



Norwegian Forum
for Development
and Environment



MOVING BACKWARDS OR FORWARDS?

– Norway's Approach to Responsible Investment

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Cover photo: A woman carries a bundle of dried grass along a road through which a proposed railway will pass through in Dinkia, Odisha, India, on Sunday, 19th January 2014. Photographer: Prashanth Vishwanathan/Bloomberg via Getty Images.

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SUMMARY

In 2013 the Norwegian government began to raise a number of objections to international principles that promote responsible business conduct. In meetings of the Paris-based OECD Investment Committee, Norway lobbied for certain 'clarifications' to the OECD Guidelines for Multinational Enterprises - the main principles that encourage companies from OECD states to behave responsibly. The Norwegian government changed its position in mid-2014, accepting the international consensus on these issues, but doubts remain whether the policy change will be fully implemented in practice and whether the government will take a strong stance to ensure that the OECD Guidelines are implemented by Norwegian institutions.

Norway's challenge to these international principles began after an investigation into an investment by Norges Bank Investment Management (NBIM), the body that manages Norway's huge Oil Fund. The investigation, by the National Contact Point (NCP) for Norway under the OECD Guidelines, was related to the Oil Fund's investment in a controversial steel project in India by South Korean company, POSCO. The NCP found that the NBIM had violated the OECD Guidelines.

Norway made three challenges to international principles concerning corporate responsibility:

- That the OECD Guidelines should not apply to minority shareholders
- That the Guidelines should not apply to sovereign wealth funds such as the Oil Fund
- That 'local' National Contact Points under the OECD Guidelines should take the leading role in handling complaints against companies.

A litany of responses by the UN and OECD confirmed that Norway's positions were wrong and not in accordance with the OECD Guidelines and other global norms on responsible business conduct. Norway was the only country pushing for such changes and was isolated in the OECD on these issues.

It appears that Norway's Ministry of Finance took the lead in making these challenges, overriding the lead role previously played on these issues by the Ministry of Foreign Affairs. Norway's position was surprising in light of the relatively progressive role that past Norwegian governments have played on corporate responsibility. This role now appears to be rolled back, a stance begun by the previous Labour-led government and continued by the present Conservative-led government. The main reason for the Norwegian stance appears to be that policy makers feared that the Guidelines could challenge the financial interests of the state, and that there could be a flood of complaints and future NCP investigations into other Oil Fund investments.

In June 2014, after more than a year of making these challenges, the Norwegian government officially withdrew its request for 'clarifications' on these issues in the OECD and accepted the international consensus. However, its stance also shows that it remains unclear the extent to which the government will encourage the financial institutions under its jurisdiction to implement the OECD Guidelines.



Norway's lobbying has been the first major challenge to the global norms on responsible business conduct since the UN Guiding Principles on Business and Human Rights were endorsed, and the OECD Guidelines revised, in 2011. Oslo's efforts could have undermined broader development policies. As regards minority shareholdings, if the Guidelines were to apply only to majority shareholdings, this would be tantamount to abolishing them (since most investments are minority shareholdings), meaning that the entire system of corporate responsibility would be challenged. Similarly, if the Guidelines were to exclude sovereign wealth funds that act on commercial terms, this would absolve those governments from promoting the global norms and therefore remove moral or practical levers they have to encourage the companies based in their countries to do the same.

Norway's stance also risks distracting attention from the real need, which is to encourage states to be much *more* proactive when it comes to promoting responsible business conduct. Instead, Norway could open up a downwards-facing debate on *reducing* global standards for corporate responsibility and could set a precedent for revising global rules to benefit corporations.



INTRODUCTION

'Our most important instrument for monitoring industry abroad is the national contact point for the OECD Guidelines'

Jonas Gahr Støre, then Minister of Foreign Affairs, June 2012

During 2013 and early 2014, the Norwegian government raised a number of objections to international principles that promote responsible business conduct. In meetings of the Paris-based OECD Investment Committee, Norway lobbied for certain 'clarifications' to the OECD Guidelines for Multinational Enterprises² - the main set of principles that encourage companies from OECD states to behave responsibly, including by promoting human rights. This analysis examines Norway's stance and argues that there could have been adverse implications for the protection of human rights globally if Norway's challenge to the international community had succeeded.

