

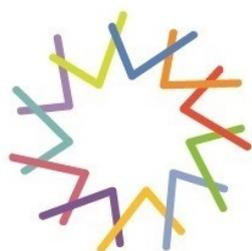
REPORT

CASE E-00009:

***Committee for Solidarity with the
Arab Cause (CSCA)***

-

Spanish company



LINEAS DIRECTRICES DE LA OCDE
PARA EMPRESAS MULTINACIONALES

PUNTO NACIONAL DE CONTACTO ESPAÑOL



GOBIERNO
DE ESPAÑA

MINISTERIO
DE INDUSTRIA, COMERCIO
Y TURISMO



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I. DESCRIPTION OF THE CLAIM

A. Summary

On 20 December 2019, the Committee for Solidarity with the Arab Cause (hereinafter "the complainant" or "CSCA") filed a request with the Secretariat of the Spanish National Contact Point (hereinafter "NCP") to open a "good offices" process with the Spanish company. Specifically, the request was based on the alleged incorrect application by the Spanish company of certain points of the Guidelines in its project in East Jerusalem.

The Spanish company and an Israeli construction company formed the consortium TransJerusalem J-Net Ltd, which was selected in August 2019 by the JTMT (Jerusalem Transportation Masterplan Team) authority as the successful bidder for the East Jerusalem light rail project. It should be noted that on 20 January 2020, the same complainant filed a complaint against the Israeli construction company with the Israeli NCP.

The project, developed under the PPP (Public-Private Partnership) modality, includes the construction of 27 new kilometres of track, 53 new stations and several depots, including both the extension of the existing Red Line by 6.8 kilometres and the construction of the new Green Line, which will be 20.6 kilometres long. The contract also includes the design and supply of 114 new Urbos trams for the new Green Line and the refurbishment of the 46 units currently in service on the existing Red Line.

The projected route of the lines extends into East Jerusalem across the "Green Armistice Line" (the original 1949 border of the State of Israel with the territory claimed by the State of Palestine) in three sections: from approximately French Hill to Neve Ya'kov on the Red Line extension; between Gilo and Beit Zafafafa at the southern end; and from French Hill to Mount Scopus in the north on the Green Line. It should be noted that:

- It is a project that passes through illegal settlements in occupied Palestinian territories.
- The Red Line project is contained in Resolution 31/36 (A/HRC/RES/31/36) of the United Nations Human Rights Council (hereinafter UN) concerning a violation of international law.¹

The selected consortium will complete its scope in the project with the supply of the signalling, energy and communications systems, as well as the operation and maintenance of both lines, in the case of the operation of the system for a period of 15 years, with the possibility of extension, being 25 years for the maintenance activity.

B. Identification of the parties

- Institution or person making the request:

¹ <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/082/57/PDF/G1608257.pdf?OpenElement>



Committee for Solidarity with the Arab Cause.

Address: Calle Miguel Llaneza 66, 33208, Gijón, Spain.

- Company:

The company that is the subject of the complaint is a Spanish multinational, which has requested, in accordance with the Spanish NCP's Guide to NCP-specific case handling procedures, that its company name should not be explicitly stated.

C. Points of the Guidelines that are considered violated according to the Arab Cause Solidarity Committee:

The complaint points to potential non-compliance with the [OECD Guidelines for Multinational Enterprises](#) with regard to chapters II, III, IV, VIII, X, XI and other chapters:

Chapter II. General principles:

The complainant alleges that the Spanish company's activities in Jerusalem would allegedly violate several points of Chapter II of the General Principles of the OECD Guidelines for Multinational Enterprises, arguing that the project would be developed in occupied Palestinian territory and that this would entail a violation of human rights as well as a limitation for development, for the generation of local capacities and for the formation of human capital.

Furthermore, the complainant alleges that the consortium is allegedly profiting from the expropriations and the affectation of Palestinian natural resources.

In particular, it considers that the Spanish company's actions allegedly infringe the following paragraphs:

II.A.1 To contribute to economic, social and environmental progress in order to achieve sustainable development.

II.A.2 Respect internationally recognised human rights of individuals.

II.A.3 Stimulate local capacity building through close cooperation with the local community, including the interests of entrepreneurs, while developing the company's activities in internal and external markets in a way that is compatible with the need for sound business practices.

II.A.4 Promote human capital formation, especially by creating employment opportunities and providing training for employees.

II.A.5 Refrain from seeking or accepting exemptions not covered by the legal or regulatory framework related to human rights, environment, health, safety, labour, taxation, financial incentives or various other issues.



