

Specific instance of non-compliance with the OECD Guidelines for Multinational Enterprises

**FEDIQUEP, FECONACOR, OPIKAFPE,
ACODECOSPAT, Peru EQUIDAD, Oxfam in
Perú, Oxfam Novib, SOMO**

vs.

Pluspetrol Resources Corporation B.V.

Complainants

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FECONACOR (Federación de Comunidades Nativas de la Cuenca del Corrientes)

Achuar Federation from the Corrientes River

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OPIKAFPE (Organización de Pueblos Indígenas Kichwas Amazónicos Fronterizo Perú Ecuador)

Kichwa Federation from the Tigre River

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ACODECOSPAT (Asociación Cocama de Desarrollo y Conservación San Pablo de Tipishca)

Kukama federation from the Marañon, Chambira and Patuyacu rivers

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Glossary

ACODECOSPAT	(Complainant) La Asociación Cocama de Desarrollo y Conservación San Pablo de Tipishca
ANA	Agencia Nacional del Agua (National Water Agency)
ASIS	Análisis de la Situación Integral de Salud (Analysis of the Comprehensive Health Situation)
BIT	Bilateral Investment Treaty
CIAC	Comisión Interamericana de Arbitraje Comercial (Inter-American Commercial Arbitration Commission)
DIGESA	Dirección General de Salud Ambiental (General Directorate of Environmental Health)
EIA	Environmental Impact Assessment
ELAW	Environmental Law Alliance Worldwide
EPA	Environmental Protection Agency
FECONACOR	(Complainant) La Federación de Comunidades Nativas de la Cuenca del Corrientes
FEDIQUEP	(Complainant) La Federación Indígena Quechua del Pastaza
FPIC	Free Prior and Informed Consent
IIAP	Instituto de Investigación de la Amazonía Peruana (Research Institute of the Peruvian Amazon)
ISDS	Investor State Dispute Settlement
MINEM	Ministry of Energy and Mines of Peru
OEFA	Organismo de Evaluación y Fiscalización Ambiental (Agency for Environmental Assessment and Supervision)
ONERN	Oficina Nacional de Evaluación de Recursos Naturales (National Office of Natural Resources Assessment)
OPIKAFPE	(Complainant) Organización de Pueblos Indígenas Kichwas Amazónicos Fronterizo Perú Ecuador
OSINERG	Organismo Supervisor de la Inversión en Energía
OSINERGMIN	Organismo Supervisor de la Inversión en Energía y Minería (Supervisory Agency of Investment in Energy and Mining of Peru)
OXY	Occidental Petroleum Corporation
PAC	Plan Ambiental Complementario (Complementary Environmental Plan)
PAH	Polycyclic Aromatic Hydrocarbon
PAMA	Programa de Adecuación Ambiental (Environmental Adaptation and Management Program)
PCM	Presidencia del Consejo de Ministros (Presidency of the Council of Ministers)
PUINAMUDT	Pueblos Indígenas Amazónicos Unidos en Defensa de sus Territorios
PW	Production Waters
SCADA	Supervisory Control And Data Acquisition

SOF	Soluble Organic Fraction
TPH	Total Petroleum Hydrocarbons
UAB	Universidad Autónoma de Barcelona (Autonomous University of Barcelona)
UN	United Nations
UNDP	United Nations Development Program

Executive summary

This specific instance contends that Netherlands-based oil company Pluspetrol Resources Corporation B.V. (hereinafter “Pluspetrol”) has failed to conduct adequate due diligence to prevent adverse environmental and human rights impacts and to remediate adverse impacts it caused and contributed to in Peru’s Lot 1AB (re-named lot 192 in 2015), in breach of OECD Guidelines provisions on due diligence and remediation (Chapters II and IV). The specific instance also contends that Pluspetrol has breached the OECD Guidelines provisions on taxation (Chapter XI), and has failed to disclose material information relevant to its operations, in breach of OECD Guidelines provisions on disclosure (Chapter III).

Headquartered in Amsterdam, the Netherlands, Pluspetrol purchased oil extraction operations, rights and liabilities in Peru’s Lot 1AB from another private company in 2000 and subsequently operated in and extracted oil from Lot 1AB for 15 years between 2000-2015. This complaint alleges that during this time, Pluspetrol:

- Failed to conduct environmental due diligence, leading it to cause and contribute to significant adverse environmental impacts, which it has also failed to remediate
- Failed to conduct human rights due diligence, leading to cause and contribute to adverse impacts on the rights of the local indigenous population
- Used artificial tax avoidance structures and strategies, including offshore trusts and empty letterbox companies, with the likely purpose to minimise payment of taxes in countries in which it operates
- Failed to disclose material information about its corporate structure and operations

Pluspetrol failed to conduct appropriate due diligence to identify its existing impacts and prevent new ones, leading it to cause and contribute to the contamination of at least 1,963 sites with spilled oil, industrial waste, and other pollution from industrial oil extraction. This complaint alleges that the contamination has caused serious environmental impacts and that it is linked to adverse health impacts in local indigenous populations, ranging from high blood concentrations of carcinogenic metals such as cadmium and lead, to other potential health conditions. Pluspetrol is now seeking to abandon Lot 1AB without fulfilling its due diligence requirement under the OECD Guidelines to remediate the contamination it has caused or contributed to and leaving local communities at significant risk of additional adverse health impacts.

Through its failure to conduct appropriate human rights due diligence as outlined in the OECD Guidelines, this complaint alleges that Pluspetrol also adversely impacted several human rights of the local indigenous population. Pluspetrol avoided compensating indigenous communities for access to their lands and perpetuated the practice of its predecessor of not ensuring the communities' right to free prior and informed consent to ongoing use of their territory. Pluspetrol failed to respect the communities' right to self-determination by failing to engage them and their traditional leadership meaningfully in consultation over the lot's exploitation, as is expected by the OECD Guidelines. And Pluspetrol's contamination of rivers, soils, and dependent species violated the communities' rights to water and food.

In addition to causing, contributing to and failing to remediate environmental and human rights impacts in Peru as described above, this complaint alleges that Pluspetrol has employed artificial corporate structures, including offshore trusts and empty letterbox companies without employees, tactics frequently used to avoid paying taxes, in breach of OECD Guidelines provisions on disclosure and taxation. Pluspetrol's failure to disclose all material information about its business operations,

identified in this complaint, prevents a complete understanding by the public of the full extent of its tax payments and possible tax avoidance.

Complainants seek accountability and remediation for the environmental degradation of the 1,963 contaminated sites for which complainants assert Pluspetrol is responsible. With this specific instance, complainants request that the Dutch NCP offer its good offices and facilitate a process aimed at bringing Pluspetrol's behaviour in line with the OECD Guidelines. Complying with the OECD Guidelines and associated due diligence responsibilities implies that Pluspetrol must properly remediate the 1,963 sites that the company left contaminated when it stopped operations in 2015, and the associated adverse human rights impacts.

Complainants argue that the Dutch NCP has jurisdiction and competence to handle this specific instance and is the appropriate entity to handle the complaint for four reasons: 1) because Pluspetrol is headquartered in the Netherlands, 2) because the issues raised in this specific instance "arose" at the company's Dutch headquarters, 3) because previous attempts to resolve issues in Peru with the company's Peruvian management have failed, and 4) because indigenous communities and civil society lacks confidence in the Peruvian NCP's ability to handle the case effectively.

1. Introduction and context

The Corrientes, Tigre and Pastaza river basins in the Loreto region of the Peruvian Amazon rainforest have been inhabited by the Quechua, Kichwa and Achuar indigenous peoples for hundreds of years. Since 1971, the area has also been subject to oil extraction activities by Pluspetrol Resources Corporation B.V. and its subsidiaries and predecessor, Occidental Petroleum Corporation (Oxy). In 1971, Oxy bought a concession from the Peruvian state to extract oil from the indigenous-inhabited land in the Loreto region at two lots then named 1A and 1B (merged and renamed “Lot 1AB” in 1985 with a new contract that lasted until 2015, when the lot was again renamed “Lot 192”).



Figure 1: Map of Lot 1AB

From 1971-1999, Oxy used a range of irresponsible extraction practices and infrastructure: Oxy dumped production waters (the waste water from oil extraction) into rivers; failed to maintain its piping and processing infrastructure; and disposed of waste in porous ponds.¹ Complainants are not aware of any detailed assessment that was undertaken before 2000 of the damages Oxy left at the site; however, in 1984 ONERN, the Peruvian government's environmental agency at the time, found that the area of plots 1A and 1B were highly contaminated, and contemporaneous studies showed pollution in the rivers' fish species.² In 1996, Oxy agreed to comply with new environmental

¹ Earthrights International, et al., “A Legacy of Harm,” April 2007, <<https://earthrights.org/publication/a-legacy-of-harm/>> (accessed 24 February 2020). p.18.

² Earthrights International, et al., “A Legacy of Harm,” April 2007, <<https://earthrights.org/publication/a-legacy-of-harm/>> (accessed 24 February 2020). p.18.

regulations and standards by 2002 under an Environmental Adaptation and Management Program (PAMA) for the lot approved by the state.^{3, 4}

However, before Oxy had time to implement the PAMA, Pluspetrol acquired Oxy's concession. Pluspetrol acquired Lot 1AB under a private accession contract in 2000, modified in January 2003 upon the transfer of the property to Pluspetrol's subsidiary Pluspetrol Norte SA. When Pluspetrol acquired the lot in 2000, complainants argue that it employed the same poor operational practices as Oxy and that Pluspetrol insisted on having very low environmental standards, despite the fact that by the year 2000, environmental standards in Peru were substantially higher than they had been during the 1970s when Oxy began operation. Pluspetrol exploited the oil resources in Lot 1AB for 15 years until its contract expired in August 2015.

In 2015, Pluspetrol undertook a site identification in which it self-identified more than 2000 sites of contamination in Lot 1AB.⁵ However, rather than accept responsibility, Pluspetrol classified these sites as falling under the responsibility of Oxy, not itself. OEFA, Peru's agency for environmental assessment and supervision, maintains that Pluspetrol is the one responsible for remediating at least 1,963 contamination sites at Lot 1AB (and likely many hundreds more).⁶ Pluspetrol continues to dispute and challenge its responsibility for the remediation through the Peruvian administrative and judicial courts. The number of contamination sites and Pluspetrol's responsibility for these is discussed further below in this complaint.

In the meantime, in 2014 before its impending departure from the lot, Pluspetrol was required by regulation to implement a "decommissioning plan" or "abandonment plan" laying out its plan to remediate (clean up) the lot before its departure.⁷ To date, Pluspetrol has submitted three abandonment plans. Its first and second plans were both rejected by the Ministry of Energy and Mines in 2016⁸ and 2019⁹ for being insufficient. Pluspetrol filed an appeal following each rejection, but the Ministry of Energy and Mines confirmed the rejections both times.^{10, 11} In June 2019, Pluspetrol presented a third plan which is now being considered. None of the first three abandonment plans addressed anywhere near the 1,963 sites the Peruvian government attributes to Pluspetrol's care. The first two plans identified a need for remediation at only 49 sites, and the third at just 35 sites.¹²

It is important to note for context that while this specific instance is focussed on Pluspetrol's due diligence for its activities in Lot 1AB, Pluspetrol is also operating Lot 8, which is adjacent to Lot 1AB. Pluspetrol's activities in Lot 8 affect the Achuar, Urarina and Kukama communities that live on the Corrientes River and the Marañon River and their tributaries. Pluspetrol acquired Lot 8 in 1996 from its former owner, Petroperu, who started operations in 1971. The lot is currently being exploited through an association contract, in which Pluspetrol Norte S.A. owns a 60% stake. The resolution of the issues raised in this specific instance and the necessary improvements in Pluspetrol's due diligence procedures are crucial for avoiding additional adverse impacts through Pluspetrol's ongoing activities in Lot 8.

³ OEFA, Informe 411-2014-OEFA/DS-HID, (October 2014), paragraph 10(iii) (Annex 1).

⁴ Caso Andoas, "Antecedentes del conflicto en la región de Andoas. Relación con la transnacional Pluspetrol," (April 2009), <<https://casoandoas.wordpress.com/2009/04/10/antecedentes-del-conflicto-en-la-region-de-andoas-relacion-con-la-transnacional-pluspetrol/>> (accessed 24 February 2020).

⁵ OEFA, Informe 77-2015-OEFA-DS-HID, (June 2015), (Annex 2).

⁶ OEFA, Informe 411-2014-OEFA/DS-HID, (October 2014), (Annex 1).

⁷ Peruvian Ministry of Energy and Mines, Regulation for environmental protection for hydrocarbon activities, Supreme Decree 039-2014-EM, <[http://www.minem.gob.pe/minem/archivos/DS-039-2014-EM\(2\).pdf](http://www.minem.gob.pe/minem/archivos/DS-039-2014-EM(2).pdf)> (November 2014).

⁸ Peruvian Ministry of Energy and Mines, RD 206-2015-MEM-DGAAE, (June 2015) (Annex 3).

⁹ Peruvian Ministry of Energy and Mines, RD 067-2019-MEM-DGAAH, (2019) (Annex 4).

¹⁰ Peruvian Ministry of Energy and Mines, Resolution 029-2015, (August 2015) (Annex 5).

¹¹ Peruvian Ministry of Energy and Mines, Resolution 067-2019, (2019) (Annex 4).

¹² OEFA, Informe 77-2015-OEFA-DS-HID, (June 2015), (Annex 2).

2. Admissibility and jurisdiction

2.1. Parties

2.1.1. Complainants and their interest in the case

FEDIQUEP, FECONACOR, OPIKAFPE and ACODECOSPAT are federations of indigenous communities living in the Loreto region of the Peruvian Amazon. FEDIQUEP, the Quechua federation from the Pastaza River, represents 20 Quechua and Achuar communities, six of them in the area of Lot 1AB. FECONACOR, the Achuar federation from the Corrientes river, represents 13 Achuar and Urarina communities, six of them in the area of Lot 1AB and seven in the area of Lot 8. OPIKAFPE, the Kichwa federation from the Tigre river, represents four Kichwa communities all located in Lot 1AB. ACODECOSPAT, the Kukama federation of the Marañon, Chambira and Patuyacu River, represents 61 communities, several of them affected directly or indirectly by oil operations in Lot 8.

The four federations work together under the platform of PUINAMUDT, created in 2011. Although they are from different river basins and from different indigenous peoples, all are affected by the same impacts and actors. Therefore, the four federations have decided to work together and combine efforts in demanding that the environment and human rights are respected and impacts are remediated.

As this complaint will show, for almost half a century, indigenous peoples of the Quechua, Achuar, and Kichwa ethnic groups have suffered extremely negative environmental, health, cultural, social, and economic impacts as a result of the operations of the oil companies Occidental Petroleum (1971-2000) and subsequently Pluspetrol (2000-2015) in the area of land at issue in this complaint called Lot 1AB. Complainants assert that over the past decades, these indigenous federations have staged peaceful protests and taken other action to raise public awareness ¹³about the damaging impacts of Pluspetrol and its predecessor and to seek restitution and remediation for the harms caused. Although the federations have been successful in achieving some condemnation and call for correction by the state¹⁴, Pluspetrol has resisted providing remedy for all the impacts for which it is responsible. The federations therefore have a strong interest in bringing this complaint to the Dutch NCP in the hope that the NCP may be able to assist in securing, through dialogue, Pluspetrol's commitment to meaningfully resolve the numerous harms for which it is responsible.

The Indigenous federations named above are the lead complainants in this complaint. They are supported by the following Peruvian and Dutch civil society organisations as co-complainants.

Peru EQUIDAD is a non-governmental Peruvian organisation based in Lima that defends and promotes human rights, accompanying people and communities whose rights have been violated by state, corporate, or other actors. In continuous dialogue with indigenous peoples, Peru EQUIDAD particularly works to influence and implement national and international regulatory frameworks for indigenous rights. Its mission is to create the tools to guarantee indigenous rights, strengthening

¹³ See Dorissa Act (2006) <https://observatoriopetrolero.org/wp-content/uploads/2019/02/Acta-Dorissa-22-10-06.pdf>, or visit web page of the indigenous federations: www.observatoriopetrolero.org

¹⁴ See, e.g. various agreements between Federations and the State: Comisión Multisectorial "Desarrollo de las Cuatro Cuenca" (http://www.minem.gob.pe/minem/archivos/file/6%20-%20Mesa%20%204%20Cuenca_marzo.pdf); Acta of Lima 2015 (<http://www.minam.gob.pe/oaas/wp-content/uploads/sites/49/2017/04/18-Acta-Lima-M2-10.03.15.pdf>); Acta de Teniente Lopez of 2015 (<https://observatoriopetrolero.org/wp-content/uploads/2015/10/ACTA-TENIENTE-LOPEZ-W.pdf>) or Acta de José Olaya (<https://observatoriopetrolero.org/wp-content/uploads/2015/11/ACTA-DE-REUNION-FEDERACIONES-NATIVAS-DE-LAS-4-CUENCA-EJECUTIVO-05.11.15.pdf>).

restitution mechanisms while calling for mitigation of the impacts that state policies and corporate economic activity have had in violating human rights. For over seven years, Peru EQUIDAD has supported the above-named indigenous federations in their struggle for remedy for the harmful impacts of Pluspetrol at Lot 1AB. Peru EQUIDAD has raised the case to United Nations, with the Special Rapporteur of indigenous peoples and the Special Rapporteur of Toxic Waste involved in the case since 2014¹⁵. The United Nations Working group on Business and Human Rights has also held interviews with the indigenous federations and has made strong recommendations to the Peruvian state on the case. Peru EUIDAD has a strong interest in seeing Pluspetrol address once and for all the impacts it is responsible for in Lot 1AB. More information is available at www.equidad.pe.

Oxfam in Perú represents the Oxfam International Confederation within the country's jurisdiction. Aligned with Oxfam International's mission to help create lasting solutions to the injustice of poverty, Oxfam in Peru confronts inequality in its multiple dimensions, and specializes in specific themes including territorial rights, public health affected by toxic pollution from mining and hydrocarbon exploitation, tax justice, political capture by economic elites, women's rights, and youth empowerment. Since 2013, Oxfam in Perú has supported communities affected by operations in Lot 192, through their PUINAMUDT Platform, enabling indigenous organizations to conduct coordination and meetings among affected communities, access to mass communications media, and access to academic research and relevant publications. More information is available at www.peru.oxfam.org.

Oxfam Novib is the Dutch member of Oxfam, an international confederation of 20 non-governmental organizations and a worldwide development organization that mobilises the power of people against poverty and injustice through humanitarian relief, programs,, campaigns and research in 93 countries.¹⁶ Oxfam Novib has been working for decades with other Oxfam affiliates, country teams and partners to defeat poverty, including by strengthening the capacity and the voice of civil society organizations in the Global South, and engaging with Dutch actors and audiences. In 2016 and 2017, Oxfam Novib has supported Oxfam in Perù to support communities affected by operations in Lot 192. More information is available at <https://www.oxfamnovib.nl/>.

SOMO is a non-governmental organisation based in Amsterdam, the Netherlands. SOMO supports civil society in holding corporations accountable for their actions by researching the activities and structures of multinational corporations and providing civil society with this information. SOMO has a clear interest in the issues raised in this specific instance given its mission is to "support and strengthen civil society movements in defending human rights and promoting public interests." SOMO has previously published research on the link between extractives companies, including Pluspetrol, using Dutch tax structures to avoid paying its fair share of taxes while simultaneously adversely impacting human rights and the environment. See, for example, SOMO's 2013 report "Private Gain, Public Loss".¹⁷ More information is available at www.somo.nl.

2.1.2. Respondent

Pluspetrol Resources Corporation B.V. is registered in Amsterdam, the Netherlands and is the ultimate owner of 42 subsidiaries in several countries in Latin America, Canada, the Netherlands, and the United States.¹⁸ The group also contains nine subsidiaries that are located in the Cayman Islands

¹⁵ Urgent Appeals on Peruvian government from UN Rapporteur of Indigenous peoples and UN Rapporteur of Toxic Waste: 2014: <http://www.ohchr.org/SP/NewsEvents/Pages/DisplayNews.aspx?NewsID=15421&LangID=S>; 2017: <http://www.ohchr.org/SP/NewsEvents/Pages/DisplayNews.aspx?NewsID=21871&LangID=S>

¹⁶ Oxfam Novib, Our Story, <<https://www.oxfamnovib.nl/donors-partners/about-oxfam/our-story>>.

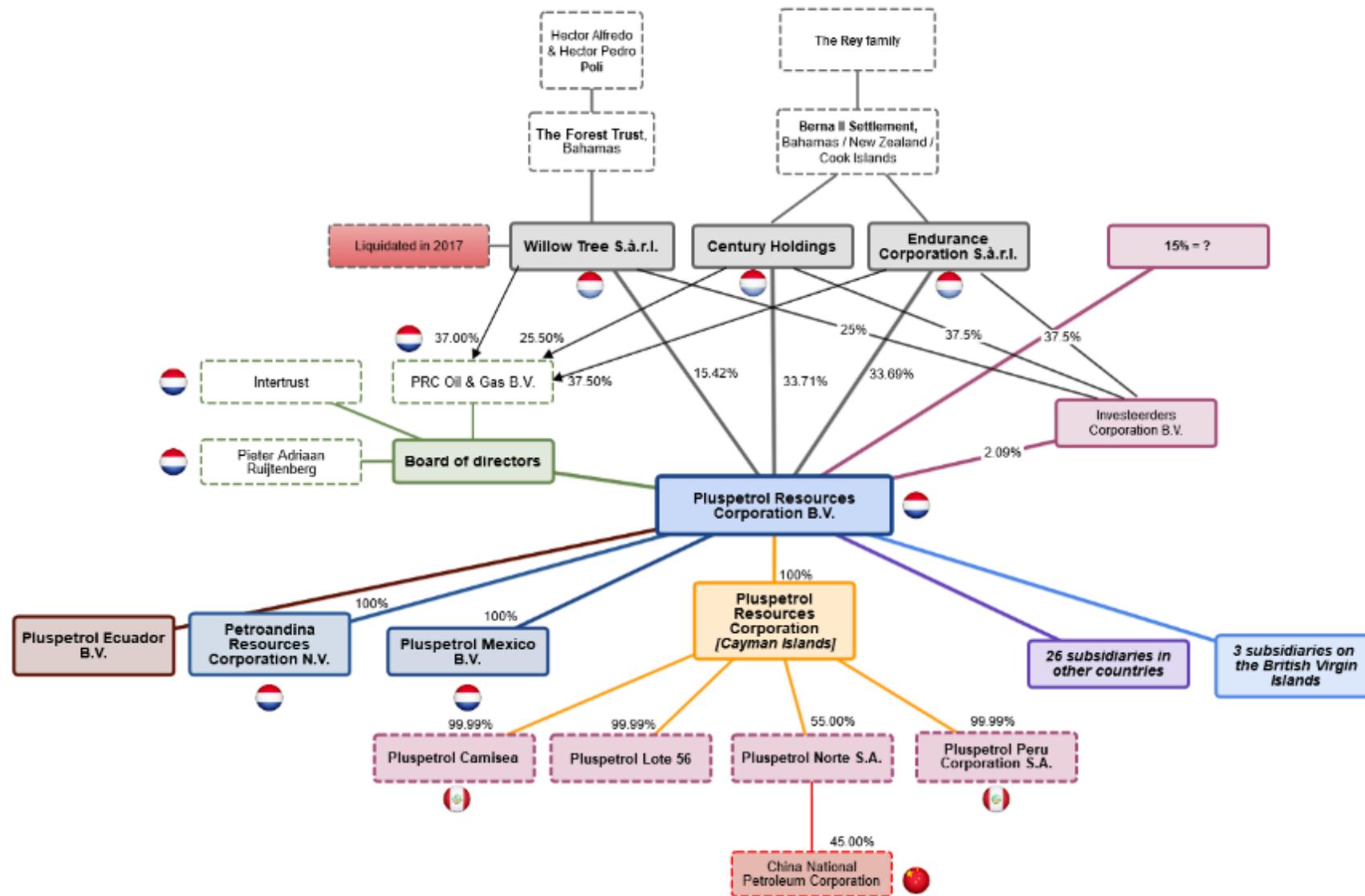
¹⁷ SOMO, "Private Gain, Public Loss", July 2013, <<https://www.somo.nl/private-gain-public-loss/>> (accessed 27 February 2020).

¹⁸ Pluspetrol Resources Corporation B.V., 2019, "Directors' report and Accounts as of December 31, 2018", extracted from Kamer van Koophandel (23 July 2019), p. 29; and Orbis database, 2019, "Pluspetrol Resources Corporation B.V." (23 July 2019).

one of which, Pluspetrol Resources Corporation, is the direct owner of several Pluspetrol companies in Peru: Pluspetrol Norte SA (55% ownership), Pluspetrol Peru Corporation S.A., Pluspetrol Camisea and Pluspetrol Lote 56 (99.99% ownership). In its 2017 and 2018 annual reports, Pluspetrol states that Pluspetrol Resources Corporation B.V. is the “ultimate parent company of the Group.”¹⁹ Figure 2 below presents a graphical depiction of Pluspetrol’s corporate structure.

¹⁹ Pluspetrol Resources Corporation B.V., 2018, “Directors’ report and Accounts as of December 31, 2017”, extracted from Kamer van Koophandel (23 July 2019), p. 22; and Pluspetrol Resources Corporation B.V., 2019, “Directors’ report and Accounts as of December 31, 2018”, extracted from Kamer van Koophandel (23 July 2019), p. 25.

Figure 2: Pluspetrol corporate structure including country of registration of various corporate entities, as of 24 February 2020



In 2018, Pluspetrol Resources Corporation B.V.’s turnover amounted to \$1.486 billion, and the company’s assets were worth \$4.6 billion at the end of the financial year.²⁰ In 2018, Pluspetrol earned its revenues in Peru, Argentina, Angola and Bolivia (no revenue was earned in the Netherlands).²¹ The company’s result before tax was \$437 million. The company only had one employee in the Netherlands in 2018 and 2017.²² Its board of directors included Intertrust Netherlands B.V. and Individual 1.²³ Intertrust is a Dutch trust company, which specialises in fiduciary services, such as tax planning. Individual 1 is a member of the boards of several companies in the Netherlands, the UK and Pakistan, including several companies in the oil sector. Individual 1 is also a director of Petroandina Resources Corporation N.V., one of Pluspetrol’s subsidiaries in the Netherlands.

2.2. Jurisdiction

This specific instance is intentionally directed solely to the Dutch NCP. Complainants contend that the Dutch NCP has jurisdiction and competence to handle this specific instance and is the appropriate entity to take the lead in handling the case for four reasons: 1) Pluspetrol is headquartered in the Netherlands, 2) many of the issues raised in this specific instance “arose” at the company’s Dutch headquarters, 3) previous attempts to resolve issues in Peru with the company’s Peruvian management have failed, and 4) indigenous communities and civil society lack confidence in the impartiality and functioning of the Peruvian NCP. Each of these reasons is explained in further detail below.

The Netherlands is Pluspetrol’s home country

Pluspetrol is a Dutch-based multinational company with headquarters in the Netherlands. Pluspetrol Resources Corporation B.V. is registered in Amsterdam, the Netherlands, and is the controlling owner of all of the Pluspetrol companies in Peru. Pluspetrol states that Pluspetrol Resources Corporation B.V. is the “ultimate parent company of the Group”.²⁴ As Pluspetrol’s “home country”, the Netherlands has a duty to ensure that its companies abide by the OECD Guidelines when operating abroad.

The OECD has recently provided guidance to NCPs and stakeholders regarding NCP coordination in specific instances involving “home” and “host” NCPs that, in our opinion, indicates that the Dutch NCP is competent to handle this case.²⁵ The OECD explains that, *“The Procedural Guidance provides that generally, issues will be dealt with by the NCP of the country in which the issues have arisen. The use of the word “generally” suggests that some degree of flexibility is permitted when applying this provision. There is no requirement under the Procedural Guidance for the NCP in the company’s home country [in this case, the Netherlands] to transfer the specific instance. Furthermore, the Procedural Guidance encourages NCPs to reach resolution on where the case should be handled. As such, the NCP receiving the submission [in this case, the Netherlands] may still handle the case”*.²⁶

²⁰ Pluspetrol Resources Corporation B.V., 2019, “Directors’ report and Accounts as of December 31, 2018”, extracted from Kamer van Koophandel (23 July 2019), p. 21-22.

