

FINAL STATEMENT

Chile's National Contact Point OECD Guidelines for Multinational Enterprises

Non-official English translation

In Santiago, on 15 April 2015, Chile's National Contact Point for the OECD Guidelines for Multinational Enterprises (hereinafter referred to as the NCP), taking into account the request and supporting information presented by the requesting national company, in order to initiate a specific instance for alleged breaches of the OECD Guidelines for Multinational Enterprises (hereinafter referred to as the Guidelines) by the Chilean subsidiaries of a multinational company of Spanish origin, and also considering the information provided by the latter, hereby declares the following;

I. OECD Guidelines for Multinational Enterprises

The Guidelines are recommendations addressed by governments to multinational enterprises operating in or headquartered in adhering countries. They contain non-binding principles and standards for responsible business conduct in a global context, consistent with applicable laws and internationally recognised standards.

Their objective is to promote the positive contribution of enterprises to economic, environmental, and social progress worldwide, reflecting the shared values of the governments of countries that are the source of a significant portion of global foreign direct investment and are home to many of the world's largest multinational enterprises.

In this context, and with the aim of promoting and implementing the Guidelines, the governments of adhering countries have committed to establishing National Contact Points.

Among their responsibilities, National Contact Points are tasked with assisting enterprises and stakeholders in taking appropriate measures to promote the implementation of the Guidelines, serving as a platform for mediation and conciliation to resolve practical issues that may arise.

II. Procedure of the NCP

Submission of the specific instance request

Any person (natural or legal) currently affected by a multinational enterprise's non-compliance with the Guidelines may submit a formal complaint to the NCP.

Analysis of the submission

Every submission, along with its supporting documents, will be reviewed by the NCP and its Executive Secretariat. Based on this assessment, the NCP may conclude:

1. That it must request additional information from the submitter.
2. That it must request clarification on one or more points of the submission.
3. That it must request the submitter's authorisation to share the submission with the multinational enterprise.
4. That it is appropriate to inform one of its counterparts of the submission.

Information exchange

Once authorised, the NCP will share the information contained in the submitter's submission (complemented and clarified, where applicable), forwarding all relevant materials to the multinational enterprise. The enterprise will be given a non-extendable deadline to respond, which must also include a statement on whether it accepts or declines the NCP's good offices. This deadline will be determined on a case-by-case basis, taking into account the merits of the available information provided by the submitter(s).

Once the response from the multinational enterprise has been received, both the response and the supporting information will be reviewed by the NCP and its Executive Secretariat. Based on this assessment, the NCP may conclude:

1. That additional information regarding its response must be requested.
2. That clarification on one or more points of its response must be requested.

Assessment of the specific instance

Once the non-extendable deadline set by the NCP has passed, the following situations may arise:

1. The deadline has passed and no response has been received from the multinational enterprise.
2. A response has been received within the given deadline in which the good offices of the NCP are rejected.
3. A response has been received in which the good offices of the NCP are accepted.

In the event that either of the situations outlined in points 1 or 2 occurs, the process must proceed to the next stage, referred to as the Conclusion of the Process.

Once the response has been received (complemented and clarified, where applicable), the NCP, together with its Executive Secretariat, will assess whether it is appropriate to initiate a Specific Instance, through which mediation or conciliation may be carried out.

Conclusion of the process

Every submission to the NCP will conclude with the preparation of a Final Statement, which will indicate, as applicable:

1. The agreements and commitments adopted by the Parties.
2. The timelines and actions for the follow-up of those commitments.
3. The reasons why the Parties were unable to reach an agreement, along with the comments and proposed actions of the NCP.
4. The rejection of the NCP's good offices by the company concerned (whether by failing to respond within the deadline or by explicitly declining the offer of good offices).
5. The reasoning on the basis of which the NCP considered that the issues raised did not merit further consideration.

III. Submission of the specific instance request

The specific instance request before this NCP focuses on the expansion of the Trunk Transmission System of the Central Interconnected System, which was awarded to a Spanish multinational company following a Public Tender process by the National Energy Commission.

