

**THE PROMISE OF A
HUMAN RIGHTS AND BUSINESS COMMISSION**

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ABOUT THIS REPORT

This report responds to a request from the Human Rights and Business Project, an undertaking of Denmark's national human rights institute, the Danish Centre for Human Rights (DCHR), in conjunction with the Confederation of Danish Industries and the Industrialization Fund for Developing Countries (IFU).

The report was written by three masters degree candidates at the Woodrow Wilson School of Public and International Affairs at Princeton University, under the guidance of Professor Liam Mahony, who teaches a graduate-level seminar workshop entitled "Human Rights: From Grassroots Courage to International Influence." This report reviews existing resolution mechanisms for disputes involving business and human rights and recommends the establishment of a Human Rights and Business Commission (HRBC).

Interviews with experts in human rights, labor, conflict resolution, and corporate responsibility were instrumental in the research and writing of this report. Field research in Mumbai and New Delhi, India allowed the authors to obtain the views of businesses, human rights groups, labor unions, public officials and non-governmental organizations concerning the context in which a commission might be applied.

The authors are grateful for the generosity with which so many experts in the field shared their wisdom and expertise. We wish to acknowledge the many people who assisted us, particularly Professor Mahony, Margaret Jungk of the DCHR, Judy Gearheart, and Luc Zandvliet. We would also like to thank the Woodrow Wilson School for supporting our research. Any faults in this report are the responsibility of the authors alone.

The Danish Centre for Human Rights gave us tremendous latitude to ask difficult questions and seek unconventional answers. We are enormously grateful for the opportunity to consider in depth the Centre's groundbreaking proposal and hope our research has helped to clarify some of the issues involved in such a complicated undertaking. In the process we have learned a great deal, and we hope that we are able to contribute in one way to the growing cooperation between the business and human rights communities.

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EXECUTIVE SUMMARY

Globalization has had tremendous impacts on the promotion of human rights and the expansion of commercial activity. For businesses, advances in transportation and communication have created opportunities to access resources and labor markets around the world, often bringing business operations to developing countries with less familiar cultures and political systems. For human rights activists, the ability of local and international groups to communicate directly and quickly with each other, the media, and potential donors has been transformative. At the same time, however, globalization and the increasing influence of non-state actors have posed new challenges to safeguarding human rights in the traditional state-centered international system, in which governments are the legal guarantors of human rights.

The number of human rights related complaints that are lodged against businesses and the attention paid to the behavior of companies operating in developing countries reveals a need for an alternative dispute resolution process that is specifically charged to address and resolve human rights and business disputes. Conflicts arise for a number of different reasons and are often exacerbated due to misunderstandings of interests. Business officials point out that global competition presses them to reduce costs while international workplace and environmental standards place additional responsibilities on business operations. Some companies may complain that human rights advocates target businesses operating in developing countries to gain political points, gain compensation, or because they are unable to address the real source of human rights abuses, such as repressive governments. Human rights groups may respond that many multinational companies seek to establish operations in poor, disempowered communities or in countries that have fewer regulations and are therefore able to evade human rights, labor standards, or environmental regulations that are often required in the business' home country.

Current Mechanisms for Addressing Human Rights and Business Disputes

Current dispute resolution mechanisms are not sufficiently strong or well suited for addressing and resolving disputes that arise for Danish businesses operating in developing countries. Voluntary principles, codes of conduct, and international guidelines often do not hold businesses fully accountable to their stated intentions to abide by the principles, and often they do little to decisively solve contentious disputes. Adjudication in a court of law is very often a long and drawn out process that saps valuable resources from both sides, increases antagonism as the case drags on, and may end with one side being dissatisfied with the decision. In many developing countries independent and robust legal systems do not exist.

Existing mechanisms for dealing with disputes can often fan the flames of antagonism. Human rights, labor, and environmental groups often use shame and blame tactics, bringing in the media and international constituents to help in a public relations battle. Businesses sometimes feel they are unfairly blamed for problems stemming from

government policies and practices. Some companies simply deny or ignore human rights or environmental complaints. Furthermore, businesses unfairly maligned by human rights groups' accusations have no investigative body that might dismiss unfair allegations and restore their reputation.

The Human Rights and Business Commission

We propose the establishment of a Human Rights and Business Commission (HRBC, or “the Commission”) that aims to fill the gap in existing mechanisms and seeks to resolve human rights and business disputes in an expeditious and effective manner. Because the Commission will be unable to make legally enforceable decisions, it complements adjudication and the other methods described above, and serves as an alternative to them in places where those mechanisms are weak or do not exist.

The objectives of the Commission are to:

- ❑ Seek the support of both the business community and human rights and other civil society groups in Denmark and more broadly;
- ❑ Provide businesses and human rights advocates with an expeditious and effective process to resolve their disputes;
- ❑ Recommend substantive changes in a business' policy or practice to prevent human rights abuses, where warranted;
- ❑ Seek to resolve situations, rather than only solve disagreements, for the long term by addressing the sources of a conflict;
- ❑ Incorporate business suppliers and contractors into the process; and
- ❑ Ensure as much transparency in the process as possible.

The process would be consensual, dependent on the agreement of both parties to the dispute. Its mandate would be “proactive mediation,” which involves a more rigorous search for solutions than in traditional mediation but is not legally binding or with the robust decision making authority of arbitration. As we envision it, the Commission's resolution process would include four phases:

1. Investigation of the allegation and counter-argument,
2. Process-oriented mediation to encouraged greater communication and cooperation between the parties,
3. Agreement or proposed resolution that likely would include recommendations for one party or both to change operating practices, and
4. Final reporting on the dispute and monitoring implementation of the agreement.

Set Up of the Commission

While we recognize that future research and debate may lead DCHR to different choices, this report makes the following specific recommendations for the set up of Commission:

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- Access to the commission: All parties with a direct connection to the issue – what a court might call “legal standing” – should be permitted to file complaints. This might include national or local governments as well as non-governmental organizations.
 - Accepting petition: The Commission should only accept petitions for its intervention if both (or all) parties to a dispute agree to participate in the process and abide by the Commission’s guidelines.
 - Commitment Contract: Parties to the dispute should be obliged to sign a “pre-conciliation commitment contract,” containing a commitment to cooperate with the Commission, refrain from acts that might endanger the process, and implement any agreements reached. The commitment contract should also establish rules regarding relations with the press.
 - The Commissioner: A Commissioner with conflict resolution experience should head each resolution process. This Commissioner should be able to call on outside experts as needed.
 - Funding: Resources to deal effectively with multiple disputes will necessarily depend on funding. It would be prudent to ensure that dependence on certain organizations for funding does not affect the Commission’s perceived impartiality.
 - Timing: Given delays that are often common in other conflict resolution mechanisms, the Commission’s chief attraction may be its expeditious resolution of conflicts. However, even more important than quick resolution, will be quick intervention in situations that threaten to spiral out of control.
 - Accepting Cases: The Commission will require a process to determine what cases it should take up, based on an assessment of whether the dispute involves issues within the Commission’s purview and the likelihood it can be resolved in such a forum.
 - Gathering Evidence: The Commissioner’s efforts to investigate the dispute should not be limited to only material submitted by the parties. A site visit to speak with local communities and the businesses will almost certainly be necessary, as will consultations with technical experts.
 - Outside Parties: The Commission should be wary of allowing advocates to represent the parties during the process, since that may lead to a more confrontational atmosphere. Exceptions should be made in cases where a party cannot effectively present its case without assistance.
 - Transparency: We believe the process should be conducted as transparently as possible while still protecting vulnerable witnesses or confidential

information.

- Legal Recognition of Decisions: Where possible, the Commission should seek to have its agreements “recognized” by an appropriate court, to augment enforceability and precedential value. It will be important for the Commission to work with local authorities and institutions.
- Implementation: Monitoring implementation of any agreement reached will be as important as reaching a settlement. The Commission should seek to uncover underlying sources of tension and conflict so that the final agreement discourages future conflicts. If the parties disagree on implementation issues, they should be able to refer the matter back to the Commission.

Applicability and Efficacy

We recognize that any dispute resolution mechanism will be limited in its ability to address the wide array of possible disputes. With regard to the Commission, there are “parameters” that will determine how well the Commission is likely to work in different situations. Some disputes will be outside the scope of the Commission if they involve extremely complicated technical issues or wide-scale military conflicts. Likewise, petitions brought to the Commission concerning some workplace disputes may be so minor or tangential to human rights issues as not to warrant the Commission’s consideration. Cases involving gross violations of human rights (e.g., war crimes, crimes against humanity) may be more appropriately addressed by formal legal mechanisms. Other applicability parameters for the Commission to consider include the extent of labor union and civil society representation and the state of relations between businesses and communities.

The DCHR should be conscious of the risks to its reputation in the development of such a commission. Human rights groups may worry the Commission could let businesses off the hook. Businesses may worry the process presumes them guilty or that their detractors will continue to pursue them in other fora. Some governments may see the Commission’s work as arrogant meddling. These are all legitimate concerns. To establish a reputation for independence and efficacy that will help insulate it from such charges, we suggest that the Commission begin gradually, with a trial process. A pilot project involving a few cases would be useful to better understand the issues and problems that may arise in a specific case so that appropriate changes can be made in the Commission’s procedures and set up.

