

# In Search of Effective Corporate Grievance Mechanisms: Can Mandatory Due Diligence Laws be a Progressive Force?

James Harrison,<sup>\*</sup>  Mark Wielga,<sup>\*\*</sup> and Margarita Parejo<sup>\*\*\*</sup>

## Abstract

Mandatory human rights due diligence (mHRDD) laws are currently being proposed and/or implemented in countries around the world. Increasingly, these laws place obligations on corporations to establish or participate in corporate grievance mechanisms (CGMs). CGMs have the potential to ensure that rightsholders are empowered to hold corporations accountable for their human rights performance. But our limited knowledge of how CGMs operate indicates that many are not producing results that are valuable for workers and communities. CGM provisions in mHRDD laws in Germany and Norway, and draft laws produced in the European Union and Brazil are rudimentary and unlikely to produce better-performing CGMs. Analysis of Norwegian mHRDD corporate reporting identifies that many corporations fail to understand the basic elements of an effective CGM. The article therefore argues that requirements for CGMs in mHRDD laws will only be a progressive move if such laws also demand disclosure of information that empowers national authorities, as well as civil society actors and researchers, to scrutinize CGMs to ensure they are effective. Disclosure requirements must speak to three issues: (1) how accessible CGMs are, (2) the way complaints are handled, and (3) the remedies provided to rightsholders. If, as a result of scrutiny of this data, mHRDD laws can produce well-functioning CGMs, this could lead to rightsholder concerns becoming more central to due diligence processes, potentially addressing cosmetic compliance with due diligence obligations.

## Practitioner Points

- Mandatory human rights due diligence laws should require companies to publicly disclose specific information about their corporate human rights grievance mechanisms to allow monitoring and scrutiny.
- These disclosures should, at a minimum, include the number, types, location and outcome of claims; who investigates the claims; and the time they have taken to process and address.

**Keywords:** complaints; due diligence; grievance mechanisms; transnational corporations, UN Guiding Principles

\* Professor, School of Law, University of Warwick, Coventry, United Kingdom.

\*\* Director, Nomogaia, Denver, United States.

\*\*\* Senior Associate, Nomogaia, Bogotá, Colombia.

## 1. Introduction

Both human rights due diligence (HRDD) and corporate grievance mechanisms (CGMs) have risen to prominence from a human rights perspective in recent years, largely as a result of the UN Guiding Principles on Business and Human Rights (UNGPs). Over the decade since their publication, the UNGPs have become the most significant international instrument in relation to corporate human rights responsibilities. The UNGPs are grounded in three pillars: the state duty to protect human rights, the corporate responsibility to respect human rights, and the requirement to provide access to remedy.

The first pillar of the UNGPs requires states to protect against human rights abuses, including ‘taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication’. The second pillar places a responsibility on corporations to respect human rights. This is primarily achieved through undertaking human rights due diligence. HRDD is a multi-faceted process which requires companies to first assess their actual and potential human rights impacts, then to address any adverse impacts they identify, to monitor the success of their responses, and finally to communicate to stakeholders the action that they have taken (Principles 17–21). Finally, the third pillar is ‘access to remedy’ requiring corporations to provide for, or cooperate in, systems to address human rights complaints and remedy adverse impacts where those have occurred.

According to the UNGPs, access to remedy is provided first and foremost by judicial mechanisms (Principle 26). However, other mechanisms are also identified as important, including private forms of remedy in which the government has no direct role. These include grievance mechanisms run by the company themselves (‘internal grievance mechanisms’), and those in which multiple companies participate (Principle 29). The latter category includes grievance mechanisms run by multi-stakeholder initiatives (MSIs) (frameworks for cooperation among businesses, civil society and other stakeholders often aimed at meeting social and environmental objectives) and other groups (for example business associations). Collectively we term these ‘corporate grievance mechanisms (CGMs)’. They are the focus of this article. At the moment, there are concerns that many CGMs do not appear to be effective from a rightsholder perspective (see discussion in section 2). It is in this context that human rights due diligence laws could have an impact.