The project consists of the construction and operation of a 2x500 kV electrical transmission system, enabling and energising a single circuit, starting 307 km south of the capital, to deliver energy to the municipality of Buin, Santiago Metropolitan Region. This project involves the construction of 587 structures along its route, crossing 419 private properties, 2 public properties, and 88 National Public Use Properties, with a total route length of 255.37 km.

The objective of this project is to contribute to the national energy policy by strengthening or expanding the current capacity of the Central Interconnected System (SIC).

In this context, the multinational company, on 31 January 2011, requested a definitive concession to build a Category C transmission line, with a nominal voltage of 500 kV, which was published in the Official Gazette on 1 April of the same year.

The submitter's property is located in the municipality of San Fernando, Colchagua Province, Sixth Region, through which the electrical transmission line must pass, and whose route occupies a total area of 116,375.23 square metres of the mentioned property, according to the special easement plan, which was notified to them on 30 July 2012.

Submitter

On 25 April 2014, the submitter requested the Good Offices of this NCP to initiate a specific instance based on the alleged breach of the Guidelines due to actions related to the transgression of the chapters on Human Rights and Environment, which have been concentrated in the granting of an easement and the construction of an electrical line crossing the submitter's property, causing harm in the following areas:

1. The land through which the electrical line would pass contains a Manor House and a Chapel, both of which would have significant historical and cultural value.
2. The submitter states that a project for the expansion of their vineyard is currently underway on the slope of the hill adjacent to the site where it is currently located, the exact location where the multinational company intends to place the electrical transmission line.
3. The submitter's property has native vegetation of landscape and forestry significance, particularly due to the reintroduction of tree species such as Chilean palms, bellotos, and algarrobos.
4. The submitter adds that the properties affected by the mentioned electrical concession are part of the so-called 'Wine Route,' which is a major international tourist attraction, as this route offers the truest reflection of the country's rural, cultural, and winemaking traditions.
5. There are archaeological remnants on the property, presumably related to indigenous ceremonies, which could constitute protected national heritage.
6. There is already an electrical transmission line on the submitter's property, along with its corresponding easement, so the imposition of a new line of this type and a second correlating easement on the same property would constitute an irreparable burden on the said property.

Regarding this matter, the submitter specifies that the route proposed by the multinational company for this second electrical concession does not run parallel to or close to the route of the first concession. On the contrary, it would cross the middle of the property, dividing it into two parts, and thereby permanently and irreversibly affecting the environment, as well as its tourist, landscape, historical, and forestry properties.

It is for the above reasons that the submitter concludes that the actions of the multinational company are clearly at odds with the principle of proportionality or the principle of minimising the burden on the servient property.

Principles of the Guidelines allegedly breached

1. Principle N° IV. Human Rights.
2. Principle N° VI. Environment.

Grounds for the submission

Regarding the principles of the Guidelines allegedly breached by the multinational company, the submitter has stated that *"The Human Right violated by the Spanish multinational company [...] is the Right to the Environment"*¹. In fact, it indicates that this violation results in an infringement of their right to property, as there is no conducive environment for its enjoyment, given that there is a viable alternative regarding the current location for the construction of the electrical line.

Thus, as it is a large-scale project with potential adverse effects on the environment, Law 19.300 regulates its submission to the Environmental Impact Assessment System, requiring the preparation of an Environmental Impact Study.

However, although the aforementioned Environmental Impact Study was positively evaluated by the previously identified Public Service (sanctioned by Exempt Resolution No. 50, of 2012), the submitter asserts that the multinational company does not have an effective environmental management system, as it has made an incorrect decision regarding the electrical line construction, *"[...] allowing the company to persist in a wrong decision that maximises the damage to the environment"*².

Furthermore, it states that *"[...] during the processing of the procedure that environmentally assessed the project for the implementation of the high-voltage transmission system, multiple irregularities were committed, including those related to the public participation process, which is particularly serious [...]"*³.

The above is based on the fact that the first paragraph of Article 4 of Law No. 19.300 states that *"It is the duty of the State to facilitate public participation, allow access to environmental information, and promote educational campaigns aimed at environmental protection"*. It then states in the first paragraph of Article 30 ter that *"Notwithstanding the provisions of Articles 28 and 30, proponents must announce the submission of the Study or Declaration through notices at their own expense in local broadcast media, stating the location where the documents are available and the deadline for submitting observations. The regulations must establish the content of the announcements, the method for proving their publication to the authority, and the deadline within which these announcements must be made"*.

