

Translation of letter from Germany's Ministry of Economics and Technology (BMWi) to Greenpeace Germany, 15 March 2010

Federal Ministry of Economics and Technology, 11019 Berlin

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Mr Karsten Smid
Greenpeace e.V.
Grosse Elbstrasse 39
22767 Hamburg

SUBJECT **Decision on complaint filed by Greenpeace against Vattenfall**
ATTACHMENT Written explanation of the decision taken by the National Contact Point

Dear Mr Smid,

Please find attached the decision taken by the National Contact Point (NCP) regarding the Greenpeace complaint filed against Vattenfall on 29 October 2009.

As Ms Weidmann explained in a telephone conversation on 15 March 2010, the Federal Ministry of Economics and Technology is very willing to discuss with you the NCP's decision in more detail.

Yours sincerely,

(signed)

Joachim Steffens

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Complaint lodged by Greenpeace e.V. against Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG & Co. KG and Kernkraftwerk Krümmel GmbH & Co. oHG [Krümmel nuclear power plant] at the National Contact Point for the OECD Guidelines for Multinational Enterprises.

Decision on acceptance of the complaint

On 30 October 2009, Greenpeace e.V. [Greenpeace in Germany] filed a complaint against the Vattenfall group with the National Contact Point (NCP) for the OECD Guidelines for Multinational Enterprises at Germany's Ministry of Economics and Technology (BMWi).

In the complaint, the enterprise is charged with contradicting the goals to reduce carbon dioxide emissions, and of disregarding the principle of comparative energy efficiency, by constructing and intending to operate a coal-fired power plant (Hamburg-Moorburg). In addition, the enterprise is charged to have deceived the public by making reference to CCS [carbon capture and storage] technology and the possible shutdown of the Wedel power plant. The complaint sees Vattenfall's ICSID (International Centre for Settlement of Investment Disputes) proceedings against Germany in the framework of the Energy Charter Treaty as an attempt to receive unlawful special treatment, since these proceedings aim to annul the mandatory regulations contained in the licence for water usage as required under German water statutes. Moreover, crisis management for dealing with the accident at Krümmel nuclear power plant in June 2007 was poor and in breach of protecting public safety and health. In addition, the complaint charges the Vattenfall group of deceiving consumers by issuing a climate declaration, of inappropriate lobby activities because of its involvement in the Working Group on Emissions Trading in Germany's Ministry for the Environment, Nature Conservation and Nuclear Safety, and because of a letter written by Vattenfall CEO Lars G. Josefsson to German Chancellor Angela Merkel.

The National Contact Point (NCP) subjected the complaint to an initial evaluation with the involvement of the Ministry for the Environment, Nature Conservation and Nuclear Safety. The complaint comprises several independent charges listed together; these were separately evaluated.

The first evaluation, according to the Implementation Procedures of the OECD Guidelines, is to see whether the issues raised in the complaint justify further investigation.

To pursue a detailed investigation of a complaint, the charges must be sufficiently substantiated and fall within the scope of the OECD Guidelines for Multinational Enterprises.

In consensus with those federal ministries represented in the 'OECD Guidelines' departments, the National Contact Point has come to the following conclusion:

The complaint will not be accepted.

Reasons

The charges in the complaint are to some extent not substantiated, and to some extent founded on an interpretation of the guidelines that is too broad to conform to the guidelines' goals. According to a consensus reached by National Contact Points at their annual meeting in Paris, litigation and arbitration proceedings pending with regard to the Hamburg-Moorburg coal-fired power plant and running in parallel to the complaint do not hinder the acceptance of those parts of the complaint *per se*. Rather, a decision was taken considering the goals of the Guidelines in each specific case.

1. Construction and intent to operate a coal-fired power plant – violation of environmental protection goals

a) Litigation proceedings at Hamburg's High Administrative Court (Oberverwaltungsgericht)

Administrative legal proceedings are pending at Hamburg's High Administrative Court with regard to the construction of the Hamburg-Moorburg power plant. Basically, the issues of the court proceedings overlap with this part of the complaint to the NCP.

In well-founded individual cases, the acceptance of a complaint can be justified even when other proceedings are dealing with the same circumstances. This can be the case in particular when the need and scope for out-of-court mediation is recognised and when therefore the acceptance of a complaint is in line with the goals of the Guidelines.

