



**An Roinn Fiontar,
Trádála agus Fostaíochta**
Department of Enterprise,
Trade and Employment

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

**Specific Instance Complaint from the Global Legal
Action Network (GLAN) against San Leon Energy plc**

Legal Disclaimer

This document is without prejudice to the status of or sovereignty over any territory, to the delimitation of international frontiers and boundaries and to the name of any territory, city or area.

Summary of the Ireland NCP Decision

- An NGO, GLAN, contends that certain petroleum exploration activities of an Irish headquartered company, San Leon Energy plc. are not in compliance with the OECD Guidelines, specifically the principle of meaningful engagement with stakeholders (Article A.14 of Chapter II, OECD Guidelines) and the principle of respect for internationally recognised human rights (Articles A.2 of Chapter II and Chapter IV).
- The Ireland NCP has decided that there is a *prima facie* case to proceed to the offer of good offices to the parties of the Complaint. The Ireland NCP believes on the basis of both the Complaint and the response by the Company that there are significant differences in perspectives between the Complainant and the Company and therefore organising dialogue between the parties could contribute to a resolution of the issues.
- The Ireland NCP will formally ask the parties whether they are willing to engage in mediation/conciliation with the aim of reaching a resolution. Subject to their response, the Ireland NCP will liaise with the parties to arrange mediation/conciliation meetings.
- If these meetings achieve a resolution, the Ireland NCP will reflect this in a Final Statement without making a determination about the merits of the claim on whether the Company acted consistently with the Guidelines. If a mediated solution is not possible, the Ireland NCP will conduct an examination of the case and will reflect the outcome in a Final Statement that may include recommendations.

Object of the Complaint

On 24 October 2018 the Ireland NCP received a Specific Instance Complaint from the Global Legal Action Network (GLAN) an independent, non-profit organisation consisting of legal practitioners, journalists and academics with offices in Dublin and London. The Complaint is against San Leon Energy plc (SLE), a Dublin headquartered oil and gas exploration and development company.

GLAN contends that certain petroleum exploration activities of San Leon Energy are not in compliance with the OECD Guidelines, specifically the principle of meaningful engagement with stakeholders (Article A.14 of Chapter II, OECD Guidelines) and the principle of respect for internationally recognised human rights (Articles A.2 of Chapter II and Chapter IV).

The Complaint by GLAN contends that “since Western Sahara is a [Non-Self-Governing Territory] NGST under Chapter XI of the United Nations Charter, the Sahrawi people – the indigenous population – have an internationally recognised right of self-determination, which includes permanent sovereignty over its natural resources”. GLAN argues that San Leon Energy’s exploration activities have been occurring without the consent of the Sahrawi people.

The Complainant requests that the Ireland NCP (summarised below):

- “Determine that the mentioned activities of San Leon Energy do not comply with its responsibilities under the OECD Guidelines for Multilateral Enterprises...”.
- “Issue a direction, or recommendation, that San Leon Energy relinquish its license rights, assets or other interests inside Western Sahara...”;
- “Issue a direction, or recommendation, that San Leon Energy deliver a formal apology to the Sahrawi people...”;
- “Issue a request that the Irish Government provide advice to companies about business activities in Western Sahara”.

Guidelines provisions cited by the Complainant

Chapter II A.2: Enterprises should... *“Respect the internationally recognised human rights of those affected by their activities.”*

Chapter II A.12 Enterprises should... *“Seek to prevent or mitigate an adverse impact where they have not contributed to that impact, when the impact is nevertheless directly linked to their operations, products or services...”*.

Chapter II A.14: Enterprises should... *“Engage with relevant stakeholders in order to provide meaningful opportunities for their views to be taken into account in relation to planning and decision making for projects or other activities that may significantly impact local communities.”*

Chapter IV A.1-3: *“...Enterprises should, within the framework of internationally recognised human rights, the international human rights obligations of the countries in which they operate as well as relevant domestic laws and regulations:*

1. *Respect human rights, which means they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.*
2. *Within the context of their own activities, avoid causing or contributing to adverse human rights impacts and address such impacts when they occur.*
3. *Seek ways to prevent or mitigate adverse human rights impacts that are directly linked to their business operations, products or services by a business relationship, even if they do not contribute to those impacts.”*

A number of the Guidelines commentary paragraphs are also cited by the Complainant (see the Appendix to this Initial Assessment).

