

Hague Utilities for Global Organisations Conflict Management Facility on CSR

Report and recommendations following the CSR expert meeting

14 June 2011

At the offices of Pels Rijcken & Droogleever Fortuijn

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WORLD LEGAL FORUM
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CSR Expert meeting
Towards an International Conflict Management Facility on Corporate Social Responsibility
14 June 2011
At the offices of Pels Rijcken & Droogleever Fortuijn

On 14 June 2011, the World Legal Forum foundation and its partners convened an expert meeting in The Hague, chaired by Mr. Paul Hohnen, to brainstorm with leading experts in the field of Corporate Social Responsibility about the potential establishment of a conflict management facility for CSR related disputes. Participants included representatives from NGO's, business, and government. The meeting was held under the Chatham House rule; any suggestions made are not attributed to the individual participants.

The participants were sent a position paper, drafted by the HUGO partners to prepare for the meeting. The position paper can be downloaded from the WLF website. The meeting was focussed on discussing three main issues:

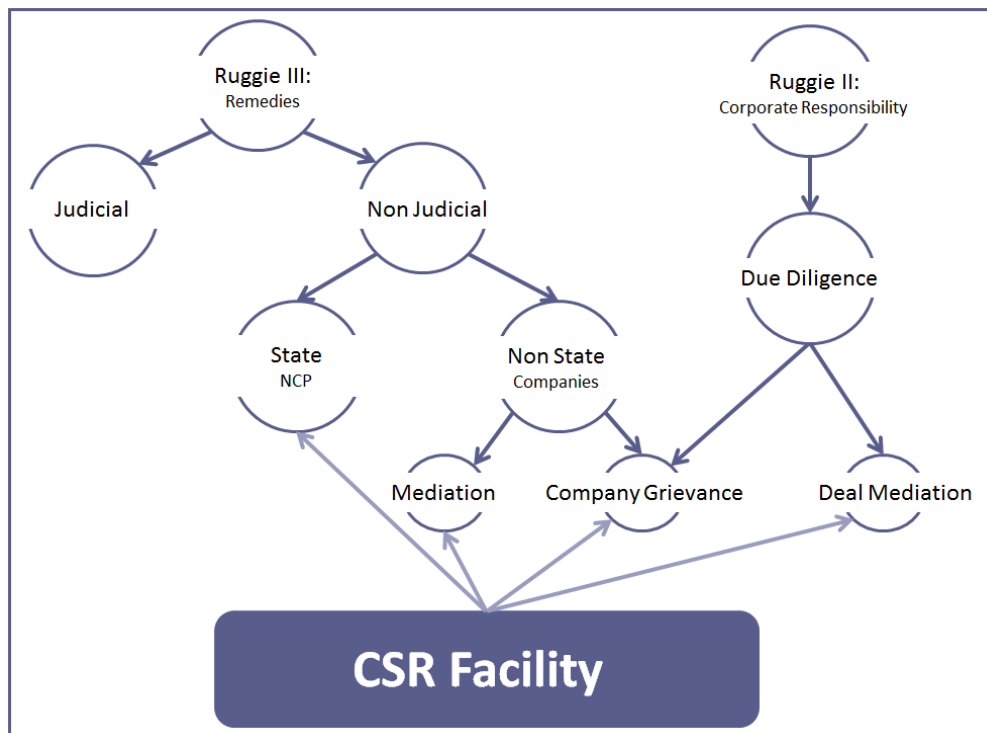
1. Potential services of the proposed facility
2. The facility in practice: case studies
3. Next steps

The meeting started with an introduction to the initiative by the HUGO partners, including the history of the project, a summary of the previous expert meeting which was focussed on the need for a new facility, the potential scope and the potential functions of the facility.

Introduction to the proposed facility

Potential outline

The initiative is a part of the three year programme Hague Utilities for Global Organisations (“HUGO”), which is subsidised by the Dutch Ministry of Economic Affairs, Agriculture and Innovation, and the City of The Hague. The HUGO programme aims to, *inter alia*, investigate the feasibility of the establishment of a conflict management facility on CSR, with an emphasis on disputes involving human rights, labour and environmental issues. With the HUGO programme, WLF and its partners aim to contribute to the second and third pillars of the Ruggie Framework: the corporate responsibility to respect human rights and greater access for victims to effective remedies. The positioning of the facility in the Ruggie framework can be illustrated by the following outline:



As is illustrated by the outline above, the facility intends to deal with non-judicial remedies and assist companies in their due diligence efforts. Its main function will be to act as a hub, with links to local CSR dispute mechanisms world-wide.

