

Report from a session at the United Nations Sixth Annual Forum on Business and Human Rights, 28 November 2017

Access to Remedy Through Multi-Stakeholder Engagement

Insights from cases in Myanmar and South Africa

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This report provides insights from two case study-based sessions entitled 'Access to Remedy Through Multi-Stakeholder Engagement', which took place on 28 November 2017 as part of the sixth annual UN Forum on Business and Human Rights (the Forum). The Global Business Initiative on Human Rights (GBI) and the Business & Human Rights Resource Centre (BHRRC) have released this report in their capacity as co-organisers of the session, alongside the UN Working Group on Business and Human Rights, which submitted a separate commentary on the sessions as part of its report to the UN Human Rights Council in 2018. The sessions aimed to explore multi-stakeholder perspectives and experiences on specific case studies on realising and delivering access to remedy in local contexts. The Forum continues to provide a critical space for stakeholders to share progress and practices, as an aid to peer learning and to establishing the state of play of implementation on the ground.



**Business & Human Rights
Resource Centre**



**GLOBAL BUSINESS INITIATIVE
ON HUMAN RIGHTS**

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1 : OVERVIEW AND INSIGHTS

This report provides insights from two case study-based sessions entitled “Access to Remedy Through Multi-Stakeholder Engagement”, which took place on 28 November 2017 as part of the sixth annual UN Forum on Business and Human Rights (the Forum). The Global Business Initiative on Human Rights (GBI) and the Business & Human Rights Resource Centre (BHRRC) have released this report in their capacity as co-organisers of the sessions, alongside the UN Working Group on Business and Human Rights, which is submitting a separate commentary on the sessions as part of its report to the UN Human Rights Council in 2018. The sessions were televised in full on UN TV and can be viewed [here](#).

The sessions featured two case studies of multi-stakeholder action on realising access to remedy:

- access to remedy for people affected by the Thilawa Special Economic Zone in Myanmar; and
- an independent problem-solving service for communities affected by mining operations in South Africa.

Insights from the panels and interaction with the audience, together with a full background, are given in Section 2 of this report.¹

WHAT THE SESSIONS ACHIEVED

The focal point and aim of the sessions was to demonstrate practice and innovative responses around the complex realities of implementation of the third pillar of the UNGPs where multiple parties are involved in remedial efforts. Understanding the opportunities, and challenges, in such approaches is essential to their success and to the evolution of the Business and Human Rights agenda in the coming decades. Key to this approach is an understanding that for the UNGPs (and B&HR movement) to succeed, all three pillars of the ‘Protect, Respect and Remedy’ Framework must be implemented, and be implementable in practice, including at the local level.

Although the sessions at the Forum provided only a snapshot and current state of play for each of the case studies, the process of formulating these multi-stakeholder sessions with the parties, coupled with two-way interaction and exposure to others from impacted communities, international practitioners and experts on the day, sets the value of conducting the panels far beyond what might be anticipated from a traditional panel format. In practice this is demonstrated by reports from panellists that participating in the panels assisted with the process on the ground by:

- Bringing together all the parties around the same table – in some cases for the first time – which both opened the way for and progressed dialogue and greater understanding. It brought the parties ‘up to speed’ on where each perceived the processes to be, and where remaining challenges lie. Some of the parties have arranged further discussions as a result of the sessions.
- The need for panellists to clearly frame their remedial efforts or the impacts experienced by their communities for the Forum audience gave greater clarity and focus to the aims and ultimately intended outcomes of the processes underway.
- For those less familiar with the discourse of business and human rights, exposure to the Forum and the UNGPs aided understanding of normative expectations and clarified obligations between parties.

¹ For an account of the methodology employed to select the cases and prepare for the sessions, please see Annex at page 14.

- For some, in both the panels and in the audience, they heard for the first time the extent and nature of differential impacts on the human rights of different parties, thus providing a new or deeper understanding of the differing requirements necessitated to provide effective remedy to all impacted parties.
- For some panellists, excellent connections were made with others working on similar remedial mechanisms or in similarly challenging contexts, and they are now in contact to share their experiences and insights.

