

Operational-Level Grievance Mechanisms: A New Approach to
Human Rights for Mining Corporations

Major Research Paper
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ABSTRACT

This major research paper explores operational-level grievance mechanisms established by mining multinational corporations (MNCs) to complement and act as an alternative to judicial and non-judicial resolution processes currently addressing human rights issues. This type of mechanism has great potential to better address human rights complaints and ultimately mitigate the varied negative impacts mining MNCs have on local communities. To position the discussion in its broader context, the international legal framework from the perspective of international human rights law is presented. Subsequently, the Canadian framework is discussed as an example of national provisions affecting MNCs extraterritorially. This example demonstrates how the current national laws, court decisions, as well as non-judicial mechanisms fail to ensure that victims of human rights abuses committed by Canadian MNCs abroad receive proper adjudication and redress in Canada. Consequently, the background and definition of such grievance mechanisms is presented as well as three sets of criteria used to assess their effectiveness. In order to examine the question of site-level grievance mechanisms critically, two case studies of corporate grievance mechanisms established by mining MNCs are discussed and analysed.

ACRONYMS

CHRAJ: Commission on Human Rights and Administrative Justice

CSRМ: Centre for Social Responsibility in Mining

CSR: Corporate Social Responsibility

DFATD: Department of Foreign Affairs, Trade and Development Canada

ICMM: International Council on Mining & Metals

IFC: International Finance Corporation

OECD: Organisation for Economic Co-Operation and Development

Guidelines: OECD Guidelines for Multinational Enterprises

GPs: Guiding Principles for Business and Human rights

MMTs: Multipartite Monitoring Teams

MNC: Multinational Corporation

MP: Member of Parliament

NCP: National Contact Point

NGGL: Newmont Ghana Gold Limited

NGO: Non-Governmental Organization

SRSG: Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises - United Nations appointed Special Representative for Business and Human Rights

TSX: Toronto Stock Exchange

TVI: Toronto Venture Inc. Pacific

TVIRD: Toronto Venture Inc. Pacific Research and Development

INTRODUCTION

Now more than ever, the business activities of mining companies internationally are made available to the public; who it seems, is also paying attention. Due to the magnitude and intrusive nature of mining, mining multinational corporations (MNCs) too often negatively impact local communities. Their operations can and frequently do displace local people, degrade the quality of the environment, and negatively impact communities' livelihoods. Grievances are rarely well managed and occasionally escalate to human rights violations. Some MNCs have elaborated operational-level grievance mechanisms by creating processes for receiving, evaluating, and addressing local grievances at the project level. Once in place, these processes offer MNCs and communities an alternative to external legal and administrative dispute resolution processes that have been proven to be ineffective.

Canada has an interesting position in this regard. It is recognized on the international stage as being a champion of human rights as well as being the mining center of the world. Its main cities of Montreal, Toronto, Vancouver and Calgary have become the world's mining capitals. Additionally, Canadian mining MNCs have operations in every corner of the globe; 75% of mining companies operating worldwide are Canadian.¹ However, although these MNCs are Canadian businesses, their activities overseas traditionally fall outside the scope of Canadian jurisdiction.

National and International public scrutiny has helped advance the question of whether Canada should impose that Canadian mining corporations operating in a foreign country adopt the same human rights standards as in Canada. Tentatively, the Canadian Parliament, government and courts have partially addressed the issue and left the door open to new and

¹ Government of Canada, "Corporate Social Responsibility", *DFATD* online: <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/csr-strat-rse.aspx?lang=eng>>.

innovative approaches. International law, with a multitude of international standards, guidelines, and norms (known commonly as "soft law") has provided little guidance for a comprehensive answer. Their inherent nature, international law resting on states' practices and only evolving slowly, and domestic regulations falling short to ensure that human rights are not violated by corporations in a host jurisdiction, have resulted in a standstill position. Multiple regimes of accountability exist at this level, but all are falling short in regards of sufficiently addressing local grievances.

“It is clear that conventional international law-making has so far been unable to deliver a substantive answer to the challenges posed by corporations to the effective enjoyment of human rights. The relevance of alternative modes of regulation consequently increases.”² There is a growing need for mining corporations to create effective operational-level grievance mechanisms.

This paper advances the argument that although national – in this case Canadian – and international legal processes are part of the answer, project-level grievance mechanisms detect and address any legitimate concerns of those who suffer from the misconduct of mining corporations. And when efficiently managed thereafter, will mitigate human rights abuses better than traditional mechanisms. The argument at the center of this paper is that although national and international judicial and non-judicial processes are part of the answer, effective and appropriate operational-level grievance mechanisms are better suited to address minor grievances at site operation.

² Nicola Jägers, “Will transnational private regulation close the governance gap?” in Surya Deva & David Bilchitz, eds., *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge: Cambridge University Press, 2013) at 303 [Jägers]

Many crossing points exist with labour law, anti-discrimination law, humanitarian law, investment law, trade law, consumer protection law, corporate law and securities regulations.³ This issue becomes more complex once considered through the lens of International Human Rights Law (IHRL). For the purpose of this paper, we will use the broadest human rights definition. The rights one has simply because one is human, understood as rights deriving from human dignity that are inalienable and cannot be renounced or forfeited.⁴ Human rights at issue are those protected by international standards. Note that in this paper the terms ‘operational-level grievance mechanism’, ‘community-company grievance mechanism’ and ‘corporate grievance mechanism’ are used interchangeably.

In this paper and the larger discussion, the clearest starting point is the Guiding Principles for Business and Human Rights (*GPs*), drafted by the United Nations Special Representative of the Secretary General on the issue of Human Rights and Transnational Corporations and other Business Enterprises (*SRSG*), John Ruggie in 2011.⁵ A grievance is understood to be a “perceived injustice evoking an individual’s or 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”.⁶ Annex 1 offers examples of various types of grievances.⁷

This paper is divided into four ideas or chapters. Chapter one asks, are operational-level grievance mechanisms well positioned to address local grievances as a complementary process to

³ John G. Ruggie, “A UN Business and Human Rights Treaty Update” *Harvard Kennedy School* (1 May 2014) online: <http://www.business-humanrights.org/media/un_business_and_human_rights_treaty_update.pdf>.

⁴ David Bilchitz, “A chasm between ‘is’ and ‘ought’? A critique of the normative foundations of the SRSG’s Framework and the Guiding Principles” in Surya Deva & David Bilchitz, eds., *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge: Cambridge University Press, 2013) at 122. [Bilchitz, A chasm between ‘is’ and ‘ought’?]

⁵ Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, *Guiding Principle on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, U.N. Doc. A/HRC/17/31 (Mar 21, 2011) online: <<http://www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf>>. [SRSG, Guiding Principles]

⁶ UN Human Rights Office of the High Commissioner, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, Principle no 25 at 27 U.N. Doc. HR/PUB/11/04 (New York and Geneva: 2011) online: <http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf>. [UN HR Office of the High Commissioner, Guiding Principles Commentary]

⁷ See Annex 1, p. 65.

traditional judicial and non-judicial avenues? This question discusses the main concepts of international law and the responsibilities of the state and the MNCs. Based on the Canadian experience, chapter two summarizes the framework applied to mining MNCs and their activities abroad. Legislation, judicial decisions, and other non-judicial mechanisms offered in Canada are critically discussed. Chapter three provides definitions and background of traditional corporate grievance mechanisms, and examines key criteria for the effectiveness of operational-level grievance mechanisms. Finally in chapter four two examples where mining MNCs have established operational-level grievance mechanisms are presented and analysed. These case studies enable us to draw lessons from the crucial role community-company grievance resolutions play and mostly how they can provide effective change towards supporting human rights.

1. THE RELEVANCE OF INTERNATIONAL LAW

A discussion of international rule of law is needed to set the framework of this paper, as a common reaction to the issue of Canadian mining MNCs violating or potentially infringing upon human rights in another country is ‘*Why should Canada care?*’ (this goes for any country). There are many reasons why Canada (or any country) should be watchful of the behaviour of their MNCs abroad. The reason which is of interest to this paper is that they are legally obligated under international law. Since this discussion also focuses on community-company issues, the responsibilities that corporations have under this particular body of law are also presented. We will find that if the state is responsible for the protection and respect of human rights, so are MNCs. Despite this rather strong conceptual assertion, a clear gap exists between theory and practice; leading in some cases to a legal vacuum where human rights violations may occur.

1.1. INTERNATIONAL HUMAN RIGHTS LAW AND HUMAN RIGHTS

International human rights law (IHRL) is one specific branch of law emanating from the broader umbrella of international public law. The fact that IHRL is defined as ‘public’ implies that states are both creators and guardians of the law. This state-centric paradigm on which IHRL was developed in the early 20th century, does not call upon third parties, such as corporations, to protect human rights. In 1948, *The Universal Declaration of Human Rights* established common human rights standards at the foundation of IHRL. Further, the International Covenants for Civil & Political Rights and Social, Economic, & Cultural Rights, and other international treaties compose part of a comprehensive body of international and customary law in regards to human rights.⁸ Soft law (norms, guidelines, principles, etc.) have also contributed to the ever-evolving nature of human rights and have assisted in modernizing the interpretation of IHRL.

Today, it is clearly understood that both states and private parties can potentially violate human rights. It is important to recognize that corporations are impacting the full range of human rights as their impact on day-to-day lives is omnipresent.⁹ To date however, mostly states or in very few cases, individuals, have been held accountable for such violations. It is only the most extreme IHRL violations, which trigger the highest level of scrutiny, for which national, regional and international bodies have created mechanisms to hold corporations or individuals liable for their actions. For example, for several Western states that have ratified the *Rome Treaty*, the International Criminal Court could in theory hold accountable individuals for alleged cases of genocide, crimes against humanity, or war crimes, although this is an evolving practice that is quite controversial.

⁸ International Convention on the Elimination of All Forms of Racial Discrimination, Convention on the Elimination of All Forms of Discrimination against Women, Convention against Torture and Other Cruel, Inhuman or Degrating Treatment or Punishment, Convention on the Rights of the Child and International Convention on Protection of the Rights of All Migrant Workers and Members of Their Families, are, along with the Covenants, considered the core human rights treaties.

⁹ Andrew Clapham, *Human Rights Obligation of Non-State Actors* (Oxford: Oxford University Press, 2006).

1.2. STATE DUTIES

States have been traditionally perceived as and are still the primary and perhaps sole direct duty-holders in IHRL.¹⁰ The state has the general obligation of respecting, protecting and implementing international law in its jurisdiction. Traditionally, each state has a duty to protect against human rights abuses by third parties.¹¹ This is a broad duty or, moreover, a legal obligation. States also have a duty to regulate behaviour of private actors in order to prevent harm and to ensure remedy if harm may take place.¹² The implementation of these IHRL principles is subject to a state's power, willingness, as well as its capabilities. Application within and outside a state's territory (extraterritorial application) are understood differently. Extraterritorial application and jurisdiction of a state duties and powers are debated.

In theory, it seems clear what a state's duties are vis-à-vis it's IHRL's obligations; however "matters of economic co-operation and competition across national-territorial borders are creating greater gaps between the operational capacities of the global business entities and the regulatory capacities of territorial states".¹³ Due to globalization and the internationalization of economies, markets and even people, it has been challenging to clearly define whose responsibility and duty it is to ensure the respect and protection of human rights.

The United Nations Guiding Principles for Business and Human Rights (*GPs*) are helpful in providing some clarification. According to the *GPs*, states have the responsibility to protect individuals against potential abuse committed by MNCs.¹⁴ Although non-mandatory, the *GPs*

¹⁰ Larissa Van den Herik & Jernej Letnar Cernic, "Regulating Corporations Under International Law: From Human Rights to International Criminal Law and Back Again" (2010) 8 J. Int'l Crim. Just. 725, at 727.

¹¹ Robert McCorquodale, "Corporate Social Responsibility and International Human Rights Law" (2009) 87 J. Bus. Ethics 385, at 386.

¹² Robert McCorquodale and Penelope C. Simons, "Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations By Corporations of International Human Rights Law" (2007) 70 Mod. L. Rev. 598, at 602.

¹³ Daniel Augenstein & David Kinley, "When human rights 'responsibilities' become 'duties': the extra-territorial obligations of states that bind corporations, in Surya Deva & David Bilchitz, eds., *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge: Cambridge University Press, 2013) at 271.

