



*Submission to the UN Committee on Economic, Social and Cultural Rights (hereinafter ‘the Committee’) by ForUM – Forum for Development and Environment*

## **NORGES BANK INVESTMENT MANAGEMENT (NBIM) AND NORWAY’S COMPLIANCE WITH ITS EXTRATERRITORIAL OBLIGATIONS (ETOs)**

*Parallel Report in Response to the 5<sup>th</sup> Periodic Report of Norway on the Implementation of the International Covenant on Economic, Social and Cultural Rights*

### **INTRODUCTION**

Traditionally, states’ obligations have often referred only to the human rights of people living in their own territory. However, this does not mean that states do not have to pay attention to the human rights of people living in other countries. Especially in times of globalisation, international economic and political relations have intensified considerably.<sup>1</sup>

The CESCR employs the term “international obligations” to refer to what scholars often call ETOs, i.e. concerning the extent of State responsibility to individuals and communities outside their own territories. The textual departure point for such obligations is Article 2(1), which requires States to take steps, individually and through international cooperation, to progressively realise the rights, which is supported and complemented by other articles in the International Covenant on Economic, Social and Cultural Rights<sup>2</sup> such as Articles 11, 15, 22 and 23.

According to the Maastricht Principles<sup>3</sup>, the State is required to respect, protect and fulfil ESCR in all situations to which its jurisdiction extends, which include the following two main categories of ETOs:

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<sup>1</sup> A. Paasch et al. (2007): *Trade Policies and Hunger: The impact of trade liberalisation on the Right to Food of rice farming communities in Ghana, Honduras and Indonesia*. FIAN, Heidelberg.

<sup>2</sup> The International Covenant on Economic, Social and Cultural Rights is hereafter referred to as ‘the Covenant’.

<sup>3</sup> See: [http://www.fian.org/fileadmin/media/publications/2012.02.29 - Maastricht Principles on Extraterritorial Obligations.pdf](http://www.fian.org/fileadmin/media/publications/2012.02.29_-_Maastricht_Principles_on_Extraterritorial_Obligations.pdf), accessed 31.08.2013.

- State obligations relating to conduct within or beyond its territory: Obligations binding upon a state relating to its conduct, within or beyond its territory, that has effects on the enjoyment of ESCR outside of that state’s territory.
- State obligations of a global character: Obligations of a global character set out in the Charter of the United Nations and human rights instruments<sup>4</sup> to take action, separately, and jointly through international cooperation, to realise ESCR universally.

This report will highlight a specific case related to Norway’s compliance with its ETOs in the area of ESCR. More specifically, it will focus on Norges Bank Investment Management (NBIM), the Norwegian State entity managing the Government Pension Fund Global (GPF), and the actions in India of a South Korean multinational company, POSCO Limited, in which the GPF is invested. The GPF is wholly owned by the Norwegian government from which NBIM has also received its mandate. This particular case has already undergone a significant and thorough complaint process in Norway and NBIM has been found in breach of the OECD Guidelines for Multinational Enterprises (the OECD Guidelines).<sup>5</sup> Furthermore, this process will be outlined after a brief mention of methodology and sources.

## METHODOLOGY AND SOURCES

The main motivation of this report is to contribute to the Committee’s analysis of the ETOs of Norway in the area of economic, social and cultural rights (ESCR) in order to ensure sound management of the world’s largest State investment fund and to make Norway aware of and accountable for its responsibilities and obligations abroad. It is also important to ensure a continued commitment by the Norwegian Government to stay at the forefront of human rights respect, protection and fulfilment.

Legal analysis dominates the discussion on ETOs and draws on a number of legal sources, including General Comments, concluding observations, Maastricht Principles, Commentary to the Maastricht Principles and other academic sources. A comprehensive legal discussion of the ETOs, based on jurisprudence and complemented by other international treaties and the founding *Maastricht Principles* can be found in the commentary written by the Special Rapporteur on the Right to Food, Dr. Olivier De Schutter, and other experts on international human rights law.<sup>6</sup>

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<sup>4</sup> Including ICESCR, CRC, CEDAW.

<sup>5</sup> The Norwegian Ministry of Finance has mandated NBIM to be in accordance with the OECD Guidelines in order to be a responsible investor: “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. The Bank shall have internal guidelines for its exercise of ownership rights that state how these principles are integrated.” <http://www.nbim.no/en/About-us/governance-model/management-mandate/> (accessed 11<sup>th</sup> September 2013).

<sup>6</sup> De Schutter et al. (2012): ‘Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights’, *Human Rights Quarterly* 2012.