Comments from experts, practitioners and representatives of communities provided invaluable inputs from the floor to guide panellists in their work, for example, by drawing out the difference between ‘development’ and ‘remedy and reparations’ for the initial harm, and of the need to remain cognisant of when remedy should be considered at community level, and when provision of remedy to an individual is appropriate and effective. Audience members also asked advice of the panel, for example one mining company asked a community representative to help them understand how best to engage and empower the community in redesigning a grievance mechanism and in understanding how best to deal with conflicting interests of different community members.

“ These panels ... seem to demonstrate that we can have constructive dialogue at this Forum and I'm very delighted to see it happen – even if it means that we disagree on some of the issues – I think that's a very positive development. **”**

Michael Addo, Chair, UN Working Group on Business and Human Rights



HIGH-LEVEL OBSERVATIONS ON MULTI-STAKEHOLDER PANELS – 2014-2017

In preparation and to enhance the opportunity for dialogue on multi-stakeholder approaches to remedy at the Forum in 2017, GBI and BHRRRC prepared a [blog](#) entitled “*Effective Remedy: The power and pitfalls of multi-stakeholder engagement*”, which was published online for the [2017 UN Forum blog series](#), hosted by the Cambridge Business and Human Rights Journal.² It focussed on how multi stakeholder approaches can be used to realise effective access to remedy for victims of business-related human rights abuses, and illustrated some of the lessons learnt from past panels and research. The blog highlighted that:

- Effective engagement involves all parties at the table, with rights-holders at the centre.
- It takes effort and time and there is no one-size-fits-all solution.
- Three is still the magic number. Implementation of all three pillars of the UNGPs is needed to ensure effective remedy.
- It can be complex – it is inevitable that conflict will arise and there is value in becoming comfortable with the complexity and time required for operationalising multi-stakeholder remedial initiatives in practice.

² Reports are available here (<http://www.global-business-initiative.org/wp-content/uploads/2016/08/Respect-in-Practice-Report.pdf>) and here (<http://www.global-business-initiative.org/wp-content/uploads/2016/08/UN-Forum-2015-Multi-Stakeholder-Engagement-Full-Report-GBI-BHRRRC1.pdf>).

2 : CASE STUDIES

Multi-stakeholder perspectives on access to remedy for people affected by the Thilawa Special Economic Zone in Myanmar

Panellists

Phil Bloomer, Executive Director, Business & Human Rights Resource Centre (Moderator)

Daw Ai Ai Khaing, General Administration Department of the Yangon Southern District

Tomoyasu Shimizu, CEO, Myanmar Japan Thilawa Development Limited (MJTD)

Masayuki Karasawa, Chief Representative, Japan International Cooperation Agency (JICA)

Daw Than Ei, member, Thilawa community-driven operational level grievance mechanism (CD-OGM) Design Committee and affected community member

U Tin Latt Ye, Representative of affected community of Thilawa SEZ & of Thilawa Coordination Committee

Katherine McDonnell, Legal Advocacy Coordinator, EarthRights International

Michael Addo, Chair, UN Working Group on Business and Human Rights



ABOUT THE SESSION

The Thilawa special economic zone (SEZ) 23 km southeast of Yangon is the first SEZ to be established by the Myanmar Government. The Zone is being developed in cooperation with the Japanese Government. This panel explored approaches by key stakeholders to ensure access to remedy for people affected by the development of the Thilawa SEZ. The session also aimed to:

- Explore how effective access to remedy is linked with the economic and social development for local communities;
- Increase understanding of the practical complexity of implementing access to remedy and the experiences of key stakeholders in the case of the Thilawa SEZ;
- Share the process of designing a community-driven operational grievance mechanism;
- Explore lessons learned and plans for strengthening remedy mechanisms in Thilawa moving forward; and
- Surface lessons learned and other examples of innovative approaches for realising access to remedy from participants.

A full description of the case is given on page 8.

