Corporations and Human Rights:
Accountability Mechanisms for Resolving Complaints and Disputes

Report of a Multi-Stakeholder Workshop
11-12 April, 2007

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Corporate Social Responsibility Initiative

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

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

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EXECUTIVE SUMMARY

On 11-12 April 2007, the Mossavar-Rahmani Center for Business and Government at Harvard University's Kennedy School of Government hosted a multi-stakeholder workshop as part of a project entitled 'Corporations and Human Rights: Accountability Mechanisms for Resolving Complaints and Disputes'. The workshop brought together a broadly-ranged group of expert stakeholders to explore how one could enhance the effectiveness of complaints/dispute resolution mechanisms in the business and human rights arena. The objective was to gain a better understanding of participants' views on existing mechanisms, their merits and deficits, what optimal mechanisms might look like, and how could fit together within a wider accountability system.

The first part of this report provides a **synthesis of the discussions**, based around some **core themes**:
- the importance of recognising and working within the human rights framework when seeking to resolve disputes based on rights issues;
- the importance of helping ensure that those suffering from real infringements of their human rights have access to mechanisms where they can seek remediation;
- the importance of incentives for parties to engage in a process focused on dialogue-based dispute resolution;
- the importance of understanding and managing power disparities in any dialogue-based dispute resolution process;
- the importance of maximising the scope for effective outcomes for all;
- the importance of promoting processes and outcomes that can advance learning and capacity-building for all stakeholders and thereby advance dispute prevention;

and on some **core 'axes of tension'**:
- between processes focused on the law and standards and those focused on interests and values;
- between processes aimed at punitive justice and those seeking restorative justice;
- between the benefits of providing solutions at the local level and the necessity sometimes to provide them at more remote levels;
- between providing fairness of outcome in a specific dispute and consistency of outcomes across disputes;
- between providing the transparency necessary for legitimacy and public confidence and the confidentiality necessary for parties to share interests and identify optimal outcomes.

The second part of the report identifies six '**key emerging themes**' – thematic propositions based on the workshop discussions, designed as a platform for further feedback and consultations. These are:

7. The need for a general human rights framework: general to enable its acceptance by all without lengthy arguments over specific standards, which would defer dispute resolution and remediation; a framework nonetheless, to provide confidence that the process is based on a common understanding of the relevance of human rights and is therefore worth engaging.

8. The need for a minimum standard of access: minimum in order to allow that the dispute resolution process can be developed by the parties to suit the local context; but a standard that at least provides access to a credible process for those with legitimate grievances, including the most vulnerable.

9. The need to maximise space for dialogue based on values and interests: since it is generally through exploring and sharing values and interests that the most creative, optimal, win-win solutions to disputes can be found to the benefit of all;

10. <u>The relevance of having alternatives to a dialogue-based process</u>: since having alternatives such as litigation or other adjudicative mechanisms provides an incentive for parties to engage in dialogue- and consensus-based processes; and the awareness that these alternatives exist helps balance power disparities between the parties in the process itself.

11. <u>The identification of functional gaps</u>:
    a. a **catalyst function** for access to localised solutions: recognising that the most sustainable solutions to disputes usually come at the local level; yet access to mechanisms can be most limited at the local level, and that even at more remote levels they are bound by conditions; therefore suggesting that a catalyst function might guarantee access for legitimate complaints while supporting and catalysing more local, dialogue-based processes to address them.
    b. an **assessment function** as fall-back and incentive: meaning a function that could produce an authoritative, respected view on a particular dispute - as a fall-back in case dialogue-based processes fail to reach resolution and other alternatives are unavailable; and as an incentive for parties to pursue dialogue as a better option in most cases than adversarial, adjudicative processes.
    c. a **resource function** for information and learning: providing accessible information on mechanisms, resources, experts and current practices that could assist the handling and resolution of disputes in the business and human rights field at all levels; and assisting learning by analysing outcomes, identifying emerging jurisprudence and lessons learned, in support of capacity-building and dispute prevention.
    d. **complementarities and linkages** between these functions: noting that the functions could be provided individually or in combination; recognising that the resource and catalyst functions overlap and would support a 'system' for dispute resolution, while the assessment function suggests a mechanism in its own right; recognising also the risk that an assessment function without the catalyst function could undermine rather than promote dialogue-based processes; and the risk that a catalyst function without an assessment function could limit the incentive for parties to engage with those dialogue-based processes.

12. <u>The paramountcy of legitimacy</u>: given that if any existing or new institution were to provide one or more of these functions, its success in doing so would depend largely on its legitimacy, including the transparency and inclusiveness of its governance structures and processes.

The final section of the report describes the **<u>next steps for the project</u>**, building on the draft background paper for the workshop, the workshop discussions and the key emerging themes identified. These activities will include:
- seeking <u>feedback on the report</u> from workshop participants and their inputs to upcoming project activities (below); disseminating the report to a wider audience for <u>further consultations</u>; and conducting field visits to Sao Paolo, Buenos Aires and South Africa.
- <u>Mapping existing mechanisms</u> in the business and human rights arena in terms of their spatial location (company/industry/multi-industry/national/regional/international) and their functionalities (provision of access, type of process, range of outcomes etc).
- <u>Developing criteria for assessing the effectiveness of complaints/dispute resolution mechanisms</u>, testing these with stakeholders, and surveying stakeholders for their views of how existing mechanisms perform against the criteria.
- <u>Drawing conclusions and making recommendations</u> as to where the <u>effectiveness gaps *in* existing mechanisms</u> and the <u>functional gaps *between* existing mechanisms</u> lie and how they might best be filled.
- Using the November workshop to test and hone emerging conclusions and recommendations.

INTRODUCTION

1. On 11-12 April 2007, the Mossavar-Rahmani Center for Business and Government at Harvard University's Kennedy School of Government hosted a multi-stakeholder workshop as part of a project entitled 'Corporations and Human Rights: Accountability Mechanisms for Resolving Complaints and Disputes'. The project forms part of the work of the CBG's Corporate Social Responsibility Initiative and is conducted in cooperation with the Hauser Center for Nonprofit Organisations at the Kennedy School. This multi-stakeholder project aims to examine the strengths and weaknesses of existing complaints or dispute resolution mechanisms, suggest some lessons to be drawn from their experience, consider how they might be improved and explore what a model mechanism might look like for the field of business and human rights.

2. The workshop involved 37 participants from business, international NGOs, local NGOs, academia, law, government, international organisations and human rights institutions, coming from all continents. Participants took part in their personal capacity and the workshop was conducted under the Chatham House Rule of non-attribution of comments.

The project

3. At the outset of the workshop, the project leader summarised the genesis and aims of the project and workshop. The project was positioned to fill a particular space identified on the basis of the following observations:

➢ Growing attention was being paid to issues of accountability in the business and human rights arena, alongside longer-running debates on standards.
➢ The focus of this attention had largely been on top-down approaches to accountability such as auditing, monitoring and reporting, which remained important.
➢ But there had been a relative lack of attention to bottom-up approaches to accountability in the form of complaints/grievance/dispute resolution mechanisms.
➢ The two mechanisms most frequently used when a dispute arose remained litigation and public campaigning, which frequently had limitations in terms of accessibility, resource-demands, time-delay, uncertainty and the sub-optimality of outcome.

4. The project aimed to address this space between institutionalised, judicial mechanisms on the one hand and informal, campaigning mechanisms on the other. It would explore complementary and supplementary approaches to resolving disputes in the business and human rights arena, drawing on two particular sources of learning:

➢ Those non-judicial mechanisms that did have a human rights component, which had now been operating for a few years and were learning useful lessons from that experience (notably multi-stakeholder initiatives built around labour codes; the World Bank Group's Compliance Advisor Ombudsman, and the OECD's National Contact Points).
➢ The broader range of experience with complaints/dispute resolution mechanisms outside the business and human rights arena that also offered an array of lessons and options.

5. It was stressed that the project was an on-going process of consultations with as wide a set of stakeholders as possible. The workshop was a crucial part of that consultative process, bringing a broadly-ranged group of expert stakeholders together to work through the issues in a focused and interactive environment. The objective was to gain a better understanding of participants' views on existing mechanisms, their merits and deficits, what optimal mechanisms might look like, and how they could fit together within a wider accountability system.

6. Workshop participants received a draft background paper describing a non-exhaustive cross-section of 21 existing complaints/dispute resolution mechanisms. These included international, regional and national mechanisms; sectoral, membership-based and multi-stakeholder mechanisms; judicial, arbitration, mediation, investigation and public pressure-based mechanisms; hard law and soft law mechanisms. (They did not include any company-based mechanisms due to the difficulty thus far in gaining access to such information – beyond project-specific mechanisms – that could be used publicly.) The aim of the paper was to cast beyond the human rights arena in order to describe a broad range of complaints/dispute mechanisms as factually as possible and bring out their different approaches to issues such as accessibility, involvement of stakeholders, relationship to standards, conduct of processes, outcomes, enforceability and the provision of confidentiality or transparency[1].

