



6 February, 2018

Analysis of the Thilawa SEZ Complaints Management Procedure

This analysis was written in response to the proposed Thilawa Special Economic Zone Complaints Management Procedure (TCMP), recently uploaded onto the website of Myanmar Japan Thilawa Development Limited (MJTD). The analysis below reflects EarthRights International's concerns over the content of the TCMP and the process to create it. Because this document is only in English, the relevant community stakeholders have not yet had the opportunity to provide comments on the content.

The TCMP claims to be intended to build a better relationship with the Thilawa community members. However, the process for creating the TCMP and its contents do not align with that stated intention. Both the process for creating the TCMP and the content therein fall severely short of international good practice.

Under the United Nations Guiding Principles on Business and Human Rights (UNGPs), a grievance mechanism should be 'based on engagement and dialogue.'¹ **The TCMP reflects not just a lack of engagement and dialogue, but an active rejection of both.** We are disappointed that the Thilawa SEZ (TSEZ) parties have elected to reject three years' worth of requests from community members to collaborate on a multi-stakeholder grievance process. Rather, in the face of consistent efforts from the Thilawa community towards meaningful dialogue, the TSEZ parties chose to spend time and money to create a competing complaints procedure.

International good practice requires grievance mechanisms to be accessible, predictable, equitable, legitimate, rights-compatible, and transparent. The TCMP meets none of these criteria, ignoring the most basic and well-accepted elements of good practice. The document itself is not complete. The content lacks detail and clarity, and gives disproportionate discretion to untrained internal staff. It would allow decisions to be made with no criteria and no oversight.

I. Summary

Process

It is necessary to recognize the years of efforts on the part of the community to collaborate on a problem-solving process for TSEZ. There is a well-documented history of formal and informal engagement on creating a grievance mechanism for the TSEZ, led by Project Affected People (PAPs) and supported by civil society. For example:

- From **February 2015 until October 2017**, a number of documents outlining the business case for a CD-OGM were sent to the stakeholders.

¹ UNGP Principle 31.



- From **mid-2015 until mid-2016**, an Interim Joint Problem-Solving Process was formally negotiated through three different Multi-Stakeholder Advisory Group (MSAG) meetings, additional MSAG “working meetings,” and numerous email exchanges.²
- In **November 2015**, all Thilawa stakeholders shared a panel at the 2015 UN Forum on Business and Human Rights, and discussed the Community-Driven Operational Grievance Mechanism (CD-OGM).³
- In **December 2016**, the proposed full CD-OGM was shared, and community members have made continuous efforts to have Thilawa SEZ Management Committee (TSMC), Japan International Cooperation Agency (JICA) and MJTD collaborate on this document.⁴
- In **December 2016**, in **March 2017**, and again in **October 2017**, the CD-OGM proposal was shared with the stakeholders, requesting their input.

Yet in **November 2017**, one week after the Design Committee had meetings with MJTD and JICA to once again request their feedback on the CD-OGM draft and to seek collaboration, TSMC and MJTD revealed, through JICA’s Expert Team (JET), a new, competing problem-solving process: the TCMP.⁵ The community and civil society groups involved in the CD-OGM engagement were excluded from this meeting.⁶ Shortly thereafter, at the 2017 UN Forum on Business and Human Rights, various stakeholders shared a panel on the history of efforts related to access to remedy in Thilawa. The representatives from MJTD, JICA, and the Yangon Regional Government (represented by an MJTD employee) made no mention of the history of engagement on the CD-OGM, despite this being directly relevant to the topic of the panel and each party having participated in engagement on the CD-OGM.⁷ The parties shared that the TCMP resulted from a study conducted in **October 2017** on the current landscape of access to remedy. From that study, the need for a systematic problem-solving mechanism was identified, a position which the community and civil society have been trying to get the stakeholders to accept for years. The TCMP was shared a month later. The community and civil society groups involved in the CD-OGM engagement were excluded from both the research on existing efforts and the consultations on the TCMP, and no mention was made of the CD-OGM when the TCMP was presented.

While we are pleased that the stakeholders now realize the importance of taking a systematic approach to problem-solving, it is unfortunate that they did not start from the existing dialogues and documents. By creating a new, competing mechanism, the stakeholders have not only incurred additional expenses and lost relevant information, but have also caused both confusion and distrust in the community. PAPs have

² See MSAG meeting minutes, available at, <http://www.myanmar-responsiblebusiness.org/pdf/MSAG/2015-09-02-Meeting-Record-2nd-MSAG.pdf>; http://www.myanmar-responsiblebusiness.org/pdf/MSAG/2015-12-15-Meeting-Memo-3rd-MSAG_en.pdf; http://www.myanmar-responsiblebusiness.org/pdf/MSAG/2016-03-17-4th-MSAG-Meeting-Memo_en.pdf.

³ See, <http://webtv.un.org/search/session-i-multi-stakeholder-action-forum-on-business-and-human-rights-2015/4615868683001?term=multi-stakeholder>.

⁴ See Annex 4 for the draft CD-OGM

⁵ See, http://mjtd.com.mm/sites/default/files/csr_activities/TCC%20miinute%28005%29.pdf.

⁶ In an email from November 11, 2017, ERI requested an answer as to why the Design Committee and ERI were intentionally excluded from this meeting, despite previous promises to be invited (documented in emails from July 2017, September 2017, and discussed in the meeting with MJTD on October 27, 2017). MJTD did not respond, but instead directed the question to JICA’s Expert Team (JET).

⁷ See, <http://webtv.un.org/search/case-studies-achieving-access-to-remedy-forum-on-business-and-human-rights-2017/5661197972001/?term=remedy&sort=date>.



already reached out to the Design Committee – the group leading in the drafting of the CD-OGM – expressing confusion and frustration after hearing about the TCMP. PAPs have indicated that they were not consulted about the TCMP, only given a presentation on what was already decided.

Substance

Substantively, the TCMP falls severely short of international good practice regarding operational-level grievance mechanisms. It also ignores the basic recognized principles on business and human rights.

At a general level, some of the overall concerns with the proposed procedure include the following:

- **The TCMP document is not complete.** It omits key annexes and supplemental documents, it contains unfinished sentences and contradictory clauses, and the content that is included lacks the level of detail necessary to understand how it will be implemented properly. The full document appears to be available only online and only in English.
- **Adequate research into good practice was not conducted.** The TCMP appears to only reference a single, outdated resource. It copy-and-pastes the process step chart and selective text passages, but omits anything referencing good practice, trust-building, or roles of third parties or communities. It also omits reference to existing problem-solving processes or existing efforts to create problem-solving processes in the TSEZ area. This lack of due diligence has resulted in a document that lacks the most essential elements of a legitimate problem-solving mechanism.
 - **The TCMP omits reference to key international good practice indicators and obligations.** The UN Guiding Principles on Business and Human Rights (UNGPs) is the most widely-accepted indicator of good practice, and contains specific obligations for the TSEZ stakeholders by reference in Myanmar Law, and the UN Global Compact of which MJTD is a member. The TCMP makes no reference to this instrument. In fact, the TCMP does not cite specifically any instruments that provide indicators for what TSMC and MJTD see as their obligations, or what good practice is more generally.
 - **The TCMP omits any reference to vulnerable groups.** It is universally accepted that international good practice requires project proponents to take into consideration additional barriers that vulnerable groups face in accessing remedies, and to make a mechanism accessible for them. No reference is made in the TCMP to the recognition of the need to consider the scope of the different groups impacted by the SEZ and the additional barriers some groups face, and none of the processes outlined in the TCMP take these additional barriers into account.
 - **The TCMP lacks impartiality.** International good practice emphasizes that impartiality is critical for the legitimacy of a grievance mechanism, and notes the high risks of having a mechanism that is internally designed and implemented. The TCMP gives unfettered discretion to internal actors, with no identified criteria for the decision-making process. Good practice also emphasizes the importance of training for staff implementing a grievance mechanism, as well as training any staff who will be engaging with communities more generally. The current TCMP staff and the TSEZ stakeholders lack this training.
 - **The TCMP lacks oversight.** Another crucial tool for ensuring legitimacy is oversight. This is particularly important in a mechanism that relies on internal actors, and in



situations where there is a history of distrust. It can take many forms, but none are in place in the TCMP.

