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Human Rights and Grievance Mechanisms
How judicial are non-judicial remedies?

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Abstract
Recent decades have seen a strong trend towards the ‘privatization’ of international politics in many areas. Corporate actors, in particular, increasingly exert ‘private authority’, meaning they take over formerly public functions. This paper argues that non-state actors, when taking over public functions, often copy the institutional designs and procedural rules of state-based institutions fulfilling similar functions – thereby often creating dysfunctionality. The paper illustrates this point by reference to a newly emerging variant of private authority, namely so called grievance mechanisms established by corporate actors to solve disputes with their various stakeholders. The paper shows that grievance mechanisms, while deliberately meant to be non-state and non-judicial, often adopt a number of procedural rules stemming from state-based and judicial models of dispute settlement although a clearer orientation towards principles of alternative dispute resolution would often be more conducive to the cases they deal with. These points will be illustrated by a brief introduction of two grievance mechanisms in the transnational sphere, namely the Fair Labor Association’s ‘Third Party Complaint Process’ and so called ‘dialogue tables’ employed in Peru’s extractive sector to solve disputes between companies and local communities.
1. Corporate Grievance Mechanisms: Filling an Institutional Vacuum

While transnational\(^1\) rule-setting and implementation processes have been proliferating in recent years (Dingwerth, 2007: 7), few institutions exist to ‘adjudicate’ disputes over these rules. Hence, the transnationalization of legislative and executive powers seems to outgrow the provision of ‘judiciary’ functions. This is not a wholly new trend: Even when the realm beyond the state was dominated by exclusively intergovernmental forms of rule-setting, judicial dispute resolution institutions were few in number, although growing in recent years (compare (Keohane et al., 2000). But the existing gap between substantive rules applicable internationally and dispute resolution bodies empowered to ‘adjudicate’ them is now widening because rules in the international arena no longer take the form of binding international law subject to jurisdiction of intergovernmental courts (in particular, the ICJ). Instead, they emerge as voluntary regulations (Abbott and Snidal, 2009, Djelic and Sahlin-Andersson, 2006, Mattli and Woods, 2009) or non-binding standards (Botzem, 2008, Hülsse and Kerwer, 2007) that are not justiciable before either international or national courts. The transnational sphere, therefore, is subject to a growing net of rules but lacks the equivalent of a judiciary to oversee these.

Ruggie identified this institutional gap as one of the most pressing problems in the field of business and human rights and devoted a large part of his ‘Protect, Respect and Remedy’-Framework to addressing it. One of the framework’s core propositions – and one of its most heavily criticized ones – is the idea of providing non-state based grievance mechanisms as a form of remedy for human rights violations. As suggested by Ruggie, grievance mechanisms could take a number of forms, they could be installed by individual companies on project or corporate level or could be attached to multistakeholder codes of conduct. Indeed, grievance mechanisms have become a strongly promoted policy tool, not only through adoption of the ‘Guiding Principles on Business and Human Rights’\(^2\) by the UN Human Rights Council in June 2011. The International Finance Corporation, the World Bank’s financier for the private sector, also strongly promotes these instruments. And a large number of industry associations, including, among others, as the International Council on Metals and Mining, foster the creation of grievance mechanisms among their members. For the purpose of this paper, non-

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\(^1\) The term ‘transnational’ as employed in this paper is loosely defined as all phenomena and processes that involve non-state actors in cross-border contexts.

state-based grievance mechanisms are loosely defined as institutions established by non-state actors to resolve or ‘adjudicate’ conflicts between globally operating corporations and their various stakeholders, i.e. employees, consumers, or communities in the vicinity of corporate operations. To date, grievance mechanisms addressing business’ human rights responsibilities exist, for example, in the following contexts:

- labor rights disputes between individual employees and multinational corporations regarding working conditions in global supply chains;
- land rights and environmental disputes involving local, sometimes indigenous, communities affected by extractives industries projects;
- and even severe humanitarian law and human rights violations by private security and military companies are addressed by grievance mechanisms allowing individual victims recourse against these;

Against the background of a growing universe of grievance mechanisms, this paper will be arguing two things: For one, that non-state-based grievance mechanisms indeed constitute a private take-over of a largely public function, i.e. the settlement of disputes that endanger societal peace. Traditionally, when this function is fulfilled by public or state actors it has taken a judicial form. But while many critics see the takeover in and of itself as an undue dimension of privatization, this paper, secondly, argues that taking over the function of dispute settlement becomes problematic only when non-state actors, at the same time, copy the forms in which state actors perform dispute settlement – and thereby sacrifice the added-benefit that private, or non-judicial, dispute resolution mechanisms could bring for preservation of societal peace and human rights protection, among others. In other words, non-state-based non-judicial remedies become more problematic the more they seek to be judicial, after all.

