Business and Human Rights
Indigenous Peoples’ Experiences
with Access to Remedy

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BACKGROUND

The UN Guiding Principles on Business and Human Rights (henceforth the Guiding Principles) were endorsed by the Human Rights Council (HRC) in 2011. They consist of three pillars aimed at ensuring compliance with human rights in the context of corporate activities. The first pillar is specifically targeted at States and reaffirms their duty to protect human rights, including those rights affirmed in specific standards addressing vulnerable groups such as indigenous peoples. It also addresses State responsibility to ensure that business actors respect these rights.

The second pillar addresses the corporate responsibility to respect human rights which exists independently of State actions and duties. This responsibility relates to all human rights, including the rights of indigenous peoples, and requires that corporations avoid causing or contributing to adverse human rights impacts by preventing and mitigating the human rights-related risks that are linked to their activities or business relationships. Realizing this requires that they have human rights policies and human rights due diligence processes in place which affirm their commitment to respecting human rights, including indigenous peoples rights as affirmed under the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) and ILO Convention 169. This is required to enable them to identify and account for potential impacts on human rights and prevent and mitigate adverse impacts prior to their occurrence, through compliance with the principle of free prior and informed consent (FPIC) and other indigenous rights based safeguards. Where violations do occur, corporations are to provide for, or cooperate in, the remediation through legitimate processes.


The third pillar of the Guiding Principles identifies the measures to be taken by both States and businesses in order to facilitate access to effective remedies. A range of mechanisms are addressed including State based judicial and non-judicial mechanisms, non-State based judicial mechanisms (such as regional or international courts), and non-judicial mechanisms, including operational level grievance mechanisms which corporations may implement, or in which they may participate. The need for greater attention directed to this issue of access to remedy has been highlighted by the Human Rights Council in its 2014 resolution requesting the Working Group on the issue of human rights and transnational corporations and other business enterprises to:

- launch an inclusive and transparent consultative process with States in 2015, open to other relevant stakeholders, to explore and facilitate the sharing of legal and practical measures to improve access to remedy, judicial and non-judicial, for victims of business-related abuses, including the benefits and limitations of a legally binding instrument … [and] …include as an item of the agenda of the Forum on Business and Human Rights the issue of access to remedy, judicial and non-judicial, for victims of business-related human rights abuses, in order to achieve more effective access to judicial remedies.

Access to remedy has many dimensions in the context of the protection of and respect for indigenous peoples’ rights. From the geographical perspective remedial mechanisms span the local, national, regional and international levels, while from the procedural perspective they range from mediation style dispute resolution processes up to judicial proceedings. Issues which arise consequently range from the effectiveness of international and State based judicial and non-judicial mechanisms, to respect for indigenous peoples’ customary institutions, processes and laws.
Indigenous peoples’ access to remedy through State based judicial mechanisms in the context of human rights harms caused by natural resource extraction and infrastructure projects is generally ineffective due to significant practical and legal obstacles which they face when attempting to access courts. State based non-judicial mechanism tasked with addressing indigenous peoples’ rights frequently tend to lack sufficient capacity or awareness of indigenous peoples’ rights. Access to mechanisms at the regional and international levels is also challenging for most indigenous communities, and the lack of enforcement powers of these mechanisms limits their effectiveness.

In light of this reality the potential of operational level grievance mechanisms has gained increased attention. These mechanisms range from those established and run by companies, to corporate engagement with indigenous peoples’ own dispute resolution systems under their customary institutions and laws. However, many questions remain as to the potential of these mechanisms to effectively address the core concerns of indigenous peoples, as well as questions around how they should relate to the broader landscape of judicial and non-judicial mechanisms.

Given the current ineffectiveness of remedial mechanisms and the unacceptable extent and nature of violations of indigenous peoples’ rights which occur in the context of extractive industry and infrastructure projects, there is an urgent need for research around access to remedy which is grounded on the experiences and perspectives of indigenous peoples. This is a necessary starting point in order to attempt to bridge the huge gap between access to remedy requirements affirmed in international human rights standards, such as the UN Guiding Principles and the UNDRIP, and the reality on the ground as experienced by indigenous peoples.

**UN Declaration on the Rights of Indigenous Peoples: explicit affirmation of an indigenous human right to remedy**

The UNDRIP, which was adopted by the UN General Assembly in September 2007, is regarded as one of the most comprehensive universal human rights instruments specifically concerning indigenous peoples. In the context of access to remedy, the UNDRIP provisions, to a large extent, are responsive to the demands of indigenous peoples and adequately address their needs in the area of redress, reparations and remedies. Article 8 of the UNDRIP provides for the prevention of, and redress for, forced assimilation and destruction of the culture of indigenous peoples. Article 10 established a prohibition against forcibly removing indigenous peoples from their ancestral lands; and relocation is only possible with the “free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation, and where possible, with the option of return.” It also addresses the right to redress the anguish suffered by those relocated. Articles 11 (2) and 12 (2) are also complementary and address the restitution of cultural property taken without the free, prior and informed consent of the indigenous peoples concerned, or in violation of their traditions and customs, and the need for repatriation of ceremonial objects. The use of the term “effective mechanisms” presupposes that any redress or reparations are deemed adequate by the indigenous peoples concerned. This is further bolstered by the fact that such mechanisms must be developed in conjunction with indigenous peoples.

Article 28 affirms the right of indigenous peoples to redress, by means that can include restitution or, when this is not possible, just, fair, and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent. The repatriation proscribed in this Article applies to violations that are continuing to take place. This is important as deprivation of ancestral lands of indigenous peoples perpetrated in the past continues to have on-going impacts on the communities concerned. Such acts are therefore associated with on-going rights violations which have effects today and the future.

Article 32 (3) affirms the obligation of States to provide effective mechanisms for just and fair redress for any project affecting the lands or territories and other resources belonging to indigenous peoples, particularly in connection with the development, utilization or exploitation of mineral, water or other resources; as well as the fact that appropriate measures must be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact arising from such projects.
Finally, Article 40 provides the “right of indigenous peoples to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights”.

Reaffirming States’ support for the UNDRIP, the UN General Assembly held the World Conference on Indigenous Peoples (WCIP) and adopted an Outcome Document in September 2014. The Outcome Document recalls the responsibility of all businesses to respect all applicable laws and international principles, including the Guiding Principles on Business and Human Rights, and to operate transparently and in a socially and environmentally responsible manner. States commit to take further steps, as appropriate, to prevent abuses of the rights of indigenous peoples.

The Outcome Document also includes an acknowledgement on behalf of UN members States that:  

indigenous peoples’ justice institutions can play a positive role in providing access to justice and dispute resolution and contribute to harmonious relationships within indigenous peoples’ communities and within society.

