

Specific Instance filed to the Dutch National Contact Point for the OECD Guidelines for Multinational Enterprises

La Asamblea Campesina del Cesar por la Restitución de Tierras y el Buen Vivir, PAX for Peace, and The Centre for Research on Multinational Corporations

vs.

RWE AG, Uniper SE, Engie SA, Vattenfall AB, HES International, Havenbedrijf Amsterdam NV, and Havenbedrijf Rotterdam

Subject: Alleged non-compliance with the OECD Guidelines for Multinational Enterprises (OECD Guidelines) of four electric utility companies that operate or operated coal-fired power plants in the Netherlands and three logistics companies involved in the coal trade in the Netherlands with regard to adverse human rights impacts associated with forced displacements in the Cesar mining region of Colombia.

To **National Contact Point Netherlands**

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Complainants **La Asamblea Campesina del Cesar por la Restitución de Tierras y el Buen Vivir [Cesar Farmers' Assembly for the Restitution of Lands and Wellbeing] ('Asamblea Campesina')**

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1 EXECUTIVE SUMMARY

This specific instance alleges that RWE, Uniper, Engie, Vattenfall, HES International, Port of Amsterdam Authority, and Port of Rotterdam Authority ('the Respondents') have failed to meet the standards expected of them in Chapter II (General Policies) and Chapter IV (Human Rights) of the OECD Guidelines for Multinational Enterprises ('OECD Guidelines') in relation to their association – through their purchases and handling of coal – with the ongoing severe adverse human rights impacts of forced displacement of over 59,000 individuals from farming communities in the coal mining region of Cesar, Colombia.

Since 2009, more than 100 million tons (100 Mt) of coal associated with forced displacements in Cesar, Colombia, have been transported through Dutch ports for use in power plants in the Netherlands and other European countries.¹ Imports of coal from Cesar peaked in 2017, and then declined for several years until Russia's invasion of Ukraine. The subsequent boycott of Russian coal triggered a sudden reversal of that trend and led to a dramatic increase in Dutch and European demand for coal associated with forced displacements in Colombia, with shipments of coal from Cesar spiking again in 2022 and 2023.² Since the outbreak of the war in Ukraine, coal imports from Cesar have risen by over 350%, and are expected to continue rising in the near future.³

Through business relationships directly linking them to coal mined by coal mining companies Drummond and Prodeco/Glencore, the Respondents were (or still are) directly linked to mass forced displacements that originally took place in the Colombian state of Cesar between 1996 and 2006 and that continue unresolved to this day. The Respondents have to varying degrees taken some actions to seek to mitigate the impact as part of their due diligence procedures and provided varying degrees of transparency. However, none of these actions resulted in any actual remediation or mitigation of the adverse impacts. According to the OECD, if an enterprise "continues to maintain a business relationship with a [supplier] in the absence of the impact being remediated, then the [enterprise] may be considered to be facilitating an ongoing (unremediated) impact due to inadequate due diligence".⁴ This complaint argues that, at the latest by 2017, four of the Respondents – RWE, Uniper, Engie, and Vattenfall – did in fact shift from a position of being directly linked to the impact to a position of facilitating and thus contributing to these ongoing, unresolved adverse impacts as they continued their substantial purchases of coal from Drummond and Prodeco/Glencore's Cesar mines while failing to undertake effective due diligence to address the severe human rights harms. As such, these companies have a responsibility under the OECD Guidelines to halt their contribution to the ongoing

¹ SOMO calculation, based on data from Kpler database, www.kpler.com (accessed 20 March 2023).

² SOMO calculation, based on data from Kpler database, www.kpler.com (accessed 20 March 2023).

³ Not all of the Respondent energy companies continue to source coal from Colombia. For example, Vattenfall does not.

⁴ OECD, *Due Diligence for Responsible Corporate Lending and Securities Underwriting: Key Considerations for Banks Implementing the OECD Guidelines for Multinational Enterprises*, 2019. 46.

harm and contribute to the remediation of the harms associated with the forced displacements. The complainants seek a concrete financial contribution from the Respondents, as well as other forms of remediation.

For more than a decade, the Complainants have individually or collectively engaged with the Respondents – especially RWE, Uniper, Engie, and Vattenfall – on their responsibilities regarding human rights abuses (including forced displacements) in Cesar. These discussions have not led to the effective remediation of the ongoing adverse impacts associated with the forced displacements, or even a concrete contribution to the remediation by any of the Respondents. The Dutch NCP's acceptance and handling of this specific instance could, among other things, assist with establishing a dialogue aimed at bringing the Respondents' conduct in line with the OECD Guidelines and facilitating a contribution to the remediation of the harms suffered by the victims of forced displacements in the Cesar mining region of Colombia.

This complaint is structured as follows:

- Section 2: Overview of the Complainants and Respondent companies
- Section 3: Fulfilment of the Dutch NCP's criteria for the initial assessment phase and accepting the case for further examination and good offices
- Section 4: The Respondents' relationship to adverse human rights impacts in Cesar
- Section 5: Reference to the specific provisions of the OECD Guidelines which the Respondents have failed to fulfil
- Section 6: The Complainants' requests of the Dutch NCP and the Respondents

2 PARTIES

2.1 Complainants

Asamblea Campesina is a regional organisation of peasant communities who have been victims of forced displacements by illegal armed groups that took place mainly in the years 1996-2006. Since its establishment in 2012, the organisation has been working for the victims' right to truth, justice, reparations, and security guarantees. In that pursuit, the Asamblea Campesina has, at least since 2015, been engaging with various governmental and non-governmental actors in Colombia and beyond, including mining multinationals, energy companies, and other economic actors in the coal chain, in their pursuit of a reasonable measure of truth, recognition, and reparation in relation to the injustice suffered, and thus the restoration of their livelihoods.

PAX works to protect civilians against acts of war, end armed violence, and build inclusive peace. PAX's work in Colombia focuses on restoring and returning land to farmers who have been forcibly displaced, and promoting dialogue between victims and actors involved in the armed conflict to achieve reconciliation. Since 2011, PAX has researched the history of paramilitary violence in the Cesar mining region and its connection with extractive multinational companies. In 2014, PAX published "The Dark Side of Coal"⁵ and is currently leading the "Stop Blood Coal"⁶ campaign, which aims to make a difference in the lives of thousands of victims of paramilitary violence in Cesar.

SOMO conducts research to expose the impact and unprecedented power of multinational companies and show the underlying structures that enable them. In 2012, SOMO published "The Black Box"⁷, which analysed the Dutch coal supply chain, tracing the origins of coal used in Dutch power plants owned by companies, including RWE, Uniper, Engie, and Vattenfall. In 2021, SOMO published "Responsible Disengagement From Coal as Part of a Just Transition"⁸, which assessed the relationship between European energy companies and adverse human rights impacts associated with coal mining in the Cesar mining region.

⁵ PAX, 'The Dark Side of Coal', 30 June 2014, <https://paxforpeace.nl/what-we-do/publications/the-dark-side-of-coal>.

⁶ PAX, 'Stop Blood Coal', <https://paxforpeace.nl/stop-blood-coal>.

⁷ Joseph Wilde-Ramsing, Tim Steinweg, Kristof Racz, and Fleur Scheele, 'The Black Box: Obscurity and Transparency in the Dutch Coal Supply Chain', SOMO, January 2012 (Updated March 2013), <https://www.somo.nl/wp-content/uploads/2012/01/The-Black-Box.pdf>.

⁸ Joseph Wilde-Ramsing, Katharine Booth, Ben Vanpeperstraete, and Mariëtte van Huijstee, 'Responsible Disengagement From Coal as Part of a Just Transition: Exploring Due Diligence, Disengagement and Contribution to Grave Human Rights Violations Associated with Coal Mining in Cesar Department, Colombia', SOMO, <https://www.somo.nl/responsible-disengagement-from-coal-as-part-of-a-just-transition/>.

2.2 Respondents

RWE is a listed energy company headquartered in Germany. Since 2009, when it acquired the Dutch energy company Essent N.V., RWE has operated coal-fired power plants in the Netherlands.

Uniper is a listed energy company headquartered in Germany. Uniper was formed by the separation of E.ON's fossil fuel assets into a separate company that commenced operation in January 2016.⁹ Uniper's subsidiary Uniper Benelux operates a power plant in the Netherlands that uses hard coal to generate electricity.

Engie is a public company headquartered in France. Through its subsidiary company Electrabel SA, Engie operated two coal-fired power plants in the Netherlands, which were closed or sold in 2015 and 2019.¹⁰ Engie currently operates no coal-fired power plants in the Netherlands.

Vattenfall is 100% owned by the Swedish state.¹¹ In July 2009, Vattenfall N.V., headquartered in the Netherlands,¹² was acquired by Vattenfall AB¹³ (starting with a 49% stake, which granted Vattenfall AB utility operational control¹⁴), which was fully controlled by Vattenfall AB by 2012.¹⁵ In July 2015, Vattenfall AB acquired 100% of the share capital in Vattenfall N.V. From 2015 to December 2019, Vattenfall N.V. operated coal-fired power plants in the Netherlands.¹⁶ One of these plants operated from 2001 to 2013, and the other operated from 1994 to December 2019. From 2020 to the present day, Vattenfall has no coal-fired power stations in the Netherlands.

HES International is one of Europe's largest bulk handling companies for dry bulk products such as coal. Headquartered in Rotterdam, the Netherlands, HES has operated coal storage and processing

⁹Christophe Steitz, "E.ON CFO Schaefer to head future spin-off Uniper" (2015).

¹⁰Emporis, 'Elektricitieitscentrale Gelderland' <<https://www.emporis.com/buildings/1230363/elektricitieitscentrale-gelderland-nijmegen-netherlands>> accessed 4 July 2022; ENGIE, 'ENGIE to sell its German and Dutch coal assets and boosts the implementation of its strategy' <<https://www.engie.com/en/journalists/press-releases/sell-german-dutch-coal-assets>> accessed 22 June 2022.

¹¹Vattenfall, 'Who We Are - About Us' <<https://group.vattenfall.com/who-we-are>> accessed 4 May 2022.

¹² Vattenfall NL, 'Corporate governance' <<https://group.vattenfall.com/nl/wie-we-zijn/corporate-governance>> accessed 4 May 2022.

¹³The history and heritage of Vattenfall, 'NUON – the Story behind the Company That Vattenfall Purchased' <<https://history.vattenfall.com/stories/a-pan-european-company/nuon-the-story-behind-the-company-that-vattenfall-purchased>> accessed 4 May 2022; 'Press Release - Nuon Part of Vattenfall Group' <<https://mb.cision.com/wpyfs/00/00/00/00/0F/2A/5F/wkr0011.pdf>> accessed 4 May 2022.

¹⁴ Reuters, 'Vattenfall to Buy Nuon Unit for \$13.3 Billion' (23 February 2009) <<https://www.reuters.com/article/us-nuon-vattenfall-idUSTRE51M3AX20090223>> accessed 4 May 2022.

¹⁵ News Powered by Cision, 'Nuon Part of Vattenfall Group Nuon and Vattenfall Complete Transaction' <<https://news.cision.com/nuon---vattenfall/r/nuon-part-of-vattenfall-group-nuon-and-vattenfall-complete-transaction,c435303>> accessed 4 May 2022.

¹⁶ Vattenfall NL, 'Consecutive Working of the Articles of Association of Vattenfall N.V.' <<https://group.vattenfall.com/nl/siteassets/vattenfall-nl-site-assets/wie-we-zijn/corp-governance/vattenfall-n.v.-articles-of-association-5-march-2019.pdf>> accessed 4 May 2022.

terminals in the ports of Rotterdam and Amsterdam in which it has stored and processed coal from Cesar, Colombia, for many years.