Paradigms of dispute management

7. Participants heard an opening presentation on an array of 'paradigms of dispute management'. These were ranged along an axis between 'negotiation' at one end (ie the parties reaching a resolution through direct negotiation with each other) and 'litigation' at the other (ie judicial recourse). Towards the 'negotiation' end of the axis were other non-binding alternative dispute resolution processes (eg mediation, neutral evaluation, mini or summary jury trials). Towards the 'litigation' end of the axis were the binding, adjudicative alternative dispute resolution processes (various forms of arbitration and private judging). The presentation highlighted a number of tensions or implicit trade-offs to be made when opting for one approach or another. These included trade-offs between corrective and preventive outcomes; rights-driven and interest-driven processes; institutional and ad hoc approaches; external and subjective standards; incident-based and relationship-based approaches; public (transparent) and private (confidential) processes.

8. Many of these 'axes of tension', or trade-offs between different approaches to dispute resolution, became recurrent themes throughout the workshop's discussions. The main body of this report groups the views and ideas raised by the participants in large part around these axes, under the general headings of 'The Law', 'Access, Engagement and Power Disparities', 'Effective Outcomes', 'Learning, Capacity-Building and Prevention' and 'Legitimacy'. It highlights points where views converged and diverged and closes with some 'Key Emerging Themes'. These 'emerging themes' are designed to provide a platform to stimulate further feedback and ideas from stakeholders and <u>not</u> as an indication of any fixed position the project is adopting. Finally, the report outlines some 'Next Steps' for the project in the coming six months, building in part on the workshop.

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[1] This paper will be filled out and finalised in the course of the project and comments and contributions are welcome.

The Law

Caveat

9. This workshop was positioned to look at mechanisms for resolving complaints/disputes that stem from the impact of business on the human rights of workers, other individuals and communities. It was not aimed at the question of what human rights standards are applicable to companies, which remains the subject of various on-going projects and processes. Inevitably, however, the issue of dispute resolution in the business and human rights arena cannot be divorced from that of standards, whether voluntary or binding..

Standards

10. There was a recurrent discussion of whether some general standards had to be agreed as a *prerequisite* to engaging in a dispute resolution process, and if so what they would be, or whether and how far dispute resolution could proceed without such pre-agreement. There appeared to be a distinction here between agreeing minim**um** standards (qualitative demands directly applicable in the particular situation), which was the focus of other, on-going projects, and minim**al** standards, meaning the least that might have to be agreed in order for the parties to come to the dispute resolution table.

There was a strong sense from many participants of the need for some minimal standards – a general, normative framework - in order for any complaints/dispute mechanism in the business and human rights arena to be widely acceptable and therefore function effectively. The proposal was that without some basic common acceptance of the *relevance* of human rights, it was difficult to enter into dialogue aimed at resolving a dispute based around rights issues. One participant suggested that the Universal Declaration on Human Rights was a sufficient framework. Another thought the international human rights law framework could be taken as the backdrop without suggesting, or needing to suggest, that it was directly applicable to companies.

11. Some noted that arguing over specific standards and their application to business as a prerequisite to addressing a dispute could prevent the parties from ever sitting down together to seek solutions. A broad framework, on the other hand, could provide a backdrop to the process without a need for wrangling over specific standards in advance.

12. The observation by one participant that law came after, and was built on, customs gained resonance amongst participants. On the one hand, this point was used to note that the a strict adherence to the law could at times lead to perverse situations counter to the realisation of human rights. On the other hand, it was noted that the reverse could also be true. One participant noted that this linkage might suggest international law in turn reflected international customs. Yet there was often little evidence to support this. Indeed, the danger of any global dispute resolution mechanism was that it would not accommodate differences of context, culture and custom.

Courts

13. All participants recognised that many of the current deficits in addressing complaints in the business and human rights arena flowed from an inadequate implementation of national laws and

international legal obligations by governments and judiciaries. Depending on the circumstances, this could reflect a lack of political will, of capacity or both.

14. At the same time, participants seemed in general agreement that effective, functioning courts were not a panacea: even the best judicial systems were frequently not capable of producing optimal outcomes to disputes. Their value was identified as lying as much, or more, in their capacity for altering the risk calculations of parties to a dispute. Examples were raised of national companies that were quick to agree to dialogue-based dispute resolution processes, knowing they would be on the losing end of a court case. Comparable examples were raised regarding incentives for both national and multi-national companies to engage in non-judicial processes, considering the time, cost and reputational implications of litigation.
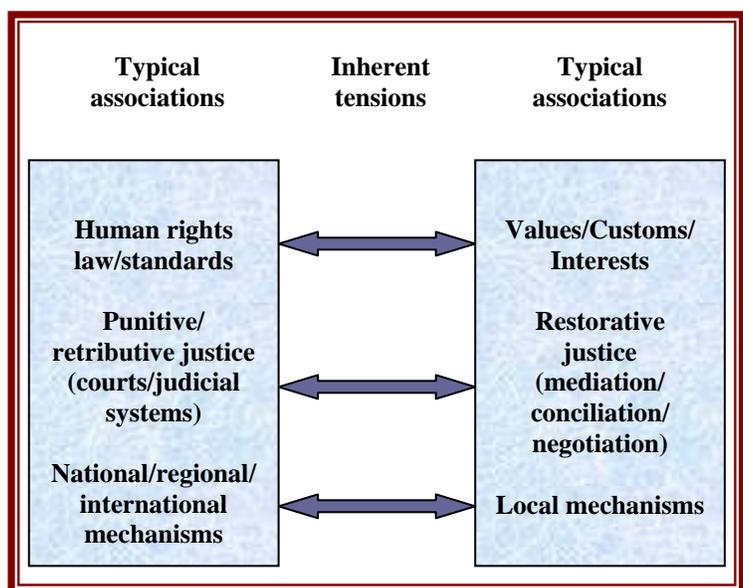
15. A number of participants noted that the option of recourse to judicial mechanisms was not only an incentive for parties to come to the table, but could also mitigate power disparities once at the table. This meant it was important that alternative dispute resolution mechanisms did not preclude judicial recourse if they failed, as an important point of leverage would be lost.

16. Some participants noted that in many instances the option of effective judicial recourse did not exist. Therefore its deterrent role and capacity to provide complainants with leverage was equally absent. Companies with policies of engaging with communities and seeking consensual resolution of disputes could still be expected to do so in such circumstances. But those with no such policies or intentions could 'get away with it'. This was an inherent weakness of any sub-global, non-judicial system.

17. Some suggested that there might be alternative ways to create these points of leverage or incentives absent the 'shadow of the law' and effective courts. One option was through the oversight and demands of lending institutions. It was noted that much of the focus on standards to date had come through public financing institutions, such as the IFC. Another option was through the expression of an opinion or judgment even if by a non-judicial body. An example was raised of an authoritative, non-binding opinion of this kind then being used influentially in a binding tribunal.

Key points of tension

18. Three linked 'axes of tension' or sets of trade-offs were identified in the course of discussions, which repeatedly brought discussions back to the fact that we were working in the context of human rights law. These trade-offs were between human rights law or standards on the one hand and interests or values on the other; between punitive or retributive justice on the one hand and restorative justice on the other; and between national or supranational mechanisms and local mechanisms.

Typical associations	Inherent tensions	Typical associations
Human rights law/standards	⬌	Values/Customs/Interests
Punitive/ retributive justice (courts/judicial systems)	⬌	Restorative justice (mediation/ conciliation/ negotiation)
National/regional/ international mechanisms	⬌	Local mechanisms

Human rights law/standards ⟷ **Interests/values**

19. The tension between international human rights law or standards and the satisfaction of interests and values was a recurrent theme of discussions. This was not to suggest that the two were necessarily incompatible, but that there could often be a trade-off between them.

20. One participant stressed that in mediation/negotiation/conciliation processes, the more legal or normative absolutes that were brought into the discussion, the less room there was for creative solutions that could create win-win outcomes for the parties, based on their interests.

21. Similarly, there was some discussion of whether individuals who felt their rights had been violated were more likely to articulate their aims in terms of realising a human right or in terms of seeking a certain kind of treatment.   While the law might place a rights framework on disputes, the individual might perceive their situation more in terms of interests and values.

22. Equally, it was noted that whilst a dispute might originally be framed in terms of one rights-related issue such as land ownership, it might actually be about something rather different eg access to revenues from natural resources. A court process could be limited in its ability to explore the underlying interests and therefore find optimum solutions.

23. Others observed that unless there was some basic understanding of a common normative framework it could be either difficult or pointless to enter into a negotiation or mediation.   For example, if a financing institution placed 'client confidentiality' above human rights standards when faced with allegations that their client was complicit in human rights abuses, then a discussion of the issue in dispute could not even take place.

24. One participant noted that without set standards, a consensus-based dispute resolution process might risk reducing everything to the lowest common denominator. Outcomes could fall below generally-recognised standards of human rights law, undermining the system rather than strengthening it. A counter-view was that a good mediation process, where participants had autonomy and could speak freely about their interests could create innovative solutions that were not lowest common denominators.

