



OECD GUIDELINES
FOR MULTINATIONAL
ENTERPRISES

NATIONAL CONTACT POINT
FOR RESPONSIBLE BUSINESS
CONDUCT THE NETHERLANDS

Final Statement

Indigenous Federations from Peru et al. vs

Pluspetrol Resources Corporation B.V.

3 September 2025

Notification to the Dutch National Contact Point (NCP) for Responsible Business Conduct by four indigenous federations from Peru together with four NGOs concerning an alleged violation of the OECD Guidelines for Multinational Enterprises (hereinafter the Guidelines) by Pluspetrol Resources Corporation B.V.

As noted in the Procedural Guidance to the Guidelines, following conclusion of a specific instance and after consultation with the parties involved, the NCP will make the results of the procedures publicly available.

This statement describes the issues raised, the reasons why the NCP decided that the issues raised merited further examination, and the procedures initiated by the NCP to assist the parties. This statement also includes recommendations and conclusions based on the further examination made by the NCP to the enterprise on the implementation of the Guidelines, and outlines the reasons why there has been no dialogue facilitated by the NCP with the objective of reaching an agreement between the parties.

As specific instances are not judicial proceedings and NCPs are not judicial bodies, NCPs cannot directly order compensation nor compel parties to participate in a conciliation or mediation process.

Note: During the procedure of this notification the Guidelines have been updated in June 2023. The NCP applied the updated Guidelines in its forward-looking recommendations.

Table of Contents

1. Executive Summary.....	3
2. Substance of the submission, relevant provisions and the enterprise’s response.....	7
3. Initial assessment by the NCP	10
4. The proceedings of the NCP.....	10
5. Parties’ responses to the offer of good offices.....	13
6. Response to questions for clarification	13
7. Examinations and conclusions	15
Methodology.....	15
Concerning Disclosure.....	16
Concerning Taxation	17
Concerning Human Rights (the Rights of Indigenous Peoples) and General Policies (Meaningful Stakeholder Engagement).....	19
Concerning Environment (Environmental Pollution) and Human Rights (Right to Health).....	21
Concerning General Policies (Remedy).....	23
Concerning General Policies (Cooperation in the NCP Procedure)	24
8. Recommendations	25
Concerning Disclosure and Taxation.....	26
Concerning Human Rights (the Rights of Indigenous Peoples) and General Policies (Meaningful Stakeholder Engagement).....	26
Concerning Environment (Environmental Pollution) and Human Rights (Right to Health).....	27
Concerning General Policies (Remedy).....	27
Concerning General Policies (Cooperation in the NCP Procedure)	28
9. Follow Up	29
Annex A Provisions of the Guidelines referred to by the notifying party.....	30
Annex B Provisions of the Guidelines referred to by the NCP.....	32

1. Executive Summary

On 9 March 2020, four indigenous federations from Peru, FEDIQUEP, FECONACOR, OPIKAFPE, ACODECOSPAT, together with four NGOs, Peru Equidad, SOMO, Oxfam Peru and Oxfam Novib (hereinafter the notifying party) 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 or the enterprise), based in Amsterdam, the Netherlands.

The notification concerns the alleged non-observance of environmental and human rights due diligence and remediation (Chapter II General Policies, par. 10, 11, 12, 14 and Chapter IV Human Rights, par. 1, 2, 3, 5, 6), disclosure (Chapter III Disclosure, par. 1, 2 and 3) and taxation (Chapter XI Taxation, par. 1 and 2) of the Guidelines (2011).

Coordination with other NCPs

Since part of the alleged adverse impact has taken place in Peru, 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 has kept the Peruvian NCP informed of the progress in the procedure.

Initial Assessment

In its Initial Assessment, published on 20 April 2021, the Dutch NCP concluded that this notification merited further consideration, based on the following considerations:

- the Dutch NCP is the right entity to assess the alleged violation by the enterprise concerned;
- the notifying party has a legitimate interest in the issues raised in the notification;
- Pluspetrol is a multinational enterprises within the meaning of the Guidelines;
- the issues raised by the notifying party is material and *prima vista* 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 was based on an initial assessment of the information submitted and did not represent a conclusion as to whether the enterprise observed the Guidelines, nor as to whether the statements made by the notifying party were accurate.

Good offices

Following the conclusion that this notification merited further consideration, the NCP offered its good offices to the parties on 25 September 2020 to address the concerns raised by the notifying party and come to a solution through dialogue, with reference to the Dutch NCP Specific Instance Procedure for handling notifications. The good offices were accepted by the notifying party on 12 October 2020. The enterprise informed the NCP on 26 October 2020 that it would not accept the good offices and confirmed its decision on 12 February 2021.

Response to questions for clarification

This statement also includes a general clarification request on the following two questions from the notifying party: 1) the responsibilities of companies to respect human rights and the environment regardless of the inaction or inability of states, and 2) the responsibility of companies to undertake due diligence regarding adverse impacts initiated by a predecessor company that are ongoing. Because this is a general clarification, the NCP has not related its analysis to the notification.

Examination and conclusions

As no dialogue could take place, the NCP conducted a further examination, to assess whether the enterprise observed the Guidelines on the grounds put forward in the notification. The further examination resulted in this final statement.

In this final statement, the NCP makes the following assessment regarding the issues raised in the specific instance. Note: the conclusions are shortened for the purpose of the executive summary, see for the full text the respective sections.

Concerning Disclosure, the NCP assesses that, as the enterprise does not provide disclosure through freely and publicly available sources on basic aspects of its corporate structure, operations, annual accounts, or ownership, neither at the level of the parent company nor at the level of its Peruvian and Dutch subsidiaries, the enterprise has failed to act in line with paragraphs 1-3 of the Disclosure Chapter 2011.

Concerning Taxation, the NCP assesses that the enterprise failed to demonstrate, either through freely and publicly available information or at least to the NCP in response to this notification, that it acts in line with the spirit of the law. Therefore the NCP is unable to establish that the enterprise has observed paragraph 1 of the Taxation Chapter 2011. Concerning paragraph 2, the NCP confirms that the enterprise has strategies or policies concerning tax governance and compliance in place.

However, considering *i.a.* the limited guidance by the Guidelines, the NCP decided not to examine further whether their content is fully in line with the Guidelines. Therefore, it cannot establish whether the enterprise acted fully in line with paragraph 2 of the Taxation Chapter 2011. In addition, the NCP notes that the fact that the enterprise provides very limited publicly available information on taxation is not in line with what is expected from it under the Guidelines 2011.

Concerning Meaningful Stakeholder Engagement and the Rights of Indigenous Peoples, the NCP is of the opinion that the enterprise has not acted fully in line with the expectations to foster a relationship of mutual trust with the communities and to respect human rights as outlined in the Guidelines 2000 (General Policies Chapter, par. 2, 7), by concluding agreements with disadvantageous elements for the communities.

Concerning Environmental Pollution, the NCP assesses that the enterprise did not do enough to prevent and address adverse environmental impacts resulting from its activities. The NCP is of the opinion that the enterprise has not acted fully in line with the expectations of the Environment Chapter as outlined in the Guidelines 2000.

Concerning the Right to Health, the NCP assesses that the enterprise did not do enough to respect the right to health by protecting the environment. The NCP is of the opinion that the enterprise has not acted fully in line with the human rights expectations of the General Policies Chapter as outlined in the Guidelines 2000.

Concerning Remedy, the NCP relied on the findings of a 2018 UNDP report. This study concluded that the enterprise used remediation techniques which have been found partially inadequate and in turn resulted in incomplete remedy of the environmental contamination in Lot 1AB. The NCP is of

the opinion that the enterprise has not acted fully in line with the remediation expectation of the General Policies Chapter as outlined in the Guidelines 2011.

The NCP makes the following assessment regarding cooperation in the NCP Procedure and related responsibilities:

While the enterprise displayed a cooperative stance throughout the procedure in terms of providing information and corresponding with the NCP, it is the NCP's assessment, given the non-acceptance of the good offices, the enterprise's general refusal to share any of the information provided with the notifying party, and its failure to genuinely engage in the procedure with a view to finding a solution to the issues raised, that the enterprise has not acted as could have been expected from it under step six of the due diligence process as described in the OECD Due Diligence Guidance or under paragraph 21 of the Commentary on the Procedural Guidance.

Recommendations

Note: the recommendations are shortened for the purpose of the executive summary, see for the full text and references to the Guidelines the section Recommendations. The NCP recommends the enterprise to:

Concerning Disclosure and Taxation

- Align its conduct with paragraphs 1-4 of the Disclosure Chapter, i.e. consider the views and informational requirements of relevant stakeholders, including local communities and civil society, regarding the disclosure of material company information. More specifically, the enterprise should disclose information on its corporate structure, operations, ownership and annual accounts for both the parent company as well as its subsidiaries; and, where appropriate, along business lines or geographic areas. It should do this in an easily accessible and user friendly manner.
- Take note of the expectation that disclosure of responsible business conduct information is part of the enterprise's responsibility to conduct due diligence. Moreover, it can support in identifying (material) risks and impacts.
- Demonstrate that it acts in line with the spirit of the Dutch tax law in view of the fact that the Dutch corporate entities do not seem to have any real economic activities in the Netherlands.
- Become transparent on taxation policies and payments per corporate entity per country. The enterprise is recommended to follow the best practice example of other multinational enterprises, for example by publishing a Country-by-Country-Report of its tax payments.

Concerning the Rights of Indigenous Peoples and Meaningful Stakeholder Engagement

- Ensure its conduct is aligned with the Human Rights Chapter of the Guidelines, the relevant human rights standards and the international standards stipulating the rights of indigenous peoples, such as the ILO C169 and UNDRIP, as well as the OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector. For example, the right to free, prior and informed consent (FPIC) is an indigenous peoples' right which should be taken into account by business before starting activities.
- Take note of the importance of meaningful stakeholder engagement, which has been underlined in the 2023 update of the Guidelines and is clarified in General Policies, commentary 28.
- Engage more meaningfully with the local communities that are directly affected by the enterprise's operations, in order to foster a relationship of confidence and mutual trust.

- Conclude agreements with stakeholders, such as local communities, which are equivalent and include the right to redress for adverse impacts resulting from the enterprise's activities.
- Ensure the right to self-determination of indigenous peoples is respected and that agreements are concluded with the representative determined by the indigenous community concerned.
- Ensure that the (ownership) position of the community in relation to the land in question is mentioned in agreements and, where appropriate, compensation for the use of land is being given from the start.