KEY INSIGHTS FROM THE SESSION

- **Access to remedy for people negatively affected by business operations is usually hindered by inequality of power between companies and government on the one hand, and communities or organisations on the other.** In these cases, it takes vision, self-reflection, and an understanding of these dynamics from the powerful actors to shape the process to achieve remedy in ways that include the voices, needs, and solutions of those most affected and with the least access to power. This inclusive approach can bring benefits to all parties: the community is fairly treated, and the investment and project gain stability and goodwill through a strong social license to operate.
- **People are often affected differently by business operations and some may face additional barriers to access remedy.** This is the case with the Thilawa SEZ, where some families have experienced loss of land, livelihoods, educational opportunities and access to adequate clean water due to relocation, while other people affected by the project have benefited. However, even if the majority of people benefit, those who have been negatively impacted still have the right to access remedy. Equitable, transparent and accessible grievance mechanisms should be developed through inclusive processes with opportunities for representatives from all affected communities to engage in order to ensure that their diverse experiences, perspectives, and solutions are reflected in the design of the grievance mechanism, so that it will be more effective.
- **Effective access to remedy usually involves early and upstream efforts to build an inclusive mechanism that puts affected communities at the centre of the process.** Transparent, inclusive, and respectful dialogue between all stakeholders will significantly contribute to the project's success – by building trust and helping to ensure that everyone can benefit from the project. Developing and implementing remedy mechanisms is an iterative process, that involves ongoing learning and modifications to ensure that the mechanisms best meet the needs of the people most affected. Some groups argue that this did not happen in Thilawa and that it has taken years for a grievance mechanism to be discussed. Most groups agree that there is still an opportunity to build that trust and create an effective mechanism.
- **In the case of the Thilawa Special Economic Zone (SEZ), there is agreement among key stakeholders that this project needs to provide effective remedy for those negatively affected.** Diverse approaches are being taken and all parties see the need for dialogue and to learn from previous experience to enhance access to remedy. Stakeholders also agree the SEZ could generate important economic benefits for local communities. The stakeholders represented on the panel are taking steps to support affected community members, such as creating new jobs, providing vocational training for some people who lost their livelihoods due to the project, and strengthening healthcare. This type of development support is important, yet at the same time, it does not eliminate the need to provide effective access to remedy. This type of support must also come from meaningful engagement with the proposed recipients, in order to ensure that it meets their diverse needs.

“ We have improved aspects of the process aligned with the UNGPs, specifically Article 31, for example, we rely more on dialogue between the complainants and the responsible parties and introduced common formats of data and information which will be used for compliance and sharing with the public for more transparency. **”**

Masayuki Karasawa, Chief Representative, Japan International Cooperation Agency (JICA)





“ We tried many different ways to get remedies and felt we were being ignored and neglected. That's why in early 2015 we met with local ERI and studied CD-OGM system and decided to form the committee... At the end of 2016 we finished the design. In 2017 we held meetings with communities... so that they could understand, since the design is for everyone and it is important that all participate. At the same time, we tried to meet with MJTD, JICA and TSMC to seek advice because we understand the importance of agreement from those who implement this project. **”**

Daw Than Ei, member, Thilawa community-driven operational level grievance mechanism (CD-OGM) Design Committee and affected community member



“ In line with the UNGPs, we will continuously make efforts for the compliant management procedure to be formalised in collaboration with affected communities ... Transparency and accountability are very important to secure trust and make more informed decisions. **”**

Tomoyasu Shimizu, CEO, Myanmar Japan Thilawa Development Limited (MJTD)



“ With MJTD and JICA, we have been working to strengthen our existing complaints management processes in a systematic, realistic, and practical way... We have tried to solve complaints, concerns, and requests for local development by meeting with people at community meetings, inside villages, at resettlement sites, and by phone. **”**

Daw Ai Ai Khaing, General Administration Department of the Yangon Southern District



“ It's great to hear that now the stakeholders want to implement a systematic remedial process. [But] it's a little disheartening that it's taken ... 4 years after resettlement, to come to this idea, while it's been something that's been promoted to them since early 2015. **”**

Katherine McDonnell, Legal Advocacy Coordinator, EarthRights International

PAST ACTIONS AND NEXT STEPS

- All speakers noted the importance of increased dialogue and transparency about access to remedy in Thilawa.
- In December 2016, Design Committee members shared their CD-OGM proposal for Thilawa.
- Following a consultation with numerous stakeholders conducted in October 2017, Japan International Cooperation Agency (JICA), Myanmar Japan Thilawa Development Limited (MJTD), and the Thilawa SEZ Management Committee (TSMC) streamlined their existing complaints mechanisms into one process. Following the Forum session in November 2017, the Thilawa Management Committee (TSMC) and Myanmar Japan Thilawa Development Limited (MJTD) launched a draft version of this separate mechanism, the Thilawa Complaints Management Procedure (TCMP).
- In early February 2018, the Thilawa CD-OGM Design Committee members sent a [formal response](#) to MJTD about the TCMP, requesting that negotiations to be initiated in order to agree on a better grievance mechanism and a meeting to discuss the best solution.
- Since February 2018, the Design Committee has met with the stakeholders and will continue to do so to try and come to a compromise on an improved grievance mechanism.
- In early February 2018, EarthRights International [published an analysis of the TCMP](#) with its views about the procedure's shortcomings in light of international business and human rights norms.
- In March 2018, the TSMC and MJTD published a second version of the TCMP.

