ARTICLE

The Stewardship of Trust in the Global Value Chain†

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Global governance has not yet caught up with the globalization of business. As a result, our headlines provide daily accounts of the extent and consequences of these "governance gaps." The ability of corporations to evade state control also contributes to an unusual, even frightening, phenomenon: corporations are governing like states. Some governance functions traditionally delivered by state actors are now increasingly undertaken by transnational corporations. One area that is experiencing this substitution is dispute resolution of human rights. Corporations and other business enterprises, individually or collectively, are creating a variety of grievance mechanisms to address human rights and other conflicts associated — even caused — by their business activities.

When these roles are fulfilled by state actors, we rely on procedural fairness to guide, even discipline, decision-makers. Procedural fairness improves our faith in decision-makers and their institutions even if we might disagree with the outcomes reached. What does procedural fairness mean when it is undertaken by a corporation providing quasi-public governance? What factors might improve its disciplining potential on corporations and increase the likelihood that the watching public, local and global, might accept the outcomes reached? Current guidance to corporations is based upon public law traditions. Consequently, success has been limited because these approaches fail to address the characteristics and dynamics of governance by the business sector.

By contrast, this Article offers a new framework for procedural fairness that is based upon a neglected but significant source: contract law. This framework draws upon interdisciplinary research on relational contracts to develop a strategy for trust-building that can improve the quality of governance performed by the transnational business sector.

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INTRODUCTION

Many transactions in the marketplace benefit from trust. Trust can lower the cost of transacting and increase the odds of future exchanges between parties. Unfortunately, it is not easy to build trust, especially when the marketplace is global, the parties are strangers, and their interactions occur under conditions of doubt, suspicion and even violence. These are the conditions in many global value chains (GVCs) through which transnational corporations produce their goods.

Unsurprisingly, these GVCs are sites of recent conflict. In Papua New Guinea, private security personnel employed by the world's largest gold producer, Barrick Gold, were implicated in violence towards local residents.[1] Violence continues to plague the oil-rich Niger Delta region and the multinational oil companies operating there.[2] In South Africa, violence also broke out when fruit farm workers went on strike to protest their low wages.[3] Many of these fruit farm workers occupy the lowest ranks of global supply chains for multinational retail supermarkets.

Many of these conflicts are not new. What *is* new is that access to remedies is not provided by the courts but by corporations.[4] This situation may seem surprising — even disturbing. It is further complicated by the fact that the human rights abuses that occur are often associated — or even caused — by the same corporations that are resolving the dispute and offering remedies. The potential for abuse is high when a multinational corporation decides the fate of a local villager in Indonesia or a factory worker in Mexico.

These characteristics create two related challenges for dispute resolution in the value chain: (a) Why would a local villager, factory worker or farmer trust a grievance mechanism developed by a foreign corporation, especially when this same corporation is often to blame for the grievances? and (b)

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1. HUMAN RIGHTS WATCH, GOLD'S COSTLY DIVIDEND: HUMAN RIGHTS IMPACTS OF PAPUA NEW GUINEA'S PORGERA GOLD MINE (2011).

2. Daniel Balint-Kurti, *Nigerian Army on Alert Amid Oil Unrest: Chevron Closes Two Flow Stations; Shell Staff Leaves*, BOSTON GLOBE, Sept. 24, 2005, http://archive.boston.com/news/world/africa/articles/2005/09/24/nigerian_army_on_alert_amid_oil_unrest; *Chevron Pipeline Attacked in Nigeria*, WALL ST. J., Jan. 9, 2010, http://www.wsj.com/articles/SB126303670192923185.

3. *South Africa Police Fire Rubber Bullets at Farm Workers*, BBC NEWS, Jan. 9, 2013, http://www.bbc.com/news/world-africa-20957069.

4. *See, e.g.*, DISPUTE OR DIALOGUE? COMMUNITY PERSPECTIVES ON COMPANY-LED GRIEVANCE MECHANISMS 27 (Emma Wilson & Emma Blackmore eds., 2013) [hereinafter DISPUTE OR DIALOGUE]; Caroline Rees & David Vermijs, *Mapping Grievance Mechanisms in the Business and Human Rights Arena* (Harv. Kennedy Sch. Corp. Soc. Responsibility Initiative Report No. 28, 2008); *Human Rights in the Mining & Metals Industry: Handling and Resolving Local Level Concerns & Grievances*, INTERNATIONAL COUNCIL ON MINING AND METALS (ICMM) (2009), http://www.icmm.com/document/691 [hereinafter ICMM]; IPIECA, *Community Grievance Mechanisms in the Oil and Gas Industry: A Manual for Implementing Operational-Level Grievance Mechanisms and Designing Corporate Frameworks* (2015).

How do we reduce the risk that corporations will exploit these mechanisms to advance their own interests?

This Article offers a framework for addressing these challenges when corporations and other business enterprises create dispute resolution mechanisms to address conflicts related to their business activity abroad.

When building institutional trust, the intuition is to turn to public law. Public law's relevance is clear. The state must continually manage its relationship with its citizenry and this relationship depends on public perceptions of the processes by which the state and its representatives make decisions that affect the general welfare of the citizenry. The movement for procedural justice has long recognized the importance of trust for creating fair processes.[5]

The public approach is reflected in the advice of the United Nations to corporations that emphasizes the importance of trust for successful company-led dispute resolution of human rights abuses.[6] Its particular prescription for trust-building is stakeholder engagement. According to the United Nations, corporations can facilitate trust in their dispute resolution mechanisms by including a broad range of affected stakeholders — such as community members, local NGOs, trade unions, laborers, and suppliers — in the design of dispute resolution mechanisms.[7]

Unfortunately, this advice is incomplete. This Article argues that the missing piece is supplied by a neglected source: contract law.[8] This revelation may seem as surprising as the reality that corporations are addressing conflicts involving human rights. However, dealmakers and their attorneys also worry about trust. They also confront the challenge of building trust between unfamiliar, even hostile, parties. A rich literature

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5. TOM R. TYLER, WHY PEOPLE OBEY THE LAW 151 (1990).

6. Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, ¶ 31(a), Human Rights Council, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) (by John Ruggie) [hereinafter *Guiding Principles on Business and Human Rights*] (explaining that effective grievance mechanisms must be perceived as legitimate, defined as "enabling trust from the stakeholder groups for whose use they are intended"). An extensive literature discusses the importance of perceptions of legitimacy for institutional success. *See, e.g.*, Carrie Menkel-Meadow, *When Litigation Is Not the Only Way: Consensus Building and Mediation As Public Interest Lawyering*, 10 WASH. U. J.L. & POL'Y 37 (2002); Daniel M. Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?*, 93 AM. J. INT'L L. 596, 603 (1999) ("[P]erceptions of legitimacy are an important basis of effectiveness and . . . whether international environmental regimes are perceived as legitimate will play an important role in their long-term success."); Laura A. Dickinson, *The Promise of Hybrid Courts*, 97 AM. J. INT'L L. 295, 301 (2003); TYLER, *supra* note 5, at 161.

7. *Guiding Principles on Business and Human Rights*, *supra* note 6, at ¶ 31(h).

8. For example, studies recognizing the importance of stakeholder participation in institutional design have relied on moral philosophy, political science, and social psychology to address risks of stakeholder engagement. Contract law is usually not consulted. *See*, *e.g.*, Jaya Ramji-Nogales, *Designing Bespoke Transitional Justice: A Pluralist Process Approach*, 32 MICH. J. INT'L L. 1, 21–24 (2010).

studies their strategies for overcoming these challenges.[9] This insight is particularly important because it not only recognizes the importance of trust but also provides guidance on how to create trust between strangers in situations where trust is low and interests are adverse.[10] This Article draws upon contract theory to supplement the guidance of the United Nations and other human rights bodies. Perhaps fittingly, the result is a "public-private" framework for procedural fairness that addresses the "public-private" phenomena of corporate actors addressing human rights abuses and other conflicts.

The implications of this framework are considerable for addressing human rights globally. Lawyers are usually tempted to answer the accountability gap in international law with a robust adjudicative or semi-adjudicative body that satisfies our notions of accountability. This temptation to equate accountability with judicialization may result from a belief that the use of a court or similar body will help legitimize the process adopted and the outcomes reached.

This Article suggests a different pathway for accountability by illustrating the benefits of decentralized, dialogue-based approaches to address violations of human rights by corporations and other business enterprises. This Article argues that the level of trust that stakeholders place in a dispute resolution mechanism is not only a product of its attributes during the operational stage. Instead, these mechanisms are perceived as legitimate when the processes leading up to their creation — institutional design — build trust between the stakeholders involved.

One may wonder why corporations are motivated to resolve disputes, much less resolve them in ways that accord with procedural fairness. After all, many corporations purposefully relocate to faraway places that are also less regulated spaces where they can operate unfettered by host states or home states alike.[11] One reason is that this "accountability gap" has not gone unnoticed and the increasing number of headlines documenting the consequences of this accountability gap has led to various initiatives for change. For example, in June 2014, the Human Rights Council adopted a resolution by Ecuador and South Africa to consider an international legally binding instrument addressing transnational business and human rights.[12] In another example, the Working Group on an International Arbitration Tribunal on Business and Human Rights has proposed an international

9. *See* Robert E. Scott, *A Theory of Self-Enforcing Indefinite Agreements*, 103 COLUM. L. REV. 1641, 1644–45 (2003); Ronald J. Gilson, Charles F. Sabel & Robert E. Scott, *Braiding: The Interaction of Formal and Informal Contracting in Theory, Practice, and Doctrine*, 110 COLUM. L. REV. 1377 (2010).

10. *See generally* Gilson, Sabel & Scott, *supra* note 9.

11. *See* Mathias Koenig-Archibugi, *Transnational Corporations and Public Accountability*, 39 GOV'T & OPPOSITION 234, 239 (2004).

12. G.A. Res. 26/22, U.N. Doc. A/RES/26/22 (June 27, 2014).

permanent tribunal to address human rights abuses by transnational businesses.[13]

Corporations are also motivated to develop their own dispute resolution mechanisms in order to demonstrate their willingness and capacity to address these accountability concerns. They may need to engage in dispute resolution in order to obtain financing or secure certain forms of certification.[14] Finally, it can benefit a corporation to invest in an effective and trusted dispute resolution mechanism. Such a mechanism may allow corporations to address issues early before these issues escalate into conflicts imposing significant financial and reputational costs. In the words of a Peruvian community leader, "[t]hey paid no attention to us when we raised small problems, so we had to create a big one."[15] In order for these mechanisms to work effectively, however, the potential disputants must trust the mechanisms enough to use them.

This Article's project of creating fair processes for institutional design builds on scholarship examining the legitimacy of global governance institutions.[16] The global administrative law movement's prescriptions — often based on legitimacy of public institutions — are valid and important for governance by international bodies. Unfortunately, these prescriptions are more challenging to apply when the governance is performed by corporations, especially in the context of non-judicial forms of dispute resolution.

This Article focuses on the potential for corporations and other business actors to ameliorate some of the negative effects of their transnational business activity. This is not a complete solution for all the risks and abuses currently rampant in international production. It is also not meant to serve as a substitute for public action, whether local or global. Instead, it is offered as an avenue for improving current practices in

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13. Claes Cronstedt et al., *An International Arbitration Tribunal on Business & Human Rights — Reshaping the Judiciary*, https://business-humanrights.org/sites/default/files/documents/Tribunal%20Version%205.pdf.

14. Natalie L. Bridgeman & David B. Hunter, *Narrowing the Accountability Gap: Toward a New Foreign Investor Accountability Mechanism*, 20 GEO. INT'L ENVTL. L. REV. 187, 210 (2008).

15. DISPUTE OR DIALOGUE, *supra* note 4, at 29 (quoting John Ruggie, Professor, Harvard Kennedy School of Gov't, Keynote Address at Canadian Business for Social Responsibility: Just Business: Why Companies Must Pay Attention to Human Rights (Nov. 5, 2009)).

16. *See, e.g.*, Allen Buchanan & Robert O. Keohane, *The Legitimacy of Global Governance Institutions*, 20 ETHICS & INT'L AFF. 405 (2006); Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 L. & CONT. PROBS. 15 (2005); Jost Delbrück, *Exercising Public Authority Beyond the State: Transnational Democracy and/or Alternative Legitimation Strategies?*, 10 IND. J. GLOBAL LEGAL STUD. 29 (2003); Daniel Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?*, 93 AM. J. INT'L L. 596, 602–03 (1999); *see also* Michael P. Vandenbergh, *The New Wal-Mart Effect: The Role of Private Contracting in Global Governance*, 54 UCLA L. REV. 913 (2007); Terry Macdonald & Kate Macdonald, *Non-Electoral Accountability in Global Politics: Strengthening Democratic Control Within the Global Garment Industry*, 17 EUR. J. INT'L L. 89 (2006).

international business by examining the effects, motivations, and capacities of business enterprises.[17] As such, it is consistent with similar recognition of the importance of business sector participation in global governance under the United Nations' Protect, Respect, and Remedy Framework.[18]

The Article is organized as follows: Part I explains why corporations are investing in dispute resolution and the importance of procedural fairness for institutional design. Part II explains why current research on global governance institutions does not address the problems confronted by corporations regarding the design of their dispute resolution mechanisms. Part III explains and applies a new framework for procedural fairness in the institutional design of grievance mechanisms. Part IV considers the implications of this framework for other stages in private institutional development. Finally, Part V uses a global value chain analysis to explain the applicability and limitations of using procedural fairness across value chains.

I. INSTITUTIONAL DEVELOPMENT BY THE TRANSNATIONAL BUSINESS SECTOR

Increasingly, corporations and other business enterprises are undertaking activities that we normally associate with a government actor. They develop standards governing environmental and labor standards.[19] They monitor human rights abuses.[20] They are now starting to provide remedies for a range of social ills caused by their business activities.

This rise in corporate-led institutional development may be undesirable. Instead of the business sector, we may prefer that robust public institutions fill these roles instead. The difficulty is that the globalization of business occurred more swiftly and effectively than global governance. The dispersion and fragmentation of global business, especially production, across several borders challenges traditional, state-based forms of public governance. This challenge is exacerbated when corporations concentrate production in places where local government is an ineffective check on corporate activity.

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17. Michael P. Vandenbergh, *Private Environmental Governance*, 99 CORNELL L. REV. 129, 138 (2013).

18. John Ruggie (U.N. Secretary-General's Special Representative for Business and Human Rights), *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises: Protect, Respect and Remedy: A Framework for Business and Human Rights*, U.N. Human Rights Council, 189 U.N. Doc. A/HRC/8/5 (Apr. 7, 2008) [hereinafter *Framework*] (noting that this framework creates a distinct role for businesses "to respect human rights," primarily through increased due diligence to "become aware of, prevent and address adverse human rights impacts").

19. *See, e.g.*, Mark B. Baker, *Promises and Platitudes: Toward a New 21st Century Paradigm for Corporate Codes of Conduct?*, 23 CONN. J. INT'L L. 123 (2007); Vandenbergh, *supra* note 17, at 146.

20. Baker, *supra* note 19, at 123.

These less regulated spaces give rise to several governance gaps that reveal the limits of state-based regulation. Some of these governance gaps are addressed by the corporations themselves. This section explains why corporations are addressing one form of governance gap: accountability through grievance mechanisms. It is necessary to understand these reasons in order to appreciate the leverage points for improving the quantity and quality of corporate-led institutional development. These reasons generally fall into two categories: internal and external drivers for private governance.

A. External Drivers: Why Companies May Want a Grievance Mechanism

External drivers for institutional development are derived from growing expectations of corporations that parallel their expansion on the world stage. As the resources and footprint of the transnational business sector expands, we expect more from them besides the pursuit of profit. At the very least, there is an increasing expectation that corporations and other business enterprises should curb the harmful effects of their own transnational activity.[21]

Consequently, national governments and international organizations are also increasing pressure on businesses to make themselves more accountable to those impacted by their activities. Many international, regional, and national financial bodies offer dispute resolution services to stakeholders[22] negatively affected by projects financed through these bodies.[23] Similarly, many companies now need to develop their own operation-level grievance mechanisms as a condition of financing. Several commercial banks have signed on to the Equator Principles[24] and require their clients to develop grievance mechanisms for the local communities when the client's project involves significant environmental and social impacts.[25] Countries are also applying pressure on multinationals to develop these processes. Under a 2008 motion by the Australian Federal Parliament,

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21. *See supra* notes 14–17 and accompanying text; *see also* Christiana Ochoa, *Corporate Social Responsibility and Firm Compliance: Lessons from the International Law-International Relations Discourse*, 9 SANTA CLARA J. INT'L L. 169, 175 (2011).

22. A stakeholder is "any group or individual who can affect or is affected by the achievement of the organisation's objectives." R. EDWARD FREEMAN, STRATEGIC MANAGEMENT: A STAKEHOLDER APPROACH 46 (1984). For a list of additional definitions of stakeholder, see Paul Littau, Nirmala Jyothi Jujagiri & Gerald Adlbrecht, *25 Years of Stakeholder Theory in Project Management Literature (1984–2009)*, PROJECT MGMT. J. 17, 29 (2010).

23. *See infra* notes 79–91 and accompanying text.

24. *About the Equator Principles*, EQUATOR PRINCIPLES, http://www.equator-principles.com/index.php/about-ep/about-ep (last visited Feb. 1, 2015) ("The Equator Principles (EPs) is a risk management framework, adopted by financial institutions, for determining, assessing and managing environmental and social risk in projects and is primarily intended to provide a minimum standard for due diligence to support responsible risk decision-making.").