Norway's challenge to these international principles was launched following an investigation into one particular investment by Norges Bank Investment Management (NBIM), the body that manages Norway's huge Oil Fund (formally known as the Government Pension Fund Global). The investigation, by the National Contact Point for Norway under the OECD Guidelines, concerned the Oil Fund's investment in a controversial steel project in India by South Korean company, POSCO (see box 1). The Oil Fund holds (at December 2013) a 0.71 per cent stake in POSCO, worth NOK 1.16 billion (€143 million), though held a 0.9 per cent stake worth NOK 1.42 billion (€175 million) at the end of 2012, when the NCP investigation was launched. In addition to this equity stake, the NBIM has a NOK 264 million fixed income bond holding in POSCO.³ The NCP investigation, launched following a complaint by the Forum for Development and Environment on human rights grounds, found that the NBIM had violated the OECD Guidelines.

Norway's challenges to international principles on corporate responsibility were surprising in light of the relatively progressive role that past Norwegian governments have played on this issue. Norway produced the first White Paper on corporate social responsibility in 2009 and has since 2004 accorded the Oil Fund stronger ethical principles, including an independent ethics council, than many other institutional investors. Moreover, Norway played a leading role in the negotiations leading up to the endorsement of the UN Guiding Principles on Business and Human Rights in 2011 (see below) and in efforts to strengthen the OECD Guidelines over the same period.

This Norwegian role now appears to be rolled back, a stance begun by the previous Labour-led government and continued by the present Conservative-led government.



Box 1: The POSCO project and the Oil Fund

South Korean company POSCO is promoting a giant \$12 billion steel plant in the port city of Paradip in the state of Odisha, one of the largest foreign investments in India. Yet the project threatens to displace 22,000 people and has been widely accused of abusing human rights. Government approval for the project was given in 2011 after a six-year struggle between the company and environmental campaigners, but construction has been delayed by public protests at plans to clear 1,600 hectares of mostly forested land.⁴ In October 2013, no less than eight UN special rapporteurs called on POSCO to halt the construction of the steel plant, unless the rights of those affected were respected.⁵ POSCO claims that project will create 48,000 direct and indirect jobs in the region and 'is expected to bring about meaningful growth and investment in India, and would also further downstream industries like automobile, shipping and construction'.⁶

In December 2013, the Oil Fund's Ethics Council revealed that in June 2012 it had written to the Ministry of Finance to request that POSCO be excluded from the Oil Fund's investments. The reason was that POSCO had stocks in South Korean conglomerate, Daewoo, which was recommended to also be excluded from the fund because of its investments in Burma. The Oil Fund has reportedly ignored reports of abuses in Burma in years.⁷

The Oil Fund

Norway's Government Pension Fund Global, managed by NBIM, is a huge pot of money worth NOK 5.0 billion (at the end of 2013⁸), amounting by some estimates to around 1.25 per cent of all global equities.⁹ The Fund invests in over 7,000 companies in 82 countries.¹⁰ Norway's Ministry of Finance regularly transfers petroleum revenue to the fund. The capital is invested abroad to avoid overheating the Norwegian economy and to shield it from the effects of oil price fluctuations. The fund invests in equity and fixed-income markets and real estate, with the aim of having a diversified investment mix that will provide the highest possible risk-adjusted return within the guidelines set by the ministry.¹¹

Although the Fund has withdrawn investments from over 60 companies on human rights or environmental grounds, it continues to invest in *most* of the world's companies that are most heavily criticised by NGOs and others for involvement in human rights or environmental abuses, such as Nestlé, Shell (which two companies are among the Fund's largest equity investments¹²) BP, Brazilian mining company Vale, Glencore Xstrata and Coca-Cola.¹³



1. THE NCP COMPLAINT AND RULING

The Oil Fund's investments have been explicitly subject to the OECD Guidelines since 2004, according to the parliamentary mandate given to NBIM for administering the Fund. NBIM accepts that the OECD Guidelines 'serve as a basis for our responsible investment and active ownership with regard to the companies we invest in and their standard of conduct'.¹⁴

Box 2: The OECD Guidelines and UN Guiding Principles

The OECD Guidelines for Multinational Enterprises are the most comprehensive set of government-backed recommendations on responsible business conduct in existence today. According to the OECD, 'the governments adhering to the Guidelines aim to encourage and maximise the positive impact MNEs can make to sustainable development and enduring social progress.'¹⁵

