

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 Point s (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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29 OECD Guidelines, Chapter I (Concepts and Principles), para 3.

30 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>

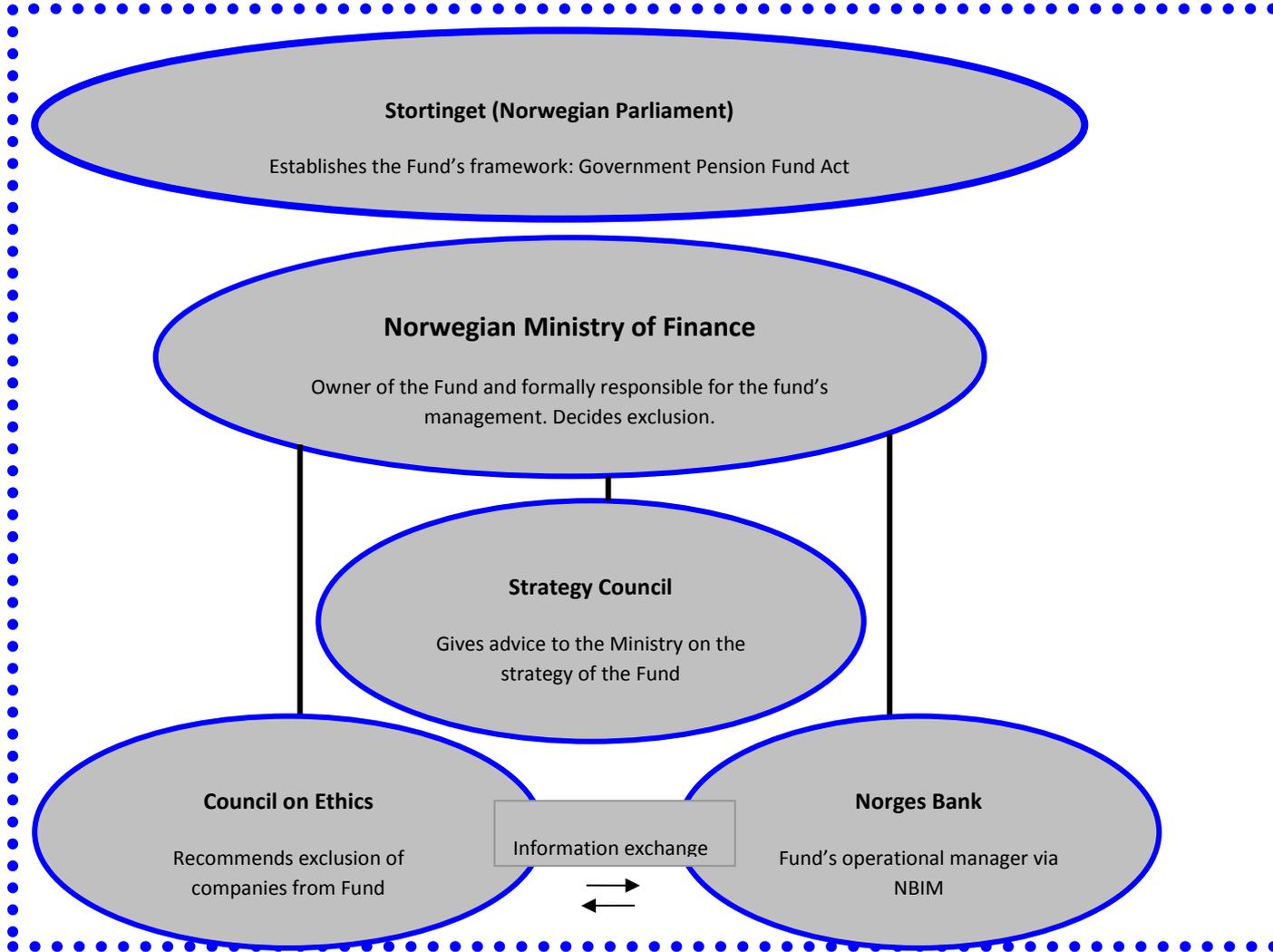
The general structure of the Fund is set out below. Although the Council on Ethics may be the most well-known part of the social responsible policy of the Pension fund, it is important to underline that from the point of view of the ethical guidelines, limits to the investment universe and divestment 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”.

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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.**

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#### 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 be 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 ENTERPRIZE 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)

Thank you for the meeting yesterday on 12 February 2012, where NBIM held a presentation for the Norwegian NCP and presented their views on why the NCP should not have accepted the complaint. As for the past, the Norwegian and the Dutch NCP in consultation agreed that the OECD guidelines cover minority shareholders and the existence of a "business relationship" in the Code. The OECD Investment Committee has tasked national contact points (but not the respondent companies) to assess whether a case falls under the guidelines or not. This question was finally settled by the Norwegian NCP November 27, 2012 and the Dutch NCP December 10,

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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>

2012.

We do not consider the presentation and discussion at the meeting in response to the 33 specific questions from the national contact point to NBIM. We therefore ask NBIM to reconsider its decision not to respond to the NCP's questions.

As emphasized by us in the meeting, Norway has an obligation by public international law to promote the OECD Guidelines and the OECD national contact point scheme, and we expect Norwegian actors to respect the OECD guidelines and cooperate with OECD national contact point. The OECD Guidelines "jointly recommend to multinational enterprises operating in or from their territories the observance of the Guidelines," ref preamble to the guidelines p. 8 This recommendation implies at least a willingness to cooperate with the national contact point. Cooperation with the OECD contact point for OECD guidelines is a key part of "responsible business conduct".

"Confidential business information" is not a sufficient reason not to provide information to the contact point, see section C-4 Implementation procedure p.73. We will not accept this as a reason not to answer our questions. After Implementation Procedure Section C-3 c) (p. 73) the NCP is to provide "a statement when ... a party is unwilling to participate in the procedures" that include the NCPs recommendations.

If the NCP does not get a response from NBIM to their questions, the contact point must conclude that NBIM regretfully do not follow the recommendation to follow the guidelines and that NBIM does not follow basic requirements for responsible business conduct.

If NBIM choose not to answer the questions to the national contact point, this is particularly regrettable in light of the specific expectation that apply to state-owned entities, see the commentary on the General Principles section 10 p 22.

The NCP will consider presenting a conclusion on NBIMs practice in relation to the OECD guidelines and the guidelines that are given to the Fund by the Ministry of Finance

The NCP final statement ("final statement") will contain a description and assessment of the difficulties we have experienced in their efforts to bring about a constructive dialogue with NBIM.

We encourage NBIM on this background by Monday, February 18, 2013 at 14:00 to answer questions that were submitted NBIM on January 4, 2013 with a deadline of January 25, 2013.

Regards Hege Røttingen

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

## 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 statseiede 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)