25. Bridgeman & Hunter, *supra* note 14, at 210; DISPUTE OR DIALOGUE, *supra* note 4, at 27.

the Australian government now "encourage[s] Australian companies to respect the rights of members of the communities in which they operate and to develop rights-compliant grievance mechanisms, whether acting in Australia or overseas."[26]

A second external driver is that businesses may experience pressure to develop and participate in credible and effective methods of dispute resolution in order to preclude more robust international institutional solutions. One group of lawyers has proposed a permanent international arbitration tribunal on business and human rights.[27] This tribunal "would likely have wide-ranging subject matter jurisdiction, covering all human rights for which a cause of action could arise under the laws of a state that are applicable to a particular abuse."[28]

Third, some investment funds, such as pension funds and socially responsible investment funds, are encouraging companies to adopt grievance mechanisms.[29] As such, the use of grievance mechanisms may be important in order for a company to remain in certain stock market indexes that privilege socially responsible behavior.[30] The rise of investor preferences for socially responsible investing only increases the power of this driver.

Fourth, corporations may need to adopt a grievance mechanism in order to secure certifications from organizations such as the Forest Stewardship Council (FSC) and the International Organization for Standardization (ISO).[31]

Another set of external drivers comes from industry and multi-industry groups that are actively encouraging their members to develop grievance mechanisms. For example, the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises states that enterprises should "[p]rovide for or co-operate through legitimate processes in the remediation of adverse human rights impacts where they identify that they have caused or contributed to these impacts."[32]

The Ethical Trading Initiative (ETI) requires that member companies adopt or incorporate the ETI Base Code into their own corporate codes.[33] The ETI Base Code is based on national and international labor standards

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26. Deanna Kemp & Nora Gotzmann, *Community Grievance Mechanisms and Australian Mining Companies Offshore: An Industry Discussion Paper*, CSRM 7 (2008), http://www.csrm.uq.edu.au/docs/CSRM_%20minerals%20industry%20grievance%20discussion%20paper_FINAL.pdf.

27. Claes Cronstedt et al., *supra* note 13.

28. *Id.*

29. DISPUTE OR DIALOGUE, *supra* note 4, at 27.

30. *Id.*

31. *Id.*

32. OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES (2011).

33. Rees & Vermijs, *supra* note 4, at 42.

and addresses labor rights issues such as forced labor, freedom of association, and child labor.[34] The ETI's Principles of Implementation require that ETI member companies provide a confidential method for workers at their supply factories to report the factory's violation of the applicable corporate code.[35]

The trouble with external drivers is that they are often insufficient to lead to the adoption of *effective* grievance mechanisms. Many of these motivations privilege interests other than dispute resolution; the grievance mechanism is simply a step to achieve some other desired goal, such as financing. As a result, these drivers may contribute to the proliferation of grievance mechanisms but these mechanisms may not be very good because the corporations may lack a genuine interest in the mechanism's success. That is why external drivers are not enough. The following section explores internal drivers for why corporations do — or should — genuinely desire an effective grievance mechanism.

B. Internal Drivers: Why Companies May Want an Effective Grievance Mechanism

The internal drivers for effective dispute resolution vary by industry. The extractive sector is particularly active with regard to the development of grievance mechanisms. A 2013 study by the International Institute for Environment and Development (IIED) identified several mechanisms implemented in the oil, gas, and mining industries.[36] In January 2015, the global oil and gas industry association for environmental and social issues (IPIECA) released a detailed and extensive manual providing step-by-step guidance for companies on how to design and implement grievance mechanisms.[37] This manual was based on seven pilot projects undertaken over several years and is intended to implement the UN Guiding Principles on Business & Human Rights.[38] Similarly, in 2009, the International Council on Mining & Metals (ICMM) also released a manual for its members on resolving local grievances.[39]

This level of activity may come as a surprise given the poor human rights records of many companies in these industries. However, these industry

34. *Id.*

35. *Id.*

36. DISPUTE OR DIALOGUE, *supra* note 4, at 23.

37. *Community Grievance Mechanisms in the Oil and Gas Industry: A Manual for Implementing Operational-Level Grievance Mechanisms and Designing Corporate Frameworks*, IPIECA, http://www.ipieca.org/publication/community-grievance-mechanisms-oil-and-gas-industry-manual-implementing-operational-leve (last visited Feb. 1, 2015).

38. *Id.* at 4.

39. ICMM, *supra* note 4.

associations see multiple benefits for their members in effective dispute resolution. First, according to the ICMM, an effective grievance mechanism can "serve as a tool to build local trust and a common understanding of the issues and thereby strengthen stakeholder support for projects."[40] It is becoming more difficult for global companies to operate without the support — to some degree — of the local population.[41] Lack of such support is manifested through a range of activities, from protests to lawsuits to attacks on infrastructure.[42] Such activities impose significant costs on corporations, both financial and reputational. An *effective* grievance mechanism, using processes acceptable to local stakeholders, can offer a way for a corporation to resolve issues in a manner that encourages local support.

Second, by offering an effective forum for dispute resolution, a grievance mechanism can reduce the likelihood that local actors unhappy with company practices will resort to violent forms of opposition.[43] In the extractive sector, many acts of opposition, including violent conflict, "begin as relatively minor issues at a local community level that could have been resolved early and peacefully."[44] A critical benefit of an effective grievance mechanism is that "it enables companies to identify minor community incidents before they escalate into unmanageable disputes."[45]

These factors explain why extractive companies have been among the most active regarding the adoption of grievance mechanisms. However, the utility of grievance mechanisms is not limited to the oil, gas, and mining sectors. There are also important reasons why companies in other industries, such as global electronics and garments, may also want to invest in effective grievance mechanisms. For example, these mechanisms offer a superior form of risk management in the value chain. Due diligence can be challenging when the sites of production are dispersed around the globe.

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40. *Id.* at 3.

41. *See* Paul Klein, *Three Ways to Secure Your Social License to Operate in 2013*, FORBES (Dec. 28, 2012, 12:26 PM), http://www.forbes.com/sites/csr/2012/12/28/three-ways-to-secure-your-social-license-to-operate-in-2013.

42. *See, e.g.*, Alan Neuhauser, *Will There Be Blood?*, U.S. NEWS & WORLD REP. (July 29, 2015, 12:01 AM), http://www.usnews.com/news/articles/2015/07/29/mexico-faces-cartel-security-risks-in-opening-energy-sector ("Mexico's plan for new profits comes with plenty of risk, as hopes for foreign investment in the country's ailing oil and gas sector hinge largely on the government's ability to contain powerful and often ruthless criminal organizations like Los Zetas and the Sinaloa Cartel, or at the very least to compel them not to attack foreign oil and gas sites . . . Experts also say the gangs extort industrial facilities for rent or protection, and steal oil from pipelines — costing Pemex more than $1 billion in 2014 alone . . . ."); Conor Gaffey, *Nigeria Shuts Two Oil Refineries as Niger Delta Militancy Looms*, NEWSWEEK (Jan. 21, 2016, 1:20 PM), http://www.newsweek.com/nigeria-shuts-two-oil-refineries-niger-delta-militancy-looms-418267 (explaining that Nigeria's state oil company closed down two of its oil refineries after attacks by militants).

43. ICMM, *supra* note 4, at 3; DISPUTE OR DIALOGUE, *supra* note 4, at 28–29.

44. DISPUTE OR DIALOGUE, *supra* note 4, at 29.

45. *Id.*

Such fragmented production exposes companies to significant agency cost problems.[46] It can be challenging for a corporation based in New York to know how its suppliers are treating workers in the supply chain. Corporations dispatch their own monitors or third party monitors to inspect the production sites of their suppliers.[47] These monitors audit the facilities to make sure that the suppliers are in compliance with corporate codes of conduct. Such monitoring is meant to correct the asymmetrical information flow between corporations and suppliers and minimize risks to the former.

Unfortunately, audits of supplier sites repeatedly fail to reveal conditions of worker abuse. The problem is that suppliers engage in a range of practices that compromise the information value of audits.[48] For example, they coach workers on responses and intimidate them into providing a false image of compliance.[49] Suppliers also hide workers, such as children, from visiting monitors.[50] The result is that a corporation spends considerable resources to gain limited information and is still exposed to the reputational consequences that could result from supplier behavior.

An alternative method of addressing the problem is providing workers with a grievance mechanism. This way, a corporation learns of the conditions at a site directly from the workers.[51] Such information allows a corporation to respond to the grievance before it escalates. It also provides the corporation with an opportunity to take preventive action or improve the operations of their value chain.[52]

As Michael Vandenbergh explains, corporate social responsibility is often a product of the "preference of individuals in importing countries for sustainable practices in exporting countries."[53] The individual preferences that matter are those of consumers and investors who offer strong market incentives for environmental or labor standards in supply chains.[54] As a result, corporate social responsibility is now part of the brand reputation for many global companies. These companies are therefore sensitive to media

46. Kishanthi Parella, *Outsourcing Corporate Accountability*, 89 WASH. L. REV. 747, 749 (2014).

47. *Id.* at 775–76.

48. Daniella Gould, *The Problem with Supplier Audits: Understanding How and Why Chinese Factories Circumvent Codes of Conduct*, 2 CORP. RESP. MGMT. 24, 25–26 (2005).

49. Ngai-Ling Sum & Pun Ngai, *Globalization and Paradoxes of Ethical Transnational Production: Code of Conduct in a Chinese Workplace*, 9 COMPETITION & CHANGE 181, 194 (2005).

50. Charles Kernaghan, *Child Labor is Back: Children Are Again Sewing Clothing for Major U.S. Companies*, THE NAT'L LABOR COMM. (2006), http://www.globallabourrights.org/reports/200610-IGLHR-Child-Labor-Is-Back.pdf.

51. Caroline Rees, *Piloting Principles for Effective Company-Stakeholder Grievance Mechanisms: A Report of Lessons Learned*, HARV. KENNEDY SCH. CORP. SOC. RESPONSIBILITY INITIATIVE (2011), http://www.hks.harvard.edu/m-rcbg/CSRI/publications/report_46_GM_pilots.pdf [hereinafter *Piloting Principles*].

52. *See* Michael E. Porter & Mark R. Kramer, *Creating Shared Value*, HARV. BUS. REV., Jan.–Feb. 2011, at 67–69.

53. Vandenbergh, *supra* note 16, at 921.

54. *Id.* at 947; *see also* Koenig-Archibugi, *supra* note 11, at 249–50.

reports that they engage in human rights abuses because these reports can harm their sales and share prices. A grievance mechanism can allow a company to address a grievance before its brand reputation is damaged from media exposure.

Finally, grievance mechanisms are not intended to serve as substitutes to judicial remedies.[55] However, a trusted and fair grievance mechanism may encourage affected stakeholders to raise their claims through the grievance process instead of through litigation.

II. PRIVATE INSTITUTIONAL DEVELOPMENT AND THE PROBLEM OF MISTRUST

In order for private institutional development to succeed, these institutions must be accepted by those who are most affected. For example, in the institutional development of grievance mechanisms, the United Nations Guiding Principles recognizes the importance of "enabling trust from the stakeholder groups for whose use [the grievance mechanisms] are intended, and being accountable for the fair conduct of grievance processes."[56] However, much of the attention to creating this trust focuses on the attributes of the grievance mechanism at its operational stage. The majority of the effectiveness criteria for non-judicial mechanisms under Article 31 of the UN Guiding Principles relate to grievance mechanism functions once it is operational.

Instead, designers of grievance mechanisms should recognize that the extent to which an institution is trusted does not only result from its attributes when it is operational. This trust is also a product of the processes that led to the operational stage: standard-setting and institutional design (see Figure 1).

Figure 1: Three stages of private institutional development of grievance mechanisms.

In the context of grievance mechanisms, *standard-setting* refers to the development of codes of conduct that govern environmental, labor, and social issues in international production. *Institutional design* refers to the process of deciding issues such as the mandate of the grievance mechanism, the remedies available, and the process(es) available for dispute resolution.

55. *Guiding Principles on Business and Human Rights*, *supra* note 6, at ¶ 26–29 and commentary.
56. *Id.* at ¶ 31(a).

Finally, the *operational stage* refers to the processes used to address a party's grievance (see Figure 2).

Stage of Institutional Development	Example
STANDARD-SETTING	• Electronic Industry Citizenship Coalition (EICC) Code of Conduct
INSTITUTIONAL DESIGN	• Tesco's Oversight Stakeholder Body (OSB)
OPERATIONAL	• Information facilitation • Negotiation • Mediation/conciliation • Investigation • Arbitration • Adjudication

Figure 2: Examples of the three stages of institutional development.

Building trust for a grievance mechanism should not begin once the mechanism is operational; instead, it should begin much earlier with the processes used for standard-setting and institutional design. Each of these processes is important because it allows the affected parties — such as representatives of the business enterprise, workers, and community members — to build trust between each other and in relation to the grievance mechanism that is created. Each of these stages is an exercise in trust-building; the success of that trust-building will have downstream effects on the level of trust that the resulting institution enjoys once it is operational. It is therefore a mistake to focus only on the operational stage of a grievance mechanism while neglecting the processes used during these other critical stages of institutional development. The following sections expand on these different stages of institutional development for non-judicial grievance mechanisms. Each section also discusses illustrative examples of mistrust that can characterize the relationship between the parties involved in each of these three stages.

A. Stage 1: Standard-Setting

The first stage of institutional development for a grievance mechanism relates to the standards that it will apply. It is important to note that many sites of international production occur in places where the rule of law is weak. There is often a lack of local laws proscribing undesirable conduct or ineffective access to remedies through local courts for the enforcement of such laws. These inadequacies may partially explain why so many global companies have relocated the production of their goods to these less regulated spaces.

However, alliances between the media and NGOs have revealed the consequences of such less regulated spaces and mobilized civil society demands for better practices by the transnational business sector. The result was the proliferation of private codes of conduct developed by companies — individually or collectively, with or without consultation of other stakeholders — regarding what happens in their supply chains. Now hundreds of global brands and retailers boast corporate codes of conduct that are meant to establish social and environmental standards for their suppliers. For example, HP's Supplier Social & Environmental Responsibility Agreement states that suppliers are "responsible for identifying any areas of its operations that do not conform to HP's Supplier Code of Conduct and HP's General Specification for the Environment," as well as "implementing and monitoring improvement programs designed to achieve" these standards.[57] The agreement also gives HP the right to progress reports and the right to records for verification of the information in the supplier's reports.[58]

This example of a company-level code of conduct also reflects broader consensus on applicable standards. The HP Code of Conduct is based on the Electronic Industry Citizenship Coalition (EICC) Code of Conduct that establishes "standards to ensure that working conditions in the electronics industry supply chain are safe, that workers are treated with respect and dignity, and that business operations are environmentally responsible."[59] The EICC, in turn, reflects international norms embodied in other instruments: "[The] standards set out in the Code of Conduct reference international norms and standards including the Universal Declaration of Human Rights, ILO International Labor Standards, OECD Guidelines for Multinational Enterprises, ISO and SA standards, and many more."[60]

Despite their proliferation, these codes have not proven very effective and suppliers often knowingly violate their standards.[61] A study commissioned by the World Bank attempted to diagnose the primary failings of these corporate codes. Unsurprisingly, the study found that these codes did not garner much support from suppliers because of their

57. *Supplier Social & Environmental Responsibility Agreement*, HP INC. (2008), http://www.hp.com/hpinfo/globalcitizenship/environment/pdf/supagree.pdf [hereinafter HP AGREEMENT].

58. *Id.*

59. *HP Supplier Code of Conduct*, HP INC. (2015), http://www.hp.com/hpinfo/globalcitizenship/environment/pdf/supcode.pdf.

60. *Code of Conduct*, EICC, http://www.eiccoalition.org/standards/code-of-conduct/ (last visited Apr. 11, 2016).

61. Helle Bank Jørgenson et al., *Strengthening Implementation of Corporate Social Responsibility in Global Supply Chains*, WBG 25 (2003), http://siteresources.worldbank.org/INTPSD/Resources/CSR/Strengthening_Implementatio.pdf.

marginalization and neglect in creating the applicable codes.[62] Many codes of conduct are developed unilaterally by companies or industries.[63]

This marginalization of lower-tier suppliers and workers comes at significant costs for compliance with these codes. According to the World Bank Study, "[s]uppliers tend to see the top-down approach as problematic because it does not involve them sufficiently in the development and implementation of codes."[64] Their marginalization in the process of creating the codes means that suppliers are often unaware of the process of improving labor and environmental practices.[65] It also reduces the likelihood of local ownership of the codes and compromises adaptation of a global code to the local context.[66] Neglect of suppliers also means that there is a lost opportunity to change supplier attitudes towards codes and alter a culture of "non-compliance" among suppliers.[67]

Suppliers also tend not to trust these codes when they are drafted without their involvement and without appreciation of their interests and constraints in achieving implementation. For example, the World Bank Study found that many suppliers mistrust the motivations of buyers because of the tension between the standards promoted in corporate codes of conduct and the substantial pressure that suppliers experience to lower prices and decrease turnaround times.[68] This tension between the twin goals presented by buyers leads to mistrust by suppliers regarding the motivation and genuine commitment of buyers to their stated standards. Increased auditing may even compound this mistrust because it sends external signals to suppliers regarding the buyer's lack of trust in them.[69]

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62. *Id.*

63. Niklas Egels-Zandén & Peter Hyllman, *Evaluating Strategies for Negotiating Workers' Rights in Transnational Corporations: The Effects of Codes of Conduct and Global Agreements on Workplace Democracy*, 76 J. BUS. ETHICS 207, 215 (2007) (contrasting the "unilateral nature of codes of conduct" with the "bilateral union-TNC negotiation structure" used in global agreements); *see also id.* at 218 ("Codes of conduct narrowly focus on the outcome components of workplace democracy, while neglecting process components such as shared sovereignty, participation, and access to information and education.").

