

# U.S. National Contact Point for the OECD Guidelines for Responsible Business Conduct



## Final Statement

Specific Instance between Divest Invest Protect,  
Indigenous Peoples Law and Policy Program,  
Women's Earth and Climate Action Network and  
Credit Suisse

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## **Executive Summary**

The U.S. National Contact Point (NCP) for the OECD Guidelines (the Guidelines) for Multinational Enterprises (MNEs) has declined to offer mediation services to parties regarding a Specific Instance between, on the one hand, Divest Invest Protect (DIP), Indigenous Peoples Law and Policy Program (IPLP), and Women's Earth and Climate Action Network (WECAN) (collectively, the Submitters) and, on the other, the Switzerland-based Credit Suisse Group (the MNE) regarding the MNE's financing of a U.S.-based energy company.

The U.S. NCP concluded that offering its good offices would not contribute to the purposes and effectiveness of the Guidelines.

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

In early 2020, DIP, IPLP, and WECAN submitted a Specific Instance to the U.S. NCP alleging conduct inconsistent with Chapter II (General Policies), Chapter IV (Human Rights), and Chapter VI (Environment) of the Guidelines. The issues raised in the Specific Instance cover a period from 2016 to the present.

The Submitters claim that the MNE has not leveraged its business relationship with the U.S.-headquartered Energy Transfer Partners (ETP) energy company to prevent or mitigate potential adverse impacts linked to the MNE's ongoing financing services of ETP's U.S.-based oil pipeline activities. ETP is a company engaged in natural gas and propane pipeline transport and is the company that built and is now operating the Bakken Pipeline system, including the Dakota Access Pipeline. The Submitters alleged that the MNE failed to exert its due diligence responsibilities under the Guidelines to identify, prevent, and mitigate actual and potential adverse impacts, such as human rights abuses and environmental and social impacts to surrounding communities. To address the allegations, the Submitters requested that the U.S. NCP offer mediation between the MNE and the Submitters.

During the course of the Specific Instance process, the MNE responded to the Submitters' complaint and asserted that in relation to transactions with ETP, the MNE's governance procedures, policies, and internal processes – including the environmental and social due diligence – are aligned with the Guidelines. The MNE claimed that the focus of its due diligence was the corporate entity to which financial services were provided, and that key projects at the time, including the oil pipeline system, were assessed. The MNE added that it had already participated in Swiss NCP-led mediation based on the same client relationship in 2019, and that the issues raised are being adjudicated in U.S. courts.

### **Decision**

The purpose of the Guidelines is to promote responsible business conduct by multinational enterprises. Adhering governments to the Guidelines have committed to encouraging their multinational enterprises to promote and implement the Guidelines in their global operations and appointing an NCP to assist parties in seeking a mutually satisfactory resolution to issues that may arise under the Guidelines.

Per the Guidelines, the U.S. NCP considered the criteria in the NCP Specific Instance Procedural Guidance in determining the admissibility of this Specific Instance. After thorough review of the information provided, the U.S. NCP has decided not to offer its mediation services, and brings the Specific Instance to a close with this Final Statement, which is published online at [www.state.gov/u-s-national-contact-point-for-the-oecd-guidelines-for-multinational-enterprises](http://www.state.gov/u-s-national-contact-point-for-the-oecd-guidelines-for-multinational-enterprises).



U.S. National Contact Point for the OECD Guidelines  
U.S. Department of State

## **Annex: Details of U.S. NCP Specific Instance Process and Outcome of Initial Assessment**

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

[The OECD Guidelines for Multinational Enterprises](#) (Guidelines) 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 an 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, which are based on the Guidelines.

One of the U.S. NCP's functions 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.

### **II. 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 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

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.

### III. 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 the Submitters have provided sufficient information regarding their interest in the issues raised. DIP, IPLP, and WECAN are U.S.-based organizations comprised of indigenous peoples, students, lawyers, and environmental activists. The Submitters have previously engaged directly with the MNE to attempt a resolution of their concerns.

*b. Whether the issue is material and substantiated*

The Submitters provided information in the form of letters and annexes in their submission alleging the MNE's business relationship with its client, ETP, and specifically, the corporate-level financing that the MNE provides to ETP.

The U.S. NCP, per its established procedures, makes no determination as to whether the MNE's activities were conducted in accordance with the Guidelines.

*c. Link between Respondent's activities and issues raised*

The Guidelines apply across all sectors, including the financial sector and lenders. The OECD's 2019 *Due Diligence for Responsible Corporate Lending and Securities Underwriting (Lending Due Diligence)*<sup>1</sup> guidance notes that a relationship between a bank and a client is considered a "business relationship" under the Guidelines, but that due diligence does not shift responsibilities; each enterprise in a business relationship has its own responsibilities to identify and address adverse impacts. "Where a bank is directly linked to an adverse impact through a client, but does not cause or contribute to it, the bank will not be responsible for remedying the impact."<sup>2</sup> The Guidelines instead recommend that "each enterprise addresses its own responsibility with respect to adverse impacts,"<sup>3</sup> and banks would therefore be expected to consider and act on responsible business conduct risks throughout their corporate lending activities and to use their leverage with their clients to influence them to prevent or mitigate adverse impacts where relevant.