II.A.6 Support and defend the principles of good corporate governance and develop and implement good corporate governance practices, including through groups of companies.

II.A.7 Develop and implement effective self-disciplinary practices and management systems that promote a relationship of mutual trust between companies and the societies in which they operate.

II.A.10 Implement risk-based due diligence, for example by incorporating it into their risk management systems, in order to identify, prevent or mitigate actual or potential negative impacts as described in paragraphs 11 and 12 and report on how they react to such negative impacts. The nature and extent of due diligence depends on the circumstances of each particular situation.

II.A.11 Prevent own activities from generating or contributing to negative impacts in the fields covered by the Guidelines and take the necessary measures to address them when such impacts occur.

II.A.12 Strive to prevent or mitigate negative impacts, even in cases where companies have not contributed to them, if they are directly related to their activities, products or services by virtue of a business relationship. This should not be interpreted as a transfer of responsibility from the entity causing the negative impact to the company with which it has a business relationship.

II.A.14 Engage with stakeholders by providing them with real opportunities to participate in planning and decision-making on projects or other activities that could have a significant impact on local populations.

II.A.15 Refrain from any undue interference in local political activities.

II.B.2 Participate in or support, where appropriate, private (citizens') or multi-stakeholder initiatives and social dialogue on responsible supply chain management, ensuring that such initiatives take due account of their social and economic consequences in developing countries and comply with existing internationally recognised standards.

Chapter III. Disclosure of information

With regard to Chapter III, the complainant alleges that the company has omitted relevant information about its participation in and winning of the tender. It also argues that information about the active participation in the occupation of its partner in the consortium was omitted, as were the names of the competing companies which, according to the complainant, did not present themselves because they refused to violate international law, thus avoiding the damage that this would have caused to their corporate image.

In particular, it complains of non-compliance with the following paragraphs:



III.1 Companies should ensure the timely publication of accurate information on all material aspects of their activities, structure, financial situation, results, shareholders and system of corporate governance. This information should be disclosed for the company as a whole and, where appropriate, broken down by business line or geographical area. Company disclosure policies should be tailored to the nature, size and location of the company, with due regard to costs, business confidentiality and other competitive factors.

III.2F Companies' disclosure policies should include the publication of detailed information concerning, inter alia (f) foreseeable risk factors.

Chapter IV. Human Rights

The complainant considers that the company, in its activity, violates all six paragraphs of this chapter concerning respect for human rights:

IV.1 Respect human rights, which means that they must ensure that they do not infringe on the rights of others and address negative human rights impacts in which they are involved.

IV.2 In the framework of their own activities, avoid causing or contributing to negative human rights impacts, and address such impacts where they exist.

IV.3 Strive to prevent and mitigate adverse human rights impacts directly linked to their activities, goods or services by virtue of a business relationship with another entity, even if the companies do not contribute to such impacts.

IV.4 Develop a policy outlining its commitment to respect human rights.

IV.5 Exercise human rights due diligence in accordance with their size, the nature and context of their activities and the severity of the risks of adverse human rights impacts.

IV.6 Establish legitimate mechanisms or cooperate through such mechanisms to remedy negative human rights impacts where they are found to have caused or contributed to such impacts.

Chapter VIII. Consumer interests

The complainant alleges that the company fails to comply with the following paragraphs:

VIII.4 Not make any representation or omission or engage in any other deceptive, misleading, fraudulent or unfair practice.

VIII.7 Exercise close cooperation with public authorities to prevent and combat misleading commercial practices (including misleading advertising and commercial fraud) and to reduce or prevent serious threats to the



public health and safety or for the environment, arising from the consumption, use or disposal of their goods and services.

Chapter X. Competition

The complainant considers that the following paragraph is violated:

X.1 Conduct its activities in a manner consistent with all applicable competition laws and regulations, taking into account the competition laws of all countries where its activities may have anticompetitive effects.

The argument put forward by the complainant is that winning the tender for the construction of the light rail in Jerusalem means for the Spanish company an improvement in turnover figures and better use of economies of scale, which gives the Spanish company an advantage in future tenders over other companies that decide not to participate in the tender.

Furthermore, it considers that, by omitting the reason for others not to compete, misleading and unfair advertising is being carried out.

Chapter XI. Tax Matters

The complainant alleges non-compliance with the first two paragraphs of this chapter, considering that taxation and finances are controlled by Israel, so that only Israel receives financial compensation and "arbitrarily" transfers contributions to the Palestinian administration.

