



National Contactpoint

OECD Guidelines for Multinational Enterprises

Notification

Both ENDS, Fórum Suape, Conectas,
Colônia de Pescadores Cabo de Santo Agostinho
– Atradius Dutch State Business

16 December 2015

ArgentinaAustraliaAustriaBelgiumBrazilCanadaChileColombiaCzechRepublicDenmarkEgyptEstoniaFinlandFranceGermanyGreeceHungaryIcelandIrelandIsraelItalyJapan

Notification to the Dutch National Contact Point from Both ENDS, also submitted on behalf of Associação Fórum Suape Espaço Socioambiental (Fórum Suape), Conectas Direitos Humanos and Colônia de Pescadores do Município do Cabo de Santo Agostinho, concerning an alleged violation of the OECD Guidelines for Multinational Enterprises by Van Oord Marine Ingenuity, Atradius Dutch State Business and Complexo Industrial Portuário Eraldo Gueiros – Empresa Suape, Pernambuco (8 June 2015). On 1 June 2015 Fórum Suape also notified the Brazilian National Contact Point of the specific instance.

Table of Contents

Executive summary	1
Summary of the notification	2
Summary of ADSB's initial response	2
Initial assessment	3
Further considerations	4
Conclusion	4

Executive summary

On 8 June 2015, Both ENDS – in conjunction with and on behalf of local NGOs/CSOs (Associação Fórum Suape Espaço Socioambiental, Conectas Direitos Humanos and Colônia de Pescadores do Município do Cabo de Santo Agostinho) – notified the Dutch National Contact Point of a specific instance concerning an alleged violation of the OECD Guidelines for Multinational Enterprises ('the Guidelines') by Van Oord Marine Ingenuity, Atradius Dutch State Business and Complexo Industrial Portuário Eraldo Gueiros – Empresa Suape, Pernambuco. On 1 June 2015 Fórum Suape also notified the Brazilian National Contact Point of the specific instance.

As part of its initial assessment, the NCP had separate, confidential meetings with both the parties raising the issue and two of the businesses involved (Van Oord Marine Ingenuity and Atradius Dutch State Business) concerning the specific instance and related matters. In accordance with paragraph 23 of the Commentary on the Implementation Procedures of the Guidelines, the Dutch and Brazilian NCPs are working together closely on this case. Both NCPs will act under their own responsibility in accordance with their own procedures. The Dutch and Brazilian NCPs agreed that the Dutch NCP is the right entity to assess the alleged violation by Atradius Dutch State Business NV. The Brazilian NCP will assess the alleged violations by Van Oord Marine Ingenuity and Complexo Industrial Portuário Eraldo Gueiros – Empresa Suape.

The Dutch NCP concludes that this notification merits further consideration based on the following criteria:

- the notifying parties are concerned parties with a legitimate interest in the issues raised in the notification;
- Atradius Dutch State Business (ADSB) is a multinational enterprise within the meaning of the Guidelines;
- the issues raised by Both ENDS et al. are – prima facie – material and substantiated;
- there is a link between ADSB activities and the issues raised in the specific instance;

- consideration of this specific instance may contribute to the Guidelines' objectives and effectiveness.

The decision to further examine this specific instance does not entail substantive research or fact finding, nor does it entail a judgment on whether or not ADSB has violated the Guidelines.

In this initial assessment, the Dutch NCP explains its decision to offer parties its good offices to reach a solution through dialogue, with reference to its specific instance procedure for handling notifications.¹

In accordance with the Dutch NCP procedure, the draft assessment was sent to the parties involved, inviting them to respond in writing within two weeks, after which the initial assessment was finalised, taking into account the parties' comments. The initial assessment was subsequently published on the NCP's website: www.oecdguidelines.nl.

Summary of the notification

On 8 June 2015 Both ENDS – in conjunction with and on behalf of Associação Fórum Suape Espaço Socioambiental, Conectas Direitos Humanos and Colônia de Pescadores do Município do Cabo de Santo Agostinho – notified the Dutch Contact Point of a specific instance concerning an alleged violation of the OECD Guidelines for Multinational Enterprises ('the Guidelines') by ADSB relating to the provision of export credit insurance on behalf of and for the account of the Dutch State with respect to dredging projects by the Dutch company Van Oord for the Suape Industrial Port Complex in Suape, Brazil. Parallel notifications were lodged with Van Oord Marine Ingenuity (Rotterdam), Van Oord Serviços de Operações Marítimas Ltda (Rio de Janeiro) and Complexo Industrial Portuário Eraldo Gueiros – Empresa Suape, Pernambuco, which will be considered by the Brazilian NCP in accordance with paragraph 23 of the Commentary on the Implementation Procedures of the Guidelines.

