



The Patchwork of Non-Judicial Grievance Mechanisms

Addressing the limitations of the current landscape

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Business can become implicated in human rights violations in various ways, by causing, contributing or being directly linked to the abuse. There is a pressing need for states in both home and host countries of multinational companies to ensure access to effective domestic judicial mechanisms for those affected by business-related human rights abuses. At present, however, judicial avenues for obtaining remedy for business-related harm are often not a viable option. In the vacuum, non-judicial grievance mechanisms (NJGMs) have proliferated.

In an ideal world, NJGMs would supplement judicial mechanisms. The reality is that in many jurisdictions judicial remedies are ineffective or non-existent, and NJGMs are in practice the only option for those affected by business-related human rights abuse. It is, therefore, of great importance to strengthen the accessibility and effectiveness of such mechanisms.

NJGMs vary in form and scope – the issues they address, the standards they apply, the companies within their jurisdiction, how they function, their authority and governance. Complaints may be filed by the victims of business-related human rights violations (such as directly affected workers, communities or individuals) and/or by the civil society organisations directly or in representation of others,

depending on the specific requirements of each mechanism. And, importantly, the outcomes delivered by NJGMs vary greatly.

The *purpose* of this briefing note is to describe the current patchwork of existing NJGMs and how they function, identify their limitations, and provide recommendations for improving them.

Non-judicial grievance mechanisms: a snapshot

Types

The taxonomy of NJGMs is evolving as new and different mechanisms are established. In the current NJGM landscape, a distinction can be made between the following types of mechanisms:

- **Intergovernmental grievance mechanisms:** Intergovernmental NJGMs are created by an international agreement between states. Examples include mechanisms linked to United Nations treaty-based and charter-based bodies, and the International Labour Organization's Committee on Freedom of Association that accepts complaints concerning violations of
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trade union rights by states. At the regional level, intergovernmental grievance mechanisms can be found within the European, African and Inter-American systems of human rights. The National Contact Points, which handle complaints about alleged breaches of the OECD Guidelines for Multinational Enterprises, are something of a hybrid. Their creation is required by all member and adhering countries to the OECD, but they operate at the national level.

- ❑ **National Human Rights Institutions:** Many NHRIs can receive complaints regarding business-related human rights abuses.
- ❑ **Mechanisms associated with Development Finance Institutions (DFIs):** These grievance mechanisms receive complaints from individuals and communities adversely affected by the public and private sector activities financed by the DFI with which they are associated. Examples are the Inspection Panel of the World Bank, the Compliance Advisor Ombudsman of the International Finance Corporation, the Project Complaint Mechanism of the European Bank for Reconstruction and Development, the Accountability Mechanism of the Asian Development Bank, and the newly established Independent Complaints Mechanism that is shared between the Dutch and German development banks, FMO and DEG, respectively. Together, these mechanisms have formed the Independent Accountability Mechanisms network.

- ❑ **Sectoral and multi-stakeholder grievance mechanisms:** Corporations and other stakeholders have created several self-regulatory initiatives in different sectors, developing standards and grievance mechanisms to handle complaints in the event that the standards are breached. Examples are the complaints mechanisms of the Roundtable on Sustainable Palm Oil (RSPO) and the Fair Wear Foundation.
- ❑ **Operational-level grievance mechanisms:** Many business enterprises have established their own project- or corporate-level grievance mechanisms. These vary from well-established mechanisms to hotlines. Because they are owned and operated by the same actors who have allegedly committed the abuse, these mechanisms often lack the confidence of stakeholders. They are not comparable to the aforementioned mechanisms because they are not as independent or robust and, therefore, are not the subject of this briefing note.

