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International Support for Effective Dispute Resolution Between Companies and Their Stakeholders: Assessing Needs, Interests, and Models

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Corporate Social Responsibility Initiative

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

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

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INTERNATIONAL SUPPORT FOR EFFECTIVE DISPUTE RESOLUTION BETWEEN COMPANIES AND THEIR STAKEHOLDERS: ASSESSING NEEDS, INTEREST AND MODELS

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INTERNATIONAL SUPPORT FOR EFFECTIVE DISPUTE RESOLUTION BETWEEN COMPANIES AND THEIR STAKEHOLDERS: ASSESSING NEEDS, INTEREST AND MODELS

I. EXECUTIVE SUMMARY

This report presents the results of interview-based research aimed at identifying whether and how the international community could improve capacity for the effective mediation of disputes between businesses and those affected by their operations. It seeks to answer the questions:

- Is there benefit in developing some form of "international mediation facility" to support more dialogue-based resolution of disputes between companies and their stakeholders in society?
- Is it viable and practicable to do so?
- If so, what kind of roles or functions should such a "facility" have, and what form should it take to best perform those functions?

This research was conducted by the Corporate Social Responsibility Initiative at Harvard Kennedy School on behalf of the United Nations Secretary-General's Special Representative for Business and Human Rights (Special Representative), Professor John Ruggie. In 2008, the Special Representative proposed, and the UN Human Rights Council (HRC) endorsed, a three-pillar framework for understanding and addressing business and human rights challenges. It consists of the State duty to protect human rights against abuse by third parties, including business; the corporate responsibility to respect human rights; and the need for greater access to remedy where abuses nevertheless occur. The HRC subsequently requested the Special Representative to take forward this "Protect, Respect and Remedy" Framework and to "operationalise" it. The ultimate product of this "operationalisation" is a set of "Guiding Principles for Business and Human Rights" which the Special Representative will present formally to the UN Human Rights Council in June 2011.

The research presented in this report aims to help clarify how some elements of the "Access to Remedy" pillar of the Framework and the Guiding Principles – notably those related to non-judicial remedy – might be further operationalised. Section II of the report sets out some of the other reserach with regard to non-judicial remedy on which this particular project builds.

Section III of the report describes basic premises and methodology of the research. In total, more than 130 interviews were conducted, with representatives from business, international, national and local civil society organisations, as well as with a few practitioners in stakeholder engagement and dispute resolution. Forty-five interviews were conducted at the "global" level by the lead research team, and a

further 86 were conducted locally by research partners in Argentina, India, Nigeria, Peru, the Philippines and South Africa. This section also defines some key terms used throughout the report.

Section IV of the report conveys the key research findings in terms of the main themes that emerged from the interviews. These include some framing issues with regard to terminology, a focus that emerged on company-community disputes, and the current limits on the extent to which the need for better dispute resolution is recognised. The section goes on to identify eight substantive findings:

- the lack of information available for businesses, communities and civil society organisations to make informed choices on grievance-handling options;
- the challenges in identifying effective "third-party neutrals" (facilitators or mediators);
- the absence of agreed-upon process standards for mediation in this field;
- the opportunities for a more proactive and preemptive approach to disputes;
- concerns that the parties to disputes often lack the capacity to participate effective in mediation processes;
- concerns about the incentives for parties to disputes to participate in mediation;
- questions about the role of governments in company-community mediation processes; and
- the challenges in ensuring authentic community representation in dispute resolution processes.

Section V of the report contains analysis and conclusions based on these findings. It sets out four framing propositions related to the important potential role of mediation in addressing business-stakeholder disputes; a preference for processes at the local level aimed at local solutions; the need for stakeholder engagement in any process of designing a new "facility" in this field; and the particular interest in focusing new capacity on "business-community" disputes. Within these framing propositions, a number of first and second priority roles and functions for any new "facility" or "facilities" are identified:

<u>First priority:</u>

- Helping parties to assess their options for accessing remedy;
- Strengthening professional resources;
- Enhancing effective participation of parties; and
- Acting as a clearinghouse for cases stories, experiences and analysis.

<u>Second priority:</u>

- Promoting awareness of the nature and benefits of mediation;
- Strengthening the incentives for parties to use mediation;
- Developing process standards and principles for mediation in this field; and
- Building the capacity of mediators in this field.

The section closes with some preliminary observations and recommendations about institutional design for any new "facility" or "facilities" that might support the resolution of disputes between businesses and their stakeholders in society. These related to:

- Mutli-stakeholder oversight;
- Networked approaches, with central and devolved functions; and
- Issues of institutional affiliation.

Section VI concludes the report with some final observations.

II. BACKGROUND

In his 2008 report to the UN Human Rights Council, the UN Secretary-General's Special Representative (SRSG) for Business and Human Rights, Professor John Ruggie, reviewed the role and reach of judicial and non-judicial grievance mechanisms in addressing the human rights impacts of business. He concluded that the current "patchwork of mechanisms remains incomplete and flawed. It must be improved in its parts and as a whole".

The SRSG noted that current inadequacies in this area take two forms. First, there is inadequate access to information for those with grievances about what mechanisms are available to them, how they function and what supporting resources exist; and inadequate information for companies and others as to what makes non-judicial grievance mechanisms effective in practice. Second, there are "intended and unintended limitations in the competence and coverage of existing mechanisms". Since 2008, he has pursued research and consultations aimed at identifying how, through his mandate, he might best help address these deficits. That research has encompassed state-based and non-state-based, judicial and non-judicial, adjudicative and dialogue-based grievance mechanisms. The remainder of this section provides an overview of the issues he has explored.

A. National judicial mechanisms

There can be many barriers to accessing judicial remedy for those with legitimate claims against business. Many of these barriers are in no way specific to business-related human rights claims, such as a lack of resources and training for those working in the judicial system, as well as corruption. There are numerous governmental, international and private organizations working to address these deficits.