More detailed concerns within each of the chapters are listed below:

- **Chapter 1** provides incomplete, vague, and contradictory paragraphs. It omits any reference to remedy in its framing of the purpose and scope of the TCMP. It similarly avoids acknowledging SEZ actions as being connected to the issues raised in complaints. It mentions that the TCMP seeks to “foster trust in the process,” yet provides no information on how it intends to establish that trust.
- **Chapter 2** gives disproportionate discretion to untrained, internal actors, without any criteria for the decision-making process nor any oversight. The discretion to reject complaints outlined in this chapter is at odds with paragraphs in Chapter 1, which purports to allow a wide scope of complaints.
- **Chapter 3** lacks clarity and detail, particularly regarding how to ensure the participation of the relevant actors and how to deal with non-compliance.
- **Chapter 4** provides incomplete and misleading information. In particular, the definition of ‘complaint’ avoids any reference to the actions of the parties potentially causing the harm. The word ‘grievance’ is not included in the terminology.
- **Chapter 5** is incomplete, as Annexes 3, 5, and 6 have been omitted, and Annex 4 is not finished. These Annexes are intended to provide details on the roles and responsibilities of key actors in the TCMP.
- **Chapter 6** appears to be a duplicate of the 2012 International Petroleum Industry Environmental Conservation Association (IPIECA) grievance mechanism process step chart. The TCMP does not credit IPIECA for this, and its inclusion indicates that the TCMP is not Thilawa-specific.
- **Chapter 7** outlines details of the process steps, but each step lacks accessibility, predictability, equitability, and transparency: Step 1 is prohibitively limiting for Complainants; Step 2 misconstrues the purpose of a severity matrix and places disproportionate discretion on untrained staff with no objective criteria; Step 3 should happen sooner in the process; Step 4 lacks adequate information about the “responsible parties” and relies on internal actors for functions that should be handled by impartial actors; Step 5 similarly excludes external, objective actors and denies access to advocates for the Complainant; Step 7 also excludes external, impartial actors.
- **Chapter 8** fails to identify how it will share the information or ensure that PACs both know about it and understand it. While this chapter notes that PACs can participate in trainings on how to use the TCMP, it fails to include the PACs in any opportunities to participate in design or decision-making. It also fails to include any formal feedback processes.
- **Chapter 9** provides for only internal monitoring with no transparency.
- **Chapter 10** denies the option for anonymous complaints and gives the parties responsible for handling confidential information to untrained staff with a history of conflict.
- **Chapter 11** fails to address the legitimate risks of conflicts of interest with the parties involved in implementing the TCMP. It provides no criteria on how a conflict is decided, and no oversight to ensure impartial or consistent application.



- **Chapter 12** does not articulate how retaliation claims can be raised or how they will be addressed. The chapter also fails to include external actors, or how to it will address retaliation claims against CRT actors.

II. Process Issues

The TCMP was not the first attempt at creating a problem-solving system for the Thilawa SEZ (TSEZ). As outlined below, efforts from the community have been ongoing for over three years.

We are pleased to see that the TSEZ stakeholders have finally recognized the need for a systematic approach to problem-solving in Thilawa. This is a welcome change from the positions taken by MJTD and JICA in the past, such as:

- **Various meetings in 2015-2017** with MJTD, JICA, and JET, where the parties indicated that a grievance mechanism should not be SEZ-wide.
- **An email from May 19, 2016**, where JET stated that they did not see “establishing a mechanism” as priority.
- **An April 2017 meeting** where MJTD stated being “insulted” that community members had proposed a multi-stakeholder grievance mechanism, and asserted that a systematic approach to problem-solving was not needed.
- **An October 2017 meeting** where JICA stated that a grievance mechanism was not needed because of the existence of a small, exclusive group who discuss Thilawa issues, and that multiple problem-solving processes cannot co-exist.

The recent effort to create a systematic problem-solving process marks an important and positive departure from those previous positions. However, these recent efforts unnecessarily expended additional time and financial cost by actively excluding community groups already working on problem-solving in the SEZ. As a result, the mechanism created fails to reflect the needs and preferences of the Project Affected Communities (PACs). It also reinforces power imbalances instead of establishing trust and legitimacy.

Both civil society groups and community groups have attempted to work together with the TSEZ parties to create and implement a fair problem-solving process since 2015. The processes proposed by the community have always been collaborative in nature. The first formal process proposed in 2015 was an Interim Joint Problem-Solving Mechanism (Interim Mechanism) proposed by community members through the Multi-Stakeholder Advisory Group (MSAG). This Interim Mechanism was designed to have a body made up of representatives from all relevant stakeholders.⁸ Subsequently, the proposed Thilawa Community Driven-Operational level Grievance Mechanism (CD-OGM) also envisions multi-stakeholder

⁸ See, <http://www.myanmar-responsiblebusiness.org/pdf/MSAG/2015-09-02-Meeting-Record-2nd-MSAG.pdf>; http://www.myanmar-responsiblebusiness.org/pdf/MSAG/2015-12-15-Meeting-Memo-3rd-MSAG_en.pdf; http://www.myanmar-responsiblebusiness.org/pdf/MSAG/2016-03-17-4th-MSAG-Meeting-Memo_en.pdf. The document itself is also available upon request, although the stakeholders should already have it.



body to run it.⁹ For each of these processes, TSMC, MJTD, and JICA were actively encouraged to contribute.

The Interim Mechanism was negotiated over a period of several month in 2015 and early 2016, with all of the relevant stakeholders providing inputs, and eventually agreeing on a final draft.¹⁰ Project Affected People (PAPs), going on the belief that the Interim Mechanism was operational based on the verbal support and completion of the document, attempted to utilize it by filing two complaints in May 2016. However, once the complaints were submitted, TSMC, MJTD, and JET (acting in place of JICA) walked away from the Interim Mechanism without formal notice. Shortly thereafter, the MSAG stopped meeting as well.

Nevertheless, the Design Committee chose to continue to pursue a collaborative approach to problem-solving. They continued to work on a grievance mechanism, seeking stakeholder input in the design, and envisioning stakeholder participation in the implementation. Beginning in November 2016, the Design Committee made several attempts to meet with each relevant party to share updates and elicit feedback on their draft CD-OGM. This can be summarized as follows:

- **November 23, 2016-** the Design Committee and ERI met with MJTD to share updates on the CD-OGM. In this meeting, MJTD indicated that staff members had not shared information about meeting with these parties previously to discuss the CD-OGM.
- **November 28, 2016-** the Design Committee, ERI, an expert lawyer from International Senior Lawyer's Project (ISLP) met with JICA, JET, and Social Clarity to discuss the CD-OGM
- **November 29, 2016-** ERI and an expert corporate lawyer from International Senior Lawyer's Project (ISLP) met with MJTD to provide more information on the business case for a CD-OGM. In this meeting, MJTD rejected the idea of a systematic problem-solving process as well as the need to have any sort of obligation or commitment put to writing.
- **November 30, 2016-** ERI and an expert corporate lawyer from International Senior Lawyer's Project (ISLP) met with TSMC to provide more information on the business case for a CD-OGM. In this meeting, TSMC stated support for the idea of a systematic grievance mechanism.
- **December 21, 2016-** ERI sent emails to TSMC, MJTD, and JICA, attaching the Design Committee's first draft of the CD-OGM, as well as a briefer outlining international good practice on community engagement.
- **March 9, 2017-** ERI sent follow-up emails to MJTD, JICA, and TSMC to try to schedule meetings to discuss CD-OGM with the Design Committee.
- **April 4, 2017-** members of the Design Committee and ERI met with TSMC to seek feedback on the draft CD-OGM. In this meeting, TSMC stated that the design content was good, and that TSMC had no issues with the content, as it seemed in line with international best practice. TSMC agreed to follow up with the Design Committee once additional logistics issues were added to the draft.
- **April 6, 2017-** members of the Design Committee and ERI met with MJTD to seek feedback on the draft CD-OGM. MJTD refused to comment on the CD-OGM, stating only that it was

⁹ See Appendix 3 for the draft CD-OGM, sent to stakeholders on three different occasions.

¹⁰ See, MSAG meeting minutes available at, <http://www.myanmar-responsiblebusiness.org/pdf/MSAG/2015-09-02-Meeting-Record-2nd-MSAG.pdf>; http://www.myanmar-responsiblebusiness.org/pdf/MSAG/2015-12-15-Meeting-Memo-3rd-MSAG_en.pdf; http://www.myanmar-responsiblebusiness.org/pdf/MSAG/2016-03-17-4th-MSAG-Meeting-Memo_en.pdf.



“offended” that the CD-OGM was proposed, that no one really used OGMs in reality anyways, and that international good practice was a Western construct and does not reflect how people do business in Asia.

- **May through October 2017**- ERI sent numerous emails on behalf of the Design Committee to try to schedule follow up meetings to discuss the CD-OGM. The emails were met with no reply.
- **July 5, 2017**- ERI sent an email to the Japanese parent companies of MJTD to raise concerns about poor engagement and re-shared a briefer on the business case for CD-OGM (the document had previously been shared with the parties in September 2016 during an advocacy trip to Tokyo).
- **July to October 2017**- ERI sent multiple emails on behalf of the Design Committee to JICA to request a meeting to discuss the CD-OGM. In the first reply, JICA stated that they would meet “next week,” then did not reply to any other emails until October.
- **September 8- 26, 2017**- ERI exchanged emails with MJTD to request date of next Thilawa Coordination Committee (TCC) meeting. ERI was told that it would be in December, when in fact it was on September 29, three days after the September 26 email.
- **October 2017**- TSEZ stakeholders agree to invitation from Business and Human Rights Resource Centre to participate on a panel at the UN Forum, focusing on access to remedy in Thilawa.
- **October 2017**- JET began work that leads to the TCMP (according to the presentation at the UN Forum).
- **October 27, 2017**- members of the Design Committee and ERI met with MJTD to seek input on the CD-OGM. In the meeting, MJTD expressed a willingness to listen and understand the CD-OGM, but refused to provide comments on it. The only feedback on the content was criticizing the oversight provisions proposed, and the level of detail (such as providing multiple access points for filing complaints). In this meeting, MJTD indicated that it had “started researching” OGMs and would seek consultations with the Design Committee once finished.
- **November 2, 2017**- members of the Design Committee and ERI met with JICA to seek input on the CD-OGM. JICA refused to provide feedback on the design, and instead questioned the make-up of the group and demanded a guarantee of success. A JICA representative also stated that there was no need for this type of mechanism.
- **November 10, 2017**- A Thilawa Coordination Committee (TCC) meeting was held where the TCMP was shared. ERI, TSDG, and Design Committee members were again excluded from this meeting, and only found out about it on the day.

