

**COMMUNIQUÉ OF THE ARGENTINE NATIONAL CONTACT POINT
(ANCP) for the OECD Guidelines for Multinational Enterprises**

Buenos Aires, Argentina

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The functions of the Argentine National Contact Point (ANCP) are to promote the Guidelines for Multinational Enterprises of the Organization for Economic Cooperation and Development (OECD) and to contribute to the resolution of issues related to their implementation. The *OECD Guidelines for Multinational Enterprises* are recommendations issued by governments to multinational companies that operate in adhering countries or with headquarters in said countries. The *Guidelines* set forth voluntary principles and rules for responsible corporate conduct that is compatible with applicable legislations and internationally recognized rules.

The ANCP is the authority in charge of receiving claims involving non-compliance with the OECD Guidelines for Multinational Enterprises. The ANCP acts in compliance with the Procedure Manual and within the framework of the abovementioned Guidelines.

Specific instance: Ricardo Molina / Lafarge Holcim Ltd.

Claimant:

In March 2016, Ricardo José Manuel Molina requested the good offices of the ANCP for it to consider possible non-compliance with the *Guidelines* by company Lafarge Holcim Ltd., particularly in relation to the preface, the concepts and principles, and the chapters on the environment, science and technology.

Mr. Molina stated that he is an electromechanical engineer and that he worked for almost 19 years in the company until he was laid off on 16 October 2014 due to restructuring. At the time he was Head of Production at the Capdeville plant in the province of Mendoza (Argentina).

He explained that, during the last period of his employment, he developed a machine that helps to improve the combustion of a considerable part of hazardous waste, providing thermal energy and partially replacing noble fuels, with the consequent reduction in the cost of the process.

As explained by Mr. Molina, the machine he invented was patented by Holcim Technology Ltd (currently Lafarge Holcim Ltd.) while he was employed at the company, recognizing him as the inventor in all the countries that are signatories to the European Patent Convention, as well as in Russia, Brazil, Indonesia, Mexico, the Philippines, and Azerbaijan, among others, but not in Argentina, where the patent process is in progress.

The claimant submitted his claim on the grounds of lack of payment of fair compensation that covers the actual and potential economic benefit of his invention in all the countries where it is already patented and the 20-year period of exclusive use established in section 10 of Law No. 24481 (Argentine Patent Law).

Although the company offered Mr. Molina a certain amount of money as compensation, he considered that such amount only covered the partial benefit obtained with the prototype used in Argentina, while in fact Lafarge Holcim patented the final model with all its improvements (submitted in Switzerland on 21 October 2009). Furthermore, the compensation offered did not cover the benefit obtained in all other plants worldwide (a total of 188) nor the 20-year period of exclusive use.

In view of the above, the claimant requested the ANCP that Lafarge Holcim Ltd.:

- Comply with international treaties and applicable Argentine laws, offering a fair economic compensation that covers the actual and potential economic benefits of Ricardo José Manuel Molina's invention in all the countries where it has been patented and the 20-year period of exclusive use.
- Disseminate information on the characteristics and possibilities of use of the equipment at least internally among the plants of the group, highlighting its environmental benefits.
- Commit to formally establishing links with associations of inventors in the countries where it has plants, coordinating activities and enhancing benefits for both parties.

Proceedings:

In May 2016, following an analysis of the correspondence between Molina's argument, the documents submitted and the objectives proposed by OECD in the Guidelines, as well as the interest in the case, the ANCP declared the formal admissibility of it, since it considered that, *prima facie*, the complaint submitted by Molina complied with the formal requirements set forth in the OECD Guidelines for Multinational Enterprises.

In this context, the ANCP offered its good offices to the parties in order to facilitate the dialogue process for them to reach an understanding that is beneficial to all parties involved, maintaining individual contact with them.

Holcim (Argentina) S.A. (the local subsidiary of Lafarge Holcim Ltd.) made a submission to the ANCP through its attorneys requesting the termination of the Specific Instance initiated in May 2016, pursuant to the provisions of Article 14 of the ANCP Procedure Manual.

