

Community-Driven Operational Grievance Mechanisms

DISCUSSION PAPER FOR A NEW MODEL



Background

EarthRights International (ERI), with the cooperation of SOMO, is developing a model for operational-level grievance mechanisms to address corporate human rights abuses that will be designed and driven primarily by communities. This paper is an introduction to the concept of the community-driven grievance mechanism and is intended to serve as the basis for expert discussion and input.

BACKGROUND

PROPOSAL

ESSENTIAL PHASES

PROJECT-BASED QUESTIONS

DESIGN & IMPLEMENTATION
QUESTIONS

ENDNOTES

Operational-level grievance mechanisms (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 remedy human rights violations, and include a series of criteria to ensure the effectiveness of such mechanisms.¹ Generally, OGMs are designed to respond to complaints through dialogue, and in addition to providing remedies to affected communities, they may serve two important functions: to assist companies in learning about the negative impacts of their operations, and to prevent escalation by providing a way for companies to provide remedies early and directly. Some new project-level OGMs operate primarily as a means to provide remedies for past human rights abuses. This latter form can have advantages over other systems (such as the formal judicial process), as OGMs may be more accessible to victims, provide a forum for empowerment, improve company-community relationships, and enable swift distribution of remedies.

Existing OGMs have generally been designed and implemented by the very companies that are the targets of the complaints that the mechanisms are designed to address. In numerous cases, rights-holders and outside observers have critiqued these mechanisms for failing to meet international standards on fair process – including the effectiveness criteria such as legitimacy and predictability that are listed in the UNGPs² – and for falling short when it comes to providing meaningful remedies.³ Recent studies on implementation of OGMs show that some corporate-designed grievance mechanisms are flawed in ways that have significant implications for communities. In particular, studies have noted grievance mechanisms are often weak on engagement and dialogue with users and other stakeholders, and that they are not “rights-compatible” – the UNGPs effectiveness criterion⁴ that measures grievance mechanisms against the consistency of their process and outcome with international human rights principles.⁵

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

PAGE 2

COMMUNITY-DRIVEN
OGM DISCUSSION PAPER

Background

BACKGROUND

PROPOSAL

ESSENTIAL PHASES

PROJECT-BASED QUESTIONS

DESIGN & IMPLEMENTATION
QUESTIONS

ENDNOTES

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.⁶ A lack of expertise or experience can also result in deficient mechanisms: even if a company wishes to create an adequate OGM, its employees may not know how to design it.⁷ While some companies have reported using external experts or stakeholders to design a grievance mechanism, they rarely report consulting with the intended users of the mechanism.⁸

Partly as a result of these shortcomings, users often report dissatisfaction with the mechanisms as well. OGMs have sometimes been seen as a ploy to buy legal immunity cheaply, rather than as a serious attempt to provide adequate and effective remedies for the injuries caused by the failure to respect human rights. OGMs are often rolled out in remote regions where oversight is difficult and the potential for abuses by multinational companies is high. Because inadequate and coercive OGMs can re-traumatize victims and cause them to lose access to judicial remedies, participation can actually leave victims worse off than they were prior to participating in the mechanism.

Proposal

PROJECT BACKGROUND

PROPOSAL

ESSENTIAL PHASES

PROJECT-BASED QUESTIONS

DESIGN & IMPLEMENTATION
QUESTIONS

ENDNOTES

This project proposes to create a community-driven alternative to company-developed OGMs: instead of the corporate model, OGMs should be designed and implemented based on the expectations and intentions of the affected communities whose rights they purport to respect. We propose to develop a model for OGMs that are designed primarily by the affected populations themselves to meet their needs and expectations as rights-holders seeking an adequate remedy. This approach will ensure that OGMs provide adequate, appropriate remedies for human rights abuses, through a process that is considered legitimate by the affected communities and complies with international human rights law. The scope of the OGM, the processes by which it functions, the people who staff it, and the outcomes of individual grievance complaints will all be dictated by the communities themselves, based on international human rights principles and their own traditional conceptions of fair process and just outcomes.

Phase I of the project has already begun with the development of Foundational Principles and Practice Points – principled and practical guidelines for OGM design and implementation that are guided by a focus on the right to a remedy and respect for autonomy, based on rights articulated by international human rights instruments, the UNGPs, and the principle of free, prior, and informed consent, and informed by lessons gleaned from studies, evaluations, and guides on the design of OGMs. The Foundational Principles and Practice Points will serve as the starting point for conversations with the communities that will ultimately design and seek to implement operational-level grievance mechanisms.

ERI is also developing a procedural and strategic toolkit, created with guidance from experts in the field and from successful models of community-driven design in other contexts. The toolkit's purpose is to offer examples and models to communities that may assist them in developing a design and implementation strategy for their own OGMs.

