

National Contact Point of Switzerland

Initial Assessment

Specific Instance regarding Lombard Odier submitted by the international trade union IUF

Berne, 12 July 2023

Executive summary

The Swiss NCP received a written submission by the international trade union IUF, the International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers' Associations (hereafter "IUF" or "submitting Party") under the OECD Guidelines for Multinational Enterprises (hereafter "OECD Guidelines"). It concerns Bank Lombard Odier & Co Ltd, headquartered in Switzerland (hereafter "responding Party" or "Lombard Odier"). The submission is related to alleged violations of the OECD Guidelines by not having properly conducted due diligence related to an investment in the Cambodian company NagaCorp Ltd. (hereafter "NagaCorp") alleged to have committed violations of fundamental rights at work.

In the view of the Swiss NCP, the issues raised in the submission are material and substantiated in the sense that, based on the information submitted, they are plausible and related to the application of the OECD Guidelines, in particular Chapters II (General Policies) and IV (Human Rights). The NCP took note of a previous engagement of Lombard Odier Investment Managers group with NagaCorp upon request by an NGO. However, the NCP notes that no dialogue between IUF and Lombard Odier has taken place and therefore accepts the specific instance and offers its good offices to the Parties for further consideration.

The offer for mediation focuses on Lombard Odier's due diligence process including its engagement with NagaCorp. The Swiss NCP considers that by accepting this specific instance and offering a confidential mediation it could contribute to the dialogue between the Parties and help them to reach a better mutual understanding of the issues raised and a mutually acceptable outcome. This decision is not based on conclusive research or fact-finding, nor does it represent a conclusion as to whether Lombard Odier observed the OECD Guidelines or not.

1 Submission and alleged violations of the OECD Guidelines

The Swiss NCP received a written submission on 5 April 2023 to consider a specific instance under the OECD Guidelines regarding Bank Lombard Odier & Co Ltd, headquartered in Switzerland. This specific instance has been raised by IUF, the International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers' Associations.

The submission relates to the human rights' due diligence of the responding Party regarding a specific investment in the Cambodian enterprise NagaCorp. The latter is an investment holding company that manages and operates NagaWorld, a hotel and entertainment complex in Phnom Penh, Cambodia. According to IUF, the responding Party is the second largest bondholder in the company NagaCorp. IUF notes that this results in a business relationship between the responding Party and NagaCorp according to the OECD Guidelines.

IUF claims a series of violations of fundamental labour rights by NagaCorp. According to IUF, they include dismissals of union leaders and members of the Union of Khmer Employees of NagaWorld (hereafter “LRSU”), an IUF affiliate, back in the years 2009 and 2010. A decision by the Arbitration Council, a specialized government body established under Cambodian law to hear labour disputes, to reinstate the dismissed workers was not implemented by NagaWorld. According to the IUF, another large wave of layoffs during the Covid pandemic in 2021 affected a high percentage of union members. The resulting strike of workers led to the arrest of trade unionists. IUF also claims that since February 2022, there has been violence and death threats from the Cambodian authorities against the workers. According to IUF, in March 2022, Naga World’s management introduced a parallel trade union and called workers to resign from LRSU and join the new union instead. In April 2022, LRSU held new elections of their leaders in which Ms. Chhim Sithar was re-elected as president. However, the Cambodian Department of Labour Disputes rejected their registration as NagaWorld had unilaterally declared that the elected leaders were no longer employed in their company. On 26 November 2022, LRSU President Sithar was arrested by the Cambodian authorities upon returning from abroad. The government claimed that she was being arrested for violating bail conditions preventing her from international travel. According to IUF, the arrest appears to be in retaliation for speaking out on an ongoing dispute case on the international stage.

In conclusion, the submitting Party claims the violation of the following recommendations of the OECD Guidelines by the responding Party:

- Chapter II (General Policies), para. 10: *“Carry out risk-based due diligence....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.”*
- Chapter IV, (Human Rights), para 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.”*

Additionally, IUF claims the violations of labour rights according to Chapter V of the OECD Guidelines by NagaCorp.

