be argued that companies do have a responsibility not only to respect human rights, but also to respect the environment and the society where they operate. Therefore, company-based grievance mechanisms should be prepared to address these issues.

This article will try to contribute to the topic by looking at the following questions: What do current company-based grievance mechanisms look like? What should company-based mechanisms look like? And is it possible to create a general and basic model of company-based grievance mechanism?

In line with the research questions, the research aims at positioning the company-based grievance mechanisms within the broader framework of conflict resolution, which ranges from judicial and non-judicial mechanisms, on the various levels of implementation, such as industry, multi-industry, national, regional, and international levels. The research will also identify the elements that a (basic) model for a company-based grievance mechanism should contain. These elements will be derived from the Guiding Principles.

These objectives will be achieved by performing desk research of literature on existing company-based grievance mechanisms and other non-judicial grievance mechanisms and best practices. Due to their relevance on the topic, Ruggie’s reports on the UN ‘Protect Respect and Remedy’ Framework and on the Guiding Principles for the implementation of the Framework will be studied as the core documents of research to determine the elements of a grievance mechanism model.

## 1. Non-judicial Grievance Mechanisms

Non-judicial grievance mechanisms are procedures consisting of receiving, evaluating, and addressing grievances from affected actors.<sup>18</sup> These grievance mechanisms can be implemented at company, industry, regional, national, or international levels. There are an increasing

18. Compliance Advisor/Ombudsman (CAO) 2008, p. 4. Available at <[www.cao-ombudsman.org/howwework/advisor/documents/implement\\_grieveng.pdf](http://www.cao-ombudsman.org/howwework/advisor/documents/implement_grieveng.pdf)> (last accessed 31 July 2013).

number of multi-stakeholder initiatives on the industry, national and international levels to which companies can subscribe. International initiatives, such as the World Bank Group's Ombudsman and Inspection Panel, have attempted to increase accountability of companies and projects being financed like in the case of the World Bank's Inspection Panel. Some multi-stakeholder initiatives provide independent mechanisms to monitor, investigate and help solve grievances of affected groups or, in some cases, individuals.<sup>19</sup> Furthermore, many of those multinational enterprises subscribing to these initiatives aim at increasing credibility by demonstrating compliance to meet requirements.<sup>20</sup> The grievance mechanisms of these initiatives, or the guidelines they provide companies to implement them, vary in scope and structure, and most of the time they are not situated in the operational levels of companies.<sup>21</sup>

At the company level, the grievance mechanism structures also vary from one another. There is a wide range of types of grievance mechanisms currently being put into place. Some companies make use of the services of a hotline provider, such as Clear Voice Hotline, to establish it as an information facilitator and a first confidential contact point for aggrieved workers.<sup>22</sup> Others like Hewlett Packard work in partnership with a local non-governmental organization (NGO) to identify and address grievances of workers in their supply factories. This NGO often becomes the first contact point to access the grievance mechanism and may act as a worker representative and a monitoring institution of the company's procedure.<sup>23</sup> And some other companies prefer having direct dialogue with the assistance of a third-party facilitator knowledgeable of international standards to find the best possible solution. For example, in Cambodia, a labour inspectorate official may play the role of conciliator in dispute resolution between a company and its workers.<sup>24</sup> It is the official's duty to assure that the resolution respects labour standards, while leaving the option of filing a claim at the Arbitration Council of the country if the aggrieved party is not satisfied with the outcome.<sup>25</sup> Company-based grievance mechanisms will be further explored in the second section of this article.

An important characteristic of non-judicial grievance mechanisms is that they may make use of alternative dispute-resolution procedures to help parties reach a settlement. They will be further explored in the following section.

## 1.1 Alternative Dispute-Resolution Procedures

Interest in alternative dispute resolution and the recognition of its potential to complement judicial mechanisms are not a new phenomenon. The basic work on alternative dispute resolution, and the development of theories and concepts that have influenced modern literature on the topic, can be dated back to early 1980s. This literature is, thus, relevant for understanding non-judicial grievance mechanisms employing alternative dispute-resolution procedures. Alternative dispute resolution is generally understood as

the set of practices and techniques that aim (1) to promote legal disputes to be resolved outside the courts for the benefit of all disputants; (2) to reduce the cost of conventional litigation and the delays to which it is ordinarily subject; or (3) to prevent legal disputes that would otherwise likely be brought to the courts.<sup>26</sup>

Procedures of alternative dispute resolution generally consist of mediation and arbitration.<sup>27</sup> Other authors have added to this categorization other procedures such as negotiation, information facilitation and investigation.<sup>28</sup> In this article, a broader definition of alternative conflict resolution will be adopted to include all the techniques mentioned. *Negotiation* consists of "direct dialogue between the parties to the grievance with the aim of resolving the grievance or dispute through mutual agreement".<sup>29</sup> *Mediation/conciliation* is similar to negotiation, except that it requires the assistance of an external, neutral facilitator that helps the parties to solve the grievance through mutual agreement. This facilitator could take a more or less active and intrusive role in the process.<sup>30</sup> *Arbitration* is a more formal procedure where arbitrators (either or not selected by the parties) hear the positions of the parties, question them or conduct a wider investigation and arrive at a (mostly binding) judgment that settles the grievance or dispute.<sup>31</sup> *Information facilitation* consists of gathering and disseminating information on grievances, leaving any further action on that information to its end users.<sup>32</sup> And *investigation* consists of a process aimed at gathering information and views about the grievance in order to produce an assessment of the facts.<sup>33</sup> Alternative dispute resolution is seen by many as a promising way to complement the judicial system when litigation or binding arbitration can be less responsive to

19. For instance, the World Bank Inspection Panel is the first institution to create a mechanism that can be accessed by affected citizens, rather than just communities or other collective stakeholders. Citizens affected by projects being financed by the World Bank can request their compliance to policies and procedures established by the World Bank Group. See Bridgeman & Hunter 2008, p. 208.

20. Bridgeman & Hunter 2008, p. 218.

21. See Rees 2007.

22. Rees & Vermijs 2008, p. 24.

23. Corporate Social Responsibility Initiative 2008, p. 17.

24. *Ibid.*, p. 37.

25. *Ibid.*

26. See Lieberman & Henry 1986, p. 426; Shavell 1995.

27. Shavell 1995, p. 1; Hensler 2003-2004, p. 166.

28. Rees & Vermijs (2008) have found company-based grievance mechanisms that include information facilitation and investigation as procedures of conflict resolution.

29. Rees & Vermijs 2008, p. 3.

30. Lieberman & Henry 1986, p. 428.

31. Rees & Vermijs 2008, p. 3. An important distinction is to be made here: many practitioners draw a distinction between binding and non-binding forms of dispute resolution and do not consider binding arbitration as belonging to the ADR scope (Eijsbouts 2010).

32. Rees & Vermijs 2008, p. 3.

33. *Ibid.*

the needs of society.<sup>34</sup> Alternative dispute resolution tends to be less costly in terms of money and time. It also tends to be more flexible. Whereas courts deal exclusively with legal rights, alternative dispute resolution can address legitimate grievances that concern individual interests or needs that are not justified by a legal right.<sup>35</sup> Moreover, because alternative dispute resolution procedures concern individual interests and needs, they allow parties flexibility to find a satisfying settlement.<sup>36</sup> However, alternative dispute resolution also has shortcomings that should be considered. Critics have pointed out that alternative dispute resolution often fails to provide due process protections (*e.g.* right to be advised and represented by an attorney) to the less powerful party, making it vulnerable to power and class differences between the parties.<sup>37</sup> Another concern is that alternative dispute resolution might bring improper resolution of public law questions in private fora.<sup>38</sup> Because of the generally informal nature of the procedures, critics argue that alternative dispute resolution tends to focus on party interests and needs and make use of non-legal values that may not always be aligned with public rights and duties or statutory standards.<sup>39</sup> How to overcome these issues will be addressed in the third section of this article.

