



Initial Assessment

Indigenous Federations from Peru et al. vs Pluspetrol Resources Corporation B.V.

Date: 20 April 2021

Notification to the Netherlands National Contact Point for the OECD Guidelines for Multinational Organisations from 4 indigenous federations from Peru together with 4 NGOs concerning an alleged violation of the OECD Guidelines for Multinational Enterprises by Pluspetrol Resources Corporation BV.

Table of Contents

1. Executive Summary.....	1
2. Summary of the Notification.....	2
3. Summary of Pluspetrol's Initial Response.....	4
4. Initial Assessment	5
5. Conclusion.....	8
6. Next Steps.....	8

1. Executive Summary

On 9 March 2020, 4 indigenous federations from Peru (FEDIQUEP, FECONACOR, OPIKAFPE, ACODECOSPAT) together with 4 NGOs (Peru Equidad, SOMO, Oxfam Peru and Oxfam Novib) notified the Dutch National Contact Point (hereinafter: NCP) of a specific instance regarding an alleged violation of the OECD Guidelines for Multinational Enterprises (hereinafter: the Guidelines) by Pluspetrol Resources Corporation BV (hereinafter: Pluspetrol), based in Amsterdam, the Netherlands. The NCP has informed both parties that under the given circumstances, unfortunately, it is not able to meet the OECD indicative period standard of publishing an initial assessment after three months of receiving a specific instance.

As part of its initial assessment, the NCP held separate, confidential meetings with the notifying parties (on March 11, 2020) and with the enterprise concerned, Pluspetrol (on July 2, 2020 and

February 5, 2021), about the specific instance and related matters. On June 3 and July 28, 2020, the NCP received written submissions from the company.

The Dutch NCP coordinated this notification with the NCP of Peru, which agreed to act in a supportive capacity with the Dutch NCP taking the lead.

The Dutch NCP concludes that this notification merits further consideration, based on the following considerations:

- the Dutch NCP is the right entity to assess the alleged violation by the companies concerned;
- the notifying parties have a legitimate interest in the issues raised in the notification;
- Pluspetrol is a multinational enterprise within the meaning of the Guidelines;
- the issues raised by the notifying parties are material and *prima facie* substantiated;
- there is a link between the enterprise's activities and the issues raised in the specific instance;
- the consideration of this specific instance may contribute to the Guidelines' objectives and effectiveness.

The decision on behalf of the Dutch NCP to examine this specific instance further is not based on substantive research or fact-finding, nor does it represent any judgment as to whether or not Pluspetrol has violated the Guidelines.

In this initial assessment, the NCP explains its decision to offer parties its good offices to come to a solution through dialogue, with reference to the [Dutch NCP Specific Instance Procedure](#) for handling notifications.

In conformity with the Dutch NCP's procedures, the draft initial assessment was sent to the parties involved, inviting them to respond to the assessment in writing within two weeks (which were extended to four weeks), after which the initial assessment was finalised, taking into account the parties' comments. This initial assessment has been published on the [NCP's website](#).

2. Summary of the Notification

On 9 March 2020, the Dutch NCP received a notification from 4 indigenous federations from Peru (FEDIQUEP, FECONACOR, OPIKAFPE, ACODECOSPAT) and 4 NGOs (Peru Equidad, SOMO, Oxfam Peru and Oxfam Novib) against Pluspetrol. In this initial assessment, the NCP does not express an opinion on the accuracy of the statements made by the notifying parties.

