

**Specific Instance**  
**OECD Guidelines for Multinational Enterprises**

**POSCO**

*Concerning POSCO's human rights and environmental breaches in relation to the proposed development of an iron ore reserves, an integrated steelworks plant and associated infrastructure in the State of Odisha, India*

Complainants

Lok Shakti Abhiyan (India)  
Korean Trans National Corporations Watch (South Korea)  
Fair Green and Global Alliance (Netherlands)  
Forum for Environment and Development (Norway)

Presented to:

**Korean OECD National Contact Point**

Ministry of Knowledge Economy  
Foreign Investment Policy Division  
1 Jungang-dong, Gwacheon-si, Gyeonggi-do  
Tel: +82-2-2110-5356  
Fax: +82-2-504-4816  
[fdikorea@mke.go.kr](mailto:fdikorea@mke.go.kr)  
[www.mke.go.kr](http://www.mke.go.kr)

**Dutch OECD National Contact Point**

Trade Policy and Globalisation Division  
Ministry of Economic Affairs, Agriculture and Innovation  
Alp. N/442, P.O. Box 20102  
NL-2500 EC The Hague  
Tel: +31-70-379-8617  
Fax: +31-70-379-7221  
[ncp@minez.nl](mailto:ncp@minez.nl)  
[www.oesorichtlijnen.nl](http://www.oesorichtlijnen.nl)

**Norwegian OECD National Contact Point**

Ministry of Foreign Affairs  
P.O. Box 8114 – DEP  
N-0032 OSLO  
Tel: +47-22-24-4599 and +47-22-24-4237  
[her@mfa.no](mailto:her@mfa.no) and [mban@mfa.no](mailto:mban@mfa.no)  
[www.responsiblebusiness.no](http://www.responsiblebusiness.no)

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# INTERESTED PARTIES

## 1. Lok Shakti Abhiyan

Lok Shakti Abhiyan is an alliance of progressive people's organisations and movements, who while retaining their autonomous identities, are working together to bring the struggle for primacy of rights of communities over natural resources, conservation and governance, decentralised democratic development and towards a just, sustainable and egalitarian society in the true spirit of globalism.

Prafulla Samantara  
Lohiya Academy, A/3, Unit – 9  
Bhubaneshwar, Orissa – 751022  
India  
Cell: +91-94372-59005  
[psamantara@rediffmail.com](mailto:psamantara@rediffmail.com)

## 2. Korean Trans National Corporations Watch (KTNC Watch)

KTNC Watch is a network of NGOs<sup>1</sup> based in Korea working in various fields ranging from human rights and corporate social responsibility to energy/climate policy and labour rights. The network was formed with the view to bring together various expertise and experience to monitor transnational corporations registered in Korea and address issues arising from their operations.

KTNC Watch  
2nd Fl., 184-2 Pirun-dong  
Jongno-gu, Seoul 110-044  
South Korea  
Tel: + 82-2-736-5808/09  
Fax: + 82-2-736-5810  
Contact: [khis21@hanmail.net](mailto:khis21@hanmail.net)

## 3. Fair Green and Global Alliance

Fair Green Global Alliance is an alliance of Dutch civil society organisations.<sup>2</sup> The overall objective of the FGG alliance is to contribute to poverty reduction and socially just and environmentally sustainable development by enhancing the capacity of civil societies in the South.

Fair Green Global Alliance  
Sarphatistraat 30  
1018 GL Amsterdam  
The Netherlands  
+ 31-20-639-1291  
Contact: [info@somo.nl](mailto:info@somo.nl)

#### **4. Forum for Environment and Development | Forum for utvikling og miljø (ForUM)**

ForUM is a think tank and national and international contact point for the coordination of policy initiatives and recommendations. These are anchored in a community of 54 member organisations in Norway and the viewpoints of our international partners and those in the Global South.

ForUM

Storgata 11

0155 Oslo

Norway

Tel: +47-23-01-0300

Fax: +47-23-01-0303

<http://www.forumfor.no/>

Contact: [forumfor@forumfor.no](mailto:forumfor@forumfor.no)

## ENTITIES NAMED IN THIS SPECIFIC INSTANCE

### 1. **POSCO (South Korea)**

POSCO (formerly Pohang Iron and Steel Company) is a South Korea-based company engaged in the manufacture of steel products. It is the fourth largest steel company in the world. POSCO-India Pvt. Limited is a wholly-owned subsidiary of POSCO.

Jun Yang Jung, Chairman & CEO  
POSCO  
1, Goedong-Dong  
Nam-Gu  
POHANG, 790300  
South Korea  
Tel: +82-54-220-0114  
Fax: +82-54-220-6000  
Press Center: [webmaster@posco.co.kr](mailto:webmaster@posco.co.kr)  
[www.posco.com](http://www.posco.com) and  
<http://www.posco-india.com/>

### 2. **ABP/APG**

Stichting Pensioenfondsen ABP (National Civil Pension Fund) is the pension fund for employees in the government, public and education sectors in the Netherlands.

Henk Brouwer, Chairman  
ABP  
Head office Heerlen  
Oude Lindestraat 70  
6411 EJ Heerlen  
Netherlands  
Tel: +31-45-579-9111  
[pensioenen@abp.nl](mailto:pensioenen@abp.nl)  
<http://www.abp.nl/>

APG carries out the administration of pensions for approximately 2.6 million Dutch people, including ABP's assets.

Drs. Dick Sluimers, CEO  
APG  
Oude Lindestraat 70  
6411 EJ Heerlen  
Netherlands  
Tel: +31-45-579-9222  
[corporate.communicatie@apg.nl](mailto:corporate.communicatie@apg.nl)  
<http://www.apg.nl/>

### **3. The Government Pension Fund - Global (Norway)**

The purpose of the Government Pension Fund - Global (GPF) is to facilitate government savings necessary to meet the rapid rise in public pension expenditures in the coming years, and to support a long-term management of petroleum revenues in Norway.

Sigbjørn Johnsen, Minister of Finance

Ministry of Finance

P.O. Box 8008 Dep

NO-0030 Oslo

Norway

Tel: +47-22-24-9090

Fax: +47-22-24-9514

[postmottak@fin.dep.no](mailto:postmottak@fin.dep.no)

<http://www.regjeringen.no/en/dep/fin.html>

## INTRODUCTION

We, Lok Shakti Abhiyan, KTNC Watch, Fair Green and Global Alliance and ForUM (Complainants), hereby file a Specific Instance concerning POSCO's breaches to the *OECD Guidelines for Multinational Enterprises* (Guidelines) in relation to the proposed development of iron ore reserves, an integrated steelworks plant and associated infrastructure in the State of Odisha, India.

POSCO has not carried out comprehensive human rights and environmental due diligence, and it has not engaged in meaningful consultation with all affected communities to identify the full scope and severity of potential human rights, social and environmental impacts. POSCO's failure to conduct due diligence will mean the company will be incapable of preventing or mitigating significant adverse impacts on thousands of people and the environment should its proposed project proceed.

Specifically, POSCO is alleged to have breached the Guidelines by failing to:

- 1) seek to prevent and mitigate human rights abuses directly linked to their operations and exercise their leverage to protect human rights;
- 2) conduct comprehensive human rights due diligence, including consulting with and preventing harm to affected communities; and
- 3) carry out comprehensive environmental due diligence for all aspects of its proposed project, including consulting with and informing affected communities about the project's actual and potential impacts.

The Dutch pension fund ABP/APG and Norwegian Government Pension Fund – Global (GPF) should seek to prevent or mitigate the real and potential adverse impacts directly linked to their operations through their financial relationships with POSCO.

## WHAT IS AT STAKE

POSCO and its wholly-owned subsidiary POSCO India Pvt. Limited are seeking to extract and process an estimated 600 million tons of iron ore reserves in the State of Odisha<sup>3</sup>, India. POSCO's original plan involves building a 12 million tons per annum (MTPA) integrated steelworks plant in the Jagatsinghpur District (10 km south of Paradip Port). The integrated steel plant will include a captive power plant<sup>4</sup> and a captive minor port<sup>5</sup>. POSCO also plans to develop related infrastructure (such as roads and railways and possibly conveyor belts in lieu of some roads) to transport 20 MTPA iron ore from the mines to the plant.<sup>6</sup> An integrated township is also planned.<sup>7</sup>

POSCO claims the project is "expected to bring about meaningful growth and investment in India, and would also further downstream industries like automobile, shipping and construction". POSCO also claims "India will derive significant benefits from the POSCO India project, as it will create an estimated 48,000 direct and indirect jobs in the region. In addition, the construction phase will create about 467,000 man years of employment for the local population".<sup>8</sup> However, there is little possibility the purported job creation will benefit the thousands of local residents who do not have the skills to work for a steel plant and offspring industries that will allegedly be created.

The project originally involved the Odisha State Government acquiring 4,004 acres of land, including 438 acres of private land. In this regard, according to 2001 census data, the acquisition of 438 acres of private land would result in 3,578 families losing their land through forced eviction, either entirely or partially, and 718 families losing their homes.

However, it is important to understand that the State Government claims the 4,004 acres slated for POSCO's project is government-owned, but the communities have lived and subsisted on these lands for generations, including individuals who have special legal protections under the Scheduled Tribes or Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (hereafter "Forest Rights Act 2006" or "FRA")<sup>9</sup>.

Indeed, the Gram Panchayats of Dinkia, Nuagaon and Gadakujang are sited primarily in the proposed project site. These Gram Panchayats include 11 villages. As per the 2001 Census, there were 3,350 households with a total population of approximately 22,000 people living in these three Gram Panchayats. However, PPSS estimates the total number of households that will be affected today is about 4,000.

In addition, approximately 75% of the total land allotted for the proposed project is forest land. These communities depend on the surrounding forest land and coastal ecosystem for food such as rice, vegetables, fruits and fish, but also for the cultivation of cash crop such as betel vine and cashew. Their farming and fishing practices have allowed many community members to maintain a peaceful and sustainable way of living for generations.

## LATEST DEVELOPMENTS

- On 30 March 2012, the National Green Tribunal (NGT) suspended POSCO's final 2011 environmental clearance.<sup>10</sup> The NGT ordered the Ministry of Environment and Forests (MoEF) to carry out a "fresh review" by a newly-formed committee of "subject matter specialists for better appreciation of environmental issues". POSCO, for its part, "shall be asked to furnish relevant details required for the said review by the newly constituted committee to recommend specific conditions to be attached/revise in the [environmental clearances] granted by MOEF".<sup>11</sup> (Appendix A – See Pgs. 31-32, Paras. 8.1 – 8.9)
- In July 2012, POSCO "submitted a revised proposal to the [Odisha State Government] seeking transfer of 2,700 acre land in its favour for establishing a 8 MTPA factory" instead of the original 4,004 acres of land for a 12 MTPA power plant.<sup>12</sup> POSCO has stated "it will expand the capacity to [the] envisaged 12 [MTPA] when it is provided the rest [of the] land".<sup>13</sup>
- Also in July 2012, the Odisha State Government announced it "has decided against acquiring about 438 acres of private land for the 12 [MTPA] steel plant proposed to be set up by [POSCO] near Paradip".<sup>14</sup>
- On 22 August 2012, the MoEF review committee established in response to the NGT's order visited the Noliasahi and Nuagaon villages.<sup>15</sup> According to local community activists, no prior notice of the committee's visit was provided, and in fact they only learned of the visit after it was reported in the media. According to media reports, the committee members also met with state officials.



- As of 6 September 2012, the Odisha State Government is reportedly set to acquire the final 700 acres of government land needed for an 8 MTPA factory. According to media reports, “The land will be given to the South Korean steelmaker in October and construction could begin by the end of the year”.<sup>16</sup>
- If and when POSCO obtains a new environmental clearance from the MoEF per the NGT’s order, the Odisha State Government is set to approve a new Memorandum of Understanding (MoU) with POSCO (the original 2005 MoU expired in June 2011).

**It is our understanding POSCO actually intends to commence construction in October 2012. We therefore request urgent attention is given to the issues raised in this Specific Instance.**

## **KEY BACKGROUND INFORMATION**

### **1. About the “Saxena” and “Meena Gupta” Committees**

Two government-appointed committees – commonly referred to as the “Saxena Committee” and “Meena Gupta Committee” – conducted field investigations of the POSCO project in 2010.

The Saxena Committee was commissioned by the MoEF and the Ministry of Tribal Affairs (MoTA) to examine the wider implementation of the FRA and other issues in the State of Odisha. Three members of the Saxena Committee issued a scathing report in August 2010 on the FRA implementation relative to the POSCO project. Please see Appendix B, “MoEF/MoTA Committee on Forest Rights Act: Report of visit to Jagatsinghpur (site of proposed POSCO project), Orissa, 23-24 July 2010”.

In response to the Saxena Committee’s report, the MoEF appointed a four-member committee led by former State Environment Secretary Meena Gupta to “[E]nquire into the status of implementation of FRA in and around forest land of the POSCO project and rehabilitation and resettlement provisions. Subsequently, the committee was asked to review the environment, [Coastal Regulation Zone] and other clearances also given by MoEF and state and local authorities”.<sup>17</sup>

While the four members agreed the FRA had not been implemented, they could not come to a joint conclusion on all the issues they were commissioned to investigate. Therefore, two reports were issued: one by Meena Gupta and a second by a majority of the members, Dr. Urmila Pingle, Dr. Devendra, and Pandey, Dr. V. Suresh (hereafter referred to as the “Meena Gupta Majority Report”). Please see Appendix C, the Executive Summary for the “Report of the Committee Constituted to investigate into the proposal submitted by POSCO India Pvt. Limited for establishment of an Integrated Steel Plant and Captive Port in Jagatsinghpur District, Orissa, October 18, 2010”.

Many of the allegations contained in this Specific Instance are corroborated by the findings of these committees.

## **2. Land acquisition and Scheduled Tribes or Other Traditional Forest Dwellers**

The Odisha State Government has sought to acquire the land POSCO needs for its project under the Land Acquisition Act 1894, which was created with the expressed purpose of facilitating the government's acquisition of privately held land for public purposes. However, when Scheduled Tribes or Other Traditional Forest Dwellers (OTFDs) reside in the area, the Forest Rights Act 2006 applies.

Under the FRA, OTFDs is defined as any member or community who has for at least three generations prior to the 13 December 2005 primarily resided in or who depends on the forest or forest land for bona fide livelihood needs. One generation refers to a 25-year period. Similarly, Scheduled Tribes refers to indigenous people who are specially protected by the Indian Constitution. The FRA requires the free, prior and informed consent of the appointed village council before land can be acquired from these protected classes like Scheduled Tribes and OTFDs. Two issues have been raised with regard to the FRA. The first issue is whether Scheduled Tribes or OTFDs, who under Indian law hold forest rights, reside in the project area. The second issue is whether their free, prior and informed consent was obtained in a legally valid manner.

In August 2010, three members of the MoEF/MoTA Committee (also referred to as the "Saxena Committee") issued a highly critical report on the implementation of the FRA with respect to POSCO's proposed project (Appendix B). The Committee concluded, among other things (**emphasis below was not added**):

1. ***There are Other Traditional Forest Dwellers (OTFDs) in the area***, contrary to what the district administration is saying. Both documentary and oral evidence exists to this effect. A sample of the documentary evidence has been attached with the letter sent by the Committee to the Minister for Environment and Forests, on 3 August 2010.
2. The FRA process has not been completed, in fact it has not proceeded beyond the initial stages, for various reasons. ***It is therefore incorrect and misleading for the district administration to conclude that there are no OTFDs "in cultivating possession of the land since 3 generations" in the area.*** Firstly, this cannot be concluded without having gone through the process of claims; secondly, the FRA provides for dependence on forest land also as a criteria for eligibility, not only "cultivation possession of land".
3. Some palli sabhas have given ***resolutions refusing to consent to diversion of forest land*** on which they are dependent. These palli sabhas were convened by the district administration itself, after receiving instructions relating to the MoEF circular of July 2009, which indicates that the administration was aware of the possible presence of forest rights claimants in the area. (It is interesting that this was done *after* the District Collector had given the opinion that there are no STs and OTFDs in the project area). ***To the best of our knowledge these palli sabha resolutions have not been sent by the state government to the MoEF, which is tantamount to deliberate withholding of relevant information/documents.*** Only the palli sabha resolutions setting up FRCs in March 2008, have been sent to MoEF (which MoEF has asked the state government to translate, in April 2010).<sup>18</sup>

The Meena Gupta Majority Report also states that not only OTFDs, but also 21 adults belonging to Scheduled Tribes reside in the project area and the process procedures to obtain their consent were not implemented properly due to non-cooperation and negligence on the part of the State

Government of Orissa. The majority members concluded the final forest clearance should be revoked due to illegalities and that the Odisha State Government "...must initiate implementation of the FRA process afresh in the project area in a transparent and democratic way and ensure settling of individual and community rights as per the provisions of the Forest Right Act and Rules made therein".<sup>19</sup>

However, the Minister of Environment and Forests did not cancel the permission for forest land diversion, but rather requested the Odisha State Government "provide a categorical assurance" that it did not violate FRA in requesting the permission for the diversion of 1,253 hectares. The Minister's request came as surprise given the fact that from the very beginning it had been the position of the Odisha State Government that no Scheduled Tribes or OTFDs resided in the proposed project area.

In November 2010, the MoEF's Forest Advisory Committee recommended "temporary withdrawal" of the forest clearance on grounds of violation of the FRA. However, ignoring the findings and recommendations of all three committees, the Odisha State Government issued final clearance (meaning the FRA had been properly implemented) in January 2011. In response two Public Interest Litigation petitions were filed with the Orissa High Court.

On 9 September 2011 the Orissa High Court refused to pass an interim stay with regard to acquisition of forest land by the Odisha State Government. However it stayed the acquisition of private land. In other words, the status quo with regard to the State Government's acquisition of private land for the project was maintained.

As per media reports, in July 2012, the Odisha State Government "has decided against acquiring about 438 acres of private land for the 12-[MTPA] steel plant proposed to be set up by [POSCO] near Paradip".<sup>20</sup>

**However, the Odisha State Government's decision to no longer acquire private land does not resolve the FRA issue. Despite the findings of the Saxena and Meena Gupta Committees, the Odisha State Government still has not acknowledged the existence of Scheduled Tribes or OTFDs in the area, and therefore has not complied with the statutory rights of these groups under the FRA. The original writ petition regarding the Odisha State Governments' failure to implement the FRA is pending.**

## **BREACHES TO THE GUIDELINES**

### **1. Failure to seek to prevent or mitigate adverse impacts directly linked to their operations and exercise their leverage to protect human rights**

For the past seven years, efforts by the Odisha State Government to acquire land for POSCO's project have been opposed by local communities. Their opposition, expressed through peaceful demonstrations, has been met with violence and acts of intimidation. While not an exhaustive list of incidents, examples of state-sponsored human rights abuses include the following:

- On 26 September 2011, about 400 armed personnel entered Govindpur village where the POSCO Pratirodh Sangram Samiti, (PPSS - Committee for resistance against POSCO) campaign is

located in order to build a coastal road along the beach from the Indian Oil Refinery complex to the port for POSCO. The armed personnel attacked the villagers with rod, sticks and hand-bombs. The police took no action during this incident. More than 30 villagers, including 6 women, were injured. Two villagers remain in critical condition. The injured could not seek treatment at the nearest hospital, because they feared arrest as the police have registered false cases against some them.

- Following a July 2011 visit, the National Commission for Protection of Child Rights recommended the Odisha State Government withdraw its police presence at schools and made an appeal to ensure children's right to education and well-being are protected. (Appendix D)
- On 2 June 2010, protesters were attacked by the police who charged and fired on them during a demonstration opposing a "socioeconomic survey" in the Village of Nuagaon, because they feared the survey was a precursor to land acquisition. Ten people were injured and two protesters were arrested. One of the arrested, Ajaya Swain, was beaten and tortured in the police station.
- On 15 May 2010, Odisha state police brutally attacked local people who were guarding an entrance point to the proposed project site by using tear gas, rubber bullets and police clubs. Several family residences were burned and over 100 local people were injured as a result.
- On 20 June 2008, a group of people at Govindpur were attacked with bombs. Tapan (Dula) Mandal was killed on the spot and several others injured. POSCO did not condemn the death of Dula Mandal.
- On 29 November 2007, the protest dharna (peaceful protest) at Balitutha was attacked by approximately 500 goondas armed with bombs, swords and other deadly weapons. Eight people were badly injured, around 50 sustained lesser injuries, more than 50 motorcycles were damaged and the dharna tent was burned. The police, who were stationed half a kilometre away, stood by during the attack. After the dharna participants fled, the police used the opportunity to move into Balitutha, Gadkujang and Nuagaon, from which they had been previously barred from entering by the people's protests.
- On 27 November 2007, 55 people walking to a protest dharna at Balitutha were attacked by a larger group with sickles and other weapons. Six people were seriously injured, four of whom were hospitalised.
- To date, the Odisha State Government has registered more than 200 criminal cases against the villagers and issued 1,500 warrants, 340 of which are women. Two individuals, who are undertrial prisoners, remain incarcerated.
- Using the threat of arrest, the police continue to impose a de facto blockade on the area and particularly on the residents of Dhinkia Gram Panchayat. Anyone who leaves, including those in need of medical treatment or those who go to the market, is at risk of arrest. Schools in the area are repeatedly closed and used as police camps. The people have suffered repeated and prolonged hardship as a result.

- Abhay Sahoo, a reputed human rights defender and Chairperson of the PPSS has been targeted by the Odisha State Government in order to suppress opposition to the project. More than 55 false cases have been brought against him, including the following:
  - Mr. Sahoo was arrested in October 2008 when he left Dinkia village for ongoing medical treatment. Mr. Sahoo is an acute diabetic and has high blood pressure. Only after Mr. Sahoo's health further declined did the authorities move him to a hospital on 3 December 2008. While he was in hospital, the police's inhumane treatment included requiring him to be on the floor and handcuffed in chains.
  - Mr. Sahoo was again implicated in another false case leading to his incarceration from 25 November 2011 to 14 March 2012. (For more information, please see Appendix E, People's Union for Civil Liberties' press release concerning the arrest and treatment of Mr. Sahoo. Also see Appendix F, "Attack on people of Dinkia, Gadakunjanga & Nuagaon (anti-POSCO campaigners) by goons, supposedly hired by POSCO contractors on 26th Sep 2011".)

In a written response to the Business & Human Rights Resource Centre, POSCO stated:

As per Indian Constitution, law and order is a State subject. It is the prerogative of administration to use police based on threat perception. Private companies like POSCO would have no role in this. But as far as we know, there has been no use of force by Govt anywhere during land acquisition process. On the contrary, PPSS has been using violent means to terrorise people into submission and some of those daring to oppose have been exterminated. Any inference on intimidation is without any basis. (Appendix G)

**The above response demonstrates POSCO denies any correlation between state-sponsored human rights abuses and the land acquisition process. Consequently, POSCO has not sought to use its leverage to affect change in abusive state practices to acquire land that, should its project proceed, will ultimately benefit the company.**

**While most of the incidents cited above took place prior to the 2011 revision of the Guidelines, we are calling attention to the fact that POSCO's denials and continued silence with respect to human rights abuses during the land acquisition process represent a breach to the following human rights-related sections in the Guidelines:**

### **Failure to respect human rights**

- Human Rights Chapter IV, Paragraph 1: Enterprises should respect human rights, which means they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.

Relevant Commentary: The chapeau and the first paragraph recognise that States have the duty to protect human rights, and that enterprises, regardless of their size, sector, operational context, ownership and structure, should respect human rights wherever they operate. Respect for human rights is the global standard of expected conduct for enterprises independently of States' abilities and/or willingness to fulfil their human rights obligations, and does not diminish those obligations.<sup>21</sup>

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 extent which does not place them in violation of domestic law, consistent with paragraph 2 of the Chapter on Concepts and Principles.<sup>22</sup>

Enterprises can have an impact on virtually the entire spectrum of internationally recognised human rights. In practice, some human rights may be at greater risk than others in particular industries or contexts, and therefore will be the focus of heightened attention. However, situations may change, so all rights should be the subject of periodic review. Depending on circumstances, enterprises may need to consider additional standards. For instance, enterprises should respect the human rights of individuals belonging to specific groups or populations that require particular attention, where they may have adverse human rights impacts on them. In this connection, United Nations instruments have elaborated further on the rights of indigenous peoples; persons belonging to national or ethnic, religious and linguistic minorities; women; children; persons with disabilities; and migrant workers and their families...<sup>23</sup>

### **Failure to use leverage to affect a changes in state practices that violate human rights**

- Human Rights Chapter IV, Paragraph 2: Within the context of their own activities, avoid causing or contributing to adverse human rights impacts and address such impacts when they occur.

Relevant Commentary: Paragraph 2 recommends that enterprises avoid causing or contributing to adverse human rights impacts through their own activities and address such impacts when they occur. 'Activities' can include both actions and omissions. Where an enterprise causes or may cause an adverse human rights impact, it should take the necessary steps to cease or prevent the impact. Where an enterprise contributes or may contribute to such an impact, it should take the necessary steps to cease or prevent its contribution and use its leverage to mitigate any remaining impact to the greatest extent possible. Leverage is considered to exist where the enterprise has the ability to effect change in the practices of an entity that cause adverse human rights impacts.<sup>24</sup>

## **2. Failure to conduct comprehensive human rights due diligence, including consulting with and preventing harm to affected communities**

POSCO has not carried out comprehensive human rights due diligence (in violation of General Policies Chapter II, Paragraph A.10 and Human Rights Chapter IV, Paragraph 5). This clear breach of the Guidelines includes the company's failure to engage in meaningful consultation with all affected stakeholders (in violation of General Policies Chapter II, Paragraph A.14) in order to identify the full scope and severity of potential human rights impacts (in violation of General Policies Chapter II, Paragraph A.14 and Human Rights Chapter IV, Paragraph 2). Indeed, we cannot find any evidence of sincere efforts to listen and reflect the opinions of affected communities at any stage of the project planning process.

Rather than conducting appropriate and thorough human rights due diligence, it is our understanding POSCO is proceeding on the basis of a socio-economic survey report conducted by Xavier Institute of Management Bhubaneswar (XIMB) that greatly under-estimates the number of people who will have their livelihoods and human rights severely impacted. This includes persons who have special protections as members of Scheduled Tribes or OTFDs under the FRA, which the Odisha State Government has denied their existence (Please see "Background: Land acquisition and Scheduled Tribes or Other Traditional Forest Dwellers" above).

Given the presence of Scheduled Tribes, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and ILO 169 are of particular relevance and should therefore be respected by POSCO. In this regard, we would like to draw the attention to statements from other NCPs, such as the Norwegian NCP in the Intex and Cermaq cases and the British in the Vedanta case on how these rights are linked to the OECD Guidelines.

We therefore allege POSCO has breached the following Guidelines:

### **Failure to conduct comprehensive human rights due diligence**

- General Policies Chapter II, Paragraph A.10: Enterprises should carry out risk-based due diligence, for example by incorporating it into their enterprise risk management systems, to identify, prevent and mitigate actual and potential adverse impacts as described in paragraphs 11 and 12, and account for how these impacts are addressed. The nature and extent of due diligence depend on the circumstances of a particular situation.

Relevant Commentary: Due diligence is understood as the process through which enterprises can identify, prevent, mitigate and account for how they address their actual and potential adverse impacts as an integral part of business decision-making and risk management systems. Due diligence can be included within broader enterprise risk management systems, provided that it goes beyond simply identifying and managing material risks to the enterprise itself, to include the risks of adverse impacts related to matters covered by the Guidelines...<sup>25</sup>

- Human Rights Chapter IV, Paragraph 5: Enterprises should carry out human rights due diligence as appropriate to their size, the nature and context of operations and the severity of the risks of adverse human rights impacts.

Relevant Commentary: Paragraph 5 recommends that enterprises carry out human rights

due diligence. The process entails assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses as well as communicating how impacts are addressed. Human rights due diligence can be included within broader enterprise risk management systems provided that it goes beyond simply identifying and managing material risks to the enterprise itself to include the risks to rights-holders. It is an on-going exercise, recognising that human rights risks may change over time as the enterprise's operations and operating context evolve...<sup>26</sup>

#### **Failure to engage in meaningful consultation with all affected stakeholders**

- General Policies Chapter II, Paragraph A.14: Enterprises should 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 and other activities that may significantly impact local communities.

Relevant Commentary: Stakeholder engagement involves interactive processes of engagement with relevant stakeholders, through, for example, meetings, hearings, or consultation proceedings. Effective stakeholder engagement is characterized 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 of projects or other activities involving, for example, the intensive use of land or water, which could significantly affect local communities.<sup>27</sup>

#### **Failure to identify the full scope and severity of potential human rights impacts**

- General Policies Chapter II, Paragraphs A.11: Avoid causing or contributing to adverse impacts on matters covered by the Guidelines, through their own activities, and address such impacts when they occur.
- Human Rights Chapter IV, Paragraph 2: Within the context of their own activities, avoid causing or contributing to adverse human rights impacts and address such impacts when they occur.

Relevant Commentary: Paragraph 2 recommends that enterprises avoid causing or contributing to adverse human rights impacts through their own activities and address such impacts when they occur. 'Activities' can include both actions and omissions. Where an enterprise causes or may cause an adverse human rights impact, it should take the necessary steps to cease or prevent the impact. Where an enterprise contributes or may contribute to such an impact, it should take the necessary steps to cease or prevent its contribution and use its leverage to mitigate any remaining impact to the greatest extent possible. Leverage is considered to exist where the enterprise has the ability to effect change in the practices of an entity that cause adverse human rights impacts.<sup>28</sup>

### **3. Failure to carry out environmental due diligence, including consulting with and informing affected communities**

POSCO has not completed comprehensive environmental due diligence that assesses all project components and their impacts (in violation of General Policies Chapter, Paragraph A. 10 and Environment Chapter VI, Paragraph 3). In addition, POSCO has not engaged with all relevant stakeholders during the environmental assessment process (in violation of General Policies



Chapter II, Paragraph A.14) thereby rendering the company's existing environmental studies incomplete and inadequate. Consequently, POSCO will be incapable of preventing or mitigating significant adverse impacts on thousands of people and the environment should its proposed project proceed (in violation of General Policies Chapter, Paragraph A.11). Furthermore, POSCO has not provided the public with adequate, measurable and verifiable information about potential environmental impacts of its proposed project (in violation of Environment Chapter VI, Paragraph 2a).

As noted earlier, POSCO intends to build and operate a 12 MTPA integrated steelworks plant, which will include a captive power plant and a captive minor port. POSCO only completed Rapid EIA for Phase I of the steelworks plant and captive minor port (evaluating the impacts at the 4 MTPA capacities) even though these components are planned for 12 MTPA capacity.

The Environment Protection Act 1986, the main legislation governing EIAs, requires the completion of a comprehensive EIA based on data collected for one year. A Rapid EIA is based on data collected for one season, and shows whether a Comprehensive EIA is necessary.<sup>29</sup> The Rapid EIA for the steel plant was based on data collected for only for two (2) months (not an entire season). The Rapid EIA for the captive minor port was based on the data collected from September to November, which is the monsoon period, during which time (according to the Environment (Protection) Act 1986) conducting an EIA is prohibited.

The Rapid EIA did not include the planned township, transportation or other related infrastructure. It also did not examine a number of other critically important environmental issues, including the planned water diversion from the Jobra Barrage of Mahanadi River<sup>30</sup>; impacts to water resources and marine fisheries during construction; the plant's water usage once operational and how this might affect water availability or usability in the region; coastal erosion and pollution to ecologically sensitive estuary and coastal sand dunes; and impacts to Paradip Port, which is already a heavily polluted area.

