

FINAL STATEMENT

Chile's National Contact Point OECD Guidelines for Multinational Enterprises

Non-official English translation

In Santiago, on 20 August 2015, Chile's National Contact Point (NCP) for the OECD Guidelines for Multinational Enterprises (hereinafter, the NCP), taking into consideration the specific instance request and available information submitted by a Chilean national (hereinafter, the submitter), with the aim of initiating a specific instance regarding alleged breaches of the OECD Guidelines for Multinational Enterprises (hereinafter, the Guidelines) by a multinational enterprise of North American origin through the employment contracts it held with its subsidiaries or representations in Brazil, Venezuela, and Chile, hereby states 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

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 reason for initiating a specific instance request is the absence of a severance agreement and the corresponding payment of compensation related to an employment contract entered into on 3 February 1975 in the city of Paulinia, State of São Paulo, Brazil.

On 15 May 2015, a submission was filed by a natural person of Chilean nationality.

The Executive Secretariat acknowledged receipt of the aforementioned submission on 20 May 2015, via an email sent to the submitter, in which it also informed them that their request was under review.

After reviewing the information provided by the submitter, on 11 June 2015 it was deemed appropriate to notify the NCPs of Brazil and the United States of the submission, in order to gather any information related to the case that those NCPs might have.

The above was communicated to the submitter via email dated 17 June 2015.

By the same means, on 12 June 2015, the Brazilian NCP indicated that it had no further information or knowledge regarding the present submission.

Likewise, it should be noted that, to date, no response has been received from the U.S. NCP regarding the requested information.

1. Information provided by the submitter

On 7 May 2015 (submitted to this NCP on 15 May 2015), the submitter requested the good offices of the NCP through the initiation of a specific instance, based on the alleged breach of the Guidelines due to actions related to violations of Chapter V concerning Employment and Industrial Relations.

The alleged breaches have materialised in the failure to settle an employment contract entered into with the multinational enterprise on 3 February 1975, and the consequent failure to pay compensation in accordance with the periods during which the submitter effectively worked in Brazil, Venezuela, and Chile, as detailed in the table below:

DAYS	MONTHS	YEARS	YEARS OF ACTUAL
28	02	1991	

03	02	1975	EMPLOYMENT BRAZIL / VENEZUELA
25	00	16 YEARS	
10	03	2010	PERIOD OF EMPLOYMENT GNL - CHILE
11	10	2007	
29	04	02 YEARS	
25	00	16 YEARS	TOTAL YEARS OF ACTUAL EMPLOYMENT
29	04	02 YEARS	
24	05	18 YEARS	
30	12	39 YEARS	YEARS TO CALCULATE SEVERANCE PAY
24	05	18 YEARS	
06	07	21 YEARS	

Regarding the table above, the claimant states that the multinational enterprise owes him 21 years and 7 months of salary, plus adjustments, statutory bonuses, and vacation pay for the same period, which amounts to a total severance of USD \$971,208 (nine hundred seventy-one thousand two hundred and eight United States dollars).

He concludes by stating that, in addition, he is entitled to a lifetime pension to be paid by the North American multinational enterprise.

2. Principles of the Guidelines allegedly breached

- Principle N° V. Employment and Industria Relations.

3. Grounds for the submission

With regard to the principles of the Guidelines allegedly breached by the multinational enterprise, the submitter has not provided the grounds on which he asserts that the Guidelines have been violated by the company. Instead, he has merely stated that he has an "active" contract that has not been settled, which is the reason he is requesting the intervention of the NCP.

IV. Solution expected by the submitter of the specific instance

- The submitter requests that the NCP intervene with the multinational enterprise in order to secure payment of what he claims is owed to him: the severance payment for what he claims is an active contract, and the payment of a lifetime pension by the company.

V. Competence of the NCP regarding the specific instance request submitted

As stated in the preface of the Guidelines, their purpose is 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 multinational enterprises*”¹.

Notwithstanding the above, the Guidelines do not provide an explicit definition of a multinational enterprise; however, they offer elements or characteristics that help identify what is to be understood as 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)*”².

