

March 13, 2015

Community-Driven Operational Level Grievance Mechanisms

Co-organized with and hosted by the Centre for Research on Multinational Corporations (SOMO) in Amsterdam.



Kyaw Win, a peaceful protester of the Thilawa Special Economic Zone, chooses to stay in his village while other families have been forced to relocate.

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This report records discussions and recommendations from an expert workshop that was convened to discuss a new model for the design and implementation of operational-level grievance mechanisms (OGMs) that is driven by community conceptions of justice and fair play.

OGMs are systems that companies set up at their operational sites to handle complaints from workers, community members, and other stakeholders. The United Nations Guiding Principles on Business and Human Rights (UNGPs) have popularized the idea of OGMs as an important way for companies to fulfill their responsibilities to respect human rights and provide for an effective remedy. Existing OGMs, however, have generally been designed and implemented by the very companies that are the targets of the complaints that the mechanisms are designed to address. These OGMs often reflect a significant power imbalance between the parties. In numerous cases, rights-holders and outside observers have criticized these mechanisms for failing to meet international standards on fair process and for providing inadequate remedies for human rights abuses.

Recent studies on implementation of OGMs show that when companies design a grievance mechanism, it is often the case that neither side truly trusts the mechanism or the other side. Corporate-designed OGMs have been shown in some cases to weaken the legal rights of victims of abuse, risk their physical safety, and subject victims to bureaucratic hurdles that feel abusive rather than cathartic. Studies also show that existing grievance mechanisms suffer from a lack of corporate buy-in. Even where companies themselves design the mechanism, they may not be sufficiently supportive of or engaged in an OGM because of a lack of trust in the community, a fear of one group within the company losing power or control to another, or a simple failure to take the process seriously due to their perception that the community lacks bargaining power.

EarthRights International seeks to create a community-driven alternative to company-developed OGMs, based on the insight that OGMs should be designed and implemented based on the expectations and intentions of the affected communities whose rights they purport to respect. Unlike in corporate-driven OGMs, community-driven OGMs are designed primarily by the affected populations themselves to meet their needs and expectations as rights-holders seeking an adequate remedy.

In order to develop the model, ERI has initiated a Community-Driven OGMs (CDOGM) project. In addition to launching a pilot community-driven OGM at a site in Myanmar, ERI is developing toolkits and guides for communities and holding a series of expert workshops to obtain feedback and new ideas. This report arises out of the second workshop in this series; the first was held in New York in October 2014.

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On March 13, 2015, EarthRights International (ERI) and the Centre for Research on Multinational Corporations (SOMO) convened an expert workshop on an emerging model for operational-level grievance mechanisms that emphasizes the primacy of community voices. Over the course of the workshop, participants contributed valuable insights to improve the model, identify key problems, and discuss the potential of community-driven OGMs to enhance human rights protection and provide adequate remedies.

THE PARTICIPANTS

Approximately twenty participants with a wide range of expertise, perspectives, and professional affiliations attended the workshop. The workshop was held under the Chatham House Rules; participants were informed that the information gathered would be used to update and enhance the model but that specific input would not be attributed to any individual.

Participants included expert practitioners, academics, civil society representatives, government officials, and private sector employees. For a full list of participants and their professional affiliations, please see Annex A.

While civil society advocates were well-represented at the workshop, it lacked both community voices and company representatives – two serious gaps for a workshop on community-driven, corporate grievance mechanisms. ERI and SOMO had reached out to a number of company representatives but were able to confirm attendance for only one corporate employee, a representative from FairPhone. With regard to the lack of community members, it was deemed impractical to include community members from project sites at this convening, the purpose of which was to gather expert advice from practitioners in order to be better positioned to advise communities as they implement their own grievance mechanisms. Separately, ERI is also seeking input from local and international NGOs and partners who have first-hand experience with OGMs. ERI also plans to conduct further interviews with past users of existing mechanisms. Additionally, ERI continues to interact directly, through trainings and workshops, with the Myanmar community that is piloting the community-driven model.

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The conveners circulated a discussion paper and the meeting report from a prior convening to participants prior to the workshop. The paper discussed the theory and context that led to development of the community-driven OGM model, as well as general concepts and examples of challenges identified through ERI's desk research and on-the-ground experience. The paper posed a number of discussion questions, with the intention that workshop participants would offer insight and expertise to fill in critical knowledge and experience gaps.

