

## **EASTERN PRODUCE KENYA INDEPENDENT MONITOR REPORT**

This is the first report from the Independent Monitor regarding the Operational Level Grievance Mechanism (“OGM”) at Eastern Produce Kenya Ltd. (“EPK”). The OGM is called TWEGUU AKASE, which translates to “Talk to me, I am listening” in Nandi. Pursuant to the structure of the OGM, under the current Terms of Reference, the Independent Monitor is to provide annual reports regarding the implementation of the OGM.<sup>1</sup>

We note at the outset that the Independent Monitor has received excellent cooperation in preparing this assessment, and a welcome embrace of suggestions made during the course of it. The OGM has been in full operation since May 2023, and is organized with two tiers. Tier 1 is managed by EPK and addresses operational grievances occurring during normal business operations. Tier 2 of the OGM is an independent process for grievances involving allegations of severe human rights impacts that have been caused by, contributed to, or are directly linked with EPK.

This report is based on an extensive review of documentary materials, a site visit during March 2023, and interviews relevant stakeholders.

### **I. Executive Summary**

*Development of the OGM:* The OGM was established as part of EPK’s commitment to respect human rights, consistent with the UN Guiding Principles on Business and Human Rights (UNGPs). With the assistance of Triple R Alliance (TRA), EPK conducted extensive stakeholder engagement between September 2021 and October 2022 (more than 1000 internal and

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<sup>1</sup> The review is to include assessments of the rigor of the OGM’s investigation and dispute-resolution process, the outcomes of the specific grievances received in terms of rights-compatibility, the adequacy, appropriateness and effectiveness of supports and safeguards for complainants and vulnerable groups, collective remedy options or programs that could deliver remedy more effectively and/or prevent future grievances, risks to effective OGM implementation and independence, and recommendations for improvements of the OGM process and outcomes.

external stakeholders on the OGM design process, and more than 2000 stakeholders through trainings and information-sharing sessions). Extensive feedback was received, which was integrated into the OGM's design in a variety of ways. Tier 1 began operating in October 2022. Tier 2 became operational in May 2023.

*Design of the OGM:* The OGM has a company-managed process (Tier 1) for grievances regarding operational impacts, and an Independent Human Rights Mechanism (IHRM) (Tier 2) for grievances that concern allegations of severe human rights impacts that have been caused by, contributed to, or are directly linked with EPK and/or its business partners. An extensive OGM Manual has been prepared to assist in the implementation of Tier 2, which continues to be honed based on the practical experience associated with administering it. A detailed SOP also has been developed for Tier 1. Both Tiers include qualified, dedicated lead personnel, with adequate resources given the current caseload and mandates. Tier 1 is located at management headquarters, and 2 is located offsite in a commercial office building.

Both tiers have the same 7 step process for receiving and processing grievances, with detailed guidance in the OGM Manual and Tier 1 SOP.<sup>2</sup> For Tier 2, grievances are investigated and remedy provided if the head of Tier 2 is satisfied that the claim has been established based on the balance of probabilities. Remedy is determined based on consultation with the claimant, and may include compensation. The Manual also describes a range of safeguards for claimants, as well as common challenges for OGMs. The Tier 1 SOP is similar in detail and process, with grievances evaluated for action by a Grievance Committee. Both Tiers include review processes if claimants are not satisfied with the outcome.

The design of the OGM is thorough and complete, and consistent with best practices for OGMs.

*OGM Cases:* Tier 2 has received 96 cases, closing 60 of them, and covering a wide range of issues. The claims involve both community members and EPK employees. On average, Tier 2 is receiving about 7-10 cases per month. The

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<sup>2</sup> Schematics for both tiers is reproduced in Appendix 2.

remedy being provided varies, and includes most prominently treatment and counseling. Tier 1 of the OGM receives roughly 20 grievances per month, varying between 12 and 28 new monthly cases. Most relate to labor and employment issues, but some relate to health and safety, environmental, sexual harassment, community projects, and human rights issues. Most grievances come from 5 locations. Reporting through grievance boxes is most common, and reporting to grievance officers, through the hotline and by text are also frequent access points. Roughly 43% of the cases are filed anonymously. Most cases at Tier 1 are resolved within indicative timeframes, and most claimants report satisfaction with the process and the outcomes.

*Methodology.* The Independent Monitor team assessed the OGM through a comprehensive review of documents and interviews, including of claimants and community members. That information was considered against a template consisting of 36 indicators and 84 sub-indicators, which seek to translate UNGPs 22, 29 and 31 into an assessment framework. Our template is found at Appendix 1.

*Analysis:* At a high level, both tiers of the OGM are operating with integrity, dedication, and a seriousness of purpose. While we have suggestions for improvements, they should not be construed to imply that either tier of the OGM is ineffective or faulty, particularly at the relatively early stages of their existence. To the contrary, consistent with the objectives of OGMs, both tiers of the OGMs are being actively socialized, grievances are relatively easy to lodge, the OGM is being utilized, affected stakeholders are increasingly comfortable lodging grievances, and grievances are being addressed by the OGM in a thoughtful and rights-compatible manner.

- **UNGP 22:**

- Observations: The OGM was established as one pathway of a larger ecosystem of remedy, without any substantive limitations. Both Tiers have received a wide variety of grievances. Remediation decisions for Tier 1 are developed by a Grievance Committee, while for Tier 2 remediation decisions are largely left to the discretion of the head of Tier 2. In practice, remedy generally has included referrals to doctors, wage repayment, contract renewals, workplace adjustments and similar steps. The

OGM also is being received as a tool to foster further engagement with affected stakeholders.

o Recommendations: We recommend: develop guidance on the kinds of remediation that should be considered in different circumstances - that might include discussions of “causing and contributing” to negative impacts, as opposed to being “directly linked” to negative impacts, as they are contemplated under the UNGPs<sup>3</sup> in the context of remedy considerations.

● **UNGP 29:**

o Observations:

- Workers, suppliers and visitors can submit claims directly to the OGM without first exhausting other avenues, and available pathways are actively used. The OGM does not preclude access to alternative state-based processes, and we have seen no evidence that claimants have been discouraged from its use and/or encouraged to seek remedy through other channels instead of the OGM. The OGM’s procedures expressly contemplate addressing remediation for harms, and remediation has been applied in practice. For Tier 2, remedy is to be provided if the head of Tier 2 determines that the evidence more likely than not confirms alleged facts, although in practice the OGM is providing victim assistance before any determination is made.
- The OGM Manual and Tier 1 SOP include detailed discussions remedies. For Tier 2, compensation is determined with reference to a detailed matrix (that has not yet been employed). There is a binding agreement involving independent counsel if claimants and the company reach agreements that involve monetary compensation (also not yet employed).

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<sup>3</sup> UNGP 22 provides that where businesses “have caused or contributed to adverse impacts,” they should provide for or cooperate in their remediation

- We have no concerns about the independence of Tier 2, which has many built-in safeguards, but given the adjudicative nature of Tier 2 we note that EPK pays the salaries of the Tier 2 participants and the appearance of independence may become more relevant going forward.

o Recommendations: We recommend: continue to consider steps to enhance the appearance of independence of Tier 2, particularly over time.

- **UNGP 31(a): Legitimate**

- o Observations:

- There are elements of independence and accountability built into the OGM's procedures, and they are respected in practice. Most obviously, they prominently feature an independent process with Tier 2 and the involvement of its head. Both tiers also have a review process, and the governance structures clearly define appropriate roles and responsibilities. Over time, it will be important to consider whether the review mechanisms are being accessed.
- There have been dozens of grievances filed across both tiers since operations began, signifying at least some level of trust in the mechanism. The claims vary widely, with an emphasis on workplace claims (Tier 1) and claims involving defilement, sexual harassment, gender based violence and similar human rights issues (Tier 2). Claimants appear to be becoming more comfortable reporting their concerns. **Most claimants to date have been men,** and most Tier 1 claimants report satisfaction with the process.
- The OGM is attentive to physical safety concerns for claimants and witnesses, and takes active steps in that regard. There are safeguards, such as anonymous reporting, available. Tier 2 also is located off-site in an office building among other businesses. The OGM Manual and Tier 1 SOP has detailed discussions of claimant safety, and internal and external stakeholders generally did not believe

that individuals were refraining from accessing the mechanism because of safety concerns.

o Recommendations: We recommend: that the OGM consider the reasons behind the substantial majority of men reporting, particularly in light of substantive concerns being raised.

- **UNGP 31(b): Accessible**

- o Observations:

- The OGM has undergone extensive promotional efforts, particularly among the workforce but increasingly outside of it. There have been numerous training efforts, including all EPK managers. The socialization efforts include key aspects related to the OGM's scope and processes. Further socialization efforts are being planned and occur on a monthly basis. There also are relevant infographic posters throughout the operation, along with t-shirts, wrist bands and stickers.
- There are numerous channels to lodge grievances, including in person, through a hotline, by text, by letter, drop boxes, and email. Referrals also have been made from counselors and shop stewards. Further socialization efforts aimed at increasing reporting access through local NGOs, dispensaries, schools, government agencies and others are underway. Security personnel also can be an access point, but further training is likely appropriate around human rights issues generally (in addition to OGM specifics).
- Barriers to claims, such as illiteracy, the lack of telephones, and safety, have been considered and addressed through the presence of the multiple reporting channels, permitting anonymous claims and other steps. Many of the key staff who can receive claims are women, which is beneficial in light of the nature of claims being received. We note that Tier 1 is located at management headquarters, where claimants who come in person may be viewed by management (which may deter people).

- The OGM's procedures and Manual strongly prohibit retaliation against individuals because they lodged grievances. The head of Tier 2 also undertakes risk assessments to identify potential retaliation concerns, and can investigate claims of potential retaliation; for Tier 1, retaliation claims are reported immediately to the Grievance Committee. Concern about retaliation was discussed extensively during stakeholder engagement at the design phase, and affected stakeholders have expressed concerns that filing grievances has led to workplace repercussions. More than 40% of complaints are anonymous. We also caution the OGM to pay attention to potential retaliation concerns among witness and community retaliation against claimants, at least where employee disciplinary actions are contemplated. Investigations may inevitably create tension for confidentiality, however.
  - While the OGM Manual discusses police referrals and engagement extensively, police investigations may take a substantial time to conclude, for various reasons.
- Recommendations: We recommend: continue socialization efforts around the OGM, and seek to identify additional potential referral points, including schools, dispensaries and through security personnel – developing a socialization plan for the year may be helpful in that respect; conduct focused human rights training for security personnel, which includes OGM-related access; consider steps to enable reporting at Tier 1 in person, without management scrutiny, such as an additional access point; develop a program to address potential fears of retaliation for reporting, both for claimants and witnesses, in the workforce, the villages and, if possible, in local communities; consider steps to conduct investigations in a manner that maximizes confidentiality of claimants and witnesses; develop an approach to concluding grievances while police action may still be pending, to avoid undue delays in grievance closure.

- **UNGP 31(c): Predictable**

- Observations:

- For both Tiers 1 and 2, the OGM has detailed implementing procedures and indicative timelines. Tier 2's procedures are supported by forms that are in English to ensure consistency, and the files are thorough and complete. There are clear and simple infographic posters for Tier 1 and Tier 2 that have been published widely, describing a structure that aligns with grievance submission, evaluation and resolution in practice.

In addition, while most of the relevant forms and documents related to OGM personnel translate the forms orally and explain their meaning in a language the claimant can understand, but the OGM may wish to have some of the forms translated or at least document in the file each time the documents are orally explained or translated. We also note that the OGM Manual and Tier 1 SOPs are not public (nor is there mention of them on the EPK website)

- Tier 1 and Tier 2 are staffed separately, allowing for better and more tailored resourcing evaluations. Tier 1's staff are able to capably address grievances that are filed within the relatively short (30 days) indicative timeframe, and it is overseen by a qualified Grievance Officer and the head of Human Resources. Tier 2 has a substantial budget and a highly qualified lead, as well as a legal assistant, investigator and expert counsellor available. There is substantial management support. We note that Tier 2 currently lacks an investigator, which is being addressed.
- The OGM's processes are intentionally flexible, and allow for adjustments depending on the needs of claimants and the facts of each case. Adjustments have been and continue to be made as the OGM matures.
- The OGM tracks cases against its indicative timeline and core processes, and follows its processes as contemplated.



There also is substantial management and Board of Directors reporting.

- o Recommendations: We recommend: continued reinforcement and socialization about the OGM's processes; for Tier 2, documenting in the file when translations of documents and decisions have been provided (or obtain translations of those documents); continue to actively seek a new investigator for Tier 2; consider steps to provide more information about the grievance process, whether through FAQs, town halls, or summaries on the EPK website, if the OGM Manual and Tier 1 SOP are not made public.
- **UNGP 31(d): Equitable**
  - o Observations:
    - Neither the SOP for Tier 1 nor the Tier 2 OGM Manual insist that claimants are advised of investigatory fact-finding, or invited to participate in investigations. That also does not occur in practice. An amendment to the OGM Manual and Tier 1 SOP may be appropriate to help drive greater access to information in fact-finding.
    - Claimants have been referred to counselors and medical professionals, and Tier 1 contemplates such support. The OGM Manual for Tier 2 also contemplates that support, along with independent counsel for settlements, and possibly other matters. There also are pathways for victims to seek compensation under Kenyan law related to victim assistance, and some provision in the OGM Manual for referrals, with the courts open for claims (although we understand there may be skepticism about the reliability of the local courts). The OGM Manual does not include terms for providing information to claimants on alternative pathways.
  - o Recommendations: We recommend: review the OGM Manual to greater integrate participatory fact-finding considerations; and

review the OGM Manual to greater consider how information about other pathways might be presented.

- **UNGP 31(e): Transparent**

- Observations:

- Under Tier 1, cases proceed quickly there is rapid claimant engagement. The head of Tier 2 communicates the results of her determination, and there is periodic engagement with claimants during the pendency of claims, but the OGM Manual does not contemplate regular updates and engagement with claimants and engagement in practice is informal and periodic.
- There has been substantial internal reporting on OGM progress for both Tiers, with detailed reports monthly to management and quarterly to the Board. The reports include metrics, photographs, successes and challenges. However, there is no public reporting on the OGM's progress, to date.

- Recommendations: We recommend: continued communication with claimants while their cases remain under investigation and consideration, potentially with guidance formalized in the OGM Manual; and consider publishing metrics and indicative information about the functioning of the OGM.

- **UNGP 31(f): Rights-compatible**

- Observations:

- Remedies are considered and provided to try to restore individuals to their pre-harm states, consistent with principles of compensation, rehabilitation, satisfaction, restitution and/or guarantees of non-repetition. Under both tiers of the OGM, remediation is tailored to the needs of individual claimants. For Tier 1, it has included steps to prevent recurrence through trainings, policy adjustments, employment actions and other

such activities, as well as monetary reimbursements. Tier 2 contemplates a similar array of measures. For Tier 2 remediation has largely focused on counselling and psychosocial services thus far. As the OGM matures, the OGM Manual and Tier 1 SOP contemplate a wide array of potential remediation consistent with international norms. By all accounts, the OGM treats claimants fairly and respectfully, and claimants have not expressed dissatisfaction with the process. There have been no negative NGO reports and engagement with local NGOs has been highly constructive with the potential for further collaboration.

