

Working Group on Business and Human Rights Extractive sector, just transition and human rights

Input for the report to be presented to the 78th session of the General Assembly in September 2023

I. Introduction

1. The Centre for Research on Multinational Corporations (SOMO)¹ has worked on the issue of responsible disengagement for several years, examining a range of contexts, from companies ending a business relationship in their supply chain to multinationals pulling out of a country.² This contribution uses SOMO's reports on the matter³ to address questions 9 and 17 about corporate responsibility and access to remedy, specifically regarding responsible disengagement from coal in Colombia's Cesar Department and focusing on a recent complaint to the Dutch National Contact Point (NCP).

II. Addressing the irresponsible exist of fossil fuels: the urgent need for access to remedy (question no. 9)

2. Why companies disengage is important, but how they do so is critical. Against the climate emergency backdrop, fossil fuel corporations must withdraw from fossil fuels like coal and gas urgently. However, urgency shouldn't justify irresponsible withdrawal. Responsible exit strategies and respect for the climate can and should coexist.

3. The UN Guiding Principles on Business and Human Rights (UNGPs) and OECD Guidelines for Multinational Enterprises (OECD Guidelines) provide a framework for responsible disengagement which implies applying human rights due diligence to any proposed disengagement. According to the UNGPs, if a company identifies an adverse impact as part of due diligence, it should engage with business partners to prevent, mitigate, or remediate it. The company should consider responsibly disengaging if engagement fails to prevent and remediate the impact.⁴ According to the OECD Guidelines, responsible disengagement from a business relationship causing or contributing to an adverse impact may be necessary when a company's products or services are "directly linked" to the

¹ SOMO conducts action-oriented research to expose multinationals' impact and unprecedented power and show the underlying structures that enable them. For more information on our work, see:

<https://www.somo.nl/>

² M. van Huijstee, J. Wilde-Ramsing & L. de Leeuw, SOMO, *Should I Stay or Should I Go? Exploring the Role of Disengagement in Human Rights Due Diligence*, December 2020, <https://www.somo.nl/should-i-stay-or-should-i-go-2/> (3 May 2023); J. Wilde-Ramsing, M. Ingrams, M. van Huijstee, B. Vanpeperstraete & J. van de Sandt, SOMO, *Responsible Disengagement in the Time of Corona*, April 2020, <https://www.somo.nl/corona-crisis-lays-bare-the-need-for-responsible-conduct-in-dealing-with-business-relationships/> (3 May 2023).

³ Joseph Wilde-Ramsing, Tim Steinweg, Kristof Racz and Fleur Scheele, SOMO, *The Black Box: Obscurity and Transparency in the Dutch Coal Supply Chain*, January 2012 (Updated March 2013) <https://www.somo.nl/the-black-box/>, (3 May 2023); Joseph Wilde-Ramsing, Katharine Booth, Ben Vanpeperstraete, and Mariëtte van Huijstee, SOMO, *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*, July 2021, <https://www.somo.nl/responsible-disengagement-from-coal-as-part-of-a-just-transition/> (3 May 2023).

⁴ UNGPs, 2011, Pillar II: The Corporate Responsibility to Respect Human Rights, Section B: Operational Principles, Human Rights Due Diligence, Principle 19 and Commentary paragraph 19.

impact through a business relationship or a chain of relationships. Disengagement from business relationships is a measure of “last resort”.⁵

4. When considering disengagement from a business relationship, these standards indicate that companies should contemplate several factors, including the severity of the potential or actual adverse impact; the results of previous attempts to address the adverse effects; the likelihood of preventing and remediating impacts in the future; the consequences of not disengaging, such as a shift in the relationship from directly linked to contributing; and finally, the potential adverse impacts of the resulting from disengagement itself.

5. Responsible disengagement also means the exiting company must remediate previous adverse impacts it caused or contributed to. This applies even if the company disengages from the business relationship through which it contributed to the impact. Companies are not relieved of their obligations simply by disengaging; under the UNGPs and OECD Guidelines, even if they disengage, they remain responsible for addressing any harm they caused or contributed to while operating. Any attempts to transfer or conceal liability and responsibility for past wrongs are inconsistent with respect for human rights. Moreover, if they decide to refrain from disengaging, these companies must accept the consequences of being considered to be contributing to the ongoing impacts. Such consequences may be legal⁶, financial or reputational.

6. Responsible disengagement from coal has broader policy implications. Coal mining and coal-fired electricity production are associated with severe human rights and environmental harms, including anthropogenic climate change. The fossil fuel industry's extensively documented record of social and environmental injuries highlights the crucial role that due diligence plays in addressing the question of remedy. A just transition to sustainable energy cannot accommodate unresolved human rights and environmental violations stemming from previous oil, gas, and mining ventures. Furthermore, transferring economically unfeasible extraction operations to governments or state-owned enterprises is not viable for promoting responsible business conduct or facilitating a just transition.