All of the inter-related, inter-connected, indivisible and inter-dependent rights enshrined in the UNDRIP reinforce the content and substance of an affirmative right of indigenous peoples to self-determination and to free, prior and informed consent. States must restructure their domestic law with a view to adopting all necessary measures – including constitutional amendments, institutional and legislative reforms, judicial action, administrative rules, special policies, reparations procedures and awareness-raising activities – in order to make the full realization of indigenous peoples’ human rights possible within their territories, consistent with the rules, principles and standards established by the UNDRIP and the Guiding Principles on Business and Human Rights.

Corporations, on the other hand, whose activities may affect indigenous peoples must align their policies and practices to be consistent with the UNDRIP and the perspectives and aspirations of the concerned indigenous peoples. Any remedial mechanisms which they operate or participate in must be consistent with the provisions of the UNDRIP and the Guiding Principles, in particular principles 22, 29 and 31.

Indigenous Peoples’ Experiences with Access to Remedy

I. The difficult challenge of redressing and mitigating impacts in La Guajira Colombia: The Wayuu People and their relationship with the Cerrejón Mine

The case study examines the human rights impacts which the Carbones del Cerrejón (Cerrejón) mining project has had on the Wayuu communities over the course of its 30 years of operations in their territories, and the potential for the Guiding Principles to reduce those impacts and provide remedies to the Wayuu. Cerrejón’s current concession expires in 2034. It is owned by subsidiaries of Anglo American, BHP Billiton and Glencore and is one of the biggest open cast coal mines in the world, occupying an area of 800 square kilometres in the municipalities of Albania, Hatonuevo, Maicao y Barrancas, La Guajira, in the northeast Atlantic coast of Colombia. It currently supplies 60% of Colombia’s coal producing 32 million tonnes of coal per annum. It necessitated the construction of a 150km train line through the Wayuu territory and the largest coal port in Latin America to facilitate its export of coal to elsewhere in the continent and to Europe.

The Wayuu territories are home to numerous extractive and tourism megaprojects, all of which have had major negative impacts on the environment and cultural and physical well-being of the Wayuu people. The communities have also suffered major human rights abuses, including forced displacement, as a result of paramilitaries who control much of the economic activity in the region. The case study describes the extensive impacts which Cerrejón has had on the Wayuu and afro-descendant peoples’ rights. These include adverse impacts on health and the environment, cultural rights, subsistence and conditions of
life, physical integrity, and on their self-government and territorial rights, including consultation and participation rights which are affirmed under ILO Convention 169 and the UNDRIP. Having described the historical and on-going issues which six Wayuu and seven afro-descendant communities are facing as a result of Cerrejón, and the absence of adequate compensation or reparations, the chapter suggests that there are two parallel realities in La Guajira. One is that presented by the communities - a reality of unremedied wrongs, on-going harms, including major environmental problems impacting on water and food and contributing to extreme poverty and huge discontent, including among resettled communities. In the other reality Cerrejón claims to have contributed to the wealth of Guajira and paints a picture of a world in which there are no problems as it takes care of everything, including through its policy commitments to respecting the Guiding Principles.

However, despite the explicit reference to international indigenous rights standards in the Guiding Principles and the clarification by a range of human rights bodies that corporations must respect the rights affirmed in ILO Convention 169 or the UNDRIP, Cerrejón does not include a single reference to the rights of indigenous peoples in its policies. This is the case even though its entire operation is located in indigenous peoples’ territories. From the perspective of the Wayuu, Cerrejón’s actions to date demonstrate inadequate efforts to avoid negative impacts on their rights, the absence of due diligence and remediation, with even resettled communities dissatisfied with the outcomes.

Cerrejón has plans to further expand its operations which would necessitate the rerouting of the river Ranchería and result in further major impacts on the Wayuu. It is attempting to proceed with these plans despite the fact that it has not yet adequately addressed the serious legacy and on-going issues associated with its existing operations or provided remedies or guarantees of non-repetition. The case demonstrates the range and nature of rights violations which can arise in contexts where the complaints of indigenous and tribal communities go unaddressed over extended periods by both the State and companies. In doing so, it highlights not only the need for indigenous rights due diligence prior to any further expansion plans, but also the fundamental importance of recognizing legacy impacts and addressing them in a manner that is satisfactory to the affected indigenous communities.

II. Oil Exploration in the Peruvian Amazon, Violations of Human Rights and Access to Remedy: the Case of the Amazonian Indigenous Peoples of the Pastaza, Tigre, Corrientes and Marañón Rivers

The case study focuses on difficulties which 100 Amazonian indigenous communities have faced in accessing reparation for violations of their rights arising from the contamination of the Pastaza, Tigre, Corrientes and Marañón rivers (all of which are tributaries of the Amazon) in Loreto, Peru where Pluspetrol conducts oil exploitation. A particular feature of the case is the extent to which the representative organizations of the affected communities coordinated their actions and raised their issues before various mechanisms of the State and the international system. The contamination is a result of oil exploitation in lots 1AB and 8, which have been operational for 40 years and are currently operated by Pluspetrol, a company which has Argentinean origins and has its headquarters in Holland. The gravity of the situation is reflected in the fact that the area was classified as being in a state of environmental emergency in 2013 and as constituting a sanitary emergency in April 2014.

The case study outlines the human rights violations that have arisen as a result of the oil exploitation and the extent to which the obligation to provide remedies has not been respected. The rights impacted span rights to a healthy environment, to water, food, health, adequate housing as well as territorial, cultural and self-determination rights, including the rights to consultation and participation in decision-making, the right to determine development priorities and rights to practice religion and protect sacred places. In addition to these collective rights affirmed under ILO Convention 169, there have also been violations of the communities’ right to freedom of expression and peaceful assembly.

Despite the longstanding protests of the affected communities neither the State nor the Pluspetrol have taken appropriate actions. At the State level significant obstacles exist to access to remedy, including lack of information and a lack of willingness of the responsible bodies to engage with the complaints
made by the communities. As a result, there have been no remedies forthcoming to date in relation to the cases filed. In addition the environmental oversight bodies are weak. In cases where they have sanctioned the company it has refused to accept their determinations. In 2012, following community pressure, the State conducted its first environmental assessment leading to declarations that the area was in a state of environmental and sanitary emergency and the initiation of a dialogue process. While this constituted a step in the right direction, compliance with the declarations has been inadequate and the company has withdrawn from the dialogue process, significantly weakening its potential to deliver remedies. In addition, rather than protecting the indigenous communities’ rights the State is instead implementing reforms and policies which promote extractive industries to the detriment of the affected communities. This is reflected in the fact 30% of the country is under mining, oil and gas concessions, with 60% of the oil concessions located in the Amazon.