¹⁴ SRSF, Guiding Principles *supra* note 5 at 7.

represent a breakthrough: they emphasize the business' responsibility in regards to human rights, regardless of the location of its operations. Where human rights breaches and violations occur, MNCs must offer remedies to victims, or at the very least contribute to the redress mechanisms.¹⁵ These responsibilities are directly targeted at MNCs. However, it is important to take note that the GPs are not calling for MNC legal accountability, which has been one of the biggest critiques of the SRSB's work.

Hypothetically, if a Canadian mining MNC would violate - voluntarily or not - the human rights of local communities while operating overseas, state's duties, whether Canada or the host country, often get blurred. The next section proposes a summary of the duties and responsibilities of host states versus home states in such circumstances. We will also briefly clarify the role of MNCs and how they can contribute to improving this system.

1.2.1. DUTIES OF THE HOST STATE

The obligation to address the misconduct of corporations rests principally with the host state in which the MNC operates, as the violations are committed in its jurisdiction, and to a much lesser extent with the home state of a corporation, where the MNC is incorporated or headquartered according to general principles of International Law.¹⁶ The second option will be discussed in the next section.

A corporation (foreign or national) which operates in the territory of any state is subject to that host state's laws. As previously mentioned, there is a clear obligation on a state to prevent violations of human rights by moral and legal persons, which include non-state actors and thus corporations on its territory.¹⁷ In line with a state's national laws, and from what we have seen in more recent years perhaps according to a state's international trade agreements, a MNC may be

¹⁵ *Ibid.*, Chapter II at 24.

¹⁶ Larissa Van den Herik & Jernej Letnar Cernic, *supra* note 10 at 727.

¹⁷ *Ibid.*

restricted to operate only under certain conditions or may need to establish local subsidiaries to be able to proceed.

The primary assumption is thus that a Canadian mining company operating internationally is accountable to the country in which it, or its subsidiary, conducts business. This becomes more complicated when mining MNCs operate in a developing state or in a region with an unsettled social and political climate. The past has shown that major extractive (not just mining) corporations frequently proceed with projects in what commentators have called failed or weak states, or what can generally be defined as a territory with no political and administrative structure or power. In such cases, the distribution of power and control of MNCs can be arranged in ways that defy territorial boundaries. For example, a “parent” corporation may be a “national” in Canada and its various subsidiaries are “nationals” in the state in which they operate. Because these MNCs sometimes operate in a legal vacuum, they are not likely to be held accountable for their actions. If human rights violations or grievances occur, it is very doubtful that victims would have access to proper redress.

Moreover, noting the structural imbalance of power in situations where a MNC outweighs a less developed or developing host state in terms of economic power, that weaker state may not be inclined or have the capacity to regulate a corporation too severely.¹⁸ The investment prospect and economic activity originating from the MNC may be more appealing to the developing state than the need to protect its citizens from violations committed by that same MNC which is often an important job provider for the region.¹⁹

1.2.2. DUTIES OF THE HOME STATE

Where there is effectively no government imposing restrictions or guidelines ensuring that

¹⁸ *Ibid.*

¹⁹ *Ibid.*

the MNC conducts its activities without infringing human rights, or when there is a government but with limited tools to do so, should it also fall under the responsibility of the MNC's home state to ensure its companies respect human rights abroad?

Partially answering that question, some observers have argued that there has not been a shift in the state-centric paradigm, as human rights obligations are still attached to the nation state in international law and not to MNCs.²⁰ Undeniably, the 2011 GPs failed to enshrine into hard law the fact that states should be held accountable for the misbehaviour of their MNCs.

Alternatively, some authors disagree and propose that a corporations' home state should be held accountable. In that regard, Seck proposes the following: "[T]o the extent that home states do not exercise due diligence to prevent harm and to the extent that home states neither prosecute private actors that have caused harm nor provide access to justice for the victims of harm, the home state has itself engaged in wrongful conduct for which state responsibility is applicable."²¹

Contrary to the belief of fierce critics, this is not a novel claim. As early as 1993, Diane F. Orentlicher and Timothy A. Gelatt have argued that governments of developed states should be responsible for regulating domestically based corporations to ensure compliance with international human rights norms given the hesitation of some developing countries to regulate MNCs.²² Although the current state of international law still does not render states responsible for the acts of private entities and nationals abroad, observance and regulation of corporations

²⁰ *Idid.* Despite of this reality, the authors contend that the argument is nonetheless more intrusive and may require a new vision on human rights – a vision that more fully includes and accepts non-state actors as new duty holders.

²¹ Sara L. Seck, "Home State Responsibility and Local Communities: The Case of Global Mining" (2008) 11 Yale Hum. Rts. & Dev. L. J. 177 at 204. [Seck]

²² Diane F. Orentlicher & Timothy A. Gelatt, "Public Law, Private Actors: The Impact of Human Rights on Business Investors in China" (1993) 14 NW. J. Int'l L. & Bus. 66 at 103.

domiciled within their territory is highly acceptable with the aim of mitigating human rights violations in other countries.²³

The commentary to the second GP clarifies that “at present States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction. Nor are they generally prohibited from doing so”.²⁴ It has been widely acknowledged that home state regulation of corporate conduct abroad is *legally permissible* in international law, but it is less clear whether states have an *obligation* to monitor and control the activities of their corporations extraterritorially.²⁵ This question remains unanswered and consensus is far from being reached on whether states have the *duty* or the *right* to do so.

It is not pertinent for the purpose of this paper to determine which view is more appropriate. This is a relatively new question, and one would need to study various national legislations to paint a broader picture of what states are imposing on their MNCs when operating outside of their jurisdiction. Very few developed states have partially or fully embraced their right or duty to extraterritorially regulate MNCs and to hold them accountable for their actions in cases where the host state fails to do so. In Canada, the political structure and the laws enable extraterritorial oversight to some extent but they are far from ensuring that Canadian MNCs fully respect the whole spectrum of human rights. A more in depth assessment of the Canadian regulatory framework in this respect is presented in the second chapter.

²³ Christen Broecker, “‘Better The Devil You Know’: Home State Approaches To Transnational Corporate Accountability” (2008) 41 N.Y.U. J. Int’l L. & Pol. 159 at 181. [Broecker]

²⁴ UN HR Office of the High Commissioner, Guiding Principles Commentary, *supra* note 6 at 4.

²⁵ Broecker, *supra* note 23 at 179-181.

1.3. CORPORATE DUTIES

MNCs can be either complicit in human rights violations or be direct violators. Local and international scrutiny has shifted and begun to focus on MNCs as they have gained increasing power and influence in the global economy.

There seems to be consensus that corporations as private actors along with states must respect (at the very least) IHRL. Some go even further in asserting that corporations are responsible and accountable for their behaviour regardless of the permissiveness or the absence of a solid national framework guiding their operations.²⁶ Consequently, this should be reflected in MNCs' activities and could partially fill the accountability gap that occurs in ungoverned territories. Through Corporate Social Responsibility (*CSR*), MNCs can address some of these issues. "When articulated from a managerial standpoint, this definition [*CSR*] calls for corporations to be ethical and promote the virtues of good corporate citizenship, as well as obey the law while striving to make profit. [...] *CSR* also transcends its original definitional boundaries as corporate philanthropy and assumes the form of justice".²⁷ MNCs voluntarily agree to apply certain principles derived from IHRL, environmental law, international labour standards, etc... in attempting to take responsibility for their impact on the milieu in which they operate.²⁸

CSR's main critics point to the fact that adhering to voluntary guidelines is costless and do not bind the company, which is in itself a weakness. Responding to this Nicola Jägers asserted that:

Voluntary commitments taken up by corporations are not without 'teeth'. Whilst the adoption of measures to discharge the responsibility to respect might (initially) be of a voluntary nature, compliance with these measures increasingly

²⁶ Seck, *supra* note 21.

²⁷ Kenneth Amaeshi, Paul Nnodim and Onyeka Osuji, *Corporate Social Responsibility, Entrepreneurship and Innovation* (New York: Routledge, 2013) at 7.

²⁸ *Ibid.*

is not. Law is gradually encroaching upon voluntary CSR policies. Stakeholders are turning to law to enforce voluntary commitments undertaken by corporations²⁹

According to the GPs, MNCs have the responsibility to respect human rights and prevent possible abuses that could result from their activities. “The responsibility to respect human rights is a global standard of expected conduct for all business enterprises wherever they operate. It exists independently of States’ abilities and/or willingness to fulfill their own human rights obligations, and does not diminish those obligations. And it exists over and above compliance with national laws and regulations protecting human rights.”³⁰

The GP number 15 provides that:

In order to meet their responsibility to respect human rights, business enterprises should have in place policies and processes appropriate to their size and circumstances, including:

- (a) A policy commitment to meet their responsibility to respect human rights;
- (b) A human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights;
- (c) Processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute.³¹

Additionally, human rights due diligence is key in the SRSG’s framework and GPs 17 to 22 elaborate on it. Conducting proper human rights due diligence, helps businesses identify its potential adverse human rights impacts and helps them address risk of legal claims “by showing that they took every reasonable step to avoid involvement with alleged human rights abuse”.³² Importantly, businesses should know that due diligence processes will not absolve them from liability for causing or contributing to human rights abuses.

SRSG’s framework proposed that business must establish, or to the very least participate, in operational-level grievance mechanism for individuals and communities whose human rights

²⁹ Jägers, *supra* note 2 at 299-300.

³⁰ UN HR Office of the High Commissioner, Guiding Principles Commentary, *supra* note 6 at 13.

³¹ SRSG, Guiding Principles 15 *supra* note 5.

³² UN HR Office of the High Commissioner, Guiding Principles Commentary, *supra* note 6 at 19.

may be adversely impacted.³³ This does not mean, however, that operational-level grievance mechanisms ought to replace judicial and non-judicial mechanisms, but rather that they should be seen as complementary to one another.³⁴

The formal recognition of the framework by the UN Human Rights Council was applauded as a success, however its innovativeness is not as great as it was first told. Indeed, the GPs are not creating new obligations for corporations, which would then trigger new a international legal oversight and redress mechanism for victims. Rather they are reinforcing and confirming what was already understood as the underlying responsibilities of corporations.³⁵

Some commentators see the fact that no legal accountability is imposed to MNCs as a major impediment.³⁶ In legal terms, there is a large difference between a *responsibility* and a *duty*. While the former creates expectations, the latter implies legal obligations and makes one accountable for its actions (or inaction). The carefully chosen words used in the GPs, “responsibility to protect human rights”, dilute MNCs’ duties and do not call for their accountability.³⁷ Critics have argued that in order to obtain a consensus on the GPs, MNCs got the better deal out of the UN mandate on Business and Human Rights, avoiding legal accountability.³⁸ On corporate grievance mechanisms, Surya Deva underlines that the GPs are silent on what kinds of remedies victims of corporate human rights abuses could have against MNCs.³⁹

³³ SRSG, Guiding Principles 29 *supra* note 5.

³⁴ UN HR Office of the High Commissioner, Guiding Principles Commentary, *supra* note 6 at 32.

³⁵ “The responsibility of business enterprises to respect human rights is distinct from issues of legal liability and enforcement, which remain defined largely by national law provisions in relevant jurisdictions”, in UN HR Office of the High Commissioner, Guiding Principles Commentary, *supra* note 6 at 14.

³⁶ Bilchitz, A chasm between ‘is’ and ‘ought’?, *supra* note 4 at 120.

³⁷ Surya Deva, “Treating Human Rights Lightly: a critique of the consensus rhetoric and the language employed by the Guiding Principles?”, in Surya Deva & David Bilchitz, eds., *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge: Cambridge University Press, 2013) at 79. [Deva, Treating Human Rights Lightly]

³⁸ Carlos Lopez, “The ‘Ruggie Process’: from legal obligations to corporate social responsibility ?” , in Surya Deva & David Bilchitz, eds., *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge: Cambridge University Press, 2013) at 60-61.

³⁹ Deva, Treating Human Rights Lightly, *supra* note 37 at 102-103.

In this chapter, we have established the role and duties of host and home states in relations to the activities of MNCs extraterritorial operations. States have general obligations under international law to guarantee the protection and respect of human rights of their population and most vulnerable communities. Home states could use extraterritorial application of such rights and duties to regulate their MNCs behavior abroad. While this is a possibility, it is very uncommon and creates jurisdictional gaps, leaving victims of human rights abuses committed by MNCs abroad few forums to get proper adjudication and redress.