The paper will show that grievance mechanisms could, theoretically, follow either one of two established institutional models that fulfill the function of dispute settlement: the judicial form enshrined in the public court system or its long established counterpart, alternative dispute resolution (ADR). Judicial, or court-like dispute settlement, can be briefly described as a tripartite process characterized by its departure from pre-existing rules and striving to interpret and apply these in the context of a concrete dispute in order to determine which of the disputing parties is right and which is wrong (Shapiro, 1981). ADR-based mechanisms, that deliberately seek to be alternatives to judicial dispute settlement, to do away with the
‘legalistic’ nature of the judicial processes that, allegedly, disempowers the disputants and, in particular, the injured party by leaving the solution of their dispute to ‘professionals’. ADR’s goal, instead, is to ensure that the parties retain control of the proceedings and are, thereby, empowered. Furthermore, through its departure from the parties interests – rather than pre-existing rules – with the goal of reconciling these, ADR hopes to arrive at more sustainable dispute resolutions. This empowerment-based approach would seem particularly fitting when looking to conflicts between corporations, on the one hand, and usually significantly weaker parties, on the other hand.

Empirically, both kinds of grievance mechanisms exist in the realm of transnational dispute settlement, those that follow a judicial and those that follow an ADR approach. But nevertheless, as the paper will illustrate briefly, grievance mechanisms often strive to be as court-like as possible, in their form and procedures, even when ADR-oriented designs would seem significantly more functional.

This allegation – of an ADR approach to addressing corporate human rights responsibilities being functionally more appropriate – is supported, for example, by recent policy changes in many multilateral development banks (MDB). Faced with severe criticism regarding the negative environmental and social impacts of the projects they finance, the World Bank Group and its regional equivalents have long adopted accountability mechanisms that are authorized to receive complaints from affected communities. Originally, almost all of these mechanisms followed an inspection model (Bradlow, 2005, Nanwani, 2008), meaning when activated by a complaint, they would investigate whether the respective MDB had or had not complied with its own environmental and social standards and procedures. The ensuing investigation usually was a relatively legalistic process testing all aspects of bank behaviour for their compatibility with the standards and resulting in a mere statement of facts about whether noncompliance had occurred. Because this approach often remained wanting as a genuine ‘remedy’ for the complaints of affected people and in terms of sustainably solving disputes, many MDBs have recently supplanted or complemented their investigation instruments by ‘problem-solving’ mechanisms such as ombudsmen proceedings .(Nanwani, 2008) as these promise better outcomes in terms of remedying rights violations.

Nevertheless, despite the apparent functional superiority of ADR approaches to solving disputes involving corporations and their stakeholders, grievance mechanisms often times orientate themselves more to the judicial than to the non-judicial model of dispute settlement and thereby become ineffective in addressing the problems they are meant to solve.
To make this argument, the paper proceeds by, first, outlining in what sense grievance mechanisms are fulfilling public functions in transnational regulatory contexts. Secondly, it argues that non-state actors often seem to defer from the publicness of this function, a necessity to follow traditional judicial forms and procedures in fulfilling it. The fourth section, briefly recaps the – idealtypical – characteristics of judicial dispute settlement by state-based courts and of alternative dispute settlement as an, idealtypically, non-state institution. The following two snapshots at empirical cases show that some grievance mechanisms more closely follow the first, others the second model and it briefly points out some of the dysfunctional implications of the first approach.

2. Dispute Settlement: Public in Function, Private in Form

Grievance mechanisms are seen as helping to overcome an accountability deficit resulting from the fact that corporate behavior is subject to manifold rules and regulations but no mechanisms exist to hold them accountable when they are not complying with these rules. That corporations become ‘defendants’ before grievance mechanism – in the sense that claims can be brought against them – therefore is their primary achievement and is particularly important in the context of business and human rights where a lack of institutions authorized to ‘adjudicate’ corporate misbehavior is one of the central problems. For the purpose of this paper, however, the private nature of the defendants in grievance mechanisms is less of interest. Instead, it is the private nature of the dispute settlement body that is seen as theoretically as well as normatively challenging. The paper concurs with many observers that grievance mechanisms signify a new dimension in the ongoing ‘privatization’ of governance. Their new and special nature can be described in terms of three public-private dichotomies: The disputing parties as well as the dispute settlement institution are private in nature but the substance of the disputes being ‘adjudicated’ are very public. The first dichotomy, the nature of the disputing parties, already distinguishes grievance mechanisms from other forms of quasi-judicial dispute settlement in the international arena, namely, from international investment arbitration tribunals that address conflicts between corporate investors and host states (Burke-White and von Staden, 2010, Mattli, 2001). Secondly, when it comes to grievance mechanisms, the dispute settlement body itself is also provided by or constituted of private actors. At this point, grievance mechanisms – as they are understood in this paper – are distinct from other, relatively recent forms of dispute settlement, such as the IFC’s Compliance Advisor Ombudsman (in its Ombudsman function) or the National Contact
Points provided under the OECD Guidelines for Multinational Corporations. While the latter also address disputes between private actors, namely corporations and their employees or communities, the dispute resolution mechanism is provided by public actors, usually intergovernmental organizations.

When referring solely to these two characteristics – the nature of the disputing parties and of the dispute settlement institution – grievance mechanisms would fully equal international commercial arbitration by which corporate actors solve their border-crossing trade-related disputes under *lex mercatoria* (see Table 1).

