

Complaint under the OECD Guidelines for Multinational Enterprises submitted to the German National Contact Point for the OECD Guidelines

Against

HeidelbergCement Group, concerning its development of a cement mine and factory in Indonesia

Submitted by

[REDACTED] with support from Inclusive Development International (IDI) and FIAN Deutschland e.V. (FIAN Germany)

9 September 2020

1. Introduction

This complaint sets out breaches of the OECD Guidelines for Multinational Enterprises (the OECD Guidelines) by HeidelbergCement Group in relation to the operations of its controlled subsidiary PT Indocement. It is submitted by [REDACTED] who stand to be adversely impacted by a planned limestone mine and cement factory in the Kendeng Mountains of Pati regency, Central Java, Indonesia (“the Complainants”). Inclusive Development International and FIAN Germany are assisting [REDACTED] to submit this complaint through the National Contact Point (NCP) complaints handling process.

[REDACTED] have been publicly opposed to the development of a limestone mine and cement factory in the Kendeng Mountains for over a decade. For reasons stated in this complaint, the Complainants believe it is inevitable that they will face severe human rights, social and environmental impacts from the project. Of particularly acute concern to the Complainants is the destruction of the karsts of the Kendeng Mountains, which is a vital source of water for local communities. The mountain springs are not only crucial to the survival of the agrarian livelihoods of thousands of families across the region, but they are also of deep spiritual significance to [REDACTED], a local self-identifying Indigenous peoples. For this reason, [REDACTED] firmly reject the project and refuse to grant their free, prior and informed consent to its development in their territory.

The project has generated extensive and transnational opposition as a result of its noncompliance with human rights standards,¹ including those enshrined in the International Covenant on Economic, Social and Cultural Rights (ICESCR), the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), and the UN Declaration on the Rights of Peasants and Other People Working in Rural Areas (UNDROP).² Local activists and their international supporters have been vocal and active in expressing their resistance to the project, engaging in public demonstrations in both Indonesia and Germany.³ Indonesian advocates have also challenged the legality of HeidelbergCement’s operating license in domestic courts.⁴ HeidelbergCement has largely dismissed this opposition, resisted meaningful and active dialogue with human rights and environmental advocates, and is proceeding with its development plans.

We submit that HeidelbergCement is in breach of Chapters II, III, IV and VI of the OECD Guidelines as the majority owner with ultimate control over the project. The company and its subsidiaries have not taken adequate steps to ensure transparency surrounding the project’s development, nor have they undertaken satisfactory human rights due diligence and stakeholder engagement, including good faith meaningful

¹ See, e.g., [REDACTED]

² *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations. The Covenant was ratified by Indonesia in 2006 and by Germany in 1973.

-and-

UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples / adopted by the General Assembly*, 2 October 2007, A/RES/61/295. Germany and Indonesia both voted in favour of the adoption of the UNDRIP. <https://www.un.org/press/en/2007/ga10612.doc.htm>

-and-

UN General Assembly, *United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas / adopted by the General Assembly*, 17 December 2018, A /HRC/RES/39/12. <https://digitallibrary.un.org/record/1661560?ln=en>

³ For example, Knight, B., “Indonesian farmer joins May 1 rally to protest German cement”, Deutsche Welle, May 1, 2017. <https://p.dw.com/p/2cBcp>

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Open Democracy, “In Indonesia, the peasant struggle of Kendeng.” July 11, 2017. <https://www.opendemocracy.net/en/in-indonesia-peasant-struggle-of-kendeng/>

⁴ Case file number 015/G/2015/PTUN-SMG

-and-

BBC News, ‘Aksi menyemen kaki di Jerman untuk petani Kendeng’ May 10, 2017. <https://www.bbc.com/indonesia/indonesia-39871127>

consultation with local communities. In addition to human rights concerns, the company has failed to conduct and/or disclose a comprehensive environmental impact assessment of the project, despite the findings of a government study that mining of the Kendeng Mountains would cause serious and irreparable environmental damage to the surrounding ecosystem.

2. Identity and interest of the Complainants

Inclusive Development International (IDI) is an international human rights organization that works to make the global economy more just and inclusive. IDI supports affected communities to defend their rights and the environment in the face of harmful investment, trade and development activities.

FIAN Deutschland e.V. (FIAN Germany) is the German section of the international human rights organization FIAN International, a not-for-profit organization without religious or political affiliation that has a consultative status to the United Nations. FIAN Germany has been advocating for the Right to Food and Nutrition (RtFN) since 1986. FIAN Germany supports affected communities and grassroots movements – mainly in the global south – in their struggles against RtFN violations and land grabbing.

IDI and FIAN Germany are supporting [REDACTED] in filing this complaint to defend [REDACTED] rights and the environment against the proposed limestone mine and cement factory. [REDACTED] Indonesia who stand to be adversely impacted by the project in [REDACTED] question.

Due to concerns for personal security, the Complainants request that their identity be kept confidential. They further request that all correspondence related to the complaint be directed to advisors at IDI: Natalie Bugalski, Legal Director, (Natalie@inclusivedevelopment.net) and Craig Bradshaw, Southeast Asia Legal Coordinator (Craig@inclusivedevelopment.net), as well as FIAN Germany: Philipp Mimkes, Secretary General (p.mimkes@fian.de), and Mathias Pfeifer, Program Officer (m.pfeifer@fian.de), who will facilitate secure communication between the NCP and the Complainants.