“ The local community feels that the implementation of the Thilawa SEZ is like the occurrence of “Padethar Pin” in Myanmar language which is something like a tree from which people can get whatever they want that is necessary for their livelihoods, for example food, clothing, and a place to live. **”**

U Tin Latt Ye, Representative of affected community of Thilawa SEZ & Thilawa Coordination Committee



THILAWA CASE STUDY BACKGROUND

The Thilawa SEZ, located 23 km southeast of Yangon, is the first large-scale SEZ in Myanmar. The Zone, which is 2,400 hectares (ha) in total, is being developed in phases under Myanmar Japan Thilawa Development Ltd. (MJTD), a public-private partnership joint venture initiated by Myanmar and Japan. The first Zone A development, 400ha for mainly industrial use, started in late 2013, and over 30 factories are now operational. The second Zone B, 262 ha for industrial use, has been split into several areas for gradual development. An updated joint venture agreement of MJTD which includes the first area of Zone B was signed in October 2016, and construction started in early 2017. Negotiations with stakeholders are currently underway for the next area in Zone B.

Manufacturing and services investors in the SEZ are offered certain tax and export privileges, superior infrastructure and a ‘one-stop service centre’ that provides services ranging from company incorporation to visa applications. There are currently nearly 90 investors in the Thilawa SEZ, with many more anticipated for Zone B. Investments to date come mainly from Japan, China, USA, and Thailand in sectors that include manufacturing of garments and toys, steel products, radiators, aluminium cans, packaging and waste management. The Myanmar Government estimates 30,000-50,000 direct employment opportunities in Zone A and B.

The legal framework for SEZs, and its relationship to other Myanmar law, is still evolving, but the Government’s stated intention since the beginning has been that the Thilawa SEZ should be developed in accordance with international environmental and social safeguard standards. Thilawa SEZ Management Committee (TSMC) is in charge of governance of the entire Zone.

Zone A affected 81 households, 68 of them relocated in late 2013 by the Myanmar Government to a site 4.5-8 km away. Some relocated villagers and civil society organizations were critical of the relocation process and the site, as it had a number of infrastructure problems early on, some of which have since been resolved. Three members of the community supported by Earth Rights International and a Japanese NGO submitted a complaint to the Japan International Cooperation Agency (JICA)’s Independent Examiners in June 2014 concerning non-compliance with the 2010 JICA Guidelines for Environmental & Social Considerations in relation to Zone A resettlement. Concerns included in the complaint letter were: loss of farmland and/or access to farmland; loss of livelihood opportunities; impoverishment; loss of educational opportunities; substandard housing and basic infrastructure; loss of access to adequate clean water.

While recognising some of the concerns, the [JICA Examiner’s November 2014 report](#) did not find non-compliance with JICA’s Guidelines. It did recommend improved dialogue and communication among stakeholders and further improvements in living conditions at the relocation site and the Examiners conduct follow up visits to assess whether the recommendations have been followed. The report’s findings were criticised by the Thilawa Social Development Group, a community-based organisation that was formed by some affected community members, and some civil society organisations, although they welcomed the recommendation for more dialogue.

The SEZ-Zone B development affected 108 households in early 2017 and 90 of them were relocated after May 2017 by the Myanmar Government to the same site as Zone A. Based on lessons learned from the experience of the Zone A and another resettlement program conducted in Thilawa, as well as engagement with affected communities, the relocation site was developed with input from and in collaboration with people who were relocated.

Communities and people affected by the project have sought remedy through various means, including direct engagement with the Government of Myanmar and other stakeholders, and letters to government departments and officials at various levels. This session explored several approaches by key stakeholders to ensure access to remedy for people affected by the development of the Thilawa SEZ.