<table>
<thead>
<tr>
<th>Dispute Resolution Institution</th>
<th>(Partly) Public</th>
<th>Private (only)</th>
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<tbody>
<tr>
<td>Public</td>
<td>International Courts (ICJ, ECJ) WTO Dispute Panels</td>
<td>IFC CAO/Ombudsman OECD National Contact Points</td>
</tr>
<tr>
<td>Private</td>
<td>Investment Arbitration (e.g. under ICSID)</td>
<td>Grievance mechanisms Commercial Arbitration</td>
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**Table 1:** Types of dispute settlement institutions in the international and transnational realm

Important, however, is the third public-private dichotomy in terms of which grievance mechanisms are located more on the public side. Publicness here describes the substance of the disputes that grievance mechanisms have ‘jurisdiction’ over. Loosely defined, public interest disputes are those over the (equivalent of) public law while private interest disputes arise from civil or private law. In the international legal realm, the distinction between public and private law is somewhat less clear and definitive than it is in domestic legal systems but, nevertheless, a difference exists. Importantly, the difference is located on the level of substance, not form. Broadly speaking, international rules can be considered equivalent to public law when they protect either fundamental, or quasi-constitutional, values of the international legal system such as human rights, or public goods such as the environment. An important body of international rules not qualifying as Public International Law as it is legally

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3 According to its legal definition (ICJ Statute art. 38), the body of Public International Law is constituted by formal, not substantive criteria implying that not all Public International Law disputes constitute substantively public disputes and not all disputes falling outside the formal realm of PIL are necessarily private in their substantive nature.
defined (ICJ Statute art. 38) but nevertheless equivalent to public law in terms of substance is inter- or transnational regulation of corporate behavior: While not usually adopted by states, i.e. public actors, these rules protect the public or public goods against negative externalities of corporate activities (Mattli and Woods, 2009b: 1). Disputes over transnational regulation, therefore, constitute public interest disputes.

It is in terms of this criterion that the grievance mechanisms under study here differ strongly from other forms of privatized dispute settlement in the international realm, most notably from international commercial arbitration. While commercial arbitration also relies on privately provided dispute settlement institutions, it is, usually, concerned with pure private interest disputes. These arise from contracts entered into by private actors in order to protect their commercial – rather than public regulatory – interests (see Table 2).

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<tr>
<th>Dispute Resolution Institution</th>
<th>Public</th>
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<tr>
<td><strong>Legal Substance</strong></td>
<td></td>
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</tr>
<tr>
<td>Public</td>
<td>WTO Dispute Settlement World Bank Inspection Panel</td>
<td>Grievance Mechanisms</td>
</tr>
<tr>
<td>Private</td>
<td><em>(so far, not existent in the international realm)</em></td>
<td>Commercial Arbitration</td>
</tr>
</tbody>
</table>

Table 2: Types of dispute settlement institutions in the international and transnational realm ctd.

One can conclude that in establishing or participating in grievance mechanisms, private actors are taking on a – traditionally – highly sovereign function, one that is intimately linked to the core of statehood. Dispute resolution has long been understood as a prerogative or exclusive competence of the state. It is directly related to social control and to the preservation of inner societal peace, functions intimately linked to the sovereign’s monopoly over the legitimate use of force (Fiss, 1984).

But while Global Governance research has devoted much attention to the ‘destatisation’ of world politics (Schuppert, 2006) and inquires into the implications of the increasingly private nature of governance activities, such as rule-setting and implementation, from a normative perspective, private involvement in dispute resolution has remained largely out of focus. While legal theory has long been concerned with the privatization of judicial functions
(Cutler, 2003, Teubner, 1997a, Teubner, 2000, Teubner, 1987), it has generally focused on those private phenomena that come closest to a traditional lawyer’s understanding of law and courtliness and has therefore remained limited in its observations: Private ‘almost-court’ phenomena in the transnational realm have emerged primarily in contexts that can be considered the sphere of private or civil law where two private parties seek out court-like institutions to solve their private interest disputes (Mattli, 2001). Recently, however, grievance mechanisms are emerging to solve disputes relating to labor law, environmental law or human rights. In these, the private nature of dispute resolution contrasts with the public interests reflected in the dispute.