The Meena Gupta Majority Report concluded:

The Committee strongly feels that there have been many serious lapses and illegalities in the EIA process. The EIA for such a megaproject is rapid, based on one-season data without taking into account all the components of the project like the township project, water project, railroad and transport facilities etc. Moreover it is limited only to Phase I of the project. There are serious violations in the public hearing process where many communities have been left out. The imposition of additional conditions to the existing [environmental clearances] will not at all remedy the lapses and illegalities. The Committee therefore strongly recommends that the Environmental Clearance given by the MoEF dated 15.5.2007 for minor port and 19.7.2007 for the steel plant should be immediately revoked.<sup>31</sup>

Moreover, POSCO's one public hearing on 15 April 2007 about its environmental due diligence was entirely inadequate. In this regard, the Meena Gupta Majority Report noted:

The Committee is of the firm view that the Public Hearing held on 15.4.2007 was not in compliance with the rules. The authorities failed to provide copies of the EIA to panchayats; all the project affected persons were not given opportunity to be heard. It was held in Kujanga about 15 km away from the affected villages. During the hearing, many people complained that

because of the prohibitive distance, many villagers could not travel to participate in the Public Hearing. The committee was informed that there was presence of a strong police force at the venue of the public hearing a day prior to the hearing itself. This served as a deterrent to free participation by local villagers, who were opposing the project. Other project affected people like traditional fishing community and farmers were not covered by the public hearing. The social impact of the project was also not discussed. Project proponent has failed to answer all the objections raised during the public hearing. The EAC has failed to apply its mind to the objections raised by various authorities and the public and have also failed to consider the available material on record. The EAC has also failed to record any reasons in respect of accepting or rejecting the objections raised but instead gave clearance. Such mechanical clearance makes a mockery of rule of law and procedural safeguards.<sup>32</sup>

In addition, the Meena Gupta Majority Report also found serious issues with clearances given to POSCO for its Coastal Zone Management Plan. The issues raised by the majority members include maps that do not accurately show the demarcation of the Coastal Regulation Zone (CRZ)<sup>33</sup> and are also inconsistent with maps by the Orissa Space Application Centre; a recommendation to establish a coal/ore and slag yard in areas that clearly violate CRZ regulations; plans to disrupt the natural flow of the Jatadharmohan creek that also violates CRZ regulations; and the failure to request clearance for wastewater treatment plans. Despite the above issues, POSCO was granted clearance by the Government. However, the majority Meena Gupta Committee members concluded:

...POSCO-India Pvt. Ltd has not been able to address all the issues relating to [Coastal Regulation Zone] notification. There are a number of serious lapses and violations, including suppression of facts. The environment clearance given by the MoEF vide letter dated 15 May 2007 should therefore be revoked forthwith.<sup>34</sup>

On 30 March 2012, the National Green Tribunal (NGT) suspended POSCO's final 2011 environmental clearance.<sup>35</sup> We refer you to Appendix A, "National Green Tribunal, Appeal No. 8/2011, 30 March 2012 between Prafulla Samantray and Biranchi Samantray [vs.] Union of India, Orissa State Pollution Control Board and M/S POSCO India Pvt. Ltd". In its Order, the NGT noted:

...A project of this magnitude particularly in partnership with a foreign country has been dealt with casually, without there being any comprehensive scientific data regarding the possible environmental impacts. No meticulous scientific study was made on each and every aspect of the matter leaving lingering and threatening environmental and ecological doubts unanswered...<sup>36</sup>

The NGT's Order examined the question of whether POSCO should have completed a comprehensive and integrated EIA report of various project components:

7.1 Need for Comprehensive and integrated EIA report of various project components. The majority members of the Review Committee have pointed out that for a project of this magnitude, a Comprehensive and integrated EIA report was required based on at least one full year base line data at the time of conduct of PH and subsequent appraisal by the EACs and the same argument has been put forward by the appellant. Whereas, the Respondents have submitted that at relevant point of time and as per the procedure, Comprehensive and integrated EIA report was not mandatory, it was only that as a part of own responsibility that

Respondent No. 3 prepared a Comprehensive and integrated EIA report engaging agencies of repute at a later date. The issue of integrated EIA report for various components of the project raised by the Review Committee and the appellants needs a consideration. Of course, as per the provisions, the proponent was required to approach different EACs for steel plant and captive minor port and accordingly, separate rapid EIAs were furnished. The available records also indicate that respective EACs were well aware of the other component. We have gone through the various provisions in the EIA requirement procedure and the material placed on record, undoubtedly, at the time of [Public Hearing] and subsequent appraisal by the [Environmental Advisory Committees], Comprehensive and integrated EIA report was not warranted, however, it would have been prudent to have this report at the very beginning stage itself to avoid all the confusion and delays especially considering the magnitude of the project and its likely impact on various environmental attributes in the ecologically sensitive area. In this direction, it would be prudent to note that a similar observation has also been made by Ms. Meena Gupta in her review report. Similar apprehensions have also been raised by the majority members of the Review Committee that considering the nature and extent of project, it was necessary to have a comprehensive and integrated EIA rather than rapid fragmented EIA...<sup>37</sup>

As noted above, The NGT ordered the Ministry of Environment and Forests (MoEF) to carry out a “fresh review” by a newly-formed committee of “subject matter specialists for better appreciation of environmental issues”. POSCO, for its part, “shall be asked to furnish relevant details required for the said review by the newly constituted committee to recommend specific conditions to be attached/revised in the [environmental clearances] granted by MOEF”.<sup>38</sup> (Appendix A)

**While the NGT determined POSCO met its minimum legal obligations with respect to the EIA process, the NGT’s Order affirms the fact POSCO has not conducted the level of environmental due diligence needed for a project of its magnitude and anticipated environmental impacts. In this regard, we contend POSCO has also failed to “honour” the Guidelines to the fullest extent possible by failing to complete comprehensive due diligence that assesses all of the project’s components.**

**It is also important to reiterate that POSCO has not provided the public with adequate, measurable and verifiable information about potential environmental impacts; nor has it engaged in meaningful consultation with affected communities. POSCO’s inadequate and substandard environmental due diligence demonstrates it not only lacks the necessary competency to prevent or minimize environmental damage should its project proceed, but also demonstrates a lack of good faith on the part of the company in dealing with affected people who will be impacted by its project. We therefore allege POSCO is in violation of the following Guidelines:**

**Failure to conduct comprehensive environmental due diligence**

- General Policies Chapter II, Paragraphs A.10. Enterprises should carry out risk-based due diligence, for example by incorporating it into their enterprise risk management systems, to identify, prevent and mitigate actual and potential adverse impacts as described in paragraphs 11 and 12, and account for how these impacts are addressed. The nature and extent of due diligence depend on the circumstances of a particular situation.

Relevant Commentary: For the purposes of the Guidelines, due diligence is understood as

the process through which enterprises can identify, prevent, mitigate and account for how they address their actual and potential adverse impacts as an integral part of business decision-making and risk management systems. Due diligence can be included within broader enterprise risk management systems, provided that it goes beyond simply identifying and managing material risks to the enterprise itself, to include the risks of adverse impacts related to matters covered by the Guidelines. Potential impacts are to be addressed through prevention or mitigation, while actual impacts are to be addressed through remediation...<sup>39</sup>

- Environment Chapter VI, Paragraph 3: Assess, and address in decision-making, the foreseeable environmental, health, and safety-related impacts associated with the processes, goods and services of the enterprise over their full life cycle with a view to avoiding or, when unavoidable, mitigating them. Where these proposed activities may have significant environmental, health, or safety impacts, and where they are subject to a decision of a competent authority, prepare an appropriate environmental impact assessment.

**Failure to engage with all relevant stakeholders during the environmental assessment process**

- General Policies Chapter II, Paragraph A.14: Enterprises should 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 and other activities that may significantly impact local communities.

Relevant Commentary: Stakeholder engagement involves interactive processes of engagement with relevant stakeholders, through, for example, meetings, hearings, or consultation proceedings. Effective stakeholder engagement is characterized 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 of projects or other activities involving, for example, the intensive use of land or water, which could significantly affect local communities.<sup>40</sup>

**Failure to identify the full scope and severity of potential environmental impacts**

- General Policies Chapter II, Paragraphs A.11: Avoid causing or contributing to adverse impacts on matters covered by the Guidelines, through their own activities, and address such impacts when they occur.

**Failure to provide the public with adequate, measurable and verifiable information about potential environmental impact**

- Environment Chapter VI, Paragraph 2a: Enterprises should... provide the public and workers with adequate, measurable and verifiable (where applicable) and timely information on the potential environment, health and safety impacts of the activities of the enterprise, which could include reporting on progress in improving environmental performance.

## OTHER PROCEEDINGS

The issues raised in this Specific Instance primarily relate to POSCO’s failure to carry out comprehensive human rights and environmental due diligence, including meaningful consultation

with all affected communities to identify the full scope and severity of potential human rights and environmental impacts. Therefore, none of the following proceedings should prevent or delay consideration of this Specific Instance, as further explained below.

- Orissa High Court regarding the Forest Rights Act 2006 – As noted above, the original petition regarding the Odisha State Governments’ failure to implement the FRA is pending. Nevertheless POSCO has a responsibility to conduct comprehensive human rights due diligence in accordance with the Guidelines and the UN’s “Protect, Respect and Remedy” framework prior to commencing its project.
- National Green Tribunal proceedings - As noted above, on 30 March 2012, the National Green Tribunal (NGT) suspended POSCO’s final 2011 environmental clearance.<sup>41</sup> The NGT’s Order affirms the fact POSCO has not conducted the level of environmental due diligence needed for a project of its magnitude and environmental impacts. The NGT proceedings have concluded.
- Orissa High Court regarding tree felling - A writ petition has been filed at the Orissa High Court by local community members in response to tree felling carried out by the State Government on POSCO’s behalf in September 2011 even though a valid Memorandum of Understanding did not exist between the parties. According to the petitioners, approximately 50,000 trees have been cut down in proposed steel plant area. Another 300,000 Jhaun, Casuarina and Tamarisk trees that protect the coast from wind and sea waves are slated for removal. The petitioners have argued that loss of trees will impact the ecological balance and make communities significantly more vulnerable to devastating cyclones, which are recurrent in the region. The petitioners noted that in 1999 when a super cyclone struck, there were no casualties in the villages protected by the trees. While these proceedings are not directly relevant to the allegations contained within this Specific Instance in so far as the Odisha State Government is the responsible party, the environmental implications of deforestation and increased cyclone risk to local communities should be addressed in POSCO’s environmental due diligence.
- National Human Rights Commission<sup>42</sup> - The Commission has made inquiries into some of the acts of repression and violence against community members. In addition, the Commission held a hearing on the problems faced by the Scheduled Castes in April 2012. The NHRC is not currently pursuing civil action at this time, but rather the Commission is monitoring developments related to POSCO project. In addition, the Commission has limited authority to make recommendations to companies and therefore cannot recommend or instruct POSCO to conduct human rights due diligence. We refer you to Appendix H, “NHRC team meets villagers at Posco site”.
- Supreme Court regarding mining concession rights - The Odisha State Government leased the Khandhar mines located 500 km from the proposed plant site in the Sundargarh District to POSCO. However, the Odisha High Court has cancelled the lease while a petition filed by Geo-min Minerals, a mining company that had also applied for lease, is pending. The Odisha State Government has appealed the lease cancellation to the Supreme Court. The nature of this legal action – namely whether POSCO will have rights to the Khandhar mines – is beyond the scope of this Specific Instance.

## COMPLAINANTS' REQUESTS OF NCPS

We request the Korean, Dutch and Norwegian NCPs to facilitate mediation between all parties to this Specific Instance to address POSCO's breaches to the General Policies, Disclosure, Human Rights and Environment Chapters of the Guidelines. We request all three NCPs to cooperate to the fullest extent possible, and ensure a consistent handling of this Specific Instance in the interest of functional equivalence.

As institutional investors, ABP/APG and GPFG should, consistent with their stated policy commitments to corporate social responsibility, urge POSCO to address the breaches cited in this complaint. Specifically, we request ABP/APG, and GPFG to elaborate on the steps they will take to prevent, through their investments in POSCO, contributing to adverse impacts, to ensure compliance with the Guidelines and their own ESG criteria.

The Guidelines state:

If the enterprise identifies a risk of contributing to an adverse impact, then it should take the necessary steps to cease or prevent its contribution and use its leverage to mitigate any remaining impacts to the greatest extent possible.<sup>43</sup>

The Guidelines furthermore state:

Appropriate responses with regard to the business relationship may include continuation of the relationship with a supplier - or business relationship - throughout the course of risk mitigation efforts; temporary suspension of the relationship while pursuing ongoing risk mitigation; or, as a last resort, disengagement with the supplier either after failed attempts at mitigation, or where the enterprise deems mitigation not feasible, or because of the severity of the adverse impact.<sup>44</sup>

First and foremost, ABP/APG and GPFG should engage in a dialogue with the affected communities and their representatives. We request ABP/APG and GPFG to develop, in consultation with the complainants, a clear and credible mitigation strategy that includes:

- 1) steps to exercise their leverage;
- 2) if necessary, steps to increase their leverage; and
- 3) the public disclosure of minimum criteria for the continuation of the investment

In addition, given the magnitude of the potential adverse impacts and the many years of controversy between POSCO and affected communities, we ask the NCPs carry out or commission an independent fact finding mission that examines all the issues raised in this Specific Instance prior to convening discussions. The NCPs should also be aware of the fact that there is intense local opposition to the POSCO project, so we request all options, including the cancelation, relocation and significant down-sizing of the project, be discussed during mediation.

If mediation fails, we request the NCPs to jointly make an assessment of the facts and circumstances in a final statement, including whether the allegations contained herein constitute breaches of the Guidelines. In order to comply with the Guidelines, we believe POSCO should:

- 1) Obtain the free, prior and informed consent from all members of Scheduled Tribes and OTFDs in accordance with the FRA as a central component of comprehensive human rights and environmental due diligence processes.
- 2) Demonstrate compliance to statutory rights by asking the Odisha State Government to ensure informed consent of the gram sabhas (village counsels) are obtained in accordance with the FRA.
- 3) Make a good faith demonstration of its intentions to ensure that the FRA is implemented, both in letter and spirit, by publicly requesting that the State Government of Orissa halt evictions and deforestation.
- 4) Conduct comprehensive human rights due diligence in a manner that is consistent with the United Nation's "Protect, Respect, Remedy" Framework on business and human rights. The human rights assessment should include meaningful consultation with all affected communities in order to identify the full scope and severity of potential human rights impacts.
- 5) Complete a new Comprehensive EIA that takes into consideration the findings of the report by majority members of the MoEF committee headed by Meena Gupta, the concerns and issues raised by the local people at the public hearing on 15 April 2007 and the National Green Tribunal's March 2012 ruling. The EIA should be based on data collected over 1-year consistent with the Environment (Protection) Act 1986 requirements.
- 6) Engage in meaningful stakeholder consultation with all affected communities to identify the full scope and severity of potential human rights, social and environmental impacts.
- 7) Provide specific and detailed information on the conditions attached to the clearances for the steel plant and port granted by the Indian government and the status of implementation of such conditions.
- 8) Adopt and publish a policy commitment affirming POSCO is committed to operating in accordance with international human rights best practices as reflected in the UN's "Protect, Respect and Remedy Framework" and the OECD Guidelines for Multinational Enterprises.
- 9) Issue a public statement that states POSCO opposes and condemns the use of force or repression under any circumstances.

We look forward to a written confirmation of receipt of this complaint, and appreciate your assistance and leadership in resolving the issues raised herein.

Please send all correspondence to Prafulla Samantara at [psamantara@rediffmail.com](mailto:psamantara@rediffmail.com).

Sincerely,

Prafulla Samantara  
Lok Shakti Abhiyan

## LIST OF APPENDICES

### **Appendix A**

“National Green Tribunal, Appeal No. 8/2011, 30 March 2012 between Prafulla Samantray and Biranchi Samantray [vs.] Union of India, Orissa State Pollution Control Board and M/S POSCO India Pvt. Ltd”.

### **Appendix B (“Saxena Committee Report”)**

“MoEF/MoTA Committee on Forest Rights Act: Report of visit to Jagatsinghpur (site of proposed POSCO project), Orissa, 23-24 July 2010”.

### **Appendix C (“Meena Gupta Report”)**

“Summary Report of the Committee Constituted to Investigate into the proposal submitted by POSCO India Pvt. Limited for establishment of an Integrated Steel Plant and Captive Port in Jagatsinghpur District, Orissa, October 18, 2010”. To download the full report (261 pages): <http://moef.nic.in/downloads/public-information/report-committee-posco.pdf>

### **Appendix D**

“National Commission for Protection of Child Rights, Report following visit to Jagatsinghpur District, Odisha, 3-5 July 2011 to assess the safety and security of children in the POSCO area, 22 Jul 2011”.

### **Appendix E**

People’s Union for Civil Liberties’ press release concerning the arrest and treatment of Mr. Sahoo

### **Appendix F**

“Attack on people of Dinkia, Gadakunjanga & Nuagaon (anti-POSCO campaigners) by goons, supposedly hired by POSCO contractors on 26th Sep 2011”.

### **Appendix G**

“POSCO’s response to concerns about its proposed steel project in Jagatsinghpur district, Odisha, India”, submitted to the Business & Human Rights Resource Centre, 1 Sep 2011.

### **Appendix H**

“NHRC team meets villagers at Posco site”, [The Times of India](#), 11 Apr 2012.



## VIDEOS

“Peoples Resistance to Posco”

<http://www.youtube.com/watch?v=RhcZ2ZmApys&feature=related>

“Anti Posco Leader Illegally Chained to Hospital Bed”

<http://www.youtube.com/watch?v=px3d52vTEuM&feature=relmfu>

“The secret of Dinkia & other villages opposing POSCO steel project”

<http://www.youtube.com/watch?v=sV6dWDhX4Lw&feature=related>

“NO POSCO”

<http://www.youtube.com/watch?v=ar4L2SJRjCA&feature=related>

## ACRONYMS

- CRZ .....Coastal Regulation Zone
- EIA .....environmental impact assessment
- FRA .....Forest Rights Act of 2006
- MoEF .....Ministry of Environment and Forests
- MoTA.....Ministry of Tribal Affairs
- MTPA.....million tons per annum
- NCP.....National Contact Point for the OECD Guidelines for Multinational Enterprises
- NGT .....National Green Tribunal
- NHRC .....National Human Rights Commission
- OTFDs .....Other Traditional Forest Dwellers
- PPSS.....Committee for resistance against POSCO
- UN .....United Nations
- XIMB.....Xavier Institute of Labour Management

## ENDNOTES

<sup>1</sup> KTNC WATCH is composed of APIL (Advocates for Public Interests Law, apil@apil.or.kr), CFA (Corporate For All, csr@action.or.kr), Energy & Climate Policy Institute (enerzin@naver.com), GONG-GAM Korean Public Interest Lawyers' Group (gonggam@gmail.com), KCTU (Korean Confederation of Trade Unions, inter@kctu.org), KHIS (Korean House for International Solidarity, khis21@hanmail.net), KPLH (Korean Lawyers for Public Interest and Human Rights, hope@hopeandlaw.org), National Association of Professors for Democratic Society (chohiyeon@naver.com), and PSSP (People's Solidarity for Social Progress, pssp@jinbo.net).

<sup>2</sup> Milieudefensie/FOE-NL, Niza/Action Aid, Transnational Institute, Clean Clothes Campaign, SOMO and Both Ends.

<sup>3</sup> "Orissa" is officially spelled "Odisha". Both spellings are used interchangeably in this Specific Instance.

<sup>4</sup> "CPP means the power plants commissioned by the industries for their self-consumption". (Source: Captive Power Plants: Case Study of Gujarat, India, P. 6: [http://iis-db.stanford.edu/pubs/20454/wp22\\_cpp\\_5mar04.pdf](http://iis-db.stanford.edu/pubs/20454/wp22_cpp_5mar04.pdf))

<sup>5</sup> Similar to a captive power plant, a captive minor port is built and operated by a company for its own purposes.

<sup>6</sup> Source: <http://posco-india.com/website/project/details.htm>

<sup>7</sup> "II. Report Submitted By Dr. Urmila Pingle, Dr. Devendra, Pandey, Dr. V. Suresh", Pg. 7, Para. 1.

<sup>8</sup> Source: <http://posco-india.com/website/project/benefits.htm>

<sup>9</sup> [http://www.orissa.gov.in/stsc/FOREST\\_RIGHT\\_ACT/FRA\\_English.pdf](http://www.orissa.gov.in/stsc/FOREST_RIGHT_ACT/FRA_English.pdf)

<sup>10</sup> [http://www.indiaenvironmentportal.org.in/files/file/final\\_order.pdf](http://www.indiaenvironmentportal.org.in/files/file/final_order.pdf)

<sup>11</sup> "NGT Appeal No. 8/2011, 30 March 2012 between Prafulla Samantray and Biranchi Samantray [vs.] Union of India, Orissa State Pollution Control Board and M/S POSCO India Pvt. Ltd", Pgs. 31-32, Paras. 8.1 – 8.9 (8.8 has been omitted).

<sup>12</sup> "POSCO submits revised land plan for 8 MTPA steel plant". Business Standard (India), 5 Jul 2012:

<http://www.business-standard.com/india/news/posco-submits-revised-land-plan-for-8-mtpa-steel-plant/479403/>

<sup>13</sup> "POSCO submits revised land plan for 8 MTPA steel plant". Business Standard (India), 5 Jul 2012:

<http://www.business-standard.com/india/news/posco-submits-revised-land-plan-for-8-mtpa-steel-plant/479403/>

<sup>14</sup> "Odisha government not to acquire private land for Posco project". The Economic Times (India), 6 Jul 2012:

[http://articles.economictimes.indiatimes.com/2012-07-06/news/32566399\\_1\\_posco-steel-steel-project-land-for-posco-project](http://articles.economictimes.indiatimes.com/2012-07-06/news/32566399_1_posco-steel-steel-project-land-for-posco-project)

<sup>15</sup> The Indian Express. "MoEF team visits Posco site for green clearance", 22 Aug 2012:

<http://www.indianexpress.com/news/moef-team-visits-posco-site-for-green-clearance/991295/>

<sup>16</sup> Abhishek Shanker, "Posco Said to Get Land for \$12 Billion India Unit in October", Bloomberg Businessweek, 6 Sep 2012: <http://mobile.businessweek.com/news/2012-09-06/posco-said-to-get-land-for-12-billion-india-unit-in-october>

<sup>17</sup> "II. Report Submitted By Dr. Urmila Pingle, Dr. Devendra, Pandey, Dr. V. Suresh", Pg. 8, Para. 5.

<sup>18</sup> "MoEF/MoTA Committee on Forest Rights Act: Report of visit to Jagatsinghpur (site of proposed POSCO project), Orissa, 23-24 July 2010", Pg. 4.

<sup>19</sup> "II. Report Submitted By Dr. Urmila Pingle, Dr. Devendra, Pandey, Dr. V. Suresh", Pg. 10, Paras 15-16.

<sup>20</sup> "Odisha government not to acquire private land for Posco project". The Economic Times (India), 6 Jul 2012:

[http://articles.economictimes.indiatimes.com/2012-07-06/news/32566399\\_1\\_posco-steel-steel-project-land-for-posco-project](http://articles.economictimes.indiatimes.com/2012-07-06/news/32566399_1_posco-steel-steel-project-land-for-posco-project)

<sup>21</sup> OECD Guidelines for MNEs, Commentary on Human Rights, Pg. 31, Para. 37.

<sup>22</sup> OECD Guidelines for MNEs, Commentary on Human Rights, Pg. 32, Para. 38.

<sup>23</sup> OECD Guidelines for MNEs, Commentary on Human Rights, Pg. 32, Para. 40.

<sup>24</sup> OECD Guidelines for MNEs, Commentary on Human Rights, Pg. 33, Para. 42.

<sup>25</sup> OECD Guidelines for MNEs, Commentary on General Policies, Pg. 23, Para. 14.

<sup>26</sup> OECD Guidelines for MNEs, Commentary on Human Rights, Pg. 34, Para. 45.

<sup>27</sup> OECD Guidelines for MNEs, Commentary on General Policies, Pg. 25, Para. 25.

<sup>28</sup> OECD Guidelines for MNEs, Commentary on Human Rights, Pg. 33, Para. 42.

<sup>29</sup> "The difference between Comprehensive EIA and Rapid EIA is in the time-scale of the data supplied. Rapid EIA is for speedier appraisal process. While both types of EIA require inclusion/coverage of all significant environmental impacts and their mitigation, Rapid EIA achieves this through the collection of one season (other than monsoon) data only to reduce the time required. This is acceptable if it does not compromise on the quality of decision-making. The review of Rapid EIA submissions will show whether a comprehensive EIA is warranted or not". (Source: MoEF - <http://envfor.nic.in/divisions/iass/eia/Chapter1.htm>)

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<sup>30</sup> The Jobra Barrage of Mahanadi River provides drinking and irrigation water to the cities of Cuttack and Bhubaneswar and districts of Cuttack, Jagatsinghpur, Khurda and Kendrapada.

<sup>31</sup> "II. Report Submitted By Dr. Urmila Pingle, Dr. Devendra, Pandey, Dr. V. Suresh", Pg. 14, Para. 32.

<sup>32</sup> "II. Report Submitted By Dr. Urmila Pingle, Dr. Devendra, Pandey, Dr. V. Suresh", Pg. 13-14, Para. 30.

<sup>33</sup> The Coastal Regulation Zone refers to an area designated according to High Tide Lines and Low Tide Lines as provided by the Environment Protection Act 1986. Certain actions such as the establishment or expansion of industrial facilities within the CRZ area are very restricted.

<sup>34</sup> "II. Report Submitted By Dr. Urmila Pingle, Dr. Devendra, Pandey, Dr. V. Suresh", Pg. 16, Para. 39.

<sup>35</sup> [http://www.indiaenvironmentportal.org.in/files/file/final\\_order.pdf](http://www.indiaenvironmentportal.org.in/files/file/final_order.pdf)

<sup>36</sup> NGT Final Order, Page 22, Section 7.

<sup>37</sup> NGT Final Order, Page 23-24, Section 7.1.

<sup>38</sup> "NGT Appeal No. 8/2011, 30 March 2012 between Prafulla Samantray and Biranchi Samantray [vs.] Union of India, Orissa State Pollution Control Board and M/S POSCO India Pvt. Ltd", Pgs. 31-32, Paras. 8.1 – 8.9 (8.8 has been omitted).

<sup>39</sup> OECD Guidelines for MNEs, Commentary on General Policies, Pg. 23, Para. 14.

<sup>40</sup> OECD Guidelines for MNEs, Commentary on General Policies, p. 25, Para. 25.

<sup>41</sup> [http://www.indiaenvironmentportal.org.in/files/file/final\\_order.pdf](http://www.indiaenvironmentportal.org.in/files/file/final_order.pdf)

<sup>42</sup> The NHRC has broad powers to investigate alleged incidents of human rights abuse, including taking civil action in courts. The NHRC also often undertakes field investigations. We refer you to the NHRC's Frequently Asked Questions portion of its website for further information about the Commission's activities: <http://nhrc.nic.in/>

<sup>43</sup> OECD Guidelines for MNEs, Commentary on General Policies, Pg. 24, Para. 19.

<sup>44</sup> OECD Guidelines for MNEs, Commentary, on General Policies, Pg. 25, Para. 22.

**INITIAL ASSESSMENT**

**Notification and request for mediation to the South Korean, Norwegian and  
Netherlands National Contact Points for the OECD Guidelines for Multinational  
Enterprises  
18 JANUARY 2013**

**EXECUTIVE SUMMARY**

On 9 October 2012 Lok Shakti Abhiyan, KTNC Watch, Fair Green and Global Alliance and Forum for environment and development notified a specific instance with the National Contact Points of South Korea, Norway and the Netherlands with regard to an alleged breach of the OECD guidelines for Multinational Enterprises (hereafter: the Guidelines) by South Korean Pohang Iron and Steel Company (Posco) and two of its investors; the Dutch pension fund ABP and its pension administrator APG and the Norwegian Government Pension fund Global<sup>1</sup>.

The Netherlands NCP concludes that the notification concerning ABP/APG merits further consideration based on the following criteria:

- the notifying parties are concerned parties with a legitimate interest in the issues raised in the notification;
- ABP and APG are multinational enterprises in the sense of the Guidelines;
- the issues related to ABP and APG are material and substantiated;
- there is a link between the enterprise's activities and the issues raised in the specific instance;
- the consideration of this specific instance contributes to the Guideline objectives and effectiveness.

The decision to further examine this specific instance does not entail a substantive research or fact finding nor does it entail a judgement on whether or not the company in question has violated the Guidelines.

The Netherlands NCP will seek to collaborate with the Norwegian and the Korean NCP to further investigate the notification and to offer mediation to all parties involved.

In conformity with the Netherlands NCP's procedure<sup>2</sup>, the provisional initial assessment has been sent to the parties involved, inviting them to respond to the assessment in writing within a two – weeks notice, after which the provisional initial assessment has been determined and published on the NCP's website [www.oecdguidelines.nl](http://www.oecdguidelines.nl).

**SUMMARY OF THE NOTIFICATION**

On 9 October 2012 the Netherlands NCP received a notification against ABP and APG for not having taken the appropriate steps to prevent or mitigate negative impacts related to their activity through their business relationship with Posco.

The notification against ABP/APG entails the alleged non-observance of OECD Guidelines Chapter II, commentary 19 and 22. In a clarification of the specific instance by mail of 23 November 2012 the notifying parties submitted additional information on the alleged

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<sup>1</sup> On 17 October 2012 notifying parties have changed the Norwegian addressee of their notification into Norwegian Bank Investment Management (NBIM).

<sup>2</sup> Attachment II: The Netherlands NCP procedure

breach by ABP/APG. Notifying parties refer to Chapter II, section A, paragraph 12 of the Guidelines where enterprises are expected to "seek to prevent or mitigate an adverse impact where they have not contributed to that impact, when the impact is nevertheless directly linked to their operations, products or services by a business relationship".

The notifying parties request that ABP/APG should *increase* their efforts to use their leverage in order to influence Posco. Furthermore notifiers request the public disclosure of minimum criteria for the continuation of the investment in Posco by ABP/APG. In addition the South Korean, Norwegian and Netherlands NCP are asked to carry out an independent fact finding mission in order to examine the issues raised in this specific instance.

The notification also entails an alleged breach of the guidelines by Posco for failing to seek to prevent or mitigate human rights impacts, failing to conduct comprehensive human rights due diligence and failing to carry out environmental due diligence in its project to set up a steel plant in the Jagastinghpur District in Odisha, India, which is carried out by the wholly owned subsidiary Posco India Private Limited.

## **THE NETHERLANDS NCP ASSESSMENT**

In accordance with the OECD Guidelines and the Dutch NCP Survey for handling notifications, the Netherlands NCP concludes that the notification merits further examination, after analysing the following considerations:

### *Is the Netherlands NCP the right entity to assess the alleged violation?*

The notification is submitted to three NCP's; the South Korean NCP is the right entity to assess the alleged breach by Posco, the Norwegian NCP is the right entity regarding NBIM and the Netherlands NCP is the right entity to assess the alleged breach by ABP/APG. The Netherlands NCP has agreed with the Norwegian and South Korean NCP to cooperate throughout the dealing with this specific instance as well as support the other NCP's.