Conclusion

From feedback that we have received from numerous experts in this field, we believe that DCHR’s proposed Human Rights and Business Commission would fulfill a genuine need. It is not, of course, a panacea for all of the problems concerning human rights and businesses. Indeed, many of these disputes cannot or should not be dealt with by the HRBC. Nevertheless, the Commission may offer additional hope to people and

organizations without access to adequate mechanisms to resolve their problems. It can serve as an additional tool for those who want to raise human rights standards while not choking off legitimate commercial activity that spreads economic opportunity and growth. Moreover, it may be a useful tool for businesses maligned by false allegations. We believe that the establishment of the Commission is a risk worth taking. It has our high hopes and best wishes.

1. INTRODUCTION

Globalization has had tremendous impacts on the promotion of human rights and the expansion of commercial activity. For businesses, advances in transportation and communication have created opportunities to access resources and labor markets around the world, often bringing business operations to developing countries with less familiar cultures and political systems. For human rights activists, the ability of local and international groups to communicate directly and quickly with each other, the media, and potential donors has been transformative. At the same time, however, globalization and the increasing influence of non-state actors have posed new challenges to safeguarding human rights in the traditional state-centered international system, in which governments are the legal guarantors of human rights.

One positive response to this situation has been the increasing cooperation between the businesses and human rights communities to develop concrete and achievable human rights standards and practices for corporate behavior. Some companies have established corporate social responsibility units within their organizational structures, incorporated voluntary codes and human rights standards into their business practices, and implemented initiatives to improve their image around the world. Multilateral, NGO, and business initiatives have provided voluntary principles by which companies agree to abide by standards similar to those enshrined in international treaties and conventions.

Despite these efforts, however, many companies are still accused, rightly or wrongly, of being complicit with and profiting from oppressive regimes, or violating the human rights of their employees or of the local people in communities in which they operate. This can result in protracted conflicts between the companies and local human rights groups. Such conflicts may fester for years, languishing in slow court systems or serving as fodder for public opinion wars conducted through the media.

International companies that operate in developing countries can have a significant impact on local communities and environments, including the human rights situation. The proliferation of international and local NGOs that monitor, report, and publicize human rights abuses around the world has made some companies lightning rods for criticism. Furthermore, multi-national companies are under pressure to take responsibility for the conduct of their principal suppliers and contractors.

The dispute resolution mechanisms that currently exist are often insufficient for addressing the number and variety of human rights complaints. Outside of adjudication, existing mechanisms are often inadequate in design to sufficiently resolve disputes or the product of small organizations with limited funds and capacity. Businesses and affected communities need and deserve a forum in which their cases are investigated and heard expeditiously and impartially, where cases can be resolved without vilifying or undermining the parties involved, and in a fair manner that is mutually agreeable and leaves open the possibility of a continued relationship.

The proposed Human Rights and Business Commission (hereafter HRBC or the Commission) aims to help address this need. Initially, it could serve as an important human rights alternative dispute resolution procedure for Danish businesses operating internationally or domestically. Eventually, the Commission could be made more broadly applicable and utilized by non-Danish businesses.

1.1. Report Objectives

This report will examine the virtues of different methods for addressing human rights and business disputes and develop guidelines and recommendations for the establishment of a human rights complaints procedure for Danish businesses. DCHR's Human Rights and Business Project commissioned the report to inform their planning and creation of a voluntary dispute resolution mechanism. Businesses have tremendous potential to either contribute positively to or exacerbate problems and harm the communities and countries in which they operate. Our canvassing of business and human rights advocates provided insights to the desired attributes of a commission that would best encourage the participation of both sides to disputes. We raise questions and offer initial recommendations about the desired functions and characteristics of a commission that is credible, procedurally sound, and responsive to all parties in a human rights dispute.

1.2. Scope and Limitations

The development of a complaints procedure is in its initial stages, and this report reflects only preliminary research to inform its potential creation. More research could usefully be conducted regarding the specific procedures for identifying, investigating and resolving cases; to gauge the range of appropriate participation for all parties; and to determine the treaties and voluntary guidelines and other viable benchmarks upon which the commission's decisions would be based.

Any dispute resolution procedure must be flexible enough to account for the specific nature of the dispute, the needs of the parties involved, and the political and legal environment and local situation in which the dispute takes place. Crafting the commission will require a broad understanding of the incentives for voluntary participation of all relevant parties, including businesses, affected individuals, local communities and human rights groups, and, where relevant, trade unions.

Further research could usefully expand on our limited number of interviews with grassroots human rights groups and businesses to assess their support for a commission that requires the cooperation of companies, and closely analyze why businesses would find cooperation with the Commission in their best interest. Lastly, we would recommend that a trial period take place involving a real world case study or pilot project that may bring out nuances that we have overlooked.

2. CURRENT METHODS FOR DEALING WITH DISPUTES

Human rights, labor, and environmental standards and laws coupled with other dispute resolution mechanisms have been used to prevent and address human rights disputes between businesses and the communities, individuals, and workers whom their activities affect. Some of the existing models are more regulatory, in that they seek to monitor and hold businesses accountable for their operations, while others are essentially voluntary and are based chiefly on the enlightened self-interest of businesses. The advantages and drawbacks of some of these mechanisms are discussed below.

2.1. International Conventions, Treaties, and Standards

Although most international standards concern the obligations of governments and not companies, they can serve as useful benchmarks for businesses and can be reflected in company codes of conduct. In the broadest sense, socially responsible companies are expected to respect the principles manifested in the Universal Declaration of Human Rights, the United Nations Convention on the Rights of the Child, and the United Nations Convention to Eliminate All Forms of Discrimination Against Women. Furthermore, the experience of UN complaints commissions* manifests the many challenges for establishing and sustaining similar well-intentioned projects.

2.1.1. *International Labor Organization***

The International Labor Organization (ILO) is responsible for setting international labor standards; it offers the most comprehensive and universally applicable standards directly addressing the responsibilities of businesses operating internationally. The ILO stands as the authoritative and legitimate source of international labor standards primarily because of its tripartite structure, involving employers' and workers' representatives as well as governments, coupled with the technical expertise of the organization in all matters relating to the world of work.

ILO Conventions constitute international law; they are enforceable in principle if not always in practice. In the June 1999 Report on Decent Work, the Director General acknowledged that “even when ratified, many Conventions are only weakly implemented”¹. The ILO has attempted to become more robust in this regard by assisting countries with implementation, enhancing supervision and improving reporting. ILO standards are set in *Conventions*, which have the force of international law and are

* There are relevant complaints procedures under the optional protocols to the International Covenant on Civil and Political Rights, Convention for the Elimination of Discrimination Against Women, Convention for the Elimination of Racial Discrimination, and the Convention Against Torture. The above have mechanisms for dealing with complaints by citizens of signatory countries in breach of these conventions. They are under resourced and demonstrate the manifold challenges for complaints-based human rights commissions.

** For more information about the ILO, please see Appendix 2.

binding for states that have ratified them; and in *Recommendations*, which provide additional guidance to governments. With regard to accountability, member states must provide regular reports to the ILO on the application of ratified Conventions.

2.2. OECD Guidelines

The Organization for Economic Cooperation and Development (OECD) established a set of voluntary principles in June 2000 called the OECD Guidelines for Multinational Enterprises, which includes provisions for a complaints procedure when a company violates the guidelines. The procedure allows for a preliminary inquiry followed by a full investigation, which includes the involvement of external consultants and experts. Consultation meetings are held between the complainant and the company, and if an agreement is not reached, the OECD representative in a country, called the National Contact Point, can issue recommendations, which can be kept confidential or made public.

The guidelines also deal with companies' responsibility to ensure that its contractors and suppliers meet established standards of conduct. While this mechanism is new and thus far under utilized, it has produced some successes. In one case, a company agreed to change corporate behavior after a labor complaint was filed but before the investigation even took place. However, human rights groups have criticized the OECD guidelines for not ensuring transparency and full disclosure of the final report recommendations.

2.3. Voluntary Principles and Codes of Conduct

Voluntary principles developed by international organizations, governments, educational institutions, industry associations, and human rights advocates are increasingly widespread, as are codes of conduct drafted and adopted by corporations. Voluntary principles and codes of conduct can complement, but do not replace, enforcement of national legislation and international standards. They can provide standards of transparency, environmental protection, and worker, community, and consumer rights in business operations at levels even above that required by local law or international agreement. Some even commit companies to working with contractors and suppliers to ensure that those companies abide by the same standards. By expressing their support for voluntary principles, companies can improve their public image and learn how to improve their business practices.

There is some debate, however, regarding the efficacy of voluntary principles, since they may not be readily enforceable. By definition, voluntary principles do not apply to businesses that are unwilling to participate. Even when adopted, critics charge that too frequently they do not, in practice, hold businesses accountable for violations. Because they are not binding or enforceable, they may improve the image of the company without requiring it to make concrete improvements in its operations. However, voluntary

principles do provide a lever for advocacy groups to pressure a company to uphold its socially responsible promises or criticize it for failing to do so.

