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Brief on Concerns Related to Project-Level Non-Judicial Grievance Mechanisms

***Data derived from work by MiningWatch Canada and partners
on the Porgera Joint Venture Mine in Papua New Guinea and
the North Mara Gold Mine in Tanzania***

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Background: MiningWatch Canada's Work on Non-Judicial Grievance Mechanisms

MiningWatch Canada (MiningWatch) is a pan-Canadian initiative supported by environmental, social justice, Aboriginal and labour organizations from across Canada.¹ The organization was created by founding members in 1999 to address the need for a co-ordinated public interest response to threats to public health, water and air quality, fish and wildlife habitat and human rights posed by irresponsible mineral policies and practices in Canada and by Canadian companies around the world. With Canadian and global partners, MiningWatch carries out and/or supports the monitoring, analysis and advocacy necessary to improve corporate practices and inform policy and regulatory development by public decision-makers.

MiningWatch engaged in the development of the UN Guiding Principles on Business and Human Rights (UN GPs) by presenting and participating in workshops and through written submissions. In our submission to the draft "Guiding Principles for the Implementation of the United Nations 'Protect, Respect and Remedy' Framework," we raised concerns about the potential for abuse of non-judicial grievance mechanisms by states and corporations.² We have published on the failures of state-based non-judicial mechanisms in Canada to address human rights abuses by Canadian mining companies.³

In this brief we focus on some key concerns with Project-Level Non-Judicial Grievance Mechanisms based on our engagement with these mechanisms at Barrick Gold's (Barrick) Porgera Joint Venture (PJV)⁴ mine in Papua New Guinea (PNG), and African Barrick Gold's (ABG) North Mara Gold Mine Ltd. (NMGML) in Tanzania.

Raising Awareness of Violence at the Porgera Joint Venture Mine

Since 2005, we have engaged publicly on the issue of violence against men and rapes of women by police and security guards at Barrick's PJV mine.⁵ We helped local PNG partners⁶ raise the issue of violence by mine security guards at Barrick's Annual General Meetings between 2008-2011. We testified on the issue

¹ The current members of MiningWatch Canada are: Bathurst Sustainable Development; Bedford Mining Alert; Unifor; Canadian Environmental Law Association; Centre for Long-term Environmental Action in Nf/Ld; Canadian Parks and Wilderness Society; Canadian Union of Public Employees; Canadian Catholic Organization for Development and Peace (CCODP); Friends of the Earth Canada; Friends of the Stikine Society; Innu Nation; Inter Pares; International Institute of Concern for Public Health; Canadian Ecumenical Justice Initiatives (Kairos); The Mixedwood Forest Society; Nature Canada; Northwatch; Polaris Institute; Primates World Relief and Development Fund; Public Service Alliance of Canada; Rivers Without Borders; Sierra Club of Canada; Steelworkers Humanity Fund; United Church of Canada; Yukon Conservation Society.

² <http://www.business-humanrights.org/SpecialRepPortal/Home/Protect-Respect-Remedy-framework/GuidingPrinciples/Submissions>

³ See for example: Coumans, Catherine. October, 2012. Mining and Access to Justice: From Sanction and Remedy to Weak Non-Judicial Grievance Mechanisms in *The University of British Columbia Law Review*. 45 U.B.C. L. Rev. 651; Coumans, Catherine. *Ottawa Citizen*. October 31, 2013. Op-Ed: Canada needs effective mining oversight. <http://www.ottawacitizen.com/opinion/op-ed/Canada+needs+effective+mining+oversight/9109205/story.html> ; MiningWatch Canada. March, 2011. *Concerns with regard to the mandate and review procedure of the Office of the Corporate Social Responsibility Counsellor for the Government of Canada*. http://www.miningwatch.ca/sites/www.miningwatch.ca/files/MiningWatch_Brief_on_CSR_Counsellor.pdf

⁴ Barrick is 95% owner of the PJV mine and the mine is operated by a Barrick subsidiary

⁵ <http://www.miningwatch.ca/faceted-search/results/taxonomy%3A4318.4321.4332.4412?page=3>

⁶ MiningWatch partners in Porgera are local grassroots human rights organization Akali Tange Association and the Porgera Landowners Association.

in a Canadian parliamentary inquiry.⁷ We conducted field work at the mine and interviewed rape victims in 2008 and 2009. Our findings were included in an OECD complaint we launched with our local PNG partners with the National Contact Point in Canada in 2011.⁸ Barrick denied reports by MiningWatch, our local PNG partners, and other organizations⁹ of ongoing extreme violence by mine security guards and police at the Porgera mine until late in 2010.