3. Identity of the Respondents and relationship to the project

HeidelbergCement Group is a large multinational company headquartered in Heidelberg with operations in more than 50 countries on five continents.⁵ The company is listed on the Frankfurt, Stuttgart, Düsseldorf, and Munich stock exchanges.⁶ It is recognized as one of the 30 largest listed companies in Germany, and one of the largest building materials companies in the world.⁷ The extraction of raw materials used to produce concrete is one of the company's core activities.⁸

According to the company's website, HeidelbergCement is divided into five geographical group areas, including an Asia-Pacific Group with operations in Indonesia.⁹ All of HeidelbergCement's operations in Indonesia are conducted through its subsidiary PT Indocement.¹⁰ Heidelberg holds a controlling 51% stake

⁵ HeidelbergCement, "Company," accessed August 2020. <https://www.heidelbergcement.com/en/company>

⁶ HeidelbergCement, "Shareholder Information," accessed August 2020.

<https://www.heidelbergcement.com/en/shareholder-information>

⁷ Ibid, and HeidelbergCement, "Company," accessed August 2020. <https://www.heidelbergcement.com/en/company>

⁸ Ibid.

⁹ HeidelbergCement, "Asia-Pacific," accessed August 2020. <https://www.heidelbergcement.com/en/asia-pacific>

¹⁰ HeidelbergCement, "Indonesia," accessed August 2020. <https://www.heidelbergcement.com/en/indonesia>

in PT Indocement through several wholly-owned holding companies.¹¹ Formerly state-owned, PT Indocement is one of the largest cement producers in Indonesia.¹² PT Indocement publicly presents itself as a constituent part of HeidelbergCement Group.¹³

PT Indocement, in turn, holds 99.99% of PT Sahabat Mulia Sakti (PT SMS).¹⁴ PT SMS appears to have the sole function of developing the limestone mine and cement factory in Kendeng Mountains. As such, HeidelbergCement is the parent company of the project with ultimate control of its management and operation (see Diagram 1).

HeidelbergCement maintains a close managerial relationship with its Indonesian subsidiary, with significant overlap between HeidelbergCement management boards and the PT Indocement Board of Commissioners.¹⁵ Four of the six members of PT Indocement's Board of Commissioners, including the President Commissioner, are representatives of the Managing Board of HeidelbergCement Group.¹⁶ One of these individuals is the Chief Financial Officer of HeidelbergCement Group.¹⁷

The Board of Commissioners' duties and responsibilities as set forth in PT Indocement's Articles of Association and Board Charter include, inter alia, "[t]o supervise the operations, management and business activities of the Company, and provide supervision, advice and recommendations to the Board of Directors in the interests and in accordance with the goals and objectives of the Company."¹⁸ As such, HeidelbergCement representatives exert significant operational-level control over the decisions of Indocement and its projects in Indonesia. Moreover, company representatives at HeidelbergCement's 2020 Annual General Meeting noted that all information regarding the human rights risk assessments covering the global operations of the HeidelbergCement Group is regularly communicated to and discussed by both the company's Management Board and the Supervisory board.¹⁹

4. Competency of German NCP to handle the complaint

The Procedural Guidelines of the German NCP state that, "by default, complaints are handled by the NCP of the country in which the issues in hand have arisen [...] if the complaint relates to activities in a non-adhering country, the NCP may be responsible for handling the case if the relevant company's main headquarters are in Germany."²⁰

This complaint sits squarely within the jurisdiction of the German NCP office based on this criterion. The harms associated with HeidelbergCement's operations have arisen in Indonesia, a non-adhering country to

¹¹ Ibid.

¹² PT Indocement, "Company," accessed August 2020. <http://www.indocement.co.id/v5/en/company/>

¹³ PT Indocement, "Homepage," accessed August 2020. <http://www.indocement.co.id/v5/id/>

¹⁴ PT Indocement, "Subsidiaries' Information," accessed August 2020.

<http://www.indocement.co.id/v5/en/company/informasi-pemegang-saham/informasi-entitas-anak/>

¹⁵ PT Indocement, "Board of Commissioners," accessed August 2020.

<http://www.indocement.co.id/v5/en/compliance/dewan-komisaris/susunan-anggota-dewan-komisaris>

¹⁶ Kevin Gluskie: President Commissioner of Indocement and member of the Managing Board of HeidelbergCement for Asia Pacific region.

Albert Scheuer: Board of Commissioner of Indocement and member of Managing Board of HeidelbergCement.

Bernd Schelfele: Board of Commissioner of Indocement and Chairman of the Managing Board of HeidelbergCement.

Dr Loenz Naeger: Board of Commissioner of Indocement and Chief Financial Officer of HeidelbergCement.

¹⁷ Ibid.

¹⁸ PT Indocement, "Board of Commissioners' Duties and Responsibilities," accessed August 2020.

<http://www.indocement.co.id/v5/en/compliance/dewan-komisaris/tugas-dan-tanggung-jawab-dewan-komisaris>

¹⁹ Notes from HeidelbergCement 2020 Annual General Meeting for shareholders.