The day-long workshop included two breakout sessions, each with two groups of 8-10 participants. Each breakout session was guided by a series of questions framed in one of four broad areas:

- › Building power in communities: how to exercise leverage, define the role of the company in a community-driven mechanism, and win corporate buy-in.
- › Inclusive community design: how to get/maintain unity and consensus, and balance traditional culture with human rights norms.
- › Developing the contents of the agreement: how to identify the proper scope, features, language, and legal character of a grievance mechanism.
- › Managing external considerations: how to address funding, ensure that a mechanism includes adequate capacity-building opportunities, and choose pilot communities.

While for the most part this report is faithful to the chronological presentation of the issues discussed at the workshop, the report represents a synthesis of discussions rather than a direct recording of proceedings, and some discussions have been combined or reordered to reflect cross-cutting issues and avoid repetition.

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The discussions in the workshop addressed the ways that the CDOGM initiative can fit into the broader business and human rights context. Participants stressed, for example, the role of a grievance mechanism in company-community relationship, and noted common ground with other community-driven initiatives, such as Human Rights Impact Assessments (HRIAs). While most participants supported the CDOGM project, some did question whether it was realistic, and whether it would be able to solve important human rights problems that arise with corporate investment.

CROSS-CUTTING ISSUES

Buy-in versus leverage. Participants debated the feasibility of obtaining corporate “buy-in” to the community-driven model; some participants were of the opinion that companies would adopt community-driven grievance mechanisms only if forced, while others considered voluntary buy-in to be essential. Strategies for getting companies to buy in to the CDOGM (or, at least, to not reject it) included using “soft” language, early engagement, and selling the model to all levels of the corporate entity. In particular, if an OGM is framed as part of the broader company-community relationship, it will likely seem less threatening and will be better received.

OGMs as part of a bigger picture. Participants were eager to see the CDOGM model as one in a constellation of community-led human rights tools, such as HRIAs, community land-mapping, and community environmental impact assessments. A number of participants saw this community-driven toolkit as the vanguard of a new “ecosystem” of tools and initiatives that puts community voices at the forefront.

Relationship to formal judicial system. Many participants were uncomfortable with the idea that an OGM might “privatize” justice and remove incentives for governments to improve their judicial systems. It was suggested that a grievance mechanism should include “off-ramps” to the formal judicial system. However, it was recognized that OGMs are often most needed in contexts where the courts are not practically available and the government cannot be counted on to support remedial processes for affected communities.

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Sensitivity to community fears. Participants repeatedly underlined the reality that communities facing human rights abuses by companies often are not in a position to negotiate. They may well fear government retaliation for speaking out or seeking remedies, and it may be possible to “compromise” community members or their families by taking advantage of their poverty and either offering money or threatening to terminate people who are employed with the company. It is therefore important to prepare the ground by working within a community to build unity and strength before engaging in OGM development, and to stave off intimidation through public advocacy strategies and the development of international standards.

BUILDING POWER IN COMMUNITIES

This topic concerns issues of power and leverage, presenting the question of how communities can best prepare to achieve a strong OGM that delivers remedies and carries consequences for non-compliance. Participants disagreed considerably on how to achieve this goal, or whether it was even possible.

Building and exercising leverage. Participants suggested that communities could find leverage for the adoption of the community-driven grievance mechanisms through the following strategies:

- › Ensure that community has understood the model and coalesced around a particular vision of an OGM *before* a project with potential for abuse begins.
- › Build a strong civil society network with advocacy capacity.
- › Engage the media to highlight the human rights incidents that arise in the context of a particular company’s operations.
- › Develop evidence that legal claims against companies for human rights abuses are on the rise, in order to make the “business case” that a community-oriented conflict resolution mechanism is cost-effective.
- › Enlist a company’s home-state government through the concept of home-state responsibility.
- › Enlist the host-state government’s support (although this may not be realistic in many cases).
- › Appeal to existing standards on grievance mechanisms (such as those described in the UNGPs), and develop international standards-level operational guidance that leaves little room for corporate-driven OGMs.

