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Traversing The Web Of Nonjudicial Grievance Mechanisms

By **Sarah Bishop, Hannah Edmonds-Camara and Cherine Foty** (April 12, 2024, 5:54 PM EDT)

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On March 15, the Council of the European Union voted to approve the Corporate Sustainability Due Diligence Directive, which will require European Union member states to introduce laws requiring certain EU and non-EU companies to conduct environmental and human rights due diligence on their global operations and value chains.

The Corporate Sustainability Due Diligence Directive will add to a growing number of "hard law" requirements for companies to implement human rights and environmental due diligence processes. Companies will need to comply with those hard law requirements while continuing to navigate existing legal risks and "soft law" mechanisms such as nonjudicial grievance mechanisms, or NJGMs.

In this article, we provide an overview of NJGMs and discuss how they may intersect with emerging hard law regimes.

NJGMs, many of which have been in place for several years or even decades, continue to play an important role in the overall business and human rights, or BHR, landscape.

NJGMs provide a range of stakeholders, including third-party civil society organizations, the opportunity to submit complaints on corporate behavior that allegedly violates guidelines on responsible business conduct, or otherwise adversely affects human rights or the environment. They are intended to provide a forum in which adversely affected individuals or their representatives can seek engagement with companies and, where relevant, remediation of the issues raised.

While NJGMs are voluntary processes that do not subject companies to legal liability, they often result in public statements or decisions that can have significant reputational consequences for companies. As BHR-related legal and regulatory risks continue to evolve, companies involved in NJGM processes increasingly need to consider how issues discussed in NJGM processes may affect future or ongoing litigation, arbitration, or enforcement proceedings.

This article discusses key NJGMs, including the National Contact Point, or NCP; specific instance process under the Organization for International Cooperation and Development's "OECD Guidelines for Multinational Enterprises on Responsible Business Conduct";[1] communications from the UN's working group on the issue of human rights and transnational corporations and other business enterprises, or

BHR working group;[2] and other mechanisms implemented by international financial institutions and national institutions.

We also provide some practical tips on how companies can prepare for and respond to complaints submitted via NJGMs.

The OECD Guidelines and the NCP Specific Instance Process

First published in 1976 and most recently updated in 2023, the OECD guidelines are the leading responsible business conduct standards that cover a range of issues, including human rights, labor rights, the environment, bribery, consumer protection, disclosure, science and technology, competition, and taxation.

The guidelines and a host of supporting guidance set out principles to guide businesses as they seek to address the impacts of their own operations and value chains on people and the planet.

Each government that adheres to the OECD guidelines — currently 51 — is required to set up an NCP tasked with, among other things, establishing a complaints process — known as the specific instance process — for the resolution of issues that may arise from allegations of noncompliance with the OECD guidelines. While the OECD guidelines contain basic guidance on the NCP specific instance process, the procedural particularities of each NCP process vary.

The specific instance process can be accessed by any party with a specified interest in an alleged violation of the OECD guidelines, including trade unions and nongovernmental organizations. The process is initiated by a submitter — or submitters — filing a specific instance with an appropriate NCP. That is usually the NCP in the country in which the multinational enterprise is headquartered or the NCP in the country where the violation of the guidelines is alleged to have occurred.

Following the submission of a specific instance, the named company is given an opportunity to provide a written response.

As the process is voluntary, a threshold question that companies grapple with is whether to participate in the process and submit a response. There may be drawbacks to engaging with adversaries through the process, especially when dealing with bad-faith submitters who misuse confidential information, prolong exchanges resulting in increased length and cost, and contribute to negative press.

However, there can be benefits to participating, as the response provides an opportunity for the company to clarify the facts, counter any allegations with which it disagrees, dispel any unmeritorious claims and highlight any other concerns, such as potential prejudice to parallel litigation.

The company's response will play a role in the content of any statement published by the NCP and can address many of the reputational risks linked to the filing of a specific instance. Moreover, as the NCP process is considered a credible stakeholder engagement process, declining to engage in the process at an early stage may be viewed externally as a signal that the company is not committed to stakeholder engagement.

For example, the EU's 2022 "Final Report on Minimum Safeguards",[3] in relation to the EU Taxonomy Regulation, states that nonengagement with the OECD NCP process signals that a company does not engage with stakeholders, which could indicate that a company is not compliant with minimum

safeguards.

