

WHAT IS REMEDY FOR CORPORATE HUMAN RIGHTS ABUSES?




Listening to Community Voices: A Field Report



A Capstone Report of the
School of International and Public Affairs (SIPA)
Columbia University

Commissioned by: ACCESS Facility
The Hague, Netherlands

December 2015



This project was conducted by graduate students of School of International and Public Affairs (SIPA), Columbia University as a Capstone Project for ACCESS Facility. The authors gratefully acknowledge SIPA Faculty Advisor Joanne Bauer and ACCESS Facility Editor in Chief Brian Ganson for their guidance during this research.

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Citation: “Taylor Fulton, Jinhwa Ha, Michael Karimian, Eva Lerner, Annalisa Castillo Meier, and Isabelle Plessis (2015). *“What is Remedy for Corporate Human Rights Abuses? Listening to Community Voices, A Field Report.”* New York: SIPA. Print.

Cover photo: *Taylor Fulton*, water case site

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I. Executive Summary

International accountability mechanisms, including those operated by multilateral development banks (MDBs) and the National Contact Points of the Organization for Economic Cooperation and Development (OECD), are expected to provide remedy for people who have been harmed by business activity.¹ Yet there is limited empirical evidence as to whether these mechanisms in fact provide effective remedy for affected communities, as required by the UN Guiding Principles on Business and Human Rights (UNGPs) and other sources. One important yet often overlooked measure of effective remedy is how the affected communities themselves, including both complainants and non-complainants, regard the remedy rendered.

To help bridge this gap, ACCESS Facility commissioned a Columbia University SIPA graduate student Capstone team to undertake fieldwork in March 2015. Two fieldwork sites were identified by the research team as contexts where remedy was purportedly delivered following a mediated agreement between a company and one or more communities affected by the company's operations. The stories of these communities as told by community members themselves are presented in this report, followed by a brief analysis of common themes on community expectations for remedy and the degree to which those expectations were met as measured against international recognized standards.

Rather than critique a given mechanism or mediation process, our aim is to amplify the voices of the affected communities to draw general lessons about how well these processes are working, and to challenge current thinking around effective remedy. For this reason, and in order to protect individual respondents, the sites are not identified in this report, and are referred to simply as “the land case” and “the water case.”

The following key messages emerged from the interviews:

- **Revival of hope:** Following failed efforts in both cases to achieve remedy through local courts, the start of the mediations revived the hopes of many community members.

¹ Since the adoption of the UN Guiding Principles (UNGPs), the international community has looked to these international accountability mechanisms as sources for non-judicial remedies for alleged corporate harms, a key requirement for Access to Remedy under the UNGPs. It should be noted that not all accountability mechanisms have redress procedures. Moreover, MDBs have legal immunity designed to protect their independent functioning. Consequently, the grievance mechanisms are not subject to international human rights or other treaty law, and are “primarily intended to serve as internal governance tools as non-judicial bodies and to enhance the institutional development effectiveness, in line with the mandates of their institutions.” Richard Bissell and Suresh Nanwani, “Multilateral Development Bank Accountability Mechanisms: Developments and Challenges,” *Manchester Journal of International Economic Law*, Volume 6, Issue 1 (2009).

- **The limits of representation:** Community members who did not participate directly in the mediation were generally less satisfied with the outcome and had less of an understanding of what was achievable in the mediation and how the implementation of the agreement would unfold than those who did participate directly.
- **Absence of government:** The absence of the government from the mediation process, despite the government's contribution to the harm, resulted in an incomplete sense of justice. Community members spoke of the government's failure not only to protect them, but also to accept responsibility for the harm.
- **Necessity of NGO support:** Accessibility of the mechanism depends on NGO support. NGO support is essential for communities to gain access to the mechanism and to support them in the mediation.
- **"Something is better than nothing":** A message from communities in both the land case and the water case is that the remedy came up short of what they hoped for. Nonetheless, in both contexts a repeated refrain is that they were glad for what they did get from the mediation because "something is better than nothing."
- **One size does not fit all:** Treating communities as homogeneous in mediation leads to agreements that do not meet the needs of all members in the community. The community members we met, who were of varied ethnic or socioeconomic backgrounds, held different priorities that they wanted the mediation to address. Failure to recognize the heterogeneity of the aggrieved parties results in marked inequalities in remedy implementation.
- **Lack of information on rights under international law:** Community members entering mediation do not understand the rights they are entitled to under international and national law and other standards which are binding on companies.² This reflects a fundamental power imbalance between companies and communities at the mediation table and a failure of the mechanism to adequately address it.

² For example, companies receiving funding from the IFC are legally required to adhere to the IFC Performance Standards.

II. Introduction

Under the UN Guiding Principles on Business and Human Rights (UNGPs), non-judicial grievance mechanisms (NJGMs) must provide “effective remedy” for corporate human rights violations.³ What this means is subject to substantial debate. Is it enough that aggrieved parties accept a mediated agreement?

Largely absent from our understanding of remedy in company-community mediations have been the voices of aggrieved parties themselves. The report features interviews with community members conducted in two contexts – a land case and a water case – where communities have reached an agreement with a company that had allegedly harmed or contributed to harm against them. It aims to provide a platform for community members to be heard regarding what remedy means to them and whether it was achieved.

The report begins with the stories told to us by community members we interviewed at each site. We then draw insights across the two contexts on what the affected people themselves consider effective remedy. Finally, we consider the stories of the community members interviewed in terms of the implications for existing standards for effective remedy of corporate harm under Principle 31 of the UN Guiding Principles on Business and Human Rights (UNGPs): The Effectiveness Criteria for Non-Judicial Grievance Mechanisms. We conclude with recommendations for further research.

We are grateful to all community members who took the time to speak with us and to trust us with their stories. They have shown great courage and resilience that is humbling. We hope that this report has done justice to them and their stories.

³ "UN Guiding Principles on Business and Human Rights." HR/PUB/11/04, United Nations, 2011.

III. Case Study 1: Land Case

Background

More than 900 families were forcibly removed from their land to make way for a plantation by a foreign multinational corporation. The community of approximately 5,000 people had been living on the land for an average of fifteen years at the time of the evictions. Those we interviewed stated that they had been living there anywhere from five to “over forty” years.


According to their personal accounts, plots of land in the designated area ranged in size from two acres to forty acres and were used to farm cows, goats, sheep, pigs, bananas, mangoes, corn, cassava, potatoes, and coffee. This agrarian lifestyle enabled the community to maintain modest yet sustainable standards of living: families supported themselves through subsistence farming, children attended schools, and health care was accessible.

One year after the evictions, four community leaders, with support from one local and two international NGOs, submitted a complaint to the dispute mechanism of an international financial institution on behalf of the community residing on the designated land. The complaint raised concerns about evictions that took place to make way for a foreign agribusiness, which had been granted permission by the government to establish agricultural plantations on the designated land.

The dispute mechanism accepted the case and the company agreed to enter into mediation with the community. The following year the process began. After two and a half years, the company and the community reached an agreement. While denying responsibility for the evictions, as part of the mediated agreement the company agreed to give the community a development grant over a period of five years to purchase land, which would result in secure land tenure to the

THE AGREEMENT

Money from the grant is paid to a newly formed community cooperative, into which community members are required to buy shares to be eligible to access the new land. In addition, the company has agreed to provide hospitals and schools, in subsequent phases of implementation of the agreement over the five-year period. The agreement details remain confidential at the behest of the company. Currently, less than one third of families have been resettled; over the next four years more land will be purchased for additional families. It is unclear whether the money will ever be enough to buy enough land for all affected families of the community. Currently, all resettled community members own one acre of land, regardless of how much land they owned before.



communities (see textbox). At the time of our interviews, the dispute mechanism was continuing to monitor the implementation of the agreement and therefore the case was still considered “open.”

Below we report on the experiences and perceptions of the mediation process and agreement as conveyed by the community members themselves. Throughout, we aim to reflect the diversity of perspectives, while highlighting common themes across the interviews.

Sampling

Interviews were conducted in March 2015. In total, 28 individuals affected by the evictions were interviewed. Interviewees include community members who had been relocated to the new land (24 individuals) and community members still awaiting receipt of any land or money since the mediation (4 individuals).

Our initial contact with the community was with the community leader, whom we were introduced to by the attorneys and the interpretation team that represented the community during mediation. The community leader provided a general explanation of the makeup of the community and offered to suggest individuals to interview for the first two interview days. On days three and four, we selected our own interviewees by visiting individual house plots. We also interviewed community members who approached us directly wanting to talk. The community members suggested by the community leader were for the most part those who had been involved in the mediation process. These individuals tended to be satisfied with the outcome. Those community members we interviewed on days three and four were markedly more negative about the process and the outcome.

Interviews took place in both individual and group settings, with informed consent granted by all participants. We conducted twelve individual interviews, one youth focus group, one elder focus group (men only), and two-person interviews with two groups of currently displaced community members. Interviews were conducted orally with open-ended questions and generally lasted between 45 and 60 minutes. All interviews were conducted through the assistance of professional interpreters.

In addition to community member interviews, our understanding of the case was contextualized through discussion with the mechanism, NGOs, and the attorney and interpretation team that supported the community during the mediation.

Community Voices

The Evictions

We were given 28 days to leave the land, but soldiers came before then and started evicting us... They burned our houses, chased us out of the villages, others died in the eviction. Children jumped into the water to avoid the guns and couldn't get out.

