

Initial Assessment by the Israeli National Contact Point for the OECD Guidelines for Multinational Enterprises

Regarding:

**the Complaint of Comite de Solidaridad con la Causa Arabe concerning Shapir
Engineering and Industry**

8 December 2021

Contents

I. Summary of the Israeli National Contact Point (IL NCP) decision

* The Complainant, **Comite de Solidaridad con la Causa Arabe**, (hereinafter, "the Comite") alleges that Shapir Engineering and Manufacturing's (hereinafter, "Shapir") involvement in the tender competition run by the Israeli Authority to build a tram line and extend another in certain areas of Jerusalem and the West Bank and to provide trams, traffic signals, power and communications systems and to operate the tram lines and traffic signals for 15 to 25 years is inconsistent with OECD Guidelines.

* Shapir informed the IL NCP that in regards to the tender for the construction of the Jerusalem light rail, all its actions were done in accordance with Israeli law and in line with protecting human rights.

* In accordance with the Implementation Procedures of the OECD Guidelines, issues are to be dealt with by the NCP of the country in which the issues have arisen.¹ The activities that are being alleged to be in breach of the Guidelines were and are being carried out in Israel and relate directly to Israeli government policy.² Accordingly, the Israeli National Contact Point is best situated to handle this complaint.³

* After reviewing all six of the Initial Assessment Criteria set out in the Commentary on the Implementation Procedures of the OECD Guidelines for Multinational Enterprises, the IL NCP finds no basis for further examination of the complaint.

* This decision is made following a full review of the allegations raised by the complainant, and further to independent information about the complainant received from the Spanish NCP, and information received regarding the project from various sources including from the relevant Israeli Authorities.

¹ *Commentary on the Implementation Procedures of the OECD Guidelines for Multinational Enterprises* (2011 edition) at 82, paragraph 23.

² In fact, as referenced further herein, to the extent allegations are raised with regard to Israel's policy related to the trams and tram lines, the courts in Israel, not the NCP, are the appropriate fora, as the NCP addresses corporate violations of the OECD Guidelines.

³ For simplification purposes, the IL NCP substitutes the term "complaint" for "specific instance".

II. Substance of the Complaint

Comite de Solidaridad con la Causa Arabe, a non-governmental organization which describes itself as an organization that studies and promotes international human development cooperation, including actions aiming to contribute to the improvement in the human development index of the Arab world (see below section VI), submitted a complaint alleging that actions carried out by Shapir are inconsistent with Chapters I-IV (Concepts and Principles, General Policies, Disclosure, Human Rights), V and VI (Employment and Industrial Relations and Environment), X (Competition), XI (Taxation) of the OECD Guidelines (pages 3-5 of the complaint).

The complaint alleges that Shapir is in breach of the OECD Guidelines, *inter alia*, by:

- Participating in the tender process to work on the tram lines in and near Jerusalem and the West Bank organized by the Israeli authority, which the complainant describes as the "occupying Power in the Palestinian Occupied territories";
- Giving a false account of the awarded contract to shareholders, investors, clients and providers;
- Associating itself with "theft and the financial, regulatory and the reputation risks" of the taxation system in the area in which the Comite claims that "only randomly does the occupying Power transfer[s] amounts to the Palestinian Authority";
- Acting in complicity with the authorities in expropriating Palestinian property and demolishing it.

In the complaint, the Comite requests that Shapir end its participation in the tram line project so that Israel will discontinue it and "report its withdrawal to the Palestinian authorities."

III. IL NCP Handling Process

The Initial Assessment handling process, as outlined below, was conducted to determine whether the issues raised merit further examination.

23 January 2020	The IL NCP receives a complaint regarding Shapir via email from the Comite.
28 January 2020	The IL NCP shares the complaint regarding Shapir with the Spanish NCP.
30 January 2020	The IL NCP sends confirmation of receipt of the complaint to the complainant.
30 January 2020	The IL NCP shares the complaint with Shapir.
3 February 2020	The IL NCP and Spanish NCP Secretariat discuss how to handle the two complaints procedurally. The two NCPs agreed in principle to share all information and work on the two cases together. It was also proposed that the IL NCP serve as the lead NCP. The Spanish NCP Secretariat indicated its willingness to have the IL NCP be the lead NCP, but noted that this recommendation would need to be approved by the Spanish NCP.
4 February 2020	The IL NCP receives a copy of the Complaint that had been submitted to the Spanish NCP regarding a Spanish company, Construcciones y Auxiliar de Ferrocarriles (CAF), from the Spanish NCP Secretariat.
10 February 2020	The IL NCP shares requested information with the Spanish NCP Secretariat and agrees to have a coordination meeting on the sidelines of the March 2020 RBC meeting. This meeting was later canceled due to travel restrictions stemming from the COVID-19 crisis.