7. Additionally, the act of disengagement itself can cause new negative impacts distinct from those that led to the decision to disengage. Reparation also involves companies using their leverage to mitigate negative impacts on workers and local communities. The UNGPs and OECD Guidelines underscore the importance of communicating and consulting as clearly as possible with relevant stakeholders.⁷ Consultation is vital to any meaningful due diligence and helps companies clarify their responsibilities and identify the right course of action. Therefore, mining and energy companies should develop – through meaningful engagement with trade unions, local communities, civil society organisations and governments – ambitious plans to disengage responsibly from coal.

8. This is of particular relevance in post-conflict contexts like the Cesar mining region (see below); mass unemployment with little or no warning and inadequate severance packages may exacerbate unresolved and latent tensions, potentially reigniting conflict and associated human rights violations. Abandoning these workers and communities – which have borne the brunt of the negative human rights and environmental impacts of coal mining for decades – without remediating these impacts would be unjust and irresponsible.

⁵ OECD, 2011, Guidelines for Multinational Enterprises, Chapter II (General Policies), Commentary on Chapter II.

⁶ Complaint submitted to the Dutch NCP against Pluspetrol Resources Corporation B.V. referred to the responsibility of energy companies that “inherit” adverse impacts from predecessor companies to remediate those impacts. The Dutch NCP accepted the complaint as “material and substantiated”. “*Peruvian Indigenous Federations et al. vs Pluspetrol*”, 11 March 2021, <https://www.oecdwatch.org/complaint/peruvian-indigenous-federations-et-al-vs-pluspetrol/> (3 May 2023).

⁷ OECD, 2017, Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector, p. 25.

III. The case of coal mining in the Cesar Department, Colombia (question no. 17)

9. On the 20th of April, 2023, a National Contact Point (NCP) complaint was submitted to the Dutch NCP.⁸ The complaint is addressed to RWE AG (Germany), Uniper (Germany), Engie (France), Vattenfall (Sweden), HES International (the Netherlands), Port of Amsterdam Authority, and Port of Rotterdam Authority (the respondents) for their alleged non-compliance with the OECD Guidelines for their involvement in the coal trade in the Netherlands concerning adverse human rights impacts associated with forced displacements in the Cesar mining region of Colombia.⁹

10. The Asamblea Campesina¹⁰, PAX¹¹, and SOMO submitted the complaint. The complaint argues that 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 concerning 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.

11. Between 1996 and 2006, over 3,000 people were killed, and tens of thousands were displaced from their land around the coal mines in the northern Colombian province of Cesar.¹² The coal mines are operated by US-based Drummond and Swiss-based Glencore, which have expanded the mines onto the land where the victims were displaced.¹³ The victims are yet to receive any redress for the injustice done to them, which continues to be threatened daily by illegal armed groups. The companies targeted in the OECD complaint have imported or distributed coal from the Cesar region for years, and some continue to do so.



⁸ La Asamblea Campesina del Cesar por la Restitución de Tierras y el Buen Vivir et al. v. RWE, Uniper, Engie, Vattenfall, HES International, Port of Amsterdam Authority, and Port of Rotterdam Authority available at: <https://www.somo.nl/wp-content/uploads/2023/04/OECD-complaint-Asamblea-Campesina-el-al-vs-RWE-et-al-re-Colombia-coal.pdf>.

⁹ In 2012, SOMO's report *The Black Box* further detailed the flow of coal from problematic mines in Cesar to the Netherlands, destined for combustion in coal-fired power plants throughout Europe.

¹⁰ The Asamblea Campesina is a regional organisation of peasant communities who have been victims of forced displacements by illegal armed groups, mainly in 1996-2006. See further: <https://www.asambleacampesinadelcesar.com/>.

¹¹ PAX works to protect civilians against acts of war, end armed violence, and build inclusive peace. See further: <https://paxforpeace.nl/>.

¹² M. Moor & J. van de Sandt, *The Dark Side of Coal: Paramilitary Violence in the Mining Region of Cesar, Colombia*, PAX, June 2014, <https://paxforpeace.nl/what-we-do/publications/the-dark-side-of-coal> (3 May 2023).

¹³ In December 2020, both the current and the former president of the Colombian subsidiary of Drummond were charged with complicity in crimes against humanity. PAX, "Top-Level Drummond Managers Charged with Financing Paramilitaries," January 2021: [Top-level Drummond managers charged with financing paramilitaries - Peace Organization PAX \(paxforpeace.nl\)](https://paxforpeace.nl/what-we-do/publications/top-level-drummond-managers-charged-with-financing-paramilitaries) (3 May 2023).

