OECD **GUIDELINES** FOR MULTINATIONAL ENTERPRISES | NATIONAL CONTACT POINT FOR RESPONSIBLE BUSINESS NORWAY

Oslo, 17 January 2019

INITIAL ASSESSMENT

INDUSTRI ENERGI AND THE COORDINATION COUNCIL OF DNO YEMEN LABOR UNION – DNO ASA

SUMMARY

The Norwegian trade union Industri Energi and the Coordination Council of DNO Yemen Labor Union have filed a complaint against the Norwegian company DNO ASA, claiming that DNO has failed to comply with Chapter I, paragraph 2 and Chapter V, paragraph 4, letter a of the OECD Guidelines for Multinational Enterprises.

The Unions consider that DNO Yemen did not obey Yemeni labour laws in connection with the dismissal of its workers in Yemen in 2015, that DNO Yemen has failed to comply with a final judgment on the matter by Yemeni courts, and that DNO is in a position to reemploy its workers or assure their transition to a new operator as the company has not relinquished its 'blocks' in Yemen. In the view of the Unions, DNO Yemen has observed standards of employment less favourable than those observed by comparable employers.

DNO considers that the present complaint contains virtually identical requests to a previous complaint by Industri Energi and declines to participate in another exercise covering the same subject matter. DNO considers that it has acted in full compliance with both Yemeni law and the Guidelines. DNO is not willing nor able to fulfil the judgment, as it was delivered by illegitimate courts and the company has relinquished the relevant blocks.

The NCP considers that the issues raised merit further examination. The complaint refers to key principles of the Guidelines, has been brought against a Norwegian company to which the Guidelines apply, the issues fall within the scope of its mandate and the NCP did not decide on the present issues in the previous complaint.

THE COMPLAINT

The present complaint brought by Industri Energi and the Coordination Council of DNO Yemen Labor Union ('the Unions') makes reference to a former complaint by Industri Energi on behalf of the DNO Yemen Union. In the NCP's closing statement on that matter, the NCP concluded that DNO did not meet the expectations expressed in the OECD Guidelines on prior notice and consultation with the employees of DNO Yemen.

The complaint at hand concerns two accounts. First, the Unions claim that DNO has not obeyed domestic laws in Yemen, contrary to Chapter I, paragraph 2 of the Guidelines. Second, they claim that the company has observed standards of employment less favourable than those observed by comparable employers in Yemen, contrary to the provision in Chapter V, paragraph 4, letter a.

With regard to the first account, the Unions refer especially to a judgment by the First Arbitration Committee for Labour Issues and Disputes in Sana'a, issued on 3 August 2016. DNO's appeal to the Sana'a Court of Appeal was rejected on 20 February 2017 and the company's subsequent appeal to the Supreme Court was dismissed on 13 December 2017. According to the Unions, DNO has to pay 75 percent salaries to the employees as long as the company has a product sharing agreement and licenses to operate blocks.[1] The Unions assume that DNO has not relinquished the blocks and is in a position where reemployment is possible, and hence DNO can assure the employees are handed over to a new operator.[2]

The Unions consider that DNO has not complied with the judgement. The Unions refer to the response of 3 March 2018 from DNO Yemen, wherein the company stated, *inter alia*, that "*you misrepresent and mischaracterise the rulings of the Sana'a-based Supreme Court and we stand ready to address them at an appropriate time and in a legitimate legal venue"* and that *"we remain prepared to release the contractually-designed severance payments and Ramadan bonuses to all those employees who elected not to receive these*

1 The complaint p. 12.
2 The complaint p. 13.. The Unions refer to a letter 15 June 2018 from DNO Yemen AS to DNO Yemen Union, wherein it was stated that "ultimately the MOM changed its mind and refused to accept handover" (p. 13 and appendix 19).

payments at the time DNO relinquished its Yemen blocks back to the Government and decided instead to pressure DNO to assure them of indefinite employment …".[3]

The complaint also cites correspondence between the General Manager of DNO Yemen AS and representatives of the Ministry of Labour and Social Affairs and the Ministry of Oil and Minerals concerning the decision to terminate employment contracts.[4] It is stated in the complaint that the Ministry did not approve of DNO's dismissals, and, *inter alia*, instructed DNO "that it is obliged to keep the employees".[5] The Unions also refer to a letter from the Deputy Governor of the Office for the Affairs of the Valley and Desert, where DNO was instructed to keep its employees and continue paying salaries like the other companies did.[6]