In Phase II of the project, ERI will work with implementing partners and communities in Myanmar, Peru, and/or Colombia to develop pilot community-driven OGMs. We will collaborate with the implementing communities to design OGMs that reflect international standards on the right to a remedy and their own conceptions of justice. We will also assist them to engage with the relevant company or companies to achieve the implementation of an actual grievance mechanism that is based on the community's design and preferences.

PAGE 4

COMMUNITY-DRIVEN
OGM DISCUSSION PAPER

Essential Phases

PROJECT BACKGROUND

PROPOSAL

ESSENTIAL PHASES

PROJECT-BASED QUESTIONS

DESIGN & IMPLEMENTATION QUESTIONS

ENDNOTES

While the precise nature of an OGM will differ based on the implementing community and the operating context, we believe that the key aspects of design, implementation, and perpetuation of community-driven mechanisms will fall into three basic categories.

1. THE SUBSTANCE OF THE REMEDY

Each implementing community will need to address a number of issues in advance, which will frame the OGM as a whole. First, they will define the intended scope of the mechanism by identifying harms and impacts that they have suffered or that they foresee as a result of corporate activities that affect them, and deciding which of these impacts is suitable for a non-judicial grievance process. Similarly, they will discuss the actual content of the remedies that they expect to be available through the mechanism, taking into consideration basic principles of the internationally recognized right to a remedy, their own conceptions of justice and fairness, and their realistic expectations of the company. Remedies may include but also may go beyond financial compensation.

2. PROCEDURE FOR EVALUATING CASES AND OBTAINING REMEDY

Corporate operational-level grievance mechanisms typically include a series of procedural steps, starting with the initial communication of a grievance to the mechanism and proceeding through initial determination, investigation and assessment, offer of remedies, implementation of the remedy, and the possibility of appeal. While these steps are in and of themselves neither good nor bad, they can be profoundly disempowering to affected persons and communities if they are designed in such a way as to take power away from rights-holders and put it in the hands of third-party experts or corporate representatives. Procedure can also violate the human rights of claimants if it leaves them without recourse or at an even steeper disadvantage should the company refuse to deliver the benefits and procedural guarantees promised by the mechanism. For example, if the mechanisms fails to protect the identity of a claimant, she could be subject to abuse as a result of the disclosure of her story. Alternatively, if the company declines to comply with the terms of a grievance determination after a lengthy process, the claimant might lose his ability to seek judicial recourse because statutes of limitations have lapsed or key evidence has disappeared.

In the community-driven OGM model, communities will have access to flow charts and detailed descriptions of the procedural

Essential Phases

PROJECT BACKGROUND

PROPOSAL

 **ESSENTIAL PHASES**

PROJECT-BASED QUESTIONS

DESIGN & IMPLEMENTATION
QUESTIONS

ENDNOTES

steps that constitute typical grievance mechanisms, but they will not be tied to any one conception of how human rights-related grievances should be addressed. Rather, they will use these materials as a baseline for discussing and designing procedures that reflect their own conceptions of fair process and also meet international standards on the right to a remedy. For example, some communities may have the capacity to understand and undertake environmental monitoring and assessment, and they may insist on not outsourcing that function to third-party assessors. Some communities may not accept the results of an appeals process and may prefer instead a conciliation process that seeks the consensus of key stakeholders. In some situations, joint investigations may be preferable, while in others evaluation by impartial experts could be more appropriate.

Communities will also have the opportunity to consider options for increasing their leverage and maintaining their legal rights in order to even out the imbalance of power between themselves and the company. They will discuss whether and under what circumstances claimants might sign legal liability waivers in return for accepting benefits through the OGM. They will consider how to protect themselves from potential non-compliance or other bad-faith conduct by the company. And they will delineate procedures for maintaining confidentiality of the claimants' identities and stories, where necessary, at all stages of the process.

3. PERPETUATION OF THE MECHANISM THROUGH MONITORING AND COMMUNITY TRAINING

True community ownership and long-term buy-in for the OGM can only occur if the affected communities continuously monitor and improve the process and spread awareness and knowledge about the mechanism across diverse constituencies. Communities will therefore discuss and design systems for oversight and training. They will set out their expectations for supervision of the OGM process, the preparation of reports on how cases are handled (on an individual basis, to the extent consistent with claimant security and confidentiality, and also on a collective or aggregated basis in order to identify trends), and the presentation of those reports to the community as a whole. They will also designate individuals or bodies to ensure that this information is collected, analyzed, and used to develop recommendations for improving the mechanism that can be fed back into the OGM and lead to actual reform.