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Others suggested that it would be more fruitful to seek corporate buy-in rather than using leverage to compel companies to adopt OGMs. In order to do so, communities should:

- › Adopt a collaborative (rather than completely community-driven) approach to ensure that the company does not feel that a mechanism is being imposed on it. Some participants felt that if the community were to design a mechanism unilaterally, it would be making the same mistake that the CDOGM model was designed to rectify.
- › Include more than one company in the mechanism so it does not appear that a particular target is being singled out.
- › Be careful with language – terms like “grievance” and “leverage” imply conflict and coercion. It may even be appropriate to avoid the term “community-driven,” in favor of words like “legitimacy-led” or “meaningful.”
- › Reach out through industry associations that already have some expertise on OGMs, such as the International Council for Mining and Metals, or IPIECA, the global oil and gas industry association for environmental and social issues.

In response to the suggestion that a community-driven OGM would likely only be adopted by building corporate buy-in, one participant pointed out that the Coalition of Immokalee Workers’ Fair Food Program – perhaps the leading example of a community-driven remedial mechanism – was not developed through negotiation with companies, but rather through strategic campaigning and the success of the coalition in harnessing market forces.

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Compliance. Participants agreed that one of the most difficult aspects of a successful OGM will be ensuring compliance with the outcomes of each grievance process – that is, attaching consequences when a company refuses to provide remedies or change its behavior pursuant to the OGM's determinations. As one participant put it, “agreeing to do something is one thing, agreeing to consequences is a whole different thing.” Some possibilities for compliance mechanisms that could be feasible included:

- › Agreeing up-front that disputes would be decided by a trusted arbitrator or mediated.
- › Incorporating contractually binding commitments in the agreement that constitutes the OGM, similar to the Bangladesh Accord process.
- › Providing for an appeals process that is contractually binding.
- › Providing for automatic pay-outs to claimants (or some other recipient) from a pre-funded “swear jar” in case of failures to comply.

In general, participants recognized that communities will need to exercise considerable leverage or otherwise command impressive persuasive power if they want to achieve an OGM with “teeth.” In many cases, communities may be so disempowered or intimidated that they will be unable to bargain for much. For this reason, it is important for the model to emphasize that communities must have a safe space in which to develop their positions and expectations.

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The topic of inclusive community design raises questions of building and maintaining consensus within a community, including whether consensus is possible, whether consensus is necessary, and how to ensure that all groups are represented.

A preliminary question: who is the “community”? Participants with significant community-based experience pointed out that the concept of “community” is complex. In the case of the CDOGM model, a community could encompass a group of users of the mechanism, the inhabitants of a geographical area, people with particular affiliations (i.e. tribal or political), or company employees. When a community is diverse, it may include widely diverging interests. For example, people sometimes move to a project area when they learn that a development is being planned, either to seek employment or benefits from the project or in the hope receiving relocation compensation when land is taken. People who lived in the area before the project was announced may not want to share the benefits of the OGM with them.

Because the definition of “community” is complex, participants recommended that advocates conduct extensive research on the beneficiaries before beginning to develop an OGM with them, such as research on land ownership patterns.

Consensus and unity before a harm occurs. Participants discussed the difficulty of reaching consensus on an OGM before a community has visible harms with which to contend. In other words, it is difficult for people to focus on remedial mechanisms when abuses are merely hypothetical. Yet it is precisely by anticipating problems and establishing mechanisms to deal with them in advance that communities are most likely to build a productive relationship with the company. Participants suggested that advocates working with communities that have yet to experience impacts or abuses could facilitate an inter-community exchange, presenting the evidence of harms that other communities have suffered and what the community can do to prevent similar abuses from happening to them. Communities could continue communicating through means such as in-person exchanges, a blog, or shared database. However, technological solutions could be impractical in communities with limited technical capacity.

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Civil society allies. Participants agreed that a community-driven mechanism must be owned by the community, and not by the international NGOs that are working with the community. The proper role of the NGO is to bring expertise and provide training or facilitation where requested, but not to design the mechanism or to run it. As one participant put it, international NGOs “cannot fly in all the time.” For this reason, communities will generally need a strong local civil society network on the ground to work with them on grievance mechanism design. The existence of a unified community and a strong local civil society network will also increase the community’s leverage. Some participants offered community-led HRIAs as a model for civil society collaboration. In such a project, the community puts together its own team to conduct the HRIA, but works with a “backbone organization” – possibly an international NGO – that serves as a channel for communication and information.

