

COMMUNITY-DRIVEN OPERATIONAL GRIEVANCE MECHANISM DISCUSSION PAPER

WHAT IS AN OGM?

Operational level grievance mechanisms (OGMs) are non-state, non-judicial mechanisms that companies create or participate in to handle complaints from employees, workers in their supply chains, community members impacted by their activities, and other stakeholders, such as civil society organizations. They are located within a broader remedy “landscape” that encompasses both judicial and non-judicial, and state and non-state-based avenues for seeking remedy. The UN Guiding Principles on Business and Human Rights (UNGPs) instruct all business enterprises to have OGMs in place, and they are often required by financial institutions or by certification bodies or other voluntary initiatives. Since the endorsement of the UNGPs, businesses have begun to contemplate and put in place OGMs with more frequency.

Proponents of OGMs claim that they have the potential to address harms caused by a business activity quickly and locally and that this helps to prevent escalation of harms and to identify patterns of impacts that can be stopped and prevented in the future. Some also believe that a well-designed and implemented OGM can avoid conflicts between companies and the communities and can even offer an opportunity to develop a more positive overall company-community relationship.

REMEDY THROUGH OGMs?

The UNGPs include eight “effectiveness criteria” for OGMs. Among other criteria, OGMs should be rights-compatible and based on engagement and dialogue. Despite this, more than a decade after the endorsement of the UNGPs, the consensus is that OGMs are not living up to their promise in terms of providing remedy. This may be for several reasons:

- *Misrepresenting the purpose of OGMs.* Corporations can distort the purpose of OGMs as corporate philanthropy or corporate social responsibility (CSR). This may be at odds with a community’s understanding and expectations of the purpose of the OGM.
- *Trivializing language.* OGMs are often framed in language such as “complaints management” or “dispute resolution,” which trivializes abuses and implies that human rights issues can and should be the basis of negotiation.
- *Poor institutional design.* OGMs have limited scope and mandates, are almost always non-binding, and they allow the company – the party responsible for the harms – to control the OGM without oversight.
- *Unacceptable treatment of rights holders.* Rights holders were largely excluded from the development of the UNGPs, where OGMs became a key feature. They continue to be sidelined in the design of specific OGMs, and while seeking remedy through OGMs.

These failures go beyond the creation of ineffective OGMs. There are risks to rights holders when OGMs are designed and implemented in ways that are not rights-compatible and that sideline those that would use the OGM. Top-down OGM may serve to circumvent rather than provide remedy, place undue burdens on rights holders, or even exacerbate harms.

Despite these flaws, OGMs are nonetheless becoming a permanent part of the remedy landscape. And in some situations, they may be the only viable option for seeking remedy.

After years of advocacy, there is a renewed focus on the need to increase and improve rights holder involvement in OGMs. Guidance documents call for increased participation, co-design of OGMs, and some have supported the idea of community-driven design. To give meaning to those concepts, communities must be seen and treated with full agency and dignity. Increasing engagement with rights holders alone is not enough. They must be participants rather than objects of consultations.

COMMUNITY-DRIVEN OGMs: A BETTER APPROACH

EarthRights International and Just Ground seek to address the co-option of “community-focused” activities by business entities and their habit of paying lip service to participatory principles on only paper or cherry picking which parts of existing guidance to follow and which to ignore. Even well-intentioned engagement can reinforce power dynamics and fail to recognize rights holders’ agency and to treat them with dignity. Meaningful rights holder involvement and leadership are needed to help ensure a true rights-based approach.

In 2014, EarthRights International began developing a model for Community-Driven Operational-level Grievance Mechanisms (CD-OGMs). The model is informed in large part by working alongside community leaders in Myanmar as they designed and advocated for a CD-OGM. The CD-OGM model seeks to confront and upend the existing structures and exercises of power that top-down OGMs create and reinforce. It is premised on the fact that rights holders – those who will use the OGM – are best-placed to identify what the OGM they will use should look like and are entitled to have that input taken seriously.