Like the woman cited above, every individual interviewed – irrespective of age, gender, and socioeconomic status – emphasizes deep personal suffering as a result of the evictions.

They also convey confusion over their right to the land prior to eviction. They had bought the land with the understanding that they had legal rights to it and explain to us that they only learned about the ambiguity over their land tenure a short while before they were told to leave. This man's comment demonstrates the confusion and frustration at the time: *"People sold us the land, and then we find out that it does not belong to us."*

Within months of receiving their notice of eviction, residents launched a civil suit against the company to assert their legal right to the land. The court granted several interim restraining orders against the company, and allowed the case to proceed. As one young man explains, *"We had hope in the high court, because we believed that 'yes, we are true citizens of [this country],' we had hope the court would rule in favor of us."* However, with the suit still pending, the evictions began. This same man recalls:

The soldiers started shooting and tear gassing... and all the people ran. One of the kids fell in the pond and died. They were burning houses. One child passed away while trapped in the burning house. The policemen who were chasing them captured one of the community members, and took them to the prison cells of the district.

Many residents, like this young man, describe personal encounters with police, soldiers, and security guards. Some report witnessing government officials, as well as representatives from the company, visiting the community prior to the evictions and ordering them to leave the land. But they do not know for sure where the eviction order came from. The company denies playing any role in the evictions.

Several residents convey the sentiment that the government is to blame for leaving them disenfranchised and marginalized. As one male community member explains:

We asked the government, 'When we leave this land, where are we going?' The response from the government was 'Go back to where you came from.' I started thinking: "am I a true citizen?"

Many individuals also note the lasting effects of the forced evictions on their health and wellbeing, across all ages in the community. As one male elder tells us,

Because of the evictions I got high blood pressure. Before the evictions I used to have money to go to the hospital, but now I don't get any help. I cannot cultivate land because of my high blood pressure and diabetes.

The desperation that the community felt after the convictions is conveyed poignantly by one youth leader: *"After the evictions we had no hope... I thought I would be a street kid."* Another man explains: *"I was prepared to suffer. All the money that I had invested in my land had been wasted."*

The Mediation and Agreement

Some community members we speak with tell us that once the mediation process began, they started to feel hopeful again. One woman recalls feeling that *"...patience pays at last, [we knew] that hope is there, that there is hope at the end."* A significant number of interviewees, however, had no expectations at all for the mediation, *"because we had lost hope [after the evictions]."* Another person notes,

I did not have any expectations [for the mediation]. This land [we received as part of the agreement] was a surprise.

Community members experienced the mediation process differently. Those who participated in the mediations felt the burden of responsibility to communicate the proceedings to residents who were not present. These representatives also struggled to uphold community morale in spite of an often challenging and frustrating process. As one female community leader explains:

I was told not to demoralize the people outside, show them that progress is being made. There is a point we would reach in the discussion; where we would fail to find an agreement, and I would ... keep convincing [community members] that

there was progress, even when I knew that there was not progress. Because I knew that the mediation was taking place, because I didn't want to demoralize [the community], because that was the only way of showing hope.

Many community members recount the hardship of maintaining their health and livelihoods throughout the mediations, without land to cultivate. Those who participated in the negotiations emphasize additional burdens to their personal livelihoods, given that they could not work while attending mediations. According to one woman participating in the mediation:

I worried about wasting time, the pain in my legs, worried about my children at home, what they would eat while I was away... We started thinking that what they were telling us was maybe a lie, because it was taking so long.

Nearly all community members articulate the important role of the international NGO who supported them in the mediations. The NGO not only connected the community to the mechanism and helped to file the complaint, but was also responsible for paying an attorney's legal fees throughout the duration of the mediation. It also provided mobile phone credits so that the representatives could communicate with the rest of the community.

Community members additionally describe the NGO's integral role in the community's rehabilitation post-evictions, providing healthcare and psychological services. According to one woman,


I wanted to be part of the mediation process because [the NGO] provided me with health workers and they encouraged me and gave me confidence.

While some community members tell us they were empowered by the NGO, others emphasize a dependence on the NGO, particularly to be respected during the negotiations:

If [the NGO] was not around during the mediation, and it was just [the mediator], us, and the company, sometimes the company would blast us. That was disappointing.

Community members also note their economic vulnerability throughout the mediation process. One participant in the negotiations explains,

During the mediation, I was the only person who could provide food for the family. So during the mediation, I could go [to the negotiations], but at home the children are hungry.



There was a yearlong wait for the grievance mechanism to accept the complaint. Moreover, there was an additional year and a half-long wait to commence the mediation process. This exacerbated the community's vulnerabilities.

Others note their fear that if they did not take the offer on the table, they would have been left with nothing in the end. This concern is articulated by a man close to the participants of the mediations:

There were problems but we thought if we don't participate in the agreement, or don't agree on it, then there would be no agreement at all. The thought was that the only way to get land was to accept less than we wanted.

Another community member adds, "*The agreement was signed because we wanted a starting point.*" Elders in the community echo this feeling, with one man lamenting:

Because of the situation you are passing through, that's what you accept, because it's there. Yes, we are receiving what was in the agreement, but it's not what we should have gotten.

Community members communicate varying levels of comprehension and satisfaction with the process and subsequent outcome of the mediation. Representatives present during the negotiations convey that their expectations of the possible outcomes changed during the mediations, because "*the company would not always accept what we would suggest.*"

These community members tell us what we had been told by the NGO and attorney involved: that monetary compensation was off the table. According to one man,

During the mediation, we expected that everything that was destroyed during the eviction would be compensated for. Then during the mediation, we saw that this could not be expected.

The disappointment is palpable in our interviews, where dissatisfaction with the remedy is clearly expressed by this female community member:

Yes, we are receiving what was in the agreement, but it's not what we should have gotten. We are living a life we never wanted to live.

Unlike those who participated in the negotiations, many non-participants never understood that they would need to alter their expectations; as a result, their disappointment in the outcome was also significant. Interviews with several of the elderly in the community reveal a sense of having been cheated by the agreement, as this elderly man states:

We thought at one time the negotiations would come up with ideas like they give individuals different money to buy land on their own. I wanted 10 acres where I could do my grazing, put some plants, but not this small amount of land that I have now; I had 10 acres on the previous land.

Similarly, many residents expected compensation proportional to their previous assets:

I hoped for at least the 3 acres I had previously. I wanted what I previously had.

We expected we would be compensated wholesomely – we expected that we would get compensated with everything that was lost.” (a community member close to the mediations)

[I] hoped for what was lost in the eviction would be compensated. I thought that I would get what I lost, but learned that I wouldn't.” (a young woman)

The change in expectations surrounding the agreement is also likely due to misunderstandings around who was responsible for ordering the evictions. One male community representative, like other members of the community as well as the NGO and attorney, explains that the company never claimed responsibility for the evictions:

When we started negotiating with [the company], [the company] started telling us that [the company] are not the people who brought the police or the soldiers who are beating you, it's your government who are beating you.

The community members we speak with generally accept the company's innocence and express the view that the company is helping the community not out of an obligation to do so, but out of its own good will. According to another community member,

At first my thought was that it was [the company] that was doing all the beating and shooting onto us... [the company] showed us what was being done, and from that I heard it was the government who was against us... I am happy with what [the company] provided, the mistake was not theirs. It was the government's....

Regardless to whom the community attributes the responsibility, most community members express dissatisfaction with the outcome of the mediation. One source of contention is in the small size and infertility of the land, as one female community member articulates:

We hoped that we could get a bigger chunk of land. Because of the situation we are in, we couldn't accept to have a bigger piece of land....

Similarly, a young mother noted: “*We have gotten land, but it is not fertile. It has stones in it.*” In summarizing his feelings on the mediation and agreement, one community leader who participated in the mediations tells us that:

Mediation is a nice thing to use, because it will help you in solving major issues. But small issues, for example, the houses we are living in, are not the right houses we are supposed to be living in.... Sometimes, mediation only solves your immediate hunger....

As another mother describes her experience with the lengthy mediation process,

The transition situation was totally bad. It took long. It was over two years before a final decision, before getting hope.

Most community members, particularly the women, speak at length about how the evictions interrupt their children's education, which was an on-going problem at the time of our interviews. One mother tells us her expectations of the mediation were “*getting land, and also constructing schools for the children so that they can go to school to study.*”

Another mother expresses her concern about her children and their peers:

Before the eviction they used to go to school. Now their rights have been taken from them because they can't go to school anymore....

A youth adds:

I do not feel like this is fair. I have an interest in education; you cannot live a better life without education. I used to be studying and now I'm not.

There also appears to be a knowledge gap – and resulting dissatisfaction – with regard to the implementation of the remedy per the mediated agreement. One youth, echoing the perspective of all the youth we interviewed, laments:

We wanted them to buy us land, build us a school, and hospitals, and give us water. We haven't seen any of that.

By contrast, community members who were part of the mediations or close to those who participated in them understand that there are phases to the implementation, and that “[the company is] currently providing what was outlined in the agreement.” This includes a phased-in implementation of resettlement, which has not always been clear to many of the current residents, even at the time of our interviews. According to one woman:

I do not feel justice has been done. Justice would be that everyone who was evicted from the land could have gotten land here. If everyone gets land here, that's what justice would look like.

