



14 February 2013

INITIAL ASSESSMENT

JIJNJEVAERIE SAMI VILLAGE VS STATKRAFT

EXECUTIVE SUMMARY:

The Norwegian and the Swedish OECD National Contact Points (NCPs) hereby in principle accept, but defer the consideration of, a notification from the Sami reindeer herding collective Jijnjevaerie Sami Village against the Norwegian state-owned company Statkraft AS.

The notification concerns alleged breaches of the OECD Guidelines for Responsible Business Conduct (the Guidelines) by Statkraft AS in its wind farm projects in the counties of Jämtland and Västernorrland in Sweden. The joint venture Statkraft SCA Vind AB, of which Statkraft owns 60 per cent, operates the wind power project. Jijnjevaerie Sami Village claims that it has not been adequately consulted about the parts of the project that affect their reindeer herding and that Statkraft AS risks breaching the Guidelines provisions on the corporate responsibility to respect human rights if they do not engage in meaningful consultations. Their main request to Statkraft AS is to engage in such consultations with the Sami Village. The Sami Village requests the NCPs to facilitate such a dialogue.

How a multinational company engages with relevant stakeholders and respects the internationally recognised human rights of those affected by their activities, including indigenous peoples, fall within the scope of the Guidelines.¹ The NCPs also find that the notifier has a legitimate interest in the matter, that the claims concerning stakeholder engagement are material and substantiated, and that there is a link between the enterprise's activities and the issue raised. That the notification is admitted should in no way be understood to imply that the enterprise has breached the Guidelines. The NCPs have only considered whether the notification could merit further consideration, and not the substance of the claims.

¹ See for instance OECD Guidelines Chapter II A. 2 and 14, Chapter IV and Chapter V 2a) and b)

However, since a bilateral dialogue between the parties has been renewed since the notification, the NCPs have decided to defer the case to allow the parties to find a mutually acceptable solution to this situation without the NCPs' assistance. The case is put on hold until either of the parties requests the NCPs to open the case.

The NCPs are non-judicial grievance mechanisms with a mandate to help resolve issues related to how enterprises implement the Guidelines. The wind power project in question has been permitted by the Swedish Superior Environmental Court, provided that the enterprise implements certain measures to reduce adverse impact on the reindeer-collective.² How these measures should be implemented for the season 2012/2013 has been an issue of legal dispute in a parallel proceeding to the notification.³

The NCPs underline that they cannot review decisions by national authorities or courts and that notifications should concern business practices rather than the policies of national authorities.⁴ In practice, this means that the NCPs cannot review decisions such as to permit the project, or undertake new environmental and social impact assessments.

On the other hand, that parallel proceedings have taken place is not a sufficient argument to reject this case. The NCPs find that an offer of good offices could make a positive contribution to the resolution of these issues.

The NCPs commend both parties for being forthcoming with information during this initial assessment. While the case is put on hold, the NCPs strongly encourage the parties to engage in a dialogue that can provide the basis for long-term co-existence acceptable to both parties. The NCPs recommend that the parties base their dialogue on two-way communication and the good faith of the participants on both sides in accordance with the Guidelines and on other widely recognised corporate responsibility instruments such as the UN Guiding Principles on Business and Human Rights, the International Finance Corporation's Performance Standards and the UN Global Compact.⁵

² Swedish Superior Environmental Court, Stockholm, Decision 2011-11-23, Case nr. M 824-11

³ Swedish Environmental Court, Östersund, Court Decision 2013-01-10, Case nr. M 2956-12 and nr. M 2957-12, and Court Decision 2013-01-10, Case nr. M 2997-12 and nr. M 3018-12

⁴ As noted by the Norwegian NCP in the specific instance Concerned Scientists Norway and the Norwegian Climate Network vs. Statoil ASA, the complaint should be directed towards the practices of the enterprise rather than (...) at national authorities.

⁵ See for instance IFC Performance Standard 7. Inspiration could also be drawn from the UN Global Compact Exposure Draft UNDRIP: Business Reference Guide released on 10 December 2012 and the Draft Good Practice Note for the UN Global Compact by Amy Lehr, Foley Hoag LLP, Draft for comment on "Effective Company Engagement with Indigenous Peoples: Consultation and Consent" D130467.1. Statkraft is a member of the Global Compact and is committed to follow the IFC PS in development projects and to the OECD Guidelines.