However, the most important documentation underlying this report on NBIM's investment in POSCO Ltd remains the initial complaint, submitted by ForUM (Forum for Environment and Development) and others<sup>7</sup>, to the OECD National Contact Points (NCPs) in Norway, South Korea, the Netherlands. The NCPs have been established as an implementation mechanism for the OECD Guidelines for enterprises and relevant stakeholders.<sup>8</sup>

The complaint represents the work of four NGOs and uses sources such as government reports, newspaper articles, and commentaries to present the alleged human rights and environmental infringements committed by India in POSCO's project area. Accordingly, the Final Statement of the Norwegian NCP, responding to the complaint, constitutes the backbone of this parallel report.<sup>9</sup>

Thus, two aspects are relevant for this report in order to highlight the ETOs of Norway in the area of ESCR: (1) The human rights infringements committed by India due to POSCO, which the Norwegian State is accountable for through its ownership of the GPF, and (2) NBIM's investment policies, management and risk assessment related to human rights. Both these aspects are highly relevant in order to understand Norway's extraterritorial obligations as outlined by the *Maastricht Principles*.

## THE PROCESS SO FAR

As mentioned above, ForUM and its international partners have already instigated a thorough process in Norway in an attempt to hold NBIM, and as a consequence the Norwegian Government, accountable for infringements of human rights as a result of the establishment of POSCO in India. This process is appropriate to highlight in this report as it shows that national mechanisms, specifically the OECD NCP, have been fully utilized. It is also important to show that the ETO perspective, in the area of ESCR, complements the OECD Guidelines, thus urging the CESCR to question Norway about its ability to adhere to the relevant international obligations.

The Norwegian OECD NCP has processed a total of 11 complaints and NBIM is the first respondent to have declined to participate constructively in any dialogue regarding the complaint as well as recognizing the complainants, in this case represented by ForUM. As mentioned above, the NCP in Norway concludes in its Final Statement of 27 May 2013 that NBIM has breached the OECD Guidelines through its narrow approach to human rights and lack of willingness to cooperate with the NCP. More specifically, the NBIM did not only reject

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<sup>7</sup> Lok Shakti Abhiyan (India), Korean Transnational Corporations Watch, and Fair Green and Global Alliance

<sup>8</sup> See: <http://www.oecd.org/daf/inv/mne/ncps.htm>, accessed 31.08.2013.

<sup>9</sup> SWFI website at [www.swfinstitute.org/fund-rankings/](http://www.swfinstitute.org/fund-rankings/) (accessed 27<sup>th</sup> August 2013).

offers of dialogue, but made the NCP question whether NBIM has the “necessary corporate culture to fulfil its duties as a responsible investor” as outlined in the ethical guidelines of the Norwegian Ministry of Finance.<sup>10</sup> Also, the Norwegian NCP is led by Professor Hans Petter Graver, who is regarded as pioneering the ethical guidelines for the GPF as he led the commission who drafted them.<sup>11</sup>

NBIM was made aware of the complaint against them in October 2012. ForUM targeted NBIM as it manages the GPF under the direct ownership of the Norwegian Ministry of Finance. Throughout the fall of 2012, ForUM continued to submit clarification on the specific breaches of the OECD Guidelines by NBIM. However, beyond confirming that the factual specifics in the complaint were correct, NBIM rejected the NCP offer of dialogue, but informed the NCP, in writing, about their general commitment to good governance and environmental and social considerations in their approach to investments. The NCP considered this an inadequate response to the NCP’s 32 specific questions.

Despite recognizing the existence of the OECD Guidelines, questions from the NCP were left unanswered and NBIM stated that, as a minority shareholder in POSCO, the complaint should be rejected by the NCP. In their opinion, the Guidelines do not apply to them..

This view was not shared by the NCP as the Guidelines make no exemption for minority shareholders. Moreover, the main argument of NBIM not to cooperate with the NCP was due to “business confidentiality” concerns. Despite being given an extended deadline to answer 32 questions from the NCP, a final statement was issued due to the unwillingness of NBIM to take part in the procedures.<sup>12</sup>

The UN Office of the High Commissioner of Human Rights (OHCHR) has also confirmed that the Guiding Principles on Business and Human Rights, which are incorporated in the OECD Guidelines, are applicable to minority shareholders of institutional investors such as the GPF<sup>13</sup>.

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<sup>10</sup>See: [http://www.regjeringen.no/nb/sub/styrer-rad-utvalg/kontaktpunkt\\_naringsliv/saksbehandling/klagesaker/lok-shakti-abhiyan-et-al-vs-posco-abpapg.html?id=732957](http://www.regjeringen.no/nb/sub/styrer-rad-utvalg/kontaktpunkt_naringsliv/saksbehandling/klagesaker/lok-shakti-abhiyan-et-al-vs-posco-abpapg.html?id=732957), p. 8

<sup>11</sup> See ‘The Graver Committee and the Ethical Guidelines’: <http://www.regjeringen.no/en/dep/fin/Selected-topics/the-government-pension-fund/responsible-investments/The-Graver-Committee---documents/the-graver-committee-and-ethical-guideli.html?id=434926> (accessed 11 September 2013).