Raising Concern about Barrick's Project-Level Non-Judicial Grievance Mechanism in Porgera

Since 2012, we have reviewed and commented on a project-level grievance mechanism put in place by Barrick Gold for victims of rape by the mine's security guards.¹⁰ In 2012, we raised concerns about this mechanism directly with Barrick. In 2013, we went public with our concerns in a joint press release with other organizations and provided a detailed brief of problems with the mechanism.¹¹ Later in 2013, we again conducted field research and interviewed rape victims in the context of the ongoing grievance mechanism. We detailed the findings of our field research and our concerns about the Porgera grievance mechanism in a number of letters to the UN High Commissioner.¹²

Violence at African Barrick Gold's North Mara Gold Mine Ltd.

Violence against men and women by security guards and police at African Barrick Gold's North Mara Gold Mine Ltd. in Tanzania has been documented over many years.¹³ In 2011, Barrick issued a statement announcing that the company had received "highly disturbing allegations of sexual assaults by the police and ABG security against local women" and that an internal investigation had "identified credible evidence of sexual assaults by members of the Tanzanian police and employees of ABG's security unit."¹⁴ Barrick and ABG made a number of commitments to deal with the issue in 2011, but no further substantial communications on this topic were provided until December 30, 2013, when ABG responded¹⁵ to a press release from MiningWatch Canada¹⁶ and a subsequent article in Canada's Globe and Mail.¹⁷

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<http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=4134547&Language=E&Mode=1&Parl=40&Ses=2#Int-2885336>

8 http://www.miningwatch.ca/sites/www.miningwatch.ca/files/OECD_Request_for_Review_Porgera_March-1-2011.pdf

9 International Human Rights Clinic of the Harvard Law School and the Center for Human Rights and Global Justice of New York University School of Law.

10 Note this project-level grievance mechanism does not cover men who have experienced violence by the mine's security guards, nor does it cover women who have been raped by PNG police living at the mine site and supported by the mine.

11 <http://www.miningwatch.ca/news/rape-victims-must-sign-away-rights-get-remedy-barrick>

12 Letter to OHCHR March 19, 2013:

http://www.miningwatch.ca/sites/www.miningwatch.ca/files/letter_to_unhchr_on_porgera_2013-03-19.pdf;

Letter to OHCHR April 2, 2013:

http://www.miningwatch.ca/sites/www.miningwatch.ca/files/letter_to_un_high_commissioner_april_2_2013.pdf

; Joint letter to OHCHR with 77 organizations May 14, 2013:

http://www.miningwatch.ca/sites/www.miningwatch.ca/files/ltr_to_unhchr_may_14_2013_re_porgera_sign-on.pdf

13 See for example: <http://www.theglobeandmail.com/report-on-business/rob-magazine/barricks-tanzanian-project-tests-ethical-mining-policies/article559188/?page=all>

14 <http://www.barrick.com/investors/news/news-details/2011/North-Mara-Mine-Tanzania/default.aspx>

15 http://www.africanbarrickgold.com/~media/Files/A/African-Barrick-Gold/Attachments/press-releases/2013/abgupdate-north-mara-sexual-assault-allegations_20122013.pdf

16 <http://www.miningwatch.ca/news/african-barrick-s-confidential-compensation-agreements-questioned-troubled-tanzania-mine>

Raising Concern about Barrick/ABG's Project-Level Non-Judicial Grievance Mechanism in North Mara

