

T R A N S L A T I O N

I-141/19

**Ministry of Foreign Affairs**

**International Economic Affairs Directorate General**

**CER - Responsible Business Conduct**

**FINAL STATEMENT - CHILEAN NATIONAL CONTACT POINT**

Responsible Business Conduct Division - DIRECON

Santiago, April 1, 2019

The Chilean National Contact Point (hereinafter "NCP") before the Organisation for Economic Cooperation and Development (hereinafter, "OECD") for the OECD Guidelines for Multinational Enterprises (hereinafter "Guidelines") dependent upon the Responsible Business Conduct Division, International Economic Affairs Directorate General, does hereby issue this *final statement* in culmination of the complaint for review filed by the Trade Union No. 1 of Maersk Containers Industry (hereinafter, "Complainant") on the alleged infringements of OECD's guidelines by said enterprise (hereinafter, "enterprise").

To such end, considering the reply by the enterprise to the initial statement by the Chilean NCP - delivered on November 5, 2018 declining the offer for good offices - this final

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statement terminates the procedure and, according to the Guidelines and the procedural regulations, the NCP hereby makes recommendations to the enterprise, based on the information provided by both Parties.<sup>1</sup>

**I. SUMMARY OF FACTS UNDERLYING THE COMPLAINT FOR REVIEW FILED BY THE COMPLAINANT**

On June 27, 2018, the union filed a complaint for review to this Chilean NCP identifying alleged infringements of the Guidelines by the enterprise.

The complainant union acts on behalf of 500 operators of this enterprise, out of a total of about 1,200 workers. About 90% of workers are members of the union.

The complaint for review is connected with the enterprise's decision to close the factory located in the district of San Antonio, Chile, and the layoff of 1,200 workers.

According to the complainant, the enterprise unexpectedly informed its decision to close the factory, leaving workers defenseless, without any possibility of anticipating remedial or preventive measures to mitigate the impact on their lives and families. Said decision - in complainant's words - worsened an already highly vulnerable socioeconomic situation in the port of San Antonio.

Moreover, the complainant stated that during the time prior to the decision, a series of irregular practices were carried out by the enterprise during the collective bargaining processes, particularly as regards benefits and bonuses. It is noted that before informing the closure, the union was preparing

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<sup>1</sup> Procedural Guidelines, OECD Guidelines, 2011 version, p. 77 (Spanish version).

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a complaint to be filed before this NCP grounded on infringements of the Guidelines in Chapter V (Employment and Industrial Relations).

In this complaint, the union states that after the factory's closure, the enterprise offered no dialogue and negotiation opportunities for joint agreements to be reached; rather, it unilaterally set a severance procedure and compensation plan without any consultation or negotiation with workers. The conditions contained in such plan were considered insufficient by the complainant given the extent of the impact of the factory's closure on the district of San Antonio, which also involved a Chilean State investment for its installation.

**PARAGRAPHS CITED IN THE COMPLAINT**

Chapter II. General Principles

A. 1, 4, 10, 11, 14

Chapter IV. Human Rights

1, 2, 3, 4, 5, 6

Chapter V. Employment and Industrial Relations

2(a), (b), (c); 3; 5, 6, 7.

**II. EXPECTATIONS BY COMPLAINANT AS REGARDS THE CHILEAN NATIONAL CONTACT POINT PROCEDURE**

(a) To reach an effective closure agreement with the enterprise through dialogue and consensus building on compensation mechanisms in line with the extent of the closure economic and social impact.

(b) The enterprise is expected to commit its support to work reconversion activities for dismissed workers.

(c) To ensure recognition of the collective agreements in force, which the enterprise would be ignoring as a result of

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the factory's closure.

4. Finally, as a constructive, permanent solution proposal to face the economic and social impact of the factory's closure on dismissed workers and their families, as well as on the district, the union - through the offices of the Chilean NCP - is seeking the enterprise's support to make the cooperative association established by workers under the name LOGISTICOOP operative and provide logistic services.<sup>2</sup> Workers specifically requested to make use of the enterprise's container factory at Malvilla, San Antonio, under the appropriate legal mechanism.

Complainant informed that, as at this date, the cooperative association continues to seek the enterprise's support to this business proposal, as well as public support.