Concerning Environmental Pollution and the Right to Health

- Ensure its conduct is aligned with the Guidelines' Chapters General Policies, Human Rights and Environment and the OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector.
- Conduct its activities in a manner that takes due account of the need to protect the environment, and in turn the health of communities and society more broadly, thereby focusing on the prevention of adverse impacts (Chapter Environment). In this regard it should carry out risk-based due diligence, as described in the Guidelines' Chapters General Policies, Human Rights and Environment; to avoid and address adverse environmental and human rights impacts.
- Raise the level of environmental performance in all parts of its operations by applying international best practices, even where this may not be formally required by existing local practice or regulation of the country in which it operates.
- Address adverse impacts that the enterprise inherited from its predecessor but to which the enterprise continues to contribute; and exercise leverage with respect to the remediation of adverse impacts caused or contributed to by its predecessor to which it is directly linked.

Concerning Remedy

The NCP recommends the enterprise to align its conduct with the Guidelines' Chapters General Policies, Human Rights and Environment, taking into account the best practices of the extractive industry, regarding remedy. More specifically, it recommends to the enterprise the following actions to be taken, directly relevant and applicable to this specific instance, regarding the sites where it has had its operations and that in the meantime have been abandoned:

- Assess which sites it has remediated inadequately and seek to provide remediation to the greatest extent possible, through any possible means;
- Assess regarding which sites it has contributed to the inherited adverse impacts and remedy the remaining impact to the greatest extent possible;
- Consult and engage with impacted communities in the design and planning of any remediation activities, in a meaningful way that ensures their free, prior and informed consent is obtained.

Concerning Cooperation in the NCP Procedure

- Cooperate in good faith and meaningfully with legitimate remediation mechanisms, with a view to addressing and resolving the issues raised by impacted stakeholders and rightsholders.
- To genuinely engage in any future proceedings with a view to finding a Guidelines-compatible solution to the issues raised, including giving serious consideration to any offer of good offices made by an NCP.

Follow Up

With the publication of the final statement the NCP procedure is concluded. The follow-up will consist of an evaluation of the recommendations and will take place one year after publication of the final statement.

2. Substance of the submission, relevant provisions and the enterprise's response

The parties

The notifying party consists of four federations of indigenous communities from the Peruvian Amazon and four non-governmental organisations (NGOs). The four federations (FEDIQUEP, FECONACOR, OPIKAFPE, ACODECOSPAT) claim to represent 101 indigenous communities living in the Peruvian Amazon, sixteen of which claim to be affected directly by Pluspetrol's operations. The four NGOs are based in Peru (EQUIDAD and Oxfam Peru) and the Netherlands (SOMO and Oxfam Novib). They work on strengthening civil society in the field of environmental and human rights, tax justice and corporate accountability, both in Peru and worldwide.

The enterprise, Pluspetrol Resource Corporation B.V., is based in the Netherlands. It is the ultimate parent company and headquarters of the Pluspetrol group of companies. The group is active in the oil and gas sector. Its extractive activities take place mainly in Latin America. According to its website, Pluspetrol is the largest oil and gas producer in Peru.

Substance of the submission

On 9 March 2020, the Dutch NCP received a notification from four indigenous federations from Peru (FEDIQUEP, FECONACOR, OPIKAFPE, ACODECOSPAT) and four NGOs (Peru Equidad, SOMO, Oxfam Peru and Oxfam Novib) against Pluspetrol.

According to the notification, 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 it 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 party claims 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 party states 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 party alleges 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 party seeks the following:

- accountability and remediation for the environmental degradation of the 1,963 contaminated sites for which, according to the notifying party, 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 offers its good offices and facilitates a process aimed at bringing Pluspetrol's behaviour in line with the Guidelines.

Relevant provisions

See Annex A for the provisions of the Guidelines 2011 referred to by the notifying party in the specific instance and which have, allegedly, not been observed by Pluspetrol.

The enterprise's response

The enterprise's response with regards to issues raised in the submission reads:

“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.

The enterprise objects to the application of the Guidelines 2011 version to events and matters prior to 2011."

3. Initial assessment by the NCP

The NCP concluded the notification merited further consideration. The full text of the initial assessment including the reasons why the NCP decided it merited further consideration can be found [here](#) on the NCP's website.

4. The proceedings of the NCP

After receipt of the submission, the NCP, in accordance with its procedure, held separate meetings with the parties involved. Since the submission refers to impact that has taken place in Peru, the NCP of Peru was asked to act as supportive NCP, but only on an informative basis, to which it agreed.

On April 2021, the NCP published on its website the Initial Assessment, in which it found that the issues raised merited further consideration. Following this conclusion, the NCP has offered its good offices to the parties. The NCP has asked both parties whether they are willing to engage in a mediation process, facilitated by the NCP, with the aim of agreeing how the issues raised can be successfully addressed. The notifying party accepted the good offices. The enterprise declined the offer.

In July 2021, the NCP received a letter from the enterprise in which it claimed that one NCP member and the Peruvian NCP should be disqualified from the procedure due to a lack of impartiality. The NCP considered these concerns and concluded that no further action needed to be taken.

As the good offices were not accepted, the NCP initiated the examination of the issues raised in the notification in order to draft the final statement. To this end, it examined information brought forward by the parties, open sources and consulted experts and other NCPs.

The NCP notes that the enterprise shared comprehensive information with the NCP with the request to keep it confidential and not share it with the notifying party. Upon enquiry by the NCP, the enterprise indicated it also did not want to share parts of the information or redact it in order for (parts of) it to be shared due to pending litigation. It did agree that the NCP could include the information that the NCP deemed relevant in the final statement.

The draft final statement was sent to the notifying party and the enterprise for comments. With the publication of the final statement the NCP concluded the Specific Instance Procedure.

Below is a chronological overview of what the NCP has done since receiving the submission.

In addition to the account given below, the NCP has also corresponded on various occasions throughout the process with both parties to give updates on the procedure and explanations for delays.

The NCP has unfortunately not been able to meet the indicative timelines as recommended by the OECD. This is due to the complexity of this specific instance and the extensive documentation that was shared by the parties, part of which needed to be translated in order to be accessible to the NCP. In combination with a high workload of the NCP related to the increasing number of specific instances submitted to it, this has resulted in the fact that the handling of this case has taken a very long time. The NCP regrets this and is aware that this may have had a negative impact on the effectiveness of the procedure by delaying access to remedy for the notifiers. The NCP wants to stress that the delay has in part also been due to its commitment to taking the complaints of the notifying parties seriously and to providing both parties with valid responses and guidance on the different issues raised in this case.

Date	Actions taken
	Initial Assessment phase
9 March 2020	Receipt of the specific instance
9 March 2020	Confirmation of receipt sent to notifying party
11 March 2020	Meeting between NCP and notifying party
2 April 2020	Submission sent to enterprise
26 May 2020	Video meeting between NCP secretariat and Netherlands Embassy to Argentina
3 June 2020	Receipt of written response of enterprise
5 June 2020	Submission with coordination proposition sent to NCP of Peru
2 July 2020	Video meeting between NCP and enterprise
7 July 2020	NCP Peru agreed to coordination proposition
14 July 2020	Follow up questions sent to enterprise
24 July 2020	Telephone call between NCP secretariat and Netherlands tax authorities
28 July 2020	Receipt of response to follow up questions from enterprise
21 Sep 2020	Draft initial assessment sent to NCP of Peru
25 September 2020	Draft initial assessment shared with parties for comments and good offices offered
12 October 2020	Receipt of response to draft IA and acceptance of the offer of good offices by notifying party
26 October 2020	Receipt of response to draft IA and rejection of the offer of good offices by enterprises
7 January 2021	Video meeting between NCP and OECD Secretariat
8 January 2021	Video meeting between NCP secretariat and NCP of France
15 January 2021	Video meeting between NCP secretariat and NCP of Chile
5 February 2021	Video meeting between NCP and enterprise
12 February 2021	Final rejection of good offices by enterprise
16 March 2021	Second draft IA sent to parties for factual corrections

17 March 2021	Receipt of response to second draft IA from notifying party
25 March 2021	Receipt of response to second draft IA from the enterprises
20 April 2021	Publication of the initial assessment on the NCP's website
	Further examination and final statement phase
16 July 2021	Receipt of letter for enterprise with request to disqualify Peruvian NCP and one NCP member due to perceived conflicts of interest
16 November 2021	Receipt of letter from enterprise with confidential information on its observance of the Guidelines
21 December 2021	Response to letter of 16 July 2021 sent to enterprise
29 June 2022	Receipt of USB flash drive from enterprise with confidential annexes belonging to letter of 16 November 2021
20-24 March 2023	Consultation with several external experts
6 November 2023	Request for selected supporting documents sent to enterprise
14 November 2023	Request for translation of first set (out of three) of supporting documents sent to translation department
10 January 2024	Receipt of supporting documents from enterprise
25 February 2024	Receipt of last set of translated supporting documents
2 May 2025	Draft final statement shared with NCP of Peru
2 May 2025	Draft final statement shared with parties for comments
11 June 2025	Receipt of response to draft FS by notifying party
13 June 2025	Receipt of response to draft FS by enterprise
25 August 2025	Final statement and publication date shared with parties and NCP of Peru
3 September 2025	Publication of the final statement on the NCP's website and closure of the specific instance

5. Parties' responses to the offer of good offices

The notifying party accepted the good offices. The enterprise declined the offer.

6. Response to questions for clarification

The notifying party has requested the NCP to clarify the following: 1) the responsibilities of companies to respect human rights and the environment regardless of the inaction or inability of states, and 2) the responsibility of companies to undertake due diligence – including to address and cease causation of or contribution to – regarding adverse impacts initiated by a predecessor company that are ongoing.

The NCP has treated this as a general clarification request, *i.e.* it has *not* related its analysis to the notification. Also, as the Guidelines do not explicitly address the responsibilities regarding adverse impacts initiated by a predecessor and leave room for interpretation, the conclusions of the clarification have not been applied in the section 'Examination and conclusions'.

In order to show the development in the Guidelines on these questions, the NCP chose to discuss the 2000, 2011 and 2023 versions, as well as relevant OECD Guidances.

The responsibility of enterprises to respect human rights and the environment versus the states' obligation to protect human rights and the environment

The Guidelines 2000 provided that enterprises should respect the same human rights that governments have an obligation to protect: *"MNEs are encouraged to respect human rights, [...], in a manner that is consistent with host governments' international obligations and commitments. The Universal Declaration of Human Rights and other human rights obligations of the government concerned are of particular relevance in this regard"* (Commentary, par. 4).