Moreover, as many companies issue public statements expressing their commitment to the OECD guidelines and human rights and environmental due diligence, refusing to participate in the NCP process may call into question the sincerity of such commitments.

After reviewing submissions from both parties, the NCP conducts an initial assessment and evaluates whether to accept the case for further consideration.

During the initial assessment, the NCP considers a range of factors, which vary across NCPs but generally include:

- Whether the issues are material — i.e., relevant to the implementation of the OECD guidelines;
- Whether the issues are substantiated — i.e., supported by sufficient and credible information;
- Whether there appears to be a link between the enterprise's activities and the issues raised;
- The extent to which applicable law or parallel proceedings limit the NCP's ability to contribute to the resolution of the issue or the implementation of the guidelines; and
- Whether the examination of the issue would contribute to the purpose and effectiveness of the guidelines.

Some NCPs — but not all — publish a statement at the conclusion of the initial assessment stage outlining the submissions made by the parties and the NCP's analysis and decision on whether to offer its good offices for mediation.

If the NCP accepts the case and offers to mediate, the parties must decide whether to participate in a voluntary mediation process facilitated and observed by the NCP. While the mediation process is confidential, the processes some NCPs offer provide stronger confidentiality protections than others — e.g., by imposing sanctions in the event of confidentiality breaches.

Following a mediation or a decision not to mediate, the NCP issues a final statement describing the issues raised and the outcome of the specific instance, including, if there was mediation, whether the parties were able to reach an agreement.

The NCP may also engage in follow-up reviews; some NCPs do this more routinely than others and may publish follow-up reports, whereas others may engage in more limited, confidential follow-up.

According to the OECD's database of specific instances, there have been 295 human rights-themed specific instances brought before NCPs since human rights were integrated into the OECD guidelines in 2011.[4]

The most targeted sectors have been manufacturing (58 complaints), mining and quarrying (56 complaints), and financial and insurance activities (40 complaints). Most human rights-related cases relate to employment and industrial relations (118 complaints), the environment (81 complaints), and/or disclosure policies related to responsible business conduct (76 complaints).

UN BHR Working Group Communications

There is a long-established communications procedure under the special procedures of the UN Human Rights Council through which individuals and civil society organizations can provide information on specific allegations of human rights violations by member states and others, including businesses, to a number of thematic and country-specific mandate-holders covering a broad range of human rights issues.

One of the key mandates for businesses is the BHR Working Group. Its communications procedure, established in 2012, is instigated by submissions sent by any individual, group, civil society organization, inter-governmental entity, or national human rights body through an online special-procedures portal.

Communications in the form of letters of allegation are sent by the BHR working group — often along with other special rapporteurs — to companies and other relevant stakeholders.

The letters report on allegations of human rights violations that they have received and request responses addressing certain issues and concerns, including questions about companies' human rights and environmental due diligence processes. The communications can also request that action be taken to prevent, stop, investigate or remedy the alleged violation.

Companies are not legally obligated to respond, but often elect to do so. The BHR working group communications are made public on the Office of the United Nations High Commissioner for Human Rights communications database, as are any responses received.[5]

The communications and any replies are collated into reports presented to the Human Rights Council at each session, and annual summaries are submitted by the Human Rights Council to the UN General Assembly. The special procedures are fairly active: In 2022 alone, the BHR working group sent 117 communications to companies and other stakeholders related to human rights concerns.

The BHR working group does not have power or authority to enforce their views or recommendations. Rather, the intended effect of the communications process is to encourage businesses to engage with the BHR working group in relation to the allegations, and to enable businesses to provide information on their business conduct and alignment with the UN "Guiding Principles on Business and Human Rights."

Other NJGMs

There are a variety of other NJGMs that are implemented by different organizations. Some of the key mechanisms that businesses should be aware of include the following.

NJGMs of National Human Rights Institutions and Ombudspersons

National human rights institutions are autonomous bodies mandated by states to promote and protect human rights. Many national human rights institutions and ombudspersons have dispute mechanisms in place, which are becoming increasingly active.

For example, there has been a recent proliferation of activity from the Canadian Ombudsperson for Responsible Enterprise, or CORE, which was established in 2019 to investigate alleged adverse human rights impacts of the overseas operations of Canadian companies in the garment, mining, and oil and gas sectors.[6]

CORE's complaint process is similar process to that of an OECD NCP, and involves an initial assessment, mediation, investigation, issuance of recommendations and follow-up.