3. The Copying-Problem: Non-State Actors Confusing Function with Form

International Relations in recent years are characterized by a rise of ‘private authority’ (Cutler et al., 1999), non-state actors of various kinds assume positions of formal decision-making power and are participating in governance and regulation in manifold ways, taking on functions that were formerly considered of public nature and that range from setting agendas, via designing and implementing rules to monitoring and enforcement (Abbott and Snidal, 2009). Their relations with state actors – once exclusive governors in the international sphere – vary across different policy fields and regulatory schemes, sometimes both are complementing each other in sharing governance functions, sometimes their relationship is more competitive or constitutes full out substitution. According to Wolf, however, where non-state actors seem to substitute for state authority and to exert public functions in an otherwise authority-free space or governance vacuum, the state-based order still retains ultimate control, even if it may exert it by choosing not to intervene (Wolf, 2012). According to this neo-Westphalian perspective, self-regulation always is regulated self-regulation because it can only emerge where the state or interstate order, at a minimum, does not actively suppress it. In other words, wherever regulatory functions are exerted, the shadow of the state is present. As argued by this paper, this is exactly the problem: Because the public shadow persists even when private forms of governance would promise ‘better’ regulatory approaches and solutions. Non-state actors who take on perceived public functions tend to copy the forms in which state actors would exert these, i.e. non-state takeover of public functions often (though surely not always) goes hand in hand with takeover of institutional designs and procedural rules developed by state actors and now applied in the non-state sphere, thereby confusing function and form and often creating dysfunctionalities.
Dispute settlement by state-based institutions, namely courts, has always relied on a judicial model. A primary characteristic of judicial dispute settlement is that it closely couples two functions with one another: The authoritative application and interpretation of abstract rules, on the one hand, with the attempted solution of the concrete dispute, on the other. While this coupled approach is a necessity for state-based courts – that derive their authority from the law and have no authority beyond the law – grievance mechanisms would not necessarily have to proceed in the same way but could, as ADR aims to do, proceed from the concrete dispute and the interests of the disputing parties rather than from the ‘law’ as written, it could devote less attention to rule interpretation and focus on problem resolution. Again, that these two functions may well be separated, is illustrated, for example, by the MDB complaints mechanisms: While they usually provide both functions – authoritative rule application and investigation of non-compliance as well as (rule-free) problem solution through mediation and the like – the two are fully separate processes that aim for very different results and can be launched independently of one another⁴.

Grievance mechanisms, however, are rarely following the ADR based model of dispute settlement and instead, strive to be as judicial as possible in their form and, in particular, their procedures. Several explanations may be given for this phenomenon: On the one hand, copying judicial forms of dispute settlement may constitute classic isomorphism: non-state actors in situations of uncertainty faced with unfamiliar problems copy what is already known (DiMaggio and Powell, 1983). On the other hand, it may also be an attempt at legitimation by non-state actors seeking to gain acceptance for their exertion of public functions by copying forms of seemingly more legitimate actors. In any case, the fact that certain functions have always been exerted by and closely associated with the state seems to have established the state’s way of exerting them as the norm for how they should be exerted. This shadow cast by the state-based order can become problematic, on the one hand, because some institutional forms and procedural rules, by their very nature, can only be applied by state actors and cannot be transferred to non-state actors without, necessarily, producing dysfunctionality. On the other hand, the takeover of public functions by non-state actors is often times motivated by the failure of states to appropriately address particular governance problems. If in such scenarios of failing state-governance, all that non-state actors can bring is a copy of the way

⁴ Compare in particular the proceedings of IFC’s Compliance Advisor/Ombudsman that, in its compliance function, investigates whether IFC has violated any of its policies and procedures and in its Ombudsman function, provides for mediatory and other services to solve disputes between IFC-clients and communities affected by IFC projects.
things were always done, the emergence of private authority can surely not be the miracle cure for governance gaps that many see in it.

4. Two Models of Dispute Settlement: Courtness and Alternative Dispute Resolution

This section describes the two relatively distinct institutional models of dispute settlement that exist today, in the national as well as in the international sphere. Judicial or court-based dispute settlement, on the one hand, and alternative dispute resolution, on the other hand. As previously argued, dispute settlement institutions of both types, in principle, can be endowed with two different tasks – with resolving conflicts arising between that particular legal community’s subjects and with authoritative application of the rules governing the legal community and investigation of whether they have been violated.

Courts, as the incarnation of judicial dispute settlement, are characterized by combining the two functions: They seek to solve conflicts brought before them by public and private disputing parties and, in doing so, they provide authoritative interpretations of the rules governing the respective legal community and investigation of whether or not any of the parties has violated the rules. In other words, courts solve disputes by applying abstract rules to concrete cases in order to determine which of the disputing parties is legally right and which is legally wrong. This linkage between dispute resolution and authoritative rule interpretation is a characteristic of judicial dispute settlement. The close alignment of the two functions is an implication of rule-of-law conceptions of modern statehood as a result of which state institutions – including courts – cannot resort to any actions, not even for the purpose of dispute resolution, without proceeding from the law. In this sense, when dispute settlement is quasi-definitionally associated with rule application, this is a first instance of confusing function – dispute settlement – with form – namely judicial dispute settlement: Providing the function of dispute resolution does not necessarily require rule application, interpretation and investigation. Instead, dispute settlement could also proceed in a rule-free space. And this is indeed one of the basic tenets of alternative dispute resolution (ADR) that is often defined as a simple opposite to courts and judicial dispute settlement: In applying pre-existing rules, courts do not genuinely ‘solve’ disputes, they simply pronounce a winner. ADR, instead, discards with pre-determined rules and instead, aims to genuinely solve the dispute by addressing the underlying problems and actors’ interests.
Apart from this overarching difference between the functions sought to fulfil by judicial dispute settlement and ADR, respectively, there are also a number of more concrete design aspects that differentiate the two. Although, as aptly pointed out by Shapiro, the differences between dispute resolution by courts, on the one hand, and ADR, on the other hand, are probably overstated. Both conform to a root concept of courtness as triadic dispute resolution (Shapiro, 1981). Nevertheless, for the sake of argument, this paper will depict each, judicial courts and ADR, as idealtypes that starkly contrast with one another.