<sup>12</sup> Ibid, p. 13.

<sup>13</sup> See letter from the OHCHR (26 April 2013): ‘Subject: The issue of applicability of the Guiding Principles on Business and Human Rights to minority shareholders’. See annex.

## THE OBLIGATION TO RESPECT- NBIM AND POSCO INDIA

### *POSCO's project in India and NBIM's investment*

As of 31 December 2012, the NBIM's ownership in POSCO represented 0.9 % at a value of over 1400 million NOK.<sup>14</sup>

POSCO and its wholly-owned subsidiary POSCO India Pvt. Limited are seeking to extract and process an estimated 600 million tons of iron ore reserves in the State of Odisha<sup>15</sup>, India. POSCO's original plan involves building a 12 million tons per annum (MTPA) integrated steelworks plant in the Jagatsinghpur District (10 km south of Paradip Port).

The integrated steel plant will include a captive power plant<sup>16</sup> and a captive minor port<sup>17</sup>. POSCO also plans to develop related infrastructure (such as roads and railways and possibly conveyor belts in lieu of some roads) to transport 20 MTPA iron ore from the mines to the plant.<sup>18</sup>

POSCO claims the project is "expected to bring about meaningful growth and investment in India, and would also further downstream industries like automobile, shipping and construction". POSCO also claims "India will derive significant benefits from the POSCO India project, as it will create an estimated 48,000 direct and indirect jobs in the region. In addition, the construction phase will create about 467,000 man years of employment for the local population".<sup>19</sup> However, there is little possibility the purported job creation will benefit the thousands of local residents who do not have the skills to work for a steel plant and offspring industries that will allegedly be created.

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

However, it is important to understand that the State Government claims the 4,004 acres slated for POSCO's project is government-owned, but the communities have lived and subsisted on these lands for generations, including individuals who have special legal

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<sup>14</sup> See: [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>15</sup> "Orissa" is officially spelled "Odisha". Both spellings are used interchangeably in this report.

<sup>16</sup> "CPP means the power plants commissioned by the industries for their self-consumption". (Source: Captive Power Plants: Case Study of Gujarat, India, P. 6: [http://iis-db.stanford.edu/pubs/20454/wp22\\_cpp\\_5mar04.pdf](http://iis-db.stanford.edu/pubs/20454/wp22_cpp_5mar04.pdf))

<sup>17</sup> Similar to a captive power plant, a captive minor port is built and operated by a company for its own purposes.

<sup>18</sup> See: <http://posco-india.com/website/project/details.htm>, accessed 31.08.2013.

<sup>19</sup> See: <http://posco-india.com/website/project/benefits.htm>, accessed 31.08.2013.

protections under the Scheduled Tribes or Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (hereafter “Forest Rights Act 2006” or “FRA”).<sup>20</sup>

Indeed, the Gram Panchayats<sup>21</sup> of Dhinkia, Nuagaon and Govindpur own 78% of the original proposed project site – 58% of which is their forest land. These Gram Panchayats include 11 villages. Per the 2001 Census, there were 3,350 households with a total population of approximately 22,000 people living in these three Gram Panchayats. However, Committee for resistance against POSCO (PPSS) estimate the total number of households that will be affected is about 4,000.

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

## **HUMAN RIGHTS ISSUES - ESCR**

### *Background information*

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

The Saxena Committee was commissioned by the Ministry of Environment Forestry (MoEF) and the Ministry of Tribal Affairs (MoTA) to examine the wider implementation of the FRA and other issues in the State of Odisha. Three members of the Saxena Committee issued a scathing report in August 2010 on the FRA implementation relative to the POSCO project.

In response to the Saxena Committee’s report, the MoEF appointed a four-member committee led by former State Environment Secretary Meena Gupta to “[E]nquire into the status of implementation of FRA in and around forest land of the POSCO project and rehabilitation and resettlement provisions.

While the four members agreed the FRA had not been implemented, they could not come to a joint conclusion on all the issues they were commissioned to investigate. Therefore, two reports were issued: one by Meena Gupta and a second by a majority of the members, Dr. Urmila Pingle, Dr. Devendra, and Pandey, Dr. V. Suresh (hereafter referred to as the “Meena Gupta Majority Report”).