INVESTORS

Thilawa SEZ Management Committee (TSMC) (<http://www.myanmarthilawa.gov.mm/>) is in charge of governance of the Zone as well as representing the Myanmar Government's 10% share in MJTD (see below). It comprises representatives of government departments including construction, planning and finance, Commerce, etc and the Yangon Regional Government. The TSEZ MC website includes the Resettlement Work Plan for Zone A and Notice 4/2015 on responsible business conduct in the Zone.

Myanmar Japan Thilawa Development Ltd (MJTD) (www.mjtd.com.mm) is the Developer of the SEZ in Zone A and B. It was formed in January 2014 as a joint venture company between MTSH, MMSTD (see below), TSEZMC and JICA (see below). MJTD recently joined the UN Global Compact.

Japan International Cooperation Agency (JICA) (www.jica.go.jp) is the implementing agency of Official Development Assistance (ODA) of the Government of Japan. It has a 10% share in MJTD. It provides technical support for the project to the Myanmar Government by dispatching Expert Team, through preparing the RWP and IRP, and strengthening social performance and community relations including stakeholder engagement and complaint management.

GOVERNMENTAL ACTORS

Yangon Regional Government is in charge of planning and implementing land acquisition, resettlement and income restoration program at Thilawa SEZ development project.

Thilawa SEZ Management Committee (TSMC) Please see above.

Japan International Cooperation Agency (JICA) Please see above.

NON-GOVERNMENTAL ACTORS

Thilawa Social Development Group (TSDG) is a community-based organisation that was formed by the communities affected by Phases 1 and 2 of the Thilawa SEZ. The members of TSDG were selected by the communities to collaborate with local and international NGOs to advocate for the rights of local communities. See: A foreseeable disaster in Burma: Forced displacement in the Thilawa SEZ, November 2014, by Physicians for Human Rights, Mekong Watch and TSDG.

Earth Rights International (ERI) (www.earthrights.org) is a nongovernmental, non-profit organisation that combines the power of law and the power of people in defense of human rights and the environment. It specialises in fact-finding, legal actions against perpetrators of earth rights abuses, training grassroots and community leaders, and advocacy campaigns. ERI has worked with the communities in Thilawa since 2013. See Analysis of EIA for Phase 1 of Thilawa SEZ, November 2014; Community Rights & Remedies under Myanmar Law & JICA's Guidelines: A Brief, November 2014; "Experts Help Communities Take Control of Justice", March 2015, available at <http://bit.ly/1Ryz9nG>.

Myanmar Centre for Responsible Business (MCRB) (www.mcrb.org.mm) is a multi-donor initiative established in Yangon in 2013 by the Institute of Human Rights and Business and the Danish Institute for Human Rights that aims to provide a trusted and impartial platform for the creation of knowledge, capacity, and dialogue amongst businesses, civil society organisation and governments to encourage responsible business conduct throughout Myanmar. In late 2014, the Myanmar Centre for Responsible Business (MCRB), with the JICA Expert Team, facilitated the formation of a Multi-stakeholder Advisory Group (MSAG), a forum for dialogue and coordination among various stakeholders, which continued for 18 months.

Multi-stakeholder perspectives on access to remedy: The establishment of an independent problem-solving service for communities affected by mining operations in South Africa

Panellists

Katryn Wright, Director, Global Business Initiative on Human Rights (Moderator)

Mmathapelo Thobejane, Community Representative

Tebello Chabana, Senior Executive: Public Affairs & Transformation Chamber of Mines South Africa

John Capel, Executive Director, the Bench Marks Foundation

Michael Addo, Chair, UN Working Group on Business and Human Rights



ABOUT THE SESSION

This panel focussed on an example of an innovative and in-progress approach to remedy from the perspectives of different stakeholders. A new Independent Problem-Solving Service (IPSS) for affected communities in mining areas in South Africa is currently being created by the Bench Marks Foundation. The service will focus on facilitated dialogue and developmental solutions, and seeks to independently facilitate sustainable solutions in the context of fraught histories, the absence of trust between business and communities and systemic human rights challenges. The session also aimed to:

- Demonstrate an innovative and unique example of an NGO leading a multi-stakeholder, collaborative process to solve company-community challenges at local levels;
- Highlight the value of independent mechanisms that have the buy-in of the main stakeholders concerned;
- Emphasise the need for independent services formulated through consultative processes – while not excluding the voluntary use of company-led grievance mechanisms where communities have sufficient trust in them; and
- Engage in two-way dialogue between the panel and the audience. The Bench Marks Foundation showed an eagerness to connect with experts and the experiences of others as they design this process.