## 1.2 The Complexity of Conflicts: What Are We Looking at?

Alternative conflict resolution procedures can solve conflicts in various ways: according to the parties' interests, their rights, or their power.<sup>40</sup> Solving a conflict by looking at parties' *interests* means that whatever they care about – including economic, rational, political, and social values – is what should be negotiated by the parties to reconcile and reach an agreement, either directly or with the assistance of a third party.<sup>41</sup> Solving disputes based on parties' *rights* necessarily requires “a neutral third party to apply agreed-upon rules to a set of facts to determine who prevails”.<sup>42</sup> The difference between rights-based and interests-based claims is that rights-based claims are generalizable and are often absolute, whereas interests-based claims emphasize individual interests or needs.<sup>43</sup> Solving rights-based claims usually requires a normative approach to decide who is right or entitled to something, and who has a duty to fulfil that right. Solving interests-based claims is more conducive to compromise between the parties, where neither should be a ‘loser’.<sup>44</sup> Whether rights-based claims should be left to exclusive oversight of courts or binding

arbitral proceedings, or whether non-binding alternative dispute resolution can also handle them has been subject of debate.<sup>45</sup>

And finally, a way of solving disputes that might not be considered by many as a conflict-resolution procedure *per se* is solving conflicts according to *power*. Those with the most power, leverage, status and resources (*e.g.* strikes, lockouts, violence) are more likely to get the most favourable outcome, however, at the cost of breaking a relationship or failing to vindicate a right.<sup>46</sup>

Figure 1 shows the progress of conflict, along with the conflict-resolution mechanisms on every stage. Avoidance and violence are the two opposite extreme ways of dealing with a conflict, having the various conflict-resolution procedures in the middle of the continuum. These procedures also show different degrees of third-party involvement and formality, as well as a shift from interests- to rights-based conflict resolution.

Negotiation is the most informal procedure of all, where the focus is on interests and where the parties retain control over the procedure and the outcome. Mediation can be a formal or informal procedure, but it necessarily involves a neutral third party who does not have the authority to impose a binding decision. Arbitration and judicial mechanisms are the most formal procedures of all, involving a third party with the power to impose binding decisions over the rights of the parties submitted under its authority.<sup>47</sup>

## 2. Company-Based Grievance Mechanisms

Some multi-stakeholder initiatives, such as the UN Global Compact, provide a code of conduct or require certain performance standards. But these mechanisms usually function above the operational level of companies, and some of them do not provide companies with guidance on grievance mechanisms<sup>48</sup> or lack a fully developed complaint mechanism aiming at solving disputes between companies and stakeholders.<sup>49</sup> Thus, establishing grievance mechanisms at the company level can provide a better, more effective and direct procedure to address grievances between a company and its stakeholders.<sup>50</sup>

Companies now have the opportunity – and the challenge – of regulating themselves. Self-regulation through voluntary initiatives emphasizes corporate responsibility regarding social conditions and the environment.<sup>51</sup> According to Backer, self-regulation

34. See Edwards 1985-1986, p. 668.

35. Edelman *et al.* 1993, pp. 503-504; Fisher *et al.* 1991.

36. See Edelman *et al.* 1993, p. 503 and Edwards 1985-1986.

37. See Delgado *et al.* 1985, p. 1359.

38. See Edelman *et al.* 1993; Edwards 1985-1986; Hensler 2002, p. 81; Menkel-Meadow 1997, p. 407; Silbey & Sarat 1989, p. 437.

39. Edwards 1985-1986, p. 676.

40. Ury *et al.* 1988, pp. 3-9.

41. Lytle *et al.* 1999, p. 33; Smith & Martínez 2009, p. 126.

42. Smith & Martínez 2009, p. 126.

43. Edwards 1985-1986.

44. Edelman *et al.* 1993, pp. 503-505.

45. See Edelman *et al.* 1993; Edwards 1985-1986; Hensler 2002; Menkel-Meadow 1997; Silbey & Sarat 1989.

46. Smith & Martínez 2009, p. 127.

47. *Ibid.*

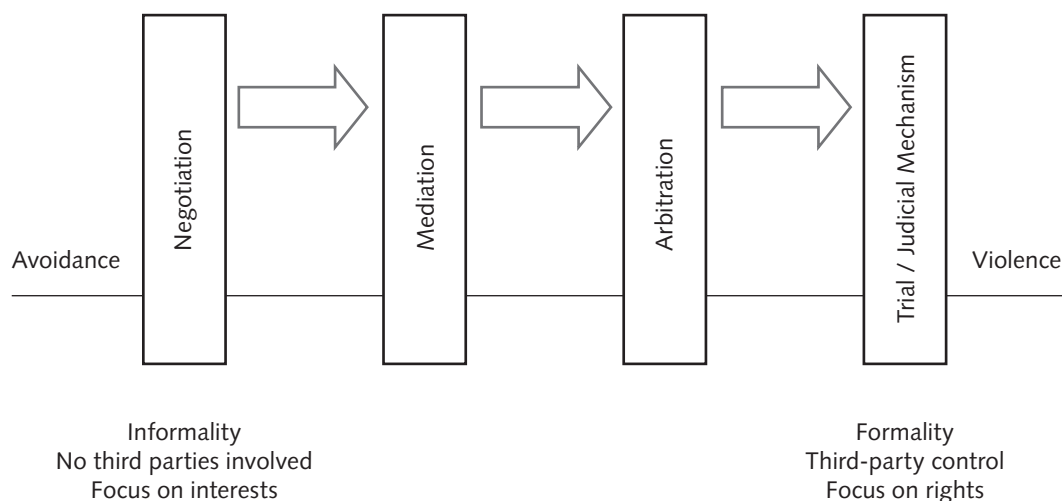
48. Corporate Social Responsibility Initiative 2008, p. 11.

49. See Rees & Vermijs 2008.

50. See Fisher *et al.* 1991.

51. See Jenkins 2001.

Figure 1. *Alternative conflict-resolution procedures. Source: Smith & Martinez (2009), p. 127.*



includes three aspects: assessing the impacts that corporate activities have on issues such as human rights, environment and labour conditions; reporting on those impacts; and providing assurance to society regarding responsible behaviour.<sup>52</sup> Business self-regulation has been, on the one hand, welcomed by both business and civil society. On the other hand, it has also been criticized of appearing innovative but not being systematic.<sup>53</sup> For this reason, in his 2011 report, Ruggie developed also Guiding Principles that should be applicable to operational-level company-based grievance mechanisms, providing some degree of systematization to grievance mechanisms.<sup>54</sup>

### 2.1 What Do Company-Based Grievance Mechanisms Currently Look Like? State of the Art

Companies' grievance mechanisms vary in structure and procedure (negotiation, mediation, etc.). However, some patterns can be identified. The examples of grievance mechanisms studied by Rees and Vermijs allow seeing, on average, what grievance mechanisms look like.<sup>55</sup> They categorize grievance mechanisms by level of implementation (company, industry, national, international, etc.) and by type of process (information facilitation, negotiation, mediation, arbitration, etc.). Their

research studies 28 cases<sup>56</sup> out of which 4 are of companies.

From this research, it can be drawn that grievance mechanisms in companies are composed of five phases: (1) registration of a claim, (2) negotiation, (3) mediation/conciliation, (4) arbitration, and (5) settlement. These stages are not present in all existing grievance mechanisms. However, as will be presented in the following section, they can compose a grievance mechanism model. Not all conflicts are the same, thus not all conflicts should be handled the same way. Each of the conflict-resolution procedures – negotiation, mediation and arbitration – addresses conflicts differently with varying degrees of formality and party control over the outcome. A grievance mechanism should offer its users all possible alternatives to solve disputes, including the option of revising a non-satisfactory outcome.

### 2.2 What Should Company-Based Grievance Mechanisms Look Like? UN Guiding Principles on Non-judicial Grievance Mechanisms

As it has been previously mentioned, in 2008 Ruggie's report to the UN Human Rights Council introduced his 'Protect, Respect and Remedy' Framework. Whereas the Framework lays down the respective duties and responsibilities of states and companies to protect and

52. Backer 2010, p. 125.

53. Ogus 1995, pp. 98-99; Backer 2010, p. 125.

54. UNHRC 2011, A/HRC/17/31.

55. Rees & Vermijs 2008.

56. Examples on the company level are BTC Pipeline/BP in Azerbaijan, Gap Inc. in Lesotho, Hewlett-Packard in Mexico, and Xstrata Copper in Peru. Examples on the industry level are Clear Voice Hotline, Fair Labor Association, Fair Wear Foundation, International Council Toy Industries, Voluntary Principles Security & Human Rights, and Workers Rights Consortium. Examples on the multi-industry level are Ethical Trading Initiative and Social Accountability International. Examples on the national level are India's National Human Rights Commission, Kenya's National Commission of Human Rights, New Zealand's Human Rights Commission, Cambodia's Labor Dispute System, South Africa's Labor Dispute System, and UK's Labor Dispute System. Examples on the regional level are African Development Bank, Asian Development Bank, European Bank for Reconstruction and Development, and the Inter-American Development Bank. And the examples on the international level are Global Union Federations/TNCs, International Labor Organization, Organization of Economic Co-Operation and Development, United Nations Global Compact, World Bank Group (CAO), and World Bank Group Inspection Panel (Rees & Vermijs 2008, p. 4).

respect human rights, it is expected that both states and companies take steps to provide access to remedy to victims of human rights violations.<sup>57</sup> In 2011, Ruggie proposed the Guiding Principles for the implementation of his 2008 UN ‘Protect, Respect and Remedy’ Framework, which provides an authoritative global standard of expected conduct for preventing and addressing adverse impacts on human rights linked to business activity. In this article, the focus will be on (non-state-based) grievance mechanisms as non-judicial alternatives to access to remedy.