²⁰ Procedural Guidelines of the German National Contact Point for the OECD Guidelines for Multinational Enterprises at the Federal Ministry for Economic Affairs and Energy, Adopted at the meeting of the Interministerial Committee of the OECD Guidelines for Multinational Enterprises of 25 February 2019.

https://www.bmwi.de/Redaktion/DE/Downloads/M-O/oecd-procedural-guidelines.pdf?__blob=publicationFile&v=4

the OECD, leaving the German NCP as the only competent authority to facilitate an assessment of the German parent company's adherence to the OECD Guidelines. While HeidelbergCement's controlling stake in the Indonesian project is held through several holding companies based in OECD adhering jurisdictions (UK and Luxembourg), there is no indication that these companies play an active role in managing the operations of PT Indocement.

5. Breaches of the OECD Guidelines on MNEs by HeidelbergCement

5.1 Lack of disclosure and transparency

Chapter III Disclosure (2)(F-G): Disclosure policies of enterprises should include, but not be limited to, material information on, [inter alia,] foreseeable risk factors; [...] issues regarding workers and other stakeholders.

Chapter VI Environment (2)(A-B): Provide the public and workers with adequate, measurable and verifiable (where applicable) and timely information on the potential environment, health and safety impacts of the activities of the enterprise [...] engage in adequate and timely communication and consultation with the communities directly affected by the environmental, health and safety policies of the enterprise and by their implementation.

The above provisions and associated commentary in Chapters III and VI make clear that enterprises have a responsibility to report transparently about their operations, including associated impacts, as a means to improve general public understanding and confidence.²¹ The Guidelines further emphasize the need for enterprises to take special steps to ensure access to information by communities affected by their operations, with the aim of “promot[ing] a climate of long-term trust and understanding,” on issues of mutual interest.²²

HeidelbergCement has failed to ensure adequate disclosure and transparency regarding project design, stages and timeline, as well as the precise risks of the planned project. Despite the local communities' vocal expression of concerns over the destruction of the Kendeng mountains, the company has not meaningfully consulted them regarding these concerns and provided them with relevant information to address them. HeidelbergCement subsidiary, PT SMS, apparently hired consultants to conduct an environmental assessment of the project,²³ but according to the Complainants, the impact assessment was never publicly disclosed or explained to the affected communities. The assessment is not available on HeidelbergCement's or Indocement's websites. Additionally, the company did not respond to letters from ██████████ raising concerns over flaws in the impact assessment process.

Instead, local communities are operating only with the limited information disclosed to them by relevant government authorities, rather than by the company itself. This has created an operating environment characterized by distrust.

5.2 No public environmental impact assessment and risk management system

Chapter VI (1): Enterprises should establish and maintain a system of environmental management appropriate to the enterprise.

Chapter VI (3): Assess, and address in decision-making, the foreseeable environmental, health, and safety-related impacts associated with the processes, goods and services of the enterprise over their full life cycle with a view to avoiding or, when unavoidable, mitigating them. Where these proposed activities may have significant environmental, health, or safety impacts, and where they are subject to a decision of a competent authority, prepare an appropriate environmental impact assessment.

²¹ Chapter III Disclosure, Commentary para 28; Chapter VI Environment, Commentary para 65.

²² Chapter VI Environment, Commentary para 65.

²³ According to the complainants, the firm hired to conduct the environmental assessment is PT Mitra Adi Pranata.

Chapter VI Environment: Enterprises should [...] take due account of the need to protect the environment, public health and safety, and generally to conduct their activities in a manner contributing to the wider goal of sustainable development.

Chapter VI Commentary, 69: The basic premise of the Guidelines is that enterprises should act as soon as possible, and in a proactive way, to avoid, for instance, serious or irreversible environmental damages resulting from their activities.

In the view of the Complainants, the company has failed to adequately assess the serious environmental risks posed by this project. In response to concerns raised by local activists at the company's June 2020 Annual General Meeting for shareholders, HeidelbergCement claimed that Indocement had undertaken a detailed environmental impact assessment in coordination with stakeholders and NGOs. The company further claimed that the outcome of such an assessment informed the design of the planned extraction project, limiting the cement plant "to regions that are not relevant to the karst system."²⁴

Yet, it is the Complainants' understanding from observations on the ground and the analysis of an Indonesian geologist that the extraction site is squarely within the karst area and will impact the karst system.²⁵ Additionally, a 2017 report by Indonesia's Presidential Staff Office and Ministry of Environment and Forestry found that mining in this area would have severe adverse impacts on local water resources used both for agricultural livelihoods and subsistence.²⁶ According to the geologist Petrasa Wacana, the karst complex in North Kendeng has the potential for water resources for the basic needs of more than 8000 households and more than 4000 hectares of agricultural land as a source of their livelihood.²⁷

The lack of transparency around the project and the company's failure to disclose the impact assessment makes it impossible to verify the company's account of the project's design. The Complainants have never been meaningfully consulted as part of the impact assessment process and have yet to learn of the outcome of the assessment. The Complainants report that while the company did engage consultants to conduct meetings between 2012 and 2014, the process was severely flawed and did not amount to meaningful engagement with project-affected communities. The company did not respond to the Complainants' concerns, first raised in 2012, over the lack of meaningful consultation under this process. Where meetings did take place at village level between 2012 and 2014, the Complainants report that attendance was low and not representative of the local population and that the meetings were controlled by village chiefs. Attendees who were able to join meetings report not being informed of the purpose of the meeting prior to arrival. According to attendees, uniformed and undercover police officers and state officials were present at meetings. Attendees also report that the meetings were simply a presentation of the company's plans for the development rather than a dialogue.