Port of Amsterdam Authority is the corporation that manages and operates the **Port of Amsterdam**, the fourth-largest port in Western Europe.¹⁷ Port of Amsterdam Authority has business relationships with clients and business partners around the world and has been connected to coal from the Cesar region of Colombia since at least 2009.¹⁸ Port of Amsterdam Authority is 100% owned by the Municipality of Amsterdam.

Port of Rotterdam Authority is the corporation that manages and operates the **Port of Rotterdam**, the largest port in Europe.¹⁹ Port of Rotterdam Authority has business relationships with clients and business partners around the world and has been connected to coal from the Cesar region of Colombia since at least 2009.²⁰ It is a government corporation that is owned for 70% by the Municipality of Rotterdam and 30% by the national government of the Netherlands.²¹ In addition to operating the Port of Rotterdam, the corporation has activities in several other countries around the world, including joint ventures in Indonesia, Oman, and Brazil.²²

Through their purchases or processing of substantial volumes of coal from the Cesar mining region of Colombia, all of the Respondents had or still have business relationships that connect them to the adverse human rights impacts associated with forced displacements in or around Drummond and Prodeco/Glencore's coal mining operations in Cesar.

¹⁷ Port of Amsterdam, 'Who We Are', <https://www.portofamsterdam.com/en/about-port-amsterdam/who-we-are>

¹⁸ Joseph Wilde-Ramsing, Tim Steinweg, Kristof Racz, and Fleur Scheele, 'The Black Box: Obscurity and Transparency in the Dutch Coal Supply Chain', SOMO, January 2012, (Updated March 2013), p.26 <https://www.somo.nl/wp-content/uploads/2012/01/The-Black-Box.pdf>.

¹⁹ Port of Rotterdam, 'The port that will take you ahead' <https://www.portofrotterdam.com/en/why-rotterdam/port-will-take-you-ahead#:~:text=With%20a%20surface%20area%20of,even%20to%20maximum%20size%20vessels>.

²⁰ Joseph Wilde-Ramsing, Tim Steinweg, Kristof Racz, and Fleur Scheele, 'The Black Box: Obscurity and Transparency in the Dutch Coal Supply Chain', SOMO, January 2012, (Updated March 2013), p.26 <https://www.somo.nl/wp-content/uploads/2012/01/The-Black-Box.pdf>.

²¹ Port of Rotterdam Authority, 'About', <https://www.portofrotterdam.com/en/about-port-authority>.

²² Port of Rotterdam Authority, 'Partnerhavens', <https://www.portofrotterdam.com/nl/over-het-havenbedrijf/partnerhavens>.

3 INITIAL ASSESSMENT CRITERIA

The OECD Guidelines and the Dutch NCP's specific instance handling procedures set out several criteria that specific instances must satisfy to be admissible. Each of these criteria is addressed below. We note here that the fulfilment of these initial assessment criteria and acceptance by the NCP of the specific instance for further examination does not imply a decision or determination by the NCP on compliance or not by the Respondents with the OECD Guidelines, nor a determination of a particular relationship of "directly linked" or "contributing" to adverse impacts.

3.1 The identity of the person or organisation that submitted the notification and its interest in the matter

Section 2.1 outlines the Complainants' identities and their interest in the issues raised.

3.2 Whether the issue is material and substantiated, plausible and related to the Guidelines

The issues raised in this specific instance are material, substantiated, plausible, and related to the OECD Guidelines. The issues raised pertain to alleged non-compliance by the Respondents of provisions in Chapter II (General Policies) and Chapter IV (Human Rights) of the OECD Guidelines.

This specific instance also raises the issue of an enterprise's relationship to an adverse human rights impact and the non-static nature of its relationship. The Complainants argue that four of the Respondents 'shifted' from being directly linked to contributing to the severe adverse impacts associated with forced displacements in Colombia. The OECD Guidelines and OECD Due Diligence Guidance provide broad insight into the conditions for the occurrence of this shift (see section 4.2). However, the Dutch NCP's acceptance of this specific instance for further consideration would offer an opportunity for the NCP to facilitate a discussion between the parties on how and when an enterprise's relationship to an adverse impact can shift from direct linkage to contribution.

3.3 Whether there seems to be a link between the enterprises' activities and the issue raised in the specific instance

Section 0 explains the relationship (link) between the Respondents' activities (the purchasing, trading, processing, and/or combusting of coal) and the issues raised in this specific instance, namely, the inadequate human rights due diligence conducted by the Respondents in relation to the severe adverse human rights impacts associated with forced displacements in the Cesar mining region of Colombia.

3.4 The relevance of applicable law and procedures, including court rulings

Aside from those identified under section 3.5 below, the Complainants are not aware of any applicable law and procedures, including court rulings, that relate to this specific instance.

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

A number of other domestic and international proceedings have dealt with issues related to the alleged involvement of the coal mining companies Drummond and Prodeco/Glencore in human rights and land rights violations associated with coal mining in Colombia. These claims are relevant to understanding the Respondents' awareness of the forced displacements and the foreseeability of their contribution to the impacts associated with the displacements in Cesar, but the proceedings themselves do not address the activities or the responsibility of the Respondents. Accordingly, they do not limit the ability of the Dutch NCP to accept this complaint for further consideration. More information on these proceedings can be found on PAX's website, and they are summarised in Section 2 of SOMO's 2021 report, "Responsible disengagement from coal as part of a just transition".²³ We summarise them very briefly here: In relation to Drummond, since 2009, four legal claims have been brought against the company for alleged involvement in human rights and land rights violations in Colombia in US courts, but they have all been dismissed by US courts on jurisdictional grounds. In 2015, the Colombian government's Land Restitution Unit forwarded 103 of the thousands of land restitution requests related to forced displacement and expropriation of land by paramilitaries to the responsible legal authorities; sixteen of these claims resulted in lawsuits over land that paramilitaries had violently appropriated and then allegedly sold to Drummond, which said the land was acquired in good faith. In 2020, two Drummond executives were indicted by the Colombian National Prosecutor's Office in the criminal justice system, charged with involvement in a criminal scheme for the funding of paramilitaries to commit the murder of union leaders. The executives deny the allegations, and the case is pending. In the Colombian transitional justice system, several testimonies have been taken against Drummond executives by the Special Justice of the Peace, which continues its operation and investigation. Regarding Prodeco/Glencore, a claim for return of lands from which a local community was forcibly displaced has also been made in relation to the company's La Jagua and Calenturitas coal mining concessions.²⁴

²³ SOMO (2021), "Responsible Disengagement from Coal as part of a just transition, <https://www.somo.nl/responsible-disengagement-from-coal-as-part-of-a-just-transition/>.

²⁴ These proceedings and all of the proceedings mentioned in this paragraph are summarized and referenced in SOMO (2021), "Responsible Disengagement from Coal as part of a just transition, <https://www.somo.nl/responsible-disengagement-from-coal-as-part-of-a-just-transition/>.

3.6 Whether the consideration of this specific issue would contribute to the purposes and effectiveness of the Guidelines

The Dutch NCP's acceptance of the specific instance will contribute to the purposes and effectiveness of the Guidelines. Its offer of good offices would allow a mediated discussion between the parties on the Respondents' (non-)compliance with their responsibilities under the OECD Guidelines. Such discussions could encourage the Respondents to better align their policies and practices (including their human rights due diligence policies and practices) with the OECD Guidelines.

The Dutch NCP's consideration of this specific instance could clarify the Respondents' (and perhaps also other energy companies and coal purchasers') responsibilities under the Guidelines, including in relation to adverse impacts to which they are connected through their value chains. Good offices could involve discussion of if and how the Respondents' failures to effectively address the adverse impacts to which they were directly linked through their business relationships could, with time and knowledge of those impacts, bring them into a position of contributing to these impacts.

3.7 Whether the Dutch NCP is the right entity to handle the complaint

The Dutch NCP is the correct entity to handle this complaint. Four of the Respondents – RWE, Uniper, Engie, and Vattenfall – are signatories to the so-called “Dutch Coal Covenant”, which identified the Dutch NCP as the “most appropriate” body to handle alleged breaches of the OECD Guidelines in their coal supply chains.²⁵ In addition, the three other Respondents – HES International, Port of Amsterdam Authority, and Port of Rotterdam Authority – have their headquarters in the Netherlands. The Netherlands is also a crucial location for all Respondents' coal supply chains and decision-making about the supply chain, so many of the *issues* raised in this complaint regarding the Respondents' (failure to conduct adequate) due diligence arose in the Netherlands. These elements are explained in further detail below.

A The Dutch NCP was the Dutch Coal Covenant's dispute resolution forum

The Dutch Coal Covenant was signed in November 2014 by representatives of the Dutch Government and the Dutch subsidiaries of RWE, Uniper, Engie, and Vattenfall. The Covenant focused on the Respondents' coal supply chains between Colombia and the Netherlands. Its goal was expressed as follows:

“Article 1. Energy companies

²⁵ Dutch Coal Covenant, 'Final Report: 2014-2019', (2020), <https://www.government.nl/binaries/government/documenten/reports/2020/09/28/final-report-dutch-coal-covenant-2020/Final+Report+Dutch+Coal+Covenant+-+2020.pdf>.

The goal is to improve social and environmental conditions in the international coal chain. Energy companies fulfil their [supply] chain responsibility in terms of corporate social responsibility as formulated in the OECD Guidelines. They do this in the countries of origin of the coal used by the energy companies in the Netherlands in order to:

- *To prevent their own activities from causing or contributing to harmful effects, and to be able to address such effects when they occur;*
- *To seek to prevent or mitigate adverse impacts where they have not contributed to that impact, but where that impact is nevertheless directly linked to their activities, products or services through a business relationship;*
- *Encourage business associates, including suppliers and subcontractors, to apply the recommendations of the OECD Guidelines.”*

Implementation by RWE, Uniper, Engie, and Vattenfall of the standards of the OECD Guidelines, particularly the responsibility to conduct human rights due diligence, and improving social and environmental conditions in sourcing countries was at the heart of the Dutch Coal Covenant. The Covenant also identified Colombia as an important sourcing country because it was a major supplier of coal to the Dutch and European markets in the years preceding the signing of the Covenant.²⁶

The Covenant designated the Dutch NCP as the best suited to handle disputes about alleged abuses at the mines from which the energy companies’ source and noted that the NCP provides access to redress and remedy.²⁷ According to Article 4.5 of the Covenant, “[T]he [Dutch] Government shall enable the [Dutch] NCP to have sufficient capacity to deal with reports of an alleged wrongdoings in the coal chain as described in Article 2.8.”²⁸

In addition, RWE, Uniper, Engie, and Vattenfall committed in Article 2.8 of the Covenant to cooperate with the Dutch NCP procedure to resolve disputes related to alleged breaches of the OECD Guidelines:

“If a complaint is filed about an alleged violation of the OECD Guidelines in a mine listed in the overview mentioned under [Article] 2.6, the energy companies are jointly accountable in the dispute settlement procedure. In this context, the energy companies will provide insight into those matters that are functional and necessary for the handling of a complaint within the grievance procedure. This information will be made available in confidence to the administrator of the dispute resolution mechanism to be referred to under [Article] 2.9.”

Accordingly, under the Dutch Coal Covenant, the Dutch NCP was to consider alleged breaches of the Guidelines in a mine from which the Respondents purchased coal. Article 2.6 of the Covenant refers to a jointly published list of mines from which the Respondents purchased coal for the production of electricity in the Netherlands. When it was eventually published, this list included mining concessions of

²⁶ Dutch Coal Covenant, Art. Chapeau 9.

²⁷ Dutch Coal Covenant, Art. 2.9

²⁸ Art. 4. Dutch Coal Covenant (2014). Art. 4(5): “De overheid maakt het mogelijk dat het NCP voldoende capaciteit heeft voor het behandelen van meldingen van vermeende misstanden in de steenkolenketen zoals beschreven in artikel 2.8.” [“The government shall enable the NCP to have sufficient capacity to deal with reports of alleged abuses in the coal chain as described in article 2.8.”]

both Drummond (La Loma and Descanso) and Prodeco/Glencore (Calenturitas and La Jagua) that were associated with the forced displacements that are referenced in this complaint.