If DNO wanted to downscale the work force, it should – according to the Unions – have asked the Yemenisation department and labour bureau of the Ministry of Oil and Minerals' approval. DNO should have informed the Ministry of Labour, in accordance with article 100 in the Labour Law, of why the company would like to eliminate the positions, and waited for an approval from the Ministry of Labour.[7]

With regard to the claim that DNO's standards of employment and industrial relations have been less favourable than those observed by comparable employers in the host country, the Unions refer to the French company Total and the Austrian company OMV. According to the Unions, Total paid salaries to all employees until the company handed over Block 10 to the new operator PetroMasila in December 2015. The new operator employed all the former Total-employees, who in addition to reemployment received end of service benefits and compensations. [8]

According to the Unions, OMV paid their workers minimum 75 percent salaries from the time the company suspended production in 2015 to the 1st of April 2016.[9] The employees who were not assigned duties got their salaries reduced to 50 percent. The company did not dismiss workers in order to save money, and it guaranteed minimum wages. On the 19th of December 2016, OMV sent a letter to all Yemeni employees offering voluntary

3 The complaint p. 12 and appendix 17..
4 The complaint p. 5–6 and appendices 2–6.
5 Letter 12 August 2015, see p. 6 of the complaint.
6 Letter 22 November 2015, p. 6 of the complaint, appendix 6.
7 The complaint p. 6–7..
8 The complaint p.. 7–8 and appendix 7.
9 The complaint p. 9 and appendix 9.

leaver schemes.[10] The company had to reduce its work force in the beginning of 2017, however, and this was done in cooperation with the labour union. As far as the Unions know, OMV has not relinquished its block.

The Unions refer to attempts made in June 2015 by the DNO Yemen Union to engage with DNO Yemen to discuss possible solutions instead of dismissals and at an unspecified later time to discuss the situation.[11] The Unions consider that an offer made by DNO on 15 June 2018 to DNO Yemen Union is "a trick from DNO's side", as the Unions assert that DNO has shown little interest for negotiation, and the company's offer is very low compared to what other companies have given their employees and very low compared to the verdicts of the courts.[12]

The Unions request the NCP to facilitate mediation between DNO Yemen Union, assisted by Industri Energi, and the international management of DNO in a country in which the leadership of the DNO Yemen Union will be able to acquire visas, i.e. Lebanon.

RESPONSE FROM DNO ASA

DNO ASA ('DNO') submitted its response on 12 October 2018. Regarding DNO's operations in Yemen, the company observes that in early 2015, DNO Yemen had 242 employees, 97.5 percent of whom were Yemeni nationals.[13] DNO Yemen's operations were disrupted, and ultimately rendered impossible, by political instability and insecurity.[14] Eventually the company was forced to cease its activities in the country and reduce its workforce on Blocks 32, 43 and 47. According to the company, DNO Yemen "relinquished Blocks 32 and 43 in November 2016 and handed back the licenses and assets to the Yemen Government".[15]

DNO considers the complaint to contain virtually identical requests to Industri Energi's first complaint.[16] DNO refers to the NCP's closing statement 22 March 2018 and declines to participate in another exercise "covering the same subject matter".[17] The NCP found

[10] The complaint p. 9, attachment 10.
[11] The complaint p. 11..
[12] The complaint p. 14..
[13] DNO's response p. 2, first paragraph.
[14] DNO's response p. 2, second paragraph.
[15] DNO's response p. 2, second paragraph i.f.
[16] DNO's response p. 1 .
[17] DNO's response p. 1

there that DNO Yemen failed to provide adequate notice to its employees in contravention of the OECD Guidelines, Chapter V (6) and that DNO Yemen complied with the expectations of the OECD Guidelines supporting the right of employees to unionize.

In the view of DNO, the NCP's closing statement 22 March 2018 also found that "[i]t is too late for the Yemen Union to bring up new arguments (after the mediation was completed) as to whether DNO Yemen breached the PSAs for Blocks 32 and 43 by pulling out of Yemen".[18] DNO adds that "in fact, a specific dispute resolution mechanism exists within each PSA which mandates that any dispute concerning the PSA be exclusively decided by the International Chamber of Commerce arbitration and that process is underway".