The Initial Assessment (IA) Process

The purpose of the Initial Assessment is to determine if the issues raised in the Complaint merit further examination by the Ireland NCP. **It does not determine whether the Company has acted consistently or inconsistently with the Guidelines.**

Handling Process

24 October 2018	Complaint received by Ireland NCP from GLAN.
25 October 2018	Ireland NCP confirms receipt and commitment to review.
25 October 2018 to 18 December 2018	Review by the Ireland NCP including consultation (internal review, desk-based research, consultation with NCP peers and OECD NCP secretariat).
18 December 2018	Letter issued by Ireland NCP to GLAN outlining Ireland NCP Procedures and inviting submission of any further information.
18 December 2018	Letter issued to Company including sharing of Complaint and Ireland NCP Procedures. Ireland NCP invites Company response by 22 February 2019.
19 February 2019	Ireland NCP receives further letter from GLAN.
1 March 2019	Ireland NCP issues follow up letter to Company due to non-response and extends deadline to 12 March 2019.
2 April 2019	Ireland NCP issues further reminder letter to Company due to non-response.
12 April 2019	Ireland NCP receives Company response.
17 April 2019	Ireland NCP requests consent of Company to share response with Complainant. Company refuses consent.
29 April 2019	Ireland NCP requests consent to share substantive points of Company response with Complainant and offers assurances of written confidentiality by the Complainant.
2 May 2019	Company refuses consent. Ireland NCP proceeds to complete initial assessment.
24 January 2020	Ireland NCP completes IA and shares draft with parties.

4 February 2020	Company provides substantive response to draft initial assessment
22 July 2020	Ireland NCP requests consent of Company to share response with Complainant. Company refuses consent.
7 January 2021	Company agrees to share Company response with Complainant subject to written assurances of confidentiality from the Complainant
18 January 2021	Initial Assessment published

Is the Ireland NCP the right entity to assess the Specific Instance Complaint?

For guidance, the Ireland NCP has consulted similar cases ([UK](#); [Norway](#)) and also the OECD Guidelines and NCP manual on *Coordination between OECD National Contact Points during Specific Instance handling* [link to report](#). The Procedural Guidance (Commentary, paragraph 23, page 82) within the Guidelines states that: “Generally, issues will be dealt with by the NCP of the country in which the issues have arisen.”. Additionally, however, the NCP manual states that the "issues" in question could refer to a general policy set by a Company at headquarter level. In such a case the location of the "issues" may be traced back to the location of the Company headquarters. In the case of this Specific Instance received, the substance of the Complaint concerns investment decisions which originate at headquarter level in Ireland in relation to strategic assets (exploration licenses). Accordingly, this favours acceptance by the Ireland NCP in our view.

The NCP for Morocco did not agree that Ireland NCP should be the lead NCP handling this specific instance. It argued that it should be the lead NCP as the issues raised, including the alleged adverse impacts of the activities of the company subject to the complaint, related to facts that took place on Moroccan territory. The NCP for Morocco based its view on Articles 23 and 24 of the commentary on co-ordination between NCPs in specific instances, contained in the commentary on implementation procedures in Part II of the OECD Guidelines for Multinational Enterprises. These articles state that “Generally, issues will be dealt with by the NCP of the country in which the issues have arisen... The NCP of the host country should consult with the NCP of the home country in its efforts to assist the parties in resolving the issues”.

Consultations took place with the NCP for Morocco in the course of preparation of this initial assessment. As the substance of the complaint relates to policy decisions made at the company’s headquarters in Ireland, the Ireland NCP will proceed as lead NCP. In an agreed outcome facilitated by the OECD, the Ireland NCP will continue to offer collaboration and accept input from the Morocco NCP after the initial assessment stage. This input will not be binding and responsibility for decisions will rest with the Ireland NCP alone.

Ireland NCP Decision

The Ireland NCP decides that there is a *prima facie* case to proceed to the offer of good offices to the parties of the Complaint. Both parties have submitted information to the NCP which the NCP considers material and substantiated. The Ireland NCP believes on the basis of both the Complaint and the response by the Company that there are significant differences in perspectives between the Complainant and the Company and therefore organising dialogue between the parties could contribute to a resolution of the issues.