64. Helle Bank Jørgenson et al., *supra* note 61, at 23.

65. *Id.* at 23–24.

66. *Id.*

67. *Id.*

68. *Id.* at 25.

69. *See* Margaret M. Blair & Lynn A. Stout, *Trust, Trustworthiness, and the Behavioral Foundations of Corporate Law*, 149 U. PA. L. REV. 1735, 1809 (2001).

B. Stage 2: Institutional Design

Many corporations operate in situations characterized by high mistrust between themselves and the local communities.[70] This mistrust often results from long histories of human rights violations that went unaddressed by local government actors and the corporations themselves.[71] Civil conflict only exacerbates these conditions for mistrust, especially when the conflict concerns distributional outcomes and governance arrangements between the national government and local communities.[72] It is therefore not surprising that the stakeholders who are meant to use a grievance mechanism may view it with a skeptical eye.

The process of institutional design offers corporations an opportunity to overcome this trust deficit by communicating with local actors about the grievance mechanisms and the corporation's objectives. It can also offer a valuable setting for stakeholder feedback on what they want in a grievance mechanism. For these reasons, a variety of guidelines and best practices recommend engaging local stakeholders during the institutional design stage.[73] For example, Principle 31(h) of the UN Guiding Principles advises that operational-level grievance mechanisms should be based on "engagement and dialogue" that involves "consulting the stakeholder groups for whose use they are intended on their design and performance."[74] Commentary to Principle 31 explains that "[f]or an operational-level grievance mechanism, engaging with affected stakeholder groups about its design and performance can help to ensure that it meets their needs, that

70. *See, e.g.*, Hendrik Kotze, *Farmworker Grievances in the Western Cape, South Africa*, ACCESS CASE STORY SERIES (2014), http://accessfacility.org/sites/default/files/Farmworker%20Grievances%20Western%20Cape%20South%20Africa.pdf.

71. *See* Joe Brock, *Shell Fuelled Human Rights Abuses in Nigeria — NGO*, REUTERS (Oct. 3, 2011, 1:39 PM), http://www.reuters.com/article/2011/10/03/nigeria-shell-idUSL5E7L33Q720111003.

72. *See The Price of Oil: Corporate Responsibility and Human Rights Violations in Nigeria's Oil Producing Communities*, HUMAN RTS. WATCH 84 (1999), https://www.hrw.org/reports/1999/nigeria/nigeria0199.pdf.

73. *See* Sarah Knuckey & Eleanor Jenkin, *Company-Created Remedy Mechanisms for Serious Human Rights Abuses: A Promising New Frontier for the Right to Remedy?*, 19 INT'L J. HUM. RTS. 801, 806 (2015).

74. *Guiding Principles on Business and Human Rights*, *supra* note 6, at ¶ 31(h). Similarly, the Office of the Compliance Advisor/Ombudsman of the International Finance Corporation recommends stakeholder engagement during the developmental and operational phases of the grievance mechanism. *A Guide to Designing and Implementing Grievance Mechanisms for Development Projects*, OFFICE OF THE COMPLIANCE ADVISOR/OMBUDSMAN 2 (2008), http://www.caoombudsman.org/howwework/advisor/documents/implemgrieveng.pdf. These recommendations are supported by "best practice" studies of grievance mechanisms already in place. *Assessing the Effectiveness of Company Grievance Mechanisms: CSR Europe's Management of Complaints Assessment (MOC-A) Results*, CSR EUR. (2013), http://www.csreurope.org/sites/default/files/Report%20Summary-%20Management%20of%20Complaints%20assessment-%20final%20Dec%202013.pdf; *Piloting Principles*, *supra* note 51.

they will use it in practice, and that there is a shared interest in ensuring its success."[75]

Although stakeholder engagement is important for institutional design, it is not enough to ensure trust-building and the creation of an effective grievance mechanism. The following case provides an illustration of the challenges of stakeholder engagement. The retail supermarket Tesco sources fruit from over 600 farms across the Western Cape of South Africa.[76] Tesco expects all its suppliers to abide by the standards of the ETI Base Code.[77] It recently piloted a grievance mechanism for farm-level disputes in the Western Cape Region of South Africa in order to enforce the standards of the ETI Base Code and as part of a broader study on effective principles for grievance mechanisms.[78]

When Tesco started the process of designing a grievance mechanism, its representatives knew that they were confronting a significant trust deficit. There was a high level of mistrust between key stakeholders in the fruit value chain in the region because of a number of structural issues in the fruit sector, including discriminatory hiring and employment practices and health and safety conditions on the farms.[79] Tesco attempted to build trust and create "buy-in" for its grievance mechanism by establishing an Oversight Stakeholder Body (OSB) composed of members of several stakeholder groups: business, government, trade unions, and other civil society organizations.[80] Their mandate was to design a grievance mechanism for the resolution of farm-level disputes.[81]

The institutional design process began with bold ambitions as Tesco wanted the local stakeholder community to have significant ownership over the design and development of the local grievance mechanisms.[82] Tesco's objectives were apt because, as it learned from the pilot project, "for these types of initiatives to be successful and sustainable in the long-term, local

75. *Guiding Principles on Business and Human Rights*, *supra* note 6, at 27.

76. Kotze, *supra* note 70, at 3.

77. *Our Ethical Trading Approach: Supporting Decent Labour Standards in Tesco's Supply Chain*, TESCO 2 (2015), http://www.tescoplc.com/assets/files/cms/Resources/Trading_Responsibly/Our_Ethical_Trading_approach_Aug_2015.pdf [hereinafter TESCO].

78. Kotze, *supra* note 70, at 3 (describing how Tesco undertook this project in cooperation with the Corporate Social Responsibility Initiative (CSRI) of Harvard University's Kennedy School and both Tesco and CSRI did this project on behalf of the UN Special Representative on Business and Human Rights, John Ruggie).

79. *Id.* at 5; *see also* HUMAN RTS. WATCH, RIPE WITH ABUSE: HUMAN RIGHTS CONDITIONS IN SOUTH AFRICA'S FRUIT AND WINE INDUSTRIES 11 (2011), https://www.hrw.org/report/2011/08/23/ripe-abuse/human-rights-conditions-south-africas-fruit-and-wine-industries.

80. Kotze, *supra* note 70, at 5.

81. *Id.*

82. *Id.* at 7; *From Audit to Innovation: Advancing Human Rights in Global Supply Chains*, SHIFT (2013), http://shiftproject.org/sites/default/files/From%20Audit%20to%20Innovation-Advancing%20Human%20Rights%20in%20Global%20Supply%20Chains_0.pdf [hereinafter *From Audit to Innovation*].

stakeholders need to feel that they own and drive the process, and not that they are being driven by multinational brands and retailers."[83] Tesco made good on this desire for local ownership and even chose to become a non-voting member of the OSB.[84] It also engaged a neutral third-party mediator, Bill Thompson, to facilitate the process.[85]

Despite these good efforts, Tesco was not sufficiently prepared for stakeholder conflict during the institutional design process. One significant conflict that emerged concerned the mandate of the grievance mechanism. Tesco preferred a narrow mandate that was limited to a discrete farm-based, labor-focused complaints-handling mechanism.[86] Other OSB members, however, wanted a broader mandate that allowed for sectoral reform and was not only limited to farm-level grievances.[87] Tesco, under time pressure to develop the grievance mechanism, addressed this conflict by drafting the Terms of Reference for the OSB, which limited the mandate to an operational-level grievance mechanism. Although Tesco submitted the Terms of Reference to the broader OSB group for debate and adoption,[88] its limitation of the mandate "had a decisive impact on the value of the process."[89] Those whose views did not prevail on the issue of the mandate "lost interest and ceased effective participation."[90]

The fact that a conflict arises is not necessarily enough to destroy trust within institutional design; after all, only some members of the OSB rejected the narrower mandate supported by Tesco. However, in order to preserve trust, this conflict must be resolved in a manner that accords with participants' sense of fairness. Unfortunately, it does not appear that was what happened here: "Some of the participants may have felt that the OSB was only established to try and give credentials to a process that had already been decided on. This feeling came about because some OSB members felt that their views were not fully listened to, and that the outcomes were much narrower that what they felt was required."[91] According to Thompson, adherence to an external mandate and deadlines resulted in sporadic and limited attendance at OSB.[92]

The subsequent farmworker protests in 2012 and 2013 reinforced a view among "South African stakeholders that the grievance mechanism

83. *From Audit to Innovation*, *supra* note 82, at 45.
84. Kotze, *supra* note 70, at 7.
85. *Id.*
86. *Id.* at 6.
87. *Id.*
88. *Piloting Principles*, *supra* note 51, at 68.
89. Kotze, *supra* note 70, at 4.
90. *Id.*
91. *Id.* at 7.
92. *Id.* at 8.

produced by the Tesco pilot did not serve as a viable channel for farmworkers to air the simmering grievances underlying these protest actions."[93] Instead, the grievance mechanism was branded as a "Tesco pilot."[94]

Another contributing factor to this failure was insufficient trust-building: "There were severe trust issues around the project. People doubted what Tesco's real agenda might be, which was probably part of general distrust of big multi-nationals. Past history between stakeholders also played a role."[95]

In a follow-up study on the project, South African stakeholders explained that "by not prioritizing time and space for trust-building and buy-in to a common agenda, the process had little prospect of effecting real change in the conflict dynamics or human rights of farmworkers."[96]

C. Stage 3: Operational Stage

In 2014, the Centre for Research on Multinational Corporations (SOMO) reported their findings on a multinational study of factory-level grievance mechanisms used in the global electronics industry.[97] SOMO interviewed or surveyed 337 workers from 40 companies in the electronics industries of China, India, Mexico, the Philippines, and Thailand.[98] SOMO's intent was to evaluate these company-level grievance mechanisms according to the effectiveness criteria of Article 31 of the UN Guiding Principles on Business and Human Rights.[99] As part of this study, SOMO and its partners asked factory workers if they trusted the systems in place and if they were satisfied with the operation and outcomes of these grievance mechanisms.[100] The individuals interviewed worked at factories operated by some of the world's leading contract manufacturers, including Foxconn, Flextronics, Nokia, and Toshiba.[101]

The findings were grim. According to SOMO's study, 64% of the workers did not trust their grievance mechanisms.[102] Trust was particularly low in Mexico (88% mistrust), followed next by India (64% mistrust), and

93. *Id.* at 9.
94. *From Audit to Innovation*, *supra* note 82, at 44.
95. Kotze, *supra* note 70, at 6.
96. *Id.* at 4.
97. Colleen Freeman & Esther de Haan, *Using Grievance Mechanisms: Accessibility, Predictability, Legitimacy and Workers' Complaint Experiences in the Electronics Sector*, SOMO (2014), *available at* http://www.somo.nl/publications-en/Publication_4059.
98. *Id.* at 10.
99. *Id.* at 11.
100. *Id.* at 29.
101. *Id.* at 30.
102. *Id.* at 35.

China and Thailand tying at 57% mistrust.[103] Within these countries, worker trust varied by company. In India, Flextronics enjoyed a particularly high level of trust among workers compared with Nokia and Foxconn.[104] In Thailand, LTEC Fujikura garnered greater worker trust than Sony and Fisher-Paykel.[105] In Mexico, however, the level of mistrust was uniformly high among all three factories surveyed: Flextronics, Foxconn, and Jabil.[106] The reported mistrust was so high among participants that SOMO concluded that "a very large majority of respondents continue to *not* trust their GMs."[107]

The reasons for this mistrust vary, but the primary reasons are: (a) complaints go unresolved, (b) workers fear termination or punishment, (c) the process is not impartial, fair and/or genuine, and (d) not all outcomes are reported.[108] Overall, SOMO concluded that "the companies are basically failing to implement their GM processes in a manner that engenders workers' trust."[109]

III. UNDERSTANDING THE ROOTS OF MISTRUST: PRIMARY V. SECONDARY CONFLICTS

When engaging in institutional development, a corporation should distinguish between *primary* and *secondary* conflicts. This distinction intentionally evokes H.L.A. Hart's typology of rules. Hart distinguished between primary rules and secondary rules in a legal system.[110] Primary rules are rules of conduct concerning what an individual should or should not do; they confer duties on individuals.[111] Examples of primary rules include criminal statutes that identify proscribed behavior.[112] By contrast, secondary rules concern the creation, extinction, and alteration of primary rules; they confer legal powers to modify primary rules.[113] Examples of secondary rules are those that confer "legal powers to adjudicate or legislate (public powers) or to create or vary legal relations (private powers)."[114]

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103. *Id.*

104. *Id.* at 30.

105. *Id.*

106. *Id.*

107. *Id.* at 37; *see also Summary of Discussions of the Forum on Business and Human Rights, Prepared by the Chairperson, Makarim Wibisono*, ¶ 46, U.N. Doc. A/HRC/FBHR/2013/4 (April 15, 2014); UN Forum on Business and Human Rights, *Access to Effective Non-Judicial Remedy — UN Forum on Business and Human Rights*, YouTube (Dec. 3, 2013), https://www.youtube.com/watch?v=zT_iJ_A4JTk&list=PLYUVFvBU-loceMJo57pWMfFpNcfvWsws_&index=5.

108. Freeman & de Haan, *supra* note 97, at 35–36.

109. *Id.* at 37.

110. H.L.A. HART, THE CONCEPT OF LAW 79–81 (2d ed. 1994).

111. *Id.* at 81.

112. *Id.* at 79.

113. *Id.* at 81.

114. *Id.* at 79.

Hart's typology parallels the types of conflicts that corporations encounter in their engagement with stakeholders: *primary conflicts* and *secondary conflicts*. Primary conflicts concern a violation of the rules governing behavior of a corporation or its suppliers, such as the corporate code of conduct. The code of conduct identifies the responsibilities of a supplier towards its workers. When the code's rules are violated, a complainant, the worker, will claim that the supplier breached the applicable rule and, consequently, will request a remedy from the grievance mechanism. Primary conflicts are easy to identify; international arbitration tribunals, mediation sessions, and grievance committees are all examples of dispute resolution of primary conflicts (see Figure 3(a)).

Site of Conflict	**Type of Conflict**	**Nature of Conflict**	**Example**
OPERATIONAL	Primary	• Conflict regarding the breach of the applicable standard and a request for remedies	• Information facilitation • Negotiation • Mediation/ conciliation • Investigation • Arbitration • Adjudication

Figure 3(a): Primary vs. Secondary Conflicts in Institutional Development

For example, Tesco, as a founding member of the Ethical Trading Initiative (ETI), expects all of its suppliers to abide by the standards of the ETI Base Code,[115] a multi-industry code of labor practice that is based on the conventions of the International Labour Organization.[116] The core provisions of the ETI Base Code are as follows: (a) employment is freely chosen, (b) freedom of association and the right to collective bargaining are respected, (c) working conditions are safe and hygienic, (d) child labor shall not be used, (d) living wages are paid, (e) working hours are not excessive, (f) no discrimination is practiced, (g) regular employment is provided, and (h) no harsh or inhumane treatment is allowed.[117] Providing standards is only half a solution to improving supply chains; workers must have a means to enforce those standards and seek remedies when those standards are breached. That is why Tesco embarked on the process of designing a grievance mechanism for its supply chain in South Africa. This project was an attempt to address primary conflicts that arise when Tesco's suppliers in South Africa violate the ETI Base Code.

115. TESCO, *supra* note 77, at 2.

116. *ETI Base Code*, ETHICAL TRADING INITIATIVE, http://www.ethicaltrade.org/eti-base-code (last visited Feb. 1, 2015).

117. *Id.*

Unfortunately, primary conflicts are not the only types of conflicts that arise in global value chains; secondary conflicts also arise, but they are less obvious. Secondary conflicts concern the normative and procedural bases for primary conflicts. They are disputes about the creation or amendment of (a) the applicable standards (such as corporate codes of conduct) that apply between the parties, or (b) the method for resolving breaches of those standards (such as mediation, arbitration, or other grievance mechanisms).

Given the nature of these conflicts, they are likely to arise during the standard-setting stage or the institutional design stage. Secondary conflicts arise during standard-setting when workers, local managers, representatives of transnational corporations (TNCs), and other stakeholders disagree over the content of the standards that the parties should uphold. Examples of such standards are the corporate codes of conduct that transnational companies introduce into their value chain and demand that suppliers implement. These standards are the bases for the claims and remedies that aggrieved workers will seek through a grievance mechanism.

Site of Conflict	**Type of Conflict**	**Nature of Conflict**	**Example**
STANDARD-SETTING	Secondary	• Conflict over the content of the applicable standard	• Electronic Industry Citizenship Coalition (EICC) Code of Conduct
OPERATIONAL	Primary	• Conflict regarding the breach of the applicable standard and a request for remedies	• Information facilitation • Negotiation • Mediation/ conciliation • Investigation • Arbitration • Adjudication

Figure 3(b): Primary vs. Secondary Conflicts in Institutional Development

Secondary conflicts can also arise during institutional design. These conflicts occur when workers, managers, TNCs, and others stakeholders disagree over the form and functions of the grievance mechanism that is used to settle secondary conflicts. Disagreements can occur over whether the grievance mechanism will (a) issue binding or non-binding decisions; (b) use external parties and, if so, in what capacity; (c) favor arbitration, mediation, or some other form of conflict resolution; or (d) publish their decisions in the interest of transparency, and other institutional choices.