KEY INSIGHTS FROM THE PANEL

- **The status quo is not working for anyone.** Communities are frustrated and often do not see the benefits of mining. Companies do not benefit from protests outside the mine gates and community disruptions. There is a legacy of unmet expectations, inequality and poverty that needs to be transformed for the benefit of everyone involved. Company-community relations are deteriorating, and this must be addressed.
- **Independent mechanisms to resolve problems and grievance mechanisms can be hugely valuable in vexed contexts.** There is a significant trust deficit between companies and communities in mining areas in South Africa. Company-led grievance mechanisms are often under-utilised – a point that was echoed by a mining company representative in the audience – or not designed with community needs in mind. Legal mechanisms are often out of reach for poor communities and may not be fit-for-purpose for smaller grievance mechanisms. Independent mechanisms could transform the status quo. The speakers and audience highlighted several critical success factors including: the levelling of unequal power dynamics; a need to focus on process as much as outcome; use of facilitated dialogue; and the necessity of mechanisms to be truly independent and credible.
- **Connections are made at the UN Forum.** The UN Forum presents a unique opportunity for people from around the world, focusing on different industrial sectors and country contexts to come together and learn from each other's work. The panel itself was an opportunity for key stakeholders to meet, discuss where they are aligned on what the challenges are and explore solutions and ways forward together. Another important connection was made between the Independent Problem Solving Service and the Coalition of Immokalee Workers around their experiences with the Fair Food Program and complaint resolution system.



“ We as communities are afraid because we know that the companies may not even consider the Independent Problem Solving Service. We know that there are company grievance mechanisms that we need to follow but as communities we find it very difficult because they require experts. You often need some technical evidence that we as communities don't have. **”**

Mmaphapelo Sebotse Thobejane,
Community Representative



“ It takes a leap of faith from both sides to enter into this process. There are two fundamental problems. Communities lack access to justice and lack the ability to organise themselves to engage mining on a level footing – so we're dealing with skewed power relations. We find that industry and corporations we engage with say to us in principle they think the IPSS is a good idea, but they are used to a practice where they use tribal authorities and the local chief to obtain consent. That's much easier than dealing with a whole lot of differently impacted parties and different interest groups within communities. **”**

John Capel, Executive Director,
the Bench Marks Foundation

“ The situation continuing as it is, is not in anybody's favour... It is important that companies go back to basics – ensure that they have grievance mechanisms and that they are effective. Companies need to get back to the basics of engaging their stakeholders on a regular basis and move away from acrimonious relationships.

Tebello Chabana, Head of Public Affairs and Transformation, Chamber of Mines South Africa



ACTIONS AND NEXT STEPS

- The panellists agreed to work together on solutions. This included suggestions of more meetings between the Independent Problem Solving Service and industry to test the mechanism and contribute to its robustness.
- The Independent Problem Solving Service also requested further conversations with representatives of the Coalition of Immokalee Workers to understand more about their process and experiences in setting up a widely recognised and successful process to address human rights risks and process grievances.

INDEPENDENT PROBLEM SOLVING SERVICE BACKGROUND

The Chamber of Mines has reported that at least three protests per day take place around mining operations. Fraught relations between mining companies and communities represent a microcosm of the daily struggles of many in South Africa. In the mining sector, communities face a multitude of challenges, whether access to water, land, and community health and wellbeing or livelihood impacts.

The Bench Marks Foundation (a South African NGO) is working to establish a rights-based problem-solving service that affected communities can utilise in mining areas in South Africa focused on facilitated dialogue and developmental solutions. The proposed service seeks to independently facilitate sustainable solutions in the context of fraught histories, the absence of trust between business and communities and systemic challenges.

The service comprises a process of facilitated dialogue, followed where necessary by processes drawn from a ‘toolbox’ of components for each specific case. The scope of the service is expansive, encompassing any community grievance, though these are likely to concern health, housing, livelihoods, pollution or water. It is multi-faceted and includes both reactive and proactive elements including ongoing monitoring and early interventions, community awareness raising and continuous engagement with mining companies.