Rather than rely on top-down, one-off engagement or other limited avenues for rights holders to provide input, in the CD-OGM model the community drives the process by deciding:

- What the OGM should look like, proposing the scope of harms it will cover and the remedies available, the process steps, and the parties who will run it;
- What measures should be in place to provide oversight and ensure actual provision of remedy.
- The type and extent of engagement with the company and the level of their own involvement;
- How information on the CD-OGM will be shared with, and feedback collected from, complainants and others in the community.

This community-driven approach to OGMs can help counter many of the causes of the failures of existing OGMs. In the CD-OGM model, rights holders can make it clear that the purpose of an OGM is to provide remedy, insist on a process that reflects that, and demand the respect within the remedy-seeking process that they deserve. This has the potential to drive institutional changes.

Designing and advocating for a CD-OGM may also help to:

- Improve an existing but flawed top-down OGM or other remedial mechanism;
- Establish an OGM where one did not exist before, that includes at least the key priorities identified by the community in the CD-OGM;
- Identify processes, remedies, implementation measures and oversight and monitoring procedures that may inform a community’s position in mediation as a part of other alternative dispute resolution or accountability mechanisms, and improve their negotiating power in those dialogues;
- Establish evidence of a company’s failure to implement an adequate OGM, which may be used in other accountability mechanisms or litigation.

The CD-OGM model has significant potential to improve access to remedy, but it may not be useful or the best option in every situation. For example, if a community opposes a project, they may choose alternative advocacy actions. If the company is not responsive to community efforts, this may prevent the implementation of the CD-OGM. If there are high risks to rights holders, especially those whose anonymity may be hard to maintain if they are involved in the design or implementation of a CD-OGM, the environment may not be safe enough to pursue one.

A rights holder-centered approach is critical for confronting the shortcomings of top-down OGMs and preventing them from becoming accepted as “good practice.”

OGMs will always be limited in terms of what they can provide. But a community-driven approach holds potential for improvements.



The Thilawa CD-OGM

Between 2014 and 2020, community leaders impacted by the Thilawa Special Economic Zone in Myanmar designed and advocated for a CD-OGM that they felt met their needs. While the proposed CD-OGM has not yet been accepted by the project proponents, the process of designing and advocating for it resulted in some successes for the community. Through their advocacy, those involved in the project accepted the need for systematic problem-solving, and a mechanism was put in place. While the current mechanism is far from adequate, it gives rights holders a starting point for seeking remedy. And the project proponent signaled a willingness to make improvements to the mechanism based on community input. The Thilawa CD-OGM design and advocacy process also highlighted that significant challenges remain, and the current political situation in Myanmar has created additional challenges.

Visual representation of the proposed CD-OGM designed by community leaders in Myanmar impacted by the Thilawa Special Economic Zone. A draft was shared with project stakeholders in early 2017.

INITIAL REFLECTIONS

In reflecting on the CD-OGM model development this far, some initial points of focus have emerged. These are early impressions, based on work with communities and informed by international human rights principles as well as theory and practice in community-led research and advocacy. As the CD-OGM work develops, these will evolve.

OGMS should have a strategic, but not primary, role in the “remedy landscape.”

Under no circumstances should a CD-OGM impede access to judicial mechanisms, or other accountability mechanisms related to the business activity, and should not operate as a way to “privatize remedy.” Instead, it should operate within a broader remedy landscape, both to leverage the other avenues for gaining company buy-in on the CD-OGM, and to provide leverage to address non-compliance through the CD-OGM itself. Rights holders should have access to other remedial processes, including independent accountability mechanisms and courts, even after accepting a remedy through this mechanism. If a complainant is not satisfied with the process at any point, there must be an opportunity to appeal or exit.

The community decides its level of direct engagement in both the design and the implementation, while retaining the right to make decisions, demand improvements, and to adjust its participation level.

