



OECD **GUIDELINES**
FOR MULTINATIONAL ENTERPRISES

NATIONAL CONTACT POINT
NORWAY

National Contact Point Sweden

Final Statement Jijnjevaerie Saami village – Statkraft SCA
Vind AB (SSVAB)

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1 SUMMARY

On 29 October 2012, Jijnjevaerie Saami village (the Saami village) in Sweden submitted a complaint to both the Swedish and the Norwegian NCPs for the OECD Guidelines. The complaint concerned Statkraft SCA Vind AB's (SSVAB) planned wind power project in areas where the Saami village engages in reindeer herding. The Saami village wanted the NCPs to facilitate meaningful dialogue between the Saami village and Statkraft, with a view to reaching a mutually acceptable solution in the case. The Saami village claimed that the consultations that SSVAB had conducted with them had been flawed and that the project was contrary to the Saami village's wishes. Furthermore, it claimed that the project would limit the Saami village's possibility of continuing to pursue sustainable reindeer herding, which forms the basis for the community's economic and cultural survival. Several aspects of the case have been considered by the Swedish court system.

In its response to the complaint, SSVAB argued that the case should be rejected because the claims in the complaint had been considered by the Swedish court system, and because Statkraft had complied with all applicable laws and procedures. The company referred to how adverse impacts of the project had been assessed and alleviated, and, where avoidance was not possible, a number of measures had been initiated to minimise and mitigate the effect of these impacts. The company also referred to the fact that it had engaged in extensive dialogue with the Saami village on compensation schemes, and that a provisional compensation agreement had been entered into that went further than ordered by the court.

The NCPs decided to accept the complaint for consideration in March 2013. Reference was made to the fact that the contact point arrangement is a non-judicial mechanism, and that the NCPs can facilitate dialogue and mediation if it is believed that this may make a positive contribution to resolving the issue. The parties resumed a bilateral dialogue after the complaint was submitted, and the NCPs therefore deferred the case until September 2013, when the Saami village again requested the NCPs to facilitate mediation. In spring 2014, the NCPs engaged an external mediator in agreement with the parties. The mediation was concluded in June 2014 without results. The NCPs have therefore reviewed parts of the case and will now give their assessment of Statkraft's compliance with the OECD Guidelines and of the parties' conduct in the case, and provide recommendations for cooperation in the future. Both parties have shown that they are willing to participate constructively in all parts of the NCPs' processes, for which they are commended.

The complaint covers events both before and after the Guidelines were revised in 2011. The main question is whether SSVAB has taken into account the Saami village's interests and respected their human rights in connection with the wind power project. This question can be divided into several sub-questions, including whether the company has carried out risk-based human rights due diligence and whether it has remedied any adverse impacts when it became aware of them. Furthermore, the NCPs have looked at how SSVAB has conducted consultations with the Saami village.

The NCPs have not found any grounds for concluding that there has been any non-compliance with the Guidelines on the part of SSVAB, but have pointed to some areas where there is room for improvement. Finally, the NCPs provide recommendations for how SSVAB can work in a manner that even more clearly promotes indigenous people's rights and the implementation of the Guidelines. The NCPs recommend that the parties show renewed will to negotiate an agreement on the further development of the wind power projects, the scope and extent of these projects, and compensation schemes.

2 BACKGROUND

2.1 THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES

The OECD Guidelines for Multinational Enterprises (hereinafter 'the Guidelines') are recommendations from authorities to multinational enterprises on responsible business conduct. The Guidelines set out good practice

for all types of enterprises in all sectors and are based on internationally recognised standards. The Guidelines contain recommendations on transparency, human rights, employment and labour rights, the environment, bribery and extortion, consumer interests, science and technology, competition and taxation. The OECD member states and other acceding countries are obliged to establish a national contact point (NCP) tasked with promoting the Guidelines and considering requests and specific instances that arise relating to the implementation of the Guidelines.

The OECD Guidelines are voluntary, non-judicial recommendations, at the same time, as there is a clear expectation on the part of the authorities that enterprises implement the Guidelines.

The Norwegian NCP¹ consists of four independent experts and a secretariat. Together, they consider specific instances and contribute to raising awareness about the Guidelines. The Ministry of Foreign Affairs has administrative responsibility for the NCP. During the consideration of this specific instance, both the NCP and the secretariat have undergone significant replacements. The NCP's Procedural Guidelines are available here: http://www.responsiblebusiness.no/files/2014/01/FINAL_KPprosedyreregler_norsk_godkj.pdf

The Swedish NCP² is a tripartite collaboration between the State, the business sector and employee organisations. The State is represented by several ministries, and the Swedish Ministry for Foreign Affairs is the convening entity. The business sector is represented by the Confederation of Swedish Enterprise and the Swedish Trade Federation, while the employee organisations are the Swedish Trade Union Confederation (LO), the Swedish Federation of Professional Associations (Saco), the Swedish Confederation of Professional Employees (TCO), Unionen and IF Metall.

