



INITIAL ASSESSMENT

JANUARY 2015

FIVAS VS NORCONSULT AS

EXECUTIVE SUMMARY

The Norwegian OECD National Contact Point (NCP) received a complaint against the Norwegian company Norconsult AS for the conduct of its subsidiary enterprise (NorPower).

The complaint was submitted by the Norwegian non-governmental organisation (NGO) for international water studies (FIVAS) on its own behalf and in consultation with the NGO coalition “Save Sarawak Rivers”. The complaint alleges that Norconsult AS, its subsidiary NorPower and business partner are contributing to violation of international standards through two hydropower projects in Malaysia.

The Norwegian NCP hereby accepts to process this specific instance for further examination. However, the NCP has not considered the substance of the claims or whether the expectations in the Guidelines have been met. Thus, accepting to process does not mean that the company in question has done anything that warrants criticism with regard to the Guidelines.

The NCP has based its decision to accept the case on the following:

- FIVAS and Save Sarawak Rivers are concerned parties with a *legitimate interest* in the matters raised in the complaint;
- Norconsult AS is an *enterprise in the sense of the OECD Guidelines* for Multinational Enterprises (the Guidelines), and it operates internationally;
- The issues raised are *material, substantiated and thus merits further examination*; The complaint concerns whether the companies in question have carried out sufficient risk-based, human rights due diligence in the two projects, including to “identify, prevent and mitigate actual and potential adverse impacts¹” that they are directly linked to through a business relationship. The complaint also concerns whether the

¹ OECD Guidelines, Chapter II, A sections 10 and 12.

companies could have been / be more transparent about their due diligence procedures and their activities in Malaysia. These matters are covered by the OECD Guidelines, Chapter II (General Policies) section A, Chapter III (Disclosure) and Chapter IV (Human Rights).

- There is a *link* between Norconsult AS's and/or its subsidiary NorPower's activities and the issues raised in the specific instance;
- Consideration of this specific instance could *contribute to the purposes and effectiveness of the Guidelines* by further clarifying how the expectations in the Guidelines Chapters II, III and IV, including carrying out risk-based, human rights due diligence, can be met. It also concerns the OECD expectations towards consultancy firms providing services to other companies.

Following this initial assessment, the NCP will invite the parties to a meeting to explore opportunities for further dialogue or mediation. If dialogue or mediation is rejected or the NCP concludes that the continuation of the procedure is not likely to be productive, it will conclude the process and prepare a final statement based on the expectations outlined in the OECD Guidelines. The Norwegian NCP Procedural Guidelines are available at www.responsiblebusiness.no²

THE COMPLAINT

On 22 August 2014, the Norwegian NCP received a complaint against Norconsult AS regarding:

- lack of transparency about Norconsult AS's involvement in two hydropower development projects (Murum and Baram) in Malaysia,
- failure to carry out adequate risk-based, human rights due diligence assessments and failure to provide adequate information about them;
- contributions to the negative impacts that have occurred due to NorPower's contracting business partner, and
- failure to adequately address these adverse impacts.

FIVAS's complaint refers to the OECD Guidelines Chapter II (General Policies) section A, paragraphs 2, 10-13, Chapter III (Disclosure) paragraphs 1, 2(f)(g), 3(b-d), and Chapter IV (Human Rights) paragraphs 1, 3-5. Reference is also made to Commentary 41 in Chapter IV (Human Rights) and Principle 21 from the UN Guiding Principles on Business and Human Rights.

FIVAS is of the opinion that Norconsult AS should be more open about its human rights due diligence process. FIVAS states that lack of transparency about these processes can indicate deficiencies in the human rights due diligence process itself. Furthermore, FIVAS states that the two hydropower projects have resulted in serious human rights violations, including lack of respect for the rights of indigenous peoples, and that there is a potential risk of future violations. In FIVAS's view, Norconsult AS and NorPower are linked to these violations by

² <http://www.responsiblebusiness.no/files/2013/12/NCP-Norway-Procedural-Guidelines.pdf>

providing services to the projects. FIVAS asks Norconsult AS to raise these violations with its business partner. If this does not yield positive results, and the projects continue to result in adverse impacts, FIVAS believes that Norconsult AS/NorPower should withdraw from the projects.