Remedial actions taken to date have all been short term measures, such as the distribution of water and limited compensation to certain communities, and are disproportionate to the harms suffered and the damage caused. In addition they lack steps to ensure that further harms are not caused. A particular concern relates to the uncertainty in relation to consultations around the renewal of the licence for lot 1AB (now referred to as lot 192) and the need for reparations, issues which have been addressed by the UN Special Rapporteur on the rights of indigenous peoples. Finally, as the case study notes, the issues are related to protection of territory and consequently are of a strategic nature. As a result, the conflicts which these operations have generated will not be resolved by focusing exclusively on environmental analysis or access to water for consumption and health. Instead, their resolution will have to involve addressing the fundamental territorial and self-governance rights of the affected indigenous peoples.

III. Indigenous Peoples’ Access to Remedies for Violations of their Rights in the Context of Mining Operations in India

The case addresses the situation of indigenous communities namely the Baigas, the Gonds, the Agarias, the Khairawas and the Panikas in Mahan, Singrauli District of Madhya Pradesh, in Central India, who are opposing a proposed coal mine in their territories. Permissions have been granted for the project to proceed however forest clearing activities have yet to commence and the legality of those permissions is being challenged by the communities who are actively protesting against the project. The proposed coal mine is located in a 20,000 hectare stretch of dense deciduous forest. It would necessitate the clearing of 1,200 hectares of that forest resulting in a profound effect on the livelihoods of 62 villages, of which approximately one third are indigenous communities.

The Mahan Coal Mining block was allocated by the Central Government of India to a joint venture of two private companies – Essar and Hindalco – in April 2006 without consultations with the affected communities. The coal from the mine is to be used to fuel two large power plants - one owned by Essar and the other by Hindalco - in Singrauli District.

In 2011 and early 2012, the affected communities started organizing themselves leading to the formation by five villages (Ammelia, Budher, Suhira, Bandhaura and Barwantola) of the Mahan Sangharsh Samity (MSS) to demand their forest rights and to oppose the coal mining project. The villagers from the most directly affected communities began sending letters to the authorities responsible for the implementation of the Forest Rights Act (FRA), and to the Central Ministry for Environment and Forests stating violations of their rights stipulated in the FRA. Despite these legal submissions, the district authorities, the police and Central and State government officials simply ignored the law and the issues which were raised by the villagers.

The communities attempted to table resolutions in the gram sabhas (village assemblies) meetings for the recognition of community forest rights, however, company agents in connivance with local officials are reported to have prevented the resolutions from being voted upon or recorded in the register. There was no attempt by the authorities to act on this interference in the gram sabha process which constitutes a criminal offense under India’s laws.
The Mahan coal mine case reveals that State institutions have either abdicated their responsibility, have been rendered inaccessible or ineffective, or have been subverted and ignored. A series of illegalities have been associated with that project since 2011. These include the subversion of *gram sabhas* (village councils) by the district administration, preventing them from adopting resolutions protecting the forest and instead producing forged resolutions in favour of the project in order to legitimize the issuance of permits to use the forest land for mining purposes. The project proceeded despite the mobilization of the communities and the recognition of the Minister of Tribal Affairs that the resolution was forged. No action has been taken by the police to address the issues raised. On the other hand, district officials and the company have filed civil and criminal charges against the villagers leading to four arrests in May 2014. Defamatory articles have also appeared in the media citing a leaked Intelligence Bureau report in relation to those opposing the project alleging they are merely acting on behalf of “foreign funded NGOs”, in particular Greenpeace India.

The case demonstrates the corrosive role which the power of corporate actors, and State actors aligned with corporate interests, plays in denying access to remedies and undermining of State institutions, even in contexts where constitutional and legislative frameworks afford protections to indigenous and tribal peoples’ rights, as is the case with the powers of the *gram sabhas* under the Forest Rights Act. The case points to the need to shift the locus of power from centralized State institutions to community controlled structures and processes, such as the *gram sabhas*. This, rather than the creation of new State institutions and legislation, is what is required for genuine empowerment of indigenous communities. The case also addresses the implications for the financial sector of this process of subversion of State institutions. As a counterbalance, and to reduce the risk exposure in the sector, it proposes that greater attention be accorded to the responsibilities of financial actors funding such projects to ensure respect for indigenous peoples’ rights, including the requirement for their free, prior and informed consent.

**IV. Access to Remedy of Indigenous Peoples Affected by large Scale Hydropower Dams in Sarawak, Malaysia: The Baram Dam Experience**

Indigenous peoples in the three Malaysian states – Sabah, Sarawak and Peninsular Malaysia – share a common experience of land dispossession brought about by development projects imposed in their territories, discrimination and loss of traditional livelihoods, knowledge and culture. Owing to the rich water resources of Sarawak, a state of Malaysia and part of the island of Borneo, indigenous peoples have been confronted with plans to build up to 50 large hydropower dams, the location of 12 of which are already known. The plans are part of the “Sarawak Corridor of Renewable Energy” (SCORE), a development corridor in central Sarawak, which will result in the displacement of thousands of indigenous peoples and inundate agricultural lands and sacred areas of indigenous communities.

This case study describes the harsh reality which community members face in the absence of effective rights safeguards and remedial mechanisms. This case specifically discusses the situation of the indigenous peoples impacted by the planned Baram Dam between the villages of Long Na’ah and Long Kesah on the Baram river in Sarawak. This project has been specifically identified by the SEB as being central to generating energy for SCORE-related industries and as a potential source of energy for export to Indonesia, once the cross-border transmissions lines are built.

It is estimated that between 6,000 and 20,000 people belonging to Kenyah, Kayan and Penan peoples would be displaced from their lands if the Baram dam is constructed. The project is opposed by community members who have organized themselves, filed petitions, lobbied international organizations and erected and maintained barricades for over a year up to present to halt construction. Some of those opposing the project have been subject to harassment and detention, while indigenous leaders have been offered financial incentives to accept the project and the state is reported to have interfered in the appointment of village headmen and chiefs.

According to the Indigenous Peoples Network of Malaysia (JOAS) many of the indigenous communities have filed court cases in order to have their land claims validated. However, these cases are rendered moot due to delays as injunctions are not issued enabling development projects to proceed and cause
irreversible harm before claims are addressed. In addition language barriers and culturally inadequate
court procedures, in particular around cross examination, constitute major obstacles to access to
remedies through the courts for indigenous peoples. The case therefore highlights the challenges to
access to remedy where indigenous peoples are not afforded an opportunity for meaningful participation
in the planning of large-scale projects, and deficiencies in judicial process prevent them from ensuring
that indigenous rights safeguards are respected before projects are implemented. It also highlights the
important role which customary law should play in any dispute resolution process if barriers to access
to justice are to be addressed.