Site of Conflict	Type of Conflict	Nature of Conflict	Example
STANDARD-SETTING	Secondary	• Conflict over the content of the applicable standard	• Electronic Industry Citizenship Coalition (EICC) Code of Conduct
INSTITUTIONAL DESIGN	Secondary	• Conflict over the form and function of the grievance mechanism for resolution of breaches of the applicable standards	• Tesco's Oversight Stakeholder Body (OSB)
OPERATIONAL	Primary	• Conflict regarding the breach of the applicable standard and a request for remedies	• Information facilitation • Negotiation • Mediation/ conciliation • Investigation • Arbitration • Adjudication

Figure 3(c): Primary vs. Secondary Conflicts in Institutional Development

One illustration of such a secondary conflict comes from Tesco's pilot of a grievance mechanism for its fruit farms in South Africa that was discussed in Section II(B). The different stakeholders involved in Tesco's Oversight Stakeholder Body disagreed over the mandate for the grievance mechanism.[118] Some members wanted a narrow mandate while others preferred an approach capable of addressing the broader, structural issues within the industry.[119] Both of these views dealt with the scope of issues that would be addressed by the grievance mechanism that they were designing. The resolution of this conflict in favor of a narrow mandate resulted in a loss of participation and interest by those who lost this battle.[120] What Tesco lacked was a strategy to address this type of conflict. It was so focused on designing a mechanism to deal with breaches of the ETI Base Code — primary conflicts — that it neglected to deal with secondary conflicts while designing the grievance mechanism.

Standard-setting and institutional design both represent sites of potential conflict that also need effective resolution. However, there is disproportionate and almost exclusive attention to the resolution of primary

118. Kotze, *supra* note 70, at 6; *see also supra* notes 90–94 and accompanying text.
119. *See supra* notes 90–94 and accompanying text.
120. *Id.*

conflicts. Conflict management works better when parties distinguish between these two types of conflicts because parties are more likely to utilize processes that are more appropriate for each type of conflict. In particular, they are more likely to recognize secondary conflict as a particular class of conflicts that requires strategies for management. Failure to acknowledge secondary conflicts means that companies are unprepared for conflict management in their engagement with stakeholders. The result is a deadlock where no decisions are reached and stakeholder engagement is abandoned with public relations consequences. Alternatively, the deadlock is overcome by unilateral decision-making by the company under the thin guise of multi-stakeholder consensus. This latter move will not fool the public or media for long. Unilateral corporate action will be recognized as such and the outcomes that follow will be mistrusted. This is why it is critical that companies are prepared when they go to the stakeholder table.

III. A NEED FOR NEW PROCEDURAL CRITERIA?

This section explores whether any existing approaches to global governance institutions address the trust-building challenges confronted by the transnational business sector. In response to a range of transboundary harms, an increasing amount of global regulation occurs outside the traditional format of command and control regulation exercised by state actors.[121] Transnational networks of regulators, international organizations established by treaties, and global standard-setting bodies are all part of this trend towards an "unruled world."[122]

This phenomenon has not gone unnoticed by the academy. The Global Administrative Law (GAL) Project examines transparency and accountability issues associated with regulation by "formal intergovernmental regulatory bodies, informal intergovernmental regulatory networks and coordination arrangements, national regulatory bodies operating with reference to an international intergovernmental regime, hybrid public-private regulatory bodies, and some private regulatory bodies exercising transnational governance functions of particular public significance."[123]

GAL scholars are primarily concerned with the good governance of global administrative bodies and they are not alone in this regard. A number

121. *See* Stewart Patrick, *The Unruled World: The Case for Good Enough Global Governance*, 93 FOREIGN AFF. 58 (2014) (defining global governance as "the collective effort by sovereign states, international organizations, and other non-state actors to address common challenges and seize opportunities that transcend national frontiers").

122. *Id.* at 58.

123. Kingsbury, Krisch & Stewart, *supra* note 16, at 17; *see also* Daniel C. Esty, *Good Governance at the Supranational Scale: Globalizing Administrative Law*, 115 YALE L.J. 1490, 1500 (2006).

of scholars have generally recommended the following prescriptions: (a) transparency and access to information,[124] (b) broad participation,[125] (c) reasoned decisions[126] and effective review of rules and decisions,[127] and (d) accountability. This Article does not challenge the importance or validity of these criteria for global governance. This section only evaluates the applicability of these procedural recommendations to the resolution of secondary conflicts discussed in the case study of Tesco above.

A. Transparency

Transparency is important because it serves as a foundation for other procedural values, such as public participation and the right of review, as well as fostering accountability by "exposing administrative decisions and relevant documents to public and peer scrutiny."[128] Transparency "helps ensure that there is some sort of dialogue between the government and the governed to act as a disciplining check on power and guard against the possibility of capture by interest groups."[129]

The UN Guiding Principles similarly prioritize transparency for non-judicial grievance mechanisms.[130] Providing information through statistics and case studies can help establish legitimacy and trust among a broad stakeholder base.[131] However, the benefits of transparency must also be weighed against party interests in confidentiality that are vital in order for complainants to come forward without fear of retaliation.[132] It is important to remember that these potential complainants may be in employment relationships where they are vulnerable and their anonymity is important.[133] This expectation of confidentiality is consistent with the broader practice of transnational dispute resolution that respects the parties' expectations of privacy.

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124. *See, e.g.*, Kingsbury, Krisch & Stewart, *supra* note 16, at 38; Esty, *supra* note 123, at 1530–31, 1533.

125. *See, e.g.*, Kingsbury, Krisch & Stewart, *supra* note 16, at 34–35, 37–38; Esty, *supra* note 123, at 1531–32.

126. *See, e.g.*, Kingsbury, Krisch & Stewart, *supra* note 16, at 39; Esty, *supra* note 123, at 1529–30.

127. *See, e.g.*, Kingsbury, Krisch & Stewart, *supra* note 16, at 39–40; Esty, *supra* note 123, at 1536.

128. Kingsbury, Krisch & Stewart, *supra* note 16, at 38; Koenig-Archibugi, *supra* note 11, at 238; Jost Delbrück, *Exercising Public Authority Beyond the State: Transnational Democracy and/or Alternative Legitimation Strategies?*, 10 IND. J. GLOBAL LEGAL STUD. 29, 42 (2003).

129. Laura A. Dickinson, *Privatization and Accountability*, 7 ANN. REV. L. SOC. SCI. 101, 110 (2011).

130. *Guiding Principles on Business and Human Rights*, *supra* note 6, at 27.

131. *Id.*

132. *Id.*; Caroline Rees, *Corporations and Human Rights: Accountability Mechanisms for Resolving Complaints and Disputes*, HARV. U. 12 (2007), http://www.ksg.harvard.edu/m-rcbg/CSRI/publications/report_15_accountabilitymechanisms.pdf.

133. Rees, *supra* note 132, at 12.

It is also worth asking whether improved transparency could have improved Tesco's stakeholder discussions. Tesco included a range of stakeholders in its discussions, which is one way of increasing transparency.[134] Tesco also engaged in a variety of outreach efforts with fruit producers and workers in order to obtain participation in the pilot project and obtain feedback on the draft grievance mechanism.[135] Despite these efforts, stakeholder engagement was a challenging process for Tesco. Tesco's experience suggests that successful multi-stakeholder engagement is dependent upon a type of transparency that is often ignored: transparency regarding character attributes and dispositions. The Tesco story is ultimately a story of failed trust among the various stakeholders involved. Transparency can be an important ingredient for overcoming this lack of trust, but it would involve more than sharing information regarding decision-making processes and documents. As discussed below in Section IV(B), it necessitates transparency regarding the character of the participants themselves.

B. Broad Participation

For administrative lawyers, public participation ensures dialogue "between the government and the governed"[136] so that "affected individuals . . . have their views and relevant information considered before a decision is taken."[137] This emphasis on public participation accords with the UN Guiding Principles by advocating the importance of broad participation by external stakeholders. Unfortunately, as illustrated in the Tesco case study, participation is not enough to ensure that external stakeholders have a voice in the process. After all, Tesco's Oversight Stakeholder Body included members from several stakeholder groups, including business, trade unions, civil society, and government.[138]

What the Tesco case study illustrates is that it is equally important to develop a method for dealing with stakeholder conflicts when participants' views clash, such as the stakeholder disagreement over the mandate for the grievance mechanism. A corporation that consults with a range of actors and then engages in unilateral decision-making may not be trusted any more than a company that opted not to consult with anyone. In order to ensure

134. *See* Kingsbury, Krisch & Stewart, *supra* note 16, at 37–38.

135. *Piloting Principles*, *supra* note 51, at 65, 69–70.

136. Laura A. Dickinson, *Regulating the Privatized Security Industry: The Promise of Public/Private Governance*, 63 EMORY L.J. 417, 432 (2013-2014).

137. Kingsbury, Krisch & Stewart, *supra* note 16, at 37.

138. *Piloting Principles*, *supra* note 51, at 68.

that participation is meaningful, corporations must also adopt a method of stakeholder conflict management that is perceived as fair and trustworthy.

C. Right of Review

Requiring reasoned decisions for administrative decision-making makes sense when we are dealing with adjudicative or quasi-adjudicative actions or administrative bodies engaging in supranational policymaking.[139]

However, under Article 31 of the UN Guiding Principles on Business and Human Rights, operation-level grievance mechanisms should be based on engagement and dialogue, with the latter as the preferred means of addressing and resolving grievances.[140] This focus on dialogue results from a business enterprise's position as both the subject of complaint and the architect of the dispute resolution system.[141] As a result, operational-level grievance mechanisms usually abandon adjudicative approaches in favor of negotiation, mediation, and conciliation.

A dialogue-based approach is less likely to lead to decisions that can be reviewed by local courts, especially during the institutional design stage. Even if a decision was produced that could be reviewed, to whom would the claimants appeal? If the local courts were effective for adjudication of their claims, then one would expect the claimants to resort to these courts instead of opting for a grievance mechanism run by the corporation that caused the harm. Unfortunately, operation-level grievance mechanisms often substitute for a local legal order that is absent.[142]

D. Accountability/Sanctions

Accountability depends on ensuring that transnational actors conform to the preferences and expectations of key stakeholders.[143] In the public context, this sanction takes the form of removal from office through elections when elected officials fail to conform to public expectations.[144] In the market context, consumers and NGOs sanction importing firms through boycotts and media campaigns or by resort to accountability mechanisms.[145]

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139. *See* Kingsbury, Krisch & Stewart, *supra* note 16, at 39; Esty, *supra* note 123, at 1529–30.

140. *Guiding Principles on Business and Human Rights*, *supra* note 6, at 27.

141. *Id.*

142. *See supra* notes 1–2 and accompanying text (discussing the lack of legal remedies in Papua New Guinea by women assaulted by contractors of Barrick Gold).

143. *See* Vandenbergh, *supra* note 16, at 959–60; Macdonald & Macdonald, *supra* note 16, at 112; Koenig-Archibugi, *supra* note 11, at 238; Dickinson, *supra* note 136, at 435.

144. Macdonald & Macdonald, *supra* note 16, at 112.

145. Vandenbergh, *supra* note 16, at 961; Macdonald & Macdonald, *supra* note 16, at 116–17.

The intended users of grievance mechanisms have few, if any, sanctions to wield over transnational business enterprises. The most significant sanction is one that threatens the continued business operation of a corporation in a locality, but such a sanction can be very costly for the stakeholders who try to employ it. Northern intermediaries (e.g., transnational advocacy networks, media) can help to buttress local stakeholder power through public exposure and consumer activism, but only to a point. After all, many of the corporations adopting grievance mechanisms operate in the energy sector where naming and shaming practices do not have the same resonance. The most effective sanctions are those offered by some form of accountability mechanism. Unfortunately, recognizing the need for an accountability mechanism does not explain how to ensure that it is trusted and trustworthy.

IV. THE STEWARDSHIP OF TRUST FRAMEWORK: RESOLVING SECONDARY CONFLICTS

As discussed in Section II, trust is vital for institutional design to succeed. The dominant approaches to governance of global institutions, valid and valuable in other contexts, appear less well suited to the challenges confronted by Tesco and other businesses that undertake institutional design.

This section suggests an alternative framework for institutional development that addresses the challenges experienced by Tesco: the stewardship of trust (SoT). Under the SoT framework, each stage of institutional development is a site for trust-building between the multinational enterprise and its local suppliers, workers, and community members. At its core, it involves stakeholder engagement during each of its stages, transforming potentially top-down corporate policies into collaborative governance. As demonstrated in Section III, stakeholder engagement is not sufficient on its own to build trust or ensure success of the institutions developed.

Under SoT, corporations should distinguish between conflicts about non-compliance with applicable standards (*primary conflicts*) from conflicts about the content of those standards and their enforcement (*secondary conflicts*). Corporations should focus on resolving both primary *and* secondary conflicts for three important reasons. First, stakeholder acceptance of processes and outcomes used to resolve primary conflicts — the grievance mechanism in its operational stage — will depend upon the processes used to overcome secondary conflicts during the stages of standard-setting and institutional design. Unsatisfactory resolution of these conflicts can lead to lack of participation by stakeholders, which can subsequently compromise the acceptance of the grievance mechanism during its operational stage.

Second, the processes used for resolving primary and secondary conflicts can be vital opportunities to facilitate the growth of trust between parties. As explained above in Section II, mistrust is often high between stakeholders when they embark on institutional design. The process of institutional design, especially concerning how secondary conflicts are resolved, can provide important opportunities for trust-building that can endow the operational grievance mechanism with acceptance by the local community. A stewardship of trust framework must incorporate specific tools intended to facilitate the growth of trust during the three institutional stages.

Third, some critics may respond that secondary conflicts only arise when there is increased stakeholder participation; reduce such participation and potentially reduce the likelihood and severity of such secondary conflicts. The response is that secondary conflicts are not going away and are only likely to increase as the United Nations, industry organizations, and other actors push for stakeholder engagement in institutional development. As stakeholder engagement expands, so do the voices at the table and the risks for secondary conflict.

A. Strategies for Secondary Conflict Resolution

Stakeholder engagement is a good place to begin the process of institutional design, but it is not enough for this process to succeed. This is because stakeholder engagement is not synonymous with stakeholder harmony. Stakeholders come to the negotiating table with particular interests and fears. Often, they share long histories of conflict between each other and with the company that is undertaking the institutional development. It is no surprise, therefore, that such situations are characterized by high levels of mistrust among those at the table. It is also not a surprise that those at the table may disagree about important decisions regarding institutional design. For example, during the institutional design phase for Tesco's grievance mechanism, stakeholders disagreed over the scope of the mandate for the grievance mechanism.[146] Those participating in the institutional design process had not developed a method for resolving such stakeholder conflicts. The result was that that those who lost this disagreement also lost interest in the institutional design process.[147]

Stakeholder conflicts during the institutional design stage may be inevitable but they are not necessarily fatal to the process. Disagreements may occur but what is vital is that there is a strategy in place to address these disagreements *and* that this strategy is perceived as acceptable by those

146. Kotze, *supra* note 70, at 6; *see also supra* notes 90–94 and accompanying text.
147. *Id.*

stakeholders participating in the institutional design process. The following examples illustrate strategies for secondary conflict resolution.

1. Wilmar Group in Indonesia

The Wilmar Group (Wilmar) is a leading global trader in palm oil. Wilmar acquired palm oil plantations on the island of Kalimantan in 1980.

Wilmar received financial support for its operations through loans and guarantees from the International Finance Corporation (IFC).[148] The IFC is one of the organizations of the World Bank Group and supports the private sector in developing countries. Companies that receive financial support from the IFC are obligated to comply with the IFC's Performance Standards on Environmental and Social Sustainability.[149]

In addition to providing standards for conduct, the IFC also provides grievance mechanisms for stakeholders who have been negatively affected by conduct of companies financed by the IFC.[150] The Compliance Advisor Ombudsman (CAO) addresses complaints from persons claiming social and environmental impact of IFC/MIGA (Multilateral Investment Guarantee Agency) projects.[151]

In 2007, a group of civil society and community organizations filed a complaint with the CAO alleging that Wilmar's wholly-owned subsidiaries (Wilmar Subsidiaries) in Indonesia violated a number of the IFC's Performance Standards on Social and Environmental Sustainability.[152] Specifically, the complaint alleged that the Wilmar Subsidiaries failed to comply with local laws requiring environmental impact assessment and permits, failed to conduct social and environmental assessments, engaged in involuntary land acquisition and re-settlement, inadequately protected habitats, and provided insufficient measures to protect indigenous populations.[153]

Even though the parties were ultimately resolving issues regarding land rights and other primary conflicts, they were also prepared for secondary

148. *Indonesia/Wilmar Group-01/West Kalimantan*, OFFICE OF THE COMPLIANCE ADVISOR/OMBUDSMAN (July 1, 2014), http://www.cao-ombudsman.org/cases/case_detail.aspx?id=76.

149. *Performance Standards on Environmental and Social Sustainability*, INT'L FIN. CORP. (2012), http://www.ifc.org/wps/wcm/connect/115482804a0255db96fbffd1a5d13d27/PS_English_2012_Full-Document.pdf?MOD=AJPERES.