<http://annualreport2011.statkraft.com/>

THE COMPLAINT

On 29 October 2012 the Norwegian and Swedish NCPs received a notification against Statkraft for alleged failure to respect the OECD Guidelines, Chapter II (General Policies), A.1, 2 and 14, Chapter IV (Human Rights), 1, 2 and 5 and Chapter VI (Environment), 2 a) and b). The primary request is that Statkraft engage in meaningful consultations with Jijnjevaerie Sami Village on any and all developments affecting them. The complainants acknowledge that consultations have taken place, but claim that these consultations have been flawed. “Meaningful engagement” should, according to the complainants, entail that the company respect the Jijnjevaerie Sami’s right to free, prior and informed consent. Their goal, if meaningful consultations take place, is that the company takes all appropriate steps to prevent adverse impacts on the environment and their reindeer-herding practices, and to receive appropriate compensation from the company. The Norwegian and Swedish NCPs are asked to offer their good offices to facilitate a mutually-acceptable solution to this situation, and assist the parties during the process of meaningful consultation.

RESPONSE TO THE COMPLAINT

Statkraft writes in a letter of 23 November 2012 that the case should be declared inadmissible, mainly because the claims in the submission to the OECD NCPs have been fully considered by the Swedish judiciary system and that by accepting the case the NCP would play a *de facto* role as a judicial grievance mechanism. The company notes that both the issues raised and the proponent of the submission before the three national courts are in essence the same as the one presented to the NCPs. As recognized by Swedish judicial authorities, Statkraft also underlines that the enterprise has complied with all applicable laws and procedures, provided extensive information, as well as that consultations have taken place. Statkraft also emphasise that impacts have been assessed, avoided, and where avoidance was not possible, minimized and mitigated and that compensation measures have been established. Furthermore, Statkraft states that it will continue its commitment towards stakeholder engagement, human rights and the environment regardless of whether the case is declared admissible or not. Statkraft is encouraged to note that the Jijnjevaerie Sami Village is willing to engage in renewed dialogue and remains ready to discuss how best to implement the measures listed in the Court ruling. Such dialogue on the implementation of the measures listed by the Court could, according to Statkraft, naturally take place under the County Administrative Board process.

THE NCPS ASSESSMENT

In accordance with the OECD Guidelines for handling complaints, the NCPs have considered the following criteria:

- Which NCP is the right entity to assess the alleged violation?

The complaint is submitted to the Norwegian and the Swedish NCPs against a Norwegian state-owned company with headquarters in Norway for a joint venture project in Sweden, of which the Norwegian company owns 60 per cent of the shares. According to the Guidelines issues should generally be dealt with where they have arisen, and the NCP of the home country should strive to provide appropriate

assistance in a timely manner when requested by the NCP of the host country. In this particular case the complainants acknowledge this, but ask the Norwegian and the Swedish NCPs to jointly handle the case. Hence, Sweden leads the case with support from Norway.

- Is Statkraft a multinational enterprise according to the OECD Guidelines?

Statkraft develops and generates hydropower, wind power, gas power and district heating, and is a major player on the European energy exchanges. Statkraft has more than 3,400 staff in more than 20 countries. The company qualifies as a multinational enterprise according to the OECD Guidelines.

- Has the notifier a legitimate interest in the matter submitted to the NCP?

The notifier is the legitimate representative of Jijnjevaerie Sami Village, an indigenous reindeer-herding collective located in the municipality of Jämtland in the north-west of Sweden. The village has 50 members, whose livelihood and membership in the village is dependent upon continued reindeer-herding practices. The reindeer-herding community is concerned that Statkrafts' wind power operations will severely impact their livelihood and that community members may be dislocated from the environment that provides them with their cultural identity. In a parallel proceeding, the Swedish Superior Environmental Court has established that the project does have adverse impact on this particular Sami Village's reindeer herding. On this basis, the NCPs deem that the Sami Village has a legitimate interest in the matter submitted to the NCP.

- Is the notification material and substantiated?⁶

The notification is material in the sense that it refers to alleged breaches of relevant provisions of the Guidelines related to human rights and stakeholder engagement.⁷ The complaint also refers to relevant provisions in public international law and is substantiated with correspondence between Jijnjevaerie Sami Village and Statkraft, the Superior Environmental Court Ruling from 2011 and correspondence between Jijnjevaerie Sami Village, Statkraft and the municipality of Jämtland.

- Does there seem to be a link between the enterprise's activities and the issue raised in the specific instance?