March – May 2020	The IL NCP is on mandatory leave due to a lockdown in Israel.
1 April 2020	After consultations with the Chair of the RBC, the IL NCP notifies all parties that due to restrictions related to the COVID-19 crisis, there will be delays in the handling of the complaint.
20 April 2020	The Comite starts what becomes a monthly email campaign to a broad distribution list of non-relevant recipients from OECD and governmental entities.
22 April 2020	The IL NCP contacts the Spanish NCP by email to coordinate a meeting to receive an update from the Spanish NCP.
11 May 2020	The Spanish NCP informs the IL NCP that it cannot move forward with the matter without having an internal, in-person meeting. Due to the shutdown in Spain, the Spanish NCP does not know when that will be possible.
3 June 2020	The Spanish NCP again updates the IL NCP that it has not had its internal meeting due to the shutdown. The Spanish NCP commits to updating the IL NCP once there is such a meeting.
11 June 2020	The IL NCP receives information it requested from the Spanish NCP Secretariat regarding the complainant.
18 December 2020	The IL NCP reaches out to the Spanish NCP Secretariat regarding rumors that it has moved forward in the handling of the case.
18 December 2020	The Spanish NCP Secretariat denies the rumors and states that it is still conducting internal inquiries. It also informs the IL NCP that there

has been a change in the personnel handling the complaint.

23 December 2020

The Spanish NCP confirms that no decision has been taken how to move forward with the Complaint and once a decision is taken it will inform the IL NCP.

15 January 2021

A Zoom meeting is held between the IL NCP and the Spanish NCP. The Spanish NCP updates that it has started to work on its initial assessment. The Israeli NCP requests cooperation or at least coordination in the handling of the two cases.

04 February 2021

The OECD Secretariat sends a letter dated February 4, 2021 to the complainant in response to its monthly email explaining the different roles of the OECD and NCPs in the handling of complaints. The OECDs role is to give support to the NCPs in order to fulfill their tasks.

March 2021

The IL NCP receives unofficial information that the Spanish NCP has concluded its initial assessment and has accepted the case.

22 March 2021

The IL NCP requests the intervention of the Chair of the WPRBC to assure that the spirit of the Guidelines is followed with regards to NCP coordination.

12 April 2021

A meeting is held between the IL NCP and the Spanish NCP under the auspices of the Chair of the WPRBC. The Spanish NCP assures the IL NCP that it has not yet finished its initial assessment and agrees to share its draft assessment with the IL NCP.

22 April 2021	The Chair of the WPRBC sends the Spanish NCP a reminder of its agreement to share its initial assessment with the IL NCP.
September 2021	Given the lack of cooperation from the Spanish NCP, the IL NCP decides to proceed with its initial assessment without any further coordination with the Spanish NCP.
12 October 2021	The IL NCP receives a copy of the Spanish NCP's initial assessment from the OECD Secretariat accepting the case, dated March 9 th 2021. In addition, the Secretariat informs the IL NCP that mediation was not accepted in that complaint and that the Spanish NCP is working on its final decision.
November 2021	IL NCP completes its assessment of the complaint and additional information received and finalizes its decision.

IV. OECD Guidelines for Multinational Enterprises provisions cited

The Comite includes claims relating to many provisions of the OECD Guidelines, including Chapters I-IV (Concepts and Principles, General Policies, Disclosure, Human Rights), V and VI (Employment and Industrial Relations and Environment), X (Competition), and XI (Taxation). The text of these provisions may be viewed at <http://www.oecd.org/daf/inv/mne/48004323.pdf>.

V. Initial Assessment process

Upon receiving a complaint, the IL NCP follows the Initial Assessment process to determine whether the issues raised therein merit further examination. The IL NCP does not determine whether the company has acted consistently with the Guidelines. The Initial Assessment Criteria are set out in paragraph 25 of the Commentary on the Implementation Procedures of the OECD Guidelines for Multinational Enterprises (hereinafter: "the Commentary"):



In making an initial assessment of whether the issue raised merits further examination, the NCP determines whether the issue is bona fide and relevant to the implementation of the Guidelines. In this context, the NCP takes into account:

1. the identity of the party concerned and its interest in the matter;
2. whether the issue is material and substantiated;
3. whether there seems to be a link between the enterprise's activities and the issue raised in the specific instance;
4. the relevance of applicable law and procedures, including court rulings;
5. how similar issues have been, or are being, treated in other domestic or international proceedings;
6. whether the consideration of the specific issue would contribute to the purposes and effectiveness of the Guidelines.

