

# U.S. National Contact Point for the OECD Guidelines for Multinational Enterprises



## Final Statement

Specific Instance between European Centre for Democracy and Human Rights, Defenders for Medical Impartiality, and Arabian Rights Watch Association, and The Boeing Company and Lockheed Martin Corporation

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## **Executive Summary**

The U.S. National Contact Point (U.S. NCP) for the OECD Guidelines for Multinational Enterprises (the Guidelines) will not offer mediation in this Specific Instance between the parties – European Centre for Democracy and Human Rights, Defenders for Medical Impartiality, and Arabian Rights Watch Association (“the Submitters”) and The Boeing Company and Lockheed Martin Corporation (“the Companies”) – regarding transactions related to the Government of Saudi Arabia.

The purpose of the Guidelines is to promote responsible business conduct by multinational enterprises. This Specific Instance concerns the conduct of particular States, and would entail an examination of state conduct, which would not serve to advance the Guidelines. Nevertheless, the U.S. NCP offers several recommendations with regards to best practices for implementation of the Guidelines:

### **Recommendations**

- Per the Guidelines, companies in every sector should carry out human rights due diligence and avoid causing or contributing to adverse human rights impacts.
- Companies should consider incorporating the Guidelines into their existing public human rights commitments. The Guidelines recommend that enterprises express their commitment to respect human rights through a statement of policy that is approved at the most senior level of an enterprise and is publicly available.
- The U.S. government regularly engages with civil society and other stakeholders regarding any concerns with U.S. policy, including on the issues raised in the Specific Instance, and is available to discuss the issues further with the submitters.

The U.S. NCP would also note that the U.S. government notifies Congress of proposed Foreign Military Sales (FMS) that meet the monetary thresholds set out in section 36(b) of the Arms Export Control Act, as amended (AECA). In order to provide transparency, this information is made publicly available on the website maintained by the Defense Security Cooperation Agency, at [www.dsca.mil/major-arms-sales](http://www.dsca.mil/major-arms-sales). Furthermore, the United States continues to participate in and provide relevant arms transfer information to the U.N. Register of Conventional Arms and the U.N. Standardized Instrument for Reporting Military Spending. The U.S. Government also notifies Congress of applications

for licenses to export defense articles or defense services satisfying certain dollar-thresholds established in sections 36(c) and 36(d) of the AECA. These notifications are published quarterly in the *Federal Register*.

### **Substance of the Specific Instance**

On June 23, 2016, European Centre for Democracy and Human Rights, Defenders for Medical Impartiality, and Arabian Rights Watch Association (collectively “the Submitters”), human rights non-governmental organizations, submitted a Specific Instance with the U.S. NCP alleging conduct inconsistent with Chapter IV (Human Rights), paragraphs 1, 2, 3, 4, and 5 of the Guidelines, involving conduct by the Boeing Company and Lockheed Martin Corporation (collectively “the Companies”). The events addressed in the Specific Instance cover a period from March 2015 to the submission date.

The Submitters alleged that the Companies failed to take appropriate steps to ensure that their products did not cause or contribute to human rights abuses, and that the Companies’ products directly contributed to adverse human rights impacts in Yemen through their use by the government of Saudi Arabia. The Submitters also claimed that the Companies did not have a relevant human rights policy and did not carry out appropriate human rights due diligence in the sale of their products.

The Submitters requested that the U.S. NCP facilitate a resolution of the issues raised, specifically: (1) identify whether the Companies have caused or contributed to adverse human rights impacts and provide for or cooperate in legitimate processes in the remediation of any potential impact, (2) make recommendations to uphold the Guidelines, including that the Companies refrain from selling arms to the government of Saudi Arabia, and (3) for the Companies to promulgate a human rights policy and incorporate human rights due diligence in their operations.

Following receipt of the Specific Instance, the U.S. NCP acknowledged receipt to the Submitters and shared the Specific Instance with the Companies. The U.S. NCP offered both the Submitters and Companies the opportunity for a meeting or phone call to discuss the process further. Both the Submitters and Companies accepted this offer, and the U.S. NCP met separately and/or spoke with all parties involved in the Specific Instance to discuss the Initial Assessment process.

While awaiting a response from the Companies, the U.S. NCP undertook an Initial Assessment process by reviewing the issues raised in the Specific Instance, as well as consulting with relevant U.S. government experts, and concluded its Initial Assessment prior a written response from the Companies.