CORE publishes nonconfidential reports on its initial assessment, the results and recommendations of any investigation, the mediation process — when a complaint has been settled — and follow-up on the recommendations issued. CORE does not have the legal power to bring enforcement actions, but it can recommend to the relevant government minister that a matter be referred to enforcement or regulatory authorities.

Independent Accountability Mechanisms at International Financial Institutions

Many international financial institutions have voluntary external accountability mechanisms, referred to as independent accountability mechanisms, such as the International Finance Corporation and Multilateral and Investment Guarantee Agency's Compliance Advisor Ombudsman, and regional mechanisms including the African Development Bank's Independent Review Mechanism and the European Bank for Reconstruction and Development's Independent Project Accountability Mechanism.

The scope and mandate of each independent accountability mechanism varies, but in general these mechanisms provide an opportunity for individuals affected by international financial institution projects — or their representative organizations — to submit complaints about adverse environmental or social impacts resulting from the projects, including grievances directed at the behavior of companies involved in the projects.

Practical Tips for Handling NJGMs

Against a backdrop of creative civil litigation strategies, regulatory enforcement risks, and a growing number of mandatory human rights and environmental due diligence regimes, multinationals should understand how NJGMs fit into the broader BHR ecosystem.

Implementing robust human rights due diligence and stakeholder engagement processes may help to avoid NJGM grievances. In the event that grievances are raised, companies will need to navigate the multidimensional risks and benefits of participation, downstream consequences and complexities of the issues involved.

Some practical tips companies might consider include the following.

1. Educate key internal stakeholders about the processes.

Critical functions to educate on NJGMs may include litigation, legal and compliance, human rights, sustainability, and communications functions, as well as boards of directors. Companies may also wish to train frontline business personnel working in high-risk functions or on projects of a type that may give rise to NJGM grievances or related risks.

2. Evaluate human rights and environmental due diligence infrastructure.

Companies should assess human rights and environmental due diligence infrastructure against relevant standards, including the OECD guidelines, the UN guiding principles and evolving mandatory human

rights due diligence frameworks.

3. Implement robust internal escalation, investigation and engagement procedures.

It is critical for companies to implement robust escalation and investigation procedures with respect to human rights-related complaints. Grievances are often raised directly with companies before they are submitted to NJGMs, and engagement in the early stages may lead to an early resolution of underlying issues and help avoid a more formal public process.

4. Adapt to the nuances of the NJGM systems.

In our experience, NJGMs require a different approach to traditional dispute resolution. The processes are not intended to be litigious in nature, but rather are intended to serve as forums for constructive engagement, development of best practices and, ultimately, the identification and mitigation of adverse human rights and environmental impacts.

Approaching the process in the same way a company would approach a civil litigation complaint may be counterproductive and lead to unfavorable results. There are also unique nuances to each particular NJGM.

5. Consider carefully whether and how to engage in NJGM processes.

As NJGM processes are voluntary in nature and in some cases instigated by organizations that may be viewed as hostile, companies may be reluctant to engage with them. As discussed above, there can be benefits associated with participation and risks associated with nonengagement.

At the same time, NJGMs are often accessed by parties that are either threatening litigation or already engaged in active litigation against the company. Risks of prejudice to such parallel litigation, confidentiality risks, and eventual regulatory and enforcement risks should be considered carefully and balanced with the benefits of participation.

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[1] https://www.oecd-ilibrary.org/finance-and-investment/oecd-guidelines-for-multinational-enterprises-on-responsible-business-conduct_81f92357-en;jsessionid=5AMwuh7qfVUPxQeYSVkzFWBCBUaZe4aqE56LXXxy.ip-10-240-5-71.

[2] https://www.ohchr.org/en/special-procedures/wg-business.

[3] https://finance.ec.europa.eu/system/files/2022-10/221011-sustainable-finance-platform-finance-

report-minimum-safeguards_en.pdf.

[4] https://mneguidelines.oecd.org/database/.

[5] https://spcommreports.ohchr.org/TmSearch/Results.

[6] https://core-ombuds.canada.ca/index.aspx?lang=eng.