



AFRICA CENTRE FOR DISPUTE SETTLEMENT

At the University of Stellenbosch Business School

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DISPUTE SETTLEMENT

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ACCESS TO REMEDY THROUGH CONSENSUAL PROCESSES

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A growing number of non-judicial mechanisms purport to address the grievances of individuals and communities whose human rights may be adversely impacted by a business enterprise. Whether and how such mechanisms can provide effective remedy is a topic of substantial concern. The discussion becomes particularly pointed in the many contexts in which there is no meaningful access to judicial remedy, and therefore effective remedy depends fundamentally on the consent of the company to both the process and the outcome of a non-judicial mechanism. This discussion document intends to help advance this debate in constructive ways. It first draws on a variety of formal and informal inputs to explore common themes and questions that frequently arise in discussions of remedy for negative human rights impacts through non-judicial mechanisms, seeking to illustrate the logical relationships among them and to lay the ground for identifying a way forward in a complex debate. It then briefly explores two challenges that consent-based mechanisms face that appear fundamental: their interdependence with adjudicative mechanisms, and the necessity that stakeholders have confidence in both their processes and their outcomes on a sustainable basis. Moving from descriptive to prescriptive mode, the discussion document recommends exploration of the possible value of guidance on the evaluation of consent-based remedy systems and outcomes. It suggests that more structured scrutiny of systems design, systems outcomes and systems governance may be one way to increase accountability for effective remedy within non-judicial mechanisms, while respecting the need for stakeholders to sustainably implement mechanisms which they agree are appropriate to and legitimate within their particular context.

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Context of this discussion document

This discussion document explores how outcomes achieved through fundamentally consensual grievance mechanisms in the context of company-community conflicts can be considered to achieve effective remedy as required by the Guiding Principles. It organizes and synthesizes perspectives from a variety of sources: commentary developed as part of or in response to the drafting and promulgation of the Guiding Principles; roundtables and discussions sponsored by the UNWG in Toronto and Medellin and their associated reports; as well as other expert analysis and input including an exploratory report, *Company-community conflicts: The effectiveness of outcomes of non-judicial conflict resolution* prepared by the Center for Transboundary Legal Development at Tilburg University for this effort. As an intermediate output of a largely ad hoc process, this discussion document neither claims to be comprehensive nor aspires to be authoritative in the views it presents. Its purpose is to provide a platform for much broader deliberation on the issue of remedy through non-judicial processes that have at the foundation of the remedies they provide the consent of the parties, distinguishing such processes from those that have at their foundation the decision of an authoritative third party adjudicator.

Overview of this discussion paper

The principles of effective remedy for harms that impact human rights are from one perspective straight-forward and relatively uncontroversial; they are treated in congruent ways across a broad range of UN as well as regional and national rights instruments. Yet these general principles must be applied to the full range of contexts and issues where the acts or omissions of transnational corporations and other business enterprises impact the rights of others. To be consistent with the Guiding Principles and to achieve practical, positive impact they must be addressed in ways that encourage and enable the active participation of rights holders in identifying problems and solutions, even where there are substantial power imbalances among the parties. They must often be addressed in contexts where access to judicial remedy remains largely aspirational and many are gravely concerned by perceived impunity of corporations for rights violations.

While agreeing on the importance of special focus on effective remedy through consent-based processes, commentators therefore often find it difficult – and perhaps not helpful – to segregate questions of the effectiveness of remedies achieved in particular cases from related concerns. These include how parties might ensure compliance with international human rights and other applicable standards in the absence of judicial remedies, as well as how grievance mechanisms might better

contribute to preventing rights violations in the first place. Section 3 of this discussion document summarizes and synthesizes a number of themes and questions that frequently arise in discussions of remedy for negative human rights impacts through consent-based mechanisms.

What emerges from this discussion most strongly are two propositions. First, the question of effective remedy through non-judicial grievance mechanisms can likely not be divorced from broader discussions of access to justice. This may suggest that, where aggrieved parties do not have effective access to judicial remedies, stakeholders may find it prudent to negotiate the creation of fair, independent and enforceable adjudicatory mechanisms acceptable to all. This may facilitate the opening of space for the success of mechanisms that promote agreed solutions through dialogue.

