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Pillar III

Access to Remedy for
Extractive Sector Impacts



4. Pillar III: Access to Remedy for Extractive Sector Impacts

4.1 Introduction and Link to the UN Guiding Principles on Business and Human Rights

The third pillar of the three-pillar UNGP framework is about access to remedy for victims or potential victims of human rights impacts – whether by the state or companies or their business relationships. The idea behind this pillar is to counteract or make good any human rights harms that have occurred or to prevent further recurrence of harms or foreseeable harms. Remedy may include apologies, restitution, rehabilitation, financial or non-financial compensation and punitive sanctions (whether criminal or administrative, such as fines), as well as the prevention of harm through, for example, injunctions or guarantees of non-repetition. Remedy procedures should be impartial, protected from corruption and free from political or other attempts to influence the outcome.

Remedies can be provided through state-based judicial mechanisms – such as through several types of courts that are part the Tanzanian legal system set out below. But it is not just courts – non-judicial grievance mechanisms, such as the Tanzanian National Human Rights Institution, the Commission for Human Rights and Good Governance (CHRAGG), as well as labour inspectorates and environmental authorities can all play a role in trying to resolve disputes between parties around emerging extractive operations and provide remedies. These state-based mechanisms should form the foundation of a wider system of remedy that includes company-led or collaborative based operational-level grievance mechanisms that can provide early stage recourse and resolution. These state-based and non-state based mechanisms, in turn, can be supplemented or enhanced by international and regional human rights mechanisms and other international mechanisms.

4.2 Constitutional Analysis of Access to Remedy

The Tanzanian Constitution provides for impartiality in access to justice without due regard to social or economic status.³⁸⁷ When the rights and duties of any person are being determined by a court or any other agency, that person shall be entitled to a fair hearing and to the right of appeal or other legal remedy against the decision of the court or of the other agency concerned.³⁸⁸ It also provides that victims of wrong doings are to be awarded reasonable compensation in accordance with the relevant law enacted by the Parliament. However, the Constitution does not have specific provisions or guarantees on access to justice that provides reasonable or cost-free access.

4.3 Remedy in Tanzania and through International Mechanisms

4.3.1 *Judicial Mechanisms in Tanzania*

In Tanzania, the judiciary is a third, independent branch of the Government, respecting the constitutional principles of separation of powers. The Constitution provides for an independent judiciary, and respect for the principles of the rule of law, human rights and good governance.

The Judiciary in Tanzania has four tiers: The Court of Appeal of the United Republic of Tanzania,³⁸⁹ the High Courts for Mainland Tanzania and Tanzania Zanzibar, Magistrates Courts, which are at two levels, i.e. the Resident Magistrate Courts and the District Court, both of which have concurrent jurisdiction. Primary Courts are the lowest in the judicial hierarchy.³⁹⁰

The High Court (mainland Tanzania) has established 10 sub Registries in different zone of the country and has two specialised divisions, the Commercial Division and the Land Division. There are specialized tribunals, which form part of the judicial structure that include District Land and Housing Tribunal,³⁹¹ the Labour Reconciliation Board, the Tanzania Industrial Court. Appeals can be made from tribunals to the High Court for judicial review.³⁹² Other institutions with jurisdiction to entertain land cases are the Village Land Council, the Ward Tribunal, the High Court (with a special Land Division),³⁹³ and the Court of Appeal.³⁹⁴

As noted in the Universal Periodic Review of Tanzania, there is an acute shortage of courts, as well as judges and magistrates to preside over cases, severely affecting access to competent tribunals.³⁹⁵ There is very limited judicial enforcement of environmental law. There are very few cases that have been adjudicated in courts of laws and prosecution of environmental cases is very low. Instead many cases are resolved through administrative mechanisms.³⁹⁶

4.3.2 *Non-Judicial Mechanisms in Tanzania*

Courts are not the only option for addressing human rights grievances. Especially in countries with encumbered judicial systems such as Tanzania, workers and communities will often look to other, non-judicial mechanisms to resolve grievances involving the extractive sector, including the state-based mechanisms immediately below, or non-state based mechanisms, set out in Section X below, including through company operational level grievance mechanisms.