The dam will serve to provide energy for export to Indonesia via cross-border power transmission
lines which the Asian Development Bank is funding. The Bank rejects the argument of the indigenous
peoples and their support organizations that it bears a responsibility to ensure that the associated dam
building project proceeds in accordance with its safeguards in relation to indigenous peoples rights. It
holds that the dam is not an “associated facility” of the power lines, and therefore the safeguards do
not apply. However, the communities argue that dams are by definition “associated facilities”, given
that the viability of the transmission line project depends entirely on their construction. This is related
to the question as to the extent of the ADB’s responsibility as a result of its business relationships with
other parties. The requirement under the Guiding principle 19 is of relevance here, as it holds that
responsibility in such scenarios is a function of the “enterprise’s leverage over the entity concerned,
how crucial the relationship is to the enterprise, the severity of the abuse, and whether terminating the
relationship with the entity itself would have adverse human rights consequences”. Given the leverage
which the ADB holds in this context, the potential severity of the abuse for the affected communities,
and the absence of any remedy from the State or corporation, a strong argument can be made that the
Bank does indeed have a subsidiary responsibility to use its influence in order to ensure respect for the
communities’ rights and that its safeguard consequently should apply.

V. Access to Remedy for Indigenous Peoples Affected by Corporate Activities in
Cambodia

The predominant business and human rights issue in Cambodia concerns the non-consensual
encroachment (also referred to as land grabs) of economic land concessions for the rubber plantations
on indigenous peoples’ land. Since 2003, 700,000 Cambodians have been affected by such land grabs
which are estimated to have resulted in approximately 400,000 evictions. Resistant is frequently met
with violence and the issue was prominent in anti-government demonstrations which were met with
excessive use of force by the authorities.

The case study focuses on the issues of access to remedy for the indigenous peoples whose rights have
been affected by the activities of a large Vietnamese company, Hoang Anh Gia Lai (HAGL), which
operates rubber plantations through a number of subsidiaries in Rattanakiri, Cambodia, as well as in Laos.
Dragon Capital Group Ltd (DCGL) invests in HAGL through the Vietnamese Enterprise Investments
Ltd (VEIL) fund in which the International Finance Corporation (IFC), the financial lending arm of the
World Bank Group, along with other international banks, has investments. The case therefore raises the
issue of the responsibility of financial institutions for investments made via financial intermediaries in
projects which have negative impacts on indigenous peoples’ rights.

HAGL’s operations has been associated with illegal seizures of farming and grazing lands and the
destruction of forests and sacred sites, and adverse environmental impacts in 17 indigenous communities
located in the districts of Andong Meas and O’Chum, Ratanakiri Province. No compensation was
provided for the communal losses, while in some cases households received compensation for rice fields
and farming land. However, this compensation was inadequate and was only accepted due to the absence
of any alternatives. The operations were in breach of Cambodian laws and IFC safeguard policies (in
particular in relation to transparency, indigenous peoples rights and environmental protections), while
IFC itself failed to ensure that the project was subject to prior review and approval and that the client
had the capacity to implement it in an appropriate manner.
The communities submitted complaints to the commune councils, district and provincial authorities and also to mechanisms at the national level as well as organising a non-violent demonstration at the government’s provincial office and bringing the case to the attention of indigenous parliamentarians. However, the proposed solutions offered inadequate protection on indigenous peoples’ land and cultural rights. Judicial remedies were not pursued as the communities perceived the mechanisms to be ineffective and corrupted, serving instead as a tool for legitimizing forced evictions and prosecuting human/land rights defenders.

The case gained international attention following a 2013 Global Witness report entitled Rubber Barons. This led to disinvestment by Swiss-based CBR Investments and attention being focused on Deutsche Bank and the International Finance Corporation (IFC). In February 2014, the communities and their supporting organizations lodged a complaint with the IFC-Compliance Advisor Ombudsman (CAO). The CAO’s assessment was concluded in May 2014 and led to the complainants and the company agreeing to engage in a voluntary dispute resolution process which the CAO is leading. Part of the process is to provide capacity building around negotiation and bargaining to community representatives and to establish the ground rules for negotiation. In addition, HAGL committed to a moratorium for a number of its projects until November 30, 2014. However, community reports indicate that a number of its subsidiaries are nevertheless continuing to clear community forests.

One of the important lessons from the case is the constructive role which the dispute resolution processes of financial institutions can play in providing a trusted mechanism to which communities have access. The case also points to the need for greater due diligence in relation to indigenous peoples’ rights and more effective oversight of project implementation by financial institutions, in particular where financial intermediaries are involved.

VI. Business and Human Rights in Tanzania: Indigenous Peoples’ Experiences with Access to Justice and Remedies

This case study addresses the “Sukenya Farm” which consists of 12,600 hectares of land located in Soitsambu ward, Loliondo Division, northern Tanzania. Inhabited by the Maasai indigenous pastoralists, the disputed land is ecologically part of the greater Serengeti ecosystem that comprises the Serengeti National Park, the Ngorongoro Conservation Area and the Maasai Mara National Park in Kenya. The dispute started in 1984 when the Ngorongoro District Council granted Tanzania Breweries Limited (TBL), a partially privatized government owned business corporation, acquired 12,600 hectares of land belonging to the indigenous pastoralists to grow barley. It is alleged that such acquisition was made possible by using forged documents. Despite this, TBL acquired a certificate of right of occupancy over the land from the land commissioner in 2003. In 2006, TBL subleased their property to Tanzania Conservation Limited (TCL), an offshoot subsidiary of Thompson Safaris Ltd, for 96 years. Currently, the TCL is in occupation of the disputed land in which it has established a safari camp and reserved most of it for wildlife, while restricting access to indigenous peoples.

The affected indigenous pastoralists filed the first court case on this in 1987 with appeals filed up to the High Court of Tanzania which ruled more in favour of the respondents. The community also attempted to seek out of court settlement in 2008 through engagement with the Prime Minister of Tanzania who later on formed a probe committee but with lack of representation from the affected indigenous pastoralists. The findings of the committee have never been made public and consequently no actions have been taken.

The community also brought the matter to the Committee on the Elimination of Racial Discrimination (CERD) and to the Special Rapporteur on the rights of indigenous peoples and the Chair-Rapporteur on the working group on the work of mercenaries. Tanzania never responded to the letters it received from these bodies and procedures.

