

Final Statement

SACYR CHILE S.A. & INGEAUSTRAL LTDA. (2019)

Non-official English translation

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CHILE'S NATIONAL CONTACT POINT | RESPONSIBLE BUSINESS CONDUCT DIVISION |
UNDERSECRETARIAT OF INTERNATIONAL ECONOMIC AFFAIRS

FINAL STATEMENT

Sacyr Chile S.A. & Ingeaustral Ltda.

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I. Introduction

1. Chile's National Contact Point (NCP) for the OECD Guidelines for Multinational Enterprises (Guidelines), located in the Responsible Business Conduct Division of the Undersecretariat for International Economic Affairs (SUBREI), issues this Final Statement.
2. The Final Statement describes the process and the results of the analysis of the specific instance to which it refers. It is based on information received from the parties and the steps taken by the NCP. If there was confidential information submitted to the NCP in the course of the procedure, it has not been disclosed in this statement. According to the NCP's rules of procedure, the NCP will always issue a Final Statement, which is public, whether or not it has been preceded by an Initial Statement or good offices.
3. The Final Statement marks the closure of the NCP procedure, without prejudice to the possibility of a follow-up stage.

II. Parties

a) Identification of the submitter

4. Ingeaustral Ltda. (the submitter), an SME engaged in carrying out civil works in extreme conditions and climates.

b) Identification of the company

5. Sacyr Chile S.A. (the company), the Chilean subsidiary of Sacyr (Sociedad Anónima de Caminos y Regadíos), a company founded in 1986 in Spain, primarily focused on the development of public infrastructure projects.

III. Issues raised

a) Summary of the specific instance request

6. On 17 July 2019, a specific instance request was submitted by Ingeaustral Ltda. On 22 July 2019, the NCP responded via email, stating that the submission did not meet the admissibility requirements set out in its Rules of Procedure. On 31 July 2019, another specific instance request was received, but once again it did not meet the admissibility requirements, which was also communicated to the submitter. On 10 September 2019, the submitter submitted a new specific instance request to the NCP, this time meeting the requirements set out in the Rules of Procedure.
7. The chapters considered in this Final Statement are those referred to in the September 2019 submission, as it is the one that meets the admissibility requirements for the specific instance request.
8. According to the information provided by the complainant, there were several alleged contractual breaches by the company, which are also indicated as presumed breaches of the recommendations of the Guidelines. These relate to matters concerning machinery rental contracts and the execution of physical construction work, in which the complainant acted as a contractor for Sacyr Chile S.A. in the public infrastructure project titled "Improvement of Route 7 Chaitén," located on the border of the Los Lagos and Aysen regions in Chile.

9. The submitter identifies alleged breaches by the company of the following chapters of the Guidelines:

1. Chapter II. General Policies.
2. Chapter III. Disclosure.
3. Chapter IV. Human Rights.
4. Chapter V. Employment and Industrial Relations.
5. Chapter VII. Combating Bribery, Bribe Solicitation and Extortion.
6. Chapter X. Competition.
7. Chapter XI. Taxation.

10. The expected outcome by the submitter through the NCP procures is as follows:

1. That the company has a favourable disposition to reach a compensation agreement that covers the total debt and damages suffered by the submitter.
2. That the company modifies its contract execution practices with Chilean contractors.

b) Summary of the company's response

11. On 14 October 2019, the NCP sent a letter to the company, notifying them of the submitter's submission and inviting them to respond to the facts raised by it.
12. By letter dated 17 December 2019, along with submitting documents, the company responded that the submitter's claims were unfounded, due to relevant contractual breaches by the submitter in three identified service provision contracts, such as unpaid labour and social security obligations to its workers, which were covered by Sacyr Chile S.A., and the submission of unreliable guarantee bonds.
13. Additionally, the company indicated that these matters were being investigated and proven in a lawsuit for debt collection and compensation for damages in the 16th Civil Court of Santiago, a lawsuit archived since May 6, 2019, due to inactivity and lack of procedural impetus on the part of the submitter.
14. In January 2020, a meeting was held between the company and the NCP, after which Sacyr Chile S.A. made available to the NCP a new set of documents.
15. The NCP highlights the company's active participation in the process.

