Embedding Rights Compatible Grievance Processes for External Stakeholders Within Business Culture

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Embedding a Rights-Compatible Grievance Processes for External Stakeholders within Business Culture

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Consultation on Conflict Management and Corporate Culture in the Mining Sector
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Executive Summary[1]

Prof. John Ruggie, the Special Representative of the UN Secretary-General for Business and Human Rights (SRSG) has noted that companies must implement effective grievance mechanisms or processes that are rights-compatible in order to meet their responsibility to respect human rights.[2] This gives rise to some practical questions: Will the corporate culture accept or reject the process? Where does it fit in the context of their use of other nonjudicial dispute resolution processes? What can be learned from those processes? Can those lessons be applied to grievance processes for disputes with external stakeholders?

Traditionally, companies have largely left the mechanics of dispute resolution in the hands of lawyers, many of whom have a natural bias in favor of litigation, which only they are licensed to practice. Nevertheless, business use of nonjudicial or alternative dispute resolution (ADR) techniques has grown rapidly in recent decades, and is the preferred alternative of the legal departments of many of the best-run companies. In addition, starting in the 1990s, a number of organizations developed integrated conflict management (ICM) programs to resolve disputes with their employees.

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[1] This paper is based on a review of the existing literature and my forty years of experience as a practicing lawyer, during the last thirty of which I was deputy general counsel at National Grid. I would also like to thank Rwitwika Bhattacharya, a masters in public policy candidate at the Harvard Kennedy School, Elaine Cohen, CEO of BeyondBusiness, Mark Hodge, Director of the Global Business Initiative, Chip Pitts of Stanford Law School, and Caroline Rees, Director of the Governance and Accountability Program at the Corporate Responsibility Initiative at the Harvard Kennedy School, for their suggestions and contributions.

[2] Protect, Respect, and Remedy: A Framework 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, A/HRC/8/5 (April 2008) ("SRSG Report"), available at http://tinyurl.com/4snzhm. I prefer to use the term "process" rather than "mechanism" to emphasize that the SRSG did not prescribe a mechanical, tick-the-box exercise.

Although the ICM model was developed for disputes with internal stakeholders, it provides an excellent source of learning for disputes with external stakeholders, not least because it reinforces core human rights values, such as respect and empowerment. An effective grievance process requires strong senior management commitment, systemic design, the right organizational alignment and integration, incentives, communication, training, monitoring and tracking. These are key features of the ICM program model, which already address workplace disputes that raise human rights issues.

Comparing the ICM model with a recent study by the Center for Social Responsibility in Mining of community grievance handling processes suggests that with modification, the employee-focused ICM model could provide a strong platform for the development of an external stakeholder grievance mechanism. Those changes would require identifying the affected external stakeholders and working with them to develop a framework for the resolution of grievances based on mutual respect and trust. The grievance process should be integrated into the company with appropriate organizational alignment and incentives, with the recognition that community relations functions, which tend to have superior knowledge of community issues compared to legal and PR functions, need more clout with which to resolve disputes. Last, the company needs to understand the cause of the dispute, rather than just patching up immediate problems so that it can 'move on'. This requires sharing information and moving away from a reflexive bias towards confidentiality that tends to occur when disputes are handled by the legal department.

Why Company Culture is Important to Grievance Processes.

In his April 2008 Report, the SRSG outlined a three part global framework for allocating human rights responsibilities between States and business: (a) States have the duty to protect individuals and communities from human rights abuses from all sources, including business; (b) business has the responsibility to respect human rights; and (c) those who suffer harm from business activities should have access to remedy, both judicial and non-judicial.[3]

Anchoring human rights values into corporate culture is critically important,[4] and the concept of culture figures prominently in the framework. In the context of the State duty to protect human rights, the SRSG noted that some States look to a company's culture to determine its criminal accountability.[5] In addition, in the context of the business responsibility to respect human rights, the SRSG noted that companies must integrate their human rights policies into their cultures and management systems.[6]

To understand the significance of company culture to remedy, it is necessary first to understand the tie between the framework's second and third pillars—the business responsibility to respect and the need for greater access to remedy. These pillars are linked because the responsibility to respect requires companies to provide effective company level grievance mechanisms in order to enable them to identify and address grievances early, before they escalate.[7] This supports the

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[3] *Id.*

[4] Sherman and Pitts, <u>Human Rights Corporate Accountability Guide: From Law to Norms to Values</u> (Business Leaders Initiative on Human Rights, December 2008), available at http://tinyurl.com/acj9mq. ("Accountability Guide")

[5] SRSG Report, *supra,* pp. 10-11*.*

[6] *Id.*, pp. 17-19; See also, <u>Business and human rights: Towards operationalizing the "protect, respect, and remedy framework"</u>, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, A/HRC/11/13 (April 2009), p. 14, available at http://tinyurl.com/cqz384.