Complementary to the findings of these reports, which highlight the lack of implementation of the national legal framework by POSCO, other human rights issues in the area of ESCR are

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<sup>20</sup> See: [http://www.orissa.gov.in/stsc/FOREST\\_RIGHT\\_ACT/FRA\\_English.pdf](http://www.orissa.gov.in/stsc/FOREST_RIGHT_ACT/FRA_English.pdf), accessed 31.08.2013.

<sup>21</sup> Gram panchayats are local self-governments at the village or small town level in India. (Source: [http://en.wikipedia.org/wiki/Gram\\_panchayat](http://en.wikipedia.org/wiki/Gram_panchayat))

highly relevant for this report. Other human rights violations committed by the Indian Government, based on the International Covenant on Political and Civil Rights, are applicable. However, its discussion remains beyond the scope of this parallel report although the Committee should be aware that it has had great effect on the enjoyment of ESCR. Accordingly, this report focuses on the land acquisitions and forced evictions, the right to health and the right to education. Further analysis may include the assessment of the right to a standard of living, including the right to work as an extension of the Indian police presence in the village affected by POSCO's project.

Importantly, NBIM should have known about the wide spectrum of human rights violations committed by the state of India and the allegations against POSCO as they have been thoroughly documented. Referring to the Final Statement of the Norwegian NCP, NBIM has not presented any evidence of whether they have chosen to act or, if not, on what basis they decided not to.

### *Land acquisition and forced evictions*

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

Under the FRA, OFTDs is defined as any member of community who has for at least three generations prior to 13 December 2005 primarily resided in or who depends on the forest or forest land for livelihood needs. Similarly, Scheduled Tribes refers to indigenous people who are specially protected by the Indian Constitution.

In the opinion of the district administration, no OFTDs were living in the area, but this claim has been heavily refuted by the Saxena Committee in their August 2010 report on the implementation of the FRA. Importantly, the Committee concluded that documentary and oral evidence exists proving OFTDs are living in the area, thus it is therefore incorrect and misleading by the district administration to state otherwise, leaving an incomplete process as dictated by the FRA.<sup>22</sup> In addition, the Meena Gupta Majority Report goes further stating that OFTDs and individuals belonging to Scheduled Tribes reside in the area.<sup>23</sup>

Moreover, two issues remain pivotal to POSCO's land acquisition and lie at the heart of the ESCR of the individuals and communities residing in POSCO's project area. Firstly, this report shall examine whether free, prior and informed consent was obtained and, secondly,

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<sup>22</sup> "MoEF/MoTA Committee on Forest Rights Act: Report of visit to Jagatsinghpur (site of proposed POSCO project), Orissa, 23-24 July 2010", p. 4.

<sup>23</sup> "II. Report Submitted By Dr. Urmila Pingle, Dr. Devendra, Pandey, Dr. V. Suresh", p. 10, paras. 15-16.

whether the right to adequate housing, including protection from forced evictions, was respected under the ETOs of the ICESCR.

The CESCR's definition of forced evictions, outlined in General Comment No 7, shall be applied throughout. To reiterate, the term "forced evictions" is defined as the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection.<sup>24</sup>

Free, prior and informed consent is a well-known and established principle in international human rights law, especially in regards to indigenous people.<sup>25</sup> Both Article 1(2) and Article 15 of the ICESCR protect peoples' cultural values and rights.<sup>26</sup>

The report issued by the Saxena Committee concluded that some *palli sabhas*<sup>27</sup> have given resolutions refusing to consent to diversion of forest land, but that these resolutions were never sent by the state government to the Ministry of Environment and Forests (MoEF), which means they are withholding relevant information.<sup>28</sup>

Furthermore, the Meena Gupta Majority Report states that the procedures to obtain the consent of the individuals belonging to Scheduled Tribes residing in the project have not been implemented adequately due to non-cooperation and negligence on the part of the State Government of Orissa. Importantly, the report concludes that the final forest clearance should be revoked.<sup>29</sup>

Contrary to this recommendation, the Minister of Environment and Forests did not cancel the permission for the forest land clearance, but even requested the Odisha State Government to "provide categorical assurance" that it did not violate the FRA. This was a surprise given the fact that the Odisha State Government had claimed from the outset that no OFTDs or Scheduled Tribes resided in the proposed project area. Thus, the MoEF, by referring to the FRA, acknowledged the opposite of the State Government of Orissa. However, the State Government continues to deny the existence of Scheduled Tribes and OFTDs and therefore has not complied with the rights of such groups the FRA.

Many residents in the proposed project area were not informed, through public hearings or otherwise, what POSCO was planning in the area and no explanation was given for the

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<sup>24</sup> CESCR General Comment No. 7, "The right to adequate housing (art. 11 of the Covenant): forced evictions", 1997.