2.3.1. United Nations Global Compact

In June 2000, UN Secretary General Kofi Annan proposed a joint initiative to address the impacts of globalization. With the cooperation of the business community, human rights groups, country governments, and labor, the UN initiated the Global Compact to engage the business community in ways to improve the accountability of their operations. It is a voluntary initiative in which businesses make a statement of intent to pursue nine principles of conduct regarding human rights, labor, and the environment. The nine principles stem from the Universal Declaration of Human Rights, the International Labor Organization's (ILO) Fundamental Principles and Rights at Work, and the Rio Declaration on the Environment and Development.

Specifically, business partners agree to do three things. They promise to become public advocates for the Compact in their corporate mission statements, annual reports and similar venues. At least once a year businesses post on the UN Website specific examples of progress they have made, or lessons learned, in putting the nine principles into practice. The third facet is to join with the United Nations in partnership projects, either at the policy level for instance, a dialogue on the role of corporations in zones of conflict or at the operational level, such as strengthening the commitment to socially responsible practices of the small and medium sized firms they contract with in developing countries. As a result of their participation, companies are listed on the UN Global Compact website. Companies meeting the requirements also are able to use the Global Compact logo to signify their commitment.

Critics argue that the Global Compact allows companies to improve their human rights image without having to make substantive and concrete changes to their business practices. They also say the use of the UN logo lends international legitimacy to companies that may continue to have considerable human rights problems because the UN does not regulate business behavior or hold businesses accountable for violations. Officials at the Global Compact have responded to such criticisms by saying that the Global Compact is but one way to engage businesses in corporate responsibility and that it must be done in conjunction with other regulatory mechanisms.

2.4. Adjudication

In a country with a legal system regarded as generally fair, impartial and efficient, the courts may offer the best way to resolve a human rights dispute, especially when the alleged violation is egregious. Legal decisions allow for enforcement and have precedential value, as well as transparency, accountability and the possibility of redress, such as restitution or rehabilitation for the victim or punishment or fines for the offending party. Seeking redress through the court system can be a slow and expensive process,

however, and in some countries it is not a realistic option at all. Human rights groups and affected individuals often lack the resources necessary to sustain a long legal battle, and businesses often prefer for disputes to be settled out of court because they are costly, inefficient, and can damage the company's public image.

2.4.1. National Law

The application of domestic laws to address disputes between international companies and affected individuals or communities depends upon the specific domestic laws and regulations that govern the behavior of international businesses that invest in a country – perhaps even the contract that gives the company permission to operate. While civil law has traditionally been used to seek redress from companies, criminal law can be used to prosecute officials for wrongdoing. Effective adjudication also depends upon the strength of rule of law and the judicial system in the country in which the business operates. In countries with weak judicial systems, aggrieved communities and individuals with human rights complaints have limited recourse to have their cases heard and settled. Indeed, domestic legal structures are important considerations for the development of the Commission. The Commission's design and implementation must not only consider how to function in countries with weak rule of law or insufficient legal mechanisms to resolve business related disputes, but also how it can collaborate with government institutions and help improve domestic legal structures.

2.4.2. Universal Jurisdiction and International Law²

Historically, governments generally declined to assert jurisdiction over crimes committed outside their territory. That began to change over the last several centuries as nations attempted to combat piracy and slave trading on the high seas through legal means. The movement quickened after World War two, when several nations apprehended and tried suspects involved in Nazi-era atrocities. The arrest of former Chilean leader Augusto Pinochet in London in October 1998 on a Spanish warrant brought the use of universal jurisdiction to combat human rights abuses to greater public attention.

A number of countries have recently begun to utilize an expanded concept of sovereignty to take action against their citizens who perpetrate crimes abroad, against those committing crimes that affect the state's core security concerns, and (more controversially) against those foreigners who perpetrate crimes against the country's nationals abroad. State parties have been able to exercise jurisdiction over some international crimes – war crimes, genocide, crimes against humanity, for example – through international treaties that confer this right. Within the last decade, however, prosecutors in more than a dozen countries have more aggressively pursued domestic legal action against those suspected of gross human rights abuses abroad (in Rwanda and the former Yugoslavia, in addition to Chile), even in cases where the defendants' actions might not have met the standard for prosecution under an international treaty. Human rights groups have strongly encouraged the trend, campaigning to persuade more

governments to pass legislation allowing such extraterritorial prosecutions and utilize such provisions more vigorously.

Universal Jurisdiction describes the ability of the prosecutor or investigating judge of any state to investigate or prosecute persons for crimes committed outside the state's territory which are not linked to that state by the nationality of the suspect or of the victim or by harm to the state's own national interests. No nation has exhibited more activism in employing this tool for international justice than Belgium. Belgian courts are currently hearing a case that alleges the French energy giant Total with crimes against humanity and complicity with crimes against humanity for charges of forced labor, murder and rape in the construction of the Yadana natural gas pipeline in Burma.

Civil law is also being used more often to target abusers. In particular, the United States' Alien Tort Claims Act (ATCA) is increasingly being used to file civil suits against alleged human rights abusers around the world. The ATCA, passed in 1789 by the first U.S. Congress, authorizes the federal courts to accept civil suits against actions "committed in violation of the law of nations or a treaty of the United States." While it is not yet clear whether the U.S. courts will interpret this statute broadly (or whether other governments will initiate similar legislation), numerous suits have already been filed, including one against Unocal, Total's partner on the Yadana project, and another that names as defendants more than one hundred companies that did business in apartheid South Africa.

2.5. Arbitration

When commercial disputes arise, arbitration has often been employed as the primary alternative to going to courts because it is usually a faster and less costly process. National laws on arbitration exist in many countries, and international treaties and agreements on arbitration have been signed and followed with great success, including the International Court of Arbitration, which is an international arbitration system that supervises arbitral tribunals in over 40 different countries.

Generally in this dispute resolution process, an arbiter hears the view of the two sides and makes a decision that is sometimes based on an investigation. Decisions made by arbiters are not always legally binding, though they can be, and they are made with the understanding that the parties are obligated to abide by the decision. In addition, decisions in arbitration usually cannot be appealed, thus guarding against long and costly appeals processes. However, in some cases decisions can be challenged on limited grounds and within a limited time. The absence of appellate measures can cause reluctance for parties who are uncertain about the likelihood of a favorable decision.

An advantage of bringing complicated disputes to arbitration is that the parties themselves can appoint an arbiter with specialized knowledge in the relevant field. While arbitration decisions do not automatically have the force of law, they can be recognized internationally. The 1958 United Nations Convention on the Recognition and

Enforcement of Foreign Arbitral Awards (the “New York Convention”) facilitates the enforcement of awards and has been signed by over 130 member states.

2.6. Mediation

Mediation has most often been used as a way to address human rights and business disputes when the parties need a third party to intervene and help them conduct their negotiations. While a mediator, unlike an arbitrator, does not have decision-making power, a range of styles and techniques are still available in such third party interventions. Although it can take different forms, traditional mediation generally emphasizes process and strives for neutrality. The mediator does not impose a decision, but instead encourages the parties to dialogue and reach an agreement themselves.

Mediation is a forum that allows disputing parties to exercise more control over the process than is possible during court adjudication or arbitration. A mediator facilitates the negotiation, ensures that the participants abide by the ground rules, and coaches the participants to take problem-solving approaches rather than antagonistic or legalist stances. The mediator elicits from each contending party their side of the story and facilitates discussion. The mediator often conducts private talks with the parties and may shuttle back and forth to gather information, gain the trust of disputing parties, and help them come to an agreement. If the parties possess different negotiating capabilities, then the mediator can spend extra time helping the disadvantaged party clarify its interests and objectives.

We recommend a robust mediating role for the Commission. Attaining a fair and lasting resolution is more likely through a more vigorous, creative approach of asking probing questions, identifying conflicting interests and positions, and proposing possible solutions and compromises.

3. RECOMMENDATIONS FOR THE COMMISSION

The models that are described above have been used to incorporate human rights standards in business operations and address human rights disputes with varying degrees of effectiveness. While some progress has been made, the increasing attention paid to companies operating in developing countries and the growing number of human rights related complaints that are lodged against businesses reveals a need for a commission specifically charged to address and resolve human rights and business disputes.

Based on our preliminary research involving interviews with some businesses, government officials in India, and non-governmental organizations, and upon suggestions from the Industrialization Fund (IFU), we developed several recommendations for a commission that aims to fill the gap in existing mechanisms and seeks to resolve human rights and business disputes in an expeditious and effective manner.

3.1. The Need for the Commission

Despite the available models, there does not yet exist a sufficiently strong mechanism to address and resolve disputes that arise for Danish businesses that operate in developing countries. Past joint efforts internationally have paved the way for increased cooperation and understanding between the local groups, workers, and businesses. However, they are not specifically suited nor systematically designed to identify the source of conflicts, and when appropriate, to recommend changes in a company's policies and its relations with a community to prevent such disputes from occurring in the future.

Many current mechanisms for dealing with disputes often fan the flames of antagonism. Human rights, labor, and environmental groups often use shame and blame tactics, bringing in the media and international constituents to help in a public relations battle. Businesses sometimes feel they are unfairly blamed for problems stemming from government policies and practices. Some companies simply deny or ignore human rights or environmental complaints.

