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Human Rights Due Diligence and Remediation Mechanisms: Two Sides of the Same Coin

GUIDANCE FOR JAPANESE COMPANIES



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In this briefing paper, The Remedy Project illustrates how an effective remediation mechanism can help support Japanese companies fulfil their human rights due diligence responsibilities and enhance responsible business practices.

¹ The Remedy Project is grateful to Tatsuya Hasegawa for his pro bono assistance in preparing this article. This article should not be construed as legal advice or a legal opinion on any specific facts or circumstances. This article is not intended to create, and receipt of it does not constitute, a lawyer-client relationship. The contents are intended for general informational purposes only, and you are urged to consult your attorney concerning any particular situation and any specific legal question you may have.

Introduction to Remediation Mechanisms

An effective remediation mechanism has dual objectives. It provides access to a fair and effective remedy for grievances or harms experienced by the worker. At the same time, it provides the operator of the mechanism with continuous data to assess and improve corporate governance structures and operational practices to reduce the risk of future, similar grievances occurring. In this way, an effective remediation mechanism brings together human rights due diligence practices and enhances access to remedy. In this briefing, we have used the term “remediation” to refer to this more holistic view of a business’ responsibility to provide or support access to remedy, in order to distinguish this concept from operational-level grievance mechanisms² that focus on providing a platform for lodging and resolving complaints.

To date, operational-level grievance mechanisms have been implemented in a top-down manner, largely developed, and implemented by companies as a “bolt on” addition to risk management processes

and driven by considerations of shareholder value. Broader and meaningful engagement with workers, affected communities, and other stakeholders — trade unions, civil society organizations, among others — in the design and operation of such grievance mechanisms has been limited. Little has been done to address the asymmetry of power between the complainant and the business against which the complaint is made. As a result, rightsholders and affected stakeholders face challenges in effectively accessing adequate remedies through these mechanisms. As human rights due diligence laws evolve and become increasingly stringent, companies are being pushed to re-think incumbent approaches to grievance resolution. Effective remediation mechanisms, which are designed and implemented with stakeholders’ needs in mind and are embedded into a broader ecosystem of dynamic workplace dialogue, can fulfil the dual roles of providing access to remedy and supporting businesses fulfil coming human rights due diligence obligations.

2 Operational-level grievance mechanisms have been defined as mechanisms through which individuals, groups or communities, whose human rights have been adversely impacted by business activities, or their representatives, can seek remedy with respect to those adverse impacts. Stefan Zagelmeyer, Lara Bianchi, Andrea R. Shemberg. Non-state based non-judicial grievance mechanisms (NSBGM): An exploratory analysis (2018) Available at: <https://www.ohchr.org/sites/default/files/Documents/Issues/Business/ARP/ManchesterStudy.pdf>



The State of Play

A survey of Japanese companies conducted jointly by the Ministry of Economy, Trade, and Industry (METI) and the Ministry of Foreign Affairs (MOFA) in 2021, found that approximately half of companies which responded to the survey have yet to establish guidance on remediation of adverse human rights impacts arising from business practices.³ Studies of major Japanese multinational companies developed by MOFA in 2021 likewise found that implementation of effective grievance mechanisms was at a nascent stage.⁴

Yet, developing and implementing effective remediation mechanisms is an integral element of the corporate responsibility to respect human rights, and to facilitate access to remedies. International principles on business and human rights, as set out in the United Nations Guiding Principles on Business and Human Rights (UNGPs), the OECD Guidelines for Multinational Enterprises, and the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policies, all underline the crucial role of remediation mechanisms in the protection of human rights across global supply chains.

According to UNGPs Principle 29: “To make it possible for grievances to be addressed early and remediated directly, business enterprises should establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted.”

There is no more prescient time than today for Japanese companies to develop or strengthen their remediation mechanisms. Current and anticipated mandatory human rights due diligence laws⁵ and modern slavery disclosure laws⁶ at a global level show a clear trend towards a more proactive and robust approach to identify, prevent, mitigate, and resolve adverse human rights impacts, and to disclose how these responsibilities are being met. Asian businesses will be directly or

3 METI, MOFA, Results from the Questionnaire Survey on the Status of Efforts on Human Rights in the Supply Chains of Japanese Companies (2021). Available at: https://www.meti.go.jp/english/press/2021/1130_002.html.