Further, recent developments in international law have also established that MNCs have the responsibility to respect human rights, which are sometimes addressed in their CSR policies and due diligence and risk assessments. MNCs must also ensure that human rights are respected and, it is recognized, although not without uncertainty, that MNCs must dedicate resources to prevent and mitigate adverse human rights impacts. Building on this responsibility, MNCs must also offer or participate in operational-level grievance mechanisms. Although these are steps taken in the right direction the apparatus of norms, regulations and guidelines are non-binding nor enforced in an effective manner.

This unsolved matter of international jurisdiction (home vs. host states, states vs. MNCs) supports the idea that corporate grievance mechanisms present greater potential as a viable alternative where grievances can be addressed, particularly if there is no home or host state adjudication. The underlying assumption is that the community-company grievance mechanisms detect and address any legitimate concerns of those who may have suffer from wrongdoings by MNCs, and “[i]f those concerns are not identified and addressed, they may over time escalate into more major disputes and human rights abuses”.⁴⁰ However, project-level grievance mechanisms can only address and resolve minor human rights issues, and access to judicial

⁴⁰ UN HR Office of the High Commissioner, Guiding Principles Commentary, *supra* note 6 at 32.

processes remains fundamental.

Chapter two will explore the Canadian case, and how Canada, as a home state to many mining MNCs, works to ensure human rights protection and access to redress mechanisms for victims located in other countries.

2. THE CANADIAN CASE

Now that we defined the scope of responsibility and accountability of states and MNCs, this chapter provides an overview of the Canadian legislative framework at play when mining MNCs violate human rights abroad. This chapter does not attempt to offer a holistic analysis of the complex framework that Canadian mining MNCs must navigate. Rather, this chapter proposes a succinct review of the recent Canadian legislative propositions, a brief analysis of the judicial hurdles faced during litigation and of the two non-judicial mechanisms offered in Canada to address issues related with mining MNCs and their extraterritorial activities. Its aim is to demonstrate that traditional judicial avenues and non-judicial processes to obtain redress in Canada, although theoretically accessible, are in a deadlock and victims face numerous difficulties when engaging with them.

2.1. CANADIAN LEGISLATIONS

Canada does not directly regulate activities of the mining industry outside its frontiers. Because of its dual legal system, both the federal and the provincial levels could hypothetically legislate on the matter according to their respective powers.

2.1.1. BILL C-300: A FAILED ATTEMPT

The lack of extraterritorial human rights laws has instigated the introduction of various bills before the Canadian Parliament. The private member Bill C-300, an *Act respecting Corporate Accountability for the Activities of Mining, Oil or Gas in Developing Countries*, was introduced by Liberal Member of Parliament (MP) John McKay, in 2009. It represented the result of several notable years of advocacy, study and dialogue on CSR and the Canadian extractive sector, and was designed as an explicit response to the negative impacts caused abroad by nationally domiciled MNCs. Its purpose was to ensure that the activities of corporations of the extractive sector receiving support from the government of Canada behave “in a manner consistent with international environmental best practices and with Canada’s commitments to international human rights standards.”⁴¹ In sum, Canadian extractive sector corporations operating in developing countries and benefiting from financial support of the Canadian federal government would have been subject to withdrawal of funding if their environmental and human rights performance abroad violate international standards. Bill C-300 received a substantial amount of support, being defeated by only 6 votes at the report stage in the fall of 2010.

2.1.2. OTHER BILLS

Other bills that aimed to address the accountability loophole for mining MNCs abroad were presented to Parliament with no success.

The purpose of Bill C-298, an *Act respecting Corporate Social Responsibility for the Activities of Canadian Mining Corporations in Developing Countries*, introduced by NPD MP Paul Dewar in 2009, was to ensure that the mining activities of Canadian corporations in

⁴¹ Bill C-300, *An Act Respecting Corporate Accountability for the Activities of Mining, Oil or Gas in Developing Countries*, 2nd Sess, 40th Parl., 2009, online: <<http://www2.parl.gc.ca/HousePublications/Publication.aspx?Docid=3658424&file=4>>.

developing countries comply with international standards regarding human rights.⁴² During the same session, Bill C-438 was introduced by the Bloc Québécois. Unlike Bill C-298, the *Extraterritorial Activities of Canadian Businesses and Entities Act* would have required all “Canadian business[es] or entit[ies] operating abroad” to comply with Canada’s obligations under international standards.⁴³

Introduced in 2009, and defeated in 2011, the Bill C-354 *Act to amend the Federal Courts Act (international promotion and protection of human rights)*, which came back as Bill C-323 in 2013, would have created cause for civil action at the federal level and permitted appropriate remedies for victims of human rights violations that were committed abroad by non-state actors.⁴⁴ According to Peter Julian who sponsored the bill, it called “for extending the authority of the Federal Court system to protect foreign citizens against a broad range of human rights violations committed by Canadian and non-Canadian corporations and persons operating outside Canada.”⁴⁵

In 2010, Dewar initiated Bill C-571, the *Trade in Conflict Minerals Act*.⁴⁶ This bill would have required Canadian companies purchasing minerals from the Great Lakes Region of Africa to practice due diligence in the chain of custody of the minerals from extraction to final

⁴² Bill C-298, *An Act respecting Corporate Social Responsibility for the Activities of Canadian Mining Corporations in Developing Countries*, 2nd Sess, 40th Parl., 2009, online: <<http://parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=3656419&File=27>>.

⁴³ Bill C-438, *An Act respecting the extraterritorial activities of Canadian businesses and entities, establishing the Canadian Extraterritorial Activities Review Commission and making consequential amendments to other Acts*, 2nd Sess, 40th Parl., 2009, online: <<http://parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=4104798&File=27>>.

⁴⁴ Bill C-354, *An Act to amend the Federal Courts Act (international promotion and protection of human rights)*, 3rd Sess., 40th Parl, 2011, online: <<http://www.parl.gc.ca/LEGISinfo/BillDetails.aspx?billId=5138027&Language=E&Mode=1&View=3>>.

⁴⁵ *House of Commons Debates*, 41st Parl., 1st Sess, No 27 (Oct. 5, 2011) at 1510 (Peter Julian), online: <<http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=5159010&Language=E&Mode=1>>.

⁴⁶ Bill C-571, *An Act respecting corporate practices relating to the purchase of minerals from the Great Lakes Region of Africa*, 3rd Sess, 40th Parl., 2010, online: <<http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=4668098&File=24#1>>.

utilization. In 2014, Dewar introduced a similar bill, Bill C-486, *Conflict Minerals Act*, which passed the first reading in House of Commons during the last parliamentary session.⁴⁷

Lastly, defeated in April 2014, John McKay also sponsored the Bill C-474, *Transparency of Payments Made by Mining, Oil and Gas Corporations to Foreign Governments Act*.⁴⁸ It sought to fight corruption, encourage transparency and promote increased accountability within mining corporations.

Recently, Bill C-584, *Corporate Social Responsibility of Extractive Corporations outside Canada Act*, was introduced in the house in March 2014, and its fate will likely be the same as the ones presented above.⁴⁹ Well aware of the problem, Canadian MPs – all from opposition parties have tried with no success to give more teeth to federal laws and administrative processes in order to shed greater light on activities of Canadian mining corporations overseas, as well as offer better access to remedies for victims of human rights violations.

2.2. MINING CORPORATIONS BEFORE COURTS

The Canadian Federal Parliament has the power to adopt extraterritorial criminal laws, but provinces can also legislate on civil matters relating to the Canadian mining industry abroad. Aside from the theoretical possibility that the Attorney General might prosecute a corporation for a specific category of human rights crime, no extraterritorial human rights law exists that would allow victims of human rights abuse committed abroad to present a judicial recourse before a federal court of law. For this reason, victims of human rights violations have presented their claims before other forums, such as civil courts in Quebec and Ontario.

⁴⁷ Bill C-486, *An Act respecting corporate practices relating to the extraction, processing, purchase, trade and use of conflict minerals from the Great Lakes Region of Africa*, 1st Sess., 41th Parl., 2013, online: <<http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=6062040&File=4&Col=1>>.

⁴⁸ Bill C-474, *An Act respecting the promotion of financial transparency, improved accountability and long-term economic sustainability through the public reporting of payments made by mining, oil and gas corporations to foreign governments*, 1st Sess., 41th Parl., 2013, online: <<http://www.parl.gc.ca/LegisInfo/BillDetails.aspx?Mode=1&billId=5983470&Language=E>>.

⁴⁹ Bill C-584, *An Act respecting the Corporate Social Responsibility Inherent in the Activities of Canadian Extractive Corporations in Developing Countries*, 2nd Sess. 41th Parl., online : <<http://www.parl.gc.ca/LEGISInfo/BillDetails.aspx?billId=6489787&Language=E&Mode=1>>.

2.2.1. CRIMINAL LAW

Generally speaking, Canadian criminal law permits private prosecutions.⁵⁰ But it is not an easy task to bring MNCs before Canadian courts for breaches of IHRL. As previously mentioned, the fact that there is no federal statute allowing for courts to hear such cases is a major impediment. At the federal level, one criminal law could potentially be of interest for our case.

Pursuant to the complementary principle of the *Rome Statute of the International Criminal Court*⁵¹, Canada enacted the *Crimes Against Humanity and War Crimes Act* in 2000.⁵² It permits prosecution for crimes committed on Canadian territory and by Canadians anywhere in the world: it gives Canada jurisdiction over crimes committed against Canadian nationals; and the possibility to prosecute any individual present in Canada for crimes listed in the Act (crimes against humanity,⁵³ war crimes⁵⁴ and genocide⁵⁵) - regardless of that individual's nationality. However, this law only covers specific crimes: crimes against humanity, war crimes and genocide, which creates an extremely high threshold and imposes a heavy burden of proof. Additionally, it leaves numerous other human rights violations without proper adjudication from a criminal perspective.

⁵⁰ *Criminal Code*, R.S.C. 1985 c. C-46, s. 504.

⁵¹ Rome Statute of the International Criminal Court art. 1, July 17, 1998, 37 ILM 1002.

⁵² *Crimes Against Humanity and War Crimes Act*, S.C. 2000 c. C-24.

⁵³ Crimes against humanity are described in the Act as “murder, extermination, enslavement, deportation, imprisonment, torture, sexual violence, persecution or any other inhumane act or omission that is committed against any civilian population or any identifiable group and that, at the time and in the place of its commission, constitutes a crime against humanity according to customary international law or conventional international law or by virtue of its being criminal according to the general principles of law recognized by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission”. *Crimes Against Humanity and War Crimes Act*, S.C. 2000 c. C-24 s. 4(3).

⁵⁴ A war crime is described in the Act as “an act or omission committed during an armed conflict that, at the time and in the place of its commission, constitutes a war crime according to customary international law or conventional international law applicable to armed conflicts, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission”. *Crimes Against Humanity and War Crimes Act*, S.C. 2000 c. C-24 s. 4(3).

⁵⁵ Genocide is described in the Act as “an act or omission committed with intent to destroy, in whole or in part, an identifiable group of persons, as such, that, at the time and in the place of its commission, constitutes genocide according to customary international law or conventional international law or by virtue of its being criminal according to the general principles of law recognized by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission.”. *Crimes Against Humanity and War Crimes Act*, S.C. 2000 c.C-24 s. 4(3).

Since 2000, two individuals were indicted under the *Crimes Against Humanity and War Crimes Act* for genocide and war crimes, both for crimes allegedly committed during the Rwandan genocide. Only one of them was found guilty. *R. vs. Désiré Munyaneza* case was the first in which a man was sentenced to life in prison in Canada for the alleged commission of genocide acts and crimes against humanity committed somewhere else.⁵⁶ In May 2014, the Quebec Court of Appeal upheld his 2009 conviction, after he argued that he couldn't be held accountable for acts that occurred during the Rwandan genocide of 1994, as the federal statute was only created in 2000.⁵⁷

This law is a rare but strong example of how Canada could adjudicate on the activities of its nationals extraterritorially, be they natural or legal persons. Nevertheless, it appears that there is a lack of political will in bringing cases to court and it is extremely difficult for judges to adjudicate on such cases. These impediments have prompted victims to file for civil suits before civil courts. Evidentiary and procedural litigation challenges are faced by complainants both in criminal and civil courts and burdens them unequally due to the extraterritorial nature of such cases.⁵⁸

2.2.2. CIVIL LAW

Although courts have generally been reluctant to hear cases in which the defendant is a Canadian (parent) company and when the alleged harm took place in another country, recent law cases have opened the door to civil law suits, although not without procedural complications.

