

# Administrative and Judicial Mechanisms and the UN Framework

---

This module has the following objectives:

Enable the participants to

- Discuss the experiences of using the existing labor grievance mechanisms;
- Discuss the administrative oversight on corporation-related issues (e.g., compliance with domestic standards on use of natural resources that impact on livelihood security, health, land use, cultural protection, environmental protection);
- Analyze the experience of using the courts in addressing business-related human rights issues;
- Determine what measures should be done by affected people when using the administrative and judicial mechanisms to resolve business-related human rights issues.

Time: 7 HOURS AND 20 MINUTES

Materials:

- Big size papers, colored pens, writing papers, adhesive tapes;
- Equipment - computer, projector, screen;
- Video or a on labor mechanisms.

## **Administrative and Judicial Mechanisms and the UN Framework**

### **I. Procedure**

#### **a. Opener – 5 MINUTES**

Explain that there are two sections in this module. One section covers labor dispute resolution mechanisms and administrative oversight mechanisms. The second section dwells on judicial mechanism.

Inform the participants that the discussions/activities will use their own experiences and/or their own knowledge about specific cases related to the mechanisms.

### **SECTION ONE**

#### **Labor grievance mechanisms**

##### **a. Activity 1 – 1 HOUR**

Ask the participants to recall their experience in using labor mechanisms and answer the following questions:

- i. What advantages or disadvantages are provided by these labor grievance mechanisms in addressing labor issues?
- ii. What procedural aspects of the mechanisms should change or be retained to ensure that they subscribe to human rights-based approach to access to justice?
- iii. What lessons can be learned from the experiences of using these mechanisms?

Ask the participants to discuss the answers to the question in groups. Instruct them to write their answers on big size papers; and post the papers on the wall afterward.

#### **Administrative oversight mechanisms**

##### **b. Activity 2 – 1 HOUR AND 30 MINUTES**

Provide examples of existing administrative oversight mechanisms that cover human rights issues. These mechanisms can be the following:

##### **National government corporate oversight**

- i. Government agencies that monitor compliance with laws on agricultural (including aquatic) production, forestry preservation, environmental/natural resources protection, mineral exploitation, foreign investment, special economic zones, cultural assets protection, and other related issues;
- ii. Administrative procedures in resolving complaints about non-compliance by companies;

##### **Local government corporate oversight**

- i. Local government offices that monitor the corporate compliance with laws and ordinances on agricultural (including aquatic) production, forestry preservation, environmental/natural resources protection, mineral exploitation, foreign investment, cultural assets protection, and other concerns;
- ii. Remedies available in local governments (provincial, city and town governments) regarding complaints of adverse human rights impact of company operations;

## National human rights institutions

- i. Role of national human rights institutions in resolving business-related human rights issues;
- ii. Procedures for resolving business-related human rights issues.

Ask the participants to discuss in small groups lessons that can be learned from the experiences of using the existing mechanisms and determine their advantages and disadvantages in resolving business-related human rights issues. Assign each group of participants to one type of administrative mechanism.

Tell the participants to present their group reports in plenary.

Ask the participants to raise questions or comments on the group reports.

Organize on the board/big size paper the key points raised in the group reports and in the comments and questions of the participants. Use the table below in summarizing the key points:

| <b>Administrative mechanism</b>   | <b>Procedures</b> | <b>Advantages</b> | <b>Disadvantages</b> |
|-----------------------------------|-------------------|-------------------|----------------------|
| National government               |                   |                   |                      |
| Local government                  |                   |                   |                      |
| National human rights institution |                   |                   |                      |

Ask the groups to present their reports in plenary.

Tell the participants to raise questions or comments on the group reports.

Organize on the board/big size paper the key points raised in the group reports and in the comments and questions of the participants.

### Alternative Activities

Alternatively, the activities in this Section can start with a visit to nearby offices of the administrative mechanisms to interview officials involved in resolving cases related to companies. The interview on specific cases should include the procedures of the grievance mechanisms.

The participants can be divided into as many groups as there are offices that can be visited.

In this case, the participants will use the information gathered from the interview to discuss the questions in the two activities above.

### c. Input – 1 HOUR

Provide an input on how existing administrative grievance mechanisms can be improved to be able to subscribe to human rights-based approach to access to justice.

