

SPECIFIC INSTANCE

“EDF- EDF ENERGIES NOUVELLES IN MEXICO” 12 June 2018

Statement by the French National Contact Point

Following its initial assessment, the French NCP offers its good offices to the EDF Group and EDF EN, the Mexican NGO ProDESC and representatives of Union Hidalgo indigenous community.

The French National Contact Point (NCP) for the implementation of the OECD Guidelines for Multinational Enterprises received a referral on 8 and 12 February 2018 from a Mexican non-governmental organisation ProDESC¹ and from two representatives of the Union Hidalgo agrarian and indigenous community of a specific instance concerning the EDF Group and its subsidiary EDF Energies Nouvelles (EDF EN) concerning a wind farm project located in the territory of two municipalities (Union Hidalgo and La Ventosa) of the district of Juchitan de Zagaroza in the state of Oaxaca in Mexico.

1. Procedure followed by the NCP according to its bylaws

The NCP's specific instance handling procedure is confidential. The NCP must endeavour to carry out the initial assessment of a referral within an indicative deadline of three months after the acknowledgment of receipt and it then prepares a statement on the admissibility of the referral (Article 19). If the initial assessment is positive, it reviews the referral and offers its good offices to the parties to help them settle their dispute concerning the effectiveness of the OECD Guidelines.

The complainant NGO issued a press release announcing the referral on 8 February 2018. The NCP Secretariat received the complete version of the referral on 12 February 2018 and acknowledged receipt the same day. On 23 February 2018, the NCP validated the formal admissibility of the referral and began its initial assessment. It informed the parties on 27 and 28 February 2018. The NCP presented the referral procedure to the complainant organisations, asked them to provide certain details and invited them to sign a confidentiality agreement; the invitation was reiterated in March and April 2018. Upon receipt of the referral, the Group indicated its willingness to participate in the NCP dialogue process and then provided it with confidential first response elements.

The complainants only submitted the referral to the French NCP and indicated that they did not wish the referral to be forwarded to the Mexican NCP. The French and Mexican NCPs consulted together in March 2018 to formalise their coordination and appoint a leading NCP. As the referral concerns companies that are exclusively part of a French group, they decided that it would be treated by the French NCP as lead NCP with the support of the Mexican NCP.

At its meeting on 12 April 2018, the French NCP finalised the initial assessment of the referral and confirmed its leadership. It decided to accept the referral and offered its good offices to the parties by inviting them to respond by mid-May 2018. The complainants accepted the good offices of the French NCP on 15 May 2018. The Group accepted the NCP's good offices on 12 June 2018. The NCP is now entering the good offices and case examination phase, which it will endeavour to finalise within twelve months of receipt of the referral, i.e. by February 2019 (see Article 31).

¹ Project of Economic, Social and Cultural Rights, ProDESC

The NCP adopted a draft statement on 25 May 2018 and then consulted the complainants, the Group and the Mexican NCP. The NCP adopted this statement on 12 June 2018 and it was sent to the parties and to the Mexican NCP prior to its publication on the NCP website.

2. Summary of the initial assessment of the specific instance “EDF & EDF EN in Mexico”

The referral was submitted by two Mexican civil society organisations: the Mexican NGO ProDESC and two members of the Union of Hidalgo's agrarian and indigenous Zapotec community, defenders of human rights. Union Hidalgo, a municipality of about 12,000 inhabitants that is part of the district of Juchitan de Zaragoza in the state of Oaxaca in Mexico, is populated by more than 90% of Zapotecs. The Zapotecs are indigenous people in Mexico.

The referral concerns a project to build and operate a 252 MW wind farm located in the Juchitan de Zaragoza region in the Union Hidalgo and La Ventosa municipalities. This “Gunaa Sicaru” project is managed by a Mexican subsidiary of EDF EN called Eolica de Oaxaca. The project was announced publicly in April 2017. The Mexican authorities have just started a public consultation procedure.

The referral is both precise and documented. However, as the majority of the exhibits are in Spanish, and so as not to delay its work, the NCP carried out the initial assessment without waiting for the translation of all the documents. The referral calls into question, inter alia, corporate due diligence, the publication of information and responsibilities in terms of human rights connected with the groundwork and potential impact of this industrial project. The referral is complicated owing to the overlapping of issues concerning property ownership, the rights of indigenous peoples, Mexican civil law, customary law, international law and the OECD's CSR standards.