Voluntary principles, codes of conduct, and international guidelines seek to guide business practices, but often do not hold businesses fully accountable to their stated intentions to abide by the principles, and they often do little to decisively solve contentious disputes. Arbitration and adjudication can determine culpability and issue penalties and restitution for the aggrieved side; however, they only solve a specific disagreement, which often comes at the cost of mutual understanding and continued relations.

Adjudication in a court of law is very often a long and drawn out process that saps valuable resources from both sides, increases antagonism as the case drags on, and may end with one side being dissatisfied with the decision. If businesses continue to operate in the community, these tensions make continued relations between the business and community difficult after the dispute and may increase the likelihood of further conflicts and disputes arising in the future. Unlike other paradigms, at the core of the Commission are investigations to determine if business policies should be changed. In addition to facilitating this process, the Commission should determine a follow-up scheme to gauge compliance.

The Danish Centre for Human Rights identified a need for an alternative dispute resolution mechanism that is specifically charged with the resolving human rights and businesses disputes. We offer the following suggestions and highlight issues to consider for the set-up of this commission. Because the Commission will lack the ability to make legally enforceable decisions, it complements adjudication and the other methods described above; it may serve as an alternative to them in places where those mechanisms are weak or do not exist.

3.2. Objectives and Mandate

The Human Rights and Business Commission would further build upon the work of governments, NGOs, trade unions, local communities and businesses to increase understanding between businesses and human rights groups. The proposed Commission will:

- ❑ Seek the support of both the business community and human rights and other civil society groups in Denmark and more broadly;
- ❑ Provide businesses and human rights advocates with an expeditious and effective process to resolve their disputes;
- ❑ Recommend substantive changes in a business' policy or practice to prevent human rights abuses, where warranted;
- ❑ Seek to resolve situations, rather than only solve disagreements, for the long term by addressing the sources of a conflict;
- ❑ Incorporate business suppliers and contractors into the process; and
- ❑ Ensure as much transparency in the process as possible.

Businesses can have a tremendous impact on the political, environmental, and social situation in the communities and countries in which they operate. They offer many benefits, such as expanded tax revenue and an infusion of jobs and money into a community. At the same time, the capital they introduce into a community can also highlight problems associated with the inequitable distribution of resources. Businesses can exacerbate an internal conflict and create environmental damage as a result of daily operations. Furthermore, because they must operate in the context of the controlling political authority, companies may be accused of providing support, direct or indirect, to corrupt regimes that have poor human rights records. While moral culpability in such situations is not always easy to determine, companies may unintentionally provoke disputes with local communities distrustful of their government. The company's very presence and proximity to the alleged transgressions may be an indirect cause of exacerbating human rights violations.

Establishing direct business responsibility for a violation is more difficult than providing evidence of aiding and abetting human rights violations because it requires a higher threshold of proof, one that often cannot be established. However, even an indirect role in allowing a human rights violation to occur is worth identifying and remedying (i.e. lending moral and financial support to an illegitimate regime). In cases like this, a business may acknowledge that its presence exacerbates a human rights situation but does not have to accept full blame for the overall human rights situation.

To improve the atmosphere in which a business conducts its operations, a company may, with the help of the Commission and in consultation with a local community, agree to make changes in its practices or policies. For affected communities, this approach may bring important changes as well as some recognition by a business of its role in perpetuating a bad situation. This approach could offer gains to an aggrieved community, which it may not be able to pursue in a court of law. (Wherever possible, of

course, human rights groups or communities seeking redress and punishment should continue to use the judicial system.)

The chief value of the proposed Commission, compared to other methods of dispute resolution rests on changing business practices rather than assigning blame and recommending punishment and restitution. In many cases, communities in a dispute with a business do not want the company to shut down its operations because they would lose a key source of income; rather many of these communities may be asking for a change in practices so that the violations end, there is some acknowledgement of wrong-doing on the part of the business (not necessarily a public acknowledgement), and compensation is offered for damages suffered.

While it is not the focus of the Commission, the possibility of restitution should remain open for cases where it might appropriate and usefully applied. Restitution via cash transfers is often problematic, especially if it is a community and not an individual that is being compensated. In this case, tangible community improvements such as a hospital, secondary school or community center may be a more apt method for corporate contributions. However, compensation must not be given in lieu of addressing the root causes of the conflict. Though community development projects do not usually solve the underlying cause of a dispute, such corporate investments can be a constructive complement to a company's commitment to cease and desist a harmful business practice. Similarly, many businesses may welcome guidance on how to improve relations with local communities, if provided in a non-confrontational way with an outcome that contributes to, rather than detracts from, the success of their enterprise.

The main objective of the proposed Commission must be to resolve the conflict, not just to settle the surface disagreement. This distinction warrants repetition. The process of reaching a *settlement* can be antagonistic and may not improve the relationship in the long term, but instead only alleviate the immediate problem. On the other hand, the full *resolution* of a conflict usually requires a more involved process that relies on the openness of the participants. It can lead to greater mutual understanding and, by addressing underlying perceptions and problems, may allow the business to continue operations after the dispute is resolved, with the acceptance (or even support of) the local community.

Obtaining the participation of both the business and human rights communities in such a process to address and resolve disputes grants greater legitimacy and is perhaps more effective. Drawing support from both may be difficult for several reasons. Some businesses are understandably reluctant to support human rights regulatory models for fear of being incorrectly labeled a perpetrator. Others are reluctant to authorize an outside body to explain (or impose suggestions for) how they should run their business. This proposed Commission seeks to account for these concerns through a fair and transparent participatory process.

Transparency is both an underlying principle and an important goal of the Commission. Alternative dispute resolution bodies employ various means for navigating the tension

between transparency and confidentiality. In the Commission's proceedings, complainants may want to release information to the press, but they may be reluctant to participate in a process that fails to afford confidentiality to vulnerable witnesses. Businesses may at first want to suppress allegations made against them but will surely want to widely disseminate news if such allegations have been found baseless. While protecting private information is important, full disclosure serves to promote public accountability.

Human rights advocates point out that ultimately, accountability must reach down the supply chain to include contractors and suppliers. Some of the most egregious human rights violators are state-owned enterprises or the junior companies with national charters that are sourced out to by large corporations. For this reason, the Commission should seize every opportunity to work with the national human rights commission (if one exists), and local authorities.

A long-range goal of the Commission should be to build local expertise. By doing so, the HRBC can shorten the timeframe for dispute resolution and improve quality control. Furthermore, the Commission's credibility will be enhanced due to increased local participation.

3.3. Structure and Functions of the Commission

3.3.1. Name

We propose that the organization be called the Human Rights and Business Commission (HRBC). This name states in plain language the organization's mandate but is sufficiently innocuous that it alone does not discourage the parties from seeking the Commission's involvement in a dispute. As we have proposed in this report, the HRBC will function as investigator, and proactive mediator. It will seek reconciliation in all cases and propose restitution in cases where appropriate. Some concern was expressed that using words like "Investigation," and "Complaints" in the name could imply a presumption of guilt. "Mediation" or "reconciliation" could represent to human rights groups that an agreement, and not justice, would be the primary concern of the Commission. Because the DCHR will ultimately determine the appropriate name for this organization, we refer to it in this report simply as "the Commission." The person appointed by the Commission to lead the investigation, conciliation, and resolution process *for each specific case that the Commission takes on* is called the "Commissioner." The Commissioner is the public face of the HRBC and a crucial factor in determining the success of the Commission's efforts to elucidate and ameliorate any accepted complaint.

3.3.2. Access to the Commission

The parties directly involved in a human rights-business dispute, usually the business against which the allegation is made and the alleged victims, are those most likely to appeal to the Commission. In order to be seen as a fair and legitimate body, both sides must be allowed to petition the Commission to investigate a claim of human rights abuse. Furthermore, we recommend that any relevant parties with legal standing in a dispute be allowed to bring cases to the commission. This would include the parent company, the community, workers, trade unions, governmental bodies, and groups representing an aggrieved party.

Access to the Commission must work in both directions. There must be accountability, commitment, and ownership to go along with clear rules about the initial investigation and ways to prevent a party pulling out of the process if it perceives the other party to have more momentum. Business organizations like the Chamber of Commerce could file complaints against organizations believed to be making spurious claims of human rights violations, and prominent human rights groups or other civil society institutions could lodge complaints on behalf of aggrieved groups. A complaint may also be made by one affected person on behalf of a group of people, such as a group of workers or residents. This kind of complaint is a representative complaint or 'class action'. A trade union can often make a complaint on behalf of a member or group of members. Human rights advocates with legal standing should be able to file charges and initiate the process on behalf of a complainant that fears reprisals. In some cases the body referring a case to the Commission could even be a government that wants a situation resolved but does not have the capability or confidence to orchestrate such a resolution. After a case is accepted, however, the process would require the cooperation of the business as well as the human rights, labor, environmental, or community group.