The presentation can discuss the characteristics of effective non-judicial grievance mechanisms, both State-based and non-State-based, such as the following:

- a. Legitimate: enabling trust from the stakeholder groups for whose use they are intended, and being accountable for the fair conduct of grievance processes;

- b. Accessible: being known to all stakeholder groups for whose use they are intended, and providing adequate assistance for those who may face particular barriers to access;
  - c. Predictable: providing a clear and known procedure with an indicative time frame for each stage, and clarity on the types of process and outcome available and means of monitoring implementation;
  - d. Equitable: seeking to ensure that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair, informed and respectful terms;
  - e. Transparent: keeping parties to a grievance informed about its progress, and providing sufficient information about the mechanism's performance to build confidence in its effectiveness and meet any public interest at stake;
  - f. Rights-compatible: ensuring that outcomes and remedies accord with internationally recognized human rights;
  - g. A source of continuous learning: drawing on relevant measures to identify lessons for improving the mechanism and preventing future grievances and harms;
- Operational-level mechanisms should also be:
- h. Based on engagement and dialogue: consulting the stakeholder groups for whose use they are intended on their design and performance, and focusing on dialogue as the means to address and resolve grievances.

(Source: *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*. United Nations, HR/PUB/11/04, 2011, page 33)

Tell the participants to refer to Annex A for an explanation of these principles. Ask the participants to go back to their discussions on labor and administrative oversight mechanisms and determine whether these characteristics apply to these mechanisms' mandate, powers and procedures.

Provide another input on the national human rights institutions (NHRIs) and their role in resolving grievances arising from business operations. The following characteristics of effective investigation and complaints handling system can be stressed:

Complaints are handled promptly and effectively by:

1. Identifying out-of-jurisdiction complaints and potential referrals out to other organisations at the intake stage;
2. Using information and tips from NGOs [non-governmental organizations], advocates, and other organisations in the field to pursue investigations;
3. Using alternative dispute resolution (ADR) in the early stages of the complaint process (statistics show that voluntary mediation can resolve 30% - 50% of complaints submitted, if properly structured);
4. Tracks the performance of investigators in terms of the numbers of complaints they handle and close per year, depending on whether cases are systemic or complex in nature. This information feeds into both individual performance measures and institutional targets. (The target may be higher in Ombuds-style NHRIs that rely on quick, early resolution processes to resolve cases without many legal formalities);
5. Communicates regularly with parties about the status of the complaint and recording this activity;

6. Demonstrates that the NHRI has made recommendations following investigations on important human rights issues (as set out in the strategic plan) and has made efforts to ensure that these recommendations were adopted;
7. Uses case management committees, or an equivalent structure, that meets regularly and provides timely process decisions;
8. Has decision-making structures, whereby senior office-holders meet regularly to review and decide on investigation reports, and document those decisions;
9. Sets service standards for timelines for each part of the investigation process and communicating these to the public;
10. Is used to inform and improve programming and performance in investigation and in other programme areas.

(Source: Text based on *UNDP-OHCHR Toolkit for collaboration with National Human Rights Institutions* [New York/Geneva, December 2010], page 221)

Ask the participants to review their discussions on NHRIs and determine whether or not these characteristics apply to their complaints handling system.

## SECTION TWO

### Judicial mechanism

#### a. Activity 3 – 1 HOUR AND 30 MINUTES

Ask the participants to discuss in small groups court cases they are familiar with and answer the following questions:

- i. How do courts address the business and human rights issues?
- ii. What are the challenges being faced in using the courts to uphold corporate accountability and on employing the human rights-based approach to access to justice?
- iii. What lessons can be learned from these experiences?

Tell the participants to discuss in groups the questions and write on big size paper their responses. Ask them to give a report in plenary.

#### b. Input – 1 HOUR

Provide an input on judicial mechanism and the practical measures necessary to maximize the use of the courts to address business-related human rights issues. Use a case study on how resorting to court action has helped the community affected by company operations recover from the effects of pollution. See Annex B for a case study.