3 THE PARTIES

3.1 THE COMPLAINANT

The complainant represents Jijnjevaerie Saami village, an indigenous reindeer-herding collective. Jijnjevaerie is located in Jämtland municipality in the north-west of Sweden. The village consists of 50 members whose livelihood is related to traditional reindeer herding. The reindeer herding community is concerned that Statkraft's wind power development will severely impact their way of life, and that community members may be displaced from the area that forms part of their cultural identity.

3.2 THE ENTERPRISES THE COMPLAINT CONCERNS

The complaint concerns the Norwegian state-owned company Statkraft AS and its Swedish subsidiary Statkraft SCA Vind AB (SSVAB). Statkraft SCA Vind AB is engaged in wind power development in Sweden. Sixty per cent of the company is owned by Statkraft AS and 40 per cent by the company Svenska Cellulosa Aktiebolaget (SCA).

Statkraft AS is a leading company in hydropower internationally and Europe's largest generator of renewable energy. The Group produces hydropower, wind power, gas-fired power and district heating and is a global player in energy market operations. Statkraft has 4200 employees in more than 20 countries.

In this document, Statkraft AS and Statkraft SCA Vind AB are collectively referred to as 'Statkraft'. Where reference is made to one of the companies, that company's name is used specifically.

¹ <http://www.responsiblebusiness.no>

² <http://www.regeringen.se/artiklar/2015/05/nationella-kontaktpunkten-nkp>

3.3 THE COMPLAINT'S RELATION TO THE SWEDISH AND THE NORWEGIAN NCPs

On 29 October 2012, Jijnjevaerie Saami village in Sweden submitted a complaint to both the Swedish and the Norwegian National Contact Points (NCPs) for the OECD Guidelines, in which it claimed that Statkraft SCA Vind AB's (SSVAB) planned wind power project could affect the Saami village's possibility of pursuing reindeer herding as a livelihood. Prior to the submission of the complaint, there had been contact between the parties since 2007. The Saami village requested the NCPs to offer mediation and dialogue with a view to facilitating a mutually acceptable solution in the case.

The Swedish and the Norwegian NCPs found that the Norwegian NCP had more resources available at the time the complaint was submitted, and it was thus set to lead the consideration of the complaint, in close contact with the Swedish NCP.

4 OVERVIEW OF THE COMPLAINT

4.1 THE MAIN ARGUMENTS PRESENTED IN THE COMPLAINT FROM JIJNJEVAERIE SAAMI VILLAGE OF 29 OCTOBER 2012

The Saami village's main request to the NCPs was to facilitate meaningful dialogue between the Saami village and Statkraft, and to offer dialogue and mediation with a view to facilitating a mutually acceptable solution in the case.

The Saami village submitted the following in its complaint:

1. The consultations with Jijnjevaerie Saami village are flawed, and the project is contrary to the wishes of the village members. Statkraft has not provided meaningful opportunities for the Saami village's views to be taken into account in its decisions and has not obtained the Saami village's free, informed consent. The project will limit the Saami village's possibility of continuing to pursue sustainable reindeer herding, which forms the basis for the community's economic and cultural survival. It will most certainly result in members of the community being forced to give up reindeer herding, which forms a major part of their cultural identity.
2. There is a risk of environmental damage if the project is materialised, and this has not been appropriately communicated to the affected parties.
3. International law establishes that no industrial development is permitted on indigenous territories if this renders it considerably more difficult for an indigenous community to utilise the area in a traditional manner.
4. Norway and Sweden have actively supported and ratified relevant international conventions and other instruments concerning the rights of indigenous peoples, including CERD, ICCPR, ECHR and UDHR.³ In addition, Norway has ratified ILO Convention 169,⁴ which requires governments to respect and protect indigenous peoples' right to land and their right to participate in decisions that affect their management and use of natural resources. There is an inconsistency between such recognition and the fact that the Norwegian state-owned company Statkraft fails to meet these expectations.

4.2 THE PROVISIONS OF THE OECD GUIDELINES THAT THE COMPLAINANT CLAIMS HAVE BEEN BREACHED

³ CERD: The International Convention on the Elimination of All Forms of Racial Discrimination.

ICCPR – The International Covenant on Civil and Political Rights

ECHR: The European Convention on Human Rights.

UDHR The Universal Declaration of Human Rights.

⁴ ILO 169: The Indigenous and Tribal Peoples Convention.

In its complaint, the Saami village argues that the following provisions of the OECD Guidelines of 2011, which are quoted in full below, have not been complied with:

II. GENERAL POLICIES

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:

Enterprises should:

1. Contribute to economic, environmental and social progress with a view to achieving sustainable development.
2. Respect the internationally recognised human rights of those affected by their activities
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.

IV. HUMAN RIGHTS

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.
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.

VI. ENVIRONMENT

(Enterprises should:)

2. Taking into account concerns about cost, business confidentiality, and the protection of intellectual property rights:
 - a) provide the public and workers with adequate, measureable and verifiable (where applicable) 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
 - b) 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.