As indicated in the timeline above, the Design Committee and civil society learned about the proposed TCMP in late October, 2017, where MJTD described it as “early stages” which would inform future conversations. However, it was in fact already completed at the time that statement was made and was shared in Thilawa communities shortly thereafter. In the November meeting with JICA, no mention was made of the research, despite the fact that JICA had hired the consultant. Notably, as described above, the TCMP was revealed at a meeting that community groups and civil society working on the CD-OGM were intentionally excluded from. At the 2017 UN Forum on Business and Human Rights, the parties stated publicly that the TCMP was the result of research into existing problem-solving processes in place in Thilawa, yet made no mention of the CD-OGM.

The decision to reject collaboration and create competition is both fiscally irresponsible and reputationally risky. The commission of this type of work should include desk research into best practice, field work on existing problem-solving processes, and stakeholder consultations. The TCMP fails to do



this and instead appears to have selectively copied text from a single reference document,¹¹ copy and pasting only limited sections and omitting certain provisions that place obligations on TSEZ actors or give rights to PAPs. Further, a complete mechanism had already been created. Even if the parties did not agree with all of the content in the CD-OGM, it would have been more efficient to request edits than to ignore the whole design draft. In fact, the Design Committee specifically asked for their input to make edits in the final version. ***The parties would have saved significant time, financial costs, and reputational risk had they used the CD-OGM draft at least as a starting point.***

Working with the community on their CD-OGM would also have served as an opportunity to develop better community relationships more generally. The Design Committee consistently sought input from each of the relevant stakeholders. They proposed the CD-OGM in draft form, open to comments and possible changes.

Because the TCMP is not yet complete, and the Design Committee is still eliciting feedback for a final version of the CD-OGM, there remains an opportunity to collaborate on a process that actually reflects both international good practice and a sincere willingness to build a positive relationship with the PACs. Despite these setbacks, the Design Committee still seeks constructive dialogue. They still believe that the CD-OGM can benefit all parties, and hope that the parties will decide to engage with them. We urge each of the parties to take the Design Committee up on this offer.

III. Substantive Issues

In contrast to the TCMP, the CD-OGM provides multiple access points, a clear timeline, an impartial investigation process, a dialogue-based negotiation for remedy, and opportunities to appeal. It has external oversight to ensure impartiality and consistent implementation, as well as a formal process for feedback to incorporate lessons learned. Because it was created by PAPs themselves, it embodies community participation and reflects communities needs and preferences. Appendix 2 below compares the CD-OGM to the TCMP, using the UNGP's eight Effectiveness Criteria as the indicator of good practice. The Effectiveness Criteria is the most widely-accepted guidance on developing a functional grievance mechanism.¹²

The content of the TCMP falls significantly short of international good practice. It fails to meet any of the UNGP Effectiveness Criteria. In particular and in contrast to the CD-OGM, the TCMP:

- is incomplete;
- lacks adequate research into Good Practice;
 - omits reference to key international good practice indicators and obligations;
 - omits any reference to vulnerable groups;
 - lacks impartiality; and
 - lacks oversight.

¹¹ IPIECA (2012).

¹² See, UNGP Principle 31.



General concerns

The TCMP is Not Complete

The document online is not complete. Namely, it is missing key documents: Annex 3- *Thilawa SEZ Complaints Management Procedure (TCMP) Responsibility Matrix*; Annex 5- *TCMP Community Focal Points (CFPs)*; Annex 6- *TSEZ Complaints Review Board (CRB)*. All three are necessary for both understanding the proposed Procedure, as well as for assessing whether it meets international standards. Annex 4- *Organisational Chart of the Joint TSMC/MJTD Community Relations Team* appears to be incomplete. The bullet point list of the roles stops mid-sentence after three roles. The content of those three bullet points do not articulate specifically what the CRT does.

It is also missing documentation of the materials that would be used for the responsibilities outlined in Chapter 8, including: notifications such as “A summary of the procedure and how it can/should be used; Details of the process, such as who is responsible for receiving and responding to complaints, and any external parties that can receive complaints from communities; When stakeholders can expect a response, and Safeguards in place to ensure confidentiality.” Additionally, the brochures/handouts for both the community and Locators and Contractors are missing. And the Terminology section defines ‘access points,’ but does not include it in the process steps. There are also contradictory paragraphs, discussed in more detail below.

This current document is only in English, which renders it essentially useless for the potential users, who communicate in Myanmar language and Tamil.

Adequate Research into Good Practice was not Conducted

The TCMP appears to have relied on a single good practice document, the IPIECA 2012 Good Practice Survey, and only in part.¹³ The TCMP has replicated this IPIECA Survey process steps chart, which was copied almost exactly. We note the legal risk of reproducing content without the consent of the owner or providing credit to the original source. While IPIECA illustrates these as typical process steps, the Survey also states that the document, even in part, cannot be reproduced without prior consent.¹⁴ General practice would be to cite to the original source. Further, grievance mechanisms must be adapted to the context of each situation.¹⁵ By copying and pasting an existing process, the parties failed to create a Procedure that is relevant to the Thilawa context.

¹³ IPIECA, *Operational level grievance mechanisms IPIECA Good Practice Survey* (2012). Available at, <http://accessfacility.org/sites/default/files/IPIECA%20-%20Operational-level%20Grievance%20Mechanisms%3B%20Good%20Practice%20Survey.pdf>. This guidance document was translated to Myanmar Language by the Myanmar Centre for Responsible Business.

¹⁴ *Id.* (“© IPIECA 2012 All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording or otherwise, without the prior consent of IPIECA.”)

¹⁵ See e.g., International Council on Mining and Metals (ICMM), *Human Rights in the Mining & Metals Sector: Handling and Resolving Local Level Concerns & Grievances* (2009), 8 (“Whether complaints mechanisms are



The TCMP also takes specific language, in some instances verbatim, from the Terminology section of the IPIECA document, omitting only the parts of the definition that points to company action. For example, IPIECA defines ‘complaint’ or ‘grievance’ as “an expression of dissatisfaction **stemming from a real or perceived impact of a company’s business activities**,”¹⁶ and the Procedure defines ‘complaint’ as, “[a]n expression of dissatisfaction with the Thilawa SEZ,” and removes ‘grievance’ from the terminology altogether.

The failure to adequately research good practice indicators reflects a lack of due diligence. Resources discussing good practice on grievance mechanisms are readily available online, as well as through groups such as MCRB and Access Facility.¹⁷ ERI has also consistently offered to provide resources, and has cited numerous good practice documents in materials shared with all of the stakeholders. This particular IPIECA document is from 2012, and was subsequently replaced with more robust guidance in 2015.¹⁸ Without conducting the necessary background research to identify international good practice, the parties cannot create a Procedure to reflect it.

While the TCMP relied on the IPIECA document for its technical aspects, it rejected the parts of that guidance that provide instruction on adhering to the UN Guiding Principles, on building trust, and on the roles of other actors such as the community and independent third parties. Where the IPIECA document explains what the UNGPs are, and states that the UNGP’s Effectiveness Criteria are “broadly accepted as a key international reference,”¹⁹ before going into detail about each Criteria and how to ensure a grievance mechanism meets it, the TCMP fails to reference the UN Guiding Principles on Business and Human Rights at all.

The IPIECA Survey also dedicated entire sections on “potential elements of good practice” and “strategies for enhancing trust,”²⁰ noting the utility of independent third parties and multi-stakeholder groups, and of joint fact-finding and decisions-making. It recommends that a mechanism verify that the outcomes are consistent with human rights, that complainants have access to advocates, and that it should identify multiple access points based on the needs of the community.²¹ None of this is reflected in the TCMP.

The TCMP does not appear to have looked into any other good practice guidance, as the content fails to even reference some of the most accepted good practice points, discussed in more detail below.

- **The TCMP Omits Reference to Key International Good Practice Indicators and Obligations**

successful in strengthening relations with communities depends partly on the details of their design and how well they are adapted to a particular operating context.”); *Also see, Id.* at 10; IPIECA (2015) at 25.

¹⁶ IPIECA (2012), at 3.

¹⁷ See e.g., <http://www.accessfacility.org/>; <http://www.myanmar-responsiblebusiness.org/resources/>.

¹⁸ IPIECA, *Community grievance mechanisms in the oil and gas industry: A manual for implementing operational-level grievance mechanisms and designing corporate frameworks* (2015).

¹⁹ IPIECA, (2012), at 7. See also, IPIECA (2015), at 8 (“The criteria have gained international recognition as universal indicators of quality and fairness of CGM processes and outcomes, and they inform both the design and the functioning of the process.”)