Notwithstanding the offer of good offices, the Ireland NCP has also decided to limit the Complaint to the aspects relating directly to the Company regarding decisions taken at headquarter level in Ireland irrespective of whether the Company was precluded or limited by another party (i.e. a business relationship). The Ireland NCP will therefore extend the offer of good offices based on whether or not the Company's decisions to invest in assets in the region took place in accordance with the wishes and interests of the local population. In this regard, the Ireland NCP focuses its offer of good offices to those articles which specifically focus on the enterprise and not on its business relationships. Therefore, it has decided to exclude Chapter IV, Article 3 from the scope of the assessment.

The Ireland NCP affirms that **acceptance of this Specific Instance does not in any way constitute a determination of breach of the Guidelines by the Company**. The Ireland NCP also affirms that the offer of good offices is voluntary to both parties. The Ireland NCP took the following points into consideration in arriving at this decision.

a) Identity of the Complainants and their interest in the matter

According to the submission, the Complainant is an independent, non-profit organisation consisting of legal practitioners, journalists and academics "*committed to the identification and pursuance of innovative legal actions that address the overseas activities of States and private actors involved in human rights violations...*". The Ireland NCP notes the submission by GLAN is supported by certain representative organisations claiming to represent the Sahrawi people.

b) Whether the issue is material and substantiated

The Ireland NCP notes the Complainant has provided a range of information and has provided linkages between the international legal context, the OECD Guidelines and the nature of the Complaint. The Complainant further submits that a component of the right to self-determination is permanent inalienable rights to natural resources, which is enshrined in both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. The OECD Guidelines state these should be referenced at a minimum in "all cases and irrespective of the country or specific context of enterprises' operations...".

The Complaint further includes extensive references to relevant international law and opinion on human rights (international charters, findings of international bodies, resolutions, declarations, legal counsel and instruments) from various bodies including the International

Court of Justice, the United Nations and the European Court of Justice. The Ireland NCP also notes the voluntary nature of the Guidelines which provide principles and standards for responsible business conduct consistent with applicable laws and internationally recognised standards.

Regarding the specific activities of the Company, the Complaint offers details of two exploration licenses in addition to information from the Company's Annual Report, media reports and interviews. The Complaint points to previous statements by the Irish Government. The complaint also references a decision of the Council of Ethics of the Norwegian Government Pension Fund Global (2016) to exclude the Company from its investment portfolios on the basis it has not been satisfied that the operations take place in accordance with the wishes and interests of the local population.

In response, the Company contends that all aspects of the complaint are addressed, that it complied fully with the United Nations requirements and states that it "no longer has any interests or licences in the Region". Regarding ethical conduct, the Company states that "the standard to be met in determining whether San Leon's activities are ethical is Article 73 of the United Nations charter that makes it clear that the interests of the local population are paramount". The Company says that it consulted with elected representatives of the entire local population "including both Suhrawi and non-Suhrawis [*sic*]" when determining the wishes and interests of the local people. The Company states that, "the Polisario cannot be considered the legitimate representative of the local people and for that reason San Leon Energy does not engage in dialogue with this organization".

With regard to the wishes of the local people, the Company states it was its desire "that any income derived from natural resources extraction in the future benefited the local community and be in accord with their wishes". The Company also points to a statement by former UN Under-Secretary General for Legal Affairs Hans Correll (2008) that: "It [is] recognized that there [is] a value in foreign economic investment undertaken in collaboration with the peoples of the Non-Self-Governing Territories and in accordance with their wishes...".