150. *Terms of Reference* 2, OFFICE OF THE COMPLIANCE ADVISOR/OMBUDSMAN, http://www.cao-ombudsman.org/about/whoweare/documents/TOR_CAO.pdf.

151. *Id.* The complaints to CAO often relate to "Indigenous Peoples, land acquisition and involuntary resettlement, environmental management, and labour and working conditions." *About the CAO: Our Roles*, OFFICE OF THE COMPLIANCE ADVISOR/OMBUDSMAN, http://www.cao-ombudsman.org/a bout/ourroles/.

152. *Terms of Reference*, *supra* note 150, at 5–7.

153. *Id.*

conflicts during the negotiation process. They invested in developing a pre-negotiation framework outlining how they planned to address and resolve secondary conflicts that may emerge during the negotiation process. This framework was encapsulated in a Memorandum of Understanding (MOU) that established the parameters of the negotiation process.[154]

As an agreement, the "MOU established the roles and responsibilities of each party, the expectations for decision making . . . and what to do in the event of a disagreement or deadlock."[155] The MOU provided rules for communication, disclosure, monitoring, and information dissemination.[156] It also affirmed the role of the mediation process as the exclusive avenue for resolution of disputes between Wilmar and the local communities. This recognition of exclusivity was important because it "encouraged both parties to overcome deadlocks within the process rather than going outside of it when the discussions were difficult or broke down temporarily."[157] The MOU provided the parties with a framework for negotiations, including how disputes would be resolved. This shows that the parties implicitly understood the distinction between primary and secondary stakeholder conflicts and anticipated the latter during the negotiation process.

A plan for secondary conflict resolution is important not only for reaching an agreement but also for legitimizing the agreement reached. The MOU's process for handling conflicts during negotiations provided credibility and legitimacy for the outcomes reached. Given their history and interests, it was highly likely that the local residents and Wilmar would disagree on the outcomes of their disputes. Neither party's interests would likely prevail at every stage of the negotiation process. However, because the process for reaching the MOU, as well as the MOU agreement, legitimized the process of negotiations that followed and the parties were given a real opportunity to reach an agreement, the negotiation process was ultimately successful and resulted in two final agreements.[158] Wilmar agreed to return 1,699 hectares of community land and to compensate households for appropriated land or for losses associated with Wilmar's land clearance practices.[159]

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154. *Id.*

155. *Indonesia: Wilmar Group-01/West Kalimantan Final Report — CAO Dispute Resolution Function*, OFFICE OF THE COMPLIANCE ADVISOR/OMBUDSMAN 3–4 (2014), http://www.cao-ombudsman.org/cases/document-links/documents/ClosureReport-Wilmar1-June2014English.pdf [hereinafter *Close Out Report*].

156. *Id.*

157. *Id.*

158. *Close Out Report*, *supra* note 155, at 1; *see also Memorandum of Agreement Co-Management of Land Utilization Between Sajingan Kecil Hamlet Community and Agronusa Investama Co.* (2008), http://www.cao-ombudsman.org/cases/document-links/documents/08_11_24AgreementSajingan-ANIver-ENG.pdf.

159. *Close Out Report*, *supra* note 155, at 1.

2. Chevron in the Niger Delta

The Niger Delta supplies forty percent of US imports of crude oil and, over several decades of oil production, has generated $700 billion in oil revenue.[160]

Chevron has been operating in Nigeria for over fifty years. Much of that history has been widely criticized, with Chevron faulted for economically marginalizing local populations, contaminating the environment, suppressing peaceful protests, and funding violent action by state military forces.[161]

As local resistance — sometimes violent — grew to Chevron's continued oil operations, Chevron responded by undertaking community projects such as building local hospitals and schools, bolstering local economic development with increased hiring and sub-contracting, and providing scholarships for local communities.[162] It also reached a series of agreements with local communities with terms providing for development of small projects and homage payments to local leaders.[163]

These agreements did not work for several reasons. The agreements were often signed "in the heat of a crisis that impeded . . . operations" of oil companies, fostering the view that "oil companies were giving contracts to local leaders to buy their silence."[164] As such, they lacked credibility — with local stakeholders and civil society. They were also not implemented or were implemented badly.[165] When a group of Ugborodo community members demonstrated to protest the non-implementation of the agreements, they were met with "maximum violence by a combined force of armed police and soldiers," resulting in one death and dozens of injuries.[166]

In 2005, Chevron adopted a new approach to community-corporate relations. It signed several three-year General Memoranda of Understanding (GMOUs) with communities affected by Chevron's activities. These GMOUs established multi-stakeholder governance structures for the identification, development, and oversight of local community projects that

160. *See* Nnimmo Bassey, Emem Okon, Laura Livoti & Abby Rubinson, *Chevron in Nigeria*, *in* THE TRUE COST OF CHEVRON: AN ALTERNATIVE ANNUAL REPORT 45 (2010), http://justiceinnigerianow.org/lppy/2010-alternative-annual-report.pdf.

161. *See id.* at 45–46.

162. Merrick Hoben, David Kovick, David Plumb & Justin Wright, *Corporate and Community Engagement in the Niger Delta: Lessons Learned from Chevron Nigeria Limited's GMOU Process*, CONSENSUS BLDG. INST. 4 (2012), http://www.cbuilding.org/sites/default/files/Corporate%20and%20Community%20Engagement%20in%20the%20Niger%20Delta_Lessons%20Learned.pdf.

163. *Id.* at 3.

164. Stephen A. Faleti, *Challenges of Chevron's GMOU Implementation in Itsekiri Communities of Western Niger Delta*, http://www.ifra-nigeria.org/IMG/pdf/Stephen_FALETI_Challenges_of_Chevron_GMOU_Implementation_in_Itsekiri_Communities_of_Western_Niger_Delta.pdf.

165. *Id.* at 12.

166. *Id.* at 19.

Chevron funded.[167] The GMOU model was a step in the right direction for winning local trust, but it was not enough.

The first round of GMOUs expired in 2008. Chevron wanted to learn about the strengths and weaknesses of the GMOU model before re-negotiating the next set of GMOUs.[168] In order to gain this understanding, Chevron engaged in a novel diagnostic. It approached local stakeholders to collaborate on the design of a process to evaluate the GMOU framework.[169] Chevron worked with the area communities, local NGOs, and the government to identify the goals of the evaluation and develop a data collection strategy and interview protocol.[170] Once the design process was complete,

> a team of trained data collectors drawn from local NGOs used the strategy and protocol to conduct interviews and focus groups in the eight RDC areas, involving more than 1,000 individuals. The data collection team covered all five states where the GMOUs are present and visited more than 20 rural Niger Delta communities, mostly by boat.[171]

Community, company, and government representatives were also involved in the analysis of the data collected.[172]

When negotiating its second round of GMOUs, Chevron was ready for secondary conflicts among stakeholders during negotiations. It realized that stakeholder clashes were inevitable and that the process of resolving those clashes would affect the level of trust that Chevron could garner among the community members. It ensured that inevitable disagreement would not obstruct the negotiation process by developing a process for secondary conflict resolution: "The GMOU process has gone further than any previous effort to address interests and concerns around *how* CNL [Chevron Nigeria Ltd.] and communities work through difficult substantive

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167. *See* Hoben, Kovick, Plumb & Wright, *supra* note 162, at 8 ("The GMOU is stakeholder engagement mechanism built around formal signed agreements with clusters of communities impacted by Chevron's on-shore operations in Nigeria. It helps to manage proactively the overall relationship between the company and impacted communities, which have a combined population of about 850,000. It also is a community development tool that channels millions of dollars into community-identified projects each year. Chevron has GMOUs with eight community clusters, each of which has formed of a Regional Development Council composed of community representatives. The councils take primary responsibility for identifying and implementing development projects. A management board oversees the RDC and is comprised of representatives from the government, Chevron, NGOs and the community.")

168. *Id.*

169. *Id.* at 7.

170. *Id.* at 8.

171. *Id.*

172. *Id.*

challenges."[173] It also made sure that stakeholders collaborated on the process for resolving secondary conflicts:

> The creation and implementation of the GMOUs and RDCs has given community stakeholders a larger role in setting the terms of the conversation, and the process for interacting. This shift has created a greater sense of fairness in the process. It is a step towards overcoming the long-standing perception of a power imbalance between the company and communities, and it creates some of the key conditions for productive interaction and problem solving.[174]

Like Wilmar, Chevron invested time in designing a framework for negotiations, including dispute resolution

3. Summary

Neither the Wilmar nor Chevron examples concerned collaboration on the institutional design of a grievance mechanism. Instead, the negotiations concerned the resolution of primary conflicts between the parties, such as land ownership and distribution of economic benefits. However, in both examples, the parties knew that there would be disagreement and that they needed a way to resolve those disagreements. In each case, the parties invested in pre-negotiation development of strategies for resolving these secondary conflicts. The frameworks that emerged for secondary conflict resolution can help guide stakeholders when they engage in the institutional design of grievance mechanisms.

B. Strategies for Building Trust by Contracting

Public law's contribution to the study of procedural fairness is well understood. Due to this recognition, this Article will provide only a brief discussion of procedural justice. Although not obvious, contract law also has important contributions to make to the study of procedural fairness. Specifically, contract law scholars study how formal contracts serve valuable functions in building trust between strangers, even among those with adverse interests.

The study of procedural fairness from both areas of law reveals certain points of intersection. First, both contract law and public law illustrate that distributional effects are relevant to but not necessarily dispositive of a party's compliance with outcomes. An individual who loses a court case may still view the process as fair and accept the outcome.[175] Similarly, a party

173. *Id.* at 12.

174. *Id.*

175. *See* Rebecca Hollander-Blumoff & Tom R. Tyler, *Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution*, J. DISP. RESOL. 1, 4 (2011).

may accept another's contract offer not because it maximizes her wealth but because she perceives the offer as fair. Therefore, the process of reaching an outcome can matter as much as the actual outcomes reached.

Second, both areas of law also reveal that motivational inferences matter. In order to cooperate, many people need to believe that the other parties are motivated to be fair.[176] Processes used for decision-making, including dispute resolution, serve as signals of each party's capacity and willingness to engage in a trustworthy manner.

However, it is important to examine contract law's insight independently because it shows how trust is created between unfamiliar, even antagonistic, parties through the contracting process. In fact, the contracting process can be viewed as a trust-building exercise that creates a foundation of informal norms upon which the parties' exchange relationship is based. For example, pre-contractual negotiations and non-binding agreements help parties build cooperative norms and gauge the other party's trustworthiness. These assets ensure "buy-in" by the parties even if they did not receive everything they wanted from the deal. In this way, the benefits of contracting lie in its instrumental value to endogenize trust within relationships.

1. Procedural Justice

Tom Tyler's research on normative theories of compliance reveals certain values that "lead people to comply voluntarily with legal rules and the decisions of legal authorities."[177] Tyler's research reveals that an institution's legitimacy is not a result of its ability "to deliver tangible positive outcomes to self-interested citizens."[178] Instead, Tyler finds that "[p]rocedural justice is the key normative judgment influencing the impact of experience on legitimacy."[179] According to his research, "[v]iews about authority are strongly connected to judgments of the fairness of the procedures through which authorities make decisions."[180]

Tyler argues that particular factors influence individual perceptions of whether a procedure was fair: voice, neutrality, trust, and interpersonal qualities (treated politely and with respect).[181] Voice refers to an

176. TYLER, *supra* note 5, at 164; Tom R. Tyler, *What Is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal Procedures*, 22 LAW & SOC'Y REV. 103, 129 (1988) [hereinafter *What is Procedural Justice?*]; Scott, *supra* note 9, at 1664.

177. TYLER, *supra* note 5, at 164.

178. *Id.* at 163.

179. *Id.* at 162.

180. *Id.*

181. *See id.* at 163–64; Hollander-Blumoff & Tyler, *supra* note 175, at 6; Rebecca Hollander-Blumoff & Tom R. Tyler, *Procedural Justice in Negotiation: Procedural Fairness, Outcome Acceptance, and*

"opportunity to take part in the decision-making process," including a chance to present arguments that are considered by the decision-makers.[182] Procedures are also seen as fair when individuals have confidence that the decision-making process is neutral and unbiased with issues decided consistently and based on objective information.[183] Inferences about trustworthiness are a result of how authorities act: "When the authorities provide evidence that they have listened to and considered the views of the parties, and tried to take them into account in thinking about how to respond to the issues, they are viewed as more trustworthy."[184] In the absence of a third-party decision-maker, trust is produced when individuals believe that the other is motivated to act fairly and in good faith.[185]

People also evaluate procedural fairness through the lens of their own treatment: "Fair treatment by an authority can reveal that one is a valued, or not valued, member of a group, which in turn has the potential to affect one's self-esteem, one's sense of self-worth, and one's social identity."[186] It is therefore critical that authorities treat individuals subject to their authority with respect and dignity.[187] Such treatment is also important because it can determine individuals' inferences about whether the authorities are motivated to act fairly.[188] Tyler concludes,

> The obligation to obey is based on trust of authorities. Only if people can trust authorities, rules, and institutions can they believe that their own long-term interests are served by loyalty toward the organization . . . . It is being unfairly treated that disrupts the relationship of legitimacy to compliance, not receiving poor outcomes.[189]

Perceptions of procedural justice subsequently affect individual deference and compliance with decisions rendered through fair processes.[190] This is because "the procedural justice of the decision-making process leads them to conclude that the decision making authority is legitimate."[191]

Integrative Potential, 33 LAW & SOC. INQUIRY 473, 492 (2008); *What is Procedural Justice?*, *supra* note 176, at 128–30.

182. TYLER, *supra* note 5, at 163.

183. *Id.* at 163–164; Hollander-Blumoff & Tyler, *supra* note 175, at 6; Hollander-Blumoff & Tyler, *Procedural Justice in Negotiation*, *supra* note 181, at 492.

184. Hollander-Blumoff & Tyler, *supra* note 175, at 6.

185. Hollander-Blumoff & Tyler, *Procedural Justice in Negotiation*, *supra* note 181, at 492.

186. Hollander-Blumoff & Tyler, *supra* note 175, at 6.

187. TYLER, *supra* note 5, at 164.

188. *Id.*

189. *Id.* at 172.

190. Hollander-Blumoff & Tyler, *supra* note 175, at 6.

191. *Id.* at 7.

Expectations of fairness are not confined to the judicial setting. Parties carry these expectations with them into a variety of alternative dispute resolution settings, including negotiation.[192] People "are more likely to accept and adhere to a negotiated agreement when they believe that the negotiation was conducted in a fair manner."[193] Within negotiation, "individuals form judgments about whether or not they were treated fairly by assessing whether or not they were afforded a voice, were treated with courtesy and respect, and trusted the other party."[194] Trust is particularly determinative of perceptions of procedural justice in negotiations.[195] Adherence to these values in negotiations can therefore increase the likelihood of acceptance of the negotiated agreement and increased information disclosure regarding value-creating opportunities.[196] Similar results have also been found in the mediation context.[197]

2. The Private Law Contribution

The section below describes contract law's insight into the relationship between trust and contracting and explains the significance of this insight for corporate approaches to procedural fairness.

Contract law is important to the study of procedural fairness because it offers ways to create trust between strangers. According to Ronald Gilson, Charles Sabel, and Robert Scott, "[P]arties today often treat trust as endogenous, as an object of contracting rather than as a precondition."[198] Their critical insight is that a relationship between parties is not stuck with its initial endowment — or deficit — of trust. Instead, the interaction of formal and informal contract elements can build trust within collaborative arrangements between parties.

In order to demonstrate the trust-building potential of contracts, Gilson, Sabel, and Scott address the problem of inter-firm collaborations regarding innovation. Potential collaborators encounter uncertainty because parties cannot know in advance the nature or characteristics of the products that their collaboration may produce.[199] The parties also encounter each other as strangers in a context where trust is low. The uncertainty regarding the likelihood and nature of the collaboration makes formal contracting inappropriate at this stage of the parties' relationship: there is not much to

192. *Id.* at 17.
193. *Id.*
194. *Id.*; Hollander-Blumoff & Tyler, *Procedural Justice in Negotiation*, *supra* note 181, at 492.
195. *Id.* at 494.
196. *Id.* at 493.
197. Dean G. Pruitt et al., *Long-Term Success in Mediation*, 17 LAW & HUM. BEHAV. 313, 327 (1993).
198. Gilson, Sabel & Scott, *supra* note 9, at 1404.
199. *See id.* at 1383.

contract about.[200] Instead, their collaboration is more likely to be governed by informal norms of cooperation. Unfortunately, these informal norms are also weak at the beginning of the collaboration because of the parties' unfamiliarity with each other. As such, informal norms have limited potential to bind the parties as guarantees of cooperation. To address these challenges, Gilson, Sabel, and Scott introduce the concept of "braiding."

Braiding refers to a process of "using formal contracting to endogenize increased trust by making the *parties' capabilities and character observable*."[201] Formal contracting creates the conditions for informal norms to flourish. This is important because informal norms will serve as the primary guarantors of cooperation in early collaborations.[202] But because these norms are weak at the beginning of a collaboration, formal contracting creates governance processes that facilitate the growth and effectiveness of informal norms of cooperation during the collaboration stage.[203] In this way, formal contracting is instrumental and plays a supporting role to the work of informal norms that draws the parties closer. The role of formal contracts in braiding is to create processes that reveal each party's behavior to the other in a way that facilitates the growth of informal norms.[204]

One such strategy is to use formal contracts to mandate information sharing that would otherwise not occur.[205] Mandated information sharing allows the parties to learn about each other, especially their capabilities and propensities for cooperation.[206]

The processes established by formal contracts provide opportunities for parties to learn about each other, particularly regarding their capacities and problem-solving approaches.[207] These processes improve transparency in collaborations, but not only regarding outcomes and progress towards benchmarks. They also reveal important information on the nature of the collaborators, which is important in order to build trust.