25. It was also noted that there may be interests at play that went beyond those of the parties directly involved in a dispute. These might include interests in the preservation and evolution of the international human rights law framework itself, and ensuring that outcomes based on interests did not undercut generally-accepted standards.

Punitive/Retributive justice ⟷ **Restorative Justice**

26. At various times, the issue of punitive or retributive justice versus restorative justice was raised. The greater potential for achieving restorative justice through non-judicial mechanisms was underlined, as was the possibility of using these more consensus-based mechanisms to build relationships and create a means of consultation that could prevent future disputes [cf paras 39 and 56].

27. One participant noted the apparent predilection in the human rights arena for punitive justice, with a presumption of guilt towards any corporate actor. There sometimes seemed to be an attitude of 'give the guilty son-of-a-bitch a fair trial'. This linked into discussions on mutual accountability and the responsibility of all actors to respect principles of justice vis-à-vis others [cf para 45].

28. A number of discussions raised the point that restorative justice mechanisms could get to parts that punitive justice could not reach. Sometimes the dispute was not about a breach of the positive law, but a breach of a human right not embedded in domestic law.   Or it might go to an issue so specific to a particular context that even the best domestic human rights laws would not necessarily get to the point.

29. The point of criminal liability was raised a number of times. Certain abuses were particularly egregious and had to be dealt with through a mechanism that designated 'right' and 'wrong' and punished accordingly. It was suggested by one participant that even in these situations, a restorative approach to justice need not be excluded. But the prevailing view was that these issues were in a class apart and had to be addressed through court systems wherever possible.

| National/Regional/ International mechanisms | ⬌ | Local/Site-specific mechanisms |

30. There was agreement amongst participants that the best solutions to disputes were generally achieved through localised mechanisms that could take account of the specific issues, cultural context, local customs, values and needs. A 'one-size-fits-all' approach to dispute resolution was squarely rejected. That said, the recurring debate on the normative framework suggested that certain minimum standards might be generally applicable.

31. One participant with experience of a national mechanism noted that handling a dispute even at the national level could disempower a local community. The objective had to be to return control to local hands as soon as possible and build capacity at that level.

32. One group discussed the inability of more remote, higher-level mechanisms to handle the quantity of complaints that might come to them. Having a kind of 'Human Rights Thunderbirds' facility that would jet into any situation of dispute could not work in terms of capacity nor of optimising solutions. Any supranational mechanism was going to need local partners with which it could work and to which complaints/disputes could be devolved for more local solutions.

33. There was discussion of the possibility of moving up the levels of mechanisms, beginning at the local level, moving to the national, regional and then international. It was noted, however, that this was not necessarily an increasing scale of rigour and enforceability: traits that actually peaked at the national level and then tailed off in many international mechanisms.

34. One limitation of local, site-specific mechanisms was identified as being the need for an enlightened actor to create them where they did not already exist – often the company involved. In many ways, this was an ideal. But absent such an approach by the company or eg local authorities, there was often no mechanism at all for the alleged victims to access, and no forum in which they had a voice [cf paras 38-40].

35. Equally, it was noted that whilst multi-national companies may have the resources to establish permanent consultative and dispute-handling mechanisms at their sites of operation, SMEs would be unlikely to do so. Furthermore, many communities would not trust a mechanism established by a company with which they were already in a major dispute. So some kind of external, third-party mechanism – probably more remote – would be needed in some circumstances.

36. Balancing this was the experience of at least one participant that communities themselves very often had quite sophisticated mechanisms for handling disputes and individuals who were well-practised in community-level mediation. This local resource should be used wherever possible.
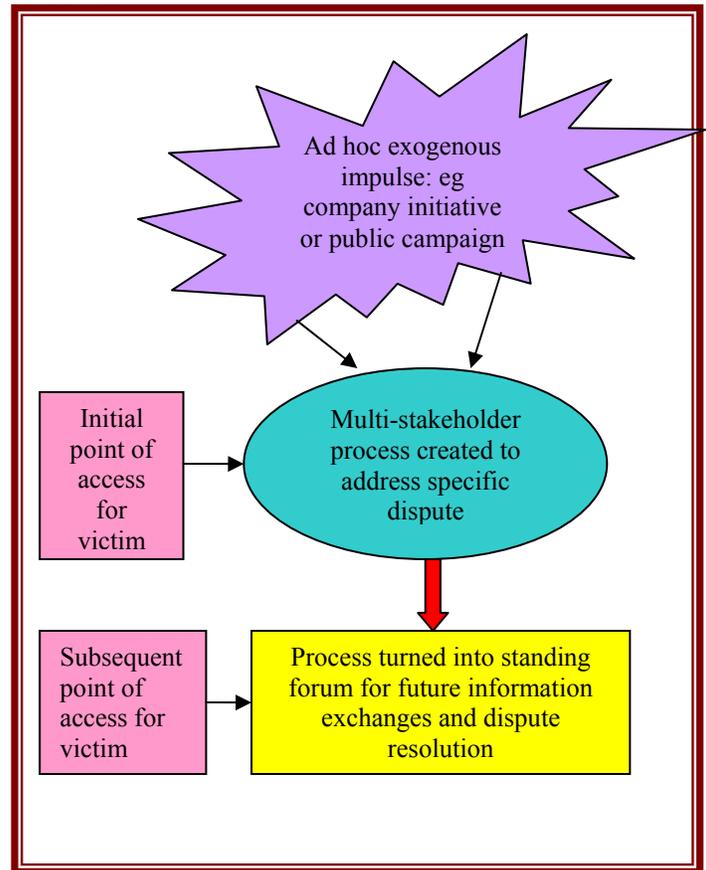
37. Some participants raised the desirability of achieving some consistency of approach or outcome that could build up a body of jurisprudence, helping all actors to learn from prior experience rather than repeat the same mistakes. One participant noted the importance for companies of being able to develop management systems that could be explained, understood and integrated throughout their structures. A purely ad hoc, localised approach would miss this opportunity for systemic practices and learning [cf paras 56-59].

Access, Engagement and Power Disparities

38. The question of access to mechanisms recurred throughout the workshop. There was broad agreement with the proposition that complaints/dispute resolution mechanisms needed to take a bottom-up approach that facilitated access for the alleged victims.

39. There was considerable concern about the lack of voice of many of the most vulnerable, and the fact that many complaints/dispute processes – whether legal or non-legal – could easily exclude them from solutions. In one instance discussed, a dispute was addressed not because the most disadvantaged were able to project their grievance, but only when a more empowered group got involved as a result of related but different concerns. Mechanisms could easily address this secondary dispute while ignoring the primary grievance of the more disempowered group.

40. It was noted that access for complainants at the local level was often limited by the absence of any existing structures for handling disputes. However, examples were cited of local mechanisms being created in response to specific disputes, providing access for communities, workers and their representatives in that instance, and continuing to exist as fora for consultation and information exchange into the future. These fora could then provide accessible mechanisms for any future complainants, and offer the companies involved an early warning system for emerging disputes, enabling them to take preventative action to the benefit of all.

Ad hoc exogenous impulse: eg company initiative or public campaign

Initial point of access for victim

Multi-stakeholder process created to address specific dispute

Subsequent point of access for victim

Process turned into standing forum for future information exchanges and dispute resolution

41. Participants noted that access to many existing mechanisms was limited: in some instances only members of an initiative could bring a complaint, or only members could be complained against. In the area of financing, only projects financed by certain public funders provided for a complaints mechanism.   This meant that the scope for raising grievances was restricted frequently to publicly-funded projects and the 'willing' corporations that adopted codes of conduct, whilst leaving the 'unwilling' corporations and privately-funded projects untouched.

42. Access and engagement by the parties to a dispute were also discussed in terms of power disparities. Power disparities between victim/worker/community and corporation were recognised not only in the obvious terms of economic and political weight, but also in terms of disparities in information/expertise and disparities in the impact of outcomes. There were also some power disparities that might work against a company.

43. There was discussion around the need for information and expertise disparities to be addressed. In this context, financial disparities often combined with disparities in trust and confidence. A company could always pay for more studies, data-collection or expert involvement in a dispute resolution process than a community or worker. But if a company paid for the provision of data or expert information as the basis for deciding a dispute, how could the community trust it? Mechanisms needed to be found whereby sources of expertise could be identified and agreed upon by the parties and then trusted by all. It was noted that in mediation and arbitration the concept of the neutral expert was often used in this way.

44. One participant underlined the need to allow anyone to come to the table who felt they were part of the dispute. It would backfire to leave them out. There was not only a power to push a solution, but also a power to frustrate it. This 'power to frustrate' was also highlighted as a balancer to the economic or political 'power' of any company. Trade Unions and workers could withdraw their labour, and communities could withdraw the 'license to operate'. Both had serious implications for a company's ability to function effectively and profitably.

45. Another power disparity raised was that of disparity in accountability. Companies might be expected to engage in a dispute resolution process as a reflection of their accountability to other stakeholders, yet find that their partners acted without any such accountability requirements. It was suggested that where a process was accepted as fair and legitimate, the decision to access that process should create links of mutual accountability between all those at the table for the success of the process and of any outcomes agreed.