[7] SRSG Report, *supra,* p. 24.

integration of human rights policy into a company's culture and management systems.

What does culture mean in practical terms? Prof. James Kotter defines a company's culture as a combination of its shared values (its common concerns, beliefs, and goals) and its norms (the way it acts in common).[8] In discussing a culture of integrity, Ben Heineman, the former General Counsel of GE, writes that company leaders "create a culture by forcefully and consistently articulating the organization's code of conduct, guiding principles and policy standards" and then implementing a "robust set of practices" that "track business disciplines," have "real consequences," and use sufficient resources to get the job done right.[9]   The absence of an effective culture can have disastrous impact on such human rights as the right to a safe workplace. For example, an independent safety review panel studying the causes of a 2005 explosion causing numerous fatalities at BP's Texas City Refinery identified the lack of an effective safety culture as a root cause of this accident. This was based on evidence of ineffective safety leadership, poor communications between management and the workforce, failure to provide adequate safety resources, corporate decision making that did not incorporate safety considerations, and the failure to create a common safety culture across all US refineries.[10]

As Prof. Kotter points out, one of the fundamental errors that companies make in trying to transform themselves is failing to anchor change firmly in company culture.   In his view, "change sticks only when it becomes 'the way we do things here,' when it seeps into the very bloodstream of the work unit or corporate body. Until new behaviors are rooted in social norms and shared values, they are always subject to degradation as soon as the pressures associated with a change effort are removed."[11]

For most companies, the implementation of a human rights grievance process will likely constitute such a change. The SRSG set out seven principles that should

[8] Kotter, Leading Change, Harvard Business School Press, 1996, p. 148 ("Kotter").
[9] Heineman, *supra*, p. 26.
[10] Report of the BP US Refineries Independent Safety Review Panel (January 2007), pp. 59-60, available at http://tinyurl.com/pe2qan.
[11] Kotter, *supra,* p. 14.

underpin any company-level grievance mechanism: legitimacy, accessibility, predictability, fairness, rights-compatibility, transparency, and operation through direct or mediated dialogue, rather than adjudication by the company.[12]

    For many companies, implementing such a process and making it effective over the long term will require firmly integrating it into a company's overall approach towards conflict management and dispute. This leads us toward examination of the corporate use of nonjudicial or alternative dispute resolution, commonly known as ADR.

Senior Management Attitudes Towards ADR

      A company's senior executive management is responsible for articulating its core values. So the logical starting place for determining whether a grievance mechanism can fit into those values is at the top of the company. For the most part, however, senior management has not yet asserted strong leadership on the use of nonjudicial dispute resolution techniques (also known as alternative dispute resolution, or ADR). For example, a 2007 survey of legal counsel of twenty-one multinational companies by the London law firm of Herbert Smith found that boards of directors and senior executives rarely give directives to use ADR. Rather they are more interested in the actual settlement, compared to the process that leads up to it.[13]

      But this attitude must change. Since the consensus of global society—as noted in the SRSG's framework and as increasingly reflected in legal systems throughout the world[14]—requires companies to respect human rights, senior executives must lead and manage on human rights. That is, they must state the human rights values of the company and ensure that effective procedures and

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[12] SRSG Report, supra, pp. 24-27.

[13] Herbert Smith, <u>The Inside Track on How Blue Chips are Using ADR (November 2007</u>), p. 35**,** available at <u>http://tinyurl.com/my9pqe</u>.

[14] Kerr, Janda, and Pitts, <u>Corporate Social Responsibility: A Legal Analysis</u>, Chapter 4 (LexisNexis, 2009).

processes drive those values deep into the company.[15]   This includes designing and implementing grievance processes as part of the responsibility to respect human rights.

As the SRSG pointed out, a grievance process is a method for reducing risk; it acts as an early warning system that enables a company to address problems before they accumulate and harden. There appears to be a positive correlation between investor confidence and the greater use of ADR to control the risks of dispute, as measured by price to earnings ratios.[16] And the corporate governance codes of many countries require companies to identify, analyze, and take steps to control their risks.[17]

For example, Jan Eijsbouts, the former General Counsel of Akzo Nobel, a Global Fortune 500 chemicals multinational based in The Netherlands, and now an advisor on corporate governance and conflict management, convinced his company to create a culture of ADR, and significantly increased its capacity to do so. He did so based on his company's experience with expensive and protracted international litigation and arbitration. He concluded that the consensual nature of ADR addresses the need for effective internal controls under corporate governance standards requiring a company to control the risks of conflict proactively.[18]