However, a mediation role for National Contact Points cannot be considered when the Guidelines do not comprise the underlying problem.

b) Standards set in Chapters II.1 and V of the Guidelines

Chapter II.1 of the Guidelines stipulates:

"In this regard, enterprises should

1. Contribute to economic, social and environmental progress with a view to achieving sustainable development."

Chapter V of the Guidelines stipulates:

"Enterprises should, within the framework of laws, regulations and administrative practices in the countries in which they operate, and in consideration of relevant international agreements, principles, objectives, and standards, take due account of the need to protect the environment, public health and safety, and generally to conduct their activities in a manner contributing to the wider goal of sustainable development."

It is the goal of these recommendations to encourage businesses to take responsibility for sustainable development. The Guidelines call on the business community to make its contribution. They challenge businesses to act within the framework of national legislation, regulations and administrative practices, as well as international agreements and principles.

The complaint charges that Vattenfall's insistence on generating electricity from coal-fired power plants stands in contradiction to today's climate protection goals. The complaint compares forms of power generation in Sweden and Germany (hydroelectric power versus coal-fired power generation), without looking more closely at differences in natural conditions, the security of energy supplies and the operation of nuclear power plants in this connection. In this way, the description of the actual situation is biased.

The National Contact Point cannot identify any conceivable violation of the Guidelines, including Chapter V.6.a), in the mere determination of Vattenfall's insistence on the legally acceptable generation of electricity from coal. The Guidelines' recommendations that enterprises make a contribution to sustainable development cannot be interpreted to mean there is no leeway for business decisions and only by refraining from using this technology would Vattenfall "duly allow for" protecting the environment. Likewise, the contribution to be made does not necessitate actively supporting every single goal of a sustainable policy.

A deeper investigation of this charge in the complaint is not justified.

2. Vattenfall's ICSID proceedings against the Federal Republic of Germany

Germany complies with the practices of the International Centre for Settlement of Investment Disputes (ICSID), thereby allowing enterprises the opportunity to initiate arbitration proceedings

with the Federal Republic of Germany. It cannot be an intention of the OECD Guidelines to strip parties of judicial remedies that have been conceded to them elsewhere. Chapter II.5 of the Guidelines, according to which businesses

"refrain from seeking or accepting exemptions not contemplated in the statutory or regulatory framework related to environmental, health, safety, labour, taxation, financial incentives, or other issues"

cannot be interpreted to mean that the initiation of such proceedings should be prohibited. As regards content, the evaluation of the request for arbitration is reserved for the arbitration proceedings.

In this connection, the complaint also charges Vattenfall with violating Chapter V.8 of the Guidelines, according to which enterprises should

"contribute to the development of environmentally meaningful and economically efficient public policy, for example, by means of partnerships or initiatives that will enhance environmental awareness and protection."

The NCP does not share the opinion that arbitration proceedings could undermine the equal and rightful enforcement of German environmental law. Furthermore, making use of this chapter assumes an underlying interpretation that the NCP does not share. As the second sentence in Chapter V.8 shows, the recommendation does not have the intention of prohibiting the rightful initiation of arbitration proceedings. Rather, the clause is directed at general activities to improve environmental protection.

A deeper investigation of this charge in the complaint is therefore not justified.

3. Management of accidents at Krümmel nuclear power plant

The introduction to Chapter V of the Guidelines (see above) addresses the protection of public health and safety; this is specified in Chapter V.5, according to which enterprises are to

"maintain contingency plans for preventing, mitigating, and controlling serious environmental and health damage from their operations, including accidents and emergencies; and mechanisms for immediate reporting to the competent authorities."

Vattenfall has a contingency plan and reporting regulations (the Nuclear Safety Officer and Reporting Ordinance as well as operator working rules for power plants) which provide for step-by-step reactions based on the kind of accident and the consequent risk each kind poses to the environment, public health and safety. The NCP has no evidence that regulations were violated in this regard or that a threat to public safety and health was imminent. The occurrence of an accident as such cannot imply a possible violation of the Guidelines.

A deeper investigation of this charge using the Guidelines as a measure is therefore not justified.