The submitting Party expects a resolution of the issues raised through a mediation by the Swiss NCP between IUF and Lombard Odier in order to mitigate the adverse impacts linked to Lombard Odier’s investment in NagaCorp by using the bank’s leverage. IUF expects that the NCP proceedings will lead NagaCorp to respect the fundamental labour rights of its workers and provide them with rights-compatible remediation. Furthermore, IUF demands that Lombard Odier disinvest from NagaCorp, should the violation of working conditions by NagaCorp continue.

2 Statement of the responding Party

On 19 May 2023, the responding Party submitted a written statement to the Swiss NCP concerning the issues raised in this specific instance. In its statement, Lombard Odier explains its relation to the alleged issues, previous steps taken as well its due diligence processes.

The responding Party states that it does not hold NagaCorp senior notes. NagaCorp senior notes are held by a Luxembourg investment fund, LOF - Asia Value Bond (hereafter “LOF”), for which Lombard Odier Funds (Europe) SA (hereafter “LOFE”), an affiliate of Bank Lombard Odier & Co Ltd acts as UCITS¹ Management Company. According to the responding Party, it does not take any part in the management of LOF and has no control or influence over its

¹ Undertakings for the Collective Investment in Transferable Securities

investments. In conclusion, the responding Party disputes that any complaint can be made against Lombard Odier & Co Ltd or other members of the Lombard Odier group in Switzerland.

The responding Party elaborates that it has liaised with the stewardship team within the Lombard Odier Investment Managers group (hereafter “LOIM”) of which LOF is part in view of understanding which steps have been taken regarding NagaCorp. According to the responding Party, LOIM has undertaken substantial due diligence and stewardship in respect of NagaCorp and therefore rejects the allegation that Lombard Odier failed to carry out an appropriate due diligence. According to the responding Party, LOIM went beyond the requirement of its exclusion/controversies policies by engaging with NagaCorp at the request of a third party, the Swiss NGO Solidar. According to the responding Party, since the first communication between Solidar and Lombard Odier on 15 March 2022, LOIM has been engaging with NagaCorp and in parallel maintained regular contact with Solidar.

According to the responding Party, LOIM concluded after its engagement with NagaCorp that the concerns elaborated by Solidar seemed to be unsubstantiated, based on media reports. There have been efforts towards settlement of the labour disputes by NagaCorp and a progress with about 150 out of original 360 protesting workers agreeing to mutual separation plans. Further, the union leaders have been released on bail as per media reports, although it should have no direct linkage to NagaCorp. LOIM concluded that the issues did not warrant a divestment/exclusion, and that sufficient and appropriate due diligence had taken place. This is based on the fact that LOIM's third party data provider, Sustainalytics, considers the controversy as a minor one on level 2 (out of 5²), because they assessed NagaCorp's strict responsibility, and not the country's legal framework. In reaching its decision, LOIM, among other factors, took into account:

- that it is not LOIM’s task to critically review decisions made by Cambodian authorities;
- that their conclusion relies on rating agencies, auditor and the local legislation;
- and that the burden of proof of the allegations lay with Solidar, respectively the submitting Party.

3 The proceedings of the Swiss NCP up to date

Since the receipt of the submission on 5 April 2023 the NCP took the following steps:

12.4.2023	Confirmation to acknowledge receipt of the submission to the submitting Party.
15.4.2023	Submission was forwarded to the responding Party.
26.4.2023	Virtual Exchange with responding Party on procedural issues.
27.4.2023	Constitution of an ad hoc Working group including representatives from the State Secretariat for Economic Affairs, the Federal Department of Foreign Affairs according to the Specific Instances Procedure of the Swiss NCP ³ .
27.4.2023	Information of the Office of the Swiss Development Cooperation in Phnom Penh (Cambodia).
27.4.2023	Information of the Swiss Embassy in Thailand (responsible for Cambodia).
10.5.2023	Exchange with US NCP regarding similar submissions by IUF related to US companies.