In addition, it is important not only for leaders to talk about the importance of resolving disputes consensually, but also to act that way in practice. Mark Gerzon, an international mediator who has worked with governments and business, has argued that leaders of complex global organizations increasingly need to exercise mediation skills in order to resolve conflict with external stakeholders and to use conflict as an opportunity to transform relationships with those

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[15] Heineman, <u>Memo to the CEO: High Performance with High Integrity</u> (Harvard Business Press, 2008) ("Heineman"), chapter 3.
[16] <u>Dispute-Wise Business Management: Improving Economic and Non-Economic Outcomes in Managing Business Conflicts</u>, American Arbitration Association (2003), p. 6 ("AAA Study").
[17] Those standards include the UK Turnbull Guidance, the Dutch Corporate Governance Code, the French Internal Control framework, and the US COSO Internal Control framework. Accountability Guide, *supra*, pp. 9-10.
[18] Conversation with Jan Eijsbouts, May 21, 2009.

stakeholders.[19] This requires recognition that in a complex dispute, there can be multiple truths, not just one. Such an executive looks at conflicts holistically from the perspective of multiple stakeholders, to think of conflicts as interrelated parts of a system, listens respectfully, engages in dialogue with stakeholders based on inquiry and trust, and is creative in brainstorming solutions. A CEO who actually sits down in the same room and talks to stakeholder representatives about mutual concerns is far less likely to regard them merely as obstacles to be overcome.

The need for executives to exercise mediation skills to deal with external stakeholders is particularly true today, where social networking technology has lowered drastically barriers to the ability of groups to form and mobilize rapidly and effectively for social change. For example, Clay Shirky describes the experience of the Roman Catholic Archdiocese in Boston, Massachusetts with two controversies in 1992 and 2002 involving similar sexual abuse allegations against priests for conduct asserted to have occurred decades earlier, resulting in litigation and receiving extensive negative media coverage. The 1992 scandal dissipated fairly rapidly, with little lasting effect. In contrast, the 2002 scandal—involving very similar facts— resulted in significant change in the church's behavior in Massachusetts and nationally, an official reaction from the Vatican, and the resignation of the Archbishop of Boston. This was prompted by coordinated public pressure from a newly formed laity group with whom the Church was initially reluctant to engage. The difference, according to Shirky, was that by 2002, the availability of email, weblogs, and the ability of people to electronically clip and email news articles enabled ordinary Catholics to more easily share information and coordinate their response.[20]

Finally, the mere fact that local government supports a company project offers little immunity from the concerns of stakeholders directly affected by its operations. Tata Motors in India learned this the hard way in 2008, when it

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[19] Gerzon, <u>Leading Through Conflict: How Successful Leaders Transform Differences into Opportunities</u> (Harvard Business Press, 2007), pp. 47-60.
[20] Shirky, <u>Here Comes Everybody: The Power of Organizing Without Organizations</u> (Penguin, 2008), Kindle edition, pp. 1876-2000.

cancelled its plans to build an automobile manufacturing plant at Singur in West Bengal, following widespread complaints by local farmers claiming that their land had been acquired under questionable circumstances. This occurred notwithstanding the fact that the eastern state of West Bengal had offered Tata a "host of incentives" to build its plant in that state.[21] The distinction is between a legal license to operate and a social license to operate. In order to keep its social license to operate, a company must deal with the complaints of its external stakeholders, in or out of court.

Company Legal Department Attitudes towards Alternative Dispute Resolution.

Absent senior management direction, the corporate legal department has the greatest influence over whether a company fights a dispute in court or uses ADR to try to resolve the dispute. Since lawyers have an exclusive license to litigate disputes, one might suppose that they are naturally disposed to favor litigation over ADR, which does not require lawyers to be in control, and in fact favors direct involvement by business executives. Nevertheless, legal departments, and many law firms, have proactively sought to reduce conflict with initiatives to resolve disputes through the use of ADR.

Companies use ADR processes widely to resolve commercial disputes, as well as a variety of disputes that implicate universally recognized human rights—such as employment, personal injury, environmental, and products liability disputes. There are many different forms of ADR, which with varying permutations and imprecise definitions, can range from direct negotiation, to dialogue mediated by a third party, to conciliation, to facilitation, to consensus building.[22]

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[21] Tata Motors in Singur: Public Purpose and Private Property (B), Harvard Business School Case Study 9-709-029 (February 11, 2009).