The NCP notes that this type of industrial project is subject to specific regulations in Mexico which were overhauled in 2014 (Federal Electricity Commission (CFE) Law and Electricity Industry Act) and which provide for several stages of authorisation. In certain cases, this involves the organisation of a public consultation by the Mexican government. The NCP stresses that these procedures are the purview of the Mexican authorities. The NCP has also been informed of the existence of a number of concurrent legal proceedings that were instituted by the complainants in 2017 against the authorisation decisions taken by the Mexican government.

The NCP notes that with regard to the rights of indigenous peoples, the referral refers to the Mexican Constitution, on the one hand, and to the free, prior and informed consent principle contained in the ILO Convention No. 169 on Indigenous and Tribal Peoples in Independent Countries and in the United Nations Declaration on the Rights of Indigenous Peoples of 2007 - instruments which are destined for States. Mexico, a member of the OECD since 1994 and an adhering country to the OECD Guidelines, ratified ILO Convention No. 169 on 5 September 1990² and adopted the United Nations Declaration on the Rights of Indigenous Peoples of the 13th September 2007³.

The OECD Guidelines are aimed at enterprises. The United Nations Guiding Principles on Business and Human Rights make a distinction between corporate responsibility on the one hand and State responsibility on the other. This distinction will have to be taken into account in the examination of this referral in particular with regard to the issue of the principle of free, prior and informed consent of indigenous peoples. The NCP's work will focus on the issues raised by the referral on the effectiveness of the Guidelines in the preparation of this industrial project by EDF, in particular with regard to the Group's due diligence vis-à-vis its activities and

² http://www.ilo.org/dyn/normlex/fr/f?p=NORMLEXPUB:11300:0::NO::P11300_INSTRUMENT_ID:312314

22 States have ratified the ILO Convention No. 169, including 15 in Latin America, Central America and the Caribbean, and 7 other States worldwide (Denmark, Fiji, Netherlands, Nepal, Norway, Central African Republic).

³ <http://unbisnet.un.org:8080/ipac20/ipac.jsp?profile=voting&index=.VM&term=ares61295>

those of its business relationships in the identification and prevention of societal and environmental risks related to the project.

See Appendix: List of recommendations of the OECD Guidelines of May 2011 subject to referral.

3. Conclusion of the initial assessment

In accordance with Article 18 of its bylaws, the NCP considers that the issues raised by the referral concerning the effectiveness of the Guidelines merit further examination. It reiterates that acceptance of the referral does not determine whether the company has acted in compliance, or not, with the OECD Guidelines.

The NCP offered its good offices to the parties who accepted them. It hopes that it can contribute positively to the resolution of the issues raised by this specific instance by offering the parties a platform for dialogue (see Article 25). During its good offices, the NCP will meet with the parties and offer them mediation. It may seek the advice of competent authorities or experts. It will take into account treaties, laws and regulations applicable in this case and the ongoing concurrent legal proceedings.

The NCP procedure is confidential. In accordance with its bylaws and the Procedural Guidelines established by the OECD, in order to build trust with the parties, the NCP takes appropriate measures to protect sensitive commercial and other information and the interests of other stakeholders involved in this specific instance. In this regard, it reiterated its invitation to the complainant organisations to sign a commitment to uphold the confidentiality of exchanges in order to facilitate the performance of its good offices. The NCP received this commitment on 15 May 2018. Lastly, certain elements brought to the attention of the NCP may be subject to confidentiality.

In the appendix:

- Recommendations of the 2011 Guidelines targeted by the referral.
- Diagram of the French NCP's procedure for handling specific instances.
- Extract from the bylaws of the French NCP on the initial assessment of a referral (Articles 18, 19, 26, 31) and the examination of specific instances (Articles 27, 28, 38, 39 and 40).

Website: <http://www.pcn-france.fr>

E-mail: pointdecontactnational-France@dgtresor.gouv.fr

© French National Contact Point for the OECD

Appendix: List of recommendations of the Guidelines subject to the referral:

OECD Guidelines for Multinational Enterprises 2011 Edition

<http://www.oecd.org/daf/inv/mne/48004323.pdf>

I. Concepts and Principles

Obeying domestic laws is the first obligation of enterprises. (...).

