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Introduction to the non- judicial grievance mechanisms landscape

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Sarah Daitch is a mediator and facilitator who currently works as Program Manager for ACCESS Facility in The Hague, the Netherlands. As Program Manager, Sarah supports a global network of mediators, works with partners to develop mediation training and raises awareness for dialogue and collaborative processes as a tool to help companies, communities and governments find better ways of working together to prevent and resolve conflict.

- 1) How do you decide whether you recommend doing a non-judicial remedy or doing a judicial remedy?

ACCESS as an organisation doesn't decide whether to recommend a judicial or non-judicial remedy. We leave this decision up to the complainant or the person who has been affected by the company's activities and also the organisations or representatives who are supporting the people who have been affected. Those are the parties who have the kind of expertise and are in a position to decide which type of redress would be best to address the grievance experienced. A note on all of my responses – its challenging to make generalizations about all non-judicial mechanisms, as many aspects depend on the type of mechanism and where it operates (state based, industry level, project level, etc.).

- 2) How do you proceed in case your client is opting for a non-judicial remedy?

Our role is to identify all the non-judicial mechanisms that we can, that are available in different industry sectors, in different countries or different regions. We want to provide information about the procedures of these mechanisms. Our aim is to make the mechanisms as visible and accessible as possible. Another role ACCESS takes is to identify good practices and challenges for non-judicial-mechanisms and share those with all the actors involved. That includes companies, international organisations, civil society groups, mediators, government agencies as well as local organisations that may be supporting people who are affected by company's activities.

CASE STORY

A case we can learn from is the construction of Ambuklao and Binga dams in Northern Philippines. Some of the families who were affected by the dam were resettled. In 1990, an earthquake resulted in the need for communities to have more assistance and a committee was created to organise compensation for the losses of people who were affected. But disputes came up because some compensation was not being paid. In 2008, the power company who originally built the dam was privatised, resulting in the new private company inheriting some of these long standing problems with compensation and non-payment of compensation. Local indigenous communities lodged their complaints through the Compliance Advisor Ombudsman, the recourse mechanism for the International Finance Corporation, the private investment arm of the World Bank. The resulting dispute resolution process lead to a series of dialogues, non-judicial approaches to solve the problem. Some of the complaints had already been in litigation for 60 years.

Parties participated in a joint workshop to increase their skills and capacity for collaborative dialogue. Traditional decision-making was used by the communities in order to choose their own trusted representatives. That ensured that the people sitting at the negotiation table had the trust of the community groups where they came from and it also ensured that those representatives prioritised collective needs over individual personal agendas. This was an important shift. In this case, moving away from litigation lead to an outcome that otherwise might not have been an option - an agreement establishing indigenous peoples cultural heritage site, managed by local government. The attributes of this case that may have been different than judicial remedy is that the communities had the chance to choose who would represent them at the dialogue table and this led to a multi-stakeholder compensation for losses. In this case a non-judicial process was a good fit and you could make the argument that it was more effective than litigation but that could be a very different in another case.

- 3) Are resolutions to grievances outside the judicial process more effective?

We wouldn't say one is necessarily more effective than the other. Non-judicial mechanisms are intended to compliment judicial ones. One important consideration on effectiveness for addressing company-community conflicts we don't know yet how effective non-judicial mechanisms are over the long-term. That's partly because non-judicial mechanisms are relatively new, but also because there is not a systematic way to measure their effectiveness in place yet. Some organizations, including development finance institute accountability mechanisms, have begun efforts to measure effectiveness.

- 4) Can judicial approaches go hand in hand with non-judicial remedies?

There is room for both, judicial and non-judicial approaches: dialogue-based approaches can solve conflicts between companies and communities, - these are non-judicial ways to solve problems. However, judicial approaches are very much needed in many situations. A benefit of non-judicial approaches in terms of problem-solving dialogue is that they can provide a larger range of solutions, which are acceptable to all parties. When the parties communicate directly with each other they can better understand each other and that can open up more possibilities for solutions. The dialogue can also improve relationships between the parties. We know that conflicts put stress upon communities and well-designed dialogues facilitated by professional mediators can help build up social capital in the community.

- 5) What are the limitations of non-judicial remedy?

There are challenges and limitations of non-judicial remedies. Some of the criticism and debates that come up are: Can the mechanisms meet international human right standards? And are they rights compatible? Another big challenge is being able to track whether non-judicial processes actually change the situation for project affecting people. Are their lives improved as a result and are their development outcomes improved? We don't actually know with certainty. It would help to understand if mechanisms are providing effective remedy over time. It is difficult to evaluate the success of non-judicial mechanisms in places where there is very limited access to judicial remedy. Some critics argue that non-judicial

mechanisms lack the authority to identify non-compliance with international standards and to enforce remedial actions. If an agreement is made and a company won't change its behaviour, non-judicial mechanisms may not have the teeth to enforce that. Another critique is that procedures are not consistent across different mechanisms or with mechanisms at different levels.