[22] Rees, Rights-Compatible Grievance Mechanisms: A Guidance Tool for Companies and Their Stakeholders, Corporate Social Responsibility Initiative, Working Paper No. 41, John F. Kennedy School of Government, Harvard University (January 2008), Annex A, available at http://tinyurl.com/dasnrx .

With some notable exceptions, most companies traditionally use ADR as a means of avoiding litigation or its threat. A significant number prefer to use ADR whenever it is practicable and have built the internal capacity to use it effectively.[23] The most comprehensive study is a 1997 survey of over 600 in-house lawyers for major US companies conducted by Cornell University, which revealed broad, but generally shallow, business use of ADR, primarily on an ad hoc basis.[24] The Cornell study did not examine use of ADR for resolution of social or human rights disputes explicitly, but did note that companies that use ADR frequently tend to have more highly evolved management processes.[25] The AAA's 2003 study, discussed earlier, largely confirmed the findings of the Cornell study.

Apart from cost savings, the most commonly cited reasons in the study of why companies used mediation were the ability of the parties to resolve the dispute themselves, and their satisfaction with the process and result. Other reasons included the ability to resolve environmental disputes with complex issues, the freedom for parties to speak freely without filtering, the ability to understand what is really important to the other side, and the ability to improve employment relationships through catharsis.[26]

The most common reasons not to mediate were, in rank order: the failure to get senior management buy-in, fear of loss of control, opposition of middle management, the difficulty and complexity of mediation, lack of procedural safeguards, unwillingness of the other side to mediate, a reluctance to compromise, and lack of confidence in the neutrals.

Whatever preferences lawyers may have towards ADR, lawyers do not operate in a vacuum; they must take instruction from their clients. A 2007 study of

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[23] Walker and Deavel, The Strategic Relationship Between Ethics and Dispute Resolution: What Every CEO Should Know, 8 Pepperdine Dispute Resolution Law Journal 335 (2008) ("Walker and Deavel").

[24] Lipsky, Seeber, and Fincher, Emerging Systems for Managing Workplace Conflict: Lessons from American Corporations for Managers and Dispute Resolution Professionals (Jossey-Bass, 2003) (" Cornell Study"), 86. Tables summarizing some of the results of the Cornell study are attached as Annex A.

[25] Id., p. 97.

[26] Id., p. 104.

in-house counsel of major companies by the General Counsel Roundtable showed that a company's level of resource investment in CSR appears to correlate with an increasing role of the legal department in CSR. Depending on the commitment to CSR by the company, legal involvement can range from risk advisor, to compliance enforcer, to proactive partner. When acting as risk advisor, the lawyer's advice tends to be reactive and situation-specific, which could result in a cautious, ad hoc, case-specific approach towards use of grievance processes. But if their clients so desire, lawyers can be more proactive partners and work with their clients to reduce social risk, including the development and support of a grievance process.[27] So if senior management tells the legal department that they are not only expected to fight alligators, but also help to drain the swamp, the lawyers will respond.

Company Use of Integrated Conflict Management Programs for Employment Disputes

Many companies have employed ADR successfully in a holistic and integrated fashion, with the strong support of senior management, by using integrated conflict management (ICM) programs to manage conflict and resolve disputes with a key internal stakeholder—the employee. A 2002 study by the CPR Institute for Dispute Resolution identified twenty companies that had adopted such programs.[28]

Employment disputes necessarily raise human rights issues, due to the application to the workplace of many specific internationally recognized human rights.[29] ICM programs are designed to prevent conflicts, resolve disputes, learn the cause of problems and fix them, and reinforce the stated values of the company's culture.[30] ICM programs vary, but generally have the following characteristics: they

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[27] General Counsel Roundtable, Moving from Risk Mitigator to Proactive Partner: Legal's Role in Corporate Social Responsibility, Corporate Executive Board (November 2007).
[28] CPR Institute for Dispute Management, How Companies Manage Employment Disputes: A Compendium of Leading Corporate Employment Programs (2002).
[29] SRSG Report, *supra*, p. 15.
[30] Conbere, Theory Building for Conflict Management System Design, Conflict Resolution Quarterly, vol. 19, no. 2, Winter 2001 (Wiley); Constantino and Merchant,

encompass a broad range of disputes; they foster an open and trusting culture in which employees can raise problems in the belief that they will be listened to; they provide multiple access points, offer various dispute resolution options that can reflect the interests of the parties (*e.g.*, ombuds persons, mediation, open door policies, union-management consultations, *etc.*), and the organization supports them with senior leadership, training and education, incentives, organizational alignment, sufficient resources, central coordination, and feedback and monitoring.[31] Some of these programs employ a kind of ADR known as transformative mediation, whose goal is to transform employer-employee relationships from vicious cycles of mistrust and powerlessness into virtuous cycles of respect and mutual empowerment.[32] As the SRSG has stated, "at the end of the day, empowerment and recognition is what human rights are all about."[33]