State-Based Non-Judicial Grievance Mechanisms: CHRAGG

The Commission for Human Rights and Good Governance (CHRAGG) is Tanzania's National Human Rights Institution (NHRI) that was established through the Constitutional Amendment Act no. 3 of 2000.³⁹⁷ CHRAGG is an independent government department³⁹⁸ that functions as the national focal point institution for the promotion and protection of human rights and good governance practices. According to the Constitution and the

Commission's founding legislation, CHRAGG has a broad mandate and wide ranging functions, which include:

- Human rights protection and promotion
- Dealing with administrative justice and maladministration
- Dealing with good governance issues

CHRAGG is additionally tasked with investigating any human rights or maladministration complaints filed by any natural person, legal person, or any other person acting on behalf of others, or on its own motion.³⁹⁹ Upon completion of an investigation, CHRAGG has a number of options it may pursue to resolve the complaint, which include initiating amicable settlement negotiations between complainants and respondents; reporting the findings to the person or institution impacted by the complaint; and making recommendations that call upon the relevant authority to take action that will lead to the effective settlement, remedy or redress of the issue.⁴⁰⁰ Significantly, CHRAGG may also initiate a court case seeking relief or enforcement of one of its recommendations.

CHRAGG is well positioned to contribute to the protection and promotion of human rights in Tanzania in the extractive sector, building on inquiries into human rights violations in the extractive sector to date.⁴⁰¹ There are numerous examples of investigations and settlement negotiations that CHRAGG has carried out, however, the majority of the reports on these visits have not been made public. In other cases, recommendations have not been acted on and CHRAGG has not had the resources to follow up.

Residents of the Katoma and Nyakabale villages in the Geita district submitted complaints to CHRAGG stating they had been forcefully evicted from their land in order to pave the way for mineral extraction. In order to bring their complaints to the attention of CHRAGG, complainants travelled to CHRAGG's head office, in Dar es Salaam.⁴⁰² Upon receipt of the complaints, CHRAGG deployed a team of investigators, who investigated the claims and prepared a draft report of their findings. However, due to budgetary constraints the report was never finalised.⁴⁰³

In response to community complaints, CHRAGG has conducted fact finding investigations in the extractive sector communities in a number of districts, including the Nzega district (Tabora region) and Simanjiro district (Manyara region).

CHRAGG assisted in reaching a negotiated settlement on compensation, in the Kilindi District, Tanga Region, between artisanal miners and the holders of a special mining license (large scale miners).⁴⁰⁴

Commissioner for Minerals & Zonal Mining Offices

The Mining Act 2010 provides dispute settlement and grievance mechanisms for aggrieved persons, including host communities or communities living close to extractive operations,⁴⁰⁵ and entrusts the Commissioner for Minerals⁴⁰⁶ with the responsibility to resolve disputes arising in the mining sector, including assessment and payment of compensation.⁴⁰⁷ The Commissioner has authority to issue orders and remedies in support of its decision.⁴⁰⁸ Such orders may include *"payment, by any party to the dispute of such compensation as may be reasonable, to any other party to the dispute."*⁴⁰⁹ For enforcement of decisions, the Commissioner may file the order or decision with the nearby court of law for execution. This

is on paper a useful, more direct administrative avenue to addressing issues, including around compensation. There is a right of appeal against the Commissioner decision to the high court.⁴¹⁰ However, this must be taken within thirty days from the date of the decision – an extremely short deadline for community members that may be unaware of filing requirements.

The research and field interviews undertaken for this Report tested community awareness and use of this mechanism. Interviews with a range of community members and experts indicated the perception that rather than being neutral, the office appeared to be closer to mining companies. Accordingly, community members did not feel it was a proper forum for them to address grievances concerning land compensation or conflicts with ASM. The Commissioner will need to demonstrate that the office is effective in resolving grievances quickly and effectively to gain trust and as an important counterbalance to the impediments in securing judicial remedies.