- *XI.1 It is important that companies contribute to the public finances of host countries by complying with their tax obligations in a timely manner. In particular, companies should comply with the letter and spirit of the tax laws and regulations of the countries in which they operate. Complying with the spirit of the law means understanding and respecting the intent of the legislator. This interpretation does not mean that a company must pay more tax than the amount provided for by law. Tax discipline specifically implies timely reporting to the competent authorities of information relevant or necessary for the correct calculation of the taxes payable on their activities and adapting their transfer pricing practices in accordance with the arm's length principle.*
- *XI.2 Companies should consider tax governance and tax discipline as important elements of their control mechanisms and broader risk management systems. In particular, boards should adopt tax risk management strategies that fully identify and assess the financial, regulatory and reputational risks associated with taxation.*

Other chapters

The complainant points out that the occupation dominates any aspect of the life, property or rights of both the occupied Arab population and the discriminated Arab population of Israel, including Chapter V and VI labour rights.



Also, although he acknowledges that he has no concrete data, he anticipates that the implementation of the projects will bring with it more exploitation of natural resources procured by illegitimate means, disorderly treatment of waste that affects the population, and complicity with the occupying authorities in expropriations obtained by force or extortion.

D. Form of order sought by the complainant

The complainant requests that the case be examined with a view to the Spanish company ceasing its participation in the project, abandoning it and informing the Palestinian authorities of the withdrawal.

II. NCP ACTIONS

A. Meetings

The NCP Secretariat has met with both parties as well as with the Israeli NCP, the Spanish NCP and the Advisory Council.

In addition, it has met with the parties involved, i.e. CSCA and the Spanish company.

A.1 Meetings with the Spanish company

A meeting was held with the Spanish company on 31 January 2020, in which a series of clarifying questions were asked about the project under analysis, with the aim of determining the relevant authority, risk analysis and due diligence carried out by the Spanish company when bidding for the tender, as well as the impact of the project on both the Israeli and Palestinian populations. The company indicated that it had scrupulously complied with the law when participating in the tender, explaining that there is no type of prohibition for European companies to participate in a tender called by the Israeli authority. It also pointed out that the Jerusalem Project allows for sustainable and beneficial development for the entire population of the territory.

Following the meeting, the NCP Secretariat wrote to the Spanish company requesting further information on:

- The authority issuing the invitation to tender.
- Data on usage expectations: information on which populations will make use of the lines to be operated that can help discern whether the project will be of use to the Palestinian population in the area.
- Disclosure of information on the company's activities.
- The company's due diligence policy and what concrete actions have been taken for this project in line with the General Principles of the Guidelines.

Given that the company's annual reports with the mandatory public information on CSR were published in February 2020 and, given the pause caused by COVID-19, it was then decided to move forward in the study of the issues, asking the Spanish company for more details on the analysis it had made of the risks of the project within the meaning of the Guidelines and the mitigation measures it had taken, if any. In its reply, the company confirmed that it had carried out a very comprehensive risk analysis and had taken measures to mitigate and prevent possible future risks, such as the inclusion of contractual and organisational clauses to ensure the commitment both of the



partner and the company maintaining the project with the Code of Conduct of the Spanish company.

Furthermore, the Spanish company assured that the project complied with international law and that there had been no negative impacts on human rights. At the same time, it confirmed that it regularly updated its risk assessments.

Subsequently, on Wednesday 5 May 2021, the NCP Secretariat met virtually with the Spanish company to discuss the possibility of initiating a new phase of mediation between the parties, as well as to inform the Spanish company of the current status of the process. The Spanish company stated that it was not going to withdraw from the project, as the project was at an advanced stage of implementation and abandoning it would not be acceptable from a contractual or business point of view. Furthermore, it reiterated that it had taken all measures in its power to ensure that human rights were not violated and conveyed its willingness to integrate any suggestions that might be made into the scope of its Corporate Social Responsibility policy.

On the other hand, the Spanish company claimed to be suffering serious reputational damage due to the fact that the matter at issue in these proceedings had been brought to the attention of the company's stakeholders, both nationally and internationally.

The Spanish NCP Secretariat, taking into account the information provided by the Spanish company, informed both parties, also on 5 May 2021, that, based on the results of the meetings held with the parties, it would not initiate a mediation process. The NCP Secretariat would therefore initiate the next phase of the procedure, which consists of drafting a final report, including the formulation of a set of recommendations if appropriate.

A.2 Meetings with the CSCA

The NCP Secretariat initially met with the CSCA on 21 February 2020. The purpose of this meeting was to have an initial contact with the complainant and to explain the NCP's functions, including mediation and good offices. This work is considered particularly important insofar as there must be a willingness among the parties involved to engage in mediation. The Secretariat therefore asked the CSCA about its willingness to co-operate and initiate a mediation process, and the response was favourable.