An ICM program can become a critical lever to drive core company values deeply into the business. "Many organizations identify a need for cultural transformation, yet fail to understand that the introduction of an integrated conflict management system could be the missing link between alignment of their internal staff approaches with their mission, values, corporate objectives, [and] core service delivery."[34] For example, the US Air Force uses its ICM program as a key means of implementing its ethical values of workplace diversity, collaborative teamwork, and respect.[35] This approach resonates strongly with the need to reinforce ethical

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Designing Conflict Management Systems: A Guide to Producing Productive and Healthy Organizations, (Jossey-Bass, 1996); Lynch, Beyond ADR: A Systems Approach to Conflict Management, Negotiation Journal, July 2001, pp. 207*, et seq* ("Lynch"); Bingham and Novac, Mediation's Impact on Formal Discrimination Complaint Filing, Review of Public Personnel Administration, Vol. 21, No. 4 Winter 2001 pp. 308-331 ("Bingham and Novac"); Sturm and Gadin, Conflict Resolution and Systemic Change, 1 Journal of Dispute Resolution 1 (U of Missouri, 2007) ("Sturm and Gadin"); Walker and Deavel, *supra*.

[31] Lynch, *supra*, pp. 213-214.

[32] Bush, Handling Workplace Conflict: Why Transformative Mediation?, 18 Hofstra Lab. & Emp. L.J. 367 (2001); Bingham and Novac, *supra*.

[33] Remarks by SRSG John Ruggie, International Institute for Conflict Prevention & Resolution, Corporate Leadership Award Dinner, New York, October 2, 2008.

[34] Lynch, *supra*, p. 211.

[35] Walker & Deavel, *supra*.

values with effective processes, such as the robust ombudsman program used extensively by GE to listen to the voice of the employee.[36]

Another US federal agency, the National Institute of Health, uses its ICM program to conduct root cause analyses of workplace problems to identify and fix systemic problems—including violations of human rights—and resolve individual disputes in ways that meet the interests of the parties.[37] A key hallmark of a well-functioning organization is its ability to listen to, understand, and respond appropriately to bad news; such feedback enables companies to learn and adapt to change.[38] Indeed, safety and environmental management systems require the investigation of the root causes of safety and environmental incidents in order to learn lessons that will prevent or reduce the recurrence of future incidents. Similarly, ICM programs act as early warning systems, which enable companies to identify and fix problems before they accumulate and become intractable.

As noted above, ICM programs also address disputes involving public rights. There is a long-standing debate over whether mediation is appropriate for human rights disputes; it is argued that mediation is inherently non-normative because of its emphasis on achieving settlements that satisfy the interests of the parties.[39] However, company ICM programs and State ADR programs already address and resolve human rights disputes in the workplace on a regular basis.

The ICM program used by the US National Institute of Health, described earlier, enforces public norms by requiring all individual complaints to undergo a root cause analysis to determine whether the conflict is systemic; i.e., whether the complaint arises from gaps with formal policy, from discrimination, from organizational structural misalignment, or from inappropriate cultural norms and practices.   Not all systemic problems require systemic solutions, however, since

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[36] Heineman, *supra*, p. 81.
[37] Strum and Gadin, *supra*.
[38] Litz, Cheating at Solitare: Self-Deception, Executive Mental Health, and Organizational Performance, Business and Society Review: 108:2 pp. 235-261 (2003); Senge, The Fifth Discipline: The Art & Practice of the Learning Organization, (Doubleday, 1996 and 2006).
[39] Strum and Gadin, *supra.*

justice is not served by making the complainant a reluctant champion.[40] In the NIH's view, root cause analysis provides the crucial link between the program's ability to elaborate upon normative public values and achieve settlements based on individual interests.[41]

An effective system for resolving internal employment disputes does not guarantee that a company will have an effective system for resolving disputes with external stakeholders.   For example, Shell has a highly evolved ICM system, according to the CPR Study.[42] Yet it just settled a twenty year old highly public lawsuit alleging that it was complicit in the executions by the government of Nigerian tribal leaders who had contested the company's gas flaring and oil spills in that country.[43]   It is worth asking whether having a conflict management system for external stakeholders in place would have enabled the company to listen to and resolve disputes over its environmental practices at an early stage, and avoid the escalation of community conflicts that in turn led to the events that engendered the lawsuit.