Need for a new facility

There is a plethora of international dispute resolution initiatives in the field of CSR. Nevertheless, the proposed CSR facility intends to fill some important gaps. The conviction that there is a need for a new facility, and which potential services that may be offered by the facility, is based on the results of research conducted in 2010 by the Corporate Social Responsibility Initiative at Harvard

Kennedy School. The scope of the research included an assessment of the current gaps in the existing mechanisms. A report of the research results has been published at:

http://www.hks.harvard.edu/m-rcbg/CSRI/publications/workingpaper_63_rees%20kovick_june%202011.pdf

The preliminary results of the research were discussed during an expert meeting organised by WLF in October 2010. The HUGO partners have used the results of the research to further develop the idea of establishing the proposed facility.

Key features

Complementarity

An essential feature of the CMF is that it intends to be a centralised hub with a high level of expertise that is complementary to existing dispute resolution mechanisms world-wide. The facility can assist parties with identifying the appropriate local dispute resolution institutes, and can be supportive to the various institutes. The facility intends to offer mediation services, when local non-judicial means are unavailable or fail to offer an appropriate solution.

The proposed facility intends to be complementary to the OECD National Contact Points. Currently, when a complaint is accepted by the NCP, it can offer conciliation and mediation services to the parties. If one of the parties withdraws from the process, or if no settlement can be reached, the NCP can make a statement about the case. In some cases, the statement is a *de facto* sanction, as it leads to naming and shaming of one of the parties involved. This is fundamentally at odds with the role of a mediator as an independent third party. The proposed facility would be complementary to the NCPs by offering deal mediation and mediation services as an independent third. The UK NCP has recognized the dilemma, and is currently the only NCP that outsources mediation to independent alternative dispute resolution professionals.

Awareness raising

The proposed facility intends to raise awareness on CSR and dispute resolution by offering conferences, trainings and workshops. Adjudication is often preferred by companies over alternative dispute resolution, even in situations where ADR may be more appropriate. A companies' incentive to choose ADR over litigation begins with being informed enough to weigh the benefits between the options. One of the interviewees of the CSRI research comments that the financial costs for the litigation procedures are not substantial for companies, leaving the companies inclined to choose litigation over ADR as a process that they are familiar and comfortable with, when ADR would be a more suitable option.¹ However, the financial costs that come with a loss of goodwill, while

¹ Kovick David and Caroline Rees. 2011. "International Support for Effective Dispute Resolution Between Companies and Their Stakeholders: Assessing Needs, Interests and Models." Corporate Social Responsibility Initiative Working Paper No. 63. Cambridge, MA: John F. Kennedy School of Government, Harvard University, p. 17.

considerable, are not immediately obvious.² Raising awareness will help stakeholders make an informed choice as to the type of dispute resolution that may be appropriate.³

Prevention

The facility intends to focus on prevention of disputes by enhancing and facilitating dialogue once a concern has been raised, yet before the concern has escalated into a legal dispute. Deal mediation services can play an important role in this respect.

Mission statement

The mission of the proposed CSR facility is to enhance and facilitate dialogue and engagement between businesses and stakeholders on issues of corporate social responsibility (CSR), and as far as possible avoiding or resolving conflicts at an early stage. This will be achieved through a mix of 'on request' dispute resolution activities, including company grievance mechanisms and mediation, and the provision of materials and advice. The centre will provide a non-judicial forum and resource tool for the private sector and civil society actors.

Session I: Plenary discussion on the potential services of the proposed facility

The introduction to the initiative was followed by a discussion as to what the added value of the facility would be and what comparative advantage the facility would have over the services offered by individual law firms or local government facilities.