46. One group discussed whether this should mean that recourse to alternative mechanisms (courts or other) should be precluded. Some felt it should, at least for long enough to provide a trusted space in which to seek a consensus-based resolution to the dispute. Others felt this was dangerous and might be a way of gagging the complainants or kicking issues into the long grass of endless 'process'. But there was some agreement that a short and strictly time-limited period might be necessary, during which other avenues of recourse could be suspended. This would not preclude recourse to other mechanisms if this period elapsed without a resolution to the dispute [cf paras 14-17].
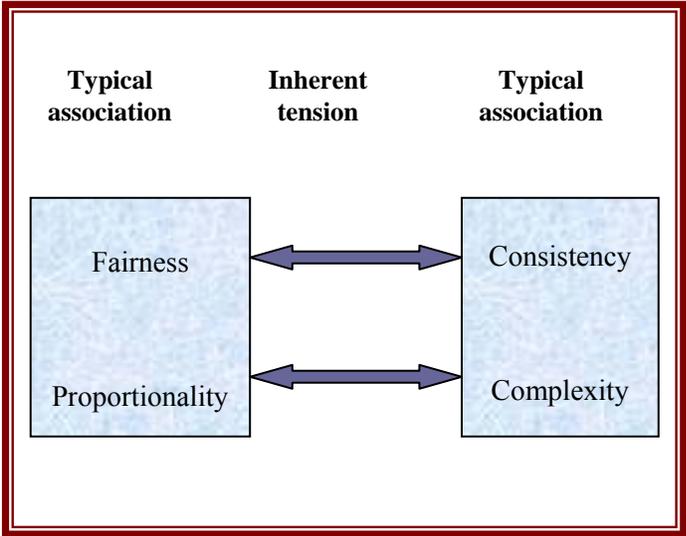
Achieving Effective Outcomes

47. Another set of tensions or trade-offs that was discussed seemed to go primarily to the issue of achieving effective outcomes to disputes, meaning outcomes that were accepted, trusted and sustainable. Here, discussions turned around the tensions between fairness and consistency, proportionality and complexity (with some parallels emerging between these two) and transparency and confidentiality. There was with a strong link also to issues of jurisprudence and learning.

Fairness ⟷ **Consistency**

48. A particularly challenging trade-off was identified between fairness and consistency. Fairness – as perceived by the alleged victim – was likely to be bound up not only with the objective legitimacy of the dispute mechanism, but also with its proximity to the complainant (the 'local' factor) and the speed of remedy. Unnecessarily remote mechanisms, or mechanisms where excessive time was spent trying to agree on the law/standards at issue rather than the remedy, were less likely to *feel* fair. Yet the more local the mechanism and interest-based (rather than law-based) the process, the less consistency that could be achieved. This would therefore limit the potential for systemic learning and the building of a jurisprudence.

49. One participant underlined the question of a mechanism's proportionality, which appeared to be in tension with its complexity. Mechanisms that tried to cater to a wide range of geographical/sectoral/cultural scenarios would likely become so complex in their structures, processes and standards that the time taken to address a specific case could be out of proportion with the immediacy and needs of the dispute. In line with this, one participant commented that complexity in a mechanism or system was rarely helpful – it created an endless maze with no clarity on how to exit from it with one's 'rights' achieved.

Typical association	Inherent tension	Typical association
Fairness	⟷	Consistency
Proportionality	⟷	Complexity

50. The proposition, generally accepted, was that on this 'fairness/consistency' axis, fairness had to take precedence in any trade-off, whilst trying to do whatever one could to manage and enhance consistency as a secondary value.

51. One suggestion was that any outcome of a complaints/dispute resolution process should be accompanied by argued reasons. This could both help preserve a sense of fairness and help build a jurisprudence that went beyond the legal sphere.

Transparency	←——————→	Confidentiality

52. A number of participants noted that transparency was a desirable trait of any mechanism, and could be linked to its legitimacy. Others underlined that where processes of negotiation, mediation or conciliation were used, they could rarely if ever succeed without confidentiality. They required that all actors be able to speak freely about their interests without risk of compromising themselves.

53. The general view emerging from the workshop was that transparency of outcome was of paramount importance, whilst confidentiality of process could be accepted if the process or mechanism were seen as legitimate and all relevant parties were included in it. That caveat of legitimacy was fundamentally important [cf paras 60-62].

54. This issue was linked also to discussions on jurisprudence and the development of management systems. Without transparency of outcome, there could be no cumulative learning, which played an important role also in dispute prevention [cf paras 56-59].

55. A separate point raised about confidentiality was related to the protection of complainants from retaliation. This could be essential to their safety and/or job security, and was also important in providing an environment where complainants felt able to come forward and raise issues of genuine concern. It was easier to provide such confidentiality (ie anonymity) when complaints were taken forward through third parties (NGOs, unions or independent complaints bodies) on behalf of a complainant. However, it was noted that this might preclude them from being party to a dialogue-based mediation process, making it harder to ensure their interests were accurately represented.

Learning, Capacity-building and Prevention

56. The three issues of learning, capacity-building and the prevention of disputes were repeatedly linked during discussions as part of a virtuous circle that could come out of effective dispute resolution mechanisms.

57. They were also linked to the question of jurisprudence – the development of a public and publicised body of outcomes from dispute resolution processes that could help other actors to understand what kinds of solutions were proving successful and how to avoid repeating mistakes others had made. In this context, the institutionalisation of ad hoc mechanisms at the local/company level could provide a vehicle for such learning, for early warning of disputes and for dispute prevention.

58. One presentation suggested that learning was likely to be less systemic across business and society in a process of conciliation that focused on the very specific circumstances of one case, and more systemic in a public enquiry process that looked at a group or pattern of alleged abuses. On the other hand, the more localised a dispute mechanism was to a specific dispute, the easier to demonstrate the business case for the company to engage in finding solutions. So the systemic learning within the one company might be greater.

59. Examples raised in discussion pointed to the fact that learning and capacity-building could take place at various levels of the 'system': at the local level through a standing mechanism for consultation and dispute management; at the corporate level through the transfer of learning from one site of operations to another; at a sectoral level through shared experiences across businesses nationally and internationally; as well as at the level of governments, societies and the international community. The more local levels of learning could take place wherever local mechanisms existed. The more cross-cutting levels of learning were to some degree dependent on consistency in both outcomes and normative frameworks. They also required a systematised gathering and sharing of information.
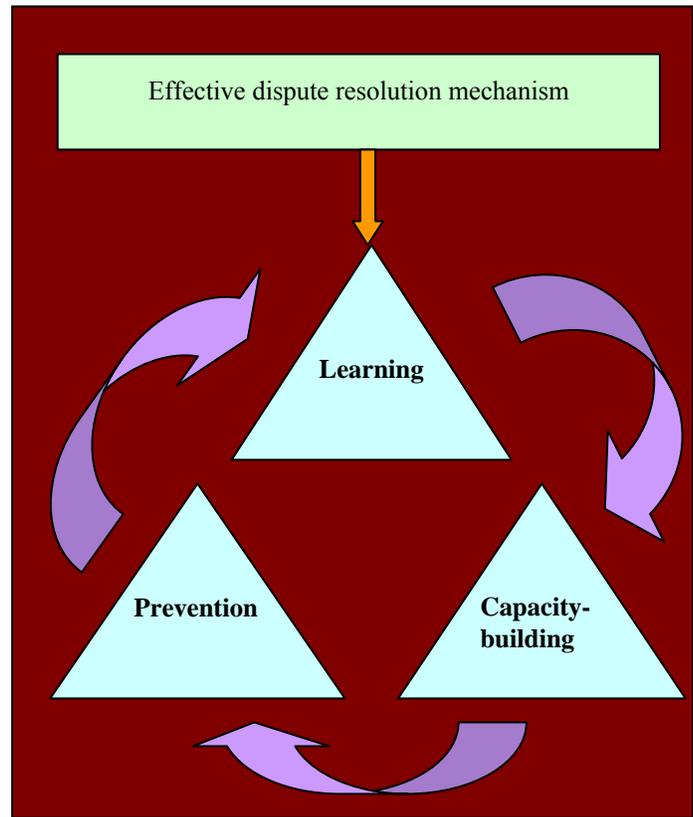
60. The issue of capacity-building was discussed in relation to communities, NGOs, trade unions, business and government. Examples showed that all groups of actors could benefit.

- Business could develop better management systems if there were more clarity on what processes were expected and likely to succeed when handling complaints. They could learn from processes tried and tested by others and the emerging jurisprudence of their outcomes. It was noted that the language of management systems was much more meaningful to a company employee in his or her day-to-day work than was the language of the law.

- Capacity-building issues for communities, trade unions and local NGOs included, most fundamentally, awareness about human rights and the mechanisms that were available through which to pursue them. The provision of access to complaints/dispute mechanisms, to expertise and to data was also crucial in terms of rebalancing power disparities.