## **Decision**

After thorough review of information provided, the U.S. NCP has decided not to offer mediation. The purpose of the Guidelines is to promote responsible business conduct by multinational enterprises. This Specific Instance concerns the conduct of particular States, and would entail an examination of state conduct, which would not serve to advance the Guidelines. According to the 2006 Annual Report on the OECD Guidelines, “The Guidelines implementation procedure is not a state-to-state mechanism and is solely concerned with private party dispute resolution.”<sup>1</sup>

This Specific Instance is inextricably intertwined with the practices of specific states, including Saudi Arabia and the United States. Arms sales to Saudi Arabia were completed through two processes: transfers completed by the U.S. government through the FMS program and Direct Commercial Sales (DCS) in which the exports were approved by the U.S. government. All arms transfer decisions are reviewed and approved under the criteria outlined in the Conventional Arms Transfer (CAT) Policy as detailed in Presidential Policy Directive 27 (PPD-27, January 15, 2014). Under PPD-27, the criteria considered includes the “likelihood that the recipient would use the arms to commit human rights abuses or serious violations of international humanitarian law, retransfer the arms to those who would commit human rights abuses or serious violations of international humanitarian law.” Additionally, for DCS cases, the State Department considers, pursuant to section 38(a)(2) of the AECA, among other factors, whether the sale would “increase the possibility of outbreak or escalation of conflict” or “support international terrorism.” The decision to use arms procured from the United States or these companies is a decision made by Saudi Arabia in its capacity as a sovereign state. However, the use must be consistent with the provisions of the agreement, or license, that was the basis for the sale or approval of the transfer.

Accordingly, this Specific Instance concerns various state practices, which NCPs are not designed to assess. And according to the OECD, “[p]erceptions that

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<sup>1</sup> OECD, Annual Report on the OECD Guidelines for Multinational Enterprises 102–103 (2006)

the Specific Instance procedure is a channel for intervening inappropriately in the domestic affairs of another country would be highly detrimental to the effectiveness of the Guidelines.”<sup>2</sup>

The U.S. NCP brings the Specific Instance to a close with this Final Statement which is published online at [www.state.gov/USNCP](http://www.state.gov/USNCP)



**Melike Ann Yetken**

**[U.S. National Contact Point](#) for the [OECD Guidelines](#)**

U.S. Department of State

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<sup>2</sup> OECD, Annual Report on the OECD Guidelines for Multinational Enterprises 102–103 (2006)

## **Annex: Details of U.S. NCP Specific Instance Process**

### **I. Context and Background on the U.S. NCP**

The OECD Guidelines for Multinational Enterprises<sup>3</sup> (MNEs) are voluntary recommendations for companies regarding responsible business conduct in a global context. The Guidelines are addressed to MNEs operating in or from the territories of governments adhering to the OECD's Declaration on International Investment and Multinational Enterprises, of which the Guidelines form one part. Adhering governments have committed to encouraging their MNEs to promote and implement the Guidelines in their global operations and appointing a national contact point (NCP) to assist parties in seeking a mutually satisfactory resolution to issues that may arise under the Guidelines.

As a part of its function, the U.S. NCP addresses issues relating to implementation of the Guidelines, raised in the form of a Specific Instance, with regards to the business conduct of an MNE operating or headquartered in the United States. The office of the U.S. NCP handles such instances in accordance with its procedures<sup>4</sup> [which are based on Guidelines](#).

The U.S. NCP's primary function is to assist affected parties, when appropriate, in their efforts to reach a mutually satisfactory resolution and its role is to offer mediation to facilitate the resolution of the matter and, where appropriate, make recommendations as to how the enterprise might make its business practices more consistent with the Guidelines. The U.S. NCP does not make a determination as to whether a party is acting consistently with the Guidelines, and the U.S. NCP does not have legal authority to adjudicate disputes submitted under this process.

Acceptance of the Specific Instance is in no way an acknowledgement of or determination on the merits of the claims presented, but merely an offer to facilitate neutral, third-party mediation or conciliation to assist the parties in voluntarily, confidentially, and in good faith, reaching a cooperative resolution of their concerns. In mediation, the parties are responsible for arriving at their own solution, and the process is designed to create an environment for cooperative problem solving between the parties.