Subsequently, the Guidelines 2011 version clarified that the Guidelines may expect the application of a higher standard than legal requirements do. They also stipulated that an enterprise should take its own responsibility in adhering to the Guidelines: *"While the Guidelines extend beyond the law in many cases, they should not and are not intended to place an enterprise in situations where it faces conflicting requirements. However, in countries where domestic laws and regulations conflict with the principles and standards of the Guidelines, enterprises should seek ways to honour such principles and standards to the fullest extent which does not place them in violation of domestic law"* (Concepts and Principles, par. 2). This clarifies that companies should also adhere to the norms and principles set out in the Guidelines, if regulatory standards on the basis of domestic laws and regulations are less stringent than what is expected under the Guidelines.

Finally, in the 2023 version the following was added to the same paragraph: *"Failure of governments to uphold the principles and standards consistent with the Guidelines or their associated international commitments does not diminish the expectation that enterprises observe the Guidelines."* This clarifies that enterprises are expected to respect human rights and the environment in accordance with international standards, independently of whether the government concerned acts in line with these standards.

The responsibility of enterprises in relation to adverse human rights or environmental impacts caused or contributed to by (the activities of) their predecessors

Neither of the 2000, 2011 nor 2023 versions of the Guidelines explicitly address this issue. The Guidelines 2011 version does introduce the ‘involvement framework’ as part of the due diligence concept, which could shed light on how an enterprise should act in this situation. In the period after the enterprise ceased its operations, two OECD RBC Guidances were published that contain relevant language. The relevant provisions and Guidances are outlined below in order to clarify what is expected of enterprises under the Guidelines.

According to the Guidelines (2011 and 2023), an enterprise’s involvement with an adverse impact is an important consideration in determining how an enterprise should respond to the adverse impact as part of its due diligence responsibility, and its role in enabling or providing remediation. An adverse impact can be caused or contributed to by the enterprise, or be directly linked to the operations, products or services of the enterprise by a business relationship. In a situation of dealing with negative impacts that have been caused by a predecessor (also referred to here as ‘legacy impacts’ or ‘inherited impacts’), the question arises how the involvement of an enterprise in such impacts can be defined.

The OECD Due Diligence Guidance for Responsible Business Conduct (OECD Due Diligence Guidance) (2018) further clarifies that ‘causing’ an adverse impact is when an enterprise’s activities on their own are sufficient to result in the adverse impact (see Q.29, p. 70). In case an enterprise is causing an adverse impact, it is expected to remedy the actual impact or cease or prevent the potential impact (Guidelines (2011), General Policies, par. A.11, Commentary 14; Guidelines (2023) General Policies, par. A.12, Commentary 15, 21).

The Guidelines explain that ‘contributing to’ an adverse impact should be interpreted as a substantial contribution, meaning an activity that causes, facilitates or incentivizes another entity to cause an adverse impact and does not include minor or trivial contributions. In addition, the OECD RBC Guidance (2018) clarifies that ‘contributing to’ is also applicable when the enterprise together with another enterprise causes the impact (see Q.29, p. 70). When an enterprise is contributing to the impact it is expected to cease or prevent its contribution and use its leverage to mitigate any remaining impact to the greatest extent possible (Guidelines (2011), General Policies, par. A. 11, Commentary 14; Guidelines (2023) General Policies, par. A.12, Commentary 16, 22).

When an enterprise is ‘directly linked’ it is expected to *“seek to prevent or mitigate an adverse impact where they have not contributed to that impact, when the impact is nevertheless directly linked to their operations, products or services by a business relationship”*. Meeting this expectation entails using its leverage to influence the entity that causes the adverse impact (Guidelines (2011), General Policies, par. A.12, Commentary 14, 20; Guidelines (2023) General Policies, par. A. 13, Commentary 16, 23); this requires a minimum level of leverage.

Translating the involvement framework to the situation of dealing with the legacy of a predecessor, the ‘causing’ type of involvement is not applicable, because it cannot apply to both the enterprise’s and the predecessor’s impact. The ‘contributing to’ type of involvement is applicable when the enterprise, through its own activities, continues to contribute to adverse impacts that were initially caused by a predecessor. The ‘directly linked’ involvement is applicable, if there is a business relationship with the predecessor and the adverse impact is linked to the successor enterprise’s activities, products or services through that business relationship. Business relationships include entities in the supply chain that are *“beyond contractual, ‘first tier’ or immediate relationships”* (Guidelines (2023), General Policies, Commentary 17).

The OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector (2017), which includes practical guidance *i.a.* on how to act in case of inherited issues stemming from poor stakeholder management, confirms the ‘contributing to’ involvement. It provides that

enterprises should: “Address adverse impacts that are inherited from a predecessor but which the enterprise continues to contribute to”. It also points out that, in the case of adverse human rights impacts, the enterprise should provide, enable or support remediation itself, to the extent of its contribution to the impacts of its predecessor (see table 7, p. 74).

The Guidelines 2023 do not provide further guidance that could be applicable to the situation of inherited impacts.

Concluding, in the situation that an enterprise continues to contribute to the inherited adverse impacts, the Guidelines expect the enterprise to cease or prevent its contribution and use its leverage to mitigate any remaining impact to the greatest extent possible. In the case that the adverse impacts concern human rights, then the enterprise should provide, enable or support remediation itself.

In the situation that an enterprise is directly linked to the predecessor and the adverse impacts through its activities, products or services, then it is expected to apply leverage, at the time of succession and/or at a later moment, in order to influence the predecessor to mitigate the impact, for instance by providing adequate remedy.

However, the Guidelines do not provide details on what is considered ‘continuing to contribute to the inherited adverse impacts’. Is the enterprise contributing to inherited adverse impact if it does not actively contribute to it by its own activities, but also does not undertake action to address it? And is the enterprise contributing to inherited adverse impacts if those impacts worsen over time because they remain unresolved, even if the enterprise’s own activities do not contribute to the adverse impacts? Does the enterprise also inherit the responsibility to remedy the adverse impact caused by the predecessor? The Dutch NCP hence advises the OECD to develop more guidance on what is expected from enterprises in different stages and situations concerning inherited impacts.

7. Examinations and conclusions

Methodology

In examining the issues raised, the NCP has focused on assessing which facts are (reasonably) established and what the applicable Guidelines expect from enterprises in light of these facts. For the purpose of the examination, the NCP has studied the information provided by both parties, consulted experts and conducted additional desk research with the aim of assessing whether and to what extent the Guidelines were observed regarding the issues raised in the specific instance.

Taking into account the complexity of this specific instance, which covers a wide range of subjects, the time that has passed since the issues occurred, the large number of documents that the NCP has received from the parties, the reliance on desk-based research, the limited resources of the NCP, and the substantial number of sources in the Spanish language which needed to be translated, the NCP took the following decisions to ensure the feasibility and effectiveness of this examination:

Firstly, the NCP has selected a limited number of key sources as it was not feasible to study all available information. The NCP would like to highlight that an important source regarding the human rights, environmental and remedy issues was the 2018 Independent Technical Study by the United Nations Development Programme (UNDP). The NCP chose this report since it appeared balanced, independent, comprehensive and relevant for the timeframe of this notification.

Secondly, although two versions of the Guidelines were applicable during the period covered by the notification, the NCP has chosen to apply the most relevant version of the Guidelines with regard to

each issue raised. With regard to the issues raised in relation to disclosure, taxation and remedy, it has focused on the 2011 version of the Guidelines. With regard to the issues raised in relation to human rights impacts, environmental impacts and meaningful stakeholder engagement, it has focused on the 2000 version of the Guidelines. The reasoning behind each choice is explained in the respective sections.

Thirdly, the NCP has focused on a selection of the various issues raised. The NCP made its selection based on the importance of the alleged adverse impacts in light of the Guidelines, and the feasibility of examination by the NCP.

These limitations have an impact not only on the scope of the NCP's findings, but also on the level of certainty with which the NCP can conclude whether and to what extent the enterprise observed the Guidelines. Therefore, the conclusions below are formulated with caution and must be understood in the context of these limitations.

Concerning Disclosure

The issues raised under this chapter relate to the enterprise's business practices at the start of the Specific Instance Procedure, therefore the Guidelines 2011 version is applicable to this part of the notification.

In accordance with paragraphs 1-3 of Chapter III on Disclosure, enterprises are expected to timely and accurately disclose information on all material matters regarding their activities, structure, financial situation, performance, ownership and governance. The purpose of the Guidelines' provisions on Disclosure is to encourage improved understanding of the operations of multinational enterprises among a variety of users, including not only (potential) investors but also other constituencies such as local communities, special interest groups and society at large. Under the Guidelines, information whose omission or misstatement could influence the economic decisions taken by such users of that information, is material and should be disclosed at a minimum (Commentary on Disclosure par. 28, 30).

In light of the notification, the abovementioned Disclosure paragraphs are relevant for assessing the alleged non-disclosure of the enterprise's corporate structure and operations of the annual accounts of the four Dutch and four Peruvian subsidiaries, and of the enterprise's beneficial owners. Following the purpose of the Disclosure Chapter and the variety of users information should be easily and economically accessible to, the NCP has taken only public and freely (without payment) available information into consideration (Commentary on Disclosure, par. 35).

The two main public sources of information made available by the Pluspetrol group that are relevant for the issues raised on Disclosure are: the corporate group website (Pluspetrol.net) and the annual sustainability reports at corporate group level. None of the Dutch or Peruvian subsidiaries have their own website.

There is no search engine on the group website, which makes it difficult to find the relevant information. No information regarding the group structure or the enterprise's beneficial owners could be identified on the corporate website Pluspetrol.net, nor in the sustainability reports of 2020-2023, and there are no freely and publicly available annual accounts for the group as a whole and/or the Dutch or Peruvian subsidiaries.

The corporate website provides general and limited information on operations per country. The sustainability reports apply the Global Reporting Initiative (GRI) index and provide information on, amongst others, environmental topics, human rights and interaction with stakeholders such as communities and indigenous peoples. The NCP could not find any reference to the Dutch or Peruvian subsidiaries and therefore no information on their operations on the website nor in the sustainability reports of 2020-2023.

No freely and publicly available annual accounts could be found on the internet for any of the entities involved, therefore no financial information (e.g. on party-related transactions between corporate group entities) is available.

In relation to the expectation in the Guidelines to provide information on major share ownership, the NCP notes that as of March 2022, it is obligatory in the Netherlands for non-listed companies and organizations to report the ultimate beneficial owner (UBO) to the Dutch Chamber of Commerce. Due to privacy regulations, this information is not made publicly available by the Chamber of Commerce. This does however not alter the fact that the expectation under the Guidelines is that the enterprise discloses information on ownership if this is not precluded by the relevant local regulations, which is not the case here.