The opacity characterizing the company's approach to environmental risk assessment has fostered a sense of distrust among local stakeholders and significantly undermines the company's efforts to assure the public

²⁴ Notes from HeidelbergCement 2020 Annual General Meeting for shareholders.

²⁵ Petrasa Wacana, Persepsi Masyarakat Terhadap Kawasan Karst Sukolilo Kecamatan Tambakromo dan Kayen, Kabupaten Pati Jawa Tengah, May 31, 2011. <https://petrasawacana.wordpress.com/2011/05/31/persepsi-masyarakat-terhadap-penolakan-rencana-pendirian-pabrik-semen-pt-indocement-di-kawasan-karst-kendeng-utara-kecamatan-kayen-dan-tambakromo-kabupaten-pati-jawa-tengah/>

²⁶ Presidential Staff Office and Ministry of Environment and Forestry (Indonesia), "Strategic Environmental Assessment (SEA) on Sustainable Exploitation and Management Policy on Kendeng Mountains: Stage II Executive Summary," December 2017, p.5, para 6 (a) and (b).

²⁷ Petrasa Wacana, Persepsi Masyarakat Terhadap Kawasan Karst Sukolilo Kecamatan Tambakromo dan Kayen, Kabupaten Pati Jawa Tengah, May 31, 2011. <https://petrasawacana.wordpress.com/2011/05/31/persepsi-masyarakat-terhadap-penolakan-rencana-pendirian-pabrik-semen-pt-indocement-di-kawasan-karst-kendeng-utara-kecamatan-kayen-dan-tambakromo-kabupaten-pati-jawa-tengah/>

of the legitimacy of its environmental permit. We note that Indonesian law also requires environmental and social impact assessments for such projects,²⁸ as well as consultation with project-affected people.²⁹

The Complainants' misgivings regarding the adequacy of the company's impact assessment are well founded: In addition to its findings of severe risks to the region's water supplies, the Presidential Office report found that continued development in the Kendeng Mountains would have a severe impact on biodiversity, threatening the habitats of several plant and animal species and that "several rare, protected animals will face further degradation or even become extinct."³⁰ The report also recognizes the vital role of the Kendeng Mountains in reducing risk in a recognized disaster-prone area. Geological damage to the mountain caused by mining activities could increase the risk of events such as flash flooding, with serious consequences for the health and livelihood of local communities.³¹

The report found that if mining activities continue, the economic losses would total 2.4 trillion Indonesian Rupiah per year, due to damage to local water resources for household and agricultural needs, the loss of bat species, which control pests, and loss of tourism. The report also recognizes there are likely to be health impacts on the local people due to dust inhalation.³²

The report recommends that the spatial planning strategy for Kendeng be altered to focus on conservation instead of mining and commercial exploitation, including specific protections for villages close to the mountain.³³

HeidelbergCement itself requires environmental guidelines for all of its operations, which it states are designed "to promote biological diversity and environmental health both during and after mining operations."³⁴ In its environmental guidance for Asia, HeidelbergCement specifically refers to the protection of sensitive water sources, noting the need for project plans to account for such systems in the extraction area and surrounding areas.³⁵

However, the company is operating in direct contradiction to these policy commitments by pushing forward with a mine and factory that, as indicated by the Presidential Office report, risk devastating a delicate water ecosystem and threatening the water supplies of an entire region.³⁶

The value of the Kendeng Mountain springs to the subsistence and livelihoods of the local communities cannot be overstated. According to community members, they have gathered water from at least 300 accessible freshwater springs in the Kendeng Mountain karst area. The local communities are reliant upon these springs and associated groundwater wells as their primary source of fresh water for consumption and agriculture. The Complainants believe that it is inevitable that these water sources will be damaged or destroyed by the planned mining of the mountain.

²⁸ Undang-Undang No. 32 of 2009, Article 14(a).

²⁹ Government Regulation No.27 of 2012, Article 9(1)-(5).

³⁰ Presidential Staff Office and Ministry of Environment and Forestry (Indonesia), "Strategic Environmental Assessment (SEA) on Sustainable Exploitation and Management Policy on Kendeng Mountains: Stage II, Executive Summary," December 2017, p.5.

³¹ Ibid, p.4; recommendations on mitigation of disaster risk, p.7

³² Ibid, p.5

³³ Ibid, p.8-10

³⁴ HeidelbergCement, "Biodiversity Management," accessed August 2020.

<https://www.heidelbergcement.com/en/biodiversity-management>

³⁵ HeidelbergCement, "Promotion of biodiversity at the mineral extraction sites of HeidelbergCement," accessed August 2020. https://www.quarrylifeaward.com/sites/default/files/media/hc_guideline_biodiversity_asia.pdf

³⁶ Presidential Staff Office and Ministry of Environment and Forestry (Indonesia), "Strategic Environmental Assessment (SEA) on Sustainable Exploitation and Management Policy on Kendeng Mountains: Stage II Executive Summary," December 2017, p.5

If water resources are damaged by the mine to the extent feared by the Complainants, they predict severe impacts on livelihoods and food security in the local area. For [REDACTED], local irrigation water is not sufficient to support all farmers.