While the Dutch Coal Covenant ended in November 2019, the logic for the Dutch NCP being the most appropriate NCP to which a specific instance against the Respondents should be submitted about irresponsible business conduct under the OECD Guidelines remains intact. The Dutch NCP remains the best forum to mediate discussion between the Complainants and Respondents on the issues raised in this complaint. Additionally, the Dutch Coal Covenant recognised the need to address these issues in the Netherlands and by the Dutch NCP as especially important given the significant trade through Dutch ports of coal mined in Cesar. This remains the case today.

B The issues raised in this specific instance arose in the Netherlands

The OECD Guidelines provide, ‘Generally, issues will be dealt with by the NCP of the country in which the issues have arisen’.²⁹ The OECD’s Guide for National Contact Points on Coordination when handling Specific Instances clarifies the meaning of ‘the country in which the issues have arisen’:

“The use of the term “issues” as opposed to “impacts” is important. If the sentence referred to impacts then the NCP that should handle a specific instance would be the one in the country where the harm or adverse impact occurred. However, the term “issues” is not synonymous with “impacts.” It is possible for one impact to give rise to several issues (or allegations). This is particularly true under the 2011 version of the Guidelines which expanded the responsibility of business beyond avoiding adverse impacts in their own operations to also managing risks across business relationships.”

For example, consider the issue of trade in minerals used to finance local conflict and human rights abuse. The impact (local conflict and human rights abuse) gives rise to several issues related to responsibilities of commercial actors along mineral supply chains (e.g. the responsibility of mineral traders buying minerals linked to conflict financing, the responsibility of smelters processing the minerals, and the responsibility of the companies using those minerals in their products or manufacturing processes.) In this respect the underlying impact may give rise to multiple issues (or allegations) which implicate enterprises across various jurisdictions, and potentially, various NCPs.

Similarly, the “issues” in question could refer to a general policy set by a company at headquarter level which may lead to impacts in several locations. In such a case the location of the “issues” may be traced back to the location of the company headquarters.”

In this specific instance, the adverse human rights *impacts* (namely, forced displacements of local communities in the Cesar mining region, see section 0) occurred in Cesar, Colombia. However, the *issues* alleged in this specific instance (namely, the Respondents’ failures to comply with the standards set out in the OECD Guidelines), arose in the Netherlands. Our reasoning follows the OECD Guide’s example above. The impact (forced displacements in Cesar) gives rise to several issues related to the responsibilities of commercial actors along coal supply chains (i.e. the responsibility of energy companies buying and port companies processing coal linked to human rights harms). In this respect, the underlying impact has given rise to issues that implicate the Respondent energy and logistics

²⁹ OECD Guidelines, Paragraph 32.

companies. The issues in question relate to the companies' human rights due diligence policies and practices at the level of the Netherlands, where the Respondents receive(d) and process(ed) shipments of coal from the relevant mines in Cesar; where the Respondents' operate(d) coal-fired power stations utilising coal from the Cesar mines in question; and where the Dutch Coal Covenant was signed and executed. It is for these reasons that we contend that the issues raised in this specific instance can be said to have arisen in the Netherlands and that the Dutch NCP is thus the most appropriate dispute resolution forum to facilitate the resolution of these issues.

3.8 The identity of the enterprises and whether they are multinational enterprise within the meaning of the Guidelines

The Respondents' identities are outlined in section 2.2. The OECD Guidelines do not explicitly define 'multinational enterprise', but they do clarify that the Guidelines apply to private, state, and mixed ownership enterprises that have business that is international in nature.³⁰ All of the Respondents fall within this broad definition and are multinational enterprises with responsibilities under the Guidelines.

³⁰ OECD, 'OECD Guidelines for Multinational Enterprises, I. Concepts and Principles', (2011) page 17, paragraph 4.

4 SEVERE ADVERSE HUMAN RIGHTS IMPACTS ASSOCIATED WITH FORCED DISPLACEMENT IN CESAR, COLOMBIA, AND THE RESPONDENTS' RELATIONSHIP TO THOSE IMPACTS

This section examines the Respondents' relationship to the severe ongoing adverse human rights impacts in the Cesar mining region, Colombia. First, the relationship between mining companies Drummond and Prodeco/Glencore and the adverse human rights impacts that occurred (and which are still occurring) in Cesar are outlined. Second, the relationship between the Respondents and these impacts, through their respective business relationships linking them to coal mined by Drummond and Prodeco/Glencore, is considered.

4.1 Drummond and Prodeco/Glencore's relationship to forced displacements in Cesar

A Drummond and Prodeco/Glencore's mining concessions in Cesar

Drummond has operated in Cesar since 1988, when the mining company entered into a coal extraction contract with the Colombian government for the La Loma concession, which began extracting coal in 1995.³¹ Drummond entered into a coal extraction contract for the El Descanso concession in 1997 and began extracting coal in 2009.³²

Prodeco/Glencore has operated in Cesar for a similar period of time. In 1995, Glencore acquired the Colombian mining company Prodeco, which had co-owned the Calenturitas concession since 1989.³³ In 1995, Prodeco (now Glencore) obtained an operating permit for the Calenturitas concession.³⁴ Production was temporarily suspended in 1998, but restarted in 2004. In 2009, the Colombian government granted permission for Prodeco/Glencore to expand the activities in the Calenturitas mine.³⁵

In 2005, Prodeco acquired the La Jagua concession,³⁶ and in 2016 the company entered into a coal extraction contract with the Colombian government for the concession.³⁷ In March 2020, Prodeco

³¹ Marianne Moor and Joris van de Sandt, *The Dark Side of Coal* (PAX, 2014) 17. Monografía de contexto sobre minería y conflicto violento en el municipio de La Jagua de Ibérico, Cesar 1991–2011. [n.p.], Corporación Nuevo Arco Iris (CNAI).

³² Marianne Moor and Joris van de Sandt, *The Dark Side of Coal* (PAX, 2014) 17; Indepaz and International Alert (2012). Proyectos mineros, ferrocarriles y puertos en los departamentos de Cesar, Magdalena y La Guajira. www.indepaz.org.co/wp-content/uploads/2012/10/PERFILES-PROYECTOS-SNSM-NOVIEMBRE-DE-2012.pdf (accessed January 2013). Ministry of Environment, Housing and Territorial Development (MAVDT) Resolution 414 of 11 March 2008.

³³ Marianne Moor and Joris van de Sandt, *The Dark Side of Coal* (PAX, 2014) 17.

³⁴ Marianne Moor and Joris van de Sandt, *The Dark Side of Coal* (PAX, 2014) 17; Corpocesar, Resolution 425 of 14 November 1995 [Plan de Manejo Ambiental].

³⁵ Marianne Moor and Joris van de Sandt, *The Dark Side of Coal* (PAX, 2014) 17.

³⁶ Marianne Moor and Joris van de Sandt, *The Dark Side of Coal* (PAX, 2014) 17.

³⁷ Montoya-Domínguez, Estefanía (December 31, 2018). "La extracción de Carbón en el centro del Cesar, Colombia: apuntes para la comprensión del conflicto ambiental". *Gestión y Ambiente*. Available at: <<https://revistas.unal.edu.co/index.php/gestion/article/view/77836/69684>>. Accessed 23 May 2022.

halted operations at its Cesar mines because of the Covid-19 pandemic.³⁸ In February 2021, Prodeco announced it would surrender both its Colombian mining contracts (La Jagua and Calenturitas)³⁹, which was approved by the National Mining Agency in September 2022, but the negotiations are ongoing.⁴⁰ Prodeco/Glencore is not currently mining coal in Cesar.

B Forced displacements in the Cesar mining region

Between 1996 and 2006, severe adverse human rights impacts occurred in the Cesar mining region.⁴¹ Atrocities were mainly committed (*caused*, in the language of the OECD Guidelines) by right-wing paramilitary groups, among which the United Self-Defence Forces of Colombia (Autodefensas Unidas de Colombia, 'AUC')⁴² were most prominent. These groups committed gross human rights violations, including the selective killing of 2,600 victims, the massacre of 500 victims, the enforced disappearance of 240 victims, and the forced displacement of more than 59,000 victims.⁴³ The latter human rights violations – the forced displacements – are the focus of this specific instance. The vast majority of displaced individuals from Cesar have not yet received adequate or effective land restitution, and indeed much of the land in question has been unlawfully expropriated. Land rights are cross-cutting rights necessary for the enjoyment of numerous other human rights, including the right to food, water, shelter, and a dignified existence. Additionally, because forced displacement is an extremely traumatic event, there is also a (continuing) adverse psychological impact. This means that the adverse impacts associated with forced displacement continue and recur daily until these impacts are remediated.

Drummond and Prodeco/Glencore commenced and eventually expanded their mining operations as paramilitary groups were committing these human rights violations. In the early years of their mining activities, in or around 1997 and peaking in 2001-2002, forced displacements were occurring in Cesar.⁴⁴ The forced displacements reached their highest point a few years before the mining companies were granted mining titles and environmental licenses for their expansion in 2008

³⁸ Diana Delgado, 'Prodeco seeks longer suspension of Colombia coal mining' *Argus* (6 July 2020). Available at: <https://www.argusmedia.com/en/news/2120730-prodeco-seeks-longer-suspension-of-colombia-coal-mining>. Access 23 May 2022.

³⁹ Luis Jaime Acosta and Oliver Griffin in Bogota, and Shanima A in Bengaluru, (Reuters), 'Update 3-Glencore to return Prodeco's coal mining contracts to Colombia' (4 February 2021). Available at: < <https://www.reuters.com/article/glencore-colombia-id!NL4N2KA3WK>>. Accessed 23 May 2022.

⁴⁰ Zona Cero, 'Sigue incierto el future de las minas de carbon devueltas al Gobierno en Cesar' (3 Nov 2022) available at: <<https://zonacero.com/generales/sigue-incierto-el-futuro-de-las-minas-de-carbon-devueltas-al-gobierno-en-cesar-202634>> accessed 9 Nov 2022.

⁴¹ Human Rights Watch, 'Colombia. Events of 2019', <https://www.hrw.org/world-report/2020/country-chapters/colombia>. Accessed 23 May 2022.

⁴² Marianne Moor and Joris van de Sandt, *The Dark Side of Coal* (PAX, 2014), 16-17.

⁴³ Marianne Moor and Joris van de Sandt, *The Dark Side of Coal* (PAX, 2014), 9–10. The Office of the Prosecutor, *Report on Preliminary Examination Activities* (2 December 2014), International Criminal Court, available at: < <https://www.icc-cpi.int/sites/default/files/iccdocs/otp/OTP-Pre-Exam-2014.pdf>> 29.; PAX, *Civil Society Under Threat: Paramilitary Violence – Cesar Region 2012-2016* (PAX, 2016).

⁴⁴ Marianne Moor and Joris van de Sandt, *The Dark Side of Coal* (PAX, 2014), 30.

(Drummond's El Descanso mine⁴⁵), and in 2005/2009 (Prodeco's La Jagua⁴⁶ and Calenturitas mines⁴⁷). These expansions took place in areas where the forced displacements of local communities had occurred, a fact that could and should have been known by Drummond and Prodeco/Glencore.

Drummond and Prodeco/Glencore financially benefited from the forced displacements of local communities due to their subsequent purchase of victims' lands from intermediaries allegedly unlawfully occupying and selling the land from which people were forcibly displaced.⁴⁸ According to court testimony, paramilitary commanders, knowing that the subsoil contained large reserves of coal, were encouraged, as early as the early 2000s, to displace farming communities because their land was a coveted object of speculation and value.⁴⁹ The same incentive has prompted neo-paramilitary groups from 2006 and up to today to use death threats and violence against human rights defenders and community leaders who are defending their right to land restitution. The purchase of these unlawfully obtained lands by Drummond and Prodeco/Glencore created an economic incentive and further increased the likelihood of the continuation of this adverse impact.