The prototype court, according to Shapiro, is characterized by four constitutive elements: Courtness describes 1) an independent judge or neutral 2) that applies pre-existing legal rules 3) after adversary proceedings 4) to arrive at a dichotomous decision on who is legally right and who is wrong (Shapiro 1981). In addition to these four, IR theory, measures a dispute settlement body’s ‘judicialization’ in terms of the degree to which 5) disputing parties are bound by the respective decisions and in terms of 6) the number of actors endowed with legal standing and empowered to bring complaints (Abbott et al., 2000, Keohane, et al., 2000). The idea that courtness is attained only when decisions are binding most clearly aligns courtness with stateness – because bindingness presupposes enforcement instruments that, in the last instance, are available only to states as the legitimate holders of the monopoly over the use of force.

When accepting all six of these as characteristics of judicial dispute settlement, ADR is easiest defined as their respective opposite: Because ADR mechanisms usually are set up for the solution of one specific dispute by the disputing parties, they neither proceed on the basis of pre-defined rules nor do they dispose of sufficient independence from the parties. ADR seeks to solve disputes not by pronouncing legal right and wrong but by finding compromises that are acceptable to both sides. It proceeds in collaborative and consensual, rather than adversarial fashion. ADR mechanisms focus on the particular parties of one particular dispute and hence, do not actually provide genuine ‘standing’ to anyone. And finally, though case-specific rules may decide otherwise, many forms of ADR are defined by their explicit non-bindingness (with the exception of arbitration, of course). In sum, ADR is a less obligatory, more flexible and more interest-based counterpart to courts. It usually seeks to transform the winner-takes-all system of judicial dispute settlement into a proceeding seeking compromise.

Importantly, when seeking to normatively judge the quality of judicial dispute settlement or ADR, each of the two models entails judgment on the basis of differing normative criteria. Requirements of due process and procedural fairness, for example, as well as their detailed
regulation, is significantly more important in judicial dispute settlement that, ultimately, determines a ‘winner’ and a ‘looser’. Since the latter will, generally, have difficulty accepting the substantive outcome of the process, it is important that he can at least accept the process as fair. In ADR, on the other hand, acceptance and acceptability of the outcome of the dispute settlement process is valued more than respect for due process.

In empirical reality, of course, many mixed versions of courtness and ADR can be found. In ADR, for example, the parties may decide that the Third Party’s decision will be binding upon them or they may agree on a set of rules to be interpreted by the neutral.

Conceptually speaking, most of the characteristics used above to distinguish courts and ADR mechanisms dichotomously, can best be depicted on continuous scales making the differences between the two merely matters of degree rather than definitional opposites. Courts proceed in more adversarial, ADR in more collaborative fashion. Courts accord greater roles to rules, ADR to interests. Courts are more independent, ADR is closer to the parties. Courts render more binding judgements, etc. Ultimately, any combination of these instruments may occur in a public or private dispute resolution institution.

Nevertheless, this paper argues that recently emerging forms of transnational dispute settlement often follow the judicial model of dispute settlement and strive to copy idealtype courts to surprising degrees – and they do so even when this seems to be functionally inadequate.

5. Two Cases of Transnational Dispute Settlement

The following sections give a very brief snapshot at two very different cases of grievance mechanisms. The Fair Labor Association’s Third Party Complaint Mechanism and a Dialogue Table process in Peru’s mining sector. While the empirical analysis still needs to be deepened here, the cases should illustrate two things: For some reason, certain grievance mechanisms – in this case the FLA – copy a number of design aspects from the model of judicial dispute settlement even though grievance mechanisms that deliberately discard with pre-set substantive and procedural rules and intentionally follow a model of ADR seem better equipped to fill the transnational sphere’s institutional vacuum described above. The two case studies will be structured analogously and will begin by briefly illustrating the context in which each of the grievance mechanisms were set up before briefly outlining the mechanism itself. In a third and fourth step, both grievance mechanisms will be assessed, first analytically, in terms of whether they are more closely modeled on a judicial or an ADR-
approach to dispute settlement and second, normatively, in terms of whether their respective setup satisfies the due process standards that are applicable respectively to judicial and ADR procedures.

**Grievance Mechanisms in Global Supply Chains: The Fair Labor Association**

The Fair Labor Association (FLA), founded in 1999 and headquartered in Washington, is one of the more prominent schemes among many transnational regulatory attempts to improve working conditions in global manufacturing supply chains. FLA is a membership organisation composed of global brand companies as well as universities and colleges sourcing from factories in the global south. While its original focus was on the apparel sector, today, it also works closely with the electronics industry and other sectors characterized by globalized supply chains.