The SRSG has therefore focused his own efforts on exploring barriers to accessing judicial remedy that are particularly salient in the context of his mandate on business and human rights. The issues he has identified include the corporate group structures that make the attribution of legal responsibility among members of the group particularly challenging; the complexities and sensitivities of

extraterritorial jurisdiction; the capacity of state prosecutors to handle such trans-boundary cases; limitations on bringing aggregated and representative claims; financial, social and political disincentives for lawyers to represent claimants in such cases; and the sheer costs of bringing a case where claimants are often extremely poor and lack financial support.[1]

Bearing these challenges in mind, the Guiding Principles on business and human rights put forward by the SRSG to the UN Human Rights Council include a Principle stating that, "States should take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing human rights-related claims against business, including considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy."[2]

B. Non-judicial mechanisms

In most, if not all, societies, non-judicial mechanisms for handling grievances, complaints or disputes provide an essential supplement to the court system. This is true as much of strong rule of law societies as it is of those where the law and legal institutions are weak. In a 2009 article, Robert Kagan of the University of California at Berkeley cites a general household survey conducted in the United States in 1980 under the Wisconsin Civil Litigation Project, which found that "only 0.5% of grievances, 7% of claims, and 11% of all 'disputes' (rejected claims) resulted in a court filing." Moreover, "in only 1% of grievances, 14% of claims, and 23% of disputes did the claimant even consult a lawyer." Instead, as he concludes, the vast majority of claimants look for civil justice through complaints offices, grievance systems and dispute resolution mechanisms established by public and private organisations.[3] It is unlikely that this state of affairs is particular to the US, where access to judicial mechanisms and a cultural readiness to use them are notably strong.

Yet, despite their potentially important role, the non-judicial mechanisms that can address alleged business impacts on human rights have been under-researched. The SRSG has therefore undertaken a number of efforts to address this gap. He has mapped a range of non-judicial grievance mechanisms relevant to the business and

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[1] Ruggie, John (April 2010) "Business and Human Rights: Further steps toward the operationalization of the 'protect, respect and remedy' framework". United Nations, Geneva, A/HRC/14/27, paras 103-113

[2] Ruggie, John (March 2011) "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework". United Nations, Geneva, A/HRC/17/31, Guiding Principle 26.

[3] Miller, James & Austin Sarat (1980-81) "Grievances, Claims and Disputes: Assessing the Adversary Culture," *Law & Society Review* 15: 525-566; cited in Robert A. Kagan, "Can Individuals Get Justice from Large Organizations? – Notes Towards a Research Agenda" University of California, Berkeley, available at:
http://www.allacademic.com//meta/p_mla_apa_research_citation/3/0/4/1/3/pages304135/p304135-1.php

human rights arena.[4] He has conducted extensive consultations to develop an understanding of what makes for effective non-judicial grievance mechanisms[5], and has piloted the resulting set of principles with 5 companies in different sectors and different regions, to test their application in practice[6]. He has developed an on-line resource – BASESwiki – designed to help companies and their stakeholders find information, share learning and engage with others about the non-judicial options available to them for the resolution of grievances and disputes.[7]

In addition, the SRSG has conducted research focused on extractive sector companies looking at the costs of conflict with communities and the wider internal drivers within companies that influence how effective they are at managing and resolving such conflicts.[8] He is also developing video tools to document the perspectives of companies and communities that found themselves in conflict and used dialogue and mediation to achieve resolution and remedy.[9]

C. The role of adjudication

Various kinds of non-judicial grievance mechanism provide for a form of adjudication in the event of a grievance arising between a company and an individual or group. They include mechanisms at the national level such as complaints offices and ombudsman offices. They also include mechanisms administered by public or private organisations that require certain standards of corporate clients or members.[10]

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[4] Rees, Caroline and David Vermijs (2008). "Mapping Grievance Mechanisms in the Business and Human Rights Arena." Corporate Social Responsibility Initiative Report No. 28. Cambridge, MA: Harvard Kennedy School.

[5] Ruggie, John (April 2008). "Protect, Respect and Remedy: a Framework for Business and Human Rights" United Nations, Geneva, A/HRC/8/5, para 92; and Ruggie, John (April 2009). "Business and human rights: Towards operationalizing the 'protect, respect and remedy' framework" United Nations, Geneva, A/HRC/11/13, para 99

[6] Ruggie, John (2011) "Piloting principles for effective company-stakeholder grievance mechanisms: A report of lessons learned". United Nations, Geneva, A/HRC/17/31/Add.1. The individual reports on the pilot projects will be available as annexes to this overarching report at http://www.business-humanrights.org/SpecialRepPortal/Home and http://www.hks.harvard.edu/m-rcbg/CSRI/pub_reports.html

[7] www.baseswiki.org

[8] Rees, Caroline (2009). "Report of International Roundtable on Conflict Management and Corporate Culture in the Mining Industry." Corporate Social Responsibility Initiative Report No. 37. Cambridge, MA: John F. Kennedy School of Government, Harvard University.

[9] These videos will issue in the course of 2011 and will be available on www.baseswiki.org.

[10] For example, the Compliance Advisor/Ombudsman of the World Bank Group, which handles complaints related to projects that receive support from the International Finance Corporation or the Multilateral Investment Guarantee Agency; or the Third Party Complaint Mechanism of the Fair Labor Association, which may be used for alleged breaches of the FLA code by members, or the suppliers of members, of the FLA.

Some observers have suggested that a new global ombudsman[11], or a similar international office with adjudicative powers, should be created to receive and address complaints alleging business abuse of human rights. In his 2009 report to the UN Human Rights Council, the SRSG noted that:

> *"the proposition of creating a single, mandatory, non-judicial but adjudicative mechanism at the international level inevitably poses [difficulties]. In handling complex disputes that involve diverse and economically unequal parties in remote locations, processes based solely on written submissions are unlikely to meet basic standards of fairness and rigor. The demands of appropriate investigations and/or hearings are likely to raise significant evidentiary, practical, financial and political challenges, while offering only limited prospects of remedies that are timely, enforceable and extend beyond a few complaints a year."*[12]

Given these continuing obstacles, and barring the unlikely event that States decide to establish a new international court for this field, the SRSG concluded that efforts to improve the adjudication of alleged business impacts on human rights must remain at the national level, whether through judicial or non-judicial mechanisms.

D. <u>The role of mediation</u>

The SRSG's research has shown that mediation –used both by some non-judicial grievance mechanisms and on an ad hoc basis by some companies and communities or workers in dispute – is often misunderstood. It is a voluntary form of dispute resolution, assisted by a neutral third party, in which the parties retain decision-making power – over any possible outcome, and over their continuing participation in the process. The role of the third party is to assist the parties to the dispute in identifying the issues and interests in play and finding their own, mutually acceptable solutions. One goal of mediation is to ensure a process in which all parties are able to participate in decision-making on a fair, sufficiently-informed basis, including exchanging or jointly generating necessary information. The only 'binding' aspect of the process is that parties typically bind themselves by mutual consent to any agreements that they voluntarily reach. If agreements are not reached, parties retain their rights to pursue redress through other mechanisms, including judicial ones.