Prior to Drummond's purchase of community land in the Cesar mining region, leaders from the displaced communities of Platanal and Mechoacán sent Drummond's President a letter urging him not to proceed with the purchase, since they had been forcibly displaced from their land shortly before.⁵⁰ Similarly, Prodeco/Glencore bought land that had been documented as previously belonging to the forcibly displaced communities of El Prado and Santa Fé.⁵¹ The mining companies justified ignoring this fact and looking the other way by claiming that the land had been 'legalised' prior to its purchase, though many have alleged that this 'legalisation' was done by corrupt public notaries in collusion with officials from the National Rural Development Institute of Colombia.⁵²

⁴⁵Marianne Moor and Joris van de Sandt, *The Dark Side of Coal* (PAX, 2014) 17; Indepaz and International Alert (2012). Proyectos mineros, ferrocarriles y puertos en los departamentos de Cesar, Magdalena y La Guajira. www.indepaz.org.co/wp-content/uploads/2012/10/PERFILES-PROYECTOS-SNSM-NOVIEMBRE-DE-2012.pdf (accessed January 2013). Ministry of Environment, Housing and Territorial Development (MAVDT) Resolution 414 of 11 March 2008.

⁴⁶ Marianne Moor and Joris van de Sandt, *The Dark Side of Coal* (PAX, 2014) 17.

⁴⁷ Marianne Moor and Joris van de Sandt, *The Dark Side of Coal* (PAX, 2014) 17.

⁴⁸ Marianne Moor and Joris van de Sandt, *The Dark Side of Coal* (PAX, 2014) 72.

⁴⁹ This has been asserted by multiple individuals on multiple occasions, with ex-paramilitary alias El Samario being one of the earliest (starting in 2010, well in advance of the US District Court case) and reliably consistent witnesses asserting this. See, for example, Verdad Abierta, 'La versión de Samario sobre la Drummond y los paras' (13 December 2010)

<<https://verdadabierta.com/la-version-de-samario-sobre-la-drummond-y-los-paras/>> accessed on 17 May 2022.; CNMH, La maldita tierra: guerrilla, paramilitares, mineras y conflicto armado en el departamento de Cesar (Centro Nacional de Memoria Histórica 2016) pp. 91 and 101.; C. Stoeckle and P. Tamayo, 'Blutige Kohle', (SWR, 18 November 2020)

<<https://www.swr.de/unternehmen/kommunikation/pressedossiers/swrfernsehen-junger-dokumentarfilm-blutige-kohle-2020-100.html>> accessed 17 May 2022; J.D. Velasco, Negotiating land: Foreign Firms, Large scale mining and Human Rights in Colombia (Estudios Socio- Jurídicos, 2014) 16(1), pp. 289-314.; Balcerio et al. v. Drummond Company, Inc. (United States District Court, N.D. Alabama, Southern Division, Case 2:09-CV- 1041-RDP).

⁵⁰ Asamblea Campesina del Cesar por la Restitución de Tierras y el Buen Vivir, 'Destrucción de Pueblos Campesinos en la Cuenca del Río Cesar' (22 November 2021).

⁵¹ CNMH, 'La maldita tierra: guerrilla, paramilitares, mineras y conflicto armado en el departamento de Cesar' (Centro Nacional de Memoria Histórica 2016) pp. 91, 101; Marianne Moor and Joris van de Sandt, *The Dark Side of Coal* (PAX, 2014) 17.

⁵² "The land of some displaced persons was declared 'abandoned' by the institute. The land was then formally granted to the new landowners. Land sales by other displaced families, who had sold their plots privately under duress, were legalized retroactively using false papers.;" Sarely Morales Caceres, 'Fiscalía 24 Seccional de Chiriguana' (2012). 'Restablecimiento y

In 2021, Asamblea Campesina, with the support of PAX and the Pontifical Javeriana University, submitted a report to the Colombian Special Jurisdiction for Peace (JEP)⁵³ documenting and alleging that military and paramilitary personnel and individuals employed by companies conspired to drive out (through forced displacement and unlawful expropriation of land) farming communities to make way for large-scale development, in particular coal mining, including mines operated by Drummond and Prodeco/Glencore.⁵⁴ Two additional submissions to the JEP dealt with the involvement of Drummond in the 2000-2001 killing of trade union leaders of the Sintramienergética union, through the channelling of money to paramilitaries through a food services contractor hired by Drummond.⁵⁵ Although these two submissions do not directly address the impact of forced displacement, the same payments made by Drummond to the paramilitaries allegedly fuelled the rise and strengthening of the paramilitaries that were also responsible for forced displacements in the area.

4.2 Respondents' relationship to the forced displacements

We allege that all of the Respondents are directly linked or were initially directly linked to the forced displacements in Cesar through their business relationships linking them to coal mined by Drummond and/or Prodeco/Glencore. However, we allege that over time, RWE, Uniper, Engie, and Vattenfall shifted from being directly linked to contributing to the recurring impacts. This section considers the business relationships between the Respondents and Drummond and Prodeco/Glencore. It examines the direct linkage between the Respondents and the severe ongoing adverse impacts associated with the forced displacements through their business relationships, and finally the shift, which took place in 2017 at the latest, from direct linkage to contribution to these adverse impacts by four of the respondents.

A Business relationships “directly link” all Respondents to foreseeable adverse impacts

All of the Respondents have maintained business relationships that directly (including through a series of relationships) link them to adverse impacts associated with Drummond and Prodeco/Glencore's coal

protección de los derechos de las víctimas' [Manuel Armenta Nieto, Josefina Silgado Budiño, Rafael Ortega Romero y otros] (27 January 2012). Chiriguana, Fiscalía 24 Seccional de Chiriguana in Marianne Moor and Joris van de Sandt, *The Dark Side of Coal* (PAX, 2014), 74.

⁵³ The Special Jurisdiction for Peace “is a transitional justice court established by the 2016 peace accords between the Colombian government and Revolutionary Armed Forces of Colombia–People's Army (...) and part of the country's Comprehensive System for Truth, Justice, Reparation and Non-Repetition. The JEP investigates violence committed during the armed conflict and administers judicial decisions through a criminal justice framework.” Corporate Accountability Lab, ‘CAL provides evidence of corporate complicity in armed conflict to Colombian Peace Tribunal’ (13 May 2022) available at: <<https://corpaccountabilitylab.org/calblog/2022/5/13/cal-provides-evidence-of-corporate-complicity-in-armed-conflict-to-colombian-peace-tribunal>> accessed 8 Nov 2022.

⁵⁴ Asamblea Campesina del Cesar por la Restitución de Tierras y el Buen Vivir, ‘Destrucción de Pueblos Campesinos en la Cuenca del Río Cesar’ (22 November 2021) 66-84.

⁵⁵ Colombian Commission of Jurists and PAX (April 2022), available at <https://www.coljuristas.org/nuestro_quehacer/item.php?id=661>; Avery Kelly, ‘CAL Provides Evidence of Corporate Complicity in Armed Conflict to Colombian Peace Tribunal’ *Corporate Accountability Lab* (13 May 2022). Available at: <<https://corpaccountabilitylab.org/calblog/2022/5/13/cal-provides-evidence-of-corporate-complicity-in-armed-conflict-to-colombian-peace-tribunal>>. Accessed 23 May 2022.

mines in Cesar. Repeated purchases and processing of coal originating at Drummond and/or Prodeco/Glencore's Cesar mines beginning in or around 2007 comprise a business relationship that "directly linked" the Respondents' product or service to the forced displacements in Cesar. Importantly, the OECD Guidelines are clear that this business relationship and the "direct link" to the harms exists regardless of whether there was a direct contractual relationship with the entity causing the harm or whether the business relationship was actually a series of relationships that started with a third party, such as a shipping company or a relationship established through a brokered market such as GlobalCoal.

RWE, Uniper, Engie and, Vattenfall

Although RWE, Uniper, Engie and, Vattenfall have not publicly disclosed detailed information about the regions, mines, or companies from which they source coal, in 2013⁵⁶ and 2014⁵⁷ SOMO and PAX identified significant commercial ties between these energy companies and Drummond and Prodeco/Glencore's coal mining operations in Cesar, Colombia. In addition, under the Dutch Coal Covenant, RWE, Uniper, Engie, and Vattenfall collectively reported on the mining regions and/or mines from which they procured coal between 2014 and 2019. From 2014 to 2017, and also in 2019, Prodeco/Glencore's Calenturitas mine and Drummond's La Loma mine were mentioned as mines from which these energy companies sourced coal through the ports of Amsterdam and Rotterdam.⁵⁸ In 2018, Drummond's La Loma mine is mentioned as a source, as well as a Prodeco/Glencore mine.⁵⁹ Beyond these collective reports, gathering and examining specific information about each individual energy company's business relationships associated with coal mined in Cesar is extremely difficult. The companies have also not provided detailed information about the volumes of coal sourced from these regions and mines. These gaps make it difficult to precisely set out the exact nature and timing of the Respondents' business relationships with Drummond and/or Prodeco/Glencore. It is clear, however, that the Respondents were linked to the forced displacements in Cesar through their business relationships that led them to Drummond and/or Prodeco/Glencore's mines. Further, as this section sets out, the Respondents were aware of the connections between the mining companies and the forced displacements in Cesar.

HES International and the Port Authorities of Amsterdam and Rotterdam

⁵⁶ SOMO (2013), 'The Black Box', <https://www.somo.nl/nl/the-black-box/>.

⁵⁷ Marianne Moor and Joris van de Sandt, *The Dark Side of Coal* (PAX, 2014).

⁵⁸ DNV GL Netherlands B.V., 'De energiebedrijven ENGIE, RWE, Uniper en Nuon/Vattenfall' (2015) 3; DNV GL Netherlands B.V., 'De energiebedrijven ENGIE, RWE, Uniper en Nuon/Vattenfall' (2016) 3; DNV GL Netherlands B.V., 'De energiebedrijven ENGIE, RWE, Uniper en Nuon/Vattenfall' (2017) 3; DNV GL Netherlands B.V., 'De energiebedrijven ENGIE, RWE, Uniper en Nuon/Vattenfall' (2018) 3; DNV GL Netherlands B.V., 'De energiebedrijven ENGIE/ONYX Power, RWE, Uniper en Vattenfall' (2023).

⁵⁹ DNV GL Netherlands B.V., 'De energiebedrijven ENGIE, RWE, Uniper en Vattenfall' (2019) 3.

We estimate that over 100 million tons (100Mt) of coal linked to forced displacements in Cesar have been transported to and through the Netherlands since at least 2009.⁶⁰ HES International and the Port Authorities of Amsterdam and Rotterdam are directly linked to the adverse impacts associated with this coal through a series of business relationships with other companies buying and selling the coal.

The logistics companies are not transparent about the exact origin and volume of the coal they receive, but SOMO began documenting coal shipments from Cesar to the ports of Amsterdam and Rotterdam in 2012 and traced imports back to 2009, when nearly 50% of all hard coal entering those ports came from Colombia.⁶¹ Imports of coal from Cesar to the Netherlands peaked in 2017, and then declined for several years until Russia's war in Ukraine and the boycott of Russian coal triggered a dramatic reversal of that trend, with shipments of coal from Cesar spiking again in 2022.⁶² Since the outbreak of the war in Ukraine, coal imports from Cesar have risen by over 350%; coal imports from Colombia were almost back to 2017 levels by 2022, and are expected to continue rising in the near future.⁶³

According to Colombian government statistics, a total of 50.4 Mt of coal from Cesar was shipped through Dutch ports during the period 2014-2021.⁶⁴ These figures are corroborated by import statistics from Kpler, which indicates a total of 11.4 Mt of coal from Cesar (8.2 Mt from Drummond and 3.2 Mt from Prodeco/Glencore) shipping through Dutch ports during 2017-2022.⁶⁵

Table 1: Volume of coal associated with forced displacement exported from Cesar (Drummond and Prodeco/Glencore) to Dutch ports, 2014-2021, in tonnes

Year	Coal volume exported to Dutch ports (t)
2014	12,600,000
2015	7,900,000
2016	9,500,000
2017	13,600,000
2018	1,100,000
2019	1,900,000
2020	1,700,000
2021	2,000,000

⁶⁰ Joseph Wilde-Ramsing, Tim Steinweg, Kristof Racz, and Fleur Scheele, 'The Black Box: Obscurity and Transparency in the Dutch Coal Supply Chain', SOMO, January 2012 (Updated March 2013), <https://www.somo.nl/wp-content/uploads/2012/01/The-Black-Box.pdf>.