The UN Guiding Principles on Business and Human Rights, which were endorsed by states in 2011, outline principles for states and companies to prevent and address human rights abuses by companies. The principles cover three pillars: the state duty to protect against human rights abuses, including by business enterprises; the corporate responsibility to respect human rights; and the requirement for states and companies to provide access to effective remedy.¹⁶

Since 2011, the OECD Guidelines, building on the UN Guiding Principles on Business and Human Rights have introduced new expectations on corporate conduct by stating that companies should:

- Avoid causing or contributing to adverse impacts through their own activities, and
- Seek to prevent or mitigate adverse impacts 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.¹⁷

In 2012, a complaint concerning NBIM was made to Norway's National Contact Point by the Forum for Environment and Development and NGOs in South Korea, India and the Netherlands. The complaint was that NBIM had failed to take appropriate steps to prevent or mitigate human rights and environmental impacts in connection with its investment in POSCO. It requested NBIM to increase efforts to use its leverage to influence POSCO and to disclose minimum criteria for the continuation of the investment in POSCO.¹⁸

After investigating the complaint, the NCP issued its final statement in May 2013, and asserted that NBIM was violating the OECD Guidelines on two counts:

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- The first was that NBIM was 'refusing to cooperate' with the NCP and thus violating the Procedural Guidance of the Guidelines. NBIM had '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 second was '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'. The NCP concluded that NBIM was expected to develop a risk-based approach to human rights and that, while NBIM already takes such an approach to certain human rights risks – such as child labour – it should also 'integrate other human rights risks into their risk management system'.¹⁹
(Currently, NBIM has six focus areas for its ownership activities; as well as children's rights, it also addresses equal treatment of shareholders, shareholder influence and board accountability, well-functioning, legitimate and efficient markets, climate change risk management and water management.²⁰)



2. NORWAY'S THREE CHALLENGES TO THE GLOBAL PRINCIPLES AND CHANGE IN POSITION

Norway took several steps during 2013 and early 2014 to challenge certain key principles promoting corporate responsibility outlined in the OECD Guidelines and UN Guiding Principles.

Throughout the NCP investigation, NBIM submitted that the OECD Guidelines did not apply to **minority shareholdings** in companies and thus that the complaint against NBIM should be rejected.²¹ Just before the NCP ruling, in May 2013, NBIM issued a media release confirming its view that:

'as the Bank is a minority shareholder, the OECD Guidelines for multinational enterprises do not apply to the Bank'.²²

NBIM also challenged the Guidelines in two other areas that are key to principles relating to business responsibility – the notion of '**business relationships**' and that of companies being '**directly linked**' (see box 3). The NBIM stated:

'The Guidelines are directed towards conditions between business partners ("business relationship"), entities in the supply chain, or other entities directly linked to an enterprise's business operations, products or services. In our view, Norges Bank is not in such a business relationship with POSCO or the other companies in which Norges Bank holds a minority share.'

And it added:

'The Guidelines also presuppose that there is a direct link between Norges Bank's operations and the potential negative impact caused by the company in question. Norges Bank is of the view that there cannot be said to be a direct link between a minority shareholder and any negative impact caused by companies or their subsidiaries in which we invest.'²³

On all these points, NBIM either misunderstood the Guidelines or else was seeking to challenge them, or perhaps a mixture of both. Not only are minority shareholders indeed covered by the Guidelines (see below), NBIM's understanding of 'business relationships' and 'directly linked' was flawed (see box 3). As outlined in the OECD Guidelines, NBIM was clearly 'directly linked' to POSCO by being in a 'business relationship' with it.



Box 3: Key definitions in the discussion

The Guidelines require enterprises to seek to prevent or mitigate adverse impacts where these are '**directly linked**' to other enterprises' operations by a business relationship. For financial institutions (such as NBIM) **business relationships** include employees, suppliers, clients, customers and investee companies.

But the term 'directly linked' is confusing and open to misinterpretation. For an enterprise to be 'directly linked' to adverse human rights impacts does not mean that it has *caused* or even contributed to those adverse impacts or even that there is a direct link between the enterprise and those impacts. 'Directly linked' means that there is a 'business relationship' between the enterprises. In the present case, NBIM is an investor in POSCO, which is accused of human rights abuses. 'Directly linked' does not mean that NBIM is causing or even contributing to those human rights abuses but simply that it has a business relationship with POSCO.

A further important issue is that the responsibility of an enterprise to carry out due diligence and/or mitigate human rights impacts of business with whom it has relationships is not determined by whether it has **leverage** over the other company.