Essential Phases

The community will also design a plan for regular and consistent community outreach and training – to be conducted by community members themselves – to ensure that a broad cross-section of the community knows about the mechanism, has the ability contribute information about how it functions, and participates in the process of improving and reforming it.

PROJECT BACKGROUND

PROPOSAL

 **ESSENTIAL PHASES**

PROJECT-BASED QUESTIONS

DESIGN & IMPLEMENTATION
QUESTIONS

ENDNOTES

PAGE 7

COMMUNITY-DRIVEN
OGM DISCUSSION PAPER

Project-Based Questions

PROJECT BACKGROUND

PROPOSAL

ESSENTIAL PHASES

PROJECT-BASED QUESTIONS

DESIGN & IMPLEMENTATION
QUESTIONS

ENDNOTES

ERI has identified potential pilot communities based on broad conversations with community partners and community-based civil society organizations in Peru, Colombia, and Myanmar. We expect to conduct broad-based community consultations with each pilot community in order to design the process and identify key individuals and bodies for designing actual community-based OGMs. To aid this process, we seek the advice of experts who have designed grievance mechanisms or otherwise led community-driven processes on a number of general questions that bear on the overall success of the project:

- › How should the consultation process be designed and sequenced?
- › What considerations should keep in mind as we select pilot communities, in addition to the community's own interest and readiness to participate in a pilot exercise?
- › What sorts of impacts or rights violations might be most amenable to redress through a pilot community-driven OGM?
- › By what criteria should we evaluate the companies that will ultimately be asked to accept and jointly implement the OGM?
- › Similarly, what strategies or arguments should we keep in mind as we begin outreach to the relevant companies in order to increase community leverage and/or increase the likelihood that the companies will participate in the pilot, even though they have not been in the driver's seat for the design of the OGM itself?
- › At what stage should the company be approached and consulted regarding the OGM?
- › What other top-level issues are we missing?

Design & Implementation Questions

PROJECT BACKGROUND

PROPOSAL

ESSENTIAL PHASES

PROJECT-BASED QUESTIONS

DESIGN & IMPLEMENTATION QUESTIONS

ENDNOTES

In order to best advise the communities with which we intend to cooperate to pilot the community-driven OGM model, we also seek input on a number of aspects of the design and implementation of the mechanism. In particular, we seek advice that will help secure remedies that are strong, rights-consistent, binding, and community-appropriate, through a procedure that preserves communities' legal rights and helps to build their power.

- › What provisions can be built into the mechanism that will make both procedure and outcome legally binding on the company, and how can complainants be empowered to use those legally binding provisions to protect themselves and ensure compliance?
- › How should an OGM be financed, in order to ensure that it remains independent of the company whose activities it addresses?
- › Where does the funding and technical support for community monitoring, supervision, and training come from, especially in situations where the only local source of expertise and finance is the company itself?
- › What is the proper relationship between the OGM and the formal judicial system, and how can the OGM be designed so as to facilitate – or at the very least, not undermine – access to legal process if necessary?
- › How is it possible to balance the need to respect and protect the confidentiality of individual claimants with the need for communities to have transparency and access to the process in order to conduct oversight and monitoring?
- › How can a community ensure the continuity of the OGM when the company sells or concludes its operations in the area?
- › If we accept that one of the goals of the community-driven OGM is to build community power to understand and influence the ways in which corporate activities affect them, then what is the proper role of third-party experts or mediators in the OGM process? Should those roles change over time?