⁶¹ Ibid.

⁶² SOMO calculation, based on data from Kpler database, www.kpler.com (accessed 20 March 2023).

⁶³ SOMO calculation, based on data from Kpler database, www.kpler.com (accessed 20 March 2023).

⁶⁴ Unidad de Planeación Minero Energética (<https://www1.upme.gov.co/simco/Cifras-Sectoriales/Paginas/carbon.aspx>), accessed: 13 January 2022.; The ports of Amsterdam and Rotterdam comprise the vast majority of this figure, but the figure does include the small Dutch ports of Vlissingen, IJmuiden, Eemshaven and Terneuzen, so the total for Amsterdam and Rotterdam is slightly lower.

⁶⁵ Kpler, [https://www.kpler.com](http://www.kpler.com), accessed: 30 October 2022.; The ports of Amsterdam and Rotterdam comprise the vast majority of this figure, but the figure does include the small Dutch ports of Vlissingen, IJmuiden, Eemshaven and Terneuzen, so the total for Amsterdam and Rotterdam is slightly lower.

Source: Colombian Mining and Energy Administration⁶⁶

Table 2: Volume of coal associated with forced displacement at Drummond mines in Cesar exported to the ports of Amsterdam and Rotterdam, 2017-2022, in tonnes

Year	Port of Rotterdam	Port of Amsterdam
2017	2,868,334	488,268
2018	562,190	117,101
2019	637,277	498,188
2020	641,400	0
2021	521,472	0
2022	1,510,074	317,125*

Source: Kpler⁶⁷ *includes 234,730 t through IJmuiden

HES International and the Port Authorities of Amsterdam and Rotterdam handled this coal despite being aware of the links to forced displacements. As explained above, reports in the Dutch media as far back as 2009 made the connection between forced displacements in Cesar and coal being imported into the Netherlands through the ports of Amsterdam and Rotterdam. SOMO began engaging with the Port Authorities on coal supply chain responsibility in 2010 and 2011, and PAX shortly after that.⁶⁸ In 2015, the Amsterdam City Council publicly demanded that the Port Authority do more to improve the situation for the victims of “blood coal” in Cesar, Colombia, or to stop the import of this “blood coal”.⁶⁹ On 30 March 2016, the Amsterdam City Council passed a motion demanding that the energy and logistics companies involved in the coal trade through the Port of Amsterdam “take their responsibility as expected by the OECD Guidelines and UN Guiding Principles” and take “concrete and tangible steps to provide remediation to the victims of severe human rights abuses in the coal mining region of Cesar, Colombia”.⁷⁰ With regard to the remediation of the harms associated with the forced displacements and unlawful expropriation of land, no such concrete or tangible steps have been taken.

RWE

RWE’s Corporate Responsibility reports track the energy company’s purchases of coal from Colombia – but not from specific regions or coal mines – from 2007 onwards. In 2007, when RWE first purchased

⁶⁶ Unidad de Planeación Minero Energética (<https://www1.upme.gov.co/simco/Cifras-Sectoriales/Paginas/carbon.aspx>), accessed: 13 January 2022

⁶⁷ Kpler, <https://www.kpler.com>, accessed: 30 October 2022.

⁶⁸ Joseph Wilde-Ramsing, Tim Steinweg, Kristof Racz, and Fleur Scheele, ‘The Black Box: Obscurity and Transparency in the Dutch Coal Supply Chain’, SOMO, January 2012 (Updated March 2013), <https://www.somo.nl/wp-content/uploads/2012/01/The-Black-Box.pdf>.

⁶⁹ GroenLinks, ‘Het begin van het einde van “bloedkolen”’, 11 June 2015, Available at <https://amsterdam.groenlinks.nl/nieuws/het-begin-van-het-einde-voor-bloedkolen>.

⁷⁰ Amsterdam City Council, ‘Motion D Groen’, Passed 30 March 2016, available at https://amsterdam.raadsinformatie.nl/document/4440290/1/285_16_Motie_D_Groen_c_s_strategisch_plan_2014-2017_Havenbedrijf.; “Meer inzet Amsterdamse Haven tegen bloedkolen” Parool 31 March 2016, <https://www.parool.nl/nieuws/meer-inzet-amsterdamse-haven-tegen-bloedkolen~bf8ceb93/>

coal from Colombia, Colombian coal totalled 4% of the company's total hard coal purchases.⁷¹ In 2009, RWE's purchases rose to 15%⁷², peaking in 2011 at 43%⁷³ of the company's total hard coal purchases. From there on, RWE's purchases slowly declined. For example, hard coal purchases from Colombia totalled 29% in 2012⁷⁴, 21% in 2014⁷⁵, 17% in 2016⁷⁶, falling to around 2% in 2018⁷⁷ and 2019⁷⁸, but likely picking up significantly again in 2022 and 2023. RWE has stated that there have never existed *direct* contractual relations between itself and individual coal companies/mines in Cesar.⁷⁹ However, as mentioned above, this makes no matter for the establishment of a direct link between a company and the adverse impact of forced displacements and unlawful expropriation of land.

It is clear that RWE has long been aware about the adverse human rights impacts, including the ongoing impacts associated with forced displacements, associated with coal mined in Cesar. In 2010, RWE acknowledged criticism regarding its coal imports from Colombia and promised to monitor the situation carefully.⁸⁰ In 2013, two NGOs, Urgewald and FIAN Deutschland, directly informed RWE about the human rights issues associated with Drummond's coal mines in Colombia.⁸¹ RWE responded by denying any responsibility for these issues.⁸² In 2014, RWE noted in its annual report, "The situation in hard coal mines in Colombia and South Africa has repeatedly made headlines."⁸³ In April 2014, RWE reportedly cut its direct contracts with Drummond, stating, "Currently we do not have a central supply contract with Drummond", but also that "Drummond remains on the 'list' of potential partners."⁸⁴ It is indeed likely that RWE purchased coal mined by Drummond through a coal trading platform during that period. By 2018, RWE was again considering Drummond as a coal supplier.⁸⁵ RWE also conducted visits and site-assessments of both Drummond and Prodeco/Glencore in the period 2018-2022, indicating there was a substantial business relationship. RWE also continued engaging with Colombian stakeholder groups until at least 2021, when the company took part in online meetings attended by Colombian coal suppliers, government agencies, international organisations, and trade unions.⁸⁶

⁷¹ RWE, 'Corporate Responsibility Report' (2007) 31.

⁷² RWE, 'Corporate Responsibility Report' (2009) 41.

⁷³ RWE, 'Corporate Responsibility Report' (2011) 69.

⁷⁴ RWE, 'Corporate Responsibility Report' (2012) 81.

⁷⁵ RWE, 'Corporate Responsibility Report' (2014) 65.

⁷⁶ RWE, 'Corporate Responsibility Report' (2016) 31.

⁷⁷ RWE, 'Corporate Responsibility Report' (2018) 40.

⁷⁸ RWE, 'Corporate Responsibility Report' (2019) 12.

⁷⁹ RWE, 'Corporate Responsibility Report' (2010) 41.

⁸⁰ RWE, 'Corporate Responsibility Report' (2010) 41.

⁸¹ Katrin Ganswindt, Sebastian Rötters, Heffa Schücking, *Bittercoal. 'Ein Dossier über Deutschlands Steinkohleimporte'* (Urgewald und FIAN Deutschland 2013) 15.

⁸² Katrin Ganswindt, Sebastian Rötters, Heffa Schücking, *Bittercoal. Ein Dossier über Deutschlands Steinkohleimporte* (Urgewald und FIAN Deutschland 2013) 15.

⁸³ RWE, 'Annual Report' (2014) 112.

⁸⁴ Oliver Ristau, 'Europas Energiehunger' (*taz*, April 2014) <<https://taz.de/Kohle-aus-Kolumbien/!149277/>> accessed 28 April 2022.

⁸⁵ RWE, 'Delivering long-term value through sustainable' (May 2019) 18.

⁸⁶ RWE, 'Corporate Responsibility Report' (2021) 94.

During nearly all of RWE's Annual General Meetings (AGM) of Shareholders between 2013 and 2020, shareholder counter-motions have highlighted that the purchase of Colombian coal was connected to human right abuses.⁸⁷ For example, in a counter-motion at the 2017 RWE AGM, critical shareholders stated, "whereas other energy utilities are taking action, RWE is yet to assume responsibility for its coal supply chain. The group continues to import 'blood coal' from Colombia despite the increase in violence and murders in the country."⁸⁸

Uniper

Uniper has conducted substantial business with both Drummond and Prodeco/Glencore since at least 2010.⁸⁹ In 2015, 2019, 2020 and 2021, Colombia was an important sourcing country for Uniper's coal, accounting for 30%⁹⁰, 24%⁹¹, 30%⁹², and 39%⁹³ of coal purchased by Uniper, respectively. Uniper has not been transparent about the region or mines from which the coal was sourced, but it is assumed that these purchases represent a substantial business relationship with both Drummond and Prodeco/Glencore.

Uniper has long been aware of the forced displacements associated with coal sourced from Colombia. In 2018, Uniper managers visited Cesar to get a clearer picture of mining standards.⁹⁴ As a result, in the AGM meeting notes, Uniper acknowledged adverse impacts in the region and the role that Drummond and Prodeco/Glencore have played in the forced displacements in Cesar.⁹⁵ Further, counter-motions at Uniper's 2017 and 2021 AGMs highlighted the severe adverse impacts associated with forced displacement in Colombia.⁹⁶ For instance, a 2021 AGM countermotion states that Uniper has purchased and continues to purchase coal from Cesar and, "In Colombia, open-pit mines are destroying huge areas of land, and the local population is being forcibly displaced. It is known that in the Cesar mining region paramilitary units have been deployed around open-pit mines. Hundreds of people have been displaced, many even murdered."⁹⁷

⁸⁷ RWE, 'General Meetings, Countermotions from 2013-2020' (2013-2020).

⁸⁸ RWE, 'Countermotion by Dachverband der Kritischen Aktionärinnen und Aktionäre e.V., in relation to the Annual General Meeting of RWE AG on 27 April 2017', (2017) 1.

⁸⁹ Netwerk, 'Factsheet Steenkoolwinning Juni 2010' (2010) 1.

⁹⁰ E.ON, 'Sustainability Report 2015' (2015).

⁹¹ Uniper SE, 'Sustainability Report 2019' (2019).

⁹² Uniper SE, 'Sustainability Report 2020' (2020).

⁹³ Uniper SE, 'Sustainability Report 2021' (2021).

⁹⁴ Progress Report: Dutch Coal Covenant (2018).

⁹⁵ Uniper SE, 'Counter-Motions And Election Proposals – Sections 126 Para. 1 And 127 Aktg' (2017) 2; Uniper SE, 'Counter-Motions And Election Proposals – Sections 126 Para. 1 And 127 German Stock Corporation Act' (2019); Uniper SE, 'Counter-Motions And Election Proposals – Sections 126 Para. 1 And 127 German Stock Corporation Act' (2021) 2.