Notwithstanding the fact that Pluspetrol is not a publicly traded enterprise, public disclosure of information on the structure, operations, ownership and annual accounts is considered material and therefore falls within the expectations of the Guidelines, as the lack of that information could influence economic decisions of stakeholders, including e.g. workers, local communities and the society at large.

Based on the above, the NCP assesses that, as the enterprise does not provide disclosure through free and publicly available sources on basic aspects of its corporate structure, operations, annual accounts, or ownership, neither at the level of the parent company nor at the level of its Peruvian and Dutch subsidiaries, in the case at hand the enterprise has failed to act in line with paragraphs 1-3 of the Disclosure Chapter.

Concerning Taxation

The issues raised under this chapter relate to the enterprise's business practices at the start of the Specific Instance Procedure, therefore the Guidelines 2011 version is applicable to this part of the notification.

Following paragraphs 1-2 of Chapter XI on Taxation, enterprises are expected to act in line with the letter and the spirit of the tax laws and regulations of the countries in which they operate. This means, amongst others, that they should contribute to the public finances of host countries, follow the intention of the local legislature, and make tax governance and tax compliance important elements of their risk management systems. In light of the notification, these paragraphs are relevant for assessing: 1) the enterprise's alleged failure to establish a strategy or policy on tax governance and compliance; and 2) its alleged establishment of the Dutch headquarters, use of trust companies and use of subsidiaries in tax havens in order to facilitate tax avoidance in Peru.

Based on the information provided by the parties and its own desk research, the NCP makes the following observations.

Concerning information published by the company, it was not possible to find any freely (without payment) and publicly available policy or strategy documents on the enterprise's tax governance and compliance. In the GRI index of the enterprise's sustainability report it is mentioned that tax-related issues are non-material and the report contains no tax-related information. There is no freely and publicly available information on tax payments, neither in general nor per country.

Concerning information published by others, in the 2021-22 EITI report of Peru, there is information available on income tax and royalties paid by three of the four Peruvian entities.

The enterprise did provide the NCP with confidential tax-related information. This information contains, among other things, an independent audit report of 2018, which states that it is drafted for the purpose of complying with the OECD Transfer Pricing Guidelines for MNEs and Tax Administrations (which the Guidelines encourage companies to follow, see Commentary 106) and

that information on the whole corporate group is reflected. Next to information on tax policies, risk management and transfer pricing, the report contains financial accounts with information on taxes. However, these numbers are on a consolidated level for the whole corporate group.

Furthermore, the NCP can confirm by its own experience in dealing with the enterprise that the Dutch headquarters is using a trust office to act as an initial point of contact and, according to received documentation, that the trust office acts as managing director. The enterprise confirmed that the Dutch headquarters has but one employee and informed the NCP that it is looking for an additional one.

The NCP notes that it does not have the authority nor the capacity to access and interpret information on tax payments of corporate entities in the Netherlands or elsewhere.

However, the NCP finds that having only one or two employees at the headquarters (parent company) of a large multinational enterprise, plus the use of a trust office as its managing director does raise doubts as to the credibility of it being the actual headquarters as well as to the reasons for the enterprise's establishment in the Netherlands. This, in combination with the absence of basic public information on the Dutch entities (see also the text above on Disclosure), raises the question whether the Dutch entities have any real economic activities in the Netherlands. If not, this may mean that their sole function is to operate as letterbox companies for the purpose of tax planning and/or to make use of benefits the Netherlands offers to enterprises under the assumption that they contribute to the Dutch economy.

The NCP notes that the Guidelines provide limited guidance with regard to what compliance with the spirit of local tax laws and regulations entails, and do not include international policy developments on tax avoidance. Moreover, the issue of letterbox companies and the interpretation of what the spirit of Dutch tax law entails in this respect, is a subject of ongoing debate in the Netherlands. However, it is the NCP's assessment that the enterprise failed to demonstrate, either through freely and publicly available information or at least to the NCP in response to this notification, that it acts in line with the spirit of the law, as it currently stands, on this issue. Therefore the NCP is unable to establish that the enterprise has observed paragraph 1 of the Taxation Chapter.

The NCP confirms that the enterprise has strategies or policies concerning tax governance and compliance in place. However, considering the complexity of the matter, the limited guidance by the Guidelines and the fact that the alleged violations relating to taxation are not at the core of the notification, the NCP decided not to examine further whether their content is fully in line with the Guidelines. Hence, the NCP concludes that it cannot establish whether the enterprise acted fully in line with paragraph 2 of the Taxation Chapter.

[Additional findings concerning Taxation in relation to Disclosure](#)

The Taxation Chapter contains many requirements that focus on the enterprise's interaction with the tax authorities, including what it discloses to them regarding oversight and broader risk management systems concerning taxation. However, according to the NCP, the Disclosure Chapter stipulates that under certain circumstances, information on taxation may also be expected to be disclosed publicly. This can be deduced from the following paragraphs:

- 1) Enterprises are encouraged to publicly disclose policies related to matters covered by the Guidelines, therefore also on taxation (see Disclosure Chapter, par. 3.a);
- 2) The disclosure of information regarding activities, structure etc. should be tailored to the nature, size and location of the enterprise (see Disclosure Chapter, par. 1). In the case of Pluspetrol, taxation can be considered a material issue since the extractive sector generates large revenues, it is a large

MNE with entities in several countries and it has confirmed to have corporate entities in countries that are considered to be tax havens;

3) The Guidelines consider issuing voluntarily codes of corporate conduct on taxation a best practice (see Commentary 34). It is becoming more common to provide transparency on taxation, as an increasing number of multinational enterprises are initiating voluntary publications of Country-by-Country-Reports on tax payments and multistakeholder initiatives have been taking steps in requiring tax transparency as well.

Based on the above, the NCP notes that the fact that Pluspetrol provides very limited available information on taxation is not in line with what is expected from it under the Guidelines.

Concerning Human Rights (the Rights of Indigenous Peoples) and General Policies (Meaningful Stakeholder Engagement)

According to the notification, the alleged non-observance of the expectation that the enterprise conducts due diligence relating to potential adverse human rights impacts, specifically concerns the alleged lack of meaningful engagement with the indigenous communities. This resulted in, amongst others: a) a failure to respect their right to self-determination by concluding agreements with the communities instead of with the indigenous federations; b) the conclusion of agreements which were disadvantageous for the communities; and c) a failure to respect their rights to land by not compensating them for the use of land in an adequate manner.

For the purpose of the examination, the NCP selected a sample of six out of the more than 70 agreements that the enterprise concluded with indigenous communities during the 15-year period of the enterprise's operations. The sample is comprised of: 1) three consecutive agreements with one specific community to view the development over time, 2) one agreement with another community, and 3) two agreements with a federation, as (not) concluding agreements with federations is one of the issues raised. The NCP conducted a qualitative assessment of these six agreements in order to examine with whom the agreements were concluded and what was agreed between the parties.

The activities pertaining to the issues mentioned above relate to the enterprise's business practices since it started its operations in 2000. Therefore the Guidelines 2000 and 2011 versions are applicable to this part of the notification. For the feasibility of the examination the NCP chose to focus on the 2000 version, also in view of the fact that those applied during most of the 15-year period of the enterprise's operations.

The Guidelines 2000 do not provide provisions on the term 'meaningful stakeholder engagement'. However, they do expect enterprises to apply practices that foster a relationship of confidence and mutual trust between enterprises and the societies in which they operate, and to engage in consultation with the communities directly affected by the environmental, health and safety policies of the enterprise and by their implementation (General Policies Chapter, par. 7; Environment Chapter, par. 2b). This means that enterprises are expected to enter into reliable, fair and reciprocal relationships with the local communities. The Guidelines 2000 provide that enterprises are expected to respect the human rights of those affected by their activities in a manner that is consistent with the human rights obligations of the government concerned (General Policies Chapter, par. 2, Commentary par. 4).

With regard to indigenous peoples, the ILO Convention 169 on Indigenous and Tribal Peoples (1989) was relevant during the period that the enterprise was active in the area, as this Convention was ratified by Peru in 1994. The UN Declaration on the Rights of Indigenous Peoples (UNDRIP), adopted in 2007, became relevant at a later stage during the enterprise's operations.

With regard to self-determination the ILO 169 and the UNDRIP state that indigenous peoples have the right to control their own institutions (ILO C169, chapeau) and the right to self-government

(UNDRIP, art. 3). Both these norms mean that indigenous peoples have the right to decide themselves how they are organized and represented.

With regard to land rights and compensation, the ILO C169 contains the following relevant provisions regarding indigenous peoples: a) their rights of ownership and possession over the lands which they traditionally occupy, shall be recognized, including lands to which they had access to for subsistence and traditional activities; b) their rights to the natural resources pertaining to their lands shall be specially safeguarded; these rights include the right to participate in the use, management and conservation of these resources; and c) they shall receive fair compensation for any damages as a result of exploitation of natural resources on their lands (ILO C169, art. 14, 15).

In addition to provisions of a similar content as ILO C169, the UNDRIP contains the right to redress for the lands which indigenous peoples have traditionally owned or otherwise used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent. Such redress is to be provided by means that can include restitution or, when this is not possible, just, fair and equitable compensation. Unless otherwise freely agreed upon, compensation shall take the form of lands and resources equal in quality, size and legal status, or of monetary compensation or other appropriate redress (UNDRIP (2007), art. 28). These norms imply that indigenous peoples have ownership rights concerning the land they own or use, that the natural resources should be protected and that damages should be compensated.

Findings

Concerning the right to self-determination, the NCP examined with whom the agreements were concluded. It found that a) in the agreements concluded with the communities, it was stipulated that the community representative is the rightful representative; b) in two of the six selected agreements the state was a co-party; and c) the enterprise concluded two of the six agreements with federations of indigenous peoples. The NCP has found no grounds in the relevant norms nor in the Peruvian constitution to assume that the fact that an enterprise is negotiating agreements with indigenous communities directly would in itself, in the absence of any special circumstances, constitute an infringement of the right to self-determination of indigenous peoples. Furthermore, the NCP has found no grounds in the selected agreements to assume that such special circumstances existed, as might have been the case for example had there been indications that the federations were purposefully or structurally excluded from those negotiations.

Concerning the agreements that were allegedly disadvantageous for the communities, the NCP focused on some of the elements brought forward by the notifying party that were considered disadvantageous, such as the inclusion of exoneration clauses (*i.e.*, clauses exempting or limiting the possibility for raising legal claims against the enterprise in case of adverse impacts) or of unilateral rights for the enterprise. The NCP found that: a) one of the selected agreements contained an exoneration clause; b) in some of the selected agreements the enterprise had unilateral rights to prematurely terminate the agreement without stating a cause; and c) the communities' relation to the land and its natural resources was either not mentioned or implied, or it was clearly mentioned that the community was the owner.