<sup>25</sup> In particular, see Article 6 of the Convention concerning Indigenous and Tribal Peoples in Independent Countries (ILO 169).

<sup>26</sup> CESCR General Comment No. 21, "Right of everyone to take part in cultural life (art. 15, para. 1 (a), of the ICESCR", 2009.

<sup>27</sup> Orissa State Government defines *palli sabha* as a "meeting of all the electorates of a revenue village". See: <http://www.orissa.gov.in/panchayat/pallisabha.htm>, accessed 01.09.2013. It is also referred to as *gram sabha*. Section 6(1) of FRA provides that the *gram sabha* will initially pass a resolution recommending whose rights to which resources should be recognised

<sup>28</sup> One generation refers to a 25-year old period.

<sup>29</sup> II. Report Submitted By Dr. UrmilaPingle, Dr. Devendra, Pandey, Dr. V. Suresh", p. 10, paras. 15-16.

frequent visit by company officials and villagers learnt about the project through various media.<sup>30</sup> Moreover, appropriate consultations with the persons affected were far below the international obligations on this matter.<sup>31</sup>

Therefore, POSCO's project causes forced evictions, as individuals and communities are removed from land which they occupy against their will without the appropriate forms of legal protection that the FRA is meant to provide. In addition, and in accordance with the interpretation of the CESCR, the State is obliged to demonstrate that they have explored all feasible alternatives to forced evictions, in consultation with the affected persons.<sup>32</sup> There is little evidence that this has been pursued<sup>33</sup>, thus the ESCR of the individuals and communities affected have not been upheld.

### *Right to education*

Following a July 2011 visit, the National Commission for Protection of Child Rights (NCPCR) recommended the Odisha State Government to withdraw its police presence at schools and made appeals to ensure children's right to education and well-being are protected. The NCPCR was stunned to find that a number of schools had been occupied and closed over long periods of time as armed police used the school facilities as camps or barracks.

Families also told the NCPCR that the education of their children had greatly decreased over the last few years since POSCO project was initiated.<sup>34</sup> There has always been a clear connection between the presence of the police and the protection of POSCO's project. This clearly infringes on the right to education as the CESCR interprets the right to education to include "essential features" such as accessibility and non-discrimination.<sup>35</sup> The children have been discriminated against as these schools are located in villages that have raised great opposition to POSCO's steel mill project from the outset.

In addition, the NCPCR found that the presence of armed police inside schools created a sense of fear and insecurity amongst the students. Older students attending the local high schools also risked arrest as they also participated in the opposition against POSCO, leading to a fear of being arrested. However, the NCPCR analyzed the possibility that the children were used by adults to oppose the steel mill project, but concluded that the children were

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<sup>30</sup> IHRC and ESCR-Net. *The Price of Steel: Human Rights and Forced Evictions in the POSCO-India Project*, 2013. p. 28.

<sup>31</sup> See CESCR General Comment No. 7, "The right to adequate housing (art. 11 of the Covenant): forced evictions", 1997. Para. 15.

<sup>32</sup> CESCR General Comment No. 7, "The right to adequate housing (art. 11 of the Covenant): forced evictions", 1997. Para. 13.

<sup>33</sup> IHRC and ESCR-Net. *The Price of Steel: Human Rights and Forced Evictions in the POSCO-India Project*, 2013. p. 27.

<sup>34</sup> The Economic Times, "NCPCR visits POSCO project site, stunned by the presence of cops", 4 July 2011. [http://articles.economictimes.indiatimes.com/2011-07-04/news/29735936\\_1\\_anti-posco-ppss-posco-pratirodh-sangram-samiti](http://articles.economictimes.indiatimes.com/2011-07-04/news/29735936_1_anti-posco-ppss-posco-pratirodh-sangram-samiti), accessed 07.09.2013.

<sup>35</sup> See CESCR General Comment No. 13, "The right to education (article 13 of the Covenant)", 1999. Para. 31, para. 50.

acting voluntarily in support of their families as POSCO threatened their way of life.<sup>36</sup> A recently published report by the University of New York International Human Rights Clinic summarizes the affected children's situation well:

Exercising their freedom of expression and resisting the loss of their lands and future livelihoods with their parents, children and teenagers have faced harassment and false charges, the occupation of or inability to travel to their schools, and a loss of related access to basic health and nutritional programs.<sup>37</sup>

### *Right to health*

The right to health of the persons affected by POSCO's project in Odisha, as dictated by Article 12 of the ICESCR, has not been respected. For the past seven to eight years, while the Odisha State Government has acquired land for POSCO, local communities have continued to oppose the project. Their opposition, expressed through peaceful demonstrations, has been met with violence and acts of intimidation. In accordance with the sentiments expressed by the CESCR, the right to health embraces a wide range of contributing factors.<sup>38</sup> Violations of civil and political rights by the Indian Government through the use of force by the police, have had great effects on the enjoyment of ESCR residing in the area or opposing the project on their behalf.

