



**OECD GUIDELINES  
FOR MULTINATIONAL  
ENTERPRISES**

National Contact Point  
for Responsible Business  
Conduct Norway

**Oslo, 19 September 2024**

**INITIAL ASSESSMENT**

**THE MAPUCHE-WILLICHE COMMUNITIES OF THE PILMAYKEN TERRITORY, REPRESENTED BY AYLLA REWE OF THE NGEN MAPU KINTUANTÜ AND ANCESTRAL AUTHORITIES, THE MACHI MILLARAY HUICHALAF, SPIRITUAL AUTHORITY OF THE MAPUCHE PEOPLE, AND THE COUNCIL OF LONKOS, ON BEHALF OF MORE THAN 150 AFFECTED INDIGENOUS COMMUNITIES, THE ORGANISATIONS INITIATIVE FOR TRANSNATIONAL JUSTICE (ITJ) AND CAJE**

**VS.**

**STATKRAFT AS**

The objective of an initial assessment under the Procedures in the OECD Guidelines is to determine whether the issues raised in a complaint merit further examination. If so, the National Contact Point (NCP) will offer or facilitate access to consensual and non-adversarial procedures, such as dialogue and mediation to the parties.

The NCP has at this stage made no determination as to whether the company has acted consistently with the OECD Guidelines. As specific instances are not legal cases and NCPs are not judicial bodies, NCPs cannot impose sanctions, directly provide compensation nor compel parties to participate in a mediation.

**EXECUTIVE SUMMARY**

On 14 September 2023, the Norwegian National Contact Point (NCP) received a complaint concerning Statkraft AS from the Mapuche-Williche communities of the Pilmayken territory, represented by Aylla Rewe of the Ngen Mapu Kintuantü and ancestral authorities, the *Machi* Millaray Huichalaf, spiritual authority of the Mapuche people, and the council of *lonkos*, claiming to represent more than 150 affected communities of El Roble Carimallín sector, Río Bueno comuna, Los Lagos region, with the assistance of Manuela Royo Letelier, Andrea Petrafesa, the Colectivo de Acción por la Justicia Ecosocial (CAJE) and the Initiative for Transnational Justice (ITJ).

The complainants claim that Statkraft AS has failed to observe the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct (the Guidelines) when it comes to the following matters: 1) failure to meaningfully engage with stakeholders, 2) failure to disclose adequate information with regards to its ongoing projects, 3) inadequate risk-based due diligence, including meaningful stakeholder engagement, 4) failure to identify, assess and mitigate environmental impacts associated with its activities and 5) facilitation of adverse environmental and human rights impacts, including failure to prevent reprisals.

The NCP finds that some of the issues raised in this specific instance warrant further examination and has therefore decided to partially accept the submission. The issues accepted concern due diligence and meaningful stakeholder engagement, as well as the assessment of environmental impacts and disclosure. There are additional stakeholders to Statkraft AS' projects that are not among the complainants. The NCP underlines the need to listen to all stakeholders in the process, and due regard will be given to mitigate any tensions between stakeholders.

The conclusion in this initial assessment rests on the criteria laid out in the Commentary to the Implementation Procedures in the Guidelines and is based on the information received from both parties. The decision does not mean that the issues raised have been given final consideration and does not imply any finding as to whether the enterprise has or has not acted in accordance with the Guidelines.

## OVERVIEW OF THE NCP AND ITS ROLE

The Guidelines are recommendations from governments to multinational enterprises and are addressed to all the entities within the enterprise. The Guidelines comprise a set of principles and standards regarding general policies, human rights, disclosure, employment and industrial relations, environment, combating bribery, consumer interests, science and technology, competition, and taxation. The NCP promotes the Guidelines and contributes to the resolution of issues that arise relating to the implementation of the Guidelines in specific instances (complaints).

This complaint was submitted in September 2023 but covers issues prior to this and before the update of the Guidelines in June 2023. In this specific instance, the part of the complaint that concerns issues prior to the 2023 update will be addressed according to the then applicable Guidelines from 2011. Subsequent issues and recommendations to the parties, which will concern future conduct, will be based on the updated Guidelines from 2023. The 2023 update entails, among other things, recommendations for enterprises to carry out environmental due diligence,

align with internationally agreed goals on climate and biodiversity and updated recommendations on disclosure.<sup>1</sup>

## SUBSTANCE OF THE SUBMISSION

On 14 September 2023 the Norwegian NCP received a complaint from Mapuche-Williche communities of the Pilmayken territory, represented by Aylla Rewe of the Ngen Mapu Kintuantü and ancestral authorities, the Machi Millaray Huichalaf, spiritual authority of the Mapuche people, and the council of lonkos, representing more than 150 affected communities in the Pilmayken territory, located within the municipalities of Río Bueno and La Union in the Los Rios region, and the Puyehue municipality in the Los Lagos region<sup>2</sup>, with the assistance of Manuela Royo Letelier, Andrea Petrafesa, the Colectivo de Acción por la Justicia Ecosocial (CAJE) and the Initiative for Transnational Justice (ITJ).