- o For Tier 2, the OGM Manual, drafted with the support of TRA, contemplates access to potential experts, and to date, there has been fairly substantial engagement with counsellors and mental health professionals. Access to certain specialists, such as in gender based violence or youths and juveniles, has been more limited in light of available expertise.

- Recommendations: We recommend: consider identifying or developing counselors with expertise in gender-based violence or children; and continue efforts to engage with local civil society around improving the OGM, including access and in relation to remedy.

- **UNGP 31(g): Source of Continuous Learning**

- o Observations:

- o Both tiers of the OGM engage with claimants during and at the end of their engagements, though documenting the engagements is recommended. There is no formal process for seeking or considering feedback, however.
- o Both Tier 1 and Tier 2 actively consider a range of different patterns in the claims that are being filed, including the nature of the claims, the location from which the claims arose, the manner it was reported, the age and gender of the claimant, and other factors. This has led to a focused effort in certain

substantive areas, such as defilement cases. The pattern of reports also suggests that targeted activities to reduce juvenile pregnancy, gender-based violence, and sexual harassment may be appropriate. However, we believe the data collected can be further scrutinized and honed to identify potential follow-up activities, such as why reports generally come from certain areas, the reason for anonymous reporting, the majority of reports coming from men, and how age and gender may support additional targeted actions.

- o While metrics are being tracked, neither tier has KPIs to measure performance against goals.
- Recommendations: We recommend: develop guidance for seeking feedback from OGM participants, and document the feedback received; scrutinize metrics more closely for potential responsive action; and develop annual KPIs to evaluate effectiveness and performance.
- **UNGP 31(h): Based on Engagement and Dialogue**
  - o Observations:
    - Feedback is received sought from claimants and external stakeholders, and the OGM was developed following consultation with numerous employees and community members.
    - Both Tiers resolve grievances and provide remedy through dialogue.
  - o Recommendations: We recommend: include in reports recounting socialization efforts the information learned during those sessions and how it might be integrated into the OGM's future performance.

April 2024

## I. Background

### a. *Development of the OGM*

EPK operates tea estates, located in the Nandi Hills, approximately 350 kilometers from Nairobi. EPK owns five factories and seven estates and manages two client factories with three large associated estates. EPK also provides extension services to 7500 smallholder farmers, taking in green leaf to process into black tea. Teas are transported to Mombasa for shipping to global destinations. In terms of its operating approach, EPK has a Rainforest Alliance certification,<sup>4</sup> has established food safety management programs consistent with [ISO 22000](#), is a participant in the [Ethical Tea Partnership](#), and is a member of [Fairtrade](#). It also engages in substantial community-related social programs, including in relation to education, water and hygiene, and supporting a center at the local police station that focuses on gender based violence. It does not appear to have a human rights policy or public facing human rights program.

The OGM was established as part of EPK's larger commitment to respect human rights, consistent with the UN Guiding Principles on Business and Human Rights (UNGPs). With the assistance of TRA, between September 2021 and October 2022, EPK engaged with more than 1000 internal and external stakeholders on the OGM design process, and engaged with more than 2000 stakeholders through trainings and information-sharing sessions. Extensive feedback was received, which was integrated into the OGM's design in a variety of ways.

The design phase of the OGM concluded in August 2022. After a socialization campaign, discussed below, Tier 1 began operating in October 2022. Tier 2 became operational in May 2023.

### b. *Design of the OGM*

The OGM operates according to two tiers: Tier 1 is a company-managed process for grievances regarding operational impacts, and Tier 2 is an

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<sup>4</sup> Confirming that estates and factories have socio-environmental management systems and processes covering ecosystem conservation, wildlife protection, fair treatment and good working conditions for employees, integrated waste management and good community relations.

Independent Human Rights Mechanism (IHRM) for grievances that concern allegations of severe human rights impacts that have been caused by, contributed to, or are directly linked with EPK and/or its business partners.

An extensive OGM Manual has been prepared to assist in the implementation of Tier 2, which continues to be honed based on the practical experience associated with administering it. A detailed SOP also has been developed for Tier 1.

Both Tiers include dedicated lead personnel, who are committed, highly active, and well-suited for their roles. Tier 2 is led by a legal and human resources practitioner, with a legal degree and MBA. She has experience in engaging with vulnerable populations, conducting social audits, addressing employee grievances and concerns, and formulating and implementing human rights programs. She previously worked for other agricultural concerns, including Finlays, and has held board and management-level positions with Fairtrade. She is supported by a highly qualified legal administrative assistant and investigator, although the investigator role is currently vacant.

Tier 1 is under the oversight of Human Resources, led by a highly experienced human resources professional. She oversees a Grievance Officer who is from the community, and is deeply committed to her role.

The OGM contemplates independent investigators for Tier 2, an independent expert to review initial decisions by the head of Tier 2, and an Independent Monitor to evaluate the implementation of the OGM on an annual basis. Tier 2 has been established offsite, in an office building with other operating businesses. The process for receiving grievances at both Tiers proceeds along 7 steps:

1. Receive
2. Register and Acknowledge
3. Assess and Assign, or Refer
4. Investigate and Recommend
5. Adjudicate and Respond
6. Resolve or Review

## 7. Follow-up and Close Out.<sup>5</sup>

The OGM manual and Tier 1 SOP describes each step in detail. For Tier 2 in particular, after grievances are evaluated, the head of Tier 2 determines whether she is satisfied that the claim has been established based on the balance of probabilities.<sup>6</sup> If so, she considers what remedy might be appropriate, in consultation with the claimant, ideally reaching a proposed outcome based on the consent of all parties. That may include a full range of potential remedies, including apology, commitment to non-repetition, rehabilitation, financial compensation, non-financial compensation, community projects (collective remedy), and punitive sanctions. Where financial remedies are considered, they are evaluated against a matrix developed in conjunction with Kenyan lawyers, according to Kenyan legal standards.

The Manual also describes a range of safeguards, including interpreters, victim protection services, transportation and logistical support, psychosocial support, medical support, and independent legal representation. It discusses common challenges for OGMs, such as engagement with public security, and the importance of regular internal reporting, with trends, metrics and key performance indicators. It very consciously tracks feedback from stakeholder engagement efforts.

The Tier 1 SOP is similar in detail and process, with modest adjustments in light of the nature of the claims contemplated. Once received, grievances are subject to fact-finding, a review by the Grievance Officer, and a determination of appropriate action by a Grievance Committee. The SOP also includes detail as to each step of the grievance process, potential remedies, and a description of how remedies might be considered. There is a process to refer claims to a review mechanism where a claimant is not satisfied with the outcome of a grievance evaluation.

The design of the OGM is thorough and complete, and consistent with best practices for OGMs.

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<sup>5</sup> Schematics for both Tiers is in Appendix 2.

<sup>6</sup> The OGM Manual also contains guidance on how to evaluate the balance of probabilities in any given case.

## II. Methodology

As with all well-designed grievance mechanisms, the true test is how they are applied in practice. This assessment of the implementation of the OGM involved engagement with internal and external stakeholders, and a review of relevant documents. These included: files for concluded and ongoing cases; documents related to the formation and operation of the OGM, including terms of reference, procedures and guidance materials, and forms; changes to the OGM; training materials provided to OGM personnel; OGM promotional materials; curriculum vitae for individuals involved in the OGM; budgetary information; documents reflecting OGM monitoring and tracking; and metrics tracked by the OGM. It also included a site visit by the Independent Monitor.

The information gathered regarding the OGM was assessed against the UN Guiding Principles on Business and Human Rights, and in particular UNGP 31, reflecting the Effectiveness Criteria for Non-Judicial Grievance Mechanisms:

<b>Effectiveness Criteria</b>	<b>Description (developed by the Guiding Principles)</b>
<b>Legitimate</b>	Enabling trust from the stakeholder groups for whose use they are intended, and being accountable for the fair conduct of grievance processes
<b>Accessible</b>	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
<b>Predictable</b>	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
<b>Equitable</b>	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
<b>Transparent</b>	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
<b>Rights-Compa tible</b>	Ensuring that outcomes and remedies accord with internationally recognized human rights
<b>Source of Continuous Learning</b>	Drawing on relevant measure to identify lessons for improving the mechanism and preventing future grievances and harm



**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

More specifically, for each of these categories in UNGP 31, as well as UNGP 22 (regarding remediation generally) and UNGP 29 (regarding the establishment of OGMs), we utilized an assessment template developed by the Independent Monitor that appears at Appendix 1. In developing the template, we considered the UN Guiding Principles Assurance Guidance,<sup>7</sup> Shift’s Doing Business with Respect for Human Rights Guide,<sup>8</sup> CSR Europe’s Management of Complaints Assessment Results,<sup>9</sup> the ICJ’s Effective Operational-level Grievance Mechanisms,<sup>10</sup> assessment resources associated with leading multi-stakeholder initiatives,<sup>11</sup> and the indicators used for other grievance mechanism evaluation exercises. The template itself consists of indicators for each aspect of UNGP 22, 29 and 31, reflecting the degree of consistency between the OGM and its correlating UNGP. Each of the 36 indicators, in turn, contains tests or sub-indicators (84 sub-indicators in all) as well as minimum assessment tests. In our view, utilizing a template designed to evaluate consistency with the UNGPs allows for sustainable, repeatable and predictable outcomes, and enable greater confidence by external stakeholders in the integrity and legitimacy of the independent assessment.

### III. OGM Cases

Since inception, Tier 2 has received 96 cases, closing 60 of them. They cover a range of issues, including assaults, defilements, domestic violence, gender-based violence, sexual harassment and other violations. The claims involve both community members and EPK employees. On average, Tier 2 is

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<sup>7</sup><https://www.ungpreporting.org/assurance/#:~:text=The%20UNGP%20Assurance%20Guidance%20is,among%20other%20non%2Dfinancial%20reporting.>

<sup>8</sup> <https://shiftproject.org/resource/doing-business-with-respect-for-human-rights/>

<sup>9</sup> <https://static1.squarespace.com/static/5df776f6866c14507f2df68a/t/5e666810b7c6ef5fcd9bf296/1583769622168/MOC-A+Report.pdf>

<sup>10</sup> <https://www.icj.org/wp-content/uploads/2019/11/Universal-Grievance-Mechanisms-Publications-Reports-Thematic-reports-2019-ENG.pdf>

<sup>11</sup> See <https://www.voluntaryprinciples.org/resource/auditing-implementation-of-the-voluntary-principles-on-security-and-human-rights/>; <https://globalnetworkinitiative.org/wp-content/uploads/2018/08/Implementation-Guidelines-for-the-GNI-Principles.pdf>; <https://www.fairlabor.org/accountability/assessments/>.

receiving about 7–10 cases per month. The remedy being provided varies, and includes most prominently treatment and counseling.

Tier 1 of the OGM receives roughly 20 grievances per month, with monthly cases varying between 12 and 28. While most relate to labor and employment issues, others relate to health and safety, environmental, sexual harassment, community projects, and human rights issues. Most grievances come either from the East or Central regions, and in particular Kipkoimet, Kapsumbeiwa, Chemomi, Siret and Kepchomo. Reporting through grievance boxes is most common, and reporting to grievance officers, through the hotline and by text are also frequent access points. Roughly 43% of the cases are filed anonymously. Most cases at Tier 1 are resolved within indicative timeframes, and there have been some referred to Tier 2. Based on claimant surveys, most report satisfaction with the process and the outcomes.

#### IV. **ANALYSIS**

##### a. Introduction

At a high level, both tiers of the OGM are operating with integrity and dedication. The OGM appears to be operating largely as designed, with room for growth and expansion. Between both Tiers, the OGM receives some 25 claims per month. The OGM generally is applying its procedures as designed, although certain concerns – such as in relation to workplace retaliation – are present. The OGM receives significant management support, and has resources allocated to handle the caseload – although it will be imperative for Tier 2 to find new investigative resources. It conducts investigations, and is attentive to concerns about confidentiality and safety. Claims are being closed in reasonable time periods, with more complex cases understandably taking longer to conclude.

To be clear, the OGM is not perfect and we have provided certain recommendations. However, those suggestions should not be construed to imply that either tier of the OGM is ineffective or faulty, particularly at the relatively early stages of their existence.

Instead, we believe it is fair to evaluate any OGM from two perspectives. The first examines “the forest.” At their core, OGMs have three relevant components: (1) claimants are comfortable lodging and can readily lodge grievances, (2) those grievances are addressed by the OGM in a constructive manner, and (3) negative impacts are remediated through a human rights-compatible approach. At this early stage of the OGM, both tiers generally satisfy those components, and are functioning with a clear seriousness of purpose.

The second perspective examines “the trees.” It involves a granular analysis, with procedural and substantive components dictated by the UNGPs. The granular analysis applies best practices for OGMs, a standard that few OGMs will be able to meet. To that end, we believe an OGM can still serve its purpose even without full and complete alignment with each component of the UNGPs, much less the dozens of indicators and tests/sub-indicators we apply to assess an OGM against them. At that granular level, we do have a range of suggestions, below. Some are easy to implement, and are actively being considered. Others will be more involved.

The below analysis focuses on UNGPs 22 and 29, which are foundational, and then proceeds with a detailed analysis of the effectiveness criteria of UNGP 31. As noted above, we apply a range of indicators for each UNGP to enable a meticulous review. In terms of organization, for each UNGP, we describe the principle and its significance, identify the relevant indicators, discuss each indicator and then provide recommendations. We note that there is some overlap between indicators, and we have sought to avoid repetition where that has occurred.

#### b. UNGP 22

UNGP 22 states that where businesses identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes. In evaluating the OGM, the relevant consideration is whether:

- The OGM was established by the company as one pathway to remediate adverse human rights impacts that it has caused or to which it has contributed.

In this case, the OGM was established without any substantive limitations, to address instances in which EPK may have caused, contributed to, or been directly linked to negative human rights impacts. It was intentionally established as one pathway in a larger ecosystem of remedy. Tier 1 has received a wide variety of grievances, including those related to workplace issues, harassment, health and safety, and other areas. Tier 2 is similar, which reflect a variety of different potential severe human rights abuses.

Based on the early reports, the OGM already is being received as a mechanism to improve engagement with internal and external stakeholders. As a critical object of grievance mechanisms is to engage with stakeholders and prevent small issues from leading to conflict, this aspect of the OGM is important in terms of longer term social license and stakeholder engagement.<sup>12</sup>

We note that UNGP 22, as reflected in the OGM Manual, provides that where businesses “have caused or contributed to adverse impacts,” they should provide for or cooperate in their remediation, whereas if they are “directly linked” to negative impacts through activities in their value chains they should use their leverage to prevent or mitigate them. The OGM contemplates several forms of remediation for negative impacts, including compensation, counseling, and apologies. Reviewing the contemporaneous documents and case files, these steps are largely followed in practice.

We do have one suggested enhancement, however. The OGM Manual does not appear to reflect guidance in evaluating whether EPK has caused, contributed to, or is directly linked to a negative impact within the meaning of the UNGPs. Nor is that analysis reflected in the decisions of the head of Tier 2. In practice, however, she is taking a broad approach and evaluating whether there is evidence that the impact occurred on the company’s property or in

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<sup>12</sup> UNGP 29, Commentary; Jonathan Drimmer & Lisa Laplante, “*The Third Pillar: Remedies, Reparations and the Ruggie Principles*,” at 318-19, in “The Business and Human Rights Landscape: Moving Forward, Looking Back” (J. Martin & K. Bravo eds.) (2017); IHRB, EC Guide, Part 3, Chapter VI, Remediation and Operational-Level Grievance Mechanisms, at [https://www.ihrb.org/uploads/reports/EC-Guide\\_OG-12\\_Part-3\\_Section-VI.pdf](https://www.ihrb.org/uploads/reports/EC-Guide_OG-12_Part-3_Section-VI.pdf).

connection with its workforce or operations. Nonetheless, we believe the OGM would benefit from a clear definition of “cause and contribute,” particularly as the terms are distinguished from being “directly linked” to negative impacts, and written guidance regarding the kinds of remedy that may be appropriate in certain situations.

