

# Collaborative and participatory approaches to HRIA: the way forward?

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## 4. Collaborative and participatory approaches to HRIA: the way forward?

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### 4.1 INTRODUCTION

The promise and potential of human rights impact assessments (HRIAs) of business projects can be felled by one significant challenge: limited stakeholder engagement, which reduces both effectiveness and trust. In particular, companies and project-affected people alike tend to view any HRIA led or commissioned by the other ‘side’ as biased or unconvincing. Moreover, company-commissioned and community-based HRIAs to date have been undertaken largely without the participation of government actors, which are the primary duty-bearers under human rights law. Is there another way? We propose that a collaborative HRIA could, in some situations, provide a path to overcome these obstacles.

This chapter explores a yet-untested approach for collaborative HRIAs that draws ideas and inspiration from existing practices (for an introduction to different HRIA approaches see Chapter 1 and Part II of this *Handbook*). We define a collaborative HRIA as a joint process undertaken by project-affected people and a company, and potentially the host government (the government of the jurisdiction where the project takes place) or other stakeholders, to investigate, measure and respond to the human rights impacts of a business project. While we focus on project-specific HRIAs as most suited to a collaborative approach, such an approach could also be pursued to assess several projects affecting a specific community, such as a hotel zone with multiple hotels and other tourism activities. The approach we describe, which emphasizes deep collaboration between stakeholders from the very beginning, differs from assessments initiated by a company and led by a third-party organization, as such assessments usually do not create space for project-affected people to jointly define and implement the process. Collaborative HRIAs are also different from situations in which different stakeholders undertake parallel assessments of the same project (e.g., a company-commissioned and community-based assessment of the same project; see Chapter 3 in this *Handbook*).

The premise for a collaborative HRIA arises from the current state of affairs, whereby HRIAs are generally commissioned by either a company (‘company-commissioned’) or by project-affected people (‘community-based’). Company-commissioned HRIAs are often conducted with little to no involvement of civil society organizations (CSOs), community representatives or workers, except as part of standard stakeholder engagement and consultations (see further Chapters 2, 8 and 17 in this *Handbook*). Likewise, community-based assessments rarely involve company representatives (see further Chapters 3 and 11 in this *Handbook*). These dynamics can lead to suspicion of HRIA results. Although independent practitioners may conduct HRIAs using the same methodology both for companies and for communities, stakeholders may mistrust assessment results simply by virtue of who commissioned them. This failure to achieve buy-in can render HRIAs ineffective or contentious, exacerbating distrust instead of building dialogue.

Most HRIAs also fail to include the participation of government representatives beyond interviewing them and making requests for data. Avoiding government participation may be necessary in some contexts. At the same time, governments are the primary duty-bearers of human rights legal obligations; for this reason, many community-based HRIAs direct recommendations to government actors, particularly host governments (FIDH et al., 2017; PODER et al., 2017). Given the expanding use of HRIAs, a lack of government involvement may, in some cases, represent a missed opportunity.

Collaborative approaches to HRIA offer an avenue for more inclusive assessments. Such inclusivity holds the potential of better results, through more insightful analyses, more appropriate action plans, and more receptive audiences for recommendations. Collaborative HRIAs can also help realize rights-based values of participation, by enabling affected people to help shape project decisions. Collaborative approaches may also support affected people in their decisions to provide or withhold informed consent (see also Chapter 8 in this *Handbook*). In many situations, this would represent a stark departure from current practices; researchers have documented, for example, indigenous representatives' assertion that they do 'not want companies to employ external consultants to conduct [impact assessments], as the result[s] were often flawed and constituted a totally inadequate basis for an informed consent process' (Doyle & Cariño, 2013, p. 21).

Yet a collaborative HRIA may also be fraught with its own challenges. Whether this approach could even succeed, and in what form, is still an open question. Although some HRIAs have incorporated strong (if not entirely successful) efforts to increase stakeholder engagement (see, e.g., Kuoni Travel Holding's (2014) HRIA in India, which was supported by a stakeholder advisory group; and the mining sector-wide impact assessment in Myanmar undertaken by the Myanmar Centre for Responsible Business et al. (2018), which had an advisory committee), no collaborative HRIA, as we define it, had been carried out at the time of writing. A collaborative HRIA is not suggested as a replacement for current HRIA approaches. Rather, it could complement (or replace) company-commissioned or community-based assessments in certain situations, providing a mechanism for moving away from unilateral and contested assessments.

This chapter outlines the rationale and opportunities for a collaborative HRIA approach; as well as discussing the options for navigating the inherent challenges of such an approach. It draws from lengthy research for a paper that the authors wrote with colleagues from the Sciences Po Law School Clinic, which involved desk-based research; interviews with 49 people, including representatives of companies, CSOs, and communities, among others; and feedback gleaned from two multi-stakeholder roundtables and from presentations at conferences and practitioner meetings (Columbia Center on Sustainable Investment [CCSI] et al., 2017). This chapter incorporates subsequent feedback and additional research undertaken since the paper was published.

The chapter proceeds as follows. In Section 4.2, we consider reasons why stakeholders might wish to undertake a collaborative HRIA, as well as factors affecting the appropriateness of such an assessment. Section 4.3 provides a theoretical and practical overview of a collaborative approach to HRIAs, including discussion of participants, timing and key steps, structure and governance, methodology, dispute resolution and funding. Section 4.4 reflects on other key challenges and opportunities raised by collaborative HRIAs and Section 4.5 concludes.

## **4.2 REASONS FOR PARTICIPATING IN A COLLABORATIVE HRIA AND FACTORS AFFECTING APPROPRIATENESS**

The motivations and expectations of companies, project-affected people and other stakeholders can converge and diverge, both between stakeholders and within each stakeholder group. Even when there are interested stakeholders, a collaborative HRIA will not be suitable in every context. The appropriateness of such an approach will depend on factors such as stakeholders' characteristics, the history of their relationships and the political context.