### *What is the identity of the reporting party and its interest in the case?*

Fair Green and Global Alliance (FGG) is a Dutch civil society organization (CSO) with a broad international network who aims to support local communities in the Southern hemisphere whose livelihood is threatened by the exploitation of human and natural resources. FGG seeks to enhance the capacity of local communities and their CSO's to influence decision making process on national and international level. In this specific instance FGG is represented by the non-profit organizations SOMO and Both Ends. SOMO is an independent research and network organisation who investigates multinational enterprises and the consequences of their activities for people and the environment. Both Ends is an independent NGO that aims to strengthen Southern CSO's by supporting strategic networks and by monitoring, analyzing and lobbying for sustainable capital flows. Hence the NCP finds that the notifying parties have a legitimate interest in the matter submitted to the NCP.

### *Are ABP and APG multinational enterprises according to the Guidelines?*

Stichting Pensioenfonds (ABP) is the Dutch pension fund for employees in the government, public and education sectors. With an invested capital of € 274 billion, ABP is one of the largest pension funds in the world and holds a substantial position in the capital market. In addition to headquarters in The Netherlands ABP has offices in New York, Hong Kong and London. Algemene Pensioengroep N.V. (APG) forms part of the APG Group which operates globally with offices in the Netherlands and subsidiaries in Hong Kong and New York. APG is one of the world's largest administrators of group pension schemes with approximately 4.000 employees. APG administrates over 30% of all

collective pension schemes in the Netherlands and manages pension assets of in total approximately 315 billion Euro. APG manages the pension capital of ABP.

*Is the issue material and substantiated?*

The notification against Posco refers to relevant provisions of the Guidelines<sup>3</sup> and is substantiated with facts.

The issues raised in the specific instance concerning ABP/APG entail the alleged non-observance of OECD Guidelines Chapter II, commentary 19 and 22. Notifying parties have substantiated the notification concerning the alleged breach by ABP/APG and NBIM to the Norwegian and Netherlands NCP. In a clarification of the specific instance by mail of 23 November 2012 the notifying parties submitted additional information, referring to Chapter II, section A, paragraph 12 of the Guidelines and paragraph 14, 20, 22 in the Commentary of General Policies. The Netherlands NCP finds that the notification refers to relevant provisions in the OECD guidelines text and commentary and is substantiated with facts.

*Does there seem to be a link between the enterprise's activities and the issue raised in the specific instance?*

The issues raised in relation to ABP/APG concern their responsibility to prevent or mitigate negative impacts related to their activity through their business relation with Posco. APG manages the pension capital of ABP and holds a share in Posco. While the share of 17 million EURO is relatively small, APG is leading a coalition of other shareholders and acknowledges to have sufficient leverage to effect change in the practices of Posco. Hence the Netherlands NCP is of the opinion that there is a link between ABP/APG's activities and the issues raised in the notification.

*What is the relevance of applicable legislation and procedures, including court rulings;*  
There are no relevant parallel procedures identified at this stage

*How are similar issues addressed by other domestic or international proceedings;*

The notifying parties refer to the INTEX and CERMAQ cases, submitted to the Norwegian NCP, and the Vedanta case, submitted to the UK NCP. In the specific instance against INTEX (2009) the Norwegian NCP concluded that the company should consult local communities and be more transparent about environmental impacts. The notification against CERMAQ (2009) resulted in a joint statement between the company and the notifiers about good corporate governance, e.g. the sustainable use of natural resources. In the Vedanta case the UK NCP recommended in its final statement that the company should engage in a dialogue with the local communities and perform a human rights due diligence.

*Would the consideration of this specific problem contribute to Guideline objectives and effectiveness.*

The NL NCP finds that dealing with this notification and requests would contribute to the purpose and effectiveness of the Guidelines by contributing to clarify the due diligence recommendations for the financial sector.

## **CONCLUSION**

The NCP is of the opinion that this specific instance merits further consideration and will therefore, in accordance with the Netherlands NCP specific instance procedure, offer its good offices to facilitate a dialogue between the parties.

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<sup>3</sup> OECD Guidelines for Multinational Enterprises Chapter IV (Human Rights), paragraph 1,2,5; Chapter II (General Policies) , paragraph A. 10,11,14 and Chapter VI (Environment), paragraph 3

## ANNEX I: THE NETHERLANDS NCP PROCEDURE IN THIS SPECIFIC INSTANCE:

On 9 October 2012 the Netherlands NCP has received a specific instance against the Dutch pension fund ABP and asset manager APG for not having taken the appropriate steps to prevent or mitigate negative impacts related to their activity through their business relationship with Posco.

On 15 November 2012 the Netherlands NCP invited parties to comment upon the notification. On 23 November 2012 the notifying parties further clarified the notification and submitted additional information on the alleged breach by ABP/APG. On 26 November 2012 the NCP met with the notifying parties. On 27 November 2012 the NCP met with APG. NCP was informed by APG that APG will represent ABP in this specific instance.

## ANNEX II: THE NETHERLANDS NCP PROCEDURE

## ANNEX III: DETAILS OF THE PARTIES

### *THE COMPANY*

Stichting Pensioenfonds (ABP) is the Dutch pension fund for employees in the government, public and education sectors. With an invested capital of € 274 billion, ABP is one of the largest pension funds in the world and holds a substantial position in the capital market. In addition to headquarters in The Netherlands, ABP has offices in New York, Hong Kong and London. Algemene Pensioengroep N.V. (APG) forms part of the APG Group which operates globally with offices in the Netherlands and subsidiaries in Hong Kong and New York. APG is one of the world's largest administrators of group pension schemes with approximately 4.000 employees. APG administrates over 30% of all collective pension schemes in the Netherlands and manages pension assets of in total approximately 315 billion euros. APG manages the pension capital of ABP. APG holds a share of 17 million EURO in Posco.

### *THE NOTIFYING PARTY*

The notifying party, Fair Green and Global Alliance (FGG), is a Dutch civil society organization with a broad international network who aims to support local communities in the Southern hemisphere whose livelihood is threatened by the exploitation of human and natural resources. FGG seeks to enhance the capacity of local communities and their civil society organizations (CSO's) to influence decision making process on national and international level. In this specific instance FGG is represented by the non-profit organizations SOMO and Both Ends. SOMO is an independent research and network organisation who investigates multinational enterprises and the consequences of their activities for people and the environment. Both Ends is an independent NGO that aims to strengthen Southern CSO's by supporting strategic networks and by monitoring, analyzing and lobbying for sustainable capital flows.

## ANNEX IV: THE NOTIFICATION

## ANNEX V: RESPONSE BY THE COMPANY

APG is fully aware of the situation concerning the project of Posco in Jagastinghpur District, Odisha and the conflict between Posco and the local communities. APG is in close contact with the notifying parties regarding the issues raised in the notification and has expressed its willingness to cooperate with the notifiers to the fullest extent possible. APG has addressed the issue with Posco in order to realize a stakeholder dialogue which would include the local communities and government. According to APG, Posco would be willing to cooperate. While APG is only holding a small share of 18,6 million Euro in Posco (Q3 2012), it is leading a coalition of other shareholders and acknowledges to have sufficient leverage to effect change in the practices of Posco. So far (and despite the efforts of APG) the stakeholder dialogue has not been realized. According to APG, the



local communities are reluctant to engage in a dialogue with Posco and it is important to identify the right partners on government level.

ANNEX VI: FURTHER CLARIFICATION BY NOTIFYING PARTIES OF 23 NOVEMBER 2012

**SOMO, BOTH ENDS, ABP and APG: PUBLIC JOINT STATEMENT**  
**March 6, 2013**

1. The Parties; SOMO, Both Ends, ABP and APG on behalf of its clients including ABP (APG acting on behalf of its clients hereinafter referred to as APG) have agreed on a Terms of Reference for their dialogue as part of the Dutch NCP process, dated 12 February 2013 (Attachment 1). The aim of this dialogue has been:
  - to come to an agreement between Parties about appropriate steps to be taken by APG, in cooperation with other (minority) shareholders, to identify, prevent, or mitigate any potential negative impacts of the investment plans of POSCO in Odisha on local communities and the environment. This process aims to further effectuate APG's ongoing efforts to use its leverage to influence POSCO to strengthen its engagement with all stakeholders and accommodate their concerns in its plans to ensure that POSCO's operations are in line with internationally recognized standards and principles, as reflected in the OECD Guidelines for Multinational Enterprises;
  - to agree a draft Terms of Reference for an authoritative, independent review and assessment of contentious issues in Odisha, referred to in the Initial Assessment by the Dutch NCP dated 18 January 2013 (Attachment 2), which should facilitate a constructive and meaningful dialogue among all stakeholders; such a review and assessment could be jointly facilitated by the Netherlands', the South Korean and Norwegian NCPs.
  
2. APG expects of its portfolio companies to operate in line with the OECD Guidelines for Multinational Enterprises.<sup>1</sup>
  - APG observes that the application of the OECD Guidelines to financial institutions needs further clarification, which is reflected in the current initiative of the OECD that aims to clarify the scope of the OECD Guidelines for the financial sector. Whilst the Guidelines refer to the term business relationship as a concept, this term is not yet specifically defined for various types of financial relationships, products or services in the text of the OECD Guidelines.<sup>2</sup>
  - Currently there is no consensus about the degree of leverage and responsibility that comes with different forms of (minority) shareholding and other investment

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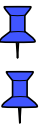
<sup>1</sup> ABP's Responsible Investment Policy states: "ABP expects companies to comply with the standards stated in the United Nations Global Compact, the OECD Guidelines for Multinational Enterprises, the OECD Principles of Corporate Governance and the International Corporate Governance Network Statement on Global Corporate Governance Principles. We will use our position as a shareholder to exert influence on companies that do not sufficiently comply with these standards. We will dispose of our investments in companies that persistently fail to improve their compliance."

APG Responsible Investment Policy states: "APG expects companies to act with respect for the principles of the UN Global Compact, and we will sell the shares we hold if the dialogue does not lead to improvement."

<sup>2</sup> The Guidelines state that "*Enterprises should (...) seek to prevent or mitigate an adverse impact where they have not contributed to that impact, when the impact is nevertheless directly linked to their operations, products or services by a business relationship*". (chapter II, article 12) Further, the Guidelines refer to business partners [Chapter IV, article 43] where it is stated that "*the term business relationship includes relationships with business partners, entities in the supply chain and any other non-state or state entities directly linked to its business operations, products or services*".

relationships. APG's commitment to exercise its influence over POSCO therefore does not mean a similar degree of influence can be assumed for all its types of holdings, and will be assessed on a case-by-case basis.

- APG is committed to continue to use its influence bringing POSCO's business practices in line with international principles and standards, under the expectation that POSCO publicly agrees to adopt these standards for all its operations including those in India and publicly reports on their implementation.
  - This engagement is focused on: establishing a meaningful stakeholder consultation process in India; to identify, prevent and mitigate any negative impacts related to POSCO's operations and investments in Odisha; and to ensure that effective local grievance procedures are developed.
  - APG has expressed a desire to further collaborate with international NGOs, the relevant NCPs and other investors to address the issues mentioned in this Specific Instance and other issues of concern;
3. To conclude the dialogue after two Dialogue sessions on 12 February and 28 February 2013, moderated by the Dutch NCP, Parties agree that:
- There is a gap between on the one hand the issues raised by the complainants in the Specific Instance ( Attachment 3) and their subsequent submissions, and on the other hand the various responses of POSCO (Attachment 4);
  - There is a gap between the public statements and information from POSCO and the reports from local stakeholders and media regarding the active involvement of POSCO in the land acquisition by the local authorities.
  - Parties are concerned about the occurrence of recent forced land acquisitions and police violence.
  - There is a need from the beginning of the project development for the establishment of a constructive and meaningful stakeholder consultation process between POSCO India the local communities and NGOs to identify, prevent and mitigate any negative impact related to the project;
  - For a successful dialogue it is essential that all parties have access to the information about all of POSCO's proposed investment plans in Odisha and their timeframes, covering its plans for the development of a steel plant, all its mining plans in the State as well as all infrastructural works required for the feasibility of the overall investment.
  - that the absence of a fruitful dialogue and trust provide regrettable breeding grounds for further conflicts surrounding the land acquisition and other aspects of POSCO's investment plans;
4. Parties agree that an Independent Review and Assessment could help to facilitate a fruitful, multi-stakeholder consultation process to take place between POSCO, the local communities and the local, national and international NGO's with the aim to identify, prevent and mitigate any adverse impacts.
5. Therefore the parties call on the NCPs of the Netherlands, Norway and South Korea to jointly commission and in consultation with the Indian authorities an International Review & Assessment Mission to identify and overcome the obstacles for such a stakeholder consultation process and to recommend feasible steps for all relevant stakeholders -including (minority) shareholders in POSCO- to resolve the current issues and conflicts;



6. The parties agree on the following draft terms of reference for such Review & Assessment Mission:
  - a mission of independent, authoritative members to prepare a high level assessment of the social, environmental and human rights aspects of all proposed POSCO investments in Odisha;
  - to assess how meaningful ongoing stakeholder engagement can be set up, in which the right to free, prior and informed consent is assured, including compliance with rights of indigenous people and forest dwellers, as defined by the UN Declaration on the Rights of Indigenous Peoples (DRIP),
  - the Mission to be acting under the authority of the NCPs of the Netherlands, Norway, South Korea; at least one member must be from India or of Indian origin with a sound understanding of the local situation and context.
  - The findings of the Mission will be made public;
7. Parties agree to continue their dialogue to seek ways to prevent or mitigate adverse impacts from POSCOs proposed investments in Odisha.

## **PRELIMINARY STATEMENT**

### **Preliminary report of the Netherlands National Contact Point for the OECD Guidelines for Multinational Enterprises (NCP)**

**on the specific instance notified by Lok Shakti Abhiyan, KTNC Watch,  
Fair Green and Global Alliance and ForUM**

**about an alleged breach of the OECD Guidelines by  
Pohang Iron and Steel Company (POSCO), ABP, All Pension Group (APG) and  
Norwegian Bank Investment Management (NBIM)**

**The Hague, March 13<sup>th</sup>, 2013**

This report describes the good offices offered by the NCP after receipt of a notification by Lok Shakti Abhiyan, KTNC Watch, Fair Green and Global Alliance and ForUM on 9 October 2012 about an alleged breach of the OECD Guidelines for Multinational Enterprises (hereafter: the Guidelines) by Pohang Iron and Steel Company (POSCO), ABP, All Pension Group (APG) and Norwegian Bank Investment Management (NBIM).

In its initial assessment of 18 January 2013 the Netherlands NCP concludes that the notification merits further consideration by the Netherlands NCP as far as it concerns the alleged breach of the Guidelines by the Dutch pension fund ABP and the Dutch pension fund asset manager APG. The Netherlands NCP has not assessed the specific notifications against POSCO and NBIM, as they are being reviewed by the South Korean and Norwegian NCP.

However, since the dialogue with APG on behalf of its clients including ABP addressed relevant issues concerning activities related to POSCO, parties have expressed the intention that the outcome of the dialogue may result in a positive contribution to the specific instances regarding POSCO and NBIM. Consequently the Netherlands NCP has published its findings in a preliminary form which will serve as input for the Netherlands NCP's Final Statement. The Netherlands NCP will complete its procedure by issuing a public Final Statement in which the results of the issues Parties have agreed upon will be addressed.

The process for the Netherlands NCP was conducted as a dialogue between the Parties Stichting Onderzoek Multinationale Ondernemingen (SOMO), BothENDS and All Pensions Group (APG) on behalf of ABP. The NCP held joint meetings on January 17<sup>th</sup>, February 12<sup>th</sup> and February 28<sup>th</sup>, 2013. Parties jointly set the agenda and terms of reference for the dialogue.

On March 6<sup>th</sup>, 2013 parties reached a joint agreement on the issues raised in the notification (*ATTACHMENT I*). Parties have agreed upon the appropriate steps to be taken by APG in order to prevent or mitigate any potential negative impacts related to their minority shareholding in POSCO and to further effectuate APG's ongoing efforts in order to influence POSCO. Furthermore Parties agreed upon the Terms of Reference for an independent Review and Assessment of contentious issues in Odisha, India.

The NCP appreciates the constructive way and forward looking approach in which Parties conducted the dialogue. The dialogue between Parties has been one of mutual consent on the main issues raised in the specific instances. The NCP welcomes their joint agreement and finds that it

contributes to the objectives and effectiveness of the Guidelines and their further implementation in a substantial way.

The NCP would like to emphasize that the Guidelines are applicable to financial institutions and to investors, including minority shareholders. The NCP finds that the term "business relationship", as referred to by the Guidelines, is applicable to financial relationships. The examples that are mentioned in the Guidelines are not limitative. The fact that the term "business relationship" is not specifically defined for various types of financial relations does not mean that the Guidelines do not apply to them, all the more since financial relations were covered by the former 'investment nexus' of the 2000 Guidelines. Consequently the NCP does not see why they should be excluded in the new broader terms of the updated 2011 Guidelines.

Throughout the process the Netherlands NCP has consulted with the Norwegian and South Korean NCPs in order to meet the OECD Guidelines requirements of coherence between the NCPs approaches (principle of functional equivalence). The Netherlands NCP will further seek to collaborate with the South Korean and Norwegian NCP prior to completion of the procedures by the individual NCPs.

The Netherlands NCP is of the opinion that an independent Review and Assessment Mission in Odisha, India as stipulated in the joint agreement of parties could contribute to a resolution of the conflict through a meaningful stakeholder consultation between POSCO and all affected stakeholders. In response to the call from Parties, the Netherlands NCP will seek to ensure such Mission is jointly commissioned by the South Korean, Norwegian and Netherlands NCP and Indian authorities are consulted.

The Netherlands NCP observes that the situation regarding the project site of POSCO in Odisha is critical, given the recent land acquisitions and violence. It therefore urges all parties involved in the specific instances to proceed in a prompt and timely manner.



HAUT-COMMISSARIAT AUX DROITS DE L'HOMME • OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS

PALAIS DES NATIONS • 1211 GENEVA 10, SWITZERLAND

www.ohchr.org • TEL: +41 22 928 9299 • FAX: +41 22 928 9010 • E-MAIL: registry@ohchr.org

REFERENCE: RRDD/DESIB/CM/ff

Geneva, 26 April 2013

**Subject: The issue of the applicability of the Guiding Principles on Business and Human Rights to minority shareholdings**

Dear Mr. Oldenziel,

In response to your request to the Office of the High Commissioner for Human Rights for clarification in regard to the applicability of the Guiding Principles for Business and Human Rights to minority shareholdings of institutional investors, please see attached interpretive guidance.

Please do not hesitate to follow up with my office through Ms. Lene Wendland ([lwendland@ohchr.org](mailto:lwendland@ohchr.org)) if further clarification or guidance is needed.

Yours sincerely,



Craig Mokhiber  
Chief

Development and Economic and Social Issues Branch  
Office of the High Commissioner for Human Rights

Mr. Joris Oldenziel  
Centre for Research on  
Multinational Corporations (SOMO)  
OECD Watch Secretariat  
Sarphatistraat 30  
1018 GL Amsterdam  
The Netherlands  
[j.oldenziel@somo.nl](mailto:j.oldenziel@somo.nl)

# The application of the Guiding Principles on Business and Human Rights to minority shareholdings of institutional investors

## Introduction

On 26 February 2013 OHCHR received a request via email from the Centre for Research on Multinational Corporations and OECD Watch to clarify certain issues relating to the interpretation of the Guiding Principles on Business and Human Rights<sup>1</sup> Specifically, OHCHR was asked to provide interpretative guidance on the following questions:

1. Do the Guiding Principles apply to institutional investors holding minority shareholdings, such as pension funds?
2. If so, do such shareholdings constitute a “business relationship” as defined by the Guiding Principles?
3. What guidance do the Guiding Principles provide with regard to the question of leverage when an entity is linked to an alleged human rights abuse through its business relationships, in the context described above (if applicable)?

The present brief does not express an opinion about any specific cases or the acts of any specific institutions or enterprises. The sole purpose is to provide interpretive guidance on the Guiding Principles with regard to the specific questions posed.

In preparing this interpretative guidance, OHCHR has consulted with the Working Group on the issue of human rights and transnational corporations.<sup>2</sup>

### 1. Applicability of the Guiding Principles to institutional investors holding minority shares

Guiding Principle 14 sets out the scope of application of the corporate responsibility to respect human rights and stipulates that “[t]he responsibility of business enterprises to respect human rights applies to *all* enterprises regardless of their size, *sector*, operational context, ownership and structure”(emphasis added).

Even though the Guiding Principles do not explicitly reference institutional investors, the application of the Guiding Principles to all enterprises regardless of sector is understood to also comprise all enterprises in the financial sector, including institutional investors.

There is nothing in the text of the Guiding Principles to indicate that their scope of application is limited to situations where institutional investors hold majority shareholdings. This may be relevant when considering the means through which a business enterprise meets its responsibility to respect human rights, including the leverage it can exercise in its business relationships (discussed in section 3), but is not relevant to the question of *the existence of the responsibility*.

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<sup>1</sup> Contained in Human Rights Council report A/HRC/17/31. The Guiding Principles were unanimously endorsed by Human Rights Council Resolution 17/4)

<sup>2</sup> See report by the United Nations Secretary-General entitled “Contribution of the United Nations system as a whole to the advancement of the business and human rights agenda and the dissemination and implementation of the guiding Principles on Business and Human Rights”, A/HRC/21/21, paragraph 96.



*In conclusion, it is the view of OHCHR that the Guiding Principles apply to institutional investors holding minority shareholdings.*

## **2. Do minority shareholdings held by institutional investors constitute a “business relationship” as per GP 13 (b)**

A business enterprise may be involved in an adverse human rights impact by either

- a) Causing or contributing to the adverse human rights impacts through its own activities (GP 13 (a));
- b) As a result of its business relationships with other parties where the adverse impacts are directly linked to its own operations, products or services by such business relationships, even if the business enterprise has not contributed to those impacts (GP 13 (b)).

The following interpretative guidance is based on the assumption that the question is concerned with scenario b), i.e. where the institutional investor is *not* itself contributing to an adverse impact, but is linked to such impact solely by their business relationships.

“Business relationships” are understood in the Commentary to GP 13 to include “relationships with business partners, entities in its value chain, and any other non-State or State entity directly linked to its business operations, products or services.” OHCHR’s Interpretive Guide on the Corporate Responsibility to Respect Human Rights<sup>3</sup> further elaborates that business relationships “include indirect business relationships in its value chain, beyond the first tier, and minority as well as majority shareholding positions in joint ventures”.<sup>4</sup> The use of the word “include” suggests that the examples of business relationships are non-exhaustive and illustrative. There is no indication that minority ownership outside the context of joint ventures would be excluded from the scope of application of GP 13 (b).

In other words, the determining factor to establish a business relationship in terms of GP 13 (b) is whether there is a link between an impact arising from the activities of an entity in which a minority investor holds shares and the operations, products or services of that minority shareholder. The relative size or percentage of the share an institutional investor holds in a company is *not* a factor in determining whether there is a business relationship for the purposes of GP 13 (b). Rather, it can be a factor in determining what measures the institutional investor is expected to take to prevent or mitigate any adverse human rights impacts which are linked to its operations, products or services through the business relationship, as stipulated in GP 19.

Institutional investors typically invest funds—their own or on behalf of clients—in various assets, which may include minority shareholdings. Impacts arising from the activities of the entities in which an investor has a minority shareholding can therefore reasonably be considered as being directly linked to the investors’ operations, products or services.

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<sup>3</sup> <http://www.ohchr.org/Documents/Issues/Business/RtRInterpretativeGuide.pdf>. The Guide was issued with the purpose of providing additional background explanation to the Guiding Principles to support a full understanding of their meaning and intent. The Guide’s content was the subject of numerous consultations during the mandate of the former Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises.

<sup>4</sup> See definition of business relationship, *ibid.* page 5.

It should be added that it is also common practice among some institutional investors to engage with the companies in which they invest to promote good corporate governance as part of a strategy to safeguard investments. Such engagement suggests an implicit recognition of a business relationship between the entities concerned.

*In conclusion, it is the view of OHCHR that minority shareholdings of institutional investors constitute a “business relationship” for the purposes of Principle 13(b).*

### **3. How should the question of leverage be assessed in the context of minority shareholdings?**

Guiding Principle 19 (b) stipulates that business enterprises should take appropriate action to prevent and mitigate adverse human rights impacts. Appropriate action will vary according to:

- (i) Whether the business enterprise causes or contributes to an adverse impact or whether it is involved solely because the impact is directly linked to its operations, products or services by a business relationship;
- (ii) The extent of its leverage in addressing the adverse impact.

As stated above, this brief focuses on the responsibility of institutional investors with minority shareholdings who are involved in an adverse impact solely because the impact is directly linked to its operations, products or services by a business relationship. This brief does not discuss situations where institutional investors themselves contribute to an adverse impact.

Where a business enterprise is linked to an adverse impact through a business relationship, the Commentary to GP 19 recognizes that the situation is complex. According to the Interpretive Guide, the actions to be considered are less straightforward than if the enterprise is causing or contributing to the impact itself, as it “has the least direct control or influence over whether that impact occurs” in a linkage situation.<sup>5</sup> However, the Guiding Principles do provide clear guidance on the key issues that need to be considered.

The commentary to Guiding Principle 19 states that, among the factors that will enter into the determination of the appropriate action in such situations are the enterprise’s leverage over the entity concerned, how crucial the relationship is to the enterprise, the severity of the abuse, and whether terminating the relationship with the entity itself would have adverse human rights consequences.

The concept of leverage is defined in the Interpretive Guide as “an advantage that gives power to influence. In the context of the Guiding Principles, it refers to the ability of a business enterprise to effect change in the wrongful practices of another party that is causing or contributing to an adverse human rights impact.”<sup>6</sup>

The Interpretive Guide presents these considerations, in general terms, in the following decision matrix:

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<sup>5</sup> Interpretive Guide, Ibid. page 48.

<sup>6</sup> Ibid. page 7.

	Have leverage	Lack leverage
Crucial business relationship	<p><b>A.</b></p> <ul style="list-style-type: none"> <li>➤ Mitigate the risk that the abuse continues/recurs</li> <li>➤ If unsuccessful</li> </ul>	<p><b>B.</b></p> <ul style="list-style-type: none"> <li>➤ Seek to increase leverage</li> <li>➤ If successful, seek to mitigate risk that the abuse continues/recurs</li> <li>➤ If unsuccessful, consider ending the relationship;** or demonstrate efforts made to mitigate abuse, recognizing possible consequences of remaining</li> </ul>
Non-crucial business relationship	<p><b>C.</b></p> <ul style="list-style-type: none"> <li>➤ Try to mitigate the risk that the abuse continues/recurs</li> <li>➤ If unsuccessful, take steps to end the relationship*</li> </ul>	<p><b>D.</b></p> <ul style="list-style-type: none"> <li>➤ Assess reasonable options for increasing leverage to mitigate the risk that the abuse continues/recurs</li> <li>➤ If impossible or unsuccessful, consider ending the relationship*</li> </ul>

\* Decisions on ending the relationship should take into account credible assessments of any potential adverse human rights impact of doing so.

\*\* If the relationship is deemed crucial, the severity of the impact should also be considered when assessing the appropriate course of action.

In line with the commentary to GP 19, where an investor with a minority shareholding has leverage to prevent or mitigate an adverse impact, it should exercise it.

Whether a minority shareholder has leverage over the entity concerned and can effect change in the wrongful practice that is causing or contributing to an adverse human rights impact, may depend on the size of the shareholding (percentage of total number of the shares).

However, several other factors may also affect a minority shareholder's leverage, such as:

- Whether there is otherwise a degree of direct control by the minority shareholder over the entity;
- The ability of the minority shareholder to incentivize the entity to improve its human rights performance through future business, reputational advantage, capacity-building, etc.;
- The benefits to the entity's reputation of the relationship with the minority shareholder and the harm to its reputation if that relationship is withdrawn;
- The ability of the minority shareholder to engage e.g. business associations and multi-stakeholder initiatives to incentivize behaviour change in the entity's sector or industry;

- The ability of the minority shareholder to engage local or central government in requiring improved human rights performance by the entity through the implementation of regulations, monitoring, sanctions, etc.;
- The ability of the shareholder to influence other shareholders of the concerned entity to insist that it address the situation.<sup>7</sup>

In situations where the minority shareholder finds it lacks leverage, it should consider ways in which it may increase its leverage to prevent or mitigate the human rights risk. This could, for example, involve filing shareholder proposals or entering into dialogue with other shareholders to build alliances for voting on the issue at shareholder meetings. Dialogue with authorities and relevant industry associations could also be considered.

As part of a strategy to increase leverage, it may be effective to engage with relevant expertise to document the consequences of the adverse impacts on human rights and possibly to the investment itself, in the form of increased costs/opportunity costs due to reputational, legal and operational risks. The shareholder should also consider whether a public statement to clarify its expectations may increase its leverage, or whether a more cautious behind-the-scene approach may be more effective.

Where a minority shareholder lacks leverage and cannot increase it should consider ending the relationship by disinvesting/selling its shares. The decision on ending the relationship should take into account credible assessments of any potential adverse human rights impact of doing so. Wherever possible, the shareholder should take steps to consult with potentially affected stakeholders on their proposed approach.

The Commentary to GP 19 emphasizes that the severity of the adverse human rights impact is an important factor in considering whether to continue the relationship. The more severe the abuse, the more quickly a business enterprise will need to see change before it takes a decision on whether it should end the relationship, including in situations where the relationship can be considered a “crucial” one. In any case, for as long as the abuse continues and a business enterprise remains in the relationship, it should be able to demonstrate its own ongoing efforts to mitigate the impact and be prepared to accept any consequences – reputational, financial or legal – of the continuing connection.

*In conclusion, institutional investors would be expected to seek to prevent or mitigate human rights risks identified in relation to shareholdings – including minority shareholdings. The Guiding Principles set out that the appropriate action in response to the identified risk depends on the degree of its leverage, where a number of options should be considered with a view to use or enhance leverage, to effect change in terms of ending harmful practice and mitigating risks of human rights abuse. If efforts in this regard are not successful, the Guiding Principles stipulate that the institutional investor should consider ending the relationship.*

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<sup>7</sup> Most listed examples have been adapted from Interpretative Guide page 49.

27 MAY 2013

# FINAL STATEMENT

COMPLAINT FROM LOK SHAKTI ABHIYAN, KOREAN TRANSNATIONAL CORPORATIONS WATCH, FAIR GREEN AND GLOBAL ALLIANCE AND FORUM FOR ENVIRONMENT AND DEVELOPMENT VS. POSCO (SOUTH KOREA), ABP/APG (NETHERLANDS) AND NBIM (NORWAY).

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## KEY TERMS and ABBREVIATIONS

Council	Council on Ethics of the Norwegian Government Pension Fund Global
ForUM	Forum for Environment and Development
the Fund	Norwegian Government Pension Fund Global
the Guidelines	OECD Guidelines for Multinational Enterprises
MNEs	Multinational Enterprises
NBIM	Norwegian Bank Investment Management
NCP	Norwegian National Contact Point for the OECD Guidelines for MNEs
Norges Bank	Norwegian Central Bank
OECD	Organization for Economic Cooperation and Development
POSCO	South Korean Pohang Iron and Steel Enterprise
POSCO India	POSCO-India Private Limited
UNPRI	United Nations Principles on Responsible Investment
UNGP	United Nations Guiding Principles on Business and Human Rights



## 1. EXECUTIVE SUMMARY

### 1.1. COMPLAINT

The Norwegian, Dutch and South Korean National Contact Points (NCPs) for the OECD Guidelines for Multinational Enterprises (MNEs)<sup>1</sup> (hereafter: the OECD Guidelines or the Guidelines) received a complaint from the four non-governmental organisations (NGOs): Lok Shakti Abhiyan (India), KTNC Watch (South Korea), Fair Green and Global Alliance (Netherlands) and Forum for environment and development (Norway) (hereafter: the Notifiers) on 9 October 2012. The notification concerned alleged breaches of the Guidelines by South Korean Pohang Iron and Steel Enterprise (POSCO) in its joint venture POSCO India Private Limited. The notification was also directed at two of POSCO's investors; (1) the Dutch pension Fund ABP and its pension administrator APG, and (2) the Norwegian Bank Investment Management (NBIM) of the Government Pension Fund Global<sup>2</sup> (the Fund).