## **Recommendations**

- Provide guidance on how the OGM should consider the UNGPs “cause, contribute, directly linked” framework in application.

### a. UNGP 29

As another foundational principle, UNGP 29 provides: “To make it possible for grievances to be addressed early and remediated directly, business enterprises should establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted.” Relevant indicators include:

- Individuals who believe they have been adversely impacted by the company are able to access the OGM directly to raise their concerns, without first seeking other means of recourse.
- The OGM is designed to directly address remediation for any harms caused or contributed to by the company.
- The OGM does not impair access to other pathways to remediation (e.g., judicial or non-judicial accountability mechanisms).

While the effectiveness criteria in UNGP 31 provide specific standards to assess the OGM’s efficacy, UNGP 29 and its Commentary identifies several core elements of OGMs: (i) they are “directly” accessible by those adversely impacted by a company’s activities; (ii) they are administered by the company or a mutually acceptable party; (iii) they can serve as a first resort for affected stakeholders; and (iv) they are part of a larger ecosystem of remedy available to affected stakeholders, and do not prevent affected stakeholders from pursuing remedy through other pathways. Regarding the final point, we note that UNGP 31(f) also addresses this question, and we will discuss it here.

**Accessing directly.** As the Commentary to UNGP 29 states, OGMs should “not require that those bringing a complaint first access other means of recourse. They can engage the business enterprise directly in assessing the issues and seeking remediation of any harm.” Accordingly, an OGM can be accessed directly when, in design and implementation, any affected stakeholder can submit claims without first pursuing alternative pathways or satisfying additional criteria.

Here, employees, community members and other third parties can submit claims directly to Tier 1 and Tier 2 of the OGM. There are multiple avenues for submitting grievances to both Tiers, as discussed below in the context of accessibility. Several of those avenues are actively used, and there is no requirement that claimants exhaust other avenues or take additional steps before lodging a claim.

**Remediation.** Regarding the second sub-indicator, the OGM’s procedures expressly contemplate addressing remediation for harms connected to the company, regardless of whether the company caused, contributed to or is directly linked to those negative impacts. For Tier 1, remediation approaches vary widely depending on the nature of the grievance. They can include issuing PPE, payment of wages, transportation fees, disciplinary measures, re-engagement, housing, changes to workshifts, and similar items. For Tier 2, the head of the mechanism has a great deal of discretion in identifying and recommending remediation approaches. In practice, the case files and interviews with stakeholders confirm that she is identifying means of directly remediating negative impacts, which have included medical referrals, psychological counseling, referrals to Tier 1 and government institutions, and other approaches.

**Impairing access to other pathways.** The Commentary to UNGP 29 provides, “[OGMs] should not be used to undermine the role of legitimate trade unions in addressing labour-related disputes, nor to preclude access to judicial or other non-judicial grievance mechanisms.” Tiers 1 and 2 by their terms do not preclude access to alternative state-based processes. Instead, Tier 2 actively contemplates pursuing remedies in other forums where agreement cannot be reached around a claim. Nor have we seen evidence that claimants have been encouraged to refrain from seeking remedy through other channels.

*Quantum of Compensation.* Under the Tier 2's procedures and the OGM Manual, where claimants are able to reach agreements with the company that involve monetary compensation, the parties enter into a binding settlement agreement. Under the OGM Manual, the quantum of remedy will be what the head of the Tier 2 believes is equal to or greater than what could be obtained before Kenyan courts, according to a detailed matrix developed by an outside law firm. Having examined the matrix and the underlying research of Kenyan law, the analysis about the relevant quantum of remedy appears consistent with the stated intent. As compensation has not yet been provided, we are not in a position to review the process in practice yet.

*Binding Settlements.* Binding settlement agreements have been the subject of significant debate in the context of operational grievance mechanisms. However, the UN Office of the High Commissioner for Human Rights has made clear that binding agreements to resolve claims are permissible: "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."<sup>13</sup> The UNGPs *Interpretive Guide* has a similar perspective, stating, that if parties to a grievance "freely" agree on a solution, they "are free to agree also that it will be binding on them."<sup>14</sup> Accordingly, binding agreements such as the one contemplated by the OGM are not *per se* inconsistent with the UNGPs, and can offer a "predictability and finality" critical to remediating negative impacts.<sup>15</sup>

Nonetheless, binding agreements do place pressure on an OGM's substantive and procedural fairness, and having independent counsel available is critical to safeguarding the rights of claimants. While a claimant can choose not to consult a lawyer, of course, any waiver of rights must be knowing and voluntary, and having independent counsel available to advise a claimant about the rights being waived and the adequacy of any compensation is vital.

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<sup>13</sup> Office of the High Commissioner of Human Rights [OHCHR], "Re: Allegations regarding the Porgera Joint Venture remedy framework" (22 August 2013, at 6 [OHCHR Opinion]).

<sup>14</sup> OHCHR Interpretive Guide, at 66.

<sup>15</sup> OHCHR Opinion, at 8.

Here, the OGM Manual contemplates these issues. The Manual provides that where settlements are entered, independent counsel will be appointed for complainants (to the extent they do not have preferred counsel), who will be present and advise the claimant surrounding the settlement agreement. In practice, this has not occurred to date, and thus we cannot yet review implementation of this important aspect of Tier 2.

*Independence.* In evaluating whether compensation should be provided, there is nothing *per se* problematic with an adjudicative OGM. They are contemplated in the UNGPs,<sup>16</sup> and can help ensure legitimacy and predictability. However, the independence of the head of Tier 2 is critical for an adjudicative OGM, as there is an “inherent problem with a company being not only the subject of a grievance, but also the final judge of the outcome.” As one authoritative source notes, “This can undermine perceptions of the legitimacy of the process and the company’s seriousness about handling stakeholder complaints.”<sup>17</sup>

From our evaluation, we do not have significant concerns about relevant independence – the head of Tier 2 is treated as independent by EPK, she sees her role as independent, there is a review process to consider her decisions, and there is a further review by an independent monitor. The structure of Tier 2 also provides certain protections to help bolster that independence. Over the life of the OGM it will be critical to maintain that independence in practice and appearance, and thus continued attention to it is prudent. In that vein, we note that EPK funds the budget for Tier 2, and at some point as the OGM further matures, it may be appropriate to consider how the appearance of independence can be enhanced in light of that fact.

### **Recommendations:**

- Consider means of enhancing the appearance of independence for Tier 2 surrounding funding activities, at an appropriate time (whether through board oversight, funding through a trust, or other means).

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<sup>16</sup> GP 31(h), Commentary (“Where adjudication is needed, this should be provided by a legitimate, independent third-party mechanism.”).

<sup>17</sup> Doing Business With Respect for Human Rights, at <https://www.businessrespecthumanrights.org/en/page/349/remediation-and-grievance-mechanisms>.



b. UNGP 31

i. Legitimate: UNGP 31(a)

OGMs are legitimate when they generate trust from the stakeholder groups for whose use they are intended, and are accountable for the fair conduct of grievance processes. Trust can be retained only through consistently effective operations, adherence to the OGM's stated processes, and perceived and actual fairness in its approach and outcomes. For many OGMs, stakeholder trust might exist early in the OGM's existence but is eventually lost, and it will be critical for the company and the OGM's participants to retain their dedicated focus on UNGP 31 adherence.

Critical indicators involved in evaluating UNGP 31(a) include:

- The OGM was designed to include elements of independence and accountability, including those that prevent parties to the grievance from interfering with its fair conduct;
- The OGM is perceived as fair and legitimate by affected individuals and the local community; and
- Reasonable efforts are taken to ensure the safety and security of individuals who access the mechanism.

**Independence and accountability.** As the Commentary to UNGP 31(a) makes clear, "Accountability for ensuring that the parties to a grievance process cannot interfere with its fair conduct is typically one important factor in building stakeholder trust." Both elements of independence and accountability are built into the procedures of the OGM, and they are respected in practice.

Tier 1, reflecting operational concerns, is administered by management. Tier 2's procedures prominently features an independent process. These are led by the head of Tier 2, who is independent of the company. Her team includes legal support personnel, as well as independent investigators to gather and evaluate information in connection with claims, guided by detailed instructions around information gathering. Our engagement with relevant stakeholders raised no concerns about a perceived lack of independence.

Further, there also is accountability built into the process. The decisions of both tiers can be appealed and the OGM Manual and Tier 1 SOP sets out the specific process through which appeals can be taken and lodged. The extent to which the appeal mechanisms are used in practice will be evaluated as the OGM continues to mature.

**Perceptions of Fairness and Legitimacy.** Perhaps the most significant sign of trust in an OGM by the targeted stakeholders is whether the OGM is being used. In considering the pattern of claims filed under the OGM, dozens of claims have been submitted since the OGM became operational. For Tier 2 in particular, the OGM has received nearly 100 cases to date, including a variety of severe allegations and issues, including in particular defilement, gender based violence, and sexual harassment claims. OGM personnel also have expressed the impression that claimants are becoming more comfortable reporting their concerns, as the impacts of the OGM are increasingly visible. The case files and interviews with OGM personnel make clear that those complaints are being considered and addressed by the OGM, and in appropriate cases, remediation ultimately is provided.

We note, however, that a substantial majority of claimants have been men (about 65%). While there may be simple explanations for that, we suggest a review of the issue to gain confidence that women feel comfortable lodging concerns. If appropriate, the OGM might consider targeted efforts to encourage women to come forward, such as dedicated socialization efforts, roundtables and other means. That is particularly significant given the number of gender-based violence and sexual harassment claims, and potential underlying risks around both areas more generally.

**Safety.** From our review of documents, a visit to the OGM offices and interviews, it is apparent that the OGM is attentive to physical safety concerns for claimants and witnesses, and takes active steps to protect both. Tier 1 is located at EPK's offices. The offices for Tier 2 are located off-site, in an office building with a driving school and a variety of other businesses, such that individuals may be seen to visit the location for purposes other than lodging grievances. The OGM Manual places a premium on claimant safety, treating the concern for physical retaliation as a part of the OGM's Statement of Ethics

and Values. Other steps to prevent retaliation besides physical safety concerns are also taken, and referenced below under 31(b).



By and large, most internal and external stakeholders, including claimants, did not believe that individuals were refraining from accessing the mechanism because of safety concerns.

### **Recommendations.**

- Consider the reasons behind the fact that mostly men are reporting, and take appropriate steps (as needed) to encourage women to come forward.
  - ii. Accessible: UNGP 31(b)

OGMs are accessible when they are known to those stakeholder groups for whose use they are intended, and provide reasonable assistance for those who may face particular barriers to access. Critical indicators include:

- The OGM has been promoted to individuals and communities where affected individuals are likely to learn of it, in a manner that accounts for local culture, literacy and need, with information sufficiently widely disseminated to reach materially all potential;
- The OGM has multiple channels for accessing it, is easy to use, and is adapted to account for local cultural norms and language at every material step;

- The OGM has been designed and implemented to account for direct and indirect costs, and physical and nonphysical hardships, that may prevent effective access or enhance harms experienced;
- The design of the OGM has considered the potential (and perceived potential) for retaliation against affected individuals, who do not believe there will be retaliation against them for accessing the OGM or receiving remedy under it;
- The physical location of the OGM and its operating hours are conducive to accessing it; and
- The OGM has a process to provide reasonable assistance for affected individuals to effectively access the OGM, if needed.

**Promotion and understanding.** In evaluating the extent to which the OGM has been promoted, we seek to understand the plan to socialize the OGM to potentially affected individuals and communities and how that plan was executed, as well as the strategy to maximize the likelihood that affected individuals would understand the information conveyed.

The OGM has been – and continues to be – promoted extensively. There have been substantial employee briefings and trainings, and meetings with union leaders, local chiefs, the police, government, community members, local NGOs, and other internal and external stakeholders. For instance, all of EPK’s managers have been trained on the UNGPs, and the role of managers in putting these principles into practice. In addition, socialization efforts have covered the OGM’s scope, timeframes, and safeguards available to complainants, with particular attention to vulnerable populations. Additional planned efforts include engagement with the labor office, and further engagement with chiefs, churches, mosques, and governmental offices focusing on child welfare.

Infographic posters in multiple language identifying the steps to access the OGM predominate. There are t-shirts, stickers and wrist bands that also reference the OGM and relevant contact information. While further briefings in villages and local communities are contemplated and encouraged, it is obvious that the OGM has been well advertised, and claimants are responding by accessing the OGM.



**Channels to lodge.** In reviewing this indicator, we evaluate whether the OGM procedures contemplate multiple means of lodging grievances, taking into account local language and culture, as well as evidence that affected stakeholders believe the OGM is easy to access. In fact, there are multiple means of lodging complaints with Tier 1 and Tier 2. These include: sending an email, calling a hotline, sending a text, use of a drop box, writing a letter and advising a village headman, among other means. Referrals also can be made from counsellors, unions and shop stewards, a local NGO, and others. Further planned socialization among dispensaries, schools, local government and others will provide additional referral points.

Another potential approach to consider is for OGM personnel to lead roundtables among different workforce demographics, such as female workers, or younger male employees, to gain insights into workplace concerns; often engaging with a group of peers encourages workers to become more vocal, and can provide insights for workplace improvements.

Finally, while security personnel represent a potential source of referrals given their community facing roles, additional training of security is likely warranted. In particular, we note that security personnel often work in remote areas, and near forests and high grasses. Training on human rights is particularly important for security guards to understand their human rights responsibilities; and further training on how to identify and report potential human rights grievances caused by others can be part of that training.

**Addressing barriers.** The Commentary to UNGP 31(b) provides, “Barriers to access may include a lack of awareness of the mechanism, language, literacy, costs, [and] physical location.” In evaluating this indicator, we consider the extent to which the OGM consciously has sought to identify and address potential barriers to filing a claim.

The OGM has identified and consciously addressed several barriers that have been identified. These include illiteracy, transportation, language limitations, the inability to use telephones, and concerns about confidentiality and retaliation. To address illiteracy, OGM pathways were created to allow claimants can file claims by telephone, in person or by approaching the Grievance Officer. Claimants also can submit anonymous claims – and indeed, some 43% of cases are anonymous. Tier 2 is located at a distance from EPK in a location designed to maximize confidentiality. It receives complaints during office hours, maintains a toll free line, and allows WhatsApp grievances to be lodged 24 hours a day. The key OGM staff are female, which also is significant in the context of sexual harassment and gender-based violence claims. Tier 2 also contemplates legal assistance with claims, further addressing potential barriers that may otherwise hinder claimants from seeking remedy.

Tier 1 undertakes similar efforts. However, we note that to access Tier 1 in person, a claimant must pass by a guard at the front, and enter through a main entrance. There also is a potential for being observed by management. That physical access could deter claimants from appearing in person – although we did not receive reports supporting such a concern, the fact that more than 40% of grievances are anonymous suggests concerns about retaliation continue, and that the possibility exists. Considering how Tier 1 may

be accessed without management scrutiny, such as creating a community-based resource, will be worthwhile.