In this initial assessment the NCP will not express an opinion on the correctness of the statements by the notifying parties.

The notification of the specific instance with respect to ADSB states:

'... ADSB failed to use its influence over Van Oord to ensure compliance with the OECD Guidelines in the activities for which it was providing cover. Similarly, ADSB failed to ensure that the UN Guiding Principles on Business and Human Rights and the IFC's Performance Standards were effectively applied in both of Van Oord's projects in Suape.

'In violation of its own corporate social responsibility, ADSB failed to ensure effective monitoring of the projects' impacts. This behaviour, among other factors, resulted in a failure to consult with the affected people and communities, a loss of traditional ways of life, as well as severe damage to

biodiversity and ecosystems. As an implanting agency that acts on behalf of the Dutch government, ADSB is committed to implementing the OECD Guidelines. In violation of those Guidelines, it failed by not encouraging Van Oord to apply them. By attempting to hold the contracting parties and Brazilian authorities liable for consulting with and guaranteeing the participation of the affected populations, ADSB shirked its responsibility to comply with OECD Guidelines, transferring it instead to the client (cf. communications and letters exchanged between Both ENDS, ADSB and Van Oord).'

Both ENDS et al. specifically request from ADSB (and Van Oord): With respect to substantial claims: '... compensation, mitigation and remediation for damage caused to the traditional communities affected, and to the environment, with restoration to the previous state, and damages for losses suffered, in addition to satisfaction of the communities' claims, so that respect for their human rights is assured....'

With respect to procedural claims: '... within the scope of their authority, and in the light of the Recommendations of the OECD Guidelines for Corporate Responsibility, seek to mitigate and remediate the impacts directly related to the operations of the two projects mentioned herein, with particular attention to the impacts of dredging, rock removal, disposal and filling; as well as the indirect impacts from the damage done to the social fabric of the local communities and the weakening of ecological interactions of existing ecosystems.'

The notification specifically concerns the alleged non-observance of the chapters of the Guidelines on General Policies (chapter II), Disclosure (chapter III, paragraphs 33 and 35), Human Rights (chapter IV) and Environment (chapter VI).

Summary of ADSB's initial response

On 19 October 2015 the NCP received a written response from ADSB to the draft initial assessment of the notification from Both ENDS, in which ADSB indicates that the Ministry of Finance will contact the NCP since the conclusion regarding the notification's admissibility directly concerns export credit insurance policy and instruments. As an implementer of export credit insurance policy, ADSB indicates that it shares the State's opinion that ADSB does not fall within the scope of the OECD Guidelines. In this regard, it refers to the letter from the Ministry of Finance of 19 October 2015, examining the Guidelines' applicability to ADSB. It stresses its willingness to hold further talks with Both ENDS – aside from the NCP notification – on the matters raised in the notification as a follow-up to earlier talks held with Both ENDS since 2012.

In the aforementioned letter, the Ministry of Finance states that it sees the notification against ADSB as a complaint against the State of the Netherlands. In summary:

Atradius DSB carries out its activities within the framework of export credit insurance policy, on behalf of and on the instructions of the State of the Netherlands, represented by the Minister of Finance and the Minister for Foreign Trade and Development Cooperation.

¹ <http://www.oecdguidelines.nl/notifications/contents/specific-instance-procedure>

The complaint against Atradius DSB relates to policy on due diligence, transparency and monitoring and also to its implementation. In implementing the policy, Atradius DSB is required to observe not the OECD Guidelines but the policy adopted by the Minister of Finance. The Minister of Finance is responsible for this policy and its implementation. As a company implementing the export credit insurance facility, Atradius DSB has no say in this policy.

Atradius DSB is not a 'multinational enterprise' within the meaning of the OECD Guidelines because:

- it does not provide insurance independently but advises the State on applications for export credit insurance. The Minister of Finance provides insurance for the State's account and risk;
- policy is drawn up not by Atradius DSB but by the State of the Netherlands. Atradius must follow the instructions of the Minister of Finance in this regard;
- like its Finnish counterpart Finnvera, Atradius DSB occupies a special position.² Unlike Finnvera, however, Atradius DSB is not allowed to provide insurance for its own account and risk.