According to the notifying parties, Pluspetrol, headquartered in Amsterdam, the Netherlands, purchased oil extraction operations, rights and liabilities in Peru's Lot 1AB from another private company in 2000 and subsequently operated in and extracted oil from Lot 1AB for 15 years between 2000-2015. The notifying parties allege that during this time, Pluspetrol:

- Failed to conduct environmental due diligence, leading it to cause and contribute to significant adverse environmental impacts, which it has also failed to remediate
- Failed to conduct human rights due diligence, leading to cause and contribute to adverse impacts on the rights of the local indigenous population

- Used artificial tax avoidance structures and strategies, including offshore trusts and empty letterbox companies, with the likely purpose to minimise payment of taxes in countries in which it operates
- Failed to disclose material information about its corporate structure and operations

Concerning the environmental due diligence and remediation, the notifying parties claim that *“Pluspetrol failed to conduct appropriate due diligence to identify its existing impacts and prevent new ones, leading it to cause and contribute to the contamination of at least 1,963 sites with spilled oil, industrial waste, and other pollution from industrial oil extraction. This complaint alleges that the contamination has caused serious environmental impacts and that it is linked to adverse health impacts in local indigenous populations, ranging from high blood concentrations of carcinogenic metals such as cadmium and lead, to other potential health conditions. Pluspetrol is now seeking to abandon Lot 1AB without fulfilling its due diligence requirement under the OECD Guidelines to remediate the contamination it has caused or contributed to and leaving local communities at significant risk of additional adverse health impacts.”*

Regarding the human rights due diligence and remediation, the notifying parties state that *“through its failure to conduct appropriate human rights due diligence as outlined in the OECD Guidelines, this complaint alleges that Pluspetrol also adversely impacted several human rights of the local indigenous population. Pluspetrol avoided compensating indigenous communities for access to their lands and perpetuated the practice of its predecessor of not ensuring the communities' right to free prior and informed consent to ongoing use of their territory. Pluspetrol failed to respect the communities' right to self-determination by failing to engage them and their traditional leadership meaningfully in consultation over the lot's exploitation, as is expected by the OECD Guidelines. And Pluspetrol's contamination of rivers, soils, and dependent species violated the communities' rights to water and food.”*

Concerning the chapters Disclosure and Taxation, the notifying parties allege that *“Pluspetrol has employed artificial corporate structures, including offshore trusts and empty letterbox companies without employees, tactics frequently used to avoid paying taxes, in breach of OECD Guidelines provisions on disclosure and taxation. Pluspetrol's failure to disclose all material information about its business operations, identified in this complaint, prevents a complete understanding by the public of the full extent of its tax payments and possible tax avoidance.”*

The notifying parties seek the following:

- accountability and remediation for the environmental degradation of the 1,963 contaminated sites for which according to notifying parties Pluspetrol is responsible
- Pluspetrol must guarantee sufficient funds to ensure remediation of all contaminated sites according to the best techniques by a third-party remediation company approved by the federations and the Peruvian environmental agency
- that the Dutch NCP offer its good offices and facilitate a process aimed at bringing Pluspetrol's behaviour in line with the OECD Guidelines

The notifying parties argue that the Dutch NCP has jurisdiction and competence to handle this specific instance and is the appropriate entity to handle the specific instance for four reasons: 1) because Pluspetrol is headquartered in the Netherlands, 2) because the issues raised in this specific instance “arose” at the company's Dutch headquarters, 3) because previous attempts to resolve issues in Peru with the company's Peruvian management have failed, and 4) because indigenous

communities and civil society lack confidence in the Peruvian NCP's ability to handle the case effectively.

As mentioned before in this initial assessment, the NCP makes no comment on the accuracy of the notifying parties' claims.

3. Summary of Pluspetrol's Initial Response

On 3 June 2020 the NCP received an initial response from Pluspetrol to the notification and afterwards the NCP received the summary of its response on July 28, 2020. In this initial assessment, the NCP does not express any opinion as to the accuracy of the company's response.

Pluspetrol states that:

"Pluspetrol wishes to express its willingness to cooperate constructively in the proceedings before the Dutch NCP. Pluspetrol also notes however that many of the issues raised by the Complainants have been - and are currently - the subject of (legal) procedures in Peru.