Similarly, many residents tell us they are giving up on getting the schools they expected. However, as with the implementation of the resettlement process, the agreement stipulates that the company will roll out civil services, including education, in phases. Again, this is not always clearly understood by the residents we spoke with.


Consistently throughout the interviews, community members explain that in terms of living standards their lives do not match the quality of what they had been before the evictions. “The happiness that we had on our previous land, we are not feeling now,” explains one man.

Elders appear most unhappy, with one commenting:

I am not happy about living in a community like this, on a small piece [of land]. My [grand]kids do not go to school. The shelter is not good. Because there is no food, the women are eating grass. I am not happy with living in this community. Everyone is very frustrated with their situation.

Another community member expresses a different opinion:

Justice to me has been done, getting what was stated in the agreement is better than what I had before when I was renting.



This statement reflects a point that is echoed by many respondents: that something is better than nothing. As one woman puts it: *“Living here, it’s not the best life for a human being, but it’s the only way I can live.”* Another woman states:

Since the mediation, more hope has come to my life. Having your own plot of land to harvest is better than nothing....

It is apparent that the community places a high premium on finally having secure land tenure, which comes with the purchasing of the land. We hear repeatedly what this man tells us: *“One acre of land with title is worth 15 acres of land without anything.”*

Community members still displaced at the time of our interviews are unsurprisingly the most burdened by the length of time it has taken to receive compensation:

They told us that when money comes, they will have somewhere for us to stay. We don’t know when that will be. We have been waiting too long – six years.

These still displaced families continue to live in a transitional period, and, as they tell us, as they tell us, feel unsettled and unhealed:

We are requesting that they speed up the process so that we can move to the land... our healing will begin when we get to the new land.

IV. Case Study 2: Water Case

Background

This case addresses the issues of potable water and sewage waste treatment services across multiple communities in an urban municipality. The national government received a loan to enable a private company to build, operate and maintain the system for potable water and sewage for the entire city under a concession from the government, with insurance from an international financial institution.

Four years later, the company assumed responsibility for potable water treatment, including its transport, storage, and delivery, as well as sewage water treatment in the city. Under the terms of the contract, the company was to invest \$500 million during its 30-year concession, raising water coverage to 90% of the population and connecting 55,000 new users to the pipeline.

The complaint filed with the dispute mechanism represented the grievances of two communities - reflecting a total of nearly 3,500 complaints⁴ - claiming that the company was responsible for a number of service delivery problems, including poor water quality and water pressure, flooding caused by malfunctioning sewage systems, health problems, environmental degradation, and charging or overcharging for services that were not provided. The dispute mechanism accepted the complaint, and the company and complainants agreed to enter into mediation.

Mediation began the same year the complaint was lodged. For nearly two years, the mechanism facilitated a dialogue process between the company and community representatives. The mechanism provided two mediators who were present throughout the process. A NGO leader and deputy leader, as well as a representative from a local co-operative, represented those communities who participated in the mediation process. The dispute mechanism was closed at after the second year. The agreement was monitored for one year and thereafter considered "closed." Our fieldwork took place five years after the case was closed.

Below we report on the experiences and perceptions of the mediation process and agreement as conveyed by the community members themselves. Throughout, we aim to reflect the diversity of perspectives, while highlighting common themes across the interviews.

⁴ There is a distinction to be made between complaints and complainants. "Complaints" refers to each individual reporting of a grievance made by a member of a community. "Complainants" refers to an individual person or family that filed a complaint.

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The mediations led to nine signed agreements between the company and the communities represented at the table. Agreements included: the reinstatement of water services in low-income areas that had been disconnected due to lack of payment; a debt forgiveness program; and a special fund from the company for consumers unable to pay and ineligible for subsidies.

Sampling

We conducted 50 individual interviews and 10 focus groups. Before beginning the interviews, several residents conducted a tour of their neighborhoods in order to show the effects of the water cuts, propensity to floodings, poor water infrastructure, low water pressure, and pollution, on their health and living situations.

Two communities were represented in the formal complaint to the dispute mechanism. However, tours with communities revealed that a number of surrounding communities that were not included in the mediation process were also affected by the same water supply issues. In addition to these two communities, therefore, we visited two communities that did not participate in the mediation process. These interviews served as a baseline for understanding the impact of the dispute resolution process on affected communities, and helped to highlight the strengths and weakness of the remedy. Hereafter, the two communities that participated in the mediation process will be referred to as a participating community, or P1 and P2, and the two communities that did not participate in the mediation process will hereafter be referred to as a non-participating community or NP1 and NP2.

Our initial contact with the communities was through an NGO, which played an active role in advocating for the needs of the affected communities and assisted them in the mediation process. For each day of our fieldwork, the NGO introduced us to community leaders, who elaborated on the history of the grievances they faced. Following these introductions, the community leaders conducted tours of individual homes and health sites so that we could understand the past and ongoing problems the communities face. During these tours, community members were free to join the tours and provide additional context and personal experiences.

Interviews were conducted in both individual and group settings, with informed consent granted by all participants. We conducted twelve individual interviews, one youth focus group, one elder focus group (men only), and two-person interviews with two groups of currently displaced community members. Interviews were conducted orally with open-ended questions and generally lasted between 45 and 60 minutes. All interviews were conducted through the assistance of

professional interpreters. Age ranges of interview subjects varied from 10 to 60, with the average age being 40.

About the Affected Communities

Communities Participating in the Mediation

P1 has a population of 500,000 residents and is racially mixed. Its roads are unpaved and it is situated near drainage and sewage ditches, which makes it particularly prone to flooding and sewage overflow. With the help of a local NGO, two P1 community leaders filed a complaint with the dispute mechanism of international financial institution that had help finance the project, and represented the complainants at the mediation table with the company. Residents have typically lived in this community for over 20 years and most personally experienced the deterioration in water quality over time.

P2 was represented by the same NGO as P1. It is comprised mainly of residents who migrated from other parts of the country as well as from other countries on the continent and, like P1 residents, have now lived in the city for more than 20 years. P2 residents participated in the mediation process with P1, rather than filing their own complaint because of more pressing concerns with the availability of electricity for their homes. However, as water became a more pressing concern, particularly the deterioration in quality and severe flooding, community members met with the NGO representing the complainants from P1.

Communities Not Participating in the Mediation

NP1 is a racially mixed community comprised mostly of single mothers. Situated in the mountains, the community suffers from heavy flooding in the winter months that causes the spread of waterborne diseases and renders road and sewage infrastructures useless. Their houses, built on bamboo canes, are above ground to avoid susceptibility to flooding and sewage overflow. Residents in these communities were only able to receive water by walking long distances to buy tanks of water. The community had not been aware of the dispute mechanism or the mediation process.

NP2 is comprised predominantly residents of African descent and refugees from bordering countries. It is more remote and much less developed than the communities that participated in mediation. The community's water concerns center principally around low water pressure and the intermittent availability of water throughout the day. Residents of NP2 sometimes create their

own means to receive groundwater to use in their homes. Around 84% of the households are headed by single mothers. Residents in these communities were unaware of the dispute mechanism or the subsequent mediation process.

Community Voices

Before Mediation: Water Service Concerns

Members of both mediation participant and nonparticipant communities speak of a lack of access to water as well as other basic services pre-dating the company's involvement. They consistently attest to the fact that these problems had existed for decades. As one woman living in P1 recalls:

I lived in this community for 30 years, and back then, the community lacked basic services such as water, street lights and prevention of street flooding.

Another woman in P1 describes how daily life used to be without access to water:

When I moved in here at the age of eight, the community was nothing but earth, dirt, and animals. I carried tanks of water from remote locations back to this place to get clean water. When tanks weren't available, the community people collected rainwater or made wells in the ground to collect the water. The whole community, including myself, protested to the local municipal government, but due to historical and political tension between national and local government, we received no support.

A woman from P2, a community member who works with the NGO and participated at the mediation table, elaborates on what the community members had to do to access water:

The community built machines called 'bombas' to drain and suck water from the river. Some machines were better than others, so families would take turns using more powerful 'bombas' to get water for the week.

Likewise, a man points out that before the company's intervention, many people relied on trucks to bring in water due to a lack of access to water. Another woman confirms, "*the water was not good.*"

When the company began operations, however, residents in P1 and P2 experienced more problems. A key issue was the steep financial cost of water service. Many community members work in the informal sector with only about 30 percent having formal work that pays the minimum wage, or below.⁵ Under these conditions the costs of the water service the company provided were prohibitive. One man living in P1 explains:

At one point I owed the [the company] \$2,000.⁶ Most of my family is unemployed. This is very unfair.

In both P1 and P2, water bills were much higher for some households than for others, without explanation from the company. As a P1 community leader recalls,

Only some families were told to pay... there were unknown reasons for this special treatment.

Other residents in NP2 express the same sentiment:

Some [families] receive benefits and others don't. There is no normalization of bills, payments, or for measuring water usage. Bills range from \$4 to \$637 for one month of service. When the [mechanism] conducted their investigations, they often found that [the company] would issue other people's receipts to other households.

Interviewees also note that they were charged for services that had either been cut off or for some reason were not provisioned:

There is ALWAYS something to pay for: pay for service connection or reconnection; meter examination; missed bill; sewage; you even have to pay for water when you don't actually have it.