⁵⁶ *R. v. Munyaneza* [2009] Q.C.C.S. 2201.

⁵⁷ *R. v. Munyaneza* [2014] Q.C.C.A. 906.

⁵⁸ Providing judges and jury evidences that are acceptable become more difficult where the alleged crimes occurred outside of Canada. Authentication and identification by proper authority or whiteness is challenging. For testimonies for example, language and cultural barriers are to be taken in account, as well as physical distance to the place where trial occurs.

Civil suits present many impediments, such as the *forum non conveniens* doctrine. *Forum non conveniens* “is a discretionary doctrine by which a court may decline to exercise its jurisdiction over a dispute if it finds that an alternative forum is more convenient or appropriate.”⁵⁹ Developed by case law, the *forum non conveniens* practice in common law provinces is ruled by the jurisdiction *simpliciter*; a court does not have to prove jurisdiction before deciding if the *forum non conveniens*’ doctrine is applicable. In Quebec, a civil law province, courts must however first decide if they can adjudicate the case.⁶⁰ Section 3135 of the *Civil Code of Quebec*⁶¹ codified the principle of the *forum non conveniens* and it is often used by Canadian corporations as an argument to obtain the Court’s dismissal.

The Anvil case (*ACCI v. Anvil Mining Limited*) is an example of where the adjudication in Quebec was allowed to proceed. In 2010, a class action suit was filed against Anvil Mining limited who operated a copper and silver mine in the Democratic Republic of Congo from 1998 until 2010. The plaintiffs alleged that the company, in providing transport and logistics to Congolese soldiers, had an important role in the Kilwa massacre of October 2004.⁶² The Quebec Court of Appeals ruling found that the Quebec Courts were not competent to hear the case and accepted Anvil's argument regarding section 3148(2) of the *Civil Code of Quebec*, which states that “a Quebec authority has jurisdiction where the defendant is a legal person, is not domiciled in Quebec but has an establishment in Quebec, and the dispute relates to its activities in Quebec.”⁶³ Since Anvil’s activities in Quebec were only established in 2005 and the company’s

⁵⁹ Jeffrey Talpis and Kath Sheley, “The Exceptional as Commonplace in Quebec Forum Non Conveniens Law: Cambior, a Case in Point” (2000) 34 R.J.T. 761.

⁶⁰ Ronald A. Brand, “Comparative Forum Non Conveniens and the Hague Convention on Jurisdiction and Judgments” (2002) 37 Tex. Int’l L.J. 467 at 485.

⁶¹ Civil Code of Québec, S.Q. 1991, c. 64, s. 3135.

⁶² Anvil was alleged to have provided logistical help to Congolese military in the massacre of Kilwa in DRC that left 100 killed. Anvil denied the allegations. *Association canadienne contre l’Impunité (ACCI) c. Anvil Mining Limited*, Requête (Statement of Claim), C.S. 500-06-000530-101, November 8, 2010.

⁶³ Civil Code of Québec, S.Q. 1991, c. 64, s. 3148(2).

representative in Quebec was merely in charge of dealing with investors and stockholders, the Court found that the Anvil's activities in the province were not related to the dispute.⁶⁴

*Recherches Internationales Quebec v. Cambior Inc.*⁶⁵ in 1998 and *Bil'in (Village Council) v. Green Park International Ltd.* in 2009, were both dismissed on the *forum non conveniens* basis.

Ontario courts have also been asked to rule on alleged cases of human rights violations committed by corporations in other counties. Two cases were recently brought before the Ontario Superior Court of Justice, where the *Cooper-Anns* test is used to determine the defendants' liability under the duty of care standard.⁶⁶

The 2009 *Piedra v. Copper Mesa Mining* case was rejected on the ground that the plaintiffs' claims failed to meet the first stage of the *Cooper-Anns* test through the requirements of foreseeability, proximity and policy and there was not a sufficient nexus in this case to convince the judges of the imposition of the duty of care.⁶⁷

In 2013 *Choc, Caal & Chub v. Hudbay Minerals Inc.*'s decision, the motion judge dismissed the defendants' claims that Hudbay could not be held liable for its subsidiary's actions at operation-level. "In a precedent-setting development, HudBay abruptly abandoned its legal argument that the lawsuit should not be heard in Canada, just before an Ontario court was set to determine the issue. As a result, and for the very first time, a lawsuit against a Canadian mining company over human rights atrocities abroad will be heard by a Canadian court."⁶⁸ At trial, the *Cooper-Anns* test will be applied to determine if there is duty of care and plaintiffs will have to

⁶⁴ *Anvil Mining Ltd v. Association Canadienne contre l'impunité*, [2012] Q.C.C.A. 117 83-85.

⁶⁵ *Recherches internationales Québec v. Cambior inc.* [1998], C.S. 1430 and *Bil'in (Village Council) v. Green Park International Ltd.*, [2009] Q.C.C.S. 4151.

⁶⁶ The test traces its origins in *Kamloops v. Nielsen*, [1984] 2 S.C.R. 2. and *Cooper v. Hobart*, [2001] 3 S.C.R. 537 and in *Anns v. Merton London Borough Council*, [1977] 2 All E.R. 492.

⁶⁷ *Piedra v. Copper Mesa Mining Corporation*, [2011], O.N.C.A. 191.

⁶⁸ *Choc v. HudBay Minerals Inc. & Caal v. HudBay Minerals Inc.*, online: <<http://www.chocversushudbay.com/>>.

defend their argument relying principally on the negligence principle. This case creates hope that victims of human rights abuses (in this particular case, shooting, killing and mass rape) could bring a Canadian mining MNC to court in Canada for wrongdoings committed abroad, but the road to redress is still uncertain.

Very recently, in June 2014, seven Guatemalan men filed a lawsuit against Tahoe Resources Inc.⁶⁹ with the Supreme Court of British Columbia, for alleged battery. It is the first time that a case of this sort is filed in British Columbia's judiciary system. Recourse to Canadian courts for such cases are becoming more frequent, and although the outcome is rarely in favour of the alleged victims, it helps continue to bring mining MNCs' actions to the public eye.

2.3. NON-JUDICIAL MECHANISMS

Canada has put in place two non-judicial mechanisms that can be used by individuals, communities and corporations with the intent of bringing all interested parties into a positive dialogue to resolve grievances. Non-judicial mechanisms are not designed to address cases of grave breaches of human rights. In such cases, the only viable options lay with the judicial system. The first was put in place as the result of an international initiative and the second emanates from an internal review of Canadian mining corporations (mal)practices.

2.3.1. NATIONAL CONTACT POINT

The OECD Multinational Guidelines for Multinational Enterprises (*Guidelines*) are an intergovernmental initiative designed to promote “responsible business conduct.”⁷⁰ Drafted in 1976 and revised in 2000 and 2011, they are extensive recommendations by governments addressed to MNCs pertaining to employment, industrial relations, human rights, environmental

⁶⁹ Canadian Centre for International Justice, “CCIJ’s Public Cases and Interventions, Thaeo Resources Inc.” online: <http://www.cciij.ca/programs/cases/index.php?DOC_INST=24>.

⁷⁰ Michael Kerr, Richard Janda & Chip Pitts, *Corporate Social Responsibility: A Legal Analysis* (Markham: LexisNexis, 2009) at 447.

issues, information disclosure and transparency (bribery), competition, taxation, and other aspects of corporate activity.⁷¹

In order to encourage implementation and observance, the 2000 revision of the Guidelines added a consultation mechanism, known as ‘specific instances’, where a National Contact Point (NCP) receives complaints and in return clarifies the said Guidelines for all invested parties (states, victims, trade unions, political parties, NGOs and MNCs). These instances do not give NCPs the power to judge the behaviour of individual companies but merely clarify the meaning of the Guidelines for future actions and possibly make recommendations.

State parties signatory to the document have committed to promoting the standards enumerated in the instrument and are obligated to set up the prerequisite complaint procedures. This is perhaps the only obligation encompassed in the Guidelines. The Guidelines target both the state and the corporations in its language, although they retain general principles of international law in privileging the prerogative of the national government in setting local standards.⁷² Conversely, the complaints target the MNCs and not states. Also, the clarifications or ‘decisions that result from this consultation mechanism are not legally enforceable.

Generally, and in most cases, a complaint should be lodged with the NCP in the state of the violation. However, in the event the violations occur in a non-OECD state - which is likely given that non-OECD states are generally developing countries - complaints may be instituted in the home state of the MNC. This flexible component to the procedure allows complaints to be lodged against both the MNCs originating from an OECD country, and its related entities, which may operate in non-OECD territories. Moreover, this component allows for complaints of

⁷¹ The revised Guidelines of June 2011 encompassed a specific chapter on human rights. Organisation for Economic Co-operation and Development, *OECD Guidelines for Multinational Enterprises* 31 (OECD Publishing, 2011) online: <<http://www.oecd.org/dataoecd/43/29/48004323.pdf>>.

⁷² Iris Halpern, “Tracing the Contours of Transnational Corporations’ Human Rights Obligations in the Twenty-First Century” (2008) 14 *Buff. Hum. Rts. L. Rev.* 129 at 173.

violations occurring as a result of MNC operations in a non-OECD country to be instituted before the NCP in the MNC's home state. This flexibility helps to fill the gap between home and host states monitoring and adjudication, as presented in the first chapter.

A signatory of the OECD Guidelines, the Canadian government established a NCP in 2000. The Canadian NCP is an interministerial committee presided over by the Department of Foreign Affairs, Trade and Development (*DFATD*).

After 13 years of operation, the Canadian NCP received only 20 complaints.⁷³ It was decided that only 12 on the 20 cases would be heard by the Canadian NCP, because the 8 others were brought to multiple NCPs simultaneously. Of the 12 remaining, four were dismissed, two were concluded, one was withdrawn, one was closed and three are still considered as pending.⁷⁴

The biggest critic of the NCP relates to fact-finding power, but the Canadian government, contrary to others such as those in the Netherlands, Norway and United Kingdom, has taken a narrow interpretation of the OECD NCP mandate and is not ready to delegate such power to the NCP.⁷⁵

2.3.2. OFFICE OF THE CSR COUNCELLOR FOR THE EXTRACTIVE INDUSTRY

The Office of the Extractive Sector Corporate Social Responsibility Counsellor (*the Office*) was appointed in fall 2009 through the strategy *Building the Canadian Advantage: A Corporate Social Responsibility Strategy for the Canadian International Extractive Sector*.⁷⁶ This was part of the Canadian effort to oversee the activities of the Canadian extractive corporations abroad.

⁷³ OECD Watch noted 20 requests compared to 11 according to the Canadian website.

⁷⁴ OECD Watch, "NCP: National Contact Point Canada" online: < <http://oecdwatch.org/cases/advanced-search/cases/advancedsearch/ncps/casesearchview?type=NCP&search=National%20Contact%20Point%20Canada>>.

⁷⁵ International Council on Human Rights, "Beyond Voluntarism: Human Rights and the Developing International Legal Obligations of Companies" online: < http://www.ichrp.org/files/reports/7/107_report_en.pdf>.

⁷⁶ Government of Canada, "Building the Canadian Advantage: A Corporate Social Responsibility Strategy for Canadian International Extractive Sector", *DFATD* online: <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/ds/csr-strategy-rse-strategie.aspx>>. [Government of Canada, Building the Canadian Advantage]

As part of the new CSR Strategy, the Office was established under DFATD and reports directly to the minister of International Trade.