²¹ Pluspetrol Resources Corporation B.V., 2019, “Directors’ report and Accounts as of December 31, 2018”, extracted from Kamer van Koophandel (23 July 2019), p. 59.

²² Pluspetrol Resources Corporation B.V., 2019, “Directors’ report and Accounts as of December 31, 2018”, extracted from Kamer van Koophandel (23 July 2019), p. 60.

²³ Pluspetrol Resources Corporation B.V., 2019, “Directors’ report and Accounts as of December 31, 2018”, extracted from Kamer van Koophandel (23 July 2019), p. 78.

²⁴ Pluspetrol Resources Corporation B.V., 2018, “Directors’ report and Accounts as of December 31, 2017”, extracted from Kamer van Koophandel (23 July 2019), p. 22; and Pluspetrol Resources Corporation B.V., 2019, “Directors’ report and Accounts as of December 31, 2018”, extracted from Kamer van Koophandel (23 July 2019), p. 25.

²⁵ OECD, 2019, Guide for National Contact Points on Coordination when handling Specific Instances, <https://mneguidelines.oecd.org/Guide-for-NCPs-on-Coordination-when-handling-Specific-Instances.pdf> (6 March 2020).

²⁶ OECD, 2019, Guide for National Contact Points on Coordination when handling Specific Instances, <https://mneguidelines.oecd.org/Guide-for-NCPs-on-Coordination-when-handling-Specific-Instances.pdf> (6 March 2020),

There is also ample precedent for the “home country” NCP taking the lead in handling cases in previous specific instances that have a link with another country with an NCP. Most recently, the French NCP accepted jurisdiction over and took the lead in handling a case similar to ours that was brought by indigenous communities and civil society organizations in Mexico.²⁷ The Dutch NCP itself has, in the past, taken the lead (jointly with the Irish NCP) in a case filed against Shell for issues arising in Ireland.²⁸

The issues raised in this specific instance “arose” in the Netherlands

The Dutch NCP is in our opinion the appropriate entity to take the lead in handling the case not only because the Netherlands is Pluspetrol’s home country, but because the breaches to the Guidelines that the complainants are alleging relate to headquarters-level decisions (actions and omissions) on due diligence (to prevent environmental and human rights impacts), remediation, disclosure, and taxation. As such, the issues put forward in this specific instance all “arose” in the Netherlands at the company’s headquarters, which is responsible for key managerial decisions, rather than in Peru. The allegations related to headquarters level breaches of the taxation and disclosure provisions of the OECD Guidelines are comparable with those in the specific instance against Chevron, for which the Dutch NCP is currently conducting an initial assessment.

Previous attempts to resolve issues in Peru have failed

A third reason for the Dutch NCP to take the lead in the case is the long history of repeated unsuccessful attempts by the complainants to resolve the issues outlined above with Pluspetrol’s management in Peru. The communities have engaged with Pluspetrol in two primary ways. First, over the years Pluspetrol has negotiated “social agreements” with individual communities. As described further below in this complaint, these social agreements have been vastly asymmetric in their benefits for Pluspetrol versus the communities, and the manner in which Pluspetrol has pursued them – negotiating different outcomes with individual communities instead of comprehensive agreements with the representative federations – has resulted in discord and weakened outcomes for the indigenous people as a whole. Second, in 2014 the state proposed a dialogue between the government, the federations, and Pluspetrol, but the company insisted on having veto rights for any agreement that would come out of the negotiation.²⁹ The Peruvian government found this demand unacceptable and removed Pluspetrol from the dialogue.

Following decades of failed negotiation with Pluspetrol’s Peruvian management, the complainants are now orienting this complaint explicitly toward Pluspetrol’s headquarters management in the Netherlands, because of the headquarters-level responsibility, vision, and resources that are required to effectively address the issues raised. As a courtesy, on 6 March 2020, complainants called Pluspetrol’s headquarters office phone and informed the file managers at Intertrust of the intention to file an OECD Guidelines complaint against Pluspetrol. The Intertrust file managers said they would pass on the message to Pluspetrol.

Indigenous communities and civil society lack confidence in the accessibility, impartiality and equitability of the Peruvian NCP

The OECD Guidelines’ Procedural Guidance states that NCPs must have the confidence of stakeholders such as civil society in order to function effectively.³⁰ The Procedural Guidance also

p.16.

²⁷ Union Hidalgo vs EDF Group, OECD Watch Case Database, https://complaints.oecdwatch.org/cases/Case_494 (6 March 2020).

²⁸ Pobal Chill Chomain Community et al. vs. Shell, OECD Watch Case Database, https://complaints.oecdwatch.org/cases/Case_146 (6 March 2020).

²⁹ Servindi website, “Nativos rechazan facultad de veto planteado por Pluspetrol”, 29 May 2014, <<http://www.servindi.org/actualidad/106019>> (3 March 2020).

³⁰ OECD, OECD Guidelines for Multinational Enterprises, 2011, Procedural Guidance, p. 80.

stipulates that NCPs must be accessible and that they must handle cases in a manner that is impartial and equitable. A recent decision to reject a case filed by indigenous communities in Peru³¹ demonstrates that the Peruvian NCP is not accessible, impartial or equitable. In the case of “Quechua indigenous group vs. Marriott International”, the NCP improperly and incorrectly challenged the indigenous complainants’ right of self-determination, and unnecessarily limited its accessibility by demanding an unreasonable burden of proof for substantiation of allegations at the initial assessment stage, when the standard to be applied should be one of “plausibility”. The NCP has rejected at the initial assessment phase all complaints filed by civil society.³²

Furthermore, the Peruvian NCP is a single-ministry NCP, the poorest performing type of NCP, and is located in a government department, ProInversión, that is tasked with attracting foreign investment, compromising its impartiality and ability to handle cases equitably. For these reasons, the Peruvian NCP does not enjoy the confidence of civil society, and it would be inappropriate for the Dutch NCP to transfer this case to the Peruvian NCP.

2.3. Parallel proceedings

2.3.1. *Past cases cited in this complaint*

This complaint refers to a number of past legal and administrative cases because they demonstrate either the Peruvian state’s acknowledgment of the adverse impacts Pluspetrol has caused, or the validity of the indigenous peoples’ protest against the company. The rulings in several of these cases have required Pluspetrol to address its impacts in various ways, such as by cleaning up contaminated sites or developing plans for remediation. Yet as the complaint also shows, Pluspetrol has largely failed to comply with these rulings, which evidences Pluspetrol’s failure to cooperate in or provide for remediation of its impacts. These past cases should not be viewed as evidence the claims have already been affirmed and the matter resolved. Instead, the cases are evidence that while the complainants’ claims are substantiated, the NCP’s assistance is still needed to encourage Pluspetrol to meet its responsibilities under international standards – and often court ruling – to address and remedy its impacts.

2.3.2. *Ongoing cases relevant to this complaint*

Pluspetrol is currently pursuing an appeal with Peru’s Supreme Court of Justice regarding its responsibility for remediation at Lot 1AB. In 2016, OEFA issued a directorial resolution sanctioning Pluspetrol for not including 1,199 additional contaminated sites in its abandonment plan.³³ In 2017 Pluspetrol appealed this ruling to the administrative Environmental Inspection Court, arguing that the sites were not attributable to them.³⁴ The Environmental Inspection Court upheld OEFA’s ruling,³⁵ so Pluspetrol appealed to the Supreme Court on 1 August 2017, asking for precautionary measures (akin to a preliminary injunction) to remove the legal effect of OEFA’s directive pending a judgment on the overall liability question. On 10 June 2019 the Supreme Court (in the first instance) denied Pluspetrol’s request for precautionary measures and left OEFA’s directorial resolution in effect. On 21 June 2019, Pluspetrol appealed this decision. The appeal has been accepted and the process is still ongoing.

³¹ Quechua indigenous group vs. Marriott International, OECD Watch Case Database, <https://complaints.oecdwatch.org/cases/Case_529> (3 March 2020).

³² OECD Watch case database, National Contact Point Peru, <<https://complaints.oecdwatch.org/cases/advanced-search/ncps/casesearchview?type=NCP&search=National%20Contact%20Point%20Peru>> (3 March 2020).

³³ OEFA, Directorial Resolution Nº 1551-2016-OEFA/DFSAI OEFA, (September 2016) (Annex 6).

³⁴ Corte Superior de Justicia, Expediente 07996-2017-7, Resolución Número Dos, 09/07/2019 (Annex 7).

³⁵ Tribunal de Fiscalización Ambiental, Resolution 046-2017-OEFA/TFA-SME, (2017) (Annex 8).

The Dutch NCP's consideration of this specific instance will not prejudice this case, for the standard used to assess award of precautionary measures under Peruvian law is quite different than the standard to assess Pluspetrol's responsibility for its impacts under the OECD Guidelines. The OECD Guidelines make clear that Pluspetrol has a responsibility to address the impacts it caused and to which it contributed even if another entity, such as the previous operator, also caused or contributed to the adverse impacts.³⁶ The Dutch NCP's consideration of Pluspetrol's Guidelines-based responsibility would not impact the Peruvian court's assessment of whether or not precautionary measures should be granted, nor whether or not Pluspetrol is ultimately liable, under the terms of its contract with Oxy, for sites initially contaminated by Oxy. Pluspetrol's denial of liability (including its related litigation) is discussed further down in the complaint.

Pluspetrol has also pursued some appeals of specific sanctions. Again, the Dutch NCP's consideration of Pluspetrol's overall remediation responsibilities under the OECD Guidelines for its activities in Lot 1AB will not prejudice Peruvian courts' or administrative bodies' consideration of these specific fines, because those appeals are grounded in Peruvian law or regulation rather than the OECD Guidelines.

2.4. Contribution to the purpose and effectiveness of the Guidelines

The Dutch NCP's consideration of this complaint will contribute to the purposes and effectiveness of the Guidelines in several ways. First, the dispute is material to several chapters and principles of the Guidelines and well-substantiated, involving several communities negatively impacted by the actions of a company headquartered in one OECD country (the Netherlands) and operating in an adhering country (Peru). Consideration of this case in order to resolve the dispute and encourage better practices by Pluspetrol is precisely the purpose of the OECD Guidelines, and also of interest to the governments involved. A second reason favouring consideration of the complaint is that application of the OECD Guidelines to the issues offers a new and untried approach to resolving a long-standing problem. To date, complainants and allies have relied on domestic Peruvian laws and international treaties to underpin their claims, and have often focused their efforts on duties of the state of Peru. Now, this specific instance allows them to try a new approach, using a different standard on responsible business conduct to hopefully encourage changed practices and policies by a multinational corporation.

Consideration of the complaint may also help elucidate the responsibilities of corporations in a couple of areas that sometimes cause confusion. First, the responsibility of companies notwithstanding failures of state duty. This case involves a few incidents where the state did not meet its own responsibility to protect certain human rights, or demand remediation for certain harms. The OECD Guidelines along with the UN Guiding Principles are clear that a company has a responsibility to respect human rights and avoid adverse impacts regardless of whether the relevant State fulfills its own duties.³⁷ Consideration of this case in that light will help clarify Pluspetrol's appropriate role and actions here. The second area of confusion that consideration of this complaint may help elucidate is the responsibility of companies over adverse impacts initiated by a predecessor. While under domestic laws, a company may not always be liable to address harms it inherited after the take-over of a predecessor company, the OECD Guidelines are clear that a company's responsibilities do extend in such cases of "legacy" impacts. The OECD's Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector clarifies that, as a part of their due diligence, "Enterprises are expected to address adverse impacts that are inherited from a predecessor but

³⁶ OECD, OECD Guidelines for Multinational Enterprises, 2011, Chapter II (General Policies) A11 and IV (Human Rights) Principles 2 & 6.

³⁷ OECD, OECD Guidelines for Multinational Enterprises, 2011, Chapter IV (Human Rights), Commentary 37-38.

which the enterprise continues to contribute to (for example discharge from operations that is being released into a community's water supply due to poor location of a catchment area by the predecessor). In the case of human rights impacts, if no other remedy is available, the acquiring enterprise should provide, enable or support remediation itself".³⁸ Consideration of this case offers a unique opportunity to inform Pluspetrol about their responsibilities in this regard under international standards.

2.4.1. Demands of Pluspetrol

In filing this complaint with the Dutch NCP, the Complainants seek the following outcomes:

- Pluspetrol's commitment to guarantee effective clean-up of all contaminated sites existing in lot 1AB before August 2015. Pluspetrol must guarantee enough funds to remediate all contaminated sites using the best techniques meeting the indigenous federations approval; and
- That Pluspetrol agrees to repair any and all damaged facilities, pipelines, wells, disposal tanks, or other property that could lead to pollution in future, under the Pipeline Integrity System Implementation Program approved by the Peruvian government for lot 1AB³⁹.

The two demands above are by far the most critical to the indigenous communities filing this complaint. At the same time, complainants also insist that Pluspetrol meet the following demands in order to bring its behaviour into line with the OECD Guidelines:

- Pluspetrol's commitment to respect human rights, including through development of a comprehensive and public human rights policy, a particular comprehensive policy on protection of the right to health of stakeholders including communities, and a particular comprehensive policy to respect the rights of indigenous peoples;
- Pluspetrol's adoption of a clear public human rights and environmental due diligence policy, aligned with the steps laid out in the OECD Multisector Due Diligence Guidance, for all of its operations across the globe;
- Disclosure by each Pluspetrol subsidiary in the Cayman Islands, the Bahamas, the British Virgin Islands, the USA, and the Netherlands of their annual accounts, their purpose and function within Pluspetrol's corporate hierarchy, and increased transparency and clarification of the purpose of intra-group transactions (e.g. loans) between these subsidiaries and Pluspetrol's subsidiaries in Peru;
- Termination by Pluspetrol of all practices designed for the facilitation of tax avoidance; and
- Adoption by Pluspetrol of disclosure, taxation, and tax risk management systems and policies that prioritize fair payment of taxes in the countries where profits are due and enable greater transparency into their operations including financial operations.

2.5. Requests of the NCP

³⁸ OECD, OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector, 2017, <<http://dx.doi.org/10.1787/9789264252462-en>>, p.74.

³⁹ OSINERGMIN, Mediante oficio N° 8377-2010-OS-GFHL-UPDL, del 17.08.2010, aprobó el Programa de implementación del Sistema de integridad de Ductos del PLUSPETROL, de acuerdo al reglamento aprobado por D.S. N° 081-2007-EM, <http://intranet2.minem.gob.pe/web/archivos/ogp/legislacion/ds081-2007.pdf>.

Complainants respectfully request that the Dutch NCP offer its good offices to facilitate mediation between ourselves and Pluspetrol to resolve the OECD Guidelines breaches discussed in this specific instance. Complainants have communicated with Pluspetrol for nearly half a century calling for it to cease and remediate its various harmful impacts in the Loreto region of the Amazon rainforest. As shown in this complaint, the indigenous communities have struggled for years using administrative and legal procedures in Peru and attempts at dialogue with Pluspetrol to attempt to compel Pluspetrol to clean up the pollution. However, these efforts have not resulted in remediation. The complainants believe that assistance of the Dutch NCP, applying the international standard of the OECD Guidelines, can help create space and impetus for a better outcome. Complainants believe an agreement could result in the tangible remediation of the harm that the people have long awaited, as well as meaningful changes in practices of Pluspetrol and perhaps other oil and extractive companies.

Two of the indigenous federations that are part of this complaint, Feconacor and Acodecospat, have communities living in Lot 8 next to Lot 1AB who are also highly impacted by Pluspetrol's past activities. Feconacor, Acodecospat and the other complainants hope that the outcome of this process may help avoid the same problems in Lot 8 when Pluspetrol's concession terminates there in 2024.

Complainants also request that the Dutch NCP offers good offices to resolve the respondent's breaches of Chapter III (Disclosure) and Chapter XI (Taxation) of the OECD Guidelines discussed in this complaint. Such an outcome would also support the global movement towards greater transparency, accountability, and citizenship in tax payment by all multinational corporations.

If mediation fails or is refused by Pluspetrol, the complainants expect that the NCP will examine the facts and make a determination itself as to whether or not Pluspetrol has breached the Guidelines. The complainants hope the NCP will provide recommendations on what steps Pluspetrol should take to address the harms it has caused and improve its due diligence in future. The complainants hope the final statement of the NCP can particularly clarify the responsibilities of companies to respect human rights and the environment regardless of the inaction or inability of states, and the responsibility of companies to undertake due diligence over – including to address and cease causation or contribution to – adverse impacts initiated by a predecessor company that are ongoing and to which the company continued to contribute. Even in the event that the NCP's good offices and efforts to bring the parties together do not result in an agreement, the complainants believe the NCP's continued handling of the case could provide a meaningful and public recognition of the harms the indigenous communities have suffered for decades, prompt improvements in Pluspetrol's behaviour, and perhaps also strengthen the Peruvian government's ability to enforce remediation on its own terms.

2.6. Statement of good faith

The complainants attest here their desire to engage in the Netherlands NCP specific instance procedure in good faith, with respect towards all parties, with the goal of bringing Pluspetrol's practices into alignment with the OECD Guidelines, for the improvement of the lives of people implicated by the harms identified in this complaint. The complainants will respect the confidentiality of any mediation proceedings that may result from this complaint; however, the complainants intend to inform their communities and constituents informed about the nature of the complaint, their demands, and the overall general progress of the complaint as it moves through the stages of the NCP's review process. No information exchanged during the NCP process will be made public.

3. Pluspetrol's breaches of the OECD Guidelines and substantiation

This specific instance complaint alleges that Pluspetrol has failed to meet expectations established in the OECD Guidelines with regard to environmental and human rights due diligence and remediation of impacts (Chapter II and Chapter IV), taxation (Chapter XI) and disclosure (Chapter III). The sub-sections below provide specific explanations and substantiation with regard to Pluspetrol's actions and omissions in breach of specific provisions of the OECD Guidelines.

3.1. Pluspetrol failed to conduct due diligence to prevent adverse environmental impacts, leading it to cause and contribute to environmental contamination at over 1,900 sites

The OECD Guidelines specify that:

- ➔ "Enterprises should carry out risk-based due diligence [...] to identify, prevent and mitigate actual and potential adverse impacts."⁴⁰
- ➔ "Enterprises should avoid causing or contributing to adverse impacts on matters covered by the Guidelines, through their own activities, and address such impacts when they occur."⁴¹

Contrary to these Guidelines provisions, Pluspetrol failed to conduct due diligence to prevent adverse impacts from its oil extraction activities in Lot 1AB. Pluspetrol's failures of due diligence led it to cause and contribute to contamination of at least 1,963 sites through a range of irresponsible practices. The contamination has been linked to health impacts. The failures of due diligence are evidenced in the following areas, each explained in further detail in the sub-sections below:

- Seeking inappropriate environmental standards for areas of human habitation
- Contamination from inadequate maintenance of pipes and other infrastructure
- Contamination by improper disposal of production waters
- Contamination by oil spills
- Contamination by other poor practices
- Sanctions against Pluspetrol for contamination

⁴⁰ OECD, OECD Guidelines for Multinational Enterprises, 2011, Chapter II (General Policies), paragraph A10.

⁴¹ OECD, OECD Guidelines for Multinational Enterprises, 2011, Chapter II (General Policies), paragraph A11.

Transitions of Environmental Competencies in Peru

1996 - 2007

2007 - 2010

2010/2011 onwards



3.1.1. Seeking inappropriate environmental standards for areas of human inhabitation

In order to understand how and why Pluspetrol polluted Lot 1AB to such a devastating degree, it is important to understand the following bit of context. In 1996, Pluspetrol contracted an external environmental consultant, the Sea Crest Group, to propose pollution levels and objectives for remediation work in Lot 8 (adjacent to Lot 1AB). Sea Crest's studies in 1997 and 1998 established different risk categories for the use of land in relation to population (high risk for populations living 400m from operations and no risk for populations living 5km from operations) and incorrectly considered area used and relied upon by indigenous communities to be in the "industrial" category for which a lower environmental standard was required⁴². The industrial categorization would allow Pluspetrol to pollute at a level of 30,000mg of total petroleum hydrocarbons (TPH) per kilogram of soil, 30 times more pollution than the standard of 1,000 mg/kg TPH for residential land finally approved for Lot 8.⁴³

This assessment was inappropriate in the Amazon context, where indigenous peoples frequently travel several kilometres to hunt animals, and animals in turn also cover large areas of the territory. Indeed, several studies have shown that numerous species of animals in the area, such as lowland tapir, paca, redbrocket deer and collared peccary, the four most important wildlife species for the local indigenous peoples' diet, consume oil-contaminated soils and water.^{44, 45} Evidence suggests that these animals approach contaminated areas to ingest oil-polluted soils due to their very high salinity. Communities that rely on subsistence hunting are thus exposed to petrogenic compounds from the

⁴² Sea Crest, 1998, Estudio Ambiental Fase I. Volumen 1. Límites de Intervención Objetivo (Annex 9).

⁴³ Comisión de Pueblos Andinos, Amazónicos y Afroperuanos, Ambiente y Ecología del Congreso de la República - Grupo de Trabajo sobre la Situación Indígena de las Cuenca de los Ríos Tigre, Pastaza, Corrientes y Marañón. Final Report. Legislative term 2012 – 2013 (en adelante Comisión del Congreso 2012-2013) en 25, 29, [http://www2.congreso.gob.pe/sicr/comisiones/2011/com2011pueandamaframbecho.nsf/pubs1foto/7C6EA2CE879846F505257A440053CE21/\\$FILE/INFORME_FINAL.PDF](http://www2.congreso.gob.pe/sicr/comisiones/2011/com2011pueandamaframbecho.nsf/pubs1foto/7C6EA2CE879846F505257A440053CE21/$FILE/INFORME_FINAL.PDF).

⁴⁴ Pedro Mayor, Antoni Rosell, Mar Cartró-Sabaté, Martí Orta Martínez 'Actividades petroleras en la Amazonía: ¿Nueva amenaza para las poblaciones de tapir?' Tapir Conservation 23(32) July 2014, p 26-30.

⁴⁵ Orta-Martínez, M., A. Rosell-Melé, M. Cartró-Sabaté, C. O'Callaghan-Gordo, N. Moraleda-Cibrián, and P. Mayor. 2018. First evidences of Amazonian wildlife feeding on petroleum-contaminated soils: a new exposure route to petrogenic compounds? *Environmental Research* 160:514-517. <http://dx.doi.org/10.1016/j.envres.2017.10.009>.

contaminated soils through the wild game they eat. Nevertheless in 1997 the Peruvian Ministry of Energy and Mines accepted these low industrial standards as proposed by Pluspetrol's hired consultant.

In 2003, new regulations⁴⁶ required Pluspetrol to present a Complementary Environmental Plan (PAC) for Lot 1AB because the environmental and remediation objectives established by its 1996 Environmental Management and Adjustment Programme (PAMA) had not been achieved by the deadline of 2002. The new regulations also demanded the identifications of contaminated sites. When Pluspetrol presented its PAC for Lot 1AB in 2004, the company proposed to continue using the low industrial standard of 30,000mg TPH / kg of soil that had been proposed by Sea Crest and accepted by the Ministry in 1997, even though Pluspetrol knew indigenous communities were using those lands.⁴⁷ The Ministry's decision over Lot 1AB was quick, to approve the low standard.⁴⁸ More time was taken to review the PAC for Lot 8, and there the Ministry instead adopted a more appropriate residential categorization.

Pluspetrol knew or should have known the industrial classification was inappropriate for Lot 1AB, because it was operating in adjacent Lot 8, inhabited to the same degree by the same indigenous groups, using the higher environmental standard of 1,000 mg/kg for total pollution by petroleum hydrocarbons.⁴⁹ Pluspetrol also knew indigenous peoples lived at Lot 1AB⁵⁰ and therefore that residential standards should be adopted. Nevertheless, Pluspetrol sought the lower standard.

Pluspetrol also failed to meet even the low industrial standards. In 2004, OSINERGMIN, the regulatory body for energy investment, reported the presence of hydrocarbons, chlorides and barium in environmental samples above acceptable limits at Lot 1AB, finding "areas saturated by contamination due to old and recent hydrocarbon activities"⁵¹ and "presence of visible petroleum spills in different places."⁵² Further, since prior to 2008 Peruvian legislation lacked official standards for some contaminants in soil, water and sediments, the state typically ignored Pluspetrol's reporting of concentrations of such chemicals exceeding international standards.⁵³

3.1.2. Contamination from inadequate maintenance of pipes and other infrastructure

Pluspetrol's failure to conduct due diligence to maintain and manage its pipe and infrastructure system led to contamination resulting from leaks from the corroded pipes and obsolete infrastructure.

The system of pipelines and other infrastructure such as wells and tanks in Lot 1AB was built in 1971 when Oxy's oil operations started. The system's lifespan was calculated at its instalment to be only

⁴⁶ Ministry of Energy and mines, Decreto Supremo N° 028-2003-EM, (2003)

http://www.osinerg.gob.pe/newweb/uploads/GFH/DS028_2003_Plan_Ambiental_Complementario_PAC.pdf.

⁴⁷ Pluspetrol, 2004, "Plan Ambiental Complementario (PAC) para el Lote 1-AB," (Annex 39).

⁴⁸ United Nations Development Programme, Independent Technical Study, (July 2018), p. 86,
https://www.pe.undp.org/content/peru/es/home/library/democratic_governance/eti-del-ex-lote-1ab.html.

⁴⁹ Evaluation of PAC for Lot 8 had observations in terms of using standards for TPH for agriculture lands, an observation that was fought by Pluspetrol under an Administrative Sanctionary Procedure: Directoral Resolution N° 098-2012-OEFA/DFSAI, <https://www.oefa.gob.pe/?wpfb_dl=1664> (April 2012) (6 March 2020).

⁵⁰ Letter from Pluspetrol to FEDIQUEP, "From the year 2001, Pluspetrol Norte S.A. has cooperation relationships with all communities that are located in lot AB," p. 1 (Annex 11); also see, e.g. Pluspetrol Social Agreement with Community Abelino Cáceres (2003) (Annex 12).

⁵¹ OSINERGMIN, 2004, Informe Lotes 1-AB y 8. Respuesta al Oficio No 0075-2004-JDC/CR del Congreso de la República, p. 19 (Annex 13).

⁵² OSINERGMIN, 2004, "Informe Lotes 1-AB y 8. Respuesta al Oficio No 0075-2004-JDC/CR del Congreso de la República, p. 16 (Annex 13).

⁵³ Orta Martínez, M., Napolitano, D. a, MacLennan, G. J., O'Callaghan, C., Ciborowski, S., & Fabregas, X. (2007), Impacts of petroleum activities for the Achuar people of the Peruvian Amazon: Summary of existing evidence and research gaps, Environmental Research Letters, 2(4), 045006. <<https://doi.org/10.1088/1748-9326/2/4/045006>> (6 March 2020).

approximately 20 years, as corrosion of the pipes and other infrastructure from the oil itself and the wet environmental conditions (high humidity, proximity to water sources and flooding, and hard rains) causes pipes and other infrastructure to corrode and rupture quickly.⁵⁴ Oxy never replaced the piping or infrastructure systems, so they were already 10 years past their expected lifespan when Pluspetrol acquired the lot in 2000. Although the pipes were in dire need of replacement or substantial renewal, Pluspetrol undertook just minor improvements such as raising and temporarily patching corroded pipes.⁵⁵ Pluspetrol went on to operate for 15 years without properly maintaining and replacing the old, dilapidated system of pipes and other infrastructure. This failure of due diligence led to numerous instances of environmental contamination, as documented by Peruvian government authorities at OSINERGMIN and OEFA in various inspection and sanctioning reports in 2012⁵⁶, 2013⁵⁷, 2014⁵⁸, 2015⁵⁹, 2016⁶⁰, 2017⁶¹, and 2018⁶².

Photo 1: Pipe showing three clamps added following three pipe ruptures that led to spills.



Credit: Yaizha Campanario and PUINAMUDT

These reports identify multiple instances in which Pluspetrol's failure to conduct due diligence to maintain and manage its pipe and infrastructure system led to contamination. For example, the 2013 OSINERGMIN technical report found Pluspetrol had not ensured a protective coating on the pipes

⁵⁴ Occidental Petroleum Programa de Adecuacion y Manejo Ambiental (PAMA) Lote 1-AB, p. 19 (Annex 14).