The high costs of services disproportionately affected women. As one community leader in NP2 explains:

⁵ According to one of the community leaders we interviewed, the average income for a citizen is approximately \$340 a month. However, in many of the communities we visited, the average monthly income per family is approximately \$100 a month.

⁶ All monetary values used in this report are presented in US dollars.

For those living below the poverty line, this [water bill] is two-thirds of their monthly income. There is greater pressure on a female head of household. More than 84 percent of families are run by single mothers. It's harder for them because they don't go to school; they also don't have the opportunity to pursue other interests.

Additional issues cited in the complaint included water cuts, water quality and health problems. The leader of the NGO, also a resident of the area, explains that health problems surfaced in part because people who had no access to water found other ways to gain access to water:

The big problem was related to the water cuts, which was especially problematic for a number of elderly residents...There were difficult illness outbreaks including skin rashes, Hepatitis A and digestive health...[which] were the results of families in the community connecting their own tubes to the main pipes, which further contaminated the water. There were no other options, but to do it ourselves.

He adds:

Contaminated water goes directly into the river. It's the only water we have so, it is hard not to use it. People are contaminating their own clothing with sewage water that runs off during the rain. People who migrate down the river are really at risk because the water they use was contaminated elsewhere further up the river. This has damaging effects on the skin and creates a horrible state for the community's people.

One woman complainant in NP1 elaborates on the health problems associated with their water:

Every time it rains, sewage sites reach levels above three meters – rainwater washes 35 year old sewage back into communities – who have no choice but to use that water. Each winter, families lose all of their belongings to floods and are forced to rebuild their homes after each flood. There is not a single proper water treatment facility in the community. This leads to a number of cases of cholera and dengue.

During Mediation and the Agreement

Ten people were at the mediation table: two mediators from the dispute mechanism, two staff of the NGO, two company representatives, and two representatives from each of the complainant communities, P1 and P2, who were elected by community members to represent them at the mediation table.

Overall, when asked to describe the mediation process, those who participated in the mediation express favorable views. According to one woman from P1 who participated in the mediation,

I thought [the mediation] was very good. The moderator set the ground rules and everyone respected them.

P1 and P2 community members use rights-based language to support their expectation of reasonably priced water as an “inherent human right.” One woman in P1 describes how differing levels of awareness of their constitutional human right to water affected the outcomes for some families:

Families are not reaching the same levels of agreement with the company because neither they nor the company looks at this from a rights perspective. For example, when a family with this knowledge or I visit [the company], we talk about the right to water as it is enshrined in the Constitution. Without that, the families must negotiate for their own outcome.

The NGO asserts that water access should be free, and promoted that idea throughout the communities they worked with. The NGO representatives reasoned that water is a basic entitlement enshrined in the national constitution and that no one should have to pay for it. According to the leader of the NGO:

Water isn't a human right [here] – it's a business. It's in the Constitution that we have the right to water but it isn't actually happening here.

Another deputy representative of the NGO adds:

The businesses only care about money.... It's easy to see. Water service doesn't have to be a business. Water is a human right – and my people shouldn't have to pay for it.

By contrast, NP1 and NP2, which did not have contact with the NGO or the complaint process, do not articulate their needs in terms of human rights. They emphasize the ongoing need for infrastructure improvements to address major problems in water access and health. They are willing to pay for these improvements in return for receiving clean, running water.

Despite favorable views of the mediation process, many residents betray dissatisfaction with the limitations of the remedy. For example, P1 and P2's initial satisfaction with the agreement diminished after the first year of implementation. They say they now realize that "*all that came of the agreement was bill standardization and normalized meter checks,*" when what they had hoped for was an improvement in the quality of water, accessibility of water and better management and upkeep of the sewage systems.

After the Agreement

Following the mediation process, the agreement established a one-year monitoring process in which the dispute mechanism oversaw the implementation of the negotiated agreement. Community members we interview suggest, however, that after the monitors left, the quality of water in all four communities disintegrated again.

A P1 community member says she was initially satisfied with the outcome of the process and that "*[the remedy] was good at first.*"

However, satisfaction with the mediation outcome diminished after the first year as community members came to see that the remedy was severely limited. Specifically, many community members feel frustration about the slowness of implementation. The leader of the NGO expresses:

[The remedy implementation] was slow overall, which was demonstrated by the continuing problems due to the low quality of water and difficult access to it. It took five years to get the connection pipes, which required doing public marches, organizing sit-ins and sending letters to [the company].

A community leader from P2, when asked how her community feels about the effectiveness of the agreement following the close of the mechanism states,

It depends – for a year, [the company] kept its agreements. Soon after though, this stopped. Thirty percent of the mediated agreements were broken within the second year.

Interviews across the four communities also highlight the inequitable distribution of remedy and its impacts on affected communities. While all of the people included in the official complaint received remedy (P1 and P2), many felt it was not adequate or fair. For example, one resident, in P2, says she is happy that her monthly bill was reduced to \$72, while another resident, also in P2, says “*the company would not listen to me, and instead I was charged \$6,000.*” Similarly, members of NP2 note, “*[The company] asking for the late fees is a burden for us.*” Another community member in P1 adds with frustration,

Every month I pay money for something I don't get and I don't understand and no one will tell me why.

One community member in P1 highlights the difference in outcomes across different communities:

[The company] took the addresses of the supposedly affected areas, but did not act upon that. Following the initial filing with [the company], some people received some debt relief, but not everyone.

On the other hand, a woman living in P2 says that despite the variation within the community of remedy received, the overall outcome of the mediation was positive:

I was charged an additional \$10 to change the name on my account after I got a divorce. But I think that it was fair.... The community is much better now.

She goes on to explain that even though there continues to be problems, such as families who cannot afford to pay their water bills, community members are now supportive of one another. For example, she notes, a community leader has organized meetings to help find a solution.

Another frustration we heard repeatedly is the persistent problem of wastewater mismanagement. Residents already suffering from low water pressure and water cuts also had to contend with standing sewage, which led to an increase in illness. The sewage concerns exacerbated residents' frustrations and dashed their hope that the company would improve the wastewater infrastructure in their communities as stipulated in the mediation agreement. Many residents lament the continuing lack of a reliable sewage system, which is necessary to avoid water pollution. A woman living in NP1 states,

Sewage is a serious problem, especially the smell. Contaminated water goes directly into the river, and because it is the only water we have, it is hard not to

use it. This has damaging effects on the skin and creates a horrible state for the community's people.

Residents reason that the mediation was simply unable to handle the breadth of environmental and economic issues that come with poor water management. They are disappointed by a failure of the company to provide increased and accurate meter checks to facilitate bill normalization, to repair sewage pipes, and to improve water pressure.

Nonetheless, these residents report that there have been some improvements. The mediated agreement included provisions to fix infrastructure problems causing flooding and sewage overflow. According to one resident:

I am excited to see how much progress has been made as I have been living in the area for 23 years. The cemented roads and the housing quality have improved compared to the previous wooden residences.

In both P1 and P2, the residents are of the view that the company should allot more resources for the water service problems. One resident wants to see the company devote resources to improving water connections so that all houses can be individually connected to the system. Many residents also want to see the water usage fees reduced.

Although the reduction of fees and the improvement of water quality and connections were part of the mediated agreement, many community members say they were not fully implemented and this is not reflective of what the communities expected to receive. According to a community leader in P1,

There is definitely no justice. Children continue to get sick, and the problems of water cuts, water quality, and sewage continue.

A woman living in NP2 notes:

[The remedy] was okay, but it wasn't sufficient. Many people lived outside the resolution area, and neither did they receive any benefits from the deal nor did they have the means to travel to get personal tanks. The costs were too high, and in the end, the community realized it needed its own water system. The good part was that the water pressure did get a little bit better as did the quality, but not by much.

Like this woman, most community members clearly express dissatisfaction with the agreement, which was not implemented in a way that improved their lives, and with the company, which continued to neglect to provide adequate service.

Some community members blame the local government, in particular the mayor's office for failing to fight on their behalf. They feel the local government failed to assume responsibility and play a role in ensuring effective remedy. As a P1 community member puts it:

More pressure should be put on the local government to make equal budgets for every community to address issues related to water. There should also be a clause about the health impacts on communities due to lack of access to water. We should create plans to have a rainwater system and filtering system especially considering that the company's maintenance [crew] never comes.

NP1 and NP2 experienced problems with the company before, during, and after the mediation, and believe that their community has been unfairly treated compared to other communities in the city. Sewage and wastewater flows from upstream communities into the two non-participating communities. Community members in NP1 and NP2 express a lack of hope when speaking about the additional inherited problems they face due to the wastewater and sewage problems of their neighbors: “*There is no water [here]. No electricity. No support at all. We are forgotten.*”


V. Analyzing Community Perceptions of Remedy across Both Contexts

In our conversations with community members across both contexts, six common themes emerged: (1) representation at the mediation, (2) definition of remedy, (3) community expectations of remedy, (4) limitations of remedy, (5) implementation and sustainability of remedy, and (6) external stakeholder dynamics. This section presents those themes and considers their implication for effective remedy.

Representation at the Mediation

Our interviews suggest that two inter-related factors for a successful mediation are: (1) who is represented at the mediation table; and (2) the breadth of the issues addressed by the mediation.