### **4.2.1 Shared Incentives**

Collaborative HRIAs could offer stakeholders the ability to develop a deeper understanding of project impacts, particularly through improved information sharing. Without a collaborative approach, for example, company-commissioned assessments may inaccurately account for project-affected peoples' priorities, needs and concerns. By facilitating collaboration and information sharing from the outset, collaborative HRIAs could incorporate more perspectives and information, enabling a more comprehensive assessment.

A collaborative HRIA may also increase the likelihood that recommendations will be implemented, by helping stakeholders to identify shared priorities and concerns and increasing their buy-in. Similarly, the ongoing opportunities for dialogue in this approach could help stakeholders to prevent and manage conflict. Apart from any formal dispute mechanisms established for the assessment, a collaborative HRIA could provide informal avenues for raising grievances and resolving disputes. In this way, the process of undertaking a collaborative HRIA may be as important as the assessment's findings and recommendations.

### **4.2.2 Additional Incentives for Companies**

While some companies have taken steps to improve their human rights performance, many remain flummoxed by the question of how to comply effectively both with internal initiatives and with the evolving human rights legal framework. Engaging in a collaborative HRIA may make a company better positioned to understand and adapt to project-affected people's expectations. Improved relationships can reduce reputational and other risks for the company, effectively rendering collaborative HRIAs a useful component of corporate risk management strategies.

Companies may also be interested in strengthening relationships with project-affected people as a way to improve decision-making regarding environmental, social and human rights management. Participating in a collaborative HRIA could, for example, deepen company representatives' awareness of human rights issues, thus enhancing the company's human rights due diligence.

### **4.2.3 Additional Incentives for Project-affected People**

Collaborative HRIAs may offer project-affected people opportunities to access information and to influence decision-making related to the project. This contrasts with community-based assessments: project-affected people may not have access to sufficient information to undertake *ex ante* assessments, while *ex post* assessments may occur too late to shape project design or to avoid negative impacts.

Collaborative HRIAs could also establish avenues for project-affected people to communicate effectively with the company, ideally in ways that bridge power imbalances. A collaborative HRIA may further provide project-affected people with an opportunity to enhance relevant knowledge and skills that may help in their interactions with other companies whose actions stand to affect them.

### **4.2.4 Additional Incentives for Government**

Government actors may also see benefits to participating in collaborative HRIAs. For instance, a collaborative HRIA might help to better articulate and reconcile a government's role as the primary duty-bearer of human rights obligations and the main facilitator of foreign direct investment. Because collaborative HRIAs could help companies and project-affected people build consensus on key priorities, government participation may help officials to navigate the competing concerns of citizens, businesses and government actors.

## **4.3 THEORETICAL AND PRACTICAL OVERVIEW OF COLLABORATIVE HRIA**

### **4.3.1 Actors Involved in Collaborative HRIA**

Stakeholder groups comprise individuals and subgroups, which should be mapped when determining which representatives should participate in a HRIA (see, e.g., BSR, 2011). In this context, participation refers to more than simply being an interviewee of an assessment process, although the manner in and extent to which representatives participate may vary. Regardless of the mode of participation, representatives of each involved group must have the trust of the people or entity they represent, and should regularly consult with and report back to their constituents throughout the assessment.

#### **Representation of project-affected people**

Identifying appropriate representatives of project-affected people is both important and complicated. Some of the inherent challenges are the same as those found in company-commissioned and community-based HRIAs. For example, the geographical limits of some project-related impacts, such as water or air contamination may be difficult to predict. To address this, a process might be required for adding additional participants, if needed, as the assessment proceeds. Another challenge lies in ensuring the participation of vulnerable or marginalized groups, and communities selecting their representatives may need to develop additional inclusivity measures beyond existing decision-making structures.

In many cases, local workers employed by the project being assessed will need their own representatives. At times, such workers may be perceived as representing the project's workforce and therefore the company itself; alternatively, they may be regarded as a subgroup of project-affected people. These conflicting aspects should be taken into consideration when determining how workers will be included and represented in the assessment.

### **Company representatives**

In company-commissioned HRIAs, company representatives may be involved in various ways, depending on how much of the assessment is outsourced. For example, representatives may serve as a link between the company headquarters and the subsidiary, provide support in organizing the logistical arrangements of the HRIA, participate as interviewees during the assessment, and elevate the findings and recommendations to the headquarter level. However, to ensure some level of independence, they do not make decisions regarding scope and stakeholder identification and should not participate in rights-holders interviews. In a collaborative HRIA, company representatives would generally participate in more depth, fully integrated into all phases of the assessment as core participants (with the potential exception of rights-holders interviews, as discussed further below). The best-placed representatives will have sufficient authority within the company to influence decisions and ensure implementation of recommendations. Such individuals could be from the company's headquarters or in-country operations (or both), depending on their positions and profiles.

A representative from headquarters may be appropriate if able to convince decision-makers to implement meaningful changes. Headquarters staff, who are more removed from on-the-ground operations, may also be able to avoid potential roadblocks caused by tensions between local communities and the country office. In addition, headquarters staff may have more time and resources to dedicate to the HRIA, or be more familiar with human rights due diligence practices. Lastly, a headquarters representative could potentially incorporate lessons learned from the collaborative HRIA into other company projects, improving the company's human rights performance beyond a specific assessment.

There are also benefits to including a local company representative in a collaborative HRIA. For instance, such representatives will be more familiar with the local context and the project's day-to-day operations, and more invested in building and maintaining good local relationships. As such, their participation could result in recommendations more tailored to the local context that can effectively prevent adverse human rights impacts in the future.

### **Government participation and representation**

Stakeholders interested in undertaking a collaborative HRIA should carefully consider the appropriateness of having government representatives participate in the actual assessment process and what role they could best play in the assessment. For example, could they serve as facilitators of contacts and data, or as members of the assessment team? Whether and how host government actors should be included may depend, for example, on the government's stance on human rights, as well as on the characteristics and priorities of specific government entities. As discussed in Section 4.3.2, below, the HRIA's structure and rules of conduct should guard against powerful participants, which could include bad faith government actors, undermining the process.