The complaint also refers to the contact FIVAS has had with the company about these issues.

THE COMPANY'S RESPONSE

Norconsult AS was informed about the complaint at a meeting with the NCP on 4 September 2014, and the company was thereafter asked to respond to a list of specific questions from the NCP. The NCP received the reply on 10 October 2014.

In its response, Norconsult AS clarifies the distinction between itself, its parent company Norconsult Holding AS and its subsidiary NorPower Sdn Bhd ("NorPower"). The latter is a Malaysian company that was established in 2012, and it is the focus of this complaint. Furthermore, Norconsult AS describes NorPower's activities in Malaysia, Norconsult AS's general code of conduct and the procedures for conducting integrity due diligence assessments of business partners. The letter also refers to the assessments of its contracting party Sarawak Energy Berhad (SEB) with which NorPower entered into its first framework agreement in 2012. NorPower's assignment in Murum (regarding solutions for "Quality Assurance Systems") was based on that agreement. NorPower does not have any direct contracts with SEB in connection with the planned dam in Baram. NorPower's contributions to the Baram project are through a contract in December 2012 with the Australian consultancy firm SMEC, which has a framework agreement with Sarawak Energy Berhad (SEB).

Norconsult AS rejects FIVAS's claim that the indigenous population in general is against the hydropower development projects conducted by SEB, and it refers to several statements in support of this view. Norconsult AS questions the basis for FIVAS's claim that it is acting in understanding with the affected local communities. Norconsult AS states that it is aware of certain allegations against SEB and the projects, and that it has raised them with SEB at several meetings.

Norconsult AS is of the opinion that the complaint should be rejected on several grounds:

- the company's involvement in the Murum project is minimal and took place when the project was nearly finalised;
- the Baram project has not yet been approved and the company is only a subcontractor to the Australian firm SMEC. When approved, the project and its owner (SEB) will follow the international standards mentioned above;
- the company's involvement is too distant to the alleged negative impacts;
- the company has carried out reasonable assessments of the projects and the business partners;
- the company has ethical procedures that have been followed; and
- the company is not obliged by law to report more than it has done.

Norconsult AS concludes its letter by confirming that, if the NCP decides that the complaint merits further consideration, it is willing to participate in the further process as the NCP deems appropriate.

THE NCP'S ASSESSMENT

The purpose of the Initial Assessment process is to determine whether the issues raised in the complaint merit further examination. It does not aim to determine whether the Company has acted consistently with the Guidelines. In accordance with the OECD Guidelines for handling notifications, the NCP has considered the following criteria:

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

The Norwegian NCP received the complaint against a Norwegian company and its Malaysian subsidiary about issues in Malaysia. According to the Guidelines, issues should generally be dealt with where they have arisen. If issues arise in non-adhering countries, NCPs shall “take steps to develop an understanding of the issues involved, and follow the procedures where relevant and practicable”. Since the allegations concern a Norwegian company (Norconsult AS), operating in a non-adhering country (Malaysia) through its subsidiary (NorPower), the Norwegian NCP is the correct NCP to assess the complaint. We have informed the Australian NCP, however, that we make reference to an Australian company in this Initial Assessment without foreseeing that they (neither the Australian NCP nor the Australian company) will be involved in our further handling of this case.

- **Is the Company a multinational enterprise according to the OECD Guidelines?³**

Norconsult Holding AS is a Norwegian company owned by more than 2000 employees of the Norconsult group. It is not listed on the Oslo stock exchange. In addition to its headquarters in Oslo, Norconsult AS has had a global presence in over 150 countries over the past 50 years.⁴ It has several subsidiaries in South America, Africa and Asia, and NorPower Sdn Bhd is one of them. As a multidisciplinary consultancy firm, the company qualifies as a multinational enterprise according to the OECD Guidelines (Chapter I, section 4).

- **Does the notifier have a legitimate interest in the matter submitted to the NCP?**

FIVAS is a Norwegian NGO specialising in corporate responsibility advocacy and lobbying about issues affecting water in the global south. FIVAS aims to influence national and international policies in order to safeguard the rights of individuals and to protect the environment. Giving voice to affected groups is central to their work in relation to Norwegian

³ OECD Guidelines for Multinational Enterprises, Chapter I, section 4: “A precise definition of multinational enterprises is not required for the purposes of the Guidelines. These enterprises operate in all sectors of the economy. They usually comprise companies or other entities established in more than one country and so linked that they may co-ordinate their operations in various ways. (...) The Guidelines are addressed to all the entities within the multinational enterprise (parent companies and/or local entities).”