One of the most notable recent actions by states to fulfil their duty to ‘protect’ has been the introduction of mandatory HRDD legislation (mHRDD laws) transforming the corporate responsibility to respect human rights from a voluntary commitment into a legal obligation. Different versions of mandatory HRDD laws have been introduced in Germany, France and Norway (Deva 2023). An EU Corporate Sustainability Due Diligence Directive (CS3D) has also been adopted in 2024, which will require all EU governments to introduce mandatory due diligence legislation within the next two years.<sup>1</sup> Beyond Europe, Brazil and Colombia are also considering proposals for laws which include mandatory due diligence.<sup>2</sup> In light of these developments, HRDD looks set to metamorphize from a voluntary activity undertaken by a small number of pioneer companies to a set of obligations which many thousands of companies globally will be required to undertake. More recent mHRDD laws, including the German law, the EU CS3D and the Brazilian proposal, all include a requirement for companies to establish or participate in CGMs.<sup>3</sup>

1 The final text of the Directive, subject to approval of the European Parliament is available at (Council of the European Union 2024).

2 Brazil’s legislative proposal can be found at (Camara dos Deputados No Date). Reports of the Colombian proposals are reported at (CERALC Project No Date). We are also aware of discussions about laws in Argentina, Chile, Mexico and Peru which are at earlier stages/there is less public information.

3 The standard terminology can be confusing, so just to be clear, the mHRDD laws discussed in this article include laws which require complaint mechanisms, despite the fact that human rights due diligence is part of Pillar II of the UNGPs and the complaint mechanisms are a part of Pillar III.















up with CGMs to ask questions to explore two key hypothesis which then need to be explored for why this might be the case.

First, there is the question of whether the CGM is making potential complainants aware of its existence. A CGM which does not publicize its existence to claimants is worthless. CGMs are not an accepted and universal part of the legal landscape like national courts. There is no reason that potential claimants should know they exist. All CGMs have the basic duty to make themselves, and basic elements about how they operate, known to their potential claimants. Those elements include the system's scope (who can file against whom for what), procedures (how to file a claim and what the claimant needs to do at each stage), and outcomes (what remedies can be provided). These answer the threshold questions claimants have: Can I file a claim? How do I do it? What will I get and how long will it take? CGMs must make affirmative efforts to present the answers to these questions to potential claimants.

'Outreach' is the term for the efforts made by a CGM to inform potential claimants of the essential elements of the system and how it can be accessed. CGMs require an ongoing programme of outreach. The effectiveness of outreach can be judged by its processes and results. With respect to the process used for outreach, information available on the internet is necessary, but is definitely not sufficient. It is of limited usefulness for many types of claimants who may lack computer or internet access and the technical skills or language ability to find information. The forms which outreach should take, and the extent of outreach activity needed will depend on the nature of the CGM, who its potential complainants are, and how they can be effectively engaged. A properly designed outreach system will start with a complainant-centred needs assessment. Subsequent outreach is likely to include activities such as in-person presentations to factory workers and local communities, posters and pamphlets distributed to them, and engagement with NGOs and other groups who can act as intermediaries to publicize the system to potential complainants through their networks. But these organizations cannot be relied upon to spread the word to communities and workers without support for their efforts from those running the CGMs. In terms of results, a successful programme of outreach will lead to increased complainant knowledge of the CGM (which can be assessed) and increased numbers of complaints filed (which should already be monitored).

A second reason why a CGM may receive low numbers of complaints is because complainants who know about the mechanism find it difficult or impossible to make a claim. Inaccessible systems can require complainants to fill in complex forms in languages they do not understand without adequate support from people who understand how the CGM works. Making systems accessible will again depend on key characteristics of potential complainants. Those running CGMs need to consider the languages that complainants speak, their preferred mode of engagement with the CGM (a person on the end of a telephone is more accessible for many potential complainants than a form on a website) and the support and assistance that potential claimants need to successfully lodge a claim.

Sometimes the problems with a system will be more complex than low numbers of all types of complaints in all contexts. Some mechanisms will have problems with particular types of claims, types of claimants and/or particular national contexts. For example, the Fair Labor Association's CGM primarily engages with trade unions or workers trying to form a union who bring claims on behalf of workers, often in relation to the right to unionize. But a very significant proportion of the factories who produce for FLA members are in China and Vietnam, where state-controlled unions fail to protect the labour rights of their members. No legitimate unions exist. The FLA's approach to engage with unions, primarily around the right to unionize, cannot function effectively in this context. It therefore needs to work out how its system will function in a country where those unions do not exist, or else admit that its CGM cannot function effectively in this context and identify other accountability mechanisms that can act as an alternative (Harrison et al. 2024).

