

Human Rights and Business



Corporate Accountability and Access to Justice

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Introduction: Rana Plaza



<https://www.youtube.com/watch?v=pH7AoEBN2yY>



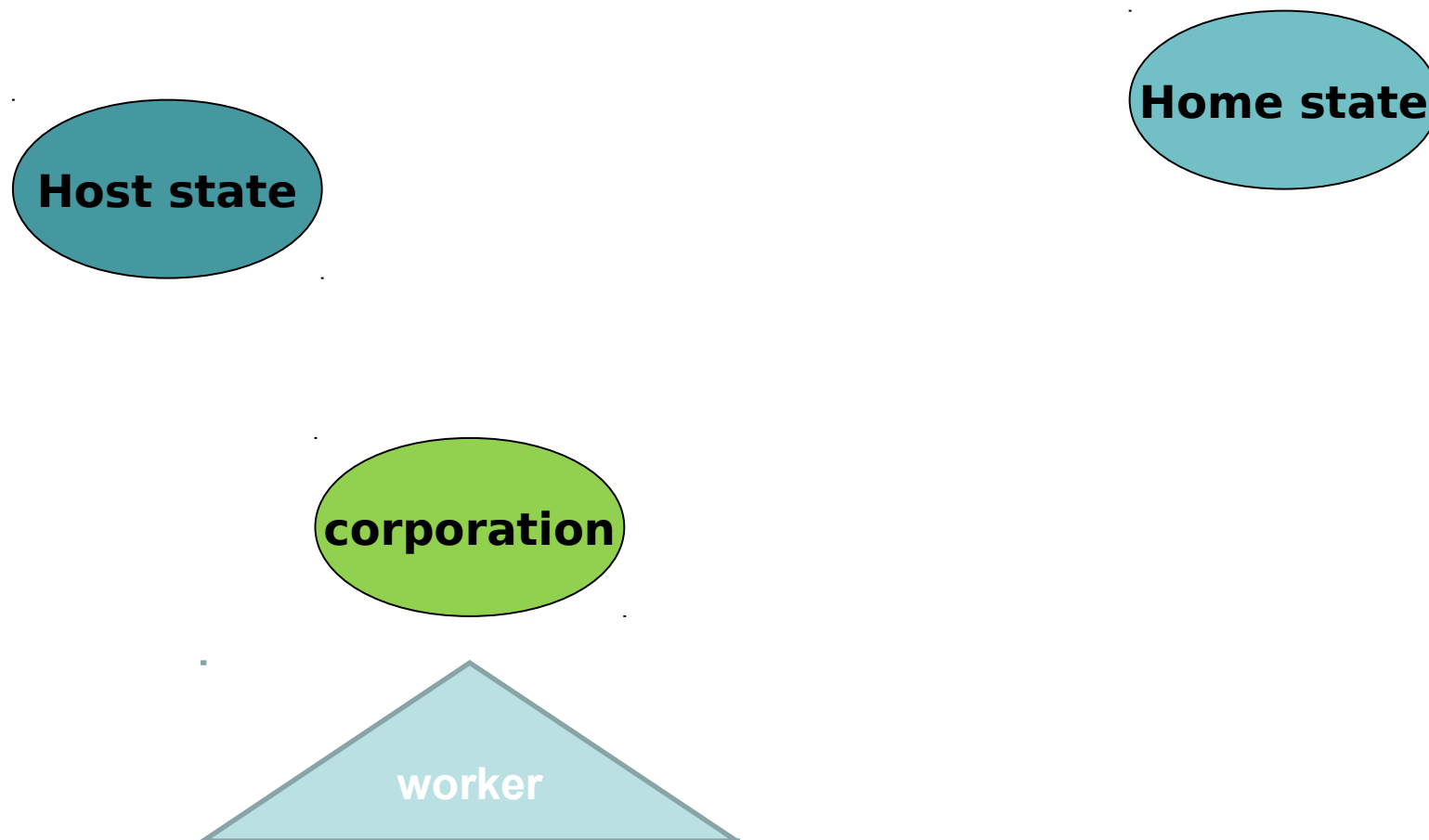
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Cases like Rana Plaza and others...