⁵⁵ Testimony from Quechua environmental monitors from FEDIQUEP Federation.

⁵⁶ OSINERGMIN, 2012, "INFORME N° 219880-2012-GFHL-UPP (Pastaza)", p.15 (Annex 15).

⁵⁷ OSINERGMIN, 2013, "INFORME N° 232960-2013-GFHL-UPPD (Tigre)" (Annex 16)

⁵⁸ OEFA, 2014, "Informe 411/2014-DS-HID," para. 57 (Annex 1).

⁵⁹ OEFA, 2015, "RSD 040-2015-OEFA/DFSAI/SDI," pp. 207, 228 (Annex 17)

⁶⁰ OEFA, 2016, "Rev 048-2016-OEFA/TFA/SME" (Annex 18).

⁶¹ OEFA, 2017, "Rev. 046-2017-OEFA/TFA-SME" (Annex 8).

⁶² OEFA, 2018, "Res 063-2018-OEFA/TFA/SMEPIM" (Annex 19).

used to reinject production waters (wastewaters with carcinogenic substances); failed to insert insulating elements between pipes and their support structures; and abandoned pipes that had been replaced, sometimes leaving them on top of others or burying them prone to pressure and breakage.⁶³ The 2014 OEFA report identified that Pluspetrol had failed to waterproof 17 of its 48 hydrocarbon storage tanks⁶⁴ and failed to store crude oil treatment facilities on waterproof concrete slabs to protect the ground in the event of spillage.⁶⁵ In yet another example, in 2015 OSINERGMIN identified 15 inactive wells in which Pluspetrol was proposing to store production waters despite the fact that "most likely, most production equipment and pipes are in poor condition due to corrosion and/or carbonate scale as a result of the time they were installed and the time they have been inoperative."⁶⁶

According to Pluspetrol's latest report presented to OSINERGMIN regarding its Pipeline Integrity System Implementation Program to bring itself into compliance with new oil pipeline regulation for Lot 1AB, Pluspetrol did not install basic spill prevention and control techniques such as shut-off valves and supervisory control and data acquisition (SCADA) systems.⁶⁷ Further, OSINERGMIN found that Pluspetrol had failed to install protective coating to prevent corrosion in 54% of its pipelines.⁶⁸

Pluspetrol has been fined extensively by OEFA and OSINERGMIN for failing to properly monitor corroding pipelines⁶⁹ and for failing to repair damaged pipelines.⁷⁰

3.1.3. *Contamination by improper disposal of production waters*

Pluspetrol's failure to conduct due diligence to ensure the appropriate disposal of production waters led it to cause extensive contamination.

Production waters are "waters trapped in underground formations that are extracted to the surface along with gas or oil" and substances added to the drilling well.⁷¹ They are the main waste produced in the exploitation of oil, and throughout the life of the well, the proportion of production waters to oil increases, reaching 98% of what is extracted at the end of its productive life.⁷² Production waters have high temperatures, high concentrations of chlorides, and may contain toxic substances including heavy metals (such as arsenic, cadmium, chromium, copper, lead, mercury, zinc), polycyclic aromatic hydrocarbons and radio isotopes.⁷³ As a result, production waters "can present a threat to aquatic life or to crops when water is used for irrigation."⁷⁴ Research shows that soils are a natural repository of

⁶³ OSINERGMIN, 2013, "Technical Report No. 33-2013-GFHL-UPPD."

⁶⁴ OEFA, 2014, "Informe 411/2014," para. 57 i) and ii) (Annex 1).

⁶⁵ OEFA, 2014, "Informe 411/2014," para. 57 iv) (Annex 1).

⁶⁶ Oficio No. 422-2015-OS-GFHL/UPPD 11 de febrero del 2015, junto con el Informe Técnico de OSINERGMIN No. 249588-OS/GFHL/UPPD Referente a Pozos Inactivos del Lote 1-AB Propuestos por Pluspetrol Norte S.A para ser utilizados como pozos inyectores de agua. 18 de enero del 2015.

⁶⁷ OSINERGMIN, 2019, "File N° 201900183934", in response to Freedom of Information request in November 2019 (Annex 20).

⁶⁸ OSINERGMIN, 2019, "File N° 201900183934", in response to Freedom of Information request in November 2019 (Annex 20).

⁶⁹ OEFA, 2016, "Rev 048-2016- OEFA/TFA/SME" (Annex 18).

⁷⁰ Tribunal de Fiscalización Ambiental, Resolución 062-2016-OEFA-TFA-SEE (September 2016) (Annex 21).

⁷¹ John A. Veil, Markus G. Puder, Deborah Elcock, Robert J. Redweik, Jr "Un Papel en Blanco describiendo el Agua producida de la Producción de Petróleo Crudo, Gas Natral, y yacimientos de metano" (Departamento de Energía de los Estados Unidos, enero del 2004, <<http://www.circleofblue.org/wp-content/uploads/2010/08/prodwaterpaper1.pdf>>, p. 5.

⁷² John A. Veil, Markus G. Puder, Deborah Elcock, Robert J. Redweik, Jr "Un Papel en Blanco describiendo el Agua producida de la Producción de Petróleo Crudo, Gas Natral, y yacimientos de metano" (Departamento de Energía de los Estados Unidos, enero del 2004, <<http://www.circleofblue.org/wp-content/uploads/2010/08/prodwaterpaper1.pdf>>, p. 5, vi.

⁷³ J.M. Neff, Bioacumulación en Organismos Marinos. Efectos de la Contaminación por Agua de la producción de petróleo (2002).

⁷⁴ John A. Veil, Markus G. Puder, Deborah Elcock, Robert J. Redweik, Jr "Un Papel en Blanco describiendo el Agua producida de la Producción de Petróleo Crudo, Gas Natral, y yacimientos de metano" (Departamento de Energía de los Estados Unidos, enero del 2004, <<http://www.circleofblue.org/waternews/wp-content/uploads/2010/08/prodwaterpaper1.pdf>>, p. 5.

heavy metals and that, because most metals do not undergo microbial or chemical degradation, “their total concentration in soils persists for a long time after their introduction.”⁷⁵ Thus environmental degradation results when production waters are poured onto the surface of bodies of water without treatment, or allowed to seep into the ground.⁷⁶

The safe method for disposal of production waters is never to dump them without treatment, but rather to “re-inject” them into rock formations for safe storage. Because of the toxicity of production waters, most authorities – for example, the U.S. Environmental Protection Agency (EPA) – forbid dumping them in local water supplies.⁷⁷ As early as 1985, the United States used reinjection to handle more than 92% of all production waters in land wells; and by 2007, 98% of production waters were reinjected.⁷⁸ Experts in the oil and gas sectors explain that the EPA “and state agencies consider [reinjection] a widely used, safe and effective method to dispose of production waters,” think dumping “is not approved for most land wells,” and say that any non-reinjected production water, “where permitted, needs to be treated unless the water is of good quality”, since “if the waters are managed carelessly, such as pouring them on the surface of local bodies of untreated water or letting them seep into the ground, extensive environmental degradation would be found.”⁷⁹

During much of the operation of Lot 1AB, the state of Peru did not require oil companies including Oxy and Pluspetrol to reinject production waters. For a while, the state set permissible limits for production waters based on the classification (industrial, residential, etc.) of the lot. The PAMAs for Lots 1AB and 8, approved in 1996 to be implemented before 2002, did not include the reinjection of produced water. Although the OECD Guidelines make clear that companies should honour international standards that do not place them in violation of national laws,⁸⁰ Pluspetrol met the lower domestic practice of dumping production waters rather than the long-standing higher international practice of reinjecting them.

Photo 2: Production waters at high temperatures being dumped into Pucacungayacu river, tributary of Corrientes river

⁷⁵ Raymond A. Wuana and Felix E. Okiemen, “Review article: Heavy Metals in Contaminated Soils: A Review of Sources, Chemistry, Risks and Best Available Strategies for Remediation,” ISRN Ecology, Volume 2011, August 2011, <<https://www.hindawi.com/journals/isrn/2011/402647/>>.

⁷⁶ Raymond A. Wuana and Felix E. Okiemen, “Review article: Heavy Metals in Contaminated Soils: A Review of Sources, Chemistry, Risks and Best Available Strategies for Remediation,” ISRN Ecology, Volume 2011, August 2011, <<https://www.hindawi.com/journals/isrn/2011/402647/>> p. 21.

⁷⁷ Documento de trabajo de la NPC *Estudio de Desarrollo de Recursos de Norte América* disponible el 15 de septiembre del 2011 Hoja #2-17 MANEJO DE AGUA PRODUCIDA DE PETROLEO Y YACIMIENTOS DE GAS Preparado por el *Technology Subgroup of the Operations & Environment Task Group* page 12 <http://www.npc.org/Prudent_Development-Topic_Papers/2-17_Management_of_Produced_Water_Paper.pdf>.

⁷⁸ Documento de trabajo de la NPC *Estudio de Desarrollo de Recursos de Norte América* disponible el 15 de septiembre del 2011 Hoja #2-17 MANEJO DE AGUA PRODUCIDA DE PETROLEO Y YACIMIENTOS DE GAS Preparado por el *Technology Subgroup of the Operations & Environment Task Group* page 12 <http://www.npc.org/Prudent_Development-Topic_Papers/2-17_Management_of_Produced_Water_Paper.pdf>, p. 15-16.

⁷⁹ Documento de trabajo de la NPC *Estudio de Desarrollo de Recursos de Norte América* disponible el 15 de septiembre del 2011 Hoja #2-17 MANEJO DE AGUA PRODUCIDA DE PETROLEO Y YACIMIENTOS DE GAS Preparado por el *Technology Subgroup of the Operations & Environment Task Group* page 12 <http://www.npc.org/Prudent_Development-Topic_Papers/2-17_Management_of_Produced_Water_Paper.pdf>.

⁸⁰ OECD, OECD Guidelines for Multinational Enterprises, 2011, Chapter I (Concepts and Principles), Principle 2.



Credit: Martí Orta-Martínez (Institut of Environmental Science and Technology. Autonomous University of Barcelona) and Feconacor

In 1993 a Peruvian law⁸¹ stated that production waters should preferably be reinjected, though dumping was allowed in some circumstances. The law from 1993 required oil companies to implement a PAMA to bring themselves into compliance with the new obligations, but the PAMAs for blocks 1AB and 8, approved in 1996 to be implemented before 2002, did not include the reinjection of produced water.

By March 2006, the reinjection of all production waters was an obligation in Peru, but lots 1AB and 8 were exempted from this provision. Pluspetrol was granted an extension until 2008 to present a new PAC at Lot 1AB. The PAC, approved in 2005, did not include the reinjection of the produced water.⁸²

The OECD Guidelines make clear that companies should honour international standards that do not place them in violation of national laws.⁸³ Despite this, Pluspetrol adopted the lower domestic practice of dumping production waters, notwithstanding the long-standing higher international practice of reinjecting them would not have put them in violation of Peruvian law.

Further, the official record shows that Pluspetrol did not even meet the state's already low standards for disposal of production waters at industrial sites. In 2004, OSINERGMIN reported that Pluspetrol only very inefficiently separated hydrocarbons and fats before dumping the production waters on the

⁸¹ Ministerio de Energía y Minas, 1993, DS-046-93-EM (Annex 22).

⁸² Orta-Martínez, M., Pellegrini, L., & Arsel, M. (2018). The squeaky wheel gets the grease? The conflict imperative and the slow fight against environmental injustice in northern Peruvian Amazon. *Ecology and Society*, 23(3), art7. <https://doi.org/10.5751/ES-10098-230307>.

⁸³ OECD, OECD Guidelines for Multinational Enterprises, 2011, Chapter I (Concepts and Principles), Principle 2.

ground or into streams. This meant that the effluent contained high concentrations of chlorides, oils and fats.⁸⁴ On 6 January 2005, OSINERGMIN fined Pluspetrol for contamination of soil and rivers by the discharge of production waters in excess of authorized amounts for an industrial site, and issued an order requesting the closure of 17 production wells in Lot 1AB.⁸⁵ According to a 2019 study by the Autonomous University of Barcelona (UAB), a significant number of the production water samples did not meet Peruvian legal requirements to be discharged into the environment.⁸⁶ Figure 3 reveals percentages of production water concentration values that exceeded current and past Peruvian legal limits for industrial effluents in Directorate Resolution N°030-96 and Supreme Decree N° 037-2008 PCM, respectively. Percentages above Supreme Decree N° 037-2008-PCM show samples that would be illegal under current standards.

Figure 3: Percentages of production water concentration values that exceeded current and past Peruvian legal limits for industrial effluents

Percentage of samples over legal thresholds									
	D.S. N° 037-2008-PCM / Res. Direct. N°030-96 average value		Res. Direct. N°030-96 instant value						
	Chlorides	Lead	SOF	Barium	Cadmium	Chrome	THC	Arsenic	
N	553	588	582	486	259	227	37	17	
Total	83/ 0/ 0	10.8/ 4.2/ 2.8	44.3/ 44.3/ 24.7	25.3/ 34.3/ 25.3	0.3/ --/ --	6.1/ --/ --	29.7/ --/ --	0/ --/ --	
Corrientes Basin	33.9/ 0/ 0	4.2/ 1.8/ 1.3	15.9/ 15.9/ 6.7	13.1/ 17.4/ 13.1	0.3/ --/ --	2.6/ --/ --	13.5/ --/ --	0/ --/ --	
Pastaza Basin	7.4/ 0/ 0	0/ 0/ 0	0.5/ 0.5/ 0.5	2/ 2.8/ 2	0/ --/ --	0/ --/ --	8.1/ --/ --	0/ --/ --	
Tigre Basin	14.1/ 0/ 0	1.5/ 0.6/ 0.6	11.5/ 11.5/ 8.9	1.2/ 1.2/ 1.2	0/ --/ --	2.2/ --/ --	5.4/ --/ --	0/ --/ --	
Marañon basin	27.1/ 0/ 0	5.1/ 1.7/ 0.8	16.3/ 16.3/ 8.5	8.4/ 12.3/ 8.4	0/ --/ --	1.3/ --/ --	2.7/ --/ --	0/ --/ --	
Oil block 192	11/ 0/ 0	0.5/ 0.1/ 0	0.5/ 0.5/ 0.5	5.7/ 6.5/ 5.7	0/ --/ --	0/ --/ --	21.6/ --/ --	0/ --/ --	
Oil block 8	71.9/ 0/ 0	10.3/ 4/ 2.8	43.8/ 43.8/ 24.2	19.5/ 27.7/ 19.5	0.3/ --/ --	6.1/ --/ --	8.1/ --/ --	0/ --/ --	

In addition, in 2004 OSINERGMIN found that production water self-monitoring by Pluspetrol was invalid, because Pluspetrol was sampling water taken too far from outlets of production water.⁸⁷ Peruvian law required all oil companies to submit to the Ministry of Energy and Mines self-assessments of water quality from water samples taken no further than 500m upstream and downstream from a production water dump site.⁸⁸ But in Pluspetrol's case, only 14% of the water samples were retrieved within a 500m distance from the discharge point, while 70% of samples were taken 10 km from a dump site.⁸⁹ Pluspetrol submitted 377 water samples from sites as far as 36 km downstream from the dump site, where the concentration of toxins in the water would necessarily appear much lower.

A 2006 report done on Achuar population by the Ministry of Health found that Pluspetrol was discharging 750,904 barrels of production water per day into water consumed or used by the communities in Lot 1AB.⁹⁰ Given its high levels of dumping and poor separation of hydrocarbons

⁸⁴ Orta Martínez, M., Napolitano, D. a, MacLennan, G. J., O'Callaghan, C., Ciborowski, S., & Fabregas, X. (2007). Impacts of petroleum activities for the Achuar people of the Peruvian Amazon: summary of existing evidence and research gaps. *Environmental Research Letters*, 2(4), 045006. <https://doi.org/10.1088/1748-9326/2/4/045006>. Referring to OSINERGMIN, 2004, Informe Lotes 1-AB y 8. Respuesta al Oficio No 0075-2004-JDC/CR del Congreso de la República (Annex 13).

⁸⁵ OSINERGMIN, Informe técnico No. 224817-2013-GFHL-UPPD, "Solicitud de Información de los Lotes 1-AB y 8 de Pluspetrol Norte S.A. por Despacho Congresal" (19 March 2013), p. 4 (Annex 23)

⁸⁶ Yusta-García, Raúl. 2019. Water and Soil Pollution due to oil extraction activities in the Northern Peruvian Amazon. PhD thesis. ICTA-UAB (Barcelona, Spain), p. 75.

⁸⁷ OSINERGMIN, 2004, Informe Lotes 1-AB y 8. Respuesta al Oficio No 0075-2004-JDC/CR del Congreso de la República, (Annex 13).

⁸⁸ Ministerio de Energía y Minas, Decreto Supremo N° 046/93/EM, "Reglamento para la protección ambiental en las actividades de hidrocarburos," (1993) (Annex 22).

⁸⁹ Yusta-García, R., Orta-Martínez, M., Mayor, P., González-Crespo, C., & Rosell-Melé, A. (2017). Water contamination from oil extraction activities in Northern Peruvian Amazonian rivers. *Environmental Pollution*, p. 225, 370–380, <https://doi.org/10.1016/J.ENVPOL.2017.02.063>

⁹⁰ Ministerio de Salud, 2006, "Análisis de la Situación Integral de Salud del Pueblo Achuar". Dirección General de Epidemiología. https://www.dge.gob.pe/publicaciones/pub_asis/asis20.pdf.

before dumping, Pluspetrol may have dumped on the ground or into streams the equivalent of 334,024 barrels between 2000 to 2006.⁹¹

Pluspetrol did not have a comprehensive plan to reinject production waters produced in Lot 1AB until the Achuar indigenous group mobilized in 2006 to protest contamination generated by Pluspetrol's operations in Lots 1AB and 8 in 2006. Their successful 13-day blockade of Pluspetrol's operating facilities resulted in the negotiation of the "Dorissa Act," an agreement between the communities, the state, and Pluspetrol.⁹² Among other achievements, the Dorissa Act secured commitment by Pluspetrol to ensure 100% reinjection of the production waters being dumped in the Corrientes River in Lot 1AB by 2007 (Lot 8 by 2008).⁹³ These commitments were formalized in a project entitled "Reinjection of production waters and Surface Facilities" for lot 1AB.⁹⁴ Although the reinjection of production waters began in a subset of areas (Capahuari Sur, Capahuari Norte and Forestal) in 2007,⁹⁵ it was not until April 2009, two years late, that Pluspetrol achieved the reinjection of 100% of their production waters in lot 1AB.

It is estimated that from 2000 to 2009, Pluspetrol dumped 1,669 million barrels of production waters in Lot 1AB.⁹⁶ According to a 2019 study by the Autonomous University of Barcelona (UAB), "the total accumulated volume of PW [production waters] discharged in the northern Peruvian Amazon [1974-2009] reached 7,090 million barrels, containing thousands of tons of different toxic chemicals."⁹⁷

In 2009, OSINERGMIN published a report acknowledging that high concentrations of chloride, alongside the high temperatures of untreated production waters, had affected large forest areas in six batteries from Lot 1AB.⁹⁸ It also stressed that production waters were the main cause of contamination⁹⁹ because, out of the 30 samples that were taken, 26 (more than 83%) evidenced the presence of at least one type of pollutant (chloride, total hydrocarbons or barium) above the maximum levels allowed.¹⁰⁰ The report explained that in addition to water, the soil was also contaminated with

⁹¹Orta-Martínez, 2020, based on data from "Calculations based on data from RD 0153-2005-MEM/AAE and Navarro, W., Muro, L. (2007). Produced Water Reinjection in Mature Field With High Water Cut. Soc. Pet. Eng. <https://doi.org/10.2118/108050-MS>

⁹² Dorissa Act, 2006: <https://observatoriopetrolero.org/wp-content/uploads/2019/02/Acta-Dorissa-22-10-06.pdf>

⁹³ "Antecedentes del conflicto en la región de Andoas. Relación con transnacional Pluspetrol" 10 abril del 2009 <https://casoandoas.wordpress.com/2009/04/10/antecedentes-del-conflicto-en-la-region-de-andoas-relacion-con-la-transnacional-pluspetrol/> (checked 28/02/2020)

⁹⁴ Ministerio de Energía y Minas, 2007, Resolución Directoral No. 612-2007-MEM/AAE. [https://cdn.www.gob.pe/uploads/document/file/311168/612-2007-MEM-AAE.pdf](https://cdn。www.gob.pe/uploads/document/file/311168/612-2007-MEM-AAE.pdf)

⁹⁵ Pilot projects for reinjection proposed by Pluspetrol: 2007: Capahuari Sur, Capahuari Norte, Forestal; 2008: Shiviaycu, 2009: San Jacinto.

⁹⁶ Orta-Martínez personal communication. Calculations based on data from W Navarro, W., Muro, L. (2007). Produced Water Reinjection in Mature Field With High Water Cut. Soc. Pet. Eng. <https://doi.org/10.2118/108050-MS>.

⁹⁷ Orta-Martínez, M., Pellegrini, L., Arsel, M., Yusta-García, R. and Rosell-Mele, A. 2020, (Submitted). "Chances for redress of environmental harm. Oil pollution in the northern Peruvian Amazon and limitations of the prosecution of extraterritorial environmental crimes committed by corporations."

⁹⁸ OSINERGMIN, "Eliminación del mayor impacto ambiental de los campos petroleros," El informe arrojó que, por lo menos, 180 áreas forestales resultaron afectadas diciembre del 2009, p. 31, https://www.osinergmin.gob.pe/seccion/centro_documental/hidrocarburos/Publicaciones/Eliminacion_del_mayor_impacto_ambiental_de_la_Selva_Peruana.pdf.

⁹⁹ OSINERGMIN, "Eliminación del mayor impacto ambiental de los campos petroleros," El informe arrojó que, por lo menos, 180 áreas forestales resultaron afectadas diciembre del 2009, p. 31, https://www.osinergmin.gob.pe/seccion/centro_documental/hidrocarburos/Publicaciones/Eliminacion_del_mayor_impacto_ambiental_de_la_Selva_Peruana.pdf.

¹⁰⁰ OSINERGMIN, "Eliminación del mayor impacto ambiental de los campos petroleros," El informe arrojó que, por lo menos, 180 áreas forestales resultaron afectadas diciembre del 2009, p. 31, https://www.osinergmin.gob.pe/seccion/centro_documental/hidrocarburos/Publicaciones/Eliminacion_del_mayor_impacto_ambiental_de_la_Selva_Peruana.pdf.

chloride, total hydrocarbons and barium that exceeded the permissible limit imposed by other countries, including the United States and Canada, as well as in Europe.¹⁰¹

Even after Pluspetrol started reinjecting production waters, it failed to comply with reinjection standards. In 2011, OSINERGMIN suspended the production of five wells in lot 1AB since the Pluspetrol's Forestal 04D wells was not complying with reinjection regulations.¹⁰² Pluspetrol also failed adequately to implement the reinjection monitoring system it committed to under its 2007 Project of Re-injection of Production Waters. In 2014 OEFA documented¹⁰³ and sanctioned¹⁰⁴ Pluspetrol for failing to monitor the quality of the production waters that were being re-injected and their possible impacts on groundwater. Leaks and spills at reinjection sites were identified by Peruvian environmental agencies in 2013¹⁰⁵ and 2016¹⁰⁶ and in an Independent Technical Study by the United Nations Development Programme (UNDP) in 2018.¹⁰⁷ The results of that UNDP Independent Study have been accepted by the Peruvian Ministry of Energy and Mines.

The amount of production water dumping at Lot 1AB, and its toxicity, has been studied in a few reports by researchers at the Autonomous University of Barcelona (UAB). A 2017 UAB report studying 2,951 river water samples and 652 production water chemical analyses from governmental institutions and Pluspetrol reports, showed Pluspetrol's dumping resulted in the widespread contamination of natural water courses and high downstream concentrations of chloride, barium, hexavalent chromium, cadmium and lead.¹⁰⁸ Other contaminants could not be evaluated due to the lack of sufficient data and shortcomings in the environmental self-monitoring conducted by Pluspetrol. The UAB study concluded that spillage of production water placed local indigenous population at risk for several decades.

The 2019 UAB study also calculated the amounts of chemicals and heavy metals introduced into the environment through the discharged production waters: "The accumulated fluxes of chemical species discharged along with produced waters reached 57 million tons of chlorides, 32,000 tons of THC (Total Hydrocarbon Content), 19,000 tons of SOF (Soluble Organic Fraction), 18,000 tons of barium, 64 tons of lead, 42 tons of chromium, 4 tons of arsenic and 3 tons of cadmium. Fluxes from oil block 8 were higher than from block 192 for SOF (13,000 tons vs 6,000 tons), chromium (40 vs 2 tons) and cadmium (2 vs 1 tons), whereas fluxes were higher at block 192 for chlorides (36 million vs 21 million tons), barium (16,000 vs 2,000 tons) and lead (33 vs 32 tons)."¹⁰⁹

Figure 4: Accumulated discharge of various chemicals and heavy metals in Lot 1AB and Lot 8, 1971-2013

¹⁰¹ OSINERGMIN, "Eliminación del mayor impacto ambiental de los campos petroleros," El informe arrojó que, por lo menos, 180 áreas forestales resultaron afectadas diciembre del 2009, p. 31, https://www.osinergmin.gob.pe/seccion/centro_documental/hidrocarburos/Publicaciones/Eliminacion_del_mayor_impacto_ambiental_de_la_Selva_Peruana.pdf.

¹⁰² OSINERGMIN, Informe Técnico No. 224817-2013-GFHL-UPPD, Solicitud de Información de los Lotes 1-AB y 8 de Pluspetrol Norte S.A por Despacho Congresal (19 March 2013) (Annex 23).

¹⁰³ OEFA, Informe número 411-2014-DS-HID (2014), (Annex 1).

¹⁰⁴ OEFA, Sanction R 300-2018-TFA-SMEPIM (2018), (Annex 24). Pluspetrol has challenged this sanction in court.

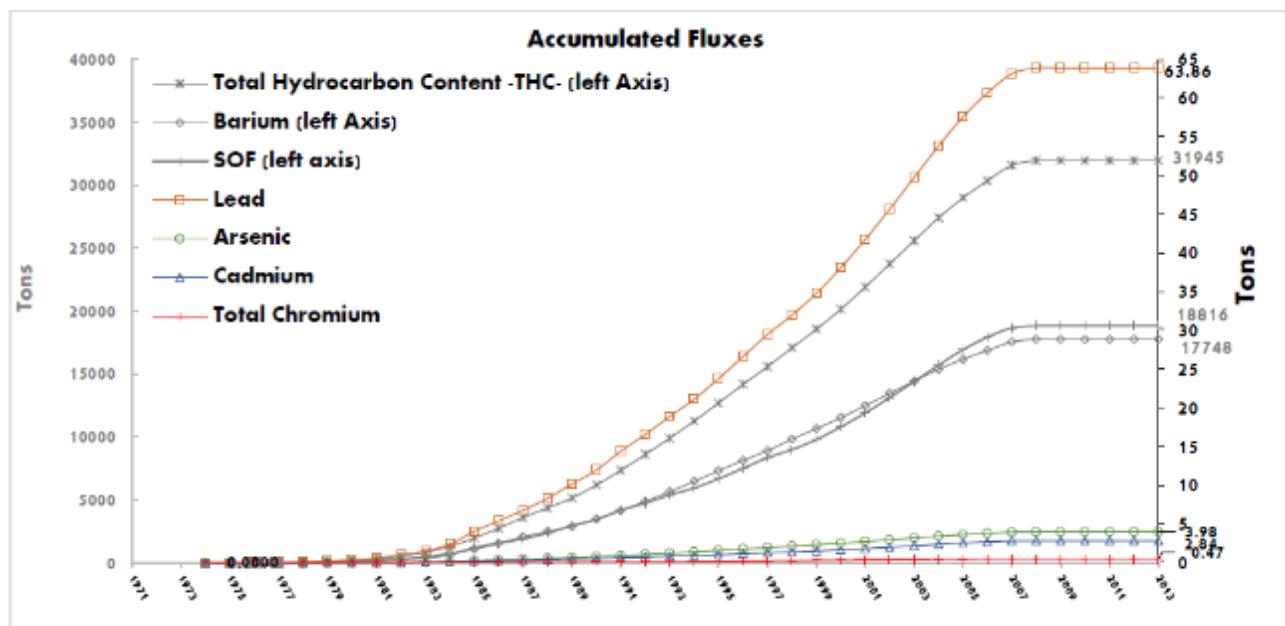
¹⁰⁵ OSINERGMIN, Informe Técnico No. 224817-2013-GFHL-UPPD-2013, Solicitud de Información de los Lotes 1-AB y 8 de Pluspetrol Norte S.A por Despacho Congresal (19 March 2013) (Annex 23).