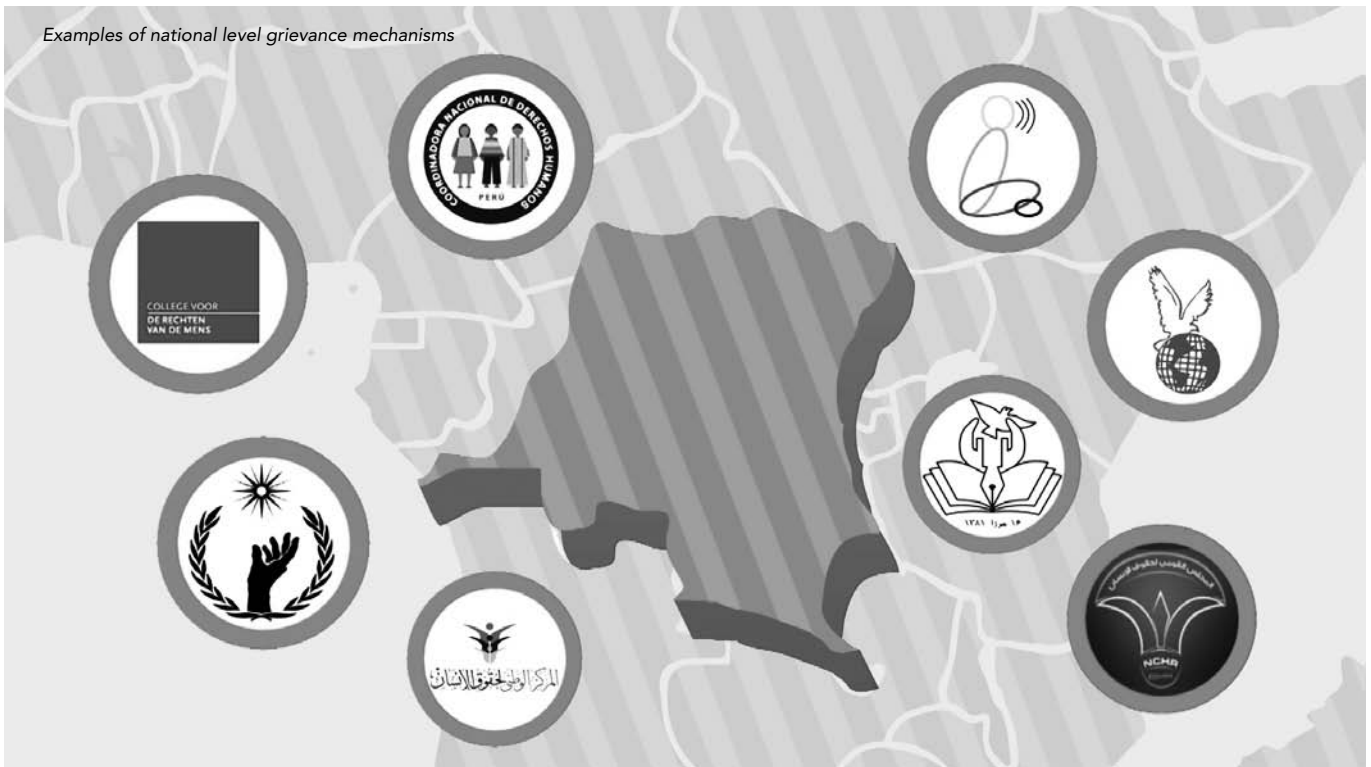
Scope of NJGMs

The NJGMs described above all vary in scope. For instance, intergovernmental NJGMs, like the UN human rights bodies, address the actions or omissions of states and make recommendations to states on how to better regulate corporations within their jurisdictions. They cannot address recommendations directly to corporations. DFI mechanisms can only be used when that institution has financed the company in question. NJGMs established by multi-stakeholder initiatives address complaints that relate to the

Examples of sectoral multi-stakeholder mechanisms



Examples of national level grievance mechanisms



actions of one of its members. Probably the most comprehensive in terms of scope are the National Contact Points (NCPs) under the OECD Guidelines for Multinational Enterprises. Complaints, called specific instances, can be filed regarding the global activities of any corporation, as long as that corporation is headquartered in or operating from an OECD member or adhering country.