### **III. ENTERPRISE'S REPLY TO THE COMPLAINT**

On July 31, 2018, the first answer to the notice served by this NCP on July 19, 2018 was received from the enterprise. The enterprise acknowledged receipt of the notice, and undertook to assess the background and send a more detailed reply.

On August 28, a detailed communication was sent by the enterprise as regards the union's submission, replying to each and every allegation made by the union, which are summarized as follows:

1. Firstly, the enterprise made reference to the economic circumstances leading to the decision to close the factory, the main reasons therefor being containers overcapacity at a global level and the difficulties in setting supply chain for the

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<sup>2</sup> On September 28, 2018, this NCP received a second communication by the complainant updating the background information for the original complaint and including this proposal. See more information in Section IV of this Statement.

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material and input to manufacture its products.

2. It was also noted that the multinational enterprise A.P. Moller-Maersk is experienced in making huge investments in the world to create and develop successful, sustainable business in the countries they operate in and that the investment in San Antonio had been conceived as a long-term investment. This means that the decision to close the factory was difficult and that it was taken as a last resort, after several fruitless attempted actions.

3. Moreover, the enterprise provided information about its experience in the development of standards for a responsible business conduct and a global prevention and monitoring vision.

4. Concerning specific issues mentioned by the union in its submission as grounds for the alleged infringements of said guidelines, the enterprise stated that it had faithfully complied with the applicable Chilean labor laws and even gone beyond their standards by providing benefits in excess of those foreseen by the law. Additionally, as for allegations of bad faith practices during the collective bargaining process, provision of information, training of workers, prevention of negative impacts - to name a few - the enterprise stated that it observed the guidelines contained in each item.

5. As for the allegation of lack of advance notice of the factory's closure, the enterprise stated that it decided to refrain from informing it until the effective day of closure upon the advice of expert legal advisors, both internal and external, on the basis of alleged security risks to workers within a manifestation and strike background. Closure advance notice would have possibly posed significant threats.

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**IV. Chilean NCP's proceedings to date**

Since the reception of the complaint on June 27, 2018, the Chilean NCP has taken the following actions:

- \* On July 5, 2018, a written acknowledgement of receipt was made of the complaint for review filed by the complainant.
- \* On July 19, 2018, the complaint for review was informed and remitted to the enterprise by mail and email.
- \* On July 19, 2018, the Danish NCP was informed by email of the receipt of a complaint for review. The support of the Danish NCP was sought to serve the corporate headquarters in Denmark of this ongoing action before the Chilean NCP through its communication channels.
- \* On July 20, 2018, a reply was received from the Danish NCP, which undertook to review the background information and offered a prompt reply.
- \* On July 23, 2018, a meeting was held with the president of the complainant union, where information was provided about the procedure and next steps.
- \* On July 25, 2018, the rules of procedure and a copy of the notice served upon the enterprise and the complainant were sent by electronic mail.
- \* On July 30, 2018, new information was received in support of the complaint for review.
- \* On August 1, 2018, the initial reply by the enterprise was received. On that same date, a phone call was made to an enterprise's representative to provide information on the NCP proceedings. The enterprise informed its interest in providing a detailed reply to the complaint for review by the complainant. The enterprise undertook to send its reply

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by August 31. The NCP sent the rules of procedure by electronic mail.

- \* On August 8, 2018, a reply was received from the Danish NCP informing that it had contacted the corporate management in Denmark, which confirmed that coordinated communication existed with the enterprise's representative in Chile.
- \* On August 28, 2018, a detailed reply from the enterprise was received.
- \* On September 3, 2018, the union was informed of the reception of a second reply from the enterprise.
- \* On September 13, 2018, an email was sent to the complainant to inform that an initial statement was soon to be prepared and to request updated information about the latest events that may be of significance to the process.
- \* On September 27, 2018, a meeting was held with the president of the union and representatives from *Central Única de Trabajadores* (hereinafter "CUT").
- \* On September 28, 2018, a document was received from the complainant and representatives from CUT updating information and incorporating a new, specific demand into the list of demands, connected with the search for support by the enterprise to the cooperative association established by former workers.
- \* On October 19, 2018, the complainant informed of a meeting between enterprise's representatives and former workers, held at the invitation of Congresspersons and former Foreign Affairs Minister Heraldo Muñoz, to discuss new proposals for an agreement between the parties.