The complainants claim that Statkraft AS has failed to observe the Guidelines in relation to its development of hydroelectric power projects in the Mapuche-Williche indigenous ancestral territory, more precisely in the Pilmaiquén river that flows across the Los Ríos region, as well as bordering the Los Lagos region, in southern Chile. The complaint includes Statkraft's subsidiaries Empresa Eléctrica Pilmaiquén and Statkraft Chile Inversiones Eléctricas Ltda.

In 2015, Statkraft AS acquired the assets of Empresa Eléctrica Pilmaiquén S.A and the three hydroelectric projects, Rucatayo, Osorno and Los Lagos. These projects had already been approved by the Chilean State, but the complainants have requested, through the *Corporación Nacional de Desarrollo Indígena* (National Corporation for Indigenous Peoples) Development (CONADI) the restitution of their territory affected by the Osorno hydropower project (Kintuante site). The demands have also been submitted directly to Statkraft AS.

The complainants consider that the hydropower projects affect their ancestral territory, including the natural ceremonial complex of *Ngen Mapu Kintuantü*, of patrimonial, cultural, and religious significance, as well as affecting the biodiversity in the area. The complainants state that the Los Lagos site is part of Pilmayken territory, and thus on indigenous land. They consider that meaningful stakeholder engagement was not conducted as part of the development of the projects, and that no free, prior and informed consent has been obtained from the affected communities. Following a decision from the Supreme Court in Chile in 2021, the *Consejo de Monumentos Nacionales* (National Monuments Council (CMN)) has initiated a consultation process related to the archaeological findings within the affected area. The complainants claim that Statkraft AS is hindering this process. The complainants also consider that no adequate risk-

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<sup>1</sup> <https://mneguidelines.oecd.org/targeted-update-of-the-oecd-guidelines-for-multinational-enterprises.htm>

<sup>2</sup> The complainants' letter refers to "...150 communities in Rio Bueno region", while the list of communities shows their location in both Rio Bueno and Los Lagos regions.

based assessment of the environmental impacts of the project has been conducted, and have challenged the study carried out in 2009, claiming that it did not involve meaningful stakeholder engagement. The complainants also allege excessive use of force by police forces in relation to a demonstration outside the Los Lagos hydroelectric plant in February 2023.

In January 2023, Statkraft announced that the Osorno project has been cancelled, a decision that was publicly confirmed by the Environmental Evaluation Services (Servicio de Evaluación Ambiental (SEA) in October 2023.<sup>3</sup> Prior to this cancellation, the complainants claim that Mapuche-Williche representatives have been subject to criminalization and reprisals. Furthermore, the complainants state that the *Ngen Mapu Kintuantü* territory has been transferred to a third party, the *Asociación Indígena Lepunera Señor Maihue*, without engagement or consultation with the complainants. The transfer has been challenged in the Supreme Court in Chile, resulting in a process where CONADI is instructed to consider the restitution of the land taking into account the interest of the whole Mapuche-Williche community of the area. In its first response to the complaint, Statkraft AS informed that the transfer of land was never completed due to challenges in identifying an entity that would legitimately represent the Mapuche-Williche communities. See more under “Enterprise’s response” below.

The complainants claim that the company has refused to give the Mapuche-Williche communities official and legal access to the land, including for indigenous consultation meetings organized by the CMN. The complainants claim that Statkraft AS and its subsidiaries have been favouring a specific group of families and individuals in its consultations and engagements, leading to conflict and select interest groups being in favour of the projects.

The complainants furthermore claim that the projects are at odds with the responsibility to respect the right to a healthy environment and to prevent and mitigate adverse environmental and social impacts. They also consider that the projects do not contribute to reaching the goals of the Paris agreement with respect to climate change mitigation and adaptation.

