

Penn State CSR Lab: Report and Observations on Non-State Based Non-Judicial Mechanisms on the Ground

Prepared Feedback for the OHCHR Accountability and Remedy (ARP) III Report: Enhancing the effectiveness of Non-State based Grievance Mechanisms

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Contents

I. Executive Summary

II. Background

III. The Penn State CSR Lab and the Object of this Report

IV. General Observations About the Work Streams

V. The Operation of Non-State Based Non-Judicial Mechanisms—Examples

VI. Recommendations

I. Executive Summary

The United Nations Accountability and Remedy Project (ARP) was developed through a strongly backed initiative of the Office of the High Commissioner for Human Rights (OHCHR). Its principal object is to address the challenges for rights holders of access to effective remedy. The [*UN Guiding Principles on Business and Human Rights*](#) (endorsed 2011) was understood as serving as an effective basis for meeting the challenges posed by the gap between rights and remedy that appeared substantial in many contexts.

Starting in 2014, ARP has developed in three phases under multiple mandates from the UN Human Rights Council. While ARP I and ARP II considered carefully judicial mechanisms, and state based non-judicial mechanisms, ARP III focused on non-state based non-judicial remedial

mechanisms. This last is an important and perhaps underdeveloped mechanism within the UNGP framework.

The ARP III has progressed substantially. Under the direction of the OHCHR, an initial report was produced and then revised after extensive formal and informal consultation. The OHCHR released a revised Report in November 2018 to generate additional feedback, including at a meeting organized therefor that takes place 29 November 2018 in Geneva. The principal focus of that meeting is to consider in some detail the five workstreams that serve as the heart of the ARP III Report. The OHCHR has welcomed additional feedback to aid in the finalization of the ARP III Report.

To that end the Penn State CSR Lab, an informally constituted collective of students and faculty at Penn State Law have produced this *Report and Observations on Non-State Based Non-Judicial Mechanisms on the Ground* to aid the OHCHR as it moves the ARP III Report to conclusion. The Report is divided into two parts. The first part provides brief observations about the Workstreams. The Second part of the Report includes information about the way that non-state based non-judicial mechanisms have been developed in a number of large multinational enterprises and the challenges and opportunities for the five streams these efforts represent.

With respect to the five Work Streams, the Penn State CSR Lab noted the following.

First, with respect to Work Stream 1, substantially more work must be undertaken to produce more effective guidance on the way in which the several criteria of UNGP 31 might be rationalized and connected to specific practice. As it stands, the approach to UNGP 31 runs the risk that its criteria may not be integrated and applied as a networked whole. Particularly concerning are the methodologies that in emphasizing some of the criteria may effectively marginalize or distort others.

Second, with respect to Work Stream 2, the CSR Lab notes the value of understanding the interface between on state non-judicial grievance mechanisms and those of the state. At the same time, Penn State CSR Lab worries that a focus on the regulatory ecosystem suggested in ARP III may both distort and marginalize the work of its principal focus. It may distort where, inadvertently, the focus on state interface veils the critical importance of state system overlap that are central to grievances touching on the concerns of multiple public and private actors. More importantly, it tends to conflate and compress the rich and complex network relationships in the private sector from out of which non-state non-judicial grievance mechanisms that may effectively reduce downstream (and mostly global South private actors) to invisibility. It may marginalize where the focus on the state reduces both internal mechanisms and mechanisms developed to provide remedy without outsider stakeholders to contingent and peripheral function. At its limit, such a connection runs the risk of reducing non-state based non-judicial mechanisms to a formality perhaps most useful for fact-finding.

Third, with respect to Work Stream 3, the CSR Lab notes the value of inter-corporate cooperation. It draws attention to those mechanisms that offer a window on patterns of success (particularly in Bangladesh). It welcomes the scenarios as both useful and effective means of conveying practical insight. However, Penn State CSR Labs note that including mechanisms for the inclusion of international organizations in the structures of these multi-corporate efforts might be useful, for example, the ILO. Penn State CSR Lab also notes that additional fact-finding would be most useful in not just mapping these structures but also in analyzing their effectiveness.

Fourth, with respect to Work Stream 4, Penn State CSR Labs notes the heavy burden of duty that falls on States in this respect. It regrets the need for the inclusion of this Work Stream which serves as an indication of state failure in substantial respect. And it notes with alarm that such failure in this respect may well impact the ability of States to serve as effective partners in Work Streams 2 and 3. Lastly, it notes the challenge of avoiding domination by large and powerful states on the development of the rules and structures in this area. To that extent, consideration of this workstream cannot be undertaken without a sensitivity to the insights of Workstream 5.

Fifth, with respect to Work Stream 5, the Penn State CSR Lab notes the great challenge posed by a responsibility for meaningful involvement. It notes that enterprises ought not to be held to the standards of states, many of which have yet to attain a full embrace of meaningful involvement within their own territories. Rather international standards for meaningful involvement ought to be developed on top of what may pass for state standards. In that context, Work Stream 5 may fail of its purpose in the absence of the imposition of a strong responsibility on states and enterprises to develop effective and respective mechanisms for assessment and accountability that is transparent and that can be used to augment any program of meaningful involvement.

With respect to the application and development of non-state based non-judicial grievance mechanisms the Penn State CSR Lab offers examples of their work considering the operation of the following enterprises: Norsk Hydro ASA (Norway); Archer Daniels Midland Co (U.S.); CitiGroup (U.S); and Alibaba (China). Taken together, they suggest both the dynamic progress undertaken by some large multinational enterprises, but also the work that must be undertaken to better align these individual efforts to the overall structures and points of focus being developed through the ARP III framework.

The Report ends with the offer of eight (8) recommendations directed to the OHCHR and the ARP III team.

The ARP III Report provides an excellent and useful framework for guidance to those enterprises and stakeholders who are working toward the creation and operation of effective non-state based non-judicial grievance mechanisms. The Report as it stands provides an excellent roadmap for further work and serves as model of its kind. It was with that in mind that the Penn State CSR Lab offered this Report to the ends of making those suggestions that might be of some value for the finalization of the ARP III report, and perhaps more importantly, for helping to shape the work that ARP III points toward.

II. Background

The United Nations Accountability and Remedy Project (ARP) was developed through a strongly backed initiative of the Office of the High Commissioner for Human Rights (OHCHR). It grew out of the notion that remedial rights ought to serve as a core tenet of the international human rights system. OHCHR saw in the [*UN Guiding Principles on Business and Human Rights*](#) (endorsed 2011) the basis for the elaboration of structures through which victims might have access to more effective remedy. At the same time, OHCHR understood the extensive gap that existed between the aspirations and its realization in the everyday conduct and operations of states, enterprises, and the civil society community.

However, extensive research has shown that in cases where business enterprises are involved in human rights abuses, victims often struggle to access remedy. The challenges that victims face are both practical and legal in nature. To begin to address these challenges, OHCHR launched the Accountability and Remedy Project (ARP) in 2014 with a view to contributing to a fairer and more effective system of domestic law remedies in cases of business involvement in severe human rights abuses. ([OHCHR Accountability and Remedy Project: Improving accountability and access to remedy in cases of business involvement in human rights abuses](#))

ARP has now proceeded through two completed phases pursuant to multiple mandates from the Human Rights Council (Resolutions [26/22](#), [32/10](#) & [38/13](#)). The aim of each is to provide credible, workable guidance to States (principally) and collaterally to enterprises and civil society actors, to enable each to adopt behaviors, systems, and approaches more consistent implementation of the UN Guiding Principles on Business and Human Rights in the area of access to remedy.

Phase one, [ARP I: Enhancing effectiveness of judicial mechanisms in cases of business-related human rights abuse](#), commenced in 2014 pursuant to a UN Human Rights Council Mandate. It's work was completed in 2016. Phase two, [ARP II: Enhancing effectiveness of State-based non-judicial mechanisms in cases of business-related human rights abuse](#), had its start on 30 June 2016 with the adoption by the Human Rights Council of [Resolution 32/10](#). Its final report was submitted and presented at the Human Rights Council's thirty-eighth session in June 2018.

On 6 July 2018, the Human Rights Council adopted consensus [resolution 38/13](#). Among other things, it requested OHCHR commence work on a third phase of the Accountability and Remedy Project (ARP III). The core objective set for the ARP III project was "to identify and analyse challenges, opportunities, best practices and lessons learned with regard to non-state-based grievance mechanisms that are relevant for the respect by business enterprises for human rights, . . . and to submit a report thereon to be considered by the Human Rights Council at the 44th session." (OP 9).

The OHCHR started its work on this mandate in an initial [paper](#) with two principal objectives, both tied to a close examination of non-state based non-judicial remedies. The first was to

provide preliminary assessment of current practices and challenges with a mind toward enhancing access to remedy. The second was to be serve as the practical expression of the themes and issues identified in the first. That is, the paper was to identify the scope, work streams and set out a preliminary program of work for the implementation of ARP III.

The initial paper put forward its approach to an appropriate scope of the research (including a typology of mechanisms). I have spoken to this issue generally elsewhere (e.g., [Effective Remedy and Accountability Through Non-State Non-Judicial Mechanisms: How Typology Matters](#)). It then suggested a set of proposed priority issues to be addressed in the course of ARP III. On that basis the initial paper proposed a set of research methodologies to be employed during the course of work on ARP III. It then suggested a general timetable and work plan, including extensive time for broad consultation, data gathering, and analysis.

