



## **CORRIB GAS PROJECT CASE**

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### **LEGAL OPINION ON PARALLEL LEGAL PROCEEDINGS IN THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES**

## Abstract

This legal study aims to analyse the parallel legal proceedings issue, that is to say when a specific instance is submitted to a National Contact Point (NCP) while a lawsuit has been brought previously before a national or an international court. This situation can create serious problems given that the existence of parallel legal proceedings might lead some NCPs to decline to hear an OECD case and, indeed, such a decision may be an obstacle to the promotion of the OECD Guidelines for Multinational Enterprises (*Guidelines*).

In this particular case, a specific instance has been submitted by Pobal Chill Chomain to the Irish and Dutch NCPs denouncing behaviours committed by a consortium composed of Royal Dutch Shell, Statoil and Marathon Oil Corporation. This specific instance points out breaches of several *Guidelines* regarding safety, security, health and environmental aspects as well as human rights violations during and following the setting up of an exploitation project named the “Corrib Gas Project”.

Prior to these proceedings however, a judicial action had been introduced in 2005, between five people (some of whom later became involved in the community group known as ‘Pobal Chill Chomain’), and the firm Shell E & P Ireland, before the Irish High Court in relation to property rights, the validity of agreements given by the Irish Minister for Communications, Marine & Natural Resources about the gas pipeline plan as well as the validity of Compulsory Acquisition Orders issued by this same Minister in 2002.

According to the results of investigation and legal analysis, NCPs should hear the Corrib gas project case, in spite of the existence of parallel legal proceedings in Ireland. Otherwise, they might undermine the right of access to the OECD *Guidelines* proceedings.

## Introduction

According to the *Guidelines*: “National Contact Points are responsible for promoting the *Guidelines*, handling enquiries and helping to resolve issues that arise in specific instances”<sup>1</sup>.

On the one hand, NCPs should encourage multinational companies to observe the *Guidelines*. On the other hand, NCPs should provide other parties with assistance: “The NCP will contribute to the resolution of issues that arise relating to implementation of the *Guidelines* in specific instances. The NCP will offer a forum for discussion and assist the business community, employee organisations and other parties concerned to deal with the issues raised in an efficient and timely manner and in accordance with applicable law”<sup>2</sup>.

Indeed, NCPs must offer a **true alternative** to adversarial means, in accordance with criteria of visibility, accessibility, transparency and responsibility<sup>3</sup>. According to the *Guidelines*, “easy access to NCPs is important to their effective functioning. This includes facilitating access by business, labour, NGOs, and other members of the public.(...) NCPs would respond to all legitimate requests for information”<sup>4</sup>. The NCPs are required to undertake the issue in an efficient and timely manner<sup>5</sup>.

It follows that **an effective right of access** to the proceedings by the interested parties must be provided for by NCPs. Therefore, if an NCP decides to relinquish in favour of another proceeding, this decision may undermine this right of the parties to have access to this instance. In addition, if this negative decision is not based on any accurate criteria set up by the *Guidelines*, the NCP will violate the aforementioned criteria of visibility and transparency.

Finally, according to the OECD *Guidelines*, NCPs are required to further the objective of functional equivalence<sup>6</sup>, that is to say NCPs must offer the same service, qualitatively and quantitatively. This being so, we can observe that various NCPs offer contradictory decisions when faced with parallel legal

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1 OECD *Guidelines*, Statement by the Chair of the Ministerial, June 2000, p. 6

2 OECD *Guidelines*, Procedural Guidance, I. C, p. 36

3 OECD *Guidelines*, Procedural Guidance, I. , p. 35

4 OECD *Guidelines*, Commentary on the implementation procedures of the OECD Guidelines for multinational companies, I, 8, p. 58-59

5 Idem

6 Sherpa's study : “The OECD Guidelines for Multinational Enterprises, an evolving legal status”, published in June 2007, p. 30. Downloadable in Sherpa's website: [www.asso-sherpa.org](http://www.asso-sherpa.org)

proceedings, undoubtedly because of the lack of an accurate legal basis. Thus, if various NCPs cannot offer the same right of access to OECD proceedings, this prevents them from fulfilling their objective.

In conclusion, if the NCP relinquishes the case, such a decision must be fully grounded on a legal basis. Otherwise, it might undermine the right of access to OECD proceedings.

## I. Alternative dispute resolution process

The main role of NCPs is to offer assistance to parties in conflict to come to an amicable resolution. This assistance clearly refers to a **conciliation or mediation process**<sup>7</sup>. Indeed, according to the *Guidelines*, the NCP will “offer, and with the agreement of the parties involved, facilitate access to consensual and non-adversarial means, such as conciliation or mediation, to assist in dealing with the issues”<sup>8</sup>; “the NCP is asked to assume a range of roles in addition to a possible role as mediator or facilitator”<sup>9</sup>.

**Conciliation** is an alternative dispute resolution process whereby the parties to a dispute agree to utilize the services of a conciliator. This organ will meet with the parties separately and make proposals in an attempt to find an arrangement. The conciliation process has no legal standing.

**Mediation** aims to assist disputants in reaching an agreement. Whether an agreement results or not, and the content of that agreement (if any) must be determined by the parties themselves, rather than accepting something imposed by a third party.