The Presidential Office report estimates the economic loss that will be caused by the degradation of agricultural water supplies alone at 1.8 trillion Rupiah per year. It also estimates that communities will face a loss of 498 billion Rupiah per year if water sources for household needs are degraded.³⁷

In the absence of a public environmental impact assessment and mitigation plan that shows otherwise, the Complainants assert that the company is failing to take measures to avoid or minimize these severe adverse impacts in line with Chapter VI of the Guidelines.

5.3 Failure to conduct comprehensive human rights due diligence

Chapter II General Policy (A)(10): Enterprises should carry out risk-based due diligence, for example by incorporating it into their enterprise risk management systems, to identify, prevent and mitigate actual and potential adverse impacts [...], and account for how these impacts are addressed.

Chapter IV Human Rights (5): Enterprises should carry out human rights due diligence as appropriate to their size, the nature and context of operations and the severity of the risks of adverse human rights impacts.

At HeidelbergCement's 2020 Annual General Meeting, company representatives claimed that the company regularly carries out country-wide human rights risk assessments and develops necessary action plans based on them. They informed stakeholders that project-specific human rights due diligence is conducted through risk assessments prior to the financial close of investments.³⁸ It is unclear how such an account of company practice tracks with HeidelbergCement's operations in Kendeng.

HeidelbergCement is constructing a mine and factory that the Complainants' believe will destroy a delicate ecosystem and habitat that is depended upon by local communities for their subsistence and livelihoods. The project is also located on land regarded by [REDACTED] as their ancestral territory. Given the severity and irreversible nature of the potential impacts, the project should have been considered high-risk and thus subject to enhanced due diligence under Chapters II(A)(10) and Chapter IV(5) of the OECD Guidelines.

An appropriately rigorous human rights due diligence procedure would have uncovered the significant risks inherent in the project. Further, HeidelbergCement's local subsidiary, PT SMS, began exploration in Pati District soon after a similar cement project, sponsored by Semen Gresik, had been subject to legal challenges by local communities. The case against Semen Gresik went all the way to the Supreme Court, and ultimately ended the company's plans to exploit karst in Pati District.³⁹ This should have been flagged as evidence of serious risks.

These considerations should directly inform HeidelbergCement's investment decision with respect to the project, in accordance with the company's own purported due diligence process. Such a process should not only influence the project design to mitigate avoidable impacts, but should also be used by the company to consider the appropriateness of the project altogether.

Further, OECD Guidance emphasizes the ongoing, dynamic and iterative nature of an effective due diligence process. Effective due diligence must go beyond initial risk assessment in the moments leading

³⁷ Ibid., p.5, para 6 (a) and (b). The currency conversion rate is accurate as of May 22, 2020.

³⁸ Notes from HeidelbergCement 2020 Annual General Meeting for shareholders.

³⁹ SHAPE SEA Research Paper, "Violations Against the Rights To Environment and Food in the Case of the Development of a Cement Factory in Pati District, Central Java, Indonesia," June 2019. http://shapesea.com/wp-content/uploads/2019/07/7-Rahma.Academic-Paper.edited.FINAL_.pdf

up to investment decisions, to encompass the lifecycle of a project. It must also be informed by meaningful engagement with relevant stakeholders, including potentially affected communities.⁴⁰

The UN Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (the UN Land Tenure Guidelines) give the most recent and detailed guidance on globally agreed human rights norms applicable to risk assessments of projects of this nature. Among others, Guideline 3.2 states: “Non-state actors including business enterprises have a responsibility to respect human rights and legitimate tenure rights. Business enterprises should act with due diligence to avoid infringing on the human rights and legitimate tenure rights of others.”⁴¹

There is no indication that HeidelbergCement has undertaken an effective and comprehensive human rights risk assessment in relation to this project, despite having been made aware of vigorous opposition on the part of local communities. On multiple occasions, ██████████ has engaged in public advocacy, directly confronting company representatives over the project. In 2017, ██████████ took part in demonstrations outside of the HeidelbergCement Annual General Meeting in Heidelberg and spoke directly with the CEO of the company. ██████████ also asked questions at the AGM and made a presentation calling on shareholders to stop the project. Again, in June 2020, advocates joined the virtual AGM to challenge the project. In each instance, HeidelbergCement has been resistant to engaging in open dialogue about the human rights risks of the proposed project.

5.4 Absence of meaningful engagement and the free, prior and informed consent of Indigenous Peoples

Chapter II General Policies (A)(2): Respect the internationally recognized human rights of those affected by their activities.

Chapter II General Policies (A)(14): Engage with relevant stakeholders in order to provide meaningful opportunities for their views to be taken into account in relation to planning and decision making for projects or other activities that may significantly impact local communities.

Chapter II Commentary, 25: Stakeholder engagement involves interactive processes of engagement with relevant stakeholders, through, for example, meetings, hearings or consultation proceedings. Effective stakeholder engagement is characterised by two-way communication and depends on the good faith of the participants on both sides. This engagement can be particularly helpful in the planning and decision-making concerning projects or other activities involving, for example, the intensive use of land or water, which could significantly affect local communities.