In the water case, the outcome for communities named in the formal complaint (P1 and P2) was significantly better than those for communities that were not (NP1 and NP2). There are two possible reasons: (1) the issues discussed at the mediation table did not include the interests of



vulnerable subgroups, particularly single mothers and Afro-descendants, who tend not to own their own land or have access to clean, reliable and consistent sources of water; and (2) non-participant communities are more likely to lack access to available resources to make their grievances known. The exclusion of some community perspectives limited the remedy's overall effectiveness.

In the land case, changes in community dynamics resulting from evictions meant that community members selected to represent the community at the mediation were not necessarily the same leaders who had previously governed the community. The representatives were decided by a vote, which community members tell us was fair, implying that the representatives had a clear mandate from the community. Along with iterative consultations with the broader community, voting was intended to increase the likelihood of community members being well represented in the mediation.

Further, conversations with affected people in both contexts suggest that there is an information gap preventing the communities from fully participating in the mediation process. In the water case, the mechanism's failure to inform all communities of the complaint and the mediation resulted in the exclusion of the interests of NP1 and NP2 and other like communities that lacked direct access to the grievance mechanism. In the land case, even though the people we interview are satisfied with those community members selected to represent them, community representatives faced challenges in communicating the progress of and obstacles to the mediation process back to their communities. In both contexts, the communities were not adequately integrated into the mediation process rendering the remedy insufficient in meeting all community member interests.

Defining Remedy: Conceptualization and Expectation

Ambiguity surrounding the language of “remedy” made interviews on the subject challenging. Instead, we opted for terms such as “justice” or “fairness” as imperfect proxies for “remedy.” Similarly, respondents in both contexts had challenges articulating a coherent *expectation* of remedy. For example, in the land case, community members say that they had no expectations for what remedy would entail, largely because after years of waiting they had lost hope and felt that nothing would ever be done to help their case. In this regard, it may be that community members' conception of remedy is dependent upon an expectation that *any* “remedy” is available to the community.

Community members generally say they expected to receive a tangible outcome, but do not mention a desire for non-compensatory measures, such as public apologies. In the land case,

interviewees articulate a clear desire for land or money, with secondary interest in building schools and hospitals. Moreover, in the land case, community members measure the size or quality of the remedy they received against their standard of living before the evictions. International standards, such as the International Finance Corporation's Performance Standards, which have been adopted by most major banks,⁷ require that when resettlement must occur, the standard of living of affected people should be restored to the level prior to the evictions. Without referencing international law standards, the people we interviewed demonstrated keen awareness that anything short of restoration of their prior livelihoods was not justice.


In the water case, community members conveyed their expectation of improvements in the provision and access to clean water, as had been outlined in the contract that the government has signed with the company. Some community members who participated in the mediation process also convey their expectations through the use of rights language, specifically referencing their "right to water." The rights language, learned through their interactions with the NGO and their involvement in the mediation, helped them to clarify their interests and strengthen their demands. The ability to more clearly articulate interests likely accounts for the better compensation packages they received than did families from NP1 and NP2.

Community Expectations of Mediation

Overall, the community members we interview in both contexts articulate a renewed sense of hope with the onset of the mediations. Many were relieved to have the opportunity to pursue justice through a non-judicial mechanism, particularly since they didn't trust the judicial systems or their governments to protect them.

In the water case, interviewees from communities that participated in the mediation say they were initially satisfied with the outcome of the process. They had been optimistic that a favorable solution was possible, despite doubts about whether the company had come to the table in good faith. However, satisfaction with the mediation outcome diminished after the first year as community members came to see that the remedy failed to address concerns beyond bill standardization and normalized meter checks. The rise in illness due to standing sewage, insufficient water pressure, and water cuts exacerbated community frustrations and dashed the community's hope that the company would adhere to the agreement. When we speak with community members, it is five years after the close of the case, and they still lack access to clean water, normalized bill delivery, and sustainable water infrastructures, all of which were to be

⁷ Soon after the release of the revised 2012 standards, which incorporated the UN Guiding Principles, the Equator Principles, an industry stakeholder initiative with 81 signatory banks, announced the adoption of the IFC performance standards.



worked towards in the terms of the agreement. Consequently, there is widespread dissatisfaction with the unraveling of the agreement and on-going neglect from the company that should be providing their water service.

In the land case, despite community leaders holding many meetings with its members, and receiving a mandate from the community through voting to represent them at the mediation, some people we interview say their suggestions and desires were unheard. Others tell us that they buried their individual hopes and expectations of remedy in order to accommodate the broader needs of the community.

Limitations of Remedy

Interviewees indicate that the purported remedy was both insufficient and exclusionary. In the water case, remedy was not standardized across communities, it failed to address underlying structural and socio-economic disadvantages facing certain communities, and it was limited to named complainants despite water being a citywide issue. In the land case, the interviews demonstrate a level of community dissatisfaction with their current living standards, despite a sense that the mediation brought them a higher standard of living than what they had post-evictions. Yet, while asserting that what they got is not enough, most community members also express gratitude for what little they did receive.

In the land case, community expectations of what remedy should or would entail appears to have been limited only to tangible compensation, namely land. In particular, the people we speak with name land title and fertile land as the two main criteria for acceptable compensation. And yet even these limited expectations were not met since the plots of land were not fertile. That some community members in the land case are happy to have received something, rather than nothing at all through the mediation process points to the urgency for remedy. Despite having trouble specifying the size of remedy or compensation they expected, community members almost universally say that what they received was insufficient to meet the needs of the entire community.

In the water case, the agreement failed to correct immense infrastructure failings. During tours of the communities, residents point out sewage and wastewater management issues that were more than 20 years old. They repeatedly speak of the failure of the mediation to correct these issues. In addition to infrastructure, residents note the problems of failed debt forgiveness schemes, and poor water pressure.

The remedy also failed to address the specific needs of affected minority communities, such as the sizable number of single women and Afro-descendants in NP1 and NP2. For example, when asked about their particular concerns, women's responses centered around the lack of consistent access to water, and their need to instead fetch water in the middle of the night when water pressure is strongest. The mediations also did not address the issue of land ownership. Interviews reveal that as refugees, many Afro-descendants rarely owned their land. As a result, they held no constitutional right to water or quality water services despite the fact that they are entitled to it in international human rights law.⁸ These social inequities were not properly considered in the mediation process and resulted in visible inequities following implementation of the agreement.

Implementation and Sustainability of Remedy

Community members perceive remedy as the *implementation* of an agreement, rather than the agreement itself. In the land context, community members speak at length about their discontent with the plot of land they received, which was not specified in the agreement. Instead, land selection was handled by a community committee, using the money donated by the company per the agreement. Because many community members have never seen the agreement, or have only a limited understanding of what the agreement entails, their view of the effectiveness of the mediation and remedy is entirely based on what they in fact received, not what was on paper.

Community members in both contexts express concern over what they perceive as a delay in delivery of the remedy. In both contexts, several of the community members are unaware that the agreement provided for phases of remedy implementation, which appears to have contributed to the sense of delay. On the other hand, in the land case, community members who understand the phased approach are still dissatisfied that they have to wait longer than other community members to get their land, despite having experienced the same harm. In both cases, despite the relief of gaining some improvement in their situation community members emphasize their disappointment and frustration with having used the mechanism only to end where they began: lacking adequate fertile land and basic services.

Stakeholder Dynamics

Our interviews brought to light several key facets of community relationships with other actors: the government, the company, and the NGO. In both contexts there is confusion within the communities over whom to hold accountable for their situation. At both sites we repeatedly hear

⁸ Dinesh Shrestha and Aidan Cronin, "The Right to Water & Protecting Refugees." The UN Refugee Agency, 2006.

of community distrust of the local and national government. Because of this distrust of government to ensure their well being, interviewees tell us they never held out hope that their situations would get any better.

When asked whom they hold responsible for their problems, residents in the water case gave a variety of answers. Some say it is the local authorities, specifically the mayor, while others point to the company. Some blame the national government, which had received a loan that facilitated the government concession that in turn gave the private company greater liberty over the city's affairs, and later adversely affected local communities. In the land case, the people we interview believed the company when it told them it was the government and not the company that was responsible for their situation. The fact that the company provides the remedy in the form of a community grant reinforces this notion. Even though community members are dissatisfied with what they receive from the mediation, they are grateful that the company has stepped in to help.

The interviews also make clear the dependence of the community on an external source of support in seeking remedy. Repeatedly respondents note that without NGO support, no part of the mediation could have been possible. The NGO provided resources, training and counsel necessary to access the non-judicial mechanism: in particular, the NGO helped to lodge the complaint and to build community capacity and awareness of their rights, which in turn strengthened their participation in a mediation process.

VI. UN Guiding Principle 31: What Aggrieved Parties Say about the Meaning of “Effective Remedy”

Grievance mechanisms can only serve their purpose if the people they are intended to serve know about them, trust them and are able to use them. Principle 31 of the UN Guiding Principles offers guidance on ways to design and implement grievance mechanisms in the form of eight effectiveness criteria:

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

- (a) **Legitimate:** enabling trust from the stakeholder groups for whose use they are intended, and being accountable for the fair conduct of 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 outcome 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.

The aim of this section is to shed light on the meaning of effective remedy as defined by UNGP 31 from the perspectives of the people we interviewed in the two contexts. In particular, we will consider what these voices tell us about the eight effectiveness criteria in practice, and what can be done to make mediated processes more effective in relation to these criteria.