The research methodologies revolved around a proposed set of five (5) workstreams. Work stream 1 was to focus on practical steps that grievance mechanisms (however those may be understood or approaches according to adopted typologies) can take to meet the “effectiveness criteria” of UNGP 31. Work stream 2 was to develop an understanding of the interface between the work of non-State-based grievance mechanisms and the powers and functions of State-based institutions. Work stream 3, then, was to develop a better understanding of the manner in which companies and other organizations use non-State-based grievance mechanisms to work together to improve the prospects for effective remedy. Work stream 4 was to focus on safeguarding rights-holders, human rights defenders and others from retaliation and intimidation. Lastly, Work stream 5 was to turn to the always complex and difficult issue of meaningful stakeholder involvement in the design and implementation of remedial outcomes.

The initial paper received feedback received from a wide variety of sources, including a two-day, multi-stakeholder expert meeting held in Geneva in September 2018. A final version, [ARP III Paper on Scope and Programme of Work, 1 November 2018](#), incorporating this feedback was distributed at the beginning of November 2018 and in time for further feedback to be received during a meeting OHCHR is organizing on Thursday, 29 November in Geneva, following the UN Forum on Business and Human Rights.

It is expected that during this meeting, the OHCHR will present the five work streams it intends to focus on during the course of ARP III and will invite participants to discuss how best to approach each work stream, including with respect to potential collaborations. Information on the September and November events may be found below.

The Office is currently undertaking substantive work on ARP III in accordance with the mandate of resolution 38/13 and the above-mentioned paper. Updated information and documents related to ARP III will be posted on this webpage as they become available.

III. The Penn State CSR Lab and Objectives of this Report.

The Penn State CSR Lab is an informally constituted collective of graduate students undertaking the study of corporate social responsibility. They include Law Students and graduates seeking the LL.M. degree at Penn State Law, State College Pennsylvania, under the guidance of Larry Catá Backer. The students represent diverse backgrounds and are from the North America, Europe, Asia, and Africa. They have undertaken the quite specific examination of the development and operation of the norms, policies, structures and delivery mechanisms of a set of six multinational enterprises, and the states in which their apex organizations are located. The object was to map the operation of enterprises, within the network of states and production chains within which they operated, to understand the scope and application of the normative structures of social responsibility embedded in each, and to analyze the ways these enterprises operationalized their responsibilities throughout their production chains and within the multi-state context on which such responsibilities must be delivered.

The work of the Penn State CSR Lab is particularly germane to the objectives of the OHCHR meeting of 29 November respecting the development of practical, globally relevant and readily implementable systems of non-state based non-judicial mechanisms. From their work, it is possible to better understand the way that enterprises, especially well-meaning enterprises, have now begun to try to adopt non-state based non-judicial remedial mechanisms in the spirit of the UNGPs, as well as the opportunities and challenges those efforts have produced to date. These observations of the actual contemporary efforts of enterprises to forge new and effective mechanism, it is hoped, may prove to be of some value as experts consider the five Work Streams that make up the heart of the ARP III project.

IV. General Observations About the Work Streams

With respect to the five Work Streams, the Penn State CSR Lab noted the following.

A. Work Stream 1: Practical steps that mechanisms can take to meet the “effectiveness criteria” of UNGP 31.

CSR Labs agrees that UNGP 31 and its criteria ought to serve as the central and organizing element of any project of non-state non-judicial grievance mechanisms. However, with respect to Work Stream 1, substantially more work must be undertaken to produce more effective guidance on the way in which the several criteria of UNGP 31 might be rationalized and connected to specific practice.

The problem is simple enough to state—UNGP 31 offers an undifferentiated list of criteria, each thought to be important enough to include as an element of effectiveness. This poses two problems. The first is that the undifferentiated criteria each are themselves in need of development on an “as applied” basis. Each of these criteria touch on some of the most sensitive issues of political organization within many of the states in which enterprise separate. And the approach of political bodies to the meaning and operationalization of these terms may differ as amongst each other

and more importantly may deviate in some respect from global consensus. The second is that taken together there is no useful methodology for aiding enterprises in the delicate work of putting the criteria together for the construction of a system of grievance mechanism. Ironically, this very list provision by its undifferentiation poses as much of a tarp as it serves as a basis for good construction of effective (within the meaning of UNGP 31) systems. Lists are notoriously weak building blocks for systems. It is to the development of systems from lists that Work Stream 1 might most usefully serve. As it stands

As it stands, the approach to UNGP 31 runs the risk that its criteria may not be integrated and applied as a networked whole. Particularly concerning are the methodologies that in emphasizing some of the criteria may effectively marginalize or distort others. Enterprises now are free either to pick and choose from among the criteria—at least with respect to emphasis—or to put them together in ways that may produce substantial differences in product (the grievance mechanisms themselves) even among enterprises operating in the same geographical space. Most importantly, there are no touchstones for assessment, and no basis on which accountability measures may be imposed. Producing effective examples—at the operational level—of how systems can be created that give appropriate weight to each of the criteria, is essential. And yet it is nowhere to be found. Without some order, again, assessment and accountability remain unattainable, and the possibility of either abuse or inadvertent system failures (for lack of conformity to criteria) becomes more real.

B. Work Stream 2: Understanding the interface between the work of Non-State-based grievance mechanisms and the powers and functions of State-based institutions.

Penn State CSR Lab agrees that the interface between state and the enterprise is a central concern. It notes the value of understanding the interface between on state non-judicial grievance mechanisms and those of the state. At the same time, Penn State CSR Lab worries that a focus on the regulatory ecosystem suggested in ARP III may both distort and marginalize the work of its principal focus. There is a fear that shifting the gaze from the enterprise to the state may prove distracting (e.g., which state in a system organized globally), and might undermine the autonomy of the Pillar II enterprise responsibility by subsuming them within state mechanisms and limiting the scope to state-based rights (and remedial preferences) only.

Distortion potential is particularly acute where (no doubt inadvertently) the focus on state interface veils the critical importance of state system overlap that are central to grievances touching on the concerns of multiple public and private actors. State interface that fails to confront the issue of polycentricity—the possible application of the law and state mechanisms of multiple states simultaneously because the source of the grievance may be located in a variety of places (simultaneously) and because the locus of the enterprise may be deemed to exist (simultaneously) in multiple locations requires careful consideration. Perhaps the model of global arbitration might prove helpful. But this is very much a work in progress that bears careful monitoring by the OHCHR for its (inadvertent) potential for abuse. More likely what may result is confusion. And in the wake of confusion may come a reluctance to offer non-state based non-judicial grievance mechanism that might otherwise be effective from the point of view

of rights holders (even if less so from the point of view of states). This last point touches as well on an underexplored connection between the implications of this workstream and workstream 5.

More importantly, it tends to conflate and compress the rich and complex network relationships in the private sector from out of which non-state non-judicial grievance mechanisms that may effectively reduce downstream (and mostly global South private actors) to invisibility. It may marginalize where the focus on the state reduces both internal mechanisms and mechanisms developed to provide remedy without outsider stakeholders to contingent and peripheral function. At its limit, such a connection runs the risk of reducing non-state based non judicial mechanisms to a formality perhaps most useful for fact-finding. Penn State CSR Lab worries that while the focus of the workstreams is on the apex states and their apex enterprises, the critical and important role of states and enterprises lower on the production chain may be marginalized in ways that eviscerate the effectiveness of remedy where they count most—usually well below the level of apex states and enterprises. Our work with such enterprises suggests the need for guidance at the middle and lower levels, and effective and sensitive state interface, to ensure that operational mechanisms closer to the locus of grievance are adequately understood and operated.

C. Work Stream 3: Understanding how companies and other organizations can work together through non-State-based grievance mechanisms to improve the prospects for effective remedy.

Penn State CSR Lab commends the ARP III report for this section of the Report. It provides a wealth of useful structuring information that has operational level application. Penn State CSR Lab notes the value of inter-corporate cooperation and considers such mechanisms to be ultimately more useful than at present. It hopes for greater OHCHR efforts to develop guidance and encourage such mechanisms. Penn State CSR Lab draws attention to those mechanisms that offer a window on patterns of potential success (particularly in Bangladesh). It welcomes the scenarios as both useful and effective means of conveying practical insight.

However, Penn State CSR Labs notes that there is a role for international organizations to play in these inter-enterprise systems, one that might be elaborated in the APT III Report. Penn State CSR Lab notes that incorporating mechanisms for the inclusion of international organizations in the structures of these multi-corporate efforts might be useful, for example, the ILO. Penn State CSR Lab also notes that additional fact-finding would be most useful in not just mapping these structures but also in analyzing their effectiveness. Lastly, it notes that these are structures and operations that lend themselves particularly well to accountability mechanisms and transparency. They also provide a basis for the development of an informal jurisprudence that may effectively contribute to the evolution to the cultures and traditions of business activity that might in turn change behaviors (see, e.g., with respect to the OECD NCP special instance procedures: [*Rights and Accountability in Development \(Raid\) V Das Air and Global Witness V Afrimex: Small Steps Toward an Autonomous Transnational Legal System for the Regulation of Multinational Corporations*](#)).

D. Work Stream 4: Safeguarding rights-holders, human rights defenders and others from retaliation and intimidation.

Penn State CSR Labs notes the heavy burden of duty that falls on States in this respect. It regrets the need for the inclusion of this Work Stream. To some extent this Workstream suggest the relevance of privatizing this function and of the governmentalization of enterprises in the wake of the inability of states to adequately undertake their duties either under their own constitutional systems or pursuant to their international law-based obligations. Yet that is also a cause for concern. To the extent that this Workstream effectively deputizes enterprises to undertake duties traditionally undertaken by states in the context of the exercise of their police powers, then it poses substantial risks to enterprises. The workstream might usefully underline those risks, complicity especially, with state and non-state actors with effective control over territories where these activities occur. Penn State CSR Lab wonders, for example, how enterprises might reconcile the duty to avoid interference with political rights with the obligation to ensure respect for international human rights in specific contexts. Greater guidance here is likely quite useful.