For example, the police have continued to use the threat of arrest by imposing a de facto blockade on the project area and especially on the residents of Dinkia Gram Panchayat. Thus, anyone who leaves, including those in need of medical treatment is at risk of arrest. This prolonged and repeated hardship is a clear infringement on the accessibility of the right to health as clearly expressed by the CESCR.<sup>39</sup>

Mr. Abhay Sahoo, a reputed human rights defender and Chairperson of the PPSS, has been continuously targeted by the Odisha State Government in an attempt to suppress opposition to the project. In October 2008, he was arrested in Dinkia village while attempting to receive ongoing medical treatment as he is an acute diabetic and has high blood pressure. After a further deterioration of health, Ms. Sahoo was moved to a hospital, but had to suffer being handcuffed in chains on the floor.

In addition to the severely restricted access to health care, the on-going insecurity felt by the villagers due to pressure from the Odisha State Government and POSCO has had an impact on the mental health of many residents in the project area. Several villagers have stated in interviews that they, or their family members, suffer from depression and anxiety attributed

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<sup>36</sup> The Indian Express, "NCPDR justifies agitation by children against POSCO project", 24 July 2011. <http://www.indianexpress.com/news/ncpdr-justifies-agitation-by-children-against-posco-project/821588/>, accessed 07.09.2013.

<sup>37</sup> IHRC and ESCR-Net. *The Price of Steel: Human Rights and Forced Evictions in the POSCO-India Project*, 2013. P. 61/62.

<sup>38</sup> CESCR General Comment No. 14, "The right to the highest attainable standard of health (article 12 of the ICESCR)", 2000. Para. 4.

<sup>39</sup> CESCR General Comment No. 14, "The right to the highest attainable standard of health (article 12 of the ICESCR)", 2000. Para. 12(b)(ii).

to the fear of arrest and their inability to leave the villages due to continuous police presence.<sup>40</sup>

POSCO directed any responsibility for the presence and use of the police in the project-affected villages to that of the Indian Government:

As per Indian Constitution, law and order is a State subject. It is the prerogative of administration to use police based on threat perception. Private companies like POSCO would have no role in this. But as far as we know, there has been no use of force by Govt [sic] anywhere during land acquisition process. On the contrary, PPSS has been using violent means to terrorise people into submission and some of those daring to oppose have been exterminated. Any interference on intimidation is without any basis.<sup>41</sup>

## **NORWAY'S EXTRATERRITORIAL OBLIGATIONS (ETOs) IN THE AREA OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS**

Norway is not meeting its ETOs in the area of ESCR by allowing the GPFG to be invested in companies such as POSCO. The infringements on human rights by the Indian Government, due to POSCO's steel mill project, are encompassing and prolonged, extending obligations on states other than India and Korea, the domicile State of POSCO. POSCO's investment of about 12 billion USD is regarded as one of the largest foreign direct investments in India and the Norwegian GPFG owns about 0.9 percent in POSCO.<sup>42</sup> The CESCR has highlighted the necessity of extraterritoriality and its importance in respecting ESCR at an international level.<sup>43</sup> Although a minority shareholder, Norway is accountable to Principles 13, 14 and 20 of the *Maastricht Principles*.

### ***Principle 13 and 20 – Obligation to avoid causing harm and to refrain from conduct***

In light of a number of reports outlining the infringements in the area of ESCR, including that of the Saxena Committee, the Meena Gupta Committee, NGO reports and, especially, the complaint submitted to the OECD National Contact Point, there should be substantial amounts of evidence in order for NBIM to pursue active ownership, using its influence as the world's largest sovereign wealth fund, and demand POSCO to stand accountable to human

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<sup>40</sup> IHRC and ESCR-Net. *The Price of Steel: Human Rights and Forced Evictions in the POSCO-India Project*, 2013. p. 58/59.

<sup>41</sup> POSCO's response to the Business & Human Rights Centre, 1 September 2011. Available at [www.business-humanrights.org](http://www.business-humanrights.org), accessed 07.09.2013.

<sup>42</sup> Aftenposten, "Oljefondet granskes for etisk brudd" [The Oil Fund is investigated for ethical infractions], 23 January 2013. <http://www.aftenposten.no/okonomi/Oljefondet-granskes-for-etisk-brudd-7099369.html#.UisHltJM9n0>, accessed 07.09.2013.