4.3 STATKRAFT'S RESPONSE TO THE COMPLAINT ON 23 NOVEMBER 2012

In a letter of 23 November 2012, Statkraft argued that the complaint should be rejected because the claims in the complaint to the NCPs had been considered by the Swedish court system. The company referred to the fact that it had complied with all applicable laws and procedures, carried out environmental and social impact assessments and engaged in extensive consultations with the Saami village. The company also referred to the fact that the NCPs, if they accepted the case for consideration, would take on the role of a judicial grievance mechanism. The company referred to how the issues raised in the complaint from the Saami village to the NCPs are the same as the ones considered by the Swedish court system.

Furthermore, the company referred to how adverse impacts of the project had been assessed and remedied, and, where avoidance was not possible, a number of measures had been initiated to minimise and mitigate the adverse impacts. The company has engaged in extensive dialogue with the Saami village on compensation schemes, and it has entered into a provisional compensation agreement that goes further than ordered by the court.

In addition, Statkraft stated that the company wished to continue its commitment to meaningful dialogue with affected parties on human rights and the environment, regardless of the NCPs' conclusions in their consideration of the case. Statkraft expressed that it believed that dialogue on compensation schemes should naturally take place in connection with the follow-up of the court decision on the measure. In connection with the NCPs' initial assessment of the case, Statkraft declared that it was willing to participate in mediation and dialogue facilitated by the NCPs with a view to reaching a solution in the case.

5 THE NCPs' CONSIDERATION OF THE CASE

The NCPs published their initial assessment of the case on 9 March 2013. The NCPs decided to accept the complaint for consideration. The assessment was published on the NCPs' websites and addresses the various aspects that, pursuant to the OECD Guidelines, shall be taken into consideration in the assessment of whether an issue merits further examination.⁵

In the NCPs' initial assessment, reference was made to how several of the issues raised in the complaint have been subject to consideration by the Swedish court system. The OECD Guidelines state that issues that have been considered by the court system usually fall outside the NCPs' mandate. The Guidelines (Commentary 37) state that respect for human rights is the global standard of expected conduct for enterprises, independently of the ability and/or willingness of states to fulfil their human rights obligations, and does not diminish those obligations. Reference is made to the fact that the NCP arrangement is a non-judicial mechanism, and that the Guidelines provide for the possibility that the NCPs can assess whether dialogue and mediation can make a constructive contribution to resolving the issue.⁶ The NCPs thereby decided to accept the complaint for further examination. The parties resumed a bilateral dialogue after the complaint was submitted, however, and the NCPs therefore deferred the case until September 2013, when the Saami village again requested the NCPs to facilitate mediation. The parties continued their bilateral dialogue, and in October 2013, they reached agreement on conditions for a trial period (from November 2013 to April 2016), which contained an agreement on the transport of reindeer, fencing in of areas, deliveries of feed etc., for two of the affected areas. The Saami village nonetheless requested continued mediation through the NCPs because of the agreement's limitation in time and scope.

At a meeting in preparation for the mediation between the parties on 18 November 2013 in Oslo, the parties decided that the NCPs were to conduct a 'stakeholder assessment' before the mediation. The NCPs assigned the task of preparing such an assessment to Anders Blom of the Protect Sápmi foundation. The assessment provides an overview of the case, including a review of the history of the development, an overview of reindeer herding activities in the area and a description of the parties' views on the issue.

In spring 2014, the NCPs engaged an external mediator in agreement with the parties. Dialogue and mediation were conducted and concluded in June 2014 without results. In the following, the NCPs will therefore review some of the facts of the case and give an assessment of Statkraft's compliance with the OECD Guidelines and the parties' conduct in the case. Because so many of the Norwegian NCP's personnel had been replaced, a meeting was held with each of the parties in spring 2015, attended by representatives of the parties and of the Norwegian NCP. The purpose of the meetings was in particular to establish a basis for assessing the whole process in the case.

⁵ http://www.responsiblebusiness.no/files/2013/12/Jijnjevaerie_statkraft_initial_assessment.pdf

⁶ The OECD Guidelines paragraph 26:

When assessing the significance for the specific instance procedure of other domestic or international proceedings addressing similar issues in parallel, NCPs should not decide that issues do not merit further examination 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.

Norwegian NCP member Frode Elgesem has not participated in the consideration of the issue as there was reason to question his impartiality.

6 BACKGROUND AND HISTORY FROM THE WIND POWER DEVELOPMENT IN 2008 TO THE MEDIATION UNDER THE AUSPICES OF THE NCPs

6.1 THE ENVIRONMENTAL IMPACT ASSESSMENT AND STUDY OF THE WIND PARK'S POTENTIAL IMPACT ON REINDEER HERDING

Statkraft submitted its application and the environmental impact assessment in December 2008. Before this, Statkraft had contacted the Saami village a number of times with a view to discussing possible measures that could protect reindeer herding activities in the area.