After the NCP ruling, NBIM responded to the OECD Investment Committee – the body that monitors the OECD Guidelines – in June 2013, in a letter that was later obtained by the Forum for Development and Environment. NBIM criticized the NCP's view that 'minority shareholders, irrespective of the size of the shareholding, are subjected to the full range of obligation under the Guidelines, including human rights due diligence'. It then added:

'In our opinion there is no "direct link" (causality), as required by the Guidelines, between a minority shareholding and the alleged human rights violations attributable to the company we have invested in'.²⁴

NBIM had again appeared to mis-interpret 'direct linkage' by implying that it meant 'causality' of human rights abuses.

In the same letter, NBIM also asserted that the NCP had interpreted the Guidelines in 'a new way'. In conclusion, NBIM stated that 'the applicability of the Guidelines to minority shareholders warrants a separate and thorough assessment'. Indeed, it asserted that 'We anticipate clarifications... so that minority shareholders are under no obligations under the Guidelines'.²⁵ Thus it 'advised' the OECD Investment Committee 'to contribute to a clarification that the Guidelines in general do not apply to minority shareholders in their relationship to investee companies'.



In September 2013, the Ministry of Foreign Affairs (MFA) also weighed in, with a letter to the OECD Investment Committee. It reiterated NBIM's view that 'the Guidelines apply to companies where the Fund has invested but not to minority shareholders in their relation to investee companies', and also sought 'clarification' on this from the Committee. But the MFA's September letter went further than the NBIM's June letter in also asking the Committee to 'clarify the extent to which the Guidelines are adapted to fit the role of **sovereign wealth funds** like ours and central banks'. It added that the recent interpretation of this matter by the High Commissioner for Human Rights – who confirmed that minority shareholders are indeed covered by the Guidelines (see below) – was 'useful but is in our view not sufficient'.²⁶ This was clearly a particular challenge to the UN. Sovereign Wealth Funds, of which Norway's Oil Fund is an example, are special purpose investment funds or arrangements, owned by government, which are commonly established out of balance of payments surpluses, the proceeds of privatisations, and/or receipts resulting from commodity exports.

But then the MFA issued a third challenge, concerning the role of **National Contact Points** under the OECD Guidelines – the bodies established in each country adhering to the Guidelines that handle complaints against companies. The MFA argued that since the NBIM was just one of nearly 200,000 investors in POSCO, 'that raises questions relating to the consistency in the processing of specific complaints under the Guidelines'. The MFA also expressed its concern over the fact that 'the local NCP and the Norwegian NCP reached different conclusions'. It concluded:

'In our view, a procedure whereby the local NCP, being closest to the company in question, takes the lead and in consultation with other NCPs involved makes a final decision, should be the preferred solution'.²⁷

The local NCP meant the NCP in South Korea, not Norway.

Following this letter, Norway's lobbying continued, especially in meetings of the OECD Investment Committee's Working Party on Responsible Business Conduct – the body tasked with ensuring the effective implementation of the Guidelines. Norway pushed the view that more work was needed to clarify the interpretation of business relationships in relation to minority investments and how the Guidelines apply to minority shareholders. In addition, Norway continued to raise concerns about the applicability of the Guidelines to sovereign wealth funds and suggested that further work by the Working Party was needed on this.

Norway was the only country pushing for such clarifications and was therefore isolated in the OECD on these issues. Hans Petter Graver, the head of Norway's NCP who was in Paris for the October 2013 meeting of the OECD Investment Committee's Working Party on Responsible Business Conduct, was reportedly told by his government not to attend the meeting, along with two other NCP staff.²⁸ It appeared that the government was trying to marginalise the body that had recently rebuked it for its investment in POSCO. In summary, Norway was making three challenges to international principles concerning corporate responsibility:

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- That the OECD Guidelines should not apply to minority shareholders
 - That the Guidelines should not apply to sovereign wealth funds, such as the Oil Fund, at all
 - That 'local' NCPs should take the leading role in handling complaints under the OECD Guidelines.

It appears that it was Norway's Ministry of Finance that made these challenges and that essentially overrode the lead role previously played on these issues by the Ministry of Foreign Affairs. It was only after the NCP ruling on the POSCO case that the Ministry of Finance began to engage on these issues.

The key principles

After Norway began issuing its challenges to the Guidelines, there were a litany of responses by the UN and OECD confirming that Norway's positions were indeed wrong. These responses, together with Norway's continued positioning, show that the government cannot simply have mis-interpreted the principles, but was directly challenging them.