The notifiers claim that NBIM has failed to take the appropriate steps to prevent or mitigate negative human rights and environmental impacts in connection with its investment in POSCO.

The notifiers request:

- (1) That NBIM (and ABP/APG) increase their efforts to use their leverage in order to influence POSCO.
- (2) That NBIM (and ABP/APG) publicly disclose minimum criteria for the continuation of the investment in POSCO.
- (3) The South Korean, Norwegian and Dutch NCP to carry out an independent fact finding mission in order to examine the issues raised related to an alleged breach of the Guidelines by POSCO. The allegations are that POSCO has failed to seek to prevent or mitigate human rights impacts, failed to conduct comprehensive human rights due diligence and failed to carry out environmental due diligence in its project to set up a steel plant in the Jagatsinghpur District in Odisha<sup>3</sup>, India, which is carried out by the wholly-owned subsidiary POSCO India Private Limited (Posco India).

### 1.2. BASIS AND SCOPE FOR THE ASSESSMENT

In accordance with the OECD Guidelines' Procedural Guidance, the Dutch, Norwegian and South Korean NCPs have agreed to coordinate, but also to handle the notification against the enterprise registered in their respective country. The NCPs have also consulted with the OECD Investment Committee.

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1 OECD Guidelines for Multinational Enterprises, Recommendations for Responsible Business Conduct in a Global Context, adopted at the 50th Ministerial Meeting 25 May 2011.

2 On 17 October 2012 the notifying parties changed the Norwegian addressee of their notification from the Norwegian Pension Fund Global and the Norwegian Ministry of Finance into Norwegian Bank Investment Management (NBIM).

3 In English, the name of the State is "ORISSA". Odisha is the Indian name, and introduced as the official name in 2011.

The South Korean NCP handles the specific instance involving POSCO. In the initial assessments the Norwegian NCP accepted the case against NBIM and the Dutch NCP accepted the case against ABP/APG.<sup>4</sup> Both NCPs found that the Guidelines apply to fund managers and minority shareholders and that the cases can contribute to clarifying the application of Chapter IV (Human Rights) to investors, and in particular how the provisions on human rights due diligence apply to minority shareholders.

The Norwegian NCP has not assessed the claims or carried out any fact finding concerning POSCO's operations in India or the activities of POSCO vis-à-vis POSCO India as this has not been deemed necessary in the assessment of NBIMs compliance with the OECD Guidelines. Examining the complaint against POSCO and APG respectively is considered beyond the scope of the review of the Norwegian NCP.

The assessment of the Norwegian NCP is specifically limited to whether NBIM has acted in accordance with the Guidelines. As the complainants have raised issues with respect to the human rights chapter of the Guidelines, the NCP has examined two dimensions of the application of this chapter of the Guidelines to NBIM: (1) the extent to which NBIM has integrated the OECD Guidelines provisions on human rights – including due diligence -- into its policies and processes;<sup>5</sup> and (2) the steps NBIM has taken -- or omitted-- in response to the allegations in this Specific Instance, including issues related to Chapter III of the OECD Guidelines on Disclosure. Environmental issues are also relevant to this Specific Instance and the Environmental Chapter of the OECD Guidelines with the update in 2011 includes due diligence requirements. However, this Specific Instance focuses on the human rights aspects as this was the focus of the ForUM submission to the Norwegian NCP concerning NBIM.

The NCP has assessed submissions from NBIM and the notifiers, the OECD Investment Committee, publicly available information on NBIM's web page and other relevant information available.

As the complaint was filed after the updated OECD Guidelines entered into force, and the investment existed after this date, it is assessed according to the 2011 version of the Guidelines.<sup>6</sup>

## 1.3. CONCLUSIONS

### 1.3.1 KEY POINT- NBIM HAS VIOLATED THE OECD GUIDELINES

The Norwegian NCP concludes that NBIM violates the OECD Guidelines chiefly on two accounts. First; by refusing to cooperate with the OECD NCP NBIM violates the OECD Guidelines Procedural Guidance. Second; by not having any strategy on how to react if it becomes aware of human rights risks related to companies in which NBIM is invested, apart from child labour violations.

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<sup>4</sup> <http://www.oecdguidelines.nl/ncp/pending-procedures/>

<sup>5</sup> The OECD Guidelines create an expectation that covered enterprises will conduct due diligence to meet the Guidelines as a whole. The language regarding the components and scope of due diligence is mirrored in Chapter IV (Human Rights).

<sup>6</sup> Adopted at the ministerial level of OECD 25 May 2011.

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### 1.3.2 THE OECD GUIDELINES ARE APPLICABLE TO THE FINANCIAL SECTOR, INVESTORS AND MINORITY SHARE HOLDERS

NBIM has submitted that the OECD Guidelines do not apply to minority shareholding nor in this Specific Instance. The NCP does not share this view. The OECD Guidelines apply to the financial, sector, as they do to all sectors. They do not make any exception for sub-groups of investors, nor do they exempt minority shareholders. The OECD Chapter on Human Rights converge with the UN Guiding Principles on Business and Human Rights, which are applicable to minority shareholders of institutional investors. The Norwegian NCP has consulted with the Dutch and UK NCPs, which in recent cases applied the Guidelines to the actions of multinational enterprises in the financial sector, including investors as majority and minority shareholders. All three NCPs have come to the conclusion that the OECD Guidelines apply to minority shareholders.

The question is thus not whether the OECD Guidelines apply to the financial sector and minority shareholding but how they apply.

In situations where the enterprise has a large number of business relationships,<sup>7</sup> the NCP recognises that it may not be feasible to conduct significant research on all companies in the portfolio prior to each investment. However, in such situations the enterprise is expected to develop a risk based approach to human rights beyond the mere financial risks. NBIM already takes such an approach to certain human rights risks, such as child labour. NBIM should build on its experience from focusing on children's rights to find ways to integrate also other human rights into their risk management system, provide more information on the processes it uses, and seek opportunities to enhance its data collection regarding human rights.

In section 4.3.2 the Norwegian NCP focus on some aspects of what due diligence may entail for minority shareholders, including its scope and depth.

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### 1.3.3. NON-COOPERATION WITH THE OECD NCP IS BREACH OF THE OECD GUIDELINES

Norway has a state obligation as an adhering country to the OECD Guidelines to promote the Guidelines and the OECD scheme of national contact points (NCPs). The Norwegian NCP expects that Norwegian actors respect the OECD Guidelines and cooperate with the OECD NCP. According to the Guidelines, cooperation with NCP is a key part of "responsible business practices". The Guidelines underscore that the effectiveness of the Specific Instances procedure depends on good faith behaviour of all parties involved in the procedures. In this context, as NBIM is the responding party, good faith means responding to the NCP queries in a timely fashion and "genuinely engaging in the procedures with a view to finding a solution."

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<sup>7</sup> For example when the investment is based on a market-weighted global benchmark index.

NBIM rejected the Norwegian NCP offer of dialogue and refused to provide any information on whether they were engaging with POSCO in any other forum.<sup>8</sup>

NBIM was given the opportunity, in line with the NCP's procedures, to address the complaint via dialogue/mediation or written procedure. NBIM chose the written procedure. The NCP pointed out to NBIM in writing 13 February that the general presentation by NBIM could not be considered response to the NCP specific 32 questions to NBIM dated 4 January.<sup>9</sup> NBIM still did not, provide a satisfactory response, in writing or orally. This is particularly regrettable in light of the Norwegian people's expectation that applies to state owned enterprises.<sup>10</sup> As a result, the NCP has drawn the conclusion that NBIM's actions were in breach of the OECD Guidelines on this point.

In light of this, the NCP finds it particularly unfortunate that NBIM has refused to engage in a meaningful dialogue with the NCP on its adherence to the OECD Guidelines.

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#### 1.3.4. NBIM'S DUE DILIGENCE AND MANAGERIAL SYSTEMS TO PREVENT POSSIBLE HARM ACCORDING TO CHAPTER IV (HUMAN RIGHTS)

This Specific Instance relates to the OECD Guidelines' human rights chapter. The NCP has thus examined the various steps of due diligence applicable to this case in section 4.3.<sup>11</sup>

The NCP underscores that companies should not simply choose to only address a small spectrum of human rights if they may have significant impacts on a range of other rights. Rather, responsibilities are tied to impacts: enterprises should be prepared to address the impacts they have, not just those they find of interest. Prior to the investment, NBIM could decide not to invest because the human rights risk is too high, or they could seek to impose conditions or changes in the management systems of a portfolio company to better manage significant human rights concerns. If NBIM, after investing, learns of a portfolio company's human rights impacts, it still has a number of tools available, including shareholder proposals, engagement with management, and the threat of divestment.

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#### 1.3.5. NBIM'S LACK OF DISCLOSURE ACCORDING TO OECD GUIDELINES CHAPTER III

It is difficult for the NCP to conclude that NBIM acts in accordance with the OECD Guidelines in the absence of information from NBIM to the contrary. NBIM has demonstrated lack of disclosure in

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<sup>8</sup> The attitude by NBIM gives reason to question whether NBIM has the necessary corporate culture to fulfil its duties as a responsible investor as they are laid out in the Norwegian Ministry of Finance ethical guidelines for the fund.

<sup>9</sup> See Attachment 2: E-mail from the NCP to NBIM dated 13 February 2013

<sup>10</sup> I.a. the Government Report to the Norwegian Parliament No. 10 (2008-9).

<sup>11</sup> The due diligence requirements are described in the OECD GL Chapter II (General Policies) and Chapter IV (Human Rights).

three areas in this Specific Instance: (1) non-cooperation with the NCP, (2) lack of communication on its human rights due diligence and (3) non-observance of the OECD Guidelines Chapter III.<sup>12</sup> After NBIM was informed of allegations that POSCO was responsible for grave and large scale human rights impacts, it should have investigated them. The NCP has received no information from NBIM to indicate whether NBIM did or has intentions to do so, alone or with other responsible investors. It is understood that there can be legitimate confidentiality concerns related to business sensitive information, meaning that NBIM cannot always provide detailed information about the nature and extent of dialogue with a specific company. However, there is an opportunity for greater openness without jeopardizing confidentiality requirements under the current system, and NBIM should have used this opportunity to disclose more, in particular to the NCP, but also to the general public

#### 1.4. RECOMMENDATIONS

The duty and mandate of the NCP is to make recommendations on the implementation of the OECD Guidelines in accordance with the “Procedural Guidance” as per Chapter C, para. 3 of the Guidelines, when a party is unwilling, or unable to participate in the proceedings. The NCP recommends that NBIM, as a minimum, acts upon the following recommendations:

- 1. Cooperate with the OECD NCP Norway by responding to the NCPs questions related to whether NBIMs conduct is in line with the OECD Guidelines and accept the NCP offer to facilitate dialogue/mediation in this Specific Instance. Be more transparent in showing to the NCP how NBIM is a responsible investor in this Specific Instance. NBIM is commended for openness on many general aspects, but is also encouraged to disclose more information related to the risk of its portfolio companies impacting other human rights than child labour.*
- 2. Expand human rights due diligence in connection with its investments to address the whole range of human rights that may be relevant to its investments, beyond just child labour.*

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<sup>12</sup> The Dutch NCP has received information from the Dutch Pension Fund that it, after it received the OECD NCP complaint, made efforts to reach out to the notifying civil society organisations as well as to Posco. SOMO, Both Ends, ABPAPB and APG Joint Statement [http://www.oecdguidelines.nl/wp-content/uploads/somo\\_bothends\\_abp\\_apg\\_public\\_joint\\_statement\\_06\\_03\\_2013incl.pdf](http://www.oecdguidelines.nl/wp-content/uploads/somo_bothends_abp_apg_public_joint_statement_06_03_2013incl.pdf). NBIM did not to respond to any of the NCPs questions, as they claimed that the OECD Guidelines are not applicable to them as minority shareholders, even after the Norwegian and Dutch NCP had determined in their respective initial assessments that the OECD Guidelines were applicable to the notifications directed at the Norwegian and Dutch pension funds. The Dutch pension fund accepted the Dutch NCP offer of dialogue. NBIM rejected not only the Norwegian NCP offer of dialogue but also any. The attitude by NBIM gives reason to question whether NBIM has the necessary corporate culture to fulfil its duties as a responsible investor as they are laid out in the Norwegian Ministry of Finance ethical guidelines for the fund. After NBIM was informed of allegations that POSCO was responsible for grave and large scale human rights impacts, it should have investigated them. The NCP has received no information from NBIM to indicate whether NBIM did or has intentions to do so, alone or with other responsible investors.

3. *Identify which human rights risks are prevalent in the various sectors or types of investments and develop a strategy to address these. NBIM is encouraged to work with other investors to increase leverage.*
4. *Include in the strategy to work with other investors to encourage selected investees with particular risks to establish a grievance mechanism.*
5. *Publicise the strategy on human rights due diligence. Disclosure will make NBIM less vulnerable to criticism that NBIM addresses human rights risks randomly.*
6. *In addition to these core recommendations, the NCP recommends that NBIM acts upon the more detailed recommendations outlined at the end of this Final Statement..*

## 2. THE NCP PROCEDURE

### 2.1 THE NORWEGIAN NATIONAL CONTACT POINT (NCP)

The Norwegian NCP belongs administratively to the Norwegian Ministry of Foreign Affairs, but is in substance independent of the government.

The NCP is tasked with assessing possible violations of the OECD Guidelines. According to the Guidelines, obeying domestic law is the first obligation of business.<sup>13</sup> The Guidelines make reference to other international instruments relevant to business operations. Where there is weak national implementation or legislation, or a discrepancy between national and international standards, the NCP encourages the enterprise to base its business on the more stringent standard, including the Guidelines. The NCP expects companies to whom the Guidelines apply to take initiatives to solve potential conflicts with civil society and to answer questions from the NCP in a cooperative, precise and speedy manner. The NCP also expects these companies to demonstrate how the Guidelines influence its business conduct.

The complaint process before the NCP is broadly divided into the following key stages:

- (1) Initial Assessment: Analysis of the complaint, the company's response, and any additional information provided by the parties. The NCP will use this information to determine whether the complaint merits further consideration.
- (2) Conciliation/mediation or Examination: If the complaint merits further consideration, the NCP will offer conciliation/mediation to the parties with the aim of reaching a settlement agreeable to both parties. Should conciliation/mediation fail to achieve a resolution or should the parties decline the offer, the NCP will examine the complaint in order to assess whether it is justified.

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<sup>13</sup> OECD Guidelines Chapter I (Concepts and Principles) , para 2: "Obeying domestic law is the first obligation of business (...) the Guidelines are not intended to place an enterprise in a situation where it faces conflicting requirements. But compliance with national law though necessary is not sufficient for compliance with the Guidelines."

(3) **Final Statement:** If a mediated settlement has been reached, the NCP will publish a Final Statement with details of the agreement. If conciliation/mediation is declined or fails to result in an agreement, the NCP will examine the complaint and prepare and publish a Final Statement. The Final Statement consists of an assessment of whether or not the Guidelines have been breached and, if appropriate, recommendations to the enterprise for future conduct.

The Norwegian NCPs complaint process, Initial Assessments, Final Statements and Follow-Up Statements, are published on the NCP's website: [www.responsiblebusiness.no](http://www.responsiblebusiness.no).

## 2.2 COORDINATION BETWEEN THE SOUTH KOREAN, DUTCH AND NORWEGIAN NCP DUE TO JOINT SUBMISSION FROM THE NOTIFIERS

On 9 October 2012, the organisations Lok Shakti Abhiyan, KTNC Watch, Fair Green and Global Alliance and Forum for Environment and Development (ForUM) notified a Specific Instance with the National Contact Points of South Korea, Norway and the Netherlands respectively with regard to an alleged breach of the Guidelines by the South Korean Pohang Iron and Steel Enterprise (POSCO) and two of its investors; the Dutch pension Fund ABP and its pension administrator APG, and the Norwegian Government Pension Fund Global (the Fund).<sup>14</sup>

The notifications to the Dutch and Norwegian NCP, entails an alleged breach of the Guidelines by ABP/APG and the Fund, respectively. The notifiers express concern that the funds have not taken the appropriate steps to seek to prevent or mitigate POSCO and POSCO India Private Limited's adverse human rights impacts which were directly linked to them through their financial relationship with POSCO.

The notifiers request the South Korean, Norwegian and Dutch NCP to carry out an independent fact-finding mission in order to examine the issues raised in this Specific Instance. Moreover, they request public disclosure of minimum criteria for the continuation of the investment in POSCO by ABP/APG and the Fund, through NBIM. Moreover, they request ABP/APG and NBIM to increase their efforts to use their leverage in order to influence POSCO.

In accordance with the OECD Guidelines' Procedural Guidance, the three NCPs have agreed to handle the notification against their respective registered enterprises, but in coordination with all NCPs and the OECD Investment Committee. The Norwegian NCP has assessed the notification solely against NBIM, and has thus not carried out any fact-finding concerning POSCO's operations in India. This part of the complaint is within the scope of the complaint to the South Korean NCP which is examining the complaint against POSCO and its wholly owned subsidiary, POSCO India Private Limited.

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<sup>14</sup> On 17 October 2012 the notifiers specified the Norwegian addressee of their notification to be the Norwegian Bank Investment Management (NBIM).

## 2.3 NORWEGIAN NCP PROCESS IN THIS SPECIFIC INSTANCE

The Norwegian NCP secretariat received the original notification against the Fund on 9 October 2012. On 17 October, ForUM on behalf of the notifiers clarified that the specific addressee was Norwegian Bank Investment Management (NBIM), the operative manager of the Fund. The Norwegian NCP forwarded the notification to NBIM the same day along with an invitation to comment on the complaint and have a meeting with the NCP.

The notifiers corrected the first submission on 24 October 2012. The notifiers allege that NBIM has failed to use its active ownership tools to promote high social and environmental standards<sup>15</sup> in its investment chain, through its investment in POSCO. On 23 November 2012, the notifiers submitted further clarification on the alleged breach by NBIM, referring to Chapter II (General Policies) of the Guidelines and other relevant provisions of the Guidelines.<sup>16</sup> NBIM did not have any comments at that stage, and on 23 November further commented that general information describing NBIM, its role and structure was factually correct.<sup>17</sup>

On 27 November 2012, the Norwegian NCP accepted the case for consideration and published its initial assessment. On 29 November 2012, the NCP had a meeting with NBIM where the NCP underscored the importance of actively engaging in the NCP process. Based on consultations with the Dutch NCP,<sup>18</sup> the Norwegian NCP followed up with a list of 32 questions e-mailed to NBIM as a basis for further dialogue.<sup>19</sup> The questions were based on the obligation to manage investments in accordance with the OECD Guidelines, in particular Chapter II (General Policies) paragraph 12<sup>20</sup> and Chapter IV (Human Rights) paragraph 3.<sup>21</sup> (See: Annex 1).

The Norwegian NCP furthermore requested NBIM to inform the NCP of any information that, in the opinion of NBIM, is subject to a duty of confidentiality by or pursuant to law and therefore should be

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15 NBIM ownership strategies: <http://www.nbim.no/en/Investments/ownership-strategies/>

16 OECD Guidelines Chapter IV (Human Rights), para 1,2,5; Chapter II (General Policies), para A. 10,11,14 and Chapter VI (Environment), para 3.

17 Letter from NBIM dated 12 November 2012. As stated in Annex 2 of the Initial NCP Assessment, the facts confirmed by NBIM where: "Norges Bank Investment Management (NBIM) is the asset management unit of the Norwegian central bank (Norges Bank). NBIM manages the Government Pension Fund Global (often referred to as the Norwegian oil fund) and most of Norges Bank's foreign exchange reserves. NBIM owns 0.79 % in Posco. NBIM was set up by the Norwegian central bank in January 1998 to manage the Government Pension Fund Global and most of Norges Bank's foreign exchange reserves. NBIM aims to get the highest possible return on the fund within the investment mandate set by the Ministry of Finance. NBIM seeks to safeguard the long-term financial interests of Norway's future generations through active management and active ownership. NBIM is an integrated global organisation with about 330 employees from 25 countries. NBIM has offices in Oslo, London, New York, Shanghai and Singapore."

18 Conference between the Norwegian and the Netherlands NCP 12.12.2012, led by Herman Mulder and Hans Petter Graver.

19 See Annex 1 for the questions. They are also available online:

[http://www.regjeringen.no/upload/JD/kontaktpunkt/sp\\_nbim.pdf](http://www.regjeringen.no/upload/JD/kontaktpunkt/sp_nbim.pdf)

20 OECD Guidelines Chapter II (General Policies), Section A, para 12: Enterprises should seek to prevent or mitigate an adverse impact where they have not contributed to that impact, when the impact is nevertheless directly linked to their operations, products or services by a business relationship.

21 OECD Guidelines Chapter II (General Policies) commentary para. 14 state that "due diligence is understood as the process through which enterprises can identify, prevent, mitigate and account for how they address their actual and potential adverse impacts as an integral part of decision-making and risk management systems (...)"



exempted from public access according to the Norwegian Freedom of Information Act.<sup>22</sup> The NCP requested a response by 16 January, 2013 and clarified that NBIM could request additional time to respond or could specify that it preferred to present responses to some of the questions in a meeting with the NCP or the secretariat.

On 31 January 2013, NBIM formally responded in a letter outlining NBIM's commitment to good governance and environmental and social considerations in their approach to long-term asset management, but did not provide any response to the questions or request an extension of the original deadline. The response referred to NBIM's framework for responsible investment and active ownership as published in NBIM's Responsible Investor Policy, public reports and other information on their web pages. The response also stated that the MNE Guidelines served as a basis for NBIM's responsible investment and active ownership with regard to the companies it invests in and its standard of conduct.

With respect to the specific complaint concerning its investment in POSCO, NBIM stated that it was of the opinion that the complaint against NBIM should be rejected by the NCP on the ground that the Guidelines are not intended to regulate the relationship between a minority shareholder and the enterprise issuing the shares. Furthermore, NBIM expressed its aim to contribute actively and constructively to the process recognising that responsible investment and active ownership are evolving concepts in the field of international investment.

In a follow-up meeting between the NCP and NBIM on 12 February 2013, NBIM provided information on the framework and structure for execution of its responsible investment and active ownership strategy. NBIM reiterated its view that the complaint should be rejected by the NCP on the grounds expressed previously. Furthermore, NBIM (again) cited concerns related to business confidentiality as a reason for not responding to the detailed questions submitted by the NCP but did not make reference to any specific regulations or provisions when requested to do so by the NCP. During the meeting, the NCP expressed its view that information provided in the meeting did not constitute a response to the questions issued to NBIM with the 25 January deadline, and requested NBIM to reconsider its decision to not provide a written response to the questions.

Furthermore, the NCP communicated to NBIM that evoking "business confidentiality" was not an acceptable ground for choosing not to answer the NCP's questions, as the Guidelines provided for the NCP to exercise careful discretion with respect to business sensitive information. The NCP referenced Section 1 (C) paragraph 4 under the Procedural Guidance chapter of the Guidelines which states that in order to facilitate resolution of the issues raised, the NCP is to "take appropriate steps to protect sensitive business and other information and the interests of other stakeholders involved in the specific instance." The Guidelines further state that while the proceeding of the NCP are underway "confidentiality of the proceedings will be maintained and that information and views

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<sup>22</sup> Act of 19 May 2006 No. 16 relating to the right of access to documents held by public authorities and public undertakings (short title: Freedom of Information Act).

provided during the proceedings by another party involved will remain confidential, unless that other party agrees to their disclosure or this would be contrary to the provisions of national law”.

The NCP requested that NBIM provide a response to the original questions within the extended deadline of 18 February 2013. Furthermore, it was expressed that, according to Section 1 (C) paragraph 3(c) under the Procedural Guidance chapter of the Guidelines, failure to do so would result in the NCP issuing a final statement as is required “when a party is unwilling to participate in the procedures.”

NBIM’s response<sup>23</sup> made reference to previous communications and meetings, and suggested a subsequent meeting if additional information was required. NBIM reiterated its understanding that the Guidelines apply to multinational companies, with a business relationship and with a direct link to the alleged breaches. However NBIM stated that in their understanding, the Guidelines are not intended to regulate the relationship between minority shareholders and an issuing company. No response to the specific questions issues by the NCP was provided.

The NCP has offered dialogue to the parties, sought advice from the OECD Investment Committee, and has collaborated with the Dutch and South Korean NCP to further investigate the notification and to offer mediation to all parties involved. Since dialogue proved difficult, the NCP decided to examine the case itself. In conformity with the Norwegian NCP’s procedure<sup>24</sup> the draft final statement dated 23 April 2013 has been sent to the parties involved, inviting them to respond to the assessment in writing within ten days’ notice, after which the final assessment is determined and published on the NCP’s website [www.responsiblebusiness.no](http://www.responsiblebusiness.no).

## 2.4 DETAILS OF THE NOTIFIERS

The notification was submitted on behalf of four civil society organisations;

1. Lok Shakti Abhiyan is an India-based alliance of progressive people’s organisations and movements. They provide a forum for coming together of numerous vibrant strands of ideologies and have as a focus to develop linkages across the various sections of dalits and other suppressed castes, minorities, *adivasis*, unprotected workers, labouring poor, as well as sensitive intellectuals and other professionals.
2. Korean Trans National Corporation Watch (KTNC) is a network of NGOs based in Korea working in various fields from human rights and corporate social responsibility to energy/climate policy and labour rights. The network was formed to bring together various expertise and experiences to monitor corporations registered in Korea and address issues arising from their operations.

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<sup>23</sup> Letter from NBIM dated 15 February 2012

<sup>24</sup> [http://www.regjeringen.no/upload/UD/Vedlegg/ncp/ncp\\_prosedyrer\\_e.pdf](http://www.regjeringen.no/upload/UD/Vedlegg/ncp/ncp_prosedyrer_e.pdf)

3. Fair Green and Global Alliance is an alliance of Dutch civil society organisations. Their overall objective is to contribute to poverty reduction and socially just and environmentally sustainable development by enhancing the capacity of civil societies in the South. Two specific organisations in the alliance that are involved in the complaint are SOMO and Both Ends. SOMO is an independent research and network organisation who investigates multinational enterprises and the consequences of their activities for people and the environment. Both Ends is an independent NGO that aims to strengthen Southern CSO's by supporting strategic networks and by monitoring, analysing and lobbying for sustainable capital flows.<sup>25</sup>
4. ForUM is a Norwegian civil society organization with 54 member organisations and a broad international network who aims to support local communities in the Southern hemisphere whose livelihood is threatened by the exploitation of human and natural resources. ForUM seeks to enhance the capacity of local communities and their civil society organizations (CSO's) to influence decision making process on national and international level.<sup>26</sup>

## 2.5. THE MULTINATIONAL ENTERPRISE- NORGES BANK INVESTMENT MANAGEMENT

Norges Bank Investment Management (NBIM) is one of the three operational wings of the Norwegian Central Bank (Norges Bank). It is the asset management unit of Norges Bank, managing the Norwegian Government Pension Fund Global (the Fund) on behalf of the Norwegian Ministry of Finance as well as most of Norges Bank's foreign exchange reserves. The Ministry determines the investment strategy for the Fund, but delegates specific investment decisions to managers within NBIM. NBIM also contracts external managers with expertise within clearly defined investment areas and award external equity mandates in markets and segments where it is not deemed practical or realistically possible for NBIM to build internal expertise.<sup>27</sup>

The Fund's investment holdings include stocks (ca. 60 per cent of its assets), bonds (35 per cent to 40 per cent) and real estate (up to 5 per cent). Stock or equity investments are spread globally outside of Norway in a wide range of sectors. As of 31 December 2012, the Fund owned stock in 7,427 companies worldwide.<sup>28</sup> As of 31 December 2012, the Funds market value was 3,816 billion kroner (approximately 650 billion USD).

## 3. BASIS FOR THE NCP'S ASSESSMENT

### 3.1 OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES

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25 SOMO website: <http://somo.nl/about-somo/fair-green-and-global-alliance>

26 ForUM website: [http://www.forumfor.no/English/About\\_us/index.html](http://www.forumfor.no/English/About_us/index.html)

27 <http://www.nbim.no/en/About-us/external-service-providers/>

28 <http://www.nbim.no/en/press-and-publications/News-List/2012/nbim-discussion-note-on-corporate-governance/>

The Guidelines comprise a set of principles and standards for responsible business conduct in areas including disclosure, employment and industrial relations, environment, combating bribery, consumer interests, science and technology, competition, and taxation. The 34 OECD governments and 10 non-OECD countries that have signed the Guidelines have made a binding commitment to implement the Guidelines and have committed to encouraging multinational enterprises operating in or from their territories to observe the Guidelines wherever they operate, while taking into account the particular circumstances of each host country.<sup>29</sup>

For the multinational enterprises based in adhering countries, the Guidelines are recommendations that are not legally enforceable, although some matters covered by the Guidelines are regulated by national law or international commitments.<sup>30</sup> The OECD adopted the updated Guidelines on 25 May 2011. The Norwegian NCP has applied the updated Guidelines to complaints submitted after 1 September 2011.

Governments adhering to the Guidelines are also obliged to establish a non-judicial grievance mechanism: A National Contact Point (NCP). NCPs are charged with raising awareness of the Guidelines amongst businesses and civil society. NCPs are also responsible for dealing with complaints that the Guidelines have been breached by MNEs operating in or from their territories.

## 3.2 FACTS RELATING TO THE COMPLAINT

### 3.2.1. CONTEXT

As of December 2012 NBIM's holdings of shares in POSCO amounted to 1,420 million NOK, representing 0,9 per cent ownership.<sup>31</sup> POSCO is the world's fourth largest steel producer and owns 100 per cent of the subsidiary POSCO India.<sup>32</sup>

POSCO India plans to construct a 12 million-ton per annum integrated steel plant, captive power plant, captive port and other related infrastructure in the Jagatsinghpur District. The notifiers claim that this project will lead to the physical and economic displacement of more than 20,000 people, including individuals who have special legal protections under the Scheduled Tribes or Other Traditional Forest Dwellers (Recognition of Forest Rights) Act. The notifiers maintain that POSCO [or POSCO India] has not engaged in meaningful stakeholder consultation with all affected communities to identify the full scope and severity of human rights, social and environmental impacts. The complainants fear that POSCO's failure to conduct due diligence will mean the enterprise will be incapable of preventing or mitigating significant adverse impacts on thousands of people and the environment during the construction of the plant and once the plant becomes operative.

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<sup>29</sup> OECD Guidelines, Chapter I (Concepts and Principles), para 3.

<sup>30</sup> OECD Guidelines, Chapter I (Concepts and Principles), para 1.

<sup>31</sup> <http://www.nbim.no>

<sup>32</sup> <http://Posco-india.com/website/company/corporate-overview.htm>

A growing body of research suggests that environmental, social and governance (ESG) factors, including human rights may create material risks for companies<sup>33</sup>, and thus that investment due diligence processes should examine these issues. Many investors “accept that good fiduciaries should take non-financial risks into account in investment decision-making”.<sup>34</sup> Companies that operate in emerging markets where regulatory frameworks or enforcement of those frameworks are weak, may encounter heightened human rights risks, yet enterprise attention to these risks often lags behind attention to environmental and governance matters.<sup>35</sup> Companies associated with human rights abuses expose themselves to operational risks (such as project delays or cancellation), legal and regulatory risks (lawsuits or fines), and reputational risks (negative press coverage and brand damage). The non-financial risks may thus materialise into financial risks for the investor.