The OECD Guidelines in Chapter II require enterprises to respect internationally recognized human rights of those affected by their activities. Commentary to Chapter IV on Human Rights, notes:

...enterprises should respect the human rights of individuals belonging to specific groups or populations that require particular attention, where they may have adverse human rights impacts on them. In this connection, United Nations instruments have elaborated further on the rights of peoples; persons belonging to national or ethnic, religious and linguistic minorities.[.]⁴²

The Declaration on the Rights of Indigenous Peoples (UNDRIP), which both Germany and Indonesia have endorsed, provides the clearest guidance on the internationally recognized rights of Indigenous Peoples with respect to participation, self-determination and consultation preceding investment projects. The UNDRIP requires consultation with the objective of obtaining free, prior and informed consent (FPIC) to be undertaken prior to the development of projects that affect Indigenous peoples' rights to

⁴⁰ OECD Due Diligence Guidance for Responsible Business Conduct, 2018, pp 16-18.

<http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf>

⁴¹ The UN Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security, Guideline 3.2. <http://www.fao.org/3/a-i2801e.pdf>

⁴² OECD Guidelines Chapter IV, Commentary 40.

land, territory and resources, including mining and other utilization or exploitation of resources.⁴³ In accordance with Chapter II(A)(2) of the Guidelines, as well as under Pillar II of the UN Guiding Principles, business enterprises have a responsibility to respect this internationally recognized human right.

Moreover the UN Land Tenure Guidelines, unanimously adopted by all member states to the UN Committee for Food Security, explain: “States and other parties should hold good faith consultation with indigenous peoples before initiating any project or before adopting and implementing legislative or administrative measures affecting the resources for which the communities hold rights. Such projects should be based on an effective and meaningful consultation with indigenous peoples, through their own representative institutions in order to obtain their free, prior and informed consent.”⁴⁴

The OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector further states: “In countries where FPIC is not mandated, enterprises should consider local expectations, the risks posed to indigenous peoples and to the operations as result of local opposition. They should pursue an engagement strategy *that meets the legitimate expectations of indigenous peoples* to the extent that it does not place them in violation of domestic law [emphasis added].”⁴⁵

██████████ are self-identifying Indigenous peoples, and a number of ██████████ have been designated as an Indonesian Intangible Cultural Heritage by the Indonesian Ministry of Education and Culture.⁴⁶ The ██████████ have a clear collective attachment to the geographically distinct habitat of Kendeng Mountain, with land in the area under their customary use.

The Complainants believe that the project, and particularly the mine, will have direct and significant adverse impacts on land and natural resources subject to the customary use of ██████████. The agricultural land located around the prospective project site is depended upon by ██████████ for their survival, and the Kendeng Mountains are considered by ██████████ as having deep cultural and spiritual value. The Complainants’ believe that the open pit limestone mining at the project site will destroy the mountain almost entirely, and jeopardize the community’s vital water source.

Given the severity of risks the project poses to ██████████, it is reasonable to insist that the legitimate expectations of ██████████ for FPIC be respected in this case. However, even without the requirement of communities’ FPIC, the requirements for meaningful consultation of vulnerable communities have clearly not been met.

The OECD Guidelines require enterprises to identify and consult stakeholders, including communities that stand to be affected by their operations. The OECD Due Diligence Guidance for Responsible Business Conduct recognizes meaningful stakeholder engagement as a necessary component of an effective due diligence process by businesses.⁴⁷ According to the Guidance, such engagement, “means that the enterprise seeks to inform its decision by eliciting the views of those likely to be affected by the decision. It is important to engage potentially impacted stakeholders and rightsholders *prior to taking any decisions that may*

⁴³ UN Declaration on the Rights of Indigenous Peoples, article 32; see also UN OHCHR, “Free, Prior and Informed Consent of Indigenous Peoples,” accessed August 2020.

<https://www.ohchr.org/Documents/Issues/ipeoples/freepriorandinformedsent.pdf>

⁴⁴ The UN Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security, Guideline 9.9. <http://www.fao.org/3/a-i2801e.pdf>

⁴⁵ OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector, February 2017, pp 96-97. https://www.oecd-ilibrary.org/oecd-due-diligence-guidance-for-meaningful-stakeholder-engagement-in-the-extractive-sector_5jm3q2mtkxr2.pdf?itemId=%2Fcontent%2Fpublication%2F9789264252462-en&mimeType=pdf

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⁴⁷ OECD Due Diligence Guidance for Responsible Business Conduct, 2018. <http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf>

*impact them, [emphasis added].*⁴⁸ The OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector specifies that, “as a rule engagement should be free of manipulation, interference, coercion and intimidation.”⁴⁹

HeidelbergCement has failed to engage local communities, including ██████████, in a manner consistent with these standards.

Instead, an air of intimidation and deception surrounds the project. Representatives of ██████████ face surveillance, intimidation and threats to their safety from state actors, including the army, that are supportive of the project’s development. As noted above, environmental impact assessment meetings are believed to have been attended by police. The Complainants also suspect that local officials and village heads were improperly influenced to secure their support for the project through various communications and inducements. According to members of the affected communities, village heads have in some cases called individuals to meetings at their home ostensibly to discuss community empowerment and farming practices. During these meetings, the village head gathered signatures from the attendees and took photocopies of their national identification cards. The Complainants believe that these signatures and copies of individual IDs were then provided to the company as falsified evidence of consent to the development of the project.

5.5 Failure to avoid causing anticipated human rights abuses

Chapter IV Human Rights (1-2): Enterprises should [...] Respect human rights, which means they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved. Within the context of their own activities, avoid causing or contributing to adverse human rights impacts and address such impacts when they occur.