A comparative advantage that was discussed, was if the facility would have a proactive and preventive function. Existing mechanisms often become involved when a legal dispute arises. The aim of the CMF could be to help companies and communities identify and deal with a concern at an early stage, before it turns into a legal dispute. It was suggested by some of the participants to focus on small and medium enterprises, since the large multi-nationals are generally aware of how to deal with CSR issues. An important tool in this regard, would be raising awareness among stakeholders on how to recognize the potential CSR conflict.

Another added value of the proposed institute is its hub function. The proposed institute would facilitate existing local means and offer support in directing people to the appropriate mechanisms. The facility would not compete with other mechanisms, but will play a complementary role. The question was raised whether the facility would assess the quality of the institute to which it refers the stakeholders, and if so, where the authority to do so comes from. This is an issue that requires further study.

It was suggested to consider complementarity to the International Labour Organisation. The ILO is state oriented and if a problem arises, a direct contacts mission is sent. If the CMF could implement the normal machinery of collective bargaining and other mechanisms, it can be seen as a private initiative that operates similarly to the direct contacts mission.

² *Ibid.*

³ *Ibid.* p. 21.

After the discussion on the comparative advantages of the facility, the participants brainstormed on the services potential services the facility might offer:

Functions providing information and advice on conflict management in CSR:

- Advice on best practices in CSR conflict management;
- Offering a model for effective operational-level grievance mechanisms;
- Advice on how to best deal with (potential) conflicts on CSR related issues and stimulating a proactive approach;
- Information and advice on applicable normative framework/roadmap;
- Offering assistance in drafting covenants between companies and stakeholders.

Services to enhance dispute resolution (advisory) with a solution on a local basis:

- Portal for the resolution of conflicts, disputes or other grievances in the field of CSR;
- Rules and Procedures for conflict resolution;
- Training and certification of mediators.

Focal point on CSR conflict management:

- Building up a network with the ambition to collect, analyse and evaluate local CSR conflicts and their resolution;
- (Co-)organise workshops or conferences in The Hague or locally.

General consensus among the participants was that the facility would need to narrow its focus and should take either a service provider or public benefit initiative. The services offered by the facility would also depend on the type of cases the facility intends to deal with.

It was suggested that, as a public benefit initiative, the facility could play an awareness raising, standard setting and convening role, while outsourcing commercial services to external parties.

From a civil society perspective, it was mentioned that the hub function would be useful, provided it is very well known and accessible to stakeholders world-wide. The awareness raising aspect is important, particularly if the CMF is to reach stakeholders worldwide, and a proactive approach is essential. It was strongly recommended to involve the NGOs in this, as they have the network which allows the facility to achieve this goal.

The facility would be stakeholder driven, and depends on participation of all parties. Therefore, it was suggested to develop a questionnaire to be sent out to stakeholders, collecting input from them on what functions they are missing in the current CSR arena. The criteria for defining the feasibility of the proposed functions may involve:

- The need, and the question of whether stakeholders would be prepared to use the function.
- The added value: Is it done elsewhere and in a satisfactory manner? If so, the function may not be appropriate for the proposed facility. Rather, in this case the facility can help the parties identify the right institutes with the appropriate functions to help them.

- The experience that the interviewees have with dispute resolution mechanisms.

Session II: Case studies

The session started with a summary of the G-Star and Shell/Nigeria case studies. The introduction to the cases resulted in the discussion on how to involve stakeholders at an early stage, thereby preventing escalation of disputes as illustrated by the case studies, and what the incentives would be for companies and communities to participate in early dialogue.

Another issue brought up was: if the facility intends to offer a roster of mediators, who would qualify as an appropriate mediator for the list? In the Shell/Nigeria case, the case was mediated by Father Kukah, a religious leader in Nigeria who was not a trained mediator. The mediator in the G-Star case, Ruud Lubbers, was not a trained mediator either. The participants remarked that some persons would be very appropriate to mediate a case, even if they are not qualified, while others may be qualified mediators but not appropriate for the specific case. It was advised to consider whether certification should be the only prerequisite for being included on the roster, or whether authority, stature and awareness of the background of the conflict should also be taken into account.