Another serious impediment to the effectiveness of the claims process is that complainants may suffer from retaliation as a result of submitting their complaints. They can suffer violence, or threats of it, be blacklisted from jobs, or suffer other forms of punishment. Fear of reprisal fundamentally undermines a CGM and limits its real accessibility. The numbers and types of claims will never prove that a serious fear of retaliation is present, but they can be the basis to begin that inquiry in a qualitative way. If the issue is flagged by the claims data, or by potential claimants who legitimately fear retaliation, CGMs should have to demonstrate to national authorities and other interested parties that they have policies and practices that act as effective deterrents against retaliation.

Overall, then, requiring key details about the number and type of complaints can alert national authorities, civil society actors and independent researchers to situations where CGMs are not receiving the complaints that they should be. This allows them to then follow up with questions to such CGMs about issues of outreach, accessibility and efforts to tackle retaliation. Furthermore, this data can trigger questions about how CGMs are performing in particular locations. All CGMs which purport to address complaints by workers and communities in relation to transnational business activity operate within varied legal, political and cultural contexts. It is not acceptable for those mechanisms to adopt one-size-fits-all systems. They must adapt so they are fit for purpose in all of the contexts in which the CGM operates.

## 4.2 The process

The second type of data which mHRDD laws should be requiring CGMs to divulge relates to the handling of complaints. The data that should be initially disclosed relates to two issues: first, the time which the CGM takes to process the complaints it receives, and second, whether or not the CGM actually undertakes investigations of the complaints itself or leaves the investigatory and evidence presentation processes to be undertaken by the parties to the claim.

On the time taken to process complaints, there should be a minimum requirement that CGMs disclose the average time taken from when a complaint is lodged to when the case is closed. For CGMs where a large number of claims are made, the mean, minimum and maximum time periods of cases concluded in a given year should be provided. It is not possible to specify a universally applicable time period which complaints should take to come to fruition. There are too many variables in terms of the complexity of individual cases. But where CGMs are consistently taking a long time to address complaints (and far longer than other comparable CGMs), this can then trigger follow-up by authorities, CSOs and researchers as to the reason for the delays.

Our investigation of MSI CGMs found there was a great differentiation between the time cases took and the resources deployed by different mechanisms. The average time complaints took from when they were first lodged to the conclusion of the adjudication process varied between 6.9 and 22.4 months (Harrison and Wielga 2023). While some of the difference could be explained by the varying complexity of cases in relation to different types of CGMs in different corporate sectors, these time differences were also indicative of the speed with which the system sought to act, and the resources which different systems had at their disposal to investigate claims. For instance, we identified above how the Bonsucro CGM is only funded so that it can process three cases per year. All other cases lodged within the system are therefore likely to languish for a significant amount of time unaddressed. The speed with which a complaint system operates can be critical for claimants. For instance, if a worker loses a job unfairly and waits too long for a claim to be processed before s/he can be reinstated, this can mean children go hungry, the family leaves its hometown, and even that the job can never be reclaimed. The more CGMs provide data about the time the complaints process takes, the more it will be possible to compare how CGMs in comparable sectors are performing and where delays look excessive.



efforts to verify that remedies were actually provided. A source which CGMs should use for this information is the claimants themselves. If they confirm that they received what the adjudicators determined they should receive, it is usually safe to conclude that they did. The exception would be when there is pressure put on them to falsely state that the remedy was carried out. This can happen, for example, in a work setting when a claim is made that there has been payment of a bonus owed, but the company only paid a partial amount and told the employee to play along if s/he wants to keep their job. In cases where there are dangers of such pressure, CGMs should seek other sources of evidence to confirm what the claimant says.