If the mediation or the conciliation succeeds in finding an agreement, this will stop the litigation if it is signed by the parties.

In this particular case, the plaintiffs who have submitted a specific instance to the Irish and Dutch NCPs, have insisted on the aim of this request, that is to say **the negotiation of an alternative solution**, more particularly the relocation of the gas refinery plant. Indeed, it has been clearly outlined in the request that the option supported by a vast majority of the community is the transfer of the project to an alternative site at Glinsk. It is worth reiterating that the pipeline expert, Richard B. Kuprewicz, President of Accufacts Inc, considered that this is the best option to follow in terms of gas exploitation, habitats safety and environment: « *In fact, it is Accufacts’ opinion that Glinsk is a vastly superior location option concerning health, safety, and environmental issues* »<sup>10</sup>.

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7 Sherpa’s study : “The OECD Guidelines for Multinational Enterprises, an evolving legal status”, published in June 2007, p.13-14. Downloadable in Sherpa’s website: [www.asso-sherpa.org](http://www.asso-sherpa.org)

8 OECD *Guidelines*, Procedural Guidance, I, C d), p. 36

9 OECD *Guidelines* for Multinational Enterprises: 2006 Annual Meeting of the National Contact Points, report by the Chair, p.21

10 Letter of Richard B. Kuprewic, Accufacts Perspective on Corrib Glinsk Siting Option

So an NCP's main mission within the context of specific instance consists of carrying out mediation or conciliation between conflicting parties. It is patently clear that such a mission cannot, under any circumstances, be in contradiction to a judicial process. On the contrary, such mediation or conciliation, if it leads to a resolution, will simply settle the litigation in a non judicial way, which is positive in every respect.

## II. OECD Proceedings: an original and specific remedy

If the NCP considers that the company has breached the *Guidelines* it might issue a statement making recommendations as to how the company could bring its practices into line with the *Guidelines* in the future. Nevertheless, such a statement cannot, under any circumstances, lead to a risk of contradiction with a pending litigation.

Indeed, the OECD proceedings are **necessarily distinct** from judicial proceedings before national or international courts, because they are completely differentiated by their **nature and grounds**.

Concerning the **nature** of the OECD procedure, we have underlined that the NCP should offer, above all, a forum of discussion and mediation. The main role of the NCP is to promote the *Guidelines* and to foster multinational companies to respect them, not to convict them of a breach of the law. In this connection, they don't identify themselves as judges but as mediators or facilitators. In addition, the use of the term "*specific instance*" shows a willingness to be distinct from the judicial term "*complaint*", appropriate for judicial proceedings.

Furthermore **regarding grounds**, the NCPs will make a non binding decision based on recommendations set out by the *Guidelines* whereas a court will rule on compulsory legislation.

In addition, the **object** of the specific instance can differ significantly from the litigation brought before national courts. Indeed, in this particular case, the specific instance denounces breaches by Shell, Statoil and Marathon companies of several OECD *Guidelines* regarding security, health and environmental aspects as well as breaches of human rights. In comparison, the pending judicial action raises several points concerning the validity of agreements and orders given by the Minister in relation to property rights of Shell E & P on lands owned by the persons already quoted.

The comments on the procedures **don't indicate any hierarchy** between pending proceedings and so confirm that both remedies are completely different. The NCP has only to « take into account » the treatment of a similar question: « *During the initial assessment concerning the opportunity to examine the*

*question with more details, the NCP will take into account how similar issues are or have been treated at the national or international level »<sup>11</sup>. Consequently, the NCP cannot be forced to relinquish the affair.*

Finally, concerning **the stay of execution hypothesis**, it seems obvious that such a decision taken by an NCP would have the same effect as the relinquishment. In fact, regarding the usual length of proceedings, an inactive stance while awaiting a judicial decision would negate the NCP role. Indeed, any definitive or temporary decision by an NCP to decline to hear the case on the basis of parallel legal proceedings would be a denial of the right of access to the *OECD Guidelines*.

It follows that a specific instance submitted to an NCP, by being necessarily completely different from a judicial action, cannot conflict with it, which requires that NCPs preserve their **independence** while dealing with the case.

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<sup>11</sup> *OECD Guidelines*, Commentary on the implementation procedures of the *OECD Guidelines* for multinational companies, I, 13, p. 60

## Conclusion

According to the OECD *Guidelines*, it is absolutely clear that there is **neither duty nor reasonable argument** for the NCPs to relinquish or delay the case.

It is essential to insist on the NCP's major role, that is to say their mission as mediator. It would be very harmful, not only for the parties but also for the proper application of *Guidelines* if the NCPs could not fully exert their conciliatory functions. It should be remembered that one of the main reasons for appealing to the NCP tends to be a desire to avoid long and expensive judicial proceedings. If the NCP refuses to act, even though no rules demand that it does so, this refusal risks vastly limiting the impact, not to mention damaging the credibility, of this innovative process.

Finally, the **urgency of finding solutions** to conflicts opposing civil communities and companies has to be underlined. In this context, Pobal Chill Chomain asks the Irish and Dutch NCPs to pronounce quickly and urgently on the specific instance which has been submitted to them on the 22nd August 2008.