If the NCP decides that the complaint warrants further examination, the complainants seek the following outcome of the process:

1. The recognition of the full legal standing of the complainants with respect to indigenous peoples’ rights in accordance with the ILO Convention 169.
2. To engage in meaningful consultations with the interested party in order to achieve a resolution with respect to a culturally adequate transfer of the Ngen Mapu Kintuantü ceremonial complex lands.
3. To grant the interested parties full access to the Ngen Mapu Kintuantü ceremonial complex.

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<sup>3</sup> [Confirman renuncia de Statkraft Chile a Proyecto Hidroeléctrico Osorno – Fundación Terram](#)

4. To provide substantive information with respect to the Osorno and Los Lagos Hydroelectric Power Plants, including evidence of the withdrawal of the correspondent authorizations for the Osorno project.
5. To establish a risk-based due diligence procedure, with the participation of the Mapuche-Williche communities in the Pilmaiquén river basin, with respect to the Osorno and Los Lagos Hydroelectric Power Plants, that includes the appropriate identification of the area of influence of both projects, their cultural impacts and the implementation of adequate preventive and mitigation measures.
6. To use its leverage in order to advocate for the distension of community division that has arisen as a result of its hydroelectric power projects, and to refrain from any action that may contribute to such divisions.
7. To conduct a new environmental impact assessment of the three hydroelectric power plants owned by Statkraft AS, in compliance with ILO Convention 169 standards.
8. To publicly acknowledge the presence, their activities, and importance of environmental and human rights defenders, and to use its leverage in order to advocate for an enabling environment in which they can operate free from threats, restrictions, and insecurity, with special consideration for the work of women indigenous human rights defenders.
9. To temporarily suspend the development of the Los Lagos Hydroelectric Power Plant until a substantive risk-based diligence procedure is concluded, as well as to reconsider its investment in the Mapuche-Williche territory.

The complainants refer to the following provisions of the Guidelines in their submission:

- Chapter I, Concepts and Principles, para. 2
- Chapter II, General Policies, Section A, paras. 1, 2, 10, 11, 12, 13 and 15
- Chapter III, Disclosure, paras. 1, 2 b) and i) and 3 d) and g)
- Chapter IV, Human Rights, paras. 1, 2, 3, 5 and 6
- Chapter VI, Environment, headline, and para. 1 a), 2 and 3

## THE ENTERPRISE'S RESPONSE

Statkraft AS submitted an initial response to the complaint to the NCP on 13 October 2023. The company expresses its commitment to cooperating transparently and in good faith with the NCP and welcomes the opportunity to engage in a structured and constructive dialogue with the complainants.

The company considers that Statkraft Chile has engaged consistently and constructively with many Mapuche-Williche communities and their representatives since the company entered the Pilmaiquén River in 2015. However, in spite of their good faith efforts, the company also recognized that there have been some communities and groups that have at times resisted dialogue with Statkraft Chile and opposed Statkraft AS' operations.

Statkraft AS has provided background information on the three hydropower projects on the Pilmaiquén River.

The Rucatayo hydropower plant was already operational at the time when Statkraft AS acquired the assets, with the rights to develop two additional projects on the river, the Osorno and Los Lagos projects, including environmental approvals from the Chilean authorities. The company considers that these projects contribute to mitigating climate change.

Statkraft AS considers that the Los Lagos project is carried out in line with its requirements for human rights due diligence, including a particular focus on indigenous peoples' rights. The identification of archaeological remains at the site of the Los Lagos plan has led to a consultation process organized by the CMN, resulting in significant delays in the project. With reference to the environmental assessment, Statkraft AS states that the area of the Los Lagos project is not recognized as indigenous land according to the official register of CONADI.

Statkraft AS refers to the termination of the planned Osorno power plant project after careful consideration of potential impacts on the Mapuche-Williche communities that could not be adequately mitigated. This process included extensive consultation and dialogue with local groups and indigenous communities. The company points to challenges in identifying the legitimate representatives of certain indigenous communities in the process of returning culturally significant parcels of land – and more specifically the appropriate legal entity to which the land rights should be transferred. The company states that efforts to return the land to the communities unfolded through a collaborative and consultative process involving members of the communities and their representatives and independent third-party advisors. The restitution of the land is under the charge of CONADI following a Supreme Court ruling mandating a participatory process with all interested parties representing the indigenous communities involved. Statkraft AS asserts it has not prevented or denied communities' access to the relevant sites.

Statkraft AS emphasises its contribution to economic, environmental, and social progress throughout its involvement in the Pilmaiquén River Basin. The company posits that it has consistently sought to comply with all national laws, regulations and judicial rulings, environmental licenses, and has gone beyond national requirements to maximize positive impact and minimize adverse impacts on affected communities. The company writes that it respects human rights and has sought to take a socially and politically informed, risk-based approach to human rights in its operations in Chile, engaging with local workers and communities. The company sets out numerous measures it has taken to better identify and assess human rights-related risks during its ongoing involvement in the Pilmaiquén River Basin.