⁹⁶ Uniper SE, 'Counter-Motions And Election Proposals – Sections 126 Para. 1 And 127 Aktg' (2017) 2.; Uniper SE, 'Counter-Motions And Election Proposals – Sections 126 Para. 1 And 127 German Stock Corporation Act' (2021) 2.

⁹⁷ Uniper SE, 'Counter-Motions and Election Proposals – Sections 126 Para. 1 And 127 German Stock Corporation Act' (2021) 2. This note is about coal purchasing in the Cesar mining region, not the necessarily about a specific purchase.

Engie

Engie has long sourced coal from Colombia, but it has not been transparent about the specific origin of the coal. In 2010, 78% of coal used at one of Engie's Dutch power stations came from Colombia.⁹⁸ Engie's use of coal has subsequently dropped. In late 2015 and 2019, Colombian coal totalled 13% and 4% of Engie's power generation capacity, respectively.⁹⁹

Vattenfall

Vattenfall purchased coal from several different mines in the Cesar mining region in 2010, including Drummond's La Loma mine¹⁰⁰ and Prodeco/Glencore's Calenturitas mine.¹⁰¹ Vattenfall ceased purchasing coal directly from Drummond in 2011,¹⁰² but it continued to purchase coal of Colombian origin, including coal mined by both Drummond and Prodeco/Glencore in Cesar via a brokered (spot) market through 2019.¹⁰³ From 2016 to 2019, Colombia was one of the company's key sourcing countries for coal, accounting for 20%,¹⁰⁴ 8%,¹⁰⁵ 6%,¹⁰⁶ and 5%¹⁰⁷ of coal sourced by Vattenfall, in each respective year in that period.¹⁰⁸

In 2015, Vattenfall engaged with NGOs and coal suppliers about its hard coal sourcing activities in Colombia.¹⁰⁹ These dialogues led to the implementation of additional requirements for Colombian suppliers in 2016.¹¹⁰ In 2017, Vattenfall representatives travelled to Colombia and met with Drummond and Prodeco/ Glencore as part of a "human rights impact assessment" (HRIA) on its Colombian coal supply chain.¹¹¹ Vattenfall's HRIA identified forced displacement and illegal expropriation of land as a

⁹⁸Uniper SE, 'Counter-Motions and Election Proposals – Sections 126 Para. 1 And 127 German Stock Corporation Act' (2021) 2.
⁹⁹ ENGIE, 'Integrated Report' (2020) 12.

¹⁰⁰ Also known as 'Pribbenow' mine, as the Drummond Colombian mining operation includes the Mina Pribbenow and El Descanso open-pit coal mines located in the Cesar Coal Basin.

¹⁰¹ 'Dutch Coal Dialogue - Final Rapport' (2013) 16. <https://www.cordaid.org/en/wp-content/uploads/sites/11/2013/07/DUTCH_COAL_DIALOGUE_FINAL_RAPPORT_2013_1.pdf> accessed 4 May 2022. Vattenfall also sourced coal from Cerrejon mine in the LaGuajira region of Colombia.

¹⁰² Vattenfall, 'Colombia HRIA' (June 2021) 22.

¹⁰³ Joseph Wilde-Ramsing, Katharine Booth, Ben Vanpeperstraete, and Mariëtte van Huijstee, 'Responsible Disengagement From Coal as Part of a Just Transition: Exploring Due Diligence, Disengagement and Contribution to Grave Human Rights Violations Associated with Coal Mining in Cesar Department, Colombia', SOMO, <https://www.somo.nl/responsible-disengagement-from-coal-as-part-of-a-just-transition/>, 29.

¹⁰⁴ Vattenfall, 'Annual Sustainability Report' (2016) 160.

¹⁰⁵ Vattenfall, 'Annual Sustainability Report' (2017) 164.

¹⁰⁶ Vattenfall, 'Annual Sustainability Report' (2018) 157.

¹⁰⁷ Vattenfall, 'Annual Sustainability Report' (2019) 161.

¹⁰⁸ Vattenfall, 'Vattenfall's Hard Coal Procurement Explained' (Sep. 2018) <https://group.vattenfall.com/siteassets/corporate/corporate_comprend/who-we-are/sustainability/doc/origin_of_hard_coal_sept2018.pdf?_t_tags=language%3Aen%2Csiteid%3Aec6448d4-f3c8-47b9-b9c4-42845a8acf13&_t_hit.id=Corporate_Web_Cms_ContentTypes_Media_PdfFile/_49dbc42e-6588-4d75-99e3-e537ecf70893&_t_hit.pos=198.> accessed 4 May 2022.

¹⁰⁹ Vattenfall, 'Annual Sustainability Report' (2016) 160.

¹¹⁰ The criteria: the suppliers should "(1) publicly condemn any human rights violations in the past that took place in the region where they currently operate, (2) publicly support the Colombian Peace Process, and (3) publicly support a reconciliation procedure for the victims of past human rights violations." Vattenfall, 'Annual Sustainability Report' (2016) 31.

¹¹¹Vattenfall, 'Annual Sustainability Report' (2016) 160.

key issue associated with the internal armed conflict in Colombia, and assessed that Vattenfall was “directly linked” to these ongoing adverse impacts.¹¹² The original HRIA was followed by updates in 2018, 2019, and 2021.¹¹³

According to Vattenfall, the company used the findings of the HRIA as a basis for engaging the mining companies (including Prodeco/Glencore and Drummond) and establishing a ‘concrete action plan’ with each of them to provide remediation.¹¹⁴ According to Vattenfall, in 2018 a specific action plan was agreed between the company and Prodeco/Glencore,¹¹⁵ but the details have been kept secret by the companies. It is not clear to what extent, if at all, these plans have ever been implemented or what result they may have had.

In conclusion, all of the Respondents have thus maintained business relationships that directly link them to the foreseeable, severe, and ongoing adverse impacts of forced displacements associated with Drummond and Prodeco/Glencore’s coal mines in Cesar. Beginning in the late 2000s and continuing for more than a decade, through 2017, until 2019 at the earliest, RWE, Uniper, Engie, and Vattenfall made substantial and repeated purchases of coal from Cesar mines operated by Drummond and/or Prodeco/Glencore.

B Shift from direct linkage to contribution to adverse impacts by RWE, Uniper, Engie, and Vattenfall

Under the OECD Guidelines, a company’s relationship to an adverse impact is not static but can shift over time, for example, from being “directly linked” to “contributing”:

“An enterprise’s relationship to adverse impact is not static. It may change, for example as situations evolve and depending upon the degree to which due diligence and steps taken to address identified risks and impacts decrease the risk of the impacts occurring.”¹¹⁶

Whether and when this shift from directly linked to contributing occurs involves consideration of several factors. A company’s relationship to an impact may shift ‘as situations evolve’, including as the company’s operational or broader context changes, and also based on the effectiveness of the company’s due diligence in actually addressing risks and adverse impacts.¹¹⁷ According to the OECD, if an enterprise “continues to maintain a business relationship with a [supplier] in the absence of the

¹¹² Vattenfall, ‘Who we are - Sustainability’ <https://group.vattenfall.com/siteassets/corporate/who-we-are/sustainability/doc/vattenfall_colombia_coal_report_english.pdf> accessed 4 May 2022.; Vattenfall, ‘Coal Sourcing’ <<https://group.vattenfall.com/what-we-do/our-energy-sources/coal/coal-sourcing>> accessed 4 May 2022.; Vattenfall, ‘Colombia HRIA’ (2017).

¹¹³ Vattenfall, ‘Colombia HRIA’ (2018).; Vattenfall, ‘Colombia HRIA’ (2019)., Vattenfall, ‘Colombia HRIA’ (2021).

¹¹⁴ Vattenfall, ‘Colombia HRIA’ (June 2021) 3.

¹¹⁵ Vattenfall, ‘Colombia HRIA’ (July 2018) 4.; Vattenfall, ‘Colombia HRIA’ (January 2019) 4.; Vattenfall, ‘Colombia HRIA’ (September 2019) 4.

¹¹⁶ OECD, ‘Due Diligence Guidance for Responsible Business Conduct’ (2018) 71.

¹¹⁷ Cf. NCP The Netherlands, ‘Final Statement: Milieudefensie/Friends of the Earth Netherlands, WALHI/Friends of the Earth Indonesia and SDI/Friends of the Earth Liberia versus ING’ (7 April 2022) 9.

impact being remediated, then the [enterprise] may be considered to be facilitating an ongoing (unremediated) impact due to inadequate due diligence”.¹¹⁸

The OECD defines “contribution” to an adverse impact to be when an enterprise’s activities cause, facilitate, or incentivise another actor in causing an adverse impact.¹¹⁹ Companies that are contributing to adverse impacts have responsibilities that are different from companies directly linked to impacts. According to the OECD Guidelines, companies contributing to adverse impacts should stop their contribution to the harm and contribute to the remediation of those impacts.¹²⁰

The OECD states that contribution must be “substantial”, meaning “not minor or trivial”. In other words, the enterprise’s activity (including its actions and omissions) must substantially increase the risk of the occurrence of the adverse impact.¹²¹ The OECD indicates that three factors can be used to assess whether an activity constitutes a non-trivial contribution:

1. The degree to which the enterprise’s actions or omissions increased the risk of the adverse impact occurring or continuing,
2. The degree of foreseeability of the adverse impact, and
3. The degree to which any of the enterprise’s activities actually mitigated the adverse impact or decreased the risk of it occurring.

These factors are non-binary, meaning they do not need to be answered yes or no, but answered in degrees.

The below sections analyse the three factors and indicate a non-trivial contribution to the recurring adverse impact of forced displacement by RWE, Uniper, Engie, and Vattenfall. In our view, at the very latest in 2017, those Respondents that continued to purchase coal from Drummond and/or Prodeco/Glencore (which RWE, Uniper, Engie, and Vattenfall all did) transitioned from being directly linked to contributing to the recurring adverse impacts from the forced displacements. From that point onward, the Respondents had a responsibility to take tangible and concrete steps to cease their contribution to the recurring adverse impacts and to contribute to the remediation of those impacts.¹²²

I. The degree to which the Respondents’ actions or omissions increased the risk of the impact occurring

¹¹⁸ OECD, ‘Due Diligence for Responsible Corporate Lending and Securities Underwriting: Key Considerations for Banks Implementing the OECD Guidelines for Multinational Enterprises’ (2019) 46.

¹¹⁹ OECD, ‘Due Diligence Guidance for Responsible Business Conduct’ (2018). 70

¹²⁰ OECD, ‘Guidelines, General Policies A.11’, Human rights 2 and 6.

¹²¹ OECD, ‘Due Diligence Guidance for Responsible Business Conduct’ (2018)70.

¹²² OECD, ‘Due Diligence Guidance for Responsible Business Conduct’, (2018) 29.

A company can contribute to an impact if its activities increase the risk of an impact occurring or continuing. This can happen either in combination with the activities of another entity (including non-state actors), or if an action or omission by the company encourages or makes it easier for another entity to cause harm.¹²³ In the context of human rights due diligence, this means that a failure to (seek to) prevent, mitigate, or remediate an (ongoing) impact may be seen as an omission that contributes or makes it easier for another entity to cause or contribute to an impact. In supply chain relationships, this is especially the case when an omission is combined with the 'action' of repeated and significant purchases of a product known to be associated with the impact. Considerations of leverage and the strength of the business relationship are also important here: Did the company have leverage (i.e. the ability to affect change) that it declined or failed to use? Did the business relationship involve the exchange of significant amounts of money or volume of goods or services over a considerable period of time? Did the company have an internationally well-regarded reputation that may have legitimised the other entity's actions? Did the company send signals that the entity causing or contributing to the impact could have interpreted as encouragement (e.g. by staying silent as severe foreseeable impacts continued unabated)? An answer of 'yes' to any of these questions increases the degree to which the company's actions increased the risk of the impact (re)occurring.