Efforts to make the commission well known must be strongly encouraged. The DCHR as well as the Danish government could alert their IFU country offices about the Commission, and in turn, IFU country offices should disseminate information about the Commission to companies, workers and trade unions, local communities, government offices, and non-governmental organizations in countries in which Danish businesses operate. Furthermore, when a business expresses its support for the Commission, they should also be willing to publicize to their workers and host communities the existence of the Commission and the services it provides. Doing so is in the interest of the business, as it may increase support for the company in local communities and bolster its public image internationally. The Commission could recognize businesses that agree to utilize its services by some sort of emblem that could be posted on company premises and publicity material.

3.3.3. Identity and Function of the Commissioner

The Commission itself would be an organization made up of experts in conflict resolution. For each case brought to the Commission, it would appoint a Commissioner specifically to handle that case. The Commissioner (or in some complex cases, a small group of Commissioners) could be drawn from within the organization if the expertise

exists, or be brought in as a consultant from an NGO or from within the business community with the caveat that they have extensive experience in dispute resolution, investigations and the process of mediation.

The Commissioner's first aim will be to develop trust and credibility among the parties to the dispute. The Commissioner's functions would include 1) investigating and diagnosing the conflict in terms of its source, nature, issues, and the positions and interests of the parties, 2) improving communication between the participants, 3) providing guidance on the ground rules and norms for the process and counteracting obstructionist or provocative actions, 4) identifying possible areas of agreement and possible solutions based on the parties' stated priorities. The Commissioner's main goal will be to develop, in consultation with sides, substantive ideas and recommendations for a resolution to the conflict.

3.3.4. Funding

Though somewhat beyond the scope of our research, it will be important for DCHR to consider carefully the issue of funding the Commission. While such considerations will obviously be driven by the supply of funding available, it would behoove the Commission to mobilize resources from diverse funding sources in order to ensure long-term sustainability and be viewed as more impartial. The rule of thumb for emerging organizations is that no one source should amount for more than 60 percent of funds. While the initial costs of establishing the Commission may be assumed by DCHR, and that funding will obviously have the Danish Government as its predominant source, we recommend that strategic long-term thinking be devoted to how the Commission will generate revenue and meet the relatively high costs of intervening in remote human rights and business disputes.

If the Danish Government will agree to cover running costs in perpetuity, then other fundraising may not be necessary. However, if that is not the case, it may be possible to secure funds by pooling IFU loan recipients and asking that they pay a small fee for establishing and maintaining an alternative mechanism for dispute resolution. Such a membership fee would immediately raise the profile of the Commission with part of the targeted audience. Alternatively, IFU might also contribute some small percentage of the interest payments it receives on outstanding loans. IFU and businesses remain potential albeit problematic sources for operational funds. All things being equal, it would be preferred if an impartial, outside body (e.g. the EU) could finance the organization, since its reputation may be adversely affected if companies are paying the bills, however indirectly.

3.3.5. Timeframe and Timeliness

One of the chief attractions of this proposed commission is that it offers both parties the hope of resolving a conflict faster than in a court of law, domestic or international. While

we cannot recommend a specific timetable appropriate for the various disputes that might come before the panel, the stated goal should be the shortest period consistent with an adequate review of the situation.

If the process takes years, then it will not likely be preferable to alternatives; if it feels rushed, the parties may complain that their views have not been taken into account. The details are best left to the Commission and the parties to decide and agree upon in the commitment contract.* The process may take an unspecified amount of time as long as the parties are talking and addressing the problems and possible policy changes. The Commissioner's key objective is to bring the parties into the process as quickly as possible. Also important is identifying a moment of intervention that is amenable to dispute resolution. The Commission should be proactive and attempt to intervene early on, before antagonism increases and the resolution process spirals out of control.

3.4. Procedures

The process by which the Commission receives, accepts, and examines cases can take place in four general phases:

- 1) Investigation, including an initial exploration into the charges to see whether or not a case warrants further pursuit. If the case is accepted, the Commissioner appointed to a case would interview the parties and seek out other experts and sources of information to gain a fuller picture of the dispute, learn about the views and perspectives of relevant stakeholders, identify sources of conflict, and explore possibilities for mitigating the conflict.
- 2) Process-oriented mediation, which encourages cooperation and dialogue between the parties and prods the parties to acknowledge and understand the views of the other party and recognize their own shortcomings. The Commission would consult with the parties to have them generate mutually agreeable resolution proposals and interim agreements.
- 3) Solution-proposing intervention, in which the Commissioner will issue findings of fact and suggest possible ways to resolve the dispute. This could include suggestions for ways that both sides can help mitigate the conflict, a recommendation to one or both parties to change the practices or policies that led to the dispute, or even a proposal for restitution to the aggrieved party if that is appropriate.
- 4) Reporting and Implementation, where the Commissioner will release a final report document that includes important findings from the investigation as well as methods to assess compliance with and implementation of solutions that are reached. The Commissioner may also monitor and moderate disputes

* See section in Pre-Conciliation Commitment Contract in section 3.4.2 below.

that arise in the period following a dispute, and continues to encourage better relations between the parties.

It may be that some of these phases are not necessary. Either party could, of course, withdraw at any time. In some instances, both parties might converge on an agreement after the initial investigative phase. In others, simple mediation may be enough to reconcile the two sides at the second stage. In difficult cases, however, the Commissioner may have to intervene more proactively into the dispute and issue decisions; in all cases, the Commissioner will want to follow-up to ensure the decision is implemented by all parties. We recognize that no “roadmap” such as this can hope to predict every eventuality; the Commissioners will utilize their judgment to determine how fast (or even in what order) to cover each stage. These phases may not always be distinct or sequential, but they serve as a general guide for how cases will be addressed by the Commission.

A talented and fair-minded Commissioner is vital to the success of the Commission. Indeed, the Commission’s early reputation will be mainly determined by the Commissioner’s effectiveness in facilitating the process and enabling honest dialogue to take place. It is just as important to establish a procedurally sound and flexible system for identifying appropriate cases and guiding the resolution. A clear system and good model will help the Commission avoid criticism that such interventions are arrogant impositions. Moreover, whenever possible the Commission’s procedures should use local expertise and be designed in harmony with local customs and culture. As such there will be times when the parties are eager for dialogue and the first phase will be mediation instead of a formal investigation. In addition, several procedural issues must also be examined in sharp focus, and we provide recommendations on specific aspects of the process in the sections below.

3.4.1. Filing Petitions and Accepting Cases

When a petition or case is filed, the Commission should record the complaint and seek any additional relevant information from the complainant that is necessary to determine whether the Commission will accept the case. The Commission must also then contact the other party to the dispute (or both parties if the petition is filed by someone else with legal standing but who is not directly involved) to secure permission by both sides for the Commission to move forward with its investigation.

To determine whether a case should be accepted, the Commission should consider several issues. As mentioned in sections 4.1 and 4.2, there may be some allegations of human rights violations that are beyond the Commission’s competence or that should be heard in more appropriate, formal settings, such as domestic institutions, courts, or international tribunals. There may be disputes that are so minor or tangential to human rights issues as not to warrant a commitment of the Commission’s time and resources. Consideration of minor complaints will often be instigated by a business being harangued in the press over a complaint whose validity they dispute. The Commission will

investigate the complaint in question and determine if there is sufficient evidence of a violation to move forward with the process. Country-specific issues also could be complicating factors, such as a government's willingness to allow the Commission to operate, or efforts to include rather than duplicate appropriate and effective domestic mechanisms. Furthermore, the importance of timing and early intervention is made clear in disputes that have dragged on and festered for long enough that the two parties distrust one another so much that direct contact is all but impossible. In such cases, the Commission will have to decide whether there is any role it could play (including shuttle diplomacy, and direct talks with the government in question) in resolving the situation.

3.4.2. Pre-Conciliation Commitment Contract

For every case that is forwarded to the Commission for investigation and approved for intervention, an agreement for participation should be drafted and signed by both parties to establish a set of guidelines for conduct during the process. Such a pre-conciliation contract could reinforce the psychological commitment of both parties and serve as a basis for the mediator to urge conformance with a set of transparent standards. Such standards could include commitments to:

- Cooperate with the Commission;
- Provide relevant information to the Commission and the other party;
- Refrain from provocative acts that might endanger the process, such as lock-outs or strikes;
- Establish, with the Commission's assistance, ground rules for releasing information to the press, and protecting sensitive information from public consumption;
- Implement fully any resolution or agreement that is reached at the end of the process;
- Provide information to DCHR as requested, and after the completion of the process, assist DCHR in assessing the efficacy of the final agreement.

The parties should commit to engage in the process for a specified period of time or until a resolution can be achieved. As a practical matter, each party could withdraw at any time, but a signed commitment could help ensure that the party that withdraws bears the blame for doing so. The parties' commitments to participate can be used publicly to deter a party from dropping out when the process becomes heated.

An agreement signed by both parties would not have the force of law behind it, and DCHR would have limited ability to pursue a claim against either party for breach of contract in this voluntary process. However, the Commission may seek recognition of the commitment contract from local authorities and domestic law.

3.4.3. Evidence Gathering Methods

There are two phases in which the Commission will have to obtain evidence to help move the process forward. The first is upon submission of the complaint, when the Commission may have to solicit additional information from the complainant (and frequently other parties in a dispute) to facilitate a decision concerning whether the petition will be accepted. We do not see the need for independent verification of facts at this point, only clarifying questions related to the parties.