Statkraft AS states that it has organized a process of “informed participation” with indigenous communities and relevant stakeholders, including a “comprehensive social, environmental and economic analysis”. The company notes that “...correctly identifying the “legitimate

representatives” of certain indigenous communities as well as how decision-making should take place within those communities is challenging both from an anthropological and legal standpoint”. In the “area of influence” affected by Statkraft AS’ project, CONADI indicated that there were 15 communities, whilst Statkraft Chile identified 25 indigenous communities likely to be affected by the projects, made up of 22 legally constituted indigenous communities, one indigenous association and two sociological or natural communities.<sup>4</sup> Statkraft AS does not dispute that the complainant, Machi Millaray Huichalaf Pradines, is a “legitimate representative” of relevant members of the Mapuche-Williche people. However, the company requested documentation of consent from the communities stated to be represented by the complainants.

Statkraft AS has requested the NCP to consider the appropriate scope of a potential mediation process, with reference to ongoing parallel proceedings and investigations relating to:

- the archaeological findings at the Los Lagos project site,
- the transfer of the parcels of land at the former Osorno project site,
- the potential review of the Los Lagos Environmental Impact Assessment, and
- the incidents of violence at the Los Lagos project site.

Statkraft AS considers it to be premature to pursue mediation on these issues, as well as any human rights-related incidents taking place before Statkraft AS’ involvement in the Pilmaiquén River Basin.

The company has provided additional responses based on follow-up information from the complainants. In its second response, the company further clarified its considerations related to the mandate for a potential mediation, updates and considerations related to the parallel proceedings, the identity of the parties, and access to territories and ceremonial sites.

In its third response to the NCP, dated 30 January 2024, Statkraft AS welcomed the list of communities provided by the complainants, whilst also requesting further documentation with regards to the consent of the individual community members to being represented by the complainants.

This request was repeated in the company’s fourth response to the NCP, dated 22 March 2024, together with a brief overview of its interaction with the identified communities. In this letter, Statkraft AS names nine communities from the complainants lists that are among the 25 communities Statkraft AS has consulted with, according to the company.

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<sup>4</sup> Nine of these communities are included in the list of communities provided by the complainants in on 17 June 2024, all with support letters and/or electronic certificates.

## THE PROCEEDINGS OF THE NCP TO DATE

### Condensed timeline

Date	Action
14 Sep 2023	Complaint received
15 Sep 2023	Complaint shared with Statkraft AS
28 Sep 2023	Complaint shared with NCP Chile, followed by a meeting where it was agreed that NCP Norway takes the leading role and NCP Chile acts as supporting NCP
13 Oct 2023	First response from Statkraft AS
Oct 2023 – Jun 2024	Four rounds of requests for more information/clarification from Statkraft AS with corresponding answers by the complainants
20 May 2024	NCP Chile shares a report with NCP Norway of a meeting held with Lepunero communities on the latter's request.
17 Aug 2024	Draft initial assessment shared with the parties
1 Sep 2024	Input to draft initial assessment received from the parties
16 Sep 2024	Final initial assessment shared with the parties and NCP Chile

The NCP received the complaint from the Mapuche-Williche communities of the Pilmayken territory et al. on 14 September 2023. In accordance with the NCP's procedural guidelines for handling complaints,<sup>5</sup> the complaint was shared with Statkraft AS on 15 September 2023, requesting a response within ten working days. Upon Statkraft AS' request, the company was granted an extended deadline until 13 October 2023. Statkraft AS also requested a meeting with the NCP to clarify some questions, which was held on 10 October 2023. The NCP received Statkraft AS' response on 13 October. The NCP shared the response from Statkraft AS with the complainants on 25 October. As per request, on 7 November 2023, the complainants provided their response to the questions raised by the company, further clarifying the interested parties to the specific instance, explaining details of community structures, and adding its views related to the delimitation of a potential mediation based on ongoing parallel proceedings, also emphasizing the importance of addressing the situation of human rights and environmental defenders.

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<sup>5</sup> National Contact Point Norway (2014), [Procedural Guidelines for Handling Complaints](#)



The Norwegian NCP shared the complaint with the Chilean NCP on 28 September 2023 followed by a meeting to further discuss the specific instance and address questions related to coordination between the Chilean and Norwegian NCPs. Following a proposal from the Norwegian NCP shared on 27 October 2023, both parties as well as the Chilean NCP supported the Norwegian NCP's decision to take the role as lead NCP in handling the specific instance, with the Chilean NCP as supporting NCP.