When government participation is acceptable, representatives of project-affected people and the company can carefully determine *which parts* of the government should be involved and *how*. In many cases, local government representatives may be appropriate participants beyond simply serving as interviewees – for example, they might be useful as facilitators of contacts, given their knowledge of the local context and dynamics. They can also be useful sources of data, contacts and other information. National government representatives could also be considered. National representatives who are proximate to key decision-makers, for example, may also have significant leverage to implement the HRIA’s recommendations.

Government actors’ objectives and responsibilities should be taken into consideration. For instance, some government actors may prefer to streamline processes for businesses with little regard for human rights considerations or may accord especially favourable treatment to certain companies or projects; such actors will likely not be appropriate participants in a collaborative HRIA as assessment team members, unless their involvement could foreseeably encourage them to factor human rights considerations into future conduct and decision-making. Other entities, such as agencies that regulate investments, might be better candidates for participation, barring any conflicts of interests. State entities with relevant skills and experience, such as the ministry of environment, or independent public bodies such as national human rights institutions (NHRIs), could also potentially help to monitor compliance with the HRIA action plan.

### **Other relevant stakeholders**

In addition to the key stakeholders outlined above, the participation of other relevant actors could provide supplementary skills and knowledge. Specific human rights expertise could be particularly important, including from relevant non-governmental organizations (NGOs) and CSOs, NHRIs, and human rights academics and experts from the country or abroad.

Civil society actors could provide important support to project-affected people to help them meaningfully participate. Such actors could include local NGOs, community-based groups, workers’ organizations, and other grassroots organizations, such as village associations and women’s and faith-based groups. Any such representatives would need to be trusted and respected by participating stakeholders. While relevant international NGOs could also provide support, they may be driven by their own agendas and should not be assumed to necessarily represent the interests of all project-affected people.

Other potential participants include independent and impartial experts who could provide either technical assistance on conducting HRIsAs or substantive knowledge on pertinent issues, such as the workings of the relevant industry.

## **4.3.2 Key Steps, Governance and Implementation**

### **The importance of capacity building**

Capacity building of principal stakeholders, while not usually a core component of company-commissioned assessments, is a crucial precondition to conducting a collaborative HRIA, which requires the active participation of different stakeholders. Given the diverse knowledge and skill-sets of participants, capacity building can minimize asymmetries that

might otherwise enable one actor to dominate processes and decision-making. Improving the capacity of stakeholders to communicate and collaborate effectively can also help to establish sustainable community-company relationships and avoid potential conflict.

Various capacity building approaches and methods could be used depending on participant needs. In some instances, undertaking joint capacity building of project-affected people and the company or other stakeholders – for example, on specific issues like human rights norms or skills such as research techniques – could also help to build trust. Yet capacity building interventions risk functioning in an ideological or paternalistic manner; empowering stakeholders to determine what capacity building they need can help to minimize this risk (Freudenberg et al., 2011).

Different actors may be suitable to lead capacity building efforts, depending on needs and context. For instance, local CSOs or experts are often well placed to navigate local customs. International experts or NGOs may offer a broader range of skills or deeper knowledge of best practices. Peer-to-peer learning may also be effective, with project-affected people learning from the experiences of project-affected people in other locations who have experienced similar projects (see, e.g., Weitzner, 2006).

Collaborative HRIAs will demand a wide variety of skills and knowledge, not all of which the participating stakeholders will have at the outset. For instance, project-affected people may need to improve their understanding of how the potential business project will operate, and foreseeable impacts. In addition to any external capacity building, there may be opportunities for company representatives to share this knowledge directly with project-affected people during the assessment. Conversely, company representatives may need to learn how to work effectively within the local context, including by understanding the cultures, customs and needs of local communities. By working directly with project-affected people, company representatives can gain such knowledge throughout the collaborative HRIA. Government representatives may need sensitization on minimizing power imbalances and ensuring that project-affected people are able to voice their opinions without fear of reprisal.

In addition, all stakeholder representatives will need to have some substantive understanding of human rights. Participants will also need to understand how to carry out impact assessments, including different approaches for gathering data about a project's potential or actual impacts. Such topics may also be ripe for capacity building. As collaborative HRIAs require stakeholders to work together to conduct research, deliberate and decide on an action plan, some participants may also need to develop skills for participating in formal collaborative decision-making structures and negotiating with different stakeholders.

### **Initiating the process**

In theory, a collaborative approach demands that even the initiation of the HRIA be done in a balanced and inclusive manner. Yet this will not be fully possible if a collaborative relationship does not already exist between stakeholders. Who then should initiate a collaborative HRIA, and can the process safeguard against the initial actor unfairly influencing the composition of participants?

The most likely scenario is that the idea is raised and pursued initially by any stakeholder or by a third party, such as a local CSO. Once a collaborative HRIA has been suggested, the actual initiation and establishment of any process should be done collaboratively. The idea of collaboration is likely to be more palatable to different stakeholders if efforts have already been made to encourage dialogue and trust between them than in situations where any interactions have been limited or accompanied by perceptions of bad faith. This stage should not be rushed, even if it interrupts or delays the business activity. To ensure an inclusive process, a starting point would be for interested stakeholders to map all relevant stakeholders and to engage in discussions with them to determine interest. If stakeholders were interested, they would then need to determine a process for agreeing upon who will participate and how the assessment will be structured. This would likely require multiple rounds of discussions. Capacity building and external support may be necessary at this stage, in particular to ensure that project-affected people are aware of their rights and have enough information to decide on the appropriateness of a collaborative HRIA.