Moreover, DNO considers that the NCP closing statement 22 March 2018 found that "[i]t is not within the mandate of the OECD Guidelines to assess whether the terminations were illegal in the first instance as this is a question for local law".[19] Having noted the findings and recommendations, DNO consequently considered these matters to be closed thereafter, apart from implementation of the recommendations made by NCP.[20]

According to DNO, the issues in dispute in this complaint by Industri Energi "brings no new arguments to warrant the initiation of yet another mediation which has not already been brought up in the First Complaint", with reference both to the factual side of the complaint and the invoked provisions of the OECD Guidelines. DNO notes that the only additions are what they call "the illegitimate Houthi Supreme Court decision" which was rendered in December 2017 and references to other companies which were also already mentioned in the First Complaint.[21]

With regard to the court decisions invoked by Industri Energi and the Yemen Union, DNO argues that the decisions were made "in total disregard of clear legislation which sets maximum compensation for workers who are subject to termination and makes no provision for mandatory specific performance".[22] Severe interferences by the Houthi

[18] DNO's response p. 3 , first indent.
[19] DNO's response p. 3 , second indent.
[20] DNO's response p. 2.
[21] DNO's response p. 3, Section C, first paragraph.
[22] DNO's response p. 4, first paragraph.

rebels, coupled with decisions on all three levels of court that awarded remedies "which are not provided for under Yemeni law and which grossly ignored Yemeni due process requirements", meant that DNO Yemen "simply could not abide by the decisions as rendered".[23] In a footnote DNO further notes that the Houthi court decisions were "determined to be void" with the issuance of the UN Sanctions.[24]

The company considers that the offers which DNO Yemen "have made and will continue to make are fully in accordance with Yemeni law and the rights to which the former Yemeni workers are entitled".[25] However, the company would not be able to fulfil a condition of continued employment, even if it were willing, as DNO has relinquished its licenses.[26] DNO strongly denies the allegations that the company has shown little interest for negotiation.[27] According to the company, DNO Yemen has made several attempts to connect with former Yemeni workers, but all have been rebuffed or rebuked.[28] DNO considers such discussions to be beyond the realm of the OECD Guidelines. The company is of the opinion that further NCP interventions will not make a positive contribution to the process.[29]

As to the NCP case handling process, DNO expresses its lack of faith with reference to the previously demonstrated lack of adherence to the principles of the Implementation Procedures and Procedural Guidelines.[30] DNO refers to four accounts connected with the NCP's handling of the previous complaint against the company, regarding the impartiality of the NCP mediator; the parties' opportunity to be heard before the final statement was written; the order of the parties' final submissions; and the NCP's engagement with the media.[31] Based on these transgressions, DNO has no confidence that the NCP is able to operate in an impartial manner as its mandate requires.

DNO moreover considers that Industri Energi and the Yemen Union, by bringing the present complaint, "clearly are not interested in cooperating in good faith or acting in

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[23] DNO's response p. 4, para. 3.
[24] DNO's response p. 4..
[25] DNO's response p. 4, para. 4.
[26] DNO's response p. 4, para. 1.
[27] DNO's response p. 3, Section C, third paragraph.
[28] Ibid.
[29] Ibid.
[30] DNO's response p. 5, Section D, first paragraph.
[31] DNO's response p. 5, Section D, third paragraph.

the best interests of DNO Yemen's former workers whom they claim to represent".[32] However, the company also states that it "will regardless continue to reach out and seek resolution with any former Yemeni worker who reaches out in good faith to receive their entitlements in accordance with Yemeni law".[33]

THE NATIONAL CONTACT POINT'S INITIAL ASSESSMENT

The NCP has considered the complaint from the Unions and DNO's response, and has come to the conclusion that the issues raised merit further examination. This decision has not involved any assessment of DNO's compliance with the OECD Guidelines.

The complaint at hand claims that DNO has failed to comply with the OECD Guidelines on two accounts. Firstly, the Unions claim that DNO has not obeyed domestic laws in Yemen, contrary to Chapter I, paragraph 2 of the Guidelines. The Unions refer to a judgment by a first instance court in Yemen, which became final on 13 December 2017 when the Supreme Court dismissed DNO Yemen's appeal. DNO maintains in its response that it is not willing nor able to fulfil the judgment since the court is illegitimate.