- Some contributions and examples suggested that government did not always need to be part of complaints/dispute mechanisms. Indeed, it was noted that government could be part of the problem in instances where they denied human rights. This might, though did not necessarily, preclude them from being part of the solution. Others emphasised that mechanisms should avoid creating a substitute for government responsibilities, and therefore aim to bring government actors into the process. One participant noted that government also had the capacity, more than any other actor, to leverage wider, systemic change and should therefore be part of the learning and capacity-building process where possible.

- One group discussion highlighted the point that complaints/dispute resolution mechanisms, as mechanisms, also needed the ability to learn from experience, to engage in understanding errors and missteps, and to adapt accordingly. This kind of learning went beyond the participants in the process to the 'institution' of the mechanism.

Legitimacy

61. On frequent occasions, the importance of the legitimacy of any mechanism was raised. This was seen as an overarching principle for any effective mechanism. Expressed another way, it was seen as a foundation stone without which a mechanism may well not be used, whatever its potential effectiveness.

62. Issues of legitimacy were touched on in the context of access and the need for the parties to develop trust in order to engage in a process, particularly one that involved some level of confidentiality. Legitimacy was also raised in relation to fairness and issues of basic procedural minima that ensured due process. It was linked many times to the need to involve all stakeholders not only in attempts to resolve a dispute, but in the creation of the dispute resolution mechanism itself. This went to the issue of the mechanism's accountability and therefore sustainability as a trusted vehicle or forum.

63. The issue of legitimacy was also linked to the axis of transparency versus confidentiality. A trusted institution or mechanism would be afforded the leeway to manage some dispute processes with confidentiality, where untrusted institutions or mechanisms would not. This made it easier for them to run dispute resolution processes involving mediation or conciliation, where confidentiality during the process was likely to be important to successful outcomes. However, it was noted that the retention of trust and legitimacy rested also on results. There was agreement amongst participants that the outcome of complaints/dispute processes should be made public, and that this could provide a basis for assessing the on-going credibility and legitimacy of the mechanism.

64. In some examples raised, a national-level institution with legitimacy had provided an available and trusted point of access for a person or group who felt their rights had been abused. That institution was then able to help catalyse a more localised process to address the issues in question. Done right, that in turn imbued the local process with legitimacy and could allow it to continue operating in future instances, without need for recourse to the more remote institution. In other words, legitimacy was conferred onwards.

65. One set of examples highlighted that a legitimate, respected mechanism could sometimes achieve results by the mere fact of showing its interest in a complaint. This might involve nothing more than a phone call from the institution as sufficient incentive for a company to desist from certain unacceptable behaviours.

66. Discussions did not get into what would make an institution legitimate in the first instance, beyond the broad parameter of multi-stakeholder involvement in its creation. However, many participants flagged that this was an issue that required serious reflection and further debate.

PART TWO: KEY EMERGING THEMES

67. There was a recurring question during the workshop about whether this project should be looking to recommend what an improved 'system' of complaints/dispute resolution mechanisms might look like or what a specific, optimal mechanism might be. Essentially, the project began with this as a question to stakeholders, rather than a pre-supposed answer. The following is an attempt to draw the preceding threads of discussion together and suggest some key emerging themes that go to this issue of 'system' or 'mechanism'. These are <u>not</u> intended to suggest any definitive position or conclusion for the project's final outputs. Rather, they constitute a set of thematic propositions based on the views expressed at the workshop, and are intended as a basis for further feedback from stakeholders and a more focused platform for the project's next stage.

**EMERGING THEME I – THE NEED FOR A GENERAL HUMAN RIGHTS FRAMEWORK**:

- Efforts to refine dispute resolution processes cannot await the outcome of separate debates and initiatives aiming to identify more precisely how human rights standards apply to corporations. Equally, they should not undermine such processes.
- Yet in many instances, without some baseline agreement that the human rights framework is a relevant one, it could be difficult to create the trust for all parties to a dispute to enter a dispute resolution process.
- There therefore needs to be some general normative framework within which it is assumed all actors are operating. A general framework can allow for specific, directly-applicable standards to be added, where agreed, but does not require that they be in place before dispute resolution processes can proceed. It might amount primarily to a common understanding that human rights are relevant, while avoiding the need to agree exactly which rights apply to whom and how, thus deferring resolution and remediation.

  o It was assumed that a general framework included criminal law offences such as crimes against humanity, war crimes and genocide, albeit these would almost certainly have to be referred to criminal proceedings where these were available and credible.
  o Beyond this most egregious category, one suggestion was that the UDHR may provide the general framework necessary. An alternative raised was to look at the national law plus international human rights obligations of the state where the dispute arose, without implying that the latter were directly applicable to companies.
  o Added to these would be any standards a company had espoused to date or which may in future be developed or adopted by any relevant group or forum, thus allowing for continuing evolution in this area.

General human rights framework setting parameters of any solution

Forum for dialogue

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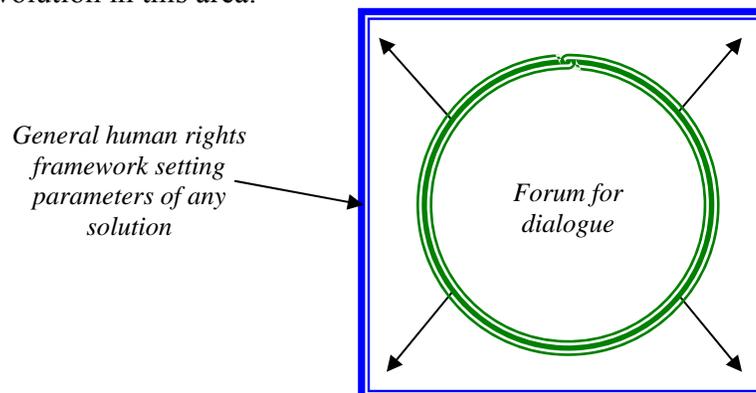
EMERGING THEME II – THE NEED FOR A MINIMUM STANDARD OF ACCESS

- There needs to be a minimum standard of access that at least provides that anyone with a credible complaint – including the most vulnerable – can have a voice and be heard.
    o The legitimacy of the procedural framework is inherently linked to the legitimacy of the body that provides or convenes the dispute resolution table: whether the company involved in the dispute; local government; a regional or national institution; multi-stakeholder initiative; international organisation or other.
    o There are related issues of who should be able to have a place at the dispute resolution table – whether there should be some 'relevance' or 'legitimacy' or 'representativeness' filter on participants in the process. These issues were only touched on briefly in discussions, though some flagged that this was not a simple process in most instances and would require further debate.

Access for all involved to a trusted forum for discussion
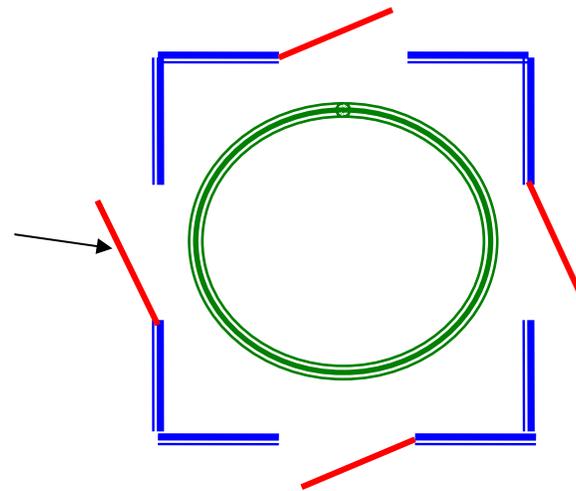
EMERGING THEME III – THE NEED TO MAXIMISE SPACE FOR DIALOGUE BASED ON VALUES AND INTERESTS

- There needs to be as much space as possible, once at the table, to allow values and interests and local specificities to come out. This will maximise the opportunities for creative, consensual outcomes to the net benefit of all.
  - o Where a straight negotiation between the parties does not provide for such an outcome, it will usually be desirable to have a neutral mediator available to facilitate the process.
  - o Any outcome from this process still needs to sit within the general human rights framework. Outcomes must not undermine human rights standards. This suggests that human rights expertise in a mediator or in a neutral expert could be important, to be guardian of the human rights parameters within which the search for consensus operates.