Minority shareholdings

The Norwegian NCP, as well as the Dutch and UK NCPs with which it consulted during the investigation into NBIM, all came to the conclusion that the Guidelines apply to minority shareholdings.²⁹ Following Norway's assertions at the OECD on minority shareholdings, the Working Party on Responsible Business Conduct was tasked to clarify the Guidelines' applicability to such shareholdings. It concluded both in its November 2013 and May 2014 reports that minority shareholders are indeed covered by the term 'business relationships' under the Guidelines.³⁰

That minority shareholdings are covered by the UN Guiding Principles, which are aligned to the Guidelines, has also been confirmed by the Office of the High Commissioner for Human Rights, the UN Working Group on Business and Human Rights and the former UN Secretary-General's Special Representative for Business and Human Rights (Prof. John Ruggie), the latter who presided over the establishment of the UN Guiding Principles in 2011.³¹

The Office of the High Commissioner for Human Rights pointed out, for example, that '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'. And that the 'relative size or percentage' of the shareholding 'is not a factor' in determining whether there is a business relationship between enterprises.³²



Sovereign wealth funds engaged in commercial activity

The OECD Guidelines do not apply to Central Banks – since these are not typically considered as having activities of a commercial nature – but they do apply to sovereign wealth funds under certain circumstances: when they are engaged in activities of a commercial nature.

Norway's NCP produced a report in September 2013 for the OECD Investment Committee addressing whether NBIM was covered by the Guidelines. It concluded that it was, since 'there can ... be no doubt that NBIM according to its operation and activities cannot be distinguished from commercial operators in the market'. The NCP report cited a 2009 letter by NBIM confirming that it acted as a regular commercial actor and 'institutional investor' and that it operates purely in accordance with financial and commercial interests as a long-term investor.³³

In fact, the international norms suggest there is a *particular* onus on states – the managers of sovereign wealth funds - to ensure that their operations support human rights. 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'.³⁴

National Contact Point process

Norway's concern that the 'the local NCP and the Norwegian NCP reached different conclusions' and that the 'local NCP, being closest to the company in question' should take the lead, points to a misunderstanding of the terminology and rules of the Guidelines. Under the Guidelines, the 'local' NCP is the *host* country (ie, India) and this is also where the issues have arisen; the 'home' NCP is South Korea. The rule is that 'generally, issues will be dealt with by the NCP of the country in which the issues have arisen', ie, India.³⁵

However, in the POSCO case there was no local country NCP because India has not adhered to the Guidelines and thus does not have an NCP. Moreover, the POSCO case involves investors from different countries, hence the case was submitted to all the home country NCPs, which were required to 'consult with a view to agreeing on which NCP will take the lead in assisting the parties' and if necessary 'seek assistance from the Chair of the Investment Committee in arriving at such agreement'. The Norwegian NCP is home to NBIM which as the case developed became the 'enterprise' in question. While there was a lamentable failure in NCP coordination between the Norwegian and South Korean NCPs, this points to the need to follow the rules and involve the OECD Chair on a timely basis, not to any need to re-write the procedural guidance.

Norway's recent position on NCPs comes out of the blue in showing apparent distrust of the NCP system. It stands in marked contrast to Norway's role as a leading supporter of strengthening the NCPs during the discussions on this in 2011. It also contrasts with Norway's past decision to make its own NCP an independent expert body under a



prominent figure, Prof Hans Petter Graver, who was previously charged by the government to set up the ethical council that screens the Oil Fund's investments.

The change in position

Norway's stance on these issues provoked some criticism in certain media and NGO circles but was also the subject of debate within the government. In March 2014, the government reached a 'compromise' position internally to the effect that the OECD Guidelines should apply to minority shareholders 'in principle'. Our understanding is that although the phrase 'in principle' may have meant *all the time* to the Ministry of Foreign Affairs, to the Ministry of Finance it appears to have meant *not necessarily in practice*. It was questionable whether the government's position had fully changed, although in the March meetings of the OECD a consensus on the issues was reached to which Norway did not object.