The actions and omissions of RWE, Uniper, Engie, and Vattenfall increased to a non-trivial degree the risk of the ongoing negative impacts of forced displacements in Cesar continuing. By 2017, these companies had purchased substantial volumes of coal from Drummond and Prodeco/Glencore's Cesar mines, even as the mining companies failed to act on their responsibility to address the severe adverse impacts of forced displacement from the mining areas. RWE, Uniper, Engie, and Vattenfall's purchases of coal provided powerful financial incentives for Drummond and Prodeco/Glencore to continue 'business as usual' on land from which local communities were forcibly displaced and for which there had been no remediation. The business from RWE, Uniper, Engie, and Vattenfall ensured the profitability of the coal mines and helped to legitimise the status quo in the region (i.e., the historical, forced displacement of communities from their lands). Their continued support and business during and after the period both mining companies expanded their mines ensured demand for coal mined from the Cesar region, therefore enabling and facilitating the continuation and expansion of Drummond and Prodeco/Glencore's mining operations on land that is the site of severe land rights violations.

Beyond the creation of this financial incentive and the general conditions that allowed the impact to occur, we consider that other specific actions and omissions by RWE, Uniper, Engie, and Vattenfall further increased the risk of the impact of past forced displacements continuing without remediation. As significant, repeat customers of Drummond and/or Prodeco/Glencore, RWE, Uniper, Engie, and Vattenfall had not only a strong responsibility but also considerable leverage to encourage both mining

¹²³ OECD, 'Due Diligence Guidance for Responsible Business Conduct', (2018) 70.

companies to engage in effective remediation of the impacts associated with forced displacements of local communities in Cesar. By continuing the business relationship beyond the beginning of 2017 in the absence of effective and meaningful remediation efforts by the mining companies and omitting to undertake other action to enable or facilitate remediation, RWE, Uniper, Engie, and Vattenfall facilitated Drummond and/or Prodeco/Glencore to continue contributing to the ongoing harms and therefore increased to a non-trivial degree the risk of the adverse impact continuing.

II. The degree of foreseeability of the impact

This factor concerns the extent to which the company could or should have known about the adverse impact or the adverse impact continuing.¹²⁴ The company does not necessarily have to have foreseen the occurrence or continuation of the adverse impact if it could have reasonably done so.

When they first began purchasing coal mined by Drummond and Prodeco/Glencore in Cesar in the 2000s, RWE, Uniper, Engie, and Vattenfall should have foreseen that purchasing coal mined by these companies in Cesar would directly link them to the severe ongoing adverse impacts of forced displacements. These forced displacements had been widely reported and the subject of civil society activism, and with each passing year the continuing adverse impacts became more foreseeable. Dutch media reports in 2010 examined forced displacements in the Cesar mining region and the purchase by European energy companies of Cesar coal in their Dutch and European power stations.¹²⁵ In 2012 and 2014, PAX and SOMO published reports on the use by European energy companies of coal mined in Cesar and linked to forced displacements. RWE, Uniper, Engie, and Vattenfall were all made aware of these impacts through counter motions at their AGMs. In 2013, RWE, Uniper, Engie, and Vattenfall all took part in a trade mission to Colombia with the Dutch Minister of Foreign Trade and Development Cooperation that included a visit to coal producing regions, including Cesar, to examine the social, environmental, and labour challenges faced there. On that trip, the energy companies were informed directly by local stakeholders about the ongoing adverse impacts from the forced displacements associated with the coal they were purchasing.¹²⁶

From the outset of their purchasing of coal from Cesar, but by 2017 at the very latest, the severe and ongoing human rights violations associated with forced displacements from land around Cesar's coal mines were highly foreseeable and could and should have been well known to RWE, Uniper, Engie, and Vattenfall.

¹²⁴ OECD, 'Due Diligence Guidance for Responsible Business Conduct', (2018) 70.

¹²⁵ Trouw, "'Foute' steenkool uit Colombia," (1 July 2010), <<https://www.trouw.nl/nieuws/foute-steenkool-uitcolombia~B6eb80b0/>>. Netwerk, 'Energiebedrijven medeplichtig aan moord' (29 June 2010).; Netwerk, 'Energiebedrijven medeplichtig aan moord (2)' (1 July 2010).

¹²⁶ PAX, 'The Balance of Five Years of Efforts Against Blood Coal' (2015).

III. The degree to which the Respondents actually mitigated the adverse impact or decreased the risk of the impact occurring

This factor relates to the adequacy and effectiveness of a company's due diligence. If a company is conducting adequate due diligence that is appropriate to the scope and complexity of its risk profile, this "should help it effectively identify risks and prevent them from occurring".¹²⁷ The effectiveness of actions at actually preventing and mitigating impacts is important in determining adequacy in this factor. In addition to examining what impact the company's activities had on actually mitigating impacts, also important in assessing this factor is the feasibility of improvements in the future (i.e. whether there is a credible prospect that any due diligence activities will actually mitigate or decrease the risk).

In situations where there is no credible prospect of improvement or where efforts have proven ineffective or failed over many years, the continuation of the same efforts or activities cannot be said to be adequate. In this regard, a company's decision to continue business operations or make new purchases from a business relation where an adverse impact caused or contributed to by the relation continues or reoccurs is relevant in assessing the adequacy of its due diligence.¹²⁸ The OECD states that if an enterprise "continues to maintain a business relationship with a [supplier] in the absence of the impact being remediated, then the [enterprise] may be considered to be facilitating an ongoing (unremediated) impact due to inadequate due diligence".¹²⁹ Particularly relevant in this situation are any new purchases from a supplier while an adverse impact to which the supplier contributed is ongoing (as is the case with Drummond and Prodeco/Glencore contributing to the ongoing impact of forced displacements in Cesar).¹³⁰ If a company continues to maintain and renew (through new purchases) the business relationship with a supplier without taking measures that effectively mitigate the impact, then the company may be considered to be contributing to the ongoing unremediated impact to a non-trivial degree, particularly if the impact is severe and thus demanding urgent and effective action.¹³¹

The severity of the impact is thus also important when determining the degree of adequacy of due diligence. The more severe the impact, the higher the standard for measuring the effectiveness and adequacy of the due diligence activities. As detailed in section 4.1, forced displacements in Cesar have severely impacted local communities. Land rights are cross-cutting rights necessary for the enjoyment of other human rights and the (psychological) impact of land violations continue unless remedied.

¹²⁷ OECD, 'Due Diligence Guidance for Responsible Business Conduct', (2018) 71.; OECD, 'Due Diligence for Responsible Corporate Lending and Securities Underwriting: Key Considerations for Banks Implementing the OECD Guidelines for Multinational Enterprises' (2019). 44.

¹²⁸ OECD, 'Due Diligence for Responsible Corporate Lending and Securities Underwriting: Key Considerations for Banks Implementing the OECD Guidelines for Multinational Enterprises', (2019). 45.

¹²⁹ OECD, 'Due Diligence for Responsible Corporate Lending and Securities Underwriting: Key Considerations for Banks Implementing the OECD Guidelines for Multinational Enterprises', (2019). 46.

¹³⁰ OECD, 'Due Diligence Guidance for Responsible Business Conduct', (2018). 45.

¹³¹ OECD, 'Due Diligence Guidance for Responsible Business Conduct', (2018). 46.

Severe impacts must be addressed quickly and demand a higher degree of effectiveness for the company to avoid being considered to be contributing to the impact. In cases where there is no credible prospect that the impacts will be mitigated or remediated, the OECD Guidelines instruct companies to consider responsibly disengaging from the business relationship that is linking them to the adverse impact. If a company decides to remain in a business relationship associated with an adverse impact, it should communicate to stakeholders (particularly rightsholders) why and how it has determined that additional efforts to mitigate and remediate the impact are feasible, and be prepared to accept the consequences of the continuing connection, including shifting from a relationship of directly linked to one of contributing. In cases where prevention or mitigation is deemed to be feasible, it is important that the company develop a time-bound corrective action plan that clearly includes the prospect of terminating the relationship if targets for preventing, mitigating or remediating impacts are not met within the timeline. A corrective action plan should have credible and clearly-defined time-bound targets, and serve as a benchmark for later decisions around disengagement.¹³² This may require the company to divert or invest (additional) resources in support of specific preventative and remedial action.

Some of the Respondents have taken due diligence steps aimed at addressing select issues in the coal supply chain, but these steps have largely not focused on the severe adverse impacts of forced displacement in Cesar. RWE, Uniper, Engie, and Vattenfall participated in the Dutch Coal Dialogue (2011-2013) and Dutch Coal Covenant (2014-2019), both of which were ostensibly aimed at generally improving conditions in the coal supply chain. RWE, Uniper, and Vattenfall are current members of Bettercoal, a coal buyer-led industry initiative of which RWE, Uniper, Engie, and Vattenfall were amongst its founding members (Engie has since discontinued its membership).¹³³ In 2018, Bettercoal established a Colombia Working Group,¹³⁴ which Uniper has chaired from 2019 to the present.¹³⁵

Bettercoal has undertaken several initiatives over the years, including meeting with Drummond and Prodeco/Glencore¹³⁶ and conducting assessments of their mining activities in Colombia.¹³⁷ In 2014, Bettercoal conducted an audit of Drummond's La Loma and El Descanso mines.¹³⁸ By May 2019, the three largest Colombian producers had been audited as part of the Bettercoal auditing process: Drummond (site-assessment in January 2019, also with Bettercoal in 2014) and Prodeco (site-

¹³² OECD, 'Due Diligence Guidance for Responsible Business Conduct', (2018). 30.

¹³³ Bettercoal, <<https://bettercoal.org/>> accessed 4 May 2022.

¹³⁴ Bettercoal, 'Progress Report, Coal Supply Chain Responsibility: Progress report on the voluntary agreement - Improving corporate responsibility in the coal supply chain' (2018). 8.

¹³⁵ Uniper SE, 'Sustainability Report 2019' (2019).; Bettercoal, 'Country Working Groups – Bettercoal' <<https://bettercoal.org/country-working-groups/>> accessed 4 May 2022.

¹³⁶ Vattenfall, 'Annual Sustainability Report' (2016). 160.

¹³⁷ Prodeco was first assessed by Bettercoal in 2018. As of 2021, Drummond had been assessed twice by Bettercoal.; Vattenfall, 'Colombia HRIA' (June 2021) 3, 22.

¹³⁸ RWE, 'Annual Report' (2014).112.

assessment in August 2018).¹³⁹ Bettercoal has regularly conducted audits “to reveal successes, progress and identified room for improvement in a transparent manner.”¹⁴⁰ However, the audits do not deal with remediation of past impacts, and thus have not led to effective measures to mitigate impacts on communities forcibly displaced from their lands in Cesar. Although Bettercoal has urged Drummond and Prodeco/Glencore to engage in dialogue with the victims on truth-finding and remediation and participate in the activities of the Colombian Truth Commission, these calls have not included a timeframe nor were they linked to consequences if Drummond and Prodeco/Glencore failed to heed them. None of the actions taken by Bettercoal have been effective at actually mitigating the adverse impacts of the forced displacement or decreasing the risk of the impacts continuing.

Of all the Respondents, Vattenfall has taken the largest step towards seeking to address the ongoing adverse impact of forced displacement. In 2016, following engagement with NGOs and coal suppliers about its hard coal sourcing activities in Colombia, Vattenfall implemented additional requirements for Colombian coal suppliers, namely, “(1) publicly condemn any human rights violations in the past that took place in the region where they currently operate, (2) publicly support the Colombian Peace Process, and (3) publicly support a reconciliation procedure for the victims of past human rights violations.”¹⁴¹ Vattenfall conducted a human rights impact assessment in 2017, which focused on Cesar, particularly impacts associated with workers' rights, forced displacement and land restitution, involuntary resettlement, and environmental impacts.¹⁴² The report identified the human rights violations associated with forced displacements in the Cesar mining region,¹⁴³ and the lack of progress that had been made in addressing these issues.¹⁴⁴ Vattenfall considered itself to be directly linked to these impacts and claimed that it could exercise its leverage towards the coal mining companies to address these issues.¹⁴⁵ Despite these initial steps, none of Vattenfall's due diligence has been effective at actually mitigating the adverse impacts of the forced displacement or decreasing the risk of the impacts continuing.