¹⁰⁶ OEFA, Informe Nº 118-2016-OEFA/DE-SDLB-CEAI (2016), (Annex 25)

¹⁰⁷ United Nations Development Programme, 2018, "Estudio Técnico Independiente del ex Lote 1AB", p.134, https://www.pe.undp.org/content/peru/es/home/library/democratic_governance/eti-del-ex-lote-1ab.html.

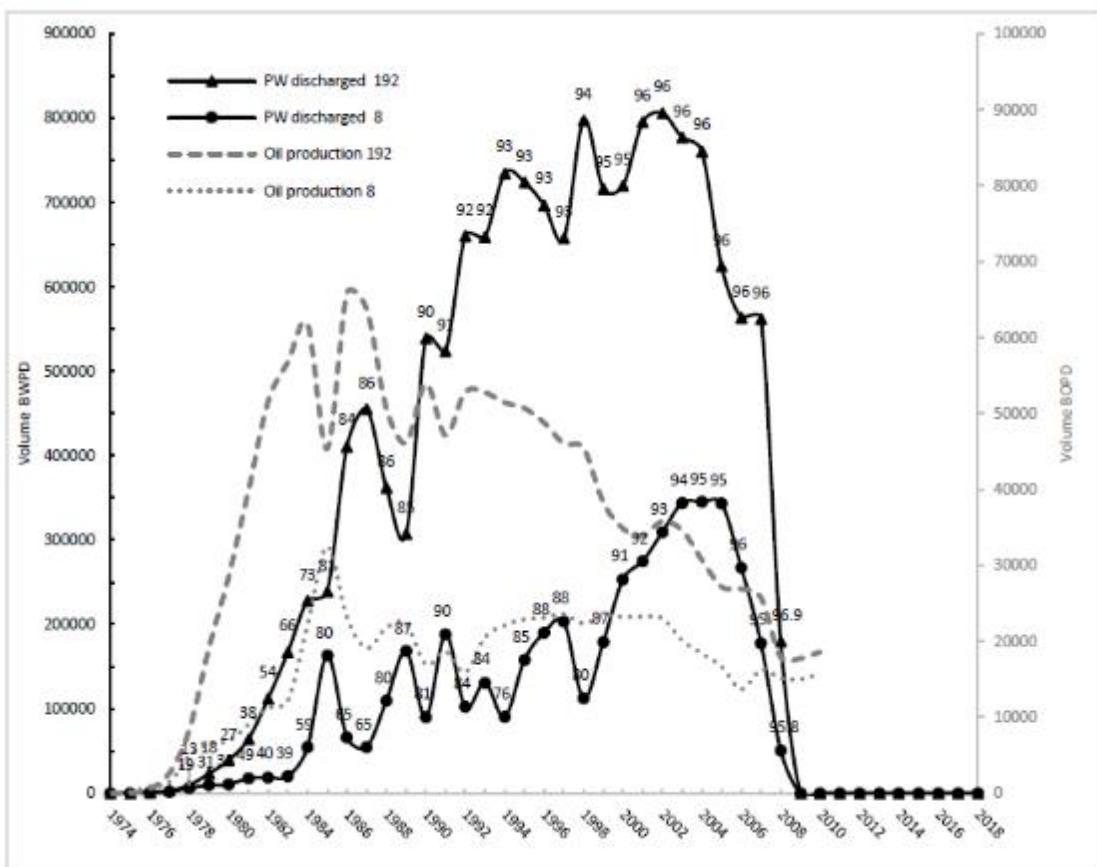
¹⁰⁸ Yusta-García, R., Orta-Martínez, M., Mayor, P., González-Crespo, C., & Rosell-Melé, A., 2017. Water contamination from oil extraction activities in Northern Peruvian Amazonian rivers. Environmental Pollution, 225, 370–380, <https://doi.org/10.1016/J.ENVPOL.2017.02.063>.

¹⁰⁹ Yusta-García, Raúl. 2019, Water and Soil Pollution due to oil extraction activities in the Northern Peruvian Amazon, PhD thesis, ICTA-UAB (Barcelona, Spain), p. 67.



Source: Yusta-García, UAB, 2019¹¹⁰

Figure 5: Total production waters discharged into rivers in Lot 1AB and Lot 8, 1974-2018



¹¹⁰ Yusta-García, Raúl, 2019, Water and Soil Pollution due to oil extraction activities in the Northern Peruvian Amazon, PhD thesis, ICTA-UAB (Barcelona, Spain), p. 81.

Source: Yusta-García, UAB, 2019¹¹¹

3.1.4. Contamination by oil spills

Pluspetrol's failure to conduct due diligence to prevent oil spills also led it to cause extensive contamination.

A key purpose of waterproofing and pipe replacement, as well as maintenance of storage tanks, is to prevent oil or other industrial materials from spilling into the groundwater and contaminating the soil, thereby preventing the photosynthetic process and causing the death of plants and dependent ecosystems.^{112,113} However, OSINERGMIN (2000-2012) and OEFA (2013-2015) identified the existence of 116 oil spills at Pluspetrol's facilities between 2000 and August 2015,¹¹⁴ resulting in 66 sanctions imposed through July 2016.¹¹⁵ Pluspetrol's 2009, 2010 and 2011 sustainability reports discussed infrastructure degradation and identified oil spills as a leading cause. But then in 2013, Pluspetrol's sustainability report attributed 90% of the spills to vandalism, excluding those spills from its performance indicators. Contradicting Pluspetrol's vandalism claim, official records from OEFA and OSINERGMIN show that of the total number of barrels spilled during Pluspetrol's operations, only 7% were caused by vandalism. Corrosion of pipelines and operational failures caused 73% of spills.¹¹⁶

Photo 3: Oil spill in Dorissacocha lagoon

¹¹¹ Yusta-García, Raúl. 2019, Water and Soil Pollution due to oil extraction activities in the Northern Peruvian Amazon, PhD thesis, ICTA-UAB (Barcelona, Spain), p. 81

¹¹² OEFA, "Informe número 411-2014-DS-HID párr. 57 i) & ii (2014), (Annex 1).

¹¹³ OEFA, "Informe número 411-2014-DS-HID párr. 57 x) (2014), (Annex 1).

¹¹⁴ OSINERGMIN, "File N° 201900134586", 2019), in response to Freedom of Information request in August 2019 (Annex 20); see also OEFA, "File N° 2019-E01-080941," (2019), in response to Freedom of Information request in September 2019 (Annex 26).

¹¹⁵ United Nations Development Programme, 2018, "Independent Technical Study of Lot 1AB", available at https://www.pe.undp.org/content/peru/es/home/library/democratic_governance/eti-del-ex-lote-1ab.html.

¹¹⁶ OSINERGMIN, "File N° 201900134586," (2019), in response to Freedom of Information request in August 2019 (Annex 20); see also OEFA, "File N° 2019-E01-080941," (2019), in response to Freedom of Information request in September 2019 (Annex 26).



Credit: Ramon Salas, Indigenous environmental monitor from Federation Feconacor

Indigenous environmental monitors have detected many more than 116 spills and allege that Pluspetrol failed to report several of the leaks that have happened. The indigenous environmental monitoring programme detected 82 oil spills in Lot 1AB from 2007 to 2011, half of which were due to corrosion from pipelines.¹¹⁷ The UNDP estimated the frequency of oil spills to be approximately one spill every 15 days.¹¹⁸ Pluspetrol has mishandled contingency and mitigation actions when oil spills occur. For example, a 2014 report describes how Pluspetrol placed “oil absorbent barriers in some places” to sop up a spill, but did not replace the barriers once they had become saturated, leaving them unable to capture more crude that spread throughout the area.¹¹⁹

3.1.5. Contamination by other poor practices

The above practices of failing to maintain pipes and infrastructure, dumping production waters, and allowing and failing properly to remediate oil spills represent the leading causes of contamination. In addition, Pluspetrol’s failure to conduct due diligence caused contamination through a number of other harmful practices. In 2014, OEFA issued a detailed report in which the agency highlighted these other harmful practices by Pluspetrol including:

¹¹⁷ Congreso de la República, 2011-2012, Comisión de Pueblos Andinos, Amazónicos y Afroperuanos, Ambiente y Ecología. Informe situación de los pueblos de las cuencas del Pastaza, Corrientes, Tigre y Marañon, p. 32, [http://www2.congreso.gob.pe/sicr/comisiones/2011/com2011pueandamaframbecho.nsf/pubs1foto/7C6EA2CE879846F505257A440053CE21/\\$FILE/INFORME_FINAL.PDF](http://www2.congreso.gob.pe/sicr/comisiones/2011/com2011pueandamaframbecho.nsf/pubs1foto/7C6EA2CE879846F505257A440053CE21/$FILE/INFORME_FINAL.PDF).

¹¹⁸ United Nations Development Programme, 2018, “Estudio Técnico Independiente del ex Lote 1AB”, p.98, available at https://www.pe.undp.org/content/peru/es/home/library/democratic_governance/eti-del-ex-lote-1ab.html.

¹¹⁹ E-TECH INTERNATIONAL, 2014, Contaminación Petrolera en La Reserva Natural Pacaya Samiria, p. .25. https://static1.squarespace.com/static/52d71403e4b06286127a1d48/t/537fba85e4b0135aba18e4f4/1400879749298/PacayaSamiria.Feb2014_Informe.web.view.pdf.

- Burning of gas under uncontrolled or unauthorized conditions: OEFA reported three uncontrolled or unauthorized gas flares (chimneys). The 2014 report noted that Pluspetrol had been burning natural gas from a production battery under uncontrolled conditions, causing damaging carbon monoxide emissions to the environment.¹²⁰

Photo 4: Gas flaring in Corrientes Basin



Credit: Martí Orta-Martínez, UAB, FECONACOR

- Inadequate management of industrial effluents: The report noted that industrial effluents must be analysed before being discharged into the environment, to verify if they meet the maximum permissible limits established for liquid effluents of the hydrocarbons subsector. However, during the supervision of Lot 1AB, OEFA discovered a discharge of industrial water directly to the environment without authorization or the mentioned analysis being carried out.¹²¹
- Improper handling of chemical substances, lubricants and fuels: OEFA monitored the handing of chemical substances in 482 infrastructure components such as cylinders, drains, and warehouses. Among these, OEFA identified inadequate chemical handling practices in 37 components.¹²²

¹²⁰ OEFA, 2014, “Informe número 411-2014-DS-HID”. párr.57 iii (Annex 1).

¹²¹ OEFA, 2014, “Informe número 411-2014-DS-HID”. párr. 57 vi (Annex 1).

¹²² OEFA, 2014, “Informe número 411-2014-DS-HID”.párr. 57 viii (Annex 1).

- Inadequate management of solid waste: OEFA's report found that Pluspetrol's waste management system (collection, storage, treatment, and final disposal) was not incorporated into an environmental management instrument approved by the competent sector authority. This resulted in contamination of 45 areas between points with waste (dumps, warehouses, landfills and incinerators). The report also observed the disposal of hazardous waste in open terrain, allowing the waste to be weathered by rain, wind, and humidity.¹²³

Photo 5: Storage tanks for oil spills that have broken; fissures allow leaks towards the Manchari River



Credit: Martí Orta-Martínez, UAB, FECONACOR

- Improper abandonment of facilities: Prior to OEFA's investigation, OSINERGMIN had sent OEFA a list of 123 reported operational facilities (tanks, wells, cisterns, incinerators, and pipelines); however, during OEFA's 2014 review, it identified 19 additional inoperative operating facilities that had not been declared nor received an appropriate abandonment.¹²⁴

3.1.6. Sanctions for contamination

Further evidence of Pluspetrol's failures of due diligence is found in the high number of sanctions it has received for breach of safety, environmental and emergency regulations.

¹²³ OEFA, 2014, "Informe número 411-2014-DS-HID párr. 57 ix (Annex 1).

¹²⁴ OEFA, 2014, "Informe número 411-2014-DS-HID párr. 57 xiii (Annex 1).

In 2016, OSINERGMIN had issued 286 sanctions to Pluspetrol in Lots 1AB and 8, for a total value of approximately US \$26 million. Approximately 188 of these sanctions were for Lot 1AB.¹²⁵ This included fines for non-compliance with safety and environmental regulations, including breaches of compliance with its PAMA and PAC.¹²⁶ As already indicated, sanctions imposed by OSINERGMIN were appealed by Pluspetrol through the administrative route.¹²⁷

From 2012 (when the mandate for environmental monitoring, supervision and inspection was given to OEFA from OSINERGMIN) to 2015, OSINERGMIN issued 23 fines related to infrastructure management. Ten of these fines had a pecuniary sanction; three of them were paid. Thirteen of them were corrective sanctions, six of which were complied with (two of the six following administrative appeal). Currently, Pluspetrol is challenging seven of the sanctions issued against it in the Peruvian courts.¹²⁸

3.2. Pluspetrol failed to conduct due diligence to prevent adverse human rights impacts

The same OECD Guidelines provisions on due diligence cited above in section 3.1 with regard to Pluspetrol's environmental contamination are also relevant to Pluspetrol's failures of due diligence to prevent human rights impacts. The failures of due diligence are evidenced in the following areas, each explained in further detail in the sub-sections below:

- Adverse impacts of Pluspetrol's contamination on the right to health
- Failure to respect the right to food, health, and livelihood
- Failure to respect the right to water
- Failure to ensure meaningful stakeholder engagement with impacted indigenous communities
- Failure to respect the land rights of impacted indigenous communities
- Failure to respect the right of self-determination of impacted indigenous communities

3.2.1. Adverse impacts of Pluspetrol's contamination on the right to health

Contamination of the water and land from Pluspetrol's harmful activities not only caused environmental damage, but has also been linked to serious health impacts in local indigenous populations. A health study conducted by the Ministry of Health in 2005 and 2006 found heavy metals in blood and urine samples from local community members that exceeded levels deemed permissible for human health in international and Peruvian standards. The study carried out in five Achuar communities included a sample of 199 people and found that more than 66% of children and 79% of

¹²⁵ OEFA, 2014, "Informe número 411-2014-DS-HID párr. 57 xiii (Annex 1).

¹²⁶ OSINERGMIN, 2010, Informe técnico sancionatorio No 183953-2010-OS/GFHL-UPPD por incumplimiento del plan ambiental complementario (PAC) y del Plan Manejo Ambiental (PMA) del Lote 1AB por parte de la empresa Pluspetrol Norte S.A. (Annex 27).

¹²⁷ OSINERGMIN, 2013, Informe técnico no 224817-2013-GFHL-UPPD Solicitud de Información de los Lotes 1-AB y 8 de Pluspetrol Norte S.A. por Despacho Congresal 19 March 2013 page 3 (procesos que han terminado en la vía administrativa) (Annex 23).

¹²⁸ Sanctions and corrective measures for lot 1AB that are on appeal until today: 080-2012-OEFA/TFA: fine for not complying with the PAC, exceeding the level of 30000mg/k of THP in batteries SHIV12 and SHIV37 (Annex 28); 004-2015-OEF/TFA-SEE: Sanshococha lake (Annex 29); 048-2016-OEFA/TFA/SME: not complying with the PAMA since Pluspetrol did not do the inspections needed in order to control pipelines corrosion (Annex 18); 046-2017-OEFA/TFA-SME: several infractions coming from the result of monitoring actions done by OEFA and the identification of 1199 new sites (Annex 22); 1016-2009-OS/TASTEM; 063-2018-OEFA/TFA-SMEPIM: Failure to properly store chemical substances, hazardous solid waste not properly stored, and exceed the maximum permissible limits for household effluents (Annex 19); 300-2018-OEFA/TFA-SMEPIM: lack of water monitoring at effluent emission points (Annex 24).

adults had levels of lead in their blood that were higher than permissible levels.¹²⁹ According to the report, almost 99% of adults and children in the sample had cadmium blood levels in excess of the permissible limits, with approximately 60% of children and 68% of adults with cadmium levels in excess of what is considered biologically tolerable. Cadmium and lead are two of the most toxic metals for humans, alongside hexavalent chromium (Cr^{6+}), which is carcinogenic. The general report on the health of the Achuar People done by the Ministry of Health in 2006, which drew from information given by communities and a health post, showed an epidemiological profile in local populations of the Corrientes river with alarming characteristics. The report highlighted an unusually high level of miscarriages, high frequency of acute diarrhoea, persistent skin problems, and other health conditions not characteristic of other national indigenous populations, in addition to frequent outbreaks of malaria in areas that traditionally were not endemic. The Achuar people attribute these conditions to the contamination of water and food by oil extraction activities.

Pluspetrol disputes the link between its own operations and the high levels of lead and cadmium in the blood of surrounding populations. For example, in 2013, Pluspetrol asserted that since it had stopped dumping production waters and furthermore that it had not contaminated the area with heavy metals, the high lead and cadmium levels in the Pastaza river were, instead, a result from the activity of the Tungurahua volcano in Ecuador.¹³⁰

Extensive research shows that oil and production waters contain toxic materials such as heavy metals like cadmium and lead.^{131,132} This was also true at Lot 1AB. One UAB study showed that the dumping of production waters by Pluspetrol significantly increased the concentration of cadmium and lead, among other heavy metals, in rivers downstream the discharge sites.¹³³ The study also quantified the annual discharge of lead (5.1 tons/year) and cadmium (0.34 tons/year) in production waters for 2008. Another study of lead levels and isotopic fingerprints in wild game species at Lot 1AB showed, on the basis of samples from 2013 and 2015, that oil-related pollution was still a major source of contaminant lead in the area.¹³⁴

Another published scientific study¹³⁵ linked the occurrence of production waters in river water and sediments at Lot 8 with adverse human health impacts. The study calculated the PAH concentrations, mutagenicity and toxicity of Pluspetrol crude oil, water and sediments from Lot 8, confirming that wastewater containing oil is comprised of harmful substances including those with genotoxic and carcinogenic effects, having the potential to adversely affect aquatic organisms and human health.

¹²⁹ Ministerio de Salud, 2006, "Análisis de la Situación Integral de Salud del Pueblo Achuar". Dirección General de Epidemiología. https://www.dge.gob.pe/publicaciones/pub_asis/asis20.pdf.

¹³⁰ La República, 2013, "Pluspetrol: Hemos heredado pasivo ambiental en el Pastaza"
<https://rpp.pe/politica/actualidad/pluspetrol-hemos-heredado-pasivo-ambiental-en-el-pastaza-noticia-581594?ref=rpp> (28 February 2020); see also Peru 21, 2013, "Pluspetrol culpa a volcán ecuatoriano por la contaminación del río Pastaza"
<https://peru21.pe/lima/pluspetrol-culpa-volcan-ecuatoriano-contaminacion-rio-pastaza-99951-noticia/> (28 February 2020).

¹³¹ J.M. Neff, 2002, Bioacumulación en Organismos Marinos. Efectos de la Contaminación por Agua de la producción de petróleo.

¹³² Fakhru'l-Razi, A., A. Pendashteh, L. C. Abdullah, D. R. A. Biak, S. S. Madaeni, and Z. Z. Abidina, 2009, Review of technologies for oil and gas produced water treatment. Journal of Hazardous Materials 170(2-3):530-551.
<http://dx.doi.org/10.1016/j.jhazmat.2009.05.044>.

¹³³ Yusta-García, R., Orta-Martínez, M., Mayor, P., González-Crespo, C., & Rosell-Melé, A., 2017, Water contamination from oil extraction activities in Northern Peruvian Amazonian rivers. Environmental Pollution, 225, 370–380,
<https://doi.org/10.1016/J.ENVPOL.2017.02.063>.

¹³⁴ Carró-Sabaté, M., Mayor, P., Orta-Martínez, M. et al., 2019, Anthropogenic lead in Amazonian wildlife, Nature Sustainability 2, 702–709, <https://doi.org/10.1038/s41893-019-0338-7>.

¹³⁵ Reátegui-Zirena, E.G., Stewart, P.M., Whatley, A., Chu-Koo, F., Sotero-Solis, V.E., Merino-Zegarra, C., Vela-Paima, E., 2014, Polycyclic aromatic hydrocarbon concentrations, mutagenicity, and Microtox® acute toxicity testing of Peruvian crude oil and oilcontaminated water and sediment. Environ. Monit. Assess. 186:2171–2184. <http://dx.doi.org/10.1007/s10661-013-3527-2>.

The ASIS report on human health conditions followed a series of studies between 1985 and 1994 by the Peruvian Amazon Research Institute (IIAP).¹³⁶ It found high concentrations of copper, lead, zinc and mercury in certain fish species that reached the maximum permissible limits for human consumption; high levels of hexavalent chromium and cadmium in the Corrientes River exceeding the maximum permissible limits; and substances such as lead, zinc, arsenic and soluble hydrocarbons. Both cadmium and lead found in urine and blood and in the environment are metals that are associated with the exploitation of oil, and since there is no other industrial activity in the area, the relationship between the two seems at least probable. If it were acting with appropriate due diligence, this probability should have been enough to prompt Pluspetrol to take precautionary measures instead of denying links or impacts.

Further, while the lack of medical studies do not allow a certain conclusion that Pluspetrol's contamination in the Loreto region caused the people's health conditions, the confirmed fact that Pluspetrol did dispose production waters improperly until 2009 and failed to maintain its piping and other infrastructure systems, paired with scientific research on the toxic nature of production waters and oil and their impact on water, soil, vegetation and wildlife, suggest a clear link between Pluspetrol's actions and the health impacts experienced by local populations. It is likely that Pluspetrol's poor due diligence caused or at a minimum contributed to the high levels of blood metals and associated health conditions in surrounding populations.

Since most of the contaminated sites that result from 45 years of oil activity still remain, indigenous communities in Lot 1AB continue to be exposed to oil pollutants in their daily life. No study on the impact of long-term exposure to oil pollution has been conducted on the local population. However, a Toxicological study was carried out in lots 1AB/192 and 8, with samples taken in 2016¹³⁷. Indigenous federations listed 66 communities, of which 39 were selected for sampling. Results were the following:

For Children:

- 72 children of 328 (22%) show blood **lead** levels above the limit established by Peruvian standards (10 ug).
- 111 children of 242 (45.9%) show blood **arsenic** levels above the limit established by Peruvian standards (20 ug).
- 62 children of 242 (25.6%) show blood **mercury** levels above the limit established by Peruvian standards (5 ug).
- 6 children of 242 (2.5%) show blood **cadmium** levels above the limit established by Peruvian standards (2 ug).
- 53 children of 323 (16.4%) show **barium** levels in blood above the limit established by Peruvian standards (2 ug).

For adults:

- 40 out of 810 people (4.9%) show blood **lead** levels above the limit, according to Peruvian standards (20 ug).
- 144 people of 654 (22%) show blood **arsenic** levels above the limit, according to Peruvian standards (20 ug).
- 180 people out of 654 (27.5%) show levels of **mercury** in blood above the limit, according to Peruvian standards (5 ug).
- 82 people of 654 (12.5%) show blood **cadmium** levels above the limit, according to Peruvian standards (2 ug).

¹³⁶ Ministerio de Salud, 2006, "Análisis de la Situación Integral de Salud del Pueblo Achuar". Dirección General de Epidemiología, p. 79, 87, https://www.dge.gob.pe/publicaciones/pub_asis/asis20.pdf.

¹³⁷ Ministerio de Salud e Instituto Nacional de Salud, 2016, Niveles y factores de riesgo a exposición a metales pesados e hidrocarburos en los habitantes de las comunidades de las cuencas de los ríos Pastaza, Corrientes, Tigre y Marañón de la región de Loreto: <https://observatoriopetrolero.org/wp-content/uploads/2019/08/Informe-Toxicol%C3%B3gico-y-Epidemiol%C3%B3gico-del-MINSA-para-Cuatro-Cuencas.pdf>.

- 97 of 805 people (12%) show **barium** levels in blood above the limit, according to Peruvian standards (6 ug).
- 52 people, of 1143, show **benzopyrene** levels above the limit established by Peruvian standards.

There are recent studies suggesting that contamination of sites caused or contributed to by Pluspetrol's actions are causing significant risks for human health in Lot 1AB. Consultant companies hired by the Peruvian government have carried out Health and Environmental Risk Assessments in 32 impacted sites, some of which have shown that the pollution is causing risks of developing cancer and non-cancer related diseases in native communities in whose territories these sites are on. For example, two of these assessments studied sites "S0111" and "S0112," of the Achuar community of José Olaya in the Corrientes river basin, that experienced several oil spills during Pluspetrol's operation of the lot. Due to the high levels of pollution at these sites and the route between these pollutants and humans, the assessments found a significant risk of cancer for the native community.¹³⁸

3.2.2. Failure to respect right to food, health, and livelihood

Pluspetrol's failures of due diligence also led it to be linked to various violations of the local indigenous peoples' right to food.¹³⁹

First, high levels of heavy metals and total hydrocarbons in water, sediments and soils attributed to oil extraction at Lot 1AB have resulted in the contamination of wildlife species that local people eat. Following studies by the Institute of Investigation of the Peruvian Amazon (IIAP) in the 1980s and 1995 that documented heavy metal levels in aquatic species, in 2010 the institute again found cadmium far surpassing permissible levels in all the fish analysed in the San Pablo de Tipishca Cocha, Kukama territory.¹⁴⁰ IIAP also found lead in two fish species widely consumed in the communities.¹⁴¹ Further, a 2014 study by the Autonomous University of Barcelona recorded video of at least four species of wild mammals consuming oil spills.¹⁴² The high salinity of the production waters associated with oil attracts such behaviour, which unfortunately leads to animals' intake of hydrocarbons and heavy metals.¹⁴³ When the animals are hunted by local communities, the metals have been found in the animals bowels. When humans eat the fish and the game that are contaminated, the contamination can pass to them. The presence of lead for example, particularly in children, accentuates nutritional problems.

¹³⁸ FONAM, 2019, Informe De Priorización Para Sitios Impactados. Cuenca río Corrientes. Septiembre, p. 1 (Annex 30).

¹³⁹ International Covenant on Civil and Political Rights Art. 6; International Covenant on Economic, Social and Cultural Rights Art. 11, 12 UN Declaration on the Rights of Indigenous People Art. 7.

¹⁴⁰ Además de estos estudios, el Ministerio de Producción informó en 2006 la detección de plomo en tejido de peces de la cuenca del Río Corrientes con repercusión negativa en el ecosistema y la salud humana. La Universidad de McGill, de Canadá, indicó en el 2010 que "la extracción petrolera está conllevando al incremento de los niveles de mercurio en peces y humanos y los niveles de Hidrocarburos Aromáticos Polícílicos (HAPs) en la población local" Webb J, Coomes OT, Mainville N, Mergler D.. 2015. "Mercury Contamination in an Indicator Fish Species from Andean Amazonian Rivers Affected by Petroleum Extraction". En *Bull Environ Contam Toxicol*, 2015 Sep; 95(3):279-85.

¹⁴¹ Además de estos estudios, el Ministerio de Producción informó en 2006 la detección de plomo en tejido de peces de la cuenca del Río Corrientes con repercusión negativa en el ecosistema y la salud humana. La Universidad de McGill, de Canadá, indicó en el 2010 que "la extracción petrolera está conllevando al incremento de los niveles de mercurio en peces y humanos y los niveles de Hidrocarburos Aromáticos Polícílicos (HAPs) en la población local" Webb J, Coomes OT, Mainville N, Mergler D.. 2015. "Mercury Contamination in an Indicator Fish Species from Andean Amazonian Rivers Affected by Petroleum Extraction". En *Bull Environ Contam Toxicol*, 2015 Sep; 95(3):279-85.

¹⁴² Pedro Mayor, Antoni Roselle, Mar Castro-Savaté y Martí Orta Martínez: Actividades petroleras en la Amazonía: ¿Nueva amenaza para las poblaciones de tapir?. Tapir Conservation. p. 26. Julio 2014.