Yet the role that mediation can play in addressing conflicts between companies and their stakeholders and providing remedy for those with legitimate grievances is relatively under-explored. In looking at how his mandate could add further value to this field, the SRSG has therefore sought to identify whether and how the

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[11] Rees, Caroline (2008). "Access to Remedies for Corporate Human Rights Impacts: Improving Non-Judicial Mechanisms – Report of a Multi-Stakeholder Workshop" Corporate Social Responsibility Initiative Report No. 32. Cambridge, MA: John F. Kennedy School of Government, Harvard University.
[12] Ruggie, supra note 5, para 111

international community could improve capacity for the effective mediation of grievances and disputes at the local level. Is there benefit in developing some form of "international mediation facility" to support more dialogue-based resolution of disputes between companies and their stakeholders in society? Is it viable and practicable to do so? If so, what kind of roles or functions should such a "facility" have, and what form should it take to best perform those functions?

It is this set of questions that formed the focus of this research.

III. RESEARCH PREMISES AND METHODOLOGY

The Corporate Social Responsibility Initiative (CSRI) at Harvard Kennedy School has taken forward this research on behalf of the SRSG. The research has been carried out with the support of the World Legal Forum in The Hague, and also forms part of their broader HUGO project, which is exploring the creation of institutions for international dispute resolution in order to help structure interactions between public and private stakeholders and between international law and regional innovation. This section of the report briefly discusses relevant precedents that informed the methodology of the research, and sets out the methodology used.

A. Relevant Precedents

Prior to conducting its own research, the research team reviewed precedents where organisations have attempted to build greater capacity at the international level for the resolution of disputes between companies and the individuals or groups impacted by their operations (hereafter 'company-stakeholder disputes'). The closest examples identified were twofold. They were attempts, in the early and late 1990s respectively, to create new international functions to address environmental and development disputes, including their social impacts. In both instances, the goal was to offer both mediation and arbitration.

In 1992, at the UN Conference on Environment and Development, the idea of creating an international ombuds function for the environment and development was raised. According to the UN University for Peace in Costa Rica, a consensus emerged "as to the need for an objective, international mechanism for investigating grievances and anticipating, preventing and mediating contentious issues outside the formal international legal system which is often a tedious and costly process, not in the last place [sic] for the poor."[13] The International Union for Conservation of Nature (IUCN) and the Earth Council Institute therefore decided to set up the Ombudsman Center for Environment and Development (OmCED). OmCED was to be located on the campus of the UN University for Peace, and launched in 2000. However, there is little trace of OmCED ever having become operational. Enquirie

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

with the IUCN suggests that despite the political support of three institutions, adequate funds were never forthcoming and so the project never came to fruition.

The International Court of Environmental Arbitration and Conciliation (ICEAC) was established in 1994 by 28 environmental lawyers from 22 countries. It can accept any environmental dispute submitted by states, natural or legal persons. It offers conciliation and arbitration services as well as the possibility of Consultative Opinions at the request of any public, private, national or international entity.[14] ICEAC's website indicates that it has handled just six cases to date, the last one in 2005, and every one of them a Consultative Opinion.

These prior examples suggest that where organisations have attempted to build a central location to handle the mediation (or arbitration) of such disputes, they have not been successful. This is true despite being backed by eminent experts and strong institutions. It has been difficult to track down the exact reasons for this failure. But the evidence available would suggest that while a clear and objective "need" was identified by those who created these mechanisms, a top-down process of designing the mechanism itself missed the mark. In the case of the ICEAC, with no ability to compel companies and complainants to use the facility and apparently no incentive or perceived interest for them to do so, the facility has not been used for mediation (or arbitration) in practice. In the case of OmCED, there similarly seems to have been a lack of interest by companies and complainants in availing themselves of the dispute resolution services, perhaps compounded by a lack of resources on the part of OmCED to drive their efforts forward.

B. Research methodology

The process for the research undertaken by the CSR Initiative deliberately took a bottom-up approach. It began with two premises, drawn from prior research work and examination of the precedents outlined above:

- First, that the most effective and sustainable solutions are likely to be local, and therefore, any international effort should be geared towards supporting, and not supplanting, local approaches, resources and processes.
- Second, that businesses and their stakeholders will only use dialogue and dispute resolution approaches if they have confidence in their design, and therefore any recommendations that emerge must be driven by the parties' needs and concerns.

This research therefore took an inductive and qualitative approach, interviewing individuals from a range of backgrounds to understand their experience, perspectives and needs with regard to dispute resolution. Interviewees were drawn from the researchers' existing network of contacts, with attention paid to ensuring a reasonable diversity of business representatives, civil society (international NGOs

[14] International Court of Environmental Arbitration and Conciliation: *Foreword*, available at http://iceac.sarenet.es/Ingles/fore.html

and local civil society organisations), lawyers and others. Interviewees were also asked to refer researchers to additional individuals and organisations that might have experience and views to contribute to the research, who, wherever possible, were then contacted and included in the interview process.

It was recognised that there was a natural bias among the interviewee base towards individuals who were both interested in seeing business-stakeholder disputes resolved and at least open to non-judicial avenues for doing so. This bias was viewed as acceptable for the research since any new "facility" to support mediation in this field will rely in the first place on a "market" of those who are already relatively persuaded of its benefits. The question in focus was rather to establish what this new "facility" should offer if – at a minimum – those predisposed to use it in theory were to see merit in doing so in practice.

Interview questions were open and allowed the interviewer to follow the interviewee's line of response flexibly, whatever direction it took. They explored what kinds of disputes the individuals interviewed, or their organisations, deal with in relation to business impacts on society; how they currently address them; whether those existing methods and mechanisms meet their needs; what they would add if they could; whether they could envision using mediation; and what design features would be most important in order for them to use a mediation process or mechanism.

Although the SRSG's mandate focuses specifically on business and human rights, this research was not limited to "human rights disputes" but considered all kinds of company-stakeholder disputes. This reflects two realities. First, most individuals or groups who believe they have been harmed by companies do not express their grievances, at least in the first instance, in terms of human rights, whether or not such rights are affected. Second, while some grievances may have human rights components from the start, many do not, but may escalate and lead to human rights impacts if not addressed early and effectively. If the primary aim is to prevent adverse impacts on human rights from occurring, processes to address grievances should ideally be capable of addressing and resolving them *before* they reach that level. For these reasons, research questions were deliberately open regarding the types of business-related dispute that might be addressed by some kind of international mediation facility, whether human rights, labour rights and practices, or other social or environmental impacts.