### **Establishing strong governance**

Once the process has been initiated, and once stakeholders are sufficiently capacitated and armed with any legal or technical support needed, an agreement should be negotiated. During negotiations, representatives should regularly seek feedback from the people or entities they represent. Before signing the agreement, each representative should confirm the commitment of those they represent and authorization to sign on their behalf. Rather than constituting a contract by one party commissioning another to conduct the HRIA, such an agreement would represent a mutual commitment between all parties to be active participants in a jointly designed and implemented impact assessment.

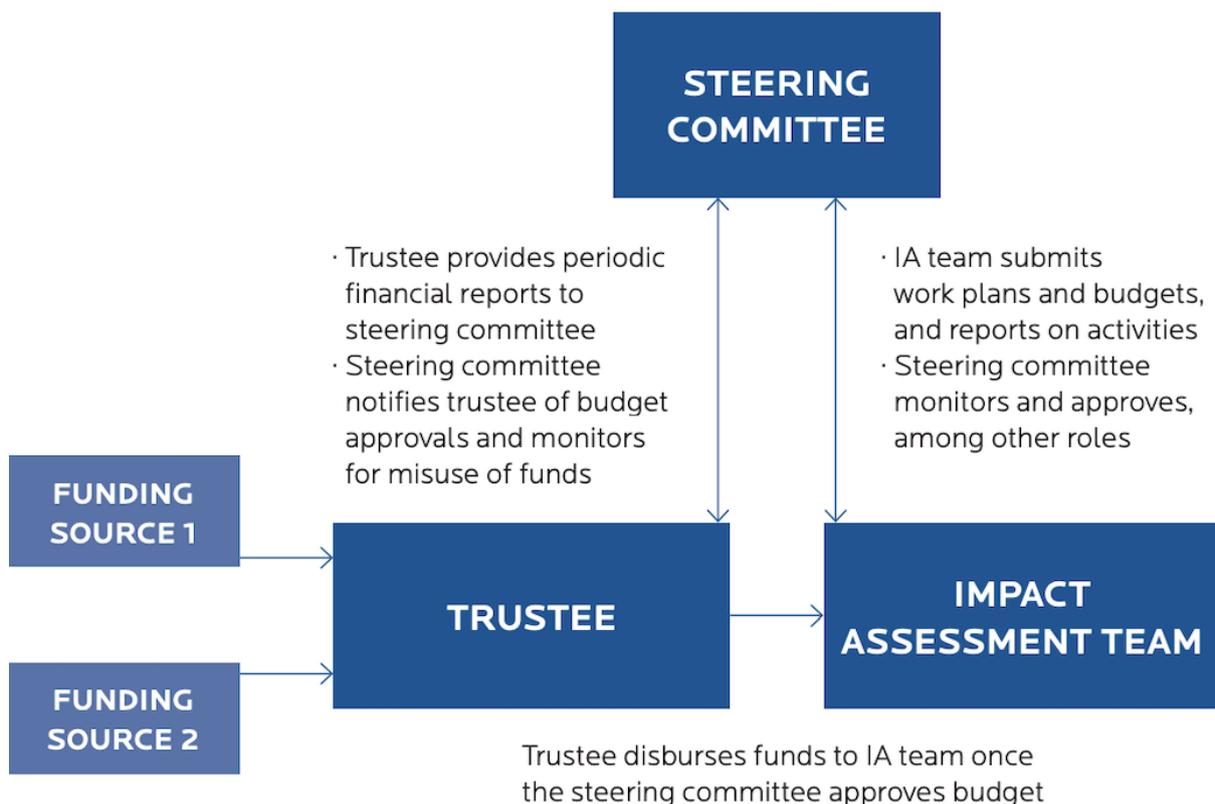
The agreement can set out the collaborative HRIA's participants (including which community subgroups will be represented), objectives, organizational structure and funding sources. Depending on how participants wish to structure the assessment, the agreement could also describe the criteria and process for a steering committee to select a trustee and impact assessment (IA) team members (these various components are discussed further below). The agreement might also include general rules of conduct, including for how decisions will be made (Gleckman, 2018), and could give the steering committee the power to establish additional rules as needed. As with other types of multi-stakeholder collaboration (see, e.g., Extractive Industries Transparency Initiative, n.d.), having clear rules of conduct and a clear structure of entities with defined roles and responsibilities can help mitigate power imbalances and increase the chances that the process will succeed.

Rules for handling sensitive information and for protecting whistle-blowers who report illegal or untoward conduct should also be defined, alongside a commitment to share all relevant information or documentation about the project being assessed with participating stakeholders. The agreement can also record the parties' commitment to comply with the recommendations and action plan. To reduce the likelihood of future disputes, the agreement could set out which potential outcomes may be acceptable, including whether or not the company would accept recommendations to not operate (or to stop operating) in the area in question. The agreement should also explain processes, and commit funding, for monitoring implementation of the action plan.

Including dispute resolution provisions in the agreement can ensure that a process is in place before any disputes or grievances arise. The agreement can describe whether and how disputes will be resolved internally (for example, by the steering committee) and/or externally. In either case, provision should be made for: disputes between members of the IA team; grievances about the collaborative HRIA raised by individuals, whether or not directly involved; and impasses or disputes within the steering committee.

To enhance the HRIA’s effectiveness (on the topic of effectiveness see also Chapters 21 and 22 in this *Handbook*), the assessment should be structured to encourage collaboration, minimize power imbalances and clearly allocate the many requisite tasks. This may require the establishment of different entities with distinct roles. For example, a steering committee could provide oversight and facilitate communication, a trustee could receive and disburse funds, and a separate IA team could carry out the assessment and design the action plan (see Figure 4.1).

