

# HUMAN RIGHTS COMPLAINTS AGAINST MULTINATIONALS INCREASING

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Legal Briefings - By **Stéphane Brabant**

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A little-known mechanism established under the [OECD Guidelines for Multinational Enterprises](#) is increasingly being used to lodge public complaints against companies over alleged human rights abuses.

The so-called 'specific instance procedure' gives some teeth to the non-binding OECD Guidelines and although the process does not entail formal legal sanctions, adverse findings against a company may cause serious reputational damage and may indicate a risk of litigation or criminal prosecution.

## WHAT ARE THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES?

The OECD Guidelines are a set of non-binding recommendations addressed to business enterprises domiciled or operating in any of the 42 adhering countries, including the 34 members of the OECD countries and 8 non-OECD countries which have elected to adhere to the Guidelines. Members of the OECD include the US, UK, Australia, Canada, France, Germany, Korea and Japan.

The Guidelines aim to encourage responsible business conduct in areas including environment, bribery & corruption, employment and industrial relations. In 2011, the Guidelines were revised to include a new chapter on human rights which includes a recommendation that business enterprises should carry out human rights due diligence to ensure that their operations do not cause or contribute to adverse human rights impacts.

The OECD Guidelines require adhering governments to establish National Contact Points to promote the Guidelines and to also to resolve complaints. Complaints may be submitted to NCPs by individuals or communities affected by a company's activities or, more frequently, by NGOs acting on their behalf. These complaints may be submitted either in the enterprises home country or any country in which the enterprise operates and which adheres to the Guidelines.

## **THE 'SPECIFIC INSTANCE' PROCEDURE**

The NCP will first decide whether the complaint engages one or more Chapters of the Guidelines, whether it is material and whether sufficient evidence has been provided to support the complaint.

If it decides to accept the complaint, the NCP will assist the parties to resolve the complaint, usually by facilitating mediation between them. If the complaint cannot be resolved, the NCP may investigate the company's conduct and will publish a final statement indicating whether the company's conduct falls short of the Guidelines and occasionally including recommendations regarding future conduct.

## **INCREASE IN HUMAN RIGHTS-RELATED COMPLAINTS**

Traditionally, the majority of complaints to NCPs were brought by trade unions alleging a breach of the Employment and Industrial Relations guidelines. Since the introduction of the human rights chapter in 2011, the number of human rights-related claims filed and deemed admissible has been gradually rising; since 2012, NGOs have filed a total of 105 complaints, 84 of which concerned alleged human rights violations.

The subject matter of complaints has ranged from allegations of complicity in war crimes as a result of supplying communications services to governments engaging in drone warfare to use of child labour and illegal land-grabbing in the agri-business sector. Complaints have targeted the companies involved and, more recently, banks and other financial institutions.

## **RISKS TO COMPANIES FACED WITH A COMPLAINT BEFORE AN NCP**

NCPs do not generally have the power to impose binding sanctions on multinationals, but the specific instance procedure does carry a number of potential risks for companies:

- **Legal risk:** in a number of cases, complaints have been brought to NCPs in advance of or in parallel with civil litigation. The complaints process may also be used as a means to gather to information for use in later proceedings.

- **Reputational risk:** allegations of human rights abuse can cause serious harm to a company's reputation. The simple fact of a complaint being brought – regardless of the merits of the complaint – usually results in negative publicity for the multinational concerned.
- **Financing risk:** financial institutions may be reluctant or unwilling to lend to projects associated with an NCP complaint. Some governments have recently linked compliance with the OECD Guidelines to the provision of external trade assistance and export credit.

Companies faced with an NCP complaint should take the process seriously. While the NCP process itself may not entail formal sanctions, the reputational, financial and legal risks associated with these complaints can be substantial.

This article was written by [Antony Crockett](#), Senior Associate, Herbert Smith Freehills LLP.



## KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



**ANTONY CROCKETT**

PARTNER, HONG

KONG

+852 21014111

Antony.Crockett@hsf.com

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