Second, effective remedy in the context of consent-based mechanisms requires a robust system monitored and evaluated on an ongoing basis for its perceived fairness and trustworthiness, its attentiveness to the parties' informed consent, its ability to deliver on agreements reached and promises made, alignment of the actual impact of remedies with the intentions behind them, the fit of the system within broader social, political and conflict dynamics around it, and its adaptation to strengths and gaps in extant judicial and non-judicial dispute resolution mechanisms and capabilities. Such a perspective strongly emphasizes co-governance by business enterprises and other institutions with affected stakeholders of the systems and processes by which they implement their responsibilities under the Guiding Principles to provide remedies for any harm done. For remedy to be effective, greater attention may be required to parties' informed consent to the systems within which remedial agreements are crafted, concluded, implemented, monitored and evaluated.

Section 4 of this discussion document takes these factors into account to explore the possible value of principles for the design and evaluation of consent-based remedy systems and outcomes. It suggests that working from the basis of agreed principles is one way for parties to balance, on the one hand, the need for rigorous standards in which stakeholders can have confidence, and on the other hand, the need for stakeholders to sustainably implement mechanisms which they agree are appropriate to and legitimate within their particular contexts.

Section 5 outlines what such principles might usefully address as a basis for further discussion and possible development by parties to a particular mechanism as it is designed, implemented and evaluated. It emphasizes systems design, systems outcomes and systems governance attentive to and legitimate within its local context and agreed to by affected stakeholders.

Survey of issues and concerns vis-à-vis non-judicial access to remedy

Common themes and questions frequently arise in discussions of remedy for negative human rights impacts through non-judicial mechanisms. The propositions put forward here include a range of key points raised by stakeholders in a variety of interactions for this project and related projects, including those described in Section 1, above. The inclusion of these propositions in this discussion document

does not imply that these are the only or the preferred perspectives on these issues. Rather, the attempt is to provide a brief overview of topics which seem to be salient to effective remedy. By exploring them here, this section seeks to organize some quite wide-ranging perspectives so as to illustrate the logical relationships among them and lay the ground for identifying a way forward in a complex debate. Familiarity with the Guiding Principles and its official commentary is assumed.

The human right to effective remedy of human rights violations is recognized in the Guiding Principles.

Non-judicial grievance mechanisms, both State-based and non-State-based, should be under Principle 31(f) “rights compatible: ensuring that outcomes and remedies accord with internationally recognized human rights.” The “right to remedy” under international human rights law is a basic principle widely understood and described in common terms in many UN, regional and national rights instruments. It broadly speaking includes (as appropriate) prevention of imminent harm, cessation of ongoing harm, compensation and other remedial measures, as well as preventive measures against future harms. It includes a criterion of timeliness, in particular prompt remedy of grave harms. And in many contexts it includes the concept of “satisfaction,” which may include punishment of wrongdoers, apologies, transparency of information that sets victims’ minds at ease, or other relief for aggrieved parties. This isn’t to say that a particular non-judicial mechanism can or should meet all of the foregoing – for example, punishment of wrongdoers – in its own outcomes. The point is rather that this human right to effective remedy of human rights violations is part of the Guiding Principles. It may most effectively be achieved through a combination of compatible judicial and non-judicial mechanisms.

Within the context of a non-judicial grievance mechanism, the fundamental basis for applying the elements of effective remedy will normally be informed consent.

Whereas the basic principles of remedy are clear and to some extent common sense, their application to the remediation of a particular human rights harm or grievance requires a host of context-specific considerations to be taken into account. Within a judicial or other State-based decision-making process, this is the role of the administrative or judicial authority, often subject to further appeal or review at the behest of a dissatisfied party. Under Guiding Principle 31(h), however, non-State, non-judicial grievance mechanisms should focus on reaching agreed solutions through dialogue. In practice, this is also a dominant focus of State-based, non-judicial mechanisms that engage within a particular local context, although there are also many examples of hybrid systems. Consent of a party to a remedy agreed to through such dialogue is subject to Guiding Principle 31(d), which states that all mechanisms should be “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.”

Mechanisms based on consent and their outcomes are typically evaluated by direct comparison with State judicial mechanisms.

While stating that access to remedy is enhanced by complementary non-judicial mechanisms, the commentary to Guiding Principle 26 readily acknowledges that “Effective judicial mechanisms are at the core of ensuring access to remedy.” Indeed, most of the literature on the value of non-judicial mechanisms uses judicial mechanisms as the point of departure. Are non-judicial mechanisms faster or more efficient? Do they result in higher party satisfaction or greater commitment to following through on agreements? Do they allow for more transformative solutions?