A representative of Holcim (Argentina) S.A. stated that the parties were summoned to the mandatory mediation process provided for in Argentine Law No. 26589 on 17 February 2016, and the mediation process was initiated on 1 March 2016. In the company's view, this meets the requirements of Article 14 of the ANCP Procedure Manual, which reads as follows: *"The ANCP will declare the instance finished if, during the course of the proceedings, either party and/or a third party resorts to a court in order to obtain a judgment on the same facts that gave rise to the proceedings before the ANCP."*

The representative of Holcim (Argentina) S.A. also stated that "(...) mediation is a mandatory instance prior to certain court procedures, as well as a requirement for the admission of judicial complaints (see Articles 1 and 2 of Law No. 26589). It follows that mediation itself should be broadly interpreted as a judicial complaint. This line of reasoning was established by the Argentine Supreme Court of Justice ("ASCJ"), which has decided that *"the beginning of the mandatory mediation process can be broadly understood as a judicial complaint."*

The ANCP clarified the issue relating to Article 14 of the ANCP Procedure Manual by stating that in the case under analysis, the judicial mediation process between the parties began (on 1 March 2016) before the specific instance was initiated (May 2016). Article 14 of the ANCP Procedure Manual only raises the incompatibility of the Specific Instance initiated with the subsequent commencement of judicial proceedings. Therefore, in ANCP's view, the requirements of said article were not met, and so the request for termination of the instance must not be admitted, without thereby prejudging the admissibility of the allegations on the merits made by Mr. Molina in his submission, which lead to the initiation of this Specific Instance.

It should be noted that paragraph 26 of the "Commentary on implementation procedures of the OECD Guidelines for Multinational Enterprises," included in the latest edition (2011) of the "OECD Guidelines for Multinational Enterprises" provides as follows: "When assessing the significance for the specific instance procedure of other domestic or international proceedings addressing similar issues in parallel, NCPs should not decide that issues do not merit further consideration solely because parallel proceedings have been conducted, are under way or are available to the parties concerned."

Taking the foregoing into consideration, the ANCP deemed it advisable to request that the company provide information on the acceptance or rejection of the ANCP's good offices to resolve the dispute between the parties and state its position (in the event that it should accept the ANCP's good offices) in relation to the substantive issues raised in Mr. Molina's submission. Additionally, Mr. Molina informed the ANCP that—in the event that Lafarge Holcim Ltd. should accept the ANCP's good offices to resolve the dispute—he would suspend the judicial complaint or any other kind of claim involving the initiation of new instances elsewhere until the dispute was resolved.

On 31 October 2016, the company submitted a new document stating as follows:

- since a judicial instance coexists with these proceedings before the ANCP based on the same facts and involving the same parties, its participation in the Specific Instance as it was initiated affected its right to defence at trial, protected by Article 18 of the Argentine Constitution.

- this is so because participating under these circumstances would require Holcim (Argentina) S.A. to produce technically, legally and economically-complex evidence, positions, arguments and defences which should be discussed in parallel, in greater detail, mandatorily and imperatively in court.

Thus, Holcim Argentina S.A., the local subsidiary of Lafarge Holcim Ltd., stated that it was “*obliged to decline to participate in the specific instance initiated by Mr. Molina, as its right to defence at trial was affected by the existence of a parallel judicial instance initiated by Mr. Molina himself against Holcim to obtain a decision on the same events that led to the instance before the ANCP; and, therefore, requests that the ANCP include these considerations in its final report terminating the proceedings and in any subsequent communiqué relating to these proceedings.*”

Following the company’s submission, the ANCP proposed that the parties conduct an exercise to reach a solution, based on the following parameters:

- the parties were to discuss a purely transactional solution in relation to the amount of compensation requested by Mr. Molina.
- the parties were not to resubmit any proposals which had already been made before (i.e., in the mediation process that had already ended); instead, they were to explore new means that improved on every other option discussed thus far.

The parties accepted the ANCP’s proposal; however, the goal was not achieved, and they failed to reach an agreement.

Conclusion:

The ANPC has duly considered the arguments of the two parties involved and has acted within the framework of the powers and functions vested upon it by the OECD Guidelines.

In this respect, the ANPC has attempted to bring the parties together in order to foster dialogue between them, with a view to complying with the role assigned to it under the Guidelines -that is, the role to serve as a discussion forum for interested parties; however, no agreement was reached.

Based on the foregoing, the ANCP considers that it can no longer persist in its role of facilitator. Consequently, the ANCP should put an end to the proceedings of this specific instance.

It should be noted that the OECD Guidelines provide for the closing of the procedures of a specific stage when no agreement is reached by the parties or when either party is not willing to take part in the proceedings.

Nevertheless, the ANCP encourages the parties to consider finding a way to generate the conditions required to engage in dialogue and constructively work for the resolution of the issues in which they are involved.