In the context of assessing the admissibility of the submission, NCPs must determine whether the companies that are the subject of the claims for alleged 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 aforementioned status as a multinational enterprise has not been addressed. For this reason, it has been considered unproductive to delve further into that qualification, given that the submission lacks foundation in aspects relevant to the Guidelines, as will be explained in the following paragraphs:

1. Substantive arguments of the submitter’s submission

The substantive arguments presented by the submitter are transcribed below:

“The contract, as of today, is over 40 years and 3 months old. It is an open-ended contract that was never terminated by either party and remains in force, despite the fact that I disassociated myself from the company, which was closed in Brazil in 1992. My contract was never terminated or settled, despite letters sent to the General Manager [...] and the Chief Accountant [...] in Houston, Texas, USA. They declared themselves unable to make a decision on the matter and referred the issue to the company’s legal employment department, where [they rejected] my request for severance payment on the grounds that the contract had been inactive. To this, the only argument I can make is that the contract is still active, and no agent or representative of [the company] from anywhere has officially terminated it. For this reason, I am requesting your assistance in resolving this situation; as I am not an active employee and not a member of any union, I am not in a position to pursue this through that channel”³

¹ OECD Guidelines for Multinational Enterprises. Preface. Number 1.

² OECD Guidelines for Multinational Enterprises. Concepts and Principles. Number 4.

³ Specific instance request by the submitter, dated 7 May 2015

In accordance with the preceding paragraph and the submitter's argument regarding the alleged breach of any of the principles of the Guidelines, it is concluded that it is not possible to clearly determine what has been breached or how, as it is only relatively clear that the purpose of the submission is to obtain payment of what is claimed to be owed by the multinational enterprise.

To support the submission in question, the submitter provides a copy of an individual employment contract, entered into on 3 February 1975 between himself and the multinational enterprise in the Municipality of Paulinia, State of São Paulo, Brazil. He also includes a letter sent to the company's Human Resources Department in the United States; the response given by that Department, dated 16 February 2015; and a letter sent to the International Labour Organization (ILO), along with the response received from that Organization, dated 18 May 2015.

2. Legislation applicable to the specific instance request

With regard to the submission addressed in this Final Statement, it should be noted that determining whether or not to offer Good Offices has not been free from various considerations, as it is true that, as previously stated, the Guidelines aim to contribute to improving the climate for foreign investment and to enhance the contribution of multinational enterprises to sustainable development, it is also true that "[...] *the Guidelines extend beyond the law in many cases* [...]"⁴, a situation which has made clarifying the very nature of the request largely the focus of the work undertaken, in order to properly assess the relevance of what is being requested.

In this context, it is important to clarify the scope of applicability of the Guidelines, insofar as they "[...] *provide voluntary principles and standards for responsible business conduct consistent with applicable laws and internationally recognised standards*"⁵, therefore, ruling on the legality, validity, or appropriateness of terminating an employment contract, as well as addressing the relevance or not of unpaid salaries, statutory vacation, compensation, and pensions that may be owed, goes beyond not only the scope of application of the Guidelines but also the authority granted to an NCP.

It would appear that the substance of the matter raised by the submitter relates solely to a litigious issue and not to a violation of any of the general principles set out in the Guidelines (particularly in Chapter V on Employment and Industrial Relations). Consequently, it must be concluded that the NCP lacks the competence to consider or issue a statement on the matters outlined in the preceding paragraphs.

⁴ OECD Guidelines for Multinational Enterprises. Concepts and Principles. Number 2.

⁵ OECD Guidelines for Multinational Enterprises. Preface. Number 1.

In this regard, to determine the scope of application of the Guidelines in relation to the matter at hand, it is necessary to refer to the Commentary on Employment and Industrial Relations of the said Guidelines, which states that: *"The Guidelines, as a non-binding instrument, have a role to play in promoting observance of these standards and principles [from the ILO MNE Declaration]"*⁶ among multinational enterprises"⁷, however, it adds that it is "The International Labour Organisation (ILO) [who is responsible] to set and deal with international labour standards, and to promote fundamental rights at work as recognised in its 1998 Declaration on Fundamental Principles and Rights at Work"⁸, concluding that the Guidelines "[...] echo relevant provisions of the 1998 Declaration, as well as the 1977 ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy [...]"⁹.