Because the provisions of the OECD Guidelines for Multinational Enterprises hold companies responsible not only for their own actions but for conducting human rights due diligence on their supply chains, the NCPs cover a significant portion of corporate activity. However, there are still limitations in their scope. For example, the actions of Chinese companies, who are investing heavily in Africa and Latin America, are not covered because China is not an OECD member or adhering country.

Functions

The UN Guiding Principles on Business and Human Rights (UNGPs) mention two functions that NJGMs can perform, adjudicative (compliance) and dialogue-based (mediation). Most NJGMs have both processes. Mediation, when it is successful, can be transformative. It has the potential to build a lasting relationship between the corporation and the surrounding communities that benefits both parties and prevents future conflicts. Adjudicative-based processes usually result in an investigative report with findings on whether relevant standards were met in the activities raised by the complaint.

Limitations in process

In addition to the limitations in scope, described above, NJGM have several structural or procedural limitations that should be addressed, including:

Effectiveness and outcome are not guaranteed

The UN Guiding Principles identify eight effectiveness criteria of NJGMs, against which the design and process of the mechanism can be assessed.¹ Accordingly, NJGMs should be legitimate, accessible, predictable, equitable, transparent, rights-compatible, a source of continuous learning, and – for operational-level mechanisms – based on engagement and dialogue. Many of the existing NJGMs do not yet meet the UNGP effectiveness criteria. An important distinction to note, though, is that the responsibility to implement some of the UNGP effectiveness criteria does not rest with the mechanisms alone. Some should be the responsibility of the mechanisms' "owners." For example, the responsibility to make potential complainants aware of the existence of a DFI mechanism and to learn and apply the lessons from its cases rests with the board and management of the financial institution, not only with the mechanism itself.

Even when NJGMs meet the criteria, complainants are not guaranteed an outcome, much less a remedy. The outcomes of NJGM processes can be categorized as follows: provision of benefits to the complainants; policy change at the company or institution in question; both; or no action. The most likely outcome for a complaint filed at an NCP

is that it will be rejected.² Similarly, DFI mechanisms reject a large proportion of the complaints that they receive,³ though more research is needed to understand why they are being rejected.

Dialogue-based processes cannot provide remedy in all cases

Dialogue-based processes face many challenges. Complainants are often at a distinct power imbalance. They frequently lack full access to information about the project, or when they do, might not have sufficient technical expertise to interpret it. They will likely have less economic and political power in their country and internationally. Building a process that ensures that the communities have the resources they need to participate meaningfully in the process is difficult and can entail considerable resources.

Furthermore, not all conflicts or actors are amenable to mediation. Mediation is premised on the idea that the interests of the parties overlap. However, when the community objects to a project in its entirety, there is little for the parties to discuss. Therefore, mediation, though seemingly preferred by many corporations and other actors, only offers the potential for remedy in a subset of cases. If mediation fails, there must be an alternative to ensure remedy for those affected by corporate-related human rights abuses.

Adjudicative-based processes have limited impact on the ground

The outcome of an adjudicative-based (compliance) process is usually an investigative report with findings on whether relevant standards were met in the activities raised by the complaint. In the case of DFI mechanisms, the board or management of the bank is then responsible for responding to the findings and taking actions to bring the project back into compliance with the standards. However, this is usually where the process breaks down. Financial institutions often lack the political will to adequately address and remedy the harm that has occurred. For other NJGMs, the process often ends after the mechanism has completed its investigation and presented its findings. The mechanisms normally do not have the authority to order corrective measures, meaning that the instances of non-compliance may remain unaddressed.

Accessibility

For individuals or communities that are harmed by business-related abuse, it is often not obvious where to go to seek redress. One of the persistent obstacles for communities in accessing NJGMs is the lack of awareness of their existence. Once aware of the mechanism, many complainants also face barriers to filing a complaint. Complainants must meet burdensome filing requirements, arbitrary deadlines, and language barriers.