² The criteria for the 5 categories (going from “low”, “moderate”, “significant”, high to “severe”) are explained in detail in the submission of the Responding Party

³ www.seco.admin.ch/ncp

19.5.2023	Receipt of a written statement of the responding Party, which was forwarded to IUF.
23.5.2023	Virtual exchange of the ad hoc Working group with the submitting Party to exchange on the procedure of the specific instance.
31.5.2023	Draft Report on Initial Assessment sent to the Parties for comments on possible misrepresentations of factual information.
9.6/4.7.2023	Receipt of written comments by Parties

4 Considerations and decision of the Swiss NCP

Based on the Procedural Guidance for the OECD Guidelines and the Specific Instances Procedures of the Swiss NCP, the NCP considers the following points in its initial assessment:

a) Identity of the party concerned and its interest in the matter

The Swiss NCP comes to the conclusion that the submitting Party has provided sufficient information regarding its interest in the issues raised. Founded in 1920, IUF is a global union federation with 407 affiliates in 126 countries representing collectively over 10 million workers in the food, farm, and hotels sectors. The Labour Rights Supported Union of Khmer Employees of NagaWorld (LRSU) is an affiliate of IUF. The submitting Party has been engaged for the release of and drop of all charges against the president of LRSU since 2022⁴.

b) Responsibility of the Swiss NCP

According to the OECD Guidelines, a specific instance should be raised in the country in which the alleged issues arise. If this country is not a signatory state of the OECD Guidelines and therefore does not have its own NCP, the issue should be raised in the country where the multinational enterprise has its headquarters.

The Swiss NCP is responsible for this specific instance regarding the issues in Cambodia because this country is not a signatory state of the OECD Guidelines and Lombard Odier has its headquarters in Switzerland⁵. Furthermore, the Swiss NCP is also competent as the submission refers to the due diligence process of Lombard Odier which is managed at its headquarters in Switzerland.

c) Scope of application of the OECD Guidelines and materiality of the specific instance

Lombard Odier is a Swiss bank headquartered in Geneva, Switzerland. It is active in, among other things, private banking and asset management. Lombard Odier has around 25 offices in Europe, the Americas and Asia.⁶ Accordingly, Lombard Odier is a multinational enterprise within the meaning of the OECD Guidelines.

The OECD Guidelines apply to enterprises of all sectors⁷, including the financial sector⁸. They distinguish between impacts on matters covered by the OECD Guidelines, including human rights, through *own activities*⁹ of the concerned enterprise and adverse impacts *directly linked* to the operations, products or services of the enterprise by a business relationship¹⁰. The term

⁴ <https://www.iuf.org/news/cambodia-release-lrsu-president-sithar-chhim-now/>

⁵ OECD Guidelines, Commentary on the Implementation Procedures of the OECD Guidelines for Multinational Enterprises, Paragraph 24

⁶ <https://www.lombardodier.com/legal-information>

⁷ OECD Guidelines, I. Concepts and Principles, Paragraph 4

⁸ Scope and application of 'business relationships' in the financial sector under the OECD Guidelines, OECD 2014, p. 6, <https://mneguidelines.oecd.org/global-forum/GFRBC-2014-financial-sector-document-2.pdf>; Responsible business conduct for institutional investors, Key considerations for due diligence under OECD Guidelines for Multinational Enterprises, OECD 2017, p. 7, <http://mneguidelines.oecd.org/RBC-for-Institutional-Investors.pdf>

⁹ OECD Guidelines, Chapter II, Paragraph 11 and Chapter IV, Paragraph 2

¹⁰ OECD Guidelines, Chapter II, Paragraph 12 and Chapter IV, Paragraph 3

'business relationship' includes relationships with business partners, entities in the supply chain and any other non-State or State entities directly linked to its business operations, products or services¹¹. The use of the word 'includes' indicates that this is a non-exhaustive and illustrative list of examples; hence business relationships can go beyond the examples given. It is precisely because the OECD Guidelines are recommendations and not legally enforceable that open-ended descriptions of what is meant by business relations can be used. A legally binding character would require much more precision with regard to their scope and applicability¹². This expansive reading is also applicable in terms of business relationships in the financial sector. According to an OECD reference document, for the financial sector business relationships include, for example, suppliers, clients, customers and investee companies, including a minority shareholding.¹³

Based on information received by IUF, the responding Party holds USD 31.8 million in NagaCorp senior notes, making it the second largest bondholder in the company. This information could not be verified by the NCP.