According to Ruggie, grievance mechanisms should perform two key functions: (1) ‘tracking’ human rights performance by providing a channel to those (to be) impacted by companies’ operations where they can raise concerns if they feel they are being (or will be) harmed and (2) once identified, addressing grievances and remediating harms early and directly by the company.<sup>58</sup> Furthermore, in Guiding Principle 31, Ruggie establishes as effectiveness criteria for non-judicial grievance mechanisms the following:<sup>59</sup>

- (a) Legitimate: having clear, transparent and sufficiently independent governance.
- (b) Accessible: being publicized to the end users and provide the necessary information and assistance to make use of it. This includes overcoming barriers due to language, literacy, awareness, finance, distance and fear of reprisal.
- (c) Predictable: providing clear and known procedure with a time frame for each stage, defined types of process and outcomes that can be expected, and monitoring procedure on the implementation of the resolution.
- (d) Equitable: ensuring that those aggrieved can have access to information and advise necessary to make use of the grievance mechanism on fair and equitable terms.
- (e) Rights-compatible: providing outcomes and remedies that are in accordance with internationally recognized human rights standards.
- (f) Transparent: having a transparent process and outcome, namely, the receipt of complaints and the key elements of their outcomes.
- (g) A source of continuous learning: drawing on relevant measures to identify lessons for improving the mechanism and preventing future grievances and harms.
- (h) Based on engagement and dialogue: those mechanisms implemented on the operational level should be based on direct or mediated dialogue that leads to agreed solutions.<sup>60</sup>

The rights-compatible approach, as Ruggie and the Corporate Social Responsibility Initiative stipulate, aims to guarantee that any settlement reached through a company-based grievance mechanism respects and supports

the human rights of the aggrieved parties.<sup>61</sup> It must be noted that the rights-compatible approach suggested by Ruggie is different to the rights-based approach found in the literature on alternative dispute resolution. As already mentioned, alternative dispute resolution literature considers the right-based approach as one way of addressing a dispute as opposed to an interest-based approach. Like court or binding arbitration proceedings, it analyzes rights, and the outcome of the negotiation or mediation usually determines whether a party is entitled to the right in dispute.<sup>62</sup> Ruggie, however, refers to the rights-compatible approach as the requirement that any settlement reached through alternative dispute resolution procedures should not contravene human rights standards. Ruggie seems to put less emphasis on the way in which a conflict is addressed (whether parties approach it by claiming rights or by trying to advance their own or joint interests or needs), but more on the *normative quality* of the agreement reached.

However, the rights-compatible approach of the Guiding Principles to grievance mechanisms has a scope limited to human rights. Although Ruggie rejected the idea to delimit the ‘human rights’ covered by his Framework, he specified in the Guiding Principles the most important ones, those contained in (1) The International Bill of Rights,<sup>63</sup> (2) the Core Conventions of the International Labor Organization (ILO),<sup>64</sup> (3) the UN Declaration on the Rights of Indigenous Peoples (if indigenous peoples are involved); and (4) companies’ own codes of conduct and other commitments undertaken by them.<sup>65</sup> Ruggie pointed to the fact that grievances are often not framed in terms of human rights, but that they may become human rights abuses if left unattended.<sup>66</sup>

The nature of many grievances can have a human right component against which the normative quality of an agreement can be assessed. However, it is possible that other social or environmental concerns are not being satisfied when the normative quality of an agreement consists of paying attention only to human rights standards. This might be the case particularly with concerns related to the environment and sustainable development. Although the fulfilment of certain human rights may depend on a healthy environment, the environmental measures taken to fulfil such human rights will not necessarily be enough to preserve the environment. Maintaining a healthy environment and preventing serious harm to it requires implementation of careful

57. UNHRC 2008, A/HRC/8/5.

58. UNHRC 2011, A/HRC/17/31, Guiding Principle 29, p. 25.

59. UNHRC 2011, A/HRC/17/31, Guiding Principle 31, p. 26.

60. UNHRC 2011, A/HRC/17/31, Guiding Principle 31, p. 26.

61. Corporate Social Responsibility Initiative 2008, p. 7.

62. Edelman *et al.* 1993; Edwards 1985-1986; Ury *et al.* 1988.

63. Including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

64. Including Convention 29 on Forced Labor, Convention 87 on Freedom of Association and Protection of the Right to Organize, Convention 98 on the Right to Organize and Collective Bargaining, Convention 100 on Equal Remuneration, Convention 105 on the Abolition of Forced Labor, Convention 111 on Discrimination (Employment and Occupation), Convention 138 on Minimum Age, Convention 182 on Elimination of the Worst Forms of Child Labor.

65. UNHRC 2011, A/HRC/17/31, Guiding Principle 12, p. 13.

66. UNHRC 2011, A/HRC/17/31, Guiding Principle 31, p. 26.

policies and industry best practices, as well as compliance with statutory environmental standards. The same way that human rights establish minimum conditions to promote human well-being, environmental best practices<sup>67</sup> and statutory environmental standards are also minimum requirements aimed at protecting the environment and promoting the sustainability of industrial activities. For example, in early 2000, Coca-Cola got involved in a conflict with the local community in Plachimada, India, when its production operations caused water scarcity in the area. Coca-Cola was sued in Indian courts for over-extracting groundwater allegedly having exceeded the amount of litres per day, granted by the governmental license.<sup>68</sup> The amount of water that the governmental license allowed Coca-Cola to extract is (or should be) determined by governmental agencies with the purpose of ensuring a sustainable water use. Had this case been resolved through a human rights-compatible grievance mechanism, the parties could have settled by reaching an agreement by which the company accepted to extract a lesser amount of water that prevents further water scarcity to community residents – which may or may not meet the limit set by the governmental license. Such a settlement would perhaps accommodate community members' human right to, for example, the enjoyment of the highest attainable standard of physical health. In other words, a rights-compatible approach would be satisfied with ensuring the well-being, health, or livelihood of a particular Indian local community. However, that does not always translate into reaching a solution that procures the protection of the environment and a sustainable use of resources. For this reason, it is important that company-based grievance mechanisms do support not only human rights but also other CSR-related issues – and the grievance mechanism model that will be developed in the following section will aim at doing so.

### 3. A Model for Company-Based CSR Grievance Mechanisms

This section will propose a model for a company-based grievance mechanism that may provide remedy to all CSR issues. Human rights form a very important part of CSR, but there are other important issues such as environmental damage or poor labour conditions for workers outside the scope of human rights. This model aspires to present the basic elements and steps that a grievance mechanism should ideally include in order to provide effective remedy to its users. These elements and steps have been elaborated based on the Guiding Principles

for the implementation of the UN 'Protect, Respect and Remedy' Framework and on other, theoretical, concepts and best practices from literature on alternative dispute resolution, most of which have been presented in the previous section.

It must be emphasized that the model proposed should be aimed at addressing early-stage grievances through dialogue-based and interest-based dispute resolution techniques (*e.g.* negotiation, mediation and non-binding arbitration). The company-based grievance mechanism model can be particularly helpful to grieved parties who have a legitimate concern but whose claim may not provide sufficient basis for a lawsuit. It should be noted, however, that this mechanism is not an equal alternative to judicial remedy and is not meant to substitute traditional judicial proceedings by courts. Moreover, the use of company-based grievance mechanisms should not preclude parties from taking their case to judicial or other non-judicial instances to seek remedy.

In particular, the model does not intend to solve cases involving serious harm to individuals or to the environment, especially when they raise criminal liability. These cases require judicial review and judgment on the rights and duties of the parties, and courts or other mechanisms<sup>69</sup> independent from the company are more appropriate. However, in these cases where adjudication is preferred, company-based grievance mechanisms may still be able to play a role in the resolution of a conflict. For instance, the mechanism may be used by victims to obtain information about the existing channels to access remedy or to provide them with access to advice (or an attorney if needed) to be able to file a case in a court or use other available mechanisms. Another potential role of the mechanism would be to cooperate in research on the matter of the conflict by an independent party. In other words, even when the company-based grievance mechanism does not play a role in resolving a grievance, it does not mean that it cannot play a role in bringing justice to the parties.

The proposed company-based grievance mechanism model will use an interest-based approach to conflict resolution. The settlements reached should support human rights, CSR-related best practices regarding the environment, labour and other social issues (such as those addressed by the OECD Guidelines for Multinational Enterprises), codes of conduct or other voluntary commitments by the company (such as the UN Global Compact and industry-specific certifications<sup>70</sup> or codes of conduct), and, where necessary, statutory (environmental or labour) standards.