**Figure 4.1:** Potential structure of a collaborative HRIA



### The steering committee

A steering committee can provide oversight and a forum for communication and rule setting (see, e.g., *On Common Ground Consultants*, 2010). Such a committee could help, for example, to articulate the collaborative HRIA’s objectives. The steering committee could also set criteria for choosing the trustee and/or members of the IA team, if the agreement does

not already do so, and subsequently select them according to those criteria. In addition, the steering committee could develop and disseminate additional rules of conduct, take steps to address breaches of those rules or the agreement, and decide on, or refer out, disputes or grievances raised. Financial and operational management of the IA team is another function that the steering committee could undertake. Specifically, the steering committee could: decide on proposals regarding wages for members of the IA team (and potentially for project-affected people on the steering committee); approve the IA team's work plan and budget; and authorize any necessary payments. The steering committee could also review financial reports, monitoring for and addressing as needed any fraud or misuse of funds. Finally, once the HRIA has concluded, the steering committee could monitor implementation of the HRIA's recommendations and plan of action, or reconvene as needed to provide a forum for dialogue between stakeholders or to resolve disputes.

While this extensive list of potential roles could translate into the steering committee wielding significant influence, the risk of this influence being misused is tempered by the committee's multi-stakeholder composition. Additional safeguards can be secured by instituting appropriate grievance mechanisms and dispute resolution processes, and carefully balancing the allocation of roles between the steering committee, the IA team and the trustee.

The composition of the steering committee should reflect the multi-stakeholder nature of the collaborative HRIA. Core members would include representatives of project-affected people, the company, and – when appropriate – the government.

A steering committee would also benefit from an independent facilitator, who could help foster dialogue and build consensus between participants, ensure the rules of conduct are followed, and address power imbalances. A facilitator with those responsibilities could become very influential, and should therefore be trusted by participating stakeholders and should have their performance subject to periodic review. To be effective, a facilitator ought to have experience in facilitation and consensus building, mediation, project management, the conduct of HRIAs, and/or human rights frameworks more generally. Multiple facilitators could be considered if needed to capture those necessary skills. To identify an appropriate facilitator, participating stakeholders could agree to each nominate several candidates, and to discuss or negotiate if no universally trusted candidate initially emerges (see, e.g., ACCESS Facility, 2012).

Steering committee members may wish to invite additional participants who could bring different skills and knowledge. These may include subject matter experts, international organizations or academics with relevant expertise, and local or international CSOs. Even if such people do not join the steering committee, they could still be engaged to provide technical support.

### **The trustee**

A trustee that manages funds could help address the particularly fraught challenges surrounding funding and finances for collaborative HRIAs (see Section 4.3.3, below). Having an independent trustee could potentially reduce the risk that conflicts of interests will arise when the source of the HRIA's funding is also a key participant, like the company (Jochnick, 2013). A trustee can also absorb the administrative burden of managing funds, maintaining a bank account and paying out wages and other expenses in compliance with approved

budgets. The trustee should provide regular financial reports to the steering committee, and should also alert the committee upon detecting any misuse of funds.

The trustee could be an organization or individual, so long as it is trusted by participating stakeholders and regarded as competent to manage the funds. It should have experience managing funds on behalf of third parties, and the ability to enter into contracts.

### **The impact assessment team**

The IA team is the component of the collaborative HRIA structure that would conduct the actual impact assessment, under the supervision of the steering committee. Its role would be very similar to that played by the individuals or entities who conduct company-commissioned or community-based HRIAs (see Chapters 2 and 3 in this *Handbook*). Responsibilities include designing a budget and work plan (to be approved by the steering committee), and determining the assessment's scope and methodology. The IA team would then collect data on the business project and its past, present or potential impacts. After assembling findings, the IA team would prepare recommendations for addressing actual or potential impacts, as well as an action plan to operationalize the recommendations.

The IA team could be composed of representatives from each stakeholder group (like the steering committee), accompanied by impact assessment practitioners and other independent experts. Alternatively, stakeholders might prefer to have a practitioner-only IA team (composed entirely of independent impact assessment practitioners).

A multi-stakeholder IA team would create opportunities to improve upon community-based and company-commissioned HRIAs. For instance, participating representatives of project-affected people will likely be well positioned to identify issues of most concern to project-affected people and to offer insights regarding how the assessment can effectively gather project-affected people's perspectives. Similarly, including company representatives could potentially increase the company's buy-in, and the HRIA's access to company-held information. A multi-stakeholder IA team also creates another vehicle for trust building.

There are, of course, potential drawbacks to having a multi-stakeholder IA team. The number of people on the IA team could quickly become unwieldy; the need for representation of different perspectives should therefore be balanced with the concurrent need for agility and efficiency. Moreover, a multi-stakeholder IA team raises the risk that the actual conduct of the assessment might become a site of contestation. A robust structure, rules of procedure and dispute resolution processes, as discussed above, could help to minimize this risk.

Multi-stakeholder IA teams would ideally have one or more independent IA practitioners, to ensure the team has the necessary expertise. Gender balance on the team is also important for designing and conducting the HRIA in a gender-responsive manner, and the participation of women on the IA team additionally allows female interviewees to be interviewed in the absence of men if they so wish. To facilitate the team's operations, one member could be designated the project manager. In some cases, the team may feel that it is important that the project manager is relatively impartial; in such cases, a team member other than a core stakeholder might be most suitable.

A practitioner-only IA team would be inherently less participatory but might be preferred by stakeholders in some cases. Multiple factors may affect whether the IA team is

comprised primarily of stakeholders representing all relevant groups, or is limited to independent practitioners. These include: time and scope (a multi-stakeholder IA team may move more slowly, limiting which issues can be addressed); funding (while a multi-stakeholder IA team may have more members and may take longer to complete the assessment, members of a practitioner-only IA team may be international consultants who charge higher rates than local stakeholder participants in a multi-stakeholder IA team); the level of trust between stakeholders; and the availability of stakeholder representatives to participate in conducting the assessment. If a practitioner-only IA team is chosen, the assessment could be made more participatory by closely involving the steering committee in setting the HRIA's scope and methodology and in devising the recommendations and action plan.