On 15 January 2024, the complainants provided a list of the communities they stated to be representing in the specific instance, with some additional information.

On 4 March 2024, in response to questions from the NCP regarding consent and representativity, the complainants' elaborated more on characteristics of the Mapuche-Williche cosmovision and culture. It conveys that the communities' recognition of the Machi as their spiritual authority through the existing organisations<sup>6</sup> in the territory constitute an implicit form of consent rather than an explicit one, as had been requested in the letter from the NCP.

On 20 May 2024, the NCP received a report from NCP Chile from a meeting held on 11 April 2024 with Lepunero communities<sup>7</sup> on the latter's request. These communities are among those previously consulted by Statkraft AS. They underlined in the meeting that they did not share the perspectives of the complainants on the issues raised in the complaint neither in terms of content nor in acknowledging them as their legitimate representatives. The Lepunero communities disputed the claim that the complainants were represented by as many as 150 communities. On 22 May 2024, the NCP requested the complainants to provide further documentation regarding the identity of the listed communities and their support of the complaint. By the extended deadline of 17 June 2024, the NCP received the complainants' answer with an updated list of communities, including electronic registry certificates and signed support letters from a number of them.<sup>8</sup>

On 17 August 2024, the parties were requested to comment any factual errors in the draft initial assessment by the NCP. These comments were taken into account in the finalisation of the initial assessment.

Documents in this specific instance are published on the NCP website, [www.responsiblebusiness.no](http://www.responsiblebusiness.no).

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<sup>6</sup> The autonomous Aylla Rewe of the Ngen Kintuantü and the council of Ionkos, according to the complainants' letter.

<sup>7</sup> Mapuche-Williche communities practising the *lepun*, an annual religious act taking place in December and January.

<sup>8</sup> See section 1 under Initial assessment by the NCP below for more details.

## INITIAL ASSESSMENT BY THE NCP

The goal of the initial assessment is to determine whether the issues raised in the complaint warrant further examination. It does not assess whether the company has acted consistently with the Guidelines. The NCP has decided to partially accept the submission for further consideration. In accordance with the Procedures in the Guidelines, the NCP has based its initial assessment on the following six criteria.

### 1. WHAT IS THE IDENTITY OF THE PARTY CONCERNED AND ITS INTEREST IN THE MATTER?

The NCP considers that the identity of the parties concerned is sufficiently confirmed and that they have legitimate interests in the matters raised in this specific instance. The Chilean Supreme Court ruling from January 2022 acknowledges the complainants as representatives for communities with interests in matters that are also raised in this specific instance.

The complainants explained in their response of 7 November 2023 the lof (community of communities), their relation to the Ngen Mapu Kintuantü ceremonial complex, how the lof in the Pilmayken territory are organized under Aylla Rewe Ngen Mapu Kintuantü – a decision-making body, as well as the council of lonkos – a structure for discussing “productive projects, social improvement, health and intercultural education.”<sup>9</sup>

According to the complainants, people from all over the *Futawillimapu* (Great Lands of the South) highlight the importance of the protection, access, and defence of the *Ngen Mapu Kintuantü*, and state that their wellbeing relies on it. The complainants do not share the assessment of the Chilean authorities nor of Statkraft with respect to who constitutes affected communities, which they consider is lacking cultural appropriateness. They emphasize the bond that many communities, who may not be settled on the territory, have to the Pilmaiquén river and the *Ngen Mapu Kintuantü*. The complainants also consider it important that the specific instance is not assessed from an individualist perspective, but rather from the perspective of their collective rights.

There are 128 communities/associations on the updated list provided by the complainants on 17 June 2024. They have provided electronic certificates from CONADI for 102 of these<sup>10</sup> and there are support letters with signatures from 60 of the 128 communities/associations. 54 of these are among the 102 from which the NCP has received electronic certificates.

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<sup>9</sup> Response from complainants of 7 November 2023, p. 1

<sup>10</sup> The complainants note that being registered with CONADI is not a legal requirement for indigenous communities, and that for some of the associations such registration is not relevant.