Independence

Complainants are frequently suspicious of the independence of NJGMs, and often for good reason. There is an inherent conflict of interest when the same institution that promoted the activity is responsible for providing remedy. For example, the NCPs of many countries are housed in the same government agency whose mission it is to promote foreign investment by corporations headquartered in its jurisdiction.⁴

Recommendations

Most NJGM undergo periodic reviews of the policies that created them and/or their own operating procedures. With each review, civil society organisations advocate for harmonization with best practice and defend against backsliding. Their efforts are met with varying degrees of success. Below are a few of the more frequent recommendations, many of them directed to the mechanisms' owner in addition to the mechanisms themselves:

Accessibility

The following would improve the accessibility of NJGMs:

- ❑ DFIs should require their clients to disclose to potentially affected communities information regarding the existence of and access to their grievance mechanisms.
- ❑ OECD member and adhering countries should publicize their NCPs online and through their embassies.
- ❑ NJGMs should communicate with complainants in their native language.

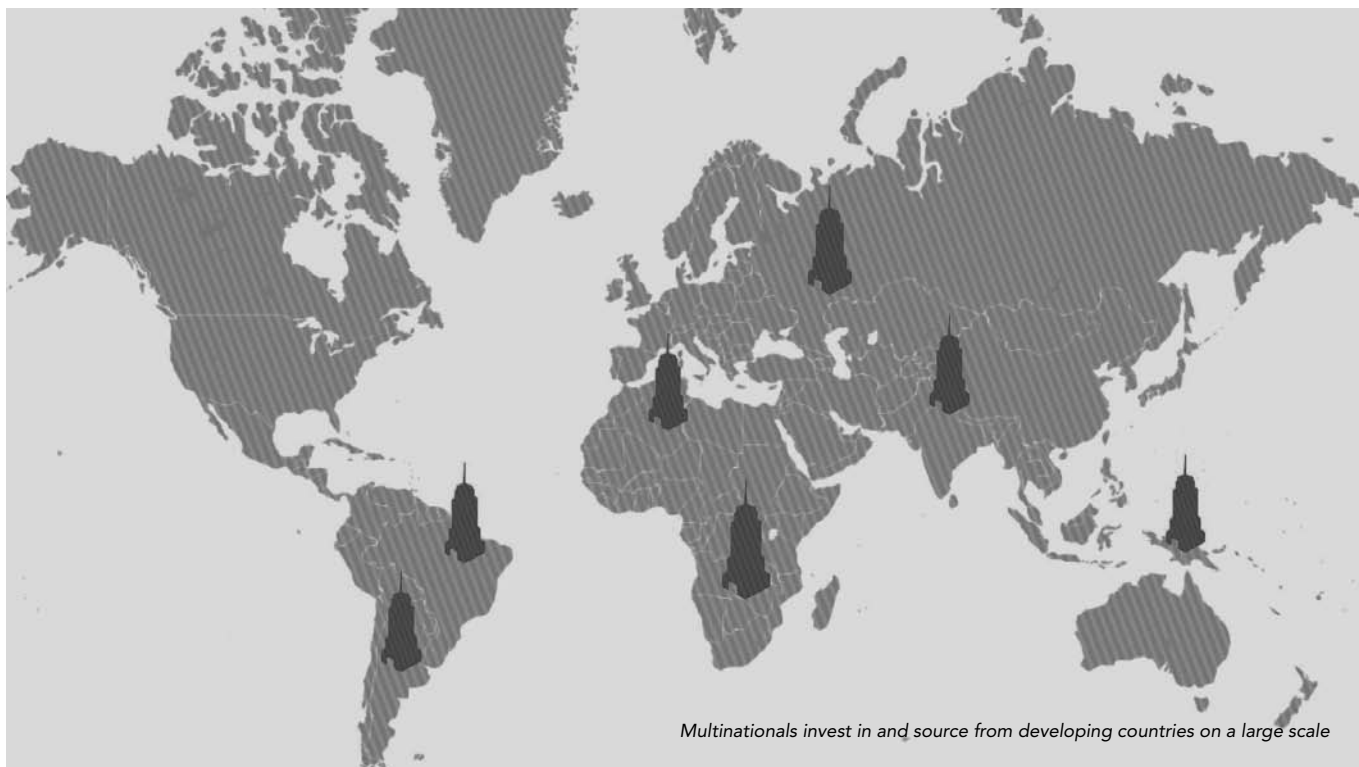
Independence

The following would improve the independence of NJGMs:

- ❑ External stakeholders should be included in the selection of the mechanisms' experts or directors. For DFI mechanisms, the principals should not have worked for the financial institution previously and should be prohibited from working for the institution after their terms expire.
- ❑ NCPs should not be housed in the same office that promotes corporate investment abroad.
- ❑ All NJGMs should be provided with adequate resources to fulfill their mandates.

Monitoring

The success of a NJGM process is in its implementation. Whether it is adjudication or dialogue-based, challenges often arise in the implementation of the outcome of the process. The following is needed to ensure the outcome of a NJGM process is implemented:



Multinationals invest in and source from developing countries on a large scale

- ❑ All NJGMs should have the mandate to monitor the project until instances of non-compliance are remedied.
- ❑ Monitoring reports from the NJGMs should be made public and reflect input solicited from the complainants.

Equity

The following measures would address some of the power imbalance between the parties:

- ❑ Complainants should receive training to ensure they: know their rights; understand the standards that apply to the project; and learn the skills required for negotiation/mediation.
- ❑ Complainants should have access to all information regarding the project and the resources to interpret it.
- ❑ All actors involved in a NJGM process must respect the role played by complainants' advisors, whether those are lawyers, technical experts or civil society organizations.

Mandate

The mandate of many NJGMs is unnecessarily limited, preventing them from providing remedy to complainants. The functions they provide and the authority they are granted can and should be expanded:

- ❑ NJGMs should have the mandate to offer mediation and conduct investigations. A third function, to provide advice, can help ensure that relevant stakeholders learn lessons from the mechanisms' cases in order to prevent future complaints.

- ❑ NJGMs should have the authority to initiate an investigation in the absence of a complaint. This is necessary especially when awareness of the existence of NJGMs among potential complainants is low.
- ❑ NJGMs must have the authority to make findings that result in consequences for failure to comply with standards, including: decertification or exclusion of membership in a multi-stakeholder initiative; refusal or withdrawal of investments; compensation to complainants for any harm or injury that occurred.

Outcome criteria

As mentioned above, meeting the UNGP effectiveness criteria does not necessarily result in an outcome for the complainant, and if there is an outcome, the criteria do not guarantee that the outcome provides a remedy. There is a need to elaborate criteria for judging the outcome in individual cases as well as the effectiveness of the mechanisms generally. Below is a suggestion for the former, but further research and consultation will be necessary to ensure that it adequately captures the necessarily elements.

Two of the eight UNGP criteria for evaluating the effectiveness of a NJGMs process can also be used to measure the outcome of the process: rights-compatibility and being a source of continuous learning. The outcome is rights-compatible if it has resulted in the cessation of the human rights abuse and restored the rights-holder to his or her position before the abuse occurred, either through an adjudicative or dialogue-based process. An effective outcome should also result in changes in policy or practice

of the institution administering the mechanism and/or the business enterprise involved. Over time, repeated grievances of the same nature or from the same population is a strong indication that: the mechanism is not identifying the underlying action that resulted in the harm; the institution administering the mechanism and/or the business enterprise is not reforming its policies and practices to address the findings of its mechanism; or both.

In order to fully measure the effectiveness of the outcome, an additional criterion should be the satisfaction of the rights-holder. It is widely acknowledged that the victims of human rights abuses often lack any viable mechanism to obtain redress for the harms that have occurred. Therefore, the over-riding principle of a grievance mechanism is whether the rights-holder is satisfied with the outcome, that he or she has received what is due. If a NJGM cannot resolve the conflict and provide a remedy for the human rights abuse to the satisfaction of the rights-holder through an adjudicative or dialogue-based process, then it has not been able to provide an effective outcome. In any case, if NJGMs are to play a role in providing a remedy for business-related human rights abuses, the process must not end with a well-written report or a failed attempt at mediation. There must be consequences when companies fail to comply with standards.