We make three observations at the outset: First, UNGP 31 establishes the effectiveness criteria for the non-judicial grievance mechanism (NJGM). Thus the criteria define effective *processes* that by implication should lead to effective remedy, but they are not by and large the criteria for effective *outcomes* (i.e. the remedy itself). As noted in the first three sections of this report, while our interviews with respondents included questions about the grievance and mediation process, not all of the respondents are aware of the process, and many who were aware are not clear about how it worked. They express more certainty when it came to their views of the outcome. Nonetheless, in the discussion that follows we attempt to map their responses in terms of what they believe effective remedy should be against the criteria.

Second, of the eight effectiveness criteria, Rights Compatibility (UNGP 31(f)) stands out: Rights Compatibility encompasses the other effectiveness criteria – accessibility, accountability, legitimacy, transparency, equitability, and so forth. Moreover, Rights Compatibility is the one UNGP effectiveness criterion that specifically refers to the “outcomes.” The analysis that follows is aligned with UNGP 31 in treating Rights Compatibility alongside the other

effectiveness criteria, while at the same time drawing on the literature on rights-based approaches to identify criteria that constitute rights compatibility with respect to outcomes.

Third, by aligning the voices of the communities with the UNGPs we aim to legitimate their expectations with respect to remedy. While the UNGPs are voluntary guidance, they are the most authoritative standards for business and human rights, having received widespread corporate, government and civil society support. Moreover, in 2011 the UNGPs were incorporated into the Performance Standards on Social & Environmental Sustainability of the World Bank's International Finance Corporation (IFC), which all projects receiving IFC funding – either directly or through financial intermediaries –are *required* to apply.⁹ Because the revised standards are now followed by most major banks, they too are relevant to this study.

Legitimacy

“Legitimate: enabling trust from the stakeholder groups for whose use they are intended, and being accountable for the fair conduct of grievance processes.”

Trust is a recurring theme in the stories of affected people in both the land and water contexts. Some individuals, notably those who participated in the mediations, state that the mediation did cultivate a degree of trust. For example, a couple that participated in the water case mediation remarks,

The relationship with [the mediator] was very strong. They wanted to seek solutions for many people in the city and actively sought to speak with as many families as possible and get the media involved to really get things done.

A prominent community leader in the land case who participated in the mediations acknowledges the efforts the mechanism made to build trust:

Many people knew about the mediation because [the mediators] built trust in the communities...it was a good relationship because they were impartial.

Some individuals, however, report that the mechanism was biased towards the company. For example, a community leader in the water case states:

⁹ They came into effect on January 1, 2012. Upon the IFC's release of the revised standards, the Equator Principles, which have been formally adopted by 80 financial institutions in 35 countries, announced that the Performance Standards will take effect for member banks.. This means that “over 70 percent of international Project Finance debt in emerging markets is subject to them.” See: <http://www.equator-principles.com/>

[The mediator] *entered the process late and no good or remedy came to us. The mediation was always going to be complicated because they were having outside conversations with [the company] before coming to meet with us.*

In the land case, several people acknowledge the benefit of pursuing non-judicial action because the mediation provided a neutral space that the courts in their country could not. Again, it was those most closely involved in the mediation that held this point of view. A community leader and participant in the mediations remarks:

Mediation is better than the court. The high court belongs to the government. The mediation was neutral, and the only way we could do it. Dialoguing is better than using the law.

Additionally, most community members we speak with in the land case express a renewed sense of hope, as a result of participating in the mediation. According to this woman:

Patience pays at last... now we know that hope was there, that there was something to look forward to at the end.

Those who participated in the mediations or were close to those who participated in the mediations are more likely to view the process and outcome as legitimate because of what it accomplished: *“The mediation allowed us to come together, get mobilized, and come to a final decision.”* This man gives several reasons why he finds the mediation satisfying:

Three important things that helped me during the mediation process were: (1) It brought together the company and the community – enemies became friends (2) Through the mediation we were able to receive trainings about founding cooperatives – it was through this training that I am able to run this cooperative (3) Through the mediation the [company] granted us jobs in the company.

In both contexts, community members who participated in the mediation generally express a degree of satisfaction with the aim of the mediation and the extent to which mediators had established a safe space for mediation to take place. By contrast, non-participants in the water case allude to the limits of the mediation’s legitimacy stemming from exclusion from the mediation process. A woman in NP1 reflects this feeling of being left behind:

Everyone has the same rights, but I don't understand why some of us are being denied them.

When asked if they would have liked to participate in the mediation, nearly all interviewed in NP1 and NP2, reply “yes” indicating that this would have been a means to make their voices heard.

Accessibility

“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.”

Our interviews in both contexts reveal the significance of the accessibility criterion in sustaining the legitimacy of the mechanism. Community members highlight three challenges to accessibility: a lack of awareness of the mediation by some segments of the community; the financial and practical burden of participation in the mediation; and the necessity of an NGO intermediary to obtain access to the mechanism and strengthen their capacity to participate in the mediation.

In the water case, one man highlights the lack of awareness of the mediation by some segments of the community:

Many people in the community didn't know that there was a mediation even though one of the women who sat at the table lives in that community.

His words suggest a failure to communicate the existence of the mediation process and its procedure. Because only two representatives were chosen to speak on behalf of each of the complainant communities, community members we met told us they feel that the mechanism failed to reach segments of the communities and was not fully inclusive.

In the land case, community members note the interruptions the mediations imposed on their lives by diverting attention from tending to their livelihood and family needs, including their own health. A woman who participated in the mediations for the land case states,

I worried about wasting time, the pain in my legs [from walking to and from the mediation], worried about my children at home...what they would eat while I was away.

These obstacles, which are not faced by the company, affected the accessibility of the mediation.

Finally, interviewees in both contexts note the critical role of NGOs in facilitating accessibility to the redress procedure. One woman who participated in the land case mediations tells us:

When [the NGO] came on board, they told us they would help us in the mediation process. They said, 'We'll provide transport, cater for you in every situation, bringing you to the mediation,' etc. [the NGO] got us health workers who helped us because some of us were sick, and provided counselors for psychological trauma. They also provided some mediation trainings. [The NGO] got lawyers for us who could help us in the mediation process.

A community leader who participated in the mediations in the land case expresses similar sentiments:

The NGO provided [us with] airtime, so that we could communicate with people by phone. They came and asked us what happened [after the evictions]... after getting our views and ideas and hearing our stories about what happened, they wrote to the [grievance mechanism to lodge a complaint]. Without [the NGO], the mediation could not take place.

In the water case community members also emphasize the role of the NGO in increasing access to information and gathering communities together to express grievances. A female community leader notes:

"The NGO helped people exercise their rights to civil participation. It brought attention to the real issues and find that the best help is to educate those who come to visit the region."

Predictability

"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 of monitoring implementation"

Predictability varied within both contexts according to whether the respondent participated in directly in the mediations. For those who did not, insufficient information about the mediation and agreement and in particular the timeline of implementation of the agreement was a significant problem in garnering trust in the process and promise of remedy.

In the land case, community representatives who sat at the mediation table explain that they were often confused by changes in the mediation agenda and timing, which made it especially difficult to convey the sudden changes back to the broader community. For example, originally the community members and their legal representations, including the NGO, expected the remedy would include direct monetary compensation to individual families. However, at the start of the mediation, the company announced that certain things were “off the table,” including direct monetary compensation. Consequently, community members who sat in the mediations were able to adjust their expectations based on this knowledge. Those community members who did not participate in the mediations held on to the expectation that remedy would include the previously promised monetary compensation. A failure to communicate this change to all segments of the community affected the predictability of the mediation’s outcome.

Likewise in the water case, it is apparent that the community representatives selected to participate in the mediation process had access to sources of information about the mechanism’s procedure and could actively engage in the process. Those community members whom were not selected to participate in the mediation process, however, felt “naïve” as they lacked access to the mediation. According to one woman living in P2,

Things are better after the agreement was reached. The problem is that the agreement is confusing for people [like me] since they weren’t [present] at the mediation.

As a consequence, those community members that did not participate in the mediation lacked a full of understanding of how the agreements were reached. A resident of P1, who did not participate in the mediation saw an improvement in her service following the agreement, but was unable to clearly explain how she received it:

I was not aware of the mediation. But I did receive an agreement with the company – which [I suppose] was made possible thanks to the [mediation] with the company.

We also heard complaints about the time frame for the execution of agreement, another indicator that the mediation may not have met the UNGP 31 criterion for predictability.

In both the land and water contexts, the perceived inequities in the provision of remedy across communities, and even between individuals from the same community, appear to be related to variance in information regarding the redress process. Overall, communication to the communities of the time frame, procedure, expected outcomes and means of monitoring implementation was deficient, and thus the criterion of predictability was only weakly met.

Equitability

“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”

In the water case, generally community members who participated in the mediation process, company representatives, and mediators in the water case held positive and complementary views of the mechanism’s attempts to establish a respectful, fair, and balanced mediation process. The problem of equitability comes in with respect to the representation of all community members at the mediation, as noted above and elsewhere in this report.

By contrast, the community members we interview in the land case suggest there was insufficient effort to address the gaping power imbalances between the company and the community that persisted at the mediation table. As already noted, community members say that the company treated them more respectfully when the NGO was present in mediations. According to the rules the parties established for the mediation however, the NGO was not always allowed to be at the table or to speak when it was at the table.