Discuss in the input the following issues, among other concerns, regarding judicial mechanism:

- Consideration of adverse human rights impacts of business operations as subject to domestic laws and therefore bases for court action;
- Requirements in initiating judicial recourse on adverse human rights impacts of business operations, including the costs of litigation;
- Role of supporters (particularly of volunteer lawyers,\* legal assistance groups and other civil society organizations) to pursue court claims on behalf of the affected

\* See for example Takeji Fujiwara, *The Involvement of Japan's Lawyers in Environmental Issues*.

people against companies - this includes the issue of the supporters' *locus standi*\*\* in representing them in court;\*\*\*

- Evidence necessary to prove claims against companies - this includes evidence of technical/medical/scientific nature that is difficult and expensive to obtain;
- Time needed to complete judicial proceedings; and
- Judicial remedies and their enforcement – the remedies include compensation for the damage caused (including compensation for lost income, or lost capacity to earn a living), restoration of property that have been taken, rehabilitation of area that has been damaged, support for the medical needs of affected people, and stoppage of operations of erring companies. Such remedies may also be in the form of settlement agreement, which require appropriate negotiation capacity on the part of the affected people to be able to obtain their demands from the companies. The extent of enforcement of the remedies obtained has to be explained too.

### c. Activity – 1 HOUR

In plenary, brainstorm on practical measures needed in seeking the courts' intervention on business-related human rights issues.

List on the board the suggested practical measures.

Report to the plenary the results of the group discussion using a panel discussion format.

## II. Summary

Time: 15 MINUTES

Summarize the main points discussed during the session such as the following:

1. General characteristics of administrative and judicial mechanisms to resolve business-related human rights issues;
2. The key issues and lessons on the resolution of specific cases using the mechanisms existing in Northeast Asia/country that affect business and human rights.

---

\*\* In law, *locus standi* means the right to bring an action, to be heard in court, or to address the Court on a matter before it. *Locus standi* is the ability of a party to demonstrate to the court sufficient connection to and harm from the law or action challenged to support that party's participation in the case (USLegal.com, <http://definitions.uslegal.com/l/locus-standi/>).

\*\*\* See discussion of this issue in the Mongolian context in Center for Human Rights and Development, *Human Rights in the Mining Industry of Mongolia*, pages 106-108.

## **Annex A**

### ***Commentary***

A GRIEVANCE MECHANISM can only serve its purpose if the people it is intended to serve know about it, trust it and are able to use it. These criteria provide a benchmark for designing, revising or assessing a non-judicial grievance mechanism to help ensure that it is effective in practice. Poorly designed or implemented grievance mechanisms can risk compounding a sense of grievance amongst affected stakeholders by heightening their sense of disempowerment and disrespect by the process. The first seven criteria apply to any State-based or non-State-based, adjudicative or dialogue-based mechanism. The eighth criterion is specific to operational-level mechanisms that business enterprises help administer. The term “grievance mechanism” is used here as a term of art. The term itself may not always be appropriate or helpful when applied to a specific mechanism, but the criteria for effectiveness remain the same. Commentary on the specific criteria follows:

a. Stakeholders for whose use a mechanism is intended must trust it if they are to choose to use it. Accountability for ensuring that the parties to a grievance process cannot interfere with its fair conduct is typically one important factor in building stakeholder trust;

b. Barriers to access may include a lack of awareness of the mechanism, language, literacy, costs, physical location and fears of reprisal;

c. In order for a mechanism to be trusted and used, it should provide public information about the procedure it offers. Time frames for each stage should be respected wherever possible, while allowing that flexibility may sometimes be needed;

d. In grievances or disputes between business enterprises and affected stakeholders, the latter frequently have much less access to information and expert resources, and often lack the financial resources to pay for them. Where this imbalance is not redressed, it can reduce both the achievement and perception of a fair process and make it harder to arrive at durable solutions;

e. Communicating regularly with parties about the progress of individual grievances can be essential to retaining confidence in the process. Providing transparency about the mechanism’s performance to wider stakeholders, through statistics, case studies or more detailed information about the handling of certain cases, can be important to demonstrate its legitimacy and retain broad trust. At the same time, confidentiality of the dialogue between parties and of individuals’ identities should be provided where necessary;