²⁰ IPIECA (2012), at 13 and 19.

²¹ IPIECA (2012), at 14.



While the TCMP makes brief references to meeting international good practice, it makes no mention of key instruments. Notably, this document omits any reference to the UN Guiding Principles, which is the most well-known internationally-recognized instrument relevant to non-judicial grievance mechanisms. Specific to Thilawa, UNGP is incorporated by reference in both the UNGC and Myanmar Law under the 2015 EIA Procedures, support for it has been pledged by Japan, and it is cited specifically in Marubeni's compliance manual, as well as in the TSMC 2015 statement. Further, all of the parties participated in a panel at the UN Forum on Business and Human Rights, twice, indicating a desire to adhere to the UNGPs. Yet the words "human rights" do not appear at all in the TCMP. And as outlined in Appendix 2, in contrast to the CD-OGM, the TCMP fails to meet the UNGP Effectiveness Criteria.²²

Effectiveness criteria for non-judicial grievance mechanisms

31. In order to ensure their effectiveness, non-judicial grievance mechanisms, both State-based and non-State-based, should be:

- a) **Legitimate:** enabling trust from the stakeholder groups for whose use they are intended, and being accountable for the fair conduct of grievance processes;
- b) **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;
- c) **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;
- d) **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;
- e) **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;
- f) **Rights-compatible:** ensuring that outcomes and remedies accord with internationally recognized human rights;
- g) **A source of continuous learning:** drawing on relevant measures to identify lessons for improving the mechanism and preventing future grievances and harms; Operational-level mechanisms should also be:
- h) **Based on engagement and dialogue:** consulting the stakeholder groups for whose use they are intended on their design and performance, and focusing on dialogue as the means to address and resolve grievances

http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

The OECD Guidelines are also omitted from reference to this document. MJTD partners, as well as many locator and contractor companies, come from OECD countries, and are thus bound by those obligations. Due diligence is required from all adhering OECD countries, and they all have responsibilities related to stakeholder engagement and access to remedy even when their business is not the direct cause of a harm.²³

²² Principle 31 of the UNGPs enumerates 8 Effectiveness Criteria, as well as guidance on how to meet them.

²³ Organization for Economic Cooperation and Development (OECD), *OECD Guidelines for Multinational Enterprises 2011 Edition* (2011).



The stakeholders have been provided with the specific guidance in both the UNGP and the OECD related to access to remedy and grievance mechanisms - both in person and on paper - on multiple occasions.²⁴

The CD-OGM by its very nature is in line with international good practice standards outlined in the UNGPs. In advocacy documents shared with all TSEZ stakeholders since 2014, information on the UNGPs and other good practice standards was provided when explaining the business case for the CD-OGM.

- **The TCMP Omits any Reference to Vulnerable Groups**

International good practice consistently emphasizes the need to take into account and to provide the necessary additional accommodations for vulnerable groups and those who face additional barriers to accessing remedy.²⁵ These groups face different impacts, and generally have more challenges in accessing remedy. The TCMP fails to include any reference to vulnerable groups. It also does not appear to include any additional measures to ensure that these groups will have fair and safe access to the TCMP.

The CD-OGM addresses how to support vulnerable groups in various ways. The outreach activities include specific focus groups with vulnerable groups, in safe spaces. This enables everyone to share the impacts they will face, the hurdles to accessing remedy they foresee, and to provide feedback on how to make the CD-OGM more accessible for them. The outreach documentation is provided in animated form for those with low literacy, and in both Myanmar language and Tamil. Materials are also shared to individuals as well as households, to ensure that women and youth have equal access. Outreach activities are conducted both formally and informally, in order to provide forums that feels safe for anyone.

- **The TCMP Lacks Impartiality**

While international good practice does not strictly require that a grievance mechanism be external, it does recognize the inherent conflict of interest where the party with a financial interest in a project is the party managing access to remedy. Indeed, The UNGP states that **“a business enterprise cannot, with legitimacy, both be the subject of complaints and unilaterally determine their outcome.”**²⁶

International good practice is clear that “[p]rocedures for the provision of remedy should be impartial.”²⁷

²⁴ ERI shared briefers outlining the business case for a CD-OGM, guidance on best practice for community engagement, and an outline of obligations for Japanese companies investing in the Thilawa SEZ, and gave presentations on the UNGPs.

²⁵ See e.g., CSR Europe, *ASSESSING THE EFFECTIVENESS OF COMPANY GRIEVANCE MECHANISMS; CSR Europe’s Management of Complaints Assessment (MOC-A) Results* (2013), 19 (“a rights compatible mechanism should be based on inclusion, fairness, participation, empowerment, transparency **and be attentive to vulnerable populations.**”) (emphasis added); Mining Association of Canada (MAC), *Site-Level Grievance and Community Response Mechanisms: A Practical Design and Implementation Guide for the Resource Development Industry* (2015) Ottawa, 16 (“An effective site-level GM should also address cultural barriers that may exist for vulnerable peoples.”)

²⁶ UNGP, Commentary h) to Principle 31. Also see, MAC (2015), at 11 (“It is human nature to inherently question anyone who is, in essence, investigating themselves.”)

²⁷ UNGP Commentary to Principle 25.



As the Compliance Advisor Ombudsman (CAO) explains, “internally-based mechanisms reinforce power inequalities, limit procedural choices, prevent complainant from having much influence in crafting a solution, and omit stakeholders from involvement in the design, rely on individuals without specific training or capacity.”²⁸ The proposed make-up of the TCMP relies disproportionately on internal parties, with significantly limited participation of PAPs or independent third parties, and provides no processes for oversight to ensure impartial and consistent implementation.

The parties to the TCMP lack the proper training to implement the TCMP independently. International good practice instructs that grievance officers, and community liaison officers more generally, require specific training and skills to perform their functions.²⁹ These include “[t]raining in conflict management, human rights and Indigenous Peoples’ rights,” “basic engagement skills, root cause analysis and basic conflict resolution skills,” and knowledge of international standards and best practice.³⁰ These officers must also have certain “soft skills” such as empathy and cultural sensitivity.³¹ This training was never given. In December 2016, a short briefer was provided to all relevant stakeholders identifying the specific skills required under international standards after direct conversations on the matter. There is no indication that any training has taken place.

Training is particularly important because the parties to the TCMP have a history of poor community relations. PAPs have made claims of intimidation, retaliation, and being ignored if they raised concerns about the action – or inaction – of the parties. Others have expressed fear of speaking out.³² Numerous civil society groups and external observers have witnessed examples firsthand as well. TSEZ stakeholders themselves have commented on the lack of capacity and understanding, and the need for more learning.³³ This lack of training raises concerns as to whether the parties have the capacity to manage the TCMP appropriately without assistance and oversight.

The CD-OGM, on the other hand, proposes specific training programs for all actors who will participate in the implementation of the mechanism.

The CD-OGM also proposes a multi-stakeholder party to run the mechanism, which would include an independent third party, to ensure impartiality of all actors who will participate.

- **The TCMP Lacks Oversight**

²⁸ CAO (2008), at 10.

²⁹ See e.g. IIED (2013), at 143 (“Ensure staff are appropriately hired and fully trained.”); IPIECA (2015), at 28 and 83; ICMM (2009), at 9; CAO (2008), at 54.

³⁰ See e.g., IPIECA (2015), at 50 and 84; CAO (2008), at 54.

³¹ *Id.* at 84. Also see, ICMM (2009), at 9 (“[Q]ualities of empathy, maturity and fair-mindedness are likely to be important.”); Wilson, E, Best, S, Blackmore, E and Ospanova, S (2016) *Meaningful community engagement in the extractive industries: Stakeholder perspectives and research priorities*. International Institute for Environment and Development (IIED), London, 17 (noting that many interviewees stated that “staff who are involved in consultation processes need to develop their ‘soft skills’ and ‘emotional intelligence’ in order to engage effectively.”)

³² Names have been withheld to protect the PAPs.

³³ In meetings in November 2016 with TSMC and with MJTD, both commented on the need for more learning from current staff. This was in part what prompted the stakeholders to request a briefer on good practice elements of community engagement, which was shared with the stakeholders in December 2016.



International good practice consistently emphasizes the need for oversight in a grievance mechanism.³⁴ There are various examples of what an oversight body might look like: an Ombudsman, an external advisory panel, external monitoring and audits, community monitoring groups, joint monitoring groups, and regular public reporting. There is no external body in the TCMP to play a role in either the implementation or the monitoring of the Procedure. In fact, one of the criticisms of the CD-OGM from TSEZ stakeholders was that it *did* have oversight. External concerns have been raised about the lack of supervision and oversight to all stakeholders.³⁵ To continue to rely solely on internal monitoring where there is a documented history of poor management makes the project susceptible to significant financial, operational, legal, and reputational risk.

Specific Concerns by Chapter

1. Introduction

Paragraph a) states that the TSEZ seeks to build strong relationships with the stakeholders and manage the impacts of the project. This framing avoids important words like “remedy” and “impacts.” International good practice emphasizes that impacted people need to feel like they are being taken seriously. However, both the process (discussed above) and the substance of the document (discussed below) in fact does the opposite.