Using the Integrated Conflict Management System as a Model for Grievance Processes for External Stakeholders

Can the learning of employee-focused ICM programs be applied to disputes with external stakeholders, that is, non-commercial, non-governmental groups or individuals who can affect or be affected by an organization? The answer appears to be yes.   As noted earlier, a core reason for creating an ICM program is to reinforce the central values of the organization, and mitigate the alienation of employees resulting from a sense of powerless and mistrust. Presumably, there is an even greater need for a program to enable a company to deal with the disputes of remote stakeholders who do not see themselves as part of the corporate family.   In order

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[40] Perry, <u>Comment on ADR and Human Rights Adjudication</u>, Dispute Resolution Journal (May, 1998), p. 54.
[41] Strum and Gadin, *supra*, p. 4.
[42] CPR, *supra,* pp. 11-12.
[43] "Shell to Pay $15.5 Million to Settle Nigerian Case", New York Times, June 8, 2009, available at <u>http://tinyurl.com/qt22nc</u>.

for a company to implement a conflict management system for such external stakeholders, however, it will be necessary to make significant changes to the ICM model. This emerges from a comparison of the features of the ICM model with the recent study by the Center for Social Responsibility in Mining (CSRM) of existing community grievance processes used in the mining industry.

The CSRM study, conducted in collaboration with the Corporate Social Responsibility Initiative at the Harvard Kennedy School of Government, is the first empirical study of this topic, and was based on interviews with senior employees from ten multinational mining companies, with experience in a broad range of minerals and mining projects throughout the world.   The study found that mining companies are looking closely at community grievance handling, since mining operations inherently generate conflict with local communities, which can disrupt the mine's production and damage the company's reputation. This is consistent with the findings of the 1997 Cornell Study showing a high use of ADR by mining and construction companies—presumably to resolve commercial disputes that could threaten operations. But recognition of the social risk of disputes with external stakeholders is something relatively new.

The CSRM study found considerable room for improvement in the analysis and assessment of social risk, in the organizational alignment and support for those in the company who resolve community disputes, and in the methods of resolving disputes.[44]   The study then identified a set of enabling factors that would make community grievance processes more effective and successful: senior management support; a culture that respects communities; multiple and dedicated pathways for complaints and grievances; the systematic use of root cause analysis to identify the real cause of disputes, with an eye towards identifying systemic issues; increasing the social dispute resolution competency of executives; and providing the right

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[44] Kemp and Bond, <u>Mining industry perspectives on handling community grievances: summary and analysis of industry initiatives</u>, Center for Social Responsibility in Mining (April 2009), p. vii. ("CSRM").

authority and resources to those who have the responsibility to resolve community disputes.[45]

These factors resonate with the key characteristics of an employee-based ICM program. But there are important differences that must be appreciated; they relate to the identification of external stakeholders, the involvement of such stakeholders in the design of the grievance process, the need for integration of the process into the company's organization, and the methods used to determine the cause of disputes.

Identifying Stakeholders

First, it is obvious that employees are critical stakeholders. Employees can generate conflict and disputes, but likely possess identifiable legal rights under contract or law. The types of disputes they generate are predictable. In comparison, identifying the appropriate external stakeholders isn't as obvious. This is true particularly if the company is unused to seeing its impact through the eyes of others, or worse, declines to engage with stakeholders absent an existing contractual or legal framework. Although the mining industry is more highly evolved than many in identifying its external stakeholders, the CSRM study noted that the hierarchical structure of most mining companies makes it difficult for managers to view problems other than from the company perspective.

The reluctance to acknowledge the full range of the concerns of impacted stakeholders can have disastrous results for an organization. We discussed earlier the consequences of the refusal of the Boston Roman Catholic Archdiocese to discuss with its laity objections to priest sexual abuse. Another example is the refusal in the 1990s by Hydro-Quebec, a state owned Canadian utility, to discuss with the indigenous Cree Indian tribe their concerns over the potential social, environmental and health impacts on the tribe of the company's plans to build a hydroelectric project using the waters of James Bay and submerge the tribe's traditional hunting and burial grounds. The tribe saw the project as a threat to their

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[45] *Id*., *supra*, pp. xi-xiii.

continued existence as a tribe, but the company viewed the dispute solely as a matter of money to be paid in compensation for the land.   In the end, the tribe sponsored litigation and organized a public campaign that led the company to shelve the new project.[46]

As the CSRM study points out, dispute resolution is a part of the overall framework of a company-stakeholder relationship.[47] The absence of a clear legal or contractual relationship between the company and external stakeholders does not mean that the company can ignore their complaints without adverse consequence. The Hydro-Quebec/Cree dispute shows that if the company had been more flexible and willing to listen to the concerns of the tribe, to develop common frames of reference, and to understand their interests, it might have achieved a better result for itself and for the tribe.[48]