The grievance mechanism is composed of six steps or phases (Figure 2): (1) filing of a claim, (2) registration of a claim, (3) analyzing the grievance and proposing a course of action, (4) party engagement – negotiation, mediation and non-binding arbitration, (5) reporting

67. For example, those derived from international initiatives such as the OECD Guidelines for Multinational Enterprises 2011 and the UN Global Compact.

68. See Hills & Welford 2005; Cedillo-Torres *et al.* 2012.

69. These may include state-based grievance mechanisms such as government ombudsman or a public institution providing judicial or non-judicial dispute resolution.

70. A couple of examples are the Forest Stewardship Council (FSC) Certification and the Roundtable on Sustainable Palm Oil Certification.

outcomes and (6) outcome monitoring and grievance mechanism evaluating.

### 3.1 Filing a Claim

The first step consists of an individual or a group approaching an access point of the company grievance mechanism to file a claim. All stakeholders of a company should be granted access to the grievance mechanism, and at this point all grievances should be filed and admitted into the mechanism. It is in the following stages of the mechanism that grievances are evaluated and considered.

It is advised that at least one of the access points should be independent from the corporate management.<sup>71</sup> This external point of access should be an entity separate from the company preferably with skills and knowledge on dispute handling of CSR-related issues, such as a local NGO or the National Commission of Human Rights or ombudsman. Literature on alternative dispute resolution points out that company-based grievance mechanisms, or ‘internal’ dispute resolution, should avoid creating the situation where the handler of complaints or mediators are also management representatives. Even if the handler or mediator is not involved in the grievance, his position could generate conflicting interests should the complainant file a complaint through external legal channels and the handler is likely to assist or represent the company. An example of such arrangement is Hewlett Packard in Mexico, which works with the Center for Reflection and Action on Labor Issues (CEREAL), a local NGO. CEREAL is in charge of identifying and addressing grievances of workers in supply chain factories. This NGO also functions as a point of information and provides training on human and labour rights to workers.<sup>72</sup>

Ruggie’s effectiveness criteria of accessibility and equitability are relevant at this stage and should be procured when grieving parties file a claim.<sup>73</sup> *Accessibility* of a grievance mechanism means that the mechanism must (1) be known to all stakeholder groups for whose use it is intended and (2) provide adequate assistance for those who may face particular barriers to

access.<sup>74</sup> Regarding the first aspect, a project conducted in 2011 by the Corporate Social Responsibility Initiative on behalf of the Special Representative of the UN Secretary-General for Business and Human Rights found that companies have difficulties with ensuring that stakeholders become aware of the existence of their grievance mechanism.<sup>75</sup> The report of the project points out that publication of the grievance mechanism does not mean that it is known to stakeholders.<sup>76</sup> Companies working in remote and spread-out communities, where Internet access is not possible, are up to the biggest challenge. In these cases, publicizing the mechanism on the company website is obviously not sufficient and alternatives have to be found. Some of the reported strategies include setting up multiple access points for contractors, employees and communities to raise complaints by phone, email or in person, as well as flyers and billboard advertisements in relevant areas.<sup>77</sup>

The second condition to accessible grievance mechanisms consists of elimination of barriers to access as much as possible. Some of these barriers may consist of a lack of awareness of the mechanism or language literacy, of costs, of physical location, of fears of reprisal,<sup>78</sup> of levels of education, and of access to Internet and other communication infrastructures such as phone and mail.<sup>79</sup> The barriers to access may differ depending on the context in which the company operates. But as minimum condition, in all cases the procedure to file a complaint should be clear and simple, and in the appropriate languages. If needed, assistance with filing the complaint should be provided to grieved parties (such as in case of illiteracy).<sup>80</sup> The Compliance Advisor/Ombudsman (CAO), the independent recourse to the International Finance Corporation (IFC) and the Multilateral Investment Guarantee Agency (MIGA) propose in-person methods to foster community accessibility to the company. This approach suggests that companies could have staff regularly present in the local communities to take complaints and putting a ‘human face’ on the communities’ relationship and engender trust.<sup>81</sup> This approach is certainly suitable for companies whose operations have potential severe impacts.

Regarding *equitability*, companies should ensure the inclusion of this principle in their grievance mechanisms by providing an informed access to remedy.<sup>82</sup> According to Ruggie, equitable grievance mechanisms “ensure that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair, informed and respectful

71. Corporate Social Responsibility Initiative 2008, p. 21.

72. Rees & Vermijs 2008, p. 17.

73. UNHRC 2011, A/HRC/17/31, Guiding Principle 31, p. 26.

74. *Ibid.*

75. Rees 2011, p. 15.

76. *Ibid.*, pp. 15-16.

77. *Ibid.*, p. 15.

78. UNHRC 2011, A/HRC/17/31, Guiding Principle 31 p. 27.

79. CAO 2008, p. 11.

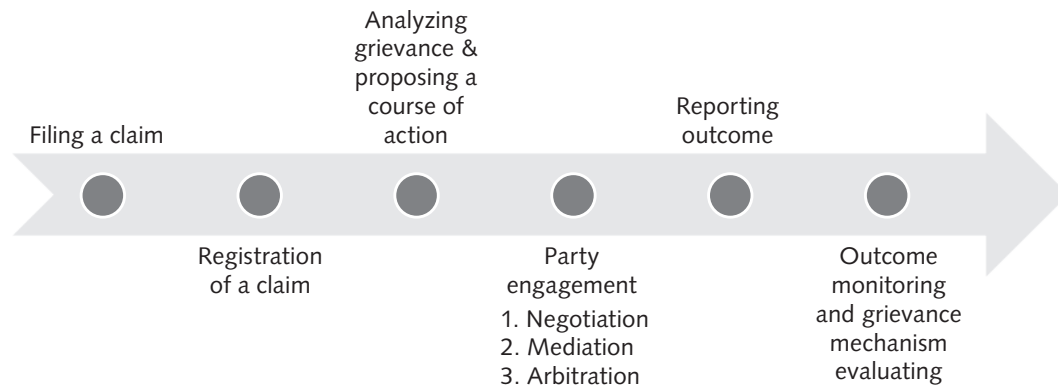
80. Corporate Social Responsibility Initiative 2008, pp. 21-22.

81. CAO 2008, p. 11.

82. See Marmorat 2009. Available at <www.fafo.no/pub/rapp/10088/10088.pdf> (last accessed 4 August 2013).



Figure 2. Six phases of the grievance mechanism model.



terms”.<sup>83</sup> Similarly, as Rees asserts, besides understanding what their rights are, aggrieved parties should also be knowledgeable of the range of existing mechanisms (both non-judicial and judicial) where they can seek remedy.<sup>84</sup> Equitability should, in the end, empower local populations to be in the position to effectively negotiate.<sup>85</sup> This way, the inherent imbalance in knowledge between companies and stakeholders can be overcome. A good way of achieving this is through building partnerships with CSR-knowledgeable institutions such as NGOs.<sup>86</sup>

### 3.2 Registration of Claim

The second step consists of registering a claim brought directly by the grieved party to the company, or through the external access point to the mechanism functioning as a representative of the grieved party. This step is to be considered apart from the first one because it may occur in the two instances mentioned: through an external partner to the company providing support in the implementation of the grievance mechanism, or in the absence of such partner, directly to the company through a department in charge of handling complaints. When a claim is registered, the claim handler should be well trained to ask the right questions to the claimant and obtain as much relevant information about the conflict as possible. The claim handler should focus on hearing and recording the facts of the concern or dispute, as well as the interests or needs that the claimant would like to address. Careful analysis of the facts and the interests or needs of the claimant can help delineate the problem, and it may be conducive to identifying potential solutions.<sup>87</sup>

Ruggie’s effectiveness criteria of transparency and predictability are relevant at this stage of the grievance mechanism. By *transparency*, Ruggie refers to the duty of complaint handlers to keep parties to a grievance “informed about its progress and providing sufficient information about the mechanism’s performance to build confidence in its effectiveness”.<sup>88</sup> Closely related

to this criterion is the principle of *predictability*. According to Ruggie, a grievance mechanism is predictable when it has a “clear and known procedure with an indicative timeframe for each stage, and clarity on the types of process and outcome available and means of monitoring implementation”.<sup>89</sup>

It is important that, when acknowledging the receipt of a claim, the claimant is also informed of what the next steps consist of, including the corresponding deadlines, and an overview of the whole procedure. This information should, of course, also be available through various other sources (*e.g.* Internet, company’s CSR department, partner institutions such as NGOs, posters posted on workplaces or public spaces in a small community, etc.).