Concerning the compensation for land use, both parties confirmed the enterprise has compensated several communities financially from 2014 onwards. The NCP found in the selected agreements that were concluded with communities that: a) in the early agreements the enterprise did not compensate the community for the land use but did provide them with goods and services as part of its social support policy; b) later on the enterprise provided goods and services to the community in exchange for the land use; and c) from 2014 onwards, following a settlement agreement, the enterprise started compensating a community financially for the use of their land. The settlement agreement states there was a prior dispute between the parties about this topic, which implies the community had already previously asked for financial compensation.

Conclusion

Taking into account the time that has passed and the fact that the NCP had to base its examination on a selection of the available sources, the NCP exercised caution in reaching conclusions on the basis of the findings set out above.

The NCP is of the opinion that on the basis of the applicable norms and the selection of sources examined, it cannot be concluded whether or not the enterprise respected the right to self-determination

Concerning the content of the agreements, however, the NCP assesses that the enterprise, by concluding agreements that contained clauses that were potentially disadvantageous for the community, did not foster a relationship of confidence and mutual trust. The NCP considers for example the use by the enterprise of exoneration clauses in these contracts that do not leave room for the communities to seek redress for adverse impacts that may result from the enterprise's activities, as an indication of inequivalence. The same is true for the use of clauses stipulating unilateral rights for the enterprise to prematurely terminate the agreement without stating a cause, and the lack of clarity in these contracts on the communities' relation to the land and its natural resources.

Concerning the right to land and compensation for its use, the NCP is not able to establish whether the enterprise should have paid financial compensation for the land use from the beginning. The relevant norms state that the right to financial compensation is applicable either in the case of damages or (from 2007 onwards) if the land was occupied, used or damaged without the indigenous peoples' free, prior and informed consent. On the basis of the selected agreements it cannot be concluded that this was the case and/or that this right was denied. However, the NCP does find that the communities' rights to land and its natural resources were not consistently recognized in the agreements. It can be assumed that such recognition could have strengthened the position of the communities in the negotiations which could in turn have led to more advantageous agreements for the communities.

Overall, the NCP is of the opinion that the enterprise has not acted fully in line with the expectations to foster a relationship of mutual trust with the communities and to respect human rights as outlined in the Guidelines 2000 (General Policies Chapter, par. 2, 7), by concluding agreements with potentially disadvantageous elements for the communities.

Concerning Environment (Environmental Pollution) and Human Rights (Right to Health)

One of the main complaints in the notification concerns environmental pollution of soil and water due to, amongst others, the disposal of waste waters and inadequate pipeline maintenance. According to the notifiers, the enterprise failed to observe the expectation in the Guidelines that it should conduct due diligence relating to the actual and potential adverse environmental and human rights impacts of its activities, which would have allowed it to prevent said pollution. The notifying party claims that the environmental pollution resulting from the enterprise's activities is linked to adverse health impacts in the local indigenous populations.

The expectation of preventing environmental pollution relates to the enterprise's business practices since the start of its operations in 2000, therefore the Guidelines 2000 and 2011 versions are applicable to this part of the notification. As the Guidelines 2000 were applicable during the most part of the period covered by the notification, as well as for the feasibility of the examination, the NCP chose to focus on the 2000 version of the Guidelines.

The Guidelines 2000 provide that enterprises should "*take due account of the need to protect the environment*". The subsequent paragraphs explain that enterprises should apply preventative

measures regarding foreseeable environmental and health impacts: “Enterprises should [...] assess, and address in decision-making, the foreseeable environmental, health, and safety-related impacts associated with the processes, goods and services of the enterprise over their full life cycle”; “The basic premise of the Guidelines is that enterprises should act as soon as possible, and in a proactive way, to avoid, for instance, serious or irreversible environmental damages resulting from their activities.” Also, enterprises are expected to apply best practices : “Enterprises should [...] continually seek to improve environmental performance” [in order to] “protect the environment from the impact of its activities” (Environment Chapter, par. 3, 6, Commentaries 31, 38).

Findings regarding environmental pollution

Concerning the disposal of waste waters, the NCP finds that: a) the reinjection of waste waters was already considered a good practice in the extractives sector before the enterprise commenced its operations in Lot 1AB in 2000; b) as a result of an agreement between communities, the state and the enterprise, the enterprise started with reinjecting waste waters in 2006 and achieved a 100% reinjection rate in 2009; c) the reinjection practice led to a decrease in the contamination levels in rivers and streams; d) new contamination has occurred, due to inappropriate reinjection and maintenance techniques of the reinjection.

Concerning the pipeline maintenance, the NCP finds that: a) the enterprise was aware that the inherited pipelines were outdated and in a bad condition; b) until 2009 the enterprise made repairs when a leakage was established; c) it started a pipeline maintenance programme in 2009 that decreased the risk of leakage; d) spills and leakages have remained an issue, however, due to inappropriate maintenance techniques.

Conclusion regarding environmental pollution

The NCP notes that regardless of the regulatory standards an enterprise is required to meet on the basis of domestic laws and regulations, it should take its own responsibility in implementing the Guidelines, which “extend beyond the law in many cases” but “are not intended to place an enterprise in a situation where it faces conflicting requirements” (Concepts and Principles, par. 2). According to the NCP, there were however no conflicting requirements..

As regards the expectations in the Guidelines concerning environmental pollution, the enterprise did not apply good practice standards from the beginning of its operations and knowingly used equipment that was in a bad state. It could have foreseen that dumping waste waters and not acting proactively to prevent leakage from outdated pipelines would lead to more pollution. Notwithstanding the fact that the situation improved when the enterprise started to apply good practice standards later on, it seems it did not apply all the relevant techniques appropriately, nor sufficiently maintained equipment, which in turn led to new contamination.

The NCP notes that it is possible that not all new leakages can be attributed to the enterprise’s conduct, as part of the spills may have been caused by vandalism. That being said, in any case, the enterprise should have acknowledged and dealt with the new contamination, but, as far as the NCP can conclude, it did not.

Overall, the NCP assesses that the enterprise did not do enough to prevent and address adverse environmental impacts resulting from its activities. With regard to the above, the NCP is of the opinion that the enterprise has not acted fully in line with the expectations of the Environment Chapter as outlined in the Guidelines 2000.

Findings regarding the right to health

Building on this conclusion, the NCP assessed the adverse impacts on the right to health of the indigenous peoples that allegedly resulted from the environmental pollution caused by the

enterprise. The right to health is a human right and the notifying party claims that the enterprise has failed to conduct adequate human rights due diligence in this regard.

The Guidelines 2000 provide that enterprises are expected to respect the human rights of those that are affected by their activities, in a manner that is consistent with the host governments' international obligations and commitments (General Policies Chapter, par. 2, Commentary par. 4).

The UN Office of the High Commissioner for Human Rights (OHCHR) describes the right to health as an inclusive right. It extends not only to timely and appropriate health care but also to the underlying determinants of health, such as access to safe and potable water and healthy environmental conditions. Protecting the right to health also upholds the right to [healthy] food. According to the OHCHR, extractive industries may also indirectly infringe upon the right to health by polluting water, air and soil (OHCHR/WHO, Fact sheet no. 31, 2008).

The NCP finds that: a) the enterprise has insufficiently prevented adverse environmental impacts, which led to the pollution of water and soil (see section on Environmental pollution); b) the enterprise has remediated contaminated sites partially inadequately which in turn led to further pollution (see sections on Environmental pollution and Remedy); c) the indigenous peoples living in Lot 1AB are suffering from poor health, which is at least partly attributed to the pollution of water and soil by oil extraction activities in general, but cannot be specifically attributed to the enterprise; d) the enterprise provided numerous health care services, such as health clinics and health care programmes.

Conclusion regarding the right to health

The NCP is unable to conclude that the activities of the enterprise have caused the adverse health impacts of the indigenous peoples living in Lot 1AB, since it did not encounter documentation that proves the direct causal relation between the enterprise's activities and the health impacts. That being said, generally speaking adverse health impacts are a foreseeable potential risk related to adverse environmental impacts, in particular if the latter involve contamination of soil and water in an inhabited area. This implies that an enterprise with activities that result in environmental pollution also has a responsibility to prevent with respect to the adverse health impacts ensuing from such pollution.

The NCP notes in this respect that the enterprise's contribution to the right to health by providing health care services (*do good*) does not take away its responsibility to prevent or mitigate adverse health impacts resulting from adverse environmental impacts that are connected to its activities (*do no harm*). The same reasoning applies for the right to food, livelihood and clean water (all human rights); offering programs to help communities with these matters is not the same as respecting those rights. Although the company has provided numerous support programmes, which in itself is commendable, it should have also made more efforts to prevent and address the environmental pollution, as the NCP clarified in the environmental pollution section, so as not to create or exacerbate the risk of related adverse human rights impacts.

The NCP therefore assesses that the enterprise did not do enough to respect the right to health by protecting the environment. With regard to the above, the NCP is of the opinion that the enterprise has not acted fully in line with the human rights expectations of the General Policies Chapter as outlined in the Guidelines (2000).

Concerning General Policies (Remedy)

In light of the notification, the alleged non-observance of the expectation that the enterprise conducts due diligence relating to adverse environmental and human rights impacts specifically concerns the remediation of the environmental pollution resulting from oil exploration activities in Lot 1AB.

As the enterprise ceased its operations in Lot 1AB in 2015, the NCP chose to assess the state of remediation of the site after the enterprise had already left, therefore the Guidelines version 2011 applies.

The Guidelines 2011 provide that enterprises should “[c]arry out risk-based due diligence, for example by incorporating it into their enterprise risk management systems, to identify, prevent and mitigate actual and potential adverse impacts [...], and account for how these impacts are addressed” (General Policies Chapter, par. 10). It is further explained that potential impacts are to be addressed through prevention or mitigation, while actual impacts are to be addressed through remediation (General Policies Chapter, Commentary 14).

Like the Guidelines 2000, the Guidelines 2011 also state that they “*extend beyond the law in many cases*” and that in the event that domestic laws and regulations conflict with the principles and standards of the Guidelines, “*enterprises should seek ways to honour such principles and standards to the fullest extent which does not place them in violation of domestic law*” (Concepts and Principles Chapter, par. 2).