In the process associated with SSVAB's environmental impact assessment, SSVAB received instructions from the County Administration Board (Länsstyrelsen) in March 2009 to conduct an in-depth study of the reindeer herding industry. The study was conducted by the consultancy firm Hifab. The Saami village received compensation for its participation and has reported that it felt properly involved in the study and that the report gives a good description of the challenges that wind parks represent in relation to the reindeer herding industry. The study concluded that the planned wind park could have an adverse impact on reindeer herding, and that it could involve both a loss of traditional pasture grounds, disruption of the reindeer migration patterns and conflicts with other Saami villages nearby. In the long term, the cumulative consequences of the wind park and other competing use of the area could force the Saami village to reduce the number of reindeer, which in turn will affect the Saami identity and entail a risk of weakening the Saami culture.

In response to an enquiry from the authorities about SSVAB's views of this report, SSVAB replied on 11 September 2009 that it did not agree with the consultants' conclusion and that the company believed that mitigating measures would ensure that the wind park had a limited impact on the reindeer herding, which would make co-existence possible. The Saami village expressed disappointment that SSVAB did not endorse the conclusion in the report.

6.2 STATKRAFT'S APPLICATIONS AND PERMITS, AND THE ENVIRONMENTAL COURT'S CONSIDERATION

In 2010, Statkraft/SSVAB was granted a planning permit from the Environmental Court (the Land and Environment Court – MMD) in Västernorrland county to build wind turbines in six areas located within the Saami village's traditional reindeer herding area. MMD introduced a limitation⁷ of the wind park in the Björkhöjden-Björkvattnet area, with reference to Article 27 of the International Covenant on Civil and Political Rights.⁸ The article states that: *'In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language'*. See page 40 of the judgment.

The Saami village appealed the decision and argued primarily that the project should be limited because it could jeopardise the Saami village's possibility of making a livelihood from traditional reindeer herding. Furthermore,

⁷ Cf. Östersund District Court, the Environmental Court, Case M 145-10, Court decision of 21 Dec. 2010 p. 40: 'The Environmental Court therefore makes the overall assessment that the construction of a wind power park in the Björkvattnet area can – to the extent it affects the migration route and the area to the south – impact the Saami village's activities to such an extent that the reindeer herding may become economically unsustainable. Under such circumstances, a permit to build a wind park may be deemed to be in conflict with Article 27 of the ICCPR. The company's application cannot therefore be upheld as regards the Björkvattnet area specified above.'

⁸ International Covenant on Civil and Political Rights

the Saami village claimed that, if the project was granted permission, it should be limited and that the court should establish additional conditions to protect the Saami village's reindeer herding.

6.3 THE COURT'S PERMIT – CONDITIONS AND LIMITATIONS

In the appeal case, the Superior Environmental Court (MMÖD) upheld⁹ the permit for the project to be extended to all SSVAB's wind parks, subject to the same limitations. According to the Court, the limitations that were introduced enabled continued use of the winter pasture grounds.

The Court's assessment is that, given the conditions and limitations introduced by the court, sufficient protection is afforded against invasive measures that could obstruct reindeer herders' use of winter pasture grounds. The Court also confirmed that a number of studies were to be conducted in which measures could be proposed to limit the adverse impacts of encroachments, and propose compensation. The Environmental Court introduced requirements for provisional conditions and compensation for impacts on the reindeer herding.

After, and in line with, the Court's decision, Statkraft and the Saami village reached agreement in October 2013 on conditions for a trial period from November 2013 to April 2016, for two of the affected areas. The agreement covered the transport of reindeer, fencing in of areas, delivery of feed and reduced snow clearing to avoid creating new reindeer migration routes.

The Environmental Permit Office (MPD), MMD and MMÖD all confirmed the need for SSVAB to conduct more follow-up studies. The study concerning Stamåsen and Mörttjärnberget was presented in October 2013 and the report on Björkhöjden and Ögonfågeln in October 2014. A second report on Stamåsen and Mörttjärnberget that will include proposals for final conditions is scheduled to be completed in October 2015. The second report and the final conditions for Björkhöjden and Ögonfågeln are scheduled for completion in October 2016.

The Saami village has expressed objections to the reports and referred to how members of the village have taken part in extensive interviews that are not adequately reflected in the reports.

6.4 THE COUNTY ADMINISTRATION BOARD'S ROLE AND RESPONSIBILITY FOR SAFEGUARDING THE INTERESTS OF THE REINDEER HERDERS IN THE LICENSING PROCESS

Statkraft/SSVAB have expressed that they understand that the Saami village has been and will be affected by a higher degree of encroachment on their pasture grounds through other parties taking an interest in setting up business in these areas. This cumulative effect should not be disregarded, but, according to Statkraft/SSVAB, it is a matter for the licensing authorities to decide. Statkraft/SSVAB therefore wanted the County Administration Board's perspective to be included in the stakeholder assessment.

The County Administration Board has stated that it has now realised that the situation regarding licences for wind parks in reindeer herding areas is more complex than it was aware of when the licensing process started. Among other things, it made reference to the fact that the wind power development may give rise to health problems for the reindeer. This means that the reindeer herders may become responsible for animal health based on a problem that they have not themselves created, under the licence from the Environment and Land Court.