Penn State CSR Lab notes the great distinction between the risks of safeguarding in that larger context, from the responsibility of enterprises to provide as safe and protected work place for is employees and to ensure that it does not interfere with the exercise of rights by people. However, again, the exercise of those civil and political rights (as understood at the international level) may well constitute a gross violation of the rules of the domestic legal orders in which the enterprise operates. It is to those interface issues that the workstream might provide advice and toolkits for the constriction of grievance mechanisms they may oversee.

Lastly, Penn State CSR Lab notes with alarm that such failure in this respect may well impact the ability of States to serve as effective partners in Work Streams 2 and 3. Lastly, it notes the challenge of avoiding domination by large and powerful states on the development of the rules and structures in this area. To that extent, consideration of this workstream cannot be undertaken without a sensitivity to the insights of Workstream 5.

E. Work Stream 5: Meaningful stakeholder involvement in the design and implementation of remedial outcomes.

Penn State CSR Lab notes the great challenge posed by a responsibility for meaningful involvement. At a base level, Penn State CSR Lab understands meaningfulness to be a function of the relationship between enterprise and stakeholders. That suggests that the community of interested persons (and the character of their values) will vary widely from enterprise to enterprise and within enterprises depending on location. Yet it is not clear that enterprises might be protected in tolerating such wide potential differentiation in the design and implementation of non-state based non-judicial grievance mechanisms. Indeed, if accountability measures conflate all such measures and subjects them to a single standard, then the ARP III project will create a contradiction from which there is no solution. The middle ground—a quite clearly specified management of the boundaries within which variance is permitted, and the criteria justifying

such variation (perhaps here tied to the Workstream I UNGP 31 constraints). Might appropriately be constructed.

Penn State CSR Lab notes that the foundational issues respecting engagement remains unresolved. This is especially the case where individuals are clothed with representative authority. Enterprises require guidance with respect to rules for the recognition of the capacity and legitimacy of representative authority. And they ought to expect protection for good faith reliance. At the same time, enterprises likely will have to build robust systems of data gathering and assessment with respect to such issues where the position of representatives is fluid and the extent of their authority quite contingent.

Penn State CSR Lab also notes that enterprises ought not to be held to the standards of states, many of which have yet to attain a full embrace of meaningful involvement within their own territories. Penn State CSR Lab suggests that, following the UNGP Pillar II framework, it may be necessary to guide enterprises in the application of international standards for meaningful involvement ought to be developed on top of what may pass for state standards. In that context, Work Stream 5 may fail of its purpose in the absence of the imposition of a strong responsibility on states and enterprises to develop effective and respective mechanisms for assessment and accountability that is transparent and that can be used to augment any program of meaningful involvement.

V. The Operation of Non-State Based Non-Judicial Mechanisms—Examples

With respect to the application and development of non-state based non-judicial grievance mechanisms the Penn State CSR Lab offers examples of their work considering the operation of the following enterprises: Norsk Hydro ASA (Norway); Archer Daniels Midland Co (U.S.); CitiGroup (U.S). Taken together, they suggest both the dynamic progress undertaken by some large multinational enterprises, but also the work that must be undertaken to better align these individual efforts to the overall structures and points of focus being developed through the ARP III framework.

Norsk Hydro ASA Report: Hydro is committed to the UNGP. To fulfill our obligation to provide an effective grievance mechanism for potentially impacted rights holders, we have created our own grievance mechanism in Brazil. The advantage with such a mechanism compared to the traditional judicial process is first and foremost that it is more accessible to our stakeholders because it is free, gives them direct access to us as the responsible party and does not require them to get legal representation. In addition, there is the issue of our stakeholders not actually having a legal claim against us, because of lack of protective legislation in some of the countries we operate.

Archer Midlands Daniel Report: From information publicly available, ADM appears to have created efficient mechanisms for the filing of complaints. The administration of grievances has been given thought and focus, and is elaborate. The effect of the elaboration remains to be

analyzed over the long term. The resolution mechanisms are not yet proven as efficient, but ambition is high and the fact that they make the summary table makes for higher incentives and transparency. The connection to the UNGP is tenuous, ADM's grievance mechanisms are driven by its own business model and forms of engagement.

CitiGroup Report: Citi's grievance mechanism outlined in Part 1 is best suited to inform the ARP III's considerations within the scope of work stream 1. Work Stream 1: Practical steps that mechanism can take to meet the "effectiveness criteria" of the UNGP31. This section will analyze Citi's grievance mechanisms under the lens of the effectiveness criteria for UNGP31 and offer suggested improvements the ARP III should consider when proposing practical solutions. The ARP III should consider of number of areas when seeking to improve grievance mechanisms for human rights violations.

The company surveys suggest a number of general points.

The first is that transparency remains a challenge for enterprises engaging in construction and operation of non-state non-judicial grievance mechanisms. Beyond the issue of privacy, which is relevant, the failures of operational transparency exposes enterprises to the potential for misunderstanding what exactly it is that they are doing. Companies ought to think more carefully about the public face of their mechanisms in light of the UNGPs.

Second, the connection between these mechanisms and the UNGP are at best tenuous. One of the enterprises considered, a European state-owned enterprise explicitly adopted the UNGP approach, among others. Most others did not. This poses a challenge, especially with respect to measures of accountability.

Third, the scope of grievance mechanisms remains fluid. To some extent this mirrors the fluidity of the scope of actionable human rights within the domestic legal orders of states. For rights holders, however, this presents substantial challenges. While the UNGP provide a rights baseline, it is not one that is necessarily consistent with domestic law. Moreover, it is not clear that rights holders understand the nature and scope of their rights, much less the mechanics of their vindication. Transparency measures here could be improved.

Fourth, the connection between these private grievance mechanisms and the availability of national remedial measures remains mysterious. Companies face a significant challenge in providing information, especially for rights holders who do not have the knowledge of these technical issues, nor the technical capacity to acquire that information on their own.

More detailed consideration follows for each in the Appendix below.

VI. Recommendations

The ARP III Report provides an excellent and useful framework for guidance to those enterprises and stakeholders who are working toward the creation and operation of effective non-state based non-judicial grievance mechanisms. The Penn State CSR Labs is grateful to its authors and the OHCHR for the work and thought that has produced a Report that develops many of the quite challenging issues in very useful ways. The Report as it stands provides an excellent roadmap for further work and serves as model of its kind.

It was with that in mind that the Penn State CSR Lab offered this Report to the ends of making those suggestions that might be of some value for the finalization of the ARP III report, and perhaps more importantly, for helping to shape the work that ARP III points toward. And it is in that context that Penn State CSR Lab offers the following few modest recommendations:

- 1. Greater effort must be undertaken to connect the UNGP with emerging efforts to develop non-state non-judicial grievance mechanisms; enterprises should be encouraged to use the UNGP as an explicit platform for developing their non-state non-judicial grievance mechanisms and as a basis for mechanism assessment.**
- 2. Greater attention must be paid to the role of enterprises in the middle and lower levels of global production chains; there must be a balance between autonomy and control by apex enterprises.**
- 3. Greater attention must be paid to the connection between accountability and such mechanisms; accountability must be understood in two senses, first with respect to the development of standards, and second with respect to the operation of such mechanisms.**
- 4. Technical assistance and education programs remains a central element with respect to which the OHCHR must exercise leadership; the worksteams will die on the vine without effect measures to ensure that they can be understood and undertaken by enterprises globally.**
- 5. Greater attention must be paid to the systematization of the UNGP's Paragraph 31 principles; the OHCHR with stakeholder input might undertake a project of fleshing out the categories in Paragraph 31 and providing guidance on how they fit together within appropriately created and operated mechanisms.**
- 6. The issue of the protection of protecting rights holders and their defenders requires the development of substantially more effective mechanisms at the international level that might encourage states to undertake their duties in that regard, and on that basis to serve a legitimate function with respect to which enterprise activity will serve as a complement; the OHCHR ought to avoid governmentalizing enterprises in this respect.**

7. The development of ARPIII mechanisms ought to be undertaken with substantial sensitivity to local context; to that end the OHCHR ought to encourage the development of guidelines to aid enterprises in recognizing and providing effective mechanisms that are compatible with local conditions; this includes respect for different political and social systems within which enterprises may operate.

8. Greater transparency appears to be a vital key element to the effective operation of these systems; the OHCHR ought to encourage the development of guidance for the reporting of grievance mechanisms, and their use in ways that might respect privacy but which also serve to enhance the development of cultures of appropriate behavior by enterprises and their stakeholders, as well as by states.

APPENDIX:

Enterprise Reports

Archer Daniels Midland Co (U.S.)