Recognizing a diversity of interests. Participants suggested beginning CDOGM design with a stakeholder mapping. Each party likely has its own interests and agendas. As one participant put it, you need to think about who is representing whom. With whom are you speaking with? The community? A translator? A local partner? Is your interlocutor accurately representing the community (or a segment of the community)? Another participant cautioned to be aware of the risk of a “capture of funds,” and offered an example in Congo, where corrupt local chiefs took money that was intended for the community-at-large.

Stakeholders’ interests are also relevant to the basic decision of whether to pursue an OGM at all. Some participants argued that this type of mechanism would not work for groups who wanted to actually stop a project from happening, as companies would not likely consent to implement a mechanism that has the power to halt their operations.

Participants also discussed the complexity of including “marginalized” voices in the decision-making process that leads to OGM design. Some recognized that communities generally have their own way of making decisions, and that is necessary to respect their traditions. It may be difficult for international NGOs to seek to go beyond a community’s indigenous structures, as that could be seen as overstepping or trying to influence the outcome. Local civil society organizations may be able to help facilitators investigate under-represented interests, but they too may be compromised or have “vested interests.” One participant proposed that a mediator could be hired to work with the community, and any community member would have the opportunity to approach the mediator to provide input, anonymously if necessary. Another participant suggested looking at best practice for norms of free, prior, and informed consent, and trying to learn from the methods used to establish consent in that context.

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Expectation Management. Participants recognized a tension between working with a community to plan for desired remedial outcomes and the fact that OGMs are processes rather than a substantive result. Facilitators need to manage expectations because there is no guarantee that community members will get what they want in any particular case that is considered by an OGM. One way to do this is emphasize the need for alternative options – i.e. appeal, judicial action, or outside advocacy – if the mechanism fails to deliver.

DEVELOPING THE CONTENTS OF AN AGREEMENT

Participants discussed a number of issues addressing the contents of the agreement that establishes the OGM, including the proper scope, features, language, and legal character of a grievance mechanism.

Scope and Language. Some participants felt strongly that OGMs are not appropriate for some human rights situations. For example, according to some, serious cases of violence or breaches of international criminal law should be handled by the judicial system and not a non-state mechanism. The example of Barrick Gold's Remedial Framework in Papua New Guinea was cited as a negative example in this regard. However, others believed that categorical exclusion of abuses was not helpful; while OGMs ideally should not be used to address grave abuses, grievance mechanisms may be “better than nothing” in contexts where the judicial system cannot be relied on to provide substantive justice. Otherwise, as one participant noted, “perversely, the people with the most serious harm, get nothing.”

Some participants suggested that as a test for determining what kinds of harms are appropriate to include in an OGM, designers should compare the remedies available with those that could be afforded in a court, and with the range of remedies described in the United Nations Guiding Principles on the Right to a Remedy (for example, apologies, guarantees of non-repetition, preventative measures, and some kind of compensation). For example, one participant questioned whether guarantees of non-repetition or deterrence are really possible without criminal sanctions, a trial, and possible jail time. Others agreed that prevention measures are missing in an OGM framework; if prevention is important for a particular type of abuse, therefore, it may not be an appropriate candidate for inclusion in an OGM.

The flexibility of the OGM and the remedies it may provide was an important topic of concern for participants. Some participants believed that in order to bind companies to provide effective remedies, the language of an OGM agreement should be quite precise. Others suggested that in order to preserve flexibility, the OGM agreement should focus on process and principle and provide for periodic reviews, rather than prescribing outcomes that could require revisiting over time.