<sup>43</sup> See CESCR General Comment No. 12, "The right to adequate food (art. 11)", 1999. para. 36: "States parties should take steps to respect the enjoyment of the right to food in other countries, to protect that right, to facilitate access to food and to provide the necessary aid when required".

rights. Any State should avoid having a negative impact on human rights as dictated by Principle 13, which outlines that

“States must desist from acts and omissions that create a real risk of nullifying or impairing the enjoyment of economic, social and cultural rights extraterritorially. The responsibility of States is engaged where such nullification or impairment is a foreseeable result of their conduct. Uncertainty about potential impacts does not constitute justification for such conduct”.

The GPFG can be regulated in order to meet Principle 13 on the obligation to avoid causing harm. Most importantly, NBIM should pursue active ownership in the companies in which it is invested. In terms of human rights, NBIM has exclusively focused on children’s rights as a part of their active ownership strategy. Thus, in this manner, NBIM has attempted to limit the human rights obligations which apply to the GPFG. This has been criticized by the OECD NCP in Norway as companies and investors 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.<sup>44</sup>

Importantly, Principle 13 of the *Maastricht Principles* stresses that uncertainty about potential impacts does not constitute justification for conduct which causes impairment of the enjoyment of ESCR. Due to the sheer number of companies in which NBIM has invested (over 8000), Principle 13 represents a vital and far-reaching extraterritorial obligation for Norway.

Thus, in order for NBIM to meet its obligations under Principle 13, active ownership should be the pursued strategy. However, if NBIM still fails to influence the behaviour of POSCO to uphold ESCR after mobilizing the maximum available resources, NBIM should disinvest in the company.

Moreover, Principle 20 echoes that of Principle 13, obligating States to refrain from conduct which nullifies or impairs the enjoyment and exercise of ESCR of persons outside their territories. This obligation to respect takes Principle 13 one step further and holds the State accountable to avoid direct interference with the extraterritorial enjoyment of ESCR. Yet, by remaining invested in POSCO, Norway has directly interfered with the ESCR of the around 20,000 people, including indigenous people, residing in POSCO’s steel mill project area.

### ***Principle 14 – Impact assessment and prevention***

Principle 14 stresses the importance of States conducting prior assessments of the risks and potential ETO impacts of their actions. Dr Olivier De Schutter, United Nations Special Rapporteur on the Right to Food, presented the Human Rights Council with the *Guiding principles on human rights impact assessments of trade and investment agreements*.<sup>45</sup>

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<sup>44</sup> The Norwegian Contact Point for the OECD Guidelines for Multinational Enterprises, “Final Statement”, 27 May 2013, p. 8.

<sup>45</sup> Human Rights Council, *Report of the Special Rapporteur on the right to food, Olivier*

Principle 14 echoes and supports this international obligation on the State to complete a human rights impact assessment:

“States must conduct prior assessment, with public participation, of the risk and potential extraterritorial impacts of their laws, policies and practise on the enjoyment of economic, social and cultural rights. The results of the assessment must be made public. The assessment must also be undertaken to inform the measures that States must adopt to prevent violations or ensure their cessation as well as to ensure effective remedies.”

For Norway to meet Principle 14, NBIM should introduce the use of human rights impact assessment, according to international standards, in cases where severe harmful impacts were not identified in the first place, but appeared after the investment was made. This process would complement the ability of the Council on Ethics to observe and recommend exclusions from NBIM’s investment universe.

Such impact assessments must be concluded in meaningful consultation with the affected communities and individuals in order to identify the full scope and severity of the potential human rights impacts. Considering the identity of the GPFG as the world’s leading State investment fund, Norway should make Principle 14 an underlying prerequisite for investments. Thus, NBIM’s investments would be a quality stamp and could have a positive branding effect on the invested companies. In the long run, this would not only benefit Norway’s reputation abroad, but also set a high standard for other sovereign wealth funds.

## CONCLUSIONS AND RECOMMENDATIONS

This report discusses NBIM’s (Norges Bank Investment Management) investment in the Korean multinational corporation, POSCO, whose wholly-owned subsidiary, POSCO India Pvt<sup>46</sup>. Limited, plans to extract and process an estimated 600 million tons of iron ore reserves in the State of Odisha. As documented throughout this report, the ESCR of the around 20,000 project affected persons and communities residing have not been respected. Norway’s extraterritorial obligations (ETOs) in the area of Economic, Social and Cultural rights (ESCR) have not been met as NBIM, managing Norway’s Government Pension Fund Global (GPFG), has not sought to prevent or mitigate the real and potential adverse impacts directly linked to their operations through their financial relationship with POSCO. More specifically, NBIM has ensured Norway’s non-compliance with the *Maastricht Principles* as they stand as the guiding text of international law on the extraterritorial interpretation of the International Covenant on Economic, Social and Cultural Rights (ICESCR). Norway,

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– Addendum: Guiding principles on human rights impact assessments of trade and investment agreements (A/HRC/19/59/Add.5). 19<sup>th</sup> Session 2011, 19<sup>th</sup> December 2011.