It appears that additional steps should be considered by the NJGM to ensure that the mediation does not exacerbate the existing power imbalance between companies and aggrieved communities. These include: 1) ensuring adequate assistance for the communities at the mediation by permitting the NGO or other legal representative to be present and support their clients at all times; and 2) by taking account of the hardship of the lengthy proceedings for the aggrieved communities.

Transparency

Transparency: “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.”

As with the Predictability criterion, the most notable factor effecting Transparency in both cases was an information gap between those who participated in the mediation and those who did not.

The land case reveals the adverse effects of insufficient transparency on the mechanism’s performance. Several community members tell us they were unaware of the true progress of the

mediation, what they could expect from a negotiated agreement, and when they could expect the remedy. Of particular relevance was the burden of responsibility on members who participated in the mediation to communicate back to the communities. A community leader who participated in the mediations aptly expresses the consequences of a lack of transparency, stating:

I was told not to demoralize the people outside, show them that progress is being made. There is a point we would reach in the discussion; where we would fail to find an agreement, and I would... keep convincing [community members] that there was progress, even when I knew that there was not progress. Because I knew that the mediation was taking place, because I didn't want to demoralize [the community], because that was the only way of showing hope.

“Showing hope” was used to justify the limiting the amount of information communicated to affected families. Ultimately this false hope only further threatened the mechanism’s effectiveness, as some community members were knowledgeable of the mediation’s progress while others were not.

The frustration with this lack of information surrounding the progress of the mediation is most prevalent among those who are still displaced. One still displaced community member tells us that,

I didn't feel happy when we heard there was an agreement. I didn't know what was in there. The best would have been if they gave us the agreement and told us 'this is what you get.' We didn't understand properly what was in the agreement.

Likewise, in the water case, residents in both of the non-participating communities (NP1 and NP2) say they were unaware of the mediation process as it was happening, though they would have participated had they known. A female community leader in NP2 states,

We didn't even know there was a mediation happening. We didn't learn of it until a man from the NGO came to see our community. Of course if we had known, we would have wanted to be apart of it.

Another clear example of the deficiency of transparency is demonstrated by community perspectives on what many feel is very slow implementation of the mediated agreement. In the water case, a community leader, commenting on the progress of implementing the negotiated solution, states,

It was slow overall, as you can see by the continuing problems due to the low quality of water and difficult access to it. It took five years to get the connection pipes, which entailed doing public marches, organizing sit-ins and sending letters to [the company].

Similarly, in the land case a mother and participant in the mediation, commenting on the implementation of the mediated agreement says,

It was over two years before a final decision, before getting hope. And even then, after two and a half years of mediation, the community is concerned about the disbursement of compensation, which will take place over five years.

Consequently, community members who were not adequately informed about the progress of the mediation are left in the dark about their futures. One person reflects this situation saying,

We feel bad that we have not been given a timeframe for when we will be moving. We need to get our land and start cultivating.

Community members in both contexts express concern over what they consider a delay in delivering aspects of the remedy. The communities came to understand that remedy is not achieved at the time of the agreement, but in its sustained implementation. In this way the two cases demonstrate that it is necessary to ensure transparency beyond the mediation. Inadequate communication to community members at any time during the use of the mechanism, including the agreement implementation monitoring phase, threatens other principles including accessibility, legitimacy, and equitability.

Rights Compatibility

“Rights-compatibility: ensuring that outcomes and remedies accord with internationally recognized human rights.”

Of the eight effectiveness criteria, rights compatibility stands out for two reasons: 1) it encompasses the other effectiveness criteria - accessibility, accountability, legitimacy, transparency, equitability, and so forth; and 2) it is the one criterion that specifically refers to the “outcomes” of mediated processes.¹⁰ The discussion thus far reflects on how the experiences of

¹⁰The 2008 report of the Corporate Social Responsibility Initiative of Harvard Kennedy School, which laid the foundation for UNGP 31, refers to the importance of rights compatibility for both process and outcome: “A rights compatible mechanism integrates human rights norms and standards into its processes and is based on principles of non-discrimination, equity, accountability, empowerment and participation...Ensuring it is rights compatible in both

the communities stack up to the UNGP effectiveness criteria with respect to process. Here we first consider what the affected communities in the two contexts say about Rights Compatibility of the outcome of the remedy – that is, the remedy itself -- before turning to some further observations they make about deficiencies in the rights compatibility of processes that may have led to the outcomes.

In both contexts, community members articulate dissatisfaction with the remedy received. In the land case, interviews refer to the infertility of the land awarded and the failure of the remedy to meet basic needs like education, health, and water. A young mother notes: *“We have gotten land, but it is not fertile. It has stones in it.”* A youth, whose house and school were burned down, bemoans the injustice of missing out on his education because it took so long for the remedy to come:

I do not feel like this is fair. I have an interest in education; you cannot live a better life without education. I used to be studying and now I’m not.

Another youth echoes that sentiment:

We wanted them to buy us land, build us a school, and hospitals, and give us water. We haven’t seen any of that.

Similarly in the water case, while acknowledging that there were some improvements, several people, like this woman, express dissatisfaction with the remedy received:

The good part was that the water pressure did get a little bit better as did the quality, but not by much.

What at first seemed to some like a good outcome, over time came to be viewed less favorably. According to one woman: *“[The remedy] was okay, but it wasn’t sufficient.”*

The principle of “justice” is also often invoked, particularly by people in the water context. To those in NP1 and NP2 the remedy was decidedly unsatisfactory; as they stress, they still do not

its process and outcome is vital to the mechanism’s credibility and legitimacy, both locally and internationally, as well as to its potential success in practice.” In fact, the report is the first to identify seven principles “for designing effective rights-compatible grievance mechanisms” whereby Rights Compatibility as the overarching goal that following the principles can be achieved. “Rights Compatible Grievance Mechanisms: A Guidance Tool for Companies and their Stakeholders,” Corporate Social Responsibility Initiative, Harvard Kennedy School of Government, January 2008, p 1.

have electricity or water. One woman living in NP2 decries: “*There is no water [here], no electricity, no support at all.*” Then, expressing the sentiment that the mediation has failed to recognize her community she adds, “*We are forgotten.*”

A community leader explains that these women have no support, are living on the margins and can hardly afford to have their right to water access denied. For them to receive what they regard as “no remedy” means a further denial of their basic rights:

For those living below the poverty line, this [water bill] is two-thirds of their monthly income. There is greater pressure on a female head of household. More than 84 percent of families are run by single mothers. It's harder for them because they don't go to school; they also don't have the opportunity to pursue other interests.

Where the purported remedy failed to provide clean water, another human right was affected: the right to the highest attainable standard of human health. A leader of the NGO aiding the communities explains, “*There were difficult illness outbreaks including skin rashes, Hepatitis A and digestive health.*” Despite the poor water quality, as a community member tells us, “*Because it is the only water we have, it is hard not to use it.*”

Interviews in both contexts suggest that the bitter sentiments expressed about the remedies may be due to two factors relating to process. First, the mediation was not organized in such a way as to make participation in it feasible for all affected people. As previously noted, whole communities in the water case were left out of the mediation, whereas community members in the land case faced logistical challenges in gaining access to the mediation. This woman who traveled a long distance to participate in the land case mediation provides an indication of why so many in the community felt they could not participate:

I worried about wasting time, the pain in my legs, worried about my children at home, what they would eat while I was away... We started thinking that what they were telling us was maybe a lie, because it was taking so long.

Similarly, a man laments the hardships of enduring a mediation that dragged on for so long. Explaining the struggle he and his neighbors were facing just to live from day to day, he explains:

Because of the situation you are passing through, that's what you accept, because it's there. Yes, we are receiving what was in the agreement, but it's not what we should have gotten.

A second factor, as noted in Section 3 of this report, is that affected communities in both contexts feel they had to accept terms with which they were not fully satisfied for fear of receiving nothing if they did not – or because their emotional and material circumstances were so compromised that they simply could not hold out any longer for something better. The same woman quoted above who participated in the mediation stresses that the mediation was taking too long, and they urgently needed a solution to their problems:

We started thinking that what they were telling us was maybe a lie, because it was taking so long.

The NGO assisting the communities in the water case suggests that a rights compatible outcome can only be achieved when the affected communities know their rights and adopt rights-based language in demanding remedy. One woman who participated in the mediation process in the water case, describes how the differing levels of awareness of the human right to water impacted the outcomes for some families:

Families are not reaching the same levels of agreement with the company because neither they nor the company looks at this from a rights perspective. For example, when a family with this knowledge or I visit [the company], we talk about the right to water as it is enshrined in the Constitution. Without that, the families must negotiate for their own outcome.

Greater awareness of legal rights might have led to an awareness that not only does international law provide that the material situation should be restored, but also that there should be compensation for the psychological and physical harm that the communities suffered and that the cost burden associated with the mediation process is covered.¹¹

Besides rehabilitation, another aspect of rights compatibility is guarantees of non-repetition aimed at ensuring that human rights harms do not happen again. This is provided for in the UN Basic Principles and Guidelines on the Right to Remedy and Reparations (Basic Principles).¹² In the water case, no one spoke of their concerns about a repetition of harm, presumably because

¹¹ Lindsay McClain and Allan Ngari, “Pay Us So We Can Forget: Reparations for Victims and Affected Communities in Northern Uganda,” Justice and Reconciliation Project, JRP-IJR Policy Brief, No. 2, 2011.