**Non-retaliation.** “[F]ears of reprisal” are recognized by the UNGPs as another potential barrier, in addition to the safety concerns noted in our evaluation of UNGP 31(a). In considering this issue, we pay particular attention to the OGM’s commitment against retaliation, evidence that individuals may have been intimidated from filing claims or retaliated against, and confidentiality provisions.

The OGM’s procedures expressly contemplate risks of retaliation for both tiers. For Tier 1, retaliation reports are forwarded to the Grievance Committee for actioning. For Tier 2, the procedure notes that the head of Tier 2 undertakes risk assessments to identify potential safety and retaliation concerns. The Manual addresses the potential for retaliation in depth, and vests the head of Tier 2 with authority to investigate claims of potential retaliation. Tier 2 also has a number of safeguards, including allowing claims to be filed confidentially, and locating it offsite in a place where individuals may go for other reasons. Other safeguards are explained to claimants at the outset of the process.

However, workplace retaliation concerns were a key focus during stakeholder engagement as part of the OGM design, and reports of potential retaliation should remain an area of focus. More than 40% of claims submitted are anonymous, suggesting potential reporting fears. One claimant reported that, although his supervisor – the cause of his grievance – was dismissed, his work function changed and his relationship with his new supervisor has suffered. OGM personnel also relayed some level of concern among managers when the OGM became operational, particularly junior level supervisors.

Of course, that is not a surprise. It is extremely common for individuals to have concerns that reporting may lead to negative repercussions from the company, third parties and community members. It is also extremely common, particularly early in the life of a grievance mechanism, for supervisors to react negatively to lodged concerns. Developing and maintaining trust in an OGM takes time and the type of assiduous effort being

employed by OGM personnel. While our primary suggestion is that the OGM, with the support of EPK, develop a targeted approach to addressing retaliation and fears around it, among the steps that might be considered are: adding statements of the OGM's non-retaliation stance to the infographic posters; having targeted training regarding non-retaliation for employees and supervisors; actively monitoring, perhaps with the support of Human Resources, potential changes to work conditions of employees to access the OGM; continued engagement with claimants during and after a claim is resolved to identify potential retaliation concerns; and integrating "bystander" training for managers and employees, encouraging them to report concerns if they see evidence of retaliation by others.

In that same vein, it will be important to consider non-retaliation approaches for witnesses in the context of investigations, and how to encourage witnesses to provide information without fear of repercussions. Finally, because claimants may live in close proximity to individuals against whom they are complaining, there may be a fear of repercussions in villages and the local community. While OGMs may emphasize employee discipline as part of a non-retaliation approach, considering how to protect individuals in their home communities is much more challenging, but also worthy of consideration in the OGM's anti-retaliation strategy.<sup>18</sup>

*Confidentiality.* Closely related to non-retaliation is claimant confidentiality, which is an important protection against retaliation. We saw clear evidence that OGM personnel take confidentiality concerns seriously. That is particularly true for Tier 2, which is a confidential process. Among the steps taken are locating Tier 2 offsite, seeking consent from claimants before contacting witnesses, and similar efforts.

However, we note that where investigations take place, there necessarily may be pressure placed on confidentiality. Actively considering how to conduct investigations in a manner to best protect confidentiality will be worthwhile.

*Public Security Engagement.* Finally, there has been fairly close interaction with the police around claims that have been lodged. Indeed, EPK helped

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<sup>18</sup> In part, that may warrant deemphasizing employee discipline except in cases where it is obviously appropriate, and emphasizing remediation for victims through job transfers and others steps with a victim-centered approach.



create a gender-based violence facility at the local police station, and has considered supporting a temporary safe-house for victims.

The OGM Manual discusses public security engagement extensively, anticipating that close interaction. However, delays in police action, as perpetrators may abscond (for instance), have created a challenge for the OGM. It will be important for the OGM to continue to progress claims of remediation to conclusion, regardless of police activity. The OGM can continue to monitor police progress, but that should not halt providing remediation and closing the grievance.

### **Recommendations.**

- Continue socialization efforts around the OGM, and seek to identify additional potential referral points, including schools, dispensaries and through security personnel. Developing a socialization plan for the year may be helpful in that respect.
- Conduct focused human rights training for security personnel, which includes OGM-related access.
- Consider steps to enable reporting at Tier 1 in person, without management scrutiny.
- Develop a program to address potential fears of retaliation for reporting, both for claimants and witnesses, in the workforce, the villages and, if possible, in local communities.
- Consider steps to conduct investigations in a manner that maximizes confidentiality of claimants and witnesses.
- Develop an approach to concluding grievances while police action may still be pending, to avoid undue delays in grievance closure.

#### iii. Predictable: UNGP 31(c)

Predictability is an important element of legitimacy and equitability. An OGM needs to provide a clear process to set claimants' legitimate expectations, which is met in practice, or it runs this risk of eroding stakeholder trust and undermining legitimacy: claimants cannot reasonably trust an OGM when processes and outcomes are arbitrary. At the same time,

a framework needs to maintain flexibility to adapt to differing situations. Further, an examination of resourcing, a common challenge for OGMs, is often useful in understanding risks to process adherence.

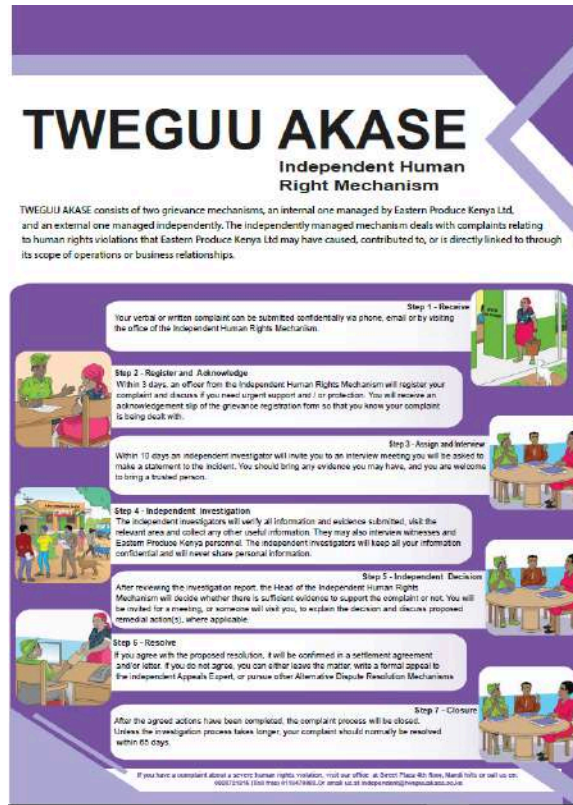
Key indicators for this principle include:

- The OGM was designed with clear steps for each material stage in the process, as well as safeguards specific to serious or sensitive grievances, with relevant timeframes;
- The material steps in accessing and seeking remedy under the OGM, as well as potential outcomes and indicative time frames, have been communicated to affected individuals in a manner they could easily understand;
- The OGM is sufficiently resourced to address the volume of concerns consistent with the indicative timeframes, and with sufficient internal expertise to address the range of grievances anticipated;
- The OGM maintained sufficient flexibility to adapt its processes to situations as needed to respect rights, including those of vulnerable populations or groups requiring assistance to access the OGM; and
- The OGM was designed to allow for monitoring and review of effectiveness of each key step, to identify gaps between the processes as designed and as implemented.

**Clear steps and communication.** In evaluating this factor, we examine the extent to which there are clearly established procedures, whether they are written in a manner accessible to claimants, and whether they include key aspects of how claims will be considered with indicative timelines. We also review the procedures and evaluate the extent to which they provide for engagement with claimants, provide support for claimants, and address how severe human rights impacts will be handled.

These sub-indicators are generally present with the OGM. Tier 1 has detailed indicative timelines that are followed in practice. For Tier 2, the OGM Manual contains some indicative timelines, although in practice more complicated grievances struggle to meet those relatively short deadlines given the complexity of the claims.

There are also clear and simple infographic posters that contain information about the OGM’s primary structure, processes, and key steps. The posters are in multiple languages to help explain the processes further.



The case files indicate that the anticipated steps have largely been followed in practice. The extensive OGM Manual sets forth detailed implementing procedures, supplemented by an impressive set of forms to ensure consistency. That includes: a Checklist Grievance Registration for first meetings with claimants, a Grievance Registration Form, an informed consent form regarding lodging a complaint, a Non-Disclosure Agreement form, an Incident/Complaint Form reflecting the core aspects of a claim, a request for information form, forms for statements, a Case Investigation Outcome Report Form, an Appeal Form, Grievance Closure Form, and forms for referring a case to another entity. The case files examined are thorough and complete, reflecting that the forms themselves are actually used in practice. They include intake materials, supporting evidence (including medical information and witness statements), and documentation reflecting the outcomes of the claims.

Nonetheless, because the grievance processes will be foreign to most claimants, continued efforts to socialize the key steps associated with lodging a claim, and reminding claimants of the key steps when they access the OGM, will be important. That includes providing contact information for follow-up. In addition, most of the relevant forms for Tier 2 appear to be in English. Many claimants may be illiterate, and/or cannot read English. In practice, OGM personnel translate the forms orally and explain their meaning in a language the claimant can understand. However, the OGM may wish to have some of the forms translated, and at a minimum, when the information about the forms and decisions is translated, it should be noted in the file to allow for auditability and to confirm comprehensiveness about this important aspect of claimant comprehension.

As another consideration, we note that the OGM Manual is not public. For transparency, and to allow stakeholders to gain a more complete understanding of the OGM – and thus confidence in the process – additional steps to make the OGM’s processes known, whether through a summary on the website, FAQs or town halls, is advisable.

**Resourcing & Expertise.** In scrutinizing the predictability of an OGM, we consider whether the company has provided sufficient resources to enable the effective operation of the OGM, given its nature and volume of its cases, in light of meeting indicative timeframes, altering published processes, or adjusting remedy decisions. We also consider the extent to which the OGM has individuals with appropriate training in the anticipated harms (e.g., sexual harassment and gender-based violence).

Tier 1 and Tier 2 are staffed separately, allowing for better and more tailored resourcing evaluations. While Tier 1 remains fairly limited in the size of its staff, it is able to capably address grievances that are filed in a timely manner. It is overseen by an experienced human resources lead, with a Grievance Officer familiar with the local community and committed to her role.

Tier 2’s resources to date also have been sufficient for the total workload. The mechanism has a substantial annual budget of 31,270,000 shillings. It includes the head of Tier 2, a legal assistant, a full time investigative position, and external counsellors. The current personnel are highly qualified for their roles,

and there is a strong gender-balance. It has multiple separate workspaces in a local commercial office building. Lodged claims to date have progressed without delay attributable to the OGM or resourcing concerns.

The primary resourcing concern at this point is the current lack of an investigator. The previous investigator departed, and it will be imperative that a new investigator is retained as soon as feasible. The OGM and EPK management are aware of the issue, and are actively seeking to address it.

**Flexibility.** While OGM processes should be predicable, they should not be rigid. It is important for OGMs to maintain sufficient flexibility to adapt their processes to situations as needed, particularly to respect rights in any given case.

In this instance, the processes for the OGM are detailed, but their flexibility is evident from the fact that the processes continue to be honed based on claimant experience and stakeholder feedback. Further, for Tier 2, the processes vest substantial discretion in its head to make recommendations and tailor processes to fit each case. That includes how matters are investigated, the appointment of counsel, notification of state authorities, and remediating impacts.

**Tracking.** It is important for OGMs to take steps to ensure consistency between their material steps as designed and their activities in practice. In particular, it is important to have consistency in how severe human rights cases are considered.

Both Tiers actively track their cases, using detailed charts and graphs. For instance, for Tier 2, the OGM closely tracks its cases in an extensive excel spreadsheet that includes 40 different inputs. These include the date of receipt and registration, the group and area of origin, the type of complaint, the access point used, the status of the case, whether a consent form was signed, the target date for closure, any referrals, remedies provided, claimant satisfaction, and a range of other issues. Both Tiers aggregate and report their data monthly. For Tier 2, the monthly reports include charts and graphs identifying claims by gender, by age, per area of origin, per group of origin, and other factors. Although the OGM is relatively young, both Tiers appear to

have infrastructure to track and follow their cases against key procedures in an organized and efficient manner.

### **Recommendations.**

- Reinforce discussions about the OGM's processes.
- Document in the file when translations of documents and decisions have been provided (and/or obtain translations of those documents).
- Continue to actively seek to retain a new investigator.
- Consider steps to provide more information about the grievance process, whether through a summary on the website, FAQs, town halls, or otherwise, if the OGM Manual is not made public.

#### iv. Equitable: UNGP 31(d)

OGMs are equitable when they seek 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. That may include advice on processing claims, on alternative remedy pathways, and on information collected during fact-finding. Relevant UNGP 31(d) indicators include:

- The OGM was designed to provide affected individuals with equal access to information collected during any fact-finding process, and implemented consistent with that design;
- The OGM provides information to affected individuals about alternative pathways to remedy;
- The OGM will provide claimants access to independent expert advice as required (including in relation to severe impacts and in connection with settlement agreements); and
- The OGM includes independent processes to mitigate perceived power imbalances, and has the flexibility to implement additional measures if a perceived power imbalance exists.

**Access to information.** Under this indicator, we consider the extent to which the OGM provides individuals with the same results of fact-finding that the OGM itself receives.

Neither the SOP for Tier 1 nor the Tier 2 OGM Manual insist that claimants are advised of investigatory fact-finding, or invited to participate in investigations. That also does not occur in practice, as claimants are advised about outcomes of their grievances, but not about fact-finding specifically. An amendment to the OGM Manual and Tier 1 SOP may be appropriate to help drive greater access to information in fact-finding.

**Independent advice & processes.** Under this indicator, we consider whether claimants have at least one alternative pathway available to them, and that the OGM provides them with information about that pathway. We also consider whether expert advisors are made available to claimants, and that those advisors engender confidence in claimants when appointed.

As discussed above, for Tier 2 in particular, claimants have been referred to counselors and medical professionals. Tier 1 also contemplates such support. The OGM Manual also contemplates independent counsel for settlements, and possibly other matters, in relation to Tier 2.

We also note that there are pathways for victims to seek compensation under Kenyan law related to victim assistance, and some provision in the OGM Manual for referrals. The courts also are open for claims, although in other matters stakeholders have expressed concerns about the reliability of the courts. The OGM Manual does not include terms for providing information to claimants on alternative pathways, though early in the OGM's lifecycle that has not been a significant issue.

### **Recommendations.**

- Review the OGM Manual to greater integrate participatory fact-finding considerations.
- Review the OGM Manual to greater consider how information about other pathways might be presented.

#### v. Transparent: UNGP 31(e)

OGMs are transparent when they keep parties to a grievance informed about its progress, and provide sufficient information about the mechanism's performance to build confidence in its effectiveness and meet any public

interest at stake. The Commentary to UNGP 31(e) provides, “Communicating regularly with parties about the progress of individual grievances can be essential to retaining confidence in the process. Providing transparency about the mechanism’s performance to wider stakeholders, through statistics, case studies or more detailed information about the handling of certain cases, can be important to demonstrate its legitimacy and retain broad trust.” This principle thus targets three separate groups, with three separate aspects of transparency: communication with claimants about their claims to engender trust in the mechanism, communication with wider stakeholders to help show the OGM is operating fairly, and communication with internal stakeholders (including management) to identify the extent to which the OGM is operating consistent with its processes and UNGP 31.