The secretariat then enquired about the objective that CSCA was seeking to achieve through mediation. According to the complaint, CSCA wants the Spanish company to withdraw from the project, but when it was pointed out that the company had already deposited substantial guarantees and was not prepared to abandon the project, CSCA replied that its objective was not to harm the company but to urge it to adopt a broader risk analysis when carrying out the project. At the same time, it was asked to take into account not only the short-term gains, but also the long-term impact of certain activities.

Another question posed by this Secretariat to the CSCA was whether it had the capacity to represent the affected population. Its response was that the CSCA, although it does not represent any communities in the area, has projects in the West Bank and has lodged a complaint noting the harm that the progressive normalisation of Israel's annexation of the territories is doing to the population. Mentioning that it has projects in the West Bank, the Secretariat requested in writing information about these projects.



projects and how the construction of the tramway may directly or indirectly affect them.

Subsequently, the Spanish NCP Secretariat met again with CSCA virtually on 22 December 2020 to ask CSCA to confirm its standing and representativeness of the affected party during the first meeting of the NCP and Advisory Council on 17 November 2020. CSCA's standing and representativeness was confirmed in the terms set out later in this report ([section A.4 Meetings with the Spanish NCP and the Advisory Council](#)).

In response to this request, the CSCA sent an email to this centre on Wednesday, 20 January 2021 in which it defined itself as² an organisation that has been active in Palestine and Arab countries for more than 35 years, having been a party to lawsuits brought by Palestinian organisations in Spain for alleged crimes against humanity committed by Israeli officials. In the email, it explained that it carries out cooperation projects in the Occupied Palestinian Territories, in various countries in the region and in refugee camps, while at the same time carrying out awareness-raising work - including websites, printed material, newspaper articles, conferences and/or street activities - to publicise the existing situation.

Subsequently, on 5 May 2021, the NCP Secretariat held a virtual meeting with CSCA to discuss the possibility of initiating a new phase of mediation between the parties, as well as to inform CSCA of the current status of its complaint. CSCA reiterated its initial claim, i.e. that the Spanish company should withdraw from the project, stating that it would not accept any solution other than the withdrawal of the Spanish company from the project in order to admit the initiation of a mediation process between the parties.

Consequently, and following its subsequent meeting with the Spanish company, the Spanish NCP Secretariat informed the parties on 5 May 2021 that, based on the results of the meetings held with the parties and in the absence of agreement between the parties, it would not initiate a mediation process, but would proceed with the drafting of a final report including the formulation of a series of recommendations, if appropriate.

A.3 Meetings with the Israeli NCP

The Israeli NCP contacted the Spanish NCP Secretariat on 28 January 2020 explaining that it had received a complaint, from the same complainant, against the Israeli construction company on the project it was going to carry out with the company.

² Extract from the E-mail of 20/01/2021: "Our association has been active for more than 35 years in Palestine and the Occupied Palestinian Territories and on Palestine and Arab countries. As stated above, it has been a party to lawsuits on the advice of Palestinian organisations in Spain for alleged crimes against humanity committed by Israeli officials which, following modifications in the legal norms of universal jurisdiction by different Spanish governments, have ended up being suspended until these officials are in Spain or until extradition can be exercised", <https://rebellion.org/la-fiscalia-define-los-hechos-cometidos-por-israel-como-crimenes-de-guerra-y-de-lesa-humanidad/>; we are an association that has cooperation projects in the Occupied Territories. Occupied Territories Palestinian Territories in various countries at the countries, at refugee camps refugee camps, <https://www.lavanguardia.com/local/asturias/20200516/481181449278/el-principado-destina-72000-euros-a-proyectos-sanitarios-y-educativos-de-atencion-a-poblaciones-arabes.html>; and we carry out awareness-raising work, including web, print, books, newspaper articles, conferences, street activities, etc. to inform about the situation of human rights violations and international law, <http://causaarabeblog.blogspot.com/2013/09/palestina-pasado-y-presente-comic-de.html> and <https://diario.madrid.es/blog/notas-de-prensa/arce-y-valiente-en-la-inauguracion-del-jardin-de-palestina/> "



Spanish. It should be noted that the two complaints were filed at the same time with the two NCPs mentioned above.

As stated in the Guidelines, when two NCPs receive complaints about the same project, it is advisable to co-operate and co-ordinate to ensure consistency in the process. In this context, both NCPs made initial contact by telephone.