The County Administration Board also raised the question of whether the wind power projects lead to considerable additional work and costs for the reindeer herders and the Saami village associated with their participation in environmental impact assessments and with transporting feed and monitoring the migration of the reindeer. The costs of replacing labour, of lost reindeer and of establishing feed areas are not always included in the licence terms. The question of who is responsible for covering these expenses is therefore

⁹ See footnote 12

unresolved. It is therefore important to ensure that the unclear legal situation does not persist, and that the wording of the licence terms should be more specific in future.

It may seem favourable for the safeguarding of local interests that the County Administration Board has assumed a clearer role as the relevant authority to give a statement before decisions are made by MPD.

It can be added that another factor whose consequences were not identified in connection with the licence for the wind park was the extent of risk of ice throw from the turbines. According to the media, new recommendations have been issued for roads to be located at least 342 metres from the wind turbines, so as to avoid the risk of ice being thrown onto passing cars. This has caused three turbines in the Björkhöyden area to be temporarily closed down, and the road passing Björkhöyden wind park will be rerouted. The development will include two stretches of road of 1,500 and 400 metres, respectively, with construction start-up scheduled for 2016. Statkraft will carry the costs.¹⁰ It must be assumed that such unexpected consequences will also have an impact on reindeer herding.

7 THE NCPs' ASSESSMENT OF STATKRAFT'S COMPLIANCE WITH THE GUIDELINES

Before the NCPs discuss Statkraft's compliance with the Guidelines, we want to underline the following about the significance of the consideration by the Swedish court system. When the Norwegian and the Swedish NCPs accepted the specific instance for consideration, they stated the following:

'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. 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.'

As stated above, one of the main reasons for accepting the case for consideration despite the fact that it had been considered by the Swedish court system, was that the NCPs wanted to facilitate mediation and contribute to resolving the issue. Now that the mediation has been concluded without result, the NCPs will issue a final statement in the case. In this context, the fact that large parts of the case have been considered by the Swedish court system imposes limitations on what parts of the case the NCPs should give a statement on. The NCPs will limit their assessment to circumstances that have not been considered by the Swedish court system.

We would also like to stress that the complaint was submitted in October 2012, but covers circumstances that existed before that date and prior to the revision of the Guidelines in 2011. The part of the complaint that concerns circumstances prior to the 2011 revision has been considered in relation to the Guidelines of 2000 that applied at the time (see section 7.1 below), while subsequent circumstances (section 7.2) and future recommendations for the parties (section 8) are based on the revised Guidelines of 2011. The Guidelines of 2011 entail a greater responsibility on the part of enterprises for respecting fundamental human rights, including the right of indigenous peoples to be consulted in connection with measures that affect their traditional livelihood and way of life.

7.1 STATKRAFT'S COMPLIANCE WITH THE EXPECTATIONS SET OUT IN THE OECD GUIDELINES OF 2000

¹⁰ News item from *Östersundposten* on 12 May 2015.

The OECD Guidelines of 2000 state the following in the chapter General Policies:

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, Enterprises should:

1. Contribute to economic, environmental and social progress with a view to achieving sustainable development.
2. Respect the human rights of those affected by their activities consistent with the host government's international obligations and commitments.

In the 2011 revision of the Guidelines, the phrase 'consistent with the host government's international obligations and commitments' was removed, and the following provision added in paragraph 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.'

7.1.1 HAS STATKRAFT, IN THE PERIOD UP UNTIL 2011, "CONSIDERED THE VIEWS OF OTHER STAKEHOLDERS"?

Statkraft took the initiative for and conducted a number of consultations with the Saami village during the planning stage of the project. When the licence was granted by the authorities and the court system, Statkraft/SSVAB entered into dialogue with the Saami village both in connection with environmental impact assessments and with a view to resolving individual issues as they arose and provide clarifications. Statkraft carried out an environmental impact assessment but did not carry out an in-depth social impact assessment on its own initiative. Statkraft did so after being instructed to do so by the authorities, despite the fact that the Saami village requested this in October 2008. The Saami village's views were included in the environmental impact assessment that was presented to MPD on 26 August 2009. There is nothing to indicate that Statkraft did not want to listen and consider to the Saami village's views, although the decisions that were made were not consistent with the Saami village's wishes.

The NCPs have not found any indication that Statkraft, during the planning phase up until 2011, failed to consider the views of other stakeholders in line with the expectations set out in the OECD Guidelines of 2000.

7.1.2 DID STATKRAFT, DURING THE PERIOD BEFORE 2011, "RESPECT THE HUMAN RIGHTS OF THOSE AFFECTED BY ITS ACTIVITIES CONSISTENT WITH THE HOST GOVERNMENT'S INTERNATIONAL OBLIGATIONS AND COMMITMENTS"?

Sweden has ratified the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). Sweden has also endorsed the UN Declaration on the Rights of Indigenous Peoples and ratified the Convention on Biological Diversity. These standards stress the need for protecting indigenous peoples' culture and values, including their traditional livelihood. They also describe procedures that can be used to ensure that these rights are respected. The standards make reference to the obligations of the states. The OECD Guidelines of 2000 state that also enterprises must respect human rights consistent with the host government's obligations and commitments.