f. Grievances are frequently not framed in terms of human rights and many do not initially raise human rights concerns. Regardless, where outcomes have implications for human rights, care should be taken to ensure that they are in line with internationally recognized human rights;

g. Regular analysis of the frequency, patterns and causes of grievances can enable the institution administering the mechanism to identify and influence policies, procedures or practices that should be altered to prevent future harm;

h. For an operational-level grievance mechanism, engaging with affected stakeholder groups about its design and performance can help to ensure that it meets their needs, that they will use it in practice, and that there is a shared interest in ensuring its success. Since a business enterprise cannot, with legitimacy, both be the subject

of complaints and unilaterally determine their outcome, these mechanisms should focus on reaching agreed solutions through dialogue. Where adjudication is needed, this should be provided by a legitimate, independent third-party mechanism.

*(Source: Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework. United Nations, HR/PUB/11/04, 2011, pages 32-34)*

## Annex B

### *Case Study: Nishiyodogawa: Community Struggle on Right to Health and Environment\**

#### Aozora Foundation

By mid-1930s, Nishiyodogawa ward had seven hundred factories, sixty thousand employees, and four hundred sixty of these factories had ten or more employees. This made Nishiyodogawa ward the heart of Osaka's industrial area.\*\*

In the 1930s, Osaka city was named the "City of Factories"\*\*\* but also as "Smoke Capital" of Japan due to its industrialization history dating back to the 1870s. In a school textbook, Osaka city's industrial development was symbolized by smokes coming from numerous factory smokestacks.

The strong demand of foreign trade as well as the military industry in the 1930s caused the fast industrial development of Nishiyodogawa ward; it resumed after World War II. In the 1960s, residents experienced brown-colored haze that enveloped the area all day. Residents believed that all types of chemical pollution existed in Nishiyodogawa ward, particularly sulfur oxides. Cars and trains had their lights turned on during the day due to poor visibility.

Protests (including law suits) against widespread pollution in the country led to the enactment of the Basic Law for Environmental Pollution Control in 1967, the Law on Special Measures Concerning Redress for Pollution-related Health Damage in 1969, and the Absolute Liability Law in 1972 and the Pollution-related Health Damage Compensation Law in 1973. The 1969 law designated parts of several cities including Yokkaichi, Osaka (including Nishiyodogawa ward) and Kawasaki cities as polluted areas. Under this law, people who were certified as suffering from pollution-induced health problems were qualified to receive medical care benefits. Under the 1972 Absolute Liability Law, lack of intent to pollute does not exempt companies from escaping their responsibility for the pollution caused.

#### Nishiyodogawa Residents' Protest

In mid-1970s, the Nishiyodogawa Association for Pollution Patients and Their Families contacted lawyer-members of the Osaka Bar Association to study the Nishiyodogawa problem. The difficulty of finding the sources of air pollution led the lawyers to do a three-year study on what legal action to take. In April 1978, the patients filed a case before the District Court in Osaka against ten companies believed to be sources of air pollution.\*\*\*\* More than twenty lawyers were involved in the filing of the complaint in court, but lawyers from different parts of Japan later joined the legal team that increased the number of lawyers to one hundred and fifty.

The tort liability complaint asked the court, among several demands, to stop the operations of the companies and to order the companies to pay compensation to

---

\* This is a short version of the article entitled "Nishiyodogawa: Community Struggle on Right to Health" published in *FOCUS Asia-Pacific*, December 2015, volume 82, and available at [www.hurights.or.jp/archives/focus/section3/2015/12/nishiyodogawa-community-struggle-on-right-to-health.html](http://www.hurights.or.jp/archives/focus/section3/2015/12/nishiyodogawa-community-struggle-on-right-to-health.html).

\*\* "A City of Factories Appears," *Osaka Asahi Shimbun*, 16 November 1936, an English version of the article is found in <http://aozora.or.jp/lang/english/nishiyodogawa-field-museum/citizens-struggle>.

\*\*\* Japan's Air Pollution from the Perspective of Pollution Victims, Center for the Redevelopment of Pollution-damaged Areas in Japan (The Aozora Foundation), page 9.

\*\*\*\* Three more complaints were subsequently filed by the patients in court including those filed against the government about the air pollution (nitrogen oxides) from vehicle exhaust from public roads.

the pollution victims. The Nishiyodogawa residents received a lot of support from the general public in pursuing the complaint.