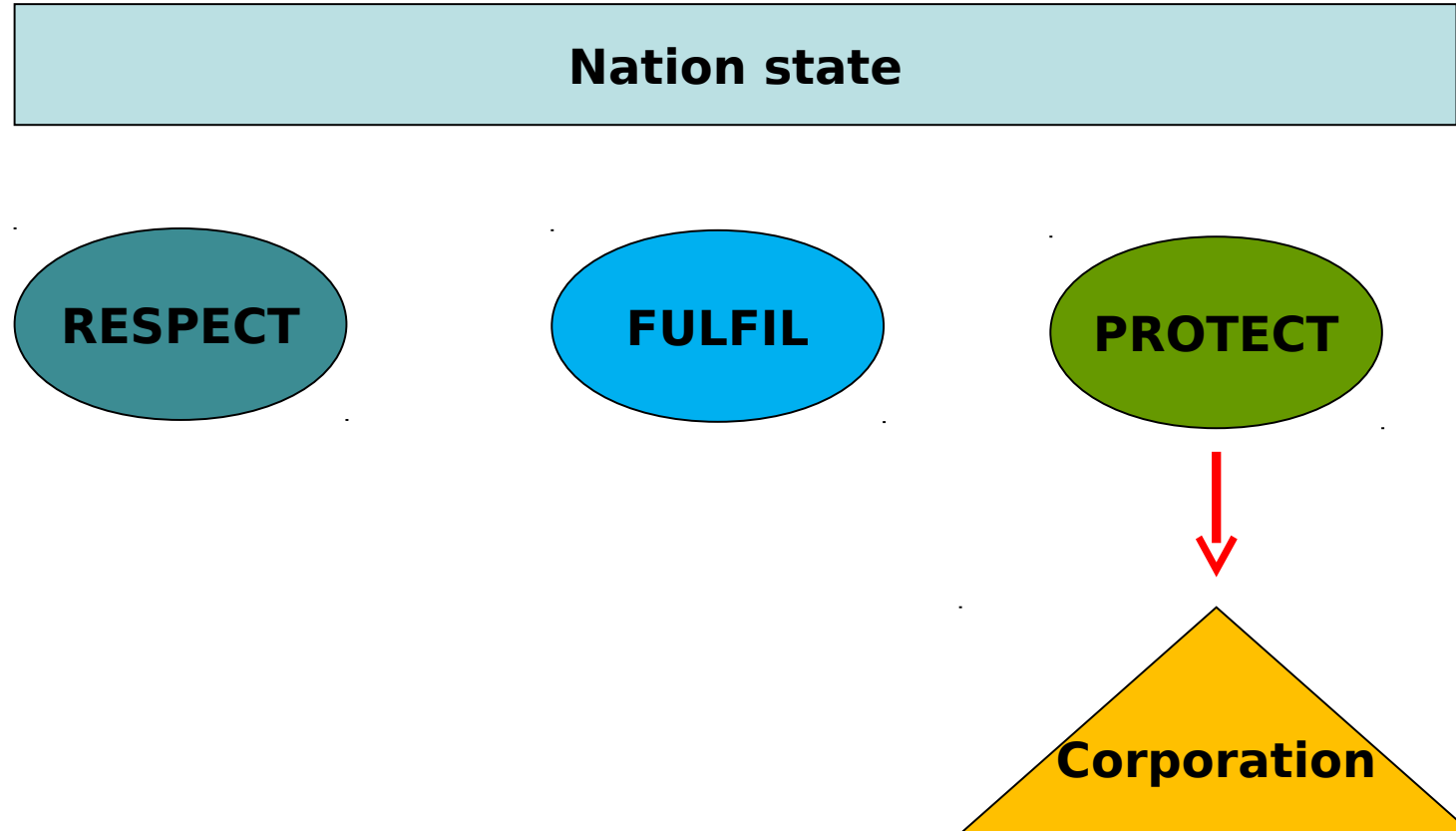
1. What kind of **strategies** would you suggest for **addressing** these issues?
2. Which **actors** would you approach and who would you try to hold **accountable**?