In total, more than 130 interviews were conducted to provide the basis for this research. The first phase of the research involved interviews with a broad range of representatives from business, international, national and local civil society organisations, as well as practitioners in stakeholder engagement and dispute resolution, lawyers and mediators. At the global level, 45 interviews in total were conducted, including approximately 25 interviews with global business leaders (with an emphasis on extractive industries, where impacts tend to be particularly well-recognized). Approximately 20 interviews were conducted with global civil

society leaders and legal advocates active in advancing and seeking to address claims of social, economic and environmental impacts by companies. The second phase commissioned similar interviews at the national level in six countries: Argentina, India, Nigeria, Peru, the Philippines and South Africa. In each country, approximately 15 interviews were conducted with representatives of civil society, affected communities and other relevant actors, for a total of an additional 86 interviews.

In partnership with the World Legal Forum, CSRI then convened a small expert workshop in The Hague on 7 October, 2010, to analyze preliminary findings from the interviews and identify emerging conclusions. Participants at the workshop incuded business and NGO representatives, community advocates, legal experts, and dispute resolution professionals with experience in company-stakeholder disputes. They included the researchers who had conducted interviews with both global and national stakeholders. Participants discussed gaps in the current international architecture for supporting mediation; what roles or functions could best address those gaps; and what that implied for the form of any new international facility.

Terminology

For the purposes of this report, interviewees from businesses or business organisations are referred to as "business" or "business interviewees"; those from international, regional or national NGOs or from legal organisations that work on behalf of individuals or communities impacted by business are referred to as "civil society actors" or "civil society interviewees". Communities impacted by or in dispute with business are referred to as "communities" or, when speaking from the perspective of a business, as "affected stakeholders" or "their stakeholders".

A number of other issues of terminology that were important to the interview process are addressed in the following section.

IV. RESEARCH FINDINGS

This section of the report highlights the views expressed by interviewees on the use of mediation to resolve disputes over business impacts on society. It addresses issues ranging from current practices in dispute resolution, to gaps in the existing international architecture, to design considerations for potential international initiatives. Part A presents several key framing issues that provide context for the substantive findings that follow in part B.

A. Framing Issues

Certain issues emerged from the interviews that provide important context for the substantive views that are reported later.

1. First, that the terminology used to discuss mediation in this context is itself confusing and requires clarification.

2. Second, that a significant majority of interviewees – for a number of reasons – encouraged a focus on disputes between companies and communities.
3. Third, that while there may be an obvious *need* for strengthened mediation and dialogue options, many interviewees question whether that need is *recognized* by the majority of their colleagues and counterparts.

1. The terms themselves require clarification

This research was framed as being about the potential need, roles and form of an "international mediation facility" in support of dispute resolution between businesses and their stakeholders in society. Each of the terms in the phrase "international mediation facility" required clarification in the interviews given the different understandings and assumptions that interviewees brought to the discussions, which in turn drove their perceptions about whether and on what terms such a facility might be desirable.

For instance, many interviewees were concerned that the term "international" might imply some form of extra-territorial jurisdiction over claims, or some form of superceding authority over local processes. It was clarified that – for purposes of this research – "international" was intended to imply simply a supra-national perspective, without any assumption about what roles and functions might be needed at that level.

The term 'mediation' was defined as including all forms of dialogue-based processes assisted by a neutral third party, for all kinds of disputes, potentially at all stages of the relationship between businesses and affected stakeholders. This contrasted with the initial assumption of many interviewees that mediation was defined narrowly as a formal process used to resolve a clearly defined claim that could otherwise be litigated.

For many interviewees, the term "facility" conjured images of a centralized "bricks and mortar" institution – a global headquarters where local disputes could be brought for resolution, or from which mediators might be dispatched to local disputes around the world. It was clarified that "facility" was intended to indicate any form of entity deemed appropriate to perform roles that would be useful to improve company-stakeholder dispute resolution. This might be a physical institution, a loose network of individuals or take some other form.

2. The focus generally moved to company-community disputes

The research began with a scope of disputes defined broadly as 'business impacts on society'. Many interviewees suggested that the focus be narrowed to disputes between companies and communities – as opposed to disputes focused on broader environmental impacts or general labor grievances. Several reasons were offered by interviewees for this proposed focus.

For many, strengthening mediation and dialogue-based dispute resolution for company-community disputes offered the greatest possible impact – "the biggest bang for the buck", as one interviewee stated. Some argued that company-community disputes were currently the most under-served, in terms of existing access to effective remedy. Community representatives may be less experienced with grievance-handling than trade unions and other worker representatives or NGOs, and therefore unaware of various mechanisms. Others argued that community disputes may be the most amenable to resolution through mediation, due to the nature of the claims that typically arise and the types of remedies that might be valued by all involved parties. For example, claims brought by affected communities may not always create a legal cause of action, but may nevertheless reflect impacts that companies and communities can find mutual interest in addressing. Likewise, the flexible remedies that mediation can offer, including both the tangible (such as employment opportunities) and the intangible (such as an apology), may be more useful in resolving company-community disputes, where an ongoing relationship between the parties is necessary, than in those disputes where establishing a generally-applicable precedent is the primary goal.

Without prejudice to the need for more effective dispute resolution for primarily environmental or labour-focused disputes, interviewees suggested several reasons not to focus on these. Many argued that such disputes are likely to involve a distinctive set of institutional actors, international legal frameworks, and existing dialogue mechanisms. These issues and actors would be likely to require a unique set of design considerations for any international facility, very different from the way a facility might be designed to address company-community disputes.

This proposed focus on company-community disputes is presented here as a framing issue because it provided a basis from which many interviewees offered their further perspectives.

3. There is a need, but the need may not be widely recognised

The research questions did not presume that there was in fact a need to strengthen, support or enhance the role for mediation in disputes over business impacts on society. However, across interviewees from business, civil society organisations and the legal and dispute resolution professions, there was widespread consensus on a number of points:

- First, that strengthening the role for dialogue-based approaches, including mediation, in these types of disputes is desirable, and would be of great benefit to both businesses and affected stakeholders.
- Second, that there are significant gaps that can be addressed from an international level to achieve this.
- Third, that doing so is critical to strengthening access to effective remedies for disputes over business impacts on society.

However – even while recognizing that need themselves – many interviewees expressed concern about the readiness of their business and civil society colleagues, or of affected communities, to utilize mediation and dialogue. One NGO leader summarized the mindset he often encounters among companies:

> *"Any time a decision is out of my control, I'm nervous, and the last thing I want to do is throw my fate into the hands of someone I don't know or a process I'm unfamiliar with. There is a perceived risk, because I don't know enough about [mediation], and therefore I won't use it, because I am unable to see the potential value. Considerations such as reputation, keeping my job, and knowing the system are all taken into account, and it is difficult to argue for mediation when we can drag it out in court through a process we are more familiar with."*

Many interviewees cautioned that businesses and communities may not understand the range of grievance-handling options that exist, may not appreciate the potential benefits of mediation and dialogue-based approaches, and may lack the appropriate tools to use and participate effectively in such approaches. Some of these issues are expanded upon below in the substantive findings.