*FLA’s Third Party Complaint Procedure*

One of FLA’s institutional innovations designed to ensure that factories comply with its workplace Code of Conduct is its ‘third party complaint procedure’ the purpose of which is to ‘investigate allegation of significant and/or persistent patterns of noncompliance, or an individual incident of serious noncompliance with the Workplace Code of Conduct’ (FLA Charter, part XI). The complaint mechanism is a relatively strongly regulated and institutionalized one with the FLA Charter outlining the process as follows: Complaints of code violations at factory-level can be filed by anyone and are lodged with FLA’s Executive Director, thereby establishing a tripartite dispute settlement relationship with a minimal – though surely not optimal – level of independence of the Third from the disputing parties. Complaints can be filed by any party, whether affected or not by the alleged noncompliance – which constitutes an unusually broad level of standing before a dispute settlement body, whether of national or international, public or private nature. Once a complaint is received, a four-step escalating procedure commences that can, however, be terminated at any of the stages. At Step 1, the FLA, in dialogue with the complaint-filing party, makes a first judgement over whether the complaint merits going to Step 2. Criteria considered for making this judgement are whether the complaint is directed against an FLA member, whether it alleges noncompliance with the FLA Code of Conduct and whether it contains ‘reliable, specific and verifiable evidence’ (FLA Charter: 29) that the alleged noncompliance has occurred. If the complaint goes to Step 2, the FLA participating company is informed of the
allegations and is allowed to choose whether it will begin its own investigation or defer the case directly to Step 3. If it proceeds with its own investigation, the company has to report to the FLA within 45 days whether, in its determination, the noncompliance indeed took place and if, how it has been or will be remedied. The complainant is then informed of this report. The process either terminates at this point – if all parties agree with the findings and reported measures – or it moves to Step 3 if the complainant provides information that ‘reasonably rebuts’ the allegation that the issue has been adequately addressed. At Step 3, the association has the capacity to bring in an external expert to conduct a formal audit of the accused company’s compliance with the FLA code of conduct. The participating company, however, can refuse the audit, thereby leading to a termination of the process and a final report. If the external expert found a significant likelihood that the alleged noncompliance occurred, the goal of Step 4 is to develop a remediation plan, in collaboration between the FLA secretariat and the participating company and to implement the plan to the satisfaction of the association. The association will monitor and report on the implementation of the plan on an ongoing basis until such time when it ‘determines that either a sufficient level of remediation has been achieved, or that it is unlikely it will be achieved; at that point, the association will prepare a final summary report and provide it to the participating company (...), the Third Party and the Board of Directors’ (FLA Charter: 31).

Assessing the FLA approach to dispute settlement

If one had to ultimately judge whether FLA’s Third Party Complaint procedure constitutes court-likeness, one would probably conclude that it does not. When measured against Shapiro’s prototype court, it is striking that the process is adversarial only to a very limited degree but instead seeks to engage and collaborate with both sides of the dispute constantly. This non-adversarial approach is most notable in Step 2 of the procedure where investigation of the alleged noncompliance is left fully up to the ‘accused’ (FLA Charter: 29). But once Step 3 is reached, the balance shifts more to the adversarial side as the audit that will then be initiated has a strongly investigative character and seeks to make findings of fact – of noncompliance, i.e. wrongfulness, of the accused party. The ultimate result of the process, however, is not an authoritative judgment that ‘imposes’ corrective measures but rather, a negotiated remediation plan that comes closer to a conflict resolution approach but remains far from its ideals, still, because the complainant does not participate in the negotiation of the remediation plan. Furthermore, when measured against popular understandings of courtliness what would be found wanting is the ultimate enforcement of FLA ‘judgments’, i.e. the
remediation plans, when members do not comply with them voluntarily. The latter, however, already confuses constitutive elements of courtness with its effectiveness in instilling change. Judged by this measure, many highly effective international institutions would fail the courtness test, including the International Court of Justice or the European Court of Human Rights.

But even if the FLA procedure cannot, ultimately, be considered to constitute courtness, it is striking in how many ways and details the procedure imitates genuinely judicial proceedings and how little of the central tenets of ADR it adopts. Most importantly, the FLA’s complaints procedure, once it has reached Step 2, is a largely bilateral process between the accused company and the FLA secretariat, it leaves almost no role to the complainant and therefore diverts from the ADR ideal of control over the process by the parties.\(^5\)

In terms of Shapiro’s four characteristics of prototype courts, the procedure fulfils them all even if only to a relative degree. Complaints are filed neither on the level of the factory nor with the FLA member company but on the level of the association, with its Executive Director. In this sense, the proceeding involves a relatively independent quasi-judge who addresses the dispute by applying pre-existing rules, namely the Workplace Code of Conduct. Finally, and importantly, while the procedure aims for performance improvement and emphasizes collaborative remediation instead of findings of fault, the FLA retains the right to provide an ultimate finding on who is ‘legally’ right and wrong in cases where it concludes Step 4 by reporting to all parties involved that it considers it unlikely that remediation will be achieved (FLA Charter: 31). This, however, is the procedure highest step of escalation and is rarely taken.

In terms of procedural design, it is interesting that Step 1 of the FLA procedure essentially constitutes an admissibility test in which questions of materiality and applicability have to be answered in the affirmative before the case is admitted to proceed. Such procedures make less sense in a conflict resolution frame where the existence of conflict would indicate the need for a case to be heard, independent of it sufficing ‘legality’. Indeed, the reasons for introducing such relatively high hurdles for bringing cases to the FLA are not fully evident. Undoubtedly, the criterion that complaints can only be brought against FLA members is fully justified and it may also be necessary to protect the procedure from excessive case load by setting a certain

\(^5\) This approach is chosen by the FLA, of course, in recognition of the significant power differences between the complainant and the accused and because FLA’s primary aim is that of protecting the complainants, usually factory workers, against potential repression.
minimal threshold of severity. Beyond that, however, it is questionable whether the requirement that the complainant prove his case sufficiently already at this stage and that alleged noncompliance shall be significant and/or persistent are not hollowing out the procedure’s potential for rendering positive impacts.