⁴ See Norconsult AS' annual report 2013 at <http://www.norconsult.com/globalassets/norconsult-annual-report-2013.pdf>

authorities, Norwegian companies and in international networks.⁵ FIVAS observes the implementation of the Guidelines in relation to hydropower development projects and investigates the consequences of these projects for civil society. FIVAS has close contact with the Save Sarawak Rivers Network, an organisation founded by civil society in the nearby villages in the areas in Malaysia affected by the project.⁶ FIVAS has also been in contact with the Swiss non-governmental organisation Bruno Manser Fonds, which is working with the affected indigenous peoples. The NCP notes Norconsult AS's objection that parts of the local communities are positive in their attitude to the projects. This does not preclude FIVAS from having a legitimate interest in the submitted matter.

- **Is the complaint material and substantiated?**⁷

The complaint refers to the OECD Guidelines Chapter II (General Policies) section A, paragraphs 2, 10-13, Chapter III (Disclosure) paragraphs 1, 2(f)(g), 3(b-d), and Chapter IV (Human Rights) paragraphs 1, 3-5. The NCP finds the complaint material and substantiated.

The main claim is that Norconsult AS and NorPower are linked to adverse human rights impacts through a business relationship and that they therefore have a responsibility in light of the Guidelines (Chapter IV paragraph 3) to "seek ways to prevent or mitigate" these adverse impacts. FIVAS has not claimed that the services provided by NorPower itself are causing⁸ human rights violations or that NorPower's services have made or can make a substantial contribution to human rights violations. The complaint refers to several NGO and media reports about the adverse impacts of the two hydropower projects, including statements from Suhakam, the Human Rights Commission of Malaysia (see below regarding possible parallel proceedings). The NCP finds this issue material and substantiated.

Regarding the issue of the company's human rights due diligence process as mentioned in the Guidelines (Chapter IV paragraph 5), the NCP notes that there is uncertainty about what the company has done with regard to the two projects. The company refers to its procedures for "integrity due diligence", and the NCP appreciates the company's efforts in that field. The NCP notes that the procedures mainly focus on corruption and bribery, and that certain facts regarding human rights due diligence must be clarified in the further NCP process. This will shed light on what assessments the company has made specifically in relation to these two projects, but also on how the company deals with human rights due diligence in general. The issues in the Guidelines Chapter IV paragraphs 1 and 4 (general

⁵ <http://www.fivas.org/ENGLISH.aspx>

⁶ Coalition formed 14 february 2012 for the purpose of protesting against dam projects in Sarawak:

<http://www.freemalaysiatoday.com/category/nation/2012/02/14/new-coalition-save-sarawaks-rivers-to-battle-dams/>

⁷ 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. It is important to note that substantiation does not necessarily mean that there is a need to document that all the adverse impacts have materialised or that the project has been finalised. The OECD Guidelines are also applicable in the planning phase of a project.

⁸ The issue of "causing or contributing" to an adverse human rights impact would be covered by Chapter IV, paragraph 2. This has not been raised in the complaint and will not be discussed further.

involvement with adverse human rights impacts and having a general human rights policy) and the expectations referred to in Chapter II will also be dealt with in this context.

Lastly, the NCP considers that there are material and substantiated issues regarding transparency/disclosure as mentioned in the Guidelines (Chapter III).

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

The claims concern the responsibility to carry out risk-based, human rights due diligence assessments in order to prevent and mitigate actual and potential negative impacts relating to the enterprise's business partners' conduct. The complaint also raises issues regarding transparency/disclosure of information by Norconsult AS concerning its own and NorPower's activities and procedures. FIVAS refers to the Guidelines Chapter II (General Policies) section A, paragraphs 2, 10-13, Chapter III (Disclosure) paragraphs 1, 2(f)(g), 3(b-d), and Chapter IV (Human Rights) paragraphs 1, 3-5. The NCP finds a link between the enterprise's activities and the issues raised in the specific instance. The NCP notes Norconsult AS's claim that its "contributions" to the alleged adverse impacts are too distant and too small, and that it has done what can reasonably be expected of it. The NCP agrees that the main responsibility for any alleged adverse impacts lies with the entity causing them. It is not the intention of the Guidelines to shift that responsibility to, for instance, a subcontractor. That does not mean, however, that the subcontractor is without responsibility, and the further examination will look into precisely these matters. Furthermore, there is a link between how Norconsult AS and NorPower have disclosed/shared information about their activities, roles and procedures and the issues relating to transparency/disclosure.

