

To: UN Working Group on Business and Human Rights

Re: Input on the [Working Group's report on Investors, ESG and Human Rights](#)

Date: October 13, 2023

We the undersigned members of the Grassroots Justice Network (GJN), convened by Namati, welcome this opportunity to provide input on the upcoming thematic report on investors, ESG and human rights. The GJN connects over 3,000 grassroots justice organizations that support individuals and communities to know, use, and shape the law. Informed by our work fighting for communities to have the power to govern their lands and natural resources, we believe that empowered communities are essential to efforts to prevent and remediate business activities that harm people and the planet.

We write to address the following two questions presented in the call for input:

1. What provisions can be included in contracts or investment agreements to encourage respect for human rights?

Despite legislative uptake of mandatory human rights and environmental due diligence, there remains an urgent need to improve community engagement and ensure access to remedy. The Working Group has recognized “more and better stakeholder engagement” and “more and better leverage” from the financial sector as key action areas for advancing implementation of the UN Guiding Principles.<sup>1</sup>

Operating companies need mechanisms for more effective community engagement, without creating the inherent conflicts of interest that come from paying for them directly. Typically, community engagement includes consultation processes that are designed by actors in positions of power and do not address asymmetries in information, organization, and financial resources.<sup>2</sup> For example, in the context of Indigenous Rights, the lack of access to adequate and correct information on mining projects is a challenge faced by Indigenous Peoples.<sup>3</sup> Misleading information, including only highlighting the positive impacts of mining such as jobs, are provided. Communities oftentimes need financial and logistical assistance in physically gathering and holding their consultations, especially for communities whose proximity is far.<sup>4</sup> Further, women’s participation in

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<sup>1</sup> UN Working Group on Business and Human Rights, [UNGPs 10+ A Roadmap for the Next Decade of Business and Human Rights](#) (2021), at 35- 38.

<sup>2</sup> Surya Deva, “[Mandatory Human Rights Due Diligence Laws in Europe: A Mirage for Rightsholders?](#),” *Leiden Journal of International Law*, February 22, 2023, 1–26.

<sup>3</sup> Asia Indigenous Peoples Pact (AIPP), [Extractive Industries and Free, Prior and Informed Consent of Indigenous Peoples](#) (2019), at 32-33.

<sup>4</sup> *Id.*

decision-making and consultation processes is less.<sup>5</sup> This imbalance reflects a difference in prioritization: men tend to prioritize funds for relatively short-term, low-impact allocations such as infrastructure and construction, while women favor more sustainable and long-term projects such as nutrition and health-related priorities, education, and capacity-building.<sup>6</sup>

The need for companies to address power imbalances to facilitate informed community decision-making during consultations is well-recognized, particularly in the context of conducting effective human rights due diligence.<sup>7</sup> Effective engagement requires that communities have access to information, legal expertise, and technical assistance on par with businesses. This may include: independent explanation of technical documents and applicable legal and regulatory frameworks; independent land mapping, value and tenure analysis; support for community organizing and negotiation strategizing; and contextual analysis of potential environmental and human rights impacts. Without support, communities impacted by business activities lack the resources to engage as empowered and equal counterparties.

“A lack of support increases the risk of community grievances, stemming from issues such as mismatched expectations, inadequate consultation, or onerous or unenforceable community-company contracts. Community grievances and social unrest can open the door to disputes and conflicts that result in significant human rights violations, poisoned community-company relations and/or disrupted business operations.”<sup>8</sup>

If companies directly finance legal and technical support for communities, however, this introduces the risk of perceived or actual influence of the company over the community or support provider.<sup>9</sup> This risk may prompt support providers to refuse to accept company funds,<sup>10</sup> particularly if they have built up trust within the communities they serve and want to avoid jeopardizing those relationships.

To reduce risk of investment and improve local social outcomes, we propose that investors include provisions in investment agreements or contracts that would

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<sup>5</sup> Legal Rights and Natural Resources Center, [Mining as a Women's Issue](#).

<sup>6</sup> *Id.*

<sup>7</sup> See, e.g., OECD, [OECD Due Diligence Guidance for Responsible Business Conduct](#) (2018), at 51; U.N. Off. of High Comm'r for Hum. Rts., [The Corporate Responsibility to Respect Human Rights: An Interpretive Guide](#) (2012), at 45.

<sup>8</sup> Columbia Center on Sustainable Development, [Innovative Financing Solutions for Community Support in the Context of Land Investments](#) (March 2019), at 11.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

require businesses to financially contribute to an independent 'basket fund' through which communities can access legal and technical support. Basket funds are funded by multiple actors - including investors - and are operated by independent, trusted entities. The presence of multiple funding sources dilutes the influence of any single funding source, and having a third party entity administer further safeguards independence.<sup>11</sup>

In addition, an independent administrator is better placed to connect communities with local support providers who understand the community context and have the necessary technical expertise. Local experts' ability to navigate divergent interests within communities (along the lines of gender, ethnic group, and class, for instance) – which international consultants often lack – is key to generating a robust community consensus.