According to the responding Party, it does not hold NagaCorp senior notes. Instead NagaCorp senior notes are held by a Luxembourg investment fund, LOF – Asia Value Bond (hereafter "LOF"), for which Lombard Odier Funds (Europe) SA (hereafter "LOFE"), an affiliate of Bank Lombard Odier & Co Ltd acts as UCITS¹⁴ Management Company. According to the responding Party, it does not take any part in the management of LOF and has no control over or influence over its investments. In conclusion, the responding Party disputes that any complaint can be made against Lombard Odier & Co Ltd or other members of the Lombard Odier group in Switzerland.

As the OECD-Guidelines are recommendations and not legally enforceable in the view of those guidelines, a business relationship can be assumed between Lombard Odier & Co Ltd and LOFE. The fact that bonds without voting rights are involved is not relevant to determine whether a business relationship exists under the OECD Guidelines, but it may influence the degree of possible leverage. Accordingly, the OECD Guidelines would expect Lombard Odier to seek to prevent or mitigate an adverse impact where it has not contributed to that impact, when the impact is nevertheless directly linked to its operations, products or services by a business relationship.¹⁵

If a business relationship as defined by the OECD Guidelines exists, the next question to be answered is whether the alleged human rights violations are directly linked to the operations, products or services of Lombard Odier. According to the Swiss NCP's assessment, IUF has credibly demonstrated that NagaCorp is directly causing and contributing to the violations of fundamental rights at work. For example, several press releases of the United States' Department of State and the United Nations raise serious concerns about the use of criminal charges against union leaders of NagaWorld casino.¹⁶ However, this finding is not based on conclusive research or fact-finding. Since LOF, an entity managed by an affiliate of Lombard Odier, hold bonds of NagaCorp, the NCP concludes that a direct link in the sense of the OECD Guidelines between this activity and the alleged violations exists.

The issues raised in the submission are therefore material and substantiated in the sense that, based on the information submitted, they are plausible and related to the application of the OECD Guidelines, in particular Chapters II (General Policies) and IV (Human Rights).

¹¹ OECD Guidelines, Chapter II, Commentary on General Policies, paragraph 14

¹² Scope and application of 'business relationship' in the financial sector under the OECD Guidelines for Multinational Enterprises, OECD 2014, p. 3, <https://mneguidelines.oecd.org/global-forum/GFRBC-2014-financial-sector-document-2.pdf>

¹³ Due diligence in the financial sector: adverse impacts directly linked to financial sector operations, products or services by a business relationship, OECD 2014, p. 10 and 11, <https://mneguidelines.oecd.org/global-forum/GFRBC-2014-financial-sector-document-1.pdf>; Responsible business conduct for institutional investors: Key considerations for due diligence under the OECD Guidelines for Multinational Enterprises, OECD 2017, p. 35, <http://mneguidelines.oecd.org/RBC-for-Institutional-Investors.pdf>

¹⁴ Undertakings for the Collective Investment in Transferable Securities

¹⁵ OECD Guidelines 2011, Chapter II "General Policies", Para. 12

¹⁶ See submission of 5 April 2023, page 5, footnotes 24 and 25.

d) Legal context and parallel proceedings

The Swiss NCP takes into consideration ongoing parallel proceedings, including court rulings. According to the Specific Instances Procedures of the Swiss NCP, already concluded or ongoing parallel proceedings do not necessarily prevent the Swiss NCP from pursuing a specific instance. However, in each individual case the Swiss NCP assesses whether or not an offer to mediate would make a positive contribution to the resolution of the issues raised or if it would prejudice either of the Parties involved in other proceedings.