This interplay between formal and informal contracts demonstrates how the former buttresses the development and effectiveness of the latter.

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200. Parties' efforts are not contractible ex ante because of uncertainty regarding the likelihood and goals of the collaboration and each party's role in achieving those goals. Once this uncertainty is resolved during the initial collaboration process, parties approach an end game scenario where these issues become clear. At this point, the parties' efforts can be contractible ex post. *See* Gilson, Sabel & Scott, *supra* note 9, at 1408.

201. Gilson, Sabel & Scott, *supra* note 9, at 1386 (emphasis added).

202. *See id.* at 1402.

203. *See id.*

204. *See id.* at 1403.

205. *See id.*

206. *See id.*; *see also* Ronald J. Gilson, Charles F. Sabel & Robert E. Scott, *Contracting for Innovation: Vertical Disintegration and Interfirm Collaboration*, 109 COLUM. L. REV. 431, 472 (2009) ("[I]n these contracts, formal contracting operates importantly to facilitate the development of informal contracting structures that police the parties' expectations of capability, cooperation, and trust.").

207. *See* Gilson, Sabel & Scott, *supra* note 9, at 1403; Gilson, Sabel & Scott, *supra* note 206, at 473.

Significantly, braiding demonstrates a way to use formal contract design to facilitate the development of powerful informal norms — such as trust — where none existed before. This strategy of interweaving formal and informal contracts is not confined to the technology sector. Instead, Gilson, Sabel, and Scott explain that this technique arises when the "precise goal and manner of achieving it only become clear in the course of the parties' collaboration."[208]

Robert Scott's theory of reciprocal fairness also emphasizes the role of agreements in encouraging information sharing between parties regarding important dispositional attributes. Once again, agreements are used to improve transparency between parties regarding their propensities. In this context, the propensity that is revealed is a party's ability and willingness to reciprocate. According to Scott, reciprocity "means that individuals respond cooperatively to generous acts and, conversely, punish non-cooperative behavior."[209]

Fairness matters to parties in contracting relationships. It matters so much that parties behave reciprocally towards others even when such reciprocity is inconsistent with pure self-interest.[210] Perceptions of fairness provide clues to parties about the nature and intentions of their counterparts on the other side of the bargaining table.[211] Signals of fairness or unfairness are so strong that parties will reward or punish such behavior, respectively, even when such action comes at a cost to themselves.[212] The preferences for fairness are not limited to individuals. Groups of individuals in regime settings may also share proclivities towards reciprocal fairness.[213]

For reciprocity to serve as an extra-legal mechanism of contract enforcement, there must be an opportunity for parties to exhibit to each other their propensity to cooperate and act fairly. Scott argues that this information-gathering function is among the reasons that parties enter into informal agreements with indefinite terms that courts refuse to enforce.[214] Examples of such agreements are "comfort agreements" that are informal "agreement[s] to agree," such as agreements to lease space, execute executive compensation packages, or enter into a partnership.[215] Scott

208. Gilson, Sabel & Scott, *supra* note 9, at 1385.

209. Robert E. Scott, *The Death of Contract Law*, 54 U. TORONTO L.J. 369, 383 (2004).

210. *See* Scott, *supra* note 9, at 1667.

211. *See id.*

212. *See id.*; Robert E. Scott & Paul B. Stephan, *Self-Enforcing International Agreements and the Limits of Coercion*, 2004 WIS. L. REV. 551, 555–56 (2004); ROBERT E. SCOTT & PAUL B. STEPHAN, THE LIMITS OF LEVIATHAN: CONTRACT THEORY AND THE ENFORCEMENT OF INTERNATIONAL LAW 88-91 (2006).

213. Scott & Stephan, *supra* note 212, at 594–96; SCOTT & STEPHAN, *supra* note 212, at 88–91.

214. Scott, *supra* note 9, at 1645, 1683.

215. *Id.* at 1682–83.

hypothesizes that the "widespread use of informal comfort agreements may be a function of their propensities as screens for voluntarily cooperative behavior."[216] Comfort agreements create opportunities for reciprocity, thereby encouraging mutual learning regarding the party's preferences for reciprocal fairness.[217]

Scott's insight is supported by sociological and experimental economic research on social exchanging.[218] This research finds that parties perceive their counterparties' actions as more fair when they participate in reciprocal exchange instead of negotiated exchange.[219] Negotiated exchange is when "actors engage in a joint decision-making process . . . in which they seek agreement on the terms of exchange" simultaneously.[220] By contrast, in reciprocal exchange, "actors' contributions to exchange are separately performed and non-negotiated."[221] In reciprocal exchange, "[a]ctors initiate exchanges individually by performing a beneficial act for another (such as giving assistance or advice) without knowing whether, when, or to what extent the other will reciprocate."[222]

Although negotiated exchange may initially appear to have more hallmarks of procedural fairness (collective decision-making, equal opportunities for voice, informed consent on terms, binding agreement),[223] it also minimizes the potential for reciprocity; that is its weakness.[224] Reciprocity is valued in itself, independent of outcomes.[225] Those who consistently reciprocate others' gifts are seen as more fair exchange partners.[226] Even if the distributional outcomes are the same in both a negotiated and reciprocal exchange, parties will perceive each other as more fair under the latter.[227]

Why is that? One possible explanation is that parties value the risks that the other takes when they allocate benefits sequentially (reciprocal

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216. *Id.* at 1685. Scott explains that there are two ways in which comfort agreements serve as a screening device: "First, the agreement provides opportunities to observe the behavior of the promisor in response to opportunities to reciprocate . . . . [Second], the comfort agreement serves to separate in time the opportunity to reciprocate from the subsequent transaction that is ultimately contemplated. It is thus an example of the expenditure of time for the purposes of communication." *Id. at* 1684–85.

217. *Id.* at 1683.

218. *See* Linda D. Molm, Gretchen Peterson & Nobuyuki Takahashi, *In the Eye of the Beholder: Procedural Justice in Social Exchange*, 68 AM. SOC. REV. 128, 148 (2003); Elizabeth Hoffman, Kevin A. McCabe & Vernon L. Smith, *Behavioral Foundations of Reciprocity: Experimental Economics and Evolutionary Psychology*, 36 ECON. INQUIRY 335, 350 (1998).

219. *See* Molm, Peterson & Takahashi, *supra* note 218, at 130.

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.* at 149.

224. *See id.* at 150.

225. *Id.*

226. *Id.* at 148–49.

227. *Id.* at 148.

exchange) as opposed to simultaneously (negotiated exchange) where the terms are agreed upon at the same time even if performance is sequenced. Reciprocal exchanges do not carry the same guarantees of return or benefit. For that reason, these exchanges may send stronger signals of the giver's disposition and motivations. Sequential resource allocation through reciprocal exchanges also creates opportunities for vulnerability, which is an important factor for trust-building.[228] In order to trust, the initial giver must expose himself to the risk of harm.[229] This demonstration of vulnerability and willingness to trust speaks to the giver's character and also to the giver's faith in the other party. Specifically, it communicates that the giver believes that the other party is trustworthy. The trusted party may therefore want to reward the giver's trust in them and validate the risk the giver took. As such, each cycle of reciprocity endogenizes trust between the parties and strengthens their relationship.

3. What Contract Design Teaches Us About Trust

The insights discussed above should also apply to building trust among stakeholders in the institutional design of grievance mechanisms. This process shares some of the key features of the contract situations discussed above. When stakeholders come together to create a grievance mechanism, they may lack a clear idea of the project's feasibility and whether they can collaborate with each other to develop a grievance mechanism that all parties can accept and respect. They often do not trust each other, doubting the other's capacity and willingness to behave in a trustworthy manner. Even if they do embark on the process of institutional design, they will not know what the end result will be when they begin the institutional design process. The grievance mechanism will only take shape during the collaboration.

This situation of uncertainty and mistrust qualifies the institutional design process for many of the contract design lessons discussed above.

First, Gilson, Sabel, and Scott's research reveals that formal contracts have a role to play even when the ultimate guarantee of cooperation lies in informal norms. This is the supportive, facilitative role of formal contracting that demonstrates its ability to buttress other norms of cooperation.

In the discussion above, formal contracts improved transparency between parties so that the parties could observe each other's behavior and

228. *See* Mark Weber, Deepak Malhotra & Keith Murnighan, *The Trust Development Process*, ROTMAN MAGAZINE, Fall 2006, at 36 (defining trust as "a psychological state comprising the intention to accept vulnerability based upon positive expectations of the intentions or behavior of another"); Jeffrey H. Dyer & Wujin Chu, *The Determinants of Trust in Supplier-Automaker Relationships in the U.S., Japan, and Korea*, 31 J. INT'L BUS. STUD. 259, 260 (2000) (defining trust as "one party's confidence that the other party in the exchange relationship will not exploit its vulnerabilities"); Deepak Malhotra, *Trust and Reciprocity Decisions: The Differing Perspectives of Trustors and Trusted Parties*, 94 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 61, 61 (2004).

229. Malhotra, *supra* note 228, at 62.

evaluate the other's potential as a collaborator. What is revealed varies by context. The information that is necessary for collaboration in a technology context will differ from the information that is needed among stakeholders creating a grievance mechanism. Regardless of these differences, the point is to use formal agreements to mandate information-sharing between parties regarding qualities that each deems vital for trust and cooperation.

Second, parties need opportunities to demonstrate their inclination and capacity to be fair. Informal "agreements to agree" can offer such opportunities to exhibit cooperative norms early on in a new relationship. The willingness to invest time in such agreements also sends strong signals to parties about the other's preference for reciprocity.[230] Similarly, parties should create opportunities to demonstrate their capacity and willingness to reciprocate. Sequenced exchanging can offer parties opportunities to act beneficially and invite reciprocity.

Of course, there are some important differences that distinguish grievance mechanisms. First, some grievance processes are followed by formal settlements that outline the parties' settlement of the dispute and govern subsequent behavior.[231] But the use of formal agreements at the end game stage does not preclude the ability to braid the process that leads up to those agreements. The difference is uncertainty. During the institutional design process, the parties are uncertain about whether they can agree on the mandate and features of a grievance mechanism. They begin collaboration but they cannot specify ex ante particular duties of the parties during this process. The noncontractible nature of their efforts means that they will largely rely on informal norms of cooperation to govern their substantive performances during this initial collaboration process. Formal contracting during this stage simply improves the effectiveness of the informal norms.

This situation changes when the parties have completed the design process. At the end stage, uncertainty dissipates, as the parties are aware of their collective goals and the means to reach them. The features of the grievance mechanism or resolution become clear and so do the parties' roles. At this stage, they can contract regarding these features. The subsequent formal agreements do not threaten the braiding process so long as there is a "clear distinction between the information exchange and dispute resolution mechanisms that support the informal contract . . . and the high-powered formal contractual regime."[232] This separation between the two "prevents the formal incentives of the latter from crowding out the informal behavior induced by the former."[233]

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230. *See* Scott, *supra* note 9, at 1685.

231. *See supra* notes 161–62 (discussing the Wilmar agreements).

232. Gilson, Sabel & Scott, *supra* note 9, at 1409.

233. *Id.*

The second main difference relates to switching costs. In innovation agreements, heightened transparency increases the endowment of trust and cooperation between the parties that in turn reduces the likelihood of switching partners because of search costs. Switching risks are not as frequently implicated in the extractive sector because of limited substitution possibilities: the parties are often stuck with each other. The value of braiding in this context is not to prevent switching but to improve trust and cooperative norms within these locked-in relationships.

The situation changes when we move from the extractive sectors to other industries, such as garment manufacturing or electronics assembly. In these sectors, corporations enjoy substitution possibilities because they can source elsewhere. In these contexts, braiding can help build relationships between the parties that may discourage or reduce the likelihood of switching by the corporation. Through braiding, the process of ex ante institutional design of grievance mechanisms, such as dispute resolution, creates a valuable venue for parties to demonstrate their partnership qualities.

The following examples demonstrate different ways of implementing the insight of Gilson, Sabel, and Scott in stakeholder engagement.

4. Strategies for Building Trust Among Stakeholders: Wilmar Group in Indonesia

The dispute between Wilmar Group and the local residents in Indonesia was characterized by a high level of mistrust.[234] Residents from Senuju, Sajingan Kecil, and Sasak perceived Wilmar as encroaching upon their land and feared that Wilmar's operations would jeopardize their livelihood.[235] Community members had little faith in a dialogue process with Wilmar because they claimed that they had been let down by the results of previous dialogues.[236]

In order to renew the residents' faith in a dialogue process, CAO engaged both parties in trust-building exercises. At least one side — the residents — needed to be convinced of Wilmar's trustworthiness as a precondition of participation in a grievance resolution process. CAO answered this need and used it as an opportunity for Wilmar to signal its intentions and commitment to the grievance process.

The residents identified two conditions to their cooperation in a dialogue process: cessation of operations by Wilmar on its plantations and

234. INT'L FIN. CORP./MULTILATERAL INV. GUARANTEE AGENCY, OFFICE OF THE COMPLIANCE ADVISOR/OMBUDSMAN, PRELIMINARY STAKEHOLDER ASSESSMENT: REGARDING COMMUNITY AND CIVIL SOCIETY CONCERNS IN RELATION TO ACTIVITIES OF THE WILMAR GROUP OF COMPANIES 9 (2007).

235. *Id.*

236. *Id.*

suspension of purchases from Duta Palma.[237] Wilmar agreed to a moratorium on land clearance; this was a strong signal offered by Wilmar that it would negotiate in good faith.[238] The subsequent positive negotiations can be attributed to these early signaling acts. According to Scott's theory of reciprocal fairness, "individuals respond cooperatively to generous acts, and, conversely, punish non-cooperative behavior."[239] Parties need an opportunity to prove their propensity towards cooperation and fairness.

The parties also used a Memorandum of Understanding (MOU) to build trust.[240] As a process, the MOU provided the parties with a small-stakes setting to evaluate the other side's trustworthiness. By reaching an MOU, the parties were reassured that agreement — at least on some issues — was possible with the other side. They also participated in joint mapping exercises, whereby the parties collaborated on identifying the lands in dispute.[241] In other words, the parties used agreements to establish interactions — joint mapping exercises and MOU process — that served information-gathering functions as screens for voluntary cooperative behavior.

Of course, it is worth querying the level of trust the local stakeholders experienced in their negotiations with Wilmar. The two indicia of trust are: (a) two agreements were reached between the parties, and (b) neither of the parties abandoned the mediation-dialogue process.

5. Strategies for Building Trust Among Stakeholders: Chevron in the Niger Delta

In order to understand why mistrust plagued its first set of GMOUs, Chevron engaged in a participatory evaluation process. This process provided Chevron with some insight into the roots of mistrust between it and local stakeholders. The evaluations revealed that the communities felt that the GMOU model had been thrust upon them without their consultation or consent. Additionally, the communities were not satisfied regarding the incorporation of their views and concerns into the negotiation process. This insight informed Chevron's re-negotiation strategy for the next set of GMOUs in which it "'proposed' — rather than imposed — process design, time frames, venues and facilitators."[242]

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237. *Id.*

238. *Resolving Land Disputes in the Palm Oil Sector Through Collaborative Mediation: CAO Ombudsman Intervention in Sambas, Indonesia — Wilmar Group Conclusion Report*, OFFICE OF THE COMPLIANCE ADVISOR/OMBUDSMAN 2 (2009), http://www.cao-ombudsman.org/cases/document-links/documents/Wilmar_Conclusionreport-Oct09.pdf [hereinafter *CAO Report*].

239. Scott, *supra* note 209, at 383.

240. *Id.*

241. *Close Out Report*, *supra* note 155, at 2.

242. Hoben, Kovick, Plumb & Wright, *supra* note 162, at 14.

Chevron incorporated many indicia of procedural and reciprocal fairness. Regarding the former, Chevron improved representation in decision-making in order to provide community members with greater participation opportunities. Chevron's previous method for selecting its negotiating partners among the community members and local leaders was not trusted because those chosen were not seen as representative of the broader community base.[243] Under the new approach, community members determined representation, including the governing body's composition and selection of members.[244] Chevron also engaged in joint agenda setting so that it was not the only one identifying the issues for negotiation and engagement.[245] The GMOU model was also structured in a way that vested a great deal of decision-making in the local communities.

Chevron improved the neutrality of the process by engaging impartial facilitators to lead it and the other stakeholders through the process of designing an evaluation process of the GMOUs and renegotiating a second round of GMOUs.[246] It also relied on local NGOs to broker relationships between itself and the local communities.[247]

Finally, Chevron knew that it confronted a significant trust deficit and that it needed trust in order for its community engagement to work. It built trust incrementally in a manner that allowed for reciprocity under Scott's theory of fairness:

> The GMOU was established in a context of substantial mistrust, and nobody presumed that trust could be built overnight. Rather, the GMOU provided opportunities for both company and communities to begin to make commitments and deliver on those commitments, to demonstrate that they could each be credible counterparts, and to build trust incrementally through that process.[248]

In order to allow trust to grow, Chevron lowered the stakes. By adopting GMOUs with fixed time limits — three years — it allowed the parties to move forward with the security that, if they were unhappy with the model, they could change it after a few years. Importantly, and similarly to Wilmar, Chevron engaged in joint problem-solving with its stakeholders. It sat "shoulder to shoulder" with them in designing a process for evaluating the first three years of the GMOU. It continued to maintain this stance during the analysis of the data.