¹²The Basic Principles outline five forms of remedy that states are obligated to provide to victims in the wake of serious human rights violations. These include restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition. See “Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law,” General Assembly Resolution 60/147, 16 December 2005.

their current hardships are foremost on their minds. And yet, as noted below, the mechanism itself could have played a role in preventing the harm had it kept the case open until the agreement had been fully implemented. By comparison the community in the land case was keenly aware of their vulnerability, which is why community members place significant stock in receiving secure land tenure.

A Source of Continuous Learning / Based on Engagement and Dialogue

“A source of continuous learning: drawing on relevant measures to identify lessons for improving the mechanism and preventing future grievances and harms”

“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.”

Here we address UNGP 31(g), A Source of Continuous Learning, and UNGP 31(h) Based on Engagement and Dialogue, together. UNGP 31 specifies that the 31(h) criterion is designed specifically for “operational-level grievance mechanisms.” Yet, once problems arise, as in the land and water cases, these cases *become* operational-level and therefore also demand engagement and dialogue. Engagement and dialogue with affected parties, in turn, is a critical source for continuous learning

Land case community members acknowledge that the dialogue process facilitated by the NJGM provided a way to more effectively communicate their grievances than available judicial processes. In the water case, the community members we spoke with who did not participate in the mediation were dissatisfied that they did not have the opportunity to express their opinions on issues related to their standard of living, nor the mechanism’s design and performance.

Moreover a significant number of the complainants in both contexts did not fully understand how the NJGM functions – or in some instances, that a mediation had even taken place. One female community member in NP2 in the water case explains,

Of course, I would have wanted to participate in the negotiations if I knew they existed. We did not know the mediation was happening until after it was finished.

...Because this is when [the NGO] first came to my community to ask questions about our situation. I wish I knew sooner.

These comments suggest that a first step in meeting the source of continuous learning criterion is ensuring that all project affected people are aware of the process. A second requirement is making sure the complainants *understand* the process so that they do not feel circumvented by the agreements their community leaders sign.

In the land case, community members highlight the limitations of dialogue and mediation in addressing all of their concerns, in particular restoring their standard of living to what it was before the evictions took place. A man who participated in the mediations in the land case states,

Mediation is a nice thing to use because it will help you in solving major issues. But small issues, for example, the houses they are living in are not the right houses they are supposed to be living in... There are other issues that mediation does not work on. Mediation will not provide you a job: if you are poor, you still remain poor. Sometimes, mediation only solves that you are hungry immediately. Yes, mediation has helped us to get land, but hasn't solved our stomachs. We still remain hungry for food.

In both contexts community members comment only indirectly on how the mediation process could be improved for future use with respect to other UNGP criteria, for example accessibility and transparency. In general, community members refrain from commenting on the quality of the mechanism that facilitated the mediation, opting instead to direct the conversation towards the remedying of their ongoing grievances:

Through the mediation I was able to learn that at least something can happen... The agreement did not give us everything we previously had – we agreed to it because at least they were giving us something. The thought was that the only way to get land was to accept less than we wanted.

The NGO in the water case provides a learning insight for the NJGM when it maintains that rights education of the affected communities is critical to a rights-compatible outcome. According to the NGO leader:

More pressure should be put on the local government to make equal budgets for every community to address issues related to water. There should also be a clause about the health impacts on communities due to lack of access to water. We should create plans to have a rainwater system and filtering system especially considering that the company's maintenance [crew] never comes.

The premature closure of the water case by the NJGM provides another key learning. We heard repeatedly that after the NJGM closed the case, the company did not keep to the agreement and the remedy promised had not been provided. In the words of a community leader:

[The company] kept only some of its agreements...and even then, soon after, this stopped – 30 percent of the mediated agreements were broken within the second year.

This discussion suggests that in order to prevent future harm, UNGP 31(g) ought to be understood as requiring that the case not be closed until the agreement is fully implemented. It begs the question, perhaps controversially, of whether noncompliance of the agreements should lead to punishment of parties that breach agreements.


VII. Conclusion

The UNGPs require states and business enterprises to provide those harmed by business-related activities access to effective remedy. They also require that states and non-state “collaborative initiatives” establish “appropriate and effective” non-judicial grievance mechanisms, which are sometimes the only forum affected groups have to access remedy. Mediation is not only typically a faster route to remedy than courts (if an effective court is even available), it can also be transformative. It has “the potential to build a lasting relationship between the corporation and the surrounding communities that benefit both parties and prevents future conflict.”¹³

Despite the established standard of remedy in international human rights law, too often there is no grievance mechanism available that offers redress. In fact, of the more than 300 cases we surveyed across the multilateral and regional development banks and the OECD Guidelines National Contact Points, only seven had met our criteria of a case that had been accepted by the mechanism, the mechanism succeeded in bringing the parties to the table, and an agreement was reached.¹⁴ In this sense, the land case and the water case presented in this report represent positive examples of the application of the access to remedy principle in that the affected

¹³ SOMO, “The Patchwork of Non-Judicial Grievance Mechanisms: Addressing the limitations of the current landscape,” *SOMO Paper*, November 2014.

¹⁴ Additional criteria we used in selecting cases were: status of the case (open versus closed cases); when the mediation took place (for less recent cases, we posited, it would be difficult to find community members who remember what happened); cases that were too new were considered too volatile and subject to change during the course of the research); more than twenty complainants (indicating a case of some complexity), the fieldwork team’s access to the communities (where introductions to the communities could be made by trusted NGO intermediaries); and the security situation at the site for undertaking fieldwork.




communities had a forum to voice their grievances and some remedy was provided. And yet as noted within this report, according to the accounts of the affected community members we met, in several respects, the mediation fell short of the UNGP effectiveness standards.

The people we interviewed for this study highlight the distinct value of NJGMs in: 1) raising community awareness of ways to address human rights harms; 2) establishing a process for communities to come together to make their voices heard; and 3) fostering a dialogue by which stakeholders can address and solve these problems. Yet they also point to effectiveness gaps. Interviewees from the two contexts experienced different shortcomings of the mediation experience. People we speak with in the land case highlight failings in the design, procedure, and legitimacy of the mediation process, more specifically significant power imbalances at the mediation table. In the water case, on the other hand, they highlight failings in the implementation and sustainability of the remedy following the conclusion of the mediation and the insufficient monitoring of the implementation of the agreement.

Their comments raise some key questions related to representation and the preconditions for a rights compatible outcome: Is it effective remedy if the UNGP effectiveness criteria are only met for direct participants in the mediation? How can all aggrieved parties be better informed about the mediation process, the terms of the mediation, and the existence of the mediation itself? How well suited is a mediation process to remedying rights abuses? How can the negotiation that takes place prior to the mediation be improved to ensure a rights compatible process? Should dissemination of information and training to aggrieved parties about their legal rights a pre-condition for a rights-compatible mediated outcome?

For mediation to meet the UNGP effectiveness criteria, stakeholders need to experience the grievance process as just. Providing necessary assistance to facilitate the informed participation of all affected communities contributes to a just grievance process. Assistance means timely and clear communication with all affected peoples about the process, and allowing unfettered access to legal representation as well as human rights training so that people understand their legal rights. It also includes material assistance, for example, in the form of transport to the mediation site, mobile phone air time, and the reasonable reimbursement of costs for the time of the community members to participate. Capacity building through access to needed resources and information both empowers communities to advocate for their rights and creates realistic expectations for the mediation process, the agreement, and the implementation of the agreement. A rights compatible process and outcome also requires attention to the most vulnerable people in a community to ensure that they are afforded equal access to the mediation and are able to buy in to the agreement.



Our effort to interpret our conversations with aggrieved peoples about remedy in terms of the UNGP effectiveness criteria revealed an uneasy fit, as UNGP 31 sets out criteria for the *processes*, but not the *outcomes*, of effective remedy. The people we interviewed possess clear opinions about the inadequacy of the remedy provided even when they expressed uncertainty and, at times, less interest in the process. This study therefore points to a shortcoming of the UNGPs and the need to develop clear criteria for assessing remedy outcomes. We hope this report will help to spur thinking on what those criteria should be.

Throughout this report we have used the word “community” or “affected community” as a stand in for the people whose rights have been violated by business conduct. As noted throughout, however, the “communities” were by no means homogenous. Particularly in the water case there were some neighborhoods that were noticeably worse off than others: the years of neglect that individuals in NP1 and NP2 had suffered was replicated in the mediation process, as these communities were not even aware that mediation had taken place. The heterogeneity of aggrieved parties raises questions about the accuracy of the term “community” – and whether the “community” is instead an imposed construction that gets defined by the human rights abuse suffered.

The aim of this project has been to give voice to people who have sought remedy following business-related human rights abuses they endured. Indeed, it is the premise of this research that the aggrieved party’s views of remedy are the critical, yet most overlooked measure of effective remedy, despite the fact that UNGP 31(g) – “a source of continuous learning” – demands it. The number of people we were able to speak with during the visits to each context was necessarily limited due to the limited time we had at each site. In both contexts – and in other such contexts – further meaningful dialogue with affected people can facilitate much needed reflection on mediated outcomes, including such factors as timeliness, safety, representation, procedural fairness and transparency, and community empowerment.

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