Requiring data on the remedy actually provided to the claimant gives national authorities and other interested parties critical information about whether CGMs are ultimately effective. Systems that are functioning effectively will have significant numbers of cases that are won by claimants, and those complainants should be receiving some form of remedy. If all CGMs publish this data then very low rates of remedy would be easy to spot and comparisons could also be made between CGMs with very differentiated outcomes and this would provide the basis for further inquiry into those that were performing poorly.

Our research into MSI CGMs (Harrison and Wielga 2023) found that outcomes varied massively between different CGMs. For instance, three of the six CGMs we investigated (RSPO, Bonsucro and the Forest Stewardship Council) only collectively produced one case where remedy was actually provided to the complainants. The other three CGMs (the Bangladesh Accord (as it was then known), Fair Wear Foundation and Fair Labor Association) all produced significant numbers of cases where some form of remedy was provided: between 41 and 58 per cent of all adjudicated cases. A key reason for the differentiation between these two groups was that the former group lacked the leverage over the respondent companies to enforce their judgments whereas the latter (often, but not always) were more capable of ensuring that the remedies they ordered were actually delivered in practice.

Ensuring that remedies are actually provided to rightsholders is a serious challenge for most CGMs. For CGMs in which companies have volunteered to participate (such as those run by MSIs or Business Associations), the respondent may well find it cheaper and easier to leave the organization rather than provide the remedy ordered by the complaint system. For instance, to allow a 'hostile' union to operate or return land now part of a plantation to its rightful owners can be a severe economic blow to a company. The company considered solely as a rational economic actor, should not, without the right incentives, be expected to perform such actions. It is up to those who run the CGM to ensure that they have sufficient leverage over the respondent to guarantee that the remedy they have ordered is actually carried out.

An internal corporate CGM must somehow induce its own corporate management to provide remedy in appropriate cases. It has no obvious leverage. Those who run such CGMs should therefore expect the outside world to be extremely sceptical about the independence of investigations, whether adequate remedies have been ordered and whether they have been paid out in practice. Currently there is almost no transparency about the processes and outcomes achieved by the vast majority of these systems. Internal CGMs can only begin to create any kind of confidence in their legitimacy if they are fully transparent about the process and outcomes of their cases.

## **5. Concluding thoughts: the potential for mutual enhancement between CGMs and HRDD obligations**

There is an urgent need to shine a light on how CGMs are operating. We currently have insufficient information to know whether they are routinely producing valuable results for rightsholders in situations where corporations have abused their rights. The picture that we

have from the few CGMs which do provide enough information about their performance for a judgment to be made is mixed. The best performing CGMs do sometimes seem to produce valuable results, indicating that they have potential. But most CGMs have serious limitations (some far worse than others) in three key areas: the complainant's ability to access the system, how complaints are then handled by the system, and the outcomes and remedies produced for rightsholders at the end. Those few CGMs that publish data about their performance are likely to work better from a rightsholder perspective than the vast majority that do not.

It is in this context that a serious debate is needed about the role of mHRDD laws and whether they can play a progressive and positive role in ensuring that CSMs are effective in addressing the grievances of rightsholders (Laplante 2023). It does not appear to be a progressive move for mHRDD laws to simply mandate that corporations establish or participate in CGMs without safeguards to ensure such CGMs are effective. Our analysis of current (Norway and Germany) future (EU) and proposed (Brazil) mHRDD laws which contain requirements for CGMs suggest this is exactly what is happening. The danger is that this will lead only to an increase in the number of CGMs operating, but no enhancement of corporate accountability or effective remedy for rightsholders. Our analysis of corporate reporting under the Norwegian Transparency Act suggests that companies lack even the most basic knowledge of what an effective CGM is. The worst fears of those commentators who are sceptical of CGMs may then be realized: that corporations who set up ineffective CGMs can argue that they are taking action to provide remedies to rightsholders, thereby avoiding pressure for other potentially more effective forms of accountability such as greater judicial oversight.

To ensure that mHRDD laws are a progressive force when it comes to CGMs, lessons must be learned from existing research into corporate disclosure practices, particularly in relation to corporate social reporting. MHRDD laws and/or national regulating authorities must first mandate the provision of specific facts and figures about CGMs in three key areas: the accessibility of the complaints system, the way complaints are handled, and the outcomes produced for rightsholders, including most importantly, the degree to which they provide remedies for rightsholders. Comparative analysis of these facts and figures will allow poorly performing CGMs to be identified by national authorities themselves as well as by civil society actors and researchers who should have access to this publicly available data. Those actors can then undertake further interrogation to identify the causes of poor performance in the ways we have set out above and demand improvements from those CGMs accordingly. The disclosure of key data is therefore necessary for effective scrutiny of CGMs but it is not sufficient and must be followed by further action.