Respondents reported a number of additional challenges that make appeals to the high court difficult to access in practice. First, interviewees reported they were unable to access the high court due to a lack of funds required to engage practicing lawyers to assist in the drafting of necessary appeal papers, filings, and court representation. Consequently, community members seeking to appeal a Commissioner's decision must rely on public interest lawyers through pro bono representation through organisations such as the Lawyers Environmental Action Team (LEAT), the Legal and Human Rights Center (LHRC), and the Legal Aid Committee of the University of Dar es Salaam (UDSM). Second, even when a community member is able to obtain legal assistance through public interest lawyers or the payment of scarce monetary resources to a lawyer, the judicial process is characterized by unbearably long delays and adherence to technicalities, both of which operate as hurdles to the dispensation of justice. For example, the case of Jovina Mtagwaba and 85 others V. Geita Gold Mining Limited was filed in 2004 and up until the time of writing this Report, the community is yet to obtain a substantive decision due to technicalities and delays. In fact, in 2014 the court of appeal ruled on technical grounds that the community lawyer had cited to an inapplicable provision in the law.

Apart from using the zonal mining office of the Ministry as a grievance mechanism, interviewees stated that it provides an avenue for them to write letters to the executive arm of the Government, particularly to the regional and district commissioners, pleading for intervention. One respondent shared that in order to get a letter sent to the Geita regional commissioner it must first be endorsed by three offices – the office of the village executive officer, office of the ward executive officer, and the office of the district commissioner, indicating the level of challenges in using administrative mechanisms.

The MEM maintains publicly available client service charters. The Energy and Water Regulatory Utilities Authority has a customer rights and obligations service which helps in handling citizen complains.⁴¹¹

The NEMC and other specialized environmental agencies have some powers of enforcement and adjudication. Orders from NEMC can be enforced by and appealed through the quasi-judicial bodies, the quasi-judicial body, the Environment Appeals Tribunal.⁴¹²

The Commissioner of Lands can operate as an independent adjudicator. The Commissioner has authority to commission an inquiry on land matters, conduct proceedings and reach

determinations. The proceedings do not require adherence to rules of evidence. However, research on land conflicts in Tanzania has noted that the procedure is distrusted by many rural communities that prefer to find local solutions to conflicts.⁴¹³

Non-State-based Non-Judicial Grievance Mechanisms

Traditional Community Grievance Handling

Both formal and informal tribunals have jurisdiction to hear land disputes under Tanzania's formal law. The Courts (Land Disputes Settlements) Act of 2002, the Land Act and the Village Land Act recognise the jurisdiction of informal elders' councils, village councils and ward-level tribunals. Village councils can establish an adjudication committee, with members elected by the village assembly. The primary mode of dispute resolution in these forums is negotiation and conciliation. The forums have not yet realized their potential to address land disputes. More than a decade after adoption of the legal framework for land, the dispute-resolution tribunals are not operating. Causes for the delay include lack of funding and lack of capacity for creating the necessary institutions. In general, most people prefer to have their land conflicts resolved as close as possible to the place where the conflicts occur. Most people try to resolve problems using family and clan members and village elders with personal knowledge about the area, its history, the parties and the issues in dispute. Local forums often tend to reinforce existing hierarchies, and women and socially marginalised people may obtain less equitable results than if they had brought their claims in other tribunals. Nonetheless, many people prefer the rapid and socially legitimate results that can be achieved using local relationships and institutions.

Company Operational Level Grievance Mechanisms

The UNGPs call on companies to set up operational level grievance mechanisms to make it possible for grievances from workers, individuals and communities to be addressed early and remediated directly.⁴¹⁴ These mechanisms are typically administered by companies, alone or in collaboration with others, including relevant stakeholders. They support the identification of adverse human rights impacts as part of a company's ongoing human rights due diligence by providing a channel for those directly impacted by the enterprise's operations to raise concerns when they believe they are being or will be adversely impacted. These mechanisms make it possible for grievances to be addressed and for adverse impacts to be remediated early and directly by the business, thereby potentially preventing harms from compounding and grievances from escalating. Such mechanisms should incorporate the UNGPs effectiveness criteria to ensure that they actually deliver on remedies in a manner that is effective and aligns with human rights requirements (see Box x below).⁴¹⁵ These criteria can be met through different forms of grievance mechanism according to the demands of scale, resource, sector, culture and other parameters.⁴¹⁶