For many years, Bench Marks has been looking at the issues of access to fairness, justice and balancing out the unequal power relations between mines and communities. Originally Bench Marks proposed an independent grievance mechanism, but after much thought and analysis, decided a more holistic approach was needed to deal with the crisis in the mining sector. Thus, the concept of a holistic problem-solving service emerged, called the independent problem-solving service (IPSS), backed up by an independent capacity building fund (ICF). The ICF will address skewed power relations, giving communities access to specialist advice on the one hand, and training company sustainability officers to engage communities with care and respect on the other.

Bench Marks is currently in a consultative process with communities and civil society regarding the IPSS and the ICF. Discussions have also begun with the business community, including the Chamber of Mines. In addition, academics have also been approached for their input.

The IPSS has a ‘toolbox’ of problem solving components, with facilitated dialogue at its centre. If this does not resolve the problem, several further options are available, including a formal grievance hearing, mediation and or expedited arbitration. The approach is flexible, allowing the case to be diagnosed, and identifying the best approach to be used. Importantly, the IPSS does not remove any rights of parties in law, allowing for judicial and other interventions as well. The emphasis is on dialogue, as opposed to a more rigid grievance mechanism approach, and is informed by both local and international experience, pointing to facilitated dialogue being a more conducive form of engagement for problem solving. Of great importance is that dialogue will be driven by suitably skilled and impartial facilitators, considering the complexities and challenges involved, including skewed power relations.

The core objective of this initiative is the restoration and maintenance of human dignity. It requires a mindset shift at both company and community level. Trust in the process is a prerequisite. It is a service with many facets. It involves both pro-active and reactive components, with a process specifically designed for each case. It prioritises a non-legalistic, non-adversarial, accessible and empowering process, with facilitated dialogue at its centre. It aspires towards sustainable, developmental solutions which go beyond rights-based remedies.



CONCLUDING REMARKS

In his concluding remarks to the sessions, Michael Addo, Chair of the UN Working Group on Business and Human Rights noted:

“What I picked up from these two panels is what the working group put into its report to the General Assembly – there is a place for an independent remedial service – an independent remedy – but it should be seen as part of what the report calls a bouquet of remedies. A bouquet of remedies increases the chances of effective remediation. The idea, therefore, is to begin to figure out when the time is right for using the community grievance mechanism or company grievance mechanism or indeed an independent mechanism, or even going for the state non-judicial mechanism or whether you should go for a judicial mechanism.**”**

ANNEX: METHODOLOGY

The methodology used to select the case studies reflected the intention for a high level of ambition around the panels and corresponding case studies. The criteria applied for selection included identifying:

- **Non-judicial mechanisms at different stages in a remedial process** (e.g. complete, in progress, being innovateddesigned);
- **Cases that highlight a diversity of potential remedial outcomes** – restorative (apology, rehabilitation, restitution), compensatory (financial, non-financial compensation), retributive (punitive criminal or administrative sanctions), deterrence (preventative injunctions of guarantees of non-repetition); and
- **A range of human rights impacts from diverse industries and geographies.**

The principles guiding the session design and delivery included ensuring that each panel and case study should:

- **Be multi-stakeholder,**³ credibly featuring and reflecting the voices and perspectives of the business concerned, the people impacted or that use the mechanism (or their legitimate representatives where/if appropriate) and other actors involved in the same case study (e.g. government, financial institutions), thereby embracing different perspectives and experiences;
- **Draw on lessons learnt** and observations that have the potential to be relevant and replicable in other contexts;
- **Highlight the value of innovative and collective action** to solve complex, often systemic, challenges; and
- **Reinforce the value and complementarity** of all three pillars of the UNGPs.

From an initial scoping of 15+ possible cases, the South Africa IPSS and Thilawa SEZ in Myanmar cases were selected in consultation with the Forum Secretariat for further exploration at the Forum.⁴

³ Whilst multi-stakeholder action can be impactful, collaboration and collective problem-solving efforts should not undermine human rights, nor excluding access to judicial mechanisms.

⁴ In line with any guidance provided by the Forum Secretariat and independently, the Resource Centre and GBI gave due consideration in each case study to any perceived sensitivities, issues of confidentiality, and potential unintended consequences or impacts on the parties and remediation process to which the case study pertains.



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