### **The collaborative HRIA methodology**

Although the methodology of a collaborative HRIA mostly resembles the standard steps and principles of any HRIA methodology (for an introduction see Chapter 1 in this *Handbook*), a collaborative HRIA could potentially take a different approach for certain aspects of the assessment. The methodology for a collaborative HRIA has the potential to move away from strictly or abstractly scaling and ranking impacts; instead, it emphasizes collaboration, which can support building consensus on shared priorities and arguably can lead to more effective ways of addressing negative impacts.

One unique challenge for collaborative HRIAs may arise in the conduct of interviews when there is a multi-stakeholder IA team. For instance, company or government representatives should not participate in interviews of project-affected people if their presence is likely to make the interviewees reluctant to speak candidly. Caution should also be taken in allowing local community representatives to participate in interviews of workers, if they are likely to have strongly opposing views. The participation of project-affected people in company interviews might also raise concerns if commercially sensitive information will be shared. Such cases require clear rules outlining when certain IA team members should not be present and how sensitive information coming out of such interviews will be managed.

Once the collaborative HRIA has concluded, a follow-up framework – with recommendations, an action plan and strategy for monitoring implementation – should be designed. Unlike company-commissioned assessments that gear recommendations towards the company and its internal functions, or community-based HRIAs that usually address recommendations to the company and government, a collaborative HRIA could address recommendations to a range of stakeholders, including but not limited to the company and government. An action plan for the prevention or mitigation of project-related human rights impacts is one of the core expectations of a collaborative HRIA. The action plan should translate the findings and agreed recommendations into specific, measurable, attainable, relevant and time-bound (SMART) actions (Andersen & Sano, 2006), and should assign actions to all relevant stakeholders. Importantly, the action plan should also set out a budget for implementation, and explain who will provide funding.

The monitoring strategy should include a process for adapting to unforeseen issues and impacts that arise after the HRIA's conclusion. This is often lacking in company-commissioned and community-based HRIAs. The monitoring strategy may include planning

for follow-up assessments or forms of ongoing engagement between relevant stakeholders. These stakeholders may have changed since the decision to conduct a collaborative HRIA; for instance, there might be new subgroups, a change in power structures, or project changes that warrant a review of the action plan.

### **4.3.3 Funding**

#### **Funding sources**

While ensuring sufficient funding for the assessment is critical, selecting the source of funding is equally important, as it may directly or indirectly influence the process, outcomes, and/or credibility of the assessment (Jochnick, 2013).

Having the participating company fund the collaborative HRIA was among the most divisive options with interviewees consulted as part of the CCSI et al. (2017) research on collaborative HRIA approaches. While multiple interviewees asserted that the company should provide funding, others were adamant that the company should not, primarily due to potential impacts on the assessment's actual or perceived independence. No in-country community representatives that we interviewed suggested that the company should fully finance the assessment. Other research suggests, anecdotally, that in-country CSOs may be 'much less wary' about company funding for community-company engagement initiatives (Bauer, 2014, pp. 16-17).

Proponents of company funding note that undertaking a collaborative HRIA can fulfil a company's need to conduct human rights due diligence, and that companies have previously funded impact assessments and monitoring. For example, in Guatemala, an affected community insisted that a mining company pay for a human rights assessment after years of alleged impacts; the company subsequently funded an assessment of its operations (see On Common Ground Consultants, 2010). Importantly, having the company pay may be more sustainable and scalable than relying on funding from donors (Bauer, 2014; Jochnick, 2013).

Determining the viability of company funding may depend in part on the company's own credibility, reputation and track record. Moreover, whether a company is motivated to pay for the process may depend on contextual factors. For example, companies may be reluctant if no grievances have been raised in relation to the project, or if the money goes into a non-transparent fund that does not allow the company help decide how it is used. Conversely, companies may be more likely to pay if there are already grievances or if they are anxious to obtain a new social licence to operate.

If company funding is used in full or in part, most interviewees believed that safeguards would be required to ensure that the process was perceived as independent and legitimate. We discuss potential safeguards in the next subsection.

Aside from companies, which other entities might provide funding for collaborative HRIAs? The two other obvious stakeholders for such assessments, project-affected people and host governments, are not particularly well-suited to provide funding.

While financial contributions from project-affected people could encourage their buy-in and help with perceptions of ownership of the process, project-affected people are often not in the position to contribute financially. Moreover, it is arguably inappropriate to expect

the people who stand to suffer adverse human rights impacts to help finance an effort to assess and address them; similarly, it may be unjust to ask them to contribute resources to measures aimed at mitigating the impact of a company's profitable activity. For these reasons, we view monetary contributions from project-affected people as a non-starter, although some in-kind contributions of time may be acceptable.

The host government is the primary duty-bearer of human rights obligations, and thus might appear to be a logical funding source. Yet host government funding presents challenges regarding actual or perceived influence similar to those presented by company funding. In some contexts, the host government might be more interested in protecting business than in protecting rights, or might be distrusted by its own citizens. In such cases, host government funding could raise serious concerns or affect perceptions of the assessment's neutrality. More practically, however, a host government of a low-income country may not have sufficient financial resources to allocate towards a collaborative HRIA. We thus consider host government funding as primarily non-viable, with the possible exception of longer-term strategies in which a new dedicated tax or fee on investments could be levied, funneled into a dedicated fund, and then used to support the funding of such assessments. While no government has attempted this as of yet, similar approaches have been proposed in some countries (see Szoke-Burke & Cordes, 2019). In Sierra Leone, for example, the government has explored the creation of a fund to support legal services for communities, funded in part by fees paid by investors as part of their impact assessment registration (Food and Agriculture Organization of the United Nations, 2015). If such a strategy were to be pursued, care would need to be taken to ensure that the fund does not, by creating a new source of revenue, inadvertently incentivize government approval of projects with negative impacts. Additional safeguards might require that the fund be administered by an NHRI or another public entity without conflicts of interest.