Joyclin Webster, Celia K. O’Sullivan, Richardson Jean

OHCHR Accountability and Remedy Project - ARP III

- How can one raise Questions and Concerns at ADM?
 - Bottom Up Strategy of Information Processing
 - ADM Offers several communication channels to administer complaints

→ Internal

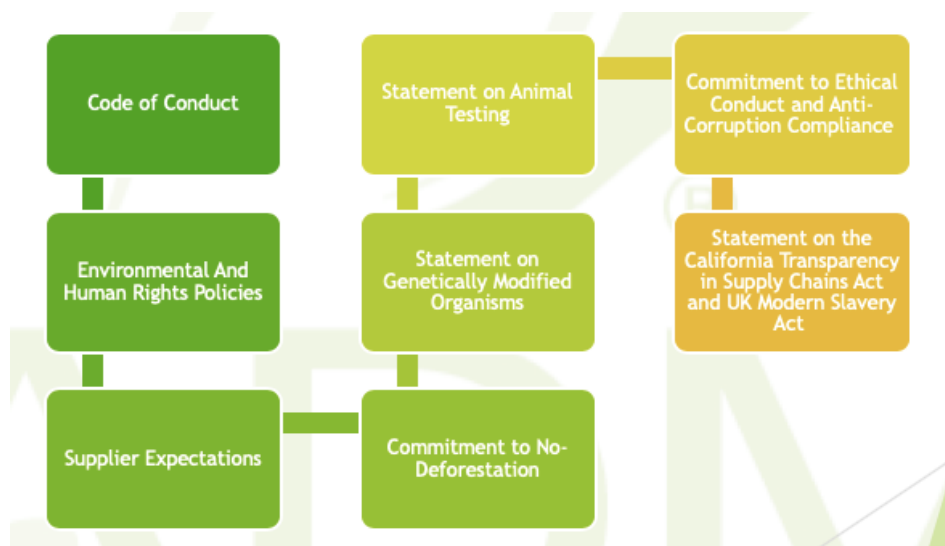
- Local resources, such as supervisors, managers or human resources professionals
- In some locations, appropriate representatives selected by colleagues such as labor unions and works councils

→ External

- Welcomes correspondence from any external parties, including individuals, government organizations and non-governmental organizations, regarding the implementation of and compliance with ADMs Commitment to No-Deforestation and the Human Rights Policy. Any concerns can be sent to responsibility@adm.com or compliance@adm.com
- The ADM Way Helpline – Available 24h, 7 days a week (anonymity possible when legal) <https://admway.alertline.com/gcs/welcome>



- What can one make a complaint about?
 - Law
 - Breaches of ADM's Social and Environmental Corporate Policies



- ADM's Code of Conduct and main internal Human Rights documents are based upon:
 - ➔ Internal

- ADM Code of Conduct < <https://www.adm.com/our-company/the-adm-way/code-of-conduct> >
- ADM No-Deforestation Policy < <https://s3-us-west-2.amazonaws.com/adms3/Sustainability/ADM-No-Deforestation-Policy.pdf> >
- ADM Supplier Expectation Guidelines < <https://www.adm.com/our-company/procurement/supplier-expectations> >

→ External

- International Labour Organization (ILO) Conventions 29, 105, 138 and 182
- United Nations (UN) Universal Declaration of Human Rights
- UN Guiding Principles on Business and Human Rights
- UN General Assembly Resolution A/RES/64/292

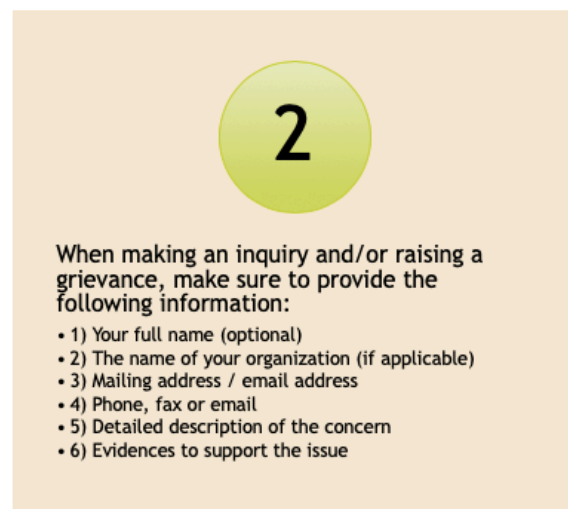
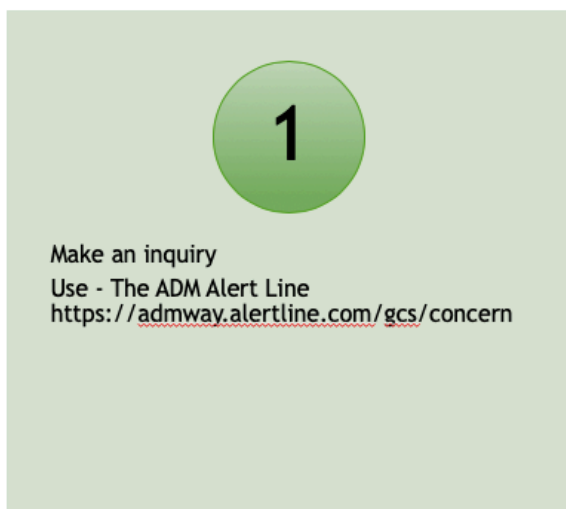
ADM - Code of Conduct



- Supplier-Related Issues
- <https://assets.adm.com/Our-Company/Procurement/SupplierExpectations.pdf>
 - Individuals with concerns about supplier-related issues are encouraged to contact the ADM Helpline at www.theadmwayhelpline.com, or call any of the designated

numbers listed in the column posted at < <https://www.rspo.org/acop/2016/archer-daniels-midland-adm/P-Policies-to-PNC-laborrights.pdf> >

- Suppliers may direct questions or report concerns to ADM via postal mail: P.O. Box 1470, Decatur, IL, USA 62525; email: compliance@adm.com; telephone: +1-800-637-5843 ext. 4929; or online: www.theadmwayhelpline.com. Reports may be made anonymously where permitted by law
- ADM commitment to Supplier-Related Issues
 - If learnt that any supplier does not satisfy the principles or misrepresents the conditions under which crops, goods or services have been produced, ADM will take appropriate action. If that supplier does not demonstrate a good-faith effort to address issues in a timely manner, those actions may include exclusion from new direct contracts or the termination of our relationship.
- Making an complaint either through the alertline or through other channel:



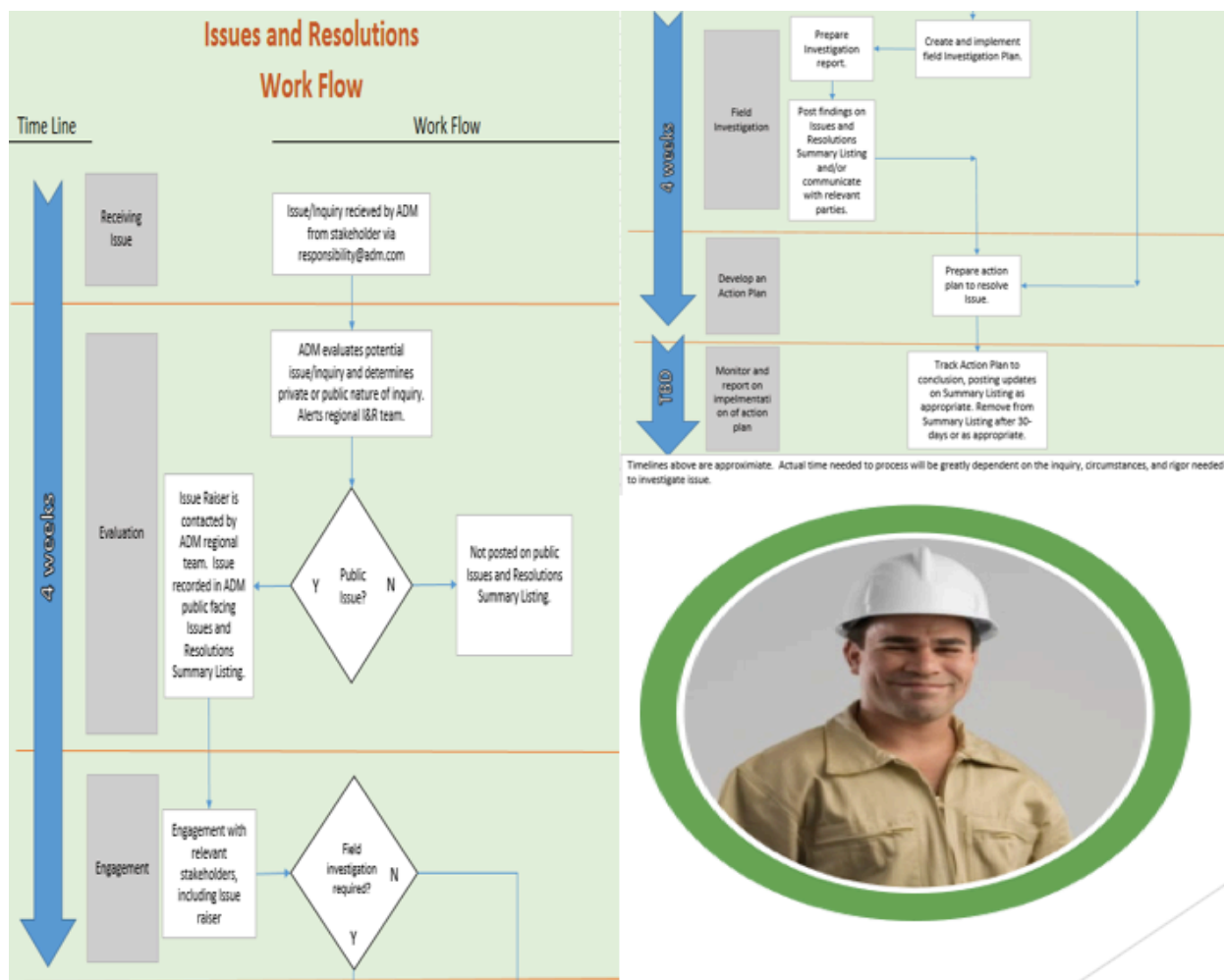
- How Does ADM Handle Reports?
 - ADM's Law Department and Compliance Office are responsible for taking prompt and appropriate action to investigate reports of possible ethical or legal misconduct. ADM will keep details of investigations confidential to the maximum extent

possible, consistent with resolution of the issue and in compliance with applicable laws.