4 MOFA, Case Studies on Efforts Relating to Business and Human Rights (2021). Available in Japanese at: https://www.mofa.go.jp/mofaj/gaiko/bhr/page23_003537.html.

5 For example, the French Corporate Duty of Vigilance Law 2017, the German Supply Chain Act 2021, the Dutch Child Labour Due Diligence Law 2019, the proposed EU Corporate Sustainability Due Diligence Directive 2022, among many others.

6 For example, the California Transparency in Supply Chains Act 2010, the UK Modern Slavery Act 2015, the Australia Commonwealth Modern Slavery Act 2018.

indirectly impacted by these anticipated laws. The largest Asian brands, exporters and service providers will likely be obligated to conduct human rights due diligence. Those that are not directly caught by these laws will likely feel their effects as their customers will be required to conduct due diligence on their supply chains in Asia.⁷ In this new landscape, the symbiosis between remediation and human rights due diligence must be addressed in a company's policy design and implementation, as part of the ordinary course of business.

Moreover, the use of import bans by the U.S. Customs and Borders Protection against Malaysian, Japanese and other companies for use of forced labour in the production of goods have led to adverse legal, financial, and reputational impact for the companies implicated. While the level of remediation required from these companies to lift these bans remains opaque, having an effective remediation mechanism in place would be helpful to demonstrate to external stakeholders genuine steps taken to address any such forced labour allegations. At the same time, the financial sector continues to forecast a steep rise in assets and investments channelled into Environmental, Social and Governance (ESG) funds.⁸ Banks have also started to use innovative financing structures to provide lower cost of capital to companies with high ESG scores.⁹

In Japan, there is also growing domestic momentum for more comprehensive guidance on business and human rights principles. A special study group has been established by METI to introduce draft non-binding guidelines on human rights due diligence by the end of July 2022.¹⁰

In this fast-evolving ecosystem, it is no wonder that Japanese companies are looking to national government institutions for guidance.

In the METI/MOFA study, roughly a fifth of companies which responded to the survey¹¹ said they would like to seek support from the State to establish and improve the remediation mechanisms.¹² However, businesses must also take complementary and supplementary steps to remedy adverse human rights impacts. While remediation mechanisms operated by the private sector are no substitute for State-based pathways to remedy (*e.g.*, through courts and labour tribunals etc.), they can offer benefits such as early-stage recourse and resolution, speed of access, reduced costs for the worker and/or transnational reach.¹³ Furthermore, State-based systems suffer their own limitations such as bias against usage by foreign nationals, language barriers, and physical accessibility challenges, among other things. In these instances, non-State based remediation mechanisms are an important complement to State systems. Thus, remedies provided through company, industry, multistakeholder initiatives or other non-State based mechanisms should form part of the available bouquet of remedies. Moreover, simply deflecting to State-based systems does not meet the business responsibility to respect human rights. States and businesses must work together to cultivate complementary and interfaced systems that provide a variety of pathways to remedy.

Thus, in the following sections of this briefing paper, we look at the crucial elements of a remediation mechanism and explain how such mechanisms can support Japanese companies in managing human rights risks.

7 Refer to The Remedy Project's Mandatory Human Rights Due Diligence: Guidance for Suppliers Operating in Asia for more information.

8 Bloomberg, ESG assets may hit \$53 trillion by 2025, a third of global AUM (2021). Available at: <https://www.bloomberg.com/professional/blog/esg-assets-may-hit-53-trillion-by-2025-a-third-of-global-aum/>.

9 See for example, JP Morgan, Supply Chain ESG Solution Sets New Standard for Working capital Optimization. Available at: <https://www.jpmorgan.com/content/dam/jpm/treasury-services/documents/jpjun21-020-bridgestone-case-study.pdf>.

10 Nikkei Asia, Japan to set human rights guidelines for companies (2022) Available at: <https://asia.nikkei.com/Politics/Japan-to-set-human-rights-guidelines-for-companies>; METI, Study Group on Guidelines for Respecting Human Rights in the Supply Chain, meeting materials. Available in Japanese at: https://www.meti.go.jp/shingikai/economy/supply_chain/index.html.

11 METI, MOFA, Results from the Questionnaire Survey on the Status of Efforts on Human Rights in the Supply Chains of Japanese Companies (2021). Available at: https://www.meti.go.jp/english/press/2021/1130_002.html.