Are they equally good at following the law and good practice? Conceptually, the evaluation of non-judicial mechanisms and their outcomes can therefore seem quite straight forward: do parties prefer consent-based mechanisms and their outcomes to the judicial alternative, and why or why not? Such comparative approaches can account for the subjective intents, interests and perceptions of parties in pursuing remedies in the first place, which are otherwise very difficult to control for in evaluation.

Yet the need for effective non-judicial mechanisms is often most compelling in the absence of effective State judicial mechanisms. The reality is that in many contexts judicial remedy is seen as an unrealistic or impractical option for many affected stakeholders. Limitations on the jurisdiction of national tribunals for actions abroad, as well as on piercing the corporate veil in ways that would hold headquarters organizations accountable for the actions of their foreign subsidiaries, limit the reach of State judicial mechanisms in companies' home countries. Weak rule of law in the country of operation, lack of adequate legal representation for communities, lack of local laws or standards, or significant barriers related to language, culture, entrenched discrimination or other issues may exacerbate power imbalances among the parties. Aggrieved individuals or communities may be facing the dilemma of accepting the remedy available through the agreement of the company, or having no access to remedy at all. Mechanisms that are often remote from the local context, such as OECD national contact points or those of international financial institutions, may be turned to not because of a belief that these are more desirable than judicial remedies, but because no judicial process is accessible. Situations where consent-based mechanisms fail to deliver remedies that aggrieved parties experience as fair, effective and timely may contribute to the entrenchment and escalation of conflict with serious human rights implications, particularly where there are no judicial remedies available.

The issue of corporate impunity for rights violations remains of grave concern. The degree of attention afforded to the Guiding Principles and their implementation may make it easier for those working at international policy levels to lose sight of the real and ongoing harms that communities in many places suffer as a result of pervasive, repeated abuse by companies. In such a context, the entire discussion of non-judicial grievance mechanisms that require the consent of the company for their establishment, for agreements on remedies to be reached, and for those agreements to be implemented may therefore seem to some to be at best window dressing and at worst another process by which companies avoid responsibility for rights violations. A substantial trust gap remains among various stakeholder groups, both internationally and in particular local contexts. Parties who think about non-judicial grievance mechanisms in terms of good practice, lessons learned and progressive improvement may speak at cross purposes with those who think about them in terms of compliance, accountability, verification and enforcement.

"Substance" and "process" are inherently intertwined. Even the outcomes of State judicial mechanisms are typically evaluated against process criteria as well as their substantive outcomes. This acknowledges that the perception of effective remedy is a product of how both process and outcome are perceived. Parties who feel marginalized, disempowered or disrespected, for example, may not judge an outcome positively even if it is ultimately the remedy that they sought. At the extreme, bad processes can serve to reinforce rather than remedy power imbalances and can multiply injustices.

But consideration of process along with substantive outcomes also speaks to the reality that the application of general principles to particular parties, contexts and events – a function at the heart of judicial as well as non-judicial processes – is extremely difficult to evaluate from the outside in a particular case. Different parties will have different perceptions about the ultimate fairness and justice of most any outcome. Appellate processes within State judicial mechanisms for these reasons will typically demonstrate reluctance to second-guess the outcome of a process otherwise determined to be procedurally fair and compatible with the law. Substantive review of outcomes, whether judicial or non-judicial, is inherently challenging.

“Remedy” and “respect” are inherently intertwined. A well-functioning grievance mechanism along with the individual outcomes it delivers are meant to be forwards- as well as backwards-looking. A system should monitor implementation of agreements and help prevent harm from recurring. So one element of all remedies of any complexity reached through consent-based processes will likely be an agreed approach to respect for human rights in the future, as well as agreement on how commitments made will be verified. Furthermore, to meet international standards a system for remedy should be able to prevent imminent harm. It should be designed to address harm at the earliest possible moment to prevent harms from becoming more grave and keep conflict from escalating. Meeting these goals is likely impossible without a robust system for respecting human rights already in place to proactively identify and manage potential human rights issues. Finally, a large body of empirical work underlines that people accord respect high importance and independent value. People want to be heard and to influence the decisions that affect their lives. The lack of a system that engages people on issues of vital importance to them is itself a source of grievance requiring remedy.