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243. *See id.* at 13.
244. *Id.*
245. *Id.*
246. *Id.*
247. *Id.*
248. *Id.*

This joint problem-solving assisted Chevron with improving the acceptability of its GMOU approach.[249] First, it communicated important motivational inferences about Chevron. By designing the evaluation process with other stakeholders, Chevron signaled that it wanted accurate information and that it was genuinely interested in what community members thought about the GMOU model. Second, the inclusion of community members communicated that Chevron valued their opinions. Finally, it was critical that the first experiment in joint problem solving occurred prior to negotiations when the stakes were lower: "Had these process elements been introduced during the renegotiations, when perceived stakes were higher, they might not have been given the chance to succeed."[250] The lesson from this experience is that "companies, communities and neutral third parties might be well-served by looking for opportunities to lower the stakes of initial engagement, when mistrust is severe."[251] This pre-negotiation joint problem solving achieves results similar to "agreements to agree." Both allow parties to gauge the disposition and motivations of each other.

6. Conclusions

This section illustrates ways that contracts can assist with trust-building between stakeholders during the institutional design process. These illustrations are subject to two conditions. First, use of contracts facilitates trust-building, but they are not sufficient on their own. Unlike many contracts in commercial contexts, the participants in stakeholder design experience significant asymmetries in power and information in relation to the corporation.[252] That is why the use of contracts should be supplemented by capacity building, training, and the assistance of a third party facilitator.[253] For example, in the Wilmar dispute resolution process, CAO prepared the parties for the mediation process, including "build[ing] their capacity for dialogue, shar[ing] information effectively with the wider community, and creat[ing] consensus around important decisions during the negotiations."[254]

Second, the benefit of contracts in these situations is that they served as early signals of trust-building. Although contracts served these functions in the illustrations above, this function is not limited to contracts. Other acts can also accomplish similar purposes.

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249. The consensus-building approach adopted by Chevron is consistent with other studies of good practices. *See* Menkel-Meadow, *supra* note 6, at 53.

250. *See* Hoben, Kovick, Plumb & Wright, *supra* note 162, at 17.

251. *Id.*

252. Knuckey & Jenkin, *supra* note 73, at 812.

253. Telephone Interview with International Mediator (December 22, 2014) (on file with author).

254. *Close Out Report*, *supra* note 155, at 3.

V. THE STEWARDSHIP OF TRUST FRAMEWORK: RESOLUTION OF PRIMARY CONFLICTS

This Article argues that the level of trust that stakeholders place in a grievance mechanism is not only a product of its attributes during the operational stage. Instead, trust-building during the stages of standard-setting and institutional design facilitates the level of trust a grievance mechanism commands during its operational stage.

However, a mechanism's attributes during its operational stage still matters (see Figure 4). This section explores two of these critical attributes: *centralization* and *judicialization*. Centralization refers to the global coverage of the grievance mechanism, whether run by public or private actors. Judicialization refers to the similarity of dispute resolution processes to judicial procedures. This section evaluates these attributes according to the framework for trust-building developed in this Article. It concludes that decentralized, non-judicial mechanisms may offer the best opportunities for cultivating trust. This conclusion runs counter to traditional expectations for international accountability that favor international courts. At a time when there is an increasing trend towards judicialization, the following section illustrates the merits of an alternative approach: counter-judicialization.

Figure 4: The operational stage in private institutional development.

A. Extent of Centralization

A grievance mechanism can operate at many points on the spectrum of centralization, from highly contextualized bodies to uniform institutions that apply across value chains and borders. Each has its own particular advantages and disadvantages. Highly centralized mechanisms concentrate the resolution of disputes across a broad geographic area within one or two bodies. For example, one group of lawyers has proposed an International Arbitration Tribunal on Business and Human Rights.[255] Like all grievance mechanisms, this tribunal is meant to provide remedies to victims of human rights abuses who are currently without options. It is modeled on international commercial arbitration. Perhaps the most ambitious aspect of

255. Claes Cronstedt, Remarks at the United Nations Annual Forum on Business and Human Rights (Dec. 3, 2014) (transcript available at http://business-humanrights.org/sites/default/files/documents/CC%20Geneve%203%20Dec%202014A.pdf) [hereinafter Cronstedt Remarks].

the tribunal is its coverage. It could hear disputes from anywhere around the world concerning a diversity of disputes, ranging from labor violations, discrimination claims, and environmental actions.[256] The diversity of these claims reflects an even greater diversity in the claimants, respondent companies, and the nature of the company's business (e.g. extractive sector, agribusiness, garments, electronics). Although the parties would have the power to decide whether to use the tribunal and what issues to submit to it, the potential range of the tribunal is extensive.

Another example is the grievance process of the Ethical Trading Initiative (ETI). ETI "is an alliance of UK-based companies, NGOs and trade union organizations working to promote and improve the implementation of corporate Codes of Practice which cover supply chain working conditions."[257]

ETI provides a grievance mechanism by which any ETI member can raise complaints against a corporate member or its supplier.[258] The grievance mechanism used by ETI has a more narrow scope than that of the proposed tribunal discussed above because ETI only focuses on violations of the ETI Base Code, which primarily concerns labor rights.[259] However, this one organization can address complaints covering a broad geographic area. For example, ETI addressed labor violations by a supplier in Cambodia that resulted in an agreement by management to provide compensation and training and permit union access.[260] It also helped negotiate an agreement in Turkey between a union and a supplier following the latter's dismissal of workers.[261]

A decentralized model, however, offers two significant advantages: proximity and inclusiveness. Many of those who study international criminal justice warn about the dangers of distance. As distance between an international court and its primary constituency grows, so do the risks of miscommunication, misunderstanding, and political manipulation. An international court or other dispute resolution body may compromise its legitimacy in the eyes of the local population when it is located far away from them.[262] According to Laura Dickinson, the location of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the

256. *Id.* at 7.

257. Rees & Vermijs, *supra* note 4, at 42.

258. *Id.*

259. *Id.*

260. *Resolving Complaints*, ETHICAL TRADING INITIATIVE, http://www.ethicaltrade.org/in-action/resolving-violations.

261. *Id.*

262. *See* William W. Burke-White, *Regionalization of International Criminal Law Enforcement: A Preliminary Exploration*, 38 TEX. INT'L L.J. 729, 735–36 (2003) (explaining that regional enforcement mechanisms are more likely to exhibit the "psychological proximity and sense of connection between the tribunal and the local community, upon which legitimacy depends").

Hague, instead of where the atrocities occurred, contributed to a situation in Bosnia and Herzegovina where even judges and lawyers were "ill-informed about the ICTY's work, and were often suspicious of its motives and its results."[263]

Distance also compromises the potential for restorative justice. William Burke-White provides an example where "thousands of miles and trans-oceanic flights separating witnesses and evidence from the court" compromised societal healing in the wake of the atrocities in Bosnia.[264]

Proximity also facilitates local capacity building, including the development of local legal institutions and training of legal practitioners.[265]

Proximity offers strong arguments in favor of decentralization but it is not enough. Even hybrid courts — located in places where the atrocities occurred — suffer from a lack of local legitimacy when they exclude local actors from the design and implementation of the courts. Decentralization therefore matters not only because it increases proximity, whether physical or psychological, but also because it increases inclusiveness by involving local actors.

According to Jaya Ramji-Nogales, the participation of local actors in the institutional design processes for these transitional justice mechanisms increases the likelihood of perceived legitimacy.[266] This perception is critical in order for these local actors — victims, perpetrators, and political elites — to develop and internalize norms against the commission of these atrocities in the future.[267] Ramji-Nogales acknowledges that it is impossible to please everyone, but she argues that it is "possible to improve contemporary transitional justice mechanisms by considering all of these perspectives during the design process in order to increase perceptions of legitimacy by as many players as possible."[268] The inclusion of local actors during institutional design allows the resulting mechanism to conform to local traditions, expectations, and cultural practices.[269]

For example, in the Mexican electronics industry, the CEREAL-CANIETI dispute resolution process illustrates a decentralized approach to dispute resolution. Many leading global electronics companies manufacture

263. Laura Dickinson, *The Promise of Hybrid Courts*, 97 AM. J. INT'L L. 295, 302 (2003) (explaining that perceived legitimacy was also reduced by failure of ICTY to publicize its work, lack of local participation, and predominant use of an unfamiliar legal tradition); *see also* Ramji-Nogales, *supra* note 8, at 28.

264. Burke-White, *supra* note 262, at 735–36.

265. Dickinson, *supra* note 263, at 303–04; Burke-White, *supra* note 265, at 735–36.

266. *See* Ramji-Nogales, *supra* note 8, at 17.

267. *See id.*; *see also id.* at 18 ("[A] transitional justice mechanism that is viewed as legitimate by as many perpetrators as possible because it incorporates as many of their interests as possible will be more effective than one that ignores the interests of perpetrators entirely.").

268. *Id.* at 21.

269. *See id.* at 24; Burke-White, *supra* note 262, at 737.

their products from supplier factories in Mexico.[270] Although a number of large branded electronic companies commit to the standards in the Code of Conduct of the Electronics Industry Citizenship Coalition (EICC), the Mexican electronics industry is characterized by significant human rights abuses.[271]

The need to address these human rights abuses led to the creation of an industry-wide grievance mechanism in Mexico's electronics sector. This mechanism is managed through an alliance between two important organizations: CANIETI (National Chamber of the Electronic, Telecommunications and Information Technologies Industry) and CEREAL (Centre for Reflection and Action on Labour Issues). Workers can use the mechanism to challenge conduct by any company member of CANIETI and the EICC Code of Conduct serves as the reference point for these complaints.

As a decentralized approach, "[t]he structure of the [CEREAL-CANIETI dispute resolution mechanism] largely reflects employment dynamics in the Guadalajara electronics industry."[272] This sector is characterized by a strong and cohesive business association that can pressure industry participants to use the dispute resolution mechanism available. This cohesiveness is partially explained by the fact that many of the firm managers are Mexican and built their careers within the electronics cluster in Mexico.[273]

Additionally, the Jesuit roots of CEREAL affected the ability of CEREAL to carry out its labor activities in Mexico: "[I]n some cases, firm managers have agreed to meet with and discuss labor rights issues with CEREAL-GDL because of their personal ties to the Jesuit institution. For example, some managers studied at Jesuit secondary and higher education schools."[274]

Although these advantages are considerable, decentralization also offers another important benefit: opportunities for trust-building. As Section IV explained, the trust and legitimacy that a dispute resolution mechanism commands is a product of trust-building during its institutional development. These processes allow the affected parties to understand, even shape, the objectives and capacities of the resulting grievance mechanism, thereby increasing the likelihood that they will perceive it as legitimate. More

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270. *Electronics Multinationals and Labour Rights in Mexico: Second Report on Working Conditions in the Mexican Electronics Industry*, CENTRE FOR REFLECTION AND ACTION ON LABOUR ISSUES (CEREAL) 10 (2007), http://www.reports-and-materials.org/sites/default/files/reports-and-materials/Cereal-Report-English-Oct-2007.pdf.

271. *Id.* at 12.

272. Héctor Salazar Salame, *Worker Rights Protection in Mexico's Silicon Valley: Confronting Low-Road Labor Practices in High-Tech Manufacturing Through Antagonistic Collaboration* 60 (2011) (unpublished MCP thesis, Massachusetts Institute of Technology), *available at* http://hdl.handle.net/1721.1/69456.

273. *Id.* at 15.

274. *Id.* at 13.

importantly, institutional design offers opportunities for trust-building among a group of stakeholders with diverse needs and interests who are unaccustomed to trusting each other. These opportunities are lost when local stakeholders are excluded from the institutional design process, which is often the case with centralized dispute resolution mechanisms that have the world as their audience.

B. Extent of Judicialization

By definition, non-judicial grievance mechanisms are not courts. Instead, they can use a variety of processes for resolving grievances. In addition to adjudication, grievance mechanisms use investigation, information facilitation, negotiation, mediation and conciliation, and arbitration.[275] Some of these processes are more "judicialized" than others, such as arbitration, which uses binding decision-making by a third party. Other processes offer different pathways to resolution and provide opportunities for parties to resolve differences. These are interesting developments given the trend towards judicialization in other areas of international law. This section provides examples of judicialized and non-judicialized processes and evaluates these options for trust-building according to the framework developed in this Article.

At the judicialized end of the spectrum, there are grievance mechanisms that favor arbitration. Some companies incorporate arbitration into a multi-stage dispute resolution process and resort to arbitration when other grievance processes fail.[276]

Arbitration is also favored for prospective tribunals, such as the proposed international tribunal for business and human rights discussed above. It is modeled on international commercial arbitration. Disputes would be resolved using arbitration; mediation would be available to address conflicts at an early stage.[277] The arbitration rules would be modeled on the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).[278] Decision-makers would be chosen from a roster of arbitrators and, critically, the decisions of the tribunal would be enforced under the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[279] This is the multilateral treaty that facilitates the enforcement of international arbitration awards and has contributed to

275. Rees & Vermijs, *supra* note 4, at 4.

276. Rees, *supra* note 4, at 14 (describing Gap, Inc.'s grievance process in Lesotho); *id.* at 19 (describing Xstrata Copper's grievance process in Peru); *id.* at 9 (describing BTC Pipeline's grievance process in Azerbaijan).

277. Cronstedt Remarks, *supra* note 255, at 2.

278. *Id.*

279. *Id.*

the growth of arbitration as the means for resolving private, cross-border disputes.

Although sharing many of the hallmarks of international *commercial* arbitration, its proponents intend to modify the tribunal to address matters dealing with human rights. For example, the arbitrators at this tribunal would have special knowledge of human rights abuses.[280] Additionally, the tribunal would include a "roster of scientific and technical experts on human rights issues, who may be appointed as expert witnesses in arbitration as well as in mediation."[281]

Arbitration is also the selected dispute resolution process for the Bangladesh Accords. In the wake of the Rana Plaza crisis that killed over 1,000 people, global brands and retailers and trade unions established the Bangladesh Accord on Fire & Building Safety. This agreement contains several provisions to improve workplace safety at supply sites. For example, brands and retailers finance the cost of improved standards in their production sites, although they are given latitude in designing the precise form of financing.[282] Additionally, under Article 24, signatory companies also financially contribute to the Accord's programs on inspection, remediation, and training.[283] The Accord is legally binding and permits arbitration in case of dispute.[284] Disputes are first submitted to the steering committee.[285] However, either party may request appeal of the decision to final and binding arbitration.[286] According to Article 5,

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280. *Id.*

281. *Id.* at 3. The scope of the issues heard by the tribunal is left to the individual parties. Parties can choose to arbitrate their dispute through the use of pre-dispute contractual arbitration arrangements, such as human rights-arbitration clauses inserted into supply contracts between multinational companies and their suppliers. These human rights clauses would identify the international human rights norms that are meant to be observed and would mandate arbitration before the tribunal if these norms are violated. Outside stakeholders who are not parties to the contract may still enforce these clauses as third-party beneficiaries. Parties may also opt for arbitration under the tribunal once a dispute has arisen. Claes Cronstedt & Robert C. Thompson, *An International Arbitration Tribunal on Business & Human Rights — Enhancing Access to Remedy*, WORKING GRP. ON INT'L ARBITRATION TRIBUNAL ON BUS. & HUMAN RIGHTS 7–8 (2014) http://business-humanrights.org/sites/default/files/documents/Intl_Arbitration_Tribunal_V4.pdf.

282. *Accord on Fire and Building Safety in Bangladesh* ¶ 6 (2013), http://bangladeshaccord.org/wp-content/uploads/2013/10/the_accord.pdf [hereinafter Bangladesh Accord]; *see also id.* at ¶ 22 ("In order to induce Tier 1 and Tier 2 factories to comply with upgrade and remediation requirements of the program, *participating brands and retailers will negotiate commercial terms with their suppliers which ensure that it is financially feasible* for the factories to maintain safe workplaces and comply with upgrade and remediation requirements instituted by the Safety Inspector. Each signatory company may, at its option, use alternative means to ensure factories have the financial capacity to comply with remediation requirements, *including but not limited to joint investments, providing loans, accessing donor or government support, through offering business incentives or through paying for renovations directly*.") (emphasis added).

283. *Id.* at ¶ 24.

284. *Id.* at ¶ 5.

285. *Id.*

286. *Id.*

> Any arbitration award shall be enforceable in a court of law of the domicile of the signatory against whom enforcement is sought and shall be subject to The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (The New York Convention), where applicable. The process for binding arbitration, including, but not limited to, the allocation of costs relating to any arbitration and the process for selection of the Arbitrator, shall be governed by the UNCITRAL Model Law on International Commercial Arbitration 1985 (with amendments as adopted in 2006).[287]

By contrast, many grievance processes prefer dialogue-based forms of dispute resolution. The United Nations recommends this approach for company-level mechanisms in particular because "a business enterprise cannot, with legitimacy, both be the subject of complaints and unilaterally determine their outcome."[288] There are several examples of non-adjudicatory dispute resolution processes. At the international level, the Compliance Advisor Ombudsman (CAO) of the International Finance Corporation uses mediation, supported by fact-finding and other methods, to help parties resolves disputes.[289] Otherwise, the CAO uses compliance investigation processes.[290]

Industry-based grievance mechanisms also adopt dialogue-based approaches. At the international level, the Ethical Trading Initiative (ETI) provides a grievance mechanism by which ETI members can raise and resolve complaints concerning violations of the ETI Base Code.[291] One advantage of the ETI grievance process is that "NGO and trade union members encourage their affiliates to use the mechanism if a complaint arises."[292] The ETI also serves as a forum for members to resolve issues without the use of a formal complaint.[293] The ETI complaints process involves the "company members whose suppliers are the subjects of complaint," the trade union or NGO members raising the complaint, "the management of the supply factory or factories involved and any complainants who wish to be directly involved."[294] The ETI complaint process uses investigation facilitation and dialogue to address the issues

287. *Id.*

288. *Guiding Principles on Business and Human Rights*, *supra* note 6, at 27.