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- \* On November 5, 2018, the Chilean NCP sent an initial statement to the Parties establishing that the complaint for review was admissible and offering its good offices, and established a timeframe for the parties to send their comments.
- \* On November 9, 2018, the Danish NCP confirmed that all communications on this complaint for review should be channeled through the enterprise's Director General in Chile, who would be in direct coordination with the enterprise in Denmark.
- \* On November 30, 2018, the enterprise sent its reply, which declined the offer for good offices by the Chilean NCP.
- \* On December 3, 2018, the Chilean NCP sent an email to the enterprise in reply to the enterprise's refusal, making preliminary comments on which it undertook to elaborate in the *final statement*. On that same date, the complainant was informed of the enterprise's response.
- \* On December 17, 2018, the Chilean NCP proposed to hold a meeting or phone conversation with the enterprise's representative to know, in greater detail, the reasons for the enterprise's refusal.
- \* On January 9, 2019, the enterprise proposed to facilitate communication by the Chilean NCP with Maersk Denmark Senior Global Sustainability Advisor.
- \* On January 16, 2019, the Chilean NCP held a Skype meeting with Maersk sustainability advisor, and asked the enterprise more information on the reasons to decline the offer for good offices.

**5. PROCEDURE'S CONCLUSION**

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Considering that the enterprise declined the offer for good offices, the Chilean NCP hereby concludes this procedure.

According to the Chilean NCP's *rules of procedure* (in line with the Guidelines), given the refusal of the enterprise and all communication alternatives having been exhausted (including the participation of the NCP for the multinational enterprise's country of origin), this NCP is bound to issue a final statement making recommendations suitable to the circumstances and available information, as appropriate.

Reply by the enterprise to the Chilean NCP offer for good offices

In its November 30, 2018 communication, the enterprise based its decision to decline the offer on its disagreement with the complaint filed with the NCP since it is convinced that it fulfilled, even exceeded, the legal requirements set in the responsible business practices promoted by the Guidelines. Accordingly, this complaint for review - in the enterprise's opinion - would provide no basis for the NCP's offer.

Additionally, the enterprise states that, given that legal actions have been already initiated, it would not be constructive or feasible to take part in NCP's good offices parallel process.

NCP's final considerations

As stated in the Guidelines' *prologue*, Guidelines aim to ensure that the operations of these enterprises are in harmony with government policies, to strengthen the basis of mutual confidence between enterprises and the societies in which they operate, to help improve the foreign investment climate and to enhance the contribution to sustainable development made by

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multinational enterprises.

Therefore, when offering its good offices, the NCP seeks: (a) to assist the parties in fully understanding the principles set in the Guidelines and the issues raised by the complainant - the union, in the instant case, and (b) to provide a neutral forum for the parties to solve the issues identified in the complaint for review submitted to the consideration of the NCP and if possible and as appropriate, to develop a mutually agreed upon path to follow.

At its initial assessment stage, the Chilean NCP concluded that this complaint merited further examination and offered its good offices in the light of the information provided by the complainant and that collected by the NCP itself.<sup>3</sup>

Considering the background examined, the NCP noted that the enterprise illustrated its experience on responsible business practices during its corporate life, both at a global level and in Chile, as well as its positive attitude and good faith in the proceedings carried out during the review. Agreeing to the above, the NCP considered that in the instant case the enterprise could have taken part in the procedure and contributed to the Guidelines' efficacy.

As regards the enterprise's allegation on parallel legal actions, the Guidelines state that, should ongoing legal actions exist on a case submitted to the NCP, it must be determined whether an offer of good offices could make a positive contribution to the resolution of the issues raised and would

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<sup>3</sup> More detail of this assessment is found on the initial statement on this complaint. The statement concludes that all the requirements for admissibility set in the Guidelines and this NCP rules of procedure to continue with its procedures have been satisfied.

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not create serious prejudice for either of the parties involved in these other proceedings or cause a contempt of court situation.<sup>4</sup>

In the instant case, the Chilean NCP concluded that its good offices could have contributed to the resolution of the issues and would have no serious prejudice to either Party or cause such a situation.