Recognising that these non-financial risks can become material risks for companies and given an increasing understanding of the relationship between attention to environmental, social and corporate governance (ESG) issues and longer term sustainability, an increasing number of institutional investors such as NBIM actively address ESG performance with the companies in which they invest. While this trend started with a smaller group of what are referred to as socially responsible investors, an increasing number of mainstream investors are considering ESG factors in their investments as evidenced, for example, by the growing mainstream investor membership of the UN-backed Principles for Responsible Investment (PRI). The majority of PRI signatories engage in dialogue with investee companies to some extent, either directly or as part of broader investor collaborations, to influence corporate behaviour.<sup>36</sup> To better manage such risks, investors, including minority shareholders, are increasingly carrying out due diligence also on social issues.

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### 3.2.2. STRUCTURE OF THE FUND

The Norwegian Government Pension Fund Global (the Fund), commonly referred to as the Norwegian Petroleum Fund, was established to manage Norway’s revenue from petroleum exploration. It is a tool to manage the financial challenges of an ageing population and an

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33 United Nations Environment Programme Finance Initiative (UNEPFI), Asset Management Working Group, Fiduciary Responsibility: Legal and practical aspects of integrating environmental, social and governance issues into institutional investment, A follow up to the AMWG’s 2005 ‘Freshfields Report’, July 2009, pp. 28-29. See: <http://www.unepfi.org/fileadmin/documents/fiduciary11.pdf>; and Freshfields report, A legal framework for the integration of environmental, social and governance issues into institutional investment, October 2005. See: [http://www.unepfi.org/fileadmin/documents/freshfields\\_legal\\_resp\\_20051123.pdf](http://www.unepfi.org/fileadmin/documents/freshfields_legal_resp_20051123.pdf).

34 NEI Investments, letter to UN Working Group on Human Rights and Transnational Corporations and Other Business Enterprises, December 2011. See:

<http://www.ohchr.org/Documents/Issues/TransCorporations/Submissions/Business/NEIInvestments.pdf>.

35 See UNPRI and IHRB Guide for Responsible Investment. See also Daan Schoemaker, Raising the Bar on Human Rights: What the Ruggie Principles Mean for Responsible Investors, Sustainalytics, August 2011, pp. 9-11. See: [http://www.sustainalytics.com/sites/default/files/ruggie\\_principles\\_and\\_human\\_rights.pdf](http://www.sustainalytics.com/sites/default/files/ruggie_principles_and_human_rights.pdf), and Ashamdeep Kaur, Ruggie’s Legal Legacy: Could Human Rights Become the Biggest Investor ESG Risk?, Responsible Investor, March 2012.

36 For instance, since 2009, a coalition of 11 investors has been encouraging 10 companies from the extractive industry to adopt better policies for managing indigenous rights risks. According to the group’s analysis, five companies (3 of which are Canadian) have improved their overall performance. For instance, since 2009, a group of 16 PRI investors have also been engaging with 16 global consumer electronics companies in the US, Europe, and Japan about managing the reputational risks of sourcing from the Eastern Congo, an area in conflict. Assessing their performance in 2012, the group found the target companies had improved their total scores by 23% on average with the greatest improvement in the disclosure area, followed by implementation performance. PRI Annual Report 2012

expected future drop in petroleum revenue. Currently, it is one of the world's largest investment funds (private or public) with a portfolio value of approximately 650 billion USD.

The Fund was designed for long-term investments, but it is possible to draw on the Fund when required. Following a public debate on the ethics of the (increasingly) sizeable Fund, Ethical Guidelines were adopted in 2004 and amended in 2010.<sup>37</sup>

The Ministry of Finance is the official owner of the Fund. The Central bank of Norway (Norges Bank) is the operational manager of the Fund through NBIM and is responsible for exercising ownership rights. The Fund also has a Council on Ethics, an independent expert body with a mandate to make recommendations to the Ministry of Finance on exclusion of companies based on the criteria in the Ethical Guidelines. The Fund also has a Strategy Council of four independent expert members. In January 2013, the Ministry of Finance published the decision to ask the Strategy Council to write a report on the strategy for responsible investment. The report is to be presented autumn 2013. The main focus of the Strategy Council's report shall be on the Fund's overarching strategy for responsible investment. The report shall amongst other things consider how the collective resources and expertise can best be utilised to strengthen the work on responsible investment further. The report may propose changes to strengthen the work on responsible investment, including operational and institutional changes.<sup>38</sup>

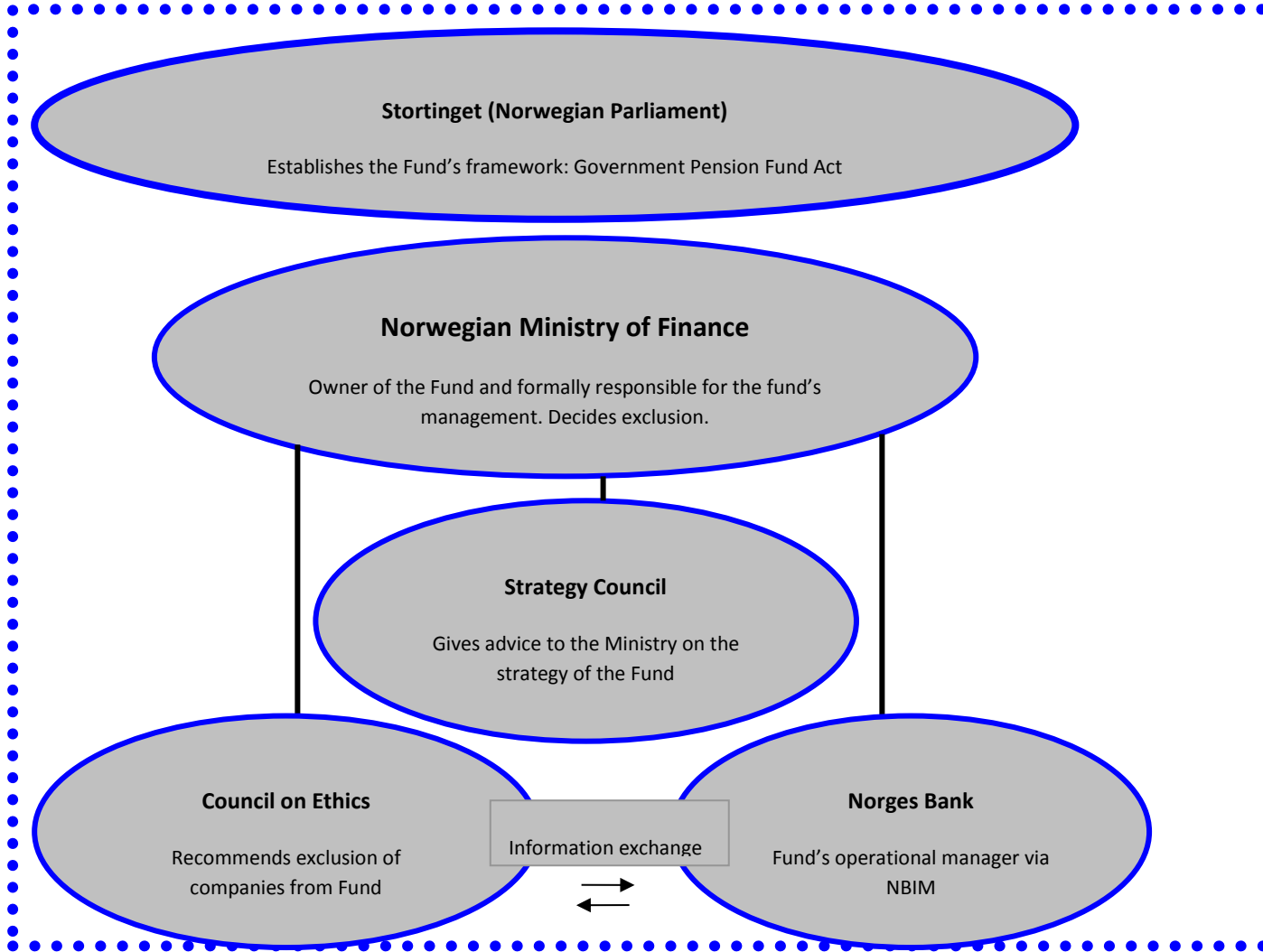
The general structure of the Fund is set out below. Although the Council on Ethics may be the most well-known part of the social responsible policy of the Pension fund, it is important to underline that from the point of view of the ethical guidelines, limits to the investment universe and divestment based on recommendations from the Council on Ethics is only a secondary measure. The main and most important instrument to adhere to the ethical requirements of responsible investment practices is the active ownership of NBIM.

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37 On the development of the guidelines, see Norwegian Government White Paper, NOU 2003: 22, On the Ethical Guidelines of the Government Pension Fund (Report from the Graver Committee).

38 <http://www.regjeringen.no/en/dep/fin/news/news/2013/strategy-council-to-look-at-responsible-.html?id=712024>

Table 1: Overall structure and division of roles at the Fund



### 3.2.3. MANDATE OF THE FUND

The overall mandate of the Fund is established by the Norwegian Ministry of Finance. The mandate outlines, inter alia, such aspects as Norges Banks overall parameters for the management, management costs and remuneration systems, and reporting. It also outlines the responsible investment strategy for the Fund.<sup>39</sup> It states that “the management of the investment portfolio shall be based on the goal of achieving the highest possible return...” and that “...a good return in the long term is regarded as being dependent upon sustainable development in economic, environmental and

39 Report No. 17 to the Storting (Norwegian Parliament); Management mandate for the Government Pension Fund Global, Laid down by the Ministry of Finance on 8 November 2010 pursuant to Act no. 123 of 21 December 2005 on the Government Pension Fund, section 2, second paragraph, and section 7. Amended by resolution nos. 1792 of 21 December 2010, 901 of 5 September 2011, 689 of 27 June 2012, 943 of 4 October 2012 and 18 December 2012; <http://www.nbim.no/en/About-us/governance-model/management-mandate/#Chapter2>. The Norwegian government issued ethical guidelines for the Government Pension Fund-Global in 2004. Revised guidelines came into force in March 2010.

social terms, as well as well-functioning, legitimate and effective markets.”<sup>40</sup> In order to implement this objective, it is stated that “the Bank shall have internal guidelines for integrating considerations of good corporate governance and environmental and social issues in investment activities, in line with internationally recognised principles for responsible investment” and that “...active ownership shall be based on the UN Global Compact, the OECD’s Principles of Corporate Governance and the OECD’s Guidelines for Multinational Enterprises” and “the Bank shall have internal guidelines for its exercise of ownership rights that state how these principles are integrated.”<sup>41</sup> Moreover, it is stipulated explicitly that “the Bank shall actively contribute to the development of good international standards in the area of responsible investment and active ownership.”<sup>42</sup> NBIM confirms in annual reports and on their website that their active ownership is based on the above-mentioned guidelines, and is also signatory to an investor statement in 2011 supporting the UN Guiding Principles on Business and Human Rights.<sup>43</sup>

The Executive Board revised the structure and content of the governing documents for NBIM’s investment management in 2011. The new governing documents include Principles for Ownership Management and Principles for Risk Management, both available online.<sup>44</sup> According to NBIM’s Ownership Principles, Norges Bank’s exercise of ownership is based on three key principles concerning the enterprise invested in: (i) the company’s objective is to build and safeguard long-term shareholder value, (ii) the company’s board of directors shall work in the interest of all shareholders and (iii) the enterprise must address the impact of its activities on society and the environment. Furthermore, the main tools for exercising its ownership is to communicate NBIM principles and be transparent about priorities and activities, co-operate with investors and organisations, engage with companies, vote at enterprise meetings and to take legal action to promote good corporate governance and safeguard NBIM’s interests as a shareholder.

## 4. NCP ASSESSMENT OF THE COMPLAINT

### 4.1. SCOPE OF NCP ASSESSMENT

The Norwegian NCP has not assessed the claim or carried out any fact finding concerning POSCO’s operations in India or the activities of POSCO vis-à-vis POSCO India. Examining the complaint against POSCO and APG respectively is considered beyond the scope of the review of the Norwegian NCP.

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40 Management mandate for the Government Pension Fund Global, Chapter 2. Responsible investment, Section 2-; The Bank’s work with responsible management. See: <http://www.nbim.no/en/About-us/governance-model/management-mandate/>

41 *Management Mandate for the Government Pension Fund Global*, Chapter 2. Responsible investment, Section 2-; The Bank’s work with responsible management. Section 2-2 Active ownership, para. 2. See: <http://www.nbim.no/en/About-us/governance-model/management-mandate/>

42 *Management Mandate for the Government Pension Fund Global*, Chapter 2. Responsible investment, Section 2-; The Bank’s work with responsible management, Section 2-3 Contribution to the development of good international standards for responsible investment See: <http://www.nbim.no/en/About-us/governance-model/management-mandate/>

43 See: [http://www.iccr.org/news/press\\_releases/pdf%20files/InvestorStatementHR\\_052311.pdf](http://www.iccr.org/news/press_releases/pdf%20files/InvestorStatementHR_052311.pdf)

44 NBIM *Principles for Ownership Management*. See: <http://nbim.no/Global/Documents/Governance/EB%20Principles%20for%20Ownership%20Management.pdf>, NBIM *Principles for Risk Management* <http://www.nbim.no/en/About-us/governance-model/executive-board-documents/principles-for-risk-management/>



The assessment of the Norwegian NCP is specifically limited to the question of whether NBIM has acted in accordance with the Guidelines.<sup>45</sup>

## 4.2. HOW THE GUIDELINES APPLY TO THE FINANCIAL SECTOR AND INSTITUTIONAL INVESTORS

### 4.2.1 APPLICATION TO THE FINANCIAL SECTOR

NBIM has submitted that the OECD Guidelines do not apply to minority shareholding. This is a view that that NCP does not share.

The Guidelines form part of the OECD Declaration on International Investment and Multinational Enterprises<sup>46</sup> and apply to all multinational enterprises from OECD Countries<sup>47</sup> and other adhering countries,<sup>48</sup> wherever they operate.<sup>49</sup> The Guidelines apply to multinational enterprises in “all sectors of the economy” – including finance.<sup>50</sup> More specifically, the Guideline provisions on due diligence also apply to all enterprises “regardless of their sector, operational context, ownership and structure”.<sup>51</sup> The Commentary in Chapter II (General Policies) specifically discusses the financial sector, making it plain that the Guidelines apply to it, noting: “[a]n increasing network of non-governmental self-regulatory instruments and actions address aspects of corporate behaviour and the relationships between business and society. Interesting developments in this regard are being undertaken in the financial sector.”<sup>52</sup> Additionally, the OECD has undertaken a mapping of how the due diligence provisions of the Guidelines apply to various types of financial companies, making it yet more clear that the sector is covered.<sup>53</sup> As there is no exclusion for the financial sector, the

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45 As the complainants have raised issues with respect to the human rights chapter of the Guidelines, the NCP has examined two dimensions of the application of this chapter of the Guidelines to NBIM: (1) to what extent NBIM has integrated the OECD Guidelines provisions on human rights – including due diligence -- into its policies and processes and (2) the steps NBIM has taken -- or omitted-- in response to the allegations in this Specific Instance, including issues related to Chapter III of the OECD Guidelines on Disclosure. The OECD Guidelines create an expectation that covered enterprises will conduct due diligence to meet the Guidelines as a whole. The language regarding the components and scope of due diligence is mirrored in Chapter IV (Human Rights).

46 The OECD Declaration on Investment and Multinational Enterprises was adopted by the Governments of OECD Member countries on 21 June 1976 and contains two Annexes, one representing the OECD Guidelines for Multinational Enterprises, the other dealing with general considerations and practical approaches concerning conflicting requirements imposed on multinational enterprises. <http://www.oecd.org/daf/inv/investment-policy/oecddeclarationoninternationalinvestmentandmultinationalenterprises.htm>

47 Australia, Belgium, Czech Republic, Chile, Denmark, Egypt, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, South Korea, Spain, Sweden, Switzerland, Turkey, UK, US.

48 As of the date of this Final Statement, Argentina, Brazil, Colombia, Egypt, Latvia, Lithuania, Morocco, Peru, Romania and Tunisia. In addition, the European Community has associated itself with the section on National Treatment on matters falling within its competence.

49 OECD Guidelines Chapter I (Concepts and Principles), para. 3.

50: Specifically, the OECD Guidelines note: “[a] precise definition of multilateral enterprises is not required for the purposes of the Guidelines. These enterprises operate in all sectors of the economy”. OECD (2011), OECD Guidelines for Multinational Enterprises, OECD Chapter I (Concepts and Principles) para. 4.

51 OECD Guidelines Chapter I para. 4.

52 OECD Guidelines Chapter II (General Policies), para. 12.

53 The OECD has established an Advisory Group on Due Diligence and the Financial Sector under the Proactive Agenda of the OECD Working Party on Responsible Business conduct. A report commissioned from Sustainable Finance Advisory on

Norwegian NCP draws the same conclusion as the Dutch NCP in the related case against the Dutch investor APG and the OECD Secretariat: the Guidelines apply to multinationals operating in the financial sector. As NBIM is a multinational based in Norway -- a party to the OECD Guidelines -- the NCP finds that the OECD Guidelines apply to NBIM. The question is thus not whether the OECD Guidelines apply to the financial sector and minority shareholders, but how they apply.

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#### 4.2.2 APPLICATION OF THE GUIDELINES TO INVESTORS, INCLUDING MINORITY SHAREHOLDERS

Like other enterprises, investors that are minority shareholders are expected to apply the OECD Guidelines, including the due diligence provisions. According to the Guidelines, enterprises are to carry out risk-based due diligence to “prevent or mitigate an adverse impact where they have not contributed to that impact, when the impact is nevertheless directly linked to their operations, products, or services by a business relationship.”<sup>54</sup>

The impacts of a company in which an enterprise has invested are directly linked by a business relationship to the investor, and thus encompassed within the due diligence framework. The OECD Guidelines Commentary defines “business relationship” broadly to include “relationships with business partners, entities in the supply chain and *any other* non-State or State entity directly linked to its business operations, products or services.” The UN Guiding Principles cover minority shareholdings of institutional investors, which constitute a “business relationship” according to the UN Office of the High Commissioner for Human Rights.<sup>55</sup> The OECD Chapter on Human Rights builds upon and converges with the UN Guiding Principles on Business and Human Rights.<sup>56</sup> The OECD Chapter on Human Rights is thus applicable to minority shareholders of institutional investors. There is little basis to argue that the OECD Guidelines as such are not applicable to investors.

The Guidelines do not make any exception for minority shareholders. The Norwegian NCP has consulted with the Dutch and UK NCPs, which in recent cases applied the Guidelines to the actions of multinational enterprises in the financial sector, including investors as majority and minority

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due diligence and the financial sector released May 2013 takes as a point of departure that the Guidelines apply to all types of financial institutions, including minority shareholders, and it explores current approaches and practices.

54 OECD Guidelines Chapter II (General Policies), A, para. 12.

55 Letter dated 26 April 2013 (interpretive guidance) from Craig Mokhiber, Chief of Development and Economic and Social Issues Branch, Office of the High Commissioner for Human Rights to Centre for Research on Multinational Corporations (SOMO) where it is i.a. stated: “There is nothing in the text of the Guiding Principles to indicate that their scope of application is limited to situations where institutional investors hold majority shareholdings.”

56 UNSGSR prof. John Ruggie was invited by the OECD to the negotiations of the new human rights chapter of the OECD Guidelines to prevent discrepancies between the UN and the OECD guidelines. The OECD Guidelines Chapter IV (Human Rights), Commentary 36: “This chapter opens with a chapeau that sets out the framework for the specific recommendations concerning enterprises’ respect for human rights. It draws upon the United Nations Framework for Business and Human Rights ‘Protect, Respect and Remedy’ and is in line with the Guiding Principles for its Implementation.”

shareholders.<sup>57</sup> All three NCPs have come to the conclusion that the OECD Guidelines apply to minority shareholders.<sup>58</sup>

The NCP therefore concludes that the Guidelines apply to NBIM, even when it is a minority shareholder, as they would to any other multinational enterprise.

#### 4.2.3 NBIM AS A STATE OWNED ENTERPRISE

NBIM is owned by the state and is therefore what the Guidelines refer to as a “state-owned enterprise.” The OECD Guidelines explicitly underscore that state owned enterprises are not exempt, and, on the contrary, suggests that public expectations are often even higher for state owned enterprises: “[s]tate-owned multinational enterprises are subject to the same recommendations as privately-owned enterprises, but public scrutiny is often magnified when a State is the final owner.”<sup>59</sup>

The Human Rights Chapter of the OECD Guidelines addresses the role of governments in regulating their state-owned enterprises. The Chapter is based on the *UN Protect, Respect, Remedy Framework* and the *UN Guiding Principles (UNGPs)*.<sup>60</sup> The UNGPs indicate that states, as part of their duty to protect human rights “should take additional steps to protect against human rights abuses by business enterprises that are owned or controlled by the state...”<sup>61</sup> The commentary to the UN Guiding Principles notes, “the closer a business enterprise is to the State, or the more it relies on statutory authority or taxpayer support, the stronger the State’s policy rationale becomes for ensuring that the enterprise respects human rights.”<sup>62</sup> The Norwegian Government places high expectations on state owned enterprises.<sup>63</sup>

### 4.3. WHAT IS EXPECTED OF NBIM AS A MINORITY SHAREHOLDER, ACCORDING TO THE GUIDELINES?

#### 4.3.1. EXPECTATION TO COOPERATE WITH THE OECD NCP

The NCP has experienced significant challenges in its work to achieve a constructive dialogue with NBIM. The NCP invited each of the parties, NBIM and the complainant, [ForUM] to separate information and consultation meetings. In addition, NCP made an offer of its “good offices” to facilitate a dialogue with the notifying parties but this was rejected in a meeting 29 November 2012 by NBIM, who opted for a written procedure. NBIM further advised the NCP to submit their questions in writing. On 4 January 2013 the NCP submitted 32 questions to NBIM with a two week

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57 See for instance UK initial assessments from December 2012 and January 2013. <https://www.gov.uk/uk-national-contact-point-for-the-organisation-for-economic-co-operation-and-development-oecd-guidelines-for-multinational-enterprises#uk-national-contact-point--whats-new>

58 [http://www.oesorichtlijnen.nl/wp-content/uploads/ncp\\_preliminary\\_statement\\_somo\\_bothends\\_abp\\_apg\\_13\\_3\\_2013incl.pdf](http://www.oesorichtlijnen.nl/wp-content/uploads/ncp_preliminary_statement_somo_bothends_abp_apg_13_3_2013incl.pdf)

59 OECD Guidelines Chapter II (General Policies), Commentary, para. 10.

60 UN Guiding Principles on Business and Human Rights (2011)

61 UN Guiding Principles on Business and Human Rights, § I, B, 4.

62 UN Guiding Principles on Business and Human Rights, § I, B, 4.

63 Norwegian Government Report to the Parliament No. 10 (2008-9)

deadline to respond. NBIM responded 31 January that it did not wish to respond to the questions as it recommended the NCP to reject the case. NBIM did not, however, provide any reference to a legal basis that would exempt it from the duty to provide information to a Norwegian state entity executing its duties.<sup>64</sup>

The NCP reiterated its request for a response to the questions and notified that the decision to investigate the case had been made in consultations with the Netherlands NCP, and was considered final. In a second meeting 12 February, NBIM provided a general presentation of their activities, but once again declined to answer any of the 32 questions. The NCP reiterated in writing on 13 February the need to respond to the questions, and that failing to do so would be in breach of the OECD Guidelines. By letter dated 15 February, NBIM declined the renewed request.

Norway has a state obligation as an adhering country to the OECD Guidelines to promote the OECD Guidelines and the OECD NCP scheme. The Norwegian NCP expects that Norwegian actors respect the OECD Guidelines and cooperate with the OECD NCP. In particular, this is expected by enterprises owned or controlled by the Norwegian State.

The Guidelines "jointly recommend to multinational enterprises operating in or from their territories the observance of the guidelines."<sup>65</sup> This recommendation implies that a willingness to cooperate with the NCP is required as a minimum. According to the Guidelines, cooperation with NCP is a key part of responsible business practices. The Guidelines underscore that the effectiveness of the specific instances procedure depends on good faith behaviour of all parties involved in the procedures. In this context, as NBIM is the responding party, good faith means responding to the NCP queries in a timely fashion and "genuinely engaging in the procedures with a view to finding a solution."<sup>66</sup> In light of this, the NCP finds it particularly unfortunate that NBIM has refused to engage in a meaningful dialogue with the NCP on its adherence to the guidelines. This attitude gives reason to question whether NBIM has the necessary corporate culture to fulfil its duties as a responsible investor as they are laid out in the OECD Guidelines as well as the Norwegian ethical guidelines for the fund.

NBIM stated in its meeting with the NCP that it was constrained in replying to the NCP's request because it did not want to disclose "confidential business information." This is not a sufficient reason for failing to provide information to the NCP.<sup>67</sup> The Norwegian NCP is subject to the Norwegian Freedom of Information Act and accordingly, all information provided to the NCP and the secretariat, including correspondence by e-mail and letters, will be treated according to the Act. Sensitive

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64 In this context it is underscored that the NCP implements state obligations linked to the Norwegian OECD membership. If NBIM is of the opinion that the legal basis prevents NBIM from providing information to a state entity with a mandate deriving from an international organization such as the UN or the OECD, NBIM should seek to correct the legal basis so that it comes in line with Norway's international obligations.

65 OECD Guidelines Declaration, para. 1

66 *OECD Guidelines Procedural Guidance, Commentary, para. 21.*

67 *Reference is made to section C-4 implementation procedure. This issue is also relevant for the assessment of Communication.*

business information can be protected under the confidentiality clauses of the Act by request of the enterprise and if agreed by the NCP and as such be exempt from disclosure to the public. Source protection to ensure the NCP's future access to information, as well as considering the sources' personal security, may also require exceptions. According to the Act, a public agency can deny disclosure of documents that are prepared for the agencies' internal administrative procedures. In addition, under the OECD Guidelines' Procedural Guidance,<sup>68</sup> the NCP is instructed to take appropriate steps to protect sensitive information and to maintain the confidentiality of the proceedings.<sup>69</sup> With respect to any final statement on the process, the NCP is instructed to make the results of the procedures publicly available, "taking into account the need to protect sensitive business information."

As the NCP's procedures and the applicable Freedom of Information Act provide for protection of commercially confidential information, this is not a valid reason for failing to answer the NCP's questions. Failing to respond in a timely fashion is not acting in good faith according to the Guidelines and thus a violation of the Guidelines.

The refusal also indicates that NBIM has a flawed understanding of the importance of openness and transparency for socially responsible business conduct. This is particularly unfortunate due to the position NBIM has as an instrument to manage publicly owned funds managed on behalf of the Norwegian population.

#### **Conclusion:**

**NBIM was given the choice, in line with the NCP's procedures, to address the complaint via dialogue/mediation or via written procedure. NBIM chose the written procedure. Having opted for that procedure, NBIM did not provide a satisfactory response, in writing or orally, as it did not address any of the NCP's 32 questions. This is particularly regrettable in light of the specific expectation that applies to state owned enterprises. The NCP has drawn the conclusion that NBIM's actions were in breach of the OECD Guidelines on this point.**

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### 4.3.2. EXPECTATION TO RESPECT HUMAN RIGHTS, INCLUDING THROUGH CONDUCTING HUMAN RIGHTS DUE DILIGENCE

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#### 4.3.2.1. RESPONSIBILITY TO RESPECT HUMAN RIGHTS

The notifiers asked the NCP to explore NBIM's implementation of Chapter II on General Policies and Chapter IV on Human Rights. The General Policies create an expectation that enterprises registered in countries adhering to the OECD Guidelines conduct due diligence in relation to the Guidelines.<sup>70</sup> The Human Rights Chapter provides more detail regarding how due diligence should be carried out

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<sup>68</sup> *OECD Guidelines, Procedural Guidance.*

<sup>69</sup> *OECD Guidelines, Procedural Guidance, Section C, para. 4.*

<sup>70</sup> This expectation applies to all first eight OECD Guidelines chapters except the chapters on Science and Technology, Competition and Taxation.

for human rights. Although this notification reflects the General Guidelines, it looks primarily to the Human Rights Chapter for more specific guidance.

The OECD Guidelines affirm the corporate responsibility to respect human rights: “[e]nterprises should [r]espect human rights, which means they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.”<sup>71</sup> The responsibility to respect applies not only to impacts created through an enterprise’s own actions, but also to the impacts from products, services or operations of business relationships that are directly linked to it.<sup>72</sup> To identify and address those impacts, the Guidelines set out three basic steps an enterprise should take to help ensure that it is respecting human rights: (i) have a policy commitment to respect human rights; (ii) carry out human rights due diligence; and (iii) provide for or cooperate in remediation of adverse human rights impacts in designated circumstances. These steps apply to investors and to all the companies in their portfolio as all enterprises have a responsibility to respect the UN Guiding Principles and for those covered by the OECD Guidelines. Investors can use the same steps as a useful framework for assessing whether companies under consideration or already in their portfolio meet their responsibility to respect human rights.

The Human Rights Chapter of the OECD Guidelines draws on and is in line with the UN Protect, Respect Remedy Framework and the UN Guiding Principles. The NCP therefore occasionally refers to the UN Guiding Principles to support further interpretation of related OECD Guidelines provisions.<sup>73</sup>

The remainder of the discussion in Sections 4.3.2.2 - 4.3.2.8 examines whether NBIM has met the three main components of the OECD Guideline’s human rights expectations.

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#### 4.3.2.2. HUMAN RIGHTS POLICY COMMITMENT

As a first, concrete step towards respecting human rights, the Guidelines state that “[e]nterprises should have a policy commitment to respect human rights.”<sup>74</sup> The Commentary indicates that the policy should address the enterprise’s human rights expectations of “personnel, business partners, and other parties directly linked to its operations, products or services.”<sup>75</sup> Moreover, the policy should be “publicly available and communicated internally and externally to all personnel, business

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71 OECD Guidelines Chapter IV, (Human Rights) para 1.

72 OECD Guidelines Chapter IV, (Human Rights) para 1-3.

73 The OECD Guidelines were drafted in consultation with the UN Secretary General’s Special Representative on Business and Human Rights, Professor John Ruggie and his team who wrote the UNGP. As the responsibility to respect human rights and the expectation to conduct human rights due diligence in the OECD Guidelines is taken directly from the UNGPs, it is relevant and appropriate to use the UNGPs for further interpretation. See also footnote 56 and 58. The analysis also in some instances draws on Investing the Rights Way, a report by the Institute for Human Rights and Business (IHRB), Calvert Investments, and The Interfaith Center on Corporate Responsibility.

74 OECD Guidelines Chapter IV, (Human Rights) para 4.

75 OECD Guidelines Chapter IV, (Human Rights) Commentary, para 44.

partners and other relevant parties.” The policy should be reflected in operational policies and procedures necessary to embed it throughout the enterprise.<sup>76</sup>

The Guidelines also note that enterprises should consider their potential impacts on the full spectrum of human rights, while allowing that certain industries will have a greater impact on particular rights, and therefore will be the focus of heightened attention.<sup>77</sup> Companies should not simply choose to only address a small spectrum of rights if they may have significant impacts on a range of other rights. Rather, responsibilities are tied to impacts: enterprises should be prepared to address the impacts they have, not just those they find of interest.