If not the company, the project-affected people, or the government, then which entities are suitable sources of funding? The most desirable source of funding in terms of objectivity is also the least scalable: actors that are not direct stakeholders in a project. Potential funders in this category include philanthropic donors, which have supported HRIA projects in the past, as well as United Nations entities or other international organizations. Other entities falling within this category, but which may be perceived as less neutral, include home governments (through embassies, foreign affairs ministries, or bilateral development agencies) or institutional investors with links to or interest in a company, sector or region. For example, all sector-wide impact assessments (SWIA) carried out in Myanmar were funded by donors (Danish Institute for Human Rights, n.d.; Myanmar Centre for Responsible Business, 2014, 2018; see also Chapter 5 in this *Handbook*).

Although neutral-party funding will always be more ad hoc, requiring each collaborative HRIA to find its own source of funding, it has the benefit of avoiding most concerns about undue influence or partiality. In some contexts, this may prove critical for building trust and reducing power imbalances between stakeholders. For this reason, we are of the view that neutral-party funding should always be explored first before considering other options.

### **Alternative funding options**

The strengths and limitations of the funding sources described above paint a challenging picture. While neutral-party funding may be optimal, it may be difficult or time-consuming for stakeholders to find sufficient funding from such sources. This suggests that creative strategies must be developed to find workable and acceptable funding approaches that guard against the risks posed by certain funding sources. Two options to try to mitigate risks are to use a phased approach or to seek mixed funding. Whether either option is feasible and acceptable for any given collaborative HRIA would depend on context and participants' perspectives.

Under a phased approach, neutral-party funding for the scoping phase could be combined with company funding for the assessment phase. During the scoping phase, participants would decide on issues such as which rights will be covered and what methodology will be used. The scoping phase can also more accurately estimate the assessment's likely costs. The company would then fund the rest of the HRIA, including the actual assessment by the IA team. Possible exceptions could be made for activities best supported by others, such as capacity building or technical support for project-affected people, or subsequent monitoring and follow-up, provided sufficient funding for those activities can be secured.

Neutral-party funding for the scoping phase would help stakeholders to begin to collaborate with fewer fears or perceptions of influence. Company funding for the remaining phases would be realistic and scalable, and would allocate a significant part of the assessment's financial burden to the actor that stands to gain the most from the underlying project that poses human rights risks.

Alternatively, participants could seek mixed funding from multiple sources, with the goal of diluting any single funder's potential influence. Unlike a phased approach, mixed funding would fund every phase of the collaborative HRIA, including scoping. For example, funding could be split between the company, the host government and a neutral entity, or equally between the company and one or more neutral entities. This type of mixed funding was contemplated for a potential HRIA that was ultimately not carried out: the funding would have been contributed equally by the company, a human rights organization and an industry organization to help address concerns of bias (Interview, January 2015). One example of a similar funding approach used in a different context is The Earthworm Foundation's Kumacaya initiative (Arljung & Hansson, 2018; Interview, October 2018). TFT secures funding contributions on a confidential basis from multiple member companies for specific TFT-designed supply chain monitoring projects, which are tendered, and then carried out by successful CSO bidders. TFT's role in collecting funding on a confidential basis, designing projects without company involvement, and selecting CSOs helps to guard against company influence.

The level of 'dilution', and mix of funding sources, needed to assuage concerns may depend on the stakeholders involved. Mixed funding from entities with actual or perceived aligned interests, such as, in some circumstances, the company and the host government, likely would not lessen the concerns of project-affected people.

As both phased and mixed funding still rely on partial company funding, additional steps would be prudent to guard the actual and perceived independence of the assessment, and project-affected people and their representatives must be involved in developing and

deciding on such safeguards. One potential safeguard would be to route all money through a neutral entity. (This is why we suggest using a trustee that is separate from both the steering committee and the IA team.) Additional safeguards could include processes or rules to stop the funding source from dominating the methodology development; ensuring that the funding source does not have editorial rights and does not receive the report before other participants; obtaining guarantees from the funding source that it will not seek to use its position as the provider of funding to influence the process (including that it will not withdraw funds before the assessment is complete); and transparently publishing all funding sources. While none of these steps would, on their own, absolutely safeguard against the risks associated with company funding, a combination of them could help to create a workable solution with which all parties are comfortable.

#### **4.4 KEY CHALLENGES AND OPPORTUNITIES FOR A COLLABORATIVE HRIA**

A variety of factors will determine whether a collaborative HRIA is feasible in any particular situation.

##### **4.4.1 Context**

The local context can greatly affect the feasibility of a collaborative HRIA. Pre-existing relationships between stakeholders, including any conflicts or tensions related to previous projects, are an important consideration. The political context is also extremely important; a collaborative HRIA might be unsuitable in a conflict zone, a context with corrupt public authorities or a context where local or national elections are about to take place. Similarly, a collaborative HRIA will likely not be appropriate if project-affected people are unwilling to speak freely due to shrinking civic freedoms and increasing government hostility towards human rights defenders.

##### **4.4.2 Characteristics of the Project**

The scope of the specific project to be assessed will also affect the feasibility of a collaborative HRIA. For instance, a single project, whether large- or small-scale, might lend itself well to this approach, whereas a HRIA related to a specific commodity would be challenging, unless tied to a specific geographical location, to ensure that project-affected people can be adequately identified and involved.

In addition, the project's complexity and the extent of the resources already invested in the project will also be relevant to the feasibility of a collaborative HRIA. A complex project with many different stakeholders and subgroups, or projects with multiple phases, might not be the most suited to a collaborative HRIA. A company that has not yet spent a lot of money on the project might be more open to changes in the project design, which would increase the feasibility of a successful collaborative HRIA. Conversely, a company that has made significant financial investments might wish to build good relations with project-affected people to avoid disruptions, but might also be less willing to make significant changes to the project design, and thus may not wish to embark upon a collaborative HRIA.

Similarly, if the company has spent significant time and money on legally required assessments, such as an environmental and social impact assessment, it might be less interested in investing additional resources for another assessment.