B. <u>Substantive Findings</u>

This section reflects several key themes that emerged from the interviews. They include perspectives on the challenges faced by businesses, communities and civil society actors with existing mechanisms, gaps that these groups perceive in the international architecture for the resolution of company/community disputes, and thoughts and concerns about how such processes might be better supported in the future.

1. *Businesses, communities and civil society organizations lack the necessary information to make informed choices on existing grievance-handling options.*

Both business and civil society interviewees expressed frustration at their inability to make informed choices about existing grievance-handling mechanisms, including which processes to use, under what circumstances, for what types of remedies, and with what level of confidence in the fairness of the process.

According to business leaders, the grievance landscape is becoming increasingly complicated and difficult to navigate, with the proliferation of voluntary commitments, legal responsibilities, and accompanying grievance-handling mechanisms. One industry leader echoed the sentiments of many business interviewees:

> *"Many companies are confused. There is a plethora of forums, guidelines and principles… But where do you actually turn when problems arise?"*

Several business leaders tied this confusion to the lack of documented cases from existing dispute resolution mechanisms, including the complaints received, the processes used, and the outcomes achieved. As a result, they argued, businesses and their stakeholders are unable to assess the performance of different grievance-handling processes or the types of outcomes that might be achieved. According to one business leader, the lack of case documentation supports an impression among colleagues and counterparts that "*the use of mediation and dialogue to address these types of disputes is rare, drastic, new, untested, and/or risky."*

Civil society interviewees reported similar difficulties in navigating the range of grievance options that may exist. One NGO leader shared his organization's strategy in response to this challenge: namely, to bring the same claim through every available mechanism, hoping that one will provide effective recourse. A dispute resolution professional shared her observation from the field that communities often ended up in grievance processes ill-equipped to meet their specific needs with regard to types of process or outcome, while other options might have been better-suited.

Several community advocates also offered the reminder that, while proliferation might breed confusion for some, the great majority of stakeholders – particularly at the local level – remain entirely unaware of existing grievance-handling options:

> *"Communities still don't have information on accessing existing mechanisms, company or otherwise."*

They argued that this lack of awareness remains the more significant obstacle to promoting greater access to effective remedy.

2. *Businesses, civil society and communities find it challenging to identify effective third-party neutrals.*[15]

At a very basic level, business and civil society interviewees said that it was a major challenge to identify third-party neutrals with experience and expertise in business-community disputes local to where they operated and/or disputes arose. According to one international NGO representative, reflecting the views of many interviewees:

[15] The term 'third-party neutral' is used here, rather than 'mediator', to encompass the full range of potential roles that a neutral party could play in company-stakeholder disputes, including those of mediator, facilitator, assessor, and process designer, among others.

> *"It is a challenge to find appropriate mediators, as there is no 'stable' of mediators in certain areas. If there are, they are not accessible at the moment."*

Business interviewees reported that in the most extreme instances their business operations were in such remote areas that third-party neutral resources were simply not available at the local level. One business leader who participated in the mediation of a major business-community dispute noted that the most significant obstacle to resolving the conflict was a lack of local mediation resources, which caused a serious bottleneck in the process.

With regard to locations where third-party neutrals might be available, many interviewees raised questions and concerns about whether they had the requisite levels of relevant experience and expertise. Several civil society advocates highlighted the unique dynamics of company-community disputes, and the distinctive skills and approaches needed to intervene effectively in such disputes as a third-party neutral. For example, they pointed to the frequent presence of substantial cross-cultural communication barriers, power disparities between the parties, information asymmetries, mistrust of 'outsiders', and to the community representation and decision-making challenges that often arise.

Other business and civil society interviewees raised concerns about finding third-party neutrals in whom all parties could have confidence. One business leader observed that it might be easy for an international company to determine which institutions it trusts, but more difficult for members of a local community to make an assessment of the same organizations. This was seen as likely to be a particular problem where the company made the initial decision to contact the third-party, rather than it being a joint decision of the company and the community.

Others argued that businesses and their stakeholders might be looking for the wrong types of third-parties in some instances – particularly where local communities are involved. Rather than focusing on finding an entirely independent and "neutral" individual, parties in a dispute might actually want a third-party who is more influential, or more of a known quantity, with one of the parties (for example if this helps the community have the confidence to engage in the process). According to one industry leader: "The parties have to find somebody who is known to both sides. While their independence might be questionable, they are actually the right person because both sides are happy."

3. ***The absence of agreed-upon process standards contributes to a lack of confidence in mediation processes among businesses and their stakeholders.***

Business and civil society interviewees also identified a reluctance to use mediation processes because of a lack of confidence in the processes themselves. Specifically, several pointed to the absence of globally-accepted standards for mediation

processes, and felt that establishing such standards would create clearer expectations and enhance perceptions of fairness:

> *"Currently, there is no standard accepted practice, and, given that, it is unrealistic to expect there to be a voluntary inclination towards dialogue. They have no prior experience with it, so why would they? Why should they?"*

Several business leaders pointed to concerns with the mediation and problem-solving approaches of some existing institutional grievance mechanisms (notably reflecting their experience with certain National Contact Points[16] and the independent accountability mechanisms of some international development or investment banks). They noted that these observations lead to broader concerns for the business community with mediation as a whole. For instance, concerns over transparency, fairness, and confidentiality of proceedings in certain instances (including the ways in which information shared during a failed mediation might adversely affect a party in a subsequent quasi-adjudicative procedure) cloud business perceptions of mediation processes in general.

Meanwhile, for ad hoc mediation processes, the absence of standards means that each process must build confidence among the parties from scratch, continually "reinventing the wheel", as one stakeholder advocate observed. Another interviewee suggested that standard, agreed-upon procedures would increase confidence by creating greater certainty and clearer expectations among all parties.

4. ***There is concern that the parties to disputes often lack the capacity to participate effectively in mediation processes.***

Getting parties to the mediation or dialogue table alone is often insufficient to enable a positive outcome. Business and civil society interviewees raised concerns that many of their colleagues and counterparts might lack the necessary skills to participate effectively in mediation processes – such as basic negotiation and engagement skills. Interviewees pointed to the important role that ad hoc capacity-building initiatives played in enabling successful outcomes in some mediation processes. However, they observed that capacity-building is only available in limited instances, such as where a proactive company recognizes the need for an effective counterpart and helps enable the capacity-building they need, or when affected stakeholders partner with international NGOs and receive such assistance through them.