4. Policy on information and consumer protection

Chapter V.2.a) of the Guidelines recommends enterprises

"[take] into account concerns about cost, business confidentiality, and the protection of intellectual property rights:

a) provide the public and employees with adequate and timely information on the potential environment, health and safety impacts of the activities of the enterprise, which could include reporting on progress in improving environmental performance".

The complaint charges Vattenfall with public deception regarding its intention to use CCS (carbon capture and storage) technology in future. The complaint substantiates this charge by pointing out that the enterprise is attempting at the same time, within the framework of the legal proceedings brought against the licence for the Hamburg-Moorburg power plant, to avoid a legal commitment to use this technology. The NCP does not identify a contradiction in this business behaviour. In view

of the fact that CCS technology is not yet mature and the legal framework for transportation and storage is still missing, the enterprise cannot be charged for not wanting to make a legal commitment in this regard. In contrast, Vattenfall has credibly shown that it is seriously interested in the development and use of this technology by investing more than EUR 100 million in the research and development of CCS technology and by winning the bid for the model Jaenschwalde CCS plant. For this reason, the charge is not substantiated.

Furthermore, the complaint charges Vattenfall with public deception regarding its intention to replace the older and more emissions-intensive Wedel power plant with the new Hamburg-Moorburg power plant. The complaint refers to Vattenfall's retention of the designation of the Wedel plant grounds as a power plant site in the course of a spatial planning act (Flaechennutzungsplan) being approved. However, the designation of a power plant site in the land utilisation plan cannot be equated with the continuous operation of the old Wedel power plant. The designation can be relevant for other future uses (such as a biomass logistics centre or a biomass cogeneration plant). For this reason, the charge is not adequately substantiated.

Finally, the complaint charges that Vattenfall's "Curbing Climate Change" report on the climate's tolerance of fossil fuel combustion is misleading because it is based on outdated tolerance limits regarding the atmospheric emission of greenhouse gases, while newer scientific findings with lower tolerance limits are merely mentioned in a footnote.

The NCP does not perceive in a footnote indicating newer scientific findings that any deliberate deception of consumers has occurred which contradicts the Guidelines recommendation quoted above regarding active and current consumer information or even Chapter VII.4 of the Guidelines.

Chapter VII.4 of the Guidelines recommends that in their relations with consumers, enterprises should

"not make representations or omissions, nor engage in any other practices, that are deceptive, misleading, fraudulent, or unfair."

The complaint attacks the campaign begun in November 2008 by Vattenfall Europe AG to collect signatures for the so-called climate declaration prepared by the group. This would suggest to consumers that Vattenfall was seriously doing all it could for climate protection, whereas it is in reality one of the most climate-unfriendly energy producers in Europe. The campaign had raised the false impression that signing the declaration would mean the consumer was doing the best he/she could to protect the environment, while in reality the economic interests of the enterprise – counterproductive for climate protection – were being advocated.

With the campaign, Vattenfall supports a global price for CO₂. Independently thereof, information on its products is posted for consumers on Vattenfall's national websites.

The chapter's intention to protect the integrity of consumer decisions is therefore not affected to such an extent that it seems to be conceivably violated by the campaign, which pursues general political goals. Here too, the NCP sees little scope for mediation regarding this charge in the complaint.

Due to these limitations, acceptance of this part of the complaint is not in line with the interests of the Guidelines.

A deeper investigation of the charges of using misleading information and deceiving consumers is therefore not justified.

5. Improper interference in local politics

Chapter II.11 of the Guidelines calls on enterprises to
"abstain from any improper involvement in local political activities."

The Working Group on Emissions Trading was set up in Germany's Ministry for the Environment, Nature Conservation and Nuclear Safety in connection with the installation and further development of the emissions trading system in Germany. The Working Group comprised representatives from parliament, government, states, industry and commerce, and NGOs. This enabled the consistent and primarily expert participation of all stakeholders. The complaint's charge that there is improper interference by business representatives is speculative and unfounded. For this reason, the charge is rejected as unsubstantiated. To entirely prohibit the representation of interests cannot be in line with the goals of the Guidelines.

The same holds true with regard to allegedly improper interference through a letter to Chancellor Angela Merkel.

The charge of improper interference in the politics of the host country therefore does not need deeper investigation.

For this reason, none of the complaint's charges justify deeper investigation or the acceptance of mediation efforts by the National Contact Point.

The complaint therefore is collectively not to be accepted.

Berlin, 15 March 2010