289. *About the CAO: Our Roles*, *supra* note 151.

290. *Id.*

291. *ETI Code Violation Procedure*, ETHICAL TRADING INITIATIVE 1, http://www.ethicaltrade. org /sites/default/files/resources/code_violation_procedure.pdf.

292. Rees & Vermijs, *supra* note 4, at 42.

293. *Id.*; *ETI Code Violation Procedure*, *supra* note 291, at 1.

294. Rees & Vermijs, *supra* note 4, at 43.

raised.[295] The complaint process is limited to members only; however, a non-member could seek the support of an ETI member in order to advance its complaint.[296]

At the national level, the sector-wide grievance process used by CANIETI and CEREAL also relies on dialogue-based approaches. The process begins with a worker raising the complaint directly with firm management, if the worker feels comfortable with such an action.[297] If resolution is not reached between the worker and firm management, the worker approaches CEREAL. CEREAL initiates an investigation and, if it finds violations of the EICC or Mexican labor law, it raises labor complaints before the mechanism. At this stage, CANIETI becomes involved by reaching out to its members and identifies a contact within the company concerned in the complaint.[298] The grievance process begins with direct dialogue.[299] If this process fails, then the parties use third-party mediation offered through the grievance mechanism.[300] If this process also fails, CEREAL can raise the matter to the brand-name level.[301] Finally, if the matter cannot be resolved at the brand level, CEREAL is permitted to publish the case in its annual report and media.[302]

As explained above, most grievance mechanisms addressing human rights and other conflicts in global production do not adopt judicialized processes. Instead, they tend to rely on dialogue-based approaches that encourage parties to reach their own solutions. What are we to make of this trend in favor of counter-judicialization?

In order to evaluate counter-judicialization in this context, it is worth exploring the limitations of judicialization within the familiar, domestic setting. Carrie Menkel-Meadow identifies several limitations of the adversarial system within this latter setting. First, she notes that the adversarial system depends on establishing facts in order for a judge to reach an opinion; however, facts can be difficult to establish and different people will interpret facts in different ways.[303] These challenges also arise in the context of conflicts in global supply chains and overseas production sites.

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295. *Id.*

296. *ETI Code Violation Procedure*, *supra* note 291, at 1.

297. Salame, *supra* note 272, at 59.

298. Brian Ganson, *Resolving Labour Issues in the Electronics Industry in Mexico*, ACCESS 5 (2014), http://accessfacility.org/access-case-story-2-resolving-labour-issues-electronics-industry-mexico.

299. *Id.*

300. *Id.*

301. Salame, *supra* note 272, at 59.

302. *Id.* at 60.

303. Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Postmodern, Multi-Cultural World*, 1 J. INST. STUDY LEGAL ETHICS 49, 50–57 (1996).

Parties may acknowledge the existence of a systemic problem but will not agree on the facts, such as details surrounding a particular event.[304]

Second, the adversarial system privileges binary narratives that are usually based on the experiences of two parties.[305] The reality is that many disputes implicate the interests of more than two parties. It is certainly true in the context of human rights disputes involving corporations. Disputes over land between a corporation and local inhabitants could implicate several communities that may have their own interests. Local state actors may also want to be involved in the process because of the effects of the land agreements for the state and other communities. Additionally, many local and international NGOs also seek involvement in the dispute resolution process. These different stakeholder voices are hard to incorporate within a dispute resolution system that is traditionally made for two.

Finally, Menkel-Meadow argues that adversarial systems compromise the quality of the outcomes reached. First, the ways to resolve a dispute are limited under an adversarial system: "[E]xpanding the stories, the interests, the issues and the things at stake actually enhances the likelihood of finding 'trades' and other creative solutions to problems so that contentious argument can be minimized and more party needs can be satisfied."[306] Additionally, solutions imposed by judges "do not deal with underlying causes of ongoing conflicts or disputes."[307] These challenges certainly support counter-judicialization in the context of the corporation and its external stakeholders. Those affected by the corporation's acts may be better informed on the types of solutions needed compared to a third-party decision-maker. Stakeholders may also be more willing to accept these outcomes if they played a role in reaching the outcomes.

Of course, dialogue-based approaches are also vulnerable to their own particular risks and evils, such as unequal bargaining power and asymmetries in information and capacity. That is why it is critical to supplement dialogue with capacity building and training.[308] For example, in the Wilmar dispute resolution process, CAO prepared the parties for the mediation process, including improving their capacity for dialogue, sharing information, and creating consensus.[309]

On balance, non-judicial approaches may be better suited to resolving disputes involving "business and human rights." This may strike some as surprising. When confronted with human rights violations, our impulse is

304. *See* Telephone Interview with International Policy Advisor (Oct. 24, 2014) (on file with author).

305. Menkel-Meadow, *supra* note 303, at 59, 62.

306. *Id.* at 63.

307. *Id.* at 64.

308. Telephone Interview with International Mediator (Dec. 22, 2014) (on file with author).

309. *Close Out Report*, *supra* note 155, at 3.

to answer the accountability gap in international law with a robust adjudicative or semi-adjudicative body that satisfies our notions of accountability. The proliferation of international courts and their kin — locally or globally — reflect these impulses. In the face of this trend toward increased judicialization, this section suggests a different pathway for accountability by illustrating the benefits of decentralized, dialogue-based approaches. Such approaches certainly offer benefits for resolving disputes between corporations and external stakeholders regarding human rights. It may be worth exploring whether these approaches can offer similar benefits in other contexts addressing international human rights.

VI. LIMITATIONS: THE VALUE CHAIN ANALYSIS

One potential concern with developing a framework for procedural fairness is the wisdom and practicality of transplanting processes between corporations operating in different value chains. Value chain characteristics are certainly important. These characteristics affect (a) the nature of the disputes that arise and (b) the types of external stakeholders involved.

In the extractive industries (such as oil and mining), the key external stakeholders are the members of the local communities in which the business enterprise operates. These individuals are not necessarily employed by the business enterprise and may not take an active part in the enterprise's value chain. As such, they may lack an employment or quasi-employment relationship with the enterprise. Instead, their interest in the enterprise's activities comes from their vulnerability to negative effects from the business operation. The disputes that arise, therefore, concern the impact of an enterprise's operations on the community's welfare, such as land clearance, environmental damage, and security issues.

The situation is slightly different when we move from the extractive industry to other value chains, such as agricultural, electronics, or garments. Here, the key stakeholders are often the suppliers of large importing companies in developed economies and the workers employed by those suppliers. In these value chains, the contentious issues generally concern labor, social, and environmental standards that govern the treatment of workers in the value chain.

These differences necessarily lead to the question of whether successes experienced by a company in one type of value chain can be replicated in another. As explained below, value chain differences do not preclude the *applicability* of procedural fairness strategies across value chains; however, these differences do influence the likelihood that a corporation *will invest* in procedural fairness.

A. Applicability of Procedural Fairness

First, the framework for procedural fairness developed in this Article builds upon the broad criteria for non-judicial grievance mechanisms set out in the UN Guiding Principles on Business Rights ("UN Guiding Principles") and the OECD Guidelines for Multinational Operations. These standards do not limit the criteria to particular value chains. Instead, under Article 31 of the UN Guiding Principles, the seven effectiveness criteria are intended for *both* State-based and non-State-based non-judicial grievance mechanisms.[310] The only distinction recognized is the special situation of operational-level grievance mechanisms, where engagement and dialogue are recommended.[311]

Second, the framework developed in this Article provides a wide margin for adaptation in different contexts. The process for resolving secondary conflicts does not need to be the same in all contexts — there simply needs to be a process in place. Wilmar incorporated its process for secondary conflict resolution in a Memorandum of Understanding that set out ground rules for the dialogue process, including rules of conduct, decision-making and how to overcome deadlock.[312] By contrast, Chevron used joint sessions "to resolve impasses and disagreements."[313]

Similarly, trust-building can also differ between contexts. For example, Wilmar and Chevron both participated in joint problem solving exercises with community members but these joint exercises differed because of the issues in dispute. Wilmar participated in joint mapping exercises with community members because much of the dispute concerned land rights.[314] By contrast, Chevron engaged in a participatory stakeholder evaluation involving representatives from the communities, local NGOs, the government, and Chevron.[315] The purpose of this process was to evaluate Chevron's first set of GMOUs and identify areas for improvement.[316]

B. Investing in Procedural Fairness

Even if value chain differences do not affect the applicability of procedural fairness, these differences do affect the likelihood that companies will adopt procedural fairness for the following three reasons: economic value of procedural fairness, susceptibility to external drivers, and centralization/decentralization of dispute resolution.

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310. *Guiding Principles on Business and Human Rights*, *supra* note 6, at 26.
311. *Id.* at ¶ 31(h).
312. *CAO Report*, *supra* note 238, at 3–4.
313. Hoben, Kovick, Plumb & Wright, *supra* note 162, at 9.
314. *CAO Report*, *supra* note 238, at 1.
315. Hoben, Kovick, Plumb & Wright, *supra* note 162, at 8.
316. *Id.*

The level of trust that a grievance mechanism commands is a result of the processes that created it. It is more likely to be trusted and used if its institutional design process is perceived as fair. But a company's willingness to invest in fair procedures also varies and depends on how much effective dispute resolution matters to its economic interests. Critically, the economic value of procedural fairness depends on whether a corporation can escape disputes in its value chain or if it must address them. A corporation will invest in superior dispute resolution mechanisms and adopt fair procedures if it must confront the disputes that occur in its value chain. Value chain characteristics determine whether a company can flee a dispute or is forced to confront it.

The first value chain characteristic that matters relates to substitution possibilities for the resources in the value chain. A transnational corporation's commitment to a region is linked to its ability to source elsewhere. The differences in the quality of the dispute resolution methods used can therefore be partially explained with reference to a company's substitution possibilities and the risk of supply interruptions. When resources are fixed and substitution is unlikely, companies are more likely to invest in better dispute resolution because they cannot run away from those disputes. In these situations, companies take the region as they find it and must work with the local communities and NGOs to resolve the disputes.

For example, Chevron's history in the Niger Delta went back over forty years before the first GMOUs were negotiated. This history had withstood several challenges, and Chevron was not going to leave the area. Not every company has such an enduring stake in the outer posts of its global value chain. Confronted with supply interruptions or an imminent public relations crisis, many companies simply abandon their operations in the "problem" region and re-locate to another location.[317]

Corporate commitment to engagement also grows when there are significant risks and consequences associated with unresolved conflicts, such as the conflict in the Niger Delta that suspended Chevron's operations. The corporate project of dispute resolution becomes even more significant when local governments lack the capacity to address these disputes. These

317. The fear of flight in the wake of a value chain crisis — or in the response to it — is the reason why multi-stakeholder agreements include "anti-flight" provisions. *See* Bangladesh Accord, *supra* note 282, at ¶ 25 ("Signatory companies to this agreement are committed to maintaining long-term sourcing relationships with Bangladesh, as is demonstrated by their commitment to this five-year programme. Signatory companies shall continue business at order volumes comparable to or greater than those that existed in the year preceding the inception of this Agreement with Tier 1 and Tier 2 factories at least through the first two years of the term of this Agreement, provided that (a) such business is commercially viable for each company and (b) the factory continues to substantially meet the company's terms and comply with the company's requirements of its supplier factories under this agreement.").

economic factors may explain why many currently available operation-level grievance mechanisms are in extractive-sector value chains: BTC Pipeline (oil), Xstrata (copper), Carbones del Cerrejon (coal), Sakhalin Energy (oil and gas), and Chevron (oil).[318] The International Council of Mining and Metals (ICMM) provides its members with detailed procedures for establishing credible grievance mechanisms.[319]

Under this value chain analysis, it is not surprising that the quality of dispute resolution therefore dwindles when the substitution possibilities increase and the supply chain risks decrease. Retailers in the garment industry have more options for sourcing. Additionally, the disputes at issue — factory-level issues between workers and managers — may not threaten widespread supply interruptions as in the Niger Delta. Here, the substitution possibilities are considerable so a company may not need to address local conflicts. They can simply take flight. The humbling insight is that although fair processes facilitate trust, economic interests facilitate fair processes, at least in the commercial context. Even if companies understand how to adopt fair processes, their investment in fair procedures depends on the economic value of that trust.

Another consequence of value chain differences is relative susceptibility to external drivers for dispute resolution. As discussed in Section IV, supra, one set of drivers come from financial institutions, such as the commercial banks that have signed onto the Equator Principles.[320] Therefore, a company's susceptibility to these drivers depends on whether it is dependent upon such financing arrangements.

A second driver for improved corporate practices generally is consumer preferences in developed markets. Certain industries, such as brand electronics and garments, seem particularly susceptible to market incentives created by such preferences, such as anti-sweatshop media campaigns and consumer boycotts. This susceptibility to consumer preferences is more pronounced in these industries than extractive industries where demand is more fixed. However, despite this susceptibility, there appears to be less activity in the former industries regarding dispute resolution within their value chains. This may reflect the lack of consumer education regarding the importance of dispute resolution and subsequent lack of consumer demand for it.

Finally, value chain differences may affect the extent of centralization in resolving disputes within value chains. Where similar disputes arise between

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318. Retail value chains have also been active, with grievance mechanisms adopted by Gap, Hewlett Packard, and Esquel Garments Vietnam. *Piloting Principles*, *supra* note 51, at 31. One driver for the use of grievance mechanisms here may be reputational risks for brand name retailers.

319. ICMM, *supra* note 4.

320. *See supra* note 24 and accompanying text.

a group of stakeholders and one firm, we may expect to see greater decentralization of dispute resolution and the predominance of company-level grievance mechanisms. For example, a great deal of the research on best practices regarding operation-level grievance mechanisms comes from value chains in the extractive industry.[321]

Where disputes arise between stakeholders and a number of different companies, it is likely that these companies will adopt industry or multi-industry dispute resolution platforms. In electronic and garment value chains, large first-tier suppliers often take orders from several different clients.[322] Therefore, labor disputes that arise between workers and suppliers may often implicate more than one company. In these situations, it is more likely that companies will use dispute resolution mechanisms offered through organizations like the Fair Labor Association or the Ethical Trading Initiative.

CONCLUSION

This Article argues that the level of trust that stakeholders place in a dispute resolution mechanism does not only result from its attributes during its operational stage when it is used to resolve grievances that have arisen between parties. Instead, the trust that claimants and other stakeholders place in the mechanism also depends on the process of its creation — institutional design — and whether this process built trust between the stakeholders involved.

Under a stewardship approach to trust-building, a corporation or other business enterprise should treat each stage of institutional development as a site for trust-building between itself and its local suppliers, workers, and community members. Stakeholder engagement should occur during each of these stages but should not be relied upon exclusively to build the desired trust. Instead, corporate actors should be prepared for conflict during the process of stakeholder engagement. They should distinguish between conflicts about non-compliance with applicable standards (*primary conflicts*) and conflicts about the content of those standards and their enforcement (*secondary conflicts*). Corporations should focus on resolving both primary *and* secondary conflicts in order to build effective trust between the parties.

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321. For example, the global oil and gas industry association for environmental and social issues (IPIECA) has already produced a good practices survey on operation-level grievance mechanisms. *Operational Level Grievance Mechanisms: IPIECA Good Practice Survey*, IPIECA (2012), *available at* http://www.ipieca.org/publication/operational-level-grievance-mechanisms-good-practice-survey. It will shortly release a report on its pilot study of grievance mechanisms. The International Council on Mining and Metals (ICMM) also released a study on designing and operating grievance mechanisms. ICMM, *supra* note 4; *see also Piloting Principles*, *supra* note 51.

322. *See* Helle Bank Jørgenson et al., *supra* note 61.

Disagreements may occur but what is vital is that there is a strategy in place to address these disagreements *and* that this strategy is perceived as acceptable by those stakeholders participating in the institutional design process. Critically, parties can facilitate trust-building through contracting strategies. The contracting process can establish a foundation of informal norms upon which the parties' exchange relationship is based. Here, contracting performs an instrumental role by endogenizing trust within relationships.

As a result, the level of trust that characterizes the relationship between the parties is not a given. Instead, it is also a product of the process of institutional design. The level of trust that stakeholders place in a dispute resolution mechanism is influenced by the trust-building that does or does not occur during that mechanism's institutional design stage. Building trust during this process can increase the trust and legitimacy that the resulting grievance mechanism commands. It may even decrease the likelihood of disputes between the parties. This insight has significant implications for public and private institutional development in comparable settings. It suggests that actors should consider opportunities for trust-building during the entire institutional development process and not focus exclusively on the operational stage. Second, this insight also suggests an alternative approach to international accountability that favors decentralization and non-judicialization and the benefits of decentralized, dialogue-based approaches to human rights violations by corporations.