12 State-based remediation mechanisms may be administered by a branch or agency of the State, or by an independent body on a statutory or constitutional basis. They may be judicial or non-judicial. Examples include criminal and civil courts, labour tribunals, national human rights institutions, National Contact Points under the OECD Guidelines for Multinational Enterprises, ombudsperson offices or government-run complaints offices. See UNGPs Principle 25 and Commentary.

13 UNGPs Principle 28 and commentary.

Effective Remediation Mechanisms

Remediation mechanisms may vary in their mandates, structure, and operational procedures however, they should be designed and implemented in a manner consistent with the UNGPs effectiveness criteria, set out in Principle 31.

UNGPs Principle 31 Effectiveness Criteria	
Legitimate	The mechanism should be trusted by all stakeholders and ensure accountability for the fair conduct of remediation processes.
Accessible	The mechanism should be known to all stakeholders and offer adequate assistance for those who may face barriers to access.
Predictable	The mechanism should provide 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.
Equitable	Operators of remediation mechanisms should seek to ensure that aggrieved parties have reasonable access to sources of information, advice, and expertise necessary to engage in the remediation process on fair, informed and respectful terms.
Transparent	Parties to a grievance should be kept informed about its progress, and the operator of the mechanism should provide sufficient information about the mechanism's performance to build confidence in its effectiveness and meet any public interest at stake.
Rights-Compatible	The outcomes and remedies provided are aligned with internationally recognized human rights.

Source of Continuous Learnings	Regular review of grievance outcomes should enable the operator of the mechanism and other stakeholders to identify lessons for preventing future grievances and harms and improve the operation of the mechanism.
Based on Engagement and Dialogue with Stakeholders	Stakeholders should be engaged in the design and operation of the mechanism. The mechanism should promote dialogue to address and resolve grievances.

Based on the criteria above, the following crucial elements of an effective remediation mechanism can be drawn out.¹⁴

- **The importance of building trust and meaningfully engaging in dialogue with stakeholders.** Stakeholders (workers and their representatives, trade unions, civil society etc.) should be involved from the design stage to ensure that the mechanism meets their needs and concerns. A process of co-creation can ensure that sufficient safeguards are built into the mechanism to protect the rights of stakeholders throughout the remediation process. Moreover, this process of co-design ensures that any language, cultural, gender-based or disability-based factors that may hinder a rightsholder's access to the mechanism are addressed in the design and implementation of the mechanism. To be effective, stakeholders must also be aware of the mechanism's existence and understand the role played by the mechanism in protecting their rights. Consulting stakeholders (especially workers and suppliers) in the design of the mechanism and conducting socialization/outreach activities are therefore key components of garnering trust. Capacity building and outreach activities should be conducted on a rolling basis to raise awareness of the mechanism and around worker's (and other stakeholder's) rights. Such educational programs must be gender-sensitive and culturally sensitive, to enhance accessibility. This also helps promote dialogue and engagement, and thus gives the mechanism legitimacy amongst stakeholders. Openness to seeking out and incorporating, the views of the people whose lived experience of the adverse human rights risks the mechanism seeks to address, is also invaluable.

¹⁴ Refer to Operational Guidelines for Business on Remediation of Migrant-worker Grievances developed by The Remedy Project in partnership with the United Nations International Organization for Migration CREST for practical recommendations on implementing effective remediation mechanisms.



Furthermore, reprisals must not be taken against those who use the mechanism. Anti-retaliation protections and safeguards to maintain their confidentiality and anonymity must be built into the design and operation of the mechanism.

- **The value of continuous monitoring and evaluation.** Lessons learned from grievances handled through the mechanism can be used to inform human rights due diligence processes and applied to prevent future similar harms from arising. This feedback loop enables the strengthening of the business' human rights compliance, corporate governance practices as well as broader ESG policies. Engaging external stakeholders (workers, affected communities, trade unions, NGOs, etc.) in monitoring implementation of the mechanism or in decision-making processes, can also help build constructive dialogue, increase the mechanism's legitimacy, and create a more equitable process. Companies that provide transparency around the impact and limitations of their practices through public disclosure, embody a "know and show" approach and as a result, are less susceptible to "name and shame" strategies.

- **Focus on remedial outcomes.** Over time, the mechanism must be proven to be responsive in securing remediation¹⁵ in order to garner trust amongst stakeholders. The most effective mechanisms tend to

incorporate elements of both "carrots and sticks" (such as exclusive or preferential sourcing arrangements, termination of purchasing relationships, granting and removal of certifications) to ensure that all actors in the global supply chain are fully committed to improving access to remedy.

