



Sector-Wide Impact Assessment

Human Rights and Business Fact Sheet

Access to Remedy



This factsheet was compiled for the use of the Myanmar Centre for Responsible Business (MCRB) sector-wide impact assessment (SWIA) research teams, but may be of wider use in understanding the human rights risks involved in particular business issues. For more information on MCRB's SWIAs, please see www.mcrb.org.mm.

Short Summary of the Human Rights Issue

Access to remedy for a human rights harm is itself a human right. Being accountable for harms caused is a key principle of human rights. To date in Myanmar, the government has been largely unaccountable for its violations of people's rights. Companies have often acted without being called to account (acted with impunity) for harms caused. The government's new commitment to rule of law and respecting human rights means that it must ensure that individuals have accessible, effective and enforceable remedies where harms have occurred, including impacts caused by businesses. A grievance is defined as a perceived injustice, raising an individual or group's sense of entitlement. It can be based on law, contract, explicit or implicit promises, customary practice or general concepts of fairness.

Given the importance of accountability, there should be one or more different kinds of procedures to make sure people have a place to bring their grievances, have some kind of a process to discuss and decide on their grievances, and get a remedy. Procedures providing remedies, often referred to as **grievance mechanisms**, should be impartial, protected from corruption and free from political or other influences. Grievance mechanisms can be state-based or independent. They can be judicial (through domestic courts or regional human rights courts), or non-judicial (e.g. labour tribunals, national human rights commissions, ombudsman, provided by a company or part of a multistakeholder initiative, etc.).

A remedy for a human rights harm may include apologies, restoration or rehabilitation, financial or non-financial compensation, criminal or administrative (such as fines) penalties, and measures to prevent further harm (for example through formal restrictions or guarantees the harm won't be repeated).

The issue of effective remedy involves many challenges:

- **Imbalances of power** between the victim, the alleged perpetrator, and the governing body. This was certainly the case when the government was the source of the harm – there was little chance of getting a fair hearing. There will still be plenty of circumstances with concerns about the imbalances of power - for example, a poor community complaining about a multinational company to a state-based grievance mechanism that the state influences to ensure the company continues investing in the country, or a grievance mechanism administered by the company itself.
- **Independence of courts.** The judicial system in Myanmar is in the process of being reformed to try to bring it in line with universal principles of rule of law and human rights. In the meantime, courts may not be considered to be fully independent from the government and thus unable to provide an effective remedy to victims. Moreover, corruption remains widespread in Myanmar.
- **Access to grievance mechanisms:** The government is implementing labour dispute mechanisms at regional/state government level throughout the country but these are not well resourced and in need of further training.
- **Costs of judicial remedy** can be extremely high, both for the time it takes to resolve a complaint, and the financial costs involved to pay for fees or representation, miss work or get child care to attend hearings, etc.
- Even if a claim is seen through to completion, **enforcement** of an award is resource intensive and often able to be avoided (illegally) by those that don't want to pay.
- When the victim and alleged perpetrator have different nationalities, particularly in the case of business, there are often **complex jurisdiction issues** in being able to bring a case against a foreign company.

- There are also many formal legal doctrines that can be used to throw out cases in judicial systems (issues of immunity, the need to go through all local remedies before elevating a claim to a higher body, if the case is too politically sensitive for the state, etc.).

In the case of remedy involving businesses, companies should establish or participate in what are known as **operational-level grievance mechanisms** (meaning the mechanisms are directly in the communities where their activities take place). They should be accessible to company stakeholders (internal and external) such as workers, customers and local communities for any concerns regarding project impacts, impact prevention and mitigation activities, and monitoring of these actions. Stakeholders should be able to submit their concerns and complaints directly to the company or through a local procedure without threat of adverse actions. The company should work with relevant workers' organisations and local community organisations/ representatives to establish and maintain effective and fair grievance procedures. The procedures should be transparent and fair and the process for receiving, processing and settling grievances should be clearly described and communicated in an understandable and accessible form (in Myanmar, this could mean anything from a web page to a community leaflet using cartoons to explain the message). If a complaint is rejected by the company, the company should inform the stakeholder about available alternative remedy options. It is important that these mechanisms never undermine the role of trade unions, or hinder access to other non-judicial or judicial mechanisms. A useful resource is IPIECA's "Operational level grievance mechanism: good practice survey" available here: <http://www.ipieca.org/publication/operational-level-grievance-mechanisms-good-practice-survey> (for Burmese translation see <http://www.myanmar-responsiblebusiness.org/my/publications/ipieca-guide-translation.html>).

Why this is Relevant to Local and International Companies Operations

It is an essential part of businesses' human rights responsibilities to address grievances early and provide direct remedies to those it has harmed – and to change its operations so it does not repeat the harms. It is also in a businesses' direct interest to hear about grievances as early as possible. Resolving small issues before they escalate into bigger problems will save the company time and money as well as reputational damage, and impacted workers and communities will feel heard, valued and empowered. Companies' grievance mechanisms should not just be complaint boxes in the workplace or community, but provided in many forms that actively invite stakeholders for dialogue. This also complements company stakeholder engagement processes (but should never replace them), allowing the company to continuously learn about where it can impact people and adjust their activities to ensure they don't recur.

For example, regarding Myanmar's Oil & Gas sector, given the current lack of capacity of national and regional courts to effectively administer complaints, effective grievance mechanisms at the operational level will be crucial to proactively manage the extreme challenges that will be faced in terms of ongoing [or ethnic and religious] discrimination (particularly in Rakhine state), security, corruption and the other human rights challenges outlined in these fact sheets.

Similarly, in other sectors, grievance mechanisms will help companies understand the impacts of their different phases of operations on communities and workers and proactively manage relationships. In the tourism sector for example, impacts may be very different when building a hotel (e.g. housing and resettlement issues, use of community resources, etc.) compared to when it's up and running (discriminatory employment, cultural sensitivity of tourists, etc.).

It is relevant to ask about Access to Remedy in order to establish whether:

- There are any concerns about companies operations in the community;

- Individuals have felt free to complain, knew how and where to complain, and whether their concerns were dealt with to their satisfaction;
- Those involved in a complaint felt it was free of influence from outside factors, and was being genuinely engaged with by the company or body dealing with it;
- There were other factors making the mechanism unusable, such as overwhelmed local courts, costs making the option impossible, they had to travel too far to make their complaint, they knew of past cases where the outcome was never enforced and felt it wasn't worth pursuing, etc.

For operational-level grievance mechanisms, it's also relevant to establish whether:

- The company just used a single hotline or complaints box, or whether there were various ways a worker or community could access the mechanism to raise their concerns, and it was clearly explained how to use them and what to expect from the process;
- The outcome of their grievance felt fair;
- They were able to lodge a grievance anonymously if they wanted to.
- This was the only form of stakeholder engagement there was, or whether there was ongoing dialogue with workers, unions and communities in addition to a formal grievance mechanism;
- The company's grievance mechanism restricted the ability of unions to bargain or negotiate in any way, or did not allow complaints to be made through other channels (such as courts, ombudsman, etc).

Human Rights References

- The right to remedy is an overarching principle within the human rights framework. It is explicit in the Universal Declaration (Art. 8) and Covenant on Civil & Political Rights (Art. 3).
- It is also elaborated with regard to companies in the UN Guiding Principles on Business and Human Rights, 25-31.