Subsequently, in January 2021, they held a first video conference meeting to discuss the matter. At this meeting, the Israeli NCP expressed its interest in taking the lead in the case. The Secretariat explained the Spanish NCP's procedure for mediating specific cases and was not in favour of the complaint filed in Spain being handled by the Israeli NCP. It agreed, however, to maintain contact when further developments arose.

After further meetings with the Israeli NCP to discuss the status of the respective instances, the Spanish NCP Secretariat decided that it would analyse the complaint received only with respect to the Spanish company, considering that it was in a better position to be able, if necessary, to adopt the necessary remedies, and that it is in accordance with the provisions of the NCP's Procedural Guidance for the Resolution of Specific Cases.³

A.4 Meetings with the Spanish NCP and the Advisory Council

On Thursday 17 November 2020, a meeting took place between NCP and Advisory Council members. During the meeting, doubts were raised regarding the standing and representativeness of the complainant (CSCA), and a request was made for a more in-depth study to be carried out, as no definitive verdict on this issue had been reached. This study focused on a consultation with the OECD and another with the State Attorney's Office:

- With regard to the OECD, the NCP Secretariat met with the Secretariat of the OECD CSR Working Group on 1 December 2020 for assistance in interpreting the reference to representative organisations in the OECD Guidance for NCPs for Initial Assessment on Specific Cases for the case study.⁴ This guide is considered the reference manual for case management. The guidance includes a reference to organisations, explaining that an NCP may approve an organisation's mandate if it considers its interests in the case to be legitimate, and stressing the importance of the representation having been requested or authorised by the affected individuals or communities.
- During the meeting, the OECD interlocutor explained that there does not need to be a legal test or mandate from the complainant for the NCP to accept the case, being

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http://comercioedicion.mityc.age/InversionesExteriores/PNCLD/Tramitacion_casos_especificos/Documents/Guide-Procedure-PNC-15-11-20.pdf

⁴ "Organisations representing affected individuals or communities, such as trade unions or, in some cases, NGOs or other representatives, may also have an interest in the matter. Where third party organisations act as representatives of individuals or communities, it will be important to ensure that such representation has been requested or authorised by the relevant individuals or communities. Statements from relevant community members authorising such representation may be one way of assessing this."



only if it can be deduced from its corporate purpose that it defends local interests⁵.

- In liaison with the State Attorney's Office at the State Secretariat for Trade, the NCP Secretariat held a meeting with that Unit on 9 February 2021, during which it was verified that the Complainant was listed as registered in Spain in the National Register of Associations.⁶ The complainant's corporate purpose was also analysed, by reviewing both Article 3 of the Association's Statute⁷ and the information contained in the email that the CSCA sent to the NCP Secretariat on Wednesday 20 January 2021, following the meeting held with the NCP Secretariat on 22 December 2020, in which doubts arose as to the standing and representativeness of the complainant. *In the opinion of the State Attorney's Office*, the doubts about the complainant's standing were dispelled as it was demonstrated that it was a legally constituted organisation, that it complies with the provisions of the NCP Guide for Initial Assessment on Specific Cases and that it shows a genuine and legitimate interest in relation to the case to be dealt with.

A subsequent meeting between the Spanish NCP and the Advisory Council took place on 24 February 2021. At this meeting, the enquiries made regarding the alleged standing and representativeness of the complainant were presented without any objections from the audience.

Finally, on 26 November 2021, the NCP and the Advisory Council met to, among other things, approve this final report, mandating the NCP Secretariat to make minor changes that were agreed at that meeting.

Once the Final Report was adopted, it was notified to the Parties on 3 December 2021, giving them the deadline for comments prescribed in the Procedural Guidance (15 days).

III. NCP ASSESSMENT

A. CONTEXT

⁵ Page 6, 3rd paragraph of <https://mneguidelines.oecd.org/Guide-for-National-Contact-Points-on-the-Initial-Assessment-of-Specific-Instances.pdf>

"Additionally, organisations with mandates or objectives related to certain RBC themes may also have an interest in issues touching on those themes (i.e. instances of environmental harm, forced labour etc.). An NCP may consider the mandate of an organisation as well as its stated objectives in submitting a specific instance in considering the legitimacy of its interests in a matter".

⁶ As stated in the complaint filed with the Spanish NCP dated 20 December 2019.

⁷ *"Article 3 of our association, CSCA, states,*

a) The study of Arab issues, with special reference to all activities related to the Arab cultural and socio-political environment in order to promote and stimulate mutual knowledge and the development of the culture of peace, solidarity and social justice.

b) The promotion of Spanish-Arab relations in a broad framework, contributing to mutual knowledge with a special dedication to all those activities related to socio-cultural knowledge and exchange and bringing the socio-political reality of these countries closer to the Spanish State.

c) The promotion of international cooperation for human development, including any actions aimed at contributing to the improvement of the human development index in Arab countries, especially in basic social infrastructures: health, education, drinking water and sanitation and any other services aimed at the weakest and most vulnerable social sectors of the population".