VI. IL NCP decision

The IL NCP has taken the following points into account when considering whether the complainant's concerns merited further consideration:

The identity of the party concerned and its interest in the matter

In its complaint, the Comite did not specify its interest in the matter about the rail project to which the complaint relates, nor did it describe its connection to the issues raised. The Israeli NCP was informed by the Spanish NCP that the Comite has been legally registered in the Spanish NGOs Register since 1986.

According to the information relayed by the Spanish NCP from the complainant to the Israeli NCP, the Comite describes its mandate as, among other objectives, to "study the problems of the Arab world, with special reference to the cultural and socio-politic environment, with the aim to promote mutual knowledge and the development of a culture of peace, solidarity and social justice"; and "to promote international human development cooperation, including any actions aiming to contribute to the improvement in the human development index of the Arab countries, especially in the area of basic social infrastructures: health, education, water and sanitation and other services aimed at vulnerable populations". The complainant has frequently involved itself in issues of international law and human rights advocacy in the area and have visited the region repeatedly.

Given this information, the Israeli NCP is satisfied that the Comite has an interest in the issues raised and satisfies the first criterion of the Initial Assessment evaluation.

Whether the issue is material and substantiated

In its complaint, the Comite cites the Fourth Geneva Convention and a few UN resolutions to support its conclusion that Israeli settlements are illegal and therefore, it contends that Shapir "should detach itself from a project of the occupying Power".⁴ As detailed more in depth in other sections of this initial assessment, it is inappropriate to use the NCP mechanism to make political decisions. The IL NCP will note that the aforementioned Convention and resolutions relate to Government activity and do not require or call upon companies to cease operating or providing services in the West Bank or to boycott Israel.⁵

According to the Complaint, Shapir "should detach itself from a project of the occupying Power".⁶ The complainant is not asking the IL NCP to examine business conduct to see if it is in accordance with the voluntary principles for responsible business conduct delineated in the OECD Guidelines, but the Comite seeks a review of and determination regarding State conduct which would not serve to advance the Guidelines. Moreover, the Complaint does not establish any connection between the alleged violations and the commercial activity. The role of an NCP is to review business conduct – not State conduct. It is not the role of an NCP, nor does it have the ability, capacity or tools to undertake an examination of State conduct. The IL NCP attempted to distinguish between the corporate social responsibility issues and government duties arising out of this complaint but was unable to do so given the inextricable link drawn between the two by the complainant. This connection was underscored by the complaint's multitude of references to the "occupying Power" and "occupation" in the description of the alleged violations by Shapir and its references to international conventions or resolutions which relate purely to State conduct.⁷ Thus, the IL NCP is of the view that the issues raised are not determinable within the NCP review mechanism, and they do not relate to or advance the application of the OECD Guidelines.

⁴ Complaint, p. 5.

⁵ It should also be noted that it is unclear whether such a complaint can be brought against Shapir. The OECD Guidelines are directed at the conduct of multinational enterprises and Shapir operates exclusively within its jurisdiction of domicile. However, as the IL NCP has decided not to proceed with the examination of the complaint on other grounds, it is not required to reach a determination on this issue.

⁶ Complaint, p. 5.

⁷ The IL NCP will note that in its research into the complaint, it was informed by government authorities of due diligence inquiries made by Shapir leading up to the tender competition. Again, as the corporate social responsibility and government duties are not separable in this complaint, the IL NCP will not address the adequacy of those efforts by the company.

Whether there seems to be a link between the enterprise's activities and the issue raised in the specific instance

The Comite's complaint contains various allegations against Shapir and the Israeli authority responsible for organizing the tender process for the light rail and lists several alleged violations of the OECD Guidelines that it perceives arise from the project or from Shapir's involvement in it (the complaint does not seem to distinguish between the project overall and Shapir's role in it). However, beyond these bald assertions, the complainant fails to provide any information demonstrating a meaningful link between the company's activities related to the light rail project and the alleged harmful consequences that it lists in its complaint. For instance, the complaint fails to establish any connection between Shapir's activities and the alleged violations with regard to illegal construction, demolition and expropriation of Palestinian property. Moreover, we note that the complaint's failure to distinguish between activities attributed to the State and activity attributed to a commercial company is in itself problematic.