The complainants claim that Statkraft AS has failed to engage in meaningful consultations with affected reindeer herders during the planning of the wind power project. Statkraft AS owns 60 per cent of and de facto controls the wind power project.⁸ Statkraft AS acknowledges a link to the issues raised and claims that adequate

⁶ According to the Norwegian NCP Procedural Guidelines, materiality is understood as a fact that is significant to the issue at hand. Substantiation concerns the extent to which the complaint is supported by proof or evidence.

⁷ The complaint refers to [Chapter II (General Policies), A.1, 2 and 14) and Chapter IV (Human Rights) 1, 2 and 5, as well as communication and consultation related to environmental impact Chapter VI (Environment) 2 a) and 2 b)].

⁸ <http://www.statkraft.no/prosjekter/sverige/statkraft-sca-vind-ab/default.aspx>

consultations have taken place. Thus, the NCPs deem there to be a link between the enterprise's activities and the issue raised.

- *What is the relevance of applicable law and procedures, including court rulings? Applicable public international law includes the UN Universal Declaration on Human Rights, the International Convention on the Elimination of All forms of Racial Discrimination (CERD) and the International Covenant on Civil and Political Rights (ICCPR). The Universal Declaration in Indigenous Peoples Rights (UNDRIP) would also be relevant, as well as reports from the UN Expert Mechanism on the Rights of Indigenous Peoples, the UN Permanent Forum on Indigenous Issues and the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples.*

In a parallel procedure to this specific instance, the Swedish Superior Environmental Court concluded an appeal against Statkraft SCA Vind AB planning permits from the Jijnjevaerie Sami Village on 23 November 2011. The Sami Village primarily wanted to stop the project. The court acknowledged that the project is likely to impact reindeer herding, but concluded that the project should be permitted on the basis of national interest in renewable energy production. The court gave the company permission to proceed with 360 turbines out of the 460 originally proposed. The court requested Statkraft to finance certain measures to reduce adverse impact on Jijnjevaerie's herding practices. However, the parties failed to agree on how these preventive measures should be detailed for the season 2012/2013 in a process administered by the County Administrative Board.⁹ It was therefore left to the County Administrative Board to design the measures. After a complaint from the Sami Village, the Environmental Court upheld the decisions from the County Administrative Board.¹⁰

According to the Guidelines, NCPs should not decide that issues do not merit further consideration solely because parallel proceedings have been conducted, are under way or are available to the parties concerned. NCPs should evaluate whether an offer of good offices could make a positive contribution to the resolution of the issues raised and would not create serious prejudice for either of the parties involved in these other proceedings or cause a contempt of court situation.¹¹

The notifier's main request to the company is to engage in meaningful consultations with the Sami Village. The notifier's request to the NCPs is primarily to facilitate a dialogue between Jijnjevaerie Sami Village and Statkraft AS.

The NCPs find that an offer of good offices could make a positive contribution to the resolution of these issues.

⁹ The County Administrative Board of Jämtland

¹⁰ Swedish Environmental Court, Östersund, Court Decision 2013-01-10, Case nr. M 2956-12 and nr. M 2957-12, and Court Decision 2013-01-10, Case nr. M 2997-12 and nr. M 3018-12

¹¹ Implementation procedures of the OECD Guidelines for Multinational Enterprises, Commentary 26

To avoid causing prejudice for either of the parties this decision is published after the court ruling on which measures the company should implement for the season 2012/2013 became enforceable on 31 January 2013.

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

On November 20 2012 the Saami Council¹² informed relevant companies, governments, investors and other stakeholders of two complaints they will submit to the United Nations Committee on the Elimination of Racial Discrimination (CERD) on behalf of the Swedish Sami villages Girjas and Laevas against an open pit mining project as soon as the mining activities commence.¹³ As of 14 February 2013 the complaints have not been submitted to CERD.

Several specific instances concerning consultation with indigenous peoples have been submitted to OECD NCPs.

In CCFD et al. vs. Michelin, the French NCP in July 2012 received a complaint against Michelin for building a tyre factory in India on land sold by local authorities presumably without any prior consultation of local villagers. Dalit villagers and indigenous groups of Irula ethnicity are allegedly affected. A decision is yet to be made public on whether the case will be accepted or not.

In Future in Our Hands vs. Intex Resources ASA (Intex) on a nickel mining project in the Philippines, the Norwegian NCP in 2011 concluded that Intex had followed national legislation and procedures, but failed to live up to the OECD Guidelines' provisions for consultations.¹⁴

In Friends of the Earth Norway and Forum for Environment and Development vs. Cermaq ASA on sustainable fish farming in Canada and Chile, the Norwegian NCP successfully mediated a joint statement in August 2011. Among other things, the company clearly expressed its respect for indigenous rights.¹⁵

¹² The Saami Council is a voluntary Saami organization (a non-governmental organization), with Saami member organizations in Finland, Russia, Norway and Sweden. <http://www.saamicouncil.net>.