Relevant indicators include:

- The OGM was designed to provide, and provides in practice, regular updates to claimants about the status and progress of their claims.
- The OGM was designed to provide, and regularly provides, public reports of its performance (whether through KPIs and metrics, case studies, and/or handling certain cases), while respecting claimant confidentiality; and
- The OGM provides internal reporting consistent with relevant international reporting standards under the UNGPs.

**Providing updates to claimants.** In reviewing this issue, we consider whether the OGM was designed to provide regular updates to claimants on the progress of their cases with sufficient information to engender trust in the OGM, and whether those updates have occurred in practice. For Tier 1, cases proceed quickly, and engagement with claimants occurs rapidly. For Tier 2, the head of the mechanism communicates the results of her determination, and there is periodic engagement with claimants during the pendency of claims.

However, the OGM Manual does not contemplate regular updates and engagement with claimants, and the engagement in practice is informal and periodic. A greater degree of guidance related to ongoing engagement during the pendency of a claim (and thereafter) would be prudent. In those



communications, the OGM can inquire whether the claimant has additional information, and/or whether other concerns have arisen (such as retaliation).

**Public reporting.** In evaluating this indicator, we seek to examine whether there is a process to collect and publicly report meaningful data on the progress of the mechanism, with the goal of creating public confidence in the OGM's operations. A great deal of data is collected regarding both Tier 1 and Tier 2. That includes detailed information about the date and origin of claims, the type of claims, the age and gender of victims, the reporting mechanisms being utilized, and the outcomes of the grievance. However, to date, the OGM has not made such information public. Indeed, the EPK website itself contains no reference to the OGM, much less its processes or usage.

**Internal reporting.** Regarding this issue, we focus on the extent to which substantive information and relevant metrics and patterns are reported internally to OGM personnel and the company, to enable the company to evaluate the OGM against its processes and UNGP 31's effectiveness criteria. Both Tiers regularly report on their progress to management and the Board of Directors, including monthly to management and quarterly to the Board. The reports contain substantial detail, including socialization efforts, information on new cases and cases to date, the status of ongoing cases, engagement with and support to victims, and a breakdown of cases by location, group of origin, and type. They also include photographs reflecting the informational content. The reports may also reflect existing challenges, and future planning. Tier 1 and Tier 2 report regular engagement with each other to discuss trends, patterns and issues.

### **Recommendations.**

- Continued communication with claimants while their cases remain under investigation and consideration, potentially with guidance formalized in the OGM Manual.
- Consider publishing metrics and indicative information about the functioning of the OGM.

vi. Rights-compatible: UNGP 31(f)

OGMs are rights compatible when they provide outcomes and remedies that accord with internationally recognized human rights. It is important that the processes established for OGMs reflect internationally recognized remedies and that the OGM has access to experts to assist appropriate outcomes. Key indicators include:

- The OGM was designed to provide, and does provide, outcomes and remedies consistent with international norms, as appropriately applied in the local context;
- The OGM has access to experts in international human rights and local culture in considering appropriate outcomes and remedies.
- Claimants believe that the outcomes and remedies they received are equitable and proportionate in light of the specific harms as reflected in their claims.
- The OGM does not impair the rights of claimants to seek accountability through other mechanisms.

**International norms.** The key question for this indicator is whether the OGM remediates impacts to restore individuals to their pre-harm status, through compensation, rehabilitation, satisfaction, restitution and/or guarantees of non-repetition. Under both tiers of the OGM, remediation is tailored to the needs of individual claimants. For Tier 1, it has included steps to prevent recurrence through trainings, policy adjustments, employment actions and other such activities, as well as wage reimbursement. Tier 2 contemplates a similar array of measures. To date, it has largely included psychosocial support and counselling, as well as training and further socialization. However, as the OGM matures, the OGM Manual and Tier 1 SOP contemplate a wide array of potential remediation consistent with international norms.

**Access to experts.** The key question for this indicator is whether experts have been consulted to provide advice on appropriate outcomes. For Tier 2, the OGM Manual, drafted with the support of TRA, contemplates access to potential experts, and to date, there has been fairly substantial engagement with counsellors and mental health professionals. Engagement with schools and others also has occurred.

However, we note that gaining access to certain specialists – such as in gender based violence, or youths and juveniles – is advised in light of the cases that are arising. The counsellors to date may not have such expertise, and either enabling additional training or identifying further resources is advised in light of the seriousness of the claims being advanced.

**Equitable outcomes and remedies.** We consider whether claimants were satisfied by remediation of negative impacts and found the process fair, and there are no larger NGO campaigns or reports about remedies that must be evaluated.

By all accounts, the OGM treats claimants fairly and respectfully, and claimants have not expressed dissatisfaction with the process – to the contrary, the reports generally have been positive. Nor have there been negative NGO reports. In fact, the OGM is actively engaging with NGOs for greater collaboration, including cross-referrals, information sharing, and an additional access point.

**Impairment of rights.** For this indicator, we evaluate whether claimants are hindered in pursuing claims through other channels, and are made aware of their rights to do so. As discussed in the context of UNGP 29, there is nothing in the design of the OGM, or how it functions, that prohibit individuals from pursuing claims through other channels.

### **Recommendations.**

- Consider identifying or developing counselors with expertise in gender-based violence or children.
- Continue efforts to engage with local civil society around improving the OGM, including access and in relation to remedy.

#### vii. Source of Continuous Learning: UNGP 31(g)

OGMs should serve as a source of continuous learning, providing lessons to improve the mechanism and prevent future harms. That includes obtaining and considering feedback from affected stakeholders and their representatives, as well as identifying patterns and trends from the grievances that are lodged.

Key indicators include:

- Feedback on experience with the OGM is solicited from users on an ongoing basis, including in regard to predictability, accessibility, transparency, equitability, and remedy, with responses considered for potential adjustments;
- The OGM was designed to, and in fact does, identify patterns, trends, and key learnings for (a) its own potential improvement, and (b) the prevention of future harms at the company;
- Patterns, trends and lessons from the OGM were (a) considered and/or acted upon to improve the mechanism, and (b) shared with the company to prevent future harms; and
- The OGM established context-appropriate KPIs that were tracked and fairly measured.

**Soliciting feedback.** In considering this indicator, we focus on evidence that the OGM engages with claimants to gain insights into their experiences, and that the results of those consultations are considered on an ongoing basis.

Both Tiers engage with claimants, as well as a variety of stakeholders, where feedback is obtained. We were advised that the feedback that is received is actively considered by both OGMs, and contributed to adjustments in relevant OGM processes.

However, there are no formal processes for seeking or considering feedback. This is particularly significant in the context of retaliation concerns above. Further, claimant perspectives on their experiences can change over time. We suggest developing a guidance or procedure that supports periodic engagement with claimants during and after a claim is filed, and documenting the feedback received.

**Pattern identification & action.** The Commentary to UNGP 31(g) provides, “Regular analysis of the frequency, patterns and causes of grievances can enable the institution administering the mechanism to identify and influence policies, procedures or practices that should be altered to prevent future harm.” Both Tier 1 and Tier 2 actively consider a range of different patterns in the claims that are being filed, as referenced above.

The analysis of claim patterns has led to changes in OGM and company practices. For instance, Tier 2 identified a troubling pattern of defilement cases from villages. The company and OGM engaged in a range of measures, including increasing the presence of the headmen in the villages, weekly engagement between the OGM and headmen, socialization and education, redesigning Wendy houses, and introducing holiday activities to keep children busy when not in school. As a result, it appears that defilement cases are decreasing. Further, the pattern of activities also suggests that targeted activities to reduce juvenile pregnancy, gender-based violence, and sexual harassment may be appropriate, and the OGM is engaging with EPK management around each of these issues.

However, while the collection of data is important, based on our observations, we believe it can be further scrutinized and honed. As an example, for Tier 1, reporting seems to proliferate from a few locations. The reasons are not completely clear. It could be based on the population size of the estates (such that total reports are relatively commensurate with the number of workers and residents). Or perhaps there have been greater socialization efforts in those locations. The imbalance also could signal more troubling issues, such as greater harms on the reporting estates that warrant further remedial efforts, or fear of reporting in the non-reporting estates. Regardless, a greater focus on the meaning of collected metrics, and further action based on them, is suggested.

Likewise, we are highly supportive of collecting the age and gender of victims. However, the information gathered can perhaps lead to targeted socialization efforts. For instance, in many geographies it is common for younger workers to be more vocal, and if younger workers are not reporting to the OGM, they could be targeted for training or asked to participate in roundtables to support efforts to improve the OGM. Likewise, as noted above, the substantial number of men who report could indicate that targeted efforts toward women are appropriate.

**KPIs.** In considering this indicator, we seek to examine whether the OGM has established and tracks performance against KPIs to demonstrate its

robustness and effectiveness. To date, while both Tiers actively track metrics, neither have key performance indicators to measure their goals and performance against them. We encourage the development of KPIs over the next year.

### **Recommendations.**

- Develop guidance for seeking feedback from OGM participants, and document the feedback received.
- Scrutinize metrics more closely for potential responsive action.
- Develop annual KPIs to evaluate effectiveness and performance.

#### viii. Based on Engagement and Dialogue: UNGP 31(h)

UNGP 31(h) provides that OGMs should be “Based on engagement and dialogue: consulting the stakeholder groups for whose use they are intended on their design and performance, and focusing on dialogue as the means to address and resolve grievances.” The critical question the principle seeks to address is whether the OGM was developed based on collaboration with the affected stakeholders for which it was designed, which assists in providing a form of consent to the OGM as a process to resolve grievances through a mutually developed approach. That collaborative approach is not fixed in time, and continuous feedback by users of the mechanism (as reflected in UNGP 31(g)) is important to its growth, development and improvements. In addition, we consider the extent to which dialogue and collaboration are the means to address and resolve grievances. Key indicators include:

- The mechanism was designed following meaningful engagement with affected individuals, their representatives, and community groups about the grievance process and outcomes, with their perspectives integrated.
- The OGM solicits and receives regular feedback from affected individuals, their representatives and community members on its performance.
- The mechanism was designed to, and in fact does, focus resolution of grievances on dialogue and joint problem solving.

**Engagement.** The Commentary to UNGP 31(h) provides that “affected stakeholders” should be consulted about the OGM’s design and performance.

For OGMs, “affected stakeholders” are a particular type of critical stakeholder for engagement. Where affected stakeholders cannot be consulted, under UNGP 18, “credible, independent expert resources” may be appropriate substitutes. In addition, engagement with affected stakeholders should be ongoing. Claimants who have been through the OGM may be best positioned to provide advice on how it can be improved through their first hand experiences. Their input is not theoretical, but grounded in participation, and establishing processes for affected stakeholder engagement in real time – such as through closeout meetings – can help improve the OGM. Further, the perspectives of affected stakeholders may change and mature over time, and thus periodic engagement after claims have been closed can also be useful. Finally, good faith stakeholder consultation involves “meaningful” engagement, in which perspectives are seriously considered and where appropriate integrated into OGM design or adjustments.

In this case, while feedback is discussed above, we note that the OGM was developed following consultation with numerous employees, community members, chiefs, claimant representatives, and others. Those consultations continue. Tier 2 representatives continue to meet with government, church, police and school officials, seeking to socialize the OGM and receive further inputs. Those socialization efforts are included in Tier 2 Board reports. However, we suggest memorializing in those reports how information gleaned during the socialization efforts is being integrated into OGM operations and adjustments.

**Dialogue.** The OGM Manual and Tier 1 SOP contemplate the resolution of disputes through dialogue. That said, Tier 2 is an adjudicative OGM, such that claims are investigated and evaluated based on a probability of the evidence. Nonetheless, when remedy is provided, it is determined through dialogue with claimants, with guidance provided by the OGM Manual. Further, the head of Tier 2 actively recognizes that when a claimant comes forward, the issue being reported might not represent the true underlying problem. She seeks to engage in dialogue to gain a fuller understanding of the claimant’s specific circumstances, to identify issues that might not be raised in the first instance. This is an important practice that should continue.

**Recommendations.**

- Include in reports recounting socialization efforts the information learned during those sessions and how it might be integrated into the OGM's future performance.



## APPENDIX 1

### Assessment Template: Indicators, Tests and Evidence

#### EVALUATION OF THE OPERATIONAL LEVEL GRIEVANCE MECHANISM: PRINCIPLES, INDICATORS AND ASSESSMENT TESTS

##### Introduction

To assist in evaluating the Operational Level Grievance Mechanism (OGM), we have prepared the following assessment template. The template consists of certain indicators, assessment tests, and the type of evidence to review for each test. The indicators themselves were designed to correlate to the UN Guiding Principles on Business and Human Rights (UNGPs), and in particular UNGP 31, relating to the effectiveness criteria for non-judicial grievance mechanisms. In developing the indicators, we considered the UN Guiding Principles Assurance Guidance,<sup>19</sup> Shift's Doing Business with Respect for Human Rights Guide,<sup>20</sup> CSR Europe's Management of Complaints Assessment Results,<sup>21</sup> the International Commission of Jurist's Effective Operational-level Grievance Mechanisms,<sup>22</sup> assessment resources associated with leading multi-stakeholder initiatives,<sup>23</sup> and the indicators used for other grievance mechanism evaluation exercises. We also conferred with Triple R Alliance (TRA), and reviewed indicators that TRA and its expert personnel have developed and used.

We believe that in the context of our instruction as Independent Monitor, utilizing a template will allow for

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<sup>19</sup><https://www.ungpreporting.org/assurance/#:~:text=The%20UNGP%20Assurance%20Guidance%20is,among%20other%20non%2Dfinancial%20reporting.>

<sup>20</sup> <https://shiftproject.org/resource/doing-business-with-respect-for-human-rights/>

<sup>21</sup> <https://static1.squarespace.com/static/5df776f6866c14507f2df68a/t/5e666810b7c6ef5fcd9bf296/1583769622168/MOC-A+Report.pdf>

<sup>22</sup> <https://www.icj.org/wp-content/uploads/2019/11/Universal-Grievance-Mechanisms-Publications-Reports-Thematic-reports-2019-ENG.pdf>

<sup>23</sup> See <https://www.voluntaryprinciples.org/resource/auditing-implementation-of-the-voluntary-principles-on-security-and-human-rights/>; <https://globalnetworkinitiative.org/wp-content/uploads/2018/08/Implementation-Guidelines-for-the-GNI-Principles.pdf>; <https://www.fairlabor.org/accountability/assessments/>.

sustainable, repeatable and predictable outcomes, enhance transparency and predictability, and enable greater confidence by external stakeholders in the integrity and legitimacy of the independent assessment.

It is important to understand that the assessment template is not a “test” intended to specifically determine whether an OGM is effective or ineffective. The template will not yield passing or failing grades. Rather, it is a tool to help evaluate how an OGM may be designed or improved, the kind of documentation it might seek to generate and collect to allow for auditability and review, how it is perceived by a range of stakeholders, the way that it considers and reports information internally and externally, and other steps. Accordingly, evidence that is lacking for certain tests does not mean the OGM is weak or inadequate. It may mean that certain documents were simply not collected, or that responses from affected stakeholders are shaded by a desire for or disappointment with certain outcomes. Even a determination that certain indicators are not met is not necessarily indicative of a “problem.” It may simply mean, for instance, that the indicators are not particularly relevant at that time or in that circumstance. In other words, the template is merely a device to translate the UNGPs into actionable steps “for designing, revising or assessing a non-judicial grievance mechanism” in an organized and coherent manner, and thus facilitate the kind of benchmarking that the Commentary to UNGP 31 expressly contemplates.