Remedy cannot rely on the willingness of the party who committed the abuse.

Endnotes

- 1 UN Guiding Principles on Business and Human Rights, Guiding Principles 31.
- 2 OECD Watch (2014). Assessment of NCP Performance in the 2013-2014 Implementation Cycle. OECD Watch Submission to the 2014 Annual Meeting of the National Contact Points.
- 3 Accountability Counsel (2014). Recent Trends in Accountability: Charting the Course of Complaint Offices.
- 4 See for example OECD Watch (2014). Assessment of NCP Performance in the 2013-2014 Implementation Cycle. OECD Watch Submission to the 2014 Annual Meeting of the National Contact Points.

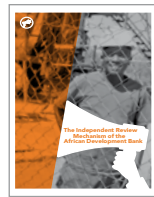
Brochures

SOMO's Human Rights & Grievance Mechanisms Programme aims to improve the accessibility and effectiveness of NJGMs for individuals, communities and workers who experience adverse impacts on their rights as a result of business activities. A set of brochures, each outlining a specific NJGM and the necessary procedures to follow when filing a complaint, is available on the website (www.grievancemechanisms.org). NJGM brochures, developed in collaboration with Accountability Counsel, Natural Justice and OECD Watch, that are currently available are:



Compliance Advisor Ombudsman

The Compliance Advisor Ombudsman (CAO) is the grievance mechanism for projects supported by the World Bank Group's International Finance Corporation (IFC) and Multilateral Investment Guarantee Agency (MIGA). Civil society organisations, workers, communities and groups of individuals who are harmed by an IFC or MIGA project can use the CAO process to address their grievance.



Independent Review Mechanisms of the African Development Bank

The African Development Bank (AfDB) is a multilateral development bank that supports public and private sector projects in 54 countries on and around the African continent. The Independent Review Mechanism (IRM) is the grievance mechanism for the AfDB.



World Bank Inspection Panel

The World Bank's Inspection Panel is the grievance mechanism for projects supported by the World Bank's International Bank for Reconstruction and Development (IBRD) and the International Development Association (IDA). Civil society organisations, workers, communities and groups of individuals who are harmed by an IBRD or IDA project can use the IP process to address their grievance.



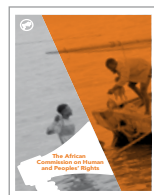
Accountability Mechanism of the Asian Development Bank

The Asian Development Bank (ADB) is a multilateral development bank that primarily supports public sector projects, but it also provides loans and equity investments for private sector projects in 40 countries in the wider Asian region. The Accountability Mechanism (AM) is the ADB's grievance mechanism.



OECD National Contact Points

The Organisation for Economic Co-operation and Development (OECD) is an intergovernmental organisation that develops and promotes social and economic policies. The OECD's 'Guidelines for Multinational Enterprises' are recommendations from 43 OECD and adhering countries to enterprises regarding responsible business conduct in their worldwide operations. A complaint can be filed against companies from or operating in an OECD or adhering country concerning their worldwide activities with the relevant National Contact Point (NCP).



African Commission on Human and Peoples' Rights

The African Commission on Human and Peoples' Rights (ACHPR) promotes and protects human and community rights within the African continent. The ACHPR also acts as a quasi-judicial agency by reviewing complaints lodged by individuals, communities and member states regarding violations of the African Charter.

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SOMO

Stichting Onderzoek Multinationale Ondernemingen
Centre for Research on Multinational Corporations

Sarphatistraat 30
1018 GL Amsterdam
The Netherlands
T: +31 (0)20 639 12 91
F: +31 (0)20 639 13 21
info@somo.nl
www.somo.nl

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