In June 2014, however, a letter from the Norwegian Ministry of Foreign Affairs to the OECD confirmed that Norway's formal position had indeed changed. The letter stated that 'we no longer see a need for further clarifications' on the applicability of the Guidelines to sovereign wealth funds, saying that the OECD discussions had helped Norway reach this understanding. However, the letter also raises some uncertainties about Norway's future stance towards the OECD Guidelines. It outlines Norway's strong support for the Guidelines but also stresses the fact that the Guidelines are merely 'recommendations and not legally enforceable'. The letter states:

'It would be up to the financial institutions themselves to consider how and in what ways observance of the Guidelines could be implemented in their business strategies, as this is not required by legislation. Our efforts should focus on how to provide the best possible practical advice and clear expectations for the multitude of business relationships within the financial sector'.

Thus the government is reiterating that it will be up to NBIM to decide the extent to which it 'could' observe the Guidelines. The statement also suggests that the Norwegian government will provide some guidance on this, but implies that this may not be strong given the 'multitude' of investments. Given that the Guidelines are voluntary and not binding on companies, the strength of the guidance on implementing those Guidelines given by the government will be crucial in determining the extent to which Norwegian institutions (and companies) are encouraged to promote them.

Norway's letter did not address its third challenge, concerning the role of NCPs, and there is no indication that its position on this has changed.



3. IMPLICATIONS OF NORWAY'S STANCE

It is ironic that a state regarded as having relatively progressive policies concerning business behavior has been challenging the OECD's corporate responsibility principles. Why Norway? The main reason appears to be that Norwegian policy makers fear that the Guidelines could challenge the financial interests of the state, and that there could be a flood of complaints and future NCP investigations into other of the Oil Fund's investments. Norway fears that it would be required to have due diligence strategies for many more of its investments.

It could also be the case that the Norwegian government takes these issues more seriously than other states and that it has actually *noticed* that there are expectations (albeit voluntary) on governments and companies to promote corporate responsibility as enshrined in the OECD Guidelines and the UN Guiding Principles. Other governments seem content to largely ignore these principles but Norway may have concluded that they could actually affect its investments.

Norway's lobbying has been the first real challenge to the global norms on responsible business conduct since the UN Guiding Principles were endorsed, and the OECD Guidelines revised, in 2011. If Norway's efforts had continued, they could have undermined broader development policies in several respects.

First, on **minority shareholdings**, if the norms – ie, Guidelines and the UN Global Principles – were to be changed so as not to apply to such shareholdings, they would barely apply to any investments at all: most investments constitute minority stakes in enterprises. (The Oil Fund's equity investment in enterprises averages around 1 per cent and does not often exceed 5 per cent.³⁶) This would remove a key instrument for encouraging investors around the world to promote human rights. Applying the Guidelines to majority shareholdings only would be tantamount to abolishing them, meaning that the entire system of corporate responsibility would be challenged. It is an indictment of developed country governments that the OECD Guidelines are only voluntary and non-binding on businesses, but to weaken them still further would be scandalous.

Second, if the Guidelines were to exclude **sovereign wealth funds** that act on commercial terms, this would absolve those governments from promoting the global norms and therefore remove any moral or practical lever they have to encourage the companies based in their countries to do the same. Norway's NCP has argued that if a government were to exclude its own operations from the Guidelines, it would be difficult to argue that its companies should adhere to them. 'In the final instance this is the most persuasive argument for the NCP in applying the Guidelines to NBIM'.³⁷ In fact, it is hard to see why companies would agree to abide by global norms when state-owned sovereign wealth funds do not. Again, the current system of corporate responsibility would be fundamentally challenged. The fact that Norway's Oil Fund has been making this argument is unlikely to increase the prospects for other states and enterprises to abide by the global norms. This is especially the case since the Fund is



regarded as an ethical leader and many institutional funds are influenced by the Oil Fund's ethical policies.

Third, Norway's stance risked watering down companies' approach to **due diligence**. Under the Guidelines, when companies have business relationships with others, they are expected to promote due diligence in their operations to identify potential or actual impacts on human rights that they may be involved in as part of their business relationships. It is recognised that some financial institutions (such as NBIM) have hundreds or thousands of clients and that it may not be practical to conduct specific due diligence on all of them. However, enterprises with large numbers of business relationships are encouraged to identify general areas where the risk of adverse impacts is the most significant and, based on that risk assessment, prioritise the most severe impacts and the business relationships that have the highest potential for creating such impacts. Due diligence should be ongoing and proactive, and carried out throughout the entire life-cycle of operations.