From the information received and communications exchanged, the Chilean NCP concluded that complainant aimed mainly at having a neutral forum for dialogue and eventual agreements.

The NCP's powers are restricted by the Chilean legal and judicial background of each procedure. Given its general, non-binding character, the Guidelines propose the NCP to seek rapprochement between the parties, without interfering with any prior or ongoing legal or court actions. There lies their singularity and benefit. *A contrario sensu*, the NCP has no powers whatsoever over legal and/or judicial decisions or outcomes.

The Chilean NCP rejects that the offer for good offices may have hindered the purpose and efficacy of the Guidelines, as there are no elements that could have been adversely affected by such offer; on the contrary, it could have contributed to bring the parties closer.

In the light of the foregoing, the Chilean NCP concludes this final statement by making the following recommendations:

I. *To evaluate assessment and management procedures in force within the enterprise to handle decisions having a*

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<sup>4</sup> Commentary on the Implementation Procedures of the OECD Guidelines for Multinational Enterprises, point 26.

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*significant impact on its workers' subsistence, as the closure of a factory and the subsequent layoff. The incorporation of due diligence criteria that are more stringent as to social risk assessment standards is recommended.*

As stated in paragraph 6 of chapter V, responsible conduct translates into providing reasonable notice to workers' representatives and competent public authorities and cooperating with them, to the maximum extent practicable, in order to mitigate any adverse effects.

The information provided by both Parties outlined the major social and economic impact of the factory closure on San Antonio, Valparaíso, the locality where the factory had operated since 2015. The closure entailed the layoff of about 1,200 workers. The case gained a high public profile and mobilized efforts by local and national governmental authorities to search for support or assistance mechanisms for affected workers.

In addition to the above, the closure directly affected the economy of workers and their families, as they could not anticipate that they would lose their job and take preventive measures to face the new scenario.

Considering that a closure decision may have such a significant impact as the one described above, the enterprise's reason to refrain from providing advance notice of the closure to its workers - that the decision was the result of security assessments made by experts (internal and external) - is, in the opinion of this NCP, insufficient given the extent of the negative impact caused. The possibility that manifestations or strikes would pose a threat to the enterprise's facilities and

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workers could have been preventively handled by local authorities, as stated by the Guidelines, to cooperate with them and mitigate adverse effects in this security aspect.

II. *To assess the implementation of improvements in consultation and cooperation mechanisms between the enterprise and its workers, particularly as regards any significant changes or impacts on the duties or subsistence of workers.* The Chilean NCP finds that, should advance notice have been given of the factory's closure, a joint solution may have been reached at to the benefit of both parties and having a lesser impact to the community, for example, by setting a joint proposal with the same characteristics as the subsequent proposal - the establishment of a cooperative association by Maersk former workers.

Transparency and confidentiality terms (upon conclusion of the procedure)

As indicated in the Guidelines, confidentiality obligation is guaranteed as regards any issues connected with the good

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offices as well as any potential agreements arising out of these procedures; therefore, only the existence of a complaint for review, either ongoing or concluded, is excluded from said obligation. Said information may be disclosed by the Parties and shall be disclosed by the NCP according to the transparency principle governing its functioning.

The Guidelines set forth that during the procedure, its existence shall remain confidential. The information and opinion provided during proceedings shall be kept secret, unless the relevant party consents to the disclosure thereof or unless its confidentiality would contravene the provisions in the national laws and regulations.

According to the transparency principle governing the NCP's duties, final statements are published at the NCP website and informed and sent to OECD Working Group on Responsible Business Conduct. Before the final statement is issued, the parties are afforded the opportunity to comment on the draft statement. If no agreement is reached between the NCP and the parties as regards its wording, the NCP shall adopt the final decision.

**Carolina Ibáñez Kollmann**

Chilean National Contact Point before the OECD

Responsible Business Conduct Division, DIRECON

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TRANSLATED BY ANA MARÍA MUÑOZ S., RESOLUTION No. 118 OF JULY 15, 1991.  
DONE at SANTIAGO, CHILE, on this 23<sup>rd</sup> day of April, 2019.

ALEJANDRA VERGARA ZAPATA  
TRANSLATOR