The export credit insurance facility is covered by special OECD Guidelines on corporate social responsibility

The OECD Guidelines do not apply to export credit insurers because:

- they are covered by special regulations, viz. the Common Approaches;
- the OECD Guidelines are too general and vague, which makes it difficult to use them to assess transactions in advance. They do not lend themselves to due diligence;
- the same rules should apply to all export credit insurers.

The discussion on the OECD Guidelines' applicability to export credit insurers and the relationship between the Common Approaches and OECD Guidelines must therefore be conducted within the OECD itself.

In this initial assessment the NCP will not express an opinion on the correctness of the responses by ADSB and the Ministry of Finance.

Initial assessment

In accordance with the OECD Guidelines and the Dutch NCP's specific instance procedure, the Dutch NCP concludes that, in light of the following considerations, the notification merits further examination.

Is the Dutch NCP the right entity to assess the alleged violation?

The Dutch NCP is the right entity to assess the alleged violation by Atradius Dutch State Business NV, established in Amsterdam.

What is the identity of the notifying party and its interest in the case?

Both ENDS is an independent NGO that aims to strengthen Southern CSOs by supporting strategic networks and by monitoring and lobbying for sustainable capital flows.³ Fórum Suape is an NGO founded in October 2013 in the city of Cabo de Santo Agostinho, Pernambuco, to defend human rights and socio-environmental rights.⁴ Colônia de Pescadores de Município do Cabo de Santo

Agostinho is a civil association representing professional and small-scale fishermen. Conectas Direitos Humanos is an international NGO founded in São Paulo, Brazil, in September 2001.⁵ Its mission is to promote the enforcement of human rights and the rule of law in the southern hemisphere. It has consulting status with the UN, and since May 2009 it has had observer status in the African Commission on Human and Peoples' Rights.

Is Atradius Dutch State Business NV (ADSB) a multinational enterprise according to the Guidelines?

Chapter I (Concepts and Principles), paragraph 4 of the Guidelines states: 'A precise definition of multinational enterprises is not required for the purpose of the Guidelines. These enterprises operate in all sectors of the economy. They usually comprise companies or other entities established in more than one country and so linked that they may co-ordinate 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. According to the actual distribution of responsibilities among them, the different entities are expected to co-operate and to assist one another to facilitate observance of the Guidelines.'

Paragraph 10 of the Commentary on the Guidelines states: 'State-owned multinational enterprises are also subject to the same recommendations [of the Guidelines] as privately-owned enterprises, but public scrutiny is often magnified when a State is the final owner.' The UN Guiding Principles for Business and Human Rights also recognise state-controlled enterprises in this context.

In the NCP's opinion, ADSB is a multinational enterprise according to the Guidelines. ADSB is a 100% subsidiary of Atradius Credit Insurance NV,⁶ which is in turn majority-held by a Spanish corporation listed on the Madrid and Barcelona stock exchanges. ADSB's sole business is to act on behalf of and for the account of the Dutch State, on the basis of an agreement signed with the State in June 2009.⁷ Its activities involve doing due diligence and facilitating the provision of export credit insurance in the international marketplace.

Are the issues raised by Both ENDS et al. material and substantiated?

The issues raised are, prima facie, material and substantiated by documents, and the notification refers to relevant provisions of the Guidelines. The notification concerns the alleged non-observance of the chapters of the OECD Guidelines on General Policies (chapter II), Disclosure (chapter III, paragraphs 33 and 35), Human Rights (chapter IV) and Environment (chapter VI).

² http://oecdwatch.org/cases/Case_g8.

³ <http://www.bothends.org/en/Themes/Mission-Strategy>.

⁴ <http://forumsuape.ning.com/page/quem-somos>.

⁵ <http://www.conectas.org/en/about-us>.

⁶ <https://group.atradius.com/about-us/shareholder-information.html>.

⁷ <http://www.atradiusdutchstatebusiness.nl/about/index.html>.

Is there a link between ADSB's activities and the issues raised in the specific instance?