- Outsourced Administration and Grievance Mechanisms



- ADM will respond to communication in accordance with the workflow in their [protocol](#)
- Their Grievances and Resolutions aspirations are depicted in below chart



- ADM Grievances and Resolutions Summary Table
- ADM's Grievances and Resolution Summary Table is made public. All complaints that are deemed to be of public character are posted there together with actions taken
 - <https://assets.adm.com/Sustainability/2018-10-01-GR-Log.pdf>

ADM Grievances and Resolutions Summary Table

Ref. No.	Date Received	Topic	Subject Matter	Stakeholder(s)	Progress																												
2018-011	8/23/2018	Deforestation	<p>Mighty Earth's Rapid Response Report 6</p> <p>Report alleges deforestation in 11 plantations in Indonesia and 1 plantation in Malaysia.</p>	Mighty Earth	<p>ADM has reached out to our direct suppliers to determine which, if any, source from these plantations.</p> <table><tr><th></th><th>GAR</th><th>Fuji</th><th>Unimills</th></tr><tr><td>PT RJ</td><td>Indirect – G33.b</td><td></td><td></td></tr><tr><td>PT KPI</td><td>Direct – G39</td><td>Indirect</td><td></td></tr><tr><td>MT MIP</td><td>Direct – G31</td><td>Not currently sourcing as mill is not in operation</td><td></td></tr><tr><td>PT KDK</td><td>Indirect – G33.e</td><td>Investigating</td><td>Indirect</td></tr><tr><td>PT SP</td><td></td><td>Investigating</td><td>Indirect</td></tr><tr><td>PT SKR</td><td></td><td></td><td>Indirect</td></tr></table> <p>We are still awaiting feedback from Wilmar/Olenex, AAK, IOI, ICOF and Cargill.</p>		GAR	Fuji	Unimills	PT RJ	Indirect – G33.b			PT KPI	Direct – G39	Indirect		MT MIP	Direct – G31	Not currently sourcing as mill is not in operation		PT KDK	Indirect – G33.e	Investigating	Indirect	PT SP		Investigating	Indirect	PT SKR			Indirect
	GAR	Fuji	Unimills																														
PT RJ	Indirect – G33.b																																
PT KPI	Direct – G39	Indirect																															
MT MIP	Direct – G31	Not currently sourcing as mill is not in operation																															
PT KDK	Indirect – G33.e	Investigating	Indirect																														
PT SP		Investigating	Indirect																														
PT SKR			Indirect																														

- ADM Human Rights Action Plan 2018-20
 - To proactively track and contribute to resolving grievances using the Grievance and Resolutions Mechanism
 - See Human Rights Progress Report 2018 < <https://assets.adm.com/Sustainability/2018-Progress-Report-Human-Rights-Policy.pdf> >

ADM Human Rights Action Plan 2018-20: Milestones and Status

To proactively track and contribute to resolving grievances using our Grievance and Resolutions Mechanism



No. z	Topic	Milestone	Status
1	Supplier Engagement and Transformation	Communicate Human Rights Policy to direct suppliers.	Ongoing
2	Supplier Engagement and Transformation	Identify regional and local programs to support that improve the lives of farmers in our supply chain.	Ongoing
3	Monitoring and Verification	Proactively track and contribute to resolving grievances using our Grievance and Resolutions Mechanism.	Ongoing
4	Monitoring and Verification	Work through supplier/farm level action plan •Phase 1 – Update risk analysis to include geographic risk as well as commodity risk, taking into account the increased labor required for crops and regions that do not have mechanized farming technology. •Phase 2 – Using analysis from Phase 1, identify assessment methodology and implementation tools. •Phase 3 – Develop and carry out two pilot assessments to test farm-level assessment technologies.	Ongoing

- Conclusions

- ADM has created efficient mechanisms for the filing of complaints
- The administration of grievances has been given thought and focus
- The resolution mechanisms are not yet proven as efficient, but ambition is high and the fact that they make the summary table makes for higher incentives and transparency.

Norsk Hydro ASA

Sussane Elkjaer, Heidi S. Egeland, Elsa Stensrud

Introduction - Norsk Hydro ASA – Key Facts

Norsk Hydro ASA is a Norwegian industry company established in 1905.¹ Hydro's headquarter is located on Oslo in Norway.² Hydro's main production is bauxite, aluminum and energy production.³ We sell products all the way through the production, serving more than 30 000 customers.⁴ More than 35 000 people work at Hydro,⁵ and we operate in more than 41 countries on all continents.⁶ The main production is in Brazil, Qatar, Germany, Norway, Slovenia and Canada.⁷

Brazil is Hydro's main source of the important raw material bauxite and is the country where the company has the most employees - or more than 5,000 if long-term contractors are included. Hydro Brazil conducts large mining operations to extract bauxite and refine Alumina. The operations in Brazil impact the local population to a greater degree than at our other production sites. This is why we have developed a local grievance mechanism in Brazil, which will be a prototype for a company-wide grievance mechanism.

Hydro and UNGP Grievance Mechanisms - Reflections

Hydro is committed to the UNGP. To fulfill our obligation to provide an effective grievance mechanism for potentially impacted rights holders, we have created our own grievance mechanism in Brazil.⁸ The advantage with such a mechanism compared to the traditional judicial process is first and foremost that it is more accessible to our stakeholders because it is free, gives them direct access to us as the responsible party and does not require them to get legal

¹ <https://www.hydro.com/en/about-hydro/Our-history/> (03.09.2018)

² https://no.wikipedia.org/wiki/Norsk_Hydro#cite_note-1 (26.08.2018)

³ <https://www.hydro.com/en/about-hydro/>

⁴ <https://www.hydro.com/en/products/all-products/> (26.08.2018)

⁵ https://no.wikipedia.org/wiki/Norsk_Hydro#cite_note-1 (26.08.2018)

⁶ <https://www.hydro.com/en/about-hydro/>

⁷ <https://www.hydro.com/no/hydro-i-norge/pressesenter/Fakta/>

⁸ Annual Report, Board of Directors Report page 27

representation. In addition, there is the issue of our stakeholders not actually having a legal claim against us, because of lack of protective legislation in some of the countries we operate. For us there is an economic advantage in being able to settle disputes and provide reparation without costly legal processes. Furthermore, one can assume that a judicial process would get greater media coverage and cause more reputational damage than settling things directly and more privately. The UNGP points to advantages such as “speed of access and remediation, reduced costs and/or transnational reach”.⁹

Our grievance mechanism in Brazil was introduced in 2014¹⁰ and is called Canal Direto.¹¹ It is available from our Brazilian web pages, by phone or email.¹² To inform our stakeholders about the solution when it first was launched, we held information meetings about it and handed out flyers in the local communities in Bacarena and Paragominas.¹³ We also used the local radio as a way of informing our stakeholders of the Canal Direto.¹⁴ As of today, in informing affected third-parties of this means of giving complaints we are using open meetings, newsletters and our website.¹⁵ The Canal Direto is a channel where the public can register complaints, doubts, compliments or suggestions, anonymously if so is preferred.¹⁶ Grievances may be of any kind, including social or environmental issues.¹⁷ We received approximately 100 complaints in 2017, most of them related to environmental issues.¹⁸ The local CSR division was responsible for addressing these complaints.¹⁹

The Danish Institute of Human Rights has, in its report from 2017, recommended that we the

Use the results of the Canal Direto pilot to develop a global mechanism for both communities and others to raise concerns to Hydro on the impacts of operations. This

⁹ Commentary on UNGP principle 28

¹⁰ Annual Report, Board of Directors Report page 27

¹¹ <https://www.hydro.com/pt-BR/a-hydro-no-brasil/Imprensa/canal-direto/> accessed 11/04/2018

¹² Annual Report, Viability performance page 92

¹³ E-mail from CSR Manager Nina Scheffe at Hydro to Heidi Egeland from 11/12/2018

¹⁴ E-mail from CSR Manager Nina Scheffe at Hydro to Heidi Egeland from 11/12/2018

¹⁵ Annual Report, Viability performance page 92

¹⁶ Annual Report, Board of Directors Report page 27

¹⁷ Annual Report, Viability performance page 92

¹⁸ E-mail from CSR Manager Nina Scheffe at Hydro to Heidi Egeland from 11/12/2018

¹⁹ E-mail from CSR Manager Nina Scheffe at Hydro to Heidi Egeland from 11/12/2018

should be communicated to all business partners, including suppliers and JV partners and be published on Hydro's website.²⁰