In December 2013, a previously confidential legal waiver was forced to light in the course of legal proceedings filed against ABG and its 100% subsidiary, North Mara Gold Mine Limited (NMGML), on March 28, 2013 in the High Court of England and Wales on behalf of Tanzanian villagers. The villagers claim that the companies are “liable for deaths and injuries allegedly caused by the use of excessive force by mine security and police.”¹⁸ The waiver relates to a non-judicial project-level grievance mechanism initiated by ABG.¹⁹ The waiver is labeled “Strictly Confidential.”²⁰ It is dated December 16, 2012 and refers to “alleged harm suffered by the Complainant,” a man, as a result of an “incident” which occurred “on the NMGML property.” In return for a “Condolence Disbursement,” the Complainant had to agree “that he will not instigate, encourage or in any way assist *other* complainants, demands or claims by any other person against NMGML, ABG or their affiliates” [emphasis added]. The Complainant was also required to sign a “covenant not to sue,” waiving “all and any rights” to be a party to “any proceedings” anywhere in the world against any of the aforementioned business entities. Leigh Day has raised concern regarding the legal waiver, noting that it “believes that the mine has made offers to people without adequate legal representation in return for those individuals signing away their rights” to legal redress.²¹ MiningWatch reviewed the legal waiver and together with Rights and Accountability in Development (RAID) sent a letter to Barrick and ABG on February 21, 2014 to detail our concerns and questions regarding, among other things, lack of transparency about the grievance mechanism and broad restraints related to the waiver.²² ABG responded with a letter and attachments informing MiningWatch and RAID that the waiver that we had reviewed had been altered, subsequent to complainants signing on to it.²³

Summary of Concerns Based on the Work Outlined Above

The work done by MiningWatch Canada, together with our PNG and international partners, on the project-level grievance mechanism at the Porgera mine, as well as our initial engagement on mechanisms at the North Mara mine, leaves us very concerned about significant aspects of these grievance mechanisms. We have detailed these concerns at considerable length in letters, referenced in this brief. We provide summaries below, with additional attention on two key areas: **lack of transparency** and **conditioning of remedy on the signing of legal waivers**.

In summary, areas of concern include:

- **Lack of meaningful consultation** on the remedial process and on the remedy itself. For example, the women who were victims of rape at the Porgera mine were not consulted about the remedy they would receive. Additionally, in spite of years of very public work on the issues of violence at the Porgera mine, the local organizations Akali Tange Association and the Porgera Landowners Association were not consulted on the remedy process and framework, aside from confidential

¹⁷ <http://www.theglobeandmail.com/report-on-business/industry-news/energy-and-resources/african-barrick-tocompensate-assault-victims/article16063262/>

¹⁸ <http://www.leighday.co.uk/International-and-group-claims/Tanzania> (accessed February 13, 2014)

¹⁹ http://www.miningwatch.ca/sites/www.miningwatch.ca/files/abg_grievance_agreement.pdf

²⁰ As the waiver was forced to light through the Leigh Day law suit, it is no longer considered confidential.

²¹ <http://www.leighday.co.uk/International-and-group-claims/Tanzania> (accessed February 13, 2014)

²² http://www.miningwatch.ca/sites/www.miningwatch.ca/files/letter_to_barrick_regarding_north_mara_2014-02-21.pdf

²³ <http://www.africanbarrickgold.com/corporate-responsibility/community-relations.aspx>

“dialogue” that took place in the context of mediation related to an OECD complaint filed by those organizations with MiningWatch Canada. This dialogue took place *after* the remedy framework had been completed and the remedy program was being implemented in Porgera.