As a result, by 2017 at the latest, it was clear that there was no evidence that any of the actions taken by any of the Respondents had actually mitigated the severe ongoing impact of the forced displacements nor decreased the risk that impacts would continue. This remains the case today. By 2017, the Respondents had had ample time to engage with Drummond and Prodeco/Glencore, collaborate with other energy companies or otherwise support remediation measures by themselves. But the victims of forced displacements had not seen any contribution to remedy for these egregious

¹³⁹ RWE, 'Delivering long-term value through sustainable' (May 2019) 18.

¹⁴⁰ Vattenfall, 'Annual Sustainability Report' (2016).18.

¹⁴¹ The criteria: the suppliers should "(1) publicly condemn any human rights violations in the past that took place in the region where they currently operate, (2) publicly support the Colombian Peace Process, and (3) publicly support a reconciliation procedure for the victims of past human rights violations."; Vattenfall, 'Annual Sustainability Report' (2016) 31.

¹⁴² Vattenfall, 'Colombia HRIA' (2017). 4.

¹⁴³ Vattenfall, 'Colombia HRIA' (2017). 48.

¹⁴⁴ Vattenfall, 'Colombia HRIA' (2017).51, 83.

¹⁴⁵ Vattenfall, 'Colombia HRIA' (2017).78.

human rights harms by the mining or energy companies. In 2017, the vast majority of displaced individuals from Cesar had not yet (and still have not) received adequate or effective land restitution. Given the period in which the forced displacements remained unaddressed, it was abundantly clear by 2017 that efforts to effectively address the impact had failed. This failure and the lack of any credible prospect that continued engagement activities with Drummond and Prodeco/Glencore would suddenly have an effect should and could have been clear to RWE, Uniper, Engie, and Vattenfall. At the very latest, at the start of 2017, after over a decade of awareness and several years of collective engagement with Drummond and Prodeco/Glencore through the Dutch Coal Covenant and Bettercoal, in addition to individual efforts such as Vattenfall's human rights impact assessment, it should have been abundantly clear to RWE, Uniper, Engie, and Vattenfall that there was no credible prospect that continuing their "business as usual" engagement with Drummond and Prodeco/Glencore would effectively address the severe ongoing adverse impacts associated with forced displacement in Cesar.

Conclusion as to contribution

Following the three-factor test provided by the OECD, we conclude that:

1. The degree to which, by 2017, the actions and omissions of RWE, Uniper, Engie, and Vattenfall in their sourcing of coal from Drummond and Prodeco/Glencore's Cesar mines increased the risk of the adverse impacts associated with forced displacements continuing is not trivial.
2. The degree to which, by 2017, RWE, Uniper, Engie, and Vattenfall could and should have foreseen the (ongoing) severe adverse impact of forced displacements in Cesar is high.
3. The degree to which any steps taken by RWE, Uniper, Engie, or Vattenfall actually mitigated the adverse impact or decreased the risk of it occurring or continuing was (and continues to be) low, nor was there by 2017 any credible prospect that this would change.

Our analysis of the results of the OECD's three-factor test and the ongoing, foreseeable, and unremediated nature of the severe adverse impact of forced displacements in Cesar, we consider that RWE, Uniper, Engie, and Vattenfall's relationship to the adverse impact has shifted from initially being one of direct linkage to a relationship of contribution. This shift has been gradual, taking place over the course of several years as foreseeability of the impacts and the amount of coal purchased increased while efforts to address the impact continued to fail. The exact 'turning point' at which RWE, Uniper, Engie, and Vattenfall's relationship to the impacts shifted to one of contribution depends on the particular company's situation. As detailed above, the exact details of each energy company's relationship remain obscured due to the lack of transparency by each company. However, it is reasonable to conclude that any individual energy company that purchased coal mined in Drummond and/or Prodeco/Glencore's Cesar mines from 2017 onwards should be considered to have contributed to the ongoing severe adverse impact of forced displacement. Since all of the energy companies

purchased coal mined in Drummond and/or Prodeco/Glencore's Cesar mines in 2017 and afterward (some still to this day), we consider that RWE, Uniper, Engie, and Vattenfall all contributed to the adverse impacts and thus have a responsibility under the OECD Guidelines to stop their contribution and contribute to the remediation of the ongoing impacts.

5 RESPONDENTS' FAILURES TO MEET THE STANDARDS IN THE OECD GUIDELINES

The Respondents have not met the following standards in the OECD Guidelines related to the expectation that companies conduct due diligence to prevent, mitigate, and remediate adverse impacts to which they contribute or are directly linked.

5.1 Chapter II (General Policies)

Enterprises are expected to carry out risk-based due diligence to identify, prevent, mitigate, and account for actual and adverse impacts (paragraph 10; commentary 14). Enterprises contributing to adverse impacts – in this case RWE, Uniper, Engie, and Vattenfall – are expected to address such impacts when they occur by stopping their contribution to the adverse impact and contribute to the remediation of the impact (paragraph 11). Enterprises directly linked to impacts through their operations, products, or services by a business relationship – in this case HES International, Port of Amsterdam Authority, and Port of Rotterdam Authority – are expected to use their leverage to seek to prevent or mitigate those impacts and to remediate them if they do occur (paragraph 12). The Respondents have not met these standards with regard to the severe ongoing adverse impacts associated with the forced displacements. They have neither individually nor collectively (through the various multi-stakeholder initiatives in which they have participated) effectively addressed the impacts associated with the forced displacements – none of the Respondents has contributed to the remediation of the adverse impacts, which continue occurring unmitigated to this day.

5.2 Chapter IV (Human rights)

Enterprises should respect human rights, which means they should address adverse human rights impacts with which they are involved (paragraph 1), including by conducting risk-based due diligence. They should avoid contributing to adverse human rights impacts, and those contributing to adverse human rights impacts – in this case RWE, Uniper, Engie, and Vattenfall – should address such impacts when they occur by stopping their contribution to the adverse impact and contribute to the remediation of the impact (paragraph 2). Enterprises should also seek to prevent or mitigate adverse human rights impacts that are directly linked to their business operations, products, or services by a business relationship (paragraph 3). Enterprises that are directly linked to adverse human rights impacts – in this case HES International, Port of Amsterdam Authority, and Port of Rotterdam Authority – are expected

to use their leverage to seek to prevent or mitigate adverse impacts and to remediate them if they do occur. As outlined above, none of the Respondents have met these standards.

Enterprises should also contribute to the remediation of adverse human rights impacts to which they have contributed (paragraph 6). Neither RWE, Uniper, Engie, nor Vattenfall have done so. Through neither their own due diligence nor the initiatives in which they have participated have they adequately addressed remediation of impacts associated with forced displacement. These severe adverse impacts remain unaddressed, unremediated, and ongoing to this day. Further, neither RWE, Uniper, Engie, nor Vattenfall have engaged with the Colombian Commission for the Clarification of Truth or the JEP in relation to their relationship to the ongoing impacts of the armed conflict in Colombia.

6 REQUESTS TO THE DUTCH NCP AND RESPONDENTS

Since 2010, the Complainants have engaged with the Respondents regarding their links and responsibility to address adverse impacts associated with forced displacement in Cesar. However, no meaningful solution has been reached between the parties. Consequently, the Complainants seek the Dutch NCP's assistance in creating further opportunities for dialogue between the parties. The Complainants respectfully request the Dutch NCP to conduct its initial assessment of this specific instance and, assuming that the NCP accepts the specific instance for further consideration, offer its good offices to the parties to facilitate resolution of the issues raised. We again note that the acceptance by the NCP of the specific instance for further examination does not imply a decision nor determination by the NCP on the Respondents' (non-)compliance with the OECD Guidelines, nor a determination of a particular relationship of "directly linked" or "contributing" to adverse impacts. The Complainants commit to engaging in NCP good offices in good faith and to respect the confidentiality of any discussions that may occur during the good offices process.

The Complainants intend for discussions during the good offices phase of the NCP complaint process to address the issues raised in this specific instance, particularly with regard to the Respondents' responsibility to conduct due diligence to prevent the continuation of the severe ongoing adverse impacts associated with forced displacement and enable and contribute to the remediation of these adverse impacts. The Complainants insist that the Respondents comply with the OECD Guidelines and undertake all of the following actions oriented toward preventing the continuation of the severe ongoing adverse impacts associated with forced displacement in Cesar and enable and contribute to the remediation of these adverse impacts.

We insist that RWE, Uniper, Engie, and Vattenfall:

- Recognise and account for their contribution to the severe ongoing adverse impacts associated with forced displacements in the Cesar mining region.

- Contribute financially to the remediation of the adverse impacts, for example by establishing a community development fund with the aim of rebuilding the livelihoods of the victims of the forced displacements and providing young victims with educational opportunities.
- Publicly call on and exercise leverage over the coal mining companies Drummond and Prodeco/Glencore to insist that the mining companies:
 - enter into meaningful dialogue with the Asamblea Campesina aimed at truth finding, in particular with regard to the role of the mining companies in the human rights violations, and contributing to peacebuilding.
 - take a constructive position in all land restitution processes in which they are involved. This exercise of leverage should include the communication of clear and time-bound targets for the mining companies to recognise and contribute to remediation, including the prospect of a time-bound plan for temporary responsible disengagement if the companies fail to comply with the standards contained in the OECD Guidelines.
 - constructively and meaningfully engage in efforts to provide safety guarantees for all victims that return to their land.
 - constructively and meaningfully engage with the Special Peace Jurisdiction (JEP) in relation to the JEP's efforts to implement remediation measures for grave human rights violations associated with the armed conflict in the region.
 - The exercise of leverage in the above three issues should include the communication of clear and time-bound targets for the mining companies to recognise and contribute to remediation, including the prospect of a time-bound plan for temporary responsible disengagement if the companies fail to comply with the standards contained in the OECD Guidelines.
- Develop a time-bound plan for just transition and responsible disengagement from coal that includes addressing and contributing to the remediation of all adverse impacts to which the company contributed while sourcing or transporting coal.
- Meaningfully engage with the Asamblea Campesina and other affected rightsholders' groups in each of the above actions.

We insist that HES International, Port of Amsterdam Authority, and Port of Rotterdam Authority:

- Recognise and account for their direct link to the severe ongoing adverse impacts associated with forced displacements in the Cesar mining region, and seek to address these impacts.
- Publicly call on and exercise leverage over RWE, Uniper, Engie, and Vattenfall, as well as coal mining companies Drummond and/or Prodeco/Glencore, to insist that they comply with the actions outlined above.

- Develop a time-bound plan for just transition and responsible disengagement from coal that includes seeking to address adverse impacts to which the individual logistics company was directly linked while handling coal.
- Meaningfully engage with the Asamblea Campesina and other affected rightsholders' groups in each of the above actions.

In accordance with the Dutch NCP's rules of procedure, should the Respondents (or any individual Respondent company) refuse the NCP's good offices, or otherwise withdraw from good offices after they have commenced, or should dialogue between the parties fail to reach an agreement, the Complainants request the NCP undertake further examination to determine whether the Respondents acted in accordance with the OECD Guidelines in matters addressed in this specific instance. As per the NCP's rules of procedure, this may include asking the parties to provide additional information, consulting external parties or independent experts, carrying out or commissioning research on location and/or requesting information from other parties involved in the complaint.

The Complainants further request that the Dutch NCP provide recommendations to the Respondents to bring their conduct into line with the OECD Guidelines, including to address the impacts to which they are linked and/or have contributed, as well as on improvements to their human rights due diligence processes to avoid contributing to adverse impacts within the context of (Colombian) coal mining.