¹ Submission of the submitter. Pg. 31.

² Ibid. Pg. 32.

³ Ibid. Pg. 21.

Regarding the above, the submitter states that “[...] *there is no record in the environmental processing file of the company’s compliance with the obligation to announce the project through locally broadcast media. Likewise, there is no evidence that the defendant company has either requested authorisation from the competent authority or carried out, with such authorisation, the replacement of the broadcasting process with another of similar reach, in order to fulfil the legal duty of public participation*”⁴. This stage includes a mandatory deadline for those who may feel affected by the project to submit observations and present their objections, a situation which necessitates ensuring proper dissemination of the project.

Similarly, it states that, according to what is established in Chapter VI, Paragraph 3, of the Guidelines⁵, there is an obligation for companies to carry out an adequate environmental impact assessment, which has not occurred due to the irregularities raised, namely, the failure to comply with the basic legal standards regarding public participation.

As a result of the above, only 21 observations were submitted as part of the public participation process, of which 14 were not accepted for processing due to failing to meet the legal admissibility requirements (lack of representation and submission of documents beyond the deadline). It is also added that Obviously, my client was never made aware of the existence of this project, which is why they were left in a state of absolute defenselessness, unable to oppose or make their numerous observations to the authority!”⁶.

In this context, it states that its position regarding the construction of the electrical route “[...] *is not obstructionist nor against development, but simply aims to ensure that the environment is not affected by the imposition of unfair burdens to the detriment of some [...]*”⁷ adding that “[...] *in absolute good faith, it conducted lengthy negotiations with representatives of [the multinational company], which lasted from mid-2012 to the end of 2013 and early 2014, ultimately aiming to place the route of the new electrical line as close as possible to the existing electrical line [...], as this would minimize the area affected by the new electrical easement, and consequently, reduce the burden or impact on both the environment and my client’s property*”⁸, negotiations which did not reach a successful conclusion due to purely economic reasons.

Finally, it states that, within the General Policies of the Guidelines regarding the duty to take into account the policies established in the countries where they operate, as well as the views of other stakeholders, and in

⁴ Ibid. Pg. 24.

⁵ “Assess, and address in decision-making, the foreseeable environmental, health, and safety-related impacts associated with the processes, goods and services of the enterprise over their full life cycle with a view to avoiding or, when unavoidable, mitigating them. Where these proposed activities may have significant environmental, health, or safety impacts, and where they are subject to a decision of a competent authority, prepare an appropriate environmental impact assessment”.

⁶ Submission of the submitter. Pg. 25.

⁷ Ibid. Pg. 25.

⁸ Ibid. Pg. 25 y 26.

particular providing real opportunities for participation when planning and making decisions about projects or other activities likely to significantly impact local populations⁹ through interactive procedures with all stakeholders¹⁰ "[...] *it is absolutely clear that the companies in question have breached this duty and, in practice, have denied the affected parties in their Project any real and effective opportunity to participate*"¹¹.

As a result of the above, the submitter filed the following actions against the multinational company:

1. Lawsuit for Public Law Annulment, before the 17th Civil Court of Santiago, with the aim of having Exempt Resolution No. 50, 2012, of the Environmental Evaluation Service declared null and void.
2. Legal Claim before the Comptroller General of the Republic, dated 21 April 2014, against Decree No. 49, 2014, of the Ministry of Energy, concerning the electrical concesión.

IV. Desired outcome sought by the submitter of the specific instance

1. That this NCP instructs the multinational company and its Chilean subsidiaries on the proper compliance with the Guidelines.
2. That the Spanish multinational company, as a form of redress, offers a public apology and disseminates in Chile the recognition of its error and breach of the Guidelines.
3. That the Spanish multinational company offers a solution for the electrical distribution line to run alongside the existing line.
4. That this NCP encourages the multinational company to create processes and controls that ensure the effective implementation of the Guidelines.

Multinational enterprise

On 27 August 2014, the multinational company made a submission to this NCP responding to the arguments presented by the submitter, '[...] aiming to

⁹ General Policies of the Guidelines, paragraph A, No. 14. "Engage with relevant stakeholders in order to provide meaningful opportunities for their views to be taken into account in relation to planning and decision making for projects or other activities that may significantly impact local communities".