CASE STORY

In the following case, mediation was not able to deliver a durable solution. In 2009, two Norwegian non-government-organisations (NGOs) called forUM and Friends of the Earth Norway filed a complaint through the Norwegian National Contact Point (NCP) against a Norwegian fish-farming company called Cermaq. The NGOs in this case alleged that Cermaq had breached the law and failed to adequately consider indigenous peoples rights in Chile and Canada. Over the next two years, the NCP facilitated a process between the NGOs and the company. The company strongly denied the allegations so there was a lot of contention. The result of the process was a joint statement that was signed by all the parties in 2011. This statement included commitments that the company would comply with environmental and labour standards, that it would improve its practices with indigenous people, that it would commit to cooperate with the NGOs and that the NGO and Cermaq would communicate better with each other in the future. So initially the joint statement was seen as a success: They came to an agreement and the process was concluded. But less than a year later the parties were at odds again about issues that were related to the original complaint.

From this case, we learn what the challenges are for company-community grievance mechanisms. Certain aspects were weak about the agreement. First, the agreements need written provisions to clarify the expectations and ensure that commitments were understood by all the parties. In this case, there was no commitment or planned monitoring to address whether the agreements they reached were actually being met. This led to on-going tension and eventually undermined the whole agreement. The second point - the case showed how important it is that the communities who are directly affected can participate in the negotiations. In this case they did not and that was a real limitation. These two Norwegian NGOs were claiming to represent project affected people in Chile, but in reality the interests of the affected Chilean community members were not adequately represented. One of the principles in successful grievance mechanism design is that stakeholders having an interest in a given problem also need to have a voice in resolving the problem. That didn't occur in this case. Similarly to the Ambuklao and Binga damcase, at ACCESS, we collect these kinds of cases to help identify what is working, but also what needs to be improved. This helps to think about how to prevent future harms from happening in the first place. In this case, mediation could not deliver a lasting solution.

- 6) How do you make sure that all involved parties are satisfied with the outcome of the remedy?

There is not really a way to ensure that all parties will be satisfied, particularly where there are long-term and complex grievances. There are some ways to check if the conditions in the beginning are well suited to problem solving dialogues and if the process follows good practices. The

dialogue should be voluntary and parties should consent to participate. Many would also argue that participants should not be required to give up other options including judicial options. The community participants should be informed and aware what their rights and options are and that's where advocacy organisations like SOMO and Greenpeace as well as others can play an important role insuring that affected communities are well informed. It also helps set up for constructive outcomes when problemsolving dialogues are facilitated by a third party professional, and all parties agree on the selection of the third party.

7) How do you identify lessons learned?

We can identify lessons to improve mechanisms by looking at the nature of complaints. This can be used to adapt projects to prevent future grievances. For example, if we know that a hundred people are complaining that a company's trucks are causing too much dust in a community, the company can adjust and design a project to prevent that issue in the beginning. This is where a more rigorous and participatory approach to evaluation is important because it helps to track those lessons that can be applied to the initial design of the project.

8) In countries where judicial remedies are ineffective or non-existent, non-judicial grievance mechanisms are used frequently. Can non-judicial complaints replace judicial remedies?

Non-judicial remedies are meant to complement rather than replace judicial remedies. But we know that there are increasing levels of foreign direct investment in the private sector in many fragile complex environments where previous conflicts may exist. These regions may have a weak rule of law and underdeveloped legal institutions. In such situations, non-judicial mechanisms might be more accessible or may even be the only option in the short term. It's

CASE STORY

A good example for a non-judicial approach to address a company-community conflict in a fragile environment comes from the Niger Delta. This was a process that led to a set of agreements called "The Global Memoranda of Understanding" (GMOUs). These agreements were reached between Chevron, Nigeria's second largest oil producer, and the communities in the Delta around its facilities. The situation that led to negotiations of these agreements was violent conflict in the region in 2003, which led to the withdrawal of the company. Buildings the company had built for the communities in the area including schools and hospitals were destroyed. Chevron had to dramatically reshape its approach to engagement with communities when it returned to do business. Their new approach was based on full participation and joint partnership - this led to the GMOUs. A key role was played by the New Nigeria Foundation, a local NGO that mediated the dialogue between Chevron and the communities. This process of dialogue helped build the foundation for increased trust amongst the parties. This led the parties to evaluate and renegotiate the agreements with the full participation of the communities themselves. Ensuring that community members participated in the evaluation helped to keep the agreements relevant and alive. These evaluations captured the community, government and company views about community engagement and benefits of the negotiations. The region did not have developed justice institutions in place, but the GMOUs helped to transform the relationship between the company and the communities in this area. It led to better outcomes for both the community members and the company.

recognized that legal institutions and improving the rule of law are absolutely important in terms of long-term solutions for countries. But these aren't things that happen overnight and it will not result in an immediate solution to company-community conflicts. We know that investments in fragile countries are increasing and so there is this need for more immediate solutions that involve the private sector. There is a need for tools and approaches that build consensus and allow people to have some access to problem solving even when legal institutions are not accessible to them. This can provide solutions despite the fragility in these countries. Non-judicial approaches can't make up for the fact that not all countries have proper justice institutions, but non-judicial mechanisms can help provide a transition towards building legal institutions in a country. It's important to think beyond providing remedy for a particular dispute and also look at how conflicts can be prevented.

In terms of supporting better outcomes for communities who are affected by company activities, we have to think about remedy. What immediate solutions are available for their complaints? How can conflicts be prevented in the first place? This is where participatory evaluation of mechanisms provides an opportunity to learn about how to prevent these disputes.

Interview: Vera Hofer, ICP