

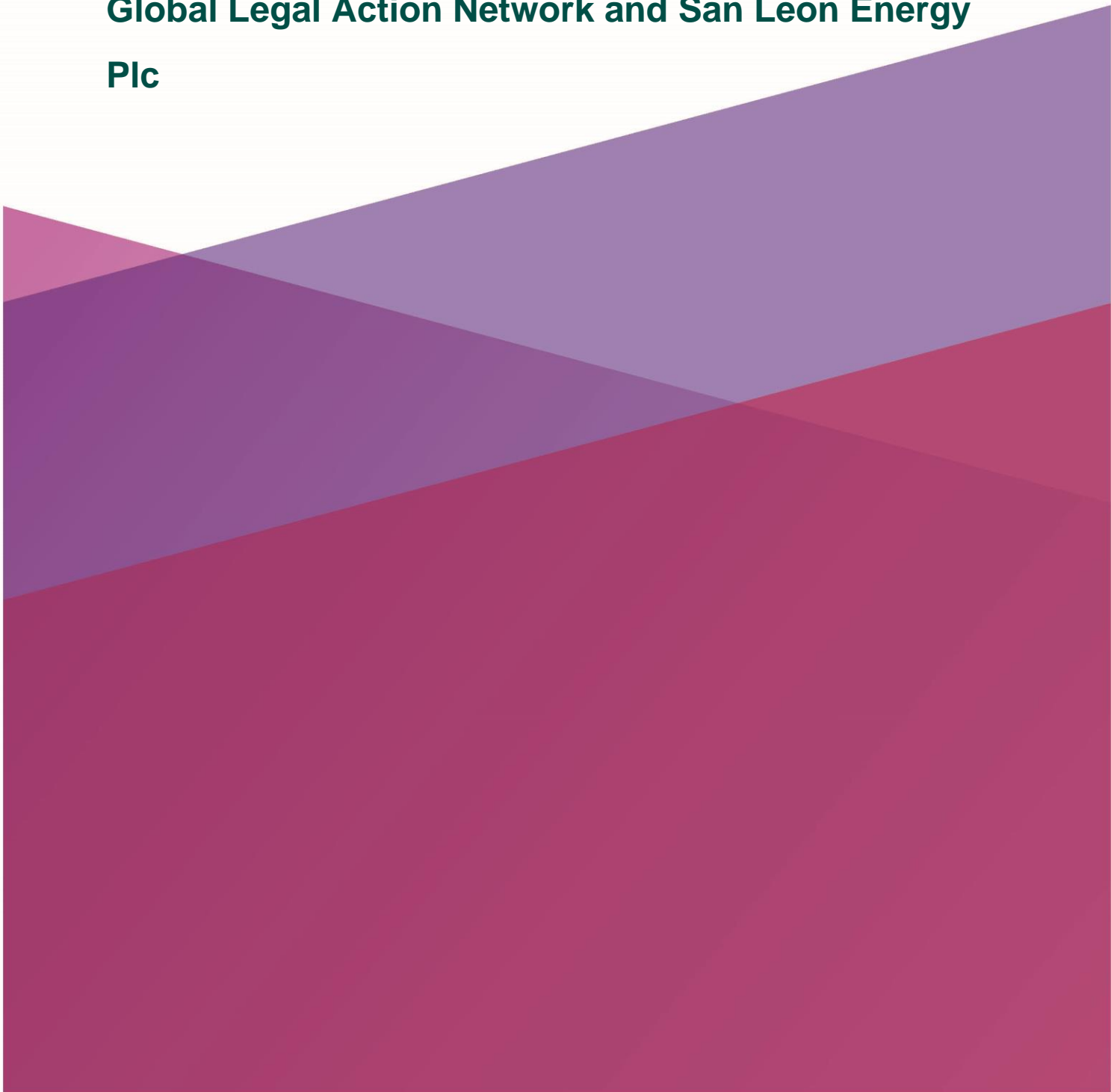


An Roinn Fiontar,
Trádála agus Fostaíochta
Department of Enterprise,
Trade and Employment

Final Statement

Ireland National Contact Point for the OECD Guidelines for Multinational Enterprises

**Global Legal Action Network and San Leon Energy
Plc**



As noted in the Procedural Guidance to the [OECD Guidelines for Multinational Enterprises](#), following conclusion of a specific instance and after consultation with the parties involved, the NCP will make the results of the procedures publicly available.

As no agreement was reached, the NCP is issuing the following statement. This statement describes the issues raised, the reasons why the NCP decided that the issues raised merited further examination, and the procedures initiated by the NCP to assist the parties. This statement also identifies recommendations made by the NCP to the enterprise on the implementation of the Guidelines.