The core human rights requirements of the OECD Guidelines are reflected in Chapter IV, which calls upon businesses to avoid infringing on the rights of others. This provision of the Guidelines reflects international standards governing the human rights responsibilities of business entities as established in the UN Guiding Principles on Business and Human Rights. Within this framework, the business responsibility to respect is akin to the minimal social expectation that businesses ‘do no harm’ throughout their operations.⁵⁰

In line with this expectation, commentary to Chapter IV of the Guidelines clarifies that: “addressing actual and potential adverse human rights impacts consists of taking adequate measures for their identification, prevention, where possible, and mitigation of potential human rights impacts [...] Where an enterprise causes or may cause an adverse human rights impact, it should take the necessary steps to cease or prevent the impact.”⁵¹

The ██████████ are currently in an extremely precarious position. While the company has not yet broken ground and begun either mining limestone or constructing the cement factory, once HeidelbergCement commences these activities the Complainants’ believe there will be rapid and irreparable social and environmental consequences.

In the view of the Complainants, the project will cause serious adverse human rights impacts, including, inter alia, violations of rights recognized in the International Covenant on Economic Social and Cultural

⁴⁸ OECD Due Diligence Guidance for Responsible Business Conduct, 2018, p 49.

<http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf>

⁴⁹ OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector, February 2017, p 52. https://www.oecd-ilibrary.org/oecd-due-diligence-guidance-for-meaningful-stakeholder-engagement-in-the-extractive-sector_5jm3q2mtkxr2.pdf?itemId=%2Fcontent%2Fpublication%2F9789264252462-cn&mimeType=pdf

⁵⁰ Nadia Bernaz, *Business and Human Rights : History, Law and Policy - Bridging the Accountability Gap* (Routledge 2016).

⁵¹ OECD Guidelines Chapter IV, Commentary 41-42.

Rights (ICESCR)⁵², under the UN Declaration on the Rights of Indigenous Peoples (UNDRIP)⁵³ and the UN Declaration on the Rights of Peasants and Other People Working in Rural Areas (UNDROP)⁵⁴.

Of particularly acute concern are the project's anticipated adverse impacts on water and food security. According to the Presidential Office report, mining in the Kendeng area will severely degrade agricultural and household water supplies relied upon by multiple communities to support farmers and their families.⁵⁵ This presents a grave threat to the enjoyment of the rights to food and water as essential components of the right to an adequate standard of living, right to health, and right to life.⁵⁶

Special consideration must also be given to the concerns of [REDACTED] with respect to rights to food and water, as the realization of these rights is inextricably linked to their access to and control over the natural resources on their ancestral lands.⁵⁷ [REDACTED] have their own perception of what constitutes an adequate standard of living, including perceptions of livelihood security and access to food and water, and their aspirations are different from mainstream and conventional economic development criteria. The confiscation of sacred [REDACTED] land for development without their free, prior and informed consent poses a serious obstacle to the realization of the rights to an adequate standard of living, as well as the rights to health and life.

Due to the inherently destructive nature of the project and clear local Indigenous opposition, HeidelbergCement is unlikely to be able to meet its responsibilities under the UN Guiding Principles and Chapter IV of the OECD Guidelines should this development proceed.⁵⁸ Now is the opportunity for HeidelbergCement to substantively fulfill its responsibility to respect human rights by avoiding the projected extensive adverse impacts of the project in Kendeng Mountains.

Further, the responsibility of HeidelbergCement to respect human rights in accordance with the OECD Guidelines and UN Guiding Principles on Business and Human Rights, to which the Guidelines explicitly adhere, is not diminished by a failure of the host country to fulfil international standards or enforce domestic law. The corporate responsibility to respect persists irrespective of the position of the Indonesian government or its willingness to fulfill its own human rights obligation. Commentary to Chapter IV of the Guidelines states:

A State's failure either to enforce relevant domestic laws, or to implement international human rights obligations or the fact that it may act contrary to such laws or international obligations does not diminish the expectation that enterprises respect human rights. In countries where domestic laws and regulations conflict with internationally recognised human rights, enterprises should seek ways to honour them to the fullest extent which does not place them in violation of domestic law[.]

In 2015, [REDACTED] challenged the legality of the PT-SMS's operations in a high-profile case, arguing that the project was unlawful based on the granting of an improperly constituted three-year

⁵² *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations. The Covenant was ratified by Indonesia in 2006 and by Germany in 1973.

⁵³ UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples / adopted by the General Assembly*, 2 October 2007, A/RES/61/295. Both Germany and Indonesia voted in favour of the adoption of the UNDRIP. <https://www.un.org/press/en/2007/ga10612.doc.htm>

⁵⁴ UN General Assembly, *United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas / adopted by the General Assembly*, 17 December 2018, A /HRC/RES/39/12. <https://digitallibrary.un.org/record/1661560?ln=en>

⁵⁵ Presidential Staff Office and Ministry of Environment and Forestry (Indonesia), "Strategic Environmental Assessment (SEA) on Sustainable Exploitation and Management Policy on Kendeng Mountains: Stage II Executive Summary," December 2017, p.5, para 6 (a) and (b).