Once a petition has been accepted, the Commission should conduct interviews with relevant stakeholders and people involved in the conflict on the ground, drawing from the material provided by the parties but also seeking out independent views and technical experts to weigh the evidence submitted and offer a more informed viewpoint. The Commissioner should conduct at least one site visit in order to interview stakeholders and better understand the context of the dispute.

Regarding who should conduct the investigations, we believe that the Commission can determine that on a case-by-case basis. Some factors to consider are whether the Commissioner should avoid doing the investigations, since remaining above the fray would in theory protect the perceived impartiality of the Commissioner so important in the process. On the other hand, in many cases, a Commissioner who is involved throughout the entire process may be better able to build trust with and among all parties.

3.4.4. Involvement of Other Parties and Experts

In addition to the company and the human rights, labor, environmental, or community representatives, there may be others that have information or expertise that would be useful in formulating a just resolution. Businesses may wish to ask business umbrella organizations or technical specialists to provide factual testimony or opinions, while aggrieved parties may wish to ask human rights, labor, or community groups to offer their factual testimony or opinions. In some cases, one of the two parties may wish to employ legal counsel or other advocacy services. Bearing in mind the risks that such representatives might bring to a more adversarial environment, we believe there are some circumstances in which allowing advocates to speak for parties might be appropriate. This might especially apply to community groups that believe they will be unable to properly portray their grievance without assistance.

The Commission should work with both parties to avoid two pitfalls: an unnecessarily adversarial process that results from a lack of direct communication between the parties, and a situation where one party might be disadvantaged in portraying its case without assistance. Robust mediation allows for power balancing intervention in which one party is essentially coached through the process to level the playing field and ensure that the underlying causes of a conflict are addressed.

3.4.5. Confidentiality, Press Issues, and Record Keeping

The parties may bring with them different expectations regarding the public relations value of the process. In some cases, a company with a complaint lodged against it may want to see the problem resolved quietly in contrast to an aggrieved party that wishes to use the media spotlight to leverage its demands. The Commission's best strategy for managing public and press issues may be to issue short press statements and/or reports at the beginning and conclusion of the process, and perhaps intermittently. This would respond to public interest but could be agreed upon by the mediator and parties themselves.

DCHR should maintain records of the procedure, in order to better assess the efficacy of the process and track implementation of resolution agreements. Record keeping is a necessary tool for self-reflection and evaluation. There may also be interest by academics in reviewing these files for research. The Commissioner should make agreements for confidentiality in consultation with both parties. The Commissioner also has an obligation to inform all witnesses of the level of protection accorded their participation in the process. In compiling case studies, confidentiality can be protected through general references to the parties instead of using names.

3.4.6. Legal Status of Agreements

As currently envisioned, the Commission's decisions would not bear the force of law. Many countries, however, offer parties the ability to take an agreement arrived at through private mediation or arbitration and have that agreement recognized by a judge. As noted in section 4.3, this can give the agreement both precedent-setting value and enforceability (although this would depend on the jurisdiction). We recommend that the Commissioner seek permission from both parties to have the agreement legally recognized in the country where the alleged abuse took place. If that is not possible legally or politically, it may still be possible (and worthwhile) to determine whether the agreement could be recognized in another jurisdiction (either that of Denmark or another country relevant to the dispute) in order to give it additional moral weight.

In establishing the Commission, DCHR must determine the extent to which Danish jurisdiction can be utilized. The importance of clarity in identifying the human rights benchmarks that ground the Commission cannot be overstated. DCHR may choose from international standards, Danish law, host country law or some combination of the above. Danish jurisdiction may be a useful tool, but it will surely present some complications. For instance, Danish labor protections are likely more stringent than those in host countries.

3.4.7. Monitoring Implementation

Monitoring the implementation of decisions is vital. If the resolution agreement is not being implemented, then the dissatisfied party should inform the Commission. To further ensure that a decision has been implemented, the Commission may want to conduct a

one-year follow-up on compliance with the agreed upon or proposed solution. A short report will be written a year following the dispute resolution process to assess the extent to which parties have changed their policies and practices in line with the agreed or recommended outcomes of the Commission. The level of the follow-up depends in part on the amount of funding as well as the legal recognition discussed in the previous section.

One way to monitor implementation is the approach taken by Social Accountability International (SAI), a charitable human rights organization that improves conditions in workplaces by developing and implementing socially responsible standards³. SAI developed the Social Accountability 8000, a uniform, auditable standard for a third party verification system. The organization provides guidelines for the independent verification of compliance and also gives examples of good practices. SAI licenses qualified auditing firms and individual auditors to certify facility compliance with social accountability standards. Certified facilities are authorized to use the SA8000 certification mark. SAI regularly audits the auditors and works through ISEAL (International Social and Environmental Accreditation and Labeling Alliance) to ensure high quality social standard setting and accreditation. SAI's oversight and review of the auditing process includes an open complaints and appeals system.

3.5. Potential Risks Posed by the Commission

The Commission will affect the reputation of the DCHR, whatever its organizational relationship is to its parent body. The Commission may be perceived as a threat to businesses, human rights groups, and governments accustomed to doing things their own way. Some members of the business community may argue that the existence of the Commission compels them to participate in a conflict resolution process that presumes their guilt. Human rights groups may fear that the Commission limits their options for applying pressure to target businesses through media campaigns or direct action. Furthermore, the parties may charge the Commission is biased against them and worry aloud about the lack of strong enforcement mechanisms other than moral suasion. In addition, governments may rankle at the implication that their legal procedures are not sufficiently robust to settle human rights disputes involving multi-national corporations and may rush to defend the efficacy of national courts or existing dispute resolution mechanisms. Some host governments may even vigorously assert their complete and sole jurisdiction over alleged infractions that occur domestically and seek to prevent the Commission from functioning.

The best way to allay these concerns is for the Commission to establish its own reputation as an independent and fair alternative dispute resolution body. Through clear assurances that the Commission will not usurp national judicial jurisdiction or interfere with the sovereign legal process, DCHR can help mollify the concerns of host nations with credible judicial systems. Recognizing the risk that some might see their actions as paternalistic, intrusive and inappropriate, Commissioners involved in each case should

commit themselves to briefing host country officials and responding forthrightly to their concerns about this foreign dispute resolution body.

The Commission must also convince human rights activists that its resolution process will not merely settle disputes, but will instead be a vigorous attempt to correct business practices that lay at the source of problems. The Commissioner should consult relevant human rights groups in the process when appropriate and should conduct the process with as much transparency as possible. The Commission also has a responsibility to convince the parties that the process is not meant to vilify or condemn businesses and that by agreeing to participate, a business concedes neither its guilt nor legal rights.

DCHR is taking a substantial risk by attaching its good name to an unproven but cutting-edge endeavor. The builders and administrators of the Commission should be prepared for problems during its initial interventions. With the sparse literature on the components and procedures of similar commissions, there is little chance that DCHR will design the ideal Commission right out of the gate. Unfortunately, the Commission will likely attract a great deal of attention and be expected to prove its efficacy at the very point that it should be learning from its mistakes.

To allay some of the risk, we recommend that DCHR collaborate with likeminded organizations willing to provide the Commission with cases that can be used in a pilot process. This will allow DCHR to test some of its assumptions in the real world, assess parameters for success, and gauge aspects of the Commission's design that do and do not work. A pilot process offers a self-reflection mechanism and a method to evaluate specific components of the Commission. It allows the HRBC to learn from mistakes, and provides a strategic approach for damage control and increasing the Commission's credibility. The procedural recommendations that have constituted this chapter should be tested in practice, evaluated, and, if necessary, adjusted. The HRBC must build on its strengths and should not overreach initially.

4. APPLICABILITY AND EFFICACY

The effectiveness of the Commission will be determined not only by its mandate, procedures and Commissioners, but also by the context in which it operates. The following factors can contribute to an atmosphere in which business-human rights disputes can be resolved effectively or frustrate even well intentioned, energetic, and competent intervention.

4.1. The Kind of Dispute

The wide range and scale of human rights and business disputes, from forced labor to environmental issues, complicity with illegitimate governments to forced dislocation, necessitate a discussion about the kinds of disputes that the Commission will address. The Commission should probably not accept labor cases related to hiring or ambiguous

rights issues like the distribution of resources; nor should the mandate include settling disputes regarding land title. The Corporate Engagement Project (CEP) identifies three levels of conflict that affect corporate operations: 1) direct conflicts between the corporation and the community, 2) conflicts in which the business has become a proxy target for grievances by local groups against the national government, militia, or other holders of wealth, and 3) conflicts based in inter-communal disputes that in their origins relate little to the business but are exacerbated by the company's operations.⁴ The latter type is especially prone to misunderstanding, and may undermine operations if the company's impact on broader social and political situations within a community is not addressed.

Cases where companies stand accused for violating political and civil rights tend to represent the most urgent and serious abuses perpetrated by companies or their employees or contractors, such as security companies. In deciding whether to cooperate with the Commission, company officials may compare this commission process to their other alternatives. In general, the company will balance the possibility of evading criminal prosecution, litigation, or a public shame campaign if the evidence of wrongdoing is strong, versus vindication in public debate or by a court if the case against the company is weak.