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[16] National Contact Points are the bodies established by those Governments that adhere to the Guidelines for Multinational Enterprises of the Organization for Economic Cooperation and Development (OECD). Their role is to promote the Guidelines and to handle complaints alleging that companies domiciled or operating in their State have acted in breach of the Guidelines. Conciliation/mediation is one of the tools they are encouraged to use. New guidance to NCPs on performing these functions will issue in May 2011.

5. ***Concerns about the incentives for parties to participate in mediation or dialogue-based processes arise from all quarters.***

Both business and civil society interviewees raised several different concerns with respect to the incentives for parties to use mediation and dialogue-based processes. According to some, incentives need to be strengthened to encourage business participation. According to others, existing incentives for all parties need to be articulated more clearly. Finally, a number of interviewees expressed concerns about the risk of creating incentives for parties to misuse some form of international mediation facility. Each of these views is elaborated further below.

Several civil society representatives raised the concern that businesses would only participate in mediation processes if they were compelled to do so under the threat of some punitive legal, social or financial action. They argued that these incentives needed to be strengthened to encourage companies to take mediation seriously. According to one legal advocate for aggrieved communities, "Companies need to feel there's a real chance of them losing in court before they would look for a way out through mediation." One NGO leader felt that companies would only participate in mediation if their social license to operate was threatened. A former company representative argued that companies would need to be motivated through negative financial repercussions: "The process would somehow need to have leverage with the company, either in the home country, through access to financing, affecting permits or licenses, or impacting its share price. Unless it does so, the company will be focused on all [those other] things which do impact these."

Others argued that the positive incentives for companies and affected stakeholders to participate in mediation are sufficient but felt that they may need to be articulated more clearly so that potential parties understand them better. For instance, several interviewees pointed to well-known potential benefits of mediation, such as the possibility of more timely and less costly resolution of grievances, lower evidentiary thresholds, a heightened sense of participation in the outcome, and greater flexibility of remedies. Others emphasized the ability of mediation to repair relationships between parties, which may be particularly relevant in disputes between companies and communities.

Several business leaders focused on the need to help businesses quantify the costs of unresolved disputes, and the potential savings that can be generated through effective early resolution of conflicts:

> *"At the moment, the costs of conflict are qualitative and intangible, such as delays in obtaining permits and interruptions to work. So the costs are not immediately obvious. Meanwhile, the cost of litigation is not substantive in the bigger picture. But there be can be large financial impacts on the company otherwise through loss of goodwill or lost opportunities. But these costs and losses are not tracked."*

Both business and civil society interviewees were concerned about the potential for parties to misuse mediation processes by acting in bad faith. Business leaders were concerned that NGOs might make spurious claims to an "international facility" as a way to generate media attention and harm the reputation of a company, rather than seeking resolution of substantive issues. At the same time, representatives of civil society organizations were concerned that companies could use their involvement in a mediation process as a delaying tactic or simply to enhance their public image, without being committed to resolving the underlying issue.

Several interviewees wanted to ensure that an international mediation facility would not have the unintended consequence of relieving parties of the responsibility to attempt to solve problems locally. As one company representative offered: "One point of caution: It wouldn't be helpful to company-community relations if it was too easy to hand off normal engagement and problem-solving to third parties or external consultants."

6. ***Both business and civil society representatives believe opportunities exist to address disputes in a more proactive, preemptive and sustainable way.***

There was widespread consensus among those interviewed that there were significant opportunities for benefit by bringing in third-party assistance (a facilitator or mediator of dialogue) to assist in preventing disputes *before* they arise, as opposed to just resolving grievances after they have emerged. Interviewees observed that the majority of existing grievance mechanisms are reactive, rather than proactive, and that access to third party neutral resources is therefore often only triggered by a formal complaint. Such complaints can only be filed after disputes have escalated and relationships have deteriorated to a level that will make resolution much more difficult. Several respondents pointed to the fact that many existing processes don't allow for the early clarification of issues, the building of trust between parties before grievances arise, and the stemming of conflict in its early stages.

At the same time, one business leader said that his company would not use third-party resources early on in its relationship with stakeholders, as involving professional "communicators" might be deemed as "too distant".

Other interviewees noted that existing grievance mechanisms tend to focus on resolving a specific instance of dispute, rather than addressing the long-term relationships between parties or the need for sustained engagement. One veteran of company-community relationships observed that this contributes to a mindset that facilitated dialogue processes are reserved for the resolution of crises, rather than tools to prevent crises from arising in the first place. As another interviewee put it:

> *"What is needed is to set up systems of communication that continue to address issues that will arise, not that just solve the immediate problem*

at hand. They need to focus on the long-term relationship between the parties, not just the grievances you see."

7. ***Interviewees raised questions about the role for government in mediation processes.***

Several interviewees raised issues related to appropriate roles for government in the mediation of company-community disputes. Some highlighted that many such disputes have their origins in a failure of local or central governments to provide basic services to communities or because the government is itself complicit in human rights abuses, and that they therefore need to participate in any resolution process. Others noted that government regulatory actions are often at the root of company-community disputes, also making government involvement essential. As one interviewee observed:

> *"It's not just about a deal being brokered between a company and a community… It is in the company's interest, as well as the community's, to actively seek to influence the government to accept its share of responsibility."*

Even where the government's involvement is not essential to resolution of the issues at hand, some interviewees emphasized the important role of government in sending the right signals to businesses and their stakeholders about the appropriate "balance of benefits and responsibilities falling to each party."

8. ***Ensuring authentic community representation is a concern for many companies and civil society organizations.***

Both business and civil society interviewees expressed concerns about ensuring the authentic representation of affected stakeholders by those who bring claims on their behalf. There was a shared acknowledgement that, in some instances, community leaders or NGOs may not be fully representative of all affected stakeholders, or may have divergent interests and seek remedies that differ from the objectives and desires of affected stakeholders. Other interviewees noted that companies were not always rigorous in ensuring the legitimacy of community representatives with whom they chose to negotiate: "There is a danger of the company engaging only with the local people who are trying to engage with the company," – either deliberately or because they lack the tools to do otherwise. This often comes at the expense of engaging with more difficult, more reluctant, or harder to reach stakeholders, and raises challenges for the sustainability of any agreements reached.

V. ANALYSIS AND CONCLUSIONS

This section presents analysis and conclusions from the research, based on the business and civil society perspectives reported above.

