

Final Statement

INFRASTRUCTURE COMPANY & FOREIGN COMPANY (2024)

Non-official English translation

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

FINAL STATEMENT

Infrastructure Company & Foreign Company (2024)

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I. Introduction

1. Chile's National Contact Point for Responsible Business Conduct (NCP), implementing body of the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct (Guidelines), located in the Head of the Responsible Business Conduct Department of the Undersecretariat of International Economic Affairs (SUBREI), hereby issues its Final Statement, in the specific instance "Infrastructure Company & Foreign Company (2024)".
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 (RdP), 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. In this case, the Chilean NCP acts as the lead NCP, while the NCPs of Korea and Spain serve as supporting NCPs.
4. Regarding a specific instance involving events that began before 8 June 2023 and have not ceased by that date, either the 2011 or 2023 versions of the Guidelines may be applied.
5. If the NCP offers its good offices or, in its Final Statement, makes recommendations to the company, this must not be interpreted under any circumstances as a statement that the multinational enterprise in question has breached the Guidelines.
6. According to the Commentary on the implementation procedures of the Guidelines and the RdP, if the NCP considers that publicly identifying a party in a statement would be unfair, it may draft the statement in a way that protects the identity of that party.
7. In accordance with the principle of transparency governing the functions of the NCP, final statements are published on the NCP's website, translated into English, reported, and sent to the OECD Working Party on Responsible Business Conduct.
8. Before the Final Statement is issued, the parties are given the opportunity to comment on its draft, bearing in mind that the wording of the statement is always the responsibility of the NCP, which will determine the final version of the document.
9. 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

10. Foreign cable manufacturing company (hereinafter, the submitter).

b) Identification of the company

11. Foreign multinational infrastructure development company (hereinafter, the company).

III. Issues raised

a) Summary of the specific instance request

12. On 10 September 2024, the submitter filed a specific instance request to the NCP, alleging breaches of the Guidelines by the company. In the request, the submitter states that, in 2021, the parties entered into an international sales contract for goods, the purpose of which was the manufacture and supply of cables for a project being developed by the company in southern Chile. Under that contract, the parties agreed that delivery and payment for the products would take place on five dates specified in the same instrument.
13. The submitter states that the execution of the contract proceeded as agreed until the company delayed payment for the fourth batch of cables, which was eventually made after persistent efforts by the submitter, several months late and in multiple instalments.
14. Regarding the fifth and final batch of cables, the submitter claims that the company refused to receive or pay for it, despite allegedly being obliged to do so. The company justified its decision by stating that the project's principal had unilaterally cancelled the concession, and therefore invoked the early termination clause of the cable purchase contract. This justification is deemed unacceptable by the submitter.
15. The submitter asserts that the alleged breach by the company also resulted in additional costs, due to prolonged storage of goods and expenses related to quality control. Furthermore, the submitter accuses the company of systematic breach of its contracts and deliberate concealment of information to simulate solvency. In this regard, it is noted that the company only disclosed the termination of the concession ten months after becoming aware of it.
16. The submitter identifies alleged breaches by the company of the following chapters of the Guidelines:
 1. Paragraphs No. 10 and 11 of Chapter II: General Policies.
 2. Paragraph No. 13 of Chapter IV: Human Rights.
 3. Paragraph No. 14 of Chapter VI: Environment.
17. The expected outcome by the submitter through the NCP procures is as follows:

Immediate payment for the fifth batch of cables and a detailed explanation of the failure to meet the previously agreed deadlines, justifying the payment delays and the reasons behind invoking the early termination clause of the contract.

b) Summary of the company's response

18. In a meeting held between the NCP and the company on 16 December 2024, the company stated that the principal of the project was not fulfilling its obligations to the company and subsequently terminated the relationship early, which is why the fifth batch of cables was ultimately not required. The company also claimed that this batch consisted of generic-type cables that could be sold on the market. It added that the contract with the submitter was terminated in accordance with the provisions of the same contract.