¹³ Girjas complaint, <http://www.sametinget.se/49821>, Laevas complaint, <http://www.sametinget.se/49823>

¹⁴ For instance, Intex had consulted with some indigenous groups, but was recommended to identify primary and secondary indigenous groups potentially affected by the project, and consult all indigenous peoples affected by the mine and associated infrastructure. The company was also recommended to establish a grievance mechanism in accordance with the UN Guiding Principles on Business and Human Rights.

http://www.regjeringen.no/upload/UD/Vedlegg/csr/Kontaktpunktet/fivh_asa111130.pdf

¹⁵ Provision m) of the joint statement reads:

Cermag respects indigenous rights in line with ILO Convention 169 and the UN Declaration of Indigenous Peoples (UNDRIP). Cermag's operations in areas with indigenous peoples in Chile, Canada and Norway will be in accordance with the provisions of these agreements. Cermag will seek to enter into mutually beneficial agreements with indigenous people in all areas where their rights are affected by Cermag's operations, including in Chile.

http://www.regjeringen.no/upload/UD/Vedlegg/ncp/final_statement.pdf

In Saami Council vs. KfW Ipex-Bank on the financing of a land-based wind power park (Markbygden) in winter pastures for reindeer, allegedly without consent of affected reindeer herders, the Swedish NCP rejected the case in 2010. The NCP acknowledged the importance of the question raised but referred to that the matter had been dealt with in accordance with the applicable laws and procedures of Sweden, and that the possibility to request a judicial review of the decision to permit the project remained open. After the complaint was rejected, the Sami Village in question signed an agreement with Markbygden Vind AB.

In Survival International vs. Vedanta Resources plc. (Vedanta), NCP UK concluded in 2009 that the company had failed to put in place an adequate and timely consultation mechanism to fully engage the Dongria Kondh, an indigenous community who would be directly affected by the environmental and health and safety impact of a planned bauxite mine in Orissa, India. The company was recommended to immediately and adequately engage with the Dongria Kondh and to respect the outcome of the consultation process.¹⁶

- Would the consideration of the specific instance contribute to the purposes and effectiveness of the Guidelines?

The NCPs find that consideration of the issues raised could contribute to clarify the OECD Guidelines' provisions of stakeholder engagement and human rights due diligence.¹⁷

ATTACHMENTS

1. The NCP process in this Specific Instance
2. Details on the parties involved
3. Information about the OECD NCPs and the OECD Guidelines
4. Background

¹⁶ NCP UK also concluded that the company had failed to respect the rights and freedoms of the Dongria Kondh consistent with India's commitments under various international human rights instruments, including the UN International Covenant on Civil and Political Rights, the UN Convention of the Elimination of All Forms of Racial Discrimination, the Convention on Biological Diversity and the UN Declaration on the Rights of Indigenous Peoples. NCP UK <http://webarchive.nationalarchives.gov.uk/20121205150610/http://www.bis.gov.uk/files/file53117.doc>

¹⁷ As referred to in the complaint *Chapter II (General Policies), A.1, 2 and 14) and Chapter IV (Human Rights) 1, 2 and 5, Chapter VI, 2 a) and b)*

ANNEX 1: DETAILS OF THE NCP PROCESS IN THIS SPECIFIC INSTANCE

The NCPs received the complaint on 29 October and forwarded it to the company on the same date together with NCP procedures and an invitation to comment upon the complaint within 25 November. In collaboration with the Swedish NCP, the Norwegian NCP invited the company to meet with the NCP to explain the NCP procedure on 29 November. Telephone contact with both the complainant and the company was maintained throughout the initial assessment. On 24 November the company shared its preliminary views on the complaint, arguing that the case should not be deemed admissible. The NCPs sent a shared draft initial assessment to the complainants and the company on 25 January for factual corrections.