⁵⁶ UN OHCHR, *The Right to Adequate Food*. <https://www.ohchr.org/Documents/Publications/FactSheet34en.pdf>

⁵⁷ *Ibid*, pp 12-13. See also UNDRIP, Article 26.

⁵⁸ United Nations, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, 2011.

environmental permit in 2014.⁵⁹ The Complainants won their case at the court of first instance, but ultimately lost at the Supreme Court. Despite a Supreme Court ruling in favor of mining interests, community advocates and their legal counsel continue to question the adherence of this project to domestic law governing the rights of Indigenous peoples and the requirements of meaningful impact assessment in high-risk projects.

Such a decision does not impact on the international human rights obligation of the Indonesian state to protect the rights of its citizens, nor does it alter the responsibility of HeidelbergCement. Similarly, any failure on the part of the Indonesian government to enforce domestic laws requiring environmental and social impact assessments⁶⁰ and meaningful consultation with project-affected people,⁶¹ does not diminish the responsibilities incumbent upon HeidelbergCement under the OECD Guidelines.

We also note that the UN Guiding Principles expect businesses to establish or participate in effective operational-level grievance mechanisms through which they may address adverse impacts.⁶² Chapter IV(6) of the Guidelines align with this expectation, as elaborated in paragraph 46 of the associated commentary. The Complainants are not aware of any operational-level grievance mechanism in relation to this project.

6. Threats to Indonesian activists and need for confidentiality

In Indonesia, environmental activists are subject to well-publicized risks including violence at the hands of the state and/or private actors, as well as arbitrary imprisonment.⁶³ In the final months of 2019, three prominent activists were murdered in North Sumatra. It is widely believed that their deaths were reprisals against their involvement with activism against major development projects.⁶⁴

[REDACTED]. They face continuing threats and surveillance from local authorities, federal intelligence police and security forces, including the police and military. According to the Complainants, security forces and police have disrupted gatherings in relation to this project. Being associated with foreigners also poses a risk and federal immigration officials have been deployed on the ground in Pati in recent months. It is believed this was a reaction to foreign journalists accessing the communities. The Complainants have been subject to physical violence at the hands of supporters of the mine. [REDACTED] was beaten by supporters of the project while en route to join a mass demonstration against mining and cement production in the Kendeng karst area.

As such, we reiterate our previous request in Section 2 that the identity of the Complainants remain strictly confidential.

7. Request for German NCP assistance

⁵⁹ Case file number 015/G/2015/PTUN-SMG

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BBC News, 'Aksi menyemen kaki di Jerman untuk petani Kendeng' May 10, 2017.

<https://www.bbc.com/indonesia/indonesia-39871127>

⁶⁰ Undang-Undang No. 32 of 2009, Article 14(a).

⁶¹ Government Regulation No.27 of 2012, Article 9(1)-(5).

⁶² UN Guiding Principles on Business and Human Rights, Principle 29 and Commentary.

⁶³ Mongabay, 'Watchdog denounces arrests of four anti-mining activists in Indonesia', November 26, 2019.

<https://news.mongabay.com/2019/11/indonesia-mining-activists-arrested-police/>

⁶⁴ For further information see, Paddock, R.C., "A Hard-Fighting Indonesian Lawyer's Death Has Colleagues Asking Questions", New York Times, October 24, 2019, available at

<https://www.nytimes.com/2019/10/24/world/asia/golfrid-siregar-death-indonesia.html>

-and-

The Guardian, "Murder of two journalists leads to arrest of Indonesian palm oil boss," November 10, 2019.

<https://www.theguardian.com/world/2019/nov/10/of-two-journalists-leads-to-arrest-of-indonesian-palm-oil-boss>

On behalf of [REDACTED] of the Kendeng mountain range [REDACTED], IDI and FIAN Germany request that the German NCP offer its good offices to resolve their dispute with HeidelbergCement Group over the failure of the latter to comply with the OECD Guidelines.

All previous attempts by the Complainants to engage HeidelbergCement Group over this matter have not yielded satisfactory outcomes. The Complainants therefore ask the NCP to assist them in engaging HeidelbergCement Group in a dialogue, together with additional representatives of the communities, aimed at achieving a mutually agreed solution to the issues raised in this complaint.

The Complainants further request that, should dialogue not prove fruitful, the NCP investigate this complaint and make specific recommendations to bring HeidelbergCement Group into compliance with its responsibilities under the OECD Guidelines with respect to its operations in Kendeng.

The Complainants are seeking the following from HeidelbergCement Group:

- The commission of an independent environmental, social and human rights impact assessment of the project, including through meaningful consultation with local communities and other stakeholders;
- Full disclosure of the impact assessment, project design and all actions being undertaken with respect to the project in a manner and form accessible to local communities;
- Full respect for the rights of Indigenous peoples under the UNDRIP, including the right to free, prior and informed consent, and the withdrawal of its investment in the Kendeng project should a mutual agreement with [REDACTED] not be reached.
- Full respect for rights enshrined in the international human rights covenants, including the right to food and water, to be guided by the globally agreed upon UN Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security and the United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas.
- All possible measures to ensure that the affected communities do not face reprisals, including from company employees, contractors or government officials, for filing this complaint.

Diagram 1: Ownership structure of limestone mine and cement factory

German company HeidelbergCement is the majority owner of the project through Indonesian subsidiaries, PT Indocement, and PT SMS.