II. General Policies

Enterprises should take fully into account established policies in the countries in which they operate, and consider the views of other stakeholders. In this regard:

A. Enterprises should:

1. Contribute to economic, environmental and social progress with a view to achieving sustainable development.
2. Respect the internationally recognised human rights of those affected by their activities.
5. Refrain from seeking or accepting exemptions not contemplated in the statutory or regulatory framework related to human rights, environmental, health, safety, labour, taxation, financial incentives, or other issues.
10. Carry out risk-based due diligence, for example by incorporating it into their enterprise risk management systems, to identify, prevent and mitigate actual and potential adverse impacts as described in paragraphs 11 and 12, and account for how these impacts are addressed. The nature and extent of due diligence depend on the circumstances of a particular situation.
11. Avoid causing or contributing to adverse impacts on matters covered by the Guidelines, through their own activities, and address such impacts when they occur.
12. 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.
13. In addition to
14. 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

III. Disclosure

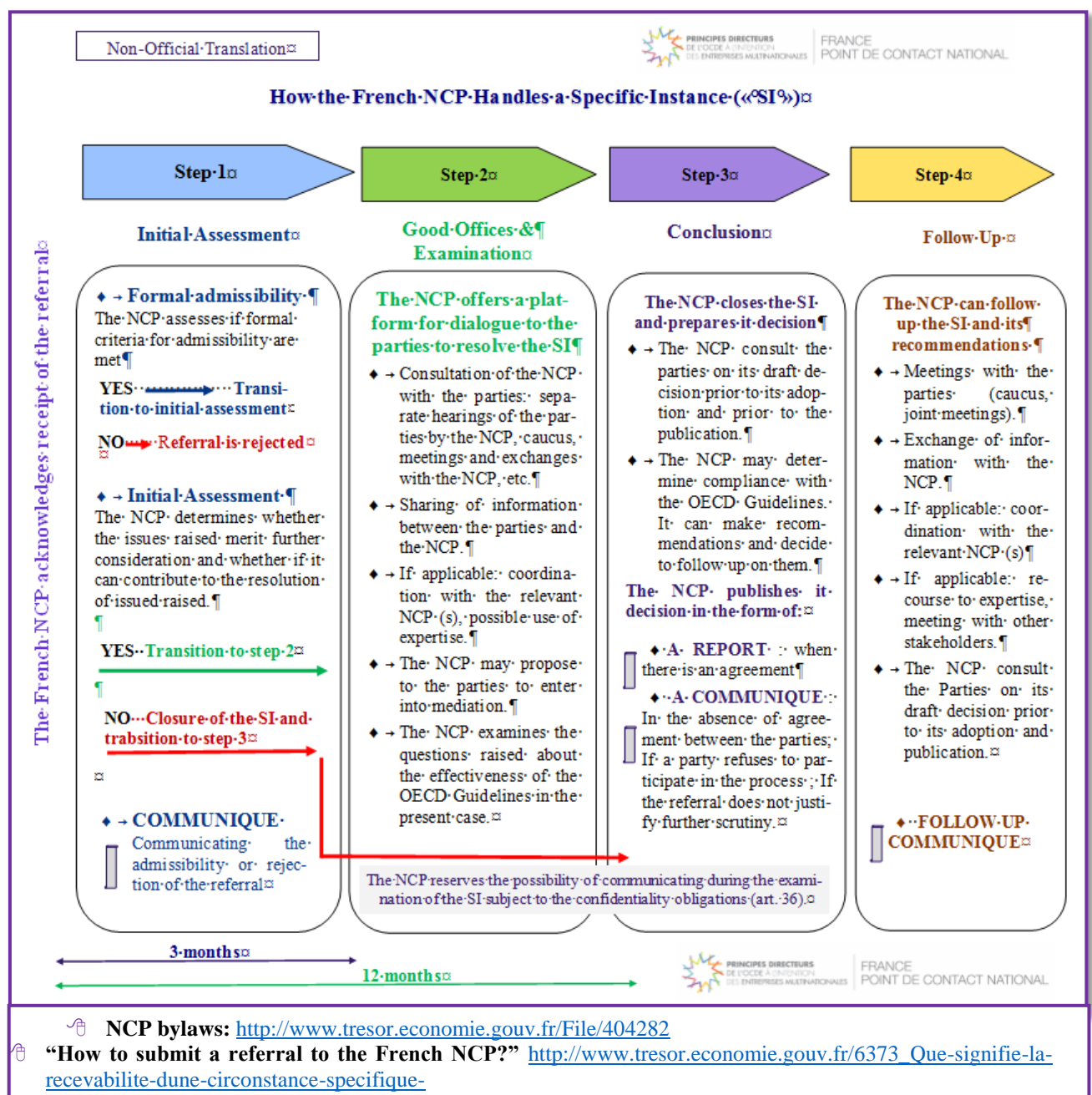
1. Enterprises should ensure that timely and accurate information is disclosed on all material matters regarding their activities, structure, financial situation, performance, ownership and governance. This information should be disclosed for the enterprise as a whole, and, where appropriate, along business lines or geographic areas. Disclosure policies of enterprises should be tailored to the nature, size and location of the enterprise, with due regard taken of costs, business confidentiality and other competitive concerns.
2. Disclosure policies of enterprises should include, but not be limited to, material information on:
 - 2c) major share ownership and voting rights, including the structure of a group of enterprises and intra-group relations, as well as control enhancing mechanisms;
 - 2h) governance structures and policies, in particular, the content of any corporate governance code or policy and its implementation process.