Maximised space within the normative framework for interests and values to be expressed

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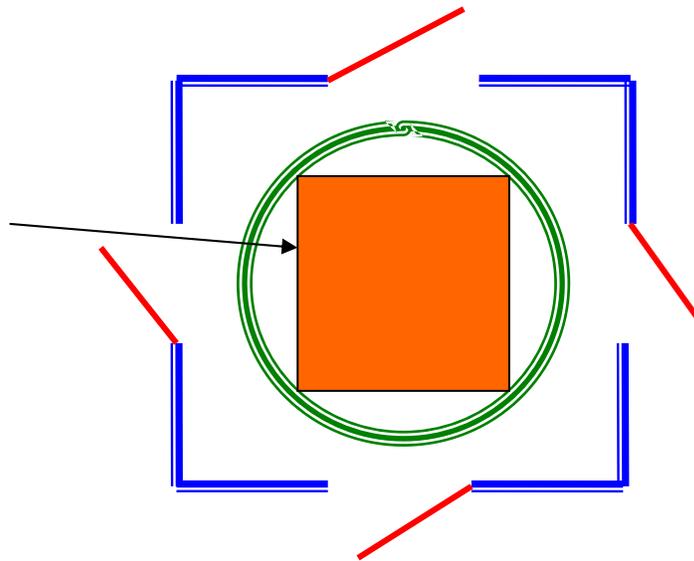
EMERGING THEME IV – THE RELEVANCE OF HAVING ALTERNATIVES TO A DIALOGUE-BASED PROCESS

- In many – arguably most – instances, alternative dispute resolution methods that seek mutually agreed solutions to disputes are preferable to litigation. However, they are most likely to be effective if the alternative of litigation also exists. This both provides incentives for the more reluctant corporate actors to engage in an ADR process and strengthens the leverage of the complainant once at the table.
    - o ADR processes must therefore not preclude the option of alternative paths of redress.
    - o Where litigation is not a viable option, other forms of alternative recourse may perform something of the same function, eg public campaigns or national mechanisms, such as a national human rights commission.
    - o It is likely to be necessary for the parties to agree not to pursue such alternative paths of redress while the ADR process is proceeding, if there is to be sufficient trust and incentive for all parties to come to the table.
    - o Equally it is likely to be necessary to put a time limit on the period allowed for an ADR process, so that it is not used as a means for delay rather than engagement.
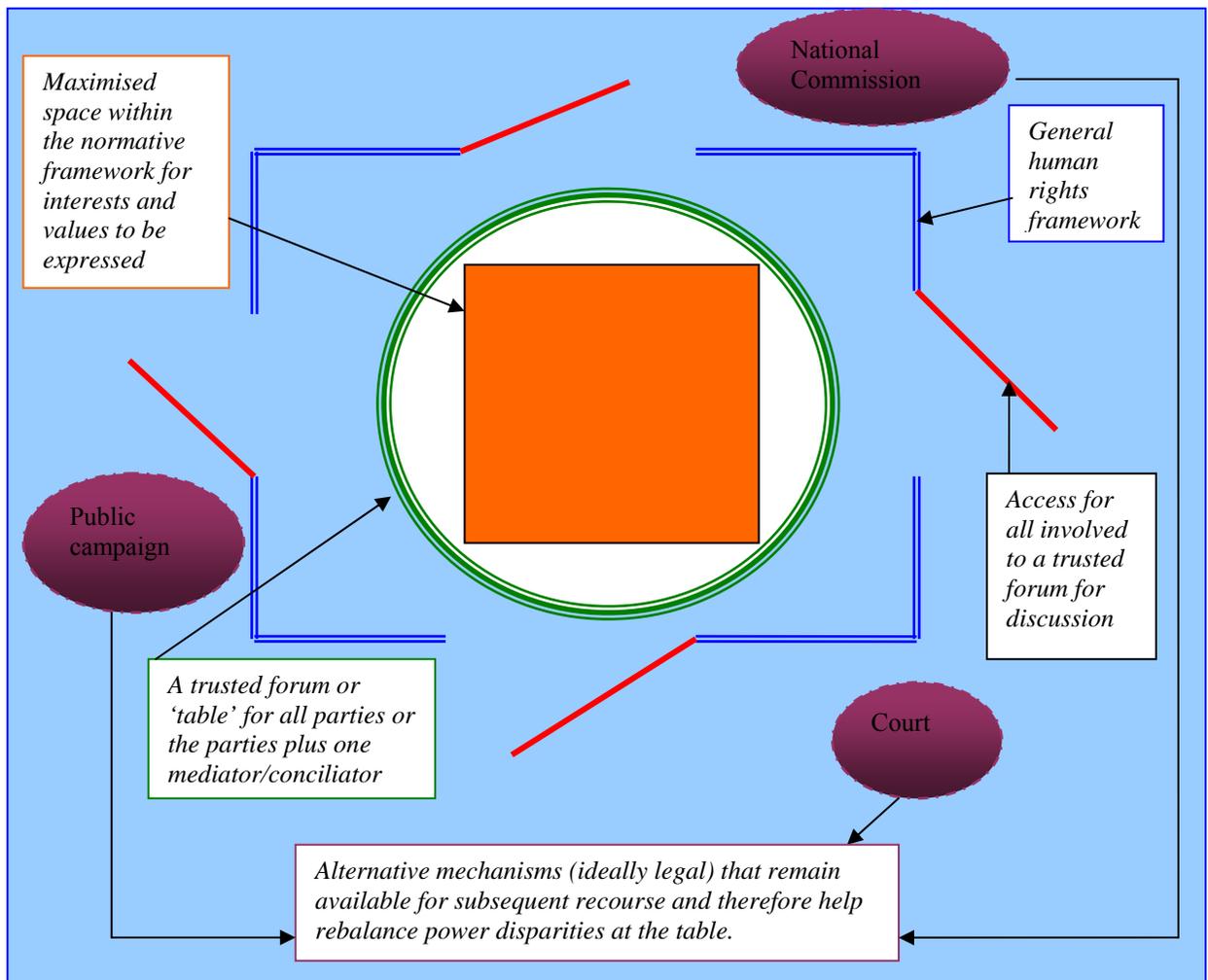
EMERGING THEME V – THE IDENTIFICATION OF FUNCTIONAL GAPS

Functional Gap A - a catalyst function for access to localised solutions.

- Solutions to disputes are most likely to be effective and sustainable if they are identified at the local level. Yet access to dispute resolution processes is often most restricted at the local level, and increases as one looks farther afield. That said, even the more remote mechanisms limit those who can access them in terms
of membership, project-type, financing requirements, relevance of the complaint to a specific code etc. This leaves many complainants with no mechanism relevant to their situation. There may therefore be some merit in providing a point of recourse to which any legitimate complainant could turn, without barriers.
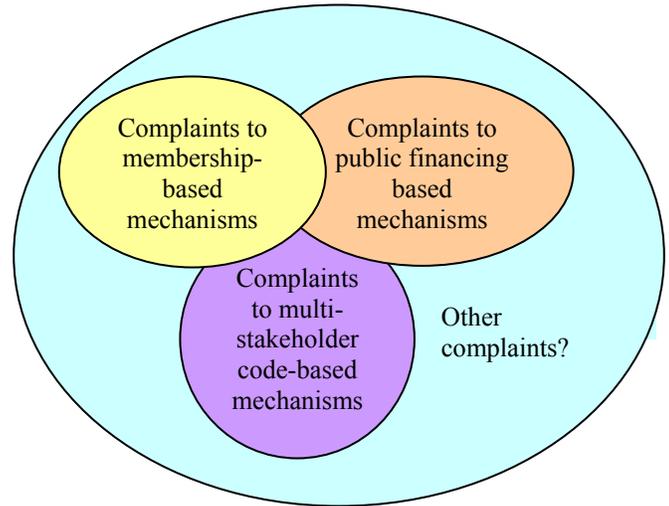

- Yet any system or mechanism focused on improving access should not compete with existing mechanisms where they are effective; and it should still encourage the handling of complaints and disputes as close to the location of the dispute as possible.

- This suggests that the value-added of creating a new point of recourse for complainants would be in providing a **catalyst function** that could facilitate the emergence and use of more localised mechanisms. This might entail:
  - Having information on relevant national institutions/multi-stakeholder initiatives/company or investor mechanisms or other points of recourse to which the complainant might be referred, and perhaps assisting them in referring the issue to that body.
  - Having information on national/regional bodies of experts in mediation/datat-gathering/human rights that could assist in resolution of a dispute, absent a pre-existing mechanism.
  - Gathering information on local-level mechanisms and resources for dispute resolution.
  - Actively encouraging dispute resolution processes at the closest level possible to the point of dispute.
  - Allowing that disputes that cannot be resolved this way may return to the higher level for alternative options (see Tentative Conclusion VI)