¹⁴³ Pedro Mayor, Antoni Roselle, Mar Castro-Savaté y Martí Orta Martínez: Actividades petroleras en la Amazonía: ¿Nueva amenaza para las poblaciones de tapir?. Tapir Conservation. p. 26. Julio 2014.

Photo 6: Tapirs (an animal hunted for food by local indigenous people) licking hydrocarbons from old pipe



Credit: UAB and PUINAMUDT

Moreover, in 2007 a report documented how an influx of external workers at Lot 1AB had led to a rise in illegal traffic of protected species and illegal hunting and sale of bushmeat.¹⁴⁴ Such competition for game and fish, along with changes to indigenous lifestyles prompted by Pluspetrol's presence, were linked in 2013 to a decline in protein consumption and increase in consumption of carbohydrates like cassava or imported rice and noodles.¹⁴⁵ This dietary shift was identified as a potential leading cause of increased gastritis and diabetes in local indigenous communities.¹⁴⁶

In 2012, the Ministry of Development and Social Inclusion prepared a Food Insecurity Vulnerability Index classifying the vulnerability level in the Andoas district, where a significant part of Pluspetrol's oil operations are located, as "very high" (0.856 according to the study calculation), and those of Pastaza as "high" (0.721).¹⁴⁷ These numbers were based on lack of access to food alone, and would have been much higher if they had considered environmental pollution as one of the risk factors for food and nutritional insecurity too.

3.2.3. Failure to respect right to water

Pluspetrol's failures of due diligence have led it to violate the local indigenous communities' right to water, which derives from the right to life, by contaminating the drinking waters around Lot 1AB through the dumping of production waters and the spills, leaks, and other contaminating activities cited above.

¹⁴⁴ M. Orta Martinez et al. *Impacts of petroleum activities for the Achuar people of the Peruvian Amazon: summary of existing evidence and research gaps*. ENVIRONMENTAL RESEARCH LETTERS. Nov. 2007. pag.4.

¹⁴⁵ "Diagnóstico social estratégico de las cuencas del Pastaza, Marañón, Corrientes y Tigre" (2013). Elaborado para el grupo de trabajo social de la Comisión Multisectorial de la Presidencia del Consejo de Ministros, coordinado por el Ministerio de Desarrollo e Inclusión Social.

¹⁴⁶ "Diagnóstico social estratégico de las cuencas del Pastaza, Marañón, Corrientes y Tigre" (2013). Elaborado para el grupo de trabajo social de la Comisión Multisectorial de la Presidencia del Consejo de Ministros, coordinado por el Ministerio de Desarrollo e Inclusión Social.

¹⁴⁷ Ministry of Development and Social Inclusion, Food Insecurity Vulnerability Index, 2012, <<https://www.mimp.gob.pe/webs/mimp/sispod/pdf/299.pdf>>.

As mentioned, in 2009, OSINERGMIN published a report highlighting the impact that Pluspetrol's dumping of production waters had on both water and soil.¹⁴⁸ A full 83% of the test samples taken showed the presence of at least one type of pollutant (chloride, hydrocarbons, oil and oils, or barium) in both water and soil above the maximum levels allowed in countries in North America and Europe.

The water quality study undertaken in 2013 on the Pastaza river by the National Water Authority (ANA) and the General Directorate of Health (DIGESA), discussed in an ELAW report, concluded that the communities whose water was analysed do not have water suitable for human consumption.¹⁴⁹ Lead was above potable limits in nearly 40% of river water samples taken. In one sample in Anapasa brook, where the river crosses several farms and is a source of daily water for the population of Andoas, lead content was 25% higher than the amount authorized by law. That area also had other metals well above the limits established by World Health Organisation, such as aluminium (86 times higher than the reference limit), manganese (3.5 times the limit) and iron (11 times the guide value). In the Ullpayacu brook, another of the creeks most actively populated by Quechua communities, river water was found to have illicitly high concentrations of lead and also of oil/fat (10.3 mg/l) and hydrocarbons (1.85 mg/l) outside a pipeline of the Pluspetrol company. The report asserted that these latter two substances should be totally absent from waters for human or agricultural consumption since they are very dangerous to human and environmental health. The ANA study determined the occurrence of oil contamination from presence of hydrocarbons in 76.5% of the sediment samples monitored, and either excess hydrocarbons or heavy metals in 82.4% of monitored sediments.

The ANA study was one of the main reasons for the 2013-4 Declarations of Environmental and Sanitary Emergency in the river basins of both Lot 1AB and Lot 8.¹⁵⁰ In response to the study, the state acknowledged the water contamination by delivering 800 water purification kits to the communities. Meanwhile, Pluspetrol drilled some water wells and gave communities high tanks to capture rainwater – but the water from the wells was found in many cases to offer equally polluted water, and lack of maintenance on the elevated tanks caused other contamination and health problems. Moreover, because these works were undertaken in relation to social agreements with communities, they were perversely accounted for as compensation for potential impacts. It was not until the signing of the Lima Act in 2015 that the Peruvian government, recognizing the seriousness of the water quality situation in the communities affected by the oil operations, promised to install 65 water treatment plants. These 65 plants are a temporary solution and insufficient to cover all affected communities in the four basins. The Ministry of Housing has committed to guarantee a sustainable solution¹⁵¹.

3.2.4. Failure to ensure meaningful stakeholder engagement with impacted indigenous communities

¹⁴⁸ OSINERGMIN, "Eliminación del mayor impacto ambiental de los campos petroleros," El informe arrojó que, por lo menos, 180 áreas forestales resultaron afectadas diciembre del 2009, p. 31, https://www.osinergmin.gob.pe/seccion/centro_documental/hidrocarburos/Publicaciones/Eliminacion_del_mayor_impacto_ambiental_de_la_Selva_Peruana.pdf.

¹⁴⁹ Lic. Flaviano Bianchini, Source International, *Informed sobre los reports de calidad Ambiental en la zona de extracción petrolífera del río Pastaza*, <http://observatoriopetrolero.org/wp-content/uploads/2013/02/SOURCE-Informe-sobre-los-reportes-de-calidad-ambiental-en-la-zona-de-extracci%C3%B3n-petrolifera-del-r%C3%ADo-Pastaza.pdf>, p. 7-8. (February 2013).

¹⁵⁰ Ministry of Environment, Environmental Emergency Declarations: for Pastaza River, N° 139-2013-MINAM (25 March 2013); for Corrientes river, N° 263-2013-MINAM, (6 September 2013); for Tigre river, N° 370-2013-MINAM (29 November 2013) and for Marañón river, N° 136-2014-MINAM (15 May 2014).

¹⁵¹ Acta de Lima del 10 de Marzo de 2015, <http://www.minam.gob.pe/oaas/wp-content/uploads/sites/49/2017/04/18-Acta-Lima-M2-10.03.15.pdf>.

To help companies ensure they respect human rights and as a key element of due diligence, the Guidelines call for companies to “engage with relevant stakeholders in order to provide meaningful opportunities for their views to be taken into account in relation to planning and decision making for projects or other activities that may significantly impact local communities.”¹⁵² Guidelines Commentary 25 explains that “effective stakeholder engagement is characterised by two-way communication and depends on the good faith of the participants on both sides. This engagement can be particularly helpful in the planning and decision-making concerning projects or other activities involving, for example, the intensive use of land or water, which could significantly affect local communities.”¹⁵³

Pluspetrol’s failures of due diligence in its engagement with local indigenous populations at Lot 1AB led it to violate the Guidelines’ expectations for companies on ensuring meaningful stakeholder engagement.

Both the OECD Guidelines and Peruvian law require companies to undertake environmental impact assessments (EIAs) through a citizen engagement process. Since Pluspetrol inherited the PAMA from Oxy, the government never demanded that Pluspetrol undertake an EIA. Even still, the PAMA was incomplete in its geographic coverage of the area, and an EIA for the whole lot would have been good practice and practical, given the interconnection between pipes beyond the area covered by the PAMA. Instead, the only EIA elaborated by Pluspetrol was for its 2006 plan to reinject production waters. Pluspetrol completed no social impact assessment at all, so the company correspondingly failed to ensure participation of indigenous communities in the elaboration of either social or environmental impacts.

Pluspetrol’s engagement with indigenous communities has been limited to negotiating social agreements., it proactively and voluntarily negotiated “social responsibility plans” or “social agreements” that severely compromised community members’ rights and disclaimed liability for all possible impacts from the company’s activities. Although many agreements were negotiated as early as 2004, most communities lost some of them, and so most copies accessible are those Pluspetrol’s last period of operations from 2011-2014/15.

The social agreements were two to four-year plans offering communities a list of goods and services – such as first aid kits, school supplies, oil for boats, minor infrastructure projects ¹⁵⁴– as compensation for all of Pluspetrol’s impacts. The complainants view the agreements as not compatible with human rights standards and representing an abuse of Pluspetrol’s power in various ways. First, the agreements offered goods and services in exchange for “any impacts the company has caused or *may cause*”, capturing not only past but all potential future impacts in an unequal trade. Second, each agreement required communities to forgo rights to take any legal action against the company from that time forward. In the case of a compensation agreement with the community of Doce de Octubre valid between 2011 and 2014, the document states that the community must “keep Pluspetrol harmless from any claim, trial, action, loss or damage, expenses, costs.”¹⁵⁵ Third, the benefits exchanged were deeply asymmetrical. Community members traded their rights to legal action and actual remediation for cheap school supplies, petrol tanks and medical tape. Meanwhile, while for

¹⁵² OECD (2011), OECD Guidelines for Multinational Enterprises, Chapter II (General Policies), principle A14.

¹⁵³ OECD (2011), OECD Guidelines for Multinational Enterprises, Chapter II (General Policies), commentary 25.

¹⁵⁴ See, e.g, Social agreement with community Doce de Octubre (Annex 31); Social agreement with community Nuevo Andoas (Annex 32); and Social agreement with community José Olaya (Annex 33).

¹⁵⁵ CONVENIO DE COMPENSACIÓN DE DOCE DE OCTUBRE 2011-2014: “Clausula 5.3. Que la Comunidad queda plenamente satisfecha con el compromiso asumido por PLUSPTEROL respecto a la contraprestación pactada en el presente Convenio, no teniendo nada que reclamar a Pluspetrol por este concepto.

Clausula 5.4: Que la responsabilidad de Pluspetrol se agota en el apoyo social señalado en la cláusula cuarta, debiendo la comunidad mantener indemne a Pluspetrol de cualquier reclamo, juicio, acción, daño, pérdida, gastos, costos que sean dirigidos contra Pluspetrol por cualquier tercero relacionados con el objeto de este Convenio” (Annex 31).

the year 2011 Pluspetrol exchanged fuel, school supplies, quotas in its regular airplanes¹⁵⁶ and some small infrastructure work in the communities, it simultaneously entered 622 million dollars from earnings at lot 1AB.¹⁵⁷ Fourth, Pluspetrol inserted resolution clauses in the company's favour allowing it to terminate the agreements without expressing any cause and notifying the community just 15 days in advance. In contrast, the communities had no protection against possible breaches by the company and no right to make complaints against it. Finally, community members describe manipulative negotiation tactics by Pluspetrol, such as attempting to bribe community members with alcohol or sex workers. Research from Orta-Martinez shows graphic evidences of Pluspetrol's barges that normally transport materials carrying large amounts of alcoholic beverages gifted to several indigenous communities in 2007. The authors argue that the goal seems to have been to override the resistance of existing indigenous organizations after the Dorissa Accords. Alcoholism among indigenous people has increased, spreading domestic violence and, most likely, increasing mortality from hepatic cirrhosis in a highly endemic area of hepatitis B.^{158, 159}

In 2013 when communities started asking for their right to be compensated for the use of their land, Pluspetrol responded simply by changing the purpose clauses of its social agreements to imply the social agreements were about compensating communities for their land, which had not been the case.¹⁶⁰ Meanwhile, the agreements remained completely unchanged.

3.2.5. Failure to respect the land rights of impacted indigenous communities

Pluspetrol's failures of due diligence in its engagement with local indigenous populations at Lot 1AB led it to violate their land rights.

Indigenous peoples rights, such as the rights to land and natural resources, autonomy, and prior consultation with the objective of achieving agreement or consent were enshrined in International Labor Organization (ILO) Convention Nº 169 on Indigenous and Tribal Peoples Rights (1989), ratified by the Peruvian State in 1995.¹⁶¹ These rights, and the right to free, prior and informed consent (FPIC) are also reflected in other core human rights instruments¹⁶², including the UN Declaration on the Rights of Indigenous Peoples (2007) – which constitutes the highest international standard – and are part of the jurisprudence of the Interamerican Court of Human rights,¹⁶³ and so part of the Peruvian legal framework. These human rights instruments recognize indigenous peoples right to

¹⁵⁶ Airplanes paid by the company go back and forth to the lot with their workers. Since communities in this area are, in the best cases, two to three days trip by boat to get to the nearest city, they usually negotiate some seats on the plane for their authorities to be able to go out when official arrangements are needed.

¹⁵⁷ Anuario estadístico de hidrocarburos 2014. Dirección general de hidrocarburos del Ministerio de Energía y Minas. Cálculo establecido multiplicando la Producción fiscalizada mensual de hidrocarburos líquidos por el valor en dólares de los barriles del lote según la balanza general de hidrocarburos del mismo Ministerio.

¹⁵⁸ Orta-Martínez, M., Pellegrini, L., & Arsel, M. (2018). The squeaky wheel gets the grease? The conflict imperative and the slow fight against environmental injustice in northern Peruvian Amazon. *Ecology and Society*, 23(3), art 7, <https://doi.org/10.5751/ES-10098-230307>.

¹⁵⁹ Ministerio de Salud, 2006, "Análisis de la Situación Integral de Salud del Pueblo Achuar," Dirección General de Epidemiología. https://www.dge.gob.pe/publicaciones/pub_asis/asis20.pdf.

¹⁶⁰ Contrast the Purpose Clause of Social agreement with Community Abelino Caceres (2003) (Annex 12); against the Purpose Clause of Social agreement with Community Doce de Octubre (2011-2014) (Annex 31).

¹⁶¹ ILO, 1989, C169 – Indigenous and Tribal Peoples Convention, https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169

¹⁶² Human rights bodies have interpreted treaties such as the International Covenant on Civil and Political Rights, International Covenant on Economic Social and Cultural Rights, and International Convention on the Elimination of All Forms of Racial Discrimination as requiring indigenous peoples' FPIC in the context of extractive industry projects. See Cathal Doyle and Andrew Whitmore, "Indigenous Peoples and the Extractive Industries: Towards a Rights Based Engagement" (London: Tebtebba, Middlesex University, PIPLinks, 2014), <http://www.piplinks.org/report%3A-indigenous-peoples-and-extractive-sector-towards-respecting-engagement>.

¹⁶³ See Inter-American Court of Human Rights, final decision in Saramaka vs. Suriname, http://www.corteidh.or.cr/docs/casos/articulos/seriec_172_esp.pdf; and final decision in Sarayaku vs. Ecuador, http://www.corteidh.or.cr/docs/casos/articulos/seriec_245_esp.pdf.

their natural resources and to own their ancestral lands (including lands they occupy or just use) even if they lack a property title. Indigenous people also have a right to be compensated for use of and harms to their lands or resources.¹⁶⁴

Although Pluspetrol had long recognised the existence of communities on the lands, in 2006 Pluspetrol proactively sought and won the right to utilize their land without any compensation at all. Under Peruvian law, any landowner has the right to be paid if a third person or company wants to trespass their property ("right of way" or "easement").¹⁶⁵ This applies to territories in which indigenous peoples have traditional presence.¹⁶⁶ In 2006, Pluspetrol requested the state to grant an easement for the use of lands in both Lot 1AB and Lot 8. Pluspetrol justified its request by arguing, first, that those lands were actually free of owner and the rightful property was the state; and second, that the lands had "no useful profit."¹⁶⁷ Yet Pluspetrol knew indigenous peoples productively used the land for dwelling space, small scale agriculture, hunting and gathering.

In 2006, Peru's government issued Supreme Decrees N°061-2006-EM for Lot 1AB and N°060-2006-EM for Lot 8 granting Pluspetrol's request for free (compensation-less) access.¹⁶⁸ Granting Pluspetrol's right of way had two serious impacts on indigenous landowners in Lot 1AB: it deprived them of compensation (beginning when Pluspetrol took over the land in 2000 and lasting until the end of its concession). It also impeded their access to title those lands that overlap, with concessions granted to Pluspetrol. Based on a Social Diagnosis published by the Ministry of Development and Social inclusion in 2013, 53% of the communities in the four basins lacked a property title and 47% required extension of their communal titles. Likewise, 65% of them had a title superimposed on concessions of oil lots.¹⁶⁹

Community members started demanding compensation in 2011, and in 2014 Pluspetrol began paying some compensation in Lots 1AB and 8. Community members filed a legal complaint against Supreme Decrees 060 and 061 in 2015¹⁷⁰ that has not yet been decided by the jury.

Photo 7: Kichwa women in protest demanding land rights

¹⁶⁴ UN Declaration on the Rights of Indigenous People, 2007, Art. 10, 28.

¹⁶⁵ Called right of "servidumbre" under Ley N°26570 - sustituye artículo de la ley N° 26505 referido a la utilización de tierras para el ejercicio de actividades mineras o de hidrocarburos, (04.01.96).

¹⁶⁶ UN Declaration on the Rights of Indigenous Peoples, 2007, Art. 26.

¹⁶⁷ Solicitud mediante Carta PPN-LEG-05-0050 del 17 de Junio de 2005 (Annex 34).

¹⁶⁸ Supreme Decrees N°061-2006-EM for Lot 1AB and N°060-2006-EM for Lot 8, 20016, <http://observatoriopetrolero.org/wp-content/uploads/2014/07/RS-060-y-061.pdf> (28 February 2020).

¹⁶⁹ Report prepared by the Ministry of Development for the multisectorial roundtable established in 2012 between the Peruvian government and the indigenous federations that represent communities of the area.

¹⁷⁰ In April 2019, the IDLADS legal team filed a complaint with the ODECMA of Loreto with file number No. 818-2019, amended on 5 April 2019 to comply with formal requirements and offering additional evidence regarding File No. 018-2015-0-19-JM-CI-01 on titling of the four Loreto accounts. The case was admitted on 6 July 2015; the oral report was on 12 June 2017. Since that date the case is pending with the judicial office.



Credit: Renato Pita, OPIKAFPE Federation

When Pluspetrol's concession for Lot 1AB expired in 2015, the right of way grant expired there as well. The communities were then able to obtain title for the land. Tellingly, Pluspetrol began paying easement rights not only to the communities in Lot 1AB, but also the communities in Lot 8, for which it technically retains free easement until 2024 when its concession there will expire.¹⁷¹ The fact that Pluspetrol is now willingly paying to access community lands in Lot 8 suggests Pluspetrol is and has been aware all along of an obligation to pay compensation for access on both lots, an obligation it actively avoided for years.

Although it is positive that Pluspetrol began paying access rights at Lot 1AB, it negotiated payment amounts bilaterally community by community instead of ensuring the presence of communities' representative organizations. In the complainants' view, the company has generated distrust between communities and their representative organisations, and between communities. This approach erodes the indigenous peoples' internal cohesion. It isolates communities from representatives of the federations or other advisors as they make decisions of great magnitude with little to no information.

3.2.6. Failure to respect the right of self-determination of impacted indigenous communities

Pluspetrol's failures of due diligence in its engagement with local indigenous populations at Lot 1AB has also led it to violate several other of their non-land-related internationally-recognised indigenous rights. Of particular note, in general Pluspetrol has not respected communities' right of self-determination by not respecting their right to self-government and to choose their own decision-making institutions and representatives.¹⁷²

¹⁷¹ Ministry of Energy and Mines, Lot 8 General Data, (January 2019), http://www.minem.gob.pe/minem/archivos/file/1%20-20Ficha%20Lote%208_enero%202019.pdf

¹⁷² UN Declaration on the Rights of Indigenous People, 2016, Art. 3, 4, 5, 20.

Indigenous peoples in Peru are organized in a federative – territorial model. Communities (recognized by the State in the Constitution, art. 49) unite to form a local federation; local federations unite to form a regional federation and regional federations unite to form a national federation. International standards state that these own decided institutions should be the rightful actors to represent indigenous people since those are created and chosen by indigenous peoples, so the government and companies should always engage communities through their local, regional or national federation.

Pluspetrol has not respected the right of indigenous communities at Lot 1AB to choose their own decision-making institutions and representatives. The indigenous federations who are complainants in this specific instance are traditional authorities registered as community representatives and recognised by the state in Public Registration. Although they have been the official interlocutors with the state of Peru as appropriate under international standards, Pluspetrol has sought a direct relationship with communities instead of engaging with the community representatives. Leaders of the indigenous federations have years of experience in negotiation with the state and companies and have access to advisors from other allied institutions.¹⁷³ As explained by the communities, the company argued that involving the federations will cause delays or reduce benefits for the community since the federations will siphon money away from compensation packages. According to community members the company has circulated rumours that leaders are receiving personal funding for their activism, or being treated to vacations when they travel abroad to speak at conferences about the communities' situation.¹⁷⁴

Photo 8: Protest against oil pollution in Iquitos. Placards highlight health, compensation, and directly address Pluspetrol's responsibility

¹⁷³ See, e.g. various agreements between Federations and the State: Comisión Multisectorial "Desarrollo de las Cuatro Cuenca" (http://www.minem.gob.pe/minem/archivos/file/6%20-%20Mesa%20%204%20Cuenca_marzo.pdf); Acta of Lima 2015 (<http://www.minam.gob.pe/oas/wp-content/uploads/sites/49/2017/04/18-Acta-Lima-M2-10.03.15.pdf>); Acta de Teniente Lopez of 2015 (<https://observatoriopetrolero.org/wp-content/uploads/2015/10/ACTA-TENIENTE-LOPEZ-W.pdf>) or Acta de José Olaya (<https://observatoriopetrolero.org/wp-content/uploads/2015/11/ACTA-DE-REUNION-FEDERACIONES-NATIVAS-DE-LAS-4-CUENCAS-EJECUTIVO-05.11.15.pdf>).

¹⁷⁴ Quechua (Pastaza river) resident and local authority, Lima, Peru, October 2015, interview.



Credit: PUINAMUDT

Photo 9: Protest against oil pollution in Iquitos. Signs highlight responsibility of Pluspetrol



Credit: PUINAMUDT

Pluspetrol's activities have contributed to a loss of the indigenous communities' cohesion, ability to determine their own independent future, and ability to enjoy their traditional means of subsistence. The communities subsist from the land, having a hunter/gather economy depending on natural resources and on selling goods at local markets. The environmental damage caused by Pluspetrol has affected surface waters, underground waters and soils, not only impacting their health, but also their ability to earn income from their food products. The loss of an agricultural livelihood has left inhabitants of the region with few opportunities to earn money other than through employment at the oil company in operation. Thus, with time, traditional ways of life have been undermined, and indigenous families depend more on jobs or handouts from the company to survive. This dependence, due to unwarranted environmental damage, represents a violation by Pluspetrol of the indigenous people's rights to self-determination and the enjoyment of their own chosen means of subsistence and development. Pluspetrol's ongoing refusal to remediate its environmental impacts deepens its violation of the indigenous peoples' right to self-determination, to determine their own priorities for development, and to engage in traditional practices.

3.3. Pluspetrol failed to meet its responsibility to adequately remediate, nearly 2,000 contamination sites

The previous section 3.1 has established how Pluspetrol's due diligence failures led it to cause or contribute to adverse environmental impacts across nearly 2,000 sites in Lot 1AB. Because Pluspetrol caused or contributed to the contamination of the sites, it has a responsibility under the OECD Guidelines to remediate them. But Pluspetrol has thus far failed to do so adequately. The specific relevant provisions of the Guidelines with which Pluspetrol has not complied are:

- ➔ “Enterprises should [...] address adverse impacts when they occur.”¹⁷⁵
 - Commentary to Chapter II: “For the purposes of the Guidelines, due diligence is understood as the process through which enterprises [...] address their actual and potential adverse impacts. Potential impacts are to be addressed through prevention or mitigation, while *actual impacts are to be addressed through remediation*.¹⁷⁶ (emphasis added)
 - The OECD Due Diligence Guidance for Responsible Business Conduct explains that the sixth step of due diligence is to “Provide for or cooperate in remediation when remediation is required to address impacts an enterprise has caused or contributed to.”¹⁷⁷
- ➔ “Enterprises should provide for or co-operate through legitimate processes in the remediation of adverse human rights impacts where they have caused or contributed to these impacts.”¹⁷⁸

At a general level, Pluspetrol has occasionally utilised two arguments for why it has not undertaken remediation. First, it argues that many of its actions were permitted under Peru's domestic law. This argument has no weight in an OECD Guidelines complaint. The OECD Guidelines are clear that companies have a responsibility to honour any higher international standards that do not place them in violation of national laws.¹⁷⁹ The Guidelines further clarify that “A State's failure either to enforce relevant domestic laws, or to implement international human rights obligations or the fact that it may act contrary to such laws or international obligations does not diminish the expectation that enterprises respect human rights. In countries where domestic laws and regulations conflict with internationally recognised human rights, enterprises should seek ways to honour them to the fullest

¹⁷⁵ OECD, OECD Guidelines for Multinational Enterprises, 2011 Chapter II (General Policies), Principle A11.

¹⁷⁶ OECD, OECD Due Diligence Guidance for Responsible Business Conduct, 2018, Fig. 1, p. 21.

¹⁷⁷ OECD, OECD Guidelines for Multinational Enterprises, 2011, Chapter IV (Human Rights), Principle 6.

¹⁷⁸ OECD, OECD Guidelines for Multinational Enterprises, 2011, Chapter I, Principle 2.

extent which does not place them in violation of domestic law, consistent with paragraph 2 of the Chapter on Concepts and Principles.”¹⁷⁹ Pluspetrol had a responsibility, as a Dutch company covered by the OECD Guidelines as of 2000, to implement known better practices to minimize environmental damage and respect human rights of indigenous communities in Lot 1AB.

Second, Pluspetrol argues that it is not responsible for remediating sites initially contaminated by Oxy. Again, this argument is contradicted by the understanding of “contributing to adverse impacts” and the remediation responsibilities associated with contribution under the OECD Guidelines. Under the OECD Guidelines, Pluspetrol contributed to the adverse impacts initially caused by Oxy, and caused additional adverse impacts on its own. In both cases, Pluspetrol has a responsibility for remediation of the sites.

3.3.1. Pluspetrol failed to remediate contamination sites in a timely manner compatible with applicable environmental standards

As mentioned, Pluspetrol missed the 2002 deadline to align their practices with newer requirements as planned in the PAMA. It therefore submitted an Environmental Complementary Plan (PAC) in 2005, wherein it also identified sites that required remediation.¹⁸⁰ The PAC identified only 75 remediation sites,¹⁸¹ a number far short of the more than 2,000 sites Pluspetrol would itself identify ten years later in 2014.

In 2008, Pluspetrol stated that the sites identified in the PAC that were within Lot 1AB had been 100% remediated.¹⁸² In reality many of these sites were not adequately remediated. Among the 75 sites, 31 were remedied after the deadline and nine were not remediated at all. In 2018, the UNDP reported that soil samples exceeding the limits for barium and lead were identified in areas of Shiviayacu, Caphuari Sur, Dorissa, Forestal and Bartra.¹⁸³ Independent experts also reported that they witnessed Pluspetrol’s poor procedures to remediate spills, which included burning the areas including the surrounding vegetation, burying them without adequate sealing measures, and using obsolete technology and materials such as buckets, tree trunks and palm leaves to collect, absorb, or contain oil spills.¹⁸⁴

Photo 10: Burning of spilled oil as inappropriate remediation technique, Jibarito Battery in the Corrientes river basin

¹⁷⁹ OECD, OECD Guidelines for Multinational Enterprises, 2011, Chapter IV, Commentary 37.

¹⁸⁰ Ministerio de Energía y Minas, 2005, Resolución Directoral N°0153-2005- MEM/AAE (Annex 10).

¹⁸¹ Ministerio de Energía y Minas, 2005, Resolución Directoral N°0153-2005- MEM/AAE (Annex 10).

¹⁸² Reportes de Sostenibilidad de Pluspetrol del 2013 indica “Vale la pena mencionar dos de los muchos compromisos ambientales especificados en el Acuerdo de Dorissa: … la remediación de aquellas áreas afectadas por derrames generadas en su mayoría antes del inicio de operaciones de Pluspetrol. Esos compromisos implican: 31 de Diciembre, 2007: remediación del suelo al 100% en 75 lugares identificados (concluido).”