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<sup>3</sup> <http://mneguidelines.oecd.org/text>

<sup>4</sup> <http://www.state.gov/e/eb/oecd/U.S.NCP/specificinstance/index.htm>

## **I. Conducting The Initial Assessment**

Per the Guidelines procedures, upon receiving a Specific Instance, the U.S. NCP conducts an Initial Assessment. The Initial Assessment does not determine whether the company has acted consistently with the Guidelines, but rather is a process to determine whether the issues raised are bona fide and merit further examination. Per the Guidelines procedures, the Initial Assessment is conducted based on:

- Identity of the party and its interest in the matter
- Whether the issue is material and substantiated
- Likely link between the enterprise's activities and the issue raised
- Relevance of applicable law and procedures, including court rulings
- Treatment of similar issues in other domestic or international proceedings
- Contribution of the specific issue to the purposes and effectiveness of the Guidelines

Under U.S. NCP procedures, acceptance of the Specific Instance would not have indicated that the U.S. NCP considered the Companies to have acted inconsistently with the Guidelines, but rather that the U.S. NCP considers it appropriate to facilitate a discussion between the parties of the issues raised. For the company's part, a decision to participate in this process would not have implied any prima facie admission of conduct inconsistent with the Guidelines. Mediation or conciliation is a voluntary step, providing an opportunity for a neutral third-party to assist parties to reach their own resolution of concerns. In mediation, the parties are responsible for arriving at their own solution, and the process is designed to create an environment for cooperative problem-solving between the parties. The parties are in control of the outcome of an agreement. Participation is voluntary and no parties would be compelled to violate the law or waive their rights under the law during the NCP process. If the parties can reach an agreement through mediation or other means, the U.S. NCP would consider requests by the parties to follow up on implementation.

The U.S. NCP contributes to the resolution of issues that arise relating to implementation of the Guidelines raised in Specific Instances in a manner that is impartial, predictable, equitable and compatible with the principles and standards of the Guidelines. The U.S. NCP works to facilitate dispute resolution in a confidential, efficient, and timely manner with an aim toward a forward-looking, good-faith resolution and in accordance with applicable law.

## **II. Outcome of the Initial Assessment**

Per the Guidelines, the U.S. NCP took the following points into account when considering whether this Specific Instance merited further consideration.

### *a. Identity of the party and its interest in the matter*

The U.S. NCP is satisfied that Submitters are able to provide information about the Specific Instance and have an interest in the issues raised.

The European Centre for Democracy & Human Rights (ECDHR) is a Brussels-based NGO working to raise awareness of human rights issues in the Middle East and North Africa region and the Gulf Cooperation Council countries. ECDHR promotes policies and actions with European Institutions, key stakeholders, and the media to strengthen advocacy efforts.

The Defenders for Medical Impartiality (DMI) is an initiative of ECDHR that engages with key actors in the international policy and medical community to build a network of support for the international protection of the right to medical impartiality. DMI brings together human rights advocates and healthcare professionals from the Middle East and across the global to advocate on behalf of codifying and protecting the concept of medical impartiality and to document regional violations.

The Arabian Rights Watch Association (ARWA) is a Washington D.C.-based human rights NGO working to defend human rights worldwide, and particularly the human rights of persons situated in the Arabian Peninsula. ARWA investigates human rights abuses on the ground to ensure accountability and to promote and protect human dignity.

The Boeing Company is the world's largest aerospace company and leading manufacturer of commercial jetliners and defense, space and security systems. A top U.S. exporter, the company supports airlines and U.S. and allied government customers in 150 countries. Boeing products and tailored services include commercial and military aircraft, satellites, weapons, electronic and defense systems, launch systems, advanced information and communication systems, and performance-based logistics and training.

Headquartered in Bethesda, Maryland, Lockheed Martin is a global security and aerospace company that employs approximately 98,000 people worldwide and is principally engaged in the research, design, development, manufacture, integration and sustainment of advanced technology systems, products and services.

*b. Whether the issue is material and substantiated*

Submitter(s) have provided information in writing alleging the Companies failed to take appropriate steps to ensure that their products do not cause or contribute to human rights abuses, and that the Companies' products have directly contributed to adverse human rights impacts in Yemen through use by the government of Saudi Arabia. The Submitters also claim that the Companies do not have a relevant human rights policy commitment, and that the Companies did not carry out appropriate human rights due diligence in the sale of their products. The U.S. NCP per its established procedures makes no determination whether a violation of the Guidelines has taken place.

*c. Link between the Companies' activities and issues raised*

The Submitter's allege that the Companies' ongoing sale of arms to the Government of the Kingdom of Saudi Arabia constitutes a breach of the Guidelines due to how those products are being used in Yemen.

*d. Relevance of applicable law and procedures, including court rulings*

While the U.S. NCP has determined that the issues raised fall outside the scope of the Office of the U.S. NCP, there are a number of U.S. laws and policies the U.S. NCP would like to highlight and that were discussed with U.S. government officials during the Initial Assessment phase of the Specific Instance:

- Under section 2 of the AECA, the Secretary of State shall, under the direction of the President, be responsible for the continuous supervision and general direction of sales, leases, financing, cooperative projects and exports under the AECA. Under section 38 of the AECA, and pursuant to delegations of authority, the Secretary of State is authorized to control the export of defense articles and defense services, and, except as specifically provided in regulations, no such export may be done without a license or other authorization. The International Traffic in Arms Regulations (ITAR),

promulgated by the Department of State, implements section 38 of the AECA.