The Norwegian government has issued high level guidance for the Fund regarding its business relationships – specifically its portfolio companies -- that incorporate broad human rights considerations. For instance, the Norwegian government issued ethical guidelines for the Fund in 2004. These were replaced in March 2010 by two new sets of guidelines. One provides for the Fund to exclude companies involved in serious or systematic human rights violations.<sup>78</sup> The other calls on the Fund to exercise active ownership, based on the UN Global Compact and OECD Guidelines, and to develop internal guidelines to do so.<sup>79</sup> Since the UN Global Compact and the OECD Guidelines both encompass human rights, this guidance constitutes a high level – albeit indirect -- commitment from the State for the Fund to respect human rights. The Ministry also underlines that “the Bank shall have internal guidelines for its exercise of ownership rights that state how these principles are integrated.”<sup>80</sup>

NBIM makes a general statement in its annual reports and on its website that it exercises its active ownership in a manner reflecting the State’s guidelines. The information that is publicly available to the NCP suggests, however, that NBIM has significantly narrowed the scope of human rights that it takes into consideration in many of its policies and practices, particularly regarding the screening of companies and active ownership. NBIM has adopted its own Responsible Investor Policy, which states that “human rights are important for the sustainable long-term development of society and the companies within. Recognising this, NBIM will work to uphold children’s rights and promote a long-term development in line with international standards.”<sup>81</sup> Similarly, in the Norwegian Bank Investment Management Strategy for 2011-2013, NBIM does not address human rights generally, but states that it “will retain [its] long-term commitment to working on children’s rights. All results will be reviewed, and new focus areas will be considered.”<sup>82</sup> It is admirable that NBIM is taking an

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76 OECD Guidelines Chapter IV, (Human Rights) Commentary, para 44.

77 OECD Guidelines Chapter IV, (Human Rights) Commentary, para 40.

78 See: <http://www.regjeringen.no/en/dep/fin/Selected-topics/the-government-pension-fund/responsible-investments/guidelines-for-observation-and-exclusion.html?id=594254>

79 See: <http://www.regjeringen.no/en/dep/fin/Selected-topics/the-government-pension-fund/responsible-investments/Guidelines-for-Norges-Banks-work-on-responsible-management-and-active-ownership-of-the-Government-Pension-Fund-Global-GPFG.html?id=594253>

80 Management Mandate for the Government Pension Fund Global, <http://www.nbim.no/en/About-us/governance-model/management-mandate/>.

81 See: <http://www.nbim.no/en/About-us/governance-model/nbim-policies/responsible-investor/>

82 See: [http://www.nbim.no/Global/Documents/Governance/2011\\_NBIM\\_strategidokument-web.pdf](http://www.nbim.no/Global/Documents/Governance/2011_NBIM_strategidokument-web.pdf)

active stance on children's rights, but it is troubling that other rights appear to be excluded entirely, when the wide range of companies in which it invests undoubtedly impact other rights, sometimes significantly.<sup>83</sup>

NBIM's Responsible Investor Policy does commit the company to supporting broader human rights proposals when other entities make such proposals. For instance, the Policy commits NBIM to support proposals that request disclosure of the company's social or environmental practices<sup>84</sup> or that "request adoption or implementation of a code of conduct based on human rights and international labour standards covering a company's operations and supply chain when the actions suggested in the proposals are considered to be reasonable with regard to what the enterprise can be held accountable for."<sup>85</sup> This approach is an important step, but does not indicate how the Fund would identify or address actual or potential human rights impacts.

NBIM has previously indicated that, given the Fund's investment universe, it is necessary to direct resources towards high-risk sectors and high-risk countries, as well as focus on the most serious human rights abuses - which appear, based on publicly available documents, to only include children's rights.<sup>86</sup> If, on a policy level, NBIM is focusing on a broader range of human rights, this is not clear from its current Responsible Investment Policy or strategy.<sup>87</sup> As a result, these documents are unlikely to provide clear expectations for NBIM's staff, managers or business partners on NBIM about how it intends to respect all human rights.

**Conclusion: The NCP commends NBIM for publishing its Responsible Investor Policy and strategies and for being transparent about its focus area of children's rights. However, the NCP requests further clarification on whether other policies integrate additional human rights into NBIM's approach to its investment portfolio. If they do not, it is the Norwegian NCP's assessment that NBIM has interpreted the OECD Guidelines, as well as guidance from the Ministry of Finance to respect human rights, too narrowly. The OECD Guidelines highlight that enterprises can have an impact on a wide range of human rights. This is particularly likely for NBIM's diverse portfolio, which includes investments across a wide range of sectors and geographies, with potential impacts on a broad scope of rights. Without an initial broader focus that can be narrowed through its application to particular circumstances and investments, NBIM risks missing or purposely excluding**

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83 A recent report from the Albright Group suggests that it was a sound choice for the Fund to select focus areas for its approach to active ownership and on which to build expertise, but notes that "The decision to select priorities cannot, of course, be used to justify inaction on other issues that implicate the Guidelines." Assessment of Implementation of Articles 3 and 4 of the Ethical Guidelines for the Government Pension Fund Global, 21 May 2008, The Albright Group LLC, submitted to the Norwegian Ministry of Finance and on file with the NCP.

84 It will "request reasonable disclosure of the company's policies, strategies, management plans, and performance data with respect to social and environmental issues, including climate change and water-related risks when the current information publicly available is insufficient and such disclosure will benefit shareholders." <http://www.nbim.no/en/About-us/governance-model/nbim-policies/responsible-investor/>

85 NBIM Policy- Responsible Investor: <http://www.nbim.no/Global/Documents/Governance/Policies/NBIM%20Policy%20RI.pdf>

86 [http://www.enewsbuilder.net/globalcompact/e\\_article001076696.cfm?x=b11,0,w](http://www.enewsbuilder.net/globalcompact/e_article001076696.cfm?x=b11,0,w)

87 NBIM also signed an investor statement in 2011 supporting the UN Guiding Principles on Business and Human Rights, but this is not the same as policy guidance.



**attention to significant human rights impacts. Absent further clarification, the NBIM Responsible Investment Policy and Strategy are deemed not to be consistent with the Guidelines.**

#### 4.3.2.3. HUMAN RIGHTS DUE DILIGENCE – OVERVIEW

According to the OECD Guidelines, due diligence is generally understood as the process to identify, prevent and mitigate actual and potential adverse impacts and account for how adverse impacts are addressed.<sup>88</sup> The UN Special Representative to the Secretary General who developed the UN Framework and UN Guiding Principles referred to this as companies “knowing and showing” what they are doing to respect human rights. Companies should develop relevant operational policies and procedures, which can be nested in the enterprise’s risk management system, so that acting on these policies and procedures becomes a routine part of doing business. The enterprise risk management system should, however, go beyond simply managing risk to the enterprise itself and include risks to rights holders.<sup>89</sup> These processes should be supported by appropriate human and financial resources, with assigned responsibility to relevant functions in the enterprise to ensure it is acting upon identified risks.

Human rights due diligence is not a one-size-fits-all approach. It should be carried out “*as appropriate to [the enterprise’s] size, the nature and context of operations and the severity of the risks of adverse human rights impacts.*”<sup>90</sup> Given that NBIM manages one of the largest funds in the world with potentially severe human rights impacts from some sectors - such as industrials, extractives and companies operating in high risk environments - a robust system of human rights due diligence is appropriate. At the same time, the human rights due diligence system must take into account the fact that NBIM invests in 7,000 companies, so it is not possible to scrutinize and engage each company in detail or even individually.

Regardless of the size or sector of the company, the Guidelines note that human rights due diligence entails: (i) assessing actual and potential human rights impacts; (ii) integrating and acting upon the findings; (iii) tracking responses; and (iv) communicating.<sup>91</sup> The NCP therefore addresses each of these components and the extent to which NBIM implements them.

#### 4.3.2.4.1 HUMAN RIGHTS DUE DILIGENCE – ASSESSING ACTUAL AND POTENTIAL HUMAN RIGHTS IMPACTS

A central component of the due diligence process is the identification and assessment of potential or actual human rights impacts through a pro-active, forward looking process that tries to identify such

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88 OECD Guidelines Chapter II, (General Policies) Commentary, para. 10.

89 OECD Guidelines Chapter IV, (Human Rights) Commentary, para 45.

90 OECD Chapter IV, para 5. See also OECD Chapter IV (Human Rights), Commentary, para. 45.

91 OECD Guidelines Chapter IV (Human Rights), Commentary, para. 45.

impacts in advance so they can be avoided.<sup>92</sup> Such due diligence should occur before an investment is made, and be conducted on an on-going basis after the acquisition of a shareholding in a company. The OECD Guidelines recognise that for companies such as portfolio investors that have a large number of business relationships, it may not be possible to assess potential impacts in relation to each business relationship in advance. Building on that pragmatic approach, the OECD Guidelines recognise that “*where enterprises have large numbers of suppliers, they are encouraged to **identify general areas** where the risk of adverse impacts is most significant and, based on this risk assessment, prioritise suppliers for due diligence.*”<sup>93</sup>

Investors with a large number of companies to assess prior to investment could develop a similar risk-based system with indicators to prioritise portfolio companies for due diligence. It is not expected that each investor conduct due diligence on every company it considers for investment, especially not if the investment is based on a market weighted global benchmark index. However, the OECD Guidelines suggest that companies should use a risk-based approach that focuses due diligence on situations in which the severity and likelihood of adverse impacts are most significant. The considerations could include: (i) the operating context (e.g. – countries, regions or particular operating environments that are high risk, such as conflict zones,); (ii) the particular operations, products or services involved (if there are typically human rights risks associated with them); and (iii) other relevant considerations (which might include a company’s poor track record on human rights performance).<sup>94</sup> Portfolio investors should develop an approach that integrates so-called ESG factors (Environmental, Social and Governance) into their analysis in order to better understand which investments that have the potential for the greatest human rights harm and focus assessment on those investments.

As the Guidelines point out, situations change, so assessments should not be a one-off process.<sup>95</sup>

Some investors actively monitor companies in their portfolios. Little information has been made public regarding NBIM’s approach to prioritizing or assessing potential or actual human rights impacts. Regarding prioritization, NBIM has identified children’s rights as a general area where the risk of adverse impact is significant. The NCP does not question this decision as such, but cannot from the material provided assess how the decision to focus only on children’s rights was reached. For instance, did NBIM assess who might be affected by operations of companies that NBIM invests in;

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92 Further explanation from the UN Guiding Principles helps elucidate what this step covers: “identifying human rights risk typically includes assessing the human rights context prior to a proposed business activity, where possible; identifying who may be affected; cataloguing the relevant human rights standards and issues; and projecting how the proposed activity and associated business relationships could have adverse human rights impacts on those identified”.

93 OECD Guidelines, Chapter II (General Policies), Commentary para 16. Although this paragraph refers to supply chains, the Norwegian NCP considers that the same general principles can be applied to other types of relationships such as investments, as long as the methodology and tools are adapted to the nature and context of investment.

94 The OECD Guidelines Commentary indicates that context and severity should be considerations. OECD Guidelines for Multinational Enterprises, Chapter IV, Commentary, para. 40. The UN Guiding Principles themselves indicate that context and types of operations, products, or services should be used in the prioritization process. UN Guiding Principles, II (B) (16), Commentary.

95 OECD Guidelines Chapter IV (Human Rights), Commentary, para 40.

catalogue the relevant human rights standards and issues; and project how associated business relationships could have adverse human rights impacts on those identified?

The fundamental question is whether NBIM has a system in place to identify and monitor significant human rights risks. NBIM has not answered questions from the NCP about whether NBIM has a system in place to screen or assess companies –in accordance with the OECD Guidelines<sup>96</sup> -- to identify potential or current investments that present significant human rights risks. The lack of openness on whether and how such assessments are performed is unfortunate and casts doubts as to whether NBIM is a responsible investor.

NBIM’s approach to assessing the risk of actual or potential impacts on children’s rights serves as a model. NBIM carries out annual assessments related to the risk of actual or potential impacts on children’s rights in high risk industries. NBIM’s assessments are based on publicly available information from the companies and cover about 500 businesses in each risk area.<sup>97</sup> NBIM then selects eight industry sectors that are exposed to highest risks related to child labour and children’s rights: food and beverage, cocoa, hybrid seed, steel, technology hardware and equipment, mining, apparel retail, and toys. NBIM then uses sector compliance assessments to determine whether companies that are most exposed to risks related to child labour and children’s rights have put in place policies, strategies, action plans, and reporting practices that meet NBIM’s expectations. The results of the assessment provide NBIM and the companies with a tool to guide improvement in corporate performance and serve as a basis for constructive dialogue.<sup>98</sup> The system for managing children’s rights appears to be robust and provides a useful good practice model for other areas of human rights.

It appears that NBIM has begun to gather human rights data on a broad spectrum of companies, although the NCP does not know what types of human rights issues the data encompasses, or how it is used. Through its own initiative, the NCP has learned that NBIM has established a database with financial information and information pertaining to social, environmental and governance risks on about 4,000 of the largest companies the fund invests in.<sup>99</sup> The database has information from internal and external sources and is maintained by NBIM’s ownership team for use by all areas of the organisation, including the fund’s portfolio manager and investment analysts. The aim is to provide “easily accessible information that can be used in the fund’s investment decisions.”<sup>100</sup> NBIM stated that in 2012, it further developed this database: “[it] was expanded to include more company-specific information on issues such as greenhouse gas emissions and risk indicators for human rights,

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<sup>96</sup> NBIM is also required to comply with the ethical guidelines prescribed to it by the State of Norway.

<sup>97</sup> NBIM Annual Report 2012, p. 34 <http://www.nbim.no/Global/Reports/2012/Annual%20report/Annual%20report%2012.pdf>

<sup>98</sup> NBIM Investor Expectation on Children’s Rights: Sector Compliance Report 2011

[http://www.nbim.no/Global/Brochures/Compliance%20reports/Childrens%20rights/2011/Childrens%20Rights\\_2011.pdf](http://www.nbim.no/Global/Brochures/Compliance%20reports/Childrens%20rights/2011/Childrens%20Rights_2011.pdf) .

<sup>99</sup> The database also contains financial information on the companies, which accounted for 90 per cent of the fund’s equity investments at the end of 2012. <http://www.nbim.no/en/Investments/research/> and 2012 NBIM Annual Report; P.32-33;

<http://www.nbim.no/Global/Reports/2012/Annual%20report/Annual%20report%2012.pdf> .

<sup>100</sup> P.18; [http://www.nbim.no/Global/Reports/2011/Q3/2011\\_3Q\\_web.pdf](http://www.nbim.no/Global/Reports/2011/Q3/2011_3Q_web.pdf) .

health, safety and environmental performance, also in the supply chains of some companies.”<sup>101</sup>

According to NBIM, expanding the database gave the fund’s analysts and equity managers a broader base for making investment decisions.<sup>102</sup> To better integrate its ownership policies with the Fund’s investment processes, analysts from the ownership policy group were transferred to the equity management department in 2012 to contribute more directly to investment decisions and better follow up on ownership issues.<sup>103</sup>

The NCP commends NBIM for establishing a database that includes human rights risk indicators, particularly given the practical challenges involved in covering the thousands of companies in the portfolio. However, because NBIM will not publish criteria for its assessment or prioritisation process or answer the NCP’s specific questions about its risk management system, it is unknown how or if NBIM uses this database to systematically analyse human rights risks.

Moreover, the NCP is concerned that the Responsible Investment Policy indicates an overly narrow approach to identifying human rights risks. The quality and scope of the human rights information within the database is unknown. It is also unclear whether or not this system includes some screening according to sectors/countries/risk-factors of companies that are not already in the portfolio -- i.e. prospective investments that require assessment -- or only companies in the portfolio, and whether it covers all companies in the portfolio. Furthermore, NBIM should provide more information on the processes it uses, and seek opportunities to enhance its data collection regarding human rights. The lack of transparency can seriously undermine confidence regarding whether NBIM adequately prioritises and assesses potential and actual human rights risk impact across a broader spectrum of human rights.

The Fund’s Council on Ethics provides some assistance to NBIM in identifying human rights impacts. The Council works systematically to identify companies in the portfolio whose operations are not in accordance with the Fund’s Ethical Guidelines, including with respect to serious or systematic human rights violations.<sup>104</sup> They conduct sector-wide analyses on issues or companies that have already been publicly flagged or an issue that the Council would like to examine more closely.<sup>105</sup> The Council follows a four-step process: (1) identification of companies accused of violations, (2) selection of companies for preliminary assessment, (3) more thorough assessment of selected companies, and (4)

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101 NBIM Annual Report 2012, p.32 <http://www.nbim.no/Global/Reports/2012/Annual%20report/Annual%20report%2012.pdf>

102 NBIM Annual Report 2012; p.32-33; <http://www.nbim.no/Global/Reports/2012/Annual%20report/Annual%20report%2012.pdf>

103 NBIM Annual Report 2012; p.32 <http://www.nbim.no/Global/Reports/2012/Annual%20report/Annual%20report%2012.pdf>

104 In order to identify companies, daily internet-based news searches are carried out on all the companies in the Fund. The news searches identify companies that are accused of severe environmental damage, contributing to human rights violations, corruption or other serious violations. The news searches are conducted by two consultancy firms that report to the Council once a month. See Guidelines for the observation and exclusion of companies from the Government Pension Fund Global’s investment universe [http://www.regjeringen.no/en/sub/styrer-rad-utvalg/ethics\\_council/ethical-guidelines.html?id=425277](http://www.regjeringen.no/en/sub/styrer-rad-utvalg/ethics_council/ethical-guidelines.html?id=425277) and Principles for the selection of companies subject to further assessment; [http://www.regjeringen.no/en/sub/styrer-rad-utvalg/ethics\\_council/councils-activities/principles-for-the-selection-of-company.html?id=445809](http://www.regjeringen.no/en/sub/styrer-rad-utvalg/ethics_council/councils-activities/principles-for-the-selection-of-company.html?id=445809)

105 Principles for the selection of companies subject to further assessment; [http://www.regjeringen.no/en/sub/styrer-rad-utvalg/ethics\\_council/councils-activities/principles-for-the-selection-of-company.html?id=445809](http://www.regjeringen.no/en/sub/styrer-rad-utvalg/ethics_council/councils-activities/principles-for-the-selection-of-company.html?id=445809)

recommendation regarding exclusion from the Fund or observation.<sup>106</sup> The threshold to recommend divestment (exclusion) is high.<sup>107</sup> It is unknown how or whether the Council transmits information to NBIM regarding companies involved in serious adverse human rights impacts that do not reach the high threshold set for divestment, nor how NBIM would utilise such information.

The Council monitors the portfolio as a basis for making recommendations to the Ministry of Finance on divestment. The Ministry of Finance Guidelines for observation and exclusion from the Government Pension Fund Global's investment universe indicate that the Council and NBIM should meet regularly to exchange information about the Council on Ethics' monitoring of the portfolio. It also states that NBIM may ask the Council on Ethics to make its assessments of individual companies available to it.<sup>108</sup> However, little information is available on how this exchange of information takes place, and NBIM has not answered questions from the NCP about how information from the Council is integrated in the NBIM risk management system. Exchange of information with the Council on Ethics could also aid human rights risk assessment.<sup>109</sup>

NBIM has already showed through its focus on children's rights, that it is possible and feasible to develop policies and procedures to managing investments while taking human rights concerns into account. Pooling resources through joint efforts, coalitions or organisations,<sup>110</sup> may be better than conducting due diligence separately.

#### **Conclusion:**

**By not answering the NCP's questions and by not making more information available on how human rights risks are identified and assessed, NBIM renders itself vulnerable to criticism that it does not have a credible system for identifying and assessing the broader range of human rights that its portfolio companies might impact. Coordination with the Council on Ethics is one means through which NBIM could more efficiently identify human rights impacts.**

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106 Principles for the selection of companies subject to further assessment; [http://www.regjeringen.no/en/sub/styrer-rad-utvalg/ethics\\_council/councils-activities/principles-for-the-selection-of-companie.html?id=445809](http://www.regjeringen.no/en/sub/styrer-rad-utvalg/ethics_council/councils-activities/principles-for-the-selection-of-companie.html?id=445809)

107 Divestment is only recommended in cases with widespread and serious violations of human rights, which are on-going and documented.

108 2012 NBIM Annual Report; p.32-33;

<http://www.nbim.no/Global/Reports/2012/Annual%20report/Annual%20report%2012.pdf>

109 Indeed, a recent report from the Albright Group makes a series of suggestions regarding how NBIM and the Council of Ethics could work together to better identify such risks. Assessment of Implementation of Articles 3 and 4 of the Ethical Guidelines for the Government Pension Fund Global, 21 May 2008, The Albright Group LLC, submitted to the Norwegian Ministry of Finance and on file with the NCP

110 One such example are the comprehensive dialogues with over 1,100 companies from 59 countries under the auspices of the UN Principles for Responsible Investment, to which NBIM subscribes. Also, examples of collaborative engagements hosted on the Clearinghouse platform can be seen by clicking on the map at this link: <http://www.unpri.org/areas-of-work/collaborations/>

#### 4.3.2.5. DUE DILIGENCE – INTEGRATING AND ACTING ON HUMAN RIGHTS IMPACTS

Once companies have identified and assessed potential and actual impacts, the Guidelines indicate that they should have a system in place to integrate and act upon the findings.<sup>111</sup> The steps a company is expected to take to respond to such impact vary depending on whether the company causes or contributes to the impacts, or rather is directly linked to them through its business relationships. Investors are most likely to be directly linked to the impacts of their portfolio companies, in which case they should “[s]eek ways to prevent or mitigate those adverse human rights impacts ... even if they do not contribute to those impacts.”<sup>112</sup>

The Guidelines recognise that companies that are directly linked to but do not cause or contribute to human rights impacts typically do not exercise control over the party responsible for the impacts, but this does not relieve them of a responsibility to take steps to influence the situation once they are in a business relationship.<sup>113</sup> In such an instance, the Guidelines indicate that a company is to “use its leverage to influence the entity causing the adverse human rights impact to prevent or mitigate that impact,” acting alone or in cooperation with other actors.<sup>114</sup> The appropriate action for an enterprise to take depends on factors including its leverage over the other entity, how crucial the relationship is to the enterprise, and whether terminating the relationship would have adverse human rights impacts.

To be aligned with the UN Guiding Principles, which the OECD Guidelines draw upon, institutional investors would according to the UN Office of the High Commissioner for Human Rights be expected to seek to prevent or mitigate human rights risks identified in relation to shareholdings – including minority shareholdings. The Guiding Principles set out that the appropriate action in response to the identified risk depends on the degree of its leverage, where a number of options would be considered with a view to use or enhance leverage, to effect change in terms of ending harmful practice and mitigating risks of human rights abuse. If efforts in this regard are not successful, the Guiding Principles stipulate that the institutional investor should consider ending the relationship”.

<sup>115</sup>

Successful integration of information on potential or actual human rights impacts, and a successful response, relies on the incorporation of such issues into company management systems. For minority shareholders, developing such an approach requires careful consideration of the tools available to effect change in portfolio companies. The Guidelines recognise that there are practical

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111 OECD Guidelines Chapter IV (Human Rights), Commentary, para. 45.

112 OECD Guidelines II (General Policies).A, 12 and IV.3.

113 The Guidelines note that this “is not intended to shift responsibility from the entity causing an adverse human rights impact to the enterprise with which it has a business relationship.” OECD Guidelines, Ch. IV, Commentary 43.

114 OECD Guidelines Chapter IV (Human Rights), Commentary, para. 43.

115 Letter dated 26 April 2013 from Craig Mokhiber, Chief of Development and Economic and Social Issues Branch, Office of the High Commissioner for Human Rights to Centre for Research on Multinational Corporations (SOMO). It is added p. 7: “The decision on ending the relationship should take into account credible assessments of any potential adverse human right impact of doing so. Wherever possible, the shareholder should take steps to consult with potentially affected stakeholders on their proposed approach.”

limitations on the ability of enterprises to create change in the behaviour or action of their partners – and this is certainly a concern for minority shareholders. Nevertheless, enterprises are expected to use the full range of options for exercising leverage at their disposal, rather than simply assuming they can take no action.<sup>116</sup> Leverage, as understood in the OECD Guidelines, “is considered to exist where the enterprise has the ability to effect change in the wrongful practices of the entity that causes the harm.”<sup>117</sup>

Although minority shareholders may need to exercise more creativity to obtain leverage than majority shareholders, they should bear in mind that leverage is not a mathematical calculation that automatically equates to the percentage of ownership. Leverage can be increased using a range of contractual and non-contractual techniques and exercised alone or together with others, and over a period of time and through different settings. Investors have a number of tools in their systems that they can use to influence portfolio companies with which they have a business relationship. Prior to the investment, they could decide not to invest because the human rights risk is too high, or they could seek to impose conditions or changes in the management systems of a portfolio company to better manage significant human rights concerns. The NCP recognises that it may not be feasible for large institutional investors to assess human rights risks prior to each investment. If an enterprise learns of a portfolio company’s human rights impacts after the investment is made, it still has a number of tools available, including shareholder proposals, engagement with management, and the threat of divestment.

NBIM has developed certain tools in its systems that are used to address children’s rights and that could be used to address the potential and actual human rights impacts of its portfolio companies. However, it is not clear whether and how it does so systematically regarding human rights.

On an organisational level, NBIM states that measures have been taken to integrate its responsible ownership policies with the fund’s investment processes.<sup>118</sup> Whether this entails acting on human rights risks<sup>119</sup> is not clear to the NCP. NBIM has not indicated that there is any department or individual with an oversight responsibility for the commitment made in the Responsible Investment Policy to respect the OECD Guidelines. Moreover, NBIM has not provided any information that it integrates human rights concerns in its overall risk management system, or that it supports this by internal policies, procedures, budgets and assigned across relevant functions to ensure acting on findings relating to human rights risks, as required under the OECD Guidelines.

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116 The Guidelines describe a number of ways in which enterprises can exercise leverage over their suppliers, including contractual and other techniques that can be used to influence supplier action, such as contractual provisions, pre-qualification requirements for potential suppliers, and voting trusts. OECD Guidelines Chapter II (General Policies), Commentary, para 21. Examples of how companies create leverage in their business relationships can also be found in Institute for Human Rights and Business, State of Play: The Corporate Responsibility to Respect in Business Relationships, 2012, see in particular Chapter 4, <http://www.ihrb.org/publications/reports/state-of-play.html>

117 OECD Guidelines, Chapter II, (General Policies), Commentary, para. 22.

118 NBIM Annual Report 2012, p. 32. <http://www.nbim.no/Global/Reports/2012/Annual%20report/Annual%20report%2012.pdf>

119 Other than children’s’ rights.

For instance, as noted in the previous section, although NBIM has a database that may include some human rights information, it is not clear whether the database includes information on a spectrum of human rights issues, nor whether the data is used to help guide decisions on whether to invest in companies. Moreover, in instances where the database identifies significant human rights risks, and NBIM nevertheless decides to invest, it is not known whether NBIM is in active dialogue with a company in order to voice their concerns or place preconditions on the company.

NBIM uses its voting rights actively to influence the actions of its 7,000 portfolio companies.<sup>120</sup> NBIM considers voting to be its main tool for influencing company boards of directors and provides information on its voting record on an annual basis.<sup>121</sup> NBIM's record indicates a general practice for voting in favour of human rights-related shareholder resolutions. The NCP commends NBIM for this practice.

NBIM also uses engagement with some portfolio companies to influence their behaviour,<sup>122</sup> and these dialogues include NBIM's three environmental and social focus areas -- children's rights, water management, and climate change -- where relevant. In 2012, NBIM selected 60 companies, which were either leading in their industries or above a certain size in the fund's equity holdings, in order to encourage improved reporting in these focus areas. The aim, as NBIM states was to get the companies to change their behaviour, setting an example for other industry members to follow.<sup>123</sup> This practice is commendable, although it does not appear to address potential or actual human rights impacts of portfolio companies other than children's rights.<sup>124</sup>

NBIM also has used broader dialogues to create change among its portfolio companies at the industry level. NBIM has published documents outlining how companies should manage social and environmental risks in their operations and supply chains, such as child labour.<sup>125</sup> NBIM has been engaged with four companies operating in the cottonseed industry in India since 2007<sup>126</sup>, and in 2012 concluded three of those four dialogues. The dialogues ended after the companies reported a decrease in the incidence of child labour.<sup>127</sup> The companies had also developed systems during this period to manage the risk of child labour and expanded these systems to include other types of seed

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120 NBIM Annual Report 2012, p.33; <http://www.nbim.no/Global/Reports/2012/Annual%20report/Annual%20report%2012.pdf>

121 <http://www.nbim.no/voting-lists>

122 NBIM states that in 2012, it engaged with about 300 companies on a range of ownership issues through meetings, letters and telephone calls. Some of the contact was part of NBIMs long term ownership work, while other engagements were prompted by company-specific events. For example, NBIM met the chairmen of several European banks to discuss the role of the board and well-functioning markets. They also met members of the board of Xstrata to advocate better terms for the mining company's shareholders in connection with its planned merger with Glencore. P.32; <http://www.nbim.no/Global/Reports/2012/Annual%20report/Annual%20report%2012.pdf>

122 NBIM Annual Report 2012 p. 34 <http://www.nbim.no/Global/Reports/2012/Annual%20report/Annual%20report%2012.pdf>

123 NBIM Annual Report 2012, p.34; <http://www.nbim.no/Global/Reports/2012/Annual%20report/Annual%20report%2012.pdf>

124 Water management and climate change, although not always defined as human rights issues per se, have significant human rights implications.

126 Monsanto, Bayer, DuPont and Syngenta. See p. 47 NBIM Annual Report 2011

127 NBIM Annual Report 2012 p. 34. <http://www.nbim.no/Global/Reports/2012/Annual%20report/Annual%20report%2012.pdf>



and geographical areas.<sup>128</sup> NBIM continues its dialogue with the fourth enterprise as its reporting on child labour remains unsatisfactory.<sup>129</sup>

Additionally, NBIM has worked with its peers to increase its leverage. For instance, NBIM and the Dutch pension Fund APG ended three years of joint dialogue with five cocoa and chocolate companies after the industry took steps demonstrating a clear commitment to combating child labour.

Finally, as noted in Section 4.3.2.2.1 (on identifying impact), NBIM uses divestment or the threat thereof to address human rights impacts. The role of the Council on Ethics in systematically examining instances for observation or divestment is good practice for which the Government of Norway should be commended.<sup>130</sup>

**Conclusion: The challenge for NBIM is to systematically influence its portfolio companies to avoid or mitigate significant human rights impacts beyond children's rights. As noted previously, NBIM cannot address every single human rights impact of its 7,000 portfolio companies, but it is not enough to simply focus on children's rights. Moreover, no information is available that NBIM has a strategy or indicators to determine when it should engage with an enterprise regarding its human rights impacts. The tools that NBIM has used to address child labour – as well as climate change and water management -- among its portfolio companies serve as a useful model to address other human rights impacts. Considering that active ownership is the main instrument outlined in the ethical guidelines of the Fund, and that disinvestment based on recommendations from the Council on Ethics is only a secondary measure, the NCP finds the lack of an internal process to address human rights impacts in general problematic.**

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#### 4.3.2.6 HUMAN RIGHTS DUE DILIGENCE – TRACKING PERFORMANCE

The Guidelines recommend that as part of the due diligence process, an enterprise should track the effectiveness of its response.<sup>131</sup> Tracking verifies whether an enterprise is following its policies and its systems are addressing potential and actual human rights impacts, as intended.<sup>132</sup> Without tracking, there is no way an enterprise could systematically know whether actions have been taken, whether they are effective, and whether they may be missing issues. Tracking typically involves the

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128 NBIM Annual Report 2012, p.34; <http://www.nbim.no/Global/Reports/2012/Annual%20report/Annual%20report%2012.pdf>

129 NBIM Annual Report 2012, p.34; <http://www.nbim.no/Global/Reports/2012/Annual%20report/Annual%20report%2012.pdf>

130 Recently, the Fund divested from 23 companies involved in the palm oil industry, might have been decisions to disinvest taken by NBIM, independent of the Council. If NBIM divests for human rights related reasons, this has not been communicated to the NCP. Nevertheless, some Norwegian civil society organisations, such as the Norwegian Rainforest Foundation, are adamant that NBIM's decision to withdraw its holdings in these companies was a result of on-going attention to the adverse negative impacts these companies have on the rainforests and indigenous peoples. See for instance (in Norwegian) <http://www.dagsavisen.no/samfunn/overrasket-over-oljefondet/>.