Access to remedy for the worker



1. State Responsibility



1.1. Host State Duty to Protect against HR Violations by Third Parties

PROTECT

The state has to take **POSITIVE** measures to prevent and punish third party interference with HR

- **Regulate**: Adopt adequate legislative and administrative measures
- **Monitor** compliance (e.g. participation) through effective mechanisms (e.g. NHRI)
- **Investigate** alleged HR violations **ensure prosecution**
- **Reparation**



- Assessment against the ppe of **DUE DILIGENCE**



Principle of Due Diligence

➤ It is **decisive whether the state**

1. **knew** about the existence of a real risk because the violation occurred with its support, acquiescence or allowance or
2. whether it **ought at least have known** about the risk of a violation,
3. **and it failed to take serious and reasonable measures** to protect against human rights violations.

[Case law from the ECtHR, African Commission and Inter-American Court]



Case Law on Obligation to Protect

➤ **Key duties** under the obligation to protect against corporate human rights violations:

1. to take reasonable and appropriate measures to **regulate and control** corporate conduct in a way to strike a fair balance between public and private interests
2. to engage in an informed, fair and **participatory decision making process** drawing e.g. on studies and impact assessments and involving the affected individuals
3. to ensure **transparency** of this process by providing access to information and by actively informing the public about potential and imminent risks
4. to ensure that affected persons are able to **appeal** to the courts against any shortcomings in the decision making process and are given the necessary legal aid
5. to ensure, by all means at its disposal, that the **legislative and administrative framework is implemented** and breaches are punished.



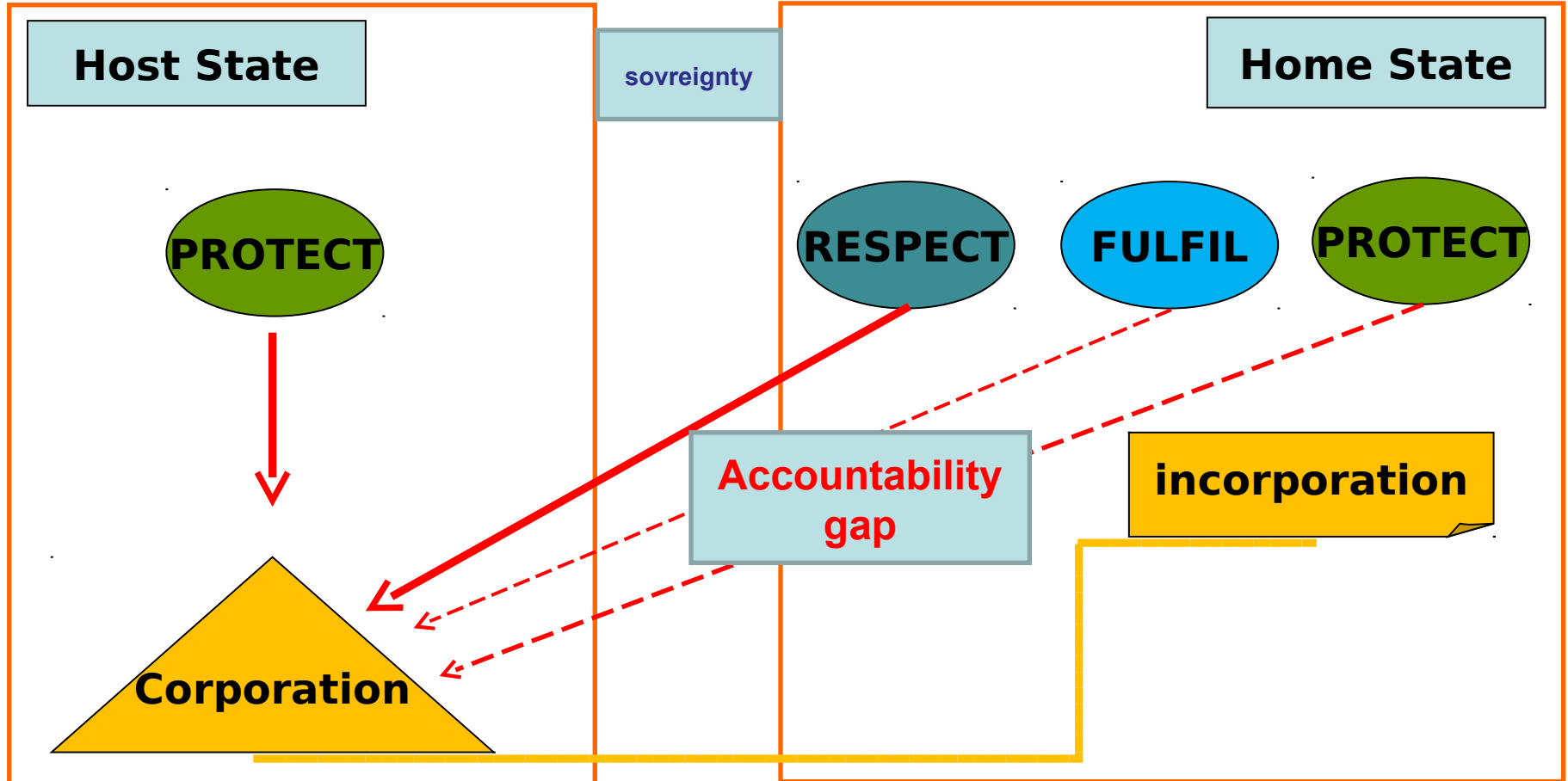
Host State: Failure to Comply with its Obligation to Protect