Even if the IL NCP was presented with sufficient facts from which it could be concluded that Shapir's activities rise to the level of breaches of the OECD Guidelines, the IL NCP is of the view, after its review of the matter, that Shapir does not have the leverage over the Israeli authorities that the Comite attributes to it. There is also insufficient information to support the complainant's claim that Shapir's withdrawal from the project would cause the Israeli authorities to cancel the project. Israeli practice reflects that if one bidder withdraws from a tender, the tender continues with the remaining bidders. In addition, the IL NCP finds the Comite's assertion that the mere withdrawal of Shapir from the project would lead Israeli authorities to change its policies with regard to the territory is unfounded, as efforts to end the conflict in the area for decades have failed to yield to such a result.

The IL NCP is of the strong view that this Initial Assessment criterion requires NCPs to consider not just whether there is *any* link between the enterprise's activities and the issues raised in a complaint but whether the link is substantial and meaningful *enough* to justify further examination in the NCP process. The IL NCP therefore finds, after a review of the allegations of the parties, and of prior relevant decisions, that this criterion has not been met.

The relevance of applicable law and procedures, including court rulings

The Comite alleges that Shapir's involvement in the tender process run by the Israeli Authority to work on the tram project in certain areas of Jerusalem and the West Bank and to provide equipment and operate the lines and signals for 15 to 25 years conflicts with OECD Guidelines.

It is important to recall that while the OECD Guidelines have been approved within the OECD international forum, they do not supersede domestic laws. As the commentary states "The *Guidelines* are not a substitute for nor should they be considered to override local law and regulation. They represent supplementary principles and standards of behaviour of a non-legal character, particularly concerning the international operations of these enterprises."⁸

The IL NCP understands that the tender process for the tram project and its development are subject to Israeli laws such as the Mandatory Tenders Law, 5752-1992, the Planning and Building Law, 5725-1965 and legal directives. Actions taken related to these tenders are subject to judicial review in the Israeli courts. A review of the case law reflects that the High Court of Justice routinely rules upon cases in which allegations are raised that the actions of the Government or enterprises violated domestic law.

As the complainants or other parties who seek redress regarding allegations against the State of Israel or its planning decisions may and do file complaints to the relevant authorities in Israel, the IL NCP does not view itself or the NCP mechanism as an alternative avenue for such claims.

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

The issues addressed in this complaint were the subject of legal proceedings in France when plaintiffs initiated a case regarding the civil liability of French companies for their role in the construction in the Jerusalem light rail project. In 2013, the Court of Appeals of Versailles upheld a 2011 lower court ruling that the French companies' participation in the project did not violate international law.⁹ As part of its decision, the Court of Appeals also concluded that those companies had not violated their corporate and ethical duties and responsibilities by signing or executing these construction contracts.

More generally, as previously mentioned, the Comite does not seem to be asking the NCP to examine Shapir's business conduct to see if it is in accordance with the voluntary principles for responsible business conduct delineated in the OECD Guidelines, but rather to examine State conduct. Numerous NCPs faced with complaints which were directed at, or which required reaching conclusions regarding State conduct, dismissed the complaint at the initial assessment stage, without referring the parties to mediation.

⁸ OECD (2001:12).

⁹ *Association France-Palestine Solidarité 'AFPS' v. Société ALSTOM Transport SA*, Case No. 11/05331, Versailles Court of Appeal, 22 March 2013.

The 2012 matter of Climate Network and Concerned Scientists Norway vs. Statoil¹⁰ demonstrates how this topic is typically handled by NCPs. The complainants alleged that Statoil's oil production in the oil sand fields of Alberta, Canada was in breach of the OECD Guidelines. In its initial assessment, the Norwegian NCP concluded that while the environmental issue raised concerning greenhouse gas emission and climate change was a serious one (which presented significant risks of major emissions), the complaint was "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," and should therefore be dismissed.