"Post-box" operational-level grievance mechanisms, where the operator of the grievance mechanism simply transmits information regarding the grievance, without playing an active role in engaging stakeholders to resolve issues, do not fulfil the role of enhancing access to remedy. In such systems, complaints may be filed but neither result in remedial outcomes for rightsholders nor consequences for businesses who persistently violate human rights.

¹⁵ Note that the UNGPs expectations on a company's degree of responsibility for remediation depends on how the company is related to an adverse impact. Where a business enterprise has caused or contributed to an adverse human rights impact, it should be actively engaged in its remediation, by itself or in cooperation with others. Where adverse human rights impacts are directly linked to a business enterprise's activities, it may play a role in remediation (e.g., by using leverage) but it is not required to provide remediation itself.

Effective Remediation Mechanisms: A Mutually Beneficial Solution

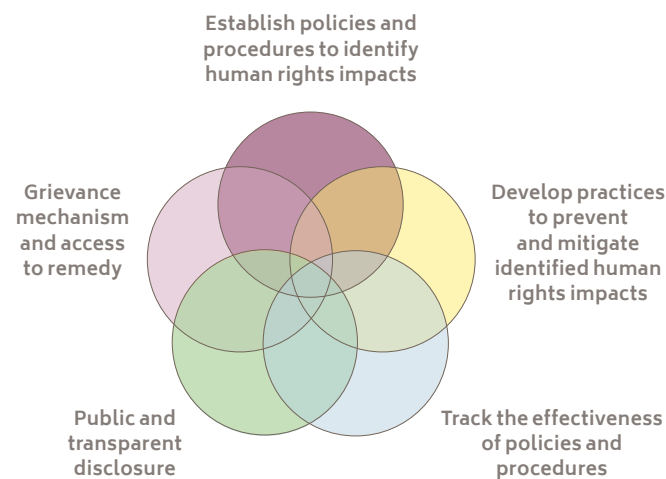
The UNGPs set out two types of responsibilities for businesses in respecting human rights:¹⁶ (1) a forward-looking responsibility of businesses to prevent human rights impacts from occurring; and (2) a backward-looking responsibility of businesses to address human rights impacts when they do occur. Effective remediation mechanisms help businesses fulfil both these responsibilities, by providing a way for them to identify and monitor human rights risks early, and to remedy adverse impacts as they occur. In this way, effective remediation mechanisms can both improve risk management for businesses and outcomes for rightsholders.

Remediation mechanisms and human rights due diligence processes therefore form part and parcel of the business responsibility to respect human rights.¹⁷ The functioning of an effective remediation mechanism maps onto the core elements of human rights due diligence.¹⁸

16 Remediation, Grievance Mechanisms, and the Corporate Responsibility to Respect Human Rights (2014). Available at: https://shiftproject.org/wp-content/uploads/2014/05/Shift_remediationUNGPs_2014.pdf/.

17 The Remedy Project's briefing on The EU Corporate Sustainability Due Diligence Directive: Guidance for Businesses in Asia provides more information on what businesses can do to prepare for human rights due diligence regimes.

18 UNGPs Principles 17-21 and commentary.



Core Elements of Human Rights Due Diligence

An effective remediation mechanism is a system through which the actual and potential human rights impacts of a business can be identified – the types and volume of grievances filed are often indicative of salient human rights risks associated with the business. The continuous monitoring and learning functions of an effective remediation mechanism enable businesses to improve human rights risk management processes and track the effectiveness of its existing practices. The data gathered through the remediation mechanism can inform public disclosure on how the business is addressing the adverse human rights impacts. Finally, the remediation mechanism also enables businesses to enhance access to remedy for rightsholders. Implementing an effective remediation mechanism and conducting human rights due diligence can and should be viewed as two sides of the same coin.

Furthermore, from the business' perspective, effective remediation mechanisms may also result in commercial advantages:

Similar benefits have also been recognized in the Engagement and Remedy Guidelines (2019) published by the Japan Responsible Supply Chains Committee.¹⁹

Moreover, in the Japanese context, an effective remediation mechanism can also support company boards in discharging their duty of care.²⁰ An effective remediation mechanism could support a director's duty of supervision, by enabling the board to identify and resolve potential non-compliance or misconduct at an early stage. Furthermore, a proactive remediation mechanism could also be viewed as part of the company's internal control system, and to this degree, support a director's duty to establish and maintain internal control systems. As such, remediation mechanisms may also complement existing Japanese corporate governance practices.