IV. NCP evaluation of the specific instance

a) Preliminary issues

16. The preliminary issue is whether the NCP has jurisdiction to hear the case.
17. For this, two requirements must be verified: (1) the requested company must be a multinational enterprise, and (2) that the alleged breaches occurred in Chilean territory or, if they occurred in a foreign country without an NCP, the multinational enterprise must be Chilean.

18. Regarding the first requirement, Sacyr is a multinational enterprise in nature because it has entities in different countries and can coordinate its activities in all of them. Therefore, the first requirement is met.
19. As to the second requirement, the alleged breaches of the Guidelines occurred in Chilean territory. Thus, the second requirement is fulfilled and, as a result, the NCP is competent to hear the case.

b) Initial assessment

20. In determining whether the issue raised merits further consideration, the NCP must establish whether the issue is bona fide and whether it relates to the Guidelines. In this context, the NCP takes into account the following criteria:
 1. The identity of the party concerned and its interest in the matter.
 2. Whether the issue raised in the specific instance request is material and justified.
 3. Whether the company's activities are linked to the issues raised in the specific instance.
 4. The relevance of concurrent legislation and procedures to the case, including court decisions.
 5. How similar or the same issues have been, or are being, addressed in other local or international processes.
 6. Whether the review of the specific instance will contribute to the purpose and effectiveness of the Guidelines.
21. In order to move forward with the process and obtain further information for this initial assessment, in June 2020, the NCP forwarded the company's response letter to the submitter, stating that the NCP was interested in holding a meeting and would provide remote means for it. No response was received from the submitter.
22. In the following months, the NCP followed up numerous times via email to obtain a response from the complainant's lawyer, which was finally received in October 2020. On that occasion, the NCP reiterated its previous requests, namely, to acknowledge receipt of the documentation shared by the company and to hold a meeting. Once again, no response was received. Consequently, on 9 November 2020, before concluding the initial assessment, the NCP informed the parties of its decision to formally close the specific instance due to abandonment. In February 2022, the NCP held meetings with each party, during which it reaffirmed its decision to proceed with the Final Statement.

V. Conclusion

23. In light of the above, the NCP concludes that there are no grounds to give further consideration to the issue raised. Consequently, this Final Statement is issued, bringing the specific instance to a close.

a) NCP Observations and Recommendations

24. The NCP concludes this Final Statement with the following recommendations for both parties:

1. Maintain active and good-faith communication in dialogue processes and in both contentious and non-contentious dispute resolution procedures, with a view to reaching consensual solutions and fostering shared learning.
2. Implement risk-based due diligence processes in business management, in accordance with the provisions of the Guidelines.
3. Encourage, where possible, their business partners, including suppliers and contractors, to implement principles of responsible business conduct in line with the Guidelines.
4. Conduct their activities in a manner consistent with the need for sound commercial practices (Recommendation A No. 3, Chapter II of the Guidelines).

Finally, it is important to highlight that the recommendations of the Guidelines are relevant to both multinational and national enterprises, regardless of their size. Consequently, all companies are expected to behave in the same manner in all cases where the Guidelines are applicable to both.

If the NCP offers its good offices or, in its Final Statement, makes recommendations to the company, this should in no way be interpreted as an assertion that the requested multinational has failed to comply with the Guidelines.

The Guidelines state that confidentiality of the proceedings shall be maintained throughout its duration. Information and opinions provided during the proceedings shall be kept confidential, unless the party concerned consents to the disclosure of such information or opinions or where non-disclosure would be contrary to the provisions of national law.

In accordance with the principle of transparency that governs the functions of the NCP, the final statements are published on the NCP's website and are translated into English and sent to the OECD Working Party on Responsible Business Conduct.

Before the Final Statement is issued, the parties are given the opportunity to comment on the draft statement, bearing in mind that the drafting of the statement is always the responsibility of the NCP, which will define the final version of the document.

Felipe Henríquez Palma

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Non-official English translation¹

¹ In case of discrepancy, the Spanish version of this Final Statement shall prevail.