In 2015, the Australian NCP (hereinafter, "ANCP") reached a similar conclusion in Human Rights Law Centre and Raid vs. G4S.¹¹ The complaint alleged that G4S, in its capacity as the company contracted by the Australian Government to oversee management and security at the Manus Regional Processing Centre (hereinafter, "MRPC"), failed to comply with OECD Guidelines. The ANCP did not see the allegations raised in the complaint as appropriate for mediation. It issued a decision dismissing the complaint, and specifically referenced the political nature of the complaint noting that "[t]he ANCP considers that aspects of the complaint could be interpreted as commentary on government policy." The ANCP stated that "G4S as a service provider is not accountable for government policy and other mechanisms exist for review and scrutiny of policy". The NCP also found that it was not the most appropriate forum to resolve such matters, and that it was "not the role of the ANCP to issue commentary, whether intended or otherwise, on government policies or law." The OECD Investment Committee in its Response to the Substantiated Submission by OECD Watch in 2018 to the ANCP's handling of the complaint, confirmed that issues that "solely addresses government policy or conduct" fall outside the scope of the Guidelines.¹²

These decisions by the Australian and Norwegian NCPs were also cited by the US NCP, in 2016, in the case of *European Centre for Democracy and Human Rights, Defenders for Medical Impartiality, and Arabian Rights Watch Association vs. The Boeing Company and Lockheed Martin Corporation*.¹³ The complainants alleged that the companies violated the Guidelines, as they failed to take appropriate steps to ensure that their products did not cause or contribute to human rights abuses; and that their products

¹⁰ https://complaints.oecdwatch.org/cases/Case_248.

¹¹ https://ausncp.gov.au/sites/default/files/inline-files/G4S_au.pdf.

¹² The IL NCP notes that the Investment Committee further explained that given the separate responsibility of enterprises from States, NCPs should distinguish "enterprise responsibility to respect human rights and the due diligence requirements that accompany that, from the broader State duty to protect human rights." [IC response to OW substantiated submission- DAF INV\(2018\)34 FINAL.pdf \(oecdwatch.org\)](#) at para. 41. As detailed above, such a distinction was not possible in this instance.

¹³ https://complaints.oecdwatch.org/cases/Case_474.



directly contributed to adverse human rights impacts in Yemen through their use by the government of Saudi Arabia. They also argued that the companies did not carry out due diligence regarding the sale of their products, nor did they have an appropriate human rights policy. The US NCP did not offer mediation, and in dismissing the complaint noted that:

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

The US NCP noted that any review of such matters beyond the purview of a local NCP, and that proceeding with the review of such a complaint would, in fact, be detrimental to the effectiveness of the Guidelines.

A review of the allegations raised by the complainants against Shapir in this matter, which is also replete with antagonistic language regarding the policies of the State of Israel, reflects that conducting mediation and/or review would require the IL NCP to review and issue findings regarding Israeli state practice and policy. As previously stated, the IL NCP is of the view that it is not its role to do so, nor does it have the ability, capacity or tools to undertake such an examination. The role of an NCP is to review business conduct – not State conduct.

Whether the consideration of the specific issue would contribute to the purpose and effectiveness of the Guidelines

It should be noted that the introductory paragraph of the complaint directly lays out its purpose: "to ascertain that the National Contact Point of Israel does good deeds." As such, it clearly sets forth that the Comite's primary focus does not appear to be directed at ascertaining whether there has been a breach of the Guidelines by Shapir or furthering the Guidelines.

Aside from the Comite's stated objective, the preface of the Guidelines explains that they are recommendations addressed by governments to multinational enterprises to promote responsible business conduct.¹⁴ As this complaint inextricably relates to State policy and would therefore involve an examination of state conduct, it is beyond the scope of the Guidelines and does not serve to advance them. The OECD has itself explained that

¹⁴ As mentioned earlier, it is unclear whether Shapir is a multinational enterprise. Given that the Guidelines may not apply to it, a complaint against Shapir seems incongruous with advancing the Guidelines.

"[p]erceptions that 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."¹⁵

While the focus on state policy alone is sufficient to reject the complaint for not contributing to the purposes of the Guidelines, in this instance, the fact that the action requested by the complainant would not solve the issues that it raises further supports that position. Shapir is not the only company that provides rail equipment and services to Israel, nor is it the only one that competed in the tender process. Thus, requiring Shapir to withdraw from its activities would not hamper Israeli authorities from continuing with the light rail project to which the Comite objects.

VII. Conclusion

An initial review of the matter has led to the conclusion that the complaint does not meet the majority of the initial assessment criteria, and its further review would not further the principles of the OECD Guidelines.

As the complaint has been rejected by the IL NCP, this Initial Assessment concludes the process with regards to this complaint.

¹⁵ OECD, Annual Report on the OECD Guidelines for Multinational Enterprises 102-103 (2006).