Communities that are appropriately supported have greater ability to define, communicate and enforce their interests. This support can bolster community efforts to: make due diligence and planning processes more consultative; influence decision making regarding proposed investments; assert customary rights; negotiate a balanced agreement with an incoming company; monitor company operations; or resolve grievances or disagreements with the company and/or government.<sup>12</sup>

In short, contributing to a basket fund can help investors and companies: 1) understand and incorporate community perspectives into the project's design; 2) work towards obtaining the community's social license to operate, and; 3) avoid or resolve costly conflict.<sup>13</sup> The funding facility itself can serve as a learning lab for effective strategies for community engagement and grievance redress. By sharing lessons with businesses and civil society organizations broadly, the facility can improve business practices within the different sectors where it provides community grants.

We envision this fund to have multiple layers of accountability, to ensure that it is responsive to community needs and maintains independence. The diagram below provides a guide:

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<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

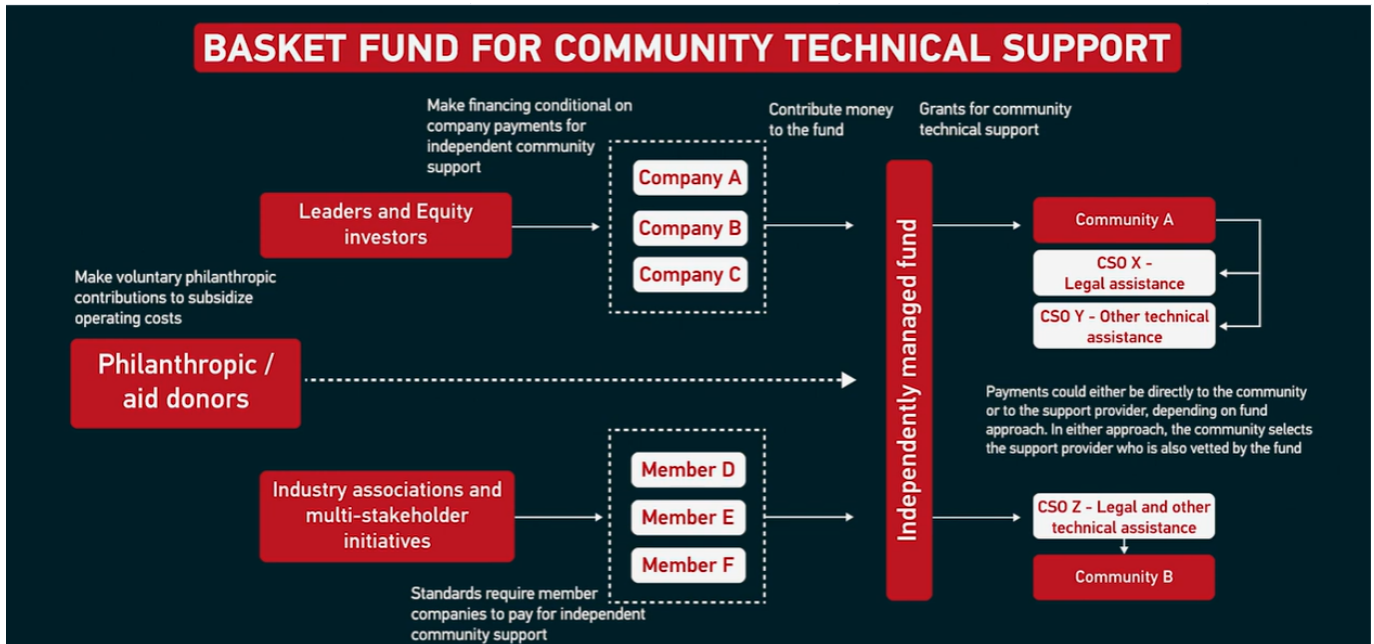


Diagram 1: Namati and CCSI (Columbia Center on Sustainable Investment) basket fund chart

2. Are there any specific recommendations to businesses (including investors) that would assist in ensuring that investors act compatibly with the UNGPs?

As the Working Group has recognized, “Investors and other financial sector actors are expected to respect human rights by knowing the risks to people connected with their investment activities and showing how they take action to manage those risks. Engaging stakeholders in this process is essential.”<sup>14</sup> The Group has noted, however, that a key challenge lies in the “the limited ability of data providers to gather the right data at scale.”<sup>15</sup>

Specifically, concerted attention is needed to improve available data, so that it goes beyond “whether company policies are in place” and embraces more than a small selection of human rights issues.<sup>16</sup> In particular, investors have noted that existing indicators on human rights due diligence do not pay attention “to whether companies are engaging with affected stakeholders” and “whether company practices work for affected stakeholders.”<sup>17</sup>

<sup>14</sup> UN Working Group on Business and Human Rights, *supra* note 2, at 38.

<sup>15</sup> *Id.* at 39.

<sup>16</sup> *Id.*

<sup>17</sup> Principles for Responsible Investment, “[Managing Human Rights Risks: What Data Do Investors Need?](#),” December 2022, 13–14.

We further propose, as a best practice, that investors themselves contribute directly to a basket fund, in keeping with their own human rights and environmental due diligence obligations. The funding facility can promote greater transparency around community engagement and grievance redress processes by providing an independent source of data, which is more reliable than information produced directly by companies or consultants, who report under conflicts of interest.

We view this basket fund as an integral part of ensuring land and environmental justice. Investor support will be crucial if this funding facility is to become a reality. Toward that end, we thank you for this opportunity to share this proposal as an input to the Working Groups' upcoming report.

Signed:

Namati

Just Ground

Zimbabwe Environmental Law Associations (ZELA)

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