There are two potential justifications companies and CGMs might have for refusing to reveal the information that should be disclosed as explained above. Neither of these justifications should be allowed to frustrate requirements in mHRDD laws and regulations. The first justification is where its provision would endanger claimants or fail to respect their privacy. CGMs such as those operated by the Fair Wear Foundation and the Bangladesh Accord (now its successor, the Ready-Made-Garment Sustainability Council), which handle many complaints from individual workers do not disclose the identity of complainants in order to protect them from genuine risks of reprisals and other harms. But this appears to be the limit of the protection that claimants need, even in the most serious of cases involving individual claimants making damaging allegations against powerful corporate entities who employ them. Indeed, in many cases the claimants adamantly desire that their identity and the nature of their claims be publicized. However, many other CGMs appear to use privacy and security concerns as an excuse to keep all information about their cases secret all of the time, which has the effect of protecting the perpetrating companies, not their victims. This is part of a long tradition of actors who are in positions of power utilizing that

power to refuse disclosure of information without proper and fulsome reasons (for example Zuckerman 1994).

A second justification might be the cost burdens that these disclosures place on businesses. But the costs involved in the collection of this data should be small. The required information described above is extremely basic and requires no analysis. Companies will need to collect this data already if they are making any attempt to know how their CGMs are operating. Information about the number and types of complaints received, the time taken to process them, and the outcomes that are achieved for rightsholders will all be needed by companies to make an informed assessment of the nature of the grievances they are receiving and whether they are handling those grievances appropriately. Immediate questions should be asked of any company which argues that these regulatory requirements impose a significant burden upon them about how they internally evaluate the CGMs which they run and/or participate in.

If it becomes mandatory for companies to disclose the data specified above and then national authorities use that data as the basis for scrutinizing CGMs and demanding that improvements are made, then mHRDD laws could make a significant difference to the lives of individual rightsholders. But CGMs can only do so much by themselves to ensure corporations *systematically* protect the rights of affected rightsholders. Even a well-functioning CGM can only respond to the issues which are raised by complainants and then, in cases that are upheld, provide remedies to those claimants that address the harms they have suffered. There is a tendency to see cases as individual instances of wrongdoing, even when the CGM is seeing the same types of cases over and over again. CGMs are generally not designed or empowered to address systematic issues. But the fact that CGMs are now being required as part of due diligence laws gives an opportunity to harness the information identified through the complaints process to influence the due diligence process which the corporation must also undertake to comply with its legal obligations.

For instance, a CGM run by an MSI or business association in the apparel supply chain may notice many claims of excessive overtime from particular factories which cluster around certain times. It may be that those factories push their employees unreasonably hard, but it may also be that the brands buying from the factories make unreasonable demands on their suppliers, forcing the factories in turn to put excessive pressure on their workers. Individual complaints can trigger a due diligence process which involves investigating both factory practices and brand behaviour. With respect to the brands, this would involve investigating whether the claims of excessive overtime correlate to particular orders from particular brands. In this way, complainant concerns would be driving due diligence investigations of potential systemic problems.

If we think about the overall possibilities of the issues discussed in this article, then a symbiotic and mutually reinforcing process could be envisaged between HRDD obligations and CGMs. MHRDD laws could lead to data being provided that allows national authorities to investigate how CGMs are functioning, to identify why and how deficiencies are occurring, and to make successful demands that they be enhanced in such a way that those CGMs become trusted to routinely address rightsholder complaints in the future. Those rightsholder complaints could then become a starting point for due diligence inquiries into specific aspects of corporate behaviour. This would put rightsholder concerns at the centre of the due diligence process in a way that might address some of the concerns in the academic literature about cosmetic compliance with mHRDD laws and marginalization of the interests of rightsholders by corporations who are undertaking HRDD.

## Conflict of Interest

None declared.



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