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Privatizing Remedies. A major concern raised in this breakout session was that the use of non-judicial mechanisms may result in the privatization of justice, undermining momentum that might otherwise exist to improve judicial functions in countries where they are weak. This is especially true in situations of grave human rights abuse. The risk may be of “privatizing not just remedy, but also privatizing investigation.” Other participants questioned whether OGMs were really unique in affording a private remedy. Alternative Dispute Resolution (ADR) is common, even in developed countries. The gravity of the issue may be the dividing line, noted one participant: parties often resort to ADR to resolve less serious issues than judicial process. Similarly, privatization of investigations may not be unusual; one participant offered the example of a large mining community that created a “mine investigation team” to look into allegations of misconduct or injury, which could then feed into judicial processes if appropriate

Some participants noted that it is neither uncommon nor necessarily negative to blur the line between governmental and non-governmental functions for enforcing rights in the extractive context; for example, one participant described a mine at which senior corporate officers are sworn in as judicial police officers with the power to arrest and interview. Clearly, giving such power solely to the company may result in corruption and cover-ups. However, if this function were allocated instead to a group of non-governmental officers including communities, under protocols designed and approved by the communities, it might be possible to improve the delivery of justice in contexts where the judicial system is weak. This would also require an enormous amount of capacity building.

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In general, participants appeared to agree that the imperative to avoid undermining judicial systems needs to be balanced against the urgent necessity of providing remedies – even sub-optimal non-judicial remedies – in grave cases. Some believed that a well-designed OGM could in fact promote an efficient judiciary by providing an alternative means of resolving less serious cases, or a means of dealing with human rights issues while the judiciary is being improved. The important lesson is that the OGM cannot be seen as a replacement for a functioning court system. In order to strike this balance, participants suggested a number of possibilities:

- › Parties could agree to use an OGM in order to resolve urgent situations but also publicly signal that the judiciary would have been the most appropriate route.
- › The OGM could have formalized links to the judicial system (i.e. through an appeals or exhaustion process, or an automated referral service if the severity of the case surpasses a pre-designated threshold). However, one participant did point out that where the judicial system is not a functional avenue for a remedy, the threat of ending up in court would not likely serve to ensure that the OGM provides effective remedies. Other participants noted that funding could become a serious problem for an OGM that links to the judicial system because companies would object to putting up money that might eventually be used to sue themselves.

The discussion also addressed situations in which not only is the judiciary deficient, but the government actively represses community activists. In such contexts, participants recognized that establishing a robust OGM would be all the more difficult in light of the need to target both the company and the government for advocacy.

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This set of topics brings together a number of external, practical considerations that will affect the design and long-term survivability of any OGM.

Seats at the Table. Participants generally felt that a variety of stakeholders would often need to be part of the process of designing and learning to run an OGM, depending on the context. For example, the involvement of local civil society organizations may help communities to feel supported and encourage community ownership. A number of participants suggested giving legal training to people in the community in order to “train the trainers.” Others stressed that lawyers should not be involved in capacity-building and training processes in order to focus on “transparency, fairness and understanding, rather than early antagonism.” One participant added that youth leadership is important, and should be a point of focus. Participants discussed other useful stakeholders to have on the community’s side. One participant noted that local eminent persons in the community can not only provide leadership, but also open doors and provide cover if needed. Other participants noted that international civil society partners could play an important role, as well as trade unions and other home country labor institutions such as Works Councils.

In some circumstances, regional authorities should at least be apprised of the process; otherwise, they may choose to oppose it and create obstacles. (This may be especially true of OGMs that will address land disputes, due to the central role of the government in land allocation and administration.) However, given how frequently the relationship between community and government is strained and problematic, participants stressed that the community should decide exactly what role the government should have, up to and including complete exclusion from the process. With regard to company involvement, some participants said that the corporate perspective could be useful. And if the community did not want to face the company itself, they could get this perspective from a local chamber of commerce or industry group.

Overall, participants converged on the need for communities to have a “safe space” within which to develop their own ideas and expectations before including other stakeholders – especially stakeholders that may be antagonistic such as companies or government representatives. One participant suggested the creation of an advisory body that can include a number of different stakeholders, leaders, and/or authorities.

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Piloting the OGM. A number of participants suggested the following criteria for piloting the CDOGM model:

- › An EU or U.S. company that has a high profile and public ethical commitments. Such a company could be subject to consumer and civil society pressure, and high-level management might be persuaded to engage.
- › A country where the government would not be opposed.
- › A well-defined and well-organized community that does not already have a negative relationship with the company.