In this context, the NCPs make reference to the fact that Statkraft is a Norwegian state-owned company, and that the Norwegian authorities have expressed special expectations that state-owned companies should respect human rights. Unlike Sweden, Norway has also ratified ILO Convention 169 – the Indigenous and Tribal Peoples Convention. The Convention sets out requirements for conducting consultations in connection with planned projects in indigenous areas with a view to obtaining the affected parties' free, prior and informed consent.

However, it is outside the NCPs' mandate to assess whether the Norwegian state's expectations as owner are met.

The requirement for respecting indigenous peoples' rights must be weighed against other considerations in situations where encroachments can contribute to achieving a relevant, social objective. Such objectives cannot represent purely economic interests or gains.¹¹ In this case, the Swedish Superior Environmental Court¹² has recognised that the wind park project can have an adverse impact on reindeer herding, but that a licence can be granted based on the national interest in renewable energy production. However, the Superior Environmental Court upheld the decision of the Environmental Court, which limited the area covered by the licence near Björkvattnet because it believed that this development would have a serious impact on sustainable reindeer herding for the Saami village, and that a development of this kind would be deemed to be in contravention of Article 27 of the UN Convention Civil and Political Rights.¹³ Apart from this, Statkraft was granted a licence for the other projects.

Indigenous peoples are particularly vulnerable groups that depend on the protection of their right to a traditional way of life and livelihood, including reindeer herding, to maintain their culture and identity. It seems clear to the NCPs that Statkraft's projects have had an adverse impact on the Saami village and have affected its members' rights as indigenous people to practise their culture and pursue a livelihood. Statkraft was aware of these potential consequences of its projects. According to the OECD Guidelines of 2000, Statkraft is obliged to respect human rights consistent with the host government's obligations and commitments.

Statkraft has had its licence terms reviewed by the Swedish court system and has complied with the instructions given concerning compensation to the Saami village. The NCPs have no basis for conducting their own or a deviating assessment of the circumstances reviewed by the Swedish court system.

The NCPs have found no grounds for concluding that Statkraft failed to comply with the OECD Guidelines of 2000 concerning the human rights of those affected by its activities.

7.1.3 DID STATKRAFT, BEFORE 2011, COMPLY WITH THE GUIDELINES' EXPECTATIONS OF ESTABLISHING MUTUAL TRUST?

Here, the NCPs have considered whether the company can be said to have fulfilled the expectations set out in the OECD Guidelines of 2000, Chapter II, General Policies, paragraph 7: '*[enterprises should] 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*'.

One of the topics raised by the Saami village in its complaint to the NCPs is the lack of structured, predictable and clear communication channels with the company. In this context, the NCPs emphasise that enterprises should seek to establish good communication channels. Enterprises engaged in dialogue with indigenous groups are expected to take into account that such groups may have limited administrative resources. In this case, it was sometimes difficult for the company to get in contact with the Saami village during busy periods of the

¹¹ Report by the then UN Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People (James Anaya) on indigenous peoples and extractive industries – 2013 A/HRC/24/41. See also the statement by the current Special Rapporteur on the Rights of Indigenous Peoples (Victoria Tauli-Corpuz) about the Saami people's situation: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16361&LangID=E>

¹² Cf. Svea Court of Appeal, the Land and Environment Court, Case no M 824-11, judgment of 23 Nov. 2011 p. 15 (Appendix B to the Saami village's complaint): 'The Land and Environment Court concludes, after considering, pursuant to Chapter 3 Section 10 of the Environmental Code, the interest in seeing the wind power come about, on the one hand, and the interest in protecting the migration route, on the other, that the wind power interest should be given preference.'

¹³ Cf. points 6.2 and 6.3 above

reindeer herding cycle. Furthermore, there were uncertainties relating to the company's documentation of the Saami village's views, including how they were considered and taken into account. In the NCPs' opinion, Statkraft could have contributed to greater clarity on this point and thus contributed to greater trust between the parties. The company could also have shown a greater understanding of the fact that the telephony infrastructure was not adequately developed in all parts of the area. Both parties could have displayed greater patience and understanding of the fact that clarification might require some time, as neither the company representatives nor the Saami village representatives were fully authorised to negotiate but had to clarify their positions with either the parent company or the village council.

It could have been useful for the process if Statkraft had attended all meetings with individuals at a high enough level to be able to make decisions at meetings, or with sufficient authorisations. The NCPs also raise the question of whether it would have benefited the process if Statkraft, in consultation with the Saami village, had hired an independent third party who could have assisted in the process with the planning and practical execution of meetings, and with keeping minutes; see also section 8 below on further recommendations.

The Saami village had considerable influence on how Statkraft's provisional compensation schemes were designed. Statkraft has expressed that input from the Saami village contributed to the design of these measures. Statkraft has also expressed that the original development plans were changed after consultations with the Saami Village. The Saami Village has however expressed that their views were not sufficiently taken into account during that process.

The NCPs have not found reason to conclude that Statkraft failed to comply with the Guidelines on this point, but have pointed to areas where there is room for improvement.