A community may decide to independently design an OGM, to co-create one with the company, or to delegate responsibilities to other actors, including company representatives. They may want to articulate how they want specific aspects to be or certain elements that they want or don’t want to include, or they may want a hand in the entire design. If a community decides to co-create an OGM or to delegate responsibilities, this should not be seen as ceding any rights to call for changes and improvements, or to become more directly involved at a later stage.

Community-driven includes deciding on whether to have a role in the implementation, intra-community outreach, monitoring, and oversight of the mechanism.

The role of the rights holder does not end once the CD-OGM is accepted by the business entity. If they so choose, community members should participate in the implementation of the mechanism. The mechanism will likely need improvements and adaptations once it is operational and receives feedback from those who have used it. For this reason, it is important to have community leadership in the monitoring and oversight functions. The mechanism must also allow the community members to play a leadership role in outreach and training to others in the community.

The “community” in “community-driven” must be broadly construed to include everyone who may be harmed by the business activity.

Groups that may be harmed by a business activity may not all be from the same community. Even when they are, communities are neither static nor homogeneous, and community conceptions of justice and fair process evolve. Therefore, a mechanism should consider the norms of marginalized groups and others who may be affected by the project but are not well-represented by the dominant culture.

Just as the CD-OGM model seeks to dismantle unjust power dynamics between companies and communities, a CD-OGM should not be used to create or reinforce other power dynamics within communities that may marginalize or sideline some rights holders. While communities’ traditional decision-making and problem-solving structures must drive and inform the development of the mechanism, constituents that are not part of those structures must also have the ability to fully participate and ensure that their particular needs and expectations are met. Minority ethnic or racial groups, women, youth, individuals with disabilities, and other groups that are often excluded from traditional power structures must have a meaningful role, including a leadership role if they choose, in both the process and the outcomes of the mechanism.

The role of a supporting organization and other relevant actors must be rearguard support.

While outside support can help to build specific skills, share expertise, and troubleshoot obstacles, any non-community partner should only play a supporting role. At the community’s request, a supporting partner may be well-placed to: introduce the CD-OGM model; assist the community through a process of assessing whether a CD-OGM is an appropriate vehicle to advance their goals; and facilitate workshops, bringing resources and information to the community. Partners might also work with the community to translate their knowledge and decisions into materials directed at different stakeholders; help them arrive at their negotiation strategy, attend meetings, and conduct other complementary advocacy work. In defining these roles, the supporting partner must take its guidance from the community, which firmly retains the power to decide whether and how to accept a partner’s support.

The safety of rights holders – both those designing the CD-OGM and those that will be using it – must be central.

Operational Grievance Mechanisms pose a complicated position for human rights defenders (HRD) as OGMs involve direct engagement with the potential perpetrators or those complicit in retaliation. For the rights holders who are the users, there must be robust, enforceable measures in place to guarantee their protection as well as that of the community organizers conducting outreach on the CD-OGM. They should be designed to safeguard the privacy and the personal security of the users.

Given that many of the existing “zero tolerance” policies have not slowed the rise in retaliation against HRDs, provisions condemning retaliation must be paired with enforcement. Protective measures for complainants must be in place to protect their privacy and safety and should cover protections from the company, government, and other community members.

CD-OGMs should be focused on rights-respecting outcomes.

Remedial outcomes must be consistent with recognized principles on the right to a remedy and must be perceived as adequate and appropriate by rights holders. While communities’ indigenous conceptions of justice may favor some elements over others, no form of remedy should be completely “off the table” if an individual victim wishes to pursue it. Rights holders should have the power to challenge decisions that they consider as failing to provide remedy that is adequate and effective.

Enforcement is critical for the proper functioning of a grievance mechanism.

The mechanism should prioritize enforcement by identifying how the remedy will be implemented, what monitoring or oversight will be conducted to ensure implementation, and the consequences for noncompliance. The mechanism should also provide for the enforcement of those consequences.