The Supreme court ruling from January 2022 regarding the Ngen Mapu Kintuantü ceremonial site underlines that both the appellants (including Machi Millaray Huichalaf) and the Lepunero communities have interests in the site and shall thus be included in the consultations.<sup>11</sup>

Machi Millaray Huichalaf, the representative of the complainants, has been a key figure in several legal national proceedings and there are no indications in these proceedings that she is not considered a legitimate representative for the Mapuche-Williche people. The ruling of the Chilean Supreme Court of 20 January 2022<sup>12</sup> acknowledges Millaray Huichalaf as a representative of communities with interests in the Ngen Mapu Kintuantü ceremonial site, and consequently in the processes related to the abovementioned hydroelectric plant.

Similarly, resolution 213 from April 2023 issued by the CNM<sup>13</sup> on its duty to carry out a consultation process in line with ILO convention 169, treats Machi Millaray Huichalaf and the indigenous communities of Leufu Pilmaiquén Maihue and Koyam Ke Khe as interested parties to the archaeological findings at the Los Lagos site.

The NCP also takes note that the Lepunero communities that met with the NCP Chile in April 2024 do not recognise Millaray Huichalaf as their Machi (spiritual leader).

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## 2. ARE THE ISSUES RAISED MATERIAL AND SUBSTANTIATED?

The NCP considers the issues raised in the complaint sufficiently material and substantiated for the purposes of an initial assessment.

The NCP interprets “material and substantiated” to mean that, based on the information submitted, the issues raised are supported by sufficient and credible information, and are relevant to the implementation of the Guidelines. The assessment at this stage is meant to be initial, and the question is whether the issues raised are material and substantiated to the extent that they warrant further examination with a view to facilitating dialogue between the parties.

The complainants claim that the company is in breach of specific provisions of the Guidelines in Chapter I (Concepts and principles), Chapter II (General policies), Chapter III (Disclosure), Chapter IV (Human Rights) and Chapter VI (Environment). The complainants state that the company has failed to:<sup>14</sup>

- Carry out due diligence according to the Guidelines, involving all relevant stakeholders (ref. Guidelines Ch. II, points 11-13 and 15; Ch. IV point 5; Ch. VI point 2);

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<sup>11</sup> Supreme Court Ruling Rol. 56.135-2021, 20 January 2022, article four

<sup>12</sup> [56135-2021-CS-revoca.pdf \(diarioconstitucional.cl\)](#)

<sup>13</sup> [res. ex. st cmn 213-2023 inicia consulta indigena pilmaiquen.pdf \(monumentos.gob.cl\)](#)

<sup>14</sup> The following references to the Guidelines as per initial submission from the complainants.

- undertake a new environmental impact assessment replacing the existing one from 2009 (ref. Ch. VI points 1a and 3);
- use its influence to contribute to a safe space for human rights defenders and mitigate adverse actions from Chilean authorities towards Mapuche-Williche activists (ref. Ch. II point 10 and Ch. IV point 6);
- engage meaningfully with stakeholders regarding the transfer of the religious Ngen Mapu Kintuantü ceremonial site (ref. Ch. II point 15 and Ch. IV point 6).

In addition to documentation in the complainants' submission, the relevance of the issues raised is supported by the 2022 ruling in the Chilean Supreme Court<sup>15</sup> and a resolution from the CMN in 2023<sup>16</sup>. The NCP finds issues raised in the complaint relevant also based on the updated 2023 Guidelines, which include new and revised recommendations on due diligence, the environment - including biodiversity - and human rights.

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### 3. IS THE ENTERPRISE COVERED BY THE GUIDELINES?

The NCP considers that Statkraft AS is covered by the Guidelines.

The Guidelines do not provide, nor require, a precise definition of multinational enterprises.<sup>17</sup> Key characteristics of an enterprise that are covered by the Guidelines include presence in at least one country adherent to the Guidelines and activities and/or business relations across several countries. Statkraft AS is a Norwegian company with state ownership and with own operations in Chile. Both Chile and Norway adhere to the Guidelines.

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### 4. IS THERE A LINK BETWEEN THE ACTIVITIES OF THE ENTERPRISE(S) AND THE ISSUES RAISED?

The NCP considers that there is a link between the company's activities and the issues raised in the complaint.