Findings

The NCP finds with respect to the remediation of adverse environmental impacts that: a) the enterprise has made efforts to remedy contamination, including some of the contamination caused by its predecessors; b) in doing so, the enterprise has made efforts to take into account the technical requirements for remediation set by the authorities; c) these requirements were not entirely clear, systematic or preventative; and d) at least in some sites, including sites that the enterprise claims to have remediated, the remediation techniques applied were not adequate and turned out to be counterproductive, i.e. contaminating a larger area instead of reducing contamination.

Conclusion

It seems that the enterprise made efforts to comply with the demands for remediation set by the authorities and in doing so, also made efforts to remedy adverse impacts caused by its predecessor. However, whereas the Guidelines expect the enterprise to apply the best remediation techniques available, the enterprise used remediation techniques which, according to the UNDP report, have been found partially inadequate. This resulted in incomplete remedy of the environmental contamination in Lot 1AB.

As a result, the NCP is of the opinion that the enterprise has not acted fully in line with the remediation expectation of the General Policies Chapter as outlined in the Guidelines 2011.

Concerning General Policies (Cooperation in the NCP Procedure)

The enterprise has declined the offer of the NCP’s good offices to facilitate a dialogue to assist the parties in dealing with the issues through non-adversarial means such as conciliation or mediation.

The NCP draws the attention to the following expectations under the Guidelines (2011), which were applicable at the start of the Specific Instance Procedure.

First, enterprises are expected to carry out risk-based due diligence (General Policies Chapter, par. A.10), and as part of that due diligence, enterprises are expected to cooperate with legitimate grievance mechanisms such as the NCP. In the OECD Due Diligence Guidance it is explained that due diligence consists of six steps. Step six reads: “[Enterprises should] *provide for or cooperate in remediation when appropriate*”. Further elaboration on this in section 6.2 reads: “*When appropriate, [enterprises should] provide for or cooperate with legitimate remediation mechanisms through which impacted stakeholders and rightsholders can raise complaints and seek to have them addressed with the enterprise. Referral of an alleged impact to a legitimate remediation mechanism may be particularly helpful in situations where there are disagreements on whether the enterprise*

caused or contributed to adverse impacts, or on the nature and extent of remediation to be provided.” This paragraph is followed by an explicit reference to cooperation with the NCP: “[Enterprises should] *cooperate in good faith with judicial or non-judicial mechanisms. For example if a specific instance is submitted to an NCP or through initiatives that provide other types of grievance mechanisms involving the conduct of the enterprise.”*

Second, the scope of the responsibility to provide for or co-operate in remediation is determined by whether the enterprise has caused, contributed to or is directly linked to the possible adverse impact. If the enterprise has caused an adverse impact or contributed to it, it should “*address the impacts by providing for or cooperating in their remediation*” (OECD Due Diligence Guidance p. 34). Concerning the expected cooperation with a remediation mechanism if an enterprise is directly linked to the impact “*it may still take a role in remediation, despite not having an expectation to provide for remedy itself. For example, the enterprise may use its leverage, to the extent practicable, with its business relationship to compel the business relationship to participate in processes to provide for remedy. Where relevant, the enterprise may provide information which can facilitate investigations or dialogue.*” (OECD Due Diligence Guidance, p. 90). Therefore, the same expectation applies, i.e. to cooperate with the NCP process with a view to providing for or cooperating in the remediation, regardless of the type of involvement of the company in the adverse impact.

Third, as outlined in the Guidelines’ Commentary on the Procedural Guidance for NCPs, paragraph 21, the effectiveness of the specific instance procedure depends on good faith behaviour of all parties involved in the procedures. Good faith behaviour in this context means responding in a timely fashion and genuinely engaging in the procedures with a view to finding a solution to the issues raised in accordance with the Guidelines.

While the enterprise displayed a cooperative stance throughout the procedure in terms of providing information and corresponding with the NCP, it is the NCP’s assessment, given the non-acceptance of the good offices, the enterprise’s general refusal to share any of the information provided with the notifying party, and its failure to genuinely engage in the procedure with a view to finding a solution to the issues raised, that the enterprise has not acted as could have been expected from it under step six of the due diligence process as described in the OECD Due Diligence Guidance or under paragraph 21 of the Commentary on the Procedural Guidance.

8. Recommendations

Recommendations of the NCP in a Final Statement have a forward looking character, they recommend the enterprise to improve and/or change their policies or practices in relation to responsible business conduct in their international business activities. Since Pluspetrol left the site in 2015, most recommendations are relevant for when it will start new operations or is operating elsewhere in a similar situation. When the recommendations are specific to this specific instance, e.g. what the enterprise should do with regard to the situation subject to this notification, this will be explicitly mentioned.

During the handling of this notification the Guidelines have been updated. In accordance with the OECD Adherents’ decision, all recommendations made in final statements published after the adoption of the updated Guidelines are based on the updated Guidelines (2023). The Guidelines 2023 are far more comprehensive and specific than the Guidelines versions 2000 and 2011 on various topics relevant to this specific instance.

To support observance of the Guidelines going forward, the NCP makes the following recommendations:

Concerning Disclosure and Taxation

The NCP recommends to the enterprise to:

- align its conduct with paragraphs 1-4 of the Disclosure Chapter, i.e. consider the views and informational requirements of relevant stakeholders, including local communities and civil society, regarding the disclosure of material company information. More specifically, the enterprise should disclose information on its corporate structure, operations, ownership and annual accounts for both the parent company as well as its subsidiaries; and, where appropriate, along business lines or geographic areas. It should do this in an easily accessible and user friendly manner (Disclosure Chapter, Commentaries 30, 32, 39).
- take note of the expectation that disclosure of responsible business conduct information is part of the enterprise's responsibility to conduct due diligence. Moreover, it can support in identifying (material) risks and impacts (Disclosure Chapter, Commentary 32).
- demonstrate that it acts in line with the spirit of the Dutch tax law in view of the fact that the Dutch corporate entities do not seem to have any real economic activities in the Netherlands (Taxation Chapter, par. 1).
- become transparent on taxation policies and payments per corporate entity per country. The enterprise is recommended to follow the best practice example of other multinational enterprises, for example by publishing a Country-by-Country-Report of its tax payments (Disclosure Chapter, par. 3a and b, Commentary 37).

Concerning Human Rights (the Rights of Indigenous Peoples) and General Policies (Meaningful Stakeholder Engagement)

The NCP recommends to the enterprise to:

- ensure its conduct is aligned with the Human Rights Chapter of the Guidelines, the relevant human rights standards and the international standards stipulating the rights of indigenous peoples, such as the ILO C169 and UNDRIP, as well as the OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector. For example, the right to free, prior and informed consent (FPIC) is an indigenous peoples' right which should be taken into account by business before starting activities.
- take note of the importance of meaningful stakeholder engagement, which has been underlined in the 2023 update of the Guidelines and is clarified in General Policies, Commentary 28: *"Stakeholder engagement is a key component of the due diligence process. [It] involves interactive processes of engagement with relevant stakeholders, through, for example, meetings, hearings or consultation proceedings.[...] [It is] ongoing, two-way, conducted in good faith by the participants on both sides and responsive to stakeholders' views. To ensure stakeholder engagement is meaningful and effective, it is important to ensure that it is timely, accessible, appropriate and safe for stakeholders, and to identify and remove potential barriers to engaging with stakeholders in positions of vulnerability or marginalization."*
- engage more meaningfully with the local communities that are directly affected by the enterprise's operations, in order to foster a relationship of confidence and mutual trust (General Policies Chapter, par. 7). For example, it could do more to understand the local context from the first point of entry, including legacy issues such as the potential cumulative impacts on stakeholders and challenges between stakeholders and predecessors, and take these into account when shaping stakeholder engagement activities (OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector 2017, table 7, page 74).

- conclude agreements with stakeholders, such as local communities, which are equivalent and include the right to redress for adverse impacts resulting from the enterprise's activities.
- ensure the right to self-determination of indigenous peoples is respected and that agreements are concluded with the representative determined by the indigenous community concerned.
- ensure that the (ownership) position of the community in relation to the land in question is mentioned in agreements and, where appropriate, compensation for the use of land is being given from the start.

Concerning Environment (Environmental Pollution) and Human Rights (Right to Health)

The NCP recommends the enterprise to:

- ensure its conduct is aligned with the Guidelines' Chapters General Policies, Human Rights and Environment and the OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector;
- conduct its activities in a manner that takes due account of the need to protect the environment, and in turn the health of communities and society more broadly, thereby focusing on the prevention of adverse impacts (Environment Chapter). In this regard it should carry out risk-based due diligence, as described in the Guidelines' Chapters General Policies, Human Rights and Environment; to avoid and address adverse environmental and human rights impacts. This includes: preparing an appropriate environmental and human rights impact assessment at the outset of its operations; establishing and implementing measurable objectives, targets and strategies for addressing (foreseeable) adverse impacts; monitoring progress toward environmental and human rights objectives; providing the public and other relevant stakeholders with adequate, measurable, verifiable and timely information on adverse impacts associated with their operations; and providing for, or co-operating in, remediation as necessary to address adverse impacts the enterprise has caused or contributed to (Human Rights and Environment Chapters, par. 1);
- raise the level of environmental performance in all parts of its operations by applying international best practices, even where this may not be formally required by existing local practice or regulation of the country in which it operates. Being a big multinational enterprise, Pluspetrol should have access to innovative prevention, maintenance and remediation techniques which could, if applied, prevent or mitigate adverse impacts. (Environment Chapter, Commentary 82 and 83).
- Address adverse impacts that the enterprise inherited from its predecessor but to which the enterprise continues to contribute (OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector (2017)); and exercise leverage with respect to the remediation of adverse impacts caused or contributed to by its predecessor to which it is directly linked.

Concerning General Policies (Remedy)

The NCP recommends the enterprise to align its conduct with the Guidelines' chapters General Policies, Human Rights and Environment, taking into account the best practices of the extractive industry, regarding remedy. More specifically, it recommends to the enterprise the following actions to be taken, directly relevant and applicable to this specific instance, regarding the sites where it has had its operations and that in the meantime have been abandoned:

- assess which sites it has remediated inadequately and seek to provide remediation to the greatest extent possible, through any possible means;

- assess regarding which sites it has contributed to the inherited adverse impacts and remedy the remaining impact to the greatest extent possible;
- consult and engage with impacted communities in the design and planning of any remediation activities, in a meaningful way that ensures their free, prior and informed consent is obtained.

Concerning General Policies (Cooperation in the NCP Procedure)

The NCP recommends the enterprise to:

- cooperate in good faith and meaningfully with legitimate remediation mechanisms, including non-judicial state-based mechanisms such as the NCP procedure, with a view to addressing and resolving the issues raised by impacted stakeholders and rightsholders. (General Policies Chapter, Commentary 15; OECD Due Diligence Guidance, section 6.2);
- to genuinely engage in any future proceedings with a view to finding a Guidelines-compatible solution to the issues raised, including giving serious consideration to any offer of good offices made by an NCP (Procedures, Commentary 26).