The human rights and environmental issues raised by the Complainants lack any merit. Pluspetrol did operate Lot 1AB during the period 2000 to 2015, as part of a joint venture (Pluspetrol Norte S.A. ("PPN")) with an unrelated company. Before this involvement, another company – which is unrelated to Pluspetrol – operated Lot 1AB from 1971 to 2000 as a services provider for the Peruvian government. During that period, significant environmental impact was caused. The Peruvian government had full control and supervisory authority. At the end of the operations by this company, the Peruvian government allowed it to leave the country without having restored the environmental situation, even though it caused severe impact. Similarly some local communities settled a judicial case against this company, without requiring it to remediate the impacted areas.

Therefore, when Pluspetrol took over the operations in 2000, Lot 1AB was already heavily contaminated (and PPN did not assume any liability for past environmental impacts when it entered into the agreement to operate the Lot 1AB). PPN brought the operations in Lot 1AB to a level that meets, or exceeds, international quality and sustainability standards for the extractive industry. In addition, and without being legally obliged to do so, PPN heavily invested to improve the environmental situation in Lot 1AB and scientific evidence supports that PPN's efforts have already significantly improved the situation. Furthermore, PPN undertook several initiatives to engage in a meaningful manner with various local communities and other stakeholders.

Notwithstanding these efforts, the Peruvian government has tried to hold PPN liable for the environmental impact caused before PPN commenced operations in Lot 1AB. This is presumably because the previous operator is no longer active in Peru and therefore not – or at least, not easily - available for recourse. Also, if no party can be held liable, the Peruvian government would be responsible for remediating any remaining environmental impact in Lot 1AB. There is no legal basis for such a shift of liability to PPN. More importantly here, the OECD Guidelines for Multinational Enterprises do not aim to shift liability in a manner contemplated by the Peruvian government. Furthermore, the guidelines are not a substitute for domestic Peruvian law, nor should they be considered to override national legislation. PPN has taken a myriad of initiatives to limit the environmental impact of its exploitation activities, to limit the impact caused in Lot 1AB by the previous operator and to support the local communities, beyond its obligations under Peruvian law.

The tax and disclosure issues raised by the Complainants generally also lack merit and seem to be based on a notion of ‘guilty unless proven innocent’; e.g. the fact that the group does not publish its tax policy does not mean it does not have one. Pluspetrol fully cooperates with the tax authorities in all countries where it is active. The group does not engage in aggressive tax planning, nor does it ‘erode’ the taxable basis of operating companies with intra-group loans, and it pays significant amounts (in absolute and relative terms) of tax in the countries where it operates, including Peru. The group is genuinely based in the Netherlands and does not use the Netherlands as a jurisdiction to allow flows of funds to its shareholder(s): it has never made a profit distribution but has rather reinvested its profits.

The group does not disclose certain confidential information to the public for reasons of competitiveness but does comply with all laws on documentation and disclosure vis-à-vis all government authorities, and is well-prepared to comply with the upcoming UBO register laws in the Netherlands and will then meet all relevant recommendations of the OECD Guidelines.”

4. Initial Assessment

The NCP has decided to accept the submission. This decision has been taken following an assessment by the NCP as to whether the issues raised are i) “bona fide”, i.e. real or authentic and ii) relevant to the implementation of the Guidelines, i.e. within the scope of the Guidelines. To achieve this, the NCP took into account the following criteria:

[Is the Dutch NCP the right entity to assess the alleged violation?](#)

Although the impact of the alleged violations takes place in Peru, the specific instance addresses issues which have allegedly arisen at the company’s Netherlands’ based headquarters. The issues that have arisen are the alleged breaches of due diligence, remediation, disclosure and taxation by Pluspetrol, making the Netherlands the *locus* of the alleged violations of the Guidelines.