The scope of the OECD Guidelines focuses on the analysis of the direct impact of company activity and responsibilities in relation to many aspects of different areas, including human rights. Such analyses are particularly complex when they concern the occupied Palestinian territories, and even more so when they relate, as in this case, to the issue of settlements. The UN has passed several important resolutions⁸ on both issues, which the CSCA recalls in its complaint.

Accordingly, it is necessary to analyse the possible liability of the Spanish company in the framework of due diligence, in line with other similar analyses and with the recommendations of the OECD itself.

On the basis of the above, it was decided to conduct a more detailed examination of the issues related to the following Guidelines:

- A.7 to II.A.14 in Chapter II, which mainly details the due diligence obligations of companies.
- In Chapter III, points III.1 and III.2.F, which establish obligations related to the disclosure of information by companies.
- In Chapter IV, points IV.3 to IV.6, where due diligence obligations of companies in the field of human rights are established.

B. ASSESSMENT OF THE SITUATION

The Spanish NCP Secretariat has examined in depth the provisions consulted for the analysis of this case. In addition, and for the proper assessment of this case, the Spanish NCP Secretariat requested a report from the International Legal Advisory Office, part of the Under-Secretariat of the Ministry of Foreign Affairs, European Union and Cooperation (hereinafter MAUC).

In presenting its legal opinion, the AJI considered it appropriate to begin with a reference to the context in which the Spanish company's actions took place, recalling that Israel's settlements in Palestine constitute a violation of international law (a point it reiterated in the conclusions of its report). At the same time, he stressed that international humanitarian law applies in the occupied territories.

On the basis of the provisions consulted and the aforementioned MAUC report, it can be affirmed that humanitarian law applies in the occupied Palestinian territories. This has been stated, inter alia, by:

- a) United Nations Security Council on the Legal Consequences of the Construction of a New Wall in the Occupied Palestinian Territory, of 9 July 2004, and in Security Council resolution 2334 (2016), adopted on 23 December 2016, under Spanish presidency, with 14 votes in favour and the United States abstaining.
- b) The European Union (EU) and its Member States, including Spain, have been very clear about the unlawfulness of settlements. This is stated, for example, in

⁸ The UN Security Council has passed 43 condemnation resolutions since it called on Israel to withdraw from the territories occupied during the Six-Day War in 1967.



a note⁹ published by Spain, warning about the possible implications for citizens and businesses.

- c) The UN Human Rights Council (hereinafter UNHRC), which in 2012 adopted resolution 19/17 establishing an independent international Fact-Finding Mission to investigate the impact of Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Occupied Palestinian Territory (including East Jerusalem). In 2013 this Mission issued a report which detailed in its paragraph 96 by way of example a number of corporate activities and related issues of particular human rights concern.

Taking into account the activity carried out by the Spanish company in the construction of the tramway, it is appropriate to highlight here certain activities mentioned in the report which are similar to those carried out by the Spanish company:

- The provision of equipment and materials that facilitate the construction and expansion of settlements and the wall, as well as associated infrastructure;
- The provision of security services, equipment and materials to companies operating in the settlements;
- The provision of services to support the maintenance and existence of settlements, such as transport.

The Report's recommendations included the following: "*Private companies should assess the impact of their activities on human rights and take all necessary measures - including by ending their business interests - to ensure that their activities do not have a negative impact on human rights.*

in settlements - to ensure that they do not have a detrimental impact on the human rights of the Palestinian people, in accordance with international law and the Guiding Principles on Business and Human Rights. The Mission calls upon all Member States to take appropriate measures to ensure that business enterprises domiciled in their territory and/or under their jurisdiction, including those owned or controlled by them, operating in or related to settlements, respect human rights in all their operations. The Mission recommends that the Working Group on Business and Human Rights should Human Rights Council to address this issue".

In short, international humanitarian law applies in the Occupied Palestinian Territories and, although the provisions analysed do not create direct obligations for companies, it can be considered that the type of activities that the company that is the subject of the complaint carries out in these territories fall within the activities that the aforementioned resolutions condemn.