There is a plausible link between the MNE's activities and the issues raised. According to the *OECD Due Diligence Guidance for Responsible Business Conduct (OECD Due Diligence*

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<sup>1</sup> OECD, *Due Diligence for Responsible Corporate Lending and Securities Underwriting: Key Considerations for Banks Implementing the OECD Guidelines for Multinational Enterprises* (2019), available at <http://mneguidelines.oecd.org/due-diligence-for-responsible-corporate-lending-and-securities-underwriting.pdf>. The document notes that the opinions and arguments therein "do not necessarily reflect the official views of the OECD or of the governments of its member countries."

<sup>2</sup> *Id.*, at p.19.

<sup>3</sup> *Id.*

*Guidance*),<sup>4</sup> regarding whether a business has contributed to adverse impacts, “the mere existence of a business relationship or activities which create the general conditions in which it is possible for adverse impacts to occur does not necessarily represent a relationship of contribution.”<sup>5</sup> The activity in question would need to have substantially increased the risk of adverse impact. This guidance further notes that an enterprise’s relationship to adverse impact is not static. “It may change, for example as situations evolve and depending upon the degree to which due diligence and steps taken to address identified risks and impacts decrease the risk of the impacts occurring.”<sup>6</sup>

Per the OECD’s *Lending Due Diligence*, a bank “providing a financial product or service is not inherently problematic.”<sup>7</sup> The MNE would have needed to take a specific action or omission that motivated or encouraged ETP to cause harm, in addition to the provision of the financing service itself. It would be difficult to conclude that the MNE has taken actions to incentivize its client to cause harm in the context of a general corporate lending transaction. Similarly challenging is determining the degree of foreseeability of the potential impact and the degree to which actions taken by the MNE have mitigated or decreased the risk of that impact.

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

The U.S. NCP is not aware of any applicable law or procedures that would weigh against offering its mediation service in this case. It is aware that on January 26, 2021, the U.S. Court of Appeals for the D.C. Circuit, a federal appeals court, upheld a U.S. District Court judge’s order for a full environmental impact review of the Dakota Access Pipeline – a more extensive review than the one conducted by the U.S. Army Corps of Engineers. The ruling revokes a Corps-granted easement for the pipeline to cross beneath Lake Oahe on land near the Standing Rock Sioux Tribe reservation, but did not require the pipeline to stop operating or be emptied of oil while the review is completed.

According to the Guidelines, parallel proceedings do not preclude an NCP from deciding that issues merit further consideration. NCPs should not decide that issues do not merit further consideration solely because parallel proceedings have been conducted, are underway, or are available to the parties concerned. Rather, 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.<sup>8</sup>

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

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<sup>4</sup> OECD, *OECD Due Diligence Guidance for Responsible Business Conduct* (2018), available at <https://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf>.

<sup>5</sup> *Id.*, p.70.

<sup>6</sup> *Id.*, p.71.

<sup>7</sup> OECD, *Due Diligence for Responsible Corporate Lending and Securities Underwriting: Key Considerations for Banks Implementing the OECD Guidelines for Multinational Enterprises* (2019), p. 44.

<sup>8</sup> OECD Guidelines for Multinational Enterprises (2011 Edition), available at <http://www.oecd.org/daf/inv/mne/48004323.pdf>, p. 83

Following mediation organized by the Swiss NCP, in September 2019, the MNE and the Society for Threatened Peoples, Switzerland reached an agreement related to the MNE's business relationship with construction companies involved in the development of the Dakota Access Pipeline in the United States. According to the agreement and the MNE's subsequent updated Sector Policies and Guidelines, the MNE will include the concept of Free, Prior and Informed Consent (FPIC) of indigenous peoples in its internal sector-specific policies for "Oil & Gas, Mining and Forestry & Agribusiness."

The principal difference between the Specific Instances alleged by the Submitters in this Specific Instance relates to questions about corporate-level, rather than project-related, financing of extractive industries. The U.S. NCP views offering mediation in this Specific Instance would not likely further the discourse of the analysis in the OECD's *Lending Due Diligence* to understand the relationship between financing and the specific activities of the client causing alleged harm.