With regard to the request that an apology be delivered to the Sahrawi people, the Company states "San Leon Energy conducted consultations in the Region with local elected officials; community, human rights groups and other organisational leaders - as well as Sahrawi business leaders - to better understand their needs and how we could cooperate to positively impact their communities and lives. We obtained their advice, cooperation and buy-in while we were active in the region". The Company also states that "for the reasons it has outlined, it does not agree with the recommendation that San Leon makes a formal apology to the Sahrawi people". The Company also submits two letters indicating support for the Company's activities – one from local community representative and local staff following an acquisition, and another letter of thanks that the Company received from the local community.

c) *Link between the enterprise's activities and the issues raised in the specific interest*

GLAN contends the Company's exploration licenses in the territory provide the link between the enterprises' activities and the issues raised. Specifically, GLAN contends that the local indigenous population "have not consented to the exploration or exploitation of their natural resources by San Leon Energy",

The Company's response states that it "has already exited the Region and can confirm that San Leon no longer has any interests or licences in the Region. This decision was taken on a commercial basis and was not influenced in any way by any NGO complaints. The Company had already initiated its exit from the Region prior to the date of this complaint being received on 24 October 2018". The Company also contends it undertook consultations with stakeholder's representative of the entire local population.

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

There are extensive references in the Complaint to relevant applicable law and procedures in the Complaint, including but not limited to:

- Article 73, United Nations Charter Chapter XI (Non-Self-Governing Territories);
- International Court of Justice Opinion 16 October 1975;
- UN General Assembly Resolutions 34/37, 1514 and 1803;
- The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Security Rights;
- Legal Opinion by UN Under-Secretary General for Legal Affairs (2002)
- European Court of Justice judgement 2016 (Council of the European Union v Front Polisario).

The Company's response also references Article 73 of the UN Charter; the legal opinion provided by the UN Under-Secretary General for Legal Affairs, Hans Sorrell, (2002) and an address by Hans Sorell on the Legality of Exploring and Exploiting Natural Resources in Western Sahara at the Western Sahara Conference Proceedings (2008)

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

The Ireland NCP has taken guidance from Complaints where similar issues have arisen, particularly those handled by [UK](#) and [Norway](#), also noting that each case should be considered on their own merits.

f) *Whether the consideration of the Specific Instance contributes to the purpose and effectiveness of the Guidelines*

The Ireland NCP is conscious of complexities and sensitivities of this case in contributing to the purpose and effectiveness of the Guidelines. The Ireland NCP affirms that it does not examine the actions of any party other than the Company identified in the Complaint and that the analysis is confined to decisions taken by the Company at headquarter level which

is based in Ireland with regard to its adherence to the specific articles of the Guidelines cited in the Complaint which the Ireland NCP has deemed within scope.

Next Steps

The Ireland NCP will formally ask the parties whether they are willing to engage in mediation/conciliation with the aim of reaching a resolution. The offer of good offices is voluntary to both parties. Subject to their response, the Ireland NCP will liaise with the parties to arrange mediation/conciliation meetings. If these meetings achieve a resolution, the Ireland NCP will reflect this in a Final Statement without making a determination about the merits of the claim on whether the Company acted consistently or inconsistently with the Guidelines. If a mediated solution is not possible, the Ireland NCP will conduct an examination of the complaint and will reflect the outcome in a Final Statement that may include recommendations.

ENDS

**Ireland National Contact Point
OECD Guidelines for Multinational Enterprises
Trade Policy Unit
Department of Enterprise, Trade and Employment**

18 January 2021

Appendix

Guidelines commentary cited by the Complainant

Chapter II Paragraph 2: *“Enterprises are encouraged to co-operate with governments in the development and implementation of policies and laws. Considering the views of other stakeholders in society, which includes the local community as well as business interests, can enrich this process...”*.

Chapter II Paragraph 12: *“An increasing network of non-governmental self-regulatory instruments and actions address aspects of corporate behaviour and the relationships between business and society...”*.

Chapter II Paragraph 25: *“Stakeholder engagement involves interactive processes of engagement with relevant stakeholders, through, for example, meetings, hearings or consultation proceedings ...”*.

Chapter IV Paragraph 38: *“A State’s failure either to enforce relevant domestic laws, or to implement international human rights obligations or the fact that it may act contrary to such laws or international obligations does not diminish the expectation that enterprises respect human rights”*.

Chapter IV Paragraph 39: *“In all cases and irrespective of the country or specific context of enterprises’ operations, reference should be made at a minimum to the internationally recognised human rights expressed in the International Bill of Human Rights, consisting of the Universal Declaration of Human Rights and the main instruments through which it has been codified: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights ...”*.

Chapter IV Paragraph 43: ... [An enterprise to] *“use its leverage to influence the entity causing the adverse human rights impact to prevent or mitigate that impact.”*.