Interestingly, at Step 1, the FLA procedure even foresees for the equivalent of preliminary or injunctive instruments. In courts of law, injunctive measures allow for immediate intervention – even before a court has reached its final judgment – in order to prevent further rights violations from taking place in the meantime. Injunctive measures are prominent in various bodies of law, including human rights law, but also in commercial arbitration. The FLA procedure, also, provides for a number of measures that can be taken to prevent further Code of Conduct violations while the process is still ongoing. Foreseeing such injunctures in the FLA context seems odd seeing that such means of enforcement are available only at the admissibility stage of the proceeding. Once the procedure reached the stage of final ‘judgment’, even if it is a judgement of ongoing non-compliance by a factory, the association cannot take any measures to end this state of affairs.

In sum, it can be noted that the FLA procedure – while not ultimately delivering an authoritative judgement – build in a number of design features that only ‘make sense’ in a judicial proceeding ultimately pronouncing who is legally right and who is wrong. If the outcome of the process, ultimately, is a negotiated remediation plan leaving considerable discretion to the accused company in its design, it is unclear why a rather legalistic finding of ‘wrong’ has to precede its negotiation.

When judged against due process rules for judicial dispute settlement, the FLA procedure fails in respecting several established standards of procedural fairness and legality at several stages of the procedure. For example, through most of the process, the ‘burden of proof’ is imposed on the complainant: For example, the decision whether a complaint reaches Step 2 or Step 3 of the process depends on the quality of evidence provided by the complainant. While such a provision would be fully untenable in criminal law, civil law also imposes this burden on the plaintiff but, after reaching a certain threshold, shifts it to the defendant. This shifting threshold is never reached in the FLA procedure. Furthermore, when judging a complaint’s admissibility at Step 1, the FLA is allowed to ‘consider the reliability of any past Complaints by the Third Party’ (FLA Charter: 29) which, in a court of law, would severely violate equality before the law.
Decisively, the procedure remains at the exclusive discretion of the accused party for an extended period of time. At Step 3, it is still left up to the accused whether external monitoring will be admitted – even if FLA as the ‘judge’ of the proceeding considers it necessary. Furthermore, if the accused disagrees, the process is terminated – without any finding of right or wrong. In this sense, the FLA’s third party complaint procedure at no point is genuinely independent from the parties.

**Grievance Mechanisms in the Extractive Sector: ‘Mesa de Dialogo’ in Peru**

The extractive industry has long been subject to heavy criticism for the many ills it allegedly causes to national political and economic development, the environment and human rights (Le Billon, 2005, Mildner et al., 2011). While many regulatory frameworks have emerged that seek to address these problems on the transnational and global level, severe problems persist in particular on the local level, in the immediate vicinity of oil, gas and mining operations. In recent years, Peru has become sadly famous for widespread social conflict surrounding its mining sector and for regular eruptions of violence in mining areas (Arellano-Yanguas, 2011). While the country is still struggling heavily with the problem and experimenting with various ways of dealing with it, one institutional format that has been repeatedly resorted to – with mixed results – is that of dialogue tables (Spanish: ‘Mesa de Dialogo’) intended to bring together the various parties involved in a conflict usually including the respective mining company as well as various representatives of local communities and civil society (Echave et al., 2004). These dialogue tables are established on a needs basis and case by case. Therefore, they differ from one another in various aspects of institutional design so that they cannot be discussed summarily here as if they were one institution. Instead, the paper will concentrate on one specific dialogue table that was recently concluded and, as of now, is considered a particularly successful case. The table was concerned with AngloAmerican’s Quellaveco mining projected located in the department of Moquegua in Peru’s southern Andean region.

**The Quellaveco Dialogue Table**

The Quellaveco dialogue table was set up in April 2011 and ran through August 2012 when it reached an agreement between the participants on how a number of social and environmental aspects of the proposed mining operation should be handled. Among other things, the agreement included provisions on the use of freshwater resources during the mine’s operation as well as a post-min-closure re-naturalisation plan. One of the design specifics of this
dialogue table was that it was officially tripartite, bringing together representatives of the mining corporation, local communities and civil society as well as representatives of the Peruvian state and the department of Moquegua. This setting was in relative contrast with other Peruvian dialogue tables that intentionally chose to keep the state out of the process (Echave, et al., 2004: part II).

The table’s proceedings were governed by a written set of rules, the so called ‘reglamento’ that was developed and agreed upon during its first sessions. The primary objective of these rules was to enable open dialogue in a consensus-oriented spirit. The reglamento specified that the dialogue table ‘is a participatory space for the purpose of generating consensus between civil society, the state and the private sector’ (Gobierno Regional Moquegua 2011: articulo 4°, translated from Spanish). Beyond that, the reglamento only recorded the participants of the dialogue – but new participants were officially incorporated at many of the sessions (Gobierno Regional Moquegua, 2011) – and the topics that had been agreed to form the subjects of its discussion, in very broad terms: Water resources, the environment and social responsibility (Gobierno Regional Moquegua, 2011: articulo 5°). It further specified that the table’s organs: a plenary, special invitees, technical commissions and a technical secretariat.