The interviews highlighted a number of overarching propositions about the most effective ways to support the mediation of disputes over business impacts on society. These propositions set the framework for the more specific conclusions with regard to the desirable roles, functions and form of any "facility" or "facilities" designed to meet this goal. Part A of this section sets out these framing propositions; Part B enumerates the roles and functions that appear to offer the most immediate promise; Part C describes those that could follow at a later stage; and Part D discusses the form or design considerations that relate to these roles and functions.

A. Framing propositions

The following overarching conclusions emerged from the research:

1. First, that mediation as an option is an important component of achieving effective access to remedy. According to both business and civil society leaders interviewed as part of this research, there is both a need and an opportunity for one or more initiatives at the international level to strengthen the role, effectiveness and availability of these types of processes to resolve disputes over business impacts on society.

2. The research began with the premise that the most effective and sustainable solutions to business-stakeholder disputes are likely to be local, and therefore any international effort to strengthen these approaches should be geared towards supporting -- and not supplanting -- local approaches, resources and processes. The researchers sought to test this hypothesis through open question techniques. Interviewees overwhelmingly endorsed the focus on supporting local efforts, rather than building a remote process or "bricks and mortar" institution. Indeed they were concerned about the risks of an international top-down approach. Many suggested that a network involving local mediators would be more appropriate.

3. As described in Section III of this report, evidence shows that it is perfectly possible to design a very good mechanism that meets all the theoretical prescriptions for mediation or dispute resolution, but which achieves little in practice. Reasons might include a lack of participation by businesses and communities and/or civil society organizations in its design, a failure to meet their needs or concerns, and a lack of trust in the mechanism by its potential users. Any initiatives to take up some of the functions identified below must therefore continue to be driven by stakeholder participation and consultation.

4. Feedback from interviewees underlined that there is a strong case to be made for focusing new capacity for dispute resolution on company-community disputes in particular. There was a sense of the high potential for mediation to play a constructive role in these types of disputes, whereas a focus on labor grievances or broad environmental impacts may involve a distinctive set of institutional actors and issues. This said, it was repeatedly evident that many business-community disputes include environmental and labor-related issues, making it important not to draw artificial boundaries around these categories.

B. Roles and functions – first tier

Several possible roles and functions for an "international mediation facility" emerged from the research. Their relative merits, practical implications and prioritization were discussed at the expert workshop in October 2010. The prioritization represented here as 'first tier' and 'second tier' reflects a generally-held view that it will be important to begin by setting good practices, establishing positive examples or "case stories", and ensuring that credible mediators and processes can be identified. This would likely require working with a "coalition of the willing" – businesses and a range of civil society actors, including community representatives, that are already pre-disposed to utilizing mediation.

1. **Helping parties to assess options for accessing remedy**: In the case of specific disputes, many parties are either unaware of or confused by the number of process options, mechanisms and other resources that may exist to raise a claim or seek resolution of a grievance. Mediation is an important option for those in a dispute, but not always the right one, just as litigation is not always the most appropriate path.

   A facility that could assist parties in navigating their options for accessing remedy, including but not limited to mediation, could make an important contribution. The aim would be to help parties understand the options, enable an informed choice, and connect them to the necessary resources to do so.

2. **Shoring up the professional resources**: For a company operating globally, or for communities and NGOs with limited experience, it can be extremely challenging to identify the *right* local mediation resources in the different places where businesses have impacts on societies. There is a strong need to identify and connect these resources with their potential users, and to help build confidence in them.

   This inevitably raises questions of who should be included, based on what qualifications or experience, and who should decide. There is no single right

way to answer these questions, and indeed, the market can decide which way is best. Possible approaches that were discussed include:

i. assembling a roster or network of experienced mediators, based on some threshold level of relevant experience, which could be made available to businesses and affected stakeholders or their representatives, for them to assess whom they wish to use.
ii. certifying or credentialing mediators based on clear standards, experience and qualifications, as a way to build confidence among businesses and stakeholders in a more select group of third-party neutrals.
iii. brokering the relationship between mediators and parties engaged in a specific dispute (i.e., identifying and vetting qualified local and international mediation resources for businesses and stakeholders).

Regardless of the process chosen, businesses and their stakeholders need assistance in knowing where to turn with confidence when seeking an experienced mediator or facilitator.

3. **Enhancing effective participation of parties**: Helping parties select the most appropriate processes to meet their needs and ensuring access to mediators/facilitators where they opt for dialogue-based processes, will only prove effective if parties have the necessary capacity to participate effectively once they are at the table. An international facility could provide skills-building for parties engaged in specific dispute resolution processes to enable them to dialogue and negotiate more effectively. A facility might provide this service directly, or connect parties to appropriate resources.

4. **Clearinghouse for case stories, experiences and analysis**: An international facility could play a pivotal role in acting as a clearinghouse for "case stories" from the application of mediation approaches to disputes over business impacts on societies. These might take the more academic form of formal case studies or more informally represent the experience of participants. Business leaders, communities, civil society organizations and dispute resolution professionals would know where to turn to gain an overview of global practice, to follow trends, and to analyze outcomes.

   Access to a more substantial body of case experience could demystify processes and enable businesses and their stakeholders to compare outcomes across various dispute resolution modalities (judicial and non-judicial, adjudicative and mediation/dialogue-based). In addition, this clearinghouse function could enable the further development of tools and approaches, the emergence of global good practices and – eventually – the development of formal or informal process standards.

C. Roles and functions – second tier

This second group of recommended roles and functions focuses on promoting more widespread use of mediation to resolve disputes between businesses and their stakeholders.

1. **Promoting awareness**: An important role for an international facility would be general promotion of mediation approaches as an effective option for resolving many kinds of dispute between businesses and communities – among audiences that might not already perceive the benefits of such approaches. Working at global and regional levels, a facility (and network partners) could speak at relevant conferences, work with institutional players such as large international and regional NGOs and global businesses at the director and board levels, and provide more general education and awareness-raising of process options, case examples, and general skills training. Through such activities, the goal would be to encourage more businesses, communities and civil society actors to consider dialogue-based approaches, including mediation, as viable options when confronting disputes over business impacts on societies.

2. **Strengthening incentives**: As noted in the research findings, many business and civil society representatives express concerns over the incentives for parties to participate in voluntary processes such as mediation. An international facility could play a role in strengthening these incentives, including through advocacy with organizations or initiatives that have business members (such as industry associations, multi-stakeholder initiatives, or business initiatives focused on corporate responsibility issues). Such organizations could have a potential multiplier effect in encouraging effective dispute resolution, if their members were incentivized to use mediation when disputes arise.