#### **4.4.3 Characteristics of Project-affected People**

Different participants within multi-stakeholder governance initiatives ‘are not created equal’ (Gleckman, 2016). This observation applies to collaborative HRIAs, where participants have different skills, expertise, types of knowledge and financial resources. These differences can lead to power imbalances that need to be consciously addressed if a collaborative approach is to be meaningfully implemented. Some of the strategies mentioned above, such as capacity building, a trusted facilitator and legal and technical support, can help.

Yet even when all of these interventions are in play, will project-affected people really be able to meaningfully participate? There certainly are instances of project-affected people being sufficiently organized and experienced to participate autonomously in similarly complex processes. In one example, concerning the Ekati diamond mine in Canada, a researcher described local Aboriginal groups as ‘effective negotiators, with the legal and technical capacity to negotiate agreements’, and noted that ‘[o]ne company official described the Aboriginal negotiators involved as “the best negotiators in the world” given their decades-long experience with land claims negotiations’ (Affolder, 2010, p. 164). In many other cases, however, project-affected people lack experience interacting or collaborating with companies, and thus may require additional support. As experience with community-based HRIAs and community-driven land protection and titling (see, e.g., Sesay, 2017) has revealed, a lack of previous experience can be remedied by the close involvement of a trusted and trustworthy CSO that can accompany and empower representatives of project-affected people throughout specific processes.

A range of factors will affect project-affected people’s willingness and ability to participate in a collaborative HRIA – even where adequate capacity building, facilitation, technical support and CSO accompaniment are all available. Such factors include the extent to which divisions within groups of project-affected people exist, whether the project-affected people are irremediably opposed to the project, their ability to negotiate and collaborate with other stakeholders and their financial and educational resources more generally.

#### **4.4.4 Issues Related to Time**

##### **Time required and implications**

A collaborative HRIA will likely require more time than typical HRIAs. Even the first steps of identifying the right stakeholders, ensuring sufficient capacity of stakeholders and negotiating a preliminary agreement setting out rules of conduct could be a lengthy process. Moreover, during the collaborative HRIA, the multiple sets of participants involved and governance structures required may extend the process’s timing. Finally, the actual conduct of the assessment and development of a subsequent action plan may also be more time-consuming than for typical HRIAs.

The lengthy time necessary for a collaborative HRIA presents challenges. Although companies have begun to understand that certain aspects of responsible business practices, such as proper community engagement, often require more time than has traditionally been allocated, such practices can be hard to square with inherent timing pressures within a business. Some companies may feel that they need to move more quickly in order to remain competitive. Others may confront pressure from investors and lenders who expect shorter timeframes for the establishment of a project.

A lengthy duration may also pose problems for project-affected people. For instance, if the project to be assessed has not already commenced, but if it is likely to proceed at some point, a lengthy assessment could introduce uncertainty for those who stand to be affected. If the project would require land acquisition, for example, project-affected people may not know to what extent they should invest in their land during the assessment period. More generally, participation in a collaborative HRIA can create significant time burdens for project-affected people, and this has funding implications. When project-affected people dedicate significant time to participate in the HRIA, potentially forgoing income, they should be paid wages for their time commitments. Other expenses may also increase when collaborative HRIAs take more time, such as the fees of any independent HRIA practitioners and travel costs, among other expenses.

#### **When should the HRIA take place?**

There is no one moment or stage of a business project when a collaborative HRIA should be carried out. In general, conducting a collaborative assessment *ex ante*, before the project begins, will be preferable, given that HRIAs are designed to act as a form of human rights due diligence that can inform the design and implementation of a project. There are various moments before a project begins in which a HRIA could be undertaken; for example, before preparatory processes such as feasibility studies have been conducted, before the company has received permission for the project or right before the project is set to begin.

Collaborative HRIAs could also be conducted *ex post*, when projects have already commenced. For example, grievances regarding the company's operations may lead different stakeholders to decide on conducting a collaborative HRIA, to help restore relations and set out a plan for a viable, rights-respecting continuation of the project. If, however, extensive disagreement exists between stakeholders regarding specific issues, or if outstanding grievances are particularly severe, a collaborative approach may be less appropriate. In such circumstances, it might be preferable for parties to jointly select an external person or entity to carry out fact-finding for specific grievances. The findings of that investigation could then be the basis for stakeholders to collaboratively design remedies and a plan of action (see, e.g., Columbia Law School Human Rights Clinic & Harvard Law School International Human Rights Clinic, 2015).

## **4.5 CONCLUSION**

Current HRIA practices fail to ensure that business projects' human rights risks are adequately identified and addressed with sufficient participation of rights-holders. This often relates to larger challenges concerning human rights and business activities in low

governance contexts. Indeed, human rights due diligence remains extremely difficult where governments inadequately regulate businesses, and where power imbalances undermine the participation of project-affected people in decision-making on issues that affect their rights and livelihoods.

A collaborative HRIA holds the potential for an alternative approach to company-commissioned and community-based assessments, one that seeks to overcome trust deficits between stakeholders and to improve data collection and analysis. The collaborative approach can also encourage more stable stakeholder relationships through consensus building and communication, and increased rights-holder participation in decision-making. At the same time, thorny considerations concerning funding, potentially unassailable power imbalances, time constraints and untrusted government actors illustrate that a collaborative approach will not always be feasible, and that deep reflection and diligence during implementation would be needed to achieve many of the potential opportunities such a model offers.

Despite these challenges, exploring the notion of collaborative HRIAs enlivens an already diverse field of practice that eschews ‘one-size-fits-all’ approaches. It also highlights that further improvement and reflection is needed to maximize the degree to which HRIAs can meaningfully contribute to the protection of human rights in the context of business projects. The discussion in this chapter reveals that assessments can be the basis for imagining new modes of meaningful rights-holder participation, and for addressing existing challenges that render such participation so difficult to achieve in practice.

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