¹⁸³ United Nations Development Programme, 2018, “Estudio Técnico Independiente del ex Lote 1AB”, p.87, available at https://www.pe.undp.org/content/peru/es/home/library/democratic_governance/eti-del-ex-lote-1ab.html.

¹⁸⁴ Orta-Martínez, M., D. A. Napolitano, G. J. MacLennan, C. O’Callaghan, S. Ciborowski, and X. Fabregas, 2007, Impacts of petroleum activities for the Achuar people of the Peruvian Amazon: summary of existing evidence and research gaps.

Environmental Research Letters 2(4):45006. <http://dx.doi.org/10.1088/1748-9326/2/4/045006>.



Credit: Martí Orta-Martínez (Institut of Environmental Science and Technology. Autonomous University of Barcelona) and Feconacor

Photo 11: Use of inadequate technology (buckets) to clean oil spills



Credit: Martí Orta-Martínez (Institut of Environmental Science and Technology. Autonomous University of Barcelona) and Feconacor

Photo 12: Burning of collected spilled oil. Even after collecting the spilled oil, Pluspetrol remediates it inappropriately by burning it



Credit: Martí Orta-Martínez (Institut of Environmental Science and Technology. Autonomous University of Barcelona) and Feconacor

In 2013, Pluspetrol stated that it had identified and remediated more than 100 sites, but also acknowledged that remediation is an on-going effort requiring significant time and investment.¹⁸⁵ Subsequent investigations already discussed in this complaint, such as the investigation leading to OEEA's 2014 report on Lot 1AB and the UNDP technical study, have also amply demonstrated the ongoing failures of Pluspetrol's weak remediation efforts.

In relation to the dumping of production waters, Pluspetrol has repeatedly presented its \$500 million investment in the reinjection of production waters as an environmental remediation measure.¹⁸⁶ This is completely inaccurate. The reinjection of production waters is merely a cessation of bad practice, not a remediation of the residual harmful impacts from that bad practice.

¹⁸⁵ Petrolera Pluspetrol niega contaminación del Pastaza' 03 April 2013 <http://larepublica.pe/03-04-2013/petrolera-pluspetrol-niega-contaminacion-del-pastaza>.

¹⁸⁶ La República, 2013, 'Petrolera Pluspetrol niega contaminación del Pastaza' (03 April 2013), <http://larepublica.pe/03-04-2013/petrolera-pluspetrol-niega-contaminacion-del-pastaza>.

Under the terms of the PAC, if Pluspetrol failed to complete its remediation commitments by 2009, it was required to develop a Cessation Plan.¹⁸⁷ Pluspetrol delivered its Cessation Plan on 23 September 2011. In May 2012, the Ministry of Energy and Mines concluded that the levels of barium and TPH proposed in this plan would considerably exceed the limits established by international standards, and that the technique proposed for the remediation of barium contaminated soils was inappropriate.¹⁸⁸

For its part, the UNDP asserted in 2018 that there has never been an adequate remediation process in Lot 1AB¹⁸⁹. Furthermore, the remediation practices implemented in the lot were often counterproductive, consisting merely of mixing contaminated soil with clean soil.

A clear example of Pluspetrol's bad practices in the area of remediation of contamination is the case of the Shanshococha lagoon. The lagoon was located within Lot 1AB in the territory of the Quechua people of the Pastaza River. The lagoon represented a habitual source of animal protein for the Quechua people. In May 2012, FEDIQUEP environmental monitors saw the lagoon severely contaminated, covered with a thick layer of crude oil on the surface.¹⁹⁰ Within four months of this discovery, representatives from OEFA, the National Authority for Water (ANA in Spanish), and the General Direction of Environmental Health (DIGESA in Spanish) visited the site. They found that to cover up the damage caused and avoid an administrative sanctioning procedure, Pluspetrol had addressed the oil in the lake by illegally draining (i.e. removing) the lagoon entirely.¹⁹¹ Pluspetrol had removed the contaminated soil and then covered the former lagoon site with tree trunks and a thick layer of earth so that soil samples could not be retrieved from below.

Photo 13: Sanshococha lagoon (Pastaza River basin) before the draining, May 2012

¹⁸⁷ Ministerio de Energía y Minas, 2003, Crean el Plan Ambiental Complementario (PAC) DECRETO SUPREMO N° 028-2003-EM Artículo 7 de Actividades por incumplimiento del PAC,
http://www.osinerg.gob.pe/newweb/uploads/GFH/DS028_2003_Plan_Ambiental_Complementario_PAC.pdf.

¹⁸⁸ Ministerio de Energía y Minas, 2012, Auto-Directoral N° 353-2012-MEM-/AAE Observaciones 4 y 8, seen in Congress Report of 2011-2012, p. 27,
[http://www2.congreso.gob.pe/sicr/comisiones/2011/com2011pueandamaframbecho.nsf/pubs1foto/7C6EA2CE879846F505257A440053CE21/\\$FILE/INFORME_FINAL.PDF..](http://www2.congreso.gob.pe/sicr/comisiones/2011/com2011pueandamaframbecho.nsf/pubs1foto/7C6EA2CE879846F505257A440053CE21/$FILE/INFORME_FINAL.PDF..)

¹⁸⁹ United Nations Development Programme, Independent Technical Study, (July 2018),
https://www.pe.undp.org/content/peru/es/home/library/democratic_governance/eti-del-ex-lote-1ab.html.

¹⁹⁰ Observatorio Petrolero de la Amazonía Norte, 2012, <http://observatoriopetrolero.org/se-puede-desaparecer-una-cocha-con-total-impunidad/>. Véase también OEFA, 2014, "Informe número 411-2014-DS-HID," párr. 63 (Annex 1).

¹⁹¹ OEFA, 2014, "Informe número 411-2014-DS-HID". párr. 62, nota al pie 9. La visita fue entre el 19 y 24 de septiembre del 2012 (Annex 1).



Credit: PUINAMUDT

Photo 14: Sanshococha lagoon after Pluspetrol's "remediation", September 2012



Credit: Stefan Kisler

On 22 November 2013, OEFA imposed a fine of approximately US\$6.1 million on Pluspetrol for soil contamination and a series of unauthorised and illegal interventions by Pluspetrol that caused irreparable damage to the lagoon.¹⁹² OEFA also issued a corrective measure that aimed to force Pluspetrol to create a new lagoon or to undertake the protection and improvement of another type of water body in the affected area.¹⁹³ On 25 March 2014, OEFA inspected the area and verified that Pluspetrol had not complied with its corrective measures.¹⁹⁴ OEFA carried out a check that showed excess levels of TPH in the soil, and levels of barium and lead which exceeded the established limits.¹⁹⁵ Pluspetrol justified its behaviour by claiming that it did not know to whom it should report the damage because it was not sure which government agency was responsible.¹⁹⁶ Pluspetrol then filed an appeal requesting the corrective measures to be suspended. The appeal is currently still proceeding through the court system.^{197,198} Meanwhile, Pluspetrol has now stated that it did not contaminate the area at all and that the damage preceded its arrival in 2000.¹⁹⁹

3.3.2. *Pluspetrol's refusal to accept responsibility for the contaminated sites at Lot 1AB*

At its departure from Lot 1AB in 2015, Pluspetrol was required by regulation to implement an "abandonment plan" laying out its plan to remediate (clean up) the lot before its departure.²⁰⁰ To date, Pluspetrol has submitted three abandonment plans. Its first and second plans were both rejected^{201,}²⁰² and its third plan is currently under review. None of the plans has addressed anywhere near the approximately 2,000 contamination sites that Pluspetrol itself identified at Lot 1AB and that the Peruvian government attributes to Pluspetrol's care.

3.3.2.1. *First Abandonment Plan – 2015*

Pluspetrol submitted its first abandonment plan in January 2015. In this plan, Pluspetrol proposed to address just 49 contamination sites.²⁰³ None of the 49 sites contemplated the remediation of soils, water or sediment, but only referred to the abandonment of wells and landfills. The plan also did not include 92 sites OEFA identified in its October 2014 report.²⁰⁴

In 2014 OEFA had identified 92 contaminated sites in Lot 1AB that should be addressed by Pluspetrol, but Pluspetrol denied responsibility for them, saying they were never included in its original remediation PAMA or PAC and that they fell under someone else's responsibility. Pluspetrol's

¹⁹² OEFA, 2013, Resolución Directoral No 534 -2013- OEFA / DFSAI, con fecha entre el 22 y 25 de noviembre (Annex 35).

¹⁹³ OEFA, 2014, "Informe número 411-2014-DS-HID".párr. 62 (Annex 1).

¹⁹⁴ OEFA, 2014, "Informe número 411-2014-DS-HID".párr. 63 (Annex 1).

¹⁹⁵ PUINAMUDT, "Pluspetrol lies in an official statement about Shanshococha," 28 November 2013, <http://observatoriopetrolero.org/pluspetrol-miente-en-comunicado-publico-oefa-desmiente/> (10 March 2020).

¹⁹⁶ Comisión de Justicia y Derechos Humanos Informe de Representación Legislatura 2012 – 2013 page 63 "Al respecto, la empresa manifestó en su defensa que no tenían a quién reportar los pasivos ambientales, aduciendo que no estaban claras las competencias del OEFA y OSINERGMIN," <https://observatoriopetrolero.org/wp-content/uploads/2013/11/Informe-4-Cuencas-Comision-de-Pueblos-2013.pdf>.

¹⁹⁷ OEFA, 2014, "Informe número 411-2014-DS-HID".párr. 63 (Annex 1).

¹⁹⁸ OEFA, 2015, 004-2015-OEF/TFA-SEE, Sanction taken to courts after the administrative level had given OEFA the reason, (Annex 29).

¹⁹⁹ Cara Clancy y Sarah Kerremans, 2015, "Dependencia del Petróleo en la Amazonía Peruana, Como las Compañías de Petróleo han explotado la Selva de Loreto" Instituto Chaikuni. <http://extractivismo.com/wp-content/uploads/2016/07/DependenciaPetrroleraAmazoniaPeru.pdf>, p. 7.

²⁰⁰ Peruvian Ministry of Energy and Mines, Regulation for environmental protection for hydrocarbon activities, Supreme Decree 039-2014-EM, <[http://www.minem.gob.pe/minem/archivos/DS-039-2014-EM\(2\).pdf](http://www.minem.gob.pe/minem/archivos/DS-039-2014-EM(2).pdf)> (November 2014).

²⁰¹ Peruvian Ministry of Energy and Mines, RD 206-2015-MEM-DGAAE, (June 2015), (Annex 3).

²⁰² Peruvian Ministry of Energy and Mines, RD 067-2019-MEM-DGAAH, (2019), (Annex 4).

²⁰³ Pluspetrol, 2016, Abandonment Plan for Lot 1AB, (Annex 36).

²⁰⁴ OEFA, 2014, "Informe número 411-2014-DS-HID".párr. 73, 97-116; Conclusiones IV.2. b (Annex 1).

argument was based in 2007 Peruvian legislation that introduced the concept of “environmental liabilities” that are contamination sites caused by companies that have already left a site area.^{205, 206} However, the term is applicable specifically to sites left outstanding at the termination of a concession contract and not to an assignment between companies occurring under the same concession contract.²⁰⁷

Pluspetrol appealed and took to courts OEFA’s 2014 report, asserting OEFA had no legal competence to interpret the term “environmental liabilities” or to identify them in practice, since that competence and authority fell under the mandate of the Ministry of Energy and Mines. But in April 2015 the First Specialized Civil Court of Maynas of the Superior Court of Justice of Loreto ruled in favour of OEFA, saying that OEFA was competent to reach such a finding and that OEFA’s 2014 report was legal.²⁰⁸ While the court did not rule on the issue of Pluspetrol’s responsibility, it did endorse the OEFA report in which Pluspetrol is declared responsible for the clean-up.²⁰⁹

In June 2015 the Peruvian Ministry of Energy and Mines rejected Pluspetrol’s first abandonment plan, primarily on grounds that it did not address the 92 additional sites.²¹⁰ Pluspetrol filed an appeal of this decision, but the Vice Minister of Energy and Mines confirmed the rejection in August 2015.²¹¹

3.3.2.2. Second Abandonment Plan – 2016

In 2016, Pluspetrol submitted, for a second attempt, another abandonment plan.²¹² This plan was essentially identical to the first: it too listed the same 49 sites and established the same budget for remediation, merely including more pages of context description.

But this time, OEFA found the plan was missing at least 1,199 contamination sites. OEFA reached that decision based on Pluspetrol’s own identification of the number of “environmental liabilities” at Lot 1AB. In 2015, Pluspetrol had submitted an accounting under a new environmental legislation for soil, identifying a total of 2,014 contamination sites at Lot 1AB.²¹³ Pluspetrol declared these sites “environmental liabilities,” trying to make them fall outside their own responsibility, as to be determined by the Ministry of Energy and Mines. But as described above, OEFA (and the court) reject the idea that the 2007 legislation on environmental liabilities applies to Pluspetrol, and they attribute responsibility for the sites to Pluspetrol. OEFA found that 51 of the 2,014 contaminated sites had been

²⁰⁵ Ley No 29134 – Ley que Regula los Passivos Ambientales del Subsector Hidrocarburos, 17 Noviembre 2007, https://www.perupetro.com.pe/wps/wcm/connect/corporativo/07833094-b4df-43bf-9878-965ce9583bc5/25_Ley_29134.pdf?MOD=AJPRES.

²⁰⁶ En la legislación peruana no se entienden los pasivos ambientales en el sentido económico de los pasivos y activos que tiene una empresa sino cómo las áreas contaminadas sin remediación que hay en una zona una vez la empresa responsable ha dejado de trabajar formalmente en ella.

²⁰⁷ Corte Superior de Justicia de Lima. Primero juzgado permanente especializado en lo Contencioso Administrativo. Expediente: 07996-2017-7-1801-JR-CA-01, p.14 (Annex 7)

²⁰⁸ OEFA, Judge in Loreta region leaves without effect the precautionary measure favoring Pluspetrol, April 2015, <https://www.oefa.gob.pe/juez-en-loreto-deja-sin-efecto-medida-cautelar-que-favorecia-a-pluspetrol/>.

²⁰⁹ The 2007 legislation is not applicable to Pluspetrol for two reasons. First, Pluspetrol acquired Lot 1AB from Oxy under an assignment contract for the same ongoing concession. The exploitation activities did not stop between Oxy and Pluspetrol and Pluspetrol was not granted a new concession; instead, Pluspetrol became the new operator of an ongoing concession for which it acquired the rights and responsibilities of the previous operator, Oxy. OEFA and the court have interpreted that the legislation is not applicable to an assignment contract where exploitation activities never ceased.²⁰⁹ Second, given that the legal concept of environmental liabilities did not exist in 2000, no reference is made to it in Pluspetrol and Oxy’s assignment contract, suggesting the contract transferred not just Oxy’s concession rights but also its responsibility to remediate existing environmental damages. Indeed, the logic that sustained the environmental instruments PAMA and PAC, which Pluspetrol itself was responsible for drafting, explicitly relies on an assumption that the responsibility for remediation would fall to Pluspetrol. Before 2007, Pluspetrol did not speak out when government (e.g. OSINERG) documents indicated its responsibility for cleaning contamination sites initially caused by Oxy.

²¹⁰ Peruvian Ministry of Energy and Mines, RD 206-2015-MEM-DGAAE, (June 2015), (Annex 3).

²¹¹ Ministerio de Energía y Minas, 2015, Vice- Ministrie’s resolution 029 - 2015- MEM/VME (Annex 5).

²¹² Pluspetrol, 2016, Plan de Abandono del lote 1AB. June 2016, (Annex 37).

²¹³ OEFA, Informe 77-2015-OEFA-DS-HID, (June 2015), (Annex 2).

counted double, lowering the number to 1,963 sites. Of these 1,963 sites, OEFA already had a record of 764 of them.²¹⁴ In 2016 OEFA thus initiated a sanction process for eight sanctions, one of them for Pluspetrol's failure to incorporate 1,199 sites in its abandonment plan.²¹⁵

In 2017 Pluspetrol appealed OEFA's 2016 sanction on the 1,199 sites to the administrative Environmental Inspection Court, arguing the sites were not their responsibility.²¹⁶ The Environmental Inspection Court upheld OEFA's ruling, stating that Pluspetrol is obliged to incorporate the 1,199 sites into its abandonment plan.²¹⁷ Pluspetrol appealed to the Supreme Court on 1 August 2017, asking for precautionary measures to remove the legal effect of OEFA's sanction pending a judgment on the overall liability question. On 10 June 2019 the first level of the Supreme Court denied Pluspetrol's request for precautionary measures and left OEFA's directorial resolution in effect. The Supreme Court ruled that because Pluspetrol's contract had a duration of 30 years from 1985 to 2015, there had been no termination of oil operations at the site between Oxy and Pluspetrol and merely a change in contractors, such that "the classification of environmental liabilities does not correspond to the areas impacted within it" – in other words, that the term "environmental liabilities" was not applicable to Pluspetrol.²¹⁸ On 21 June 2019, Pluspetrol appealed this decision in a case that is still ongoing.

It is worth noting that in March 2015, Pluspetrol had disputed its environmental obligations under the contract at the international investment arbitration tribunal *Comisión Interamericana de Arbitraje Comercial* (CIAC). Pluspetrol received an award finding that the contract between Pluspetrol, Oxy and Perupetro (the former operator at Lot 8) did not include a provision on the explicit obligation to remedy contamination sites existing in 2000, but did include an article enforcing Pluspetrol's obligation to respect environmental legislation, which itself discusses the obligation to remedy impacts. This vague award allowed different interpretations, but the Supreme Court of Justice said in its ruling, regarding the arbitration award, that Pluspetrol should have "identif[ied] the [contaminated sites] temporally, that is, which were originated before and which after" the year 2000, if Pluspetrol had actually intended, with its contract, to disclaim responsibility for all sites created prior to 2000.²¹⁹ Since this identification doesn't exist it is very difficult to demonstrate which environmental impacts came before or after that year.

While the litigation over OEFA's 2016 sanction has been underway, the Ministry of Energy and Mines rejected Pluspetrol's second abandonment plan in February 2019. The Ministry declared that among several other observations that hadn't been addressed, Pluspetrol has a responsibility to include the 1,199 sites in its abandonment plan.²²⁰ The Ministry actually additionally required Pluspetrol to include another 190 sites beyond the 1,199 identified by Pluspetrol and OEFA. (In another list of sites Pluspetrol submitted to the Ministry of Energy and Mines in 2015, Pluspetrol identified 373 additional soil contamination sites. In its rejection of the second abandonment plan, the Ministry of Energy and

²¹⁴ OEFA: Informe de supervisión 077-2015-OEFA-DS-HID (Annex 2).

²¹⁵ OEFA, Directorial Resolution N° 1551-2016-OEFA/DFSAI OEFA, (September 2016) (Annex 6).

²¹⁶ OEFA, 2017, Resolution 046-2017-OEFA/TFA-SME (Annex 8).

²¹⁷ OEFA, 2017, Resolution 046-2017-OEFA/TFA-SME (Annex 8).

²¹⁸ Corte Superior de Justicia de Lima. Primero juzgado permanente especializado en lo Contencioso Administrativo. Expediente: 07996-2017-7-1801-JR-CA-01, p.14 (Annex 7). The main argument in the ruling states that: "In accordance with the provisions of Article 22 of the Single Ordered Text of the Organic Hydrocarbons Law, approved by Supreme Decree No. 042-2005-EM, the bidding contracts for the exploitation phase have a maximum term of thirty (30) years. In response to this, the license agreement for Lot 1-AB ended on August 29, 2015, that is, thirty (30) years after its entry into force (August 30, 1985) with the signing of the original contract. It follows, then, that in the present case there was a subrogation of contractor companies in time with respect to the qualification for the exploitation of hydrocarbons in Lot 1-AB, that is, since the signing of the original contract (1986). Consequently, in the aforementioned Lot there was no cessation of hydrocarbon operations but only the change of ownership. Based on the foregoing, it is proven that in the present case there was no cessation of activities in the aforementioned hydrocarbon lot, so that the classification of environmental liabilities does not correspond to the areas impacted within it."

²¹⁹ Corte Superior de Justicia de Lima. Primero juzgado permanente especializado en lo Contencioso Administrativo.

Expediente: 07996-2017-7-1801-JR-CA-01 . pag.24 (Annex 7).

²²⁰ Ministerio de Energía y Minas, 2019, RD 067-2019-MEM-DGAAH (Annex 4).

Mines demanded that 190 of these 373 also be included in Pluspetrol's abandonment plan.²²¹⁾ Again Pluspetrol appealed the rejection decision, but the Vice Minister of Energy and Mines confirmed the decision.²²²

3.3.2.3. *Third Abandonment Plan – 2019*

Pluspetrol presented a third abandonment plan in May 2019. In this plan, the company proposes to address just 35 contaminated sites. The Ministry of Energy and Mines initially rejected the plan because it lacked adequate formality.²²³ Pluspetrol appealed this decision. Even though the Vice Minister has granted part of the appeal in favour of Pluspetrol's allegations,²²⁴ his decision implies that the content of abandonment plan is still going to be evaluated again by the competent authority. Since the third plan also fails to address the 1,199 unremediated contaminated sites and the 190 contaminated sites presented by Pluspetrol itself to the Ministry of Energy and Mines in 2015, it is expected that this plan will be rejected just like the first two were.

3.3.2.4. *Failure to remediate the contamination sites*

While Pluspetrol has repeatedly failed to submit a viable abandonment plan, and while the dispute over Pluspetrol's liability for contamination prior to 2000 is ongoing, Pluspetrol has undertaken no remediation at the 2,000-some contamination sites that continue to damage the health and well-being of the local inhabitants. In 2014, in his report visiting Peru, the UN Special Rapporteur on the Rights of Indigenous Peoples stated: "The Pluspetrol company assumed the commitments acquired by Occidental in the framework of the current environmental regulations, which consist of carrying out decontamination actions of soils and water sources in Lot 1AB [...] However, serious environmental problems continue to exist due to the contamination of the bodies of water and soils used by the indigenous peoples of that region, which has affected their food and health sources."²²⁵ Under the OECD Guidelines, Pluspetrol has a responsibility to address the impacts of its predecessor, with whom it had a business relationship, and to whose impacts Pluspetrol has further contributed, regardless of Pluspetrol's liability under Peruvian law.

3.3.3. *Inadequate remediation of health impacts*

Pluspetrol has not adequately remediated the human health impacts linked to the pollution it caused and contributed to. Pluspetrol did make a donation to the government to build a hospital in the area, but the hospital was never built. Pluspetrol has also allowed (at its discretion) community members to use the company's doctors, it has provided the communities with some health-related provisions such as first-aid kits, and it has evacuated some community members during health emergencies. None of these health responses – a donation to a never-built hospital, permission at its discretion for community members to use company doctors, first aid kits, and periodic evacuations for the extremely ill – constitute appropriate remediation of the health impacts Pluspetrol has been connected to. Instead, these measures are a band aid serving only a few people, leaving the vast majority unaided. No compensation was paid or comprehensive health care provided directly to families impacted by the pollution levels.

3.3.4. *Poor cooperation with other remediation processes*

²²¹ Ministry of Energy and Mines, 2019, Appendix 1, RD067-2019-MEM/DGAAH (Annex 4).

²²² Ministry of Energy and Mines, 2019, Directoral resolution n° 067-2019-MEM-DGAAH (Annex 4).

²²³ Ministry of Energy and Mines, 2019, Directoral resolution n° 427-2019-MINEM/DGAAH (Annex 40).

²²⁴ Ministerio de energía y minas, 2019, Vice-ministerial Resolution RVM_023-2019-MINEM-VMH (Annex 38).

²²⁵ Informe del Relator Especial sobre los derechos de los pueblos indígenas, James Anaya Adición La situación de los derechos de los pueblos indígenas en Perú, en relación con las industrias extractivas (2014) UN Doc A/HRC/27/52/Add.3 (en adelante Anaya (2014)) párr. 21 & 22.

The OECD Guidelines Due Diligence Guidance for Responsible Business Conduct clarifies that the sixth step of due diligence for companies that have caused or contributed to environmental or human rights impacts is to “provide for or cooperate in remediation.” Pluspetrol has not adequately, as described above, provided remediation. Nor has its engagement with other legitimate processes toward remediation been cooperative. Pluspetrol’s appealing of seven remediation sanctions and corrective action measures, received five years ago,²²⁶ is an example of its non-cooperative approach: instead of complying with the sanctions and the corrective action measures, Pluspetrol is still fighting the sanctions in court. Further, Pluspetrol has appealed, rather than comply, with a significant portion of the other sanctions or rulings it received from OEFA and OSINERGMIN.

3.4. Breaches of the OECD Guidelines related to tax and disclosure

The OECD Guidelines address topics relevant to tax avoidance in the chapter on tax (Chapter XI) as well as the chapter on disclosure (Chapter III). Sub-section **Error! Reference source not found.** deals with what we allege to be Pluspetrol’s breaches related to Chapter XI, then with breaches related to disclosure (Chapter III) in sub-section 3.4.2.

The following Guidelines’ provisions from the tax chapter are of particular relevance.

- ➔ Chapter XI, paragraph 1: “It is important that enterprises contribute to the public finances of host countries by making timely payment of their tax liabilities. In particular, enterprises should comply with both the letter and spirit of the tax laws and regulations of the countries in which they operate. Complying with the spirit of the law means discerning and following the intention of the legislature. It does not require an enterprise to make payment in excess of the amount legally required pursuant to such an interpretation. Tax compliance includes such measures as providing to the relevant authorities timely information that is relevant or required by law for purposes of the correct determination of taxes to be assessed in connection with their operations and conforming transfer pricing practices to the arm’s length principle.”
 - Commentary 100: Transactions should not be structured to result in tax consequences inconsistent with the underlying economic consequence of the operations, unless there is a specific legislation designed in that way. The tax consequences of an economic operation should follow the intention of the legislature.²²⁷
 - Commentary 101: Companies’ compliance with domestic tax legislation in the countries in which they operate entails cooperation with tax authorities and provision of required information.²²⁸
 - Commentary 103: Economic relationships between different affiliates of a single economic group may affect the tax liability of the involved parties. The affected tax authorities therefore may need information from outside their jurisdiction to fully comprehend and evaluate the tax situation of affiliates. Multinational enterprises should cooperate in providing the relevant information.²²⁹

²²⁶ Sanctions and corrective measures for lot 1AB that are on appeal until today: 080-2012-OEFA/TFA: fine for not complying with the PAC, exceeding the level of 30000mg/k of THP in batteries SHIV12 and SHIV37 (Annex 28); 004-2015-OEF/TFA-SEE: Sanshocha lake (Annex 29); 048-2016-OEFA/TFA/SME: not complying with the PAMA since Pluspetrol did not do the inspections needed in order to control pipelines corrosion (Annex 18); 046-2017-OEFA/TFA-SME: several infractions coming from the result of monitoring actions done by OEFA and the identification of 1199 new sites (Annex 22); 1016-2009-OS/TASTEM; 063-2018-OEFA/TFA-SMEPIM: Failure to properly store chemical substances, hazardous solid waste not properly stored, and exceed the maximum permissible limits for household effluents (Annex 19); 300-2018-OEFA/TFA-SMEPIM: lack of water monitoring at effluent emission points (Annex 24).

²²⁷ OECD Guidelines for Multinational Enterprises 2011 Edition, p.60 and 61, Commentary 100.

²²⁸ OECD Guidelines for Multinational Enterprises 2011 Edition, p.60 and 61, Commentary 101.

²²⁹ OECD Guidelines for Multinational Enterprises 2011 Edition, p.60 and 61, Commentary 103.

- ➔ Chapter XI, paragraph 2: “Enterprises should treat tax governance and tax compliance as important elements of their oversight and broader risk management systems. In particular, corporate boards should adopt tax risk management strategies to ensure that the financial, regulatory and reputational risks associated with taxation are fully identified and evaluated.”

3.4.1. Breaches of Chapter XI related to Pluspetrol’s use of the Dutch tax system

A key issue to assessing Pluspetrol’s compliance with the Guidelines is determining whether Pluspetrol has, through its actions and/or failures to disclose its actions, violated the spirit of tax law in breach of the OECD Guidelines.