   Other means of strengthening incentives might include advocacy at the corporate board level to promote early stakeholder engagement and dispute resolution policies; providing public recognition where businesses and their stakeholders engage in effective dispute resolution processes; and encouraging or assisting businesses to quantify the costs of conflict with communities, in both financial and reputational terms, to highlight the relative cost-effectiveness of local problem-solving approaches.

3. **Developing process standards and principles**: An international facility might help to build confidence in facilitated dialogue processes, including mediation, by establishing standards for credible processes, covering issues such as transparency, representation, participation and fairness. Many of these types of standards already exist in the dispute resolution field, but might need to be adapted in consultation with businesses and their stakeholders for application to this particular context.

4. **Building the capacity of mediators**: A number of activities could be undertaken at the international and regional levels to increase the capacity of mediators and facilitators, building the number of skilled individuals available to assist businesses and communities in resolving disputes. For instance, training programs could be developed to focus on the specific dynamics that differentiate company-community relationships and disputes from other contexts. A facility could establish peer learning relationships, communities of practice, or other mechanisms to expand the pool of capable mediators for these types of disputes.

D. <u>Observations and recommendations on institutional design</u>

This research proceeded on the basis that 'form should follow function', meaning that questions of institutional design should only be addressed once the desired functions and roles are clear. As such, the observations on institutional design that follow below are offered at a very general level, suggesting some options and considerations for how those who wish to take up these recommendations might proceed. It may be that several different institutions or entities pursue different recommendations contained within this report.

At a general level, questions of institutional design will be important to ensure the credibility of a new "facility" or "facilities" among diverse parties who are often already suspicious of each other (businesses, local communities, and other stakeholders). Any new "facility" will also require effective leadership to define an agenda, take action and represent the facility among global audiences, as well as the requisite resources to undertake activities. With these factors in mind, three issues that emerged during the research are discussed below:

1. multi-stakeholder governance;
2. central vs. devolved functions; and
3. institutional affiliation.

1. **Multi-stakeholder oversight**: Governance by a diverse multi-stakeholder advisory body or governing board should help build credibility and confidence in any new facility among businesses, community representatives and other stakeholders and may also cultivate a sense of shared ownership among the potential "end users" of mediation processes. Multi-stakeholder oversight would ensure that actions to enhance access to mediation continue to be driven by the needs and concerns of businesses and their stakeholder, in a bottom-up approach.

   Such a board would likely require meaningful, representative and credible participation of many of the groups interviewed as part of this research, including multinational corporations, international NGOs, community-level advocates, and dispute resolution professionals with relevant experience. It would also need to pay due attention to geographic differences, including

ensuring appropriate representation from the global north and south. Representation on such an oversight body could rotate, in order to prevent perceptions of the facility being captive to particular interests, to broaden support, and to cultivate champions.

2. **Networked approach, with central and devolved functions**: A networked structure appears to be particularly appropriate for an international mediation facility, given the overarching goal of supporting local mediation and mediation resources. A number of mediation organizations with substantial track records of experience in corporate/community mediations exist in different parts of the world and could form the backbone of such a network. A centralized secretariat with regional focal points could help to prevent diffusion of responsibility and leadership.

   At the same time, networked approaches carry the risks of insufficient resources to maintain the network and the challenge of protecting brand and reputation in a highly devolved structure. Certain functions might therefore be centralized or devolved to maximize the advantages of a networked approach while minimizing the risks.

   For instance, any involvement in specific disputes, such as support to conflict assessments or mediation, might best be implemented locally, with support from a centralized secretariat. Clearinghouse functions, such as maintaining a roster of mediators and documentation of cases, might be driven centrally, with inputs from network partners. Advocacy and case study development might be organized centrally, while implementation functions might be more effectively conducted locally or regionally. Capacity-building for mediators might happen at all levels through a mixture of training, peer-learning and partnering or mentoring, while capacity-building for effective conflict resolution by businesses and communities would best happen at the regional or local levels.

3. **Institutional affiliation**: Whether and how to affiliate an international mediation facility with an existing institution is one of the more challenging institutional design questions to address, carrying potentially significant benefits and equally significant risks. Given the close connection between this work and that of the SRSG, many of those interviewed had in mind the possibility of a new facility being institutionally affiliated with some part of the United Nations. While this may be an option, it was not a presumption of this research. Other options might include affiliation with some other existing international organization, with a university or other academic institutions, or with a consortium of existing organizations. Alternatively, a new facility could be a free-standing entity.

   In addressing this question, it is important to be guided by certain key questions, including: is there a particular institutional affiliation that could enhance the credibility of an international facility, given the business and civil society

constituencies concerned? What potential institutional affiliation could provide the appropriate leadership for a new facility? What potential institutional affiliation could provide the necessary institutional resources, including financial resources and political capital? How does the structure and culture of a potentially affiliated institution fit with the goals of the new facility, including networked ways of operating? Are there better means of building the perceived legitimacy and necessary resources for a new facility than through affiliation with an existing institution?

VI. CONCLUDING OBSERVATIONS

Ensuring access to effective remedy requires international action at many levels. National judicial structures need to be strengthened, international adjudicative mechanisms improved, and company grievance-handling processes enhanced and promoted. At the same time, this research makes clear that substantial opportunities exist at the international level to support local mediation of business-stakeholder disputes as an essential part of that remedy landscape – particularly in the area of company-community disputes.

Based on the needs and concerns expressed by business, civil society and community representatives as well as legal and dispute resolution professionals, this research attempts to provide a rough blueprint of useful actions that could be taken at the international level to strengthen mediation as a more viable option when businesses and their stakeholders are engaged in disputes.

These include a series of functions that are, in the first order, aimed at ensuring the generation of sound case examples by those already willing to use mediation to resolve their disputes: helping parties in a dispute to assess their options for pursuing remedy; helping parties that choose to pursue mediation to identify the right mediators; building the capacities of parties to participate effectively in mediation processes; and documenting those cases in order to build wider understanding of what these processes offer.

A second set of functions are aimed at promoting wider use of mediation by those who might need further encouragement: raising general awareness about the benefits of mediation among potential end-users; strengthening the incentives for businesses to use mediation to resolve disputes with their stakeholders; developing process standards to clarify expectations and build confidence; and expanding the pool of qualified mediators through training and capacity-building.

This research did not set out to name who in the international community should assume the functions outlined above. Rather, it intended to give voice to the needs and concerns of businesses, civil society, and community stakeholders, as they relate to using mediation to resolve disputes over business impacts on society. Those needs and concerns can most effectively be met by continuing to engage

business, civil society and community voices as one or more entities take up the roles described above.