Participants generally felt that a CDOGM would be most successful at handling future grievances rather than legacy problems. One participant said, “a blank slate seems easier than old conflict.” Other participants felt that the forward-looking focus was more compatible with a rights-based approach because there would be time to conduct risk assessments and community protocols. One participant suggested that funding would be easier with a forward-looking mechanism, because it could be framed as a “development” project. Additionally, as another participant noted, “you need trust where you don’t have leverage,” and trust is difficult in backward-looking cases because tension already exists. Participants suggested emphasizing mutual benefits as well as impacts, in order to facilitate this trust.

Funding. One of the biggest challenges in this model is providing the resources necessary for a grievance mechanism to run well and provide effective and adequate remedies. The company may have deep pockets and is the party whose actions necessitate a remedial mechanism in the first place, so it seems like the obvious source of funding. But if the company holds the purse strings, how can the OGM be objective and reliable?

Many participants agreed that “you can’t escape from the need for corporate funding.” Discussion focused on how to ensure that a corporate-funded mechanism is adequately capitalized and independent. One participant suggested that financial institutions could require corporations to commit up-front to fund an OGM and the remedies it might require as a condition of funding, just as they require independent assessments as part of financial risk management.

Host or home governments could also require OGM funding as a condition of permitting or licensing. For example, all corporations operating in a given country could be required to contribute to a global independent fund for community dispute settlement; contributions could be determined based on expected profits or some other objective criterion. This arrangement would allow companies to fund a mechanism that would likely operate to its benefit in the long run without giving the appearance of “pleading guilty” to future crimes.

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There was discussion on how an independent fund could be managed in order to maintain the integrity of the mechanism. One participant referred to the Coalition of Immokalee Workers and the Fair Food Standards Program and suggested that as long as funding is guaranteed – either by contract or law – then the mechanism will not come under pressure to make determinations that the company will agree with. Participants stressed that the communities themselves must be able to govern the fund in order to avoid capture by the company or government elites; they should be given assistance to manage it according to international standards of transparency and inclusiveness. One participant raised the example of Arcelor Mittal, which committed to pay \$3 million each year into a community development fund in Liberia for projects that were to be determined by community priorities. In practice, however, the communities did not have control over how the money was spent, and as a result most of the funds were lost to corruption and development projects that bore no relation to the needs of the affected communities. The company was able to claim credit for an innovative and socially responsible initiative, and corrupt officials and contractors were able to embezzle millions of dollars.

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Participants also addressed the use of legal waivers in grievance mechanisms. During the previous convening, participants had been sharply divided on the propriety of allowing companies to require OGM participants to absolve them of civil liability in exchange for accepting a non-judicial remedy. This question has also been the subject of much debate in the business and human rights community in general.

Reactions to the use of civil liability waivers varied depending on the context. Some factors tended to make participants uncomfortable with the waivers, namely:

- › Particularly severe, violent abuses
- › An OGM imposed by the company in the absence of a functioning judiciary
- › Extreme power imbalance, exacerbated by the lack of independent legal advice or adequate translation
- › Lack of enforceability of the non-judicial remedial agreements
- › Confidentiality of the non-judicial remedial agreements

Some participants were at least willing to consider that waivers might be acceptable where the community has designed or at least invited the OGM, has access to a functioning judicial alternative, and is supported by adequate legal and technical assistance. In such a case, an agreement not to sue the company could be akin to an enforceable judicial settlement. However, other participants felt it was never acceptable to expect victims of human rights abuses to waive their procedural rights in exchange for a private remedy, outside the judicial context. One participant, for example, noted that civil liability waivers are not allowed in some countries under certain circumstances. For example, in Latin America, constitutional rights are typically not waivable.

Another participant tried to put herself in the shoes of the company. She noted that companies may care more about finality than the value of any single remedy. She questioned whether it is fair for a company to have to re-litigate a case after settling it through a non-judicial grievance mechanism; this would seem to be a recipe for double compensation. Another participant suggested that any amount received through an OGM could be offset from an eventual court decision.

Participants concluded that while they could not come to an agreement on waivers, communities themselves might be able to develop their own position as part of the design process. Some participants also called for a framework on when waivers may be appropriate.

Workshop Participants

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WAIVERS OF RIGHTS

ANNEX A

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