Individual rights and systems perspectives are both important. The Guiding Principles combine claimant-level perspectives (that tend to focus on “rights” or “results”) with mechanism-level considerations (that tend to focus on “administration of justice” or “systems”). They ask if a process is fair (accessible, predictable, equitable and transparent) and delivers adequate outcomes and remedies (rights compatible) for individual claimants, but also whether it is broadly legitimate and a source of continuous learning in the wider system. All are required for sustainable and mutually respectful relationships among companies and communities, and together provide greater assurance that rights violations will be minimized, remedies will be prompt and effective, and grievances not escalate. Yet not everything that might serve to improve corporate behavior – like building root cause analysis into each grievance process – actually serves an individual claimant’s needs, and not everything that might serve individual claimants’ interests – such as prompt and informal settlement of complaints – addresses interests in predictable systems improvement. Parties will get different insight and may advocate different priorities and approaches if they examine effective outcomes versus effective systems responses to outcomes.

A variety of State and non-State, non-judicial grievance mechanisms will typically co-exist. These may include company mechanisms operated directly by a company or through third parties. They may include industry or multi-stakeholder initiatives through which parties may be able to lodge

complaints. Global Framework Agreements between companies and global trade union federations often provide for a complaints mechanism. National level mechanisms may include OECD National Contact Points and national human rights institutions that can hear complaints by individuals or groups against corporate actors and which may offer mediation and dialogue as well as independent investigation and in some cases adjudication. Regional and international mechanisms, such as the ILO tripartite, the Compliance Advisor/Ombudsman of the World Bank Group, and other regional or international development bank mechanisms may hear complaints from affected stakeholders. These in turn overlay formal and informal conflict prevention, conflict resolution and adjudicatory mechanisms that may already exist within a particular local context.

Different mechanisms will have different strengths and challenges. A well-designed and more informal local mechanism, for example, may provide the greatest opportunity for prompt resolution of concerns over how a company operates, meaningful participation by a range of local stakeholders in dialogue, resolution of disputes before they escalate, or effective monitoring to ensure that the intended impact of agreements is in fact achieved. It may be less useful in resolving disputes over whether a company should be operating at all, for example, where claims of land rights or lack of free, prior and informed consent are raised. For such disputes a more formal and internationalized mechanism may be more appropriate, even if it is still a consent-based mechanism. Rights that may not be fully locally recognized, such as those of women or labor, must also have forums for vindication and benefit as well from processes that promote harmonization of national and international standards. An optimal consent-based system will therefore help parties consider and agree on the kind of mechanism or process that will help them fairly, appropriately, and promptly reach resolution of their particular dispute.

A particular non-judicial grievance mechanism must take into account the broader landscape of conflict prevention and conflict resolution. This will necessarily require consideration of its inter-relationships with other mechanisms, whether concurrently or sequentially. Good development and peacebuilding practice requires that external actors be attentive to and respectful of existing local institutions and processes that are perceived as fair and effective, lest they be undermined. Since timely resolution of human rights issues and concerns is required, agreement to adjudicate absent agreement on a remedy should also be considered as a possible outcome of consent-based processes. The commentaries to the Guiding Principles state that “where adjudication is needed, this should be provided by a legitimate, independent third-party mechanism.” It is in all parties’ interests that State-based adjudicatory mechanisms be accessible, timely and fair. Particularly where they are not, non-State adjudicatory mechanisms should be designed and implemented with the same attentiveness to the effectiveness criteria set out in the Guiding Principles, the broader local context and the landscape of extant conflict prevention and resolution mechanisms.

Grievances with human rights implications often have public dimensions. While an issue or grievance may be raised within a non-judicial grievance mechanism by an individual or particular organization, it may have implications for other parties. Failure to recognize and engage all concerned stakeholders can result in conflicts not being resolved, even if a process appears to be moving forward smoothly.

Interests of those who in some places are not typically community representatives, such as women or ethnic minorities, can be discounted or ignored. Different treatment of similarly situated people depending on whether they are “inside” or “outside” the process can cause or exacerbate tensions among them, whether tied to the information that is shared or the remedy that is available. Secret agreements can similarly raise suspicions and promote conflict rather than harmony, while denying individuals or communities the information they need to be able to mobilize to effectively advocate for or protect their interests. An issue that a company believes is resolved or a case an international mechanism believes is closed may come back to life as parties or the context changes. Even consent-based mechanisms that address private concerns must be attentive to such public interests and dynamics.