9. Follow Up

As an important part of the NCP's non-judicial role, follow up on agreements and recommendations supports the effectiveness of the specific instance process. In particular, follow up can further the Guidelines' effectiveness by encouraging parties to remain engaged with the issues and companies to implement the recommendations and agreements adopted in accordance with the Guidelines.

The NCP will follow up the specific instance one year after the date of publication of the underlying final statement. The NCP will follow up with the parties in writing in order to evaluate the recommendations made. The outcomes of the follow-up proceedings will be shared via a publication on the NCP's website.

With this Final Statement, the NCP closes the specific instance procedure.

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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Annex A Provisions of the Guidelines referred to by the notifying party

Listed below are the provisions of the Guidelines 2011 referred to by the notifying party in the specific instance and which have, according to the notifying party, not been observed by Pluspetrol.

Chapter II. General Policies, paragraphs 10, 11, 12 and 14:

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

A. Enterprises should:

10. Carry out risk-based due diligence, for example by incorporating it into their enterprise risk management systems, to identify, prevent and mitigate actual and potential adverse impacts as described in paragraphs 11 and 12, and account for how these impacts are addressed. The nature and extent of due diligence depend on the circumstances of a particular situation.
11. Avoid causing or contributing to adverse impacts on matters covered by the Guidelines, through their own activities, and address such impacts when they occur.
12. Seek to prevent or mitigate an adverse impact where they have not contributed to that impact, when the impact is nevertheless directly linked to their operations, products or services by a business relationship. This is not intended to shift responsibility from the entity causing an adverse impact to the enterprise with which it has a business relationship.
14. Engage with relevant stakeholders in order to provide meaningful opportunities for their views to be taken into account in relation to planning and decision making for projects or other activities that may significantly impact local communities.

Chapter III. Disclosure, paragraphs 1, 2 and 3:

1. Enterprises should ensure that timely and accurate information is disclosed on all material matters regarding their activities, structure, financial situation, performance, ownership and governance. This information should be disclosed for the enterprise as a whole, and, where appropriate, along business lines and geographic areas. Disclosure policies of enterprises should be tailored to the nature, size and location of the enterprise, with due regard taken of costs, business confidentiality and other competitive concerns.
2. Disclosure policies of enterprises should include, but not be limited to, material information on: a) the financial and operating results of the enterprise; b) enterprise objectives; c) major share ownership and voting rights, including the structure of a group of enterprises and intra-group relations, as well as control enhancing mechanisms; d) remuneration policy for members of the board and key executives, and information about board members, including qualifications, the selection process, other enterprise directorships and whether each board member is regarded as independent by the board; e) related party transactions; f) foreseeable risk factors; g) issues regarding workers and other stakeholders; h) governance structures and policies, in particular, the content of any corporate governance code or policy and its implementation process.
3. Enterprises are encouraged to communicate additional information that could include: a) value statements or statements of business conduct intended for public disclosure including, depending on its relevance for the enterprise's activities, information on the enterprise's policies relating to matters covered by the Guidelines; b) policies and other codes of conduct to which the enterprise subscribes, their date of adoption and the countries and entities to which such statements apply; c) its performance in relation to these statements and codes; d) information on internal audit, risk

management and legal compliance systems; e) information on relationships with workers and other stakeholders.

Chapter IV. Human Rights, paragraphs 1, 2, 3, 5, 6:

States have the duty to protect human rights. Enterprises should, within the framework of internationally recognised human rights, the international human rights obligations of the countries in which they operate as well as relevant domestic laws and regulations:

1. Respect human rights, which means they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.
2. Within the context of their own activities, avoid causing or contributing to adverse human rights impacts and address such impacts when they occur.
3. Seek ways to prevent or mitigate adverse human rights impacts that are directly linked to their business operations, products or services by a business relationship, even if they do not contribute to those impacts.
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.
6. Provide for or co-operate through legitimate processes in the remediation of adverse human rights impacts where they identify that they have caused or contributed to these impacts.

Chapter XI. Taxation, paragraphs 1 and 2:

1. It is important that enterprises contribute to the public finances of host countries by making timely payment of their tax liabilities. In particular, enterprises should comply with both 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 discerning and following the intention of the legislature. It does not require an enterprise to make payment in excess of the amount legally required pursuant to such an interpretation. Tax compliance includes such measures as providing to the relevant authorities timely information that is relevant or required by law for purposes of the correct determination of taxes to be assessed in connection with their operations and conforming transfer pricing practices to the arm's length principle.
2. Enterprises should treat tax governance and tax compliance as important elements of their oversight and broader risk management systems. In particular, corporate boards should adopt tax risk management strategies to ensure that the financial, regulatory and reputational risks associated with taxation are fully identified and evaluated.

Annex B Provisions of the Guidelines referred to by the NCP

Listed below are the provisions of the Guidelines referred to by the NCP for the purpose of the Response to clarification questions and the Examination and conclusions.

Guidelines 2000

Chapter II. General Policies

2. Respect the human rights of those affected by their activities consistent with the host government's international obligations and commitments.

7. Develop and apply effective self-regulatory practices and management systems that foster a relationship of confidence and mutual trust between enterprises and the societies in which they operate.

Commentary

4. There should not be any contradiction between the activity of multinational enterprises (MNEs) and sustainable development, and the *Guidelines* are meant to foster complementarities in this regard. Indeed, links among economic, social, and environmental progress are a key means for furthering the goal of sustainable development. On a related issue, while promoting and upholding human rights is primarily the responsibility of governments, where corporate conduct and human rights intersect enterprises do play a role, and thus MNEs are encouraged to respect human rights, not only in their dealings with employees, but also with respect to others affected by their activities, in a manner that is consistent with host governments' international obligations and commitments. The Universal Declaration of Human Rights and other human rights obligations of the government concerned are of particular relevance in this regard.

Chapter V. Environment

[In particular, enterprises should:]

2. Taking into account concerns about cost, business confidentiality, and the protection of intellectual property rights:

- a) Provide the public and employees with adequate and timely information on the potential environment, health and safety impacts of the activities of the enterprise, which could include reporting on progress in improving environmental performance; and

Engage in adequate and timely communication and consultation with the communities directly affected by the environmental, health and safety policies of the enterprise and by their implementation. 3. Assess, and address in decision-making, the foreseeable environmental, health, and safety-related impacts associated with the processes, goods and services of the enterprise over their full life cycle. Where these proposed activities may have significant environmental, health, or safety impacts, and where they are subject to a decision of a competent authority, prepare an appropriate environmental impact assessment.

6. Continually seek to improve corporate environmental performance, by encouraging, where appropriate, such activities as:

- b) Adoption of technologies and operating procedures in all parts of the enterprise that reflect standards concerning environmental performance in the best performing part of the enterprise;

- c) Development and provision of products or services that have no undue environmental impacts; are safe in their intended use; are efficient in their consumption of energy and natural resources; can be reused, recycled, or disposed of safely;
- d) Promoting higher levels of awareness among customers of the environmental implications of using the products and services of the enterprise; and
- e) Research on ways of improving the environmental performance of the enterprise over the longer term.

Commentary

31. Sound environmental management is an important part of sustainable development, and is increasingly being seen as both a business responsibility and a business *opportunity*. Multinational enterprises have a role to play in both respects. Managers of these enterprises should therefore give appropriate attention to environmental issues within their business strategies. Improving environmental performance requires a commitment to a systematic approach and to continual improvement of the system. An environmental management system provides the internal framework necessary to control an enterprise's environmental impacts and to integrate environmental considerations into business operations. Having such a system in place should help to assure stockholders, employees and the community that the enterprise is actively working to protect the environment from the impacts of its activities.

38. The basic premise of the *Guidelines* is that enterprises should act as soon as possible, and in a proactive way, to avoid, for instance, serious or irreversible environmental damages resulting from their activities. However, the fact that the *Guidelines* are addressed to enterprises means that no existing instrument is completely adequate for expressing this recommendation. The *Guidelines* therefore draw upon, but do not completely mirror, any existing instrument.

Guidelines 2011

Chapter I. Concepts and Principles

2. Obeying domestic laws is the first obligation of enterprises. The Guidelines are not a substitute for nor should they be considered to override domestic law and regulation. While the Guidelines extend beyond the law in many cases, they should not and are not intended to place an enterprise in situations where it faces conflicting requirements. However, in countries where domestic laws and regulations conflict with the principles and standards of the Guidelines, enterprises should seek ways to honour such principles and standards to the fullest extent which does not place them in violation of domestic law.

Chapter II. General Policies

10. Carry out risk-based due diligence, for example by incorporating it into their enterprise risk management systems, to identify, prevent and mitigate actual and potential adverse impacts as described in paragraphs 11 and 12, and account for how these impacts are addressed. The nature and extent of due diligence depend on the circumstances of a particular situation.

11. Avoid causing or contributing to adverse impacts on matters covered by the Guidelines, through their own activities, and address such impacts when they occur.

12. Seek to prevent or mitigate an adverse impact where they have not contributed to that impact, when the impact is nevertheless directly linked to their operations, products or services by a business relationship. This is not intended to shift responsibility from the entity causing an adverse impact to the enterprise with which it has a business relationship.

Commentary

14. For the purposes of the Guidelines, due diligence is understood as the process through which enterprises can identify, prevent, mitigate and account for how they address their actual and potential adverse impacts as an integral part of business decision-making and risk management systems. Due diligence can be included within broader enterprise risk management systems, provided that it goes beyond simply identifying and managing material risks to the enterprise itself, to include the risks of adverse impacts related to matters covered by the Guidelines. Potential impacts are to be addressed through prevention or mitigation, while actual impacts are to be addressed through remediation. The Guidelines concern those adverse impacts that are either caused or contributed to by the enterprise, or are directly linked to their operations, products or services by a business relationship, as described in paragraphs A.11 and A.12. Due diligence can help enterprises avoid the risk of such adverse impacts. For the purposes of this recommendation, 'contributing to' an adverse impact should be interpreted as a substantial contribution, meaning an activity that causes, facilitates or incentivises another entity to cause an adverse impact and does not include minor or trivial contributions. The term '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 services. The recommendation in paragraph A.10 applies to those matters covered by the Guidelines that are related to adverse impacts. It does not apply to the chapters on Science and Technology, Competition and Taxation.

20. Meeting the expectation in paragraph A.12 would entail an enterprise, acting alone or in co-operation with other entities, as appropriate, to use its leverage to influence the entity causing the adverse impact to prevent or mitigate that impact.