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

The U.S. NCP considers that mediation would not play a positive role in assisting the parties in a dialogue on the issues raised in the Specific Instance, nor in reaching a mutually acceptable solution. Consistent with the criteria in the U.S. NCP procedures for Specific Instances (as established in the Guidelines themselves), the U.S. NCP has determined in the course of its Initial Assessment that the matters raised are bona fide, but do not merit further consideration by the U.S. NCP. Specifically, the U.S. NCP views that offering its good offices would neither contribute to the purposes nor to the effectiveness of the Guidelines.

While financial institutions' threshold of due diligence is an evolving standard under the Guidelines, offering mediation in this Specific Instance to encourage dialogue related to the same business relationship, and largely the same and similar adverse impact, that has been mediated in a separate instance is unlikely to provide a further opportunity to positively contribute to the resolution of issues.

#### *The Guidelines and Leverage*

Paragraph A.12 of the Guidelines states that enterprises should:

"Seek to prevent or mitigate an adverse impact where they have not contributed to that impact, where the impact is nevertheless directly linked to their operations, products or services by a business relationship. This is not intended to shift responsibility from the entity causing an adverse impact to the enterprise with which it has a business relationship."

The OECD Commentary on the Guidelines says, in regards to supply chain responsibility:

"If the enterprise identifies a risk of contributing to an adverse impact, then it should take the necessary steps to cease or prevent its contribution and use its leverage to mitigate

any remaining impacts to the greatest extent possible. Leverage is considered to exist where the enterprise has the ability to effect change in the wrongful practices of the entity that causes the harm.”<sup>9</sup>

This supply chain responsibility is further clarified in paragraph 20 of the Commentary on General Principles:

“Meeting the expectation in paragraph A.12 would entail an enterprise, acting alone or in co-operation with other entities, as appropriate, to use its leverage to influence the entity causing the adverse impact to prevent or mitigate that impact.”<sup>10</sup>

From the above-quoted passages from the Guidelines and the official Commentary, enterprises are responsible for the adverse impacts of other entities in the same supply chain even while those entities remain responsible for their own actions. These two separate responsibilities do not contradict each other. The U.S. company whose projects receive ongoing financing would be responsible for any violations it commits. However, that does not absolve that company or the financier from the responsibility to do what it can to prevent or mitigate such abuses and ensure that the exchange of services does not reduce rights. The need for due diligence flows from this responsibility.

It is also clear that an enterprise should use its leverage to prevent or mitigate adverse impacts.<sup>11</sup> Leverage is a complex issue. How much leverage a company may have in any given supplier relationship depends upon all the variables in play in that specific situation. In many cases, a company may not even be aware of the full extent of (or the limits to) its leverage until it attempts to wield that leverage in that case. However, the Guidelines also imply that a lack of leverage does not justify inaction.

The Guidelines recognize that there are practical limitations on the ability of enterprises to effect change in the behavior of their suppliers, related to, among other issues, product characteristics, the number of suppliers, and the structure and complexity of the supply chain. Nonetheless, enterprises may influence their suppliers, such as through contractual arrangements, voting trusts, and participation in industry-wide collaborative efforts with other enterprises with which they share common suppliers.<sup>12</sup>

#### **IV. Due Diligence**

The principles of effective due diligence are elaborated in the aforementioned *OECD Due Diligence Guidance*,<sup>13</sup> which are non-binding recommendations applicable to all sectors and adopted in May 2018. While a Specific Instance cannot be submitted on the basis of the *OECD Due Diligence Guidance* itself, the guidance does promote a common understanding of the

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<sup>9</sup> *Id.* p. 24.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*, p.25.

<sup>13</sup> OECD Due Diligence Guidance for Responsible Business Conduct (2018)

characteristics and processes of due diligence under the Guidelines, and therefore is a useful reference and tool.

The Guidelines recommend that companies use due diligence to identify, prevent and mitigate actual and potential adverse impacts, as well as account for how these impacts are addressed. Due diligence is a flexible, risk-based process and not a specific formula for companies to follow. It requires companies to know and describe the potential effects their operations could have on local communities, and on that basis take steps to address the risk. The fundamentals of the concept are familiar to companies working with risk management systems. The Guidelines acknowledge that due diligence can be included within broader enterprise risk management systems, provided that it goes beyond simply identifying and managing material risks to the enterprise itself to include the risks of adverse impacts related to matters covered by the Guidelines<sup>14</sup>.

Companies implementing due diligence processes are much better equipped to handle actual and potential adverse impacts. Additionally, companies that fail to undertake sophisticated due diligence processes run the risk of complaints from different entities, such as civil society, under various grievance mechanisms. The due diligence concept as described in the Guidelines is consistent with the UN Guiding Principles on Business and Human Rights.

## **V. Role of the Interagency Working Group and Relevant NCPs**

Per its standard procedures, the U.S. NCP consulted its U.S. government experts throughout the process. The U.S. NCP also consulted with the Swiss NCP.

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<sup>14</sup> OECD Guidelines for Multinational Enterprises (2011 Edition), p. 23