¹⁰ Commentary on General Policies of the Guidelines, paragraph A, No. 25. "Stakeholder engagement involves interactive processes of engagement with relevant stakeholders, through, for example, meetings, hearings or consultation proceedings. Effective stakeholder engagement is characterised by two-way communication and depends on the good faith of the participants on both sides. This engagement can be particularly helpful in the planning and decision-making concerning projects or other activities involving, for example, the intensive use of land or water, which could significantly affect local communities".

¹¹ Submission of the submitter. Pg. 35.

disprove each and every one of the unfounded allegations made by the submitter, on the basis of which they seek the initiation of a mediation procedure for alleged breaches of the OECD Guidelines for Multinational Enterprises, which is completely groundless as it is based on assumptions of fact and legal grounds that are entirely erroneous, potentially resulting in harm to my client in the form of the costs of conducting a mediation procedure of this nature, without any of the alleged breaches of the Guidelines justifying or supporting its initiation”¹².

Grounds for the submission

The multinational company states that the submission made by the submitter should be rejected as it is based on assumptions of fact and legal grounds that are completely erroneous, which is why the initiation of a specific instance would not be appropriate. Similarly, it states that considering a modification of the electrical line route (which would be favourable or less burdensome for the submitter) as entirely plausible has no legal basis, as the General Electricity Services Law and its Regulations provide the possibility to modify the route in response to objections raised by the owners of the affected properties during the electrical concession procedure, a process in which the submitter did not participate.

In this context, it is stated that the selection of the route for a transmission line with the characteristics of the one under discussion is neither random nor arbitrary, whether by the project owner or even by the administrative authority itself. Rather, it is determined by strict technical, safety, and environmental criteria established by the Environmental Impact Assessment System. All of the above is subject to the provisions of the General Law on Electrical Services and the prohibitions it sets out regarding which types of land or works may or may not be subject to electrical easements for the implementation of a project of this nature.

Having stated the above, the multinational company indicates that it has developed the route of the transmission line in question in the most technically feasible and least invasive manner, taking special care in locating and identifying the exceptions set out in the electrical regulations, in order to avoid affecting such locations.

It also states that, through various extensive studies, the appropriate route for installing the power line has been determined, in accordance with technical and environmental criteria and taking into account the current condition of each affected property. In this regard, it adds that Article 72, third paragraph, of the Regulations of the General Law on Electrical Services

¹² Presentation by the multinational company. Pg. 1 y 2.

¹³ “The plans must indicate the current conditions of the servient properties, their use, the owners of the affected properties, the area occupied, the length of the lines that will cross them, and the safety corridor of the works that will remain within the property. For the purposes of this paragraph, the conditions existing within the six months prior to the date of the application shall be considered current”.

sets out the requirements that the plans submitted to the relevant public authority must meet. In this sense, it notes that *"the electricity concession procedure is a regulated process, in which the legislator has laid out each of its stages and the opportunities for affected parties to raise objections. Moreover, in the absence of an agreement between the owner of the property affected by the easement and the one benefiting from it, a special procedure is established to determine the amount of compensation. This is carried out by three qualified professionals forming a valuation commission, along with a judicial review procedure that safeguards the rights of the affected party"*¹⁴.

In this context, it concludes that the burden imposed by the electricity concession would not breach the principle of proportionality, provided that compensation is determined by an ad hoc valuation commission composed of qualified and impartial professionals. It further adds that *"[...] the route and the corresponding compensation have been assessed in light of those [affected properties'] conditions, and it is unfounded for the submitter to now claim an intention to expand the vineyard area, as such interests were only alleged after becoming aware of the project [...]"*¹⁵.

It also indicates that all administrative stages have been exhausted by the submitter, who has opposed the establishment of the easement before the Superintendency of Electricity and Fuels, and has legally challenged the valuation amount determined by the valuation commission.