Human rights groups, on the other hand, will not want to limit their options. As an activist in India explained, "We would be glad to enter a mediation process to solve the issue, as long as options like litigation are not foreclosed." While interested in principle in any tool that allows them to focus pressure on an alleged human rights abuser, human rights groups worry that the Commission could replace criminal prosecution, litigation, or public mobilization campaigns that are preferred in serious cases (because they offer a more tangible hope of imposing penalties or compensating victims and may set precedents for future disputes). Cases involving alleged crimes against humanity or gross violations of human rights are best resolved through more formal and traditional means.

Disputes with Some Human Rights Component: The second general category of business/human rights complicity includes less serious but still disputed claims over employment practices, claims of improper resource exploitation, and environmental issues. We believe it is these cases that fit most easily into the proposed mandate for the commission. Labor issues such as workplace conditions and union representation can be emotionally heated, but there is long experience with resolving them through direct or assisted negotiation. Most labor issues will continue to employ collective bargaining, private arbitration/mediation services, or labor courts in places like India that boast well established labor mediation and arbitration systems. However, the Commission may be able to address labor cases where workers allege infringements of their labor rights, by identifying the source of the conflict and recommending potential ways to improve business operations.

Claims against a company for a local community's "share" of local resources also can be complicated. Even in established democracies, property law regarding the use of common resources like river water is not completely codified or consistently adjudicated

by the courts. In new democracies and countries in transition, there is less clarity still. A number of companies have found trouble unintentionally when land granted to them by the government has competing claims by long-time residents who do not possess legal title. Other problematic issues involve claims by a local community that a company's facility is not hiring enough local people, compared to expatriates or nationals from a different region of the country. In addition, companies may face demands that a "fair share" of development funding from the company be directed to the local community. When civil litigation is expensive, time consuming, biased or unavailable, we see a potential role for the Commission to resolve issues in which both parties believe an agreement is possible but need facilitation and procedural help.

Environmental degradation as Human Rights Abuse: Environmental issues can be the most complicated of all. At the most serious – an industrial accident like Bhopal – we do not see the Commission as the preferred means of addressing the complex issues involved. This applies not only to industrial accidents, but also to the serious, deleterious environmental effects of some manufacturing processes. Such complicated cases will take more time, energy, expertise, and enforcement power than the Commission will likely have. We can imagine a situation in which a complaint is filed alleging company pollution and environmental damage that is relatively small-scale in which the facts are unclear. As a non-adversarial body, the Commission might be in a position to resolve such cases.

4.2. The Scale of Dispute

The Commission must recognize that some business/human rights problems will be beyond its scope due to their seriousness. We traveled to India at a time when the 1984 tragedy at the Bhopal Union Carbide plant was again in the news due to developments in the Indian courts on indictments against the former Union Carbide CEO. The primary means of resolving issues of such a scale of abuse will likely be a process by which the alleged perpetrators face serious punishment if found guilty and where victims can seek extensive restitution for serious injuries. We recommend that DCHR avoid taking cases involving gross human rights violations. Depending on the exact nature of the alleged abuse, it would be preferable, to refer the parties to domestic courts, the Hague, an ongoing criminal tribunal or court of justice, or similar body.

4.3. National Legal Systems and Applying International Norms

In addition to the core competencies and aspirations of a country's judicial system, the Commission's process may also depend on other aspects of the country's legal framework. In some countries, private arbitration and mediation are well known and frequently practiced, particularly in the field of corporate law. Arbitration and mediation decisions can be brought before a judge to obtain legal recognition. Such decisions are then legally enforceable and have precedent setting value. We saw this in India, where

arbitration decisions made by informal local or people's courts (called Lok Adalits) were given the stamp of approval by a judge.

In other legal systems, there may be no scope for legal recognition of arbitration or mediation agreements, either because the process has not yet been created or because the government is opposed to having legal precedents established outside of the judiciary. As we have suggested elsewhere in this report, we favor obtaining local legal recognition of the Commission's decision because it would give the decision precedent-setting power and enforceability and, therefore, would more effectively compel the parties to abide by it.

Similarly, legal systems differ in the extent to which they consider international law to be an inherent part of national law. Some countries refuse to recognize the supremacy of international law except when specifically enshrined in national law, while others make the UN human rights conventions and international human rights covenants commensurate or even superior to local law. While the complaints process does not aspire to be a judicial process, if either party wants to cite international covenants, treaties, or norms as part of its argument, such differences in legal systems may have ramifications for the Commission process. A Commissioner could be faced, for example, with a complainant who bases a petition on a right enshrined in the International Covenant on Economic, Social, and Cultural Rights (ICESCR) even though the government of the complainant's country is not a signatory. If local law conflicts with the ICESCR, the Commissioner will have to work with the parties to produce a fair outcome, even though the legal basis is unclear. Legal ambiguity becomes less of an issue when the Commission is clear about its own benchmarks and manifests the guidelines, standards and laws on which it grounds its authority.

4.4. Political Systems and Existing Resolution Mechanisms

We believe the Commission would have relevance in countries with varied political systems. While we do not recommend the Commission deny complaints from any particular country based on its political system, it may be more difficult to conduct inquiries in the world's most repressive and least democratic countries, where information is controlled by the regime, activists seeking to represent victims of abuse could suffer retaliation by the state, and there is little foreign investment. In countries undergoing democratic transitions, the Commission will offer an important additional avenue for dispute resolution. Democracies, new or established, tend to have a wider range of existing mechanisms to resolve disputes, but they can also have legal systems that are overburdened, political systems that are not always accountable to public opinion, regulations that are inadequately enforced, and overburdened civil societies and press outlets that cannot investigate every report of a human rights problem.

4.5. Importance of Labor and Civil Society

In countries with strong unions, organized labor often plays the chief role in protesting abuses by companies, including matters that are not strictly collective bargaining issues. Support from trade unions could assist an individual or group to more effectively present their case to the Commission. A strong civil society may also allow the Commissioner to draw on other sources of information for the investigation. However, the Commission should be wary of being used to further the objectives of one side in pursuit of goals other than those specified in the complaint. In particular, the Commission may have to decide when it is more useful to talk to the people involved in the dispute themselves and not their representatives, whether they are corporate lawyers, public relations people, or representatives of unions or NGOs.

4.6. History of Business-Community Relationships

Commissioners should also be cognizant of a company's reputation in the local community when developing a timetable for the process. In a situation where complaints against a company are generally resolved to the satisfaction of both sides, a particularly thorny problem may require only that the Commission offer the possibility of a face-saving solution that both sides can take back to their constituencies. In such a case, the Commission can afford to focus on assessing the merits of the allegation and prodding both parties to a constructive solution.

In dealing with slowly developing, contentious conflicts between parties with a long history of mutual animosity, however, the Commissioner may have to spend additional time encouraging communication. In these cases, the Commissioner may need to spend more time, especially at the beginning of the process, focusing on the process of reconciliation rather than the substance of a possible agreement. An agreement will lack durability unless the parties commit to resolution and buy into the process.

4.7. Addressing Suspicion and Xenophobia

In some countries, the Commission will have to reassure host country publics that the process does not call into question that country's democratic development. The historical experience of other nations may cause citizens to be more skeptical of what may be perceived as foreign meddling. Some governments, seeking to avert blame for unpopular domestic policies, attempt to shift the focus from government failings to foreign targets. Although the Commission's complaints process is designed to be voluntary and will have the resolution of conflict as its main goal, it nevertheless could become a lightning rod for criticism. As we have recommended elsewhere, transparency and a good public affairs strategy can help convince skeptical publics or politicians that the complaints process is neither arrogant nor threatening. This would be especially important when handling cases involving prominent multi-national corporations, which sometimes elicit prejudiced reactions on one side or the other.

When working in any country, the Commission should make the effort to ensure that the local government does not oppose the Commission's intervention, which it could do by harassing witnesses, restricting information, declining visa requests, or refusing to allow legal recognition of the Commission's proposed solution. The ability of the Commission to carry out work in transition countries will depend on establishing a reputation as a transparent, non-polemical, results-oriented organization. We would therefore encourage the Commission or DCHR officials to pursue meetings with government officials in such countries during the course of their investigations.

5. CONCLUSION

From feedback that we have received from numerous experts in this field, we believe that DCHR's proposed Human Rights and Business Commission would fulfill a genuine need. It is not, of course, a panacea for all of the problems concerning human rights and businesses. Indeed, many of these disputes cannot or should not be dealt with by the HRBC. Nevertheless, the Commission may offer additional hope to people and organizations without access to adequate mechanisms to resolve their problems. It can serve as an additional tool for those who want to raise human rights standards while not choking off legitimate commercial activity that spreads economic opportunity and growth. Moreover, it may be a useful tool for businesses maligned by false allegations. We believe that the establishment of the Commission is a risk worth taking. It has our high hopes and best wishes.

APPENDIX 1.