It may be difficult – and perhaps not helpful – to disentangle issues, impacts and rights within the context of non-judicial grievance mechanisms. Events in the real world do not neatly divide themselves into those with human rights impacts and those without. The commentary to the Guiding Principles understands a grievance “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.” Parties may raise concerns related to their interests without identifying them as human rights impacts. Disputes over issues that at their base were not originally human rights grievances can take on human rights dimensions if the failure to address them results in escalating conflict. The commentary to the Guiding Principles also notes that poorly designed or implemented grievance mechanisms themselves can “risk compounding a sense of grievance amongst affected stakeholders by heightening their sense of disempowerment and disrespect by the process.” While theoretically possible, it may therefore be practically difficult to imagine how a non-judicial mechanism can respect human rights without also being welcoming of, and attentive to, other important issues and concerns raised by stakeholders.

How a particular consent-based remedy system operates as well the evaluation of its outcomes are subjects for dialogue and agreement. Companies often unilaterally adopt what they believe are good management practices for conflict prevention and resolution. Companies may, for example, empower line managers to resolve certain classes of disputes, or create global hotlines for public complaints about environmental practices or corruption. An operations-level grievance mechanism as described in the Guiding Principles, however, should not be unilaterally designed and implemented by a company. The commentary to the Guiding Principles reminds parties that engaging with affected stakeholder groups about the design and performance of a non-judicial grievance mechanism can help to ensure that it meets different parties’ needs, that they will use it in practice, and that there is a shared interest in ensuring its success. The principles of effectiveness enumerated in the Guiding Principles, including rights compatibility, must be respected. Because they are fundamentally based on the principle of consent, however, they must involve stakeholders in the informed consideration of all of these issues in their co-creation and implementation to be consistent with the Guiding Principles. Other consent-based grievance mechanisms, whatever their source of legitimacy, nationally or internationally, in individual cases become “local” from the perspective of the rights holder. If they are to effectively engage and achieve the agreement of parties as well as their commitment to follow through, as a practical matter, attentiveness to the same considerations may

be required to achieve local legitimacy and to dependably deliver against the elements of effective remedy.

Towards guidance on the evaluation of consent-based grievance systems and outcomes

What emerges perhaps most prominently from this discussion are two propositions. The first is that consideration of remedy in the context of consent-based grievance mechanisms is necessarily part of a larger discussion of access to justice. The premise of the Guiding Principles is that non-judicial grievance mechanisms (State and non-State) are complimentary to “effective judicial mechanisms ... at the core of ensuring access to remedy.” Stakeholder concern over non-judicial grievance mechanisms is driven in part by the absence of such fair and effective judicial remedies. Unless these fundamental concerns are addressed, it is unlikely that any non-judicial mechanism based wholly on the willingness of a company at any given point of time to participate in a process and agree to provide a remedy will be experienced as legitimate or satisfactory. The greater the scale or severity of the harm underlying a grievance, and the less aligned the parties find themselves on the standards which apply for its resolution, the more true this may be.

Companies may in particular need to acknowledge that attempts to actively avoid judicial oversight in home- or host-country jurisdictions or passively take advantage of the lack of effective access to justice for aggrieved communities and individuals will undermine trust in the company and confidence in any dialogue-based grievance process they propose. In many local contexts, universal access to State mechanisms that provide real justice is not a realistic short-term goal. In such cases it may be prudent to negotiate fair and independent adjudicatory mechanisms acceptable to all stakeholders. Agreement to be bound by principles of justice including the rights of parties to have their claims heard by impartial third parties may, rather than increasing contentious proceedings, create space for the success of non-judicial mechanisms that promote agreed solutions through dialogue.

The second proposition is that effective remedy in the context of consent-based mechanisms requires a robust system, designed and then monitored and evaluated on an ongoing basis for its perceived fairness and trustworthiness, its attentiveness to the parties’ informed consent, its ability to deliver on agreements reached and promises made, alignment of the actual impact of remedies with the intentions behind them, the fit of the system within broader social, political and conflict dynamics around it, and its adaptation to strengths and gaps in extant judicial and non-judicial dispute resolution mechanisms and capabilities.