Secondly, the Unions claim that DNO has observed standards of employment less favourable than those observed by comparable employers in Yemen, contrary to the provision in Chapter V, paragraph 4, letter a. The Unions refer to the French company Total and the Austrian company OMV, which, according to the Unions, have acted differently towards their Yemeni workers.

The NCP considers these matters to be distinct from the matter concluded in the 22 March 2018 final statement by the NCP. It transpires from Sections 7.2 and 7.3, read in conjunction with Section 7.1 and Section 8, that the only issues which were considered on their merits by the NCP were whether DNO had complied with the Guidelines with regard to notification and consultation with its former workers and whether DNO had complied with the Guidelines' expectations relating to the workers' right to organise.

It was expressly stated in Section 7.1 of the final statement that the part of the complaint, which concerned the lawfulness of dismissals as part of the downsizing of DNO's operations in Yemen in 2015, "falls outside the scope of what the NCP can consider under the Guidelines." It is not for the NCP to interpret domestic law – that is a task for the

[32] DNO's response p. 6, Section E, third paragraph.
[33] DNO's response p. 6, Section E, third paragraph.

domestic judiciary. The fact of the matter is different in the present complaint, where the question is whether DNO has failed to comply with Yemeni law, including a seemingly final judgment by a domestic court in the host country, and whether such alleged failure would amount to a breach of the fundamental principle expressed in the Guidelines Chapter I, paragraph 2.

The NCP concurred with DNO's view that the matter concerning production sharing agreements, addressed by Industri Energi after the mediation was concluded, "was put forward too late to be taken into consideration in this case [emphasis added]". Although it was necessary to preclude the inclusion of new issues at such a late stage in order to ensure due process, neither the Guidelines nor its corresponding procedural principles indicate that a later assessment of new aspects of the same case should be precluded from an examination by the NCP. The NCP observes that DNO's response takes note of the fact that the exhibits in the complaint pertaining to the court judgment and the practices of other petroleum companies in Yemen were not part of the first complaint.

In its assessment of the formal requirements for considering the complaint on its merits, the NCP has had regard to the following. The complaint refers to compliance with key principles of the Guidelines. The complaint has been brought against a Norwegian company, by the Yemeni trade union and Industri Energi jointly. The NCP has moreover had regard to the Guidelines' objective and the continuous efforts made to secure their effectiveness. In the view of the NCP, a further examination of the complaint may lead to useful clarifications for both parties with regard to the content and scope of the Guidelines.

The NCP has taken note of the parties' diverging attitudes towards further engagement by the NCP. The NCP reiterates that it is a non-judicial mechanism and that its mandate under the Guidelines dictates the offering of the NCP's good offices to the parties of a dispute under the Guidelines. The NCP thus remains at the parties' disposal in this regard. The NCP moreover continues to be of the view that dialogue and mediation should be seriously considered as a constructive way forward for both parties.

DNO has expressed its lack of faith in the NCP process through reference to four accounts connected with the handling of the previous complaint. The NCP finds all of them baseless. Regarding the question of impartiality of the mediator, the NCP would like to point to the fact that the mediator was chosen by the parties. With respect to the parties' opportunity to be heard before the final statement was written, the NCP allowed both parties to be heard and to comment upon one another's submissions. With respect to the order of the

parties' final submissions, DNO, which first expressed its wish to submit comments, was invited to do that first and was later given the opportunity to comment on the final submission by the other party. Finally, with respect to the NCP's alleged engagement with the media, the chair of the NCP only fulfilled its statutory duty to provide guidance to the interested public without making public anything from the mediation process.

Based on its decision to proceed with its consideration of the complaint, the NCP will offer its good offices to the parties with a view to resolve the issues.

THE NATIONAL CONTACT POINT'S CONCLUSION

The Norwegian National Contact Point has concluded that the issues raised merit further examination and decides to proceed with the complaint.

APPENDICES

1) Norway's NCP rules of procedure: https://nettsteder.regjeringen.no/ansvarlignaringsliv2/files/2014/01/FINAL_KPprosedyreregler_eng_godkj.pdf