Yet there is no evidence that NBIM did this in the case of POSCO; nor is it likely to in other cases unless it strengthens, not weakens, its policies in this area. The NCP concluded in its complaint regarding POSCO that, with respect to NBIM's failure to address all aspects of human rights, companies:

'should not simply choose to only address a small spectrum of human rights... Rather, responsibilities are tied to impacts: enterprises should be prepared to address the impacts they have, not just those they find of interest'.³⁸

The NCP stated that, after NBIM was informed that POSCO was accused of responsibility for human rights violations, 'it should have investigated them'. Yet the NCP received no information that NBIM did, or had intentions, to do so.³⁹

Fourth, an overall problem with Norway's stance – which remains following Norway's change of position - is that it **distracts attention and resources** from the real need, which is to encourage states and companies to be much *more* proactive when it comes to promoting responsible business conduct. The potential for investors to prevent human rights and other abuses in investee companies is often large. Norway's National Contact Point argued that NBIM's past actions suggest that it can engage companies on these issues even when it is a minority shareholder. It cites the example of NBIM engaging with Monsanto on child labour in India, when its ownership in Monsanto was lower than its current interest in POSCO.⁴⁰ The NCP also argues that NBIM could use the mechanism of shareholder proposals to influence POSCO's actions. Indeed, NBIM notes in its Responsible Investment Policy that it will vote for shareholder resolutions for proposals that request companies to disclose social or environmental impact assessments and that request the adoption of human rights codes of conduct.⁴¹

Fifth, and more broadly, Norway's stance risks **opening up a downwards-facing debate** on *reducing* corporate responsibility. It thus could have far greater implications than simply for the OECD Guidelines and UN Guiding Principles, but could set a precedent for further revising global rules to benefit corporations. The head of Norway's National Contact Point, Professor Hans Petter Graver, recently told NRK, Norway's public broadcaster: 'If we are once again to open up the discussions about what these policies



entail and limit them to the legal obligations, then we're back to where we started'.⁴² States such as the US and UK are now hardly even hiding their strategy of empowering big business in developing countries; their aid programmes are now focused on promoting 'public-private partnerships' and funding private foundations whose major beneficiaries are often transnational corporations seeking new markets. Unless this trend is reversed, it is not only the people affected by POSCO's steel plant that will be victimised, but people the world over.

Finally, on the **NCP process**, the risk remains that Norway's position on 'local' NCPs could marginalise the role of NCPs in the home states of multinational companies or investors. Indeed, a key feature of the NCP system is that companies can be investigated by the NCP in their home states.⁴³ Although NGOs have often criticised some NCPs for failing to take sufficient action following complaints, the NCP process is the most important non-judicial approach that currently exists for companies to be held to account for involvement in human rights and other violations overseas. The system needs further strengthening, not weakening.



RECOMMENDATIONS

Norway's National Contact Point challenged NBIM by asserting that 'the attitude by NBIM [to the NCP enquiry] gives reason to question whether NBIM has the necessary corporate culture to fulfil its duties as a responsible investor'.⁴⁴ In this context, and in that of the analysis in this report, the Norwegian government should ensure that NBIM:

- Supports an independent investigation into the human rights allegations against POSCO.
- Expands its internal human rights guidelines to include the full spectrum of human rights abuses and ensure that high-risk investments such as POSCO are subject to due diligence risk assessments.
- Expands its use of engagement tools, including shareholder proposals and direct engagement, to address human rights concerns
- Develops more robust disclosure and reporting on NBIM's human rights due diligence policies and active ownership strategies, and implement the NCP's recommendations
- Encourages investee companies, especially those in high-risk regions or sectors, to put in place due diligence systems and grievance mechanisms to address human rights concerns.
- Establishes its own grievance mechanism to consider complaints against its investee companies in order to help NBIM identify, prevent and mitigate the human rights impact of its investments and resolve disputes.

The Norwegian government should also:

- Ensure that its draws up strong guidance to ensure that Norwegian financial institutions and companies abide by the OECD Guidelines and the UN Global Principles, notably in the Norwegian Action Plan which is currently being developed.

The OECD Investment Committee's Working Party on Responsible Business Conduct should:

- Ensure that its work to 'clarify' the use of leverage/due diligence and the issue of 'directly linked' is limited to precisely that – clarifications – and does not revisit the general principles.
- Avoid a conflict of interest by ensuring that funding of future work in this area is from the OECD's budget. Given Norway's position it would not be appropriate for it to fund future OECD work in this area.

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