IV. NCP evaluation of the specific instance

a) Preliminary issues

19. The preliminary issue is whether the NCP has jurisdiction to hear the case.

20. 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.
21. Regarding the first requirement, the requested company is multinational in nature because it has entities in different countries and can coordinate its activities in all of them. Therefore, the first requirement is met. As to the second requirement, the events occurred in Chilean territory.
22. Thus, the NCP is competent to hear the case.

b) Initial assessment

23. In accordance with the Guidelines (2011 version) and the RdP, 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.
24. With regard to this last criterion (f), which is also included in the 2023 version of the Guidelines, it should be noted:
25. Regarding the "purpose" of the Guidelines, its Foreword (2011 version) states that it "aims to promote positive contributions by enterprises to economic, environmental and social progress worldwide." It later notes that Adhering Governments seek to "encourage the positive contribution which multinational enterprises can make to economic, social and environmental progress, and minimise and resolve difficulties which may arise from their operations." (Guidelines 2011, page 7). In the same vein, the first paragraph of the Preface to the 2023 Guidelines states that "The common aim of the Adherents to the Guidelines is to encourage the positive contributions enterprises can make to economic, environmental, and social progress and to minimise the adverse impacts on the matters covered by the Guidelines that may be associated with an enterprise's operations, products and services."
26. For its part, the Guide for National Contact Points on the Initial Assessment of Specific Instances states that "Cases that do not concern [...] issues related to sustainable development (i.e. economic, environmental and social issues, or the issues covered by the chapters of the Guidelines) may fall outside the scope of the mechanism." It then adds that "issues that do not affect the chapters of the Guidelines, such as commercial disputes between companies, would fall outside the scope."

27. In this case, the NCP has concluded that the matter is contractual in nature, involving commercial differences between companies, and not an issue related to sustainable development. Although the submitter has identified recommendations from the Guidelines that were allegedly breached by the company, no link has been established between the reported facts and those recommendations. Furthermore, the submitter has alleged a lack of good faith, ethics, integrity, due diligence, and transparency on the part of the company (which, according to the submitter, would have social and economic impacts), but without identifying any specific recommendations from the Guidelines that are being breached in that regard. After analysing the Guidelines (2011 and 2023 versions), particularly the chapters and paragraphs invoked by the submitter, including the relevant Commentaries, the NCP has not been able to conclude that the facts presented affect the chapters of the Guidelines.
28. On the other hand, regarding “effectiveness”, the Guidelines state that “Adhering countries shall set up National Contact Points to further the effectiveness of the Guidelines [...] contributing to the resolution of issues that arise relating to the implementation of the Guidelines in specific instances.” (Decision of the Council on the OECD Guidelines, paragraph I.1, Guidelines 2011 and 2023).
29. In this regard, it is not observed that the issues raised by the submitter are related to the Guidelines; therefore, the NCP could hardly contribute to their effectiveness through greater consideration of this case. As it concerns a contractual matter, there are other more appropriate mechanisms for addressing it, such as courts of justice or arbitration.
30. Therefore, after analysing the available information and holding bilateral meetings and communications with the parties – in order to obtain more details about the issue raised and greater clarity on the expected outcomes – the NCP concluded that there are no grounds to give further consideration to the issue raised.

V. Conclusion

31. In light of the above, the NCP issues this Final Statement, concluding the specific instance and making recommendations, based on the circumstances and available information.

a) NCP Observations and Recommendations

32. Recommendations for both parties:

The company is recommended to implement risk-based due diligence processes, in accordance with the Guidelines and the OECD Due Diligence Guidance for Responsible Business Conduct. These processes are ongoing and consist of identifying, preventing, and mitigating actual or potential negative impacts of the company’s activities and its business relationships, and reporting on how they are addressed (Paragraphs 11, 12, and 13, Chapter II, Guidelines 2023, pages 14 and 15).

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Non-official English translation¹

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