In Focus:

UN Guiding Principles Effectiveness Criteria for Non-Judicial Grievance Mechanisms

In order to ensure their effectiveness, non-judicial grievance mechanisms, both State-based and non-State based, should be:

- **Legitimate:** enabling trust from the stakeholder groups for whose use they are intended and being accountable for the fair conduct of the grievance process;
- **Accessible:** being known to all stakeholders groups for whom they are intended, providing adequate assistance for those who may face particular barriers to access;
- **Predictable:** providing a clear and known procedure with an indicative time frame for each stage, and clarity on the types of process and outcome available and means monitoring of implementation;
- **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;
- **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;
- **Rights-compatible:** ensuring that outcomes and remedies accord with internationally recognized human rights;
- **A source of continuous learning:** drawing from relevant measures to identify lessons for improving the mechanism and preventing future grievances and harms;
- Operational-level mechanisms should also be:
- **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.

A number of interviewees indicated that if they have grievances, they make these known directly to the companies involved. A number of the larger extractive companies – most of which are multinational companies – have grievance mechanisms and run these as part of their community engagement process. Community members noted the lack of clarity about where to address complaints about ASM operations.

4.3.3 International and Regional Grievance Mechanisms

The first “port of call” for communities or workers or individuals who feel they have been negatively impacted by an extractive operation may be the company itself. If companies are not accessible or open to addressing concerns or fail to address grievances to the

satisfaction of the complainant, the local, Tanzanian-based mechanisms to address and resolve grievances involving the extractive sector through judicial and non-judicial mechanisms provide a next line of remedy. There are also a number of international avenues that may be available to Tanzanian claimants, depending on the home state of the company or companies involved and the source of finance for extractive sector operations. The following overview provides a short summary of additional options for accessing remedy at the international level.

Courts in a Company's Home Jurisdiction

A more recent example is a case that was filed with the High Court of England and Wales in London on 30 July 2013. Represented by Leigh Day, a UK based law firm, 12 complainants sued Barrick Gold Mine (now Acacia Mining) and North Mara Gold Mine Limited alleging that the company condoned the excessive use of force by the police in the North Mara gold mine areas, which resulted in the deaths and injuries of community members. The plaintiffs even alleged that *"the police are an integral part of the mine's security and that they shoot at the villagers using tear gas and live ammunition."*⁴¹⁷ In 2015, the parties reached a confidential and privileged out of court settlement.⁴¹⁸

The African Commission on Human and Peoples' Rights⁴¹⁹ and the African Court on Human and Peoples' Rights⁴²⁰

The Commission can hear complaints from individuals and CSOs, but only concerning violations by a State party to the African Charter on Human and Peoples' Rights of one or more of the rights covered by the Charter, rather than against companies. Tanzania is a state party.⁴²¹

The East African Court of Justice

The East African Community (EAC) is a regional intergovernmental organisation of 6 Partner States: the Republics of Burundi, Kenya, Rwanda, South Sudan, the United Republic of Tanzania, and the Republic of Uganda, with its headquarters in Arusha, Tanzania. The regional co-operation and integration is wide ranging, involving co-operation in political, economic, social and cultural fields, research, technology and skills development, defence, security and legal affairs for mutual and equitable development in the region. The intention is to establish a Customs Union as the entry point of the Community, a Common Market, subsequently a Monetary Union and ultimately a Political Federation of the East African States.

The Treaty for the Establishment of the East African Community includes as an objective *"the promotion of sustainable utilisation of the natural resources of the Partner States and the taking of measures that would effectively protect the natural environment of the Partner States."*⁴²² Respect for human rights is one of the underlying principles of the EAC.⁴²³ The Court has jurisdiction over cases between the member states of the EAC, not against companies in the EAC.⁴²⁴ However, the Court may hear cases brought against a state that involve the management of natural resources that could involve extractive companies. The Court has already ruled on this objective of the Treaty in a 2014 case brought by an NGO challenging the Government of Tanzania's plans to build a highway across the Serengeti national park. The Court held that this is unlawful and an infringement of Articles 5(3)(c),⁴²⁵ that provides for the promotion of sustainable utilization of the natural resources.