The Swiss NCP is aware of ongoing legal proceedings in Phnom Penh related to labour issues including former employees of NagaCorp. Furthermore, the Swiss NCP is also aware of a complaint by IUF to the Committee of Freedom of Association of the ILO related to the violation of trade union rights by the Government in relation to the arrest and detention of union leaders and activist, anti-union discrimination and union busting.¹⁷ As the scope of the submission refers to the due diligence of Lombard Odier and its leverage on NagaCorp, the Swiss NCP considers that these parallel proceedings do not prevent the NCP from accepting this specific instance and offering its good offices. As a non-judicial mechanism, the Swiss NCP has a different role than national courts. However, when defining the topics of a possible mediation, the NCP, together with the Parties, shall ensure that the mediation does not interfere with ongoing parallel proceedings and shall focus on the role of Lombard Odier.

e) Contribution to the purpose and effectiveness of the OECD Guidelines

The role of the NCP is to offer a forum for discussion and to assist the Parties to address the issues raised. The Swiss NCP considers that by accepting this specific instance and offering a confidential mediation it could contribute to the dialogue between the Parties and help them reach a better mutual understanding of the issues raised and a mutually acceptable outcome.

The NCP took note of the previous engagement of Lombard Odier Investment Managers group (LOIM) with NagaCorp since March 2022 upon request by the NGO Solidar. However, IUF cannot be denied dialogue within the framework of the NCP because Lombard Odier was already in dialogue with Solidar. The NCP notes that no dialogue, as requested by the submitting Party, between IUF and Lombard Odier has taken place so far. The NCP is therefore of the opinion that a dialogue could offer IUF and Lombard Odier the possibility to foster a better mutual understanding. A mediation by the Swiss NCP could enable the Parties to discuss issues of Lombard Odier's due diligence process including the engagement by LOIM with NagaCorp. However, such a dialogue would not cover any possible negotiations in Phnom Penh between LRSU and NagaCorp nor negotiations involving Cambodian authorities.

d) Conclusion

The Swiss NCP accepts the specific instance and offers its good offices to the Parties for further consideration. The offer for mediation focuses on Lombard Odier's due diligence process including its engagement with NagaCorp. However, a possible dialogue would not cover any negotiations in Phnom Penh between LRSU and NagaCorp nor negotiations involving Cambodian authorities.

5 Next steps

The Swiss NCP will offer its good offices to the Parties and ask them to confirm whether they are willing to accept this offer with the aim of reaching a mutually acceptable outcome.

If the Parties reach an agreement and find a solution to the issues raised, the Swiss NCP will make publicly available a final statement with the results of the proceedings. Information

¹⁷ www.ilo.org/dyn/normlex/en/ff/f?p=1000:50001:0::NO::P50001_COMPLAINT_FILE_ID:4141200:NO

regarding the contents of the discussions and the agreement will only be published with the express consent of the Parties involved. If no agreement is reached or one of the Parties is not willing to take part in the proceedings, the Swiss NCP will also make this information publicly available in a final statement. The latter will include a summary of the reasons why no agreement was reached.

The Swiss NCP may draw up recommendations for implementation of the OECD Guidelines, which will also be included in the final statement. In addition, the NCP can envisage specific follow-up activities, for which the NCP will provide support following completion of the specific instance procedure. Final statements are published on the Swiss NCP website and are referenced in the OECD Database on Specific Instances for the OECD Guidelines. Before the statement is issued, the Swiss NCP gives the Parties the opportunity to comment on a draft statement. If no agreement between the Swiss NCP and the Parties about the wording of the statement is reached, the Swiss NCP makes the final decision.

The Swiss NCP requests that the Parties agree to maintain confidentiality during the proceedings. In order to establish an atmosphere of trust, the OECD Guidelines foresee that no information regarding the content of the proceedings may be shared with third parties or supporters of the submission. To this end, special requirements concerning the treatment of confidential information can be agreed upon by the Parties involved in this specific instance. The NCP informs the Parties that it reserves the right to stop the proceedings if one or the other of the Parties does not respect this confidentiality. Even after the proceedings have been concluded, Parties concerned remain committed to treat information received during the proceedings in a confidential way unless the other Party agrees to their disclosure.

The Swiss NCP will publish its report on the initial assessment on the Swiss NCP's website.