12. The complaint is not the first time victims have raised the issue of abuses in the coal supply chain. After a public outcry in 2012, European energy companies started an industry-led organisation called “Bettercoal”.¹⁴ Feeling the pressure, in 2014, the Dutch government signed a voluntary “Coal Covenant”¹⁵ with energy companies in which agreements were made on tackling abuses in the supply chain. After the Coal Covenant ended and with no progress to address forced displacements, Prodeco/Glencore announced the closure of its Colombian coal mining operations. The closure highlights the potential impacts of an industry associated with human rights and environmental violations and its phase-out as part of a global transition to a low-carbon economy. National and international unions and civil society organisations have called on Prodeco/Glencore to meaningfully engage with local communities, workers and their representatives to remediate past harms that have not been addressed and to mitigate new negative impacts caused by its abrupt disengagement from its Cesar mines.¹⁶ In short, to disengage responsibly.

13. Because the issue remains unsolved to this day, the NCP complaint argues that through business relationships directly linking the respondents to coal mined by coal mining companies US-based Drummond and Swiss-based Prodeco/Glencore, they were (or still are) directly linked to mass forced displacements that initially took place in the Colombian state of Cesar between 1996 and 2006.

14. Additionally, at the latest by 2017, four of the respondents – RWE, Uniper, Engie, and Vattenfall – did 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. While the respondents have to varying degrees, taken some actions to mitigate the impact as part of their due diligence procedures and provided varying degrees of transparency, none of these actions have resulted in remediation or mitigation of the adverse impacts.

15. Furthermore, after the boycott of Russian coal,¹⁷ there has been a notable surge in Dutch and European demand for coal linked to forced displacements in Colombia. This has led to an increase in coal shipments from Cesar, particularly during 2022 and 2023,¹⁸ following a brief decline in Cesar-based coal between 2017 and 2022. Since the Ukrainian conflict, coal imports from Cesar have increased by over 350% and are expected to continue increasing soon.

IV. Conclusions and recommendations

16. Although it is crucial to expedite the energy transition, if we proceed with the same business and economic assumptions as the fossil fuel industry, clean energy will only benefit some individuals at the expense of others. Consequently, the just transition must entail a change in approach. This means, among other measures, that companies in the extractive sector must examine possible negative impacts of disengagement decisions into energy transition plans and formulate and

¹⁴ Bettercoal is a membership-based organisation of major coal buyers, <https://www.bettercoal.org/> (3 May 2023).

¹⁵ Final Report Dutch Coal Covenant 2020, 28 September 2020, p. 3, [Final Report Dutch Coal Covenant 2020 | Report | Government.nl](#) (3 May 2023).

¹⁶ PAX, “PAX Letter to Glencore,” 16 February 2021, [pax-letter-to-glencore.pdf \(paxforpeace.nl\)](#) (4 May 2023); PAX, “Glencore Should Take Responsibility Towards Victims of Coal Mining,” 18 February 2021, [Glencore should take responsibility towards victims of coal mining - Peace Organization PAX \(paxforpeace.nl\)](#) (4 May 2023).

¹⁷ Since the invasion of Ukraine, the EU has announced a proliferation of sanctions across multiple sectors designed to deprive Russia of crucial revenues, such as those in the fossil fuel sector. The EU has implemented a ban on all forms of Russian coal. This measure aims to target the core of Russia’s economy to curtail its ability to wage war significantly; https://eu-solidarity-ukraine.ec.europa.eu/eu-sanctions-against-russia-following-invasion-ukraine_en#energy-sector (3 May 2023).

¹⁸ SOMO calculation, based on data from the Kpler database, www.kpler.com (accessed 20 March 2023).

implement preventative and mitigation plans. Because of the significant contribution of coal to climate change, all mining and energy companies should develop ambitious plans to disengage from coal entirely responsibly.

17. Responsible disengagement by companies is part of their due diligence responsibilities. To fulfil those responsibilities and promote a responsible and equitable disengagement process that protects the rights of workers and communities and addresses the environmental impacts of fossil fuel extraction while promoting a just transition to renewable energy, companies must conduct comprehensive human rights and environmental impact assessments to identify potential risks associated with disengagement and develop mitigation strategies to address them. These strategies must include a remediation plan to address any negative impacts from past operations and ensure that affected communities are involved in developing and implementing this plan. In addition to addressing impacts that occurred in the past, mining and energy companies that disengage should also mitigate and remediate all additional, new adverse impacts arising from their disengagement.

18. The case of blood coal from the Cesar region highlights the limitations of voluntary corporate responsibility guidelines and standards, particularly in conflict-affected areas like Colombia. To ensure that companies in global supply chains are held accountable for their actions, it is necessary to establish a legal obligation of care. Such due diligence should be codified in international, national and European legislation to ensure that companies cannot simply opt out of their responsibilities. By establishing legal obligations for due diligence, companies can be held accountable for any harm caused by their operations, and affected communities can access remedy and justice.

We hope that the information provided will be considered, and we authorise the publication of the information submitted on the Working Group's website.

May 12, 2023.