The Office offers a review process that provides a private, voluntary, and non-judicial forum for the resolution of claims by affected communities against Canadian mining, oil or gas companies operating outside the borders. Its mandate also calls for review of the CSR practices of Canadian extractive sector companies operating outside Canada and advising stakeholders on the implementation of the performance guidelines.⁷⁷ “The Counsellor is not a judge and the review process is not a Court,” he simply assists the parties in a dialogue to find a resolution to their problems.⁷⁸ The Counsellor is intended to be an impartial third party that provides a negotiation table for the parties. Through dialogue, the Office only resolves disputes that are connected to the IFC Performance Standards, the Voluntary Principles on Security and Human Rights, the Global Reporting Initiative, and OECD Guidelines.⁷⁹

Since the Office opened its doors in 2010, only six reviews have been submitted and results are limited. The Counsellor’s review has no judicial power and cannot require corporations to offer proper reparation. Corporations are not obligated to participate in a review and, even if they do, they can withdraw at any time. The Office will not investigate to determine the validity of a request for review and the Counsellor’s fact-finding powers are inadequate.⁸⁰

⁷⁷ Government of Canada, “Office of the Extractive Sector Corporate Social Responsibility (CSR) Counsellor”, *DFATD* online: <http://www.international.gc.ca/csr_counsellor-conseiller_rse/index.aspx?lang=eng>.

⁷⁸ International Human Rights Program of the University of Toronto, *Disputed Ground: A Community User’s guide to the Review Process of the Office of the Extractive Sector Corporate Social Responsibility Counsellor 1* (University of Toronto, 2011) online: <http://www.utorontoihrp.com/index.php/advocacy/working-groups/working-group-reports/doc_download/91-on-disputed-ground-a-guide-to-the-review-process-of-the-csr-counsellor-canada>.

⁷⁹ Government of Canada, The Office of the Extractive Sector CSR Counsellor, “Rules of Procedure for the Review Mechanism of the Office of the Extractive Sector Corporate Social Responsibility Counsellor” (2010) *DFATD* online: <http://www.international.gc.ca/csr_counsellor-conseiller_rse/assets/pdfs/Rules%20of%20procedure%20FINAL.pdf>.

⁸⁰ Government of Canada, Building the Canadian Advantage, *supra* note 76.

2.4. TAKE AWAYS

This chapter outlined the general judicial and non-judicial structures available to victims of human rights abuses committed by Canadian MNCs extraterritorially. Only superficially touching on the problem, it is striking how many barriers victims face when trying to engage MNCs for grievance and to seek redress.

From a broader perspective, there are both some positive and negatives consequences of having recourse to the judicial system. On one hand, judicial procedures can provide benefits such as finality and enforceability of outcome, precedent setting and generation of systematic change, specific remedies, and the capacity to deal with large scale and complex claims.⁸¹

On the other hand, there is sometimes no basis in the law to found a claim, as the Canadian case demonstrates. In cases where there are, it must be emphasized that litigations create a substantial burden on the plaintiffs in terms of human and financial resources, access to information and expertise, as well as excessive timeline. The uncertainty of the ruling also weighs heavily on the victims, as the end of the process does not guarantee reparation. “While the law may facilitate general sanction, aggrieved parties may not always be able to seek personal compensation or reparation.”⁸² Additionally, MNCs have unequal advantages and can benefit from extremely complex corporate arrangements to hide their assets. Finally, litigations in home or host state countries of MNCs might lead to further deterioration of community-company relations. To date no jurisprudence has been established for such cases in Canada, but in other circumstances if victims had better access to the Canadian judicial system, or to a

⁸¹ Centre for Social responsibility in Mining (CSRM), The University of Queensland Australia, *Community complaints and grievance mechanisms and the Australian Minerals industry*, (2009) at 6, online: < http://www.csrq.uq.edu.au/docs/CSRM%20Community%20Complaints%20and%20Grievance%20Discussion%20Paper%202009%20_FINAL%20REPORT.pdf>. [CSRM, Community complaints and grievance mechanisms]

⁸² *Ibid.*

similarly dependable one in their home country, they could benefit from sound judicial processes.

For all of the reasons presented above, non-judicial mechanisms have been developed in recent years to partially fill the judicial gap. Such mechanisms were developed because a more flexible process unrestrained by pre-determined legal procedures and precedents was needed to address complaints that did not amount to a course of action in law.⁸³ These types of mechanisms are generally less costly and timely than litigation. Their aim is to offer a neutral platform for community-company negotiation and seek resolution through dialogue. Too often discretionary and disregarded by MNCs, non-judicial mechanisms represent a new approach, and they need to be strengthened in order to provide consistent answers to human rights concerns. The two non-judicial processes available in Canada, OECD NCP and the CSR counsellor office, were established to facilitate access for individuals and communities to grievance resolutions outside of the judicial system but insufficiently responded to their own mandate.

The SRSF framework and its set of criteria offered in GPs are helpful in gauging the inefficient Canadian framework and two main comments should be considered. Firstly, principle 26 on State based judicial mechanisms provides that legal barriers, such as “when claimants face denial of justice in a host State and cannot access home State courts regardless of the merits of the claim” must be removed.⁸⁴ Although Canada has an admirable judicial system, it could work towards better facilitating access to courts, both at the federal and provincial level to offer recourse for victims of human rights abuses committed by Canadian nationals abroad. Because political challenges arise when introducing bills that would enable courts to adjudicate on those cases, other options are to be seriously considered.

⁸³ *Ibid.*

⁸⁴ UN HR Office of the High Commissioner, Guiding Principles Commentary *supra* note 6 at 29.

Secondly, all non-judicial grievance mechanisms should be held to criteria which evaluate their effectiveness. Principle 31 states that they should be legitimate, accessible, predictable, equitable, transparent, rights-compatible and a source of continuous learning.⁸⁵ While, both the NCP and the Office of the Counsellor for the extractive industry were not presented in detail, other authors have demonstrated how both do not properly ascribe to each of the criteria.⁸⁶

Due to the ineffectiveness of non-judicial mechanisms and to the limited possibilities of seeking redress through courts academics, government officials and industry representatives must turn to corporate grievance mechanisms. They embody a practical and rights-based way of addressing minor community-company grievances before they amount to human rights breaches.

3. OPERATIONAL-LEVEL GRIEVANCE MECHANISMS

The first two chapters demonstrated how the responsibility to respect human rights and offer redress belongs to both states and MNCs, and how states so far have failed in providing extraterritorial adjudication and appropriate remedies to victims. Acknowledging this governance gap and the low effectiveness of the judicial and non-judicial mechanisms, community-company grievance resolutions hold the potential to address local minor human rights issues. Chapter three discusses in more detail operational-level grievance mechanisms, provides a brief background on the fight for corporate grievance mechanisms and touches on the ‘business’ case. “In mining, the importance of operational-level grievance resolution cannot be underestimated. Given the unique circumstances and context of each host community and operation; [...] [they] provide a key

⁸⁵ SRSRG, Guiding Principles 31 *supra* note 5.

⁸⁶ Catherine Coumans, “Alternative Accountability Mechanisms and Mining: The Problem of Effective Impunity, Human Rights and Agency” (2010) 30 *Canada Journal of Development Studies* 27 and House of Commons, *Government’s Response to the Fourteenth Report of the Standing Committee on Foreign Affairs and International Trade* (Oct. 2005) online: <<http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=2030362&Language=E&Mode=1&Parl=38&Ses=1>>.

avenue for responding appropriately to the needs of each particular situation”.⁸⁷ Effectiveness criteria proper to corporate grievance mechanisms and to the mining sector are also assessed. This chapter aims to offer basic information on what grievance mechanisms are and presents key criteria which will be used to assess two examples presented in the fourth chapter.

3.1. BACKGROUND

While the literature is limited and unclear about the impetus for community-company grievance mechanisms, undoubtedly there has been a growing trend in recent years that can be explained by various factors, both at the international and state level (macro), as well as the corporate level (micro).

At the macro level, globalization (and what it entails: fast communication, better information, facilitated access to data, etc.) coupled with the governance and jurisdictional gaps identified in the first chapter of this paper, along with a parallel push for CSR policies helped bring to the forefront the activities of MNCs. International organizations, such as the UN, the OECD, the IFC, the World Bank, as well as international NGOs have outpaced states in creating norms and guidelines in regards to human rights and CSR. The SRSG mandate at the UN embodied this new field and the adoption of the ‘Protect, Respect and Remedy’ framework of the UN general assembly in 2011 marked a turning point, and in part established the concept of corporate grievance mechanisms.

At the micro level, companies became expert in costing and managing areas of conflict in operations, such as employee, consumer, business-to-business and business-to-government disputes, yet until very recently the business appeal for business-to-community conflict resolution was almost non-existent. Already known business practices, such as employee-

⁸⁷ CSR, Community complaints and grievance mechanisms, *supra* note 81 at 7.

employer dispute mechanisms, or alternative dispute resolutions provided in commercial contracts were the first drivers for human rights due diligence, CSR, and community-company relations units.

Even if we cannot set aside the external push for human rights due diligence, it is extremely important to mention that perhaps the most effective driver for corporate grievance mechanisms lies in the corporation itself, what authors have referred to as ‘the business case’.

Davis and Franks research is impressive, as they conducted field research as well as in depth interviews with 40 individuals (mostly senior managers of mining companies) to determine the financial costs to extractive MNCs associated with conflicts with local communities. They concluded that the most persuasive argument for establishing proper community-company relations programs, which grievance mechanisms would be a part of, is to quantify the cost of community disputes in terms of gains and losses of capital.⁸⁸ The business case, which uses cost quantification language, has the most success in convincing senior management to buy into CSR policies and grievance mechanisms. Understandably so, CEOs and board members are seldom if ever human rights experts. Addressing human rights thoroughly and with an effective grievance mechanism can help avoid costly litigation, evade extensive reputational damage, prevent delays or interruptions in operations, causing loss of opportunity costs (new projects, expansion, sale of assets) and reduce the amount of time senior staff spend in managing conflicts.⁸⁹ Although sound due diligence, CSR policies and grievance mechanisms may seem costly at first, figures show they are a financially positive long-term investments for MNCs.

However, if there are a lot of factors at the basis of the importance of corporate grievance mechanisms, there is probably as many types and definitions.

⁸⁸ Rachel Davis and Daniel M. Franks, *The cost of conflict with local communities in the extractive industry* (Santiago: SRMINING, 2011) at 9, online: < http://shiftproject.org/sites/default/files/Davis%20&%20Franks_Costs%20of%20Conflict_SRM.pdf>. [Davis and Franks, The cost of conflict]

3.2. GRIEVANCE MECHANISMS

Wilson and Blackmore compiled and compared existing definitions of what they identify as a company-community grievance mechanism⁹⁰, namely a:

Process or a set of processes for receiving, evaluating and addressing grievances from affected communities, in a timely and consistent manner at the site or operational level. The mechanism may be wholly or partially run by the company. Grievance might be real or perceived: the latter may be a source of acute anxiety for communities and can be addressed through dialogue and provision of timely and accurate information.⁹¹

Because they emanate from various initiatives and respond to multiple actors, grievance mechanisms can be found in multiple forms. On one hand, this makes it challenging to study as there are no proper definitions or sets of precise measures. On another hand, it is extremely important that site level mechanisms adapt to the local environment and its particularities.

While there are variances in definitions, two notions are often repeated. First, although MNCs try to differentiate real harm from perceived harm for redress purposes, no clear boundary marks the point at which minor concerns can give rise to grievances. Grievance mechanisms address a spectrum of issues that “can range from commonly occurring, relatively minor issues to more entrenched or serious ones that have become a source of significant concern or resentment.”⁹² Second, it is understood that a core characteristic of a well-functioning grievance mechanisms is that it enables companies to identify minor community incidents before they escalate into unmanageable disputes.⁹³ These two points are correlated and reassert the argument that operational level grievance mechanisms can allow for the resolution of local problems and concerns, and prevent the escalation of disputes that could lead to human rights abuse

⁹⁰ Emma Wilson and Emma Blackmore, eds, *Dispute or Dialogue?: Community Perspectives on company-led grievance mechanisms*, (UK : International Institute for Environment and Development, 2013) at 157-163, online: <<http://pubs.iied.org/pdfs/16529IIED.pdf>>. [Wilson and Blackmore, Dispute or Dialogue ?]

⁹¹ *Ibid.*, at 10.