In regard to our responsibilities under the UNGP we realize that such a mechanism should be developed and in place.²¹ However, the exact obligation of businesses in this regard can be said to be unclear under the UNGP. First of all, it is unclear whether or not businesses must provide a grievance mechanism themselves or if other available alternatives are sufficient, either state-based or non-state based. Businesses are required to "provide for or cooperate in" remediation of any adverse impacts they are responsible for.²² This obligation can be met by providing operational-level grievance mechanisms.²³ The wording of UNGP principle 29 indicates that it is up to the discretion of the company whether or not to provide such a mechanism.²⁴ Businesses "should" either "establish" or "participate in" such mechanisms.²⁵ Given that Hydro can be brought before the National Contact Points established under the OECD Guidelines for Multinational Enterprises, the obligation under the UNGP can be said to be met. The NCPs are such operational-level grievance mechanisms and the Norwegian NCP, as an example, strives to be in accordance with the effectiveness criteria for non-judicial mechanisms in UNGP principle 31.²⁶ Hence, Hydro is participating in such mechanisms in accordance with UNGP principle 29.²⁷

In attempting to go beyond our minimum obligations we are however currently working on a group-wide solution, inspired by the mechanism in Brazil.²⁸ The responsibility for a development of a worldwide mechanism lies with Corporate CSR.²⁹ The work is a bit on hold at the moment, since we are waiting for clarifications as to what kind of solution we will be in need of to cover the entirety of what we want to achieve.³⁰ Canal Direto is based on a system delivered by a

²⁰ Danish Institute's Report page 29

²¹ See UNGP principle 29

²² UNGP principle 22

²³ Commentary on UNGP principle 22

²⁴ UNGP principle 29

²⁵ UNGP principle 29

²⁶ <https://www.responsiblebusiness.no/dialogue-and-mediation/> accessed 11/15/2018

²⁷ UNGP principle 29

²⁸ Annual Report, Board of Directors Report page 27

²⁹ E-mail from CSR Manager Nina Scheffe at Hydro to Heidi Egeland from 11/12/2018

³⁰ E-mail from CSR Manager Nina Scheffe at Hydro to Heidi Egeland from 11/12/2018

company called Darzin.³¹ The company delivers a number of solutions that we will now be testing to determine what will be best suited as a global solution for Hydro and our stakeholders.³² As mentioned, the UNGP has a number of effectiveness criteria for non-judicial grievance mechanisms, but yet the concrete features that such a mechanism must have is unclear.³³ This is the second challenge in regard to the UNGP. The expectation is that a grievance mechanism is to be legitimate, accessible, predictable, equitable, transparent, rights-compatible, a source of continuous learning, and based on engagement and dialogue.³⁴ The principle's wording is broad, giving few concrete guidelines in the development of a solution. We are unaware of any clear global consensus as to the obligations under the UNGP in this respect, but are aware that the UN currently is working on the development of guidelines in the establishment of operational-level grievance mechanisms. Our recommendation is to keep track of this work and take any recommendations into account when we develop the worldwide solution for Hydro.

Our experience from the last year in respect to our current mechanism in Brazil is that most of our stakeholders wish for more direct contact with us by phone or in meetings, rather than through the Canal Direto.³⁵ Therefore, our experience with this particular solution is a bit mixed as of today.³⁶ In Paragominas an important part of the work that has been done has rather been to establish forums for having such direct contact with the local stakeholders.³⁷ This is the background for our establishment of the Sustainable Bacarena Initiative, which is a multistakeholder platform designed to facilitate greater inter-communal cooperation and dialogue.³⁸

Another problem with the mechanism in Brazil as of today might be that we are not particularly transparent as to what type of remediation a stakeholder might achieve by contacting us through

³¹ E-mail from CSR Manager Nina Scheffe at Hydro to Heidi Egeland from 11/12/2018

³² E-mail from CSR Manager Nina Scheffe at Hydro to Heidi Egeland from 11/12/2018

³³ See UNGP principle 31

³⁴ UNGP principle 31

³⁵ E-mail from CSR Manager Nina Scheffe at Hydro to Heidi Egeland from 11/12/2018

³⁶ E-mail from CSR Manager Nina Scheffe at Hydro to Heidi Egeland from 11/12/2018

³⁷ E-mail from CSR Manager Nina Scheffe at Hydro to Heidi Egeland from 11/12/2018

³⁸ E-mail from CSR Manager Nina Scheffe at Hydro to Heidi Egeland from 11/12/2018

the Canal Direto. We do not provide much information on the website as to whom the complaint will be received by, how long the processing time of a complaint is or what procedures we follow in assessing any adverse impacts and the sufficient remedy for such impacts.³⁹

³⁹ <https://www.hydro.com/pt-BR/a-hydro-no-brasil/Imprensa/canal-direto/> accessed 11/15/2018

CitiGroup

Alice Gyamfi, Travis Hilton, Caitlin Jolley

PART I: UNDERSTANDING CITIGROUP'S GRIEVANCE MECHANISMS

Whistleblower Program

The Ethics Hotline for whistleblowers was created in light of a number of regulatory issues in 2005. That year Citigroup was involved in large-scale scandals on three continents involving unethical business practices including a high profile bond trading debacle in Europe, loss of its private banking license in Japan, and the US the WorldCom and Enron scandals as it was one of the big firms in the global settlement with regulators over conflicted stock research (which cost the firm over \$5.5 billion in fines). In response, Citi's CEO at the time, Charles Prince immediately required mandatory ethics classes for all employees. Prince also worked with his executive team to enact long-term preventative measures. Their key objective was to strengthen Citi's independent controls and the control environment throughout the company to grow responsibility, minimize mistakes, and to ensure that when mistakes occur, they are handled appropriately. To accomplish that, Citi created an independent compliance unit which reports poor results on audits and regulatory and risk-control tests regularly directly to the CEO. Additionally, all employees are required to complete annual ethics training. Lastly, Citi created an "ethics hotline" where employees can raise issues anonymously.

There are multiple avenues through which employees can raise issues. They include: their manager or other members of management, their human resources or labor relations representative, internal legal counsel, a designated compliance officer and all members of the

Ethics Office. However, when Sherry Hunt utilized these avenues and they yielded no results, she was forced to turn to litigation.

Sherry Hunt blew the whistle on one of the world's largest banks and won. In 2004, at the height of the housing boom, Hunt started a new job as quality-control manager at CitiMortgage. It was Hunt's duty to inspect the loans Citi planned on buying or underwriting, making sure they were good investments, and to protect the company. Even with the 65 mortgage inspectors working under her, it was impossible to check every loan every time. Over the next two years, Hunt noticed the bank's standards slip. It was underwriting loans with sloppy paperwork or missing signatures, and extending loans to people who would never be able to pay them off.

In 2012, investigators would claim that more than 30 percent of the Department of Housing and Urban Development–insured loans that CitiMortgage underwrote or sold since 2004 — 9,636 of them — would default, costing nearly \$20 million in insurance claims. But at the time, Hunt remained dutiful: For each problematic loan that crossed her desk, she followed protocol, put it in her report, and sent it upstairs. By 2007, Hunt estimates that a full 60 percent of the loans Citi was processing were at least missing some type of documentation. Still, her superiors didn't seem concerned. Her direct boss, Richard Bowen, did take the mounting deficient home loans seriously. He even sent an email to his superiors with the subject line "URGENT — READ IMMEDIATELY — FINANCIAL ISSUES." For his troubles, Bowen was gradually stripped of his responsibilities and fired in 2009.

For doing her job, Hunt's bosses at Citigroup started making Hunt's life as miserable as they could. Hunt had begun recording everything she saw on her home computer — every bad loan, every email from her superiors telling her to keep the defective loan rate low. Hunt reported

these incidents to the Human Resources department and the Ethics Office, both of which failed to provide a remedy or even feedback. Finally, Hunt *had* had enough. As the Vice president and chief underwriter at CitiMortgage, she quit her job, blew the whistle, and decided to take the world's largest bank to court — a Manhattan federal court in 2011. With a computer full of evidence, she gifted the Justice Department a near-perfect case.

The DOJ's complaint against Citi was damning: Since 2004, Citi has endorsed nearly 30,000 mortgages for FHA insurance, totaling more than \$4.8 billion in underlying principal obligations. Of those loans, 9,636 (or more than 30% percent) have defaulted. Citi's default rate soared to more than 47% for loans originated in 2006 and 2007. In other words, nearly every other loan Citi endorsed for FHA insurance in the critical years leading up to the financial crisis defaulted, resulting in foreclosures and evictions and ultimately depressed real estate values, all to the detriment of the national housing market and the national economy.

The result of this litigation was a new Code of Conduct. In October 2017, Citi issued a new employee Code of Conduct which outlines the standards of ethics and professional behavior expected of employees whilst also illustrating how employees can make ethical decisions through a decision-making guide. Most notably, the new Employee Code of Conduct creates an affirmative duty to report using the language: "If you have reason to believe that any Citi employee, or anyone working on our company's behalf, may have engaged in misconduct, you have a *duty* to our colleagues and to Citi to promptly report your concerns...."

Ethics Hotline

Citi believes it essential that individuals feel secure when raising a concern, and it encourages individuals to communicate concerns openly. All contact to the Citi Ethics Office

and related investigations are treated as confidentially as possible, consistent with the need to investigate and address the matter, and subject to applicable laws and regulations.

Employees, customers, and third parties may raise or escalate concerns through the ethics hotline when they suspect or become aware of a possible violation of a law, regulation, Citi policy, or the Citi Code of Conduct. The Citi Ethics Hotline is available twenty four hours per day, seven days a week staffed with live operators who process submissions in English, Arabic, Chinese, French, German, Japanese, Polish, Portuguese and Spanish. Reporting is also available through a dedicated email, physical mailing address and fax number.