Such a perspective strongly emphasizes co-governance by business enterprises and other institutions with affected stakeholders of the consent-based systems and processes by which they implement their responsibilities under the Guiding Principles to provide effective remedies for any harm done. For remedy to be effective, promoting both good outcomes in individual cases as well as broader systems health, greater attention may be required to parties’ informed consent to the systems within

which remedial agreements are crafted, concluded, implemented, monitored and evaluated. Dialogue and partnership should permeate systems analysis, design, implementation, performance monitoring, and improvement, lest a system implemented unilaterally by a company, an industry group, an international or transnational actor, or even the state “risk compounding a sense of grievance amongst affected stakeholders by heightening their sense of disempowerment and disrespect by the process.”

If this is the working vision, then one salient question is how parties can design, implement and monitor consent-based systems and verify their effective performance. Another is how stakeholders at local, national and international levels can be supported to jointly advance the dialogue, decision-making and actions they must necessarily undertake together to achieved desired outcomes related to remedy of negative human rights impacts. These questions recognize that parties must be attentive not only to the legitimacy of specific remedies agreed to in consent-based grievance mechanisms, but also to the effectiveness of outcomes as they are actually experienced in specific contexts. They recognize that both individual and systems-level concerns are valid and important. To achieve effective respect for human rights consistent with the Guiding Principles, parties should together broadly consider substance and process, individual and systems-level outcomes, objective data as well as the perceptions of those concerned.

Principles for the design, implementation and evaluation of consent-based remedy systems and outcomes may be one way to balance, on the one hand, the need for rigorous standards in which stakeholders can have confidence, and on the other hand, the need for stakeholders to arrive at sustainable consent-based systems and mechanisms which they agree are appropriate to and legitimate within their particular contexts. Agreed principles potentially provide a platform to integrate individual, systems, and contextual interests and concerns across their process and substantive elements. Such principles could potentially be useful both to companies and communities as they negotiate the ways in which companies meet their responsibilities under the Guiding Principles, and to stakeholders such as home and host country governments, financial institutions and others concerned with respect of human rights by companies as well as broader issues of fairness and justice.

Draft principles for the design, implementation and evaluation of consent-based remedy systems

This section outlines principles that can serve as a guide to parties as they negotiate the process by which a consent-based remedy system is designed and implemented, or its processes and outcomes are monitored and evaluated. The term “evaluation” is used below to refer to both prospective evaluation of best-fit options (that is, in planning and implementation stages), and retrospective evaluation (that is, monitoring and feedback on a system already implemented).

A. Purpose of evaluation

An evaluation of a remedy system and its outcomes may have multiple purposes agreed to by stakeholders. It should normally address at least the following:

- (i) **Accountability.** Parties should evaluate systems to ensure that, taken as a whole, they in practice result in rights protection and effective remediation of any negative impacts or harm done.
- (ii) **Learning.** Parties should evaluate systems to understand root causes of human rights risks and grievances and to emerge with actionable insight on how these can be more effectively addressed – both remedially and proactively – in a specific context.
- (iii) **Dialogue.** Parties should engage in evaluation as part of the broader system of co-creating a common understanding of human rights as well as parties’ respective roles in advancing and protecting them, including through remedy for harm done.

B. Participation in an evaluation

Since an evaluation is itself part of the system of remedy for harm done, parties should maximize both its effectiveness and its legitimacy. This will normally require attentiveness to at least the following:

- (i) **Representation.** An evaluation should be the result of a collaborative design inclusive of the perspectives of the range of stakeholders, with special attention to vulnerable, unpopular or marginalized groups.
- (ii) **Capacitation.** Participants in an evaluation process may require support to increase both their substantive understanding of issues and their ability to effectively

participate in the process, including in appropriate cases representation. *Joint capacitation* may create an additional platform for dialogue and stakeholder alignment around an evaluation as well as the broader system of remedy.

- (iii) **Facilitation.** To encourage and enable the participation of a diverse group of stakeholders, neutral facilitation of an evaluation process, including its design, implantation, analysis, and implications, may be required.
- (iv) **Joint appointment of experts and advisors.** Any experts engaged to assist with an evaluation process should be jointly evaluated and selected by stakeholders.
- (v) **Participatory methods.** Since active participation is a touchstone of dialogue, learning, legitimacy, and commitment to follow through, participatory evaluation methodologies should normally be privileged.
- (vi) **Transparency.** Processes for initiating, conducting and funding an evaluation should normally be public and transparent.