As specific instances are not legal cases and NCPs are not judicial bodies, NCPs cannot directly order compensation nor compel parties to participate in a conciliation or mediation process.

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The OECD Guidelines for Multinational Enterprises are recommendations on responsible business conduct (RBC), addressed by Governments to multinational enterprises operating in or from adhering countries. They provide non-binding principles and standards for RBC in a global context consistent with applicable laws and internationally recognised standards. As an adhering country, Ireland is required to maintain a National Contact Point (NCP) to promote and raise awareness of the Guidelines and to consider complaints of alleged non-observance of the Guidelines.

The Ireland NCP is a standalone unit in the Department for Enterprise, Trade and Employment.

Executive Summary

- The Ireland NCP received a specific instance complaint lodged by the Global Legal Action Network (GLAN), (hereinafter “the Complainant”) against San Leon Energy plc, a company engaged in petroleum exploration activities (hereinafter “the Company”). The complaint argued that exploration activities carried out in Western Sahara were in breach of the OECD Guidelines, specifically the principle of meaningful engagement with stakeholders (Paragraph 14 of Chapter II) and the principle of respect for internationally recognised human rights (Paragraph 2 of Chapter II and Paragraphs 1, 2 and 3 of Chapter IV).
- The Ireland NCP reviewed submissions from both parties and issued an initial assessment. The NCP decided to limit its assessment to aspects of the complaint relating to company decisions taken at headquarter level in Ireland, and therefore excluded Chapter IV, Paragraph 3 from the scope of its assessment.
- The NCP offered its good offices as there were significant differences in perspective between the Complainant and the Company and, therefore, organising dialogue between the parties could contribute to a resolution of the issues.
- The NCP availed of external mediation services to facilitate two mediation sessions between the parties with the hope of finding an agreement. While both parties engaged with the mediation process, they were unable to come to a common position during the engagement.
- The NCP therefore conducted an examination of the specific instance in order to issue a final statement, including recommendations. The NCP recommends that the Company or any company considering investment in a Non-Self-Governing Territory should have regard to the rights of Non-Self-Governing Territories under Chapter XI of the United Nations Charter and be fully apprised of the OECD Guidelines for Multinational Enterprises and the related OECD Due Diligence Guidance for Responsible Business Conduct. The NCP thereby closes the specific instance.

A. Submission and initial assessment

The parties

1. The specific instance was submitted by the Complainant, an independent non-profit organisation and registered charity consisting of legal practitioners, journalists and academics aiming to highlight human rights concerns around the world. It was directed against the Company, a Dublin-headquartered oil and gas exploration and development company, in respect of exploration activities carried out in Western Sahara.

The complaint

2. The Complainant argued that these operations were carried out without the permission of the Sahrawi people. It argues that the activities were licensed by the Moroccan government, which they state “*licenses and enables the exploration of the natural resources of Western Sahara as part of its annexation of the territory*”.

3. The Complainant characterised this territory as a Non-Self-Governing Territory under [Chapter XI of the United Nations Charter](#). Citing [UN General Assembly Resolution 34/37](#), the Complainant argued that the Sahrawi people have an inalienable right to self-determination. Citing the [International Covenant on Civil and Political Rights](#) and the [International Covenant on Economic, Social and Cultural Rights](#), the Complainant argued that this included permanent and inalienable rights to the natural resources of the territory.
4. The Complainant cited a [2002 legal opinion by Mr. Hans Correll, the United Nations Under-Secretary for Legal Affairs](#), to support the argument that “*any exploration or exploitation of a people’s natural resources be undertaken only in accordance with both their interests and wishes*”. The Complainant cites a [2015 letter to the United Nations](#) from the Polisario Front and the Sahrawi Arab Democratic Republic condemning the Company’s activities. The complaint refers to the CJEU which characterises this organisation as “*the international representative of the Sahrawi people in their struggle for self-determination*”.

Relevant provisions of the Guidelines

5. The complaint cited the following Chapters and paragraphs of the OECD Guidelines:

Chapter II: General Policies

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 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*”.

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: Human Rights

Chapter IV A.1: Enterprises should “*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*”.

Chapter IV A.2: Enterprises should “*Within the context of their own activities, avoid causing or contributing to adverse human rights impacts and address such impacts when they occur*”.

Chapter IV A.3: Enterprises should “*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*”.

Remedy sought

6. With regards to remedy, the Complainant called on the Ireland NCP to:
 - i. Determine that the activities of the Company did not comply with obligations arising from the OECD Guidelines, with particular reference to respect for internationally recognised human rights and engagement with stakeholders.