### 3.3 Analysis of Grievance and Proposal for a Course of Action

Once the company has received and registered a claim, it must proceed to evaluate, classify and, if necessary, inquire about the grievance further with other parties involved and investigate the facts and aggravating issues. The claim handler should gather all the information possible to be in the position of deciding on a course of action – be it the implementation of a specific remedy or a dialogue-based process. The claim handler should, thus, analyze and classify the grievance, identify the parties to the dispute and subsequently inform them about the claim. Before the dialogue-based procedure begins, the complaint handler may hold separate informal face-to-face meetings with each of the parties involved (apart from the claimant) with the purpose of understanding each ‘side of the story’ to the grievance. The parties concerned not only include the company, but also other stakeholders who may be affected by the outcome of the dispute resolution or those who may have an effect on the outcome itself (such as NGOs).<sup>90</sup> It must be stressed that, in conflicts where the resolution of the dispute may have an impact on society at large (such as cases of potential environmental harm), authorities relevant to the issue at hand should also become involved in the conflict-resolution process. Their participation can greatly contribute to the process

83. UNHRC 2011, A/HRC/17/31, Guiding Principle 31 (d), p. 26.

84. Rees 2011, pp. 19-20.

85. Wilson 2009, p. 47.

86. Corporate Social Responsibility Initiative 2008, p. 16.

87. Lytle *et al.* 1999, p. 41.

88. UNHRC 2011, A/HRC/17/31, Guiding Principle 31 (e), p. 26.

89. UNHRC 2011, A/HRC/17/31, Guiding Principle 31 (c), p. 26.

90. See International Finance Corporation 2007, p. 24.

by providing legal, technical or scientific information that needs to be considered by all parties, as well as by ensuring that the outcome supports and protects public policy.<sup>91</sup>

This stage must follow the principles of transparency and predictability. Having a transparent follow-up and proposal of course of action requires that the parties to the grievance mechanism are well informed about the status of their claim. Therefore, once the claim handler has decided on a course of action, it must be notified to all parties in writing – and orally in case of illiteracy. The instructions must be as clear as possible explaining how the grievance is proposed to be addressed – by negotiation, mediation or (non-binding) arbitration.

According to the Corporate Social Responsibility Initiative, “[n]o complaint [...] should be rejected out of hand so long as there is some nexus with the company’s activities. Even where a complaint appears at first sight to be ill-founded [...] it may be an expression of an underlying, legitimate, grievance that warrants addressing.”<sup>92</sup> In order to decide on the course of action, a company should first evaluate and classify the complaints.

### 3.3.1 *Classifying Complaints and Proposing a Process*

The analysis of grievances will consist of their classification based on the complexity of the issue and the position of the company in the issue (*e.g.* full or partial recognition of the claim, or plain rejection of the claim). When informing the claimant(s) on the position the company has on the issue at hand, the company must (fundamentally) justify such position.

Felstiner *et al.* illustrate how a simple grievance in a pre-conflict stage may evolve to an adversarial dispute and how the dispute resolution process evolves together with the conflict.<sup>93</sup> They assert that in a pre-conflict stage, a concern could be resolved by the company by simply providing the claimant with the information needed or it may be a straightforward claim requesting a specific course of action by the company. In the latter case, the company may accept or reject the claim, partially or completely. A compromise offer may be a partial rejection of a claim, which will likely initiate a negotiation that is aimed at ending the dispute. An outright rejection of a claim creates a dispute, with two or more conflicting parties. In case of a full rejection of a claim, mediation with the help of a neutral third party or arbitration may be the best way to proceed.<sup>94</sup>

Similarly, research by the Corporate Social Responsibility Initiative has elaborated a useful classification of claims to determine what the best route of action is.<sup>95</sup> In general, it advises that in most grievances some form of dialogue-based procedure between the company and the complainants takes place. The classification proposed by

the initiative is based on four characteristics: issue, party, acceptance and solution.<sup>96</sup> This evaluation and classification provides a good guideline on how to systematize and increase the transparency and predictability of the grievance mechanism. All of the studied elements can be classified as either simple or complex. Single issue and single-party grievances are simple, whereas multiplicity in issue and/or parties make complex grievances. A simple grievance also means a grievance recognized by the company as legitimate, whereas a grievance contested by the company in whole or part makes a grievance complex.<sup>97</sup> Finally, a simple grievance has a specific solution that is either requested or evident; while a complex grievance does not have a requested solution or if it does is contested or unclear.<sup>98</sup>

Regarding the number of parties to a conflict, the Corporate Social Responsibility Initiative warns that, while the claim is being analyzed, the parties involved must be carefully identified.<sup>99</sup> There may be more parties that, although not evidently, could have a position in the dispute, adding complexity to the dispute. Complex grievances may require the involvement (as parties or observers) of sourcing, contracting or partner companies in the case of supply chain situations, or a wide group in the local community. In case of dialogue-based procedures, advisors to the parties should ensure that the parties engage directly in the dialogue and not through them. The initiative also suggests that all the parties should have the maximum authority possible to reach an agreement.<sup>100</sup>

The grievance classification developed by the Corporate Social Responsibility Initiative presents the various scenarios that could emerge from the combination of the four characteristics of a grievance and provides examples of proposed processes to address complaints (see Figure 3).<sup>101</sup> In the first scenario, all elements of the grievance are simple (issue, party, grievance accepted by the company and with specific solution requested or evident). Depending on the issue at hand, the company may decide to implement the remedy requested by the claimant, or it may decide to also meet face to face with the complainant.

In the second scenario of the classification there are two complex elements of a grievance: there are multiple parties and/or multiple issues.<sup>102</sup> The claim, however, is not contested by the company. In this type of cases, the initiative recommends companies to propose a face-to-face meeting to grant the request made by the claimants and to clarify any doubts they may have.<sup>103</sup> Holding face-to-face meetings can be favourable for the company–claimant relationship and provides to the claimants

91. See Davis 1997, p. 49; Love 1997, p. 937; Senecah, 2004; Volkéry *et al.*, 2012. Available at <[www.friendsoftheirishenvironment.net/cmsfiles/Library/EnvComplaintHandling13-01-24\\_FinalReport\\_ENVTC-2.pdf](http://www.friendsoftheirishenvironment.net/cmsfiles/Library/EnvComplaintHandling13-01-24_FinalReport_ENVTC-2.pdf)>.

92. Corporate Social Responsibility Initiative 2008, p. 31.

93. See Felstiner *et al.* 1980-1981.

94. *Ibid.*, pp. 635-636.

95. Corporate Social Responsibility Initiative 2008, pp. 32-34.

96. *Ibid.*, p. 31.

97. *Ibid.*, p. 32.

98. *Ibid.*, pp. 32-34.

99. *Ibid.*, p. 26.

100. *Ibid.*, pp. 26-28.

101. *Ibid.*, pp. 32-34.

102. *Ibid.*, p. 32.

103. *Ibid.*

the sense that their grievances are being taken seriously.<sup>104</sup>

In the third and fourth scenarios of the classification, there are more complex elements in the claim: a claim is rejected by the company and/or there is no solution being requested or evident like in case 3, and/or there is a multiplicity of parties making a claim like in case 4.<sup>105</sup> In these cases, a face-to-face meeting can be a good start. This way the issues can be discussed, evidence can be found and a mutually agreed solution can be found through negotiation. If negotiation fails, a neutral third party will have to mediate.<sup>106</sup> Finally, according to the Corporate Social Responsibility Initiative, only in the most complex situation, like in scenario 5 of Figure 3, is it more desirable to start a grievance procedure with a facilitated dialogue such as mediation.<sup>107</sup>

It is very important, that the company staff responsible for the implementation of the CSR grievance mechanism carefully analyzes the type of procedure that is more adequate to solve each of the claims. The handbook on stakeholder engagement by the International Finance Corporation provides a couple of examples that illustrate this. A simple case could be a complaint about a company truck that keeps on running over chickens in the road.<sup>108</sup> This case could be readily resolved through direct interaction between the complainant and the company's staff. If meeting face-to-face does not result successfully, the claimant should have the possibility of mediation.<sup>109</sup> A more complex case also presented by the International Finance Corporation consists of community allegations of widespread ground water contamination. Such case could be of a serious or urgent nature and require immediate intervention by senior managers and subsequent mediation.<sup>110</sup>

The company-based grievance mechanism model proposed here contemplates three stages of action that can be employed by its users according to their needs: (1) face-to-face meeting or negotiation, (2) mediation and (3) (non-binding) arbitration. When a company receives and files a claim (either directly or through a partner organization), the complaint handler must propose, after careful evaluation, to the claimant a route of action that designates on which of those three stages the grievance mechanism should start. If the opening stage did not bring a satisfying mutually agreed solution, the parties can move up to the following stages as necessary. The three stages form a continuum of steps with increasing degrees of formality. The parties may use these stages as a linear procedure that begins with negotiation and ends with arbitration.<sup>111</sup> However, they should also have the possibility of looping up or down within this continuum if they desire to do so. Also,

without exception and at any point of the grievance mechanism a claimant can bring its case to the judicial system, which may include binding arbitration, if desired.<sup>112</sup>