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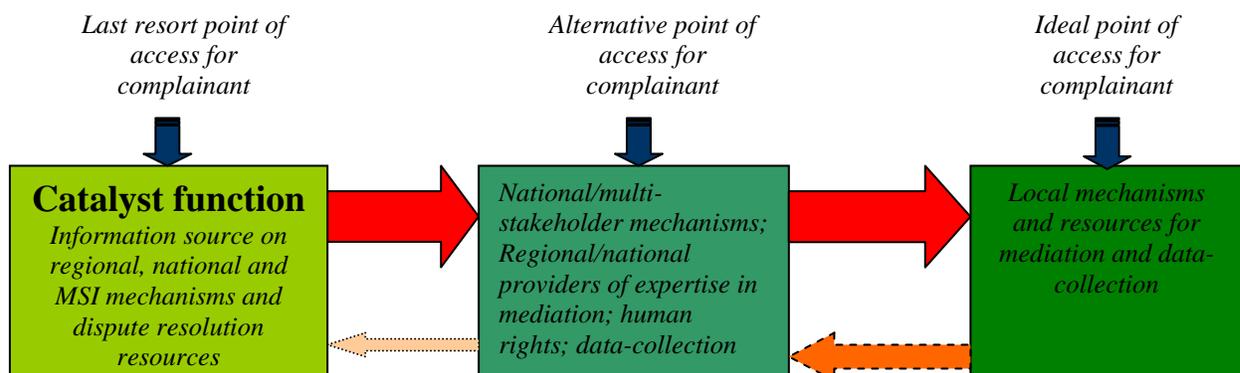
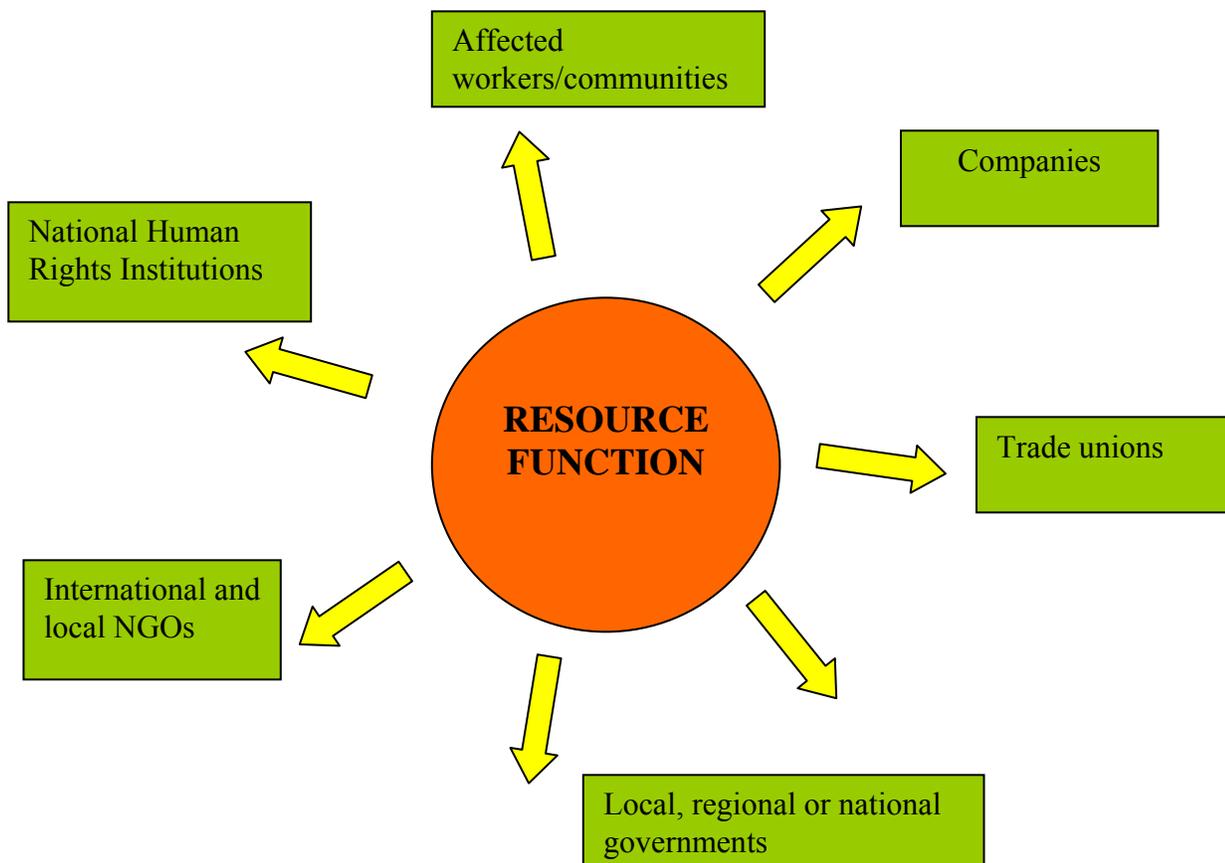## Functional Gap B: an assessment function as fall-back and incentive

- There will remain situations where a forum for consensus-based dispute resolution does not exist; where one or more of the parties to the dispute does not wish to engage with the process at any level; where alternative dispute resolution processes are unsuccessful; and where alternatives of litigation or an effective campaign that could leverage change are not available.
- For such instances, there is a question over whether it is desirable to create a credible alternative track that could opine authoritatively on the case through an **assessment function**.
  - o It could be desirable to have a potential source of an authoritative opinion that could be used publicly – either vindicating a company or exposing corporate wrong-doing that would otherwise escape wider scrutiny.
  - o The existence of such an investigation-based function with a public angle to it might incentivise companies that normally escape such scrutiny to engage in dialogue-based processes.
  - o Any such assessment function should require working with and through recognised experts at the national, regional and local levels in order to establish sufficiently the facts involved in the instance: it would be a partnership function.
  - o The success of any assessment function is inherently linked to the legitimacy of the group or body providing the opinion.
  - o Any such function would presumably have to be preceded by an assessment of the prima facie credibility of the complaint (ie admissibility criteria).
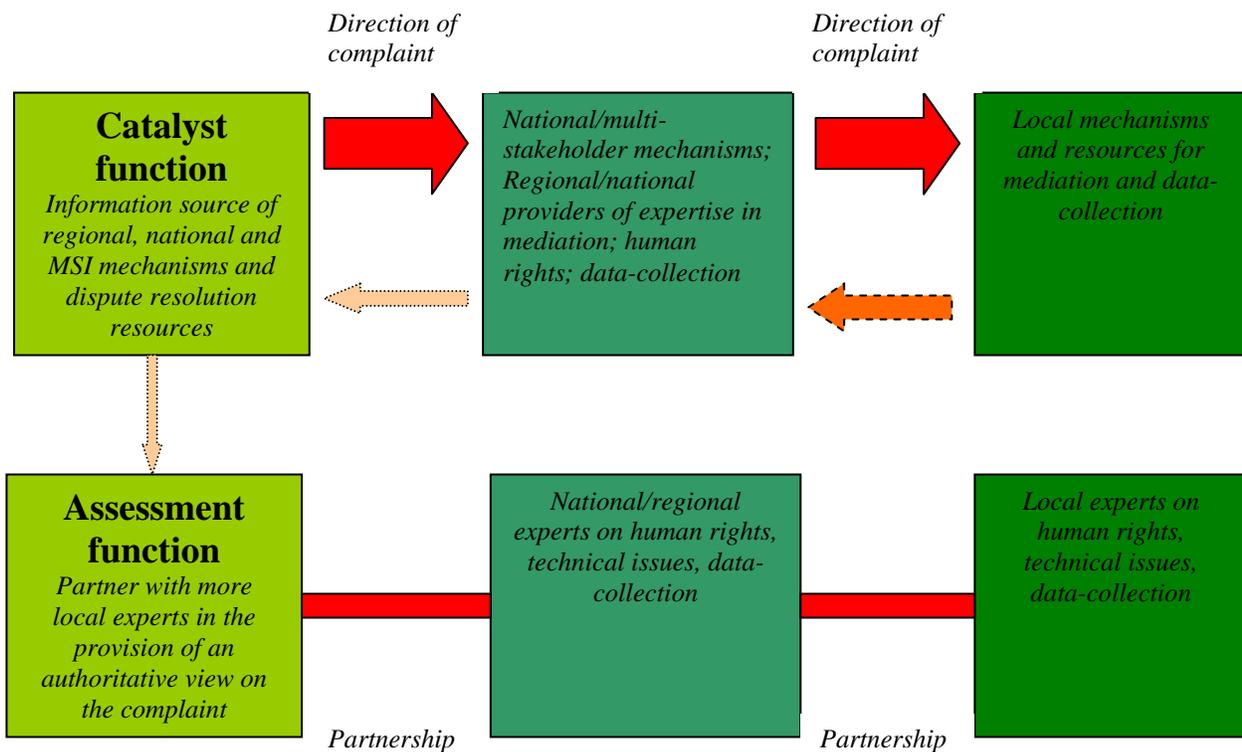
## Functional Gap C: a resource function for information and learning

- There is a lack of readily accessible information that could assist the handling and resolution of disputes in the business and human rights field at all levels. Deficits include:
  - o Collectively-held information about various mechanisms that exist and who can access them in what circumstances;
  - o Collectively-held information about institutional bodies or individuals at the national and local levels who hold expertise in alternative dispute resolution, human rights and data-gathering;
  - o Collectively-held information about the different kinds of approach to dispute resolution being tried and tested in the business and human rights arena and the lessons they are learning;
  - o Collectively-held information about the outcomes of complaints/dispute resolution processes and emerging jurisprudence;
  - o The capacity to analyse this collective information and develop guidance and tools that could be used by different stakeholders in setting up mechanisms to handle disputes, as well as contributing to on-going studies of how human rights might be applicable to companies in practice.

- The lack of such information in any central, easily-accessible location and format is a barrier to learning and capacity-building, and therefore to the improved prevention of disputes. There may be merit in a body that could provide this **resource function**.