In addition, *"The ILO MNE Declaration sets out principles in the fields of employment, training, working conditions, and industrial relations, while the OECD Guidelines cover all major aspects of corporate behaviour"*¹⁰.

In this regard, it is important to clarify that the provisions contained in the Guidelines are not legally binding rules, but rather *"are recommendations addressed by governments to multinational enterprises"*¹¹ and that although (as already indicated) *"[...] the Guidelines extend beyond the law in many cases"*¹², these clearly indicate 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"*¹³.

From what is stated in the previous paragraph, it can be inferred that compliance with or violation of the applicable national legislation does not necessarily imply adherence to or breach of the Guidelines. There may be situations in which companies comply with the law while simultaneously contravening the principles set out in the Guidelines. Conversely, the mere assertion that there has been a violation of the legal framework — in and of itself — does not imply a breach of the Guidelines. This is in view of the fact that these constitute international standards of conduct for multinational enterprises, which relate to general principles.

⁶ Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy of the ILO, 1977.

⁷ OECD Guidelines for Multinational Enterprises. Commentary on Employment and Industrial Relations. Number 48.

⁸ Ibid.

⁹ Ibid.

¹⁰ Ibid.

¹¹ OECD Guidelines for Multinational Enterprises. Foreword.

¹² OECD Guidelines for Multinational Enterprises. Concepts and Principles. Number 2.

¹³ Ibid.

In this regard, 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 [...]”*¹⁴ further adding that *“[...] the Guidelines extend beyond the law in many cases, they should not and are not intended to place an enterprise in situations where it faces conflicting requirements”*¹⁵.

From what has been outlined regarding the Guidelines and the provisions set out in Articles 7, 8 and 76 of the Political Constitution of the Republic of Chile, it follows that investigating and issuing a reasoned decision regarding the legality of a company’s actions falls outside the scope of competence of the NCP. The NCP’s role is to promote and implement the Guidelines, and to assist companies and interested parties in taking appropriate measures to support their implementation. Therefore, it would be inappropriate for the NCP to issue a statement on such matters.

In this same regard, it is important to clarify that the absence of a current judicial or administrative decision regarding the violation of national legislation in the countries where the work has been carried out, or in which the submitter has been employed under the individual employment contract submitted, does not in any way preclude the decision on the admissibility of a specific instance, insofar as the Implementation Procedures of the Guidelines provide *“[...] 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”*¹⁶. Furthermore, these Procedures state 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”*¹⁷.

3. Conclusion

The matter that gives rise to the request, and which has been reiterated on numerous occasions throughout this Final Statement, concerns a determination regarding the extinction or continuation of the rights of either party under an individual employment contract entered into 40 years ago. In particular, the submitter has requested a determination on a matter that falls exclusively within the jurisdiction of the courts of law — namely, the payment allegedly owed by the company due to a purported breach of the aforementioned employment contract, as well as the subsequent compensation for damages that would, in principle, be due.

¹⁴ OECD Guidelines for Multinational Enterprises. I. Concepts and Principles. Number 2.

¹⁵ Ibid.

¹⁶ Commentary on the Implementation Procedures of the OECD Guidelines for Multinational Enterprises. Number 26.

¹⁷ Ibid.

In this way, it can be concluded that the matters referred to above clearly go beyond the scope and purpose of what is established in the Guidelines. For this reason, it was not necessary to notify the multinational enterprise of the request addressed in this Final Statement.

In this context, and having stated the above, the submitter has neither substantiated nor clearly argued a violation of any principle of the Guidelines (particularly those related to Employment and Industrial Relations). Rather, the submitter has merely sought a determination on a matter that falls solely within the remit of the courts of law.

It is for the aforementioned reasons that it has been concluded that the issues raised by the claimant not only do not warrant further consideration, but that pursuing a mediation/conciliation process based on the claims submitted would not contribute to the purpose or effectiveness of the implementation of the Guidelines.



GASTÓN FERNÁNDEZ SCHIAFFINO
Chile's National Contact Point
OECD Guidelines for Multinational Enterprises

Sebastián Sufan Piñeiro / Teresa Corrales Bescós
Executive Secretariat of Chile's National Contact Point

Non-official English translation¹

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