⁹² ICMM, *Human Rights in the Mining & Metals Industry: Handling and Resolving Local Level Concerns & Grievances* (2009) at 4, online: <<http://www.icmm.com/document/691>>. [ICMM, 2009]

⁹³ Wilson and Blackmore, Dispute or Dialogue ? *supra* note 90 at 29.

allegations, provided that they are effective. “It is important to consider the effectiveness of remedies offered, as non-effective remedies lack any significance.”⁹⁴

3.3. EFFECTIVENESS CRITERIA

3.3.1. SRSR CRITERIA

As mentioned in the previous chapter, the SGSR provided effectiveness criteria for both state and non-state based non-judicial grievance mechanisms. Principle 31 of the GPs establishes eight criteria:

- a) **Legitimate:** enabling trust from the stakeholder groups for whose use they are intended, and being accountable for the fair conduct or grievance processes;
- b) **Accessible:** being known to all stakeholder groups for whose use they are intended, and providing adequate assistance for those who may face particular barriers to access;
- c) **Predictable:** providing a clear and known procedure with an indicative time frame for each stage, and clarity on the types of process and outcomes available and means of monitoring implementation;
- d) **Equitable:** seeking to ensure that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair, informed and respectful terms;
- e) **Transparent:** keeping parties to a grievance informed about its progress, and providing sufficient information about the mechanism’s performance to build confidence in its effectiveness and meet any public interest at stake;
- f) **Rights-compatible:** ensuring that outcomes and remedies accord with internationally recognized human rights;
- g) **A source of continuous learning:** drawing on relevant measures to identify lessons for improving the mechanism and preventing future grievances and harms;

Operational-level mechanisms should also be:

- h) **Based on engagement and dialogue:** consulting the stakeholder groups for whose use they are intended on their design and performance, and focusing on dialogue as the means to address and resolve grievances.⁹⁵

⁹⁴ Tienke Lambooy, Aikaterini Argyrou and Mary Varner, An Analysis and practical application of the Guiding Principles on providing remedies with special reference to case studies related to oil companies, in Surya Deva & David Bilchitz, eds., *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge: Cambridge University Press, 2013) at 333.

⁹⁵ SRSR, Guiding Principles 31 *supra* note 5.

While these are fairly self-explanatory, other interested stakeholders refined this research and elaborated further on specific elements at the essence of corporate grievance mechanisms. Non-governmental works are valuable because they provide more tailored criteria for specific industries and have the most impact on corporate behavior.

There are some clear advantages to drawing in regulation emerging from private actors to face the corporate challenges to human rights. It is hoped that involving those most affected by the implementation of rules in the preparation and enforcement of the regulation will result in a sense of ownership of the policies and ultimately improved compliance. Arguably, the quality of a norm is better guaranteed in private sector and the alleged greater flexibility and possibility to adjust to changing circumstances.⁹⁶

For the purpose of this paper, two additional sets of criteria defined by private entities are useful. Oxfam Australia offers an NGO's perspective, while the International Council on Mining and Metals (*ICMM*) provides specific guidance to the key players in the industry.

3.3.2. OXFAM AUSTRALIA

Oxfam Australia, an NGO, has been extremely active in advocating for grievance mechanisms and has provided strategic guidance to many companies. Oxfam Australia stresses that human rights-compatibility is the most important principle for corporate grievance mechanisms. According to them, and echoing the SRSB criteria, “a rights-compatible mechanism is based on inclusion, participation, empowerment, transparency and attention to vulnerable people”.⁹⁷ Taking a rights-based approach guides MNCs in the creation, implementation and monitoring of operational-level grievance mechanisms. Furthermore, MNCs should work in collaboration with communities in designing mechanisms to ensure that it is culturally appropriate. The resolution process should be based on engagement and dialogue, and

⁹⁶ Jägers, *supra* note 2 at 303.

⁹⁷ Oxfam Australia, *Community-company grievance resolution: A guide for the Australian mining industry*, (Oxfam Australia: Leicester, 2010) at 9, online: <www.oxfam.org.au/explore/mining>. [Oxfam Australia, Community-company grievance resolution]

both communities and companies should share the responsibilities of the outcomes. As such, greater involvement with local actors would not only bring more legitimacy to the process it would also make it more equitable. “An effective, human rights-compatible grievance mechanism can provide a channel through which communities impacted by company operations can gain recognition for legitimate concerns, engage in a process to secure acceptable solutions, and share the ownership of that process”.⁹⁸

3.3.3. INTERNATIONAL COUNCIL ON MINING AND METALS

ICMM has engaged their members and has raised awareness of CSR, best human rights’ practices and corporate grievance mechanisms. ICMM’s overarching design principles of grievance mechanisms are to:

- 1) Ensure communities face no obstacles in using the mechanism;
- 2) Establish the mechanism early on and base it around a transparent, predictable process;
- 3) Find ways to build trust in the legitimacy of the mechanism;
- 4) Create an organizational structure and mindset to support the mechanism⁹⁹

ICMM’s recommendations are notable in that they maintain that the organizational culture and mind set must support the mechanism. Accountability within the MNC must be clear and the ultimate responsibility of the mechanism should be assumed by a senior manager.¹⁰⁰ Trying to balance the need for a clear accountability chain with the need for a general knowledge of human rights policy, they also mention that the grievance mechanisms should be widely understood across the company. ICMM’s key guidance on grievance mechanisms can be summarized as (1) join efforts in designing the process, (2) ensure the process is effective (transparent, timely and

⁹⁸ *Ibid.*, at 6.

⁹⁹ ICMM, 2009 *supra* note 92 at 4.

¹⁰⁰ *Ibid.*, at 9.

systematic), (3) adapt the process to the local context and (4) create an accessible mechanism and ask for community feedback.¹⁰¹

This chapter presented the background of community-company grievance resolutions and provided three sets of complementary criteria as guiding tools used in ensuring the effectiveness of such mechanisms. MNCs must adapt to the local environment without compromising any of the standards, taking into consideration stakeholders with practical guidance on how to operationalize such criteria. SRSF framework offers a broad spectrum of effectiveness criteria that although too broad to be clear, nevertheless serves as the founding principles for non-state grievance mechanisms. Oxfam Australia and ICMM mirrors the SRSF' standards. While the former places an emphasis on human-rights compatibility as the central pillar around which grievance mechanisms should be elaborated, the latter takes a more moderate approach and underlines the crucial role of internal corporate accountability.

In chapter four, two specific examples of operational grievance mechanisms developed by mining MNCs are discussed. After a short description of each mechanism, criteria pointed out in this chapter will help us in assessing the strengths and weaknesses of the chosen examples.

4. OPERATIONAL-LEVEL GRIEVANCE MECHANISMS: TWO EXAMPLES

In order to demonstrate that corporate grievance mechanisms are worth investing in, as judicial and non-judicial mechanisms are rarely useful and effective in providing redress to minor grievances, we chose two examples where operational-level mechanisms had a positive impact in regards to human rights. The first example is a Canadian owned mine operating in the Philippines and the second is an American-owned mine in Ghana.

¹⁰¹ ICMM, *ICMM Regional Workshop: Human rights* (Toronto, 2013) at 9, online: < <http://www.icmm.com/document/5959>>.

It is important to mention the limitations faced while researching for such cases. Few mining corporations have established grievance mechanisms, and those that have are not obligated to disclose any information. “There is limited material that discusses or analyses how project-level grievance mechanisms function, and their alignment with high-level principles”.¹⁰² Due to the limited amount of information available on the subject, this chapter only makes basic observations related to how these two examples respond, or not, to the best practice principles of the SRSG, Oxfam Australia, and ICMM.

4.1. TVIRD MINE IN THE PHILIPPINES

***“TVIRD is committed to exploration and mining practices that promote transparency, responsible stewardship of the environment, and the inalienable rights to life, dignity, and sustainable development in its host communities.”*¹⁰³**

Toronto Venture Inc. Pacific (TVI), a Canadian extractive MNC operates mines, its subsidiary TVI Resource Development Philippines Inc. (TVIRD) operates on Mindanao Island in the Philippines. It acquired the Canatuan site from Benguet Corporation twenty years ago and started exploiting the mine at the end of the 1990s.

Prior to its acquisition of the Canatuan site in 1994, there were constant conflicts with the local indigenous people over exploration activities. Permanent protests were staged by the community to demonstrate its opposition to the mine project. TVIRD inherited the former mine’s problems in regards to security, evictions, ‘free, prior and informed consent’¹⁰⁴, as well as environmental damages. Although many of the problems predated TVIRD’s acquisition and the *Indigenous Peoples Rights Act*, “the lack of free, prior and informed consent in the area left an opening around community-company engagement and communication which an appropriate

¹⁰² CSRM, Community complaints and grievance mechanisms, *supra* note 81 at 30.

¹⁰³ TVI Resource Development (Phils.) Inc., “Corporate Responsibility” online: <<http://tviphilippines.com/corprespon.php>>.

¹⁰⁴ Free, prior and informed consent recognizes indigenous peoples’ inherent and prior rights to their lands and resources and respects their legitimate authority to require that third parties enter into an equal and respectful relationship with them, based on the principle of informed consent.

grievance mechanism could play *some* role in helping to fill.”¹⁰⁵ Numerous land claims founded on this principle shaped the nature of the grievance mechanism put in place by TVIRD. In parallel, aboriginal communities successfully engaged with the Filipino government and were granted a Certificate of Ancestral Domain Title¹⁰⁶ covering the entire mine site, as provided by the *Indigenous Peoples Rights Act* of 1997, where the free, prior and informed consent principle is enshrined.

Moreover, artisanal mining, which was widely practiced locally (8,000 indigenous people lived from its activities) became illegal when TVIRD acquired the land and the sole right to exploitation. This created another set of critical issues leading to tensions with the local population in relation to child labour, distribution of benefits, uncertain land tenure and population migration.¹⁰⁷

Acknowledging the precarious situation at site level, TVIRD conducted an impact assessment and an internal human rights review before the beginning of operations. Building on these, TVIRD further developed a right-based policy particularly focusing on indigenous rights and illegal mining.¹⁰⁸

It is important to note that Filipino laws provide for quasi-adjudicative mechanisms giving recourses to communities in regards to mining community rights, labour rights, indigenous people rights, and the environment. For example, the environmental impact assessment legislations require that companies monitor their environmental compliance and establish that they should “set up Multipartite Monitoring Teams (MMTs) to receive complaints”.¹⁰⁹ MMTs

¹⁰⁵ Wilson and Blackmore, *Dispute or Dialogue ? supra* note 90 at 124.

¹⁰⁶ “This title protects the rights on indigenous peoples, including the right to ancestral domain and lands; right to self-governance and empowerment; social justice and human rights; and the right to cultural integrity.” *Ibid.*, at 125.

¹⁰⁷ *Ibid.*, at 124.

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*, at 122.

are sometimes used as a complementary grievance mechanism and are composed of representatives of the government, the affected communities and the company, as well as NGOs.

TVIRD established its MMT in 2004.

4.1.1. THE COUNCIL OF ELDERS

Due to the particular context of the Mindanao region, where 61% of the indigenous population of the country lives, and given the strong lack of trust in the relationship between the previous mining companies and the community, TVIRD decided to engage with the local Tribal Council of Elders. The Council is recognized as the local decision-making authority, and acts as a channel of communication and the main vector of the grievance mechanism. TVIRD does not host or direct the mechanism. The council meets once a month and community members can raise issues. Decisions of the council are made through *gukom*, or tribunal court hearing. TVIRD's Community Relations and Development Office (*CRDO*) is asked to attend council meetings when it is known that a community member will raise issue in relation to mining.¹¹⁰ Examples of remedies asked by the community are typically compensation; generally in the form of monetary compensation, job opportunities and company payment to fix items damaged on the community property. Minutes of meetings are documented by both the council and by the CRDO and the company is asked to respond to the complaint in the next council meeting. In investigating the complaint, the company may ask for the help and presence of a local third party. TVIRD then comes to a decision by involving the proper department related to the complaint.

¹¹⁰ Concerns have been raised by local communities about the links between mining in the area and increased sediment in local rivers, which they argue affects fish spawning. Disagreements have also risen in regard to land rights, the rights of indigenous peoples to their ancestral domains, the loss of livelihoods of rice farmers, and displacement. *Ibid.*, at 124.

Strengths:

There are four outstanding features of the TVIRD mechanisms. The first and most important observation of this process is that TVIRD decided to rely on an already existing societal structure, the Tribal Council of Elders, where trust and notoriety within the community was already established. The company could thus ensure the mechanisms' *accessibility*, using existing channels of communications. Whilst the Filipino government offered other channels for resolutions of some grievances, TVIRD voluntarily chose to work with the smallest governance unit, which guaranteed that it was culturally appropriate. The community benefitted from this decision, as other formal grievance mechanisms are not as easily accessible in remote areas "where corruption, lack of resources, transparency and accessibility and cost of obtaining key documents is prohibitive".¹¹¹

Second, even if TVIRD had forgone the ownership of the mechanism, the presence of a third respected party, the elders in this particular case, and of third parties joining when TVIRD investigates a complaint, adds to the credibility and *legitimacy* of the mechanism and demonstrates good faith.