ADSB performs an environmental and social review of export transactions and investments in accordance with agreements within the OECD (Common Approaches, 28 June 2012⁸) and Dutch policy.⁹ The Dutch Government has decided to enforce the OECD Guidelines by requiring companies to use best efforts if they wish to make use of export credit insurance or investment insurance. By signing the application form, companies confirm that they have taken note of these Guidelines and will apply them to the best of their ability.

The notification concerns ADSB and the responsibility of its clients (Van Oord) to prevent or mitigate alleged adverse impacts under the above-mentioned chapters of the Guidelines.

Based on the points above, the NCP is of the opinion that there is a link between ADSB's activities and the issues raised in the specific instance.

What is the relevance of applicable legislation and procedures including court rulings?

There are no relevant legal issues causing concern about parallel proceedings as far as addressing the notification of the specific instance is concerned.

Would the consideration of the specific problem contribute to the Guidelines' objectives and effectiveness?

The Dutch NCP is of the opinion that dealing with this notification will contribute to the Guidelines' purpose and effectiveness by helping to clarify issues relating to due diligence, monitoring and leverage by Export Credit Agencies (ECAs) for this sector in addition to addressing the case-specific remedies. The dialogue could also contribute to the process currently under way to achieve policy coherence between the Guidelines and other relevant frameworks.

Further considerations

Relationship between ADSB and the Dutch State

The NCP is aware of the special relationship between ADSB and the Dutch State. In view of this statement on admissibility, this special relationship need not impede a dialogue connected with this notification.

As stated in the Commentary on the Procedural Guidance for NCPs, the National Contact Points have an important role in enhancing the profile and effectiveness of the Guidelines. Although enterprises are responsible for observing the Guidelines in their day-to-day conduct, governments can help improve the

effectiveness of the implementation procedures. In that connection, the NCP welcomes the Ministry of Finance's participation in the dialogue arising from this notification, given its close involvement in this issue.

International policy frameworks for export credit insurers

The NCP is also aware of the international policy frameworks within which ADSB and other export credit insurers operate. However, the above-mentioned OECD Common Approaches do not preclude the Guidelines' applicability to the OECD member states or implementing organisations.

Furthermore, ADSB states that it attaches great importance to its corporate social responsibility both as a private enterprise and as a manager of the Dutch State's export credit insurance facility. Thorough assessment of a transaction's environmental and social impact is therefore an integral part of its procedures for underwriting credit and investment insurance.

Coordination by Dutch and Brazilian NCPs

In accordance with paragraph 23 of the Commentary on the Implementation Procedures of the Guidelines, the Dutch and Brazilian NCPs are consulting closely on this case. Both NCPs will act under their own responsibility and in accordance with their own procedures.

Conclusion

The Dutch NCP is of the opinion that this specific instance merits further consideration and will therefore, in accordance with its specific instance procedure, offer its good offices to facilitate a dialogue between Both ENDS and ADSB. The objective is to help the parties reach an agreement on the NCP's recommendations regarding addressing issues connected to the case itself and issues relating to due diligence, monitoring and leverage for the ECA sector on the basis of the Guidelines.

Both sides, the Dutch State/ADSB and the NGOs involved, have accepted the NCP's offer to engage in mediation. In accordance with the NCP procedure, mediation or further examination will be confidential while in progress. The NCP will complete the procedure by issuing a final statement on the outcome, which it will publish on its website.

8 <http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=TAD/ECG%282012%295&doclanguage=en>.

9 http://www.atradiusdutchstatebusiness.nl/Images/Beleidsdocument%202012_tcm1008-133093.pdf.

Argentina Australia Austria Belgium Brazil Canada Chile Colombia Czech Republic Denmark Egypt Estonia Finland France Germany Greece Hungary Iceland Ireland Israel Italy Japan

The role of National Contact Points (NCPs) is to further the effectiveness of the OECD Guidelines. The Dutch government has chosen to establish an independent NCP which is responsible for its own procedures and decision making, in accordance with the Procedural Guidelines section of the Guidelines. In line with this, the Netherlands NCP consists of four independent members, supported by four advisory government officials from the most relevant ministries. The NCP Secretariat is hosted by the Ministry of Foreign Affairs. The Minister for Foreign Trade and Development Cooperation is politically responsible for the functioning of the Dutch NCP. More information on the OECD Guidelines and the NCP can be found on www.oecdguidelines.nl

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