In accordance with the OECD Procedural Guidance on coordination between NCPs (Part II, Commentary on the Implementation Procedures of the [OECD Guidelines for Multinational Enterprises](#), para 23, 24) the Dutch NCP has consulted the NCP of Peru regarding this specific instance, and has proposed, that the Dutch NCP in this case would take the lead. The Peruvian NCP has agreed that in this case it is appropriate that the Dutch NCP takes the lead, based on the above considerations that the issues at stake have allegedly arisen at the company’s headquarters in the Netherlands.

Furthermore, the draft Initial Assessment has been shared with the Peruvian NCP. The Dutch NCP will keep the Peruvian NCP informed on the further developments and progress made and share future documents before publication.

Based on the above the Dutch NCP is the right entity to assess the alleged non-observance of the Guidelines. The NCP would like to note that both parties agree with this.

[What is the identity of the notifying parties, and what is the nature of their interest in the case?](#)

The notifying parties are 4 federations of indigenous communities from the Peruvian Amazon and 4 NGOs. The 4 federations represent 101 indigenous communities living in the Peruvian Amazon of which 16 claim to be affected directly by Pluspetrol’s operations as they live in the company’s

operating lot 1AB. The 4 non-governmental organisations are based in Peru (EQUIDAD and Oxfam Peru) and the Netherlands (SOMO and Oxfam Novib). They work on strengthening civil society in the area of environmental and human rights, tax justice and company accountability, both in Peru as well as worldwide.

Based on the above, the Dutch NCP is of the opinion that they have a legitimate interest in the issues raised in the notification.

Are the issues raised by the notifying parties material and substantiated?

The NCP interprets 'material and substantiated' to mean that, based on the information submitted, the issues raised are plausible and related to the application of the OECD. They concern the alleged non-observance of environmental and human rights due diligence and remediation (Chapter II, paragraphs 10, 11, 12, 14 and IV, paragraphs 1, 2, 3, 5, 6), Disclosure (Chapter III, paragraphs 1, 2 and 3) and Taxation (Chapter XI, paragraphs 1 and 2).

Is there a link between the activities of the enterprise and the issues raised in the specific instance?

The notification concerns issues which, according to the notifying parties, have taken place in the Netherlands and Peru under the responsibility of Pluspetrol, which is the group's headquarters based in the Netherlands. Therefore, the Dutch NCP believes there to be a link between the enterprise's activities and the issues raised in the specific instance.

What is the relevance of applicable legislation and procedures, including court rulings?

The NCP notes that it will not assess whether domestic law requirements were met by the company. The Guidelines expect companies to act in line with domestic law. However, even if the company is compliant it is not equivalent to observing the Guidelines as the Guidelines "extend beyond the law in many cases" (OECD Guidelines (2011), Chapter I par. 2). Expectations from companies can exceed domestic obligations with respect to the questions at issue, which is often the case concerning due diligence expectations. Also, companies are expected to, as a minimum, make reference to international human rights and labour standards (OECD Guidelines (2011), Commentary Chapter IV par. 39). In this specific instance, besides international human rights standards, also the UN Declaration on the Rights of Indigenous Peoples and the ILO convention 169 on Indigenous and Tribal Peoples, apply.

Based on the above, the NCP assesses it can contribute to clarifying the Guidelines concerning expected conduct from headquarters and their subsidiaries in relation to domestic law requirements. In this context the NCP draws attention to the fact that the Guidelines do not aim to shift liability from one enterprise or from the government to another enterprise. (OECD Guidelines (2011), Chapter II General Policies, A.12 and OECD Due Diligence Guidance for Responsible Business Conduct, Characteristics of due diligence – the essentials, p. 17)

The NCP has taken note of a settlement, regarding a case involving the predecessor of Pluspetrol's subsidiary PPN (Pluspetrol owns 55% of PPN's shares) of Lot1AB, a US-based firm. It was settled in 2015 and concerned remediation for health issues related to contamination of Lot 1AB with indigenous communities, out of which some are represented by the federations who are a notifying party in the underlying notification.

How have similar issues been, or are being, treated in other domestic or international proceedings?