The complaint raises specific issues relating to the operations of Statkraft. The complainants claim that they have an interest in the areas affected by the Statkraft projects and should therefore be

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<sup>15</sup> That the transfer of land related to Ngen Mapu Kintuantü to Lepunero communities only is "far from sufficient to resolve existing conflicts between various communities" <https://www.diarioconstitucional.cl/wp-content/uploads/2022/01/56135-2021-CS-revoca.pdf>

<sup>16</sup> That an indigenous consultation related to the archaeological findings at the Los Lagos site is to be undertaken [https://www.monumentos.gob.cl/sites/default/files/res\\_ex\\_st\\_cmn\\_213-2023\\_inicia\\_consulta\\_indigena\\_pilmaiquen.pdf](https://www.monumentos.gob.cl/sites/default/files/res_ex_st_cmn_213-2023_inicia_consulta_indigena_pilmaiquen.pdf)

<sup>17</sup> OECD (2023), OECD Guidelines for Multinational Enterprises on Responsible Business Conduct, chapter I.4

included in the stakeholder consultations. They allege that Statkraft AS has failed to carry out due diligence according to the Guidelines.

The recognition of full legal standing of the complainants regarding indigenous peoples' rights under ILO Convention 169 (ref. point one in the list of objectives formulated by the complainants on page 4) does not concern Statkraft AS and falls outside the scope of the Guidelines. Furthermore, the NCP considers that the documentation provided does not indicate that Statkraft AS is responsible for or linked to breaches of the rights of human rights defenders allegedly inflicted by the police or other official bodies. The remaining issues concern Statkraft AS' activities and are considered relevant to the Guidelines.

The NCP has not at this stage made any assessment as to whether the enterprise has observed the Guidelines.

5. DO APPLICABLE LAW AND/OR PARALLELL PROCEDURES LIMIT THE NCP'S ABILITY TO CONTRIBUTE TO THE RESOLUTION OF THE ISSUE AND/OR THE IMPLEMENTATION OF THE GUIDELINES?

The NCP is aware of the two parallel proceedings, namely the abovementioned Supreme Court rulings. The NCP does not consider these as obstacles to accepting parts of the submission for further examination. Indeed, the existence of parallel proceedings does not preclude the NCP from accepting a submission. In this specific instance, the NCP finds that an offer of good offices could make positive contributions to the resolution of the issues that are accepted for further examination and would not create serious prejudice for either of the parties involved in the other proceedings.

The NCP considers that the implementation of the two Supreme Court rulings will address points 1, 2, 3 and (to some extent) point 5 in the complainants nine-point list of requested outcomes (page 4-5). The points addressed by the Supreme Court rulings may be summarised as:

- Full legal recognition of the complainants under ILO Convention 169
- Meaningful consultations on a culturally adequate transfer of Ngen Mapu Kintuantü land
- Access to the Ngen Mapu Kintuantü ceremonial complex
- Establish a risk-based participatory due diligence process for the Los Lagos and Osorno projects

The NCP acknowledges that a request for a new environmental impact assessment (EIA) has been tried in the Chilean judicial system and was finally declined by the Supreme Court on 14 November 2023. The Guidelines recognise that obeying domestic laws is the first obligation of enterprises. However, in light of the 2023 update of the Guidelines, which included significant updates to Chapter IV on environment, the NCP finds that the question raised by the complainants of the company's obligations under this chapter of the Guidelines, including carrying out environmental risk-based due diligence, to supplement the EIA merits further consideration.

Further, acceptance of the submission is limited to the remaining issues put forward by the complainants, which, in the view of the NCP, may be summarised as follows; the complainants ask for a well-informed, participatory and risk-based due diligence process exploring the possible adverse impacts for all relevant stakeholders, and that the company, when appropriate, implements measures and uses its leverage to prevent or mitigate identified risks and actual impacts, and/or avoids and redresses adverse impacts when appropriate. The NCP underscores that the due diligence process must be carried out with due regard to the CMN led process to avoid duplicated efforts.

The submission is partially accepted while recognising the possible influence the progress and outcome of the parallel proceedings may have on an NCP led process. Should the processes assigned to CMN and/or CONADI by the Chilean Supreme Court not be carried out as required when it comes to the involvement of relevant stakeholder groups, content and/or timing, the NCP process could consider to what extent the parties, in particular the company, could use its leverage to express its support for these processes to be undertaken.