The Functional Gaps – complementarities and linkages

- These three functions:
  - o A **Catalyst function** for alternative dispute resolution;
  - o An **Assessment function** for non-resolved disputes in the absence of judicial or other credible alternatives;
  - o A **Resource function** for all stakeholders in the provision of information relating to the resolution of human rights disputes

  could be provided separately or collectively by a body designed to deliver such results.
- Both the catalyst and resource functions are essentially facilitative of a 'system' for the enhanced resolution of complaints and disputes in the business and human rights arena.
- The assessment function would effectively be a mechanism in its own right, albeit delivered with and through other partners.
- The catalyst and resource function are closely linked in terms of the collection and provision of information on local, national, company or industry-based mechanism for dispute resolution. The catalyst function adds to the resource function the potential to promote and facilitate effective localised solutions. The resource function adds to the catalyst function the capacity to analyse the outcomes of dispute resolution processes, help build jurisprudence and draw lessons for learning, capacity-building and dispute prevention.
- There would be risks to pursuing the assessment function without the catalyst function, as this could bypass or discourage more consensus-based solutions, which are likely to prove more sustainable both in their direct outcomes and in the more permanent local processes they can engender that assist in conflict prevention.
- There is equally a risk in pursuing the catalyst function without the assessment function, as awareness of the latter and the public exposure it could bring may be an important incentive for less 'willing' companies to engage in dialogue.
- If the three functions were to be taken forward together by one body, it might look as below:
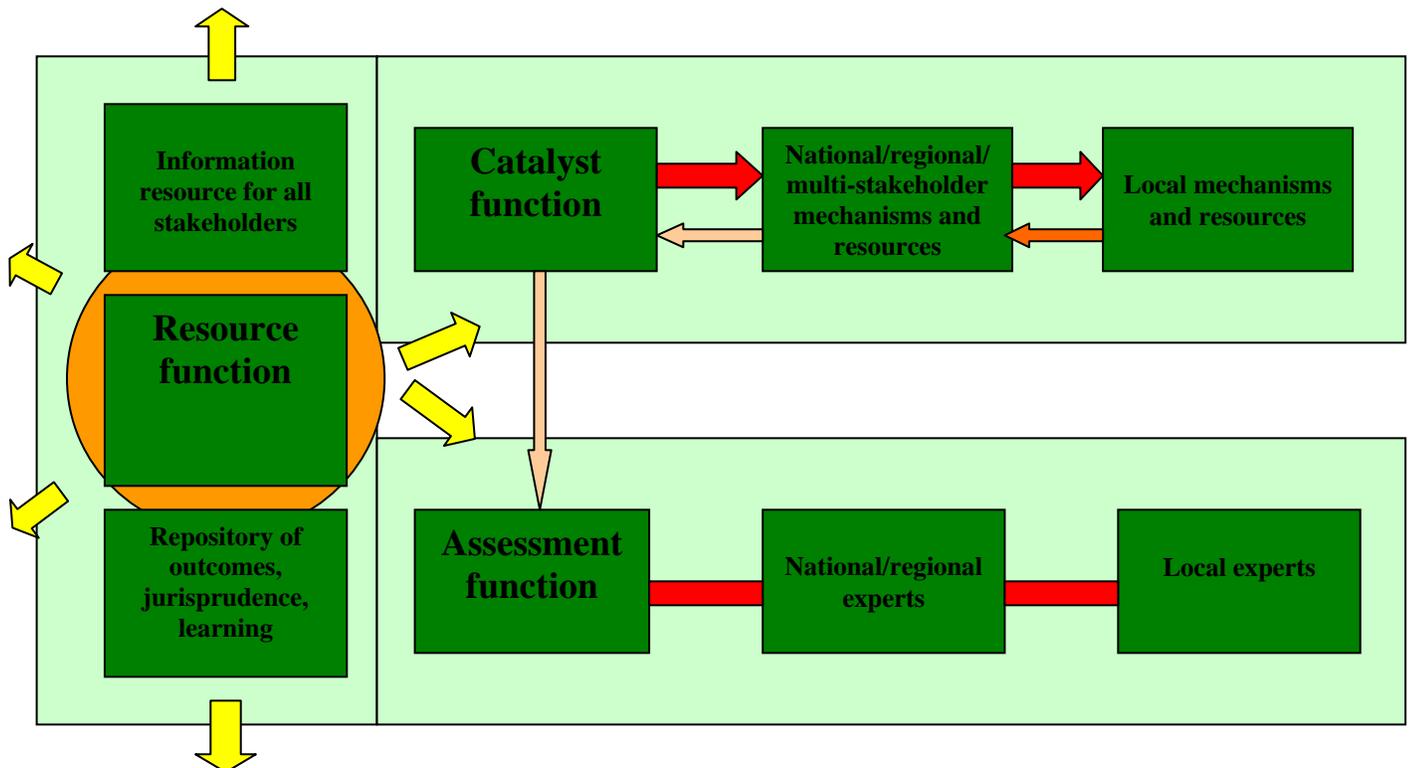
KEY EMERGING THEME VI – THE PARAMOUNTCY OF LEGITIMACY

- Were any one or more of these functions to be pursued through some institutional provider, its success would depend in the greatest part on the legitimacy of that provider in the eyes of the full array of stakeholders.
- Such legitimacy would depend fundamentally on the governance structures and processes of the institutional provider, their transparency and inclusiveness of stakeholders, both in terms of sector and geographical region.
- If no existing provider of such a function or functions were identified, any new body would be unlikely to have the requisite legitimacy unless established through an inclusive, multi-stakeholder consultation process, and with multi-stakeholder governance structures.

PART THREE: NEXT STEPS

Based on the debate at the workshop, the preceding 'Key Emerging Themes', and other research and consultations to date, the project leader will take the following as her focal activities over the next six months.

A Seeking feedback and continuing consultations

(i): We will first seek feedback from all workshop participants on this report and in particular on the key emerging themes identified. Whether in agreement, disagreement or with additional ideas and suggestions, this feedback is essential to the project, since these emerging themes will be an important factor directing its further work.

(ii) We will also be in contact with workshop participants over the coming months for further views and contributions based on the activities identified in sections B, C and D below.

(iii): The report will also be sent to a wider group of stakeholders and will be placed on the website of the Corporate Social Responsibility Initiative (www.ksg.harvard.edu/m-rcbg/CSRI/home.html) and the website of the Business and Human Rights Resource Centre (www.business-humanrights.com) for other interested stakeholders to access and contribute their views.

(iv): The project leader will visit Sao Paolo and Buenos Aires in May and South Africa in June 2007 for additional consultations and in part to test and develop further the ideas and themes in this report.

B Mapping existing mechanisms in the business and human rights arena

(i): The background paper will remain a work in progress for the time being. Its purpose remains to describe factually a non-exhaustive range of different approaches to complaints/dispute mechanisms from a variety of different contexts, beyond the business and human rights arena. Comments regarding the accuracy of the descriptions of mechanisms included in the paper are welcomed. Suggestions for mechanisms that are not included but are qualitatively different to any of those described would also be welcome. In particular, we will try to identify any company-based grievance mechanisms that may be available to external workers and communities wherever the company operates.

(ii): Drawing on this background paper, we will identify a range of 'functionalities' generic to most or all complaints/dispute mechanisms. These would include eg the basis for access; the type of process used; the range of outcomes/remedies possible; the provision for confidentiality or transparency etc.

(iii): We will also identify the set of complaints/dispute resolution mechanisms that operate entirely or partly in the business and human rights arena, and map them spatially from the corporate level, through the industry or multi-industry level, to the national level, regional level and finally international level.

(iv): We will then map these mechanisms against the functionalities identified, with the aim of providing a clearer vision of what mechanisms are available where, to whom and how.

C Developing criteria for assessing the effectiveness of mechanisms

(i): Based on the workshop discussions and other consultations, we will attempt to identify a set of 'criteria for effectiveness' that might gain broad support and acceptance. These might include, for example, a criterion related to ensuring ease of access, including for the most vulnerable, or about providing for transparency of outcomes. We will invite comments from workshop participants and others on these suggested criteria in order to adjust and improve them and ensure they carry broad acceptance.

(ii): We will conduct a survey of stakeholders on how they view the mechanisms identified in B(iii) above in terms of these 'criteria for effectiveness', and will analyse and report on the responses.

D Drawing conclusions and making recommendations

(i): On the basis of the mapping exercise (B) and the survey on effectiveness criteria (C), we will

> (a) draw some conclusions as to where the effectiveness gaps *in* existing mechanisms lie and make some general recommendations as to how they might be improved.
> (b) draw conclusions as to where the functional gaps *between* existing mechanisms lie and make some general recommendations as to how these might best be filled.

E   Gaining maximum benefit from the second workshop in November

(i) We will need to assess in the early autumn how best to benefit from workshop participants' experience and expertise at the second workshop in November. At this stage, it seems likely that this would be an ideal occasion for the group to test, debate and help adjust and hone any emerging conclusions and recommendations that would be the product of part D above.