PAGE 9

COMMUNITY-DRIVEN
OGM DISCUSSION PAPER

Endnotes

PROJECT BACKGROUND

PROPOSAL

ESSENTIAL PHASES

PROJECT-BASED QUESTIONS

DESIGN & IMPLEMENTATION
QUESTIONS

 ENDNOTES

- 1 Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework, HR/PUB/11/04 (New York and Geneva: United Nations, 2011), available at http://shiftproject.org/sites/default/files/GuidingPrinciplesBusinessHR_EN.pdf. The third pillar discusses the right to remedy, and specifically principles 28-31 deal with non-state based grievance mechanisms.
- 2 Id. at 33. UNGPs 31(a) and (c).
- 3 For example, civil society organization MiningWatch Canada sent a number of letters to the Office of the High Commissioner for Human Rights (OHCHR) regarding Barrick Gold’s Remedial Framework put in place in response to the rapes of villagers by mining security guards at the Porgera Joint Venture mine in Papua New Guinea. In addition to being an inadequate remedy for the gravity of the harm, users were required to sign a waiver which would bar any future civil actions or claims for compensation. The last letter included signatures from 77 civil society organizations. See MiningWatch Canada, Letter to UN High Commissioner Dr. Navanethem Pillay, Re: Response to Barrick’s posting of April 16, 2013 and letter from concerned organizations and individuals (May 14, 2013), available at http://www.miningwatch.ca/sites/www.miningwatch.ca/files/ltr_to_unhchr_may_14_2013_re_porgera.pdf; see also MiningWatch Canada, Letter to UN High Commissioner Dr. Navanethem Pillay, Re: Abuse by Barrick Gold of a non-judicial grievance mechanism for victims of rape (March 19, 2013), available at, http://www.miningwatch.ca/files/letter_to_unhchr_on_porgera_2013-03-19.pdf; MiningWatch Canada, Letter to UN High Commissioner Dr. Navanethem Pillay, Re: Response to Barrick Gold’s letter of March 22, 2013: Barrick should not require legal waivers of rape victims in return for remedy packages provided through a flawed and evolving non-judicial mechanism (April 2, 2013), available at http://www.miningwatch.ca/files/letter_to_un_high_commissioner_april_2_2013.pdf.
- 4 Supra, note 1. UNGP 31(f).
- 5 CSR Europe, in its assessment of a number of companies’ Operational Grievance Mechanisms, created a Management of Complaints Assessment (MoC-A) tool, basing performance off CSR’s interpretation of the eight effectiveness criteria. CSR gave its lowest score, by far, to performance on engagement and dialogue. Rights-compatibility followed as second lowest. CSR noted that most companies faced gaps in providing facilitation and mediation, finding a balance between national legislation and international norms on human rights, and establishing a system of feedback collection. See CSR Europe, Assessing the Effectiveness of Company Grievance Mechanisms; CSR Europe’s Management of Complaints Assessment (MOC-A) Results (December 2013) at 30, available at <http://www.csreurope.org/sites/default/files/Assessing%20the%20effectiveness%20of%20Company%20Grievance%20Mechanisms%20-%20CSR%20Europe%20%282013%29.pdf>. Similarly, the Ludwig Boltzmann Institute published a study assessing the strengths and weaknesses of five different complaints mechanisms. In their findings, they identified key challenges and weaknesses, including establishing and maintaining trust by the stakeholders, ensuring equity during the process, and lack of consequences for non-compliance. See Barbara Linder, Karin Lukas, & Astrid Steinkellner, The Right to Remedy: Extrajudicial Complaint Mechanisms for Resolving Conflicts of Interest between Business Actors and Those Affected by their Operations (Ludwig Boltzmann Institute of Human Rights, April 2013), available at http://bim.lbg.ac.at/files/sites/bim/Right%20to%20Remedy_Extrajudicial%20Complaint%20Mechanisms_2013_1.pdf.

PAGE 10

COMMUNITY-DRIVEN
OGM DISCUSSION PAPER

Endnotes

PROJECT BACKGROUND

PROPOSAL

ESSENTIAL PHASES

PROJECT-BASED QUESTIONS

DESIGN & IMPLEMENTATION
QUESTIONS

 ENDNOTES

- 6 The International Institute for Environment and Development has detailed the perceived disadvantages of grievance mechanisms from the company perspective, which included “perceived loss of control over the dispute resolution process by one internal function of the company over the other,” as well as the risk of encouraging vexatious claims. See International Institute for Environment and Development, *Dispute or dialogue? Community perspectives on company-led grievance mechanisms* (2013) at 31, available at <http://pubs.iied.org/pdfs/16529IIED.pdf>. The International Council on Mining and Metals also discusses how companies may not trust the intentions of the user or the reality of their complaints, and the challenge of releasing control of the mechanism through an appeals process. See International Council on Mining & Metals, *Human Rights in the Mining & Metals Sector: Handling and Resolving Local Level Concerns & Grievances* (October 2009) at 3 and 13, available at <https://www.icmm.com/document/691>. In looking at the Anglo American mining company’s Socio-Economic Assessment Toolbox (SEAT), which incorporates a grievance mechanism, the Ludwig Boltzmann Institute concludes “that developing a policy or procedure on paper is relatively simple, compared to what it takes implementing it with both internal and external buy-in.” See *supra*, note 5 at 58.
- 7 ERI interview with expert practitioner.
- 8 According to the interviews conducted by CSR Europe, most companies rely on internal expertise when developing OGMs, and only one third hired external experts or stakeholders, though the majority did consult externally. Notably, less consultation takes place with the users of the mechanism. See *supra*, note 5, at 32. The International Finance Corporation’s Compliance Advisor Ombudsman (CAO) also noted that many companies use “ad hoc or exclusively internal processes” which lead to poor results. See forward to CAO Guide, CAO, *Advisory Note, A Guide to Designing and Implementing Grievance Mechanisms for Development Projects* (2008), available at <http://www.cao-ombudsman.org/howwework/advisor/documents/implemgrieveng.pdf>.