Both the complainants and Statkraft AS refer to ongoing proceedings that are of relevance to the specific instance:

- *Recurso de Protección* - Supreme Court of Justice ruling of 19 November 2021, requiring the Consejo de Monumentos Nacionales (CMN) to conduct a consultation process with the indigenous peoples related to the archaeological findings at the Los Lagos site with the objective of determining which administrative measures the Council of National Monuments can adopt regarding the archaeological finds.
- *Resolución exenta 213* – Resolution, from 4 April 2023, by the Chilean Ministry of Culture, Art and Heritage instructing CMN to carry out a consultation process (“Consulta Indígena Pailmaiquén”) with all affected indigenous groups/communities, based on the abovementioned Supreme Court ruling.
- *Acción constitucional de protección* - Supreme Court of Justice ruling of 20 January 2022 (Rol. 56.135-2021) which establishes that CONADI must carry out a consultation process with the Lepunero and other Mapuche-Williche communities to determine to whom the implicated land at the Osorno site should be transferred.
- Ruling of the Environmental National Authority dated 14 September 2023, N°202399101737 which formally establishes the dismissal of Osorno Project – relevant to the Ngen Mapu Kintuantü ceremonial site.
- Rulings related to the environmental license issued in 2009 for the Los Lagos project (RCA 3573-2009), including the ruling of the Chilean Supreme Court of 14 November 2023.

On 5 June 2024, NCP Chile confirmed that CONADI has not yet initiated the consultation process ordered by the Supreme Court when it comes to the transfer/control of land related to the Ngen Mapu Kintuantü complex. The Supreme Court ruling identifies both the Lepunero communities, and the complainants as relevant stakeholders and they shall consequently be included in the expected CONADI-led consultations.

According to information received by the NCP in April 2024, CMN carried out preparatory meetings for the consultation in November / December 2023 as per the Supreme Court ruling of 19 November 2021. In April 2024, CNM signalled that the consultations were not carried out properly and that a new date will be set for the process to re-start. The scope of the consultation is issues related to the archaeological findings at the Los Lagos site. See also CMN's dedicated website for this consultation.<sup>18</sup>

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6. WOULD THE EXAMINATION OF THE ISSUE(S) CONTRIBUTE TO THE PURPOSE AND EFFECTIVENESS OF THE GUIDELINES?

The NCP considers that an examination of the issues listed in section 5 above, may contribute to the purposes and effectiveness of the Guidelines, taking into account the interests of all relevant stakeholders.

The question that the NCP has considered in this initial assessment is whether accepting the issues raised in the complaint for consideration as a specific instance could make a positive contribution to the purpose and effectiveness of the Guidelines.<sup>19</sup> The purpose of the Guidelines is to encourage positive contributions from business to economic, environmental and social progress, and to minimise the adverse impacts on the matters covered by the Guidelines that may be associated with an enterprise's operations, products and services.

NCPs can further the effectiveness of the Guidelines by contributing to the resolution of issues that arise in specific instances. The question here is thus also whether facilitating an exchange between the parties, discussing the issues and expectations of the Guidelines with the enterprise, or developing meaningful recommendations with respect to the enterprise's conduct, would support or encourage the resolution of the issues.

The matters that are at the core of the two consultation processes instructed by the Chilean Supreme Court are covered by the Guidelines, but the NCP expects, as discussed above, these to be treated by CONADI and CNM respectively, as per the rulings. The remaining issues raised in the complaint concerning due diligence, stakeholder engagement, environmental impacts and disclosure are relevant to furthering the purposes and effectiveness of the Guidelines.

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<sup>18</sup> <https://www.monumentos.gob.cl/hallazgos-arqueologicos-registrados-proyecto-central-hidroelectrica-lagos>

<sup>19</sup> OECD (2019), Guide for National Contact Points on the Initial Assessment of Specific Instances, pp. 9–10

## CONCLUSION

The NCP finds that some of the issues raised in this specific instance warrant further examination and has therefore decided to partially accept the submission. The issues accepted concern due diligence and meaningful stakeholder engagement, as well as the issues raised regarding the assessment of environmental impacts and disclosure. There are additional stakeholders to the Statkraft projects that are not among the complainants. The NCP underlines the need to listen to all stakeholders in the process, and due regard will be given to mitigate any tensions between stakeholders.

The conclusion in this initial assessment rests on the criteria laid out in the Commentary to the Implementation Procedures in the Guidelines and is based on the information received from both parties. The NCP has not hereby expressed any view as to the correctness of statements or the validity of the documentation provided, nor on their possible impact on the issues raised in the specific instance. The NCP has at this stage made no determination as to whether the company has observed the recommendations in the Guidelines.

## NEXT STEPS

The NCP has partially accepted the submission for further examination and offers its good offices to the parties. Both parties have stated in their initial submissions that they will participate in the NCP procedure if the specific instance is deemed admissible by the NCP. If the parties cannot reach an agreement through the offer of good offices, the NCP will examine the issues and make recommendations as appropriate. It may also make determinations where appropriate and relevant to the resolution of the issues.

The NCP will inform the OECD Secretariat, and the initial assessment will be added to the OECD Database of specific instances.