On the other hand, regarding the alleged breach of the obligation to broadcast a summary of the Environmental Impact Study and the deadline for submitting comments on it, in accordance with the provisions of Article 30 ter of Law No. 19.300, the multinational company has stated the following:

1. That this legal provision was incorporated into the Law by virtue of Article 1 No. 37 of Law No. 20.417¹⁶.
2. That the aforementioned Article 30 ter states that there must be a regulation establishing the content of the announcements, the manner in which their broadcast must be certified to the authority, and the timeframe within which they must be aired.
3. That, at the time the Environmental Impact Study was being processed, the regulation referred to in the aforementioned provision had not yet been issued¹⁷.
4. The new Regulation of the Environmental Impact Assessment System came into force in 2013, that is, nearly two years after Environmental Qualification Resolution No. 50 was issued on 24 January 2012.

¹⁴ Presentation by the multinational company. Pg. 20.

¹⁵ Ibid. Pg. 19.

¹⁶ Which was published in the Official Gazette on 26 January 2010.

¹⁷ Response from the multinational company. Pg. 28.

¹⁷ Ibid. Pg. 32.

¹⁷ Response from the multinational company. Pg. 28.

¹⁷ Ibid. Pg. 32.

In this regard, it concludes that the submitter “[...] seeks to justify their lack of participation during the public consultation period by claiming that, since the EIA [Environmental Impact Assessment] of the Project was not broadcast, they were unable to obtain information about its content and location [...]”¹⁸.

Finally, it emphasises that “[...] given that it is impossible to expect this National Contact Point to act as a body for reviewing the legality of actions taken by my client—actions that have been fully validated and supported by the administration and the Courts of the Republic, and in the absence of any ruling or opinion from a legally competent body indicating or demonstrating any flaw or breach of our legislation committed by my client in the assessment and implementation of the [power line]—there is no basis on which this National Contact Point could reasonably consider a breach of any OECD Guidelines that are embodied in our domestic law. I therefore respectfully request that you refrain from undertaking your good offices and, accordingly, reject the possibility of mediation, which would only result in harm and costs to my client, with no justification for its existence given that there is no breach to address through possible solutions¹⁹”.

V. Competence of the NCP regarding the specific instance request

According to the preface of the Guidelines, their purpose is “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 multinational enterprises”²⁰.

Although the Guidelines do not provide a definition of a multinational enterprise, they do offer elements or characteristics that help to identify what is meant by a multinational enterprise, stating that “They usually comprise companies or other entities established in more than one country and so linked that they may coordinate their operations in various ways. While one or more of these entities may be able to exercise a significant influence over the activities of others, their degree of autonomy within the enterprise may vary widely from one multinational enterprise to another. Ownership may be private, State or mixed. The Guidelines are addressed to all the entities within the multinational enterprise (parent companies and/or local entities)”²¹.

In the context of assessing the admissibility of the submission, this NCP had to determine whether the companies subject to the submission—based on alleged

¹⁸ Response from the multinational company. Pg. 28.

¹⁹ Ibid. Pg. 32.

²⁰ OECD Guidelines for Multinational Enterprises. Preface.

²¹ Guidelines for Multinational Enterprises. Concepts and Principles. Number 4.

breaches of the Guidelines—align with the concepts and ideas set out in the preceding paragraphs.

On this matter, it is important to note that the status of the company as a multinational enterprise has not been denied or contested in the response or statements submitted to this NCP on 27 August 2014 by the multinational company or its subsidiaries in Chile. Therefore, this NCP considers it appropriate not to examine this point further, as the multinational nature of the company is not a disputed fact.

On the other hand, regarding the statements made and the substantive arguments presented, it can be noted that the submitter has provided a detailed account of all the national regulations that (in their view) have been breached not only by the multinational company but also by the relevant public authority. The submitter has presented factual and legal arguments and has indicated the judicial and administrative actions they have pursued as a result.

Likewise, the multinational company has sought to present its defence, putting forward factual and legal arguments which (in its view) support the assertion that its actions have been in accordance with the law.

In this regard, it is important to clarify that the provisions contained in the Guidelines are not legally binding rules, but rather *“The Guidelines are recommendations jointly addressed by governments to multinational enterprises”*²² and that although *“the Guidelines extend beyond the law in many cases”*²³, they clearly state that *“in countries where domestic laws and regulations conflict with the principles and standards of the Guidelines, enterprises should seek ways to honour such principles and standards to the fullest extent which does not place them in violation of domestic law”*²⁴.