### 3.4 Party Engagement

According to Ruggie's effectiveness criteria on operational-level grievance mechanisms, mechanisms should be based on party engagement and dialogue.<sup>113</sup> This can be done through alternative dispute resolution procedures – be it negotiation, mediation or arbitration. Mediation and arbitration procedures should be provided by a legitimate and independent third party.<sup>114</sup>

In the work done by Ruggie and the Corporate Social Responsibility Initiative, there is an emphasis on human rights-compatible grievance mechanisms. In this report, it is argued that grievance mechanisms should be fit to solve not only human rights-related grievance but also wider CSR-related concerns. As already illustrated, companies' operations can not only potentially affect human rights, but also cause severe environmental damages and violate minimum labour conditions and standards – especially in the case of countries with weak governance and law enforcement. Therefore, it is proposed that disputes handled by the grievance mechanism model presented here should solve disputes through interest-based dialogue procedures, whose outcomes support human rights, international labour standards and applicable environmental law, norms, values and best practices. This means that the mechanism should address concerns in terms of interests. Whether or not the grievance concerns the violation of (human) rights, grievances should be admitted by the mechanism under an interest-based approach. This way, parties are allowed greater flexibility to explore solutions beyond mere legal remedies and reach a compromise that satisfies their needs as much as possible.<sup>115</sup>

Whether the problem at hand consists of a simple or a complex grievance, the *equitability* of parties should be carefully maintained during this stage. An oft-mentioned critique of alternative dispute resolution procedures is that they tend to be very sensitive to the effects of party inequality.<sup>116</sup> Due process guarantees (such as the right to an attorney) provided by courts are not always present in alternative dispute resolution. Party inequalities are mostly evident in labour-related grievances. Scholars have pointed out that employer-employee relationships are 'formally unequal' in the sense that "employees agree to a subordinate status when they accept employment".<sup>117</sup> In order to ensure that all parties are participating from equal positions, parties, especially vulnerable ones, should come well

104. *Ibid.*, p. 34. See also Drolet & Morris 2000.

105. Corporate Social Responsibility Initiative 2008, p. 33.

106. *Ibid.*, p. 34.

107. *Ibid.*, p. 36.

108. International Finance Corporation 2007, p. 71.

109. *Ibid.*

110. *Ibid.*

111. See Smith & Martinez 2009, p. 128.

112. UNHRC 2011, A/HRC/17/31, p. 25.

113. UNHRC 2011, A/HRC/17/31, Guiding Principle 31 (h), p. 26.

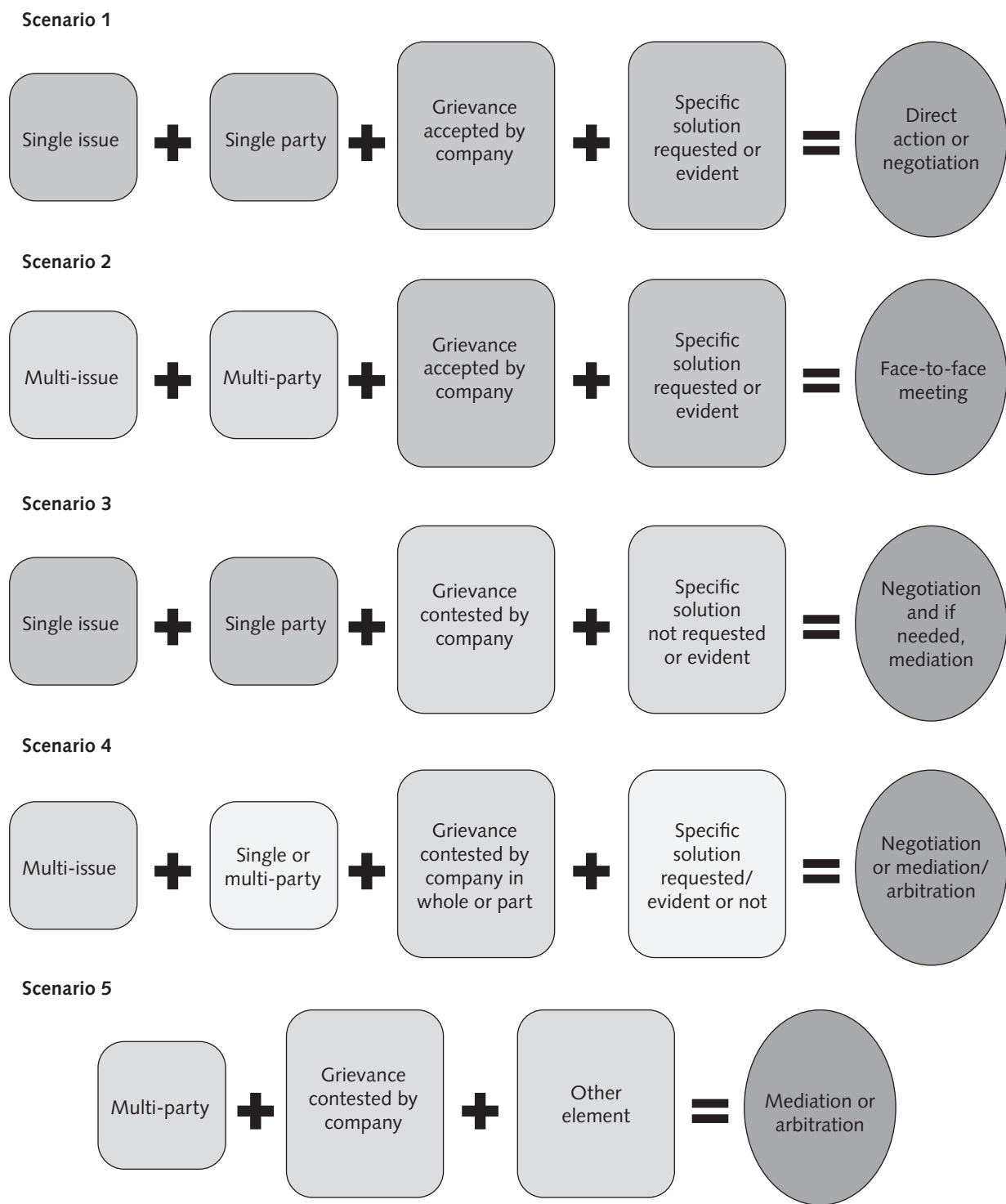
114. UNHRC 2011, A/HRC/17/31, Guiding Principle 31, p. 27.

115. See Lytle *et al.* 1999.

116. By party inequality the author refers to "significant imbalances in knowledge, power, and influence" among parties (International Finance Corporation 2007, p. 73). See also Edelman *et al.* 1993, p. 507.

117. Edelman *et al.* 1993, p. 507.

Figure 3. Classification of Claims. Source: Corporate Social Responsibility Initiative (2008), pp. 32-33.



prepared to the dialogue. This means that parties should not only understand the ways in which they can participate in the dialogue-based procedures, but also be well aware of the minimum rights and standards that the settlement should support. Moreover, parties should have equal access to expert opinions when necessary. Having the right information will not just overcome inequality between parties. Well-informed and well-advised parties will be more likely to obtain effective and fair remedy, adding *legitimacy* to the overall grievance mechanism. In some cases, access to specific legal, scientific or technical expertise is needed to understand a problem and to be in a better position of making a decision. The griev-

ance mechanism should allow bringing authorities or neutral experts or advisors to give opinions and ensure that the parties are aware of law, principles, or custom and to ensure that the outcome of the procedure goes in accordance with them.<sup>118</sup>

According to the conflict resolution theory studied in the previous chapters, the dialogue-based dispute resolution procedures are negotiation, mediation and (non-binding) arbitration. As already explained, they vary in the degrees of formality and party control over the outcomes. Hence, these three procedures, in that order,

118. See Love 1997, p. 938; Senecah 2004, pp. 13-14.

compose the ideal steps made available to parties in the resolution of company–stakeholder conflicts on CSR issues.