**Appendix 1**  
**Assessment Template: Indicators, Tests and Evidence**

	Where business enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes.	
<b>INDICATOR</b>	<b>EVIDENCE RELATED TO INDICATOR</b>	<b>EVIDENCE REVIEWED</b>
The OGM was established by the company as one pathway to remediate adverse human rights impacts which it has	<ul style="list-style-type: none"> <li>• The OGM’s formation documents, or other information, identifies that the company established the OGM to remediate negative human rights impacts to</li> </ul>	<ul style="list-style-type: none"> <li>• Review the OGM’s formation documents or other materials consistent with its formation to identify the purposes for which it was created.</li> <li>• Review 5 or more grievance files to identify intake forms and</li> </ul>

<p>caused or to which it has contributed.</p>	<p>which the company is connected.</p> <ul style="list-style-type: none"> <li>• Where individuals have been harmed at least in part due to actions, decisions or omissions of the company, there is evidence that the OGM has provided, contributed to or otherwise assisted in enabling remediation.</li> </ul>	<p>investigative reports to determine (i) whether the company reasonably determined that it did or did not cause or contribute to negative impact,<sup>24</sup> and (ii) if so, how remediation was determined.</p> <ul style="list-style-type: none"> <li>• Interview (a) OGM personnel and (b) 3 or more claimants in which remedy was provided to confirm: (i) that the OGM in fact evaluated grievances, (ii) that there was a negative impact and the company reasonably caused or contributed to it, (iii) the OGM discussed remediation approaches with claimants, and (iv) that remediation was provided.</li> </ul>
	<p>To make it possible for grievances to be addressed early and remediated directly, business enterprises should establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted.</p>	
<p><b>INDICATOR</b></p>	<p><b>EVIDENCE RELATED TO INDICATOR</b></p>	<p><b>EVIDENCE REVIEWED</b></p>
<p>Individuals who believe they have been adversely impacted by the company are able to access the OGM directly to raise their concerns, without first seeking other means of recourse.</p>	<ul style="list-style-type: none"> <li>• OGM procedures allow access to any individual or group potentially adversely impacted by the company's actions, decisions or omissions.</li> <li>• There is no evidence that the OGM requires that groups directly at risk of human rights impacts due to the company's</li> </ul>	<ul style="list-style-type: none"> <li>• Confirm the total number of grievances filed, to validate usage of the OGM.</li> <li>• Review the OGM terms of reference to confirm that they allow any individual or group to file claims without first seeking other means of recourse.</li> <li>• Interview (a) OGM personnel and (b) 3 or more claimants to</li> </ul>

<sup>24</sup> Cause in this sense is whether the company's activities on their own without other stakeholders were sufficient to cause a negative human rights impact. OHCHR Letter to Banktrack (2017), pg. 5. Contribution generally occurs in one of two ways: (1) via a third party, or (2) when acting in conjunction with another entity. The first type of contribution occurs when business takes an action or decision that "creates strong incentives for the third party to abuse human rights" or "where a company facilitates or enables such abuse." OECD Guidance, at 70; The UN Guiding Principles on Business and Human Rights and conflict affected areas: obligations and business responsibilities, at 973. In the second type, contribution can take place when a business activity leads to negative collective or cumulative impacts, such as drawing water from a well with other businesses that leaves little left for local residents or farmers (collective) or a relatively minor impact that over time leads to a significant impact (cumulative). IBA Guidance (2016), at pg. 20-21.

	<p>actions, decisions or omissions (“affected individuals”) file grievances through third parties or alternative processes.</p> <ul style="list-style-type: none"> <li>• There is no evidence that the OGM requires “exhaustion” of alternative pathways of remediation.</li> <li>• There is evidence of individuals or groups raising complaints to the OGM directly.</li> </ul>	<p>confirm that claims have been filed immediately and directly without first seeking other means of recourse.</p>
<p>The OGM is designed to directly address remediation for any harms caused or contributed to by the company.</p>	<ul style="list-style-type: none"> <li>• The OGM has clear procedures through which it systematically considers how it may provide, contribute to or otherwise enable remediation for individuals who have been harmed by the company’s actions or decisions.</li> <li>• There is evidence that OGM remediation efforts have been or are being implemented.</li> </ul>	<ul style="list-style-type: none"> <li>• Review OGM procedures for claim consideration to identify whether its processes clearly set forth how it will (i) receive, (ii) evaluate, and (iii) remediate claims.</li> <li>• Interview (a) OGM personnel and (b) 3 or more claimants whose grievances have been remediated to confirm that the OGM procedures for (i) receiving, (ii) evaluating, and (iii) providing remediation have been followed.</li> </ul>
<p>The OGM does not impair access to other pathways to remediation (e.g., judicial or non-judicial accountability mechanisms).</p>	<ul style="list-style-type: none"> <li>• OGM procedures specifically address non-hindrances of claimants seeking remediation through other pathways.</li> <li>• There is no evidence that in practice the OGM requires claimants to waive their right to access other pathways to remediation.</li> <li>• There is no evidence that individuals were pressured or coerced by the company or</li> </ul>	<ul style="list-style-type: none"> <li>• Review the OGM procedures to confirm that it addresses non-hindrances of claimants seeking other remedy pathways.</li> <li>• Interview (a) OGM personnel and (b) 3 or more claimants to confirm that (i) the OGM does not require claimants to waive any rights to seek remediation through other pathways, and (ii) there has been no pressure on claimants or potential claimants</li> </ul>

	OGM personnel to seek remedy through other pathways.	to forego other remedy pathways.
	<b>Legitimate:</b> enabling trust from the stakeholder groups for whose use they are intended, and being accountable for the fair conduct of grievance processes.	
<b>INDICATOR</b>	<b>EVIDENCE RELATED TO INDICATOR</b>	<b>EVIDENCE REVIEWED</b>
The OGM was designed to include elements of independence and accountability, including those that prevent parties to the grievance from interfering with its fair conduct.	<ul style="list-style-type: none"> <li>• OGM procedures specifically address accountability and independence.</li> <li>• The OGM's Tier 2 administrators, and any OGM oversight panel, are independent of the company in practice and perception.</li> <li>• There is evidence that senior management and individuals with responsibility for the company's human rights performance understand the company's responsibility to enable effective remediation where the company causes or contributes to negative human rights impacts.</li> </ul>	<ul style="list-style-type: none"> <li>• Review the OGM procedures to confirm how they address (i) accountability, (ii) independence and (iii) non-interference.</li> <li>• Interview (a) OGM personnel, and (b) 3 or more claimants to establish their perspective on the independence of the OGM administrators and oversight panel.</li> <li>• Interview (a) the GM and senior leadership of the company, (b) company human rights personnel, (c) OGM personnel, and (d) personnel with oversight responsibilities for the OGM to: confirm their understanding of the company's responsibility to cooperate in or provide remediation.</li> </ul>
The OGM is perceived as fair and legitimate by affected individuals and the local community.	<ul style="list-style-type: none"> <li>• Mindful of concerns regarding individuals who may not have received the remedy they had hoped for, confirm that there is no evidence that affected individuals reasonably believe the OGM is unfair regarding (a) its independence, (b) its handling of claims, (c) the steps taken to resolve grievances, or (d) its outcomes.</li> </ul>	<ul style="list-style-type: none"> <li>• To assess potential grievance patterns, identify total number of grievances and appeals filed by: (i) month, (ii) nature and date of claim, (iii) gender, and (iv) channel through which the claim was filed.</li> <li>• Interview OGM personnel and at least (a) 3 or more claimants, (b) 3 or more non-claimant community members, and (c) 3 or more members of local</li> </ul>

	<ul style="list-style-type: none"> <li>• There is no evidence that affected individuals believe the OGM will fail to engage with them respectfully while handling complaints.</li> <li>• Mindful of concerns regarding individuals who may not have received the remedy they had hoped for, confirm there is no evidence that affected individuals reasonably believe the OGM is unfair or illegitimate regarding (a) its independence, (b) its handling of claims, (c) the steps taken to resolve grievances, or (d) its outcomes.</li> <li>• There is no evidence that affected individuals believe the OGM will fail to engage with them respectfully while handling complaints.</li> <li>• There is evidence that affected individuals feel OGM is (a) free of bias, (b) free of discrimination, (c) culturally appropriate for the groups concerns, and (d) able to provide meaningful remediation in light of the perceived harms suffered.</li> <li>• There is evidence that feedback from potentially affected stakeholders was integrated into the OGM's framework.</li> </ul>	<p>vulnerable populations to determine the views of affected individuals regarding the OGM's fairness, respect and effectiveness, including specifically: its perceived (i) independence, (ii) treatment of claimants with fairness and respect, (iii) handling of claims, (iv) steps to resolve claims, (v) outcomes, (vi) bias, (vii) local cultural expertise, (viii) freedom from discrimination, and (ix) ability to deliver meaningful remediation.</p>
<p>Reasonable efforts are taken to ensure the safety and security of individuals</p>	<ul style="list-style-type: none"> <li>• OGM procedures specifically address or consider the physical security of individuals who seek to access it.</li> </ul>	<ul style="list-style-type: none"> <li>• Review the OGM procedures and other relevant documentation to confirm that the physical</li> </ul>

<p>who access the mechanism.</p>	<ul style="list-style-type: none"> <li>• There is no evidence that individuals who have accessed the OGM have been subjected to physical threats or violence.</li> <li>• There is no evidence that individuals have refrained from accessing the OGM out of fear of retribution.</li> </ul>	<p>security concerns of claimants are addressed.</p> <ul style="list-style-type: none"> <li>• Interview OGM personnel, and at least (a) 3 or more claimants, (b) 3 or more non-claimant community members, and (c) 3 or more members of local vulnerable populations to confirm that they are not aware of (i) threats of retaliation from the company, employees or community members, or (ii) individuals declining to access the OGM out of fear for their safety.</li> </ul>
<p><b>Accessible:</b> 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.</p>		
<p><b>INDICATOR</b></p>	<p><b>EVIDENCE RELATED TO INDICATOR</b></p>	<p><b>EVIDENCE REVIEWED</b></p>
<p>The OGM has been promoted to individuals and communities where affected individuals are likely to learn of it, in a manner that accounts for local culture, literacy, language and need, with information sufficiently widely disseminated to reach materially all potential adversely impacted stakeholders.</p>	<ul style="list-style-type: none"> <li>• There is a plan to promote the OGM to individuals or communities who may be negatively impacted by company decisions, actions or omissions.</li> <li>• There is evidence of OGM promotion and consultations in all local communities where affected individuals are believed to reside or work, or other locations designed to alert affected individuals to the OGM.</li> <li>• There is evidence that those promotional activities and consultations took place in a manner desired to maximize the likelihood that affected individuals would understand the information conveyed.</li> </ul>	<ul style="list-style-type: none"> <li>• Review any promotion or consultation plans developed for the OGM.</li> <li>• Review promotional materials developed for the OGM, such as flyers, posters, advertisements, and similar materials, and where and how they have been placed and/or disseminated.</li> <li>• Review documentation reflecting any community consultations that have occurred, including (i) the number of consultations, (ii) their location, length and dates, (iii) the language in which they took place, (iv) the number of community participants who attended, and (v) any presentations or scripts.</li> </ul>

		<ul style="list-style-type: none"> <li>• Interview 3 or more claimants about the consultations and promotional activities to validate their understanding of the information that was conveyed.</li> </ul>
<p>The OGM has multiple channels for accessing it, is easy to use, and is adapted to account for local cultural norms and language at every material step.</p>	<ul style="list-style-type: none"> <li>• OGM procedures specifically contemplate multiple means of lodging a grievance, and take into account local language concerns and the ways through which affected individuals may lodge claims.</li> <li>• There is evidence that affected individuals believe the OGM is easy to access, understand and use.</li> </ul>	<ul style="list-style-type: none"> <li>• (a) Review the OGM procedures and (b) interview OGM personnel to confirm that: (i) there are multiple channels for reporting, (ii) reporting can occur in all relevant local languages, and (iii) the OGM procedures account for local cultural and contextual considerations.</li> </ul>
<p>The OGM has been designed and implemented to account for direct and indirect costs, and physical and nonphysical hardships, that may prevent effective access or enhance harms experienced.</p>	<ul style="list-style-type: none"> <li>• The design of the OGM specifically and consciously addresses potential barriers that may exist for affected individuals based on consultations, related past activities, the experiences of other OGMs, and similar factors.</li> </ul>	<ul style="list-style-type: none"> <li>• Interview individuals involved in the design of the OGM to identify how they considered potential barriers to affected individuals, and how they were addressed.</li> <li>• Review the OGM procedures to confirm that it contemplates and addresses reasonably anticipated potential barriers for affected individuals.</li> </ul>
<p>The design of the OGM has considered the potential (and perceived potential) for retaliation against affected individuals, and affected stakeholders do not believe there will be retaliation against them for accessing the OGM or receiving remedy under it.</p>	<ul style="list-style-type: none"> <li>• The OGM includes a clear commitment against retaliation, supported by procedures designed to mitigate any risks of retaliation for accessing the OGM.</li> <li>• There is no evidence that affected individuals were intimidated out of using the OGM.</li> <li>• The OGM procedures include confidentiality to all claimants, and makes clear to claimants</li> </ul>	<ul style="list-style-type: none"> <li>• Review the OGM procedures to confirm the commitment against retaliation and identify how it is implemented.</li> <li>• Review the OGM procedures to (i) confirm its commitment to confidentiality, (ii) identify how that commitment is implemented, and (iii) identify how explanations are to be provided to claimants where confidentiality may not be ensured.</li> </ul>



	<p>if, why and when confidentiality may not be provided.</p> <ul style="list-style-type: none"> <li>• There is no evidence of retaliation against claimants who have accessed the OGM.</li> </ul>	<ul style="list-style-type: none"> <li>• Interview (a) OGM personnel, (b) 3 or more claimants, and (c) community representatives to confirm there have been no (i) reported/perceived claims of intimidation or retaliation, or (ii) known instances of individuals afraid to use the OGM.</li> </ul>
<p>The physical location of the OGM and its operating hours are conducive to accessing it.</p>	<ul style="list-style-type: none"> <li>• The OGM is located outside of the company's property.</li> <li>• There is evidence that the OGM is open during time periods when stakeholders with differing commitments can access it.</li> <li>• There is no evidence stakeholders cannot access the OGM because of its physical location or hours of operation.</li> </ul>	<ul style="list-style-type: none"> <li>• Confirm the location of the OGM and its operating hours, and verify that its location and operating hours are reasonably conducive to accessing it in light of the local context and needs of affected individuals.</li> <li>• Interview OGM participants and at least (a) 3 or more claimants, (b) 3 or more non-claimant community members, and (c) 3 or more members of local vulnerable populations to confirm that they are unaware of affected individuals being unable or deterred from accessing the OGM because of its location or hours.</li> </ul>
<p>The OGM has a process to provide reasonable assistance for affected individuals to effectively access the OGM, if needed.</p>	<ul style="list-style-type: none"> <li>• OGM procedures contain identified steps to provide assistance to affected individuals who may face barriers, and a process through which affected individuals may request assistance.</li> </ul>	<ul style="list-style-type: none"> <li>• Review the OGM procedures to identify how (i) barriers to access are anticipated and addressed, and (ii) affected individuals may request assistance.</li> <li>• Interview OGM participants to confirm how barriers to access have been addressed in practice, including any specific instances in which – despite the OGM's design – barriers still had to be addressed.</li> </ul>