ANNEX 2: DETAILS OF THE PARTIES INVOLVED

THE COMPANY: STATKRAFT AS

Statkraft develops and generates hydropower, wind power, gas power and district heating, and is a major player on the European energy exchanges. Statkraft has more than 3,400 staff in more than 20 countries. Statkraft is a member of the UN's Global Compact and is committed to following up this initiative and its ten principles. In development projects, Statkraft emphasises the International Finance Corporation's (IFC) standards for sustainable behaviour. Statkraft also adheres to the OECD guidelines for multinational enterprises.¹⁸

THE COMPLAINANT: JIJNJEVAERIE SAMI VILLAGE

Jijnjevaerie Sami village is an indigenous reindeer herding collective located in the municipality of Jämtland in the north-west of Sweden. The village is composed of 50 members, whose livelihood and membership in the village is dependent upon continued reindeer herding practices.

ANNEX 3: GENERAL INFORMATION ABOUT THE GUIDELINES

APPLICATION OF THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES

The initial assessment is based on the 2011 version of the Guidelines as the complaint was submitted after the updated OECD Guidelines for Responsible Business Conduct. The Guidelines comprise a set of principles and standards for responsible business conduct in areas including general policies, human rights, disclosure, employment and industrial relations, environment, combating bribery, consumer interests, science and technology, competition, and taxation. The Guidelines are not legally binding. However, OECD governments and a number of non-OECD members are committed to encouraging

¹⁸ Statkraft annual report 2011 <http://annualreport2011.statkraft.com>

multinational enterprises operating in or from their territories to observe the Guidelines, while taking into account the particular circumstances of each host country.

The Guidelines are implemented in adhering countries by OECD National Contact Points (NCPs), which are charged with raising awareness of the Guidelines amongst businesses and civil society. NCPs are also responsible for dealing with complaints concerning that the Guidelines have been breached by multinational enterprises operating in or from their territories.

THE NCP PROCEDURE

The NCP process is broadly divided into the following key stages:

- 1) *Initial assessment* – This consists of a desk-based analysis of the complaint, the company's response, and any additional information provided by the parties. The NCP uses this information to decide whether further consideration of a complaint is warranted.
- 2) *Conciliation/mediation OR examination* – If a case is accepted, the NCP offers conciliation/mediation to both parties with the aim of reaching a settlement agreeable to both. Should conciliation/mediation fail to achieve a resolution, or should the parties decline the offer, the NCP will examine the complaint in order to assess whether it is justified. The NCP may commission fact-finding or other services to support the processing of the case if deemed necessary.
- 3) *Final statement* – If a mediated solution has been reached, the NCP will publish a final statement with details of the agreement. If conciliation/mediation is refused or fails to achieve an agreement, the NCP will examine the complaint and prepare and publish a final statement on whether or not the Guidelines have been breached and, if appropriate, recommendations to the company for future conduct.

ANNEX 4: BACKGROUND ON SAMI REINDEER HERDING

An estimated Sami population of 70, 000–100,000 lives in Finland, Norway, Russia and Sweden, of which 15,000–20,000 in Sweden.¹⁹ Sami reindeer herders are among the indigenous peoples who base their culture and livelihood on raising and herding livestock.²⁰ Reindeer herding is of central importance to the Sami people. According to the Swedish Sami parliament, 51 Sami villages herd reindeer in Sweden.²¹

¹⁹ Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya, 6 June 2011 to the United Nations General Assembly on The situation of the Sami People in the Sápmi region of Norway, Sweden and Finland

²⁰ UN Permanent Forum on Indigenous Issues (UNPFII) 2010, State of the World's Indigenous Peoples 2010 Available on [http://www.un.org/esa/socdev/unpfii/documents/SOWIP_web.pdf]

²¹ The Swedish Sami Parliament <http://www.sametinget.se>

As stated by UN Special Rapporteur, Dr. James Anaya, Sami people in the Nordic countries do not have to deal with many of the socio-economic concerns that commonly face indigenous peoples throughout the world. However, he also notes that the Sami way of life, especially in relation to reindeer husbandry, is threatened significantly by competing usage of land. In all three Nordic countries, various natural resource extraction and development projects threaten to diminish areas available for grazing. Already, the construction of buildings and roads, as well as hydroelectric dams, mining, forestry projects and tourism activities have resulted in loss and fragmentation of pasture lands, with detrimental effects on reindeer movement and, consequently, on their reproductive levels and survival.²²

Considerable efforts need to be directed towards reducing the vulnerability of reindeer husbandry to the effects of climate change, and research should be carried out towards this end. At the same time, Anaya states that responses to the global climate change problem should not themselves pose threats to Sami livelihoods.²³

²² Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya, 6 June 2011 to the United Nations General Assembly on The situation of the Sami People in the Sápmi region of Norway, Sweden and Finland

²³ Ibid