Third parties can help increase the level of trust from communities as well as overcome certain limitations of project-level mechanisms, such as lack of transparency, insufficient company resources, possible conflict of interest, and biases, provided that they themselves are perceived to be unbiased and impartial relative to both the company and the communities.¹¹²

In line with the recommendations of Oxfam Australia, locals were engaged in helping the company to find suitable solutions. Indeed, "TVIRD noted that the Tribal Council will continue to convene to reach a compromise with the complainant as both the company and the community

¹¹¹ *Ibid.*, at 123.

¹¹² International Finance Corporation, *Good Practice Note Addressing Grievance from Project-Affected Communities*, (Washington : IFC, 2009) at 31, online:<http://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/ifc+sustainability/publications/publications_gpn_grievances>. [IFC, 2009]

strive to resolve the issue.”¹¹³ However, the literature did not provide information on what occurs in a situation in which a compromise is not reached.

Third, direct face-to-face discussion between TVIRD representatives and individuals who experienced the grievance as well as the timely responses from the company are positive elements. It aligns somewhat with the predictable and transparent criteria. Moreover, TVIRD’s rights-based approach allows it to focus its work and responses to grievances in a consistent manner.

Fourth, from a corporate perspective, due to the stature of the elders, only real concerns are presented to the mining company. This is an advantage for TVIRD, as it protects against less genuine complaints and reinforces the corporate buy-in.

Area for improvements:

While the case of TVIRD’s corporate grievance mechanism is a good example of how a mining MNC adapts to local situations, choosing to not fully control the grievance mechanism creates some disadvantages. For example, no data is recorded by the company on the number of complaints raised by the community and what they consist of.¹¹⁴ Poor recording and monitoring of outcomes is not optimal for corporate learning, and goes against SRSB criteria of ‘*a source of continuous learning*’. On a larger scale, this lack of sharing hinders the potential to learn from past experiences and obstructs the transfer of knowledge and expertise to other operational sites, and even to other mining MNCs. This aspect does not comply with ICMM guidelines on establishing a clear line of accountability for grievance resolutions, because the mechanism lies outside the corporate scope, it is unclear who or which department holds responsibility in the process.

¹¹³ Wilson and Blackmore, *Dispute or Dialogue?* *supra* note 90 at 125.

¹¹⁴ *Ibid.*, at 126.

Assessment:

TVIRD management decided to take a due diligence approach to the human rights issues in requesting a human rights internal review and an impact evaluation prior to the operationalization of the mine. Despite the existence of government-initiated mechanisms to address grievances, TVIRD decided to fully address the problem and leaned on an already existing local framework in order to deal with local grievances. Indeed, The Council of Elders facilitated trust building with the community and was able to respond appropriately to grievances. Nonetheless, one must keep in mind that the company has widely invested in the community in order to respond to its social license to operate, and that involvement with the Council of Elders is part of a multifaceted approach.¹¹⁵ Although it is difficult to know what is truly happening on the ground, it seems as though the community and TVIRD have learned how to cohabitate and the locals no longer oppose the mine.

4.2. NGGL MINE IN GHANA

“We respect the dignity, wellbeing and human rights of employees and the communities in which we live, as well as others affected by our operations.”¹¹⁶

Newmont Mining Corporation is a mining MNC headquartered in the United States, with activities on every continent. Through its subsidiary, Newmont Ghana Gold Limited (*NGGL*), it operates the Ahafo mine in the Brong-Ahafo region in Ghana.

In 2002-2003, NGGL acquired an Australian mining company owning the licence of the Ahafo and Akyem projects. Like its predecessor, NGGL faced opposition from the local people in regards to resettlement for the open pit gold mine in Ahafo, the first large-scale mine in the region. In 2004 Newmont started resettlement negotiations with the community (1,700

¹¹⁵ For example, the mining MNC played a crucial role in the cleaning and rebuilding of affected villages by the Bohol earthquake and Typhoon Haidan.

¹¹⁶Newmont, “Sustainability & Stakeholder Engagement Policy” online:
<http://www.newmont.com/sites/default/files/u110/Policy_Sustainability%26StakeholderEngagement_28Apr2014.pdf>.

households)¹¹⁷ and engaged in an environmental impact study. NGGL's first offer was to compensate land with money, which was not well-received by the local communities that requested land-for-land compensation. The construction of the mine impacted the livelihood of the people living in the area and the resettlement program was crucial in ensuring good community relations.¹¹⁸ A Resettlement Action Plan and Environmental and Social Impact Statements were produced later to provide guidance and ensure due diligence, but also permitted NGGL to secure a loan from the IFC.

4.2.1. STANDARD OPERATIONAL PROCEDURE: THREE ORDERS MECHANISM

The grievance mechanism was designed and introduced as part of a wider community engagement program. As required by Newmont's (the parent company) internal management standards, NGGL created a formalised grievance mechanism in the form of standard operating procedure with three orders (or steps), to manage complaints in a planned and systematic manner.¹¹⁹

First Order

Community members can lodge complaints at mine site grievance offices or community information centers, via a face-to-face dialogue with a Front Desk Officer, Community Liaison Officer or Grievance Officer, where family and friends are welcomed as witnesses. Front desk officers normally engage in preliminary discussions with complainants and provide them with information and clarification on the problematic issues. Front desk officers pass along written complaints to grievance officers. Where a complaint is made orally, it is transcribed by the Front

¹¹⁷ Depending on the source, numbers of displaced vary from 1,700 to 10,000.

¹¹⁸ NGGL's team at the Ahafo site identified five themes of the mine-community landscape: 1) a high demand for employment, 2) ongoing claims for compensation for mine-related impacts, 3) Ahafo Mine's role in stimulating local social and economic development, 4) identifying legitimate community representatives and institutions, and 5) the mine's protection of the environment. CSR, Community complaints and grievance mechanisms, *supra* note 81 at 33.

¹¹⁹ rePlan Mining Consultants Ltd, *Resettlement Action Plan: Amoma Project, Ahafo, Ghana* (2009) at 109, online: <http://www.newmont.com/sites/default/files/Preliminary%20Amoma%20Resettlement%20Action%20Plan.%20February%202009%20-%20Ahafo%20South%20Project_0.pdf>.

Desk Officer that reads it back to the complainant to ensure that he/she captured what the individual wants to express. “The procedure requires that the complaint is acknowledged to the complainant in writing within seven days.”¹²⁰ When an inquiry that is brought to the attention to the Desk Officer is not a complaint per se, the file is transferred to a Community Liaison Officer.

Once Grievance Officers receive the written complaint, they must log it into the management information system. Grievance officers are responsible for the overall process (recording grievances, documentation, follow-up, tracking, reporting, etc.). Grievance Officers assign a Resolving Officer to respond to the complaint. Resolving Officers are required to speak with the complainant and attempt to reach to a solution through dialogue. In cases where this is insufficient, an investigation is undertaken: “[i]nvestigations and resolutions are determined in collaborative manner between the company, complainant and at times an appropriate third party”.¹²¹ NGGL has 30 days to respond in writing but the response is hand delivered to the complainant. At this stage a settlement proposal is normally included. Resolving Officers are responsible for recording the receipt and acceptance of the proposed solution. If the complainant is not satisfied with the proposal, he/she can ‘appeal’ to the NGGL’s internal Complaint and Grievance Committee. This is understood as the first order.

Second Order

If an agreement fails to be reached or if the complainant wishes to appeal the decision, the complaint is taken to the Complaints and Grievance Committee, where it will review its merit and possibly determine an alternative resolution. In instances where the resolution to a complaint

¹²⁰ CSRM, Community complaints and grievance mechanisms, *supra* note 81 at 36.

¹²¹ *Ibid.*, at 37.

falls outside the scope of the Resolving Officer, the complaint is transferred to the Committee.¹²² Independent third parties (NGOs, community leaders, etc.) are sometimes asked to join.¹²³ Established by the community, the Resettlement Negotiation Committee¹²⁴ is the third party that most often becomes involved due to the number of complaints related to resettlement. In cases where the Committee is unable to resolve the complaints, it must record the reason(s) for being unable to do so. Further, unresolved complaints are to be taken to the External Affairs Management for review and to Senior Management where appropriate.

Third Order

The third order is seen as the recourse to local courts at any given time. The procedure outlines the role of Grievances Officers in such cases: communicating details of the facts with the legal department, following up with legal counsel, attending court hearings and updating management.¹²⁵

Strengths:

The site-level complaint mechanism established by NGGL is well known by the community and accessible via its Complaint and Grievance Officers. “While there are only limited entry points for complaints, they are well-publicised and staffed at consistent times throughout the week such that community members know when and where to access them.”¹²⁶ Furthermore, enabling both verbal and written complaints enhances its *accessibility*. While this is not optimal, it aims at removing a potential barrier that an individual may face.

¹²² The Committee is formed of senior employees from different departments, which includes members of the External Affairs Management Team, including the Community Relations Superintendent, the Principal Communications Officer, the Monitoring and Evaluation Manager, the External Affairs Administrator, the External Affairs Manager, and a specialist as required.

¹²³ “Third parties nominated in the procedure include the Community Consultative Committee, Traditional Leadersm the Resettlement Negotiation Committee or the Conflict Resolution Committee under the Ahafo Social Responsibility Forum.” CSRSM, Community complaints and grievance mechanisms, *supra* note 81 at 37.

¹²⁴ It is composed of independently elected community representatives and traditional leaders. The committee negotiate on behalf of the residents.

¹²⁵ CSRSM, Community complaints and grievance mechanisms, *supra* note 81 at 37.

¹²⁶ ICMM, 2009 *supra* note 92 at 16.

The emphasis on direct involvement with locals and community leaders are efforts made to make the process more *equitable*. NGGL stated that the aim of involving third parties into the process is to draw on existing knowledge and communication structures within the community and ensure fairness and objectivity in resolution of such complaints.¹²⁷ Nevertheless, Smith and Feldman have raised concerns in their independent review in regards to traditional leadership in representing the communities.¹²⁸

Data recording is the first step in a learning process, responding somewhat to the '*source of continuous learning*' principle proposed in the SRSG framework. "Ahafo has a well-established Management Information System for capturing complaints and grievances in a database that stores the number and categories of grievances received, and note the method of resolution and the time taken to reach resolution."¹²⁹ From these entries, Grievance Officers produce monthly status reports shared with the managers and respective heads of departments that are implicated in the complaints.

Clear procedures, scope of authority, and lines of reporting respond to the ICMM's guideline of a clear accountability line. The procedure is however silent of external reporting on grievances. Building on the NGGL experience and recognizing the value of grievance mechanisms, the 2009 Community Relationships Review by Newmont Mining (the parent company) recommends the development of effective grievance mechanisms for each operation as part of a broader approach to conflict management, which is a great example of corporate learning.¹³⁰

¹²⁷ CSR, Community complaints and grievance mechanisms, *supra* note 81 at 37.

¹²⁸ Gare A. Smith and Daniel Feldman, *Newmont Mining Corporation: Community Relationships Review: Global Summary Report* (March 2009) at 52, online: <http://www.beyondthemine.com/2007/pdf/CRR_Final_Global_Summary_Report_March_2009.pdf>.

¹²⁹ IFC, Good Practice Note, Addressing Grievance from Project-affected Communities : Guidance for projects and companies on designing grievance mechanisms (Septembre 2009, no 7) at 31.

¹³⁰ CSR, Community complaints and grievance mechanisms, *supra* note 84 at 12.

NGGL has a well-developed organizational capacity and through its standard operating procedure it clearly outlines the tasks and responsibilities of every Officer and Committee, of whom complainants are made aware, reinforcing the *predictability* of the mechanism.