**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.		
INDICATOR	EVIDENCE RELATED TO INDICATOR	EVIDENCE REVIEWED
<p>The OGM was designed with clear steps for each material stage in the process, as well as safeguards specific to serious or sensitive grievances, with relevant timeframes.</p>	<ul style="list-style-type: none"> <li>● OGM procedures are written in simple and plain language and: (a) address how complaints will be processed, (b) allocate responsibilities and accountabilities for handling complaints, (c) provide reasonable timeframes for addressing complaints, and (d) are designed to enable transparency for claimants about how their complaints are being handled.</li> <li>● OGM procedures provide for: (a) engagement with the claimant in a manner that enables a fair and respectful process, (b) support to the claimant whenever necessary to enable a fair and respectful process, and (c) steps to address issues that raise severe human rights impacts or represent significant disputes.</li> <li>● There is evidence that (a) these procedures have been implemented, (b) complaints typically are processed within prescribed time limits, (c) proposed solutions have been shared with claimants, and (d) solutions are compatible with human rights standards.</li> </ul>	<ul style="list-style-type: none"> <li>● Review the OGM procedures to confirm they are written in simple and plain language, and identify (i) how complaints will be processed, (ii) how responsibilities and accountabilities for handling complaints are assigned, (iii) the contemplated timelines associated with each OGM step, and (iv) how claimants will be informed of the progress of their claims.</li> <li>● Review the OGM procedures to confirm that they address (i) fair and respectful treatment of claimants, (ii) support for claimants when appropriate to enable a fair process, and (iii) how severe human rights impacts or significant disputes will be treated in the OGM.</li> <li>● Interview (a) OGM personnel and (b) 3 or more claimants to establish their views on whether: (i) claimants have been treated with respect, (ii) support has been provided where necessary, (iii) severe human rights impacts or significant disputes are addressed as contemplated in the procedures, (iv) the indicative timelines are generally followed, (v) claimants are regularly informed of the progress of their claims, (vi) proposed remediation is developed through engagement</li> </ul>

		<p>and collaboration with claimants, and (vii) remediation is compatible with human rights standards.</p>
<p>The material steps in accessing and seeking remedy under the OGM, as well as potential outcomes and indicative time frames, have been communicated to affected individuals in a manner they could easily understand.</p>	<ul style="list-style-type: none"> <li>• There is a process to communicate to claimants the material steps in accessing and seeking remedy under the OGM, including potential outcomes and indicative time frames, which is followed in practice.</li> <li>• There is evidence that affected individuals (a) know how to submit a complaint should they wish to do so, (b) are able to access at least one channel to submit a grievance given their language, literacy, geographical and cultural needs, (c) do not perceive any barriers to raising complaints should they wish to do so, (d) understand how complaints will be addressed, and (e) understand any limitations on the remedy that the process can provide.</li> </ul>	<ul style="list-style-type: none"> <li>• (a) Review the OGM procedures addressing communication about (i) the OGM’s material steps, (ii) potential outcomes, and (iii) indicative time frames to stakeholders, and confirm those procedures are followed in interviews with (b) OGM personnel and (b) 3 or more claimants.</li> <li>• Interview 3 or more claimants to confirm they (i) understood how to submit a claim, (ii) could effectively access a complaint channel, (iii) did not perceive barriers to filing a claim, (iv) understood the process to submit claims, and (v) understood at the outset the potential outcomes (including limitations on the nature, form or quantum of remedy).</li> </ul>
<p>The OGM is sufficiently resourced to address the volume of concerns consistent with the indicative timeframes, and with sufficient internal expertise to address the range of grievances anticipated.</p>	<ul style="list-style-type: none"> <li>• The company has provided sufficient resources to enable the effective operation of the OGM, given its nature and volume of its cases.</li> <li>• There is no evidence that the OGM has (a) materially failed to meet its indicative time-frames, (b) altered its published processes because of resource constraints, or (c) altered the remedy it has</li> </ul>	<ul style="list-style-type: none"> <li>• Review OGM procedures to identify indicative timeframes.</li> <li>• Review the OGM operating budget to determine its reasonableness in light of the scope of its contemplated operations.</li> <li>• Review (a) any terms of reference associated with OGM funding to identify steps to promote OGM independence,</li> </ul>

	<p>provided because of budgetary concerns.</p> <ul style="list-style-type: none"> <li>• The funding of the OGM has sufficient indicators of independence to avoid the (a) risk and (b) perception that the grievance process and outcomes are influenced by its funders.</li> <li>• The OGM is managed by individuals with appropriate training in (a) engaging with victims and vulnerable individuals, (b) handling sensitive complaints, (c) the specific types of complaints likely to arise, and (d) data protection.</li> </ul>	<p>and (b) any indicators or steps supporting that independence.</p> <ul style="list-style-type: none"> <li>• Review (a) any information made public to try to generate confidence about the OGM's independence, and (b) documents reflecting how that information has been disclosed to claimants and affected individuals.</li> <li>• Interview 3 or more claimants to evaluate the extent to which they believe the OGM is independent of its funder.</li> <li>• (a) Review any changes to OGM procedures, and (b) interview OGM personnel to understand the rationale for the changes and confirm they were not made because of budgetary reasons.</li> <li>• (a) Review the OGM procedures related to how the nature and quantum of remedy is determined, and then (b) review 5 or more case files and (c) interview OGM personnel to: confirm that remedy was (i) provided consistent with the contemplated processes and (ii) not limited or adjusted because of budgetary concerns.</li> <li>• Review (i) the total caseload of the OGM, (ii) the number of dedicated personnel, (iii) the average length of time a case takes to progress as measured against the indicative timelines, (iv) the number of cases that fell within and outside the indicative timelines, (v) the cases that have taken the longest and shortest to resolve and the</li> </ul>
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		<p>reasons, (vi) and the thoroughness of fact-finding and review.</p> <ul style="list-style-type: none"> <li>• Interview OGM personnel to confirm that they have experience and training regarding: (i) human rights, (ii) engaging with victims and vulnerable individuals, (iii) handling issues of personal sensitivity, (iv) the types of claims the OGM has received, and (v) data protection.</li> </ul>
<p>The OGM maintained sufficient flexibility to adapt its processes to situations as needed to respect rights, including those of vulnerable populations or groups requiring assistance to access the OGM.</p>	<ul style="list-style-type: none"> <li>• The procedures of the OGM are sufficiently flexible to allow for adjustment based on the specific facts of each case and the circumstances of each claimant.</li> </ul>	<ul style="list-style-type: none"> <li>• (a) Review the OGM procedures to verify they allow for adaptation in light of specific case concerns, and (b) interview OGM personnel to understand how those procedures are implemented in practice, with specific examples where it has occurred.</li> </ul>
<p>The OGM was designed to allow for monitoring and review of effectiveness of each key step, to identify gaps between the process as designed and as implemented.</p>	<ul style="list-style-type: none"> <li>• There is a process to (a) evaluate the consistency between the OGM's design and practice at each key step, (b) evaluate the effectiveness of each key step, including through feedback from those who have brought complaints, and (c) modify any step depending on the evaluation, including in relation to: (i) submitting and reviewing cases, (ii) engaging with claimants about the case once filed, (iii) investigating claims, (iv) providing claimants with the results of the investigation, (v) engaging with claimants</li> </ul>	<ul style="list-style-type: none"> <li>• (a) Review the process to evaluate the consistency between the OGM's design and implementation at each key step, (b) review the process to evaluate the effectiveness of each key OGM step, which should include feedback from claimants who have submitted grievances, and (c) interview OGM personnel to confirm that adjustments to the OGM have been made based on (a) and (b).</li> <li>• (a) Review the OGM procedures to confirm they contemplate escalation of cases involving severe harm, and (b) review 3 or</li> </ul>

	<p>about remediation, and (vi) providing or enabling remediation.</p> <ul style="list-style-type: none"> <li>• There is evidence that complaints involving severe human rights impacts or significant disputes over outcomes have been escalated, consistent with the design of the mechanism.</li> </ul>	<p>more case files involving allegations of severe human rights impacts to confirm their escalation consistent with the OGM’s design.</p>
	<p><b>Equitable:</b> 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.</p>	
<b>INDICATOR</b>	<b>EVIDENCE RELATED TO INDICATOR</b>	<b>EVIDENCE REVIEWED</b>
<p>The OGM was designed to provide affected individuals with equal access to information collected during any fact-finding process, and implemented consistent with that design.</p>	<ul style="list-style-type: none"> <li>• The OGM has specific processes that enable affected individuals to receive the same results of fact-finding efforts that the OGM may receive, and there is evidence that they receive that information in practice.</li> </ul>	<ul style="list-style-type: none"> <li>• Review the OGM procedures to confirm that stakeholders are to receive the results of any fact-finding efforts.</li> <li>• (a) Interview OGM personnel, (b) review 5 or more case files, and (c) interview 3 or more claimants to confirm that claimants receive the results of any OGM fact-finding efforts.</li> </ul>
<p>The OGM provides information to affected individuals about alternative pathways to remedy.</p>	<ul style="list-style-type: none"> <li>• There is evidence that all claimants and affected individuals have access to at least one alternative judicial or non-judicial pathway to remedy besides the OGM, which is perceived as credible and fair.</li> <li>• There is evidence that the OGM provides potential claimants with information about other pathways inside or outside the company.</li> </ul>	<ul style="list-style-type: none"> <li>• (a) Interview OGM personnel, and (b) engage with local experts, to confirm that alternative pathways exist for remedy that (i) are reasonably trusted and (ii) do not impose undue barriers on claimants.</li> <li>• Review OGM procedures and documentation to confirm that claimants receive information about alternative remedy pathways.</li> </ul>

<p>The OGM (Tier 2) will provide claimants access to independent expert advice as required (including in relation to severe impacts and in connection with settlement agreements).</p>	<ul style="list-style-type: none"> <li>● There is evidence that any advisors the OGM provides (a) act independently of the OGM or the company and in the best interests of the claimant, and (b) can be chosen by and are acceptable to the individuals they are supporting.</li> <li>● There is evidence that affected individuals (a) are aware of the availability of any resources that the OGM, the company or third parties may offer them in connection with their grievance, (b) have confidence that any advisors will act (and have acted, where relevant) independently of the company and in their interests, and (c) have felt that advisors (where used) helped them in the process.</li> </ul>	<ul style="list-style-type: none"> <li>● Review the OGM procedures for providing independent assistance, including (i) when it may be required, (ii) how individuals are selected to provide the assistance, (iii) the role of the claimant in selecting an advisor, and (iv) how the independence of any external advisor is maintained.</li> <li>● Review (a) 5 or more case files, (b) any agreements with independent advisors, and (c) interview OGM personnel, 3 or more claimants and one or more independent advisor to: (i) identify the extent to which independent assistance has been provided to claimants in connection with their claims, (ii) confirm that any contracts or agreements with providers include clauses reflecting their independence and duty to the claimant, (iii) confirm advisors consider themselves to owe a duty to the claimants, (iv) verify that any advisors were acceptable to the claimants, (v) verify that the claimants considered any advisors to be independent, and (vi) verify the claimants believed the advisors were helpful in understanding or advancing their claims.</li> </ul>
<p>The OGM includes independent processes to mitigate perceived power imbalances, and has the flexibility to implement additional</p>	<ul style="list-style-type: none"> <li>● There is evidence that the design of the OGM considered how local power imbalances might take place, and that processes specifically address those potential imbalances.</li> </ul>	<ul style="list-style-type: none"> <li>● Interview individuals associated with the design of the OGM to understand the potential local power imbalances identified, and how they were addressed.</li> <li>● Review the OGM procedures to confirm that (i) steps to address</li> </ul>

<p>measures if a perceived power imbalance exists.</p>	<ul style="list-style-type: none"> <li>• The OGM has sufficiently flexibility in its design to address “real time” perceived power imbalances that were not originally contemplated.</li> </ul>	<p>local power imbalances have been integrated, (ii) the OGM has flexibility to adapt to address those imbalances, and (iii) OGM personnel are aware of the potential imbalances and authorized to react as needed.</p>
	<p><b>Transparent:</b> 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</p>	
<p><b>INDICATOR</b></p>	<p><b>EVIDENCE RELATED TO INDICATOR</b></p>	<p><b>EVIDENCE REVIEWED</b></p>
<p>The OGM was designed to provide, and provides in practice, regular updates to claimants about the status and progress of their claims.</p>	<ul style="list-style-type: none"> <li>• A process exists to provide claimants with periodic updates regarding their claims from the time of their submission until resolution.</li> <li>• There is evidence that the process is followed in practice.</li> <li>• There is no evidence that claimants feel uninformed about the status and progress of their claims.</li> </ul>	<ul style="list-style-type: none"> <li>• Review the OGM procedures to identify how they contemplate providing claimants with updates about their claims, throughout the process.</li> <li>• Interview (a) OGM personnel and (b) 3 or more claimants to confirm that the OGM’s stated process regarding claimant notification is followed in practice.</li> <li>• Interview 3 or more claimants to confirm they have felt reasonably informed about the status of their claims throughout the process.</li> </ul>
<p>The OGM was designed to provide, and regularly provides, public reports of its performance (whether through KPIs and metrics, case studies, and/or handling certain cases), while</p>	<ul style="list-style-type: none"> <li>• A process exists to support the collection and publication of meaningful data, metrics or performance against KPIs regarding the OGM’s performance.</li> <li>• (a) Evidence exists that the process to provide public information about the OGM is being followed, (b) reported examples of actions taken by the company to provide or</li> </ul>	<ul style="list-style-type: none"> <li>• Identify a process used to collect information to evaluate and publicize the OGM’s performance, which may include data, metrics, or performance against KPIs.</li> <li>• (a) Interview OGM personnel to confirm that the process to collect and publicize information about the OGM is being implemented, (b) review the data, metrics or information</li> </ul>