Paragraph b), which states that “[t]he TSEZ aims to address all complaints received, regardless of whether they stem from real or perceived issues,” is directly at odds with Chapter 2, Paragraph d), which states that “[t]he TSEZ reserves the right not to address a complaint that it reasonably considers amounts to no more than general, unspecified and therefore un-actionable dissatisfaction with the SEZ or concerns a matter for which the SEZ has no formal responsibility.” While it is reasonable to have a limit on the scope, if the CRT can unilaterally decide which complaints are actionable without initial investigating or clear criteria, there is no assurance that all complaints will receive equal and fair consideration. Indeed, international good practice specifically notes that through investigation, the parties may discover the underlying issues that may not be evident right away.³⁶ Where the receiving body has this level discretion, perceived issues that are valid but perhaps not articulated clearly risk getting dismissed.

The CD-OGM provides a specific step to filter out which complaints are not related to the SEZ. This is conducted by trained staff with specific criteria for decision-making, a clear explanation is provided to the Complainant, and the Complainant can appeal the decision if he/she does not agree.

Paragraph d) states that “TSEZ seeks to foster trust in the process and its outcomes.” International good practice consistently emphasizes the need for meaningful community participation in both the design and

³⁴ See e.g., IIED (2013), at 144 (“Ensure third-party monitoring and mediation options are in place”); IPIECA (2012), at 20; ICMM (2009), at 20; CAO (2008), at 57-59.

³⁵ This issue was raised in Myanmar, as well as in Tokyo in the September 2016 meetings with JICA, Mitsubishi, Marubeni, and Sumitomo.

³⁶ See e.g. CAO (2008), at 36 (“[S]ome companies have found that even where cases appear frivolous or seem to be unlinked to project operations, the potential issues underlying these complaints may still need to be explored, as they could indicate some underlying concern with the project, such as lack of trust.”); IPIECA (2015), at 54.



implementation in order to establish trust, legitimacy, and credibility,³⁷ and provides numerous examples of how to do that. These recommendations include bringing the impacted communities into the design and implementation.³⁸ Indeed, the guidance document that the TCMP looked at includes an entire section devoted to the topic.³⁹ It is also specifically articulated as one of the UNGP's 8 Effectiveness Criteria.⁴⁰

The TCMP does not provide any information on the actions it will take in order to establish that trust. There is already a history of distrust in the Thilawa project, yet the TCMP does not indicate any concrete steps to reestablish trust. The process for creating the TCMP lacked meaningful input from PAPs, and they have been given no proper role in its implementation.

Further, as discussed above, the parties have already acted against building trust by refusing to engage with the Design Committee in good faith on the CD-OGM. The parties also refused to acknowledge the history of engagement on problem-solving in creating this Procedure. These actions signal to PAPs that their voices do not matter. This includes not only the Design Committee, but also the hundreds of PAPs who have attended meetings and contributed to the subsequent drafts, and those who have attempted to utilize the Interim Mechanism. Numerous PAPs have indicated that this new Procedure has created confusion and distrust.

The CD-OGM, on the other hand, conducts regular outreach to the PACs, to encourage participation and input into the CD-OGM, to ask questions, and to give honest feedback. By working through a multi-stakeholder body, the CD-OGM also seeks to build trust with TSMC, MJTD, and JICA by offering consistent opportunities to contribute, participate, and comment.

Paragraph e) claims to align with existing directives, citing the 2015 TSEZ Notice and the UN Global Compact (UNGC). However, both the 2015 Notice and the UNGC explicitly reference the UNGPs for the indicator of what a remedial mechanism should look like, and as explained above, this document makes no mention of the UNGPs. Further, the Japanese partners of MJTD are obligated under the OECD Guidelines, reference to which is also omitted from this Procedure. Both the UNGP and the OECD Guidelines address good practice on grievance mechanisms.

The CD-OGM meets the UNGP Effectiveness Criteria, the good practice articulated by the OECD, and international good practice as indicated in the 2015 EIA Procedures.

³⁷ See e.g., IPIECA (2012) at 9 ("Engaging with affected communities about the design of the mechanism creates trust and helps to build legitimacy around the process. By building a more responsive process than either of the parties could have achieved on their own, a collaborative approach brings advantages for both the company and community."); MAC (2015) at 20 ("The most successful GMs will be those that effectively involve the aggrieved parties at each step in the process to obtain their agreement and support for the matter that is being evaluated, how the process will proceed, who will be involved, whether it will be a strictly internal process, and how the resolution is designed and implemented."); CSR Europe, *ASSESSING THE EFFECTIVENESS OF COMPANY GRIEVANCE MECHANISMS*; CSR Europe's *Management of Complaints Assessment (MOC-A) Results* (2013), 11 ("Consulting key stakeholders such as employees, clients or communities in the design, monitoring and/or evaluation of a grievance mechanism will allow the company to create trust around the process. It will also lead to a more fair and responsive process, where stakeholders can contribute to the improvement of the grievance mechanism.")

³⁸ *Id.*

³⁹ IPIECA (2012), at 19-20.

⁴⁰ UNGP Principle 31 ("based on engagement and dialogue")



Paragraph f) claims to align with international good practice on stakeholder engagement. However, as explained above, TSEZ falls so short of meeting this that civil society needed to send the stakeholders a briefer outlining specifically what good practice on stakeholder engagement was,⁴¹ and the stakeholders subsequently failed to implement any of those recommendations.

The CD-OGM, on the other hand, has articulated a specific process for stakeholder engagement into the design.

Paragraph g) states that this Procedure offers the opportunity for “two-way dialogue with the Project about its operations.” International good practice encourages dialogue, and it is one of the UNGP Effectiveness Criteria.⁴² However, the language here limits this dialogue in significant ways. It specifically omits reference to grievances, impacts, and remedy, severely narrowing what the dialogue can be about.

This paragraph also states that the Procedure is “designed to enhance outcomes.” This narrow framing departs significantly from the key goals of mitigating and remedying impacts, and preventing future impacts. In fact, the word “remedy” only appears three (3) times in the entire TCMP, with two of those references in the Terminology section.

The TCMP incorrectly assumes that this limiting language alone will provide “satisfaction that their voices are being heard and that their issue was subject to formal consideration by the TSEZ.” However, in order to establish trust and legitimacy, the stakeholders must prove that they do not merely want to “appear” to be addressing concerns.⁴³

Further, the refusal to acknowledge the history of engagement on problem-solving when drafting this TCMP has resulted in a number of community members, both part of and external to the Design Committee, stating that they feel like they are being ignored. Others have stated that they feel like they are being silenced.

The CD-OGM, on the other hand, promotes a 2-way dialogue by giving all stakeholders a voice in the process. It also articulates requirements for detailed explanations of every decision so that the Complainant can be satisfied that his/her voice is being heard, and so that he/she can understand what exactly the “formal consideration” looks like. This contributes to both predictability and legitimacy of a grievance mechanism.

Paragraph h) states that the TCMP does not replace other processes, but this appears contradictory to Chapter 2, paragraphs b). By giving the parties discretion to refuse a complaint in order to avoid parallel proceedings, it is impeding access to other remedies by forcing the complainant to choose between them.

⁴¹ In December 2016, after in-person conversations sharing concerns raised by PAPs about the conduct of the different stakeholders with regard to stakeholder engagement, and at the request of those stakeholders, ERI shared a summary of good practice guidance.

⁴² See e.g., UNGP Principle 31; MAC (2015), at 39 (“Including communities in dialogue about all of these standards, procedures and tools will help to ensure that cultural and accessibility matters are identified and addressed, and that the process is understood and supported by local residents.”); CSR Europe (2013), at 23 (“Engagement and dialogue are at the core of an effective operational-level grievance mechanism. They are also a means through which legitimacy, continuous improvement, transparency and trust can be achieved.”)

⁴³ See e.g., MAC (2015), at (“Suspicion and cynicism can exist about whether a company is trying to appear to care about community concerns rather than being committed to actually demonstrating that they care.”)



This is not in line with international good practice, which explicitly envisions a variety of options to be available.⁴⁴ Further, if this Procedure had envisioned an escalation clause from one type of process to another, this must be clearly explained in the Procedure. This paragraph also fails to include in its examples reference to relevant Thilawa-specific access to remedy options, such as JICA's Objections Procedures, OECD Specific Instances, and complaints raised to the UN, access to which might be impeded under the language in the existing document.

The CD-OGM allows Complainants to leave the process at any time they choose to pursue other channels, and gives both the Complainant and the target of the complaint the right to use any evidence gathered in the CD-OGM process in other processes. It allows a Complainant to pursue parallel proceedings to the extent allowed by law.

Chapter 1.1, paragraph 2 states that one purpose is to specify the roles and responsibilities of the parties involved. However, as described above, information on the parties has been referenced but not included in the TCMP. Further, the most relevant party, the roles and responsibilities of the potential Complainant is not included at all.

The CD-OGM articulates the specific details for each role.