### 3.4.1 Negotiation

Negotiation can be a good initiating stage in a grievance mechanism. This is usually the ideal method to solve simple or relatively straightforward issues where there is no or little disagreement between the parties. In a negotiation, parties retain control over the desired process and the outcome.<sup>119</sup> In the process, the parties to a claim meet face to face and discuss the grievances they have. In cases where the claimant wants to remain anonymous, he or she should be able to have someone representing him in the grievance mechanism to the extent possible.<sup>120</sup>

### 3.4.2 Mediation

When negotiation fails, or when the issue at hand is too complex or sensitive to be solved through negotiation, a neutral third party should come to the table to help the parties find a mutually agreed solution.<sup>121</sup> A neutral and objective third party plays an essential role in guaranteeing the *legitimacy* of a grievance mechanism. As Ruggie describes it, a grievance mechanism must find ways of “enabling trust from the stakeholder groups for whose use they are intended, and being accountable for the fair conduct of grievance processes”.<sup>122</sup>

In order to maintain neutrality, the mediator should not be affiliated to any of the conflicting parties. The partnership with a respected and trusted institution becomes crucial especially in countries where there are limits to an independent judiciary or properly functioning administration.<sup>123</sup> For instance, the former High Commissioner for Human Rights, Louise Arbour, has referred to the recent increasing role of National Human Rights Institutions in handling grievances. She mentions that these institutions can provide information and advice on avenues of recourse for the victims.<sup>124</sup>

As a final remark, it is relevant to mention that experience in CSR issues should not be the only characteristic that companies and the complainants should look for when appointing a mediator. Personal traits, cultural background and other contextual elements of the claim may be of relevance to increase the chances of a successful mediation procedure. This topic is, however, out of the reach of this article and should be further researched in other instances.

### 3.4.3 Arbitration

Non-binding arbitration is the last alternative conflict resolution procedure available in the grievance mechanism model. It should be used to address the most complex cases where mediation does not redeem successful outcomes and the parties are looking for a procedure

where one or more neutral third parties decide the best possible solution to a dispute. Although parties in an arbitration have less control over the process to settle the dispute, in this procedure the parties still have more control than in litigation. However, depending on the decision of the parties, the decision may be final in this procedure (although the parties can take their case to court, if desired or the relevant jurisdiction so provides). The decision can be as binding as the parties stipulate it.<sup>125</sup>

In a company-based grievance mechanism, the parties may select an arbiter to handle their case or they may choose to have a panel of arbiters. To form a panel of arbiters, typically each party selects an arbiter, and the two selected arbiters subsequently choose a chairman, who may also be appointed by an Arbitration Institute or Court. A fair procedure to appoint a (set of) trained and well-respected arbitrator(s) is a necessary element to safeguard the legitimacy of this procedure. A good example of this practice is the grievance mechanism of the Swiss mining group Xtrata, operating in Peru. An Arbitration Court formed by three arbitrators is appointed: Xtrata and the community designate one arbitrator each, and these two arbitrators subsequently appoint a third one which is usually an ombudsman. The court investigates and decides on the cases, and no appeals are allowed on the decision.<sup>126</sup> These types of procedures balancing power differences between the company and communities are particularly essential in company projects with potential social and environmental high impacts.<sup>127</sup> NGO representatives and ombudsmen can be designated to function as arbitrators, like in the case of British Petroleum’s (BP) operations at the Baku–Tbilisi–Ceyhan (BTC) pipeline in Azerbaijan.<sup>128</sup>

## 3.5 Outcomes

In all cases and with no exception, all parties must be informed of the outcomes of the grievance mechanism and, unless in the case of binding arbitration, must have agreed to it.<sup>129</sup> Grievance mechanisms, through the employment of alternative dispute resolution techniques, provide flexibility to the parties to explore solutions and find a commitment that satisfies their needs and interests.<sup>130</sup> According to Marmorat, a remedy can function as “a treatment for an injury, a means for counteracting something undesirable, or a means for legal reparation”.<sup>131</sup> Ruggie summarizes that redress must encompass “apologies, restitution, rehabilitation, financial or non-financial compensation [...], as well as prevention of harm through, for example, injunctions or guarantees of non-repetition”.<sup>132</sup>

125. Smith & Martinez 2009, p. 127. It is noted that formal arbitration is a legal procedure and aims at a binding arbitral award. As mentioned before, many practitioners do not consider this form ADR.

126. Rees & Vermijs 2008, p. 21.

127. See CAO 2008.

128. Rees & Vermijs 2008, pp. 8-9.

129. Corporate Social Responsibility Initiative 2008, pp. 23-25.

130. Edelman *et al.* 1993; Menkel-Medow 1997.

131. Marmorat 2009, p. 9.

132. UNHRC 2011, A/HRC/17/31, p. 22.

119. Smith & Martinez 2009, p. 127.

120. Corporate Social Responsibility Initiative 2008, p. 21.

121. *Ibid.*, pp. 34-36.

122. UNHRC 2011, A/HRC/17/31, Guiding Principle 31 (a), p. 26.

123. Marmorat 2009, p. 18.

124. See Arbour 2008.

As already mentioned, the Guiding Principles assert that company-based grievance mechanisms should be *rights compatible*. This means that they must ensure that “outcomes and remedies accord with internationally recognized human rights”.<sup>133</sup> In the case of the grievance mechanism model proposed here, the settlement or outcome of the conflict resolution process should support not only human rights but also laws, values, and company commitments regarding environmental and labour issues. As previously mentioned, providing parties access to information and bringing authorities or experts – either as participants in the dispute or as independent neutral advisors – can greatly contribute to achieving rights-compatible settlements. Information and involvement of experts and authorities are key to maintaining an informed dispute resolution procedure to facilitate parties reaching a just remedy and to reinforcing the legitimacy of the grievance mechanism. Finally, parties should consider including in the final settlement devices to bind the parties to the agreement, either through self-enforcing means or through legal action. If parties see it as necessary, the settlement can include a mechanism to monitor or follow-up the remedy’s implementation by a third party (e.g. an NGO handling the claim).<sup>134</sup> The outcome, and its implementation mechanism if any, should be formally recorded in writing and confirmed and signed by the parties. It is advised that the outcomes of the grievance mechanism become public to ensure transparency of the procedure, unless otherwise requested by the claimant.<sup>135</sup> If no agreed solution was found by the company-based grievance mechanism, a report describing the process and reasons of lack of remedy should also be on the records.

### 3.6 Outcome Monitoring and Grievance Mechanism Evaluating

On his effectiveness criteria for non-judicial grievance mechanisms, Ruggie prescribes that grievance mechanisms should be a *source of continuous learning* for companies by “identify[ing] lessons for improving the mechanism and preventing future grievances and harms”.<sup>136</sup> Outcome monitoring and evaluation is usually carried out internally by companies or through audits by certification initiatives. However, there is a widespread scepticism about the ability of both internal monitoring and evaluation procedures and those of certification auditors to guarantee full transparency.<sup>137</sup>

In reaction to this scepticism, NGOs and researchers working on CSR suggest a new technique denominated ‘participatory monitoring and evaluation’. This type of monitoring and evaluation consists of involving local communities and other relevant stakeholders in the monitoring of outcome implementation and an evaluation of the company’s activities that have an impact in

local communities and other stakeholders. The company subsequently reports back to the stakeholders the results, addressing the issues raised by them.<sup>138</sup> Evaluation and monitoring of outcomes and company’s activities can also play an important role in legitimizing the grievance mechanism, building trust-based community-company relationships and preventing future conflicts. The company Veracel,<sup>139</sup> operating in Brazil, is an example of a business implementing this type of monitoring. Veracel established the Odour Perception Network to monitor its pulp mill. The network, composed of a group of volunteers living in neighbouring communities, receive training on recording and reporting the perception of odour.<sup>140</sup> This is just an example of how companies and their stakeholders can look for creative alternatives that empower the local communities by promoting its involvement in CSR.

Figure 4 simplifies and illustrates the elements of a grievance mechanism, including the steps of each stage with their corresponding effectiveness criteria of Ruggie.

## 4. Conclusions

This article aimed at providing an overview of alternative conflict resolution procedures, summarizing the state of the art of CSR grievance mechanisms and proposing a model of company-based grievance mechanisms on CSR-related issues. This model is composed of the basic steps and types of third-party engagement that companies should offer to those having been or possibly becoming affected by a company’s operations. The model is for the most part deducted from the Guiding Principles for the implementation of the UN ‘Protect, Respect and Remedy’ Framework, publications of Harvard University’s Corporate Social Responsibility Initiative Program, and concepts and best practices found in the literature on alternative dispute resolution.

The model presented here should not be taken as a finalized product. Access to non-judicial remedy in the field of CSR is at the moment a rising topic that still rests in its early stages. There is a need of more research and practical implementation of grievance mechanisms by companies in order to further develop them. Only by putting them into practice will it be possible to draw conclusions with more confidence over what works best. For instance, there could be more research done on the ways environmental issues should be addressed and the elements that the settlements should have in order to guarantee the protection or restoration of the environment, the characteristics that a mediator should have, or on effective ways of involving and empowering local communities. After all, empowerment of communities

133. UNHRC 2011, A/HRC/17/31, Guiding Principle 31 (f), p. 26.

134. Corporate Social Responsibility Initiative 2008, pp. 39-40.

135. *Ibid.*, p. 39.