7.2 STATKRAFT'S COMPLIANCE WITH THE EXPECTATIONS RELATING TO HUMAN RIGHTS SET OUT IN THE REVISED OECD GUIDELINES OF 2011

7.2.1 DID STATKRAFT FULFIL THE EXPECTATIONS EXPRESSED IN THE OECD GUIDELINES OF 2011 BY CARRYING OUT RISK-BASED HUMAN RIGHTS DUE DILIGENCE?

When the OECD Guidelines were updated, more stringent expectations were introduced that enterprises should respect internationally recognised human rights, regardless of the status of the host government's obligations and commitments. In addition, new requirements were introduced for consultations with affected groups such as indigenous peoples. The Guidelines also set out expectations that enterprises conduct human rights due diligence.

The Guidelines state that enterprises should respect human rights, which means they should avoid infringing on the human rights of others and should address adverse human rights impacts in which they are involved.¹⁴ In

¹⁴ IV. Human Rights

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.
4. Have a policy commitment to respect human rights.
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.

accordance with the OECD Guidelines Chapter IV on Human Rights, the NCPs have considered whether Statkraft, after 2011, has:

- introduced a corporate human rights policy,
- carried out human rights due diligence with a view to identifying the risk of adverse human rights impacts, including indigenous peoples' rights,
- avoided causing such adverse impacts, and
- remediated adverse impacts when it has identified that it has caused or contributed to these impacts.

In the Guidelines' Commentary on the Human Rights chapter, reference is made to how enterprises can have an impact on virtually the entire spectrum of internationally recognised human rights. Depending on the circumstances, enterprises may also need to consider additional standards. In this context, UN instruments for indigenous rights are mentioned in particular.

Statkraft has established a Code of Conduct that includes responsibility for respecting human rights and conducting human rights due diligence. SSVAB follows this Code of Conduct. After the case was considered by the Superior Environmental Court in December 2011, SSVAB has engaged in dialogue with the Saami village and the County Administration Board on practical measures and compensation schemes, and it has also carried out environmental impact assessments. SSVAB has also adapted the development and other related activities to important times of the year for the reindeer migration. Extensive consultations have taken place with the Saami village.

The NCPs are of the view that Statkraft/SSVAB have fulfilled the expectations expressed in the OECD Guidelines of 2011 concerning human rights due diligence.

7.2.2 DID STATKRAFT MEET THE EXPECTATIONS EXPRESSED IN THE OECD GUIDELINES ABOUT REMEDIATING ADVERSE IMPACTS WHEN THE ENTERPRISE BECOMES AWARE OF THEM?

The wind power projects' impact on reindeer herding is at the core of the present complaint. Reindeer herding is important because it can be said to form the basis for the Saami culture. A limited mapping of the project's impact on reindeer herding took place during the start-up of the project, but subsequent environmental impact assessments have concluded that the project can have an extensive impact on reindeer herding. The risk of adverse impacts is however not sufficient to be able to refuse the implementation of a project if general interest in another field takes precedence, in this case sustainable energy production.

The question is whether Statkraft, under the OECD Guidelines, has a duty to go further than required by Swedish legislation. Statkraft has had the licence terms for the wind park reviewed by the court system, and has been granted a permit. In the NCPs' opinion, Statkraft cannot therefore be held responsible for adverse human rights impacts on indigenous peoples simply because it has initiated wind power development. In the course of the process, Statkraft has accepted that it must remedy any adverse impacts of the development on the Saami village's reindeer herding. The issue at stake is the lack of agreement of the degree of the impact, especially the difference of the type of impact between construction and operation.

Statkraft has thus met the expectations expressed in the OECD Guidelines about remediating adverse impacts when becoming aware of having caused or contributed to them.

7.2.3 DID STATKRAFT, AFTER 2011, ENGAGE IN DIALOGUE WITH THE SAAMI VILLAGE BASED ON THE PRINCIPLE OF CONSULTATIONS WITH A VIEW TO OBTAINING THE AFFECTED PARTIES' FREE, PRIOR AND INFORMED CONSENT?

After the Guidelines were updated in 2011, enterprises are to a greater extent expected to carry out consultations. In general,¹⁵ the world's indigenous peoples are regarded as vulnerable and marginalised groups in need of special protection to safeguard their culture, and a number of recommendations exist that state that indigenous groups should be consulted in matters that directly affect them. It can be argued that enterprises are expected to carry out consultations with a view to obtaining the affected parties' free, prior and informed consent, known as FPIC consultations.¹⁶

Despite the fact that SSVAB points out that, under Swedish law, it is not obliged to carry out FPIC consultations, it refers to how it has largely implemented the principle of carrying out consultations with a view to obtaining the other party's free, prior and informed consent. Statkraft's description of the situation is that the Saami village has participated in consultations voluntarily, not forcibly, since the start-up in 2007, that the community has received a certain amount of compensation for participating in environmental impact assessments, and that it has continually been provided with information about the projects before they were carried out. The Saami village has not consented to all parts of the project, but Statkraft/SSVAB considers the Saami village to be willing to engage in further negotiations about solutions and compensation schemes and that the principle of consultation with a view to consent has thereby not been abandoned.