Chapter 1.2, paragraph a) fails to state as an objective what the entire Procedure should be focusing on: providing adequate, effective and prompt remedy for impacts arising out of the SEZ. The objective of creating a Procedure is distinct from providing remedy. Indeed, reports on existing grievance mechanisms routinely note that mechanisms on paper often fail to take shape in practice.⁴⁵ The TCMP focuses the objective solely on the creation of this document. Good practice guidance notes that it is common for communities to have suspicion that the company is "trying to appear to care about community concerns rather than being committed to actually demonstrating that they care."⁴⁶

The CD-OGM includes a step devoted to implementation to ensure that the remedy does not remain only on paper.

2. Scope

Paragraph b) gives discretion to the CRT to decide whether to accept a complaint or not based on the availability of other processes. International good practice advises that the scope of a grievance mechanism be clearly defined to ensure predictability and transparency⁴⁷ And that Complainants have the opportunity to choose which process to pursue if more than one is available.⁴⁸ The document does not

⁴⁴ Commentary to Principle 25 states, "State-based and operational-level mechanisms, in turn, can be supplemented or enhanced by the remedial functions of collaborative initiatives as well as those of international and regional human rights mechanisms."

⁴⁵ See e.g. ICMM (2009), at 5 ("[O]n paper such a mechanism may appear to have all the necessary elements, but if communities are insufficiently aware of its existence or distrustful of its outcomes, they won't use it and instead may look for other ways to resolve their concerns or express their dissatisfaction.") IIED (2013), at 89 ("[I]t is not enough simply to have policies and standards on paper. Most important is the effective implementation and oversight of these procedures, and the resulting positive effects for society.")

⁴⁶ MAC (2015), at 11.

⁴⁷ See e.g., UNGP Principle 31; ICMM (2009), at 13; CSR Europe (2013), at 15-16; MAC (2015), at 16.

⁴⁸ See e.g., UNGP Commentary to Principle 29.



define the scope, and there is no information in this Chapter on any criteria or what the decision-making process for determining why the other process is better than the TCMP. It also omits any reference to whether any oversight exists to ensure impartial and consistent application. Further, there is no appeals process in place if the Complainant does not agree with the CRT's determination, nor any process for allowing a Complainant to return to the TCMP if the other process fails. If a complaint can be redirected without the consent of the Complainant, then there is in fact a restriction on what can be raised. And if there is no recourse to appeal or no opportunity to re-enter the TCMP after another process, then the Complainant is being denied access to remedy.

The CD-OGM, as discussed above, allows parallel process to the extent allowed by law. This ensures that the mechanism does not preclude access to other mechanisms.

Paragraph d) allows the CRT to dismiss a complaint at its sole discretion. International good practice, and in particular the UNGPs, emphasize the need for predictability and transparency.⁴⁹ The TCMP does not provide any criteria for the decisions on whether to accept or reject, or what constitutes “general, unspecified and therefore un-actionable dissatisfaction with the SEZ.” International good practice emphasizes the importance of equity and equal treatment of all complaints raised, even when the receiving party doubts its credibility.⁵⁰ IPIECA explains that equitable treatment is required, even if complaints appear “false, exaggerated, unfounded or frivolous.”⁵¹

This restriction creates a lack of predictability that puts Complainants in an insecure position because they do not know what complaints will be accepted or not, and complaints that they perceive as valid may be rejected for reasons that they do not know in advance. It also leaves the Complainant unable to raise broad concerns relating to the SEZ, or to raise concerns that are valid but not articulated well. As discussed above, this restriction is at odds with the language in Chapter 1 because it does restrict what a Complainant can raise. And by giving the parties unfettered discretion to determine what they believe does not need to be addressed - without clearly articulated criteria - the Complainants are denied any assurance that their complaints will go forward in an unbiased manner.

The CD-OGM, as discussed above, includes a specific step to filter out complaints not related to the SEZ. It is implemented by trained staff, with clear criteria, and gives the Complainant a detailed explanation of the reason for the decision, other processes available, and information on his/her right to appeal.

As with paragraph b), an appeals process must be available at this stage to provide the Complainant the opportunity to challenge a decision not to allow a complaint to go forward. If the party's consideration is not reasonable, and the PAP has no recourse to appeal, then the PAP is being denied their right to access remedy.

⁴⁹ See e.g., UNGP Principle 31; CSR Europe (2013), at 15-16 and 18; ICMM (2009), at 8 (“Establish the mechanism early on, and base it on a transparent, predictable process.”)

⁵⁰ See e.g., IPIECA (2012), at 8 (“Equitability also implies handling every grievance consistently and with due respect for the complainant, **regardless of whether the company considers the issue to be well founded.**”); CAO (2008) at 36 (“The company needs to make an effort to truly understand the grievance before responding.”)

⁵¹ IPIECA (2015), at 54 (“it is important to investigate these claims because: addressing every grievance with the same approach ensures consistency; unfounded grievances may hide a separate and important issue that deserves attention; and false grievances (for example, unwarranted compensation claims) can be rejected based on evidence, and the results made public to discourage repeat cases.”)



The CD-OGM includes the opportunity to appeal any time a decision is made, in order to ensure equitable treatment of Complainants.

3. Applicability to SEZ Activities

Paragraph a) states that the TCMP is applicable to a number of non-parties (individuals, groups, and organizations), but does not articulate what role they have in the Procedure. For example, the document does not clarify whether an individual or group's action giving rise to a community complaint makes the actor a responsible party, or whether these other actors will be provided with information on the TCMP, or will need to agree to participate in it.

The CD-OGM articulates the roles of each party that may have a responsibility.

Paragraph b) states that the TCMP is to be used by all relevant stakeholders, but it fails to describe how the Procedure will ensure the participation of the SEZ stakeholders, or what measures will be in place for handling non-compliance. Oversight is crucial for ensuring that all parties adhere to their obligations.⁵²

The CD-OGM provides specific oversight processes to monitor compliance, with articulated consequences for non-compliance.

Additionally, as discussed in more detail below, the TCMP fails to articulate the roles and responsibilities of these different parties, as the relevant Annexes have been omitted. Paragraph b) does not articulate, for example, whether parties such as Locators, can “use” the mechanism as Complainants, or are also responsible for providing remedy.

Paragraph c) states that “[a]ll Thilawa SEZ staff members and contractors that interact with external stakeholders should be made familiar with the complaints management procedure on a regular basis.” But the paragraph lacks the necessary detail to explain how these parties will be made familiar with it, and fails to specify the frequency of “a regular basis.” While Chapter 8 (discussed below) focuses on publicizing the Procedure, it does not explain these efforts beyond sharing a brochure and “solicit[ing] feedback.” A more detailed explanation is required to ensure that the information reaches all relevant stakeholders.

Additionally, the role of senior management in this chapter is not explained adequately. It does not articulate who exactly this encompasses. Transparency dictates that if these parties are responsible for supervision to “ensure satisfactory performance,” they need to be identified. The paragraph also does not indicate what is considered unsatisfactory performance, how unsatisfactory performance can be reported, and by whom. Further, a supervisory role should include an outside party to ensure impartiality.

4. Terminology

⁵² See e.g., ICMM (2009), at 20.



The definition of “complaint” is misleading. As discussed above, accepted definitions of “complaint” and “grievance” include reference to company action.⁵³ The TCMP does not even include “grievance” in the Terminology, and this definition for “complaint” omits reference to company action. By limiting the definition to simply an expression of discontent or dissatisfaction and omitting the key element of harm suffered by the Complainant and the action giving rise to the dissatisfaction, the definition unfairly shields responsible parties. The definition of “concern” cites to actions by company or contractor, but not by TSMC, MJTD or JICA.

The definition of “responsible party” is incomplete, as Annex 3 has been omitted from the document.

5. Roles and Responsibilities

As discussed above, key Annexes outlining the roles and responsibilities of all of the central parties to the TCMP have been omitted. Transparency and predictability both rely on a clear articulation of roles and responsibilities.⁵⁴ With these omissions, an understanding of the roles and responsibilities of each actor is not possible. Without this information, a Complainant cannot know what to expect from the process.

The CRT Leader is responsible for the overall implementation, and the CRT Officers are responsible for coordinating. However, as discussed, none of the parties have the relevant training, which is particularly relevant to the responsibility of suggesting changes to policy and practices. Also as described above, there have been ongoing trust and engagement issues in Thilawa, raising concerns about the ability of the CRT to fill the role impartially and equitably. Further, as discussed above, Annex 4 is not complete.

This Chapter refers to a responsibility matrix for the Responsible Parties. However, there is no Annex 3. Parties responsible for investigations must be objective, and must be separate from parties responsible for providing the remedy. There is no indication from the existing text that this is the case.

The document also refers to Community Focal Points (Annex 5) and a Complaints Review Board (CRB) (Annex 6), yet this document has omitted Annexes 5 and 6. The text in these sections is similarly insufficient. While some additional details on the Complaints Review Board are provided in Chapter 7, and comments are addressed below, it is still insufficient information for assessing whether the CRB can function objectively.

6. Overall Procedure

⁵³ See, e.g., IPIECA (2012), at 3 (“Complaints or grievances are an expression of dissatisfaction stemming from a real or perceived impact of a company’s business activities.”); UNGPs Commentary to Principle 25 (“[f]or the purpose of these Guiding Principles, a grievance is understood to be a perceived injustice evoking an individual’s or a group’s sense of entitlement, which may be based on law, contract, explicit or implicit promises, customary practice, or general notions of fairness of aggrieved communities.”); UNGPs Commentary to Principle 29, (“raise[ing] concerns when they believe they are being or will be adversely impacted.”)