C. CONCLUSIONS

In accordance with international law and to the extent indicated in the previous paragraphs, the settlements of Israel (occupying power) in the Occupied Palestinian Territories are in contravention of international law and give rise to a situation, in

⁹ Possible implications for EU citizens and businesses of economic and financial activities in the Settlements:

http://www.exteriores.gob.es/Portal/es/PoliticaExteriorCooperacion/OrienteProximoMagreb/Documents/MENSAJES_OVER_INVESTMENTS_SETTLEMENTS_EN.pdf



This is an area of the world which cannot be ignored by economic operators wishing to operate there.

In addition, the analysis of the various international legal provisions mentioned above, as well as the report of the MAUC's International Legal Department, leads to a number of conclusions relevant to this report:

- First, neither the UNHRC Resolutions nor UNSCR 2334 of 23 December 2016 legally bind private companies (MAUC International Legal Advisor's Report of 21 June 2021).
- In relation to the UN Guiding Principles on Business and Human Rights, as the MAUC's International Legal Advisor's report points out, *"these serve as indicators for how States should ensure that companies do not commit human rights abuses and, although they are not legally binding, they constitute an obligatory frame of reference for States in the elaboration of legislation on business and human rights"*.
- For their part, the OECD Guidelines for Multinational Enterprises, according to the MAUC, are conceived *"as voluntary mechanisms of corporate social responsibility or corporate social responsibility"*. It adds that, although *"they are not legally binding, but are merely recommendations, they can serve as a basis or guide for the development of legally binding standards in the future"* and that the mechanism of the National Contact Points (NCPs) *"is an initiative to inspire and coordinate public policies favourable to the implementation of the Guidelines by OECD member states"*.

Based on the analysis carried out, this final report will advance a series of recommendations in accordance with the OECD Guidelines for Multinational Enterprises.

D. RECOMMENDATIONS

1.- Basis of the Recommendations:

The Spanish company submitted to the Spanish NCP Secretariat on 16 November 2020 internal plans and standards that represented the outcome of the due diligence measures taken to date. This documentation was submitted by the Spanish company at a later stage than CSCA's submission of the complaint, which may raise doubts as to whether the Spanish company is updating its due diligence policy in a timely manner.

On the other hand, from Chapter II of the OECD Guidelines for Multinational Enterprises, relating to **General Principles**, it can be deduced that, taking into account the international context existing in the area in which the tramway operates, it would have been necessary for the Spanish company, prior to its decision to participate in the project, to have taken into account the aforementioned context, as well as the possibility that its participation could lead to violations of the OECD Guidelines, in the exercise of due diligence by the Spanish company and prior to its decision to participate in the project, it should have taken into account the aforementioned context, as well as the possibility that its participation could cause human rights violations, a limitation for development, for the generation of local capacities and for the formation of human capital.



It should be noted that the local partner has been included in the UN database and excluded from the Norwegian Investment Fund.¹⁰ and excluded from the Norwegian Investment Fund¹¹. On this basis, the Spanish NCP considers that the application of an adequate due diligence policy would prevent the Spanish company from finding itself in a similar situation in the future.

From the analysis of chapter III of the OECD Guidelines for Multinational Enterprises on **Disclosure of Information**, the NCP Secretariat understands that the Spanish company should review its policy in this area with the objective of publishing, in a timely manner, accurate information on all significant aspects of its activities, structure, financial situation, results, shareholders and corporate governance system, including the risk factors that may exist in the activities it is carrying out or may carry out in the future.

An example of a disclosure review would be the analysis of the content of the reports that the Spanish company submitted to the CNMV in 2019 and the annual report of the same year. In neither of these cases did the company clearly specify that its new project would operate in the West Bank, explaining only that it would operate in Israel. Moreover, the terms used are not entirely accurate, as the reports submitted refer to Jerusalem as an exclusively Israeli city.

On the other hand, and in relation to Chapter IV of the OECD Guidelines for Multinational Enterprises relating to **Human Rights**, it is worth noting the existence of both national and international provisions that specify that working in occupied Palestinian territory and/or settlements has "*negative human rights consequences*" (United Nations High Commissioner for Human Rights)¹² and entails a "*possible violation of international humanitarian and human rights law*" (Spanish Information Note of the Ministry of Foreign Affairs, European Union and Cooperation (MAUC)¹³).