OECD National Contact Points

If a company involved in extractive sector operations in Tanzania is from one of the 46 countries⁴²⁶ adhering to the OECD Guidelines on Multinational Enterprises,⁴²⁷ a 'specific instance' (complaint) can be filed with the OECD National Contact Point (NCP) in the home country of the company if the complainant (typically a civil society organisation or a trade union) considers that the company has not observed the OECD Guidelines for Multinational Enterprises in their operations or through their business relations.⁴²⁸ The Guidelines set out a set of recommended standards for conduct across a range of topics, including human rights and labour rights. The NCPs are charged with contributing to the resolution of issues that arise from the alleged non-observance of the Guidelines. NCPs are supposed to offer investigation and mediation, either themselves or through independent mediators, to work with the parties and agree on steps to resolve the complaints. Many of the specific instances to date have involved the extractive sector.⁴²⁹

International Accountability Mechanisms of Multilateral and Bilateral Development Banks

If the extractive sector operator or the Government of Tanzania have received financing for operations from a multilateral or bilateral development bank ("Development Finance Institutions" or DFIs), it may be possible to file a complaint with the international accountability mechanism of the DFI. These accountability mechanisms provide access to remedy for individuals and communities that are adversely affected by DFI-financed activities and to hold them and their clients accountable to the DFI's own policies. To date there are more than a dozen such mechanisms and together they formed the Network of Independent Accountability Mechanisms.⁴³⁰ Some of the well-known IAMs include, the Inspection Panel of the World Bank, the Compliance Advisor Ombudsman of the International Finance Corporation, the Project Complaint Mechanism of the European Bank for Reconstruction and Development, the Accountability Mechanism of the Asian Development Bank, the Independent Review Mechanism of the Africa Development Bank and the newly established Independent Complaints Mechanism that is shared between the Dutch and German development banks, FMO and DEG, respectively.⁴³¹ While these offer an additional avenue for redress, as with other international mechanisms, complainants must meet certain criteria before the IAM will address the complaint. As a result of the application of the criteria, they have been shown to reject a large proportion of the complaints that they receive.⁴³²

In one case involving mining in Tanzania, the Lawyers Environmental Action Team (LEAT) filed a case with the Compliance Adviser Ombudsman (CAO) (World Bank Group) representing small scale miners and land holders in a case involving mining in the Bulyanhulu area. The allegations concerned the process of consultation regarding eviction and land clearance as well as resettlement and compensation of small scale miners; human rights abuses as a result of the eviction process; and the failure to conduct thorough and competent due diligence and address issues through consultation. LEAT also alleged that the Environmental and Social Impact Assessment conducted was "*inaccurate and inadequate*."⁴³³ The CAO carried out an investigation and issued an assessment. As the complainants' response to CAO's assessment was unfavourable, the case was closed in January 2005.⁴³⁴

Voluntary Multi-stakeholder Initiatives

There are a number of multi-stakeholder initiatives in the extractives sector with some form of addressing grievances within the mechanism or being developed.

The Voluntary Principles on Security and Human Rights (VPSHR)

This is a multi-stakeholder initiative involving governments, extractive companies and CSOs, established in 2000 to guide the extractive sector in designing and maintaining security for their operations in a manner that respects human rights.⁴³⁵ The Principles are non-binding and do not include an independent grievance mechanism. There is an internal process of discussion among members. Tanzania is not a member of the VPs but several of the companies operating in Tanzania are members and would be expected to apply the Principles in all countries where they operate.

The International Code of Conduct for Private Security Providers⁴³⁶

The International Code of Conduct Association (ICoCA) requires signatory companies to establish grievance procedures⁴³⁷ and is also in the process of establishing a complaints procedure to receive complaints from individuals or their representatives on alleged violations of the Code and / or the non-compliance of Member Companies' grievance mechanisms with the Code. The ICoCA will establish a process to support and oversee companies' responsibility to provide fair and accessible grievance procedures that offer effective remedies to address claims alleging violations of the Code.⁴³⁸ Currently, there are no private security providers headquartered in Tanzania that are members of ICoCA.⁴³⁹