While the domestic court case was ongoing at the Tanzanian High Court, the indigenous community, with assistance from Earth Rights International (ERI), petitioned a US district court in order to receive
information from Thomson Safaris Ltd. The petition was filed under a US Federal Statute called “Assistance to Foreign and International Tribunals and to Litigants before such Tribunals” and the court decided in favour of the petitioners.

The Tanzanian experience points to the need for measures which are aimed at facilitating Foreign Direct Investment (FDI) to go hand in hand with the recognition of the rights of indigenous communities who stand to be most impacted by investment projects. The 25 year struggle of the communities in the Sukenya Farm demonstrates that the failure to ensure rights are adequately safeguarded during the project planning stages creates a legacy of rights violations with long term effects. This threatens the pastoralist’s way of life, undermines legal certainty for investors, and creates significant reputational risk for companies involved in the project.

The case also highlights the barriers which indigenous peoples in Tanzania face when engaging with the judicial system and the importance of ensuring access to courts in the home country of corporations if remedies are to be realized. A second, extremely important, point which emerges from the case study is that discriminatory perspectives in relation to indigenous peoples – such as those which belittle their contribution to society or their right to exist as distinct peoples with their own way of life – facilitate rights violations and serve as major barriers to any prospect of access to remedy.

A significant divergence exists between the duties which States such as Tanzania have accepted under human rights law and their – frequently rights denying – interpretation of the conditions under which economic development should, or can, proceed. This indicates the urgent need for education of legislators, policy makers and the judiciary with regard to human rights standards, in particular those related to the rights of indigenous and tribal peoples within their borders.

On the part of business corporations, it is recommended that they establish operational-level grievance mechanisms in consultation with indigenous peoples for the purposes of fostering engagement and dialogue. More importantly, it is recommended that in order to avoid conflicts from arising, or minimizing them, investments in indigenous peoples’ lands should, as much as possible and in good faith, adhere to the international human rights standards, including the right to free, prior and informed consent.

VII. Indigenous Peoples and Access to Remedies in the Context of the LAPSSET Corridor, Kenya

Access to remedies is fundamental to the protection of indigenous peoples’ rights along the Lamu-Port-South-Sudan-Ethiopia Transport (LAPSSET) Corridor, a trans-boundary infrastructure project that will link Kenya, Uganda, Ethiopia and South Sudan via a railway, road and oil pipeline network. The oil pipeline is meant to transport South Sudan’s, Kenya’s and Uganda’s newly discovered oil to global markets via the Indian Ocean. For the pastoralists and hunter-gatherer communities along the Corridor, the project will be both a blessing, as it brings much needed infrastructure to a historically marginalized part of Kenya, and a curse, in that the communities risk losing their lands and resources to the Corridor infrastructure projects and to the extractive industries developing along its path.

This case study looks at three experiences of indigenous peoples from different parts of the LAPSSET Corridor where the affected indigenous communities have utilized, and continue to utilize, both judicial and non-judicial processes to seek remedies for violations or threats of violations of their rights. The first case study explores how the Turkana community used local remedies in their struggle against Tullow Oil Plc. The second case study looks at access to judicial remedies by the Ajuran community against Taipan Resources and its partners, and the third case study explores the use of international mechanisms by communities in their efforts to stop the construction of a port in Lamu.

While different lessons emerge from each of the three experiences, one of the important overarching findings is that the more organized a community is, and the stronger its local governance structures are, the better it is placed to capitalize on the available redress mechanisms – be they at the local, national or international levels. A second important lesson is that it is essential for communities to have access to a
broad range of remedial mechanisms. There is no “one size fits all” in terms of addressing the range of rights violations and issues which indigenous peoples face even with a single project, let alone within a given national or regional jurisdiction. This implies that respect for local level traditional dispute resolution processes is essential, as is strengthening of judicial and non-judicial avenues at the national level. Access to the range of remedial mechanisms which operate in isolation from one another is also insufficient to ensure effective outcomes. To realize this, mechanisms have to work in a complementary manner, with escalation channels available where a particular mechanism is ill suited or inadequate to address a particular grievance or complaint. The third lesson which emerges from the three experiences is the importance of access to independent legal assistance and expert advice. In the Kenyan context this is something that could be improved by providing incentives to educated community members to return to assist their communities in their pursuit of access to remedy.

VII. Indigenous Women and Access to Remedy

The role and voice of indigenous women in ensuring access to remedy, in assessing impacts and in decision-making processes arose in a number of the case studies. In the Cambodian case, where HAGL’s rubber plantations are affecting indigenous peoples’ enjoyment of their rights, an indigenous Kui woman from the neighbouring province in Rattanakiri joined the complaint submitted to the IFC CAO. She stated that, as an indigenous woman, she stands in solidarity with the affected indigenous women because of the difficulties they will face if they lose their lands and forests and the importance of working together to fight for justice. Such particularly profound impacts on the rights of indigenous women to health as a result of pollution arising from oil exploration are highlighted in the Peruvian case. In Colombia, the Wayuu women’s association are at the forefront of protecting their communities’ rights and demanding control over decisions impacting on their future.

In light of these and other experiences there is need for FPIC processes to be “comprehensive and respect the collective and individual rights of indigenous peoples including the rights of indigenous women.”15 It has also been cautioned that

corporations and other actors should not, however, generalize and assume that women are excluded in all indigenous peoples’ decision making processes. There are many indigenous peoples where women have leading roles in decision making. It is also possible for communities to institute their own mechanisms to address issues around lack of women’s participation where such issues exist. Women should be empowered to participate, but this must happen through internal procedures in a culturally appropriate manner and not be as a result of imposed procedures. Indigenous cultures are not static, and capacity building with communities through culturally appropriate mechanisms can help them in addressing such issues.16

A similar logic applies to the issue of remedial mechanisms which should be gender sensitive and respect the collective and individual rights of indigenous women in their design and operation. However, in the exercise of their right to self-determination indigenous peoples themselves, and in particular the women who form part of them, should be the one to determine how these processes should operate and what they deem to be culturally appropriate and gender sensitive in terms of structures, processes and outcomes.

Conclusion

Each of the cases shed light on difference aspects of the multiple challenges and barriers indigenous peoples face when seeking access to remedy and justice. Some of the communities in the case studies were relatively fortunate, in so far as they had access to some legal or technical assistance from international NGOs. That said, even in the case of those communities, it is extremely rare that they have an opportunity to present their experiences to a broader audience and to share their important lessons and insights. The number of indigenous communities throughout the world who are facing similar issues, and the incommensurability of their urgent need for legal assistance with the limited legal
support available to them, indicates that significant financial commitments are required to ensure access to remedy. Home and host States and corporations whose activities impact on indigenous peoples, have an obligation to ensure that funding mechanisms are established, and independently administered, to provide these communities with the necessary legal and technical assistance. This deficiency in legal assistance also demonstrates the need for more effective, accessible and culturally appropriate non-judicial mechanisms. By working in respectful partnerships with indigenous peoples such mechanisms can be designed, enhanced and operated in a manner which can facilitate greater respect for indigenous peoples’ rights and the realization of their right to redress.