136. UNHRC 2011, A/HRC/17/31, Guiding Principle 31 (g), p. 26.

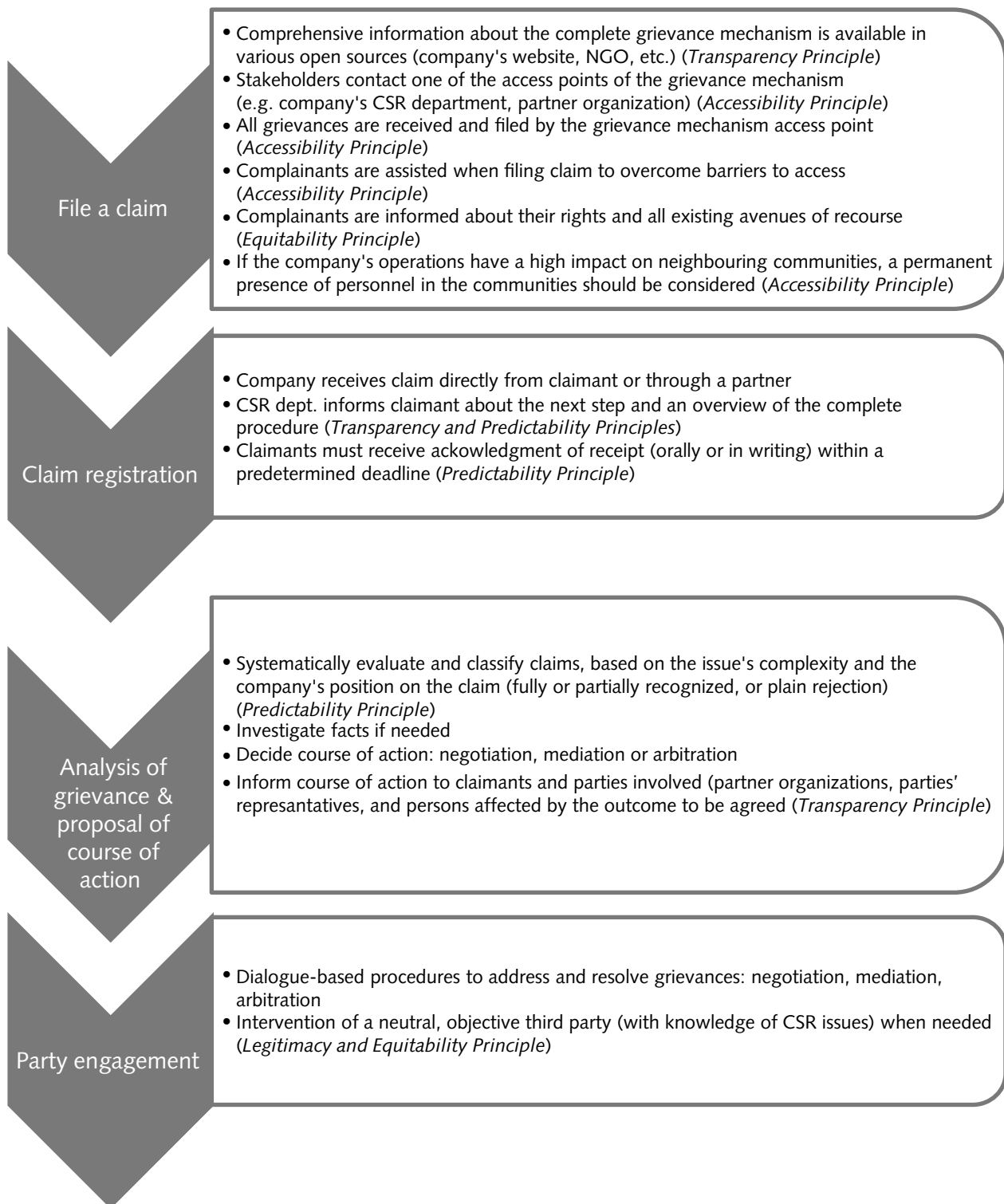
137. Wilson 2009, p. 40.

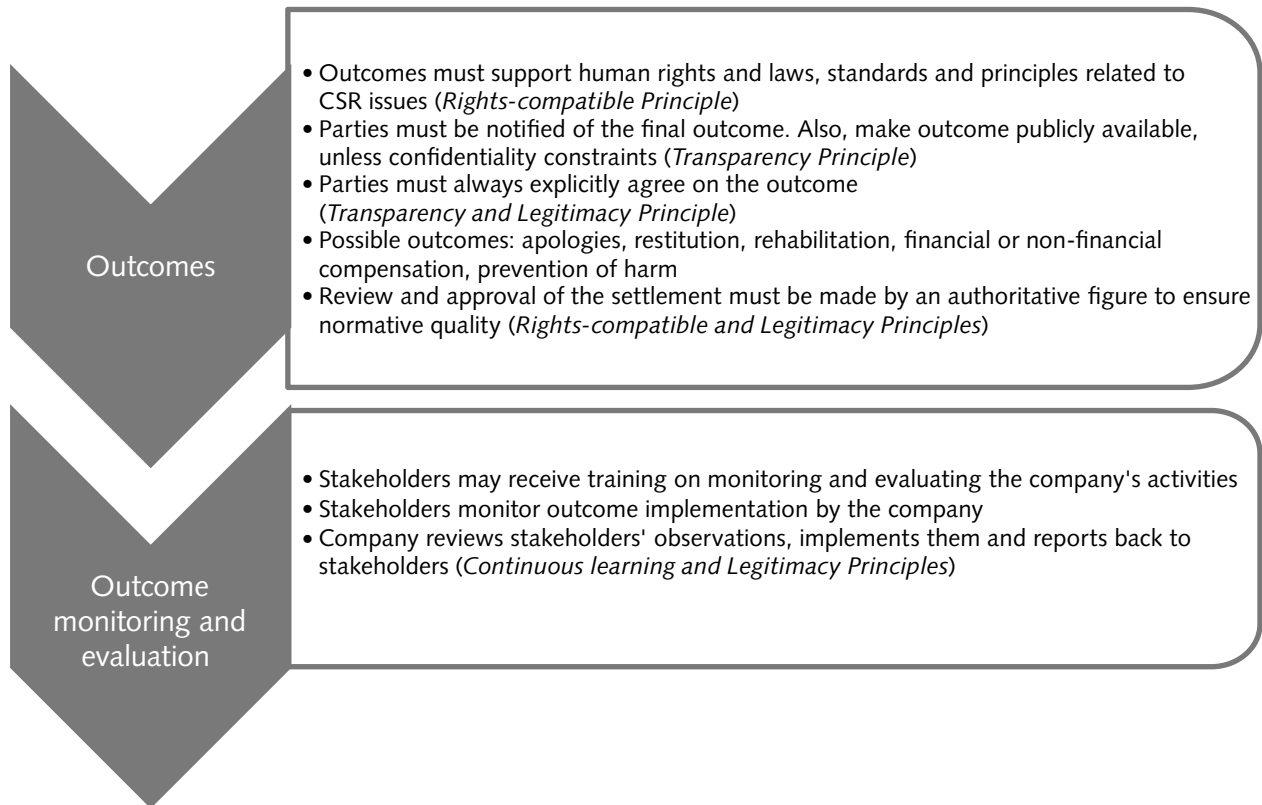
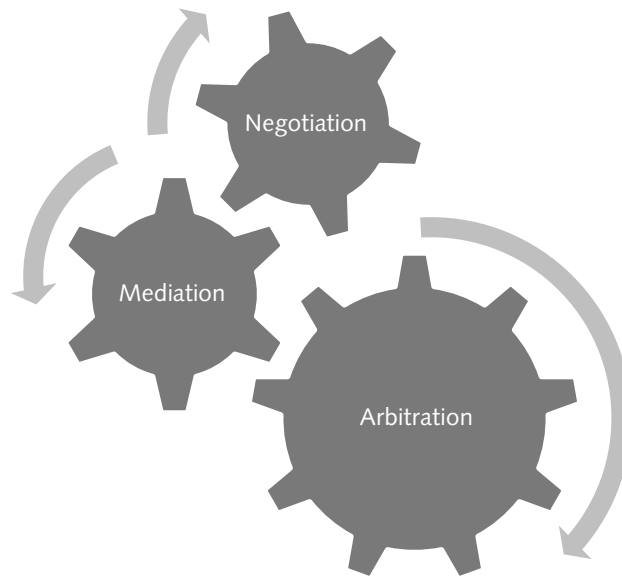
138. *Ibid.*

139. See Veracel’s website <[www.veracel.com.br](http://www.veracel.com.br)>.

140. Wilson 2009, p. 40.

Figure 4





may be one of the most important effects that a grievance mechanism can have in the long term.

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