To comply with the *spirit of the law*, a multinational enterprise must meet the meaning and purpose of the law, as well as the original intention of the original legislator, reflecting the social and moral consensus around it.²³⁰ A legislative document should be interpreted in accordance with the social choices and intentions originally invested into the rule to protect against abusive operations.²³¹

Corporate taxation in the Netherlands is governed by the Law on Corporation Tax of 1969 (*wet op de vennootschapsbelasting 1969*). This legislation makes reference to and determines the taxation of all the corporative entities utilized by Pluspetrol, regulates economic group structures and interactions with foreign taxpayers, and determines the deduction of interest payments in respect of loans. The complainants in this case argue that the benefits of the Dutch tax system were intended to benefit businesses with real business purpose in the Netherlands, and *not* intended to be used by multinationals through letterbox companies for the purpose of tax avoidance.

However, the Dutch tax system is in fact frequently used by multinationals to avoid taxes. The Netherlands was ranked as the fourth worst global corporate tax haven for multinationals by the Tax Justice Network in 2019.²³² The European Parliament also adopted a resolution declaring the Netherlands a tax haven and calling on the European Commission to add the country to its tax haven blacklist.²³³ In 2018, the European Commission named the Netherlands as one of the EU countries that facilitates aggressive tax planning by multinational corporations.²³⁴ According to a 2019 Oxfam report, if the EU would also screen EU member states for its tax haven blacklist, the Netherlands could fail their criteria and be ranked as a tax haven.²³⁵

The Netherlands Bureau for Economic Policy Analysis (Centraal Planbureau) in 2013 published a policy brief in which it states that the role of the Netherlands as a conduit country can be explained by its extensive network of favourable tax treaties, low withholding taxes (e.g. on interest and royalty payments), the participation exemption, bilateral investment treaties, tax rulings and the experience and expertise of the Dutch trust and corporate service providers.²³⁶ These features can be used by corporations to avoid taxes:

²³⁰ Ostas, D. T. Cooperate, comply, or evade? A corporate executive’s social responsibilities with regard to law. *American Business Law Journal*, 41, (2004) page 594.

²³¹ Garcia, Stephen M. et al, *The Letter versus the Spirit of the Law: A lay perspective on culpability*, Judgment & Decision Making. Sep2014, Vol. 9 Issue 5, p 479-490.

²³² Tax Justice Network, 2019, “Corporate Tax Haven Index”, <https://www.corporatetaxhavenindex.org/introduction/cthi-2019-results>

²³³ De Volkskrant, 2019, “Nederland is een belastingparadijs en moet op een zwarte lijst, vindt het Europees Parlement”, <https://www.volkskrant.nl/nieuws-achtergrond/nederland-is-een-belastingparadijs-en-moet-op-een-zwarte-lijst-vindt-het-europees-parlement~bd106c67/>

²³⁴ EU Observer, 2018, “Commission opens debate on tax competition within EU”, <https://euobserver.com/economic/141237>

²³⁵ Oxfam, 2019, “Off the hook. How the EU is about to whitewash the world’s worst tax havens”, <https://www.oxfamnovib.nl/Files/rapporten/2019/20190307%20bnoffthehooktaxhavens.pdf>

²³⁶ Centraal Planbureau, 2013, “Nederland belastingparadijs? Nederland doorsluisland!”, <https://www.cpb.nl/sites/default/files/publicaties/download/cpb-policy-brief-2013-07-bilaterale-belastingverdragen-en-buitenlandse-investeringen.pdf>

- **Extensive tax treaty network:** The Netherlands maintains double tax treaties with almost 100 countries worldwide that enable businesses to shift income in various forms (such as dividends, interest and royalties) through the Netherlands to other jurisdictions at a reduced tax cost.
- **Extensive network of bilateral investment treaties (BITs):** A bilateral investment treaty is a “legally binding agreement between two countries that establishes reciprocal protection and promotion of investments in both countries”.²³⁷ These BITs generally include Investor State Dispute Settlement (ISDS) clauses which enable investors to bring a claim against a government for breach of the treaty. The Netherlands has 79 BITs with non-EU governments.²³⁸ A 2018 report by SOMO found that 12% of all publicly known ISDS cases worldwide were filed by investors who claim that the Netherlands is their home country.²³⁹ Of these claims, 77% were filed by Dutch letterbox companies²⁴⁰ with no actual substance in the Netherlands.²⁴¹ The Netherlands is the second most popular home state (after the United States) for filing ISDS claims.²⁴² In an effort to begin addressing this abuse of the Dutch BIT network, in 2018 the Dutch government introduced several measures to limit the ability of letterbox companies to take advantage of Dutch BITs.²⁴³
- **Tax rulings:** Companies can request a tax ruling from the Dutch Tax Authority which, according to the government, provides companies with “certainty beforehand” on the application of the law regarding their tax base and how their profits will be taxed in the Netherlands.²⁴⁴ Rulings are one of the “most attractive features of Dutch tax law.”²⁴⁵ In 2017, the Dutch government provided about 500 of these rulings,²⁴⁶ with neither the public nor the Dutch Parliament having access to information on which companies have a ruling in the Netherlands.²⁴⁷ Tax rulings have come under greater scrutiny in the Netherlands and in the EU for the role they can play in tax avoidance.²⁴⁸

²³⁷ Both Ends, Madhyam, SOMO, 2016, “Rethinking bilateral investment treaties”, <https://www.somo.nl/wp-content/uploads/2016/03/Rethinking-bilateral-investment-treaties.pdf>, p.1.

²³⁸ Verbeek, B. J. & Knottnerus, R., 2018, “The 2018 draft Dutch model BIT: a critical assessment”, <https://www.iisd.org/itn/2018/07/30/the-2018-draft-dutch-model-bit-a-critical-assessment-bart-jaap-verbeek-and-roeline-knotnerus/>.

²³⁹ Verbeek, B. J. & Knottnerus, R., 2018, “The 2018 draft Dutch model BIT: a critical assessment”, <https://www.iisd.org/itn/2018/07/30/the-2018-draft-dutch-model-bit-a-critical-assessment-bart-jaap-verbeek-and-roeline-knotnerus/>.

²⁴⁰ The term letterbox company is used to refer to foreign-owned companies with little or no economic activity or employees in the country of residence.

²⁴¹ Verbeek, B. J. & Knottnerus, R., 2018, “The 2018 draft Dutch model BIT: a critical assessment”, <https://www.iisd.org/itn/2018/07/30/the-2018-draft-dutch-model-bit-a-critical-assessment-bart-jaap-verbeek-and-roeline-knotnerus/>

²⁴² Verbeek, B. J. & Knottnerus, R., 2018, “The 2018 draft Dutch model BIT: a critical assessment”, <https://www.iisd.org/itn/2018/07/30/the-2018-draft-dutch-model-bit-a-critical-assessment-bart-jaap-verbeek-and-roeline-knotnerus/>.

²⁴³ Verbeek, B. J. & Knottnerus, R., 2018, “The 2018 draft Dutch model BIT: a critical assessment”, <https://www.iisd.org/itn/2018/07/30/the-2018-draft-dutch-model-bit-a-critical-assessment-bart-jaap-verbeek-and-roeline-knotnerus/>.

²⁴⁴ Dutch Tax Authority, website: ‘Vooroverleg/Ruling’, https://www.belastingdienst.nl/wps/wcm/connect/bldcontentnl/standaard_functies/prive/contact/rechten_en_plichten_bij_de_belastingdienst/ruling/ (accessed 29 April 2019)

²⁴⁵ NFIA, ‘Why Invest in Holland? Incentives & Taxes in the Netherlands 2018’, available at https://investinholland.com/nfia_media/2018/03/FLYER-tax-and-incentives-2018_Mar18_DEF.pdf

²⁴⁶ See Dutch Tax Authority, ‘Factsheet Rulings’: <https://belastingdienst-in-beeld.nl/themas/belastingheffing-en-internationale-structuren/factsheet-rulings/> (accessed 24 January 2019)

²⁴⁷ Until the decision to publish anonymised summaries of rulings, there was little information available on the content of the rulings. However, through freedom of information requests, limited information was revealed on the kind of corporate structures that are subject to rulings. See: SOMO, ‘Structures of secret Dutch tax rulings revealed’, 9 May 2017, available via <https://www.somo.nl/structures-secret-dutch-tax-rulings-detail-revealed/>.

²⁴⁸ See e.g.: European Commission, ‘Commission decides selective tax advantages for Fiat in Luxembourg and Starbucks in the Netherlands are illegal under EU state aid rules’, press release 21 October 2015, available via

- **Participation exemption:** The “participation exemption” is a Dutch tax provision with the positive purpose of ensuring profits within a corporate group are taxed only once which makes the Netherlands an attractive location for holding companies. The provision can also be manipulated, however: when money is shifted from source countries to tax havens (e.g. The Bahamas) via the Netherlands, the income being routed through the Netherlands is not taxed at the level of the Dutch subsidiary, thereby helping the corporation avoid taxation altogether on the source income. With its intention to avoid economic double taxation, the participation exemption can lead to an undesirable outcome: double non-taxation.²⁴⁹

The complexity of domestic tax systems and the interaction of two or more jurisdictions often offer corporations opportunities to avoid taxation in ways that run contrary to the underlying economic reality of corporate transactions and the original intent of the legislators. The tax avoidance that can arise in countries where a company operates (such as Peru) from the use of tax havens such as the Netherlands and the Cayman Islands, while not necessarily violating the letter of the law, is certainly against the spirit of the law in the countries where the company operates. The use of letterbox companies violates the spirit of Dutch legislation by utilizing exclusively for tax purposes rules intended for economically-sound business operations.

This complaint, like other reports on tax avoidance²⁵⁰, strongly relies on determining the establishment of head offices and subsidiaries in known tax havens, identifying patterns of practice, and the use of particular financial transactions as indications of tax avoidance. Although high levels of opacity prevent the public from accessing much evidence of tax avoidance schemes, the limited information disclosed, paired with other structural indicators, point to occurrence of tax avoidance that benefits the few and the wealthy to the detriment of the general public.

A research report by Profundo and Offshore Knowledge Centre, commissioned by the Dutch Ministry of Foreign Affairs, developed a list of 28 risk indicators indicating the possible presence of tax avoidance strategies by multinationals.²⁵¹ The report suggests that “*a combination of different indicators in a specific context can indicate an increased probability that tax avoidance takes place. Indicators should be seen as a tool to detect tax avoidance.*”²⁵² The report identifies four risk indicators related to a company’s corporate structure, three of which can be identified in Pluspetrol’s corporate group (indicator 3 on Dutch cooperative being the one that cannot be identified for Pluspetrol):

1. A subsidiary located in a tax haven;
2. A Dutch holding or financing company;
3. A Dutch cooperative company;
4. A trust or service providers acting as director.

http://europa.eu/rapid/press-release_IP-15-5880_en.htm.

European Commission, 2019, “State aid: Commission opens in-depth investigation into tax treatment of Nike in the Netherlands”, https://ec.europa.eu/commission/presscorner/detail/en/IP_19_322.

²⁴⁹ From 2019 onwards, so-called ‘Controlled Foreign Companies’ rules were introduced for Dutch companies. Those rules intend to prevent profit shifting from to intra-group entities in low-tax jurisdictions. However, (weak) substance requirements are applicable for the foreign affiliated companies. Whenever the substance requirements are fulfilled, the CFC rules will not be applied.

²⁵⁰ Van Gelder, J.W., J. de Wilde, J. van Koningsveld and J. Ferwerda (2016, November), *Tax avoidance by mining companies in developing countries – An analysis of potential Dutch policy initiatives*, Amsterdam, The Netherlands: Profundo. <https://www.rijksoverheid.nl/documenten/rapporten/2016/12/23/tax-avoidance-and-mining-report>

²⁵¹ Van Gelder, J.W., J. de Wilde, J. van Koningsveld and J. Ferwerda (2016, November), *Tax avoidance by mining companies in developing countries – An analysis of potential Dutch policy initiatives*, Amsterdam, The Netherlands: Profundo. <https://www.rijksoverheid.nl/documenten/rapporten/2016/12/23/tax-avoidance-and-mining-report>

²⁵² Van Gelder, J.W., J. de Wilde, J. van Koningsveld and J. Ferwerda (2016, November), *Tax avoidance by mining companies in developing countries – An analysis of potential Dutch policy initiatives*, Amsterdam, The Netherlands: Profundo. <https://www.rijksoverheid.nl/documenten/rapporten/2016/12/23/tax-avoidance-and-mining-report>.

3.4.1.1. Failure to establish a strategy or policy on tax governance and tax compliance

There is no public evidence that *Pluspetrol Resources Corporation B.V.* has a strategy or policy on tax governance and tax compliance. In its 2018 annual account, *Pluspetrol Resources Corporation B.V.* does not refer to any tax governance strategy or overall tax policy. Tax is only mentioned as a risk because of the impacts policy changes may have on the company's effective tax burden.²⁵³ Pluspetrol's Sustainability Reports also do not include anything regarding tax or tax governance.²⁵⁴ This is in breach of provision 2 of Chapter XI, which states that enterprises should treat tax governance and tax compliance as important elements of their oversight and broader risk management systems, including regulatory and reputational risks.

3.4.1.2. Establishment of a Dutch headquarters likely to facilitate tax avoidance

Pluspetrol's establishment of a Dutch headquarters strongly suggests that the company uses the Dutch tax system, in breach of the spirit of Dutch tax laws and Guidelines provision XI.1, for the purpose of tax avoidance.

In 2000 Pluspetrol moved its head office from Argentina to the Netherlands and set up an ownership structure in Luxembourg (using the companies *Centennial Partners S.à.r.l.* and *Pluspetrol Capital S.à.r.l.*).²⁵⁵ This structure was set up with the help of corporate service provider Intertrust (see section below). The new head office, *Pluspetrol Resources Corporation B.V.*, is listed as the ultimate parent company of the Pluspetrol corporate group.²⁵⁶ According to Pluspetrol's website, its headquarters is located in Amsterdam because the city is "strategically linked to many countries around the world and is the centre of major financial institutions".²⁵⁷

Despite those benefits of establishment in the Netherlands, as of 2018, Pluspetrol earned no revenue in the Netherlands, and had only one employee in the country.²⁵⁸ The company is registered in Amsterdam, on Muiderstraat 7 in the Baxter Building, which also offers 'Virtual Office' services to give companies that "do not need a physical office" an official business trading address, a business phone number and full mail handling.²⁵⁹ The use of such virtual office spaces is a well-established practice to enable letterbox companies to exist in the Netherlands.²⁶⁰

Considering Pluspetrol's Argentinian origin, the fact that the company has no operational activities in the Netherlands or Europe, and the role played by The Netherlands regarding tax avoidance in the global economy, the complainants categorically conclude that fiscal considerations are the major reason for Pluspetrol's choice of the Netherlands as its head office. As described in section 3.4.1

²⁵³ Pluspetrol Resources Corporation B.V., 2019, "Directors' report and Accounts as of December 31, 2018", extracted from Kamer van Koophandel (23 July 2019), p. 15.

²⁵⁴ Pluspetrol, 2017, "Sustainability Report 2017", http://www.pluspetrol.net/pdf/IS_Pluspetrol_2017_English_interactive.pdf.

²⁵⁵ Orbis database, 2020, "Pluspetrol Capital S.à.r.l. & Orbis database, 2020, "Centennial Partners S.à.r.l.".

²⁵⁶ Pluspetrol Resources Corporation B.V., 2018, "Directors' report and Accounts as of December 31, 2017", extracted from Kamer van Koophandel (23 July 2019), p. 22 & Pluspetrol Resources Corporation B.V., 2019, "Directors' report and Accounts as of December 31, 2018", extracted from Kamer van Koophandel (23 July 2019), p. 25.

²⁵⁷ Pluspetrol, 2020, "The Netherlands", <http://www.pluspetrol.net/paisesbajos.php>.

²⁵⁸ Pluspetrol Resources Corporation B.V., 2019, "Directors' report and Accounts as of December 31, 2018", extracted from Kamer van Koophandel (23 July 2019), p. 59-60.

²⁵⁹ Baxter Building, <https://www.baxterbuilding.nl/offices/#virtual-office>.

²⁶⁰ NRC Handelsblad, 2020, "De verscholen Nederlandse bv's van Isabel dos Santos", <https://www.nrc.nl/nieuws/2020/01/24/de-verscholen-nederlandse-bvs-van-isabel-dos-santos-a3988110>
De Groene Amsterdammer, 2018, "Witwassen in een flexkantoor", <https://www.groene.nl/artikel/witwassen-in-een-flexkantoor>

above, there are various reasons why setting up a head office in the Netherlands is attractive from a tax perspective for Pluspetrol.

Because Pluspetrol is an Argentinean company with extensive operations in Argentina, it is likely that the Netherlands-Argentina tax treaty played a role in Pluspetrol's choice for the Netherlands as the location for its head office. Furthermore, the Netherlands has signed BITs with Argentina and Peru, two key countries for Pluspetrol. A 2013 article by law firm Stibbe titled "Netherlands-Argentina tax structuring opportunities", confirms that these are key features to consider when structuring investment into Argentina.²⁶¹ The authors note as attractive features: the extensive Dutch tax treaty network, the ease of establishing substance and obtaining tax rulings, the Dutch participation exemption, the Netherlands-Argentina Bilateral Investment Treaty ("which offers protection to Dutch and Argentine investors from direct or indirect measures of nationalization or expropriation by the other country and any other measure having a similar effect").²⁶²

3.4.1.3. Use of a Dutch-registered trust company to manage Pluspetrol holding companies

Pluspetrol's use of Dutch-registered trust company, Intertrust, to manage its holding companies also indicates an intent to use the Dutch tax system, in breach of the spirit of Dutch tax laws and Guidelines provision XI.1, for the purpose of tax avoidance. By using a trust and corporate service provider, Pluspetrol meets one of the risk indicators for tax avoidance identified by Profundo and the Offshore Knowledge Centre as mentioned above.

Pluspetrol Resources Corporation B.V.'s board of directors consists of *PRC Oil & Gas B.V.*, *Intertrust Netherlands B.V.*, and Individual 1.²⁶³

- *PRC Oil & Gas B.V.* is a letterbox company registered on the same address as *Pluspetrol Resources Corporation B.V.* (Muiderstraat 7a) and managed by Intertrust²⁶⁴, whose board of directors consists of two individuals: Ricardo Luis Rey and Maria Ximena Storni, Pluspetrol's attorney.²⁶⁵ The company seems to have little purpose other than serving in Pluspetrol's board of directors.
- Intertrust is stock-listed and one of the largest global trust and corporate service providers, with 3,500 employees in 30 countries across the world and an annual revenue of €485.2 million.²⁶⁶
- Individual 1 has been active as a board member of companies in the Netherlands²⁶⁷ and the United Kingdom.²⁶⁸ Individual 1 is also a director of *Petroandina Resources Corporation N.V.*, one of Pluspetrol's subsidiaries in the Netherlands.

²⁶¹ Stibbe, 2013, "Netherlands-Argentina tax structuring opportunities", <https://www.lexology.com/library/detail.aspx?g=6ff1dbb9-f5bc-411a-b69c-4d1a1eced856>.

²⁶² Stibbe, 2013, "Netherlands-Argentina tax structuring opportunities", <https://www.lexology.com/library/detail.aspx?g=6ff1dbb9-f5bc-411a-b69c-4d1a1eced856>.

²⁶³ Pluspetrol Resources Corporation B.V., 2019, "Directors' report and Accounts as of December 31, 2018", extracted from Kamer van Koophandel (23 July 2019), p. 78.

²⁶⁴ PRC Oil & Gas B.V., "Annual account 2011," "Annual account 2012," "Annual account 2014," extracted from Kamer van Koophandel (23 July 2019).

²⁶⁵ PRC Oil & Gas B.V., "Annual account 2018", extracted from Kamer van Koophandel (24 February 2020).

²⁶⁶ Intertrust, 2020, "At a glance", <https://www.intertrustgroup.com/investors/at-a-glance>

²⁶⁷ According to the Company.info database, searched 24 February 2020.

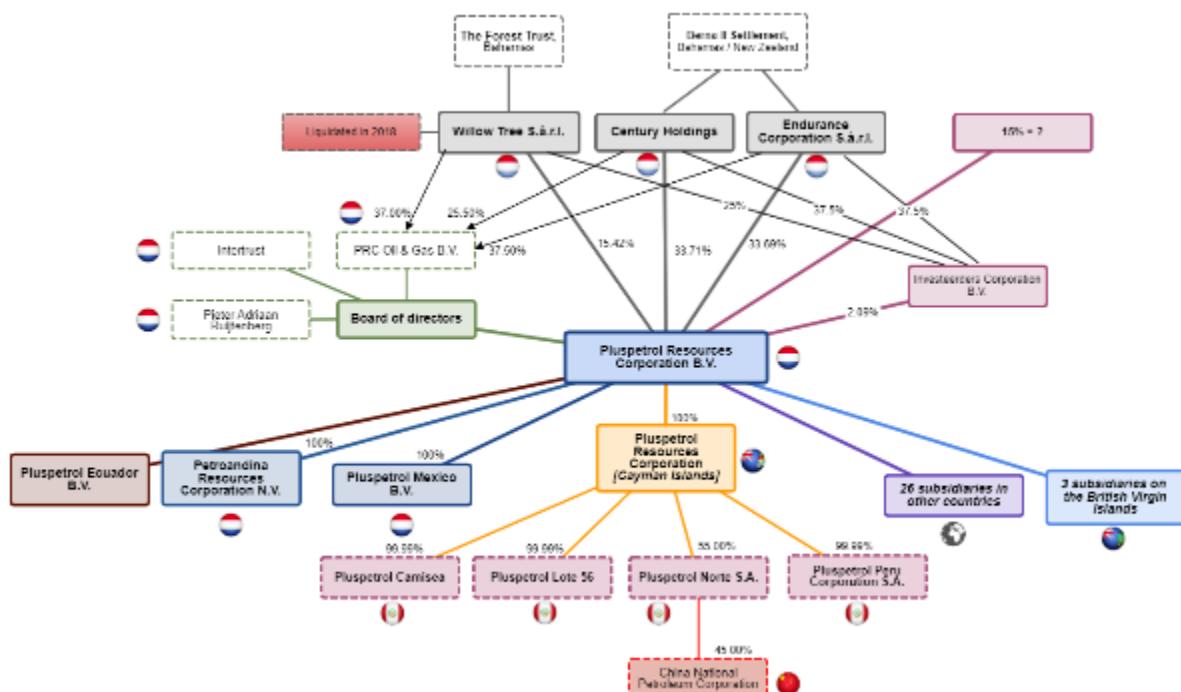
²⁶⁸ Companies House, 2020, register search for Individual 1, https://beta.companieshouse.gov.uk/officers/wX02Tjq6nwRFGOKlsU_EyUh3tL4/appointments & Open Corporates, 2020, database search for Individual 1.

Remarkably, Pluspetrol's current CEO (Claudio Martín de Diego) is not on the board of *Pluspetrol Resources Corporation B.V.*, although he was a director of *PRC Oil & Gas B.V.* until 2012.²⁶⁹ He currently also acts as the director of *Pluspetrol Norte S.A.*, as well as *Pluspetrol Camisea S.A.* and *Pluspetrol Lote 56 S.A.*²⁷⁰

Pluspetrol also has other financing and holding companies in the Netherlands: *Petroandina Resources N.V.*, *Pluspetrol Mexico B.V.*, and *Pluspetrol Ecuador B.V.*. These are all registered on the same address as *Pluspetrol Resources Corporation B.V.*: Muiderstraat 7a, Amsterdam. Intertrust has been involved with the management of *Pluspetrol Mexico B.V.* and *Petroandina Resources N.V.*²⁷¹

3.4.1.4. Use of subsidiaries in tax havens likely to facilitate tax avoidance

Pluspetrol's extensive use of subsidiaries in other tax havens in conjunction with its Dutch headquarters is a third indication of tax avoidance.



The existence of a network of companies in tax havens is a strong indicator that the company engages in tax avoidance and takes advantage of the legal and fiscal policies of these jurisdictions, and the (intentional and unintentional) loopholes contained therein, with the aim of avoiding taxes. By funnelling money through these subsidiaries, multinationals can benefit from their low tax rate or other tax advantages. These subsidiaries help facilitate financial transactions that draw funds from high-tax jurisdictions into low-tax jurisdictions, for instance by shifting profits through intercompany services or loans. Many times, the subsidiaries established in known tax havens or tax conduits have no staff or actual physical location, but are instead letterbox companies – as already witnessed regarding

²⁶⁹ Orbis, 2019, "PRC Oil & Gas B.V.", extracted from Orbis (11 September 2019).

²⁷⁰ Orbis, 2019, "Pluspetrol Norte S.A.", "Pluspetrol Camisea S.A."; "Pluspetrol Lote 56 S.A.", extracted from Orbis (11 September 2019).

²⁷¹ According to the Company.info database, Intertrust served as manager of Petroandina Resources N.V. at its founding date 20-5-2010, until 23-1-2015. Pluspetrol Mexico B.V. is managed by Intertrust according to Company.info database and Pluspetrol Mexico B.V., 2019, "Annual account 2018", extracted from Kamer van Koophandel (24 February 2020).

Pluspetrol's corporate entities in the Netherlands. As these subsidiaries have no real purpose or economic activity, it is assumed that they are established with the predominant objective of taking advantage of favourable tax rules.

Pluspetrol has subsidiaries in renowned tax havens. These are jurisdictions known for various benefits such as not imposing corporate income tax, capital gains tax or withholding taxes, and/or allowing a high level of financial secrecy. For this reason, tax havens are popular among multinational corporations to structure inter-company loans and move profits in order to avoid taxes. According to *Pluspetrol Resources Corporation B.V.*'s 2018 annual account, there are at least 12 subsidiaries in Pluspetrol's corporate group located in the Cayman Islands, the British Virgin Islands, the Bahamas, and Delaware, USA.²⁷²

These are as follows:

- Captiva Assets Corporation (The Bahamas).
- Lithea Inc. (British Virgin Islands)
- Lithium S Corporation (British Virgin Islands)
- Lithium S Corporation S.A. (British Virgin Islands)
- Pluspetrol International Inc. (Delaware, USA).

With the following seven subsidiaries located in the Cayman Islands:

- Pluspetrol Resources Corporation
- Pluspetrol Colombia Corporation
- Pluspetrol Bolivia Corporation
- Pluspetrol DRC Corporation
- Pluspetrol DRC II Corporation
- Apco Oil & Gas International Inc.
- Pluspetrol Venezuela Corporation

The British Virgin Islands, Cayman Islands, and Bahamas rank 1st, 3rd and 9th, respectively, on the aforementioned Corporate Tax Haven Index.²⁷³ Delaware is also known for the tax avoidance opportunities it offers.²⁷⁴ The Bahamas subsidiary is a so-called International Business Company,²⁷⁵ a legal form that is known for being used primarily for tax avoidance.²⁷⁶ The Delaware subsidiary is managed by the Corporation Trust Company²⁷⁷, a trust firm that facilitates the creation of subsidiaries and does the daily management of those companies in their owners' stead. This allows companies like Pluspetrol to make use of the fiscal benefits of having a legal presence in Delaware, while having no real economic activities or substance in the jurisdiction.²⁷⁸

The extensive use by Pluspetrol of the Cayman Islands, an overseas UK territory, in particular stands out. It is ranked as the third worst corporate tax haven by the Tax Justice Network because of how

²⁷² Pluspetrol Resources Corporation B.V., 2018 Annual Report, page 29 (10 October 2019), Willow Tree S.ar.l., 2016 Annual Report, page 15 (10 October 2019)

²⁷³ Tax Justice Network, Corporate Tax Haven Index 2019, 2019, <https://www.corporatetaxhavenindex.org/introduction/cthi-2019-results> (16 October 2019)

²⁷⁴ See e.g. The Guardian, 2016, "Forget Panama: it's easier to you're your money in the US than almost anywhere", <https://www.theatlantic.com/business/archive/2016/10/dont-blame-delaware/502904/> (24 February 2020).

²⁷⁵ Open Corporates database, no date, <https://opencorporates.com/companies/bs/50776B> (16 October 2019).