131 OECD Guidelines, Chapter IV (Human Rights), Commentary para. 45

132 See UN Guiding Principle 20.

use of qualitative and quantitative indicators, and may incorporate the views of internal and external stakeholders.<sup>133</sup>

Investors can track a number of issues. For instance, they can track whether they implement their policies on identifying human rights impacts, if, when and how they engage according to their policies with portfolio companies that have significant human rights impacts, and whether their engagement with those companies leads to mitigation of impacts.

The NCP has not found specific information on how NBIM tracks the effectiveness of its work to identify, assess and act upon human rights risk findings, other than in the area of children's rights. NBIM has indicated that it will review the measures it takes to address children's rights: "we will continue to focus on [climate change, water management and children's rights] over the next three years and will retain our long-term commitment to working on children's rights. All results will be reviewed, and new focus areas will be considered."<sup>134</sup> It is not known how NBIM reviews this performance, what indicators it uses, or how it draws on feedback from internal and external resources in this review. Additionally, the NCP has no information regarding whether such a review would consider the effectiveness of NBIM's approach to a broader range of human rights.

**Conclusion: Because NBIM has declined to provide any information on how it tracks its responses to human rights impacts, it again renders itself vulnerable to criticism that this aspect of its due diligence process is inadequate. Moreover, NBIM will not be able to track the effectiveness of its systems to identify and address human rights impacts among its portfolio companies until it builds such systems which, as the NCP noted in previous sections, appear to require further development in order to meet the provisions set out in the OECD Guidelines.**

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#### 4.3.2.7 HUMAN RIGHTS DUE DILIGENCE – COMMUNICATING<sup>135</sup>

According to the Guidelines, due diligence also entails communicating how impacts are identified and addressed.<sup>136</sup> This is the "showing" part of "knowing and showing" and an important dimension of being accountable and transparent. This step of the due diligence process provides information to stakeholders about how an enterprise generally integrates human rights concerns into its approach, as well as how it has responded to specific human rights impacts – such as the issues raised in the Specific Instance.<sup>137</sup>

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133 The UN Guiding Principles provide more detail on tracking than is found in the OECD Guidelines. The UN Guiding Principles suggest that tracking should include feedback from both internal and external sources, including affected stakeholders. For more detail on tracking, see UN Guiding Principles, (II) (B) (20).

134 [http://www.nbim.no/Global/Documents/Governance/2011\\_NBIM\\_strategidokument-web.pdf](http://www.nbim.no/Global/Documents/Governance/2011_NBIM_strategidokument-web.pdf)

135 For discussion of issues concerning confidential information, see Section 4.3.1.

136 OECD Guidelines, Chapter IV, Commentary para.45.

137 The OECD Guidelines provide little guidance on what it means to communicate as part of human rights due diligence. The UN Guiding Principles provide additional guidance. UN Guiding Principles (II) (B) (21).

The importance of external communication is further underscored by Chapter III of the Guidelines on disclosure.<sup>138</sup> As the commentary notes, such disclosure sometimes includes information on the activities of business partners. NBIM's implementation of the disclosure requirements is further addressed in Section 4.3.4.

Many companies, including investors, use a variety of tools to communicate with their shareholders and stakeholders – including the publication of policies and procedures, annual reports, and specialised or thematic reports. NBIM communicates externally on its approach to children's rights, although it communicates little regarding its approach to other rights. On its website, NBIM has published its policy on children's rights, documents outlining its expectation for companies regarding children's rights,<sup>139</sup> and its quarterly and annual reports.<sup>140</sup> As noted earlier, NBIM has not explained its rationale for why it has prioritized only children's rights – although it does explain that the decisions were approved by the executive board.<sup>141</sup> More specifically, for children's rights, the website helpfully lays out NBIM's policy on children's rights, its expectations of companies in which it invests, and how NBIM tracks performance and communicates those results. The reporting is quite specific in some instances. For instance, NBIM identified four companies with which it works on child labour issues. The public information gives stakeholders a good sense of how NBIM identifies children's rights risks in its portfolio, and how it works with its portfolio companies on children's rights.

NBIM communicates little about its approach to other human rights. The only information the NCP could find on the website was the existence of the database that NBIM maintains on 4,000 of the largest companies in which the fund invests. NBIM's Annual Report notes that the database was expanded to include more company-specific information on risk indicators for human rights, health, safety and environmental performance, but does not explain exactly what information is included, or how it is used.<sup>142</sup> The NCP cannot find information regarding NBIM's engagement on human rights issues – apart from children's rights. For instance, the website does not indicate how many of NBIMs dialogues with companies in 2011 and 2012 that included human rights issues -- other than children's rights– or how often other human rights issues were involved in shareholder voting in 2011 and 2012. NBIM has declined to disclose this information to the NCP.

It is not clear why NBIM cannot be more transparent regarding these practices. NBIM is transparent about other sensitive issues. For instance, in 2009, the Head of Social and Environmental Governance revealed the four companies which NBIM was engaging with on child labour in an

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138 OECD Guidelines, Chapter III (Disclosure) para 3.

139 <http://www.nbim.no/en/press-and-publications/brochures-and-presentations/>

140 <http://www.nbim.no/en/press-and-publications/Reports/2012/>

141 <http://www.nbim.no/en/About-us/governance-model/executive-board-documents/principles-for-risk-management/>

142 NBIM Annual Report 2012 p.33

interview with a newspaper.<sup>143</sup> NBIM has also publicly raised concerns related to the corporate governance practices of a private equity firm in which it invests.<sup>144</sup>

**The NCP finds that NBIM has effectively communicated regarding its approach to identifying and addressing children’s rights, but it should apply the same approach regarding a broader range of human rights issues, particularly regarding portfolio companies with severe impacts. NBIM’s reluctance to respond to the NCP’s questions means that the NCP must make its assessment based on publicly available information, which may not reflect the full scope of NBIM’s activities. The publicly available information is inadequate for such an analysis, suggesting that NBIM could strengthen its communication concerning its human rights due diligence.**

#### 4.3.2.8 REMEDY

According to the Guidelines, “[e]nterprises should (...) [p]rovide for or co-operate through legitimate processes in the remediation of adverse human rights impacts where they identify that they have caused or contributed to these impacts”.<sup>145</sup>

An investor could cause human rights abuses through discriminatory employment practices, or an investor could contribute to human rights abuses by using procurement policies that leave the supplier with no choice but to use excessive mandatory overtime. However, the NCP was asked in this specific instance to examine situations in which NBIM does not cause or contribute to human rights impacts, but rather is directly linked to them.<sup>146</sup> In some situations, an investor with a minority share in a company will not have more than a minor contribution – as appears to be the case in this specific instance. When an investor is directly linked to a human rights abuse through its investment, but did not cause or contribute to it in more than a minor way, it is not required to provide a remedy. Rather, the portfolio company should provide or contribute to a remedial mechanism. NBIM could according to the Guidelines be expected to use its leverage to encourage POSCO to have processes in place or to make sure that POSCO India to have such processes in place to enable remediation.

The NCP has neither established nor rejected that NBIM has caused or contributed to any human rights abuses. Were that to occur, NBIM, like other enterprises, would be expected to provide or cooperate in providing a remedy. The Commentary in the Human Rights chapter provides further guidance on those processes and notes that the enterprises should “have those processes in place to

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143 “Barns rettigheter, viktig for investorer”, E 24 12.06.2009 (in Norwegian), <http://www.norges-bank.no/no/om/publisert/artikler-og-kronikker/barns-rettigheter--et-anliggende-for-investorer/>

144 “Mangler uavhengig sjef”, Article in Norwegian newspaper Dagens Næringsliv (Norway’s Financial Times) 18 June 2012, p.8

145 OECD Guidelines, Chapter IV (Human Rights), para 5

146 OECD Guidelines, Chapter II (General Policies), Commentary para 14: The OECD Guidelines define “contributing to” an adverse impact as “a substantial contribution, meaning an activity that causes, facilitates or incentivises another entity to cause an adverse impact and does not include minor or trivial contributions.”.

enable remediation” and refers to those “potentially impacted,<sup>147</sup> suggesting that the processes should be established before impacts occur.

**Conclusion:**

**NBIM is expected to provide access to remedy for grievances that it may be causing or contributing to. However, for grievances related to companies in which NBIM has invested, NBIM is not expected to provide remedy, but could encourage the company to establish a company based grievance mechanism.**

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#### 4.3.3. ACTIONS WITH RESPECT TO POSCO

In this Section, the NCP addresses the specific actions that NBIM should have taken once it was alerted to the concerns about alleged human rights abuses in connection with its investment in POSCO.

After NBIM was informed of allegations that POSCO was responsible for grave and large scale human rights impacts, it should have investigated them. The NCP has received no information to indicate whether NBIM did so.

Moreover, if NBIM then found the allegations to be credible, it should have encouraged POSCO to address the claims, using tools such as engagement, shareholder proposals, or even the threat of divestment. The OECD Guidelines recognize that companies that are directly linked to human rights impacts through a business relationship may not always possess enough leverage to change the business partner’s behaviour, but they should nonetheless try.

It is the NCP’s view that NBIM could have exercised leverage as a minority shareholder. NBIM could have engaged with POSCO’s leadership, as it has done in instances involving child labour, including by working with other investors. Given NBIM’s status as one of the world’s largest institutional investment funds, its close relationship with the Norwegian State and its reputation as a socially responsible investor within the international investment community, NBIM is in a position to lead or lend its support to coalitions of investors with minority shareholdings, and thereby significantly increase its leverage. For instance, in the past, NBIM has worked with the Dutch pension Fund ABP and its pension administrator APG<sup>148</sup> to address children’s rights issues.

NBIM’s ability to engage companies on human rights is strengthened by the fact that NBIM manages investments owned by the Norwegian State and carries with it the reputation and -- to a certain extent -- the influence of the Norwegian State. Thus, its leverage may far exceed its percentage

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<sup>147</sup> OECD Guidelines, Chapter IV (Human Rights), Commentary para 35.

<sup>148</sup> APG is, together with NBIM, a named institution by the notifiers in this Specific Instance.

ownership. The Fund is one of the world's largest institutional investment funds. Although the Fund's equity investment in any single enterprise is on average around one per cent and does not often exceed five per cent,<sup>149</sup> this can nonetheless be a significantly large investment in monetary terms. NBIM's leverage is further heightened by the size of the Fund and by its formal and public process for considering divestment through the Council on Ethics. Few other funds use a public process that involves the disclosure of information outlining in detail the grounds for divestment.<sup>150</sup> Moreover, many investors and institutions track and mirror the Fund's observation list and exclusion list. In this way, the Fund's impact far exceeds the size of the investment. The possibility of this public process should influence a company's willingness to engage in a serious manner with NBIM, and thus increases its leverage beyond that of a typical minority shareholder.

NBIM's past actions suggest that it can engage companies on human rights even when it is a minority shareholder. For instance, NBIM engaged Monsanto on child labour in India when its ownership in Monsanto was lower than its current interest in POSCO.<sup>151</sup>

Moreover, NBIM could use the mechanism of shareholder proposals to influence POSCO's actions. NBIM notes in its Responsible Investment Policy that it will vote for shareholder resolutions for proposals "that request the company to perform and disclose a social or environmental impact assessment of specific project or operations when the current information publicly available is insufficient and such disclosure will benefit shareholders."<sup>152</sup> NBIM also specifies that it will support "proposals that request adoption or implementation of a code of conduct based on human rights and international labour standards covering a company's operations and supply chain" and "proposals that require adoption of a policy or reporting on efforts to promote activities against discrimination by gender, religion, sexual orientation, etc., when the actions suggested in the proposals are considered to be reasonable with regard to what the company can be held accountable for and will benefit shareholders."<sup>153</sup>

Despite these opportunities to exert leverage over POSCO, the NCP has received no information that NBIM has engaged with POSCO or with other shareholders, or used shareholder resolutions as a means to address the allegations. Indeed, NBIM could join APG's efforts to investigate the allegations. APG has agreed to work with the parties that brought the Specific Instance against it in

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<sup>149</sup> According to the 2012 report on equity holdings, the Fund had holdings of 5% or more in ca. 34 companies; [http://www.nbim.no/Global/Documents/Holdings/EQ\\_holdings\\_SPU\\_Sorted\\_12%20oppdatert.pdf](http://www.nbim.no/Global/Documents/Holdings/EQ_holdings_SPU_Sorted_12%20oppdatert.pdf).

<sup>150</sup> For instance the Norwegian Kommunal Landspensjonskasse (KLP) as a last resort, excludes companies that are in violation of international norms and conventions and publishes the exclusion criteria and the exclusion list, but not detailed reasoning behind the exclusion. KLP provides pensions, finance and insurance services to municipalities, county authorities, health enterprises and to businesses both in the public and the private sector, and to their employees. The KLP Group has total assets of NOK 313 billion.

<sup>151</sup> For example ownership in Monsanto per 31.12.2005 was NOK 657 mill (0,47 % ownership) and today ownership in Monsanto amounts to 0,74 %, which is lower than the ownership in Posco.

<sup>152</sup> <http://www.nbim.no/Global/Documents/Governance/Policies/NBIM%20Responsible%20Investor.pdf>

<sup>153</sup> NBIM's Corporate Governance Principles and Voting Guidelines  
<http://www.nbim.no/Global/Brochures/Principles%20and%20Voting.pdf>

the Netherlands under the auspices of the Dutch NCP. A Terms of Reference for an independent investigation of the POSCO allegations is drafted.<sup>154</sup>

Although NBIM has a responsibility to influence POSCO to avoid or mitigate human rights impacts, it is not expected to provide remedy to those affected, if the allegations prove to be valid. This is because NBIM according to the definitions in the OECD Guidelines is directly linked to the alleged impacts, but it has not caused or contributed to them. If abuses have occurred, the responsibility to provide remedy lies with POSCO and POSCO India and will be addressed by the South Korean NCP.

**Conclusion: If the complaints are well-founded, NBIM should use its influence, alone or together with other minority shareholders, to persuade POSCO to strengthen its engagement with all stakeholders and to address their concerns. NBIM should encourage POSCO to incorporate the OECD Guidelines' human rights provisions in its operations. NBIM should request that POSCO prevent further impacts, mitigate those that are underway, and provide or cooperate in remediation where it has caused or contributed to human rights abuses that have already occurred, including by setting up an appropriate grievance mechanism.**

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#### 4.3.4. DISCLOSURE PROVISIONS OF THE OECD GUIDELINES

In addition to Chapter IV of the OECD Guidelines that states that enterprises should communicate how impacts are addressed, Chapter III requires enterprises to disclose all material matters and are also encouraged to communicate additional information that are not material.

The purpose of the Disclosure chapter of the Guidelines is to “encourage improved understanding of the operations of multinational enterprises”.<sup>155</sup> To improve public understanding, enterprises “should be transparent in their operations and responsive to the public’s increasingly sophisticated demands for information”.<sup>156</sup> The disclosure recommendations focus mainly on publicly traded enterprises, but are intended “also to be a useful tool to improve corporate governance in non-traded enterprises; for example, - privately held or State-owned enterprises”.<sup>157</sup> The recommendations entail to apply high quality standards for accounting, and financial as well as non-financial disclosure.

Deloitte verified NBIM’s financial report for 2012 based on an audit in line with the Disclosure requirements of the Guidelines.<sup>158</sup> There is no such verification of the non-financial information, including human rights risk management.

NBIM’s annual reports and website include a significant amount of non-financial information. However, as noted above, NBIM communicates little about its approach to human rights due

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<sup>154</sup> [http://www.oecdguidelines.nl/wp-content/uploads/somo\\_bothends\\_abp\\_apg\\_public\\_joint\\_statement\\_06\\_03\\_2013incl.pdf](http://www.oecdguidelines.nl/wp-content/uploads/somo_bothends_abp_apg_public_joint_statement_06_03_2013incl.pdf)

<sup>155</sup> OECD Guidelines Chapter III (Disclosure), Commentary, para 28

<sup>156</sup> OECD Guidelines Chapter III (Disclosure), Commentary para 28

<sup>157</sup> OECD Guidelines Chapter III (Disclosure), Commentary, para 29

<sup>158</sup> OECD Guidelines, Chapter III (Disclosure), para 4.

diligence policies and processes other than those related to children's rights. This is further discussed in Section 4.3.2.7. For instance, it does not seem that NBIM regularly discloses information on how it engages with companies on the Fund's "Observation List".

The NCP commends NBIM for disclosing its voting records on its website. Although the NCP recognises that there may be legitimate reasons for voting against particular human rights related shareholder resolutions, the strategy and decisions behind voting against these resolutions should be more transparent so as to be better understood by stakeholders.

NBIM chose not to respond to any of the NCPs questions as they claimed that the OECD Guidelines do not apply to them as minority shareholders. They maintained this stand even after the Norwegian and Dutch NCP had determined in their respective initial assessments that the OECD Guidelines were applicable to the notifications directed at the Norwegian and Dutch pension funds. The Dutch pension fund accepted the Dutch NCP offer of dialogue. NBIM rejected the Norwegian NCP offer of dialogue and refused to provide any information on whether they were engaging with POSCO in any other forum. The attitude by NBIM gives reason to question whether NBIM has the necessary corporate culture to fulfil its duties as a responsible investor as they are laid out in the Norwegian Ministry of Finance ethical guidelines for the fund. After NBIM was informed of allegations that POSCO was responsible for grave and large scale human rights impacts, it should have investigated them. The NCP has received no information from NBIM to indicate whether NBIM did or has intentions to do so, alone or with other responsible investors.<sup>159</sup> It is understood that there can be legitimate confidentiality concerns related to business sensitive information, meaning that NBIM cannot always provide detailed information about the nature and extent of dialogue with a specific company. However, there is an opportunity for greater openness without jeopardizing confidentiality requirements under the current system.

NBIM has not disclosed the information NCP has requested in relation to how it respects the OECD Guidelines in this Specific Instance. Thus, it is difficult for the NCP to conclude that NBIM acts as a responsible investor in the absence of information from NBIM to the contrary. Furthermore, based on the experience of the NCP, NBIM is disrespecting the OECD Guidelines provisions on disclosure in this Specific Instance.

#### 4.4. BEST PRACTICE

The NCP recognises that the Norwegian Government Pension Fund has best in class responsible investor practices on many aspects. NBIM is commended for:

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<sup>159</sup> The Dutch NCP has received information from the Dutch Pension Fund that it, after it received the OECD NCP complaint, made efforts to reach out to the notifying civil society organisations as well as to Posco. SOMO, Both Ends, ABP and APG Joint Statement [http://www.oecdguidelines.nl/wp-content/uploads/somo\\_bothends\\_abp\\_apg\\_public\\_joint\\_statement\\_06\\_03\\_2013incl.pdf](http://www.oecdguidelines.nl/wp-content/uploads/somo_bothends_abp_apg_public_joint_statement_06_03_2013incl.pdf)



- A multi-step approach to active engagement on its policy on children’s’ rights and child labour that provides clear expectations to portfolio companies, prioritised according to the highest risk to children, a framework for assessments, tracks progress over time and uses specific benchmarks to measure progress, accompanied by continuing dialogue with company management with a focus on improving outcomes, and transparency about its dialogues and results.
- Specific voting policies that support improved human rights approaches by companies in its portfolio
- An apparent willingness to promote an approach with companies that looks deeper at root causes of repeated or pervasive human rights impacts, like child labour. However information from NBIM is scarce at this point on whether NBIM is working with companies on a more comprehensive approach to child labour, such as access to education and making available for the parents or merely looking just at reducing the numbers of children in a company’s operations.
- Development of a risk based database across a range of non-financial issues, including human rights.<sup>160</sup>
- Policy of active engagement on improving policy frameworks in line with sustainability goals.

## 4.5. RECOMMENDATIONS

When a party is unwilling or unable to participate in the proceedings, it is the duty and mandate of the NCP is to make recommendations on the implementation of the OECD Guidelines in accordance with the “Procedural Guidance” according to the Guidelines Chapter C, paragraph 3. The NCP recommends that NBIM, at a minimum, acts upon the following recommendations:

### 4.5.1. ENGAGEMENT WITH THE NCP

NBIM should, like APG/ABP has with the Dutch NCP, engage with the NCP process, and accept the offer of dialogue as well as provide the requested information to the NCP.

If NBIM believes that it is legally prohibited from providing information to a state entity such as the NCP that derives its mandate from an international organization, such as the UN or the OECD, NBIM should at a minimum refer to the legal basis for its position.

### 4.5.2. ENGAGEMENT WITH POSCO

NBIM is directly linked to POSCO through its relationship as a shareholder in the company. NBIM should investigate whether the allegations against POSCO are well-founded. If the allegations turn out to be well-founded, NBIM should, alone or together with other minority shareholders, use its

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<sup>160</sup> Even though not clear how the database is used; for optimisation it should be used in contributing to decisions to invest and in monitoring; NBIM should be vigilant about potentially inherent bias in drawing on resources from only large or well-known sources, with a focus on diversifying information sources in the global south in particular and in being alert to the increasing diversification of human rights issues within and across sectors.

influence, alone or together with other minority shareholders, to persuade POSCO to strengthen its engagement with all stakeholders and to address their concerns. NBIM should encourage POSCO to incorporate the OECD Guidelines to its operations. NBIM should request that POSCO prevent further impacts, mitigate those that are underway, and provide or cooperate in remediation where it has caused or contributed to human rights abuses that have already occurred, including by setting up an appropriate grievance mechanism. This may entail engaging in constructive dialogue with POSCO on an executive level, as well as using the range of tools it has at its disposal such as shareholder proposals, to persuade POSCO to address the situation. As a concrete step towards understanding the situation and deciding on a course of action, NBIM should work with other investors, such as ABP/APG, to support an independent investigation into the allegations against POSCO.

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### 4.5.3. THE RESPONSIBILITY TO RESPECT HUMAN RIGHTS

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#### 4.5.3.1 HUMAN RIGHTS POLICY COMMITMENT

NBIM is recommended to:

- Clarify whether its Responsible Investor Policy and strategies are applied to a broader range of human rights issues, beyond children's rights. If the Policy and other supporting strategies are not currently interpreted or applied more broadly, revise its policy (or the interpretation) to bring it better into line with the OECD Guidelines, as well as guidance from the Ministry of Finance to respect human rights.

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#### 4.5.3.2. HUMAN RIGHTS DUE DILIGENCE

NBIM is recommended to:

- Establish a system to identify areas of heightened risk of potential human rights violations that can be integrated into its overall system to screen companies for potential investment. Given the wide scope of NBIM's holdings, the system may need to prioritize based on the risk of human rights impacts, which could be identified through factors such as sector, country of operations, or other variables. In cases where serious or systematic human rights violations are identified prior to investment, NBIM should put into place a process to consider non-investment, which should weigh the gravity of the abuses, as well as the potential for NBIM to engage with the company and elicit change. In a number of instances, the NCP expects that the benefits of engagement may outweigh the interest in non-investment. To its credit, NBIM has already developed such an approach to children's rights, demonstrating that it is both feasible and reasonable to integrate human rights consideration into investment management. The Council on Ethic's work also demonstrates that it is both feasible and reasonable to develop a broad-based screening system using information from a wide range of sources. NBIM therefore already has much of the components of such a system in place. By collaborating with other investors, NBIM can increase leverage as well as pool resources.

- NBIM is not expected to screen all companies prior to investment. However, NBIM is recommended to enhance its risk management systems and procedures for managing companies currently within its investment portfolio by including a focus on a broader array of human rights. NBIM is also recommended to strengthen efforts to identify whether portfolio companies present a significant risk of actual and potential adverse human rights impacts, prioritizing companies for such assessment based on the likelihood that they would be involved in such impacts due to their sector, countries of operation, or other factors. This may also be done in coalition with other investors to save costs.<sup>161</sup>
- More fully utilise the resources, experience and knowledge currently available at the Council on Ethics and its secretariat through increased information-sharing as one efficient way to improve NBIM's information-gathering on portfolio companies.
- Expand its use of engagement tools - including direct engagement with portfolio companies and the use of shareholder proposals - to address human rights beyond children's rights.<sup>162</sup>
- Exert its leverage where it finds that portfolio companies have been or may be involved in human rights violations of a serious nature, and seek to increase that leverage where necessary for instance by building coalitions with other like-minded investors to address concerns regarding specific policies and practices of companies or sectors in relation to human rights issues.
- Continue encouraging portfolio companies to meet their own responsibility to respect by being clear about its expectations, and through, shareholder voting and dialogue that focuses on prompting the company to respect human rights, including by acting on the three core components of the responsibility to respect set out above: adopting a policy commitment to human rights, conducting human rights due diligence and providing or cooperating in remediation.
- Strengthen communication around its human rights due diligence system and performance, by developing more robust disclosure and reporting on NBIM's human rights due diligence policies and processes, including regarding NBIM's active ownership strategies and activities with respect to human rights issues.<sup>163</sup>
- Although the NCP recognizes that there may be legitimate reasons for voting against particular human rights related shareholder resolutions, the strategy and decisions behind

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<sup>161</sup> To better ensure a balanced approach to identifying key human rights risks, NBIM should make efforts to identify risks related to non-public companies or companies with weaker civil society and media, although information in such instances may be harder to obtain. Such research may initially involve the use of media and civil society.

<sup>162</sup> NBIMs approach should reflect recent changes in international norms on business and human rights with the updating of the OECD Guidelines and the endorsement of the UN Guiding Principles on Business and Human Rights by the Human Rights Council, both in 2011.

<sup>163</sup> This could include information about engagement with specific companies and sectors, either conducted alone or as part of a coalition of investors, or through its shareholder voting activities. NBIM could also provide periodic public reports on developments resulting from dialogue with companies on the Fund's "Observations List".

voting against these resolutions should be more transparent so as to be better understood by stakeholders. Moreover, it is understood that there can be legitimate confidentiality concerns related to business sensitive information, meaning that NBIM cannot always provide detailed information about the nature and extent of dialogue with a specific company. However, there is an opportunity for greater openness without jeopardizing confidentiality requirements under the current system.

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#### 4.5.4. REMEDIATION AND OPERATIONAL LEVEL GRIEVANCE MECHANISMS

The NCP encourages NBIM to

- Use its influence with portfolio companies, particularly those operating in sectors or regions in which the risk of human rights impacts is particularly high, to put into place operational level grievance mechanisms as contemplated in Chapter IV of the OECD Guidelines. Such grievance mechanisms can help prevent small issues from becoming significant sources of conflict, and thus would help the companies within which NBIM invests to avoid and mitigate human rights impacts. In turn, this could reduce the negative human rights impacts to which NBIM is otherwise might be linked through its business relationships.
- If NBIM decides to establish a grievance mechanism, alone or with other investors or organisations, it should meet the criteria set out in the Guidelines commentary and drawing on the criteria from the UN Guiding Principles: legitimacy, accessibility, predictability, equitability, compatibility with the Guidelines, and transparency, and be based on dialogue and, where possible, engagement with a view to seeking agreed solutions.

The Secretariat: Hege Rottingen (Head) and Mari Bangstad

**The Norwegian NCP, Oslo, 27. May 2013**

**Hans Petter Graver**

**Elin Myrmel-Johansen**

**Jan-Erik Korssjøen**

**Gro Granden**

**(Chair)**

## 5. ATTACHMENTS

### 5.1. ATTACHMENT 1: QUESTIONS TO NBIM DATED 4 JANUARY 2013

#### QUESTIONS TO THE ENTERPRIZE

COMPLAINT FROM LOK SHAKTI ABHIYAN, KOREAN TRANS NATIONAL CORPORATIONS WATCH, FAIR GREEN AND GLOBAL ALLIANCE AND FORUM FOR ENVIRONMENT AND DEVELOPMENT VS POSCO (SOUTH KOREA), ABP/APG (NETHERLANDS) AND NBIM (NORWAY).

#### BACKGROUND

The South Korean, Norwegian and Netherlands National Contact Points (NCPs) have received a notification under the Specific Instance Procedure of the OECD Guidelines for Multinational Enterprises (the Guidelines) concerning South Korean Pohang Iron and Steel Company (Posco) and two of its investors; the Dutch pension fund ABP and its pension administrator APG and the Norwegian Bank Investment Management (NBIM).<sup>164</sup> The Norwegian and the Netherlands NCP have carried out initial assessments concerning the alleged breaches by ABP/ APG and NBIM and have determined that the issues raised merit further examination.<sup>165</sup>

According to the Norwegian NCP procedures the Specific Instance is now in phase 2, where we will investigate the case.<sup>166</sup> In meeting between the Norwegian NCP and NBIM a written procedure was agreed upon, where the Norwegian NCP would pose questions to NBIM in connection with the above mentioned complaint notification. After consultations with the Netherlands NCP<sup>167</sup>, the Norwegian NCP will hereby pose NBIM the following questions based on the obligation to manage investments in accordance with the OECD Guidelines, in particular Chapter II (General Policies) paragraph 12<sup>168</sup> and Chapter IV (Human Rights) paragraph 3.<sup>169</sup>

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<sup>164</sup> [http://www.regjeringen.no/upload/UD/Vedlegg/ncp/posco\\_klage.pdf](http://www.regjeringen.no/upload/UD/Vedlegg/ncp/posco_klage.pdf) and [http://www.regjeringen.no/upload/UD/Vedlegg/ncp/posco\\_vedlegg.pdf](http://www.regjeringen.no/upload/UD/Vedlegg/ncp/posco_vedlegg.pdf)

<sup>165</sup> <http://www.regjeringen.no/upload/UD/Vedlegg/csr/Kontaktpunktet/121126-INITIAL-ASSESSMENT-NBIM.pdf>

<sup>166</sup> Procedural guidance for the Norwegian NCP process: [http://www.regjeringen.no/upload/UD/Vedlegg/ncp/ncp\\_prosedyrer\\_e.pdf](http://www.regjeringen.no/upload/UD/Vedlegg/ncp/ncp_prosedyrer_e.pdf) which is updated according to the Procedural Guidelines adopted at the OECD Ministerial Meeting on 25 May 2011. In addition to the transparency requirements of the Guidelines, the Norwegian NCP complies with the Norwegian Freedom of Information Act. All information will be made public, except when information may cause harm to individuals, reveal business secrets or expose certain details of the mediation process. Initial assessments, final statements, mediated outcomes, press releases and the Norwegian NCP procedures are published on the website [www.responsiblebusiness.no](http://www.responsiblebusiness.no).

<sup>167</sup> Conference between the Norwegian and the Netherlands NCP 12.12.2012, led by Herman Mulder and Hans Petter Graver.

<sup>168</sup> The OECD Guidelines Section A, Chapter II (General Policies) paragraph 12 (A.12): *Enterprises should seek to prevent or mitigate an adverse impact where they have not contributed to that impact, when the impact is nevertheless directly linked to their operations, products or services by a business relationship.*

Please inform whether there may be any information that, in the opinion of NBIM, is subject to a duty of confidentiality by or pursuant to law and therefore should be exempted from access according to the Norwegian Freedom of Information Act.<sup>170</sup> Please respond by 16 January 2013. Let us know if you would need extra time to respond or whether you would prefer to present your response to some of the questions in a meeting with the NCP or the secretariat.