Peruvian authorities have imposed fines on PPN in Peru for not complying with national environmental regulations regarding the contamination and remediation of environmental liabilities on Lot 1AB. The company has appealed each fine. Also, Pluspetrol has drawn our attention to the fact that there has been an international arbitration proceeding between PPN and Perupetro (a state company responsible for contracts concerning hydrocarbons in Peru) under the Block 1AB License Contract, which award in 2017 provided *“that PLUSPETROL [NORTE] did not contractually assume responsibility or obligation to remedy Historical Environmental Impacts caused prior to August 30, 1985 or caused between August 30, 1985 and May 8, 2000, but only contractually assumed a general obligation to comply with environmental regulations and to abide by the decisions of the competent authorities”*. Currently, there is a precautionary measure request by PPN, pending in Peru’s Supreme Court of Justice, regarding its responsibility for remediation for Lot 1AB. The case is filed by PPN in Peru regarding a Directorial Resolution in which the OEFA, which is Peru’s governmental Agency for Environmental Assessment and Supervision, imposes corrective and coercive measures on PPN.

Underlying notification is directed at Pluspetrol’s headquarters in the Netherlands and addresses its responsibility concerning environmental and human rights remediation from a due diligence perspective, including the responsibility the parent company has in this regard towards its subsidiaries.

The underlying notification addresses also taxation and disclosure issues which, as far as is known to the NCP, are not part of current cases or procedures.

The NCP considers that – if and in so far there are currently parallel proceedings on the same or related issues these are not an obstacle to accepting the submission for further examination, and that an offer of good offices could i) make a positive contribution to the resolution of the issues raised and ii) would not create serious prejudice for either of the parties involved in these other proceedings.

Would considering this specific issue contribute to achieving the Guidelines’ objectives and enhancing their effectiveness?

The NCP believes that dealing with this notification will contribute to the objectives and effectiveness of the Guidelines. By facilitating a dialogue between the parties it could contribute to a resolution between the parties and clarify the expected conduct from multinational enterprises regarding their responsibility for the issues raised including the environmental contamination caused by a predecessor and due diligence of headquarters towards subsidiaries. The OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector can be a useful tool in this regard.

Although some of the issues raised started to occur when the previous version of the Guidelines (published in 2000) was in force, Pluspetrol continued to be active also after the current version (published in 2011) was adopted. Moreover, the alleged harm and remediation issues concerning Lot 1AB are ongoing. Therefore the current version of the Guidelines applies to the specific instance.

5. Conclusion

The NCP concludes that this specific instance merits further consideration. The conclusions reached by the NCP in this initial assessment rest on the criteria laid out in the commentary to the Procedural Guidance, para 25 and are based on the information received from both parties. The NCP does not express an opinion on the correctness of the statements of the parties or the validity of the documentation provided by them.

6. Next Steps

In accordance with the Dutch NCP Specific Instance Procedure, the NCP accepts this case for further examination and offers its good offices to the parties. The NCP will ask both parties whether they are willing to engage in a mediation process, with the aim of agreeing how the issues can be successfully addressed.

The notifying parties have accepted NCP's good offices, the enterprise has not. In accordance with the NCP procedure, the NCP will examine the issues raised and may provide recommendations concerning the observance of the Guidelines. It will complete the procedure by issuing a Final Statement, which it will publish on its website.

The role of National Contact Points (NCPs) is to further the effectiveness of the OECD Guidelines. The Dutch government has chosen to establish an independent NCP, which is responsible for its own procedures and decisions, in accordance with the Procedural Guidance section of the Guidelines. In line with this, the Dutch NCP consists of four independent members, supported by four advisory government officials from the most relevant ministries. The NCP Secretariat is hosted by the Ministry of Foreign Affairs. The Minister for Foreign Trade and Development Cooperation is politically responsible for the functioning of the Dutch NCP. More information on the OECD Guidelines and the NCP can be found on the [NCP Website](#)

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