²⁷⁶ Worldwide Incorporation Services, Bahamas Tax Haven. Bahamas IBC, no date, <https://www.wis-international.com/bahamas-tax-haven.html> (16 October 2019)

Offshore protection.com, International Offshore Jurisdiction Review - Bahamas as a Tax Avoidance Center, no date, <https://www.offshore-protection.com/bahamas-tax-havens> (16 October 2019)

²⁷⁷ CT Corporation, 125 Years of Experience, no date, <https://ct.wolterskluwer.com/ct-century-of-expertise> (16 October 2019)

²⁷⁸ The Guardian, Welcome to tax-dodge city, USA, 10 April 2009, <https://www.theguardian.com/business/2009/apr/10/tax-havens-blacklist-us-delaware> (16 October 2019)

“aggressively and extensively” it contributes to tax avoidance by multinational corporations.²⁷⁹ In February 2020 the European Union added the Cayman Islands to its blacklist of tax havens, the “EU list of non-cooperative jurisdictions for tax purposes”.²⁸⁰ The jurisdiction did not implement the necessary reforms to ensure fair taxation, particularly regarding economic substance, which enables companies such as Pluspetrol to register companies in the Cayman Islands without having any real presence or economic activities there. The Tax Justice Network annually publishes a Financial Secrecy Index, which ranks countries based on how they provide legal and financial secrecy to individuals and entities based elsewhere, and how important the country is to the global market for offshore financial services.²⁸¹ In the 2020 version of this index, the Cayman Islands is ranked as the biggest enabler of financial secrecy in the world.²⁸²

Some subsidiaries in the Cayman Islands have names that indicate their involvement with countries where Pluspetrol currently has operations, such as Colombia and Bolivia.²⁸³ The involvement of a Cayman Islands subsidiary with an operational Pluspetrol subsidiary in relative high-tax jurisdictions such as Colombia and Bolivia is a strong indication of tax avoidance. The presence of intermediary companies in the Cayman Islands enables a number of possible base erosion and profit shifting strategies, including the establishment of loans with operational subsidiaries, abuse of transfer pricing regulations and the payment of management fees or royalties to the Caymanian entity. This would allow Pluspetrol to erode its tax base in its high-taxed operational subsidiaries in countries like Peru, and shift profits to low-taxed Cayman Islands entities.

According to the General Registry of the Cayman Islands, there are an additional 11 companies whose name contains Pluspetrol registered in the jurisdiction.²⁸⁴ It could not be established which of these are currently still active. The same pattern as above can be seen here, with the names of companies referring to Pluspetrol’s (past) operations in various parts of the world:

- Pluspetrol Chile Corporation
- Pluspetrol North Africa Corporation
- Pluspetrol International Corporation
- Pluspetrol Cote D’Ivoire CI-11 Corporation
- Pluspetrol Cote D’Ivoire CI-12 Corporation
- Pluspetrol El Ouara Corporation
- Pluspetrol Cote D’Ivoire CI-104 Corporation
- Pluspetrol Algeria 442 Corporation
- Pluspetrol Brazil Corporation
- Pluspetrol Algeria 237 Corporation
- Pluspetrol Black River Corporation

3.4.2. Breaches related to Chapter III on disclosure

The OECD Guidelines provisions on disclosure are also relevant to assessing the existence of tax avoidance. Lack of transparency on business structures, relationships, and practices is one of the

²⁷⁹ Tax Justice Network, 2019, “Corporate Tax Haven Index, <https://www.corporatetaxhavenindex.org/>

²⁸⁰ Council of the European Union, 2020, “Taxation: Council revises its EU list of non-cooperative jurisdictions”, <https://www.consilium.europa.eu/en/press/press-releases/2020/02/18/taxation-council-revises-its-eu-list-of-non-cooperative-jurisdictions/>.

²⁸¹ Tax Justice Network, 2020, “FAQ”, <https://fsi.taxjustice.net/en/faq>

²⁸² Tax Justice Network, 2020, “Financial Secrecy Index 2020 reports progress on global transparency – but backsliding from US, Cayman, and UK prompts call for sanctions”, <https://www.taxjustice.net/2020/02/18/financial-secrecy-index-2020-reports-progress-on-global-transparency-but-backsliding-from-us-cayman-and-uk-prompts-call-for-sanctions/>

²⁸³ Pluspetrol, 2020, “Operaciones”, <http://www.pluspetrol.net/operaciones.php>

²⁸⁴ General Registry Cayman Islands, entity search, extracted from: <https://online.ciregistry.gov.ky/cos/faces/home> (24 February 2020).

chief enablers of tax avoidance. Corporations are aware that the use of accounting manoeuvres and artificial transactions to reduce tax liabilities may be unappreciated by tax officials and considered indefensible in the arena of public opinion.

Fundamentally therefore, lack of disclosure is a prerequisite for corporations to guarantee the opacity needed to hide assets, avoid taxes and mask their transactions. Because lack of disclosure is so essential to tax avoidance, it can actually be considered not only a tool but an indicator of avoidance, as well. According to Profundo and Offshore Knowledge Centre, it “*is hard to detect such behaviour, especially when financial details are not reported per jurisdiction but only for the corporate structure as a whole. Creating this lack of transparency by not reporting per jurisdiction is therefore in itself also an indicator.*”²⁸⁵ Thus, lack of transparency could in itself be an indication of tax avoidance by the company failing to disclose sufficient information at the jurisdictional level.

The following Guidelines provisions from the Disclosure chapter are of particular relevance in this complaint:

- ➔ Chapter III, paragraph 1: “Enterprises should ensure that timely and accurate information is disclosed on all material matters regarding their activities, structure, financial situation, performance, ownership and governance. This information should be disclosed for the enterprise as a whole, and, where appropriate, along business lines or geographic areas. Disclosure policies of enterprises should be tailored to the nature, size and location of the enterprise, with due regard taken of costs, business confidentiality and other competitive concerns.”²⁸⁶
- ➔ Chapter III, paragraph 1: “Disclosure policies of enterprises should include, but not be limited to, material information on:
 - a. the financial and operating results of the enterprise;
 - b. enterprise objectives;
 - c. major share ownership and voting rights, including the structure of a group of enterprises and intra-group relations, as well as control enhancing mechanisms...;
 - d. related party transactions...;
 - e. governance structures and policies, in particular, the content of any corporate governance code or policy and its implementation process”.
- Commentary 32: Related party transactions constitute additional relevant information that should be disclosed.²⁸⁷ In the context of this complaint, related-party transactions include all operations undertaken between Pluspetrol’s parent company and its subsidiaries in multiple jurisdictions.
- Commentary 35: Enterprises are encouraged to provide easy and economical access to published information and to consider making use of information technologies to meet this goal.²⁸⁸

The following subsections identify Pluspetrol’s breaches of the OECD Guidelines disclosure provisions in respect of its subsidiaries in Peru, the Cayman Islands and the Netherlands.

²⁸⁵ Van Gelder, J.W., J. de Wilde, J. van Koningsveld and J. Ferwerda (2016, November), *Tax avoidance by mining companies in developing countries – An analysis of potential Dutch policy initiatives*, Amsterdam, The Netherlands: Profundo.

<https://www.rijksoverheid.nl/documenten/rapporten/2016/12/23/tax-avoidance-and-mining-report>

²⁸⁶ OECD Guidelines for Multinational Enterprises 2011 Edition, Chapter III on Disclosure, Page 27, Paragraph 1.

²⁸⁷ OECD Guidelines for Multinational Enterprises 2011 Edition, Chapter III on Disclosure, Page 29, Commentary 32.

²⁸⁸ OECD Guidelines for Multinational Enterprises 2011 Edition, Chapter III on Disclosure, Page 30, Commentary 35.

3.4.2.1. Failure to disclose annual accounts and other material information related to Pluspetrol's Peruvian and Dutch subsidiaries

Pluspetrol is the owner of 42 subsidiaries in several countries in Latin America, Canada, the Netherlands, Spain and the United States.²⁸⁹ As explained above, the group also contains numerous subsidiaries in tax havens such as the Cayman Islands, one of which, *Pluspetrol Resources Corporation*, is the direct owner of Pluspetrol's companies in Peru: *Pluspetrol Norte S.A.* (55% ownership; 45% ownership by the *China National Petroleum Corporation*²⁹⁰), *Pluspetrol Peru Corporation S.A.*, *Pluspetrol Camisea* and *Pluspetrol Lote 56* (all 99.99% ownership). In its 2017 and 2018 annual reports, Pluspetrol states that *Pluspetrol Resources Corporation B.V.* in the Netherlands is the "ultimate parent company of the Group."²⁹¹

	<i>Pluspetrol Resources Corporation [Cayman Islands]</i>	<i>Ricardo Luis Rey Rodríguez [Argentina]</i>
<i>Pluspetrol Camisea</i> ²⁹²	99.99%	0.01%
<i>Pluspetrol Lote 56</i> ²⁹³	99.99%	0.01%
<i>Pluspetrol Peru Corporation S.A.</i> ²⁹⁴	99.99%	0.01%
<i>Pluspetrol Norte S.A.</i> ²⁹⁵	55%	-

There is no mention of Pluspetrol's Cayman Islands subsidiaries on Pluspetrol's website. In the annual accounts of the ultimate parent company, *Pluspetrol Resources Corporation B.V.*, the company does list its Cayman Islands subsidiaries, but no explanation as to their purpose, assets or financial transactions is presented. Furthermore, Pluspetrol's four Peruvian subsidiaries do not publish annual accounts. The complainants were not able to find any annual accounts or annual reports of the Peruvian entities on the company's website, nor through a request with the Peruvian Stock Exchange and the Peruvian Chamber of Commerce. Some annual accounts of *Pluspetrol Lote 56* and *Pluspetrol Camisea S.A.* could be found through an online search, but these are not officially released documents either by the company, Stock Exchange or Chamber of Commerce.²⁹⁶ No accounts could be found on *Pluspetrol Norte S.A.* or *Pluspetrol Peru Corporation S.A.* In the Cayman Islands General Registry, no information can be found on *Pluspetrol Resources Corporation*, the owner of Pluspetrol's Peruvian entities, other than the company name and number, place and date of incorporation, type of company, status, registered office and address.²⁹⁷

²⁸⁹ Pluspetrol Resources Corporation B.V., 2019, "Directors' report and Accounts as of December 31, 2018", extracted from Kamer van Koophandel (23 July 2019), p. 29 & Orbis database, 2019, "Pluspetrol Resources Corporation B.V." (23 July 2019).

²⁹⁰ Pluspetrol Resources Corporation B.V., 2019, "Directors' report and Accounts as of December 31, 2018", extracted from Kamer van Koophandel (23 July 2019), p. 25.

²⁹¹ Pluspetrol Resources Corporation B.V., 2018, "Directors' report and Accounts as of December 31, 2017", extracted from Kamer van Koophandel (23 July 2019), p. 22 & Pluspetrol Resources Corporation B.V., 2019, "Directors' report and Accounts as of December 31, 2018", extracted from Kamer van Koophandel (23 July 2019), p. 25.

²⁹² Orbis database, 2020, "Pluspetrol Camisea S.A." (24 February 2020) & Pluspetrol Camisea S.A., 2016, "Memoria Annual 2016", <http://www.smv.gob.pe/ConsultasP8/temp/Memoria%20PLUSPETROL%20CAMISEA%20S.A.%20-%20env.pdf>.

²⁹³ Pluspetrol Lote 56 S.A., 2013, "Memoria Anual 2013", <https://www.bvl.com.pe/eeff/OE2009/20140401185102/MEOE20092013AIA01.PDF/>.

²⁹⁴ Orbis database, 2020, "Pluspetrol Peru Corporation S.A." (24 February 2020).

²⁹⁵ Orbis database, 2020, "Pluspetrol Norte S.A." (24 February 2020).

²⁹⁶ Annual accounts of i.a. 2014 and 2016 of Pluspetrol Camisea S.A. could be found through Google search but are not published on Pluspetrol's website or accessed through a request with Peru's Chamber of Commerce or Stock Exchange.

²⁹⁷ General Registry Cayman Islands, "Entity Search", https://online.ciregistry.gov.ky/cos/faces/home?_adf.no-new-window-redirect=true.

The annual accounts of two of Pluspetrol's Dutch subsidiaries, *Pluspetrol Mexico B.V.* and *Petroandina Resources N.V.*, as well as *Investeerders Corporation B.V.* – one of the owners of *Pluspetrol Resources Corporation B.V.* - and *PRC Oil & Gas B.V.*- member of the board of directors of *Pluspetrol Resources Corporation B.V.* – are limited to balance sheets. While this is in accordance with Dutch legal requirements, the balance sheets provide little to no information on their activities, objectives, structure, and related party transactions.

Without access to all of the above-named missing information, the complainants (and the public at large) lack fundamental information on these companies, such as their financial situation, ownership, related party transactions, taxation, governance structure and policy. This prevents any in-depth examination of the financial relations between *Pluspetrol Resources Corporation B.V.* (the Netherlands), *Pluspetrol Resources Corporation* (Cayman Islands) and the Peru subsidiaries, including the occurrence of intercompany and related party transactions (e.g. loans). This information is material to establish tax avoidance. This lack of disclosure represents a breach of OECD Guidelines Provision 1 and 3 of Chapter III.

3.4.2.2. Failure to disclose beneficial owners

According to the aforementioned report commissioned by the Ministry of Foreign Affairs, hiding the ultimate beneficial owner is identified as a potential indicator of tax avoidance, since “*to hide tax avoidance behaviour one needs a lack of transparency*”.²⁹⁸ This section describes Pluspetrol's current ownership structure and lack of public information on the company's ultimate beneficial owners. By not providing information on the company's full ownership, Pluspetrol is not in line with OECD Guidelines Provision 1 and 3 of Chapter III, which states that enterprises should provide timely and accurate information on its ownership.

Ownership of Pluspetrol

Three Luxembourg letterbox companies own the majority (82.8%) of shares in Pluspetrol Resources Corporation B.V.: *Willow Tree S.à.r.l.* (15.42%²⁹⁹), *Century Holdings S.à.r.l.* (33.71% as of 2018)³⁰⁰ and *Endurance Corporation S.à.r.l.* (33.69% as of 2018).³⁰¹ A small share (2.09% as of 2014)³⁰² is held by a Dutch letterbox company, *Investeerders Corporation B.V.* The shareholder(s) of the remaining 15% could not be established by the complainants. Furthermore, one of the three Luxembourg companies, *Willow Tree S.à.r.l.*, was liquidated in 2018. The complainants were not able to establish who has replaced it as shareholder of *Pluspetrol Resources Corporation B.V.* This means that at the time of filing this complaint the complainants were only able to establish 69.5% of the company's ownership.

All three Luxembourg companies are registered at 6, rue Eugène Ruppert, Luxembourg, at the same address as Intertrust's Luxembourg office. They have no employees. They are all three managed by Intertrust administrative officers.³⁰³ *Investeerders Corporation B.V.* is registered at Prins

²⁹⁸ Van Gelder, J.W., J. de Wilde, J. van Koningsveld and J. Ferwerda (2016, November), *Tax avoidance by mining companies in developing countries – An analysis of potential Dutch policy initiatives*, Amsterdam, The Netherlands: Profundo. <https://www.rijksoverheid.nl/documenten/rapporten/2016/12/23/tax-avoidance-and-mining-report>, p. 24.

²⁹⁹ The company does not report its share in Pluspetrol Resources Corporation B.V. in its annual accounts after 2015. Willow Tree S.à.r.l., 2016, “Annual account 2015”, p. 10, extracted from Luxembourg Business Registry, (11 September 2019).

³⁰⁰ Endurance Corporation S.à.r.l., 2019, “Annual account 2018”, p.10, extracted from Luxembourg Business Registry, (11 September 2019).

³⁰¹ Century Holdings S.à.r.l., 2019, “Annual account 2018”, p. 9, extracted from Luxembourg Business Registry, (11 September 2019).

³⁰² The company does not report on its share in Pluspetrol Resources Corporation B.V. in its annual accounts after 2014. Investeerders Corporation B.V., 2015, “Annual account 2014”, p. 6, extracted from Kamer van Koophandel.

³⁰³ All administrative officers of these companies have registered the Intertrust office as their business address: Luxemburg

Bernhardplein 200, Amsterdam, which is also the address of Intertrust's Amsterdam office.³⁰⁴ The managing director of *Investeerders Corporation B.V.* is Intertrust and its function is described as a finance and holding company.³⁰⁵ *Investeerders Corporation B.V.* is owned by *Willow Tree S.à.r.l.*, *Century Holdings S.à.r.l.* and *Endurance Corporation S.à.r.l.*

The owners of the three Luxembourg companies are two offshore trusts. The complainants could not access any public information on the beneficial owners of these trusts or their assets, which means the complainants could not establish Pluspetrol Resources Corporation B.V.'s ultimate beneficial owners. The owner of *Willow Tree S.à.r.l.* is *The Forest Trust*, a trust based in the Bahamas.³⁰⁶ The Bahamas is a well-known tax haven that does not levy tax on income, capital gains or wealth.³⁰⁷ *Century Holdings S.à.r.l.* and *Endurance Corporation S.à.r.l.* are owned by the *Berna II Settlement*.³⁰⁸ It is unclear where the *Berna II Settlement* trust is currently based. There are documents stating that it is organised under the laws of the Bahamas³⁰⁹, and a document stating that it is organised under the laws of New Zealand.³¹⁰ Since its trustee is currently based in the Cook Islands, the trust itself could also be located there but there are no documents confirming this.³¹¹

Pluspetrol was founded by Luis Alberto Rey and Hector Pedro Poli in 1976.³¹² According to Forbes, through their assets in Pluspetrol, the Poli family is the 18th richest in Argentina, with a fortune of US\$ 850 million, and Edith Rodriguez de Rey, the widow of Luis Alberto Rey, is the 7th richest person in Argentina with a fortune of US\$ 2 billion.³¹³ This suggests they are the ultimate beneficial owners of Pluspetrol Resources Corporation B.V. An analysis of the history of Pluspetrol's ownership in Luxembourg shows their involvement with the corporate entities that hold the shares in Pluspetrol.

Business Registers website, 2020, "Non-statutory modification of the agents Endurance Corporation S.à.r.l.", <https://www.lbr.lu/mjrcs/jsp/secured/ExtractConsultDocumentsActionSecured.action> (24 February 2020). Luxembourg Business Registers website, 2018, "Modification statutaire Willow Tree S.à.r.l." (B107204), <https://www.lbr.lu/mjrcs/jsp/secured/ExtractConsultDocumentsActionSecured.action> (24 February 2020).

³⁰⁴ Intertrust, [& Investeerders Corporation B.V.](https://www.intertrustgroup.com/our-locations/europe/netherlands), 2015, "Annual account 2014", extracted from Kamer van Koophandel (24 February 2020).

³⁰⁵ According to the Company.info database & *Investeerders Corporation B.V.*, 2015, "Annual account 2014", extracted from Kamer van Koophandel (24 February 2020).

³⁰⁶ *Willow Tree S.à.r.l.*, 2013, "Modification", extracted from Luxembourg Business Registry, (11 September 2019).

³⁰⁷ KPMG, 2019, "Bahamas", <https://home.kpmg/xx/en/home/insights/2014/04/bahamas-thinking-beyond-borders.html>

³⁰⁸ *Century Holdings S.à.r.l.*, 2014, "Modification", extracted from Luxembourg Business Registry, (11 September 2019). *Endurance Corporation S.à.r.l.*, 2018, "Modification", extracted from Luxembourg Business Registry, (11 September 2019).

³⁰⁹ *Endurance Corporation S.à.r.l.*, 2015, "Document of registration", extracted from Luxembourg Business Registry, (11 September 2019).

³¹⁰ *Endurance Corporation S.à.r.l.*, 2015, "Modification", extracted from Luxembourg Business Registry, (11 September 2019).

³¹¹ Until February 2014, the owner of *Century Holdings* was the *Berna Trust* in The Bahamas. This trust was at this time replaced by the *Berna II Settlement*, a trust represented by New Zealand-based trustee *Hiringa Investments Limited*. In May 2017, the trustee of *Berna II Settlement* was changed from *Hiringa Investments Ltd.* in New Zealand, to the identically named *Hiringa Investments Ltd.*, a company incorporated in the Cook Islands. It is not clear whether the *Berna II Settlement* trust also relocated to the Cook Islands. After the release of the Panama Papers in 2016, which heavily featured New Zealand trusts, the New Zealand government introduced tougher rules on compliance and disclosure for trusts. This led to a sharp drop in 2017 in the number of foreign trusts, which according to New Zealand's Inland Revenue did not want to comply with these rules that ordered them to provide more information on their structure and activities.

See: New Zealand Herald, 2016, "Panama Papers: leak leaves stain on New Zealand's name", https://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=11619292. Stuff.co.nz, 2017, "NZ foreign trust numbers plummet after post-Panama Papers rules kick in", <https://www.stuff.co.nz/business/industries/94403144/foreign-trust-numbers-plummet-after-postpanama-papers-rules-kick-in>. The New York Times, 2013, "Cook Islands, a paradise of untouchable assets", <https://www.nytimes.com/2013/12/15/business/international/paradise-of-untouchable-assets.html>

³¹² El Cronista, 2017, "La Carrera por el petróleo: el negocio de las familias argentinas", <https://www.cronista.com/especiales/La-carrera-por-el-petroleo-el-negocio-de-las-familias-argentinas-20170920-0005.html>

³¹³ Forbes Argentina, 2018, "50 argentinos más ricos: la lista completa", <https://www.forbesargentina.com/50-argentinos-mas-ricos/>

In 2000, when Pluspetrol moved its head office to the Netherlands, its sole shareholder was a Luxembourg company: *Centennial Partners S.à.r.l.*³¹⁴ This company was in turn owned by a number of companies registered in the Bahamas, the British Virgin Islands and the Cayman Islands.³¹⁵ The board of directors of Centennial Partners consisted of Hector Alfredo Poli, Hector Pedro Poli, Luis Alberto Rey, Ricardo Luis Rey, and Edith Rodriguez de Rey.³¹⁶ In 2005, *Centennial Partners S.à.r.l.* founded *Willow Tree S.à.r.l.*, *Centauro Investments S.à.r.l.* (in 2015 replaced by *Endurance Corporation S.à.r.l.*) and *Century Holdings S.à.r.l.* The company *Centennial Partners S.à.r.l.* was liquidated in 2005. Willow Tree appears was initially linked to the Poli family, and Centauro Investments and Century Holdings to the Rey family. Both families have since removed themselves from the board of directors of these companies:

- When *Willow Tree S.à.r.l.* was founded, its board of directors consisted of Hector Pedro Poli and Hector Alfredo Poli.³¹⁷ In 2011, both resigned as board members and were replaced by administrators working in Luxembourg on the same address as Intertrust.³¹⁸
- When *Centauro Investments S.à.r.l.* was founded in 2005, the board of directors consisted of Ricardo Luis Rey and Luis Alberto Rey. In 2013 their management was replaced by three Luxembourg administrators working from the same address as Intertrust (one of whom also manages *Willow Tree S.à.r.l.*). Intertrust submitted the management modifications in 2009 and 2015 for *Centauro Investments S.à.r.l.*, which, together with the Luxembourg administrators, indicates that it was managed by Intertrust on behalf of the Rey family. This company was liquidated in 2015 and replaced as shareholder of *Pluspetrol Resources Corporation B.V.* by the company *Endurance Corporation S.à.r.l.* which was incorporated a month before the liquidation of *Centauro*.³¹⁹
- Exactly as with *Centauro Investments S.à.r.l.*, when *Century Holdings S.à.r.l.* was founded in 2005, the board of directors consisted of Ricardo Luis Rey and Luis Alberto Rey. In 2013 their management was replaced by the same three Luxembourg administrators as *Centauro Investments S.à.r.l.*³²⁰

When Pluspetrol moved its headquarters to the Netherlands in 2000, its corporate ownership was established in Luxembourg. It is likely that tax planning considerations also played a significant role in this choice. Luxembourg offers various tax benefits, such as a lack of withholding taxes on interest and royalties.

A known tax avoidance technique in Luxembourg is the use of so-called ‘alphabet shares’.³²¹ This technique involves structuring a company’s shares into different classes coded by letters, generally 10

³¹⁴ Centennial Partners S.a.r.l., (2004), “Annual accounts 2000”, B79328, extracted from Luxembourg Business Registry (11 September 2019).

³¹⁵ Centennial Partners S.a.r.l., (2002), “Constatation de Cession de Parts Sociales du 24 Decembre 2002”, extracted from Luxembourg Business Registry (11 September 2019).

³¹⁶ Centennial Partners S.a.r.l., (2004), “Annual accounts 2000”, B79328, extracted from Luxembourg Business Registry (11 September 2019).

³¹⁷ Willow Tree S.à.r.l., 2016, “Annual account 2015”, extracted from Luxembourg Business Registry, (11 September 2019).

³¹⁸ Willow Tree S.à.r.l., 2011, “Modification of administrators”, extracted from Luxembourg Business Registry, (11 September 2019).

³¹⁹ Endurance Corporation S.à.r.l., 2015, “Annual account 2015”, extracted from Luxembourg Business Registry, (11 September 2019)

³²⁰ Centauro Investments S.à.r.l., 2013, “Modification of management”, extracted from Luxembourg Business Registry, (11 September 2019) & Century Holdings S.à.r.l., 2013, “Modification of management”, extracted from Luxembourg Business Registry, (11 September 2019).

³²¹ See e.g. Darnand, C. & Oliveira, D. D., 2016, “Luxembourg”, Stibbe, <https://www.stibbe.com/~/media/03%20news/publications/luxembourg/lux%20ddo%20cmd%20-%20iclg%20to%20private%20equity%20law%202016.pdf>; Bonn Steichen & Partners, 2018, “Case law on redemption of shares”, <https://www.bsp.lu/publications/newsletters-legal-alerts/case-law-redemption-shares>; Ogier, 2017, “Luxembourg Structuring and financing private equity and venture capital transactions,” <https://www.ogier.com/media/brochures/ogier->

classes coded A-J. Over a period of time, the company can liquidate classes of shares, the profits of which are classified as liquidation proceeds. Because liquidation proceeds paid to non-resident shareholders are not subject to withholding tax in Luxembourg, this enables a company to distribute profits and retained earnings without being subject to dividend withholding tax.³²² Alphabet shares can therefore be used by Luxembourg companies to avoid withholding taxes on the distribution of their profits to their shareholders. Both *Willow Tree S.à.r.l.*³²³ and *Endurance Corporation S.à.r.l.*³²⁴ have structured their shares into class shares (nine coded with letters A to I and ten coded with letters A to J respectively). *Willow Tree S.à.r.l.* has liquidated classes of shares each year between 2011 and 2017.³²⁵ Due to a lack of public disclosure by the shareholder of *Willow Tree S.à.r.l.*, a Bahamas-based trust, it is not possible to determine conclusively whether and how much tax is avoided in this way. *Endurance Corporation S.à.r.l.* has not yet started liquidating classes of shares according to its latest annual accounts.

4. Conclusion

This specific instance has established how Pluspetrol has breached provisions of the OECD Guidelines by causing serious environmental and human rights impacts in the Peruvian Amazon. Specifically, Pluspetrol's failure to meet the OECD Guidelines' due diligence requirements has led it to cause and contribute to the contamination, and linked health impacts, of 1,963 sites in the Loreto region. Pluspetrol has also failed to meet the Guidelines' due diligence requirement to remediate those impacts. This specific instance seeks a resolution to these impacts. The complainants ask the Dutch NCP's assistance to secure from Pluspetrol a commitment to pay for the full remediation of all environmental and health impacts, and to improve its environmental and social practices moving forward to ensure its conduct is ever after in compliance with the OECD Guidelines.

structuring-and-financing-private-equity-and-venture-capital-transactions.pdf, p.6.

³²² Loyens & Loeff, 2019, "Holding regimes 2019. Comparison of selected countries", https://www.loyensloeff.com/media/477281/holding_regimes_2019.pdf (24 February 2020).

³²³ Willow Tree S.à.r.l., 2011, "Document of modification", extracted from Luxembourg Business Registry (24 February 2020).

³²⁴ Endurance Corporation S.à.r.l., 2015, "Incorporation act", extracted from Luxembourg Business Registry (24 February 2020).

³²⁵ Willow Tree S.à.r.l., "Annual account 2012", "Annual account 2013", "Annual account 2014", "Annual account 2015", "Annual account 2016", "Annual account 2017", all extracted from Luxembourg Business Registry (24 February 2020).