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#### QUESTIONS RELATING TO THE SIZE OF THE ENTERPRISE:

1. Where does NBIM rank among the largest investors globally?
2. Where does NBIM rank among the largest funds owned by a single owner globally?

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#### QUESTIONS RELATING TO THE INVESTMENT IN QUESTION:

3. What is the size of NBIM's investment in Posco in terms of
  - a. percentage of Posco's total shares?
  - b. value (NOK) pr January 2013?
  - c. the average of NBIM's investments in Asian companies?
4. Are there any investment funds that have a larger investment in Posco than NBIM?
5. Which number of investor (ranking 1 as largest investor) is NBIM in Posco?
6. Has NBIM submitted its expectations to Posco, and if yes, when was this last sent?
7. Has NBIM assessed any risks relating to the Posco investment, and which risks are these? Where does Posco rank on these risk assessments? Has Posco been notified about the risk assessment, and when? Has there been any dialogue with Posco about the risk assessment, and if yes, what does this type of dialogue typically entail?
8. Has NBIM been in contact with Posco after the notification of the Specific Instance by the Norwegian NCP? If yes, when and in what way? If any, please inform about e-mail, conference call, site visits to India)? Who made the contact on behalf of NBIM? (responsible investment analyst, portfolio manager or any others)? At which level at the other side did you contact (Chair of the Board, Corporate Responsibility department, IR, PR or Communication, CEO, others) ?
9. Has NBIM been in contact with ABP/ APG concerning Posco after the notification of the Specific Instance by the Norwegian NCP? If yes, when and in what way?
10. What other information has NBIM received regarding Posco's policies, management systems, monitoring, third party audits etc?

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<sup>169</sup> The OECD Guidelines Chapter II (General Policies) commentary 14 state that "*due diligence is understood as the process through which enterprises can identify, prevent, mitigate and account for how they address their actual and potential adverse impacts as an integral part of decision-making and risk management systems (...)*".

<sup>170</sup> Act of 19 May 2006 No. 16 relating to the right of access to documents held by public authorities and public undertakings (short title: Freedom of Information Act).

11. What other resources if any (consultants, organisations or others) has NBIM used to gather information regarding Posco?
12. Has NBIM engaged with other investors, for example the International Corporate Governance Network or the Council of Institutional Investors or the Asian Corporate Governance Association or through the UN Principles for Responsible Investment (UNPRI) to reduce the negative impact on human rights in relation to the Posco owned project in India? If yes, with whom, when and in what way?
13. Has NBIM conducted any non-financial due diligence as described in the OECD Guidelines Chapter II and IV related to human rights and environmental adverse impact linked to the investment in Posco at any point in time? If so, what type of risk was identified? How did you identify this risk? Which actions were taken to minimize the risk identified? If no, what are the reasons why NBIM would be cautious against such an involvement?
14. Has NBIM alone or with other investors <sup>171</sup> engaged with relevant industry associations <sup>172</sup> to raise the industry standard awareness in relation to the relevant human rights and environmental risk in the steel industry? If yes, with whom, when and in what way? If no, why?
15. Have you been in contact with Indian authorities regarding Posco's project? If so, what has been discussed? Was governance, improving public policy, regulation, issues relating to corruption or other topics related to the environment in which the company is operating discussed with any authorities, and if yes, which?
16. Have you discussed any Posco findings/due diligence with your portfolio managers? What type of action has been taken if any upon your findings? Which procedures are followed by portfolio managers when due diligence findings show high risk of contribution to human rights violations?
17. If you have a policy not to comment on individual investments or companies, what are the reasons for this? If NBIM cannot provide any comments, the NCP would like to invite NBIM to a meeting to discuss this in more detail.
18. How does NBIM, forward looking, see that NBIM may play an active role in bringing better practices at Posco India?

## GENERAL QUESTIONS CONCERNING HOW THE ENTERPRISE MANAGES ITS RESPONSIBLE INVESTMENT POLICY

The NCPs are informed about the mandate of the Council of ETHICS, the NBIMs commitment to the UN Principles for Responsible Investment (UN PRI), including the annual reporting to the UNPRI, as well as NBIMs commitment to the OECDs principles for responsible investment and the OECD Guidelines for Multinational Enterprises (the OECD Guidelines).

19. Does the size of the investment determine whether NBIM engages with a company or are there other factors that are of greater importance, and which are these?

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<sup>171</sup> International Corporate Governance Network, Council of Institutional Investors, Asian Corporate Governance Association or UN Principles for Responsible Investment (UNPRI), eg. the PRI Engagement Clearinghouse.

<sup>172</sup> Such as the World Steel Association <http://www.worldsteel.org/>.

20. Could you please send a copy of the latest annual report to UNPRI?<sup>173</sup>
21. Has NBIM received any feedback from UNPRI about improvement areas? If yes, what are these, and what has been done?

The NCPs understand that NBIM Responsible Investor Policy<sup>174</sup> concerns ESG issues in general, that NBIM expects companies to manage social and environmental risks that may hurt their profits and the fund's investments and that NBIM in practice highlights children's rights, climate change and water management.<sup>175</sup> Neither child labor, pollution of water or air form basis for this Specific Instance. Hence, no further information on these topics will be requested now. However, in light of the updated OECD Guidelines with a new chapter on human rights, based on the UN Guiding Principles on Business and Human Rights, the questions are the following in relation to NBIM Responsible Investor Policy:

On the basis of these considerations:

22. In which sectors/industries and related to which environmental, social and governance (ESG) issues did NBIM participate in contribution to the development of good international standards in 2011?
23. Does NBIM have any system in place to monitor or in any way screen companies in accordance with its own ethical guidelines where there is a risk that the company that NBIM has invested in could violate or undermine the human rights of others<sup>176</sup>? In addition to the activity of the Council on Ethics, how does NBIM monitor companies to identify such risks? How is information from the Council on Ethics integrated in the NBIM risk management system?
24. How does NBIM prevent and mitigate investing in contributions to adverse impacts:
  - i. How does NBIM identify, limit and mitigate its possible contribution to adverse impact that is not covered by NBIMs main engagement themes (Climate change, child labour, water)?
  - ii. How does NBIM engage with companies that might be in violation of indigenous peoples' rights or contribute to serious environmental damage other than those related to children's rights, climate change and water management?<sup>177</sup> How many companies has NBIM engaged with about these issues in 2009-2011?
  - iii. What type of resources (in house experts, consultants etc) does NBIM have to handle other non-main-theme issues?

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<sup>173</sup> We were not able pr 2. January 2013 to locate the report at <http://unpri.org/reporting/result.php>

<sup>174</sup> <http://www.nbim.no/Global/Documents/Governance/Policies/NBIM%20Responsible%20Investor.pdf>  
 Governance: board accountability, shareholder rights, ownership structure, corporate structures and procedures, reporting and transparency

<sup>175</sup> [http://www.nbim.no/Global/Reports/2011/Annual%20report%202011/Arsrapport\\_11\\_ENG\\_web.pdf](http://www.nbim.no/Global/Reports/2011/Annual%20report%202011/Arsrapport_11_ENG_web.pdf)

<sup>176</sup> Such as expelling people from their communities, security forces that receive support from the company and/or are tasked with controlling protests against the company and use excessive force or occupy the school of children in the community etc. See also: <http://www.redflags.info/>

<sup>177</sup> One example may be a reference to the allegations against Posco



- iv. How does NBIM select the companies it engages with? How does NBIM make sure it limits its contribution to the worst type of impacts?
- 25. How and on what topics does NBIM participate in alliances of investors such as the International Corporate Governance Network, Council of Institutional Investors, Asian Corporate Governance Association or UN Principles for Responsible Investment (UNPRI)?
- 26. Has NBIM participated in any alliance on issues relating to ethics<sup>178</sup> and human rights other than children's rights? If yes, with whom, when and how? If not, what are the reasons for this?
- 27. What does NBIM do if it receives notification about concrete incidents relating to a company which NBIM has invested in and that includes human rights risks? Are there different procedures if the notification comes from media, organizations, individuals or others or are the procedures relating to such notifications the same? If different, how are the procedures for each source of notification? Do service providers such as external managers have the same or similar procedures as NBIM?
- 28. According to the Ethical Guidelines<sup>179</sup> the system is that the bank has the primary responsibility for ethical investments, and the Council on Ethics a secondary responsibility, and thus acts as a safety net for the bank. What kind of cooperation is there between NBIM and the Council on Ethics for mutual exchange of information?
- 29. How many of your company dialogues in 2011 and 2012 included human rights issues other than child labor?
- 30. When exercising voting rights at company meetings, how often were human rights issues involved in 2011 and 2012?
- 31. Does NBIM request disclosure on human rights risks by the entities in which you invest? How is this information assessed?
- 32. Does NBIM integrate non-financial due diligence in its financial risk management systems and if so, how?

## 5.2. E-MAIL FROM THE NCP TO NBIM DATED 13 FEBRUARY 2013 (ORIGINAL NORWEGIAN VERSION BELOW)

**Subject:** OECD's Contact Point. Meeting 12th February 2013: Summary and way forward.

Thank you for the meeting of 12th February 2013, where NBIM held a presentation for the Norwegian OECD National Contact Point (NCP) and put forward views regarding why in their opinion the NCP should not have accepted the complaint for consideration. With regard to NBIM's views on the matter it should be noted that the Norwegian and Dutch NCPs, in joint consultation, decided that the OECD Guidelines do cover minority owners/investors and that a 'business relationship' does exist as defined in the Guidelines. The OECD Investment Committee has assigned the responsibility of considering whether a case falls under the Guidelines or

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<sup>178</sup> The NCP only needs information in this instance about engagement on topics relevant to OECD Guidelines Chapter IV (e.g. it is not necessary to provide information about board salaries, board representation etc)

<sup>179</sup> <http://www.regjeringen.no/en/dep/fin/Selected-topics/the-government-pension-fund/responsible-investments/the-ethical-guidelines.html?id=434894>

not to the NCPs (and not to the defending businesses). Final resolution on this matter was reached by the Norwegian NCP on 27th November 2012 and the Dutch NCP on 10th December 2012.

We do not regard the presentation and the discussion at the meeting a response to the 33 specific questions posed by the NCP to NBIM. We therefore request NBIM reconsider its decision not to answer the NCP's questions.

As emphasised during the meeting, Norway is legally obliged to promote and implement the OECD Guidelines and OECD's Contact Point mechanism, and as such Norwegian parties are expected to respect OECD Guidelines and cooperate with the OECD Contact Point mechanism. The OECD Guidelines "jointly recommend to multinational enterprises operating in or from their territories the observance of the guidelines" (ref: p.8, Preface, OECD Guidelines). This recommendation implies there should at least be a willingness to cooperate with the NCP. Such cooperation is according to the OECD Guidelines a key component of "responsible business practice".

«Confidential business information» is not sufficient reason to withhold information from a NCP (ref: pt. C-4, p.73, Implementation Procedures of OECD Guidelines). We will not, therefore, accept this as grounds for not providing answers to our questions. According to point C-3 c) (p. 73) of the Implementation Procedures, OECD's NCP shall provide "a statement when ... a party is unwilling to participate in the procedures". This statement shall include the NCP's recommendations.

If NBIM does not provide the NCP with answers to the questions as requested, the NCP will conclude that NBIM chooses not follow the recommendation to follow the Guidelines and therefore that NBIM does not follow the basic requirements of responsible business practice.

In light of the specific expectations concerning state-owned enterprises (ref.: pt. 10, p. 22, Commentary on General Principles, OECD Guidelines) it is particularly regrettable if NBIM chooses not to respond to the NCP's questions.

The NCP will consider drawing a conclusion regarding NBIM's practices with respect to the OECD Guidelines, and with respect to the guidelines for the Finance Department's fund.

The NCP's 'Final Statement' will, irrespective of future developments, include a description of the difficulties experienced in establishing a constructive dialogue with NBIM, and an opinion regarding this process.

On the basis of the above statement, NBIM is strongly encouraged to answer the questions that were sent on 4th January 2013. The original deadline of 25th January 2013 is extended to 2pm on Monday 18th February 2013.

Yours faithfully,  
Hege Røttingen

PS. As outgoing correspondence to an interested party, a copy of this email will also be sent to the notifier. This email is a public document under the Freedom of Information Act, which the Norwegian NCP is required to follow.

*Hege Røttingen*

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NORWEGIAN VERSION

**From:** Røttingen Hege

**Sent:** 13. februar 2013 14:53

**To:** [contact@nbim.no](mailto:contact@nbim.no)

**Cc:** Gunhild Ørstavik ([oerstavik@forumfor.no](mailto:oerstavik@forumfor.no)); [forumfor@forumfor.no](mailto:forumfor@forumfor.no); Gro Granden ([Gro.Granden@lo.no](mailto:Gro.Granden@lo.no)); Jan Erik Korssjøen ([erik-kor@online.no](mailto:erik-kor@online.no)); Myrmel-Johansen, Elin M ([elin.m.myrmel-johansen@storebrand.no](mailto:elin.m.myrmel-johansen@storebrand.no)); Hans Petter Graver ([h.p.graver@jus.uio.no](mailto:h.p.graver@jus.uio.no)); Bangstad Mari; Vatnar, John Tore

**Subject:** OECDs kontaktpunkt. Møte 12 februar 2013. Oppsummering av møtet og videre prosess

Takk for møte i går 12. februar 2012, der NBIM holdt en presentasjon for det norske OECD kontaktpunktet og fremmet deres syn på hvorfor kontaktpunktet ikke burde ha akseptert klagesaken til behandling. Når det gjelder det siste har det norske og det nederlandske kontaktpunktet i samråd besluttet at OECDs retningslinjer dekker mindretallseiere/investorer og at det foreligger et «business relationship» i retningslinjenes forstand. OECDs investeringskomité har tillagt kontaktpunktene (men ikke innklagede selskaper) å vurdere om en sak faller inn under retningslinjene eller ikke. Dette spørsmålet ble endelig avgjort av det norske kontaktpunktet 27 november 2012 og det nederlandske kontaktpunktet 10 desember 2012.

Vi anser ikke presentasjonen og diskusjonen i møtet som et svar på de 33 konkrete spørsmålene som kontaktpunktet har stilt NBIM. Vi ber derfor NBIM om å revurdere sin beslutning om ikke å svare på kontaktpunktets spørsmål.

Som understreket fra vår side i møtet er Norge folkerettslig forpliktet til å fremme OECDs retningslinjer og OECD kontaktpunksordningen, og vi forventer at norske aktører respekterer OECDs retningslinjer og samarbeider med OECD kontaktpunksordningen. OECDs retningslinjer "jointly recommend to multinational enterprises operating in or from their territories the observance of the guidelines», ref preamble til retningslinjer s. 8. Denne anbefalingen innebærer som minimum en vilje til å samarbeide med det nasjonale kontaktpunktet. Samarbeid med OECDs kontaktpunkt er etter OECDs retningslinjer en sentral del av "responsible business practice".

«Confidential business information» er ikke en tilstrekkelig grunn til ikke å gi opplysninger til kontaktpunktet, jf pkt. C-4 implementation procedure s. 73 . Vi vil derfor ikke akseptere dette som begrunnelse for ikke å svare på våre spørsmål. Etter implementation procedure pkt. C-3 c) (s. 73) skal OECDs kontaktpunkt gi "a statement when ... a party is unwilling to participate in the procedures" som inkluderer sine anbefalinger.

Hvis kontaktpunktet ikke får svar fra NBIM på sine spørsmål vil kontaktpunktet konkludere med at NBIM beklageligvis ikke følger anbefalingen om å følge retningslinjene, og at NBIM derfor ikke følger elementære krav til responsible business practise.

Dersom NBIM velger å ikke svare på spørsmålene til kontaktpunktet er dette særlig beklagelig i lys av den særlige forventningen som gjelder for statseide enheter, jf kommentaren til general principles pkt. 10 s. 22.

Kontaktpunktet vil vurdere å komme med en konklusjon om NBIMs praksis i forhold til OECDs retningslinjer og de retningslinjene som er gitt for fondet av Finansdepartementet

Kontaktpunktets slutterklæring («final statement») vil uansett inneholde en beskrivelse og vurdering av de vanskelighetene vi har opplevd i arbeidet med å få til en konstruktiv dialog med NBIM.

Vi oppfordrer NBIM på denne bakgrunn innen mandag 18 februar 2013 kl 14.00 om å svare på spørsmålene som ble sendt NBIM 4 januar 2013 med svarfrist 25 januar 2013.

Mvh Hege Røttingen

PS. Som utgående korrespondanse til en part sendes denne eposten i kopi også til klageren. Denne eposten er et offentlig dokument i henhold til offentleglova, som det norske kontaktpunktet er pålagt å følge.

*Hege Røttingen*

*Sekretariatsleder*

*OECDs kontaktpunktet*

*Tel +47-22244599*

[http://www.regjeringen.no/nb/sub/styrer-rad-utvalg/kontaktpunkt\\_naringsliv.html?id=642292](http://www.regjeringen.no/nb/sub/styrer-rad-utvalg/kontaktpunkt_naringsliv.html?id=642292)

# **Initial Assessment of Complaint on Violation of OECD Guidelines for Multinational Enterprises**

- **Complainants:** Lok Shakti Abhiyan (India), Korean Trans National Corporation Watch (Korea), Fair Green Global Alliance (the Netherlands), ForUM (Norway)
- **Complainees :** Posco India

## **1. Backgrounds**

On October 10th of 2012, Lok Shakti Abhiyan, an Indian civic group, the Korean Trans National Corporation Watch within the Korean House for International Solidarity, a Korean civic group, the Fair Green Global Alliance, a Dutch civic group, and the ForUM, a Norwegian civic group (hereinafter collectively referred to as the "Civic Groups"), raised complaint to the Korean NCP that the business activities of Posco India are in violation of II. General Policies, IV. Human Rights, and VI. Environment of the OECD Guidelines for Multinational Enterprises (hereinafter referred to as the "Guidelines").

## **2. Details of Complaint**

The complaint raised by the Civic Groups is related to A.2, A.10, A.11 and A.10 of II. General Policies, 2 and 5 of IV. Human Rights and 2 and 3 of VI. Environment of the Guidelines.

### **\* II. General Policies**

*A.2. Respect the internationally recognized human rights of those affected by their activities.*

*A.10. Carry out risk-based due diligence, for example by incorporating it into their enterprise risk management systems, to identify, prevent and mitigate actual and potential adverse impacts as*

*described in paragraphs 11 and 12, and account for how these impacts are addressed. The nature and extent of due diligence depend on the circumstances of a particular situation.*

*A.11. Avoid causing or contributing to adverse impacts on matters covered by the Guidelines, through their own activities, and address such impacts when they occur.*

*A.14. 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.*

#### ***IV. Human Rights***

*2. Within the context of their own activities, avoid causing or contributing to adverse human rights impacts and address such impacts when they occur.*

*5. Carry out human rights due diligence as appropriate to their size, the nature and context of operations and the severity of the tasks of adverse human rights impacts.*

#### ***VI. Environment***

*2. Taking into account concerns about cost, business confidentiality, and the protection of intellectual property rights:*

*a) Provide the public and workers with adequate, measurable and verifiable (where applicable) and timely information on the potential environmental, health and safety impacts of the activities of the enterprise, which could include reporting on progress in improving environmental performance; and*

*b) Engage in adequate and timely communication and consultation with the communities directly affected by the environmental, health and safety policies of the enterprise and by their implementation.*

*3. Assess, and address in decision making, the foreseeable environmental, health and safety-related impacts associated with the processes, goods and services of the enterprise over their full life cycle with a view to avoiding or, when unavoidable, mitigating them. Where these proposed activities may have significant environmental, health or safety impacts, and where they are subject to a decision of a competent authority, prepare an appropriate environmental impact assessment.*

In the complaint, the Civic Groups argued:

First, Posco India violated the Guidelines as it did not take sufficient measures to protect human rights of the residents, who are affected by its construction project of integrated steel mills, from violence by gunmen and the Odisha provincial government.

Second, Posco India did not carry out human rights due diligence related to the issues raised above.

Third, In the process of the large-scale project that has significant impacts on the local communities, Posco India did not take into account the opinions of stakeholders including residents of the region.

Fourth, Posco India did not carry out environmental due diligence related to its large-scale development project.

Therefore, the complaint was raised against Posco India that the company is in violation of the Guidelines.

## **2. Position of Posco India**

Posco India rebutted the complaint in its reply.

First, as for the human rights issues, the violence in question has taken place in the process of the provincial government's exercising its authority to stop the violence between the opponents and the proponents.

The business activities of Posco India are not directly related to the violence and the company has even made efforts to protect the residents, for example, by requesting the maintenance of order to the provincial government.

In addition, the company is fulfilling its social responsibility (CSR) to raise the living standard of the residents: provision of equipment for education and scholarships, free medical services, maintenance of community facilities, and support for cultural events, etc.

Second, as for the human rights due diligence, Posco India conducted a socio-economic survey reflecting opinions of the residents, and the survey has been approved by the Rehabilitation and Periphery Development Advisory Committee (RPDAC).

Third, as for the resident participation, Posco India's plan for compensation related to the development was submitted to and approved by the RPDAC.

The RPDAC is an official organization founded under the provincial government's policy on compensation for relocation and it consists of about 30 stakeholders including representatives of relocated residents, women, designated tribes, local NGOs, members of the provincial assembly, village councils, and government officials.

Fourth, as for the environmental due diligence, Posco India gained approval after carrying out a phased environmental impact assessment (EIA) in accordance with the EIA 1994 of India. On January 31 of 2011, the Environment Court of India ruled that the order of the Ministry of Environment and Forests to conduct a comprehensive EIA was aimed at taking preventive measures and was not relevant enough to invalidate the approval granted in 2007. The Environment Court decided that the comprehensive EIA should be submitted to a separate committee and Posco India submitted the comprehensive EIA.



#### **4. Initial Assessment by Korean NCP**

Based on the complaint, submitted materials and meetings with the parties, the Korean NCP reviewed the followings that are provided by the OECD Implementation Procedures of the OECD Guidelines for Multinational Enterprises and the Commentary on the Implementation Procedures.

##### **1. Are the identities of the parties concerned and their interest in the matter clear?**

The complainants - Lok Shakti Abhiyan, KTNC Watch, Fair Green and Global Alliance, ForUM - are civic groups and they have clear interest in the matter in that they raised the complaint in Korea, which is a member of the OECD Guidelines, against business activities in India, a non-member of the Guidelines.

##### **2. Is the issue material and substantiated?**

The issues raised are related to adverse impacts of business activities by a multinational enterprise on human rights and environment of India. It is a significant issue, given the purpose of the Guidelines which is to pursue sustainable development of nations and companies alike by fulfilling corporate social responsibility.

##### **3. Is there a link between the enterprise's activities and the issues raised?**

The complaint raised is mainly related to:

1. Violence between proponents and opponents of the development project or between the opponents and the authorities;

2. Legitimacy of the administrative actions regarding the land expropriation under the Forest Rights Act; and

3. Approval of the Ministry of Environment and Forests and the Environment Court's ruling on the approval.

These are related to the administrative and judicial acts of the Odisha provincial government, which signed a contract with Posco India. If this is seen as the business activities of Posco India, problems arise about how much flexibility is allowed in interpreting the definition of business activities in the Guidelines. Therefore, the Korean NCP finds the issues raised not directly linked to the business activities of Posco India.

**4. Is there any applicable law and procedures including court rulings that are being proceeded, have been proceeded or will be proceeded?**

After the ruling on approvals and additional conditions by the Environment Court in March 2012, the approvals and conditions for steel plants and ports are being renewed currently.

**5. How have similar issues been treated in other domestic or international proceedings?**

No cases of indirect business activities have been found from the OECD Watch.

\* The Survival International vs Vedanta Resources case may look similar to this case. However, considering various issues ranging from administrative acts by the provincial government related to the evacuation of state-owned land, to the mobilization of police forces, the foundation of establishment and administration of RPDAC and authorities of interpreting and applying the Forest Act, there should be a clear distinction

between business acts and administrative acts. In this regard, no cases of indirect business acts similar to the Posco case have been found.

- The case where a developer covered the cost which was supposed to be covered by a nation or a local government, on the request of administrative authorities (Korea Land and Housing Corporation VS Dalseo-gu District Office of Daegu Metropolitan City)
  - According to a precedent from a court in Korea, "If a developer covers the cost, on a request of an administrative agency, and if such cost was originally supposed to be covered by municipalities or other authorities, the cost may be seen as 「surcharges paid to municipalities or other authorities」 and included in development cost, even if such charges paid by a developer to the country or municipalities are not required by other laws or not a condition for approval." This shows that although the developer covers related cost, there should be a distinction between the developer and the local government.

#### **6. Would the proceeding of the procedure contribute to the purposes and effectiveness of the Guidelines?**

- The issues raised are related to human rights and environment, and they are very significant in the development of a nation and society through responsible business conduct of multinational enterprises, which is also a purpose of the Guidelines.
  - The complaint is not directly related to business activities of Posco India. Instead, it is related to the administrative activities of the provincial and the central governments of India and the rulings of the Indian court, whose legality and legitimacy are not to be determined by the Korean NCP.

In this case, the proceeding of the procedure has a high possibility of conflicting with actions of India's central or provincial governments or courts. In this sense, the Korean NCP has decided that the proceeding does not contribute to the effectiveness of the Guidelines, which are aimed at harmonizing business activities of multinational enterprises with government policies and helping the enterprises to contribute to sustainable development.

## Conclusion

The Korean NCP considers the complaint to be related to the administrative activities of the provincial government of India rather than business activities of Posco India, and it is not the Korean NCP but the Indian court that should determine legality and legitimacy of such activities.

*\* OECD Guidelines for Multinational Enterprises*

*1. Concepts and Principles*

*2. Obeying domestic laws is the first obligation of enterprises. The Guidelines are not a substitute for nor should they be considered to override domestic law and regulation. While the Guidelines extend beyond the law in many cases, they should not and are not intended to place an enterprise in situations where it faces conflicting requirements. However, in countries where domestic laws and regulations conflict with the principles and standards of the Guidelines, enterprises should seek ways to honour such principles and standards to the fullest extent which does not place them in violation with domestic law.*

On the basis of the due diligence provisions and other procedural or practical issues stated in the Guidelines, the Korean NCP cannot find any problems in the court rulings and other relevant procedures of the Posco case.

Therefore, the Korean NCP has decided that there will be no additional proceedings.

Netherlands National Contact Point  
OECD Guidelines for Multinational Enterprises  
CC: SOMO, Both Ends, ABP and APG

July 10, 2013

Dear Netherlands NCP for the OECD Guidelines,

We, POSCO, understand that SOMO, Both Ends, ABP and APG have announced a public joint statement on March 6, 2013 as part of the Dutch NCP process, where the parties agreed to establish a stakeholder consultation process in addition to initiating an Independent Review and Assessment on the project in progress of POSCO India Co., Ltd. in Odisha, India.

We understand that the third party Independent Review and Assessment on the project has been decided based on the differences in their understandings between NGOs and POSCO. It is our understanding that the third party Independent Review and Assessment will be focused on whether POSCO has actually violated the OECD Guidelines for Multinational Enterprises and thereby, APG ensures that its portfolio company operates in line with the OECD Guidelines.

As you may well recognize, we have provided the explanations and details of the project to the South Korean NCP including information of incidents occurred at the project site. Even prior to discussion with the South Korean NCP, we have talked with APG and confirmed the issues it raised in relation to the contentions made against the project by NGOs.

Moreover, we would like to emphasize that the governmental authority of India has neither raised any negative issue concerning the project nor restricted business operations of POSCO India in the country.

Despite the communications and efforts made by POSCO, you have determined that more work needs to be done to identify, prevent and mitigate any negative impacts related to POSCO's operations and investments in Odisha. We understand that it is a necessary process and thereby we are prepared to cooperate with the Dutch NCP's consultation process as well as the third party Independent Review and Assessment.

We are prepared to discuss with ABP, APG and NGOs in regards to the procedures of selecting the independent assessor for the Review and Assessment; and determine the scope of business and project related information, including confidential information. However, we would like to share our concerns and request several matters to be satisfied prior to the initiation of the assessment.

#### Review & Assessment Mission and Selection Procedure

In the Joint Statement, it has been stated that at least one member of the third party Mission shall be from India or Indian origin with a sound understanding of the local situation and context. For the selection of the assessor institutions and/or assessors, we would like to kindly request you to consider whether such institutions and/or individuals have complete independency without bias to the project and required skills and professionalism for conducting the Assessment.

### Scope and Procedures of Review & Assessment

In order to conduct the Independent Review and Assessment more efficiently, we would like to suggest you to first review the validity of the arguments raised and their grounds of NGOs prior to the initiation of the Review. Also, there may be certain confidential information of POSCO that needed to be assessed whether they can be disclosed, and there are certain issues raised by NGOs that are directly related to the central government of India and the state government of Odisha, but not POSCO. We thus believe that it may be more appropriate and proper for certain issues and decisions made by the Indian authorities to be dealt separately with the central government of India and the state government of Odisha.

### Result of Review & Assessment and Disclosure Criteria

We principally agree with the disclosure of the findings of the Mission to the public after concluding the Review and Assessment; however, we would like to further stress that certain legal restrictions and confidentiality requirement shall require prior discussion. Moreover, we further request that we shall be given with an opportunity to review the validity of the draft report and object to any issues discovered during the process and reassess certain findings of the Assessment.

We believe the Review and Assessment will be an opportunity for us to supplement the communications previously made and reevaluate the risk management of investment overseas. As we plan to fully cooperate with the process, please contact us without hesitation at any time if you have any concern of question regarding this matter.

Thank you.

Yours sincerely,



SHIM, Tong-Wook  
Senior Vice President  
Head of Finance Department  
POSCO

> P.O. Box 20061 2500 EB Den Haag The Netherlands

**CONFIDENTIAL**

Mr. SHIM, Tong- Wook  
POSCO Center  
892 Daechi4-dong  
Gangnam-gu  
Seoul, 135-777  
South Korea

**The Netherlands National  
Contact Point OECD  
Guidelines**

**Visit address**

Bezuidenhoutseweg 67  
2594 AC Den Haag  
The Netherlands

[www.oesorichtlijnen.nl](http://www.oesorichtlijnen.nl)

**Postal address**

P.O. Box 20061  
2500 EB Den Haag

**Dealt with by**

Sylvia Deepen

T: +31 (0)70 348 4200

E: [ncpoecd@minbuza.nl](mailto:ncpoecd@minbuza.nl)

Date August 6, 2013

Re Your letter dated July 10, 2013

Dear Mr. SHIM, Tong-Wook,

Thank you for your letter dated July 10, 2013, which has been forwarded to us by APG.

We very much welcome your willingness to cooperate with the Independent Review Assessment as stipulated in the Joint Agreement of ABP, APG, SOMO and BothEnds, dated March 8, 2013. The Netherlands NCP is deeply aware that your collaboration is essential to realize improvements on the ground in Odisha, India.

The Netherlands NCP definitely encourages such a mission to take place because it may contribute to creating the conditions necessary to establish a meaningful stakeholder consultation with all relevant stakeholders affected by your plans and activities in Odisha, India. The Netherlands NCP would contribute to such a mission provided that it is jointly commissioned with the South Korean NCP and the Norwegian NCP, and in close consultation with all appropriate Indian authorities. To that end we have brought your letter to the attention of the South Korean and Norwegian NCP and will discuss joint options on this matter. We look forward to informing you on their response in due time.

Yours sincerely,



Herman Mulder

Netherlands National Contact Point OECD Guidelines