Report on Field Research in India

We traveled to Mumbai and New Delhi, India October 26 - November 2 to discuss the concept of a Human Rights and Business Commission with businesspeople, labor/human rights activists, and government officials. (A complete list of meetings is included in the attached "Sources" list.) Our goal was to learn about India's most common human rights-related conflicts affecting businesses, to research local conflict resolution mechanisms, to assess the appropriateness of the Commission model in India's social and legal context, and to determine how a commission might be structured to attract maximum interest among both business and human rights officials. As reported previously to DCHR, our key preliminary findings included the following.

Complaints with a human rights component brought against businesses in India generally fall into one of three categories:

- Labor issues such as workplace conditions and union representation,
- The environmental impact of manufacturing processes or industrial accidents, and
- Efforts by local groups to obtain or protect resources, including demands for jobs to be set-aside for local communities or conflicting claims over local resources.

India's democracy, developed court system, and energetic civil society mean there are numerous avenues already available for conflict resolution.

- While both business and NGO officials complain of the delays and costs involved in litigation, both sides generally respect the courts as impartial.
- While arbitration and mediation are relatively new fields, there are increasing opportunities for parties to a dispute to use these methods.
- All parties said they would have to weigh participation in the Commission's process against pursuing the matter through an alternative authority.
- The other alternatives include the formal court system, the labor courts (for employment related issues), petitions made to politicians, private arbitration carried out under the 1996 Arbitration Law, the Lok Adalits or "People's Courts," and the investigation services of interested non-government organizations, such as the Indian People's Tribunal on Environment and Human Rights.

In assessing prospects for a Commission in India, our respondents tended to consider foremost whether they thought it would confer greater advantage on their "side" or that of their opponents.

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- Businesses fear being drawn into a process that presumes them guilty and are concerned that their participation would be seen in the court of public opinion as an admission of culpability (and perhaps liability).
 - Human rights and labor groups worry the Commission would allow businesses to drag out legitimate complaints, defusing popular pressure and sapping the resources of NGOs, which have more limited resources.
 - Government officials are anxious that the Commission not signal a lack of respect for the Indian judiciary or divert cases from other organs like India's National Human Rights Commission.

Indians may be wary of the CC if it is seen as a foreign, or imposed, organ, rather than an indigenous institution.

- A common response was that the Commission would be less useful in India than in other countries with less entrenched respect for rule of law.
- Many questioned whether the Commission's decisions would have the force of Indian law, whether the CC would be registered with the government, and whether its decisions could be appealed in Indian courts.
- There was broad agreement that local knowledge, perhaps to include local experts incorporated in the Commission process, would be important.

Even so, our interlocutors generally welcomed the idea of a Commission in India in specific situations (and agreed the model would have greater scope in non-democratic or newly-democratic transition countries). There was some consensus that the Commission could play a useful role in certain niches:

- In disputes (not involving allegations of grave human rights abuses), if it offers a fair process that is faster and less expensive than litigation and more effective than public relations;
- In enforcing worker or environmental protections a company agrees to observe at a higher level than those enshrined by local law; and
- In resolving conflicts with local communities that are not likely to be litigated because the legal issues are unclear (as in some job and resource demands).
- Also, it was felt that the Commission's "seal of approval" could be useful in certifying businesses that respect local laws and communities.

While people we spoke with had not had a chance to think in great depth about how they would construct an ideal commission, several concerns were readily apparent.

- Whichever side initiates a complaint, both sides must agree to cooperate fully and abide by a commission decision.
- It might be useful to break the process up into two steps, investigative and agreement seeking.
- The process should be time limited.

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- Both sides should be encouraged to give the process a chance by avoiding critical public comments and other hostile actions

India clearly constitutes a unique example among democratic, developing countries. Formerly, we had planned to conduct our field research in Indonesia and had researched human rights issues in that very different political and social environment. We believe the contrast between the two cases was useful in helping us avoid the danger of extrapolating from one particular example to broader judgments of the potential efficacy of a complaints procedure in other parts of the world.

APPENDIX 2.

International Labor Organization Standards

ILO standards are set in *Conventions*, having the force of international law and binding for states that have ratified them and in *Recommendations*, which provide additional guidance to governments. With regard to accountability, member states must provide regular reports to the ILO on the application of ratified Conventions.

In June 1998 the ILO adopted the Declaration on Fundamental Principles and Rights at Work. The Declaration is a pledge by all Members to *respect, promote and realize* in good faith the principles and rights relating to:

- Freedom of association and the effective recognition of the right to collective bargaining;
- The elimination of all forms of forced or compulsory labor;
- The effective abolition of child labor; and
- The elimination of discrimination in respect of employment and occupation.

Declarations are instruments that the ILO has used sparingly. Unlike Conventions, which binds only member states that ratify it, the Declaration applies automatically to all countries that have accepted the ILO Constitution, whether or not they have ratified the core Conventions of the ILO.

The core Conventions and their accompanying Recommendations comprise:

- ILO Conventions 29 and 105 & Recommendation 35 (Forced and Bonded Labor)
- ILO Convention 87 (Freedom of Association)
- ILO Convention 98 (Right to Organize and Collective Bargaining)
- ILO Conventions 100 and 111 & Recommendations 90 and 111 (Equal remuneration for male and female workers for work of equal value; Discrimination in employment and occupation)
- ILO Convention 138 & Recommendation 146 (Minimum Age).
- ILO Convention 182 & Recommendation 190 (Worst forms of Child Labor)
- ILO Convention 81 (Labor Inspection)
- ILO Convention 122 (Employment Policy).

Although not core ILO conventions, other ILO standards especially relevant to the DCHR in grounding the Human Rights and Business Commission in international law include:

- ILO Convention 135 & Recommendation 143 (Workers' Representatives Convention)
- ILO Convention 155 & Recommendation 164 (Occupational Safety & Health)
- ILO Convention 159 & Recommendation 168 (Vocation Rehabilitation & Employment/Disabled Persons)
- ILO Convention 177 & Recommendation 184 (Home Work).
- ILO Convention 190 & Recommendations (Safety and Health in Agriculture)

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- ILO Convention 154 (Collective Bargaining)
 - ILO Convention 131 (Minimum Wage Fixing)
 - ILO Convention 175 (Part time work)
 - ILO Convention 183 (Maternity Protection).

The ILO is unique within the United Nations system for its tripartite structure and for its ability to supervise the application of its standards. This tripartite structure gives employers' and workers' representatives - the "social partners" of the economy - an equal voice with those of governments in shaping the policies and programs of the organization.

ILO Conventions constitute international law; they are enforceable in principle if not always in practice. In the June 1999 Report on Decent Work, the Director General acknowledged that "even when ratified, many Conventions are only weakly implemented"⁵. The ILO has attempted to become more robust in this regard by assisting countries with implementation, enhancing supervision and improving reporting.

Voluntary principles and codes of conduct can complement, but do not replace, enforcement of national legislation and international standards. Voluntary codes often use ILO standards as points of reference and as sources of inspiration. In the same vein, in constructing the Human Rights and Business Commission the DCHR should incorporate information on various ILO Conventions, on the 1998 Declaration and on the 1977 Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy.

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(This list is not for distribution)

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- **Luc Zandvliet**, Corporate Engagement Project
- **Jennie Pasquarella**, Lawyers Committee for Human Rights
- **Smita Narula**, Human Rights Watch
- **Margaret Huang**, Robert F. Kennedy Center

Mumbai

- **Deepika D'Souza**, India Centre for Human Rights and Law, Indian People's Tribunal
- **Ms. Kalpana Desai**, International Transport Worker's Federation Women's Committee and Transport and Dock Worker's Union
- **Mr. G.J. Rao**, Joint Secretary, Maritime Union of India
- **Mr. R. Rajamani**, Treasurer, Maritime Union of India
- **S.R. Kulkarni**, President, Transport and Dock Workers' Union
- **Mr. Vasant Gupte, et al**, Director, Maniben Kara Institute of Labor Studies
- **Mr. Prem K. Mehra**, Managing Director, Global Wool Alliance Private Limited
- **Mr. Ashish**, Sanctuary (environmental group)
- **Mr. Alok Upadhyaya**, Chief Executive Officer, Kampsax India Private Limited

New Delhi

- **Ms. Deepa Hingorani**, Resident Representative, Danish Industrialization Fund for Developing Countries (IFU), New Delhi
- **Mr. Andrew Haviland**, U.S. Embassy, New Delhi
- **Ms. Maja Daruwala**, Commonwealth Human Rights Initiative, New Delhi
- **Mr. Ravi Nair**, Executive Director, South Asia Human Rights and Documentation Centre (SAHRDC)
- **Mr. Arjun Narayanan**, Tata Consultancy Services, New Delhi
- **Justice R. Sachar**, New Delhi
- **Justice J.S. Verma**, Chair, National Human Rights Commission, New Delhi
- **Mrs. S. Jalaja**, Joint Secretary, National Human Rights Commission
- South Asia Commission on Child Servitude
- **Mr. P. Haridasan**, Executive Officer, International Confederation of Free Trade Unions (ICFTU)– Asia and Pacific Regional Organizations, New Delhi
- **Dr. Vikas Goswami**, Director General, Business and Community Foundation, New Delhi
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² <http://www.globalpolicy.org/intljustice/atca/2002/1105arm.htm>

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