⁵⁴ See e.g., CAO (2008), at 48 (“Regardless of whether staff or others involved in designing or operating a grievance mechanism are from a company or community, it is critical to clearly define and have common understandings concerning roles, responsibilities, and authority.”); IPIECA (2015), at 28 (“CGMs require skilled staff with clear roles and responsibilities.”)



As discussed above, the TCMP appears to have copy-and pasted the process chart from IPIECA's 2012 Good Practice Survey.⁵⁵ Simply reproducing rather than creating raises concerns that the parties do not fully understand the content, which will impact their ability to implement the TCMP.

The categories of the procedural steps themselves are not problematic, and in fact share many similarities to the steps proposed by the Design Committee in 2016, as highlighted in Appendix 1. However, there are important omissions which make it fail to meet international good practice. As discussed above, there needs to be recourse to appeal at the assessment stage. If a complaint is rejected, the Complainant has the right to challenge that decision. Also discussed above, the parties for each step need to be impartial, and are not under the current document. There is also an absence of oversight over these steps.

Details comments for each specific step are discussed in the comments to Chapter 7.

7. Detailed Steps for Resolving Complaints

Step 1- Receive

The first step is prohibitively limiting. While the Terminology chapter defines Access Points, the process does not actually provide them. The Effectiveness Criteria explicitly list Accessibility as one Criteria,⁵⁶ and international good practice is clear that a mechanism must have multiple access points, and they should be convenient and trusted.⁵⁷ What is proposed under this Process is neither. It requires in-person filing through the CRT (either directly or via an SEZ employee or contractor), which is both logistically challenging for many people, and contextually insensitive. According to ICMC guidance, "Communities should be easily able to lodge complaints, which may require several points of contact (**as opposed to solely via a nominated staff member**)."⁵⁸ Many PAPs do not have the means of transportation or the time to seek out the CRT members. And with the existing trust and fear concerns, PAPs may not feel comfortable approaching TSEZ staff or the CRT, especially if it is one of the parties suspected of causing the harm.⁵⁹ This will deter a large number of PAPs from using the Procedure.

The first step also ignores the large population with limited literacy levels or the population whose first language is not Myanmar. The complaint form is only in Myanmar language, while over 20% of the population speak Tamil as their first language, and many cannot read or write in Myanmar language. International practice consistently emphasizes the requirement to make this type of document available in a community's first language.⁶⁰ Further, using the CRT as the party responsible for transcribing raises objectivity concerns. An objective third party or Complainant advocate should provide the transcription to ensure impartiality and trust. This step completely omits the option for a party or an advocate to file on behalf of a person or group. With the existing trust issues, power imbalances and bargaining power,

⁵⁵ IPIECA (2012), at 10 (Figure2).

⁵⁶ UNGP Principle 31.

⁵⁷ See e.g., CSR Europe (2013) at 13 ("Address the barriers stakeholders may have to accessing the mechanism by providing multiple access points that are well adapted to the operational context."); CAO (2008), at 2; IPIECA (2015), at 43.

⁵⁸ ICMC (2009), at 13.

⁵⁹ CAO (2008), at 3 ("Individuals serving as access points are most effective if they are trustworthy, trained, knowledgeable, and approachable regardless of the ethnicity, gender, or religion of the complainant.")

⁶⁰ See e.g., CAO (2008), at 18; CSR Europe (2013), at 17.



leaving PAPs without access to support when going through this mechanism violates international good practice.⁶¹

The CD-OGM provides for six different types of Access Points, based on the preferences and concerns of the PAPs. More may be added at the request of PAPs. This step in the CD-OGM also allows for advocates to file on behalf of or in support of PAPs.

Step 2- Assess and Assign

The Procedure's step for assessing complaints borrows language from the 2012 IPIECA Survey without the full contextual understanding. This step in general practice, when used, is intended to identify the *nature* of the complaint and its overall severity in general terms. Some grievance mechanisms follow a matrix or classification system⁶² through a pre-established procedure, not through the sole discretion of the party receiving the complaint. Indeed, the CAO states that this step involves, "a screening procedure based upon a few simple eligibility criteria that do not involve judging the substantive merit of the complaint."⁶³ Good practice guidance also cautions that these classification systems can be risky, as they can be perceived to be inequitably applied, escalating tensions, or they can be inaccurate due to lack of understanding of the community's perspective.⁶⁴

The CRT lacks both the expertise and the impartiality to make assessments regarding the severity of harms raised in a complainant a consistent and objective manner, and there are no criteria in place to guide the decision-making. Yet this step gives significant deference to the CRT to make these decisions.

The document fails to articulate what steps will be taken by the TSMC Chairman if a complaint is sent to him/her.

As discussed above, the CD-OGM provides a step for filtering out complaints that are not related to the SEZ. That step is performed by specifically-trained staff, with clear criteria, and all decisions receive a detailed explanation. If rejected, the explanation includes information on other processes and the right to appeal.

Step 3- Acknowledge

Acknowledgement should happen immediately after filing a complaint, prior to assessment. The TCMP also does not address how it will ensure receipt of the acknowledgement, and/or share the information in the acknowledgement when the Complainant cannot read, or does not read in Myanmar language.

Step 4- Investigate

The impartiality of investigators is crucial for proper investigation. Annex 5, which is meant to provide information on the Responsible Parties has been omitted, so there is no indication of who specifically the Responsible Parties may be. Further, Step 4 does not provide instructions on how the parties will ensure

⁶¹ See. e.g., Commentary d) to Principle 31 ("In grievances or disputes between business enterprises and affected stakeholders, the latter frequently have much less access to information and expert resources, and often lack the financial resources to pay for them. Where this imbalance is not redressed, it can reduce both the achievement and perception of a fair process and make it harder to arrive at durable solutions"); IPIECA, 2015 at 50.

⁶² See e.g. IPIECA (2012), at 11; IPIEA, 2015 at 126; MAC (2015), at 21 and 29.

⁶³ CAO (2008), at 35.

⁶⁴ IPIECA, 2015 at 49 (Box 18).



that an investigation will be conducted in an impartial manner. The TCMP does not even instruct the Responsible Party to conduct the investigation impartially.

Paragraph 7.4 b) states that external third parties will only to be brought in “as required.” International good practice recommends either multi-stakeholder/joint fact-finding or the use of an independent third party to ensure impartiality and legitimacy.⁶⁵ Having a party investigate itself is at odds with international good practice and creates a high risk of conflict of interest, discussed in more detail below. Even guidance that accepts internal investigations instructs having independent third parties or joint fact-finding in contexts where trust is low or risks of impacts are high and/or complex.⁶⁶ The Thilawa SEZ can be defined as complex, due to the numerous impacts for a large number of people and the ongoing trust issues. Good practice also notes that the party conducting the investigation should not be the party analyzing the data and proposing a solution or remedy.⁶⁷

Further, to align with the requirement under international good practice for transparency, the findings should be shared with the complainant as well.

The CD-OGM proposes a specifically-trained group to conduct investigations and encourages external third parties experts, keeping the confidentiality of the Complainant top priority. The CD-OGM articulates examples of what the investigation would look like so that the Complainant can understand, ensuring transparency and predictability. A separate group makes a decision based on the findings by the investigators.

Step 5- Respond and Resolve

This step fails to meet international good practice by excluding objective, impartial third parties and advocates from these meetings.⁶⁸ And while smaller issues may be resolved informally or directly with the responsible party, in more complex situations, decision-making needs to be external. According to the UNGP, “where adjudication is needed, this should be provided by a legitimate, independent third-party mechanism.”⁶⁹ Due to the severe imbalance of power and negotiating leverage, the Complainant is forced into a situation without adequate bargaining power and is denied access to support.

The CD-OGM allows, and encourages, advocates or lawyers to accompany the Complainant when negotiating the proposed remedy, in order to address power imbalances and unfair bargaining power.

⁶⁵ See e.g., IPIECA (2015), at 52 (“Problems can often be resolved more effectively through collaborative approaches that involve stakeholders in finding the solution.”); ICMM, *Handling and Resolving Local Level Concerns & Grievances* (2009), at 14 (“Seek resolution of concerns and grievances where possible through dialogue and joint problem solving with communities.”); MAC (2015), at 24 (“Involving communities in the actual administrative and investigative processes further demonstrates openness, transparency and participation. Moreover, it helps align the process with any pre-existing cultural norms, builds trust in the GM and the company over time and enhances social license.”)

⁶⁶ See e.g., ICMM (2009), at 18 (“[C]omplaints which are serious or difficult to resolve by the company alone (for example, where the facts are contested) are in some cases adjudicated by relevant external parties, including representatives of government, NGOs and academic bodies.”)

⁶⁷ See e.g., IPIECA, 2015 at 51 (“The investigation is primarily meant to establish the facts rather than provide analysis or formulate a company response.”)