Finally, a common underlying theme which emerges from all of the case studies is that power, rather than law, remains the dominant force in shaping relations between indigenous peoples and corporate and State actors. This is why judicial remedies, laws and institutions continue to be regarded by indigenous peoples as serving the interests of business but as inaccessible to them and ineffective for their needs. The obstacles and barriers to access to effective remedy can only be tackled when the implications of this power dynamic are acknowledged and addressed. This calls for a far greater focus than currently exists on investment in, and support for, the empowerment of indigenous peoples. Through genuine empowerment strategies developed in partnership with indigenous peoples, concrete steps can be taken to address these power imbalances and create a context within which self-determination rights can be asserted and meaningful remedies accessed.

Operational level grievance mechanisms and indigenous peoples’ rights

This chapter addresses the criteria for effective operational level grievance mechanisms in indigenous territories as stipulated in Guiding Principles numbers 28 to 31 and reviews four experiences of indigenous communities with such mechanisms. The development and use of operational-level grievance mechanisms is in its infancy. As a result there are a range of issues in relation to these mechanisms that, from the perspective of their users, have yet to be thought through and evaluated in practice. The following cases reflect some of the initial implementation experiences around operational-level grievance mechanisms as they relate to indigenous peoples.

- The outcome of the Guiding Principles’ 2011 pilot project in relation to Cerrejón’s grievance mechanism in the territory of the Wayuu in Colombia demonstrates how internal company acceptance of the operational level grievance mechanism can be realized. However, it points to the importance of ensuring indigenous participation in the development of the mechanism if it is to have legitimacy and relevance for indigenous rights holders.

- The grievance mechanism which Sakhalin Energy operates in the territory of indigenous communities in Russia’s far-east highlights the importance of culturally appropriate mechanisms that address all of the issues relevant to indigenous peoples from the outset of operations. It also illustrates the role which donor agency requirements can play in promoting corporate respect for indigenous rights. Concerns which arise are the mechanism’s ineffectiveness in addressing power imbalances and the extent to which the company has benefited from and has potentially been (at least tacitly) complicit in the actions of the regional authorities which have serve to undermine indigenous self-determination.

- The experience of the Subanon of Mt Canatuan in the Philippines with TVI Resource Development Philippines Inc. (TVIRD) is positive in so far as it demonstrates the potential for corporate engagement with indigenous peoples’ customary dispute resolution and judicial systems. However, it also raises concerns around the failure of corporations and States to provide adequate remedies for violations of indigenous rights. It also points to a common issue of the recognition of indigenous structures only after irreparable harm has been done and in a context where doing so helps the company to realize its plans to expand into other areas.
Finally, the experience of the women and men whose rights were seriously violated by Barrick Gold Corporation’s security in Papua New Guinea and Ghana raise major concerns around the use of legal waivers under local level operational grievance mechanisms which foreclose an individual’s access to more meaningful judicial avenues of redress. The key learning from the case is that such waivers are inconsistent with the objectives of the Guiding Principles and human rights laws and can serve to deny the rights to redress and justice.

The poor historical relationship between resource extraction companies and indigenous peoples continues to be tarnished by the, often well founded, perception that many States are willing to sacrifice indigenous peoples’ rights to the interests of corporate actors and rent seeking elites. This perception is supported by the exclusion of indigenous peoples from the formulation of national development agendas and policies, and from the negotiation of the terms of trade and investment agreements and contracts impacting on their territories and rights. In such contexts, companies seeking to exploit resources are inevitably regarded with suspicion prior to the commencement of any activities on the ground. This mistrust is compounded where corporations fail to demonstrate a clear intent to go beyond national laws and policies in order to comply with international human right standards, in particular the requirements to transparently assess impacts on indigenous rights, seek and obtain FPIC and ensure adequate compensation and benefit sharing. As a result of these and other contextual realities, in many regions throughout the world there remains a huge deficiency in trust among indigenous peoples regarding extractive sector actors. Factors eroding trust have to be addressed if the potential of operational-level grievance mechanisms to address human rights harms is to be tapped.

Recommendations in relation to operational-level grievance mechanisms

This section does not attempt to provide an exhaustive list of recommendations in relation to operational-level grievance mechanisms as they relate to indigenous peoples. Instead, it seeks to identify some of the key principles which should guide these mechanisms in order to facilitate rights based engagements with indigenous peoples and ensure access to remedy.

1.1. Development of operational-level grievance mechanisms

Operational grievance mechanisms should be developed within a framework of corporate respect for indigenous peoples’ rights. This requires:

1) the conduct of indigenous rights due diligence, participatory impact assessments, consultations to obtain FPIC and broad based participation of indigenous peoples and their representative organizations in the mechanism design,

2) exploring the role of customary law and the use of traditional dispute mechanisms and reaching mutually acceptable contractual agreements providing for culturally appropriate rights based grievance handling procedures and structures as well as benefit sharing, impact mitigation, monitoring, and sanctioning arrangements.

1.2. Features of operational-level grievance mechanisms

Operational grievance mechanisms should:

1) provide clear procedures and be based on contractually binding obligations to ensure redress for violations of indigenous peoples’ rights,

2) complement the existing landscape of judicial and non-judicial mechanisms and include rapid escalation channels to them or to other mutually acceptable arbitration mechanisms,

3) ensure that consideration of, and respect for, indigenous customary law is a fundamental component of their procedures and outcomes,
4) provide channels through which communities can raise grievances in relation to the conduct of consultation and consent seeking processes and decision-making rights,

5) cater to the cultural distinctiveness of indigenous peoples and lead to outcomes that are satisfactory to them and compatible with their traditional dispute resolution procedures,

6) have a clear scope and ensure that independent advice is available to indigenous peoples when selecting the appropriate mechanism through which to address their grievances,

7) avoid the use of legal waivers prohibiting civil claims where settlements are reached, and instead ensure settlements are given due consideration in any subsequent proceedings,

8) ensure that contractors are subject to grievance mechanisms and held to account for violations of human rights,

9) be managed by people whom the indigenous community trust - this may require that they be jointly managed, or managed by independent third parties,

10) be gender sensitive and considerate of the rights and interests of women, youth and the elderly,

11) address grievances regardless of the means through which they are raised to the company.