IV. Human Rights



States have the duty to protect human rights. 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.
5. Carry out human rights due diligence as appropriate to their size, the nature and context of operations and the severity of the risks of adverse human rights impacts.



Extracts from the bylaws of the French NCP

IV – REFERRALS TO THE NCP – INITIAL ASSESSMENT

- **Article 18.** *In examining the admissibility of a referral, the NCP shall begin by assessing the importance of the issues raised to ascertain whether they merit further examination.*
- **Article 19.** *Following its initial evaluation, the NCP conveys its response to the parties involved. The NCP shall issue a statement announcing the admissibility of the specific instance, which shall stipulate the identity of the parties, the country or countries concerned by the referral and a summary of its initial evaluation. With due regard to the confidentiality incumbent on the NCP, the plaintiff may inform its principal(s) of the decision taken by the NCP with regard to admissibility.*
- **Article 26.** *The NCP should endeavour to conclude the initial assessment within three months of the acknowledgment of receipt of the referral, although additional time may be granted, if need be, in order to collect essential information necessary for an informed decision.*
- **Article 31.** *The NCP shall strive to examine the issues raised within the best timeframe, if possible within 12 months of receipt of a specific instance, it being understood that this timeframe may be extended if circumstances so warrant, e.g. if the issue raised involves a country that has not adhered to the Guidelines, or in the event of parallel procedures.*

V – EXAMINATION OF SPECIFIC INSTANCES

- **Article 27.** *Where the issues raised merit further examination, the NCP shall offer its good offices to help the parties involved to resolve them. For this purpose, the NCP shall consult with these parties and, where appropriate: seek advice from competent authorities, and/or representatives of the business community, worker organisations, other non-governmental organisations, and experts; consult the NCP(s) in the other country or countries concerned; seek the opinion of the OECD Investment Committee if it has doubts about the interpretation of the Guidelines in the particular circumstances; propose, and with the agreement of the parties involved, facilitate access to consensual and non-adversarial means, such as conciliation or mediation, to assist the parties in resolving the problems.*
- **Article 28.** *The examination of a specific instance shall take the form of a series of consultations between the enterprise involved, the party or parties having made the referral to the NCP and all NCP members. These consultations shall enable the referring party or parties to set forth the grounds for the referral in detail and allow the enterprise concerned to respond thereto.*

Confidentiality

- **Article 38.** *NCP members are bound to respect the confidentiality of a referral while its examination is not closed.*
- **Article 39.** *In order to facilitate resolution of the issues raised, the NCP shall take appropriate measures to protect sensitive business and other information and the interests of other stakeholders involved in the specific instance.*
- **Article 40.** *When closing the procedures, if the parties involved have not agreed on the resolution of the issues raised, they shall be free to communicate about and discuss these issues. However, information and opinion provided during the procedures by another party involved shall remain confidential, unless that other party agrees to their disclosure or this would be contrary to the provisions of national law.*