⁶⁸ See e.g., IPIECA, 2015 at 50; CSR Europe (2013), at 17 (“Facilitate the means through which the affected stakeholders can have access to advice or expertise.”)

⁶⁹ UNGP, Commentary h) to Principle 31.



Section 7.5.1 does not adequately address the purpose of the signature of the complaints management form. A signature of agreeing to the offered remedy must not close the complaint unless the implementation was complete to the satisfaction of the complainant.

The CD-OGM proposes a specific step for implementation, and does not consider the complaint closed until the remedy has been implemented.

The members of the Complaints Review Board do not provide impartial or objective representation. 7.5.2 c) does not articulate how the potential members are selected, or whether the Complainant has access to outside support before agreeing. In light of the existing power imbalances, the proposed scenario does not address legitimate concerns of coercion or the lack of access to adequate options.

The CD-OGM proposes a multi-stakeholder appeals body, in which every single member must be agreed on by all stakeholders. This ensures impartiality and legitimacy.

Seeking feedback is critical to a successful grievance mechanism.⁷⁰ it should not be the CRT that conducts this. The document also fails to articulate what is done with the feedback.

The CD-OGM includes specific processes for feedback, with trained staff to conduct it.

8. Publicizing and Engaging on the TCMP

Paragraph 8 a) states that it will be publicized and shared in an appropriate manner, and provides some examples of possible content. However, it does not articulate details of how that content will be provided in an appropriate manner.

The CD-OGM has provided visual materials to share with the PACs. These include animated booklets, worksheets, and video. The text is limited to ensure that it can be understood by PAPs with limited literacy, and is available in both Myanmar language and Tamil. The content and images were tested with focus groups to ensure that they would be understood by the intended audiences. Once the design is finalized, the text version will be available in English, Japanese, Myanmar language and Tamil, to be accessible to all stakeholders.

Paragraph 8 b) states that the PACs are allowed to participate in trainings on how to use the TCMP. However, that is a training, not a consultation. There is no indication that the PACs were given an opportunity to participate in its design, nor that the methods listed offer the PACs an opportunity to provide feedback or comments. In fact, many PAPs and PACs were intentionally excluded from participating.

As discussed above, the CD-OGM focuses on constant participation from stakeholders, who are encouraged to contribute to the design.

Paragraph 8 d) states that the SEZ will solicit feedback, and that it will be “taken into consideration.” International good practice requires feedback for future learning.⁷¹ However, there does not appear to be

⁷⁰ See e.g., UNGP Principle 31 (source of continuous learning); CSR Europe (2013), at 21; IPIECA (2012), at 14; IPIECA (2015), at 9 and 58.

⁷¹ *Id.*



any formal or informal process for feedback collection. Without a system, there is no way to ensure that the inputs will be used to improve the mechanism.

9. Performance Monitoring and Reporting

We welcome the reporting processes outlined in Chapter 9. International good practice emphasizes that both feedback collection and monitoring are important for assessing the functioning of a mechanism and making necessary improvements based on lessons learned from both.⁷² International good practice also emphasizes the need for transparency with this type of reporting, both in terms of how it is conducted and who it is shared with.⁷³ Further, “Performance monitoring requires clear standards and criteria.”⁷⁴ The TCMP does not include what KPI will be assessed, thus there is no clear articulation of what will be reported publicly, or what it means by “appropriate format.” The TCMP similarly does not provide detail on the methodology to be used in the qualitative assessments.

As discussed above, international good practice also emphasizes the importance of external monitoring and reporting.⁷⁵ Also as discussed above, this is particularly important in TSEZ, based on the long history of transparency and concerns regarding lack of oversight.

The CD-OGM, on the other hand, provides for regular public reporting and audits as part of its oversight procedures.

10. Confidentiality

We welcome the commitment to confidentiality in Chapter 10. International good practice requires that complaints can be submitted confidentially.⁷⁶ International good practice also instructs that complaints can be submitted anonymously as well.⁷⁷ The TCMP does not allow for anonymous complaints to be

⁷² *Id.* Also see, CSR Europe (2013), at 22 (“Key lessons learnt could be integrated through a reactive approach, where changes or adaptations take place as the result of a particular incident that triggered a response. Alternatively, companies can take a more proactive approach and introduce revisions as part of an established review or monitoring process.”)

⁷³ See e.g., CSR Europe (2013), at 18 (“Expectations on external reporting go beyond providing information on the number of grievances received to include information on substance, such as the results obtained and the level of satisfaction of the complainants. External reporting needs to take into account what is reasonable to report and what kind of information could be useful for the (potential) users of the mechanism.”); MAC (2015), at 34-35 (discussing the types of indicators, and the utility of community input and the use of independent third party monitors.); CAO (2008), at 59; IPIECA (2012), at 14 and 18-19.

⁷⁴ IPIECA (2012), at 18.

⁷⁵ See e.g., MAC (2015) at 22 (“Report both internally and externally.”); CSR Europe (2013), at 18 (“Report internally and externally on the performance of the mechanism.”) ICMM (2009), at 21.

⁷⁶ See e.g., ICMM (2009), at 8; CAO (2008), at 3 (“Confidentiality and privacy for complainants should be honored where this is seen as important.”); MAC (2015), at 32; IPIECA (2015), at 9 and 25.

⁷⁷ See e.g., CAO (2008), at 35 (“Diverse methods that are culturally appropriate should be used, including self-identified, confidential, or anonymous procedures.”); MAC (2015), at 32 (“Ensuring that mechanisms for anonymous submittal of complaints exists (e.g. using independently-managed hotlines or through neutral and respected third parties)”; IPIECA (2015), at 25 (recommending the option of being able to have someone file a complaint on behalf of someone else in order to maintain anonymity.)



filed, nor does it provide an explanation why. If the TCMP is truly committed to protecting the identity of the Complainant, it would allow anonymous complaints to go forward.

Chapter 10 b) states that personal information will be shared on a need-to-know basis. However, it does not articulate any criteria for deciding when it is relevant and necessary to share, about who makes those decisions, or about seeking consent from the Complainant either in advance or when the information is intended to be shared. Without a clear articulation of how to decide what falls under “need-to-know” and who makes that decision, there is no guarantee against arbitrary or retaliatory decisions, particularly when there is no oversight. This puts Complainants at potential risk. Further, this violates the Complainants expectation of privacy, as he/she may have elected not to file a complaint if he/she knew that information would be shared without his/her consent. Finally, consent should not be limited to only public reporting, but to who will have access to private information more generally.

Both anonymity and prior consent for internal sharing of confidential information is particularly important in TSEZ due to the history of distrust.

The CD-OGM allows for both confidential and anonymous complaints. If a Complainant wishes to remain anonymous, he/she can have an advocate file on his/her behalf. Oversight processes are articulated in the CD-OGM to ensure that the actors respect both confidentiality and anonymity.

11. Conflicts of Interest

We are pleased that the TCMP acknowledges the issue of conflicts of interest. As discussed above, the legitimacy of a mechanism is called into question in if there are real, or even perceived, conflicts of interest.

Chapter 11 offers a very limited definition, applying it only to “employees and contractors.” This appears to limit the conflict assessment to issues of only individual interests, and ignores cases where an individual, or a group, may be acting for a group purpose or for the interest of the company. It also does not address the inherent conflict of interest in having the entire complaints process run by parties with vested interests. As discussed above, there is a default perception of conflict of interest when the party benefitting from a project is in charge of the project’s complaint-handling.⁷⁸ Indeed, one of the reasons for the need for accountability and oversight is to ensure that internal actors perform properly.⁷⁹ TSMC, MJTD, as well as the Locators and Contractors are all parties that could be potentially responsible for causing a grievance, could all have conflicts between their interests and their responsibilities. Yet this chapter does not address how to proceed when a conflict issue is raised about any members of the CRT team, or about conflict issues raised about the management of the TCMP more generally.

Chapter 11 bases the decision on whether a conflict exists on “an independent observer” reasonableness standard. However, it does not articulate who in fact has the authority to make that decision, and how they apply that standard. With no criteria and no oversight, there is no guarantee of impartial and consistent

⁷⁸ See, FN 30.

⁷⁹ See e.g., UNGP Commentary a) to Principle 31 (“Accountability for ensuring that the parties to a grievance process cannot interfere with its fair conduct is typically one important factor in building stakeholder trust”)



implementation of this standard. Rather than implementing an “independent observer” standard, the TCMP should have an independent observer make the determinations.

12. Protection from Retaliation

We welcome the claimed commitment to protect from retaliation. International good practice insists that Complainants be protected.⁸⁰ However, this chapter does not articulate any details about how issues of retaliation can be raised or how they are investigated. The chapter also fails to articulate the process when a CRT member is the party accused of retaliatory actions. This is particularly relevant in TSEZ as similar claims against CRT members have already been raised and documented. Thus there is no assurance that protections against retaliation can be conducted in an impartial manner, or that Complainants can feel safe raising the concern. These concerns must be handled by an independent, external, trusted third party.

⁸⁰ See *e.g.*, ICMM (2009), at 8; CAO (2008), at 8 (“[T]he company, contractors, or government officials must convince people that they can voice grievances and work to resolve them without retaliation.”); IPIECA (2015), at 9 and 32.