- **Non-rights compatible remedy.** In interviewing rape victims in Porgera we repeatedly found that they did not agree with the remedy they were offered through the program. Most women were offered what amounted to small-scale development projects: livestock to raise and sell or second-hand clothing to sell. They found this to be, among other things, incommensurate with the severity of the assault they had endured, not addressing or remediating the particular harm that resulted from the rape, and not what they would have expected to receive through the local traditional court system.
- **Ad hoc process.** In both the Porgera and North Mara cases, changes were made to the mechanism, sometimes in response to concerns raised by MiningWatch and others, even as victims were being processed through the program. For example, after we had been assured that all rape victims would receive required medical treatment, whether or not they signed the legal waiver, we found out that this was not what the women themselves understood to be the case when they met with staff for the mechanism. When this was raised with Barrick, the company said it would correct the mistake by revisiting the waiver with all the women (over 100) who had already signed it, to ascertain if they would still have done so if they had realized that medical care could be had without a waiver. In the case of North Mara we have now been told that the waiver we critiqued²⁴ was later changed, but these changes were made *after* victims had already signed it. The ad hoc and unpredictable nature of these remedy programs disadvantages the victims.
- **Lack of transparency.** In both the Porgera and North Mara cases, lack of transparency has been the default mode, with piecemeal information provided only when the programs have come under public scrutiny, and often too late to improve the programs in a meaningful and rights-compatible manner.

For example, Barrick did not initially make public its remedy framework for Porgera. The company also did not provide a copy to MiningWatch when asked to do so. It was only after MiningWatch received a copy of the Porgera remedy framework from a third party, critiqued it in detail and published it on the MiningWatch Canada website, that Barrick, after changing some aspects of the framework, published a newer version on its own website. By the time MiningWatch was able to review the remedy framework, the remedy process was already underway.

In the case of North Mara, there has been considerably less independent scrutiny of the program. The entire program was shrouded in secrecy until a waiver, labeled “Strictly Confidential,” surfaced in December 2013, and MiningWatch issued a press release. In response, ABG issued a one-page statement concluding that “**it should not be anticipated that additional details about the program will be forthcoming from ABG or the mine.**” Following a subsequent letter from MiningWatch and RAID, raising detailed questions, ABG provided some additional information about the program, but again concluded this letter by stating “**we reiterate that it should not be anticipated that additional details about the remedies they [victims] have received will be forthcoming.**”

ABG in part justifies its lack of transparency by expressing concern for the safety of the victims. But answers to the questions we posed about the program itself, most of which remain unanswered, would not compromise the victims.

²⁴ http://www.miningwatch.ca/sites/www.miningwatch.ca/files/letter_to_barrick_regarding_north_mara_2014-02-21.pdf

Another justification for lack of transparency lies in a narrow reading by ABG of the transparency requirement in UN GP 31 (e). The following text is drawn from ABG’s response to MiningWatch and RAID:²⁵ “transparency in the context of a grievance mechanism means providing information to complainants about how their complaints are being handled, providing information to affected stakeholders, and in certain circumstances to other stakeholders, about how well the mechanism is working. We do not believe that transparency in that context means providing information about specific grievances to the public at large, as you seem to suggest.”

By interpreting the transparency requirement in UN GP 31 (e) narrowly, ABG justifies not providing information to relevant organizations, such as MiningWatch, hindering their ability to provide an independent assessment of the program.

In personal communications about project-level non-judicial grievance mechanisms with John Ruggie (August 23, 2013), Ruggie noted, “Our preference was to broaden access to remedy, in line with fully rights-compatible process requirements. And we counted on civil society to help ensure that those requirements are met in practice.”

Leaving aside the question of whether independent “civil society” has the resources and access necessary to fulfill this “ensuring” role, it is clear that civil society cannot play this role without a high level of transparency from companies that create project-level mechanisms.