- State is **unwilling or unable** to comply with the duty protect (e.g. due to conflicts, authoritarian regimes, weak governance, poor project design, implementation and monitoring)
- **Political, economic or strategic interests** of the involved countries prevail over HR interests (e.g. attract foreign investment, and low production costs)
- **Poor, vulnerable, marginalised people** are most affected, in particular **indigenous**



1.2 Home State Responsibility: Transnational Context



Extraterritorial HR Obligations

- Extraterritorial obligation to **RESPECT**: Do no harm
- Extraterritorial obligation to **PROTECT**: Prevent *third parties* from interfering with the enjoyment of human rights in another country
 - Needs additional criteria to establish **extraterritorial jurisdiction**



Extraterritorial Jurisdiction

- Home state needs to have the **power and competence to act outside its borders**
- Different standards to establish jurisdiction by **jurisdictional link**:
 - **Effective control over territory, persons** (e.g. HRC: Lopez v. Uruguay, ECtHR: Al-Skeini and Others v. the UK)
 - **Decisive influence** (e.g. ECtHR: Catan and Others v. Moldova and Russia)
 - **Causal link in the chain** (see e.g. HRC Munaf v.



Attribution of Corporate Human Rights Violations under the ECtHR

The European Court of Human Rights attributes human rights violations to the Home State when the organisation can be classified as **governmental organisation**

Criteria:

1. exercises **governmental powers**;
2. is established for **public-administration purposes**;
3. acts **under the supervision** of the state, not a completely independent entity,
4. **monopolist position** with a certain public service role;
5. its internal **structure and conduct is regulated by the state** e.g. by decree or by law.

Accountability Gap



Very challenging for HR victims to hold the home state accountable for failing to protect against extraterritorial human rights violations of its companies.