The NCPs refer to how there is no international consensus on all aspects of the requirement for FPIC. However, it is undisputed that an enterprise engaged in a project that will affect indigenous peoples' rights is expected to enter into fair and proper negotiations with a view to obtaining the other party's free, prior and informed consent. In the same way, the indigenous group is also expected to participate properly. Since indigenous groups are often considered to be the weaker party in terms of resources, it is international practice¹⁷ that enterprises help to ensure that indigenous groups can participate in the negotiations and be provided with necessary information.

The NCPs are of the view that Statkraft has carried out consultations in line with the expectations set out in the OECD Guidelines, but that the actual implementation of the process could have been better facilitated, among other things to foster mutual trust with a view to obtaining the Saami village's consent. The NCPs take a positive view of the fact that Statkraft has covered parts of the Saami village's outlays and travel expenses in connection with participation in consultation. The Guidelines do not contain any specific provisions on such compensation, but the NCPs underline that such a measure may be necessary in order to achieve genuine consultations during which indigenous groups are given an opportunity to promote and safeguard their rights.

Furthermore, the NCPs refer to how consultations are a continuing process that must be upheld and adapted so that new circumstances are also addressed, for example that the consultations must be adapted when it subsequently emerges that the impacts of the wind power development are greater than originally expected.

7.3 THE PARTIES' PARTICIPATION IN THE PROCESS

The parties have complied with the NCPs' recommendation relating to the OECD's procedures, and both parties have shown that they are willing to participate in all parts of the NCPs' processes. The parties have replied to inquiries and participated in dialogue and mediation. During the mediation, the parties treated each other in a professional and respectful manner. The process seems to have contributed to giving the parties a better understanding of the disputed issues, but it turned out nonetheless that they were too far apart to reach agreement.

¹⁵ See footnotes 1 and 2 above, with reference to several relevant human rights conventions

¹⁶ See the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) of 2007, including Article 10 http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf

¹⁷ It is common for an enterprise to cover the costs associated with the facilitation of genuine FPIC consultations, including by covering travel expenses; see, for example, guidelines issued by the International Council for the Mining and Metal Industry (ICMM) <http://www.icmm.com/document/1221> p. 58

8 THE NCPs' RECOMMENDATIONS TO THE PARTIES

The NCPs have not found any grounds for concluding that Statkraft has failed to comply with the Guidelines. It may nonetheless be the case that the company could work in a manner that even more clearly promotes indigenous rights and the implementation of the Guidelines.

Statkraft was aware that indigenous groups and reindeer herders in the area where the company wanted to set up the wind park were in a particularly vulnerable situation and would be negatively affected by the project. It seems that the company could possibly have given even more consideration to this in its planning of the project. The adverse impacts of the wind power project have subsequently proved to be more invasive than assumed in the licence applications. It also seems as though Statkraft could have shown even more willingness to implement mitigating measures and adapt the scope of the project to a level where agreement could be reached, prior to the legal process and without waiting for decisions to be made by the court system.

The NCPs recommend that consultations take place prior to setting up business in areas of importance to indigenous peoples' traditional livelihood, with a view to obtaining the consent of affected indigenous groups and to incorporating recommendations and measures to mitigate the adverse impact of the project as it continues to be developed.

Statkraft has prepared a strategy, a Code of Conduct and carried out human rights due diligence. This is positive, and the NCPs recommend that the company actively uses and develops these tools in the further development of the project.

It took some time before the Saami village reached agreement on a collective approach to Statkraft's project. It would have benefited the process if the Saami village had prepared a well thought-through plan for its use of the area. It would also have been beneficial if a coordinated process had been developed between indigenous groups in the regions for how to deal with development projects.

The NCPs refer to how international conventions, standards and guidelines recommend that indigenous groups are consulted in matters that directly affect them. The NCPs recommend that the Saami village continues its involvement in close contact with Statkraft, to recommend how the project can be carried out with an acceptable level of encroachment in relation to safeguarding the Saami village's traditional interests and reindeer herding.

The NCPs recommend that the parties show renewed will to negotiate an agreement on the further development of the wind power projects, their scope and extent and compensation schemes. We also recommend that Statkraft, in consultation with the Saami village, consider hiring an independent third party to assist in the process, including with planning and holding meetings, and taking minutes of meetings. It may also be expedient to consider joint measures, for example joint mapping of the impact of the project and/or monitoring of existing agreements. These are examples of new practices that other enterprises have established in cooperation with indigenous groups. They are mentioned, among other places, in 'A Good Practice Note', which has received support from the UN Global Compact Human Rights and Labour Working Group.¹⁸ Further guidance is available in a new guide¹⁹ prepared by the OECD on meaningful stakeholder engagement in the extractives sector. It also contains an appendix on consultations with indigenous peoples, which can be of relevance to this wind power project.

¹⁸ <http://www.foleyhoag.com/publications/alerts-and-updates/2014/april/united-nation-global-compact-indigenous-peoples>

¹⁹ <http://www.oecd.org/daf/inv/mne/OECD-Guidance-Extractives-Sector-Stakeholder-Engagement.pdf>