Session III: Terms of Reference

The HUGO partners, in cooperation with the Hague Institute for the Internationalisation of Law intend to develop a Terms of Reference for effective conflict resolution mechanisms. These Terms of Reference will describe the desired procedural results of a conflict management facility, including acceptable and fair remedies containing a mixture of actions (such as removal of waste, contributions to community development, etc.), and ways to calculate damages. The Terms of Reference will describe concrete and measurable criteria for procedural justice, and will contain an effectiveness matrix with which to measure in qualitative terms the usefulness and effectiveness of conflict resolution mechanisms.

Participants were asked for input on the common CSR problems that exist:

- Labour rights/conditions at an investor's site, including empowerment, participation, autonomy and association rights;
- Oil spills (and other environmental damage);
- Access to jobs at investor's site;
- Respect for property rights and tenure rights in and around site;
- Impact on social life (prices, prostitution etc. etc.);
- Security for persons taking action;
- Share in proceeds/revenues for community;
- Environmental damage that does not impact a person or a local community directly (such as biodiversity);
- Consumer protection related issues, such as over indebtedness due to credit card distribution to persons who have no means to resolve their debt;

- Mass claim. Participants suggested that this is more a procedure than a problem, however, some commented that mass claims very often involve a CSR issue;
- Prior informed consent of a community;
- Issue of representation;
- Reputation management.

One of the participants suggested a reverse approach: start with an examination of the human rights issues, then proceed to investigate the potential CSR problems that may arise. Another commented that this is a matter of methodology, and that the latter approach may not offer the full picture since it is often the case that a human rights issue is not identified as such in the early stage.

Transparency and confidentiality

There is an obvious tension between transparency and confidentiality which needs to be carefully balanced and it was emphasized that this needs to be taken into account when drafting the Terms of Reference. Mediation generally has a confidential nature, however, it cannot be isolated from the context of exit options, such as litigation, low key arbitration, joint fact finding, or even just a statement. Neither can it be fully isolated from public opinion.

Transparency and confidentiality may be reconciled by anonymising the parties. Another option is to publicize good practices and recommendations, as opposed to a naming and shaming exercise.

Next steps

If the facility is to succeed, full support from stakeholders is essential. The supply and demand side need to be involved in the initiative in order to fully grasp a thorough understanding of aspects should be covered by the facility and to create a sense of **shared ownership**. Therefore, the first priority of the HUGO partners will be to organise the **participatory process** and **promotional activities**. Several steps will be taken to achieve this goal. A **Multi-Stakeholder Advisory Group** will assist in advising on aspects involving the establishment of the facility. This group will consist of representatives from communities, business and NGO's, preferably with experience in setting up institutes. The Multi-Stakeholder Advisory Group will be set up in the summer of 2011. HUGO partner Buren van Velzen Guelen will host quarterly CSR cafe's, informal meetings open to those with an interest in learning more about the project. The HUGO partners will develop a **questionnaire**, devised to learn from stakeholders what they feel is missing from the international arena.

The **focus** of the facility needs to be narrowed. Participants advised that a combination of **public benefits and commercial services** is not ideal and urged to focus on one of these two approaches. In cooperation with the Hague Institute on the Internationalisation of Law, the HUGO partners will devise a business model, which is planned to start in August. Part of the cooperation involves an innovation test, which will further help narrow down the intended focus of the facility. A detailed SWOT analysis will be developed.

Several research projects will commence in September of 2011. Mr. Austin Onuoha, Executive Director Africa Center for Corporate Responsibility, will conduct research to identify and understand the effectiveness of existing mechanisms for resolving CSR-related disputes. One of the outcomes of this research will be an effectiveness matrix, with which the effectiveness of the mechanisms can be measured. Dr. Katinka Jesse, Post-doctoral research fellow, North-West University, Potchefstroom, South Africa, will identify and analyse current existing legal and semi-legal norms in the field of environment, in order to identify the normative framework in case of conflict management of environment related CSR disputes. Mr. Erik Koppe, Assistant Professor Public International Law, will investigate the international key principles and good practices in the field of labour. The outcome of the research will be subject to discussion during an expert meeting, which is planned in January of 2012.

The facility is intended to develop in several implementation phases, starting out relatively compact, with a Multi-Stakeholder Advisory Group, gradually growing into the conflict management facility by the end of 2012.

For questions about the initiative, or if you are interested in becoming involved, please contact the World Legal Forum foundation:

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