Concerns may be raised anonymously via any of the channels listed above to the extent permitted by applicable laws and regulations. If reporters wish to report anonymously, the operator will alert the reporter not to identify their name or other identifying information when submitting their concern. However, if the reporter chooses to remain anonymous and does not provide a means to be contacted, the Citi operator will make clear that Citi may be unable to obtain the additional information needed to investigate or address the concern.

The Ethics Hotline was originally created as an avenue for whistleblowers in place. In 2016 when Citi announced its new financing initiative, the Dakota Access Pipeline, it made the Ethics Hotline outward facing for members of the general public and third parties to report concerns. This action was taken to ease the burden of the customer service line, in response to the large volume of calls received.

Part II: APPLYING CITIGROUP'S APPROACH TO THE ARP III WORK STREAMS

Citi's grievance mechanism outlined in Part 1 is best suited to inform the ARP III's considerations within the scope of work stream 1. Work Stream 1: Practical steps that

mechanism can take to meet the “effectiveness criteria” of the UNGP31. This section will analyze Citi’s grievance mechanisms under the lens of the effectiveness criteria for UNGP31 and offer suggested improvements the ARP III should consider when proposing practical solutions. The ARP III should consider the following areas when seeking to improve grievance mechanisms for human rights violations.

CITI’S STRENGTHS

Legitimate	Enabling trust from the stakeholder groups for whose use they are intended, and being accountable for the fair conduct of grievance processes;
Citi’s Approach: Citi’s primary grievance mechanism and the reports generated therein are reported to shareholders during annual meetings;	
Accessible	Being known to all stakeholder groups for whose use they are intended, and providing adequate assistance for those who may face particular barriers to access;
Continuous Learning	Drawing on relevant measures to identify lessons for improving the mechanism and preventing future grievances and harms;

CRITERIA TO CONSIDER IN IMPROVEMENT

Predictable	Providing a clear and known procedure with an indicative time frame for each stage, and clarity on the types of process and outcome available and means of monitoring implementation;
Citi’s Approach: Citi currently provides no information on timeframes, processes, and potential outcomes through its grievance mechanism - the ethics hotline. The ethics hotline	

offers little recourse for both the general public and whistleblowers beyond merely providing an opportunity to report. This information helps Citi respond to potential violations and stop human rights or other violations before they reach the level of scandal but does nothing to remedy reported grievances in the form of restitution or damages.

Suggested Improvement: The ARP III should encourage companies to create grievance mechanisms with clearly defined stages, provide what the grievant can expect at each stage, and an approximate timeframe for an outcome in that stage. For example, Citi could include an escalation stage, an investigation stage, and an implementation or action stage with a description estimated timeframes and clear outcomes at each stage.

Equitable

Seeking to ensure that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair, informed and respectful terms;

Citi's Approach: Citi's ethics hotline falls short of being equitable under the effectiveness criterion for UNGP31 because it only provides for information to be received. While access to the ethics hotline is convenient and readily available (see "Accessible" above) grievants are only able to call to provide information, there is no mechanism to receive information, advice, and/or expertise.

Suggested Improvement: The ARP III should encourage companies to adopt grievance mechanisms that provide information, advice, and expertise in addition to collecting information from grieving parties.

Transparent

Keeping parties to a grievance informed about its progress, and providing sufficient information about the mechanism's performance to build confidence in its effectiveness and meet any public interest at stake;

Citi's Approach: The ethics hotline collects more information from grieving parties than it provides. Once an incident is reported to Citi there is little additional communication or dialogue. Grieving parties must blindly trust, without any evidence from Citi, that internal investigations are taking place and that concrete action will be the result. Even in best case scenarios where this does occur, the grieving party is not made aware nor is any kind of remedy provided for reported harm.

Suggested Improvement: Consistent with the suggested improvement regarding predictability, the ARP III should encourage grievance mechanisms that continue to provide the grieving party with sufficient information about that stage of the process. While, for example, specific details of an internal investigation need not be provided a simple update that an investigation is being conducted and an estimated timeline for an outcome is likely to build confidence and create transparency.

Rights Compatible	Ensuring that outcomes and remedies accord with internationally recognized human rights;
<p>Citi’s Approach: Citi’s ethics hotline is aimed at collecting information, investigating, and ending those violations. There is no information provided on how well Citi is performing that function. The hotline is not focused on outcomes and remedies and it does not specifically address human rights.</p> <p>Suggested Improvement: The ARP III should encourage companies to create grievance mechanisms that do more than provide for reporting violations and collecting information. While reporting is crucial in recognizing and stopping human rights violations it provides no remedy or relief for violations that have already been committed.</p>	

III. KEY CONSIDERATION

While Citi’s grievance mechanisms are accessible and legitimate, they may appear to fall short of providing any real remedy to aggrieved parties. The Ethics reporting and investigation function is contained within the Environmental and Social Risk Mitigation or “ESRM” Framework. In 2017, ESRM screened 328 transactions and out of those, 27 were flagged as requiring enhanced due diligence for human rights risks related to indigenous people, labor, resettlement, security practices and water.

Citi states, “as a financial institution, their approach to remedy usually involves working with clients to ensure they have the right policies in place and channels available to enable victims to lodge grievances.” This description is quite intentionally, nondescript. By way of remedies, Citi asserts (1) it has updated its ESRM policies to fill in the governance gaps between legal requirements in developed countries, where present, and international human rights norms; (2) by becoming a member of the Roundtable on Sustainable Palm Oil taskforce “RSPO” they have helped upgrade the labor provisions and standards; and (3) helped finance the construction of an infrastructure project in the Middle East, bringing in an influx of 100,000 migrant workers.

Although commendable, efforts that do nothing more than collect information (usually for their own purposes in the form of preventing PR scandals and legal/financial liability) should not be treated as a legitimate grievance mechanism when they function merely as a data collection tool for companies. In order to meet the effectiveness criteria of UNGP31 non-state, non-judicial grievance mechanisms must be aimed at providing meaningful remedy in the form of damages, restitution, resolution, etc. Additionally, these mechanisms should be designed to provide grieving parties with information, advice, expertise, and outcome expectations.

Alibaba

Miaoqiang Dai

I. Alibaba's Platform-based Business Model

Alibaba's non-state non-judicial grievance mechanism is built around platform governance and dispute settlement in its e-commerce platforms. It will be hard to understand its grievance mechanism without knowing Alibaba's platform-based business mode^l.

Alibaba is a Chinese e-commerce giant who created the Singles Day shopping festival that dwarfs Black Friday with a total sale of \$30.8 billion in 24 hours on November 11, 2018. The Singles Day is now also the biggest day of sales for many of the world's most famous brands and billions of sales are obviously made not by Alibaba alone. What helps it to turn an ordinary date into the largest e-commerce carnival in the world in 10 years is its platform-based business model. Unlike many e-commerce businesses that operate like an online retailer, Alibaba does not buy or sell anything, it only operates the platform as a marketplace and partners with businesses in it.

The platforms operated by Alibaba offer opportunities for growing and profiting to its participants including customers, businesses, third-party service providers and all other people⁴⁰. Like a physical marketplace, Alibaba set up its trading platforms for people to sell and makes money by charging commissions. Alibaba has also set up supporting systems for businesses, such as third-party payment platform, logistics service platform, online marketing service platform, e-commerce training, and educational service platform, etc. to facilitate operation of businesses and build up their reliance on the system of platforms.

To shape behaviors of users and maintain effective governance on platforms, Alibaba build up its rules system and credit points system. Its rules (Alibaba Rules) serves as the code of conduct for every user, majorly sellers, of its e-commerce marketplace and the credit points system serves as the implementation mechanism with punishments such as account suspension and rejection.

⁴⁰ See Alibaba group's website, culture. Accessed 17 December 2017
<http://www.alibabagroup.com/cn/about/culture>

II. The Code for Platform Governance: Alibaba Rules

The system of Alibaba rules consists of several parts. Firstly, general rules set out basic rules as the foundation of the whole rule system. Secondly, specific rules for implementation set rules in detail so that platform users can find specific regulations in all kinds of occasions. Thirdly, notices published by Alibaba, no matter temporary or permanent, are also taken as a part of rules. Moreover, industry standards are strictly executed as a critical part of business operation supervision. Also, agreements between Alibaba and users are also included in Alibaba's rules system for users.

The first and most important part of the Alibaba rules is a set of general rules which serves the role of the constitution in the rules system. Some basic issues such as the definition of terms, application of rules, obligation and rights of Alibaba and users, etc. will be addressed in this part. The rules clearly defined violations as behaviors not in accordance with the rules and reserved market regulation measures such as warning, removal of goods, restriction of access, suspension of shops, close accounts, etc.

Comparing with basic rules, the specific rules for implementation take much more pages. There are 22 set of specific rules regulating very specific behaviors on e-commerce platforms, ranging from the display of information, transactions, and online interactions to marketing methods. Each specific rule sets out possible condition of violation that may constitute a complaint, procedure of complaint process, and corresponding punishment for each violation.

Notices are usually temporary adjustment, risk warnings, and notice of regulations. This is the most frequently updated part of Alibaba rules, there are more than 200 notices published since 2013⁴¹. Adjustments of rules are published because of changes in business situations on Alibaba's platforms on most occasions. For example, on 1 December 2017, Alibaba published an adjustment of regulation on the timing of payment for transactions because of a platform-wide sales promotion campaign⁴². national laws or regulations. Sometimes Alibaba will also publish notice for sales prohibition or restriction according to governmental policies.