- **Legal waivers.** MiningWatch has written extensively, in letters and documents referenced in the first part of this brief, regarding our opposition to legal waivers in the case of project-level non-judicial grievance mechanisms. In summary, our concerns include:
 - Legal waivers obtained through a non-judicial mechanism unnecessarily create barriers to judicial remedy for claimants who may decide to take legal action against a company for the harm covered by the waiver. It is the express purpose of these waivers to create a barrier to access to judicial remedy against the company or companies in question.
 - The UN Guiding Principles clarify that corporations should provide remedy for harm they have caused. The UN GPs do not condition that responsibility on victims of human rights abuses giving up their right to judicial redress against the company in question. Remedy is described as a right in the UN GPs, not as a transaction of value in which a company will only provide remedy if it receives something of value to it – in this case legal immunity– in return.
 - Both the Porgera and North Mara mechanisms demonstrate that these ad hoc company mechanisms, set up in remote locations, in conditions of extreme power imbalance, with insufficient transparency and insufficient critical and independent scrutiny, have been characterized by processes, remedies and conditions on receiving remedy that are not transparent, unpredictable and not rights compatible. It is critical to ensure that victims of human rights abuses are not expected to give up a right to civil judicial redress against the company in return for benefits given these precarious circumstances.
 - Both Barrick and ABG make a point of arguing that legal waivers are necessary and of value to both the company and the complainants to achieve “predictability and finality.” While predictability and finality are undoubtedly of great value to the corporations in these cases, these are not of value to the victims of violence in the Porgera and North Mara cases, for whom greater value is obtained in maintaining the option to take civil action against the company for the harm covered by the waiver. While Barrick and ABG continue to argue that without a waiver, a

²⁵ <http://www.africanbarrickgold.com/corporate-responsibility/community-relations.aspx>

claimant might receive remedy from the company twice for the same harm, we have pointed out proven ways to avoid this occurrence without the use of a legal waiver.

- Both Barrick and ABG refer extensively to the consultants they have employed or engaged to ensure rights compatibility of the Porgera and North Mara mechanisms, retired justices, international consulting companies such as Search for Common Ground, etc. But the fact remains that these experts – generally paid– either did not notice that the waivers complainants were asked to sign were flawed, or, if they did, were not able to persuade the company to make the necessary changes. Hired consultants, who commonly operate under confidentiality clauses, are an insufficient guarantee that complainants’ rights will be protected.
- Both Barrick and ABG maintain that the remedy they provided in Porgera and North Mara was comparable to what these victims of rape and violence by security guards and police would have received in court. This argument is made in order to justify waivers. It is impossible to assess this claim, as much related to the actual remedies is not transparent. As noted above, ABG responded to our requests for more detailed information on the remedies provided to claimants in the North Mara case by stating “we reiterate that it should not be anticipated that additional details about the remedies they [victims] have received will be forthcoming.”

Finally, in September 2013, the OHCHR weighed in on the issue of the use of waivers in project-level non-judicial grievance mechanisms.²⁶ The OHCHR noted that “[t]he Guiding Principles do not explicitly address the question of whether finality of a civil claim against a company which has identified its involvement with an adverse human rights impact can be achieved through operational-level grievance mechanisms.” This is a gap that urgently needs to be addressed.

The OHCHR further noted that “the presumption should be that as far as possible, no waiver should be imposed on any claims settled through a non-judicial grievance mechanism. Nonetheless, and as there is no prohibition per se on legal waivers in current international standards and practice, situations may arise where business enterprises wish to ensure that, for reasons of predictability and finality, a legal waiver be required from claimants at the end of a remediation process.” This opinion is not helpful. While it does set out a presumption against waivers based on the *OHCHR Rule of Law Tools for Post-Conflict States: Reparations Programmes*, it qualifies that rights-based presumption by referring to the wishes of corporations for finality.

EarthRights International, in the context of the Porgera case, responded to the OHCHR by stating: “We fundamentally believe that given the general lack of judicial oversight in countries where grievance mechanisms are most critical, legal waivers are *never* appropriate as a precondition for receiving benefits through a grievance mechanism for gross human rights abuses. Rather, they are yet another avenue through which victims of human rights abuse can be taken advantage of. At most, the value of benefits received through a grievance mechanism could be applied as an offset against any civil damage award that might be obtained through the courts.”²⁷ We believe this position is a good starting point for addressing an issue, the resolution of which is urgently required.

²⁶ http://www.miningwatch.ca/sites/www.miningwatch.ca/files/22_08_lw_rh_porgera_opinion.pdf

²⁷ <http://www.business-humanrights.org/Search/SearchResults?SearchableText=porgera>