C. Contextual analysis underpinning an evaluation

A remedial system operates within a specific local context. An evaluation should therefore begin with a contextual analysis that includes at least the following:

- (i) **Leveraging of existing work.** Parties should be attentive to contextual analysis that may already be ongoing or available, both to avoid unnecessary duplication of effort and to not undermine other locally-rooted collaborative processes for gathering or analyzing data.
- (ii) **Broader context.** Evaluation should be attentive to the social, political, economic and conflict dynamics of which company-community relations are part, using a systems map or other tools to build common understanding of key dynamics including but also beyond the company and its operations relevant to the evaluation of the remedial system.
- (iii) **Standards of company conduct.** Evaluation should be attentive to standards governing company conduct relevant to stakeholder interests, including laws and regulations, performance standards to which the company is contractually obligated to adhere, and those which the company has voluntarily committed to apply.

- (iv) ***Expectations of the company in society.*** Evaluation should also be cognizant of expectations of the company at local, national and international levels that are not formally codified but all the same influence interactions among the parties.
- (v) ***Current and possible human rights impacts related to the company and its operations.*** Human rights due diligence as anticipated by the Guiding Principles should be part and parcel of the contextual analysis underpinning an evaluation, highlighting the issues that a remedial system must be capable of effectively addressing.
- (vi) ***Conflict sensitivity.*** The evaluation design should be attentive to how the evaluation process itself may either increase or decrease conflict and human rights risks, following principles of Do No Harm.

D. Analysis of capabilities for rights protection, conflict prevention and conflict resolution supporting an evaluation

A remedial system operates within a broader ecosystem of rights protection, conflict prevention and conflict resolution capabilities and gaps to which an evaluation should be attentive.

- (i) ***Existing mechanisms.*** An evaluation should be cognizant of existing capacities within the society, including State judicial and non-judicial mechanisms; traditional capacities for conflict prevention and conflict resolution; as well as other non-State, non-judicial mechanisms.
- (ii) ***Gaps and needs.*** An evaluation should consider the extent to which these mechanisms do or do not address the needs of the parties for effective access to justice within the particular local context and the particular human rights impacts related to company operations.
- (iii) ***Intended role of the system under evaluation.*** An evaluation should surface the explicit or implicit theories and assumptions about both the intended role of the system under evaluation and the mechanisms and procedures by which those roles are intended to be fulfilled.
- (iv) ***Coordinated approaches to evaluation.*** Parties should consider opportunities to evaluate a particular system or mechanism along with other mechanisms that may

be intended to address the same or related stakeholder rights and interests, both to increase efficiency and promote a whole-systems view.

E. Essential elements of systems design

To ensure mechanism-level (“administration of justice” or “systems health”) performance, an evaluation should consider whether at least the following elements are accounted for and effectively operating within the remedial system under evaluation.

- (i) ***Raising of issues, complaints or grievances.*** Evaluation should consider whether, when issues, complaints or grievances arise, the system is accessible to and inviting of those being raised, particularly for vulnerable or marginalized populations.
- (ii) ***Rights-compatible, interest-based dispute resolution.*** Evaluation should consider the extent to which a system is effectively designed and implemented both to promote reaching agreed solutions through dialogue, and to ensure that human rights and other standards of company conduct are made part of the conversation and form the boundaries of acceptable agreed outcomes.
- (iii) ***Consideration of public interest.*** Evaluation should consider the extent to which a system is cognizant of interests and implications of dispute or grievance between particular parties on other stakeholders, and works to include them in problem analysis and solution development.
- (iv) ***Proactive rights protection.*** Evaluation should consider the extent to which a system demonstrates reliable capacity to be alert and responsive to potential harm in ways that result in timely and effective preventive action, appropriate to the nature and severity of risks in the environment.
- (v) ***Timely and determinate resolution of issues.*** Evaluation should consider the extent to which a system demonstrates capacity to resolve grievances in a timely manner appropriate to the nature and severity of risks and harms implicated, and where dialogue-based processes are no longer viable for reaching that goal to channel them to fair, effective and accessible adjudicatory mechanisms.
- (vi) ***Monitoring of commitments undertaken.*** Evaluation should consider the extent to which a system effectively monitors implementation of commitments made by parties, whether as part of dialogue processes or specific grievance mechanisms. Monitoring should be attentive not only to whether parties kept their

commitments, but whether the actual impact of those actions aligned with the intent of the parties.

- (vii) ***Conflict sensitivity within the system.*** Evaluation should consider the extent to which a system is attentive to its own possible impacts either increasing or decreasing conflict and human rights risks in the way in which it is designed, implemented and governed, respecting Do No Harm principles.