The human rights provisions considered most relevant for interpreting chapter IV of the Guidelines are listed below:

- a) In 2016, the UN Human Rights Council adopted the so-called "**UN Guiding Principles on Business and Human Rights**: Implementing the UN Framework to Protect, Respect and Remedy" (hereinafter Guiding Principles). These principles, while not creating new legal obligations, clarify the implications of existing international human rights standards and provide practical guidance.
- b) The **report of the United Nations High Commissioner for Human Rights** (hereinafter OHCHR) of 1 February 2018 states that, alongside the duty of States, there is a separate and complementary responsibility for companies to

¹⁰ Database of all business enterprises involved in the activities detailed in paragraph 96 of the report of the independent international fact-finding mission to investigate the implications of the Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Occupied Palestinian Territory, including East Jerusalem
<https://undocs.org/en/A/HRC/43/71>

¹¹ <https://files.nettsteder.regjeringen.no/wpuploads01/blogs.dir/275/files/2021/05/Shapir-rec-ENG.pdf>

¹² <https://undocs.org/es/A/HRC/37/39>

^{13,14} http://www.exteriores.gob.es/Portal/es/PoliticaExteriorCooperacion/OrienteProximoMagreb/Documentos/MENSAGES_OVER_INVESTMENTS_ESP.pdf



to carry out its activity with due diligence, which implies not contributing to negative human rights impacts. In the present case, it is inferred that the participation of the Spanish company in the project, within the framework of the aforementioned tender, could contribute to causing negative consequences on human rights, and would place it in the category of companies that contribute to the establishment, maintenance and growth of settlements. The Guiding Principles do not impose a cessation of activities, but warn of the existence of "reputational, financial or legal consequences".

- c) The above-mentioned Spanish MAUC Information Note "*Potential implications for EU citizens and businesses of economic and financial activities in settlements*"¹⁴ highlights the legal and economic risks associated with economic and financial activities in settlements insofar as they are not recognised as a legitimate part of the territory of Israel, and clearly warns that "[...] in the event of litigation, it could be very difficult for [EU] Member States to ensure the protection of their interests". Furthermore, the Spanish briefing note notes that 'possible violations of international humanitarian law and human rights should be taken into account' and warns that 'EU citizens and companies should also be aware of the potential reputational implications of engaging in economic and financial activities in the settlements'.
- d) In addition, in 2017, Spain adopted the National Action Plan on Business and Human Rights¹⁵ (hereinafter National Action Plan) aimed at implementing the Guiding Principles. In application of Guiding Principle 2, the National Action Plan affirms that the State expects Spanish companies, when operating abroad, to do so with due diligence to avoid violating the rights of third parties and to address the adverse impacts of their activity.

2.- Recommendations to Spanish companies:

RECOMMENDATIONS

RECOMMENDATION 1 (related to Chapters II *General Principles* and IV *Human Rights* of the Guidelines):

Greater diligence is recommended in assessing the damage or violations of human rights that may be caused by the activity of Spanish companies. Thus, Spanish companies should review their human rights policy and integrate it - if they have not already done so - into their CSR policy, especially in the following areas:

- **their Corporate Social Responsibility plans in the area of Human Rights;**
- **its scheme of corporate *compliance* rules;**
- **its Code of Conduct;**

¹⁵<http://www.exteriores.gob.es/Portal/es/PoliticaExteriorCooperacion/DerechosHumanos/Documents/Plan%20de%20Acci%C3%B3n%20Nacional%20de%20Empresas%20y%20Derechos%20Humanos.pdf>



- its Corporate Social Responsibility policy;
- its Crime Prevention Manual;
- its Due Diligence Manual for contracting with third parties;
- its specific corporate Human Rights Due Diligence procedure;
- its *checklist* of Due Diligence controls.

RECOMMENDATION 2 (related to Chapter III *Disclosure of Information* of the Guidelines):

The Spanish company is recommended to review its disclosure policy so that it publishes, in a timely manner, accurate information on all material aspects of its activities, structure, financial situation, results, shareholders and system of corporate governance, including risk factors that may exist in the activities it is carrying out or may carry out in the future.

In addition to the two previous recommendations, which are directly related to some of the chapters of the Guidelines, the following recommendation applies to the whole of the current project:

RECOMMENDATION 3 (related to the OECD Due Diligence Guidance for Responsible Business Conduct):

It is recommended that, as part of its due diligence, the Spanish company commissions an independent third party to prepare a report examining the social impact that the project may have on the occupied territories and to act as a complement to the mechanisms already in place. This report should be made available to the NCP within one year of the publication of this report on the website of the Ministry of Industry, Trade and Tourism. In addition, it is recommended that Spanish companies remind their partners and suppliers, in line with the OECD's Due Diligence Guidance for Responsible Business Conduct¹⁶The need to respect the OECD guidelines for multinational enterprises in their business activities.

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¹⁶<https://mneguidelines.oecd.org/Guia-de-la-OCDE-de-debida-diligencia-para-una-conducta-business-responsible.pdf>