From the above, it can be inferred that compliance with or breach of national legislation does not necessarily imply adherence to or breach of the Guidelines. There may be situations in which companies comply with the law and yet breach the principles set out in the Guidelines. Conversely, merely arguing that there has been a breach of national legal provisions does not, in itself, amount to a breach of the Guidelines. This is because the Guidelines represent international standards of conduct for multinational enterprises, relating to principles of a general nature.

In this sense, the Guidelines state that *“Obeying domestic laws is the first obligation of enterprises. The Guidelines are not a substitute for nor should they be considered to override domestic law and regulation [...]”*²⁵ and further state that *“[...] the Guidelines extend beyond the law in many cases,*

²² Ibid.

²³ Ibid. Number 2.

²⁴ Ibid.

²⁵ OECD Guidelines for Multinational Enterprises. I. Concepts and Principles. Number 2.

they should not and are not intended to place an enterprise in situations where it faces conflicting requirements”²⁶.

From what has been stated regarding the Guidelines and the provisions of Articles 7, 8, and 76 of the Political Constitution of the Republic, it follows that investigating and issuing a reasoned opinion on the legality of a company's actions (and even more so on the functioning of a public body such as the Environmental Assessment Service) falls entirely outside the scope of competence of Chile's NCP. The NCP's role is to promote and implement the Guidelines, and to assist companies and stakeholders in taking appropriate measures to support their application. Therefore, it is not appropriate for the NCP to issue a statement on such matters.

It should therefore be clarified that the NCP is not responsible for deciding on or intervening in matters brought before such instances. On the contrary, its role is to contribute, through its good offices, to the resolution of the issues raised from the perspective of the Guidelines, and not from a judicial standpoint.

In the same vein, it is important to clarify that the absence of a current judicial or administrative decision regarding a breach of national legislation does not, in any case, prevent this NCP from basing its decision on the relevance or otherwise of a specific instance on such a situation. As stated in the Implementation Procedures of the OECD Guidelines for Multinational Enterprises “[...] *NCPs should not decide that issues do not merit further consideration solely because parallel proceedings have been conducted, are under way or are available to the parties concerned*”²⁷. Furthermore, the Implementation Procedures specify that “[...] *NCPs should evaluate whether an offer of good offices could make a positive contribution to the resolution of the issues raised and would not create serious prejudice for either of the parties involved in these other proceedings or cause a contempt of court situation*”²⁸.

In the opinion of this NCP, the issue that primarily motivates the submission—and which runs throughout the submitter's line of argument—is related to the selection of the route approved by the Environmental Assessment System. According to the submitter, this route was administratively endorsed despite involving breaches of the law, thereby undermining the principles set out in the Guidelines, specifically in relation to human rights—namely the right to live in an environment free from pollution—and in environmental matters, regarding the adoption of necessary measures for its protection.

Notwithstanding the above, it is at the very least unusual that the multinational company has not provided any evidence to demonstrate that it has, in any way, incorporated the Guidelines into its processes—let alone complied with them. For this reason, this NCP urges the company to take all necessary measures to incorporate the standards set out in the Guidelines,

²⁶ Ibid.

²⁷ Commentary on Implementation Procedures of the OECD Guidelines for Multinational Enterprises. Number 26.

²⁸ Ibid.

so as to operate in accordance with the commitment that any enterprise of this nature should uphold in the area of Corporate Social Responsibility.

Having stated the above, and despite it, it is the opinion of the undersigned that the submitter has neither demonstrated nor precisely argued the breach of any specific principles of the Guidelines allegedly breached. Rather (as previously noted), the submitter has focused their efforts on proving a situation of illegality for which judicial and administrative actions are the appropriate avenues—actions which they also claim to have pursued.

It is for the reasons stated above that this NCP has reached the conviction that the issues raised by the submitter not only do not merit further consideration, but that proceeding with a mediation/conciliation process based on the claims presented would not contribute to the purpose or effectiveness of the Guidelines.

GASTÓN FERNÁNDEZ SCHIAFFINO
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OECD Guidelines for Multinational Enterprises

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Non-official English translation. In case of discrepancy, the Spanish version of this Final Statement shall prevail.