<p>respecting claimant confidentiality.</p>	<p>enable remedy for actual human rights impacts are accurately represented, including with regard to any context that is relevant to understand the actions taken, (c) examples of remedy for any particularly severe impacts with which the company has been involved are included (subject to legitimate legal or other constraints as recognized under Reporting Principle G of the UN Guiding Principles Reporting Framework), and (d) the examples provided are balanced and broadly representative of the company's performance.</p> <ul style="list-style-type: none"> <li>• (a) Assessments of the OGM, including by the Independent Monitor, are made public in a form that fairly represents the findings, and (b) any lessons or recommendations from the review have been or are being implemented, or the decision not to implement them has been clearly explained.</li> </ul>	<p>collected under this process and confirm (i) it is meaningful to evaluate the OGM's implementation and (ii) it is used as part of public reporting.</p> <ul style="list-style-type: none"> <li>• (a) Review any publicly reported cases or anecdotes about the OGM, (b) review data and (c) conduct interviews of OGM personnel (and relevant claimants if needed) to confirm: (i) the accuracy of OGM disclosures, and (ii) that they are representative of the cases or issues before the OGM and/or the OGM's performance.</li> <li>• Cases of severe negative impacts are disclosed consistent with Reporting Principle G of the UN Guiding Principles reporting Framework and are accurate, subject to reasonable constraints.</li> <li>• The OGM makes public (i) its metrics and KPIs, along with (ii) relevant substantive information, (iii) as well as lessons learned and how they have been integrated, in order to allow stakeholders to evaluate the performance of the OGM.</li> </ul>
<p>The OGM provides internal reporting consistent with relevant international reporting standards under the UNGPs.</p>	<ul style="list-style-type: none"> <li>• There is (a) regular internal reporting to key internal individuals, including OGM administrators, the company and others connected to or overseeing the OGM, (b) that includes relevant metrics, as well as substantive information (such as case studies, survey results, and stakeholder reports), sufficient</li> </ul>	<ul style="list-style-type: none"> <li>• Review documentation confirming the regular internal reporting of information about the OGM's operations to individuals overseeing the OGM, which includes relevant metrics and data relevant to OGM KPIs, as well as substantive issues, concerns, or patterns, which</li> </ul>

	to evaluate the OGM against UNGP 31 in its implementation.	permits effective oversight of the OGM.
<b>Rights-compatible:</b> ensuring that outcomes and remedies accord with internationally recognized human rights		
<b>INDICATOR</b>	<b>EVIDENCE RELATED TO INDICATOR</b>	<b>EVIDENCE REVIEWED</b>
The OGM was designed to provide, and does provide, outcomes and remedies consistent with international norms, as appropriately applied in the local context.	<ul style="list-style-type: none"> <li>• There is evidence that the OGM was designed to provide (and does provide) remedies aimed at restoring affected individuals to the status preceding the harm that was done, through restitution, compensation, rehabilitation, satisfaction, and/or guarantees of non-repetition.<sup>25</sup></li> </ul>	<ul style="list-style-type: none"> <li>• Review the design of the OGM to identify contemplated remedies, and validate that the design is consistent with restoration, through restitution, compensation, rehabilitation, satisfaction, and/or guarantees of non-repetition.</li> <li>• Review 5 or more case files to identify the nature of remedy provided, and evaluate that remedy against international human rights standards.</li> </ul>
The OGM has access to experts in international human rights and local culture in considering appropriate outcomes and remedies.	<ul style="list-style-type: none"> <li>• Experts have been identified and engaged to provide advice, if requested, on appropriate outcomes.</li> </ul>	<ul style="list-style-type: none"> <li>• Review the experts who have been or may be consulted to provide advice on appropriate outcomes, and understand why they have or have not been contacted in the context of evaluating outcomes and remedies.</li> </ul>
Claimants believe that the outcomes and remedies they received are equitable and proportionate in light	<ul style="list-style-type: none"> <li>• There is evidence that recipients of remedy consider that the remedy provided was equitable.</li> </ul>	<ul style="list-style-type: none"> <li>• Review 5 or more case files to (a) confirm that where remedy was provided it was reasonably proportionate to the harm and the evidence, and (b) identify documentation verifying that</li> </ul>

<sup>25</sup> **Restitution** is intended to restore, to the extent possible, whatever has been lost (position in the community, property, liberty, etc.), and restore the victim to the state preceding the harm that took place. **Compensation** is appropriate in those cases where damage can be economically assessed. These cases include: “(a) Physical or mental harm; (b) Lost opportunities, including employment, education, and social benefits; (c) Material damages and loss of earnings, including loss of earning potential; (d) Moral damage; and (e) Costs required for legal or expert assistance, medicine and medical services, and psychological and social services.” Compensation can take the form of money or other fungible trade-offs. **Rehabilitation** covers medical or psychological care and social or legal services needed to restore the victim. **Satisfaction** includes such measures as a cessation of the violations; an acknowledgment of the harm done, including verification of the facts and public disclosure of the truth; public apologies from those responsible, including acceptance of responsibility; and sanctions against those responsible for the harm. **Guarantees of non-repetition** include a number of measures to prevent further abuses. These include investigation into crimes that result in human rights violations, and prosecution for those responsible for causing harm, while respecting the right to a fair trial. Changes in policies, procedures, laws, and oversight may also be necessary to ensure non-repetition.

<p>of the specific harms as reflected in their claims.</p>	<ul style="list-style-type: none"> <li>• There is evidence in instances where claimants/recipients do not consider the remedy acceptable or effective, that they found the process itself to be fair and respectful.</li> <li>• There are no legal disputes, campaigns, credible media or other reports indicating that recipients consider remedy to have been substantially inadequate.</li> </ul>	<p>claimants at the time of remedy were content with it.</p> <ul style="list-style-type: none"> <li>• Interview 3 or more claimants to confirm that they believed the remedy they received was (i) fair, and/or (ii) that the process was fair regardless of the remedy provided.</li> <li>• Review media reports, legal claims, NGO reports and other public source material to identify whether recipients have expressed concerns regarding the remedy provided.</li> </ul>
<p>The OGM does not impair the rights of claimants to seek accountability through other mechanisms.</p>	<ul style="list-style-type: none"> <li>• The OGM contains processes that specifically do not inhibit individuals from pursuing claims through other channels, should they so choose</li> <li>• Claimants are made aware, through written documentation and oral explanations, of their right to pursue claims through other channels.</li> </ul>	<ul style="list-style-type: none"> <li>• Review the OGM procedures to confirm that individuals may, at any time, pursue claims through other channels and the OGM places no restrictions on seeking remedy through other pathways.</li> <li>• Review OGM-related documentation regarding information provided to claimants, and interview (a) OGM personnel and (b) 3 or more claimants, to confirm that claimants are advised of their right to pursue claims through other channels.</li> </ul>
	<p><b>A source of continuous learning:</b> drawing on relevant measures to identify lessons for improving the mechanism and preventing future grievances and harms.</p>	
<p><b>INDICATOR</b></p>	<p><b>EVIDENCE RELATED TO INDICATOR</b></p>	<p><b>EVIDENCE REVIEWED</b></p>
<p>Feedback on experience with the OGM is solicited from users on an ongoing basis, including in regard to</p>	<ul style="list-style-type: none"> <li>• There is evidence that the OGM engages with claimants, including those with finalized claims, to gain insights into</li> </ul>	<ul style="list-style-type: none"> <li>• Interview (a) OGM personnel and (b) 3 or more claimants to discuss claimant engagement with the OGM in relation to the their experiences, including specifically regarding their (i)</li> </ul>

<p>predictability, accessibility, transparency, equitability, and remedy, with responses considered for potential adjustments.</p>	<p>their experiences in light of the UNGP 31 criteria.</p> <ul style="list-style-type: none"> <li>• There is evidence that the results of those consultations are continuously considered in evaluating the OGM procedures.</li> </ul>	<p>trust, (ii) the ease of access and barriers, (iii) local awareness of OGM, and (iv) remedy</p> <ul style="list-style-type: none"> <li>• Interview OGM personnel to (i) identify specific examples of claimant feedback integrated into the OGM procedures or operations, and (ii) confirm that there is continuous engagement with claimants around the OGM's operational effectiveness.</li> </ul>
<p>The OGM was designed to, and in fact does, identify patterns, trends, and key learnings for (a) its own potential improvement, and (b) the prevention of future harms at the company.</p>	<ul style="list-style-type: none"> <li>• The OGM has a process for identifying trends and patterns in complaints and their outcomes, which is capable of identifying relevant information regarding improvement of the OGM and preventing future company-related harms.</li> <li>• Information or data used to identify trends is relevant and reliable.</li> <li>• Trends or patterns identified are (a) fairly assessed, (b) fairly articulated, and (c) placed in the context necessary to understand their implications.</li> </ul>	<ul style="list-style-type: none"> <li>• Interview OGM personnel to (i) confirm that they are seeking to collect data to identify trends related to OGM steps, claims and outcomes, as well as company operations, (ii) understand how that data is being collected and those trends are being tracked and considered, (iii) confirm that the trends are relevant to the OGM's and company's operations.</li> <li>• (a) Review metrics or KPIs retained by the OGM regarding the nature and demographics of claims and claimants, (b) validate the sources of that information to confirm the reliability and reasonable completeness of the data tracked, and (c) interview OGM personnel to understand the rationale behind tracking those specific areas.</li> </ul>
<p>Patterns, trends and lessons from the OGM were (a) considered and/or acted upon to improve the mechanism, and (b) shared with the</p>	<ul style="list-style-type: none"> <li>• If facts, trends or patterns from complaints or claimant feedback clearly indicate a need to introduce or change OGM policies, processes or practices, there is evidence that the OGM (a) has acted</li> </ul>	<ul style="list-style-type: none"> <li>• Interview OGM personnel to identify specific instances in which facts, trends or patterns have been integrated into the OGM procedures and/or</li> </ul>

<p>company to prevent future harms.</p>	<p>upon those lessons, and (b) has shared the lessons with any relevant third parties.</p> <ul style="list-style-type: none"> <li>• If facts, trends or patterns in complaints received or claimant feedback may be relevant to the company's operations, activities or decisions, the OGM has shared that information with the company.</li> <li>• Any lessons the OGM has drawn from analyzing the pattern of complaints or feedback received are based on (a) a robust analysis of the trends and patterns identified, and (b) any additional information necessary to draw informed conclusions.</li> </ul>	<p>provided to the company to improve its processes.</p> <ul style="list-style-type: none"> <li>• Interview OGM personnel to confirm (a) that perceived lessons from evaluating the pattern of complaints and feedback received are (i) valid, (ii) reasonable, and (iii) meaningful in light of the OGM's operations, and (b) that the OGM has sought additional information where needed to help reach such conclusions.</li> </ul>
<p>The OGM established context-appropriate KPIs that were tracked and fairly measured.</p>	<ul style="list-style-type: none"> <li>• The OGM has established and tracks performance against KPIs to demonstrate its robustness and effectiveness.</li> <li>• The KPIs established by the OGM are meaningful in light of its goals and ambitions, its operating context, and international human rights norms.</li> </ul>	<ul style="list-style-type: none"> <li>• (a) Interview OGM personnel to identify how the OGM's KPIs were developed, and (b) review the OGM's KPIs, to: confirm that they explicitly or implicitly encompass (i) a good faith commitment to implementing the OGM as designed, (ii) OGM performance against the goals it has set and UNGP 31, (iii) the local environment, and (iv) human rights norms.</li> </ul>
	<p><b>Based on engagement and dialogue:</b> 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.</p>	
<p><b>INDICATOR</b></p>	<p><b>EVIDENCE RELATED TO INDICATOR</b></p>	<p><b>EVIDENCE REVIEWED</b></p>
<p>The mechanism was designed following meaningful</p>	<ul style="list-style-type: none"> <li>• There is evidence that engagement with a range of stakeholders occurred before</li> </ul>	<ul style="list-style-type: none"> <li>• Review (i) any consultation plans for the design of the OGM, and (ii) documentation</li> </ul>

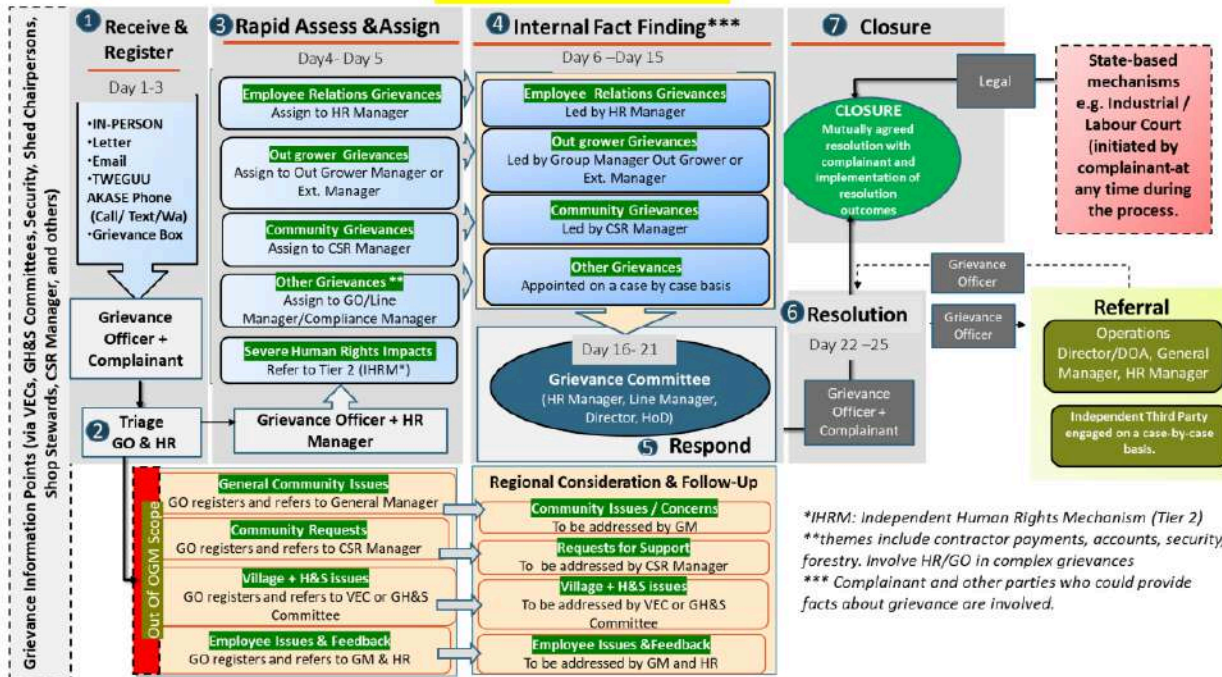
<p>engagement with affected individuals, their representatives, and community groups about the grievance process and outcomes, with their perspectives integrated.</p>	<p>the OGM was launched, and there is evidence that the feedback was integrated into the design.</p>	<p>reflecting stakeholder consultation in the design of the mechanism.</p> <ul style="list-style-type: none"> <li>● Interview individuals involved in the design of the OGM to identify the nature of feedback provided by stakeholders and how it was implemented, including specific examples.</li> </ul>
<p>The OGM solicits and receives regular feedback from affected individuals, their representatives and community members on its performance.</p>	<ul style="list-style-type: none"> <li>● The OGM has procedures for ongoing engagement with stakeholders, and there is evidence that such engagement occurs.</li> </ul>	<ul style="list-style-type: none"> <li>● Interview (a) OGM personnel, (b) 3 or more claimants, (c) 1-2 claimant representatives, and (d) non-claimant community members to confirm engagement between stakeholders and the OGM, including in relation to (i) the OGM's performance, and/or (ii) how feedback is integrated into the OGM's operations.</li> <li>● Review OGM procedures to identify how feedback from affected individuals is integrated into the OGM's operations.</li> </ul>
<p>The mechanism was designed to, and in fact does, focus resolution of grievances on dialogue and joint problem solving.</p>	<ul style="list-style-type: none"> <li>● The OGM procedures focus on grievance resolution through dialogue and engagement, and there is evidence that grievances in fact are resolved consensually and through collaboration as opposed to unilateral OGM determinations.</li> </ul>	<ul style="list-style-type: none"> <li>● Review the OGM procedures to confirm that the process through which grievances are resolved is through engagement and dialogue.</li> <li>● Identify the percentage of grievances resolved and appealed.</li> <li>● Interview (a) OGM personnel and (b) 3 or more claimants whose grievances were resolved to: (i) identify the process through which the grievances were resolved, and (ii) confirm that it was through collaboration and consensus.</li> </ul>





# APPENDIX 2

TITLE: EPK TIER 1 OGM PROCESS



## EPK Tier 2 Independent HR Mechanism Process Overview