Involving Stakeholders in the Design of the Process

Second, it is acutely important to engage external stakeholders in the design of a dispute resolution process.[49]   Employers and employees usually work within an existing contractual and legal framework, and thus can 'bargain in the shadow of the law'—which means that they negotiate and settle disputes with a close eye on an alternative court-imposed solution based on relatively clear legal standards.[50]   In comparison, companies and external stakeholders, such as communities, do not always have an alternative legal framework, so they have to create their own framework for dispute resolution. This is the teaching of the Mutual Gains approach, a consensus building process for resolving public disputes, as described by Lawrence Susskind and Patrick Field. It involves the following six steps:

- acknowledging the concerns of others;

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[46] Susskind and Field, <u>Dealing with an Angry Public: The Mutual Gains Approach to Resolving Disputes</u> (Free Press, 1996), pp. 160-177 ("Susskind and Field")
[47] CSRM, *supra*.
[48] Susskind and Field, *supra*.
[49] CSRM, *supra*, p. xi.
[50] Mnookin and Kornhausert, <u>Bargaining in the Shadow of the Law: The Case of Divorce</u>, 88 Yale L. J. 950 (1979).

- encouraging joint fact finding;
- committing to work with affected stakeholders to minimize or correct adverse project-related impacts;
- accepting responsibility, admitting mistakes, and sharing power;
- acting in a trustworthy fashion; and
- focusing on building long term relationships.[51]

This approach is familiar to some companies; e.g., National Grid followed it in siting and constructing its electric transmission lines.[52]

The Need for Internal Integration

Third, as the CSRM study notes, it is critical to take an integrated and coordinated approach towards community dispute resolution, with appropriate organizational alignment and incentives. This must also be done for employee ICM programs as well; for example, the NIH uses a dedicated conflict management function plus a robust ombuds function.[53]   The organizational challenges for the design of community based grievance processes, however, are far larger and more complex. The causes of, and solutions to, the different types of community vs company disputes may belong to different company functions; *e.g.*, employment (human resources function); procurement (supply chain function); water impact (environmental function).[54] And the community relations function, which talks directly with communities and knows more than anyone else in the company about their concerns, often lacks sufficient internal clout and capacity to mobilize and coordinate all of the necessary company resources to respond to the dispute. This is true particularly at the early stage—before complaints aggregate and harden— when the problems might be addressed with the least effort. Instead, as problems

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[51] Susskind and Field, *supra*, pp. 37-41.
[52] Sherman, How an Energy Company Takes a Human Rights Approach, Alternatives to the High Cost of Litigation, vol. 26, No. 3 (March 2008), p. 61.
[53] Strum and Gadin, *supra*, p. 15.
[54] CSRM, *supra*, 25.

escalate, community relations tends to take a back seat to public relations and legal, which tend to assert far greater influence on senior management.[55]

The misalignment of responsibilities is ironic. At the early stage of the dispute, the community relations function owns the dispute and understands the interests of the community, but lacks sufficient resources to resolve the problem. At the later stage of the dispute, legal and public relations own the dispute, and have much greater resources, but lack understanding of and sensitivity to the community's interests. This misalignment serves neither the interests of the company nor the community.

Methods for Determining the Cause of the Dispute

Fourth, the CSRM study notes the importance of studying the cause of community disputes in order to resolve them. This contrasts with a reactive 'fire-fighting' approach that patches the immediate problem so that the company can 'move on'.[56] As discussed earlier, employee-focused ICM programs require the company to understand the cause of the dispute in order to determine whether it met governing standards and values (including human rights), to understand the interests of the parties, to reach a settlement consistent with those standards, values and interests, to identify and fix systemic problems, to reinforce the company's core values, and to earn the trust of the workforce.

As the CSRM study points out, however, a community-focused grievance process requires companies to build the capacity to determine the cause of community relationship failures, which are different from the skills needed to evaluate allegations of racial discrimination in the workplace, accidents, and environmental spills.[57] Perhaps the most difficult challenge is the need for the company to take a more collaborative and open approach with external stakeholders towards determining the cause of a dispute—such as joint fact finding—in order to earn the trust of the community and build long term

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[55] *Id.*, pp. 29-31
[56] CSRM, *supra*, pp. 19-21.
[57] *Id.*, pp. 19-20.

relationships. This is the thrust of the Mutual Gains approach to public consensus building, discussed above.