⁴¹ See Alibaba rules website.

https://rule.1688.com/rule/rule_list.htm?page=23&searchType=27&key=

⁴² See Notice page of Alibaba rules. Accessed 18 December 2017

<https://rule.1688.com/rule/detail/6574.htm?spm=a26go.7662372.0.0.QaOZFA>

Alibaba rules also set industry standards for 37 specific industries or categories of products⁴³. Those standards are usually based on national standards and modified to fit Alibaba platforms. Take apparel industry for example, Alibaba industry standards directly cited national standards including GB18401, GB5296.4, GB/T8685, GB/T1335.1, GB/T1335.2, GB/T1335.3, etc.⁴⁴ for general articles but specific e-commerce standards such as picture display, product description, online services are also added to give instructions to businesses on Alibaba platforms.

III. Credit Point System as Apparatus for Enforcement

As mentioned above, Alibaba rules set specific occasions in which behaviors will be regarded as a violation of rules and refer to corresponding punishments. But how can Alibaba assess the seriousness of the violation and determine the corresponding level of punishments? The answer is credit points system.

At the beginning of each year, every user on Alibaba's platform will have 60 credit points in total. Once a user violated an article of rules or being complained by other users, Alibaba will step in and check the occasion of violation. If the occasion really constitutes a violation, Alibaba will deduct credit points from the user's account according to rules. For example, if a user used a picture of others without the person's consent and with complaints from the person with rights, the behavior constitutes a picture tort. By referring to Alibaba rules on picture tort, Alibaba will deduct the violator's credit points.

Although points deducted will be recovered one year after the deduction, too many points deduction will result in enforcement as punishments. Limited access is a common measure adopted as punishment. Limitations, including visiting access, purchase rights and access to management of the account, will be imposed on the violator's account for several days

⁴³ See Alibaba rules page.

https://rule.1688.com/rule/rule_list/34.htm?spm=a26go.7662372.0.0.6LcQwM&key=&page=4

⁴⁴ GB18401 is national basic safety technique specification for textile products set by Standardization Administrative of China. GB5296.4, GB/T8685, GB/T1335.1, GB/T1335.2, GB/T1335.3 each represents a national standard for apparel of one kind set by Standardization Administrative of China.

correspondingly. The most serious enforcement is the close account which means exclusion from the platform permanently.

Deductions ⁴⁵	Punishments
12~24(Not included)	Warning
24~36(Not included)	7 Days Limited Access
36~48(Not included)	15 Days Limited Access
48~60(Not included)	30 Days Limited Access
60~	Close Account

Figure 1 Credit Points Deductions and Punishments⁴⁶

The credit points system is used as both the apparatus for governance and enforcement in Alibaba's platforms. It can perform a function of governance because the credit points assigned to each user represents the credit allowance Alibaba granted to him or her. The with points deductions set in Alibaba rules system, users will shape common expectation for conducts and thus behave well. Alibaba rules are a code of conduct for users on the platform, but what makes those rules really make an effect is credit points system.

IV. Platform-based Grievance and Dispute Settlement Mechanism

Transparency of platforms and fairness are critical to Alibaba's platforms because stakeholders' values will be undoubtedly hurt if the platform as the infrastructure of business does not function effectively on a fair basis. Alibaba rules and credit points system formed the

⁴⁵ Deductions will recover automatically one year after the date of deduction (i.e. a deduction occurred on December 31, 2016, the points deducted on this day will recover on December 30, 2017 at 24:00), except for accounts that has been closed due to cumulated deductions equal to or exceed 60. See Article 38. Chapter 4 Violations and Treatment, General Rules, Alibaba Rules.

⁴⁶ See Article 36, Id.

<https://rule.1688.com/rule/detail/general.htm?spm=a26go.7662372.0.0.WuHFZO#chapter2>
 Accessed November 25, 2018

framework of governance but the to address grievances and settle disputes that arise from the platforms, there still needs to be an effective mechanism.

Reporting of a dispute between parties of transaction on Alibaba's platform could be filed by either party to Alibaba and then Alibaba could will deal with the dispute according to *Alibaba's Platform Dispute Settlement Rules*⁴⁷. Alibaba could review each case and make decisions by itself but it may also refer disputes to the public jury system for rulings. To avoid cost of maintaining a bulky team of judges, most disputes are referred to the platform-based public jury system which crowdsourced dispute settlement with all users.

Alibaba Public Jury system⁴⁸ is an decentralized non-judicial jury platform for disputes settlement on Alibaba's e-commerce platforms. Any user of Alibaba's e-commerce platforms who meets a set of criteria⁴⁹ could apply to be a public juror and participate judgment in disputes. Public jurors could choose cases from a pool that is randomly distributed by algorithm to work on. After reviewed all evidence submitted by the two parties in a case, public jurors have the right to vote in favor of one party.

Incentives are offered for public jurors but not in monetary measurements. Experience points are granted to jurors who participate in cases and by accumulating those points, jurors could climb up the hierarchy of virtual ranks. Moreover, philanthropic perks are also offered as jurors could get donation matches from Alibaba to their contribution in their name. It is also recently announced that Alibaba will introduce third-party credit assessment systems to the public jury system for juror qualification process and performance assessment.

Ruling of a case will be made by absolute majority votes of at least 31 jurors, meaning that 16 votes from jurors are needed for either party to win the case. Rulings of cases made by

⁴⁷ See rule.taobao.com (淘宝平台争议处理规则) <https://rule.taobao.com/detail-191.htm>
Accessed November 25, 2018

⁴⁸ See Taobao Public Jury Website <https://pan.taobao.com/> Accessed November 25, 2018

⁴⁹ As listed on Alibaba public jury websites, members should be: 1. Registered for at least one year; 2. Sesame credit points should be more than 600; 3. A buyer should have a member level higher than vip2 and credit level higher than three hearts, has up to 3 transactions need to be intervened by taobao within 90 days. A seller should have credit level higher than one diamond, have a lower-than-average dispute refund rate within 30 days, and have no credit point deductions in one natural year.

sufficient number of jurors shall be final and binding while cases that are not reviewed and voted by at least 31 jurors will be nullified and Alibaba's staff will step in and make final judgment.⁵⁰ Enforcement of rulings will be carried out by Alibaba according to articles in Alibaba Rules and thus correct behaviors of users on the platform.

V. Problems and Recommendations: Transparency and Accountability

Alibaba's platforms are now taking 58.2% of retail e-commerce in China⁵¹ and the largest e-commerce platform in the world. It serves 870 million users globally and helped millions of vendors sold goods and services worth more than \$768 billion last year.⁵² Alibaba's platforms are themselves not only a comprehensive system of marketplace but also a massive economy in which numerous businesses operates and interact with each other. In such an economy, Alibaba itself as the only authority not only creates rules but also operates its own administrative enforcement and dispute settlement system as non-state non-judicial grievance mechanism. In this sense, it is easy for not only players inside but also observers outside to see that transparency and accountability of Alibaba's mechanism appears to be problematic.

Even though a complicated portfolio of rules is built with numerous sources including national laws and regulations, national industry standards, and public suggestions, the process of rule-making and emendation remains largely a black box. The same situation could be find in Alibaba's enforcement and dispute settlement mechanisms such as credit point system and public jury system. Alibaba justifies such black-box processes as internal business policies of Alibaba as an autonomous enterprise. In this sense, the public characteristics of Alibaba's massive marketplace platforms as public goods is neglected.

Moreover, dispute settlement mechanisms currently functioning in Alibaba is designed to address grievances that rise among platform users rather than that against Alibaba itself. From Alibaba's perspective, the nature of grievance mechanism is a conflict reconciling process within

⁵⁰ See Taobao Public Jury Convention (Trail) on the website of Alibaba Public Jury.
<http://pan.taobao.com/jury/help.htm?spm=a310u.3036333.0.0.1d18cd16a0tOVf&type=standard> Accessed November 25, 2018

⁵¹ Includes Gross Merchandise Value for Tmall, Taobao, and AliExpress Global on a calendar year basis. Data from eMarketer, April 2018.

⁵² Data from Alibaba's Financial Performance Statement of Fiscal Year 2018, May 4, 2018

its marketplace platform before any party of a dispute present it before the court. Efficiency of its platform operation and its own insulation from judicial procedures are superior concerns of the mechanism rather than accountability and fairness.

One example to this point is Alibaba marketing department's internal ban on contracting with people from Putian City of Fujian Province. The policy was issued to combat counterfeit products in marketplace platforms, and Putian was targeted because it is where most of counterfeit fraud took place. To uphold the reputation and efficiency of its platforms, Alibaba arbitrarily excluded all suppliers from the region to be its suppliers. This discriminatory policy was strictly implemented across the company as an employee of Alibaba's marketing team was fired for contracting with a customer who is born in Putian City.

Even though judicial procedures helped the fired employee won her lawsuit against Alibaba, absence the state in Alibaba's massive marketplace platform governance still left the system disproportionately dominated by Alibaba in various ways. Grievance mechanisms are set to address disputes among users but without adequate coordination with the state, it's not easy for Alibaba to build up an effective mechanism in response to grievances against itself. Moreover, with the expansion of Alibaba's platforms marketplace, the duty of market regulation is partially taken by Alibaba as a private enterprise.

Such a trend of governmentalization of Alibaba will unavoidably worsen the already unbalanced socio-economic power structure between Alibaba and other market participants. In this sense, rising risk of business-related human rights abuses requires the state to take prompt and decisive measures in reshaping the not only its relationship with internet platform-based market but also operator and users of the platform. Last but not the least, coordination between the state and private entities should be put together to build a transparent and accountable market order in the era of internet and platform economy.