- Section 40A of the AECA, as delegated to the Secretary of Defense by Executive Order 13637, requires the Department of Defense (DoD) to perform End-Use Monitoring (EUM) of U.S. defense articles and defense services sold, leased, or exported under the AECA.
- **Foreign Military Sales (FMS)** include the sale and transfer of defense articles, or the provisions of defense services, to a partner country either from Department of Defense stock or through new procurement. FMS cases are implemented through government-to-government agreements between the United States and the partner country.
- **Direct Commercial Sales (DCS)** are between a U.S. private entity and the foreign end-user (either private entity or government). The Department of State, in close partnership with the Department of Defense, regulates the export and temporary import of defense articles and services through the ITAR.
- **Congressional Notification**, in the case of Saudi Arabia, is required prior to the issuance of any letter of offer to sell defense articles or defense services for \$50 million or more, design and construction services for \$200 million or more, or any major defense equipment for \$14 million or more. Additional notifications may be required if, before delivery of any defense equipment or articles, the sensitivity of technology or the capability of the equipment is enhanced or upgraded.
- **Congressional Notification** is required for certain DCS license applications for exports to Saudi Arabia including the export of any major defense equipment sold under a contract in the amount of \$14,000,000 or more; of defense articles or defense services sold under a contract in the amount of \$50,000,000 or more; firearms controlled under category I of the United States Munitions List (USML) in the amount of \$1,000,000 or more; or for any commercial technical assistance or manufacturing licensing agreement which involves the manufacture of any item of significant combat equipment on the USML.

*e. How similar issues have been, or are being treated in other domestic or international proceedings*

In 2014 the Australian NCP received a Specific Instance regarding the activities of a UK-headquartered company, G4S, in Papua New Guinea. The Australian NCP (ANCP) did not offer mediation, [noting](#) “[t]he ANCP considers

that aspects of the complaint could be interpreted as commentary on government policy. However, G4S as service provider is not accountable for government policy and other mechanisms exist for review and scrutiny of policy. The ANCP is not the most appropriate vehicle for resolution of such matters. It is not the role of the ANCP to issue commentary, whether intended or otherwise, on government policies or law.”

In 2011 the Norway NCP received a Specific Instance regarding the activities of Statoil ASA in Canada. The Norway NCP did not offer mediation, [noting](#) “in this Specific Instance the complaint is directed more towards the policy of Canada to allow the development of oil sands rather than at the manner in which Statoil acts within the framework of this policy. The complaint does not concern whether Statoil, in its activities, is in breach of international instruments or national regulations which are covered by the OECD Guidelines (hereafter the Guidelines). For the NCP to accept the complaint, it would have to specify the manners in which the company has allegedly violated the Guidelines and to substantiate their claim with facts. The complaint should be directed toward the practices of the enterprise rather than at the nature of the business sector and national authorities. The Norwegian NCP thus rejects the complaint on the basis that it does not meet the criteria specified in the OECD Procedural Guidelines, nor does it clearly fall within the scope of the Guidelines.”

*f. Whether the consideration of the Specific Instance would contribute to the purposes and effectiveness of the Guidelines*

The purpose of the Guidelines is to promote responsible business conduct by multinational enterprises. This Specific Instance concerns the conduct of particular States, and would entail an examination of state conduct, which would not serve to advance the Guidelines. According to the 2006 Annual Report on the OECD Guidelines, “The Guidelines implementation procedure is not a state-to-state mechanism and is solely concerned with private party dispute resolution.”<sup>5</sup>

This Specific Instance is inextricably intertwined with the practices of specific states, including Saudi Arabia and the United States. The arms sales in question were completed by the United States, in the cases involving FMS, or, for DCS, approved through a U.S. regulatory scheme. Accordingly, this Specific Instance is ultimately about various state practices, which NCPs are not designed to assess.

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<sup>5</sup> OECD, Annual Report on the OECD Guidelines for Multinational Enterprises 102–103 (2006)

Per U.S. NCP procedures, all parties were given an advanced copy of this Final Statement to allow the opportunity for input.

### **III. Role of the Interagency Working Group**

Per its standard procedures, the U.S. NCP consulted and received input from its U.S. government experts throughout the process, including informing U.S. government experts of the U.S. NCP's decision to not offer mediation.