An open approach cuts against the grain of the advice of many lawyers, however, particularly when the problem is escalating towards litigation. The CSRM report notes that when a dispute appears headed towards litigation, the company legal department tends to take ownership of the dispute. The lawyers are less likely to be sensitive to the need to preserve community relationships, and elevate concerns over confidentiality—tendencies that are in tension with the need to establish transparency and trust between the parties.[58] This argues for earlier resolution of community disputes, where possible, when the stakes are not so high.

It is true that out of court admissions made by company employees can be used against the company in court. These concerns can be mitigated to some degree by agreement (if feasible) or by evidentiary rules (where applicable) prohibiting use in evidence conduct or statements made in settlement negotiations.[59] But it is becoming increasingly difficult for companies to preserve the confidentiality of information in any event, given the speed and breadth with which information travels today, and the rapidity with which groups can use that information to leverage public opinion. Therefore, not only will a reflexive bias in favor of confidentiality and privacy of information make it more difficult to resolve disputes with external stakeholders, it is more likely than not to be ineffective. This will damage long-term relationships to the detriment of both society and the company. Therefore, the default response—even from lawyers—should be one of openness and transparency.

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[58] CSRM, *supra*, p. 29. Helina Ward has observed that some lawyers use legal privilege as a "a distinctive selling point" for advising on CSR, despite its tension with values of transparency and openness. Ward, The Interface Between Globalization, Corporate Responsibility, and the Legal Profession, 1 U. St. Thomas L.J. 813, p. 854 (2004)

[59] *E.g.*, U.S. Federal Rule of Evidence 408.

Conclusion

The concept of a rights-compatible company grievance process, as articulated by the SRSG, is relatively new, represents a challenge for the dominant culture within many companies. However, it has its historic roots in the use of ADR by companies to reduce risks generally, and the integrated conflict management programs of a number of organizations to address workplace conflict and reinforce core company values—including respect for human rights. What is truly new about grievance processes is their application to disputes with external stakeholders. The need to address their concerns has increased tremendously due to the growth of a global economy unburdened by global governance, and the dramatically increased ability of groups to use information technology to form and mobilize for social change. The study conducted by the Center for Social Responsibility in Mining of current mining industry grievance practices shows that there are challenges in applying the lessons learned from prior business use of integrated conflict management systems. However, those lessons are well worth applying to grievance processes for companies' external stakeholders.

Annex A – Cornell Study Tables

Top 10 reasons why companies use mediation (from Table 3.11):

Allows Parties to resolve disputes themselves	82.90%
More satisfactory prcoess	81.10%
More satisfactory settlements	67.10%
Court mandated	63.10%
Preserves good relationships	58.00%
Uess expertise of neutral	53.20%
Preserves confidentiality	44.90%
Avoids legal precedents	44.40%
Required by contract	43.40%
Provides more durable resolution	31.70%
Dispute involves international parties	15.30%

Top 10 reasons why companies don't use mediation (from Table 3.12):

unwillingness of other side	75.70%
nonbinding	40.90%
compromise solution	39.80%
lack of confidence in neutrals	29.00%
No desire by senior mgt	28.60%
risk of exposing strategy	28.60%
nont confined to legal rules	28.10%
lack of experience	24.70%
lack of qualified neutrals	20.20%
too complex	4.60%
too costly	3.90%

Which industries use mediation for which disputes (from Table 3.9):

Type of Dispute	Mining, Construction	Durable Manufacturing	Nondurable Mfg	Transport, Commun, Utilities	Trade	Finance	Insurance	Service
Commercial, Contract	100.00%	90.00%	84.00%	83.00%	77.00%	91.00%	89.00%	79.00%
Financial reorganizations	13.00%	15.00%	12.00%	14.00%	15.00%	38.00%	30.00%	5.00%
Consumer Rights	29.00%	33.00%	25.00%	43.00%	27.00%	57.00%	52.00%	45.00%
Corporate Finance	0.00%	19.00%	22.00%	12.00%	20.00%	46.00%	13.00%	19.00%
Employment	64.00%	85.00%	84.00%	84.00%	88.00%	75.00%	81.00%	91.00%
Environment	43.00%	54.00%	56.00%	51.00%	27.00%	21.00%	29.00%	42.00%
Intellectual Property	17.00%	64.00%	55.00%	23.00%	31.00%	18.00%	15.00%	44.00%
Personal Injury	67.00%	72.00%	74.00%	70.00%	69.00%	45.00%	71.00%	60.00%
Product Liability	50.00%	76.00%	71.00%	26.00%	55.00%	10.00%	55.00%	53.00%
Real Estate	50.00%	33.00%	36.00%	54.00%	51.00%	59.00%	50.00%	47.00%
Construction	100.00%	48.00%	60.00%	65.00%	55.00%	47.00%	50.00%	42.00%

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