- ii. Issue a direction or recommendation for the Company to relinquish its license rights, assets or other interests within Western Sahara; a direction or recommendation for the Company to make a formal apology to the Sahrawi people for its contribution to the violation of their rights; and condemn the activities of the Company in Western Sahara.
- iii. Request the Irish Government to provide advice to companies about business activities in Western Sahara.

The Company's response

7. In submissions to the Ireland NCP, the Company noted that it had ceased operations in the territory and no longer held any interests or licenses there. It noted that its exit had already been initiated when it had received notice of the complaint. The decision to exit was taken on a commercial basis.
8. Regarding alleged breaches of the Guidelines, the Company argued that the relevant standard to determine the ethical standard of its operations in a Non-Self-Governing Territory was [Article 73 of the Charter of the United Nations](#). It cited the [2002 opinion of Legal Counsel Hans Corell](#), the United Nations' most senior legal officer, to argue that exploitation of natural resources may be acceptable if it is carried out in accordance with the wishes and interests of the local population.
9. The Company argued that it had engaged with local representatives elected through processes including the entire local population, Sahrawi and non-Sahrawi. It stated that these elections "*are monitored by international observers and are considered free and fair*". The Company further argued that the Polisario and its affiliated Sahrawi Arab Democratic Republic (SADR) could not be considered the legitimate representatives of the local population. The Company claimed that "*In the past few years over 45 countries have frozen, suspended or withdrawn their recognition of the Polisario-backed Sahrawi Arab Democratic Republic (SADR)*".
10. The Company cited a further legal opinion by Mr. Hans Correll recognising "*value in foreign economic investment undertaken in collaboration with the peoples of the Non-Self-Governing Territories and in accordance with their wishes, in order to make a valid contribution to the socio-economic development of the territories*". The Company stated that it had consulted with community and human rights groups, organisational leaders and Sahrawi business leaders "*to better understand their needs and how we could cooperate to positively impact their communities and lives*". To underline this point, the Company's submission to the Ireland NCP included letters from parties the Company referred to as local community representatives and local staff indicating support for its activities in the territory.

Initial assessment by the NCP

11. The Ireland NCP issued its initial assessment of the complaint on 18th January 2021. This initial assessment was issued to the parties and published on the Ireland NCP website, available [here](#).
12. On the basis of submissions received, the Ireland NCP decided that there was a *prima facie* case to proceed to the offer of good offices, limiting its assessment to aspects of the complaint relating to company decisions taken at headquarter level in Ireland. For

this reason, the NCP excluded Chapter IV, Article 3 of the Guidelines from its assessment.

B. The proceedings of the NCP

13. Since receipt of the submission, the NCP has carried out the following actions:

<i>Receipt and initial assessment of the specific instance</i>	
24 October 2018	Complaint received by Ireland NCP from the Complainant
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 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 the Complainant
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 initial assessment and shares draft with parties
4 February 2020	Company provides substantive response to draft initial assessment
18 January 2021	Initial assessment published
<i>Good offices and mediation action</i>	
7 April 2021	Ireland NCP offers good offices to parties
15 April and 10 May 2021	Parties accept NCP's offer of good offices
24 June – 15 July 2021	Ireland NCP conducts competitive procurement process to appoint external mediator
15 July – 10 August 2021	Parties accept external mediator's credentials
15 September – 17 November 2021	Terms of reference drafted and agreed with the Complainant and the Company
13 and 20 January 2022	Mediation meetings held
<i>Conclusion of the specific instance</i>	
27 January 2022	Ireland NCP requests submissions from parties pending final statement
6 February 2022	Ireland NCP receives submission from Company pending final statement
18 February 2022	Ireland NCP receives submission from Complainant pending final statement

5 May 2022	Ireland NCP completes Final Statement and shares draft with parties
20 May	Ireland NCP meets with Complainant to discuss draft final statement
30 May 2022	Complainant submits suggested amendments to draft final statement
5 June 2022	Company issues response to NCP following queries arising from Complainant submission
18 July 2022	Final statement published

C. Outcome of the good offices process

14. The Ireland NCP offered its good offices as there were significant differences in perspective between the Complainant and the Company and, therefore, organising dialogue between the parties could contribute to a resolution in a spirit of mutual trust and good faith.
15. The parties were presented with the proposed nomination of an external mediator, along with draft terms of reference, which were agreed with minor edits by 17 November 2021.
16. Mediation was conducted virtually over two sessions on the 13th and 20th of January 2022. The Ireland NCP assisted in a logistical and administrative capacity but was not a party to discussions, which were treated as strictly confidential under the terms of reference.
17. On the conclusion of mediation, the mediator informed the Ireland NCP that no agreement between the parties had been reached as they had been unable to come to a common understanding despite constructive engagement.