While proving which companies were the sources of specific types and amounts of pollutants was technically difficult, proving the unusually high rate of health problems (compared to the national average) among the Nishiyodogawa residents, especially the young and old, was not. And the court considered the health issue data in favor of the complainants.

After seventeen years of litigation, the companies sought to settle the complaint. Both sides subsequently agreed on a four billion Yen compensation package. The District Court accepted the settlement agreement in a decision issued in March 1995. The Nishiyodogawa residents filed several other cases in court. These cases ended after twenty years lapsed from 1978.

### **Aozora Foundation**

Years before the District Court decision came out, the Nishiyodogawa Association for Pollution Patients and Their Families had released in March 1991 the “Nishiyodogawa Redevelopment Plan” aimed at having a pollution-free community development in Nishiyodogawa ward. The Association brought forth a series of proposals, including one directed at defendant companies and on reconstruction after earthquakes.\*\*\*\*

Using part of the settlement package given by the companies under the 1995 court settlement agreement, the Nishiyodogawa pollution victims established in 1996 the Center for the Redevelopment of Pollution-damaged Areas in Japan (Aozora Foundation).

Aozora Foundation organizes studies and practical activities that are creatively carried out from the standpoint of pollution victims and community members, and aimed at rejuvenating local areas and environments.

It also holds public lectures, symposiums and other events with the participation of the residents, gathers documents and source materials, provides information, hosts observation tours and trainees, lends support for school classes, conducts international exchanges, and more.

Redeveloping polluted areas does not merely involve rejuvenating, recreating, and preserving the natural environment. In the Aozora Foundation way of thinking such redevelopment depends on recovering and improving the health of local citizens; recovering and fostering community functions lost on account of economics-first development; rebuilding relationships of trust and cooperation among government, business, and citizens; and other such efforts. This necessitates basing initiatives on the idea of “participation” as proposed in the Basic Environment Plan\*\*\*\*\* and, from a citizens’ standpoint, obtaining the cooperation of local authorities, businesses, and all other social entities.\*\*\*\*\*

---

\*\*\*\* See website of Aozora Foundation, <http://aozora.or.jp/lang/english/nishiyodogawa-field-museum/regeneration-begins>.

\*\*\*\*\* See Basic Environment Law and Basic Environment Plan, [www.env.go.jp/en/aboutus/pamph/html/00pan250.html](http://www.env.go.jp/en/aboutus/pamph/html/00pan250.html) for basic information on the Plan.

\*\*\*\*\* “Our mission,” The Aozora Foundation, <http://aozora.or.jp/lang/english/our-mission>.

## References

Takeji Fujiwara, *The Involvement of Japan's Lawyers in Environmental Issues*. Available at <http://aozora.or.jp/lang/english/papers-from-overseas-workshops/the-involvement-of-japans-lawyers-in-environmental-issues>.

Nora Götzmann and Claire Methven O'Brien, *Business and Human Rights - A Guidebook for National Human Rights Institutions*, (International Coordinating Committee of National Human Rights Institutions [ICC] and Danish Institute for Human Rights [DIH], November 2013). Full text available at [www.humanrights.dk/files/media/dokumenter/udgivelser/bhr\\_guidebook\\_for\\_nhris\\_2013\\_eng.pdf](http://www.humanrights.dk/files/media/dokumenter/udgivelser/bhr_guidebook_for_nhris_2013_eng.pdf).

Dan Guttman and Xia Kunbao, "Protect the Environmental Rights and Justice of the Public," *Human Rights Education in Asia-Pacific*, volume 6, pages 277 – 308. Available at [www.hurights.or.jp/archives/asia-pacific/section1/13%20Environmental%20Rights%20and%20Justice%20-China.pdf](http://www.hurights.or.jp/archives/asia-pacific/section1/13%20Environmental%20Rights%20and%20Justice%20-China.pdf).

Strategic Plan of NHRIs, for Mongolia see the 5<sup>th</sup> *Strategic Plan of NHRCM – 2012-2014*, in Center for Human Rights and Development, *Human Rights in the Mining Industry of Mongolia*, pages 100-102.