F. Essential elements of systems outcomes

To ensure performance from a rights-holder's perspective, an evaluation should consider whether at least the following elements are accounted for and effectively operating within the system under evaluation.

- (i) ***Procedural outcomes.*** Evaluation should consider the extent to which a system is experienced by those who raise rights concerns, issues or grievances as equitable, predictable and transparent, and as treating them with dignity and respect.
- (ii) ***Individual outcomes.*** Evaluation should consider the extent to which a system is experienced by those who raise rights concerns, issues or grievances to prevent imminent harm, cease ongoing harm, provide appropriate compensation and other remedial measures, provide other desired forms of satisfaction, and do so in a timely manner, appropriate to the nature and severity of risks and harm experienced.
- (iii) ***Rights outcomes.*** Evaluation should consider the extent to which independent experts assess individual outcomes to be consistent with their individual rights and other applicable standards of company conduct.
- (iv) ***Systems outcomes.*** Evaluation should consider the extent to which a system as a whole is experienced by stakeholders as an equitable, transparent, effective and legitimate system for rights protection, whether or not they were party to rights concerns, issues or grievances raised.
- (v) ***Social outcomes.*** Evaluation should consider the potential positive and negative impacts of a system as a whole as well as its specific conflict resolution efforts on broader social, political, economic and conflict dynamics that may impact human rights protection and remedy in the local context.

- (vi) **Agreed methodology.** Depending on the number and nature of issues, concerns and grievances addressed by a system, the evaluation of outcomes should use an appropriate sampling and evaluation methodology agreed to by evaluation participants with expert advice as appropriate.

G. Essential elements of systems governance

To ensure a system's sustainable performance, an evaluation should consider whether at least the following elements are accounted for and effectively operating within the governance of a system under evaluation.

- (i) **Multi-stakeholder.** Evaluation should consider the extent to which a system's oversight and governance effectively incorporate the perspectives, inputs and co-determination of the range of stakeholders, with special attention to vulnerable, unpopular or marginalized groups.
- (ii) **Context-appropriate design.** Evaluation should consider the extent to which a system's design and planning reflect its specific local context, based on sound analysis of local dynamics, company operations within them, as well as consideration of the broader ecosystem of rights protection, conflict prevention and conflict resolution capabilities and gaps.
- (iii) **Appropriate resources.** Evaluation should consider the extent to which a system's effective functioning is supported or undermined by human, technical, financial or other resources issues.
- (iv) **Risk awareness.** Evaluation should consider the extent to which systems governance is alert to challenges or failures in the system of rights protection and remediation, how these are registered and responded to, and how they are addressed and followed up on, appropriate to the nature and severity of risks and harm.
- (v) **Learning and systems improvement.** Evaluation should consider the extent to which the system learns and improves from experience across all of its systems elements, including but not limited to individual grievances, and

the extent to which it does so in a timely and effective manner, appropriate to the nature and severity of risks and harm.

- (vi) ***Independent audit and reporting.*** Evaluation should consider the extent to which a system makes appropriate use of independent audit and reporting mechanisms to help ensure its integrity and legitimacy.

H. Outputs of an evaluation

An evaluation of a remedy system and its outcomes may have multiple outputs agreed to by stakeholders. It should normally address at least the following:

- (i) ***Transparency.*** While being respectful of the identities of participants and informants in the process, evaluation findings should normally be made available for scrutiny, comment and public use.
- (ii) ***Remedial action.*** An evaluation should identify and provide guidance on issues impacting rights protection and remedies requiring immediate action, appropriate to the nature and severity of risks and harm.
- (iii) ***Improvement plan.*** The evaluation should identify and provide guidance on issues of systems health and performance impacting procedural, individual, rights, systems, and social outcomes as described in section E, above.
- (iv) ***Specific commitments.*** The evaluation should include the specific commitments of the systems governance body as a whole or its individual members to address remedial and improvement issues identified.
- (v) ***Dissenting voices.*** Where there is not consensus on the evaluation findings or its recommendations, the evaluation should both highlight the findings of any independent evaluators and allow for the expression of a variety of perspectives and voices.

Evaluation of a consent-based remedial system and its outcomes consistent with Guidance developed according to this outline would presumably support more rigorous thinking, planning and action on the part of stakeholders; more dependable and rights-compatible outcomes to individual grievances; as well as greater transparency, accountability and legitimacy of the remedy system as a whole.

About the author

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