D. Examination and conclusions

18. Following the conclusion of the mediation sessions without an agreement, the Ireland NCP advised both parties of its intention to examine the complaint and issue a final statement. The Ireland NCP provided the opportunity for parties to provide further submissions to be considered at this stage in the process.

The Complainant's submission

19. The Complainant issued a submission to the Ireland NCP seeking to underline its argument that the Guidelines had been breached. The submission alleged that the Company's operations in Western Sahara constituted a failure of due diligence; adduced international legal instruments to comment on the legality of outside actors' involvement in Western Sahara; noted various state companies and other firms' positions on operations in Western Sahara; and advanced arguments concerning the human rights environment of Western Sahara.
20. The Complainant's submission stated that in operating in the territory of Western Sahara under the legal regime of Morocco, it was unavoidable for the Company to be

in breach of the human rights of local people. The submission cited the *OECD Due Diligence Guidance for Responsible Business Conduct* to argue that the appropriate way for the Company to respond to the human rights risks was “*disengagement with the business relationship either after failed attempts at mitigation, or where the enterprise deems mitigation not feasible, or because of the severity of the adverse impact*”.

21. Further to this, the submission argued that valid consent for operations in Western Sahara could only be given by the Polisario Front, “*which is the Sahrawi people’s legitimate representative*”.
22. The Complainant noted international law developments relevant to the specific instance, with particular reference to a decision of the Court of Justice of the European Union of 29th September 2021 (a link to the decision is available [here](#)). The judgment found that the 1996 EU-Morocco Association Agreement had not been concluded with the consent of the people of Western Sahara. The Complainant argued that the ruling “*further underline[d] the necessity to obtain the Sahrawi people’s consent, represented by Frente Polisario, for international agreements in the territory*”.
23. The Complainant argued that previous statements by the Irish Department of Foreign Affairs expressing support for United Nations Security Council resolutions on Western Sahara and argued that this “*affirms the right of the Sahrawi people to give their free and genuine consent, as a condition precedent for any foreign activity in the territory*”.
24. The Complainant’s submission stated that several companies had withdrawn from Western Sahara due to human rights concerns.

The Company’s submission

25. The Company’s submission called on the Ireland NCP to dismiss the complaint following the unsuccessful mediation sessions. It highlighted Paragraph 43 of Chapter IV of the Guidelines to argue that responsibility for human rights adverse impacts could not be shifted from the entity causing the impact to a commercial entity with which it has a business relationship.
26. The Company stated that the Complainant’s reading of the obligations arising from the Guidelines would prohibit any outside investment in Western Sahara.
27. The Company stated that the 2021 decision of the Court of Justice of the European Union was not pertinent as its operations in Western Sahara could only be judged by standards in place at the time. It further argued that its operations had brought social and economic benefits to the local population in Western Sahara, which currently includes both Sahrawis and non-Sahrawis, an outcome in keeping with Paragraph 3 of Chapter II of the Guidelines, calling on enterprises to “*Encourage local capacity building through close co-operation with the local community, including business interests, as well as developing the enterprise’s activities in domestic and foreign markets, consistent with the need for sound commercial practice*”.
28. The Company again confirmed that its field operations and business activities in Western Sahara have ceased. The Ireland NCP understands that any residual presence of the Company in the country concerns administrative affairs such as the recouping of VAT, which must be completed prior to the dissolution of entities. The Company also noted that if they had active operations in the territory, they would have a stock market obligation to disclose them in annual reports.

Recommendations

29. The Ireland NCP recommendations to the Company will also be relevant to other multinational enterprises considering resource exploration.
30. The Ireland NCP recommends that the Company or any enterprise considering investment in a Non-Self-Governing Territory should have regard to the rights of Non-Self-Governing Territories under Chapter XI of the United Nations Charter. Companies should be aware that operations in such Non-Self-Governing Territories carry heightened risks of adverse impact concerning human rights and stakeholder engagement and are expected to undertake enhanced due diligence measures to identify and address such risks.
31. The Ireland NCP encourages enterprises to have regard to due diligence expectations, and to be aware of the most recent developments in the practice of due diligence for international investment. The NCP strongly recommends that companies are thoroughly apprised of the OECD Guidelines for Multinational Enterprises and the related [OECD Due Diligence Guidance for Responsible Business Conduct](#). Companies should be aware that the guidance notes that in some circumstances, mitigation of human rights risks will be impossible, and the guidance will require them to disengage from the business relationship.
32. Companies should also be aware of the sector-specific due diligence guidance issued by the OECD. Particular reference is made to the [OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector](#).

Follow-up

33. Noting that the Company has disengaged from the territory, and that the operations which were the subject of the specific instance have halted, the Ireland NCP does not propose to carry out follow-up in this case. With this final statement, the NCP therefore closes the specific instance.

ENDS

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