2. Corporate Responsibility

THREE PILLARS of the UN GUIDING PRINCIPLES

HUMAN RIGHTS

PROTECT

STATE

duty to
protect

RESPECT

CORPORATE

responsibility
to respect

REMEDY

VICTIMS

access to
effective remedy

Shift Project



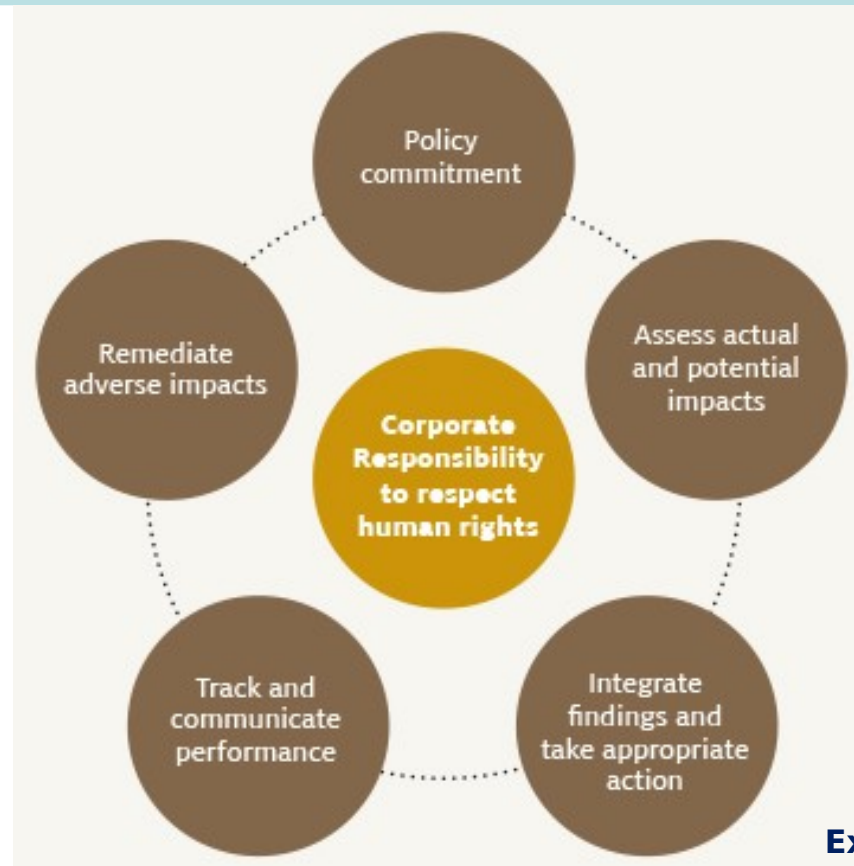
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UN Guiding Principles on Business and HR and Follow-up

- **Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises: Prof. John Ruggie (2005-2011)**
 - **Respect-Protect-Remedy** Framework for Business and Human Rights (2008)
 - **UN Guiding Principles** (2011)
Non-binding
- **Follow up: UN Working Group on the issue of human rights and transnational corporations and other business enterprises (since 2011)**



Human Rights Due Diligence



Exp. Kuoni Group

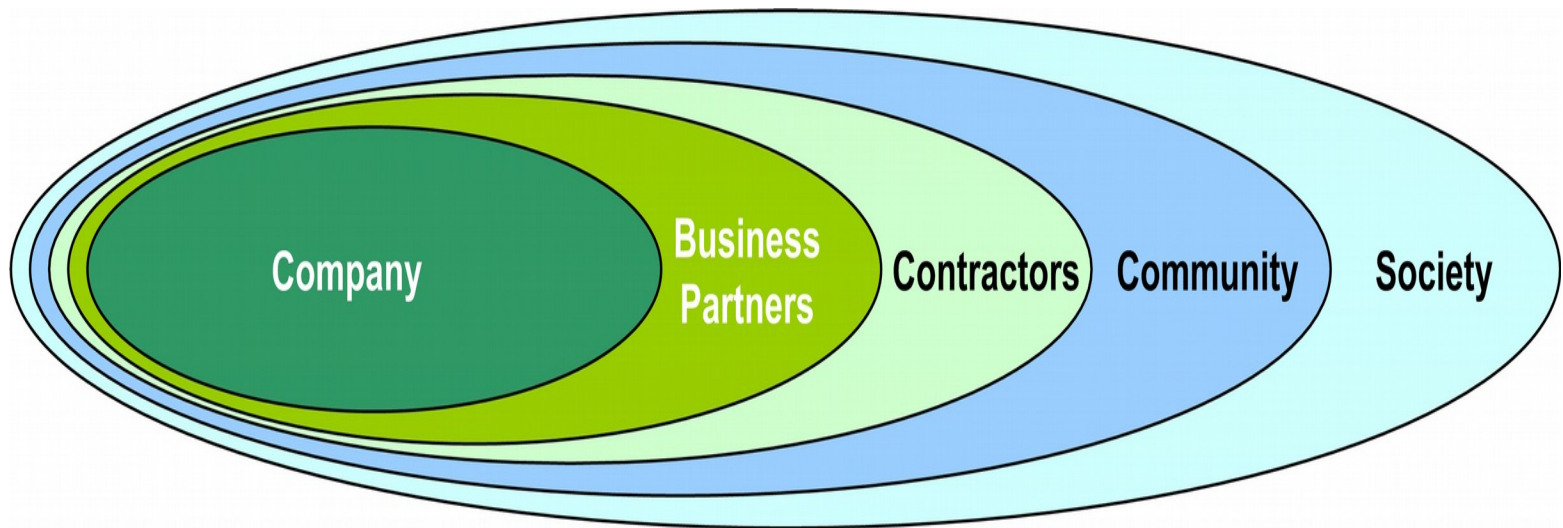
Human rights due diligence = ongoing process