Chapter III. Disclosure

1. Enterprises should ensure that timely and accurate information is disclosed on all material matters regarding their activities, structure, financial situation, performance, ownership and governance. This information should be disclosed for the enterprise as a whole, and, where appropriate, along business lines or geographic areas. Disclosure policies of enterprises should be tailored to the nature, size and location of the enterprise, with due regard taken of costs, business confidentiality and other competitive concerns.

2. Disclosure policies of enterprises should include, but not be limited to, material information on: a) the financial and operating results of the enterprise; b) enterprise objectives; c) major share ownership and voting rights, including the structure of a group of enterprises and intra-group relations, as well as control enhancing mechanisms; d) remuneration policy for members of the board and key executives, and information about board members, including qualifications, the selection process, other enterprise directorships and whether each board member is regarded as independent by the board; e) related party transactions; f) foreseeable risk factors; g) issues regarding workers and other stakeholders; h) governance structures and policies, in particular, the content of any corporate governance code or policy and its implementation process.

3. Enterprises are encouraged to communicate additional information that could include: a) value statements or statements of business conduct intended for public disclosure including, depending on its relevance for the enterprise's activities, information on the enterprise's policies relating to matters covered by the Guidelines; b) policies and other codes of conduct to which the enterprise subscribes, their date of adoption and the countries and entities to which such statements apply; c) its performance in relation to these statements and codes; d) information on internal audit, risk management and legal compliance systems; e) information on relationships with workers and other stakeholders.

Commentary

28. The purpose of this chapter is to encourage improved understanding of the operations of multinational enterprises. Clear and complete information on enterprises is important to a variety of

users ranging from shareholders and the financial community to other constituencies such as workers, local communities, special interest groups, governments and society at large. To improve public understanding of enterprises and their interaction with society and the environment, enterprises should be transparent in their operations and responsive to the public's increasingly sophisticated demands for information.

30. Disclosure recommendations are not expected to place unreasonable administrative or cost burdens on enterprises. Nor are enterprises expected to disclose information that may endanger their competitive position unless disclosure is necessary to fully inform the investment decision and to avoid misleading the investor. In order to determine what information should be disclosed at a minimum, the Guidelines use the concept of materiality. Material information can be defined as information whose omission or misstatement could influence the economic decisions taken by users of information.

34. Many enterprises have adopted measures designed to help them comply with the law and standards of business conduct, and to enhance the transparency of their operations. A growing number of firms have issued voluntary codes of corporate conduct, which are expressions of commitments to ethical values in such areas as environment, human rights, labour standards, consumer protection, or taxation. Specialised management systems have been or are being developed and continue to evolve with the aim of helping them respect these commitments – these involve information systems, operating procedures and training requirements. Enterprises are cooperating with NGOs and intergovernmental organisations in developing reporting standards that enhance enterprises' ability to communicate how their activities influence sustainable development outcomes (for example, the Global Reporting Initiative).

Chapter XI. Taxation

1. It is important that enterprises contribute to the public finances of host countries by making timely payment of their tax liabilities. In particular, enterprises should comply with both 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 discerning and following the intention of the legislature. It does not require an enterprise to make payment in excess of the amount legally required pursuant to such an interpretation. Tax compliance includes such measures as providing to the relevant authorities timely information that is relevant or required by law for purposes of the correct determination of taxes to be assessed in connection with their operations and conforming transfer pricing practices to the arm's length principle.

2. Enterprises should treat tax governance and tax compliance as important elements of their oversight and broader risk management systems. In particular, corporate boards should adopt tax risk management strategies to ensure that the financial, regulatory and reputational risks associated with taxation are fully identified and evaluated.

Commentary

106. The OECD Transfer Pricing Guidelines focus on the application of the arm's length principle to evaluate the transfer pricing of associated enterprises. The OECD Transfer Pricing Guidelines aim to help tax administrations (of both OECD member countries and non-member countries) and multinational enterprises by indicating mutually satisfactory solutions to transfer pricing cases, thereby minimising conflict among tax administrations and between tax administrations and multinational enterprises and avoiding costly litigation. Multinational enterprises are encouraged to follow the guidance in the OECD Transfer Pricing Guidelines, as amended and supplemented⁷, in order to ensure that their transfer prices reflect the arm's length principle.

Implementation Procedures of the OECD Guidelines for MNEs (Procedural Guidance for Specific Instances)

Commentary

21. The effectiveness of the specific instances procedure depends on good faith behaviour of all parties involved in the procedures. Good faith behaviour in this context means responding in a timely fashion, maintaining confidentiality where appropriate, refraining from misrepresenting the process and from threatening or taking reprisals against parties involved in the procedure, and genuinely engaging in the procedures with a view to finding a solution to the issues raised in accordance with the Guidelines.

Guidelines 2023

Chapter I. Concepts and Principles

2. Obeying domestic laws is the first obligation of enterprises. The Guidelines are not a substitute for, nor should they be considered to, override domestic law and regulation. Failure of governments to uphold the principles and standards consistent with the Guidelines or their associated international commitments does not diminish the expectation that enterprises observe the Guidelines. While the Guidelines extend beyond the law in many cases, they should not and are not intended to place an enterprise in situations where it faces conflicting requirements. However, in countries where domestic laws and regulations conflict with the principles and standards of the Guidelines, enterprises should seek ways to honour such principles and standards to the fullest extent which does not place them in violation of domestic law.

Chapter II. General Policies

11. Carry out risk-based due diligence, for example by incorporating it into their enterprise risk management systems, to identify, prevent and mitigate actual and potential adverse impacts as described in paragraphs 12 and 13, and account for how these impacts are addressed. The nature and extent of due diligence depend on the circumstances of a particular situation.

12. Avoid causing or contributing to adverse impacts on matters covered by the Guidelines, through their own activities, and address such impacts when they occur, including through providing for or co-operating in the remediation of adverse impacts.

13. Seek to prevent or mitigate an adverse impact where they have not contributed to that impact, when the impact is nevertheless directly linked to their operations, products or services by a business relationship. This is not intended to shift responsibility from the entity causing an adverse impact to the enterprise with which it has a business relationship.

Commentary

15. For the purposes of the Guidelines, due diligence is understood as the process through which enterprises can identify, prevent, mitigate and account for how they address their actual and potential adverse impacts as an integral part of business decision-making and risk management systems. The OECD Due Diligence Guidance for Responsible Business Conduct and OECD sector due diligence Guidances help enterprises understand and implement due diligence recommendation of the Guidelines. They also seek to promote a common understanding among governments and stakeholders on risk-based due diligence for responsible business conduct. To that end, the OECD Due Diligence Guidance for Responsible Business Conduct sets out a due diligence framework that governments have committed to actively support and monitor. It outlines the following measures: 1. embedding responsible business conduct into policies and management systems; 2. identifying and assessing actual and potential adverse impacts associated with the enterprise's operations, products or services; 3. ceasing, preventing and mitigating adverse impacts; 4. tracking implementation and

results; 5. communicating how impacts are addressed; and 6. providing for or co-operating in remediation when appropriate. It also suggests practical actions to implement these measures. Not every practical action mentioned in the due diligence guidance will be appropriate for every situation.

16. Due diligence can be included within broader enterprise risk management systems, provided that it goes beyond simply identifying and managing material risks to the enterprise itself, to include the risks of adverse impacts related to matters covered by the Guidelines. Potential impacts are to be addressed through prevention or mitigation, while actual impacts are to be addressed through remediation. The Guidelines concern those adverse impacts that are either caused or contributed to by the enterprise, or are directly linked to their operations, products or services by a business relationship, as described in paragraphs A.12 and A.13. Due diligence can help enterprises avoid the risk of such adverse impacts. For the purposes of this recommendation, 'contributing to' an adverse impact should be interpreted as a substantial contribution, meaning an activity that causes, facilitates or incentivises another entity to cause an adverse impact and does not include minor or trivial contributions. An enterprise's relationship to adverse impact is not static. It may change, for example as situations evolve and depending upon the degree to which due diligence and steps taken to address identified risks and impacts decrease the risk of the impacts occurring.

17. The term 'business relationship' includes relationships with business partners, sub-contractors, franchisees, investee companies, clients, and joint venture partners, entities in the supply chain which supply products or services that contribute to the enterprise's own operations, products or services or which receive, license, buy or use products or services from the enterprise, and any other non-State or State entities directly linked to its operations, products or services. Relationships with individual consumers, who are natural persons acting for purposes that are unrelated to a business, commercial, or governmental activity, are not generally considered 'business relationships' under the Guidelines although an enterprise can contribute to adverse impacts caused by them. Business relationships include relationships beyond contractual, 'first tier' or immediate relationships. Entities with which an enterprise has a business relationship may or may not be operating in or from Adherents. The ability of an enterprise to identify, prevent and mitigate actual and potential adverse impacts as described in paragraph A.11, may vary across different types of business relationships, as well as due to other factors, including as described in Commentary paragraph 24.

21. Where an enterprise causes or may cause an adverse impact, then it should take the necessary steps to cease or prevent that impact.

22. Where an enterprise contributes or may contribute to an adverse impact, then it should take the necessary steps to cease or prevent its contribution and use its leverage to mitigate any remaining impacts to the greatest extent possible. Leverage is considered to exist where the enterprise has the ability to effect change in the wrongful practices of the entity that causes the harm.

23. The Guidelines recognise that responsibility should not be shifted from an entity causing an adverse impact to the enterprise with which it has a business relationship. In this respect where an enterprise is directly linked to an adverse impact through a business relationship, but does not cause or contribute to it, it is not responsible for providing remediation, though it may take a role in doing so, but rather for using leverage alone or in co-operation with other entities, to influence the entity causing the adverse impact to prevent, mitigate or remediate that impact. Where an enterprise does not have sufficient leverage, it should consider ways to enhance its leverage. Enterprises can use or increase leverage in a number of ways to influence entities with which it has business relationships, for example, through support, training and capacity building; engagement to urge them to prevent and/or mitigate impacts; building expectations around responsible business conduct and due diligence specifically into commercial contracts such as management contracts, pre-qualification requirements for potential suppliers, voting trusts, and license or franchise agreements; linking business incentives with performance on responsible business conduct; engaging with regulators

and policymakers on responsible business conduct issues; communicating the possibility of responsible disengagement if expectations around responsible business conduct are not respected, collaborating with other enterprises (at sectoral, risk or country level) to pool leverage and implementing common standards of responsible business conduct. Other factors relevant to determining the appropriate response to the identified risks include the severity and probability of adverse impacts and how crucial that supplier is to the enterprise.