1.3. Company internal considerations

Effective operational-level mechanisms require:

1) cross-functional engagement (from the contract negotiation stage onwards) and companywide understanding of indigenous rights,

2) alignment of staff and management incentives with effective grievance resolution,

3) accountability of staff across all functions involved in the grievance resolution process,

4) clear communication channels and cooperation between those responsible for community engagement and those responsible for addressing grievances,

5) adequate resourcing of grievance mechanisms, including resources for translation, with dedicated staff who have effective communication channels to senior management,

6) robust information management systems for tracking grievances, escalating issues, identifying trends and facilitating organizational learning,

7) facilitation of independent (rights-holder trusted) third party monitoring and oversight,

8) clear escalation channels involving mutually acceptable third parties, (potentially for adjudication purposes) with transparent funding arrangements that guarantee impartiality.
RECOMMENDATIONS IN RELATION TO ACCESS TO REMEDY FOR INDIGENOUS PEOPLES

To corporations:

1. Publicly recognize negative impacts caused by their operations, commit to providing remediation, and take tangible steps to realize this, including through reaching agreements with the affected communities in accordance with the Guiding Principles;

2. Revise policies to recognize international indigenous rights standards, including FPIC, and perform updated impact assessments in conjunction with the affected communities, making them publically available as soon as they are completed;

3. Establish, in conjunction with directly and indirectly affected communities:
   - Protocols for dialogue, consultation and participation in accordance with international standards as affirmed in ILO Convention 169 and the UNDRIP;
   - Mitigation plans and permanent monitoring systems with the participation of indigenous authorities;

4. Decontaminate and rehabilitate affected areas and take urgent measures to prevent further environmental harms, in particular oil spills and water pollution, ensuring transparency when and where contamination occurs;

5. Comply with State imposed sanctions and avoid contesting them or inappropriately influencing the State when it is attempting to ensure compliance with indigenous peoples’ rights;

6. Condition investment on State compliance with the duty to consult with, and obtain the FPIC of, directly and indirectly affected indigenous peoples;

7. Ensure the public disclosure of key documents relating to investment projects and make information on investments and bidding processes for concessions, as well as on future plans, accessible to indigenous peoples and their support organizations in a language and form understood by them;

8. Ensure that consultations are meaningful, inclusive and accessible to all affected peoples and communities with due consideration given to their rights, perspectives and current livelihood activities;

9. Support and participate in dispute mediation process and adhere to their recommendations and avoid all potentially harmful activities, in particular in relation to land and resource usage, while dispute resolution processes are ongoing;

10. Ensure that communities are fully informed about all accessible grievance mechanisms, including those of financial institutions, during FPIC processes; and

11. Ensure that operational-level grievance mechanisms are:
   - Functioning from the project outset within a framework of due diligence, participatory impact assessments, and benefit sharing agreements;
   - Formalized in FPIC based agreements giving rise to contractual obligations to address rights violations;
   - Developed, operated and overseen in conjunction with indigenous peoples;
based on respect for their judicial institutions, customary laws and practices;

address all grievances irrespective of the means through which they are submitted;

provide agreed channels for escalation and adjudication of disputes in a timely manner;

interface effectively and efficiently with existing judicial and non-judicial mechanisms and under no circumstances obstruct access to these mechanisms;

transparent and based on trusted independent third party monitoring;

guarantee culturally appropriate compensation that is fair, just and equitable;

are gender sensitive and designed with the rights and interests of women, youth and the elderly in mind.

To host States:

1. promptly revise legislative frameworks, including those which relate to settlements and compensation, so that they are compliant with indigenous peoples’ rights and fully enforce them, including obliging businesses to ensure that their operations are rights-based;

2. adopt urgent measures to avoid environmental harms and require companies to decontaminate lands and water, suspending the issuance of concessions until environmentally affected areas are fully rehabilitated and legal protections guaranteed;

3. demarcate and title indigenous territories, recognize their governance structures and investigate with the indigenous peoples concerned alternative non-extractive forms of development and ensure their effective participation in strategic land and resource use planning;

4. recognize and protect the self-determination rights of indigenous authorities and communities, in particular their right to give or withhold FPIC for land use and mining activities;

5. protect and fulfil the economic, social, cultural, environmental, civil and political rights in accordance with the indigenous peoples’ own perspectives on their needs and ensure that they are provided with basic services in a manner acceptable to them;

6. conduct participatory assessments addressing health, environmental, social, cultural and economic impacts of proposed projects;

7. hold good faith consultations with indigenous peoples and obtain their FPIC before issuing concessions or licences for projects impacting on indigenous peoples’ rights;

8. establish an independent participatory monitoring mechanism to oversee project operations and the effectiveness of grievance mechanisms with the participation of the indigenous experts and the affected indigenous peoples;

9. require corporations to conduct due diligence addressing indigenous peoples’ rights and to conduct participatory environmental, social and cultural impact assessments, wherever they may potentially be impacted by a proposed project;

10. require corporations to prepare a plan in conjunction with indigenous peoples providing culturally appropriate timeframes and adequate budgets and oversight and grievance mechanisms for FPIC seeking processes;
11. publically apologize for harms caused as a result of business activities in indigenous peoples’ territories and investigate and sanction companies for violations of rights, obliging them to properly compensate communities and rehabilitate areas, based on the communities own recommendations, for harms caused and the use of their lands;

12. stop criminalization, or any form of harassment of community members who assert their rights and seek redress in the context of business related human rights violations, and take urgent action to punish those responsible in cases where harassment or intimidation occurs;

13. speed up the processing of complaints by establishing special courts, or tribunals staffed by trusted legal experts on indigenous rights, which could serve as escalation channels for other grievance mechanisms. In the case of nomadic peoples establishing mobile courts (i.e. courts which go to the communities) should be considered;

14. create independent credible mediation mechanisms, making use of indigenous customary law as appropriate, in order to support judicial processes aimed at addressing disputes;

15. strengthen the role of National Human Rights Institutions in addressing indigenous peoples rights in the context of corporate activities impacting on them, and ensure that indigenous peoples rights are adequately addressed in National Action Plans aimed at implementing the Guiding Principles;

16. facilitate community access to effective judicial and non-judicial mechanisms and provide them with the necessary financial and technical assistance, including legal aid and advice in the context of strategic litigation and efforts to obtain redress;

17. adopt financial regulations to ensure that investment funding is only authorized for projects which respect indigenous rights, including the requirements for FPIC and effective grievance mechanisms;

18. support dispute resolution processes of international financial institutions and ensure that outcomes respect internationally recognized indigenous rights and are swiftly enforced;

19. respect the requests of affected communities for land restitution and ensure that all compensation and reparations are culturally appropriate and acceptable to the affected communities;

20. ensure adequate financing of indigenous peoples’ autonomous governance structures in accordance with article four of the UNDRIP.