- **What is the relevance of applicable law and procedures, including court rulings?**

The complaint refers to the OECD Guidelines, the UN Guiding Principles on Business and Human Rights, ILO convention 169, the UNDRIP (UN Declaration on the Rights of Indigenous Peoples), IFC Performance Standards and customary public international law.

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

The NCP is currently not aware of any relevant parallel court proceedings. However, Suhakam, the Human Rights Commission of Malaysia, has looked into the Murum Hydroelectric project and its impact on the rights of the affected indigenous peoples in Sarawak⁹ and a commissioner visited the area in June 2014. The trip was facilitated by Sarawak Energy Berhad (SEB) and, to our knowledge, Suhakam is not dealing with any specific complaints related to Norconsult or SEB. We have also been informed that there might be ongoing investigations regarding allegations of corruption involving the owners of SEB. These proceedings do not concern the role of Norconsult AS, but that of its business partner and its

⁹ <http://www.suhakam.org.my/wp-content/uploads/2013/12/Murum1.pdf>

owners, which may be looked into in the next phase, if necessary.

Whether there are other NCP cases of relevance will be more closely considered in the next phase.

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

The purpose of the NCP is to contribute to the resolution of issues that arise relating to implementation of the Guidelines in specific instances in a manner that is impartial, predictable, equitable and compatible with the principles and standards of the Guidelines. The consideration of issues raised could contribute to clarifying further what it is reasonable to expect as regards human rights due diligence by consultancy firms providing services to other companies. In addition, it will examine the expectations surrounding disclosure of information..

ATTACHMENTS

- 1) Details of the NCP process in this Specific Instance
- 2) Information about the OECD NCPs and the OECD Guidelines
- 3) The complaint and the Company's response to the complaint

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

The NCP Secretariat received the complaint on Friday 22 August 2014, and, on Monday 25 August, FIVAS received confirmation that it had been registered. The complaint was forwarded to the NCP Chair and any potential conflicts of interest were assessed. On Friday 29 August, Norconsult AS was invited (by telephone and e-mail) to a meeting with the NCP Secretariat the following week. The company responded positively and the meeting took place on Thursday 4 September. At the meeting, Norconsult AS was informed about the complaint and received a copy of it with explanations of the NCP complaint process. On 8 September, the NCP sent a list of specific questions to Norconsult AS, and a response was received on 10 October. The letter was forwarded to FIVAS on 24 October with information to the effect that the NCP planned to have a draft Initial Assessment ready by the end of the month. On 5 November, the draft was sent to the parties for any factual corrections.

ANNEX 2: INFORMATION ABOUT THE NORWEGIAN NCP AND THE GUIDELINES

APPLICATION OF THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES

The initial assessment is based on the 2011 version of the Guidelines since the complaint was submitted after the updated OECD Guidelines for Responsible Business Conduct. The Guidelines comprise a set of principles and standards for 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 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 allegations that multinational enterprises operating in or from their territories have failed to observe the Guidelines.

THE NCP COMPLAINT 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 the complaint warrants further consideration.
- 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 setting out details of the agreement and the procedure followed. If conciliation/mediation is refused or fails to result in an agreement, the NCP will examine the complaint and publish a final statement on whether or not the Guidelines have been observed and, if appropriate, make recommendations to the company as regards its future conduct.
- 4) *Follow-up* - If a mediated solution has been reached, the parties may agree to seek the assistance of the NCP in following-up implementation of the agreement, and the NCP may do so on terms agreed between the parties.

ANNEX 3: THE COMPLAINT AND THE COMPANY'S RESPONSE TO THE COMPLAINT

See website (both documents are in Norwegian).