Interestingly, NGGL's specific inclusion of recourse to the Ghanaian judicial system as their third order recognizes the Commission on Human Rights and Administrative Justice (CHRAJ)¹³¹ under the 1992 Constitution of Ghana, as well as other courts. CSRSM affirms that clearly presenting the recourse to courts as the third order in the corporate procedure provides incentives for resolution at the first and second orders.¹³²

Area for improvements:

This mechanism could be improved in numerous ways. First, it is unclear if a complainant has the option of making an anonymous complaint, although employees can raise anonymous complaints or concerns.¹³³ Possibly, the same process used for employees could be extended to community members. Second, third parties are welcomed at the first step of the process as witnesses, and the company has the sole prerogative of involving them in investigations. Circumstances under which a third party would be asked to join are not made explicit, perhaps to allow for greater corporate flexibility in deciding when to engage with a third party. Conceivably, NGGL might prefer to deal with complaints in-house without exposing its internal processes to other parties, infringing on the *transparency* principle. Third, while NGGL conducted impact assessments and consultations with locals, the mechanism does not demonstrate community involvement in the creation of the grievance process. NGGL already has a stakeholder forum composed of 65 community representatives and its role is to seek solutions

¹³¹ The CHRAJ possesses broad investigative powers, including the ability to investigate complaints concerning practices and actions by persons, private enterprises and other institutions that violate fundamental Constitutional rights and freedoms. The CHRAJ judgments are non-binding.

¹³² CSRSM, Community complaints and grievance mechanisms, *supra* note 84 at 37.

¹³³ Newmont, "People Policy" online: <http://www.newmont.com/sites/default/files/u110/Policy_People_28Apr2014.pdf>.

to issues affecting both parties, “including determining and implementing culturally appropriate mechanisms of resolving potential conflicts”.¹³⁴ Nevertheless, a formalized provision in the standard operational procedure that reports back to the community on general trends extracted from the grievances and concerns would enhance the level of trust and transparency and foster a greater company-community dialogue.

Assessment:

NGGL’s first policy regarding resettlement was to comply with the minimum obligations required by law. The propriety laws in Ghana failed to offer proper guidelines on how a company should conduct business in case of displacement of local people.¹³⁵ Critics have pointed out that although at first NGGL’s main argument was that it was respecting the law, the law in itself was flawed and did not ask for proper redress. “In 2004-2005, a set of new factors – the specter of famine raised by civil society activism, the involvement and advice of the IFC, and the new and better qualified CSR team – began to emerge.”¹³⁶ Newmont took a differentiated approach in Ghana, perhaps learned from previous experience of escalated and high profile disputes at other operation sites. The MNC also sought external advice and independent assessments in an effort to understand these disputes and build organizational capacity to avoid their recurrence.”¹³⁷ Following a change in their internal staffing and lengthy discussions with local communities and the government with help from the IFC, NGGL made a complete turnaround in the way they addressed community-company issues. They worked on a multifaceted program to ensure that the local community directly affected by the mine operations would be appropriately compensated. NGGL proposed three different courses of action in order

¹³⁴ IFC, 2009 *supra* note 112 at 31.

¹³⁵ Radu Mares, “Corporate Responsibility and Compliance with the Law: A Case Study of Land, Dispossession, and Aftermath at Newmont’s Ahafo Project in Ghana” (2012) 117 *Business and Society Review* 233 at 238

¹³⁶ *Ibid.*, at 263

¹³⁷ CSR, Community complaints and grievance mechanisms, *supra* note 81 at 33.

for individuals affected to choose a means of access to new land.¹³⁸ While there are still complaints about the mine, NGGL made great efforts to properly address community issues and engage them in solutions. The grievance mechanism that was put in place, although imperfect, seems to have changed community-company relations for the better.

4.3. LESSONS

Both cases summarized in this chapter were chosen to underline the strengths and weaknesses of operational-level grievance mechanisms as a way to address community concerns from a human rights perspective. The brief review of the TVIRD and NGGL cases demonstrates that local communities are better off after grievance mechanisms, as part of a multifaceted community engagement and CSR policy, are introduced. It is important to stress, however, that improvements to community-company relationships are not to be directly correlated to grievance mechanisms, but they certainly contributed to some progress. Noting that these mechanisms are not always appropriate and massive human rights violations need to be addressed in courts of law, the cases demonstrated that site level mechanisms are key in addressing minor grievances in the reach of mining MNCs. Moreover, they are critical in mitigating concerns that could potentially escalate into greater problems such as mass human rights violations.

Further, because the mechanisms are less constrained by pre-determined administrative or legal procedures they are able to address a spectrum of grievances, that otherwise would have been left unanswered. These mechanisms adapt to the situation on the ground and to the local culture and allow TVIRD and NGGL to learn about concerns and issues from the communities themselves and include locals directly.

Drawing from the strengths and weakness of both mechanisms, below enumerates 4 lessons:

¹³⁸ The most successful one, the Agricultural Improvement and Land Access Program (AILAP), is a post-resettlement mitigation facility assisting farmers directly affected by the development of the mine. In addition to providing inputs such as seed, fertilizer and herbicides, the program has paid over GHC 1 million in cash to almost 4,000 farmers, covering 6,400 acres of land.

- **Role of local government and laws:** The Filipino example demonstrated that the stronger the governance of a host country, the more chances there are that MNCs will behave as good corporate citizens. Closing the governance and jurisdictional gap is optimal to ensure human rights are respected and monitored. Facing great opposition at first, TVIRD had no choice but to compensate the communities, as it was required by law. The Council of Elders played a subsidiary role in addressing issues with the local community. The counterfactual to this example was demonstrated in Ghana as NGGL's first resettlement offer, while respecting the (low-provisioned) local law, was widely criticized by local communities and external observers because it did not respond to the basic needs and rights of the population. Thus, one can anticipate that the weaker the host state's governance, the weaker the corporate operational mechanism will be.
- **Corporate learning:** Even in a host state with poor institutional and structural capacities, MNCs can implement proper corporate grievance mechanisms, as it is in their own interest. The Newmont example, especially the NGGL operations in Ghana, demonstrated that with clear dedicated pathways, a grievance mechanism can be a fruitful source of learning and can be the basis of new engagement practices with communities. Additionally, formal corporate procedures facilitate the access to senior management, increasing the likelihood of resolution before escalation.¹³⁹ NGGL learned from its experience in the Ahafo mine and improved the mechanism that is in place at the Akyem site.¹⁴⁰ The business case clearly modeled Newmont's management and it widely impacted their way of conducting business.

In addition, a spread of such mechanisms through various operation sites can have an impact on local government. Faced with positive results, the government may be in a better

¹³⁹ CSR, Community complaints and grievance mechanisms, *supra* note 81 at viii.

¹⁴⁰ *Ibid.*, at 35-38.

position to legislate to make grievance mechanisms mandatory for mining MNCs operating in their territory. Local governments, like those in the Philippines, can also create their own mechanisms for community-company relations, offering additional or alternate safeguards, like the MMTs in the Philippines. Further, a ripple effect could also affect other MNCs operating in a given country, acknowledging the potential benefits of corporate mechanisms and creating higher local expectations of MNCs. Finally, corporate learning is key to the development of new guidelines and is extremely useful to other MNCs via industry associations, such as the ICMM, and via international organizations, such as the IFC, which offers guidance to MNCs.

- **Involvement of third parties:** TVIRD's entire grievance mechanism relied on the Council of Elders which enabled the company to offer a channel of discussion known and trusted by surrounding communities. Further, involvement of third parties in investigations is encouraged. Contrary to TVIRD, NGGL took full ownership of the grievance mechanisms. Although it allowed for the involvement of third parties, local power structures are not fully taken into account. While the involvement of third parties is crucial, companies have to be cautious in choosing which power will be given to third parties and who they are, they should be careful not to negate the legitimacy of the mechanism.
- **Access to local judicial systems:** Both mechanisms presented did not preclude individuals or communities from having access to the judicial systems. The TVIRD case is particular, as the Council of Elders acting as the moral and legal authority of the aboriginal community facilitated grievances resolutions as an intermediate between the company and the community. Alternatively, in their standard operational procedure NGGL provided access to the Ghanaian judicial system recognizing and informing the local people about this optional

recourse. Having a local intermediary recourse before local or national courts is important, as it delivers faster outcomes and redress to affected communities. The business case also demonstrates that such mechanisms are potentially cheaper, both in cost and reputational damages, than litigations. Corporate grievance mechanisms are not designed to address gross violations of human rights, and should in no instances replace the judicial system. MNCs may want to settle with communities in such events, and communities have the right to accept settlements, but this should not be the purpose of operational level grievance mechanisms.

These four conclusions can be drawn here but other questions remain. For example, there is great potential in operational-level grievance mechanisms in other areas, such as external monitoring and reporting, which need to be further addressed to enhance their effectiveness.

CONCLUSION

Mining projects are extremely complex and invasive by their nature and unfortunately have great potential to infringe on the human rights of surrounding communities. Multiple avenues have been tested in the past to offer better adjudication and remedies for victims of human rights abuses committed by mining MNCs. The argument at the center of this paper is that although national and international judicial and non-judicial processes are part of the answer, effective and appropriate operational-level grievance mechanisms are better suited to address minor grievances at site operation. Additionally, that they detect and address legitimate concerns of those suffering from the misconduct of mining corporations, mitigating human rights abuses better than traditional mechanisms.

Firstly, the international law regime is discussed, showing how IHRL applies in cases where mining MNCs violate human rights extraterritorially. It is established that although states and MNCs are mutually responsible to ensure the respect of human rights under international law states too often fail to do so. Secondly, the Canadian case is studied to show how Canada deals with its MNCs when they extraterritorially violate human rights. A review of the Canadian legislation, jurisprudence, and two non-judicial mechanisms made clear that great hurdles are in the ways of victims trying to seek redress in Canada for crimes allegedly committed abroad. As such, operational-level grievance mechanisms represent a viable alternative where grievances can be addressed, particularly if there is no home or host state adjudication. Thirdly, background, definitions and effectiveness criteria as defined by the SRSG, ICMM and Oxfam Australia were presented. As outlined in the GPs, MNCs can partially honor their human rights responsibility in establishing corporate grievance mechanisms. Finally, two case studies of community-company grievance resolutions, TVIRD in the Philippines and NGGL in Ghana were discussed and analysed.

Finally, it is clear that additional research must be conducted in order to collect data on the ground. More theoretical work in determining the role of home state governance (although at this stage very few states regulate their MNCs extraterritorially), and an analysis of the role of international organizations and NGOs, is needed for the advancement of this question. The direct involvement of mining MNCs with the most affected people at site operations, through due diligence processes, should be the first step in addressing grievances and could no doubt leave these communities better off. Keeping in mind that room remains for improvement, the two operational mechanisms demonstrate that such mechanisms, if well designed, are adequate alternatives to the judicial and non-judicial systems in addressing local grievances. Community-

company mechanisms also enable MNCs to address issues before they escalate into major conflicts leading to costly and time-consuming litigation.

In conclusion, there is a growing need for mining corporations to create effective operational-level grievance mechanisms. If well-designed, operational-level grievance mechanisms represent win-win situation for local communities and MNCs. Home and host states of mining MNCs can and should put in place frameworks encouraging MNCs to adopt site-level grievance mechanisms. While this trend is developing slowly, NGOs, international organizations, associations, and governments who support human rights world-wide should help in bringing this issue to light.

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APPENDIX

ANNEX 1: Types of Grievances and Examples

TYPES OF GRIEVANCES	EXAMPLES
Relatively minor and one-time problems related to company operations	<ul style="list-style-type: none"> - Company equipment causes damage to an individual's livestock - One-time disagreement between a contractor and a laborer over working conditions
Relatively minor but repetitive problems related to operations	<ul style="list-style-type: none"> - Noise and dust complaints during the construction phase, brought up by a group of people or repetitively raised by individual complaints - Destruction of landscape, local greenery - Project traffic blocks the local access roads
Significant, larger problems related to operations	<ul style="list-style-type: none"> - During construction, company uses some land beyond the initial agreement with a community of temporary land use - Misconduct of in-migrant workers (do not pay for local services, such as hotels, restaurants, shops; damage crops)
Major claim, significant adverse impact on a larger group or several groups	<ul style="list-style-type: none"> - Employment opportunities do not meet expectation of local communities (no clarity regarding employment policies) - Significant water contamination (less fishing, unclean water, and so on), water shortage - Violence against women due to shifting power roles in the community
Major allegations regarding policy or procedure	<ul style="list-style-type: none"> - Allegations of systematically inadequate land compensation - Communities not provided with disclosure of project information and fear, uncertainty, or rumors leading to civil unrest and violence

Source: IFC, Good Practice Note, *Addressing Grievances from Project-Affected Communities: Guidance for projects and companies on designing grievance mechanisms*, 2009, no 7.