To home States:

1. where necessary modify legal frameworks to facilitate companies registered in their jurisdictions being brought to account for violations of indigenous peoples’ rights overseas;

2. conduct and publicize participatory evaluations of the risks and impacts of their companies’ operations on the rights of affected indigenous peoples overseas;

3. guarantee the enjoyment of the right to effective, accessible and timely remedy through both judicial and non-judicial mechanisms which ensure adequate reparations in the form of restitution, compensation, rehabilitation and non-repetition;

4. provide communities alleging corporate related human rights violations with the necessary legal and technical expertise, as well as financial resources, to access these judicial and non-judicial mechanisms and conduct civil and criminal investigations of companies, where appropriate sanctioning them for rights violations;
5. participate in the on-going UN process aimed at ensuring that transnational corporations and other business enterprises are held to accountable for violations of human rights (this recommendation applies to both home and host States).

To international and regional human rights systems:

1. request information from home and host States, and where appropriate companies, in relation to measures that have been adopted to enable victims to access effective remedial mechanisms;
2. issue findings and recommendations on measures that should be adopted to address the situation of indigenous peoples whose human rights are affected by corporate activities;
3. support the establishment of effective grievance mechanism addressing complaints of indigenous peoples on business operations affecting them;
4. include the establishment of a complaints mechanism in mandate of the ASEAN Intergovernmental Commission on Human Rights.

To industry bodies and certification schemes

1. Develop policies and safeguards which are consistent with international indigenous rights standards, including FPIC, and provide indigenous peoples with access to grievance mechanism which offer mediation and where sought adjudication in relation to alleged human rights harms caused by their members.

To financial Institutions and investors:

1. ensure that due diligence addressing indigenous peoples’ rights is conducted for all projects impacting on them and monitor client compliance with international standards;
2. ensure that robust environmental, cultural, spiritual and social impact assessments are conducted and that indigenous peoples FPIC is obtained for projects impacting on their rights;
3. review all direct and indirect (i.e. through financial intermediaries) investments to identify any projects with potential impacts on indigenous peoples and ensure access to effective culturally appropriate grievance mechanisms;
4. ensure that the violations are redressed in accordance with the process and outcomes sought by communities, including maintaining investments until disputes are resolved if communities hold that divestment would be disadvantageous for redress;
5. be proactive and initiate investigations in situations where communities are not in a position to raise their grievances and facilitate dispute resolution processes where appropriate;
6. require clients to fully inform indigenous peoples of all grievance mechanisms, including those of financial institutions, as part of their FPIC seeking processes;
7. grievance mechanisms should
   a. clearly identify sanctions for any violations committed
   b. result in disinvestment from projects where requested by indigenous peoples in the context of significant adverse impacts on their rights.
Business and Human Rights: Indigenous Peoples’ Experiences with Access to Remedy

To ensure compensation of victims and rehabilitation of lands and resources in a manner identified by the affected indigenous peoples themselves;

- provide for negotiation and mediation on mutually agreed terms and the participation of independent third parties;
- reach a determination where mediation is not possible or is not seen as appropriate by those filing the complaint.

8. ensure the proper implementation of policies and safeguards on indigenous peoples and guarantee that they are fully aligned with the UNDRIP and apply irrespective of the terms used by States to categorize indigenous peoples.

To the international community:

1. urge States to suspend all new projects until the legislative, policy and institutional reforms necessary to uphold indigenous peoples have been fully implemented; and

2. support communities in their complaints to judicial and non-judicial mechanisms and advocate for these mechanisms to ensure that remedies are adequate, culturally appropriate and proportionate to harms.

To the UN Work Group on Business and Human Rights (in keeping with Human Rights Council resolution A/HRC/26/L.1 2014):

1. include a specific focus on indigenous peoples’ rights in its agenda item on the issue of access to remedy, judicial and non-judicial, for indigenous victims of business-related human rights abuses, in order to achieve more effective access to judicial remedies at the Forum on Business and Human Rights, and

2. ensure the full and effective participation of indigenous peoples in the consultative process with States to explore and facilitate the sharing of legal and practical measures to improve access to remedy, judicial and non-judicial, for victims of business-related abuses, including the benefits and limitations of a legally binding instrument.

To non-governmental organization:

1. cooperate with indigenous communities to strengthen their capacity to engage in dispute resolution processes and support them in monitoring activities and publically reporting on violations of their rights.

Finally, good faith dialogue is necessary between corporations, international financial institutions, representatives of indigenous peoples, civil society, States and the international community in relation to grievance mechanisms and access to remedy, addressing:

1. the role which the international community, civil society actors and academia could play in the development, oversight and scaling up of indigenous rights-compliant operational-level grievance mechanisms;

2. how to ensure that indigenous peoples’ customary institutions and laws, or hybrid dispute resolution systems developed by indigenous communities, are accorded appropriate respect and resourcing in dispute resolution processes and that operational-level grievance mechanisms are entrenched in contractually binding FPIC agreements;
3. government and corporate respect for the collective and individual rights of indigenous women, youth and the elderly, ensuring, through the use of indigenous peoples’ own mechanisms, their effective participation in impact assessments and consultation and consent seeking processes;

4. financial management and oversight structures to ensure that company financed grievance mechanisms operate in a truly independent manner;

5. mechanisms and financial resources to ensure empowerment of indigenous peoples

6. capacity building in relation to indigenous peoples’ rights in corporations and States; and

7. steps to acknowledge the legacy of extractive industry activities and initiate processes of reconciliation, in cooperation with indigenous peoples, with the aim of providing culturally appropriate compensation and redress and the building of rights-based relationships.

4 The background chapter on access to remedy was authored by Dr Dalee Sambo Dorough
5 WCIP Outcome Document UN Doc. A/69/L.1
6 Ibid para 24.
7 Ibid para 16.
8 The Colombia case study was authored by Mikel Berraondo López and Fuerza de Mujeres Wayuu.
9 The case study was authored by Delphine Raynal in conjunction with Peru Equidad.
10 The India case study was authored by Shankar Gopalakrishnan.
11 The Malaysia case study was authored by AIPP.
12 The Cambodia case study was authored by Yun Mane.
13 The Tanzanian case study was authored by Elifuraha Laltaika.
14 The Kenyan case study was authored by Kanyinke Sena.
17 The chapter on operational level grievance mechanisms was authored by Dr Cathal Doyle.