19 A multi-stakeholder initiative led by the Business and Human Rights Lawyers Network Japan (BHR Lawyers) and Global Compact Network Japan (GCNJ).

20 Notably, the Japanese Bar Association's Guidance on Human Rights Due Diligence (2015) points out that due diligence systems and programs can be considered substantially synonymous with the Board's duty of care as a good manager under the Japanese Corporations Act (Article 330), and the duty under that act to establish and maintain internal control systems based on said duty of care (Article 348, paragraph 3, item 6 and Article 362, paragraph 4, item 6).

Benefits of an Effective Remediation Mechanism for Businesses

<p>An early and proactive warning system</p>	<p>For example, repeated grievances filed relating to occupational health and safety issues may indicate systemic gaps in health and safety standards, while multiple claims of unpaid wages may be symptomatic of challenges in the implementation of fair and ethical recruitment policies.</p> <p>Data gathered through the mechanism can be leveraged by businesses, and triangulated with audits and other tools, to improve risk management. Unlike audit-based compliance measures, effectively implemented mechanisms enable on-going monitoring by providing a dynamic picture of the situation on the factory floor from the worker's perspective, rather than a one-off, top-down snapshot of conditions. Where appropriate, workers should be engaged in monitoring and evaluation efforts.</p>
<p>Proactive management of legal, reputational, financial, and commercial risks</p>	<p>Implementing an effective remediation mechanism enables proactive management of human rights risks. Where adverse impacts are identified and adequate remedies are provided at an early stage, this could help prevent escalation into serious and longer-term conflicts. It can also provide businesses with a means of proactively addressing trade and sanctions-related risks, such as those arising from the human rights-based import bans imposed by the U.S. Customs and Border Protection.²¹</p>
<p>Improving working conditions and productivity of workforce</p>	<p>Better prevention of exploitative practices on the factory floor can lead to higher profitability, greater productivity amongst workers and a lower rate of employee turnover and absenteeism.²²</p>
<p>Building better relationships with stakeholders</p>	<p>An effective remediation mechanism demonstrates the business' willingness to respond to stakeholder concerns. In addition to improving dialogue with workers, communities, and suppliers, this can also help businesses meet buyer and investor expectations.</p> <p>International brands are subject to progressively stringent human rights due diligence and modern slavery disclosure requirements. Where suppliers can demonstrate they have human rights policies in place and provide data (gathered through the remediation mechanism) to evidence that such policies are being effectively implemented, they will likely be more competitive in securing orders from these brands. Furthermore, financial institutions are increasingly incorporating ESG metrics and human rights due diligence processes when making decisions on the provision of credit, loans, or other financial services. The dataset collected through the remediation mechanism can also be leveraged in this instance to inform ESG reporting. Where companies can demonstrate that they have effective remediation mechanisms in place, they may be able to attract ESG investment and/or obtain preferential supply chain financing rates from financial institutions.</p>

²¹ On June 9, 2022, the European Parliament also adopted a resolution calling for an import ban on products produced with forced labour entering the EU market.

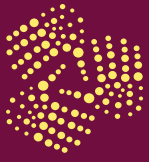
²² See for example: <https://betterwork.org/portfolio/impact-assessment/>



Steps Forward for Japanese Companies

As the heat continues to rise on Japanese companies with respect to business and human rights, understanding the linkages and synergies between remediation mechanisms and human rights due diligence can help businesses better navigate the fast-evolving landscape. Focused and well thought out human rights policies, which include an effective remediation mechanism, are likely to be mutually beneficial for businesses and rightsholders and result in sustainable positive outcomes for all stakeholders. More importantly, where businesses take on the challenge of involving rightsholders and other stakeholders in the design and delivery of human rights programs, this will make them more resilient in face of emerging regulatory challenges and unanticipated issues, *e.g.*, the COVID-19 pandemic and emergency preparedness.

For more information about this briefing, and to find out how The Remedy Project can help support you or your business in developing or strengthening remediation mechanisms, contact us at: Archana@remedyproject.co. You can also reach us through our [website](#) or connect with us on [LinkedIn](#).



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