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Corporate Leverage and Influence

The more influence and leverage- the higher the responsibility



Other Instruments and Standards

- **OECD Guidelines for Multinational Enterprises**
 - **IFC Performance Standards, World Bank Operational Policies**
 - **ILO Tripartite Declaration**
-
- **EU: Non-financial reporting Directive (2014)**
 - **Companies with more than 500 employees need to include statement on human rights, labour and environmental protection to annual reports**



National Initiatives on due diligence

- ***French loi de vigilance:***
 - Due diligence for large companies including subsidiaries, suppliers and subcontractors, also abroad
 - Put in place, disclose and implement a “plan de vigilance”
- ***UK Modern Slavery Act:*** large companies: prepare and publish a slavery and human trafficking statement
- ***Netherlands: Child Labour Due Diligence Bill:*** requires companies providing to Dutch market, to report on measures taken against child labour
- ***Switzerland:*** Responsible Business Initiative: mandatory due diligence for multinationals



Distinguish from CSR

- Corporate self-regulation, e.g. Codes of Conduct
- Lack of comprehensive definition → EU CSR Strategy (2011-2014)

CSR is “a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis” .

- Does not necessarily mean human rights in core business...



3. Access to justice

Corporate interests vs. human rights interests



National judicial systems and international human rights systems provide unsatisfying ways of to gain redress in case of corporate human rights violations

➤ **Can non-judicial grievance mechanisms provide an alternative?**

Which grievance approaches exist?

- **Hotlines** (often also „whistle blowing“, „ethics“ or „workers“ hotlines, managed by third parties)
- **Community grievance mechanisms** (face to face, usually managed by company)
- **Grievance Mechanisms run by third parties** e.g. NGO (face-to-face, managed by NGO as intermediary)



What is a grievance mechanism?

It is NOT...

- a replacement for a binding and enforceable judicial decision
- designed to handle criminal cases
- a replacement for the role of legitimate trade unions
- a replacement for concerted action towards larger legal and political reform



BUT it can...

- **Offer efficient, timely, and low-cost forms of conflict resolution**
- **Have a positive impact on operational plans, schedules and costs**
 - **Show that the company is committed to continuous improvement and internal learning**
 - **Improve compliance with local and international standards/lender requirements**
- **Offer a valuable alternative where there is little confidence in the state-run systems**
- **Enhance dialogue and local relationships**



Don't's...

- **Lack of TRUST!**
- **Lack of predictability**
- **Lack of independence**
- **Intransparency**
- **Parties lack common interest**
- **Procedural barriers**
- **Lack of consequences in case of violations**
- **Lack of monitoring of resolutions**
- **Addressing only the symptoms instead of the root causes**
- **Only financial compensation (extortion cycle)**



Example HP Mexico

- Company mechanism with third party involvement
- NGO takes role of trade union
- Strengths: Transparent process in with time lines and clear responsibilities, four stages, most of the issues can be solved on 2nd level
- Problem Patterns: NGO cannot represent all workers, risk of retaliation for workers, cannot not address strategic root causes
- Accountability increased through third party involvement, increased international attention and model for other companies



Further Information

- <http://www.business-humanrights.org/>
- <http://www.somo.nl/>
- <http://www.unglobalcompact.org/>
- <http://www.ilo.org/global/lang--en/index.htm>
- <http://www.ohchr.org/EN/Issues/Business/Pages/BusinessIndex.aspx>
- <http://www.ohchr.org/EN/Issues/Business/Pages/WGHRandtransnationalcorporationsandotherbusiness.aspx>
(UN Working Group)
- <http://www.ihrb.org/>
- <http://www.shiftproject.org/>
- <https://earthrights.org/>
- <https://www.forestpeoples.org/>
- rightsinbusiness.eu/



Further Information

- **<http://accessfacility.org/>**
- **<http://www.fairlabor.org/>**
- **<https://www.fairwear.org/>**
- **<http://www.cao-ombudsman.org/>**



Thank you for your attention

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