As an important procedural provision, the reglamento did install an official facilitator for the dialogue table but without any further specification of his role, duties or capacities. Beyond this provision, the reglamento only lay down very basic procedural rules such as the place and frequency of reunions. It also elaborated aspirational principles meant to steer the spirit of dialogue – participation, good faith, transparency, co-responsibility, equality, tolerance and respect, solidarity, and respect for the agreements to be reached (Gobierno Regional Moquegua, 2011: articulo 7°). All other matters were left up to decision-making by the participants. The final provision of the reglamento, probably, is its decisive one: It provides that ‘the decisions taken in within the framework of the dialogue table will be binding upon all its participants’ (Gobierno Regional Moquegua, 2011: dispoision final, translated from Spanish)

Assessing the Dialogue Table approach to dispute settlement

The Quellaveco dialogue table shows no ambition whatsoever to mirror state-based judicialized proceedings. Instead, it is very clearly oriented towards dialogue and collaboration-based models of ADR. The table’s procedural rules remain very basic and
pursue as their sole goal the enabling of a consensus-oriented dialogical setting. To a large degree, the table therefore constitutes an idealtpe ADR mechanism located on the opposite end of scales depicting independence, rule-guidedness and adversariness. Its design is clearly intended to profit maximally from the flexibility inherent to non-judicial conflict resolution approaches. Furthermore, no admissibility criteria were specified, beyond the requirement that issues should come within the purview set by the three broad topics to be discussed. No predetermination of what should or could be outcomes of the process was made. Hence, the substance of the process was at all times controlled by its participants. However, the liberty that came with designing the table from scratch was also used to strive for making its accords effective: The reglamento provided that accords formally adopted by the table shall be binding upon all its participants. At this point, the relatively unformalized nature of the reglamento may appear problematic because there is no indication as to what this bindingness entails and how ‘compliance’ with the accords is to be ensured once any party defaults on them.

Nevertheless, this fiction of obligation is an important design feature of the table. Its adoption was probably enabled by the participation of state actors in the table – underlining the argument of the omnipresent shadow of hierarchy in private regulatory processes. Nevertheless, what is striking about the dialogue table is not its remaining degree of reliance on public authority. Much rather, it sought to creatively level the pre-existing formal and power-based hierarchy between the participants for the purpose of the dialogue process. By making state authorities merely one among the equal parties of the tables, the participants were enabled to find innovative and creative bottom-up solutions to their problems instead of relying on hierarchical imposition of – often unsatisfactory if not outdated – legality solutions. At the same time, by having the state participate, the otherwise asymmetrical binary relationship between corporations and their local stakeholders is transformed into a tripartite eye-level one.

These latter design features, in particular, show how the dialogue table primarily sought to enable genuine conflict resolution through finding solutions that are acceptable to all parties rather than legally tenable and authoritatively imposable.

**Conclusion**

In the transnational sphere in which they operate, grievance mechanisms are often the only available institution for dispute settlement. Hence, it does make sense that their institutional
forms vary, sometimes exhibiting greater courtness, sometimes proceeding more clearly from an ADR philosophy depending on the institutional lacuna to be filled in the concrete context. But just as certain ways of designing grievance mechanisms are more appropriate to the exigencies of certain problem structures, some designs can also be inappropriate for certain purposes. In the context of global supply chain regulation, for example, institutions determining what constitutes rule violation are not the most pressing lacuna. In particular, when coupled with formal hurdles to bringing complaints and accessing grievance mechanism – in form of admissibility criteria – these seem relatively inadequate to the task. Labour law, including international labor standards, are relatively well established norms and are overseen by judicial courts in most of the world’s jurisdictions as well as on the international level – but are wholly ineffective in many of them. The governance gap cannot be described as uncertainty about what the law requires but total failure of law enforcement. This failure of judicial protection for labor standards is unlikely to be correctable via yet another quasi-judicial procedure – even if installed by a different actor – characterized by formality hurdles but also not offering enforcement mechanisms. In face of continued widespread and massive labor law violations, strong enforcement of single cases may, indeed, not be the most effective ways of instilling change. In this sense, the collaborative approach chosen by the FLA and the goal of performance improvement through agreed-upon remediation plans does seem to promise positive returns. But its coupling with a strongly formalized procedure and a high standard of evidence imposed on the complainant limits its effectiveness. In much contrast, the Peruvian example of dialogue tables bringing together mining companies and their local stakeholders, try to address problems in ways that impose no formality requirements and are therefore flexible to find solutions to problems, independent of whether law would or would not provide these. What becomes evident here is that in designing grievance mechanisms, it is important to clearly establish whether the lacuna to be filled is about individual violations of rules and standards and access to remedy for victims of these? Or whether it is about broader underlying conflicts that are not reducible to any single action and remedy and probably not addressable by formalized rules and their interpretation – therefore requiring more comprehensive, flexible and creative solutions than judicial rule interpretation would provide.
Bibliography