<sup>46</sup> The name POSCO will be used throughout to describe POSCO and POSCO India as POSCO India is wholly owned subsidiary of POSCO.

through NBIM, has an opportunity to take the lead of State sovereign wealth funds by ensuring respect for its ESCR obligations through its investment policy and practice.

Questions for the Committee on Economic, Social and Cultural Rights (CESCR) to put forward to the Norwegian Government:

- NBIM is obliged by its mandate to pursue active ownership with the companies in which it is invested. How has NBIM used its ownership in POSCO actively in order to prevent human rights violations?
- The Norwegian National Contact Point for the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises<sup>47</sup> concluded in its Final Statement<sup>48</sup> that NBIM does not seem to have any strategy on how to react if it becomes aware of human rights risks related to companies in which NBIM is invested<sup>49</sup>. Has the NBIM changed any policies and/or practices in the area of human rights as a result?
- Despite surmounting evidence against the operations of POSCO in the area of human rights and the negative impact it has on NBIM's reputation, how has NBIM justified remaining invested in such a disputed company?
- NBIM should have known about the human rights allegations against POSCO and the Indian Government. How has NBIM justified a continued investment despite this affecting Norway's obligations under international law?
- The ethical guidelines for the observation and exclusion of companies from the GPF's investment universe state that only companies responsible for serious or systematic human rights violations, such as murder, torture, deprivation of liberty, forced labor, the worst forms of child labor and other child exploitation should be excluded from investments. Does the Norwegian Government deem NBIM's strategy to only focus on the most serious human rights violations appropriate for meeting its extraterritorial obligations in the area of ESCR?
- NBIM has only revealed its strategy to prevent investments in companies where there is a real risk of child exploitation, whereas no other human rights issues are highlighted. By what measure did NBIM decide to only focus on children's rights?

**ForUM respectfully suggests that the Committee on Economic, Social and Cultural Rights present the Norwegian Government with the following recommendations.**

The Government of Norway should ensure that NBIM:

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<sup>47</sup> [http://www.regjeringen.no/en/sub/styrer-rad-utvalg/ncp\\_norway/home.html?id=732715](http://www.regjeringen.no/en/sub/styrer-rad-utvalg/ncp_norway/home.html?id=732715)

<sup>48</sup> [http://www.regjeringen.no/pages/36798927/nbim\\_final2.pdf](http://www.regjeringen.no/pages/36798927/nbim_final2.pdf)

<sup>49</sup> The Norwegian NCP commended NBIM for having implemented appropriate procedures to screen child labor violations.

- Support an independent investigation into the allegations against POSCO.
- Seek to mitigate any adverse human rights impacts that POSCO causes or to which it contributes by exercising its leverage, through constructive dialogue with the enterprise on an executive level, over the company, alone or in a coalition of investors.
- Establish a system to identify areas of heightened risk of human rights violations where investee companies may be involved
- In cases where human rights violations are identified prior to investment, NBIM should put into place a process to consider non-investment, as well as the potential for NBIM to engage with the company and elicit change. It is expected that the benefits of engagement may outweigh the interest in non-investment.
- Enhance its risk management systems and procedures for conducting research on companies currently within its investment portfolio, and include a broader array of human rights 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.
- 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 so that its approach reflects recent changes in the business and human rights landscape.
- Continue to encourage companies through submitting expectation documents, shareholder voting and dialogue to commit to respecting the relevant human rights for this company or sector, and by conducting human rights due diligence.
- Develop more robust disclosure and reporting on NBIM's human rights due diligence policies and processes as well as NBIM's active ownership activities with respect to human rights issues.
- Influence portfolio companies, particularly those operating in sectors or regions in which the risk of human rights impacts is particularly high, to put into place grievance mechanisms. Such grievance mechanisms can help prevent small issues from becoming significant sources of conflict, and thus would help NBIM avoid and mitigate human rights impacts to which it otherwise might be linked through its business relationships.
- Consider establishing its own grievance mechanism that covers the whole range of human rights grievances that stakeholders, particularly project- impacted groups and

indigenous peoples, might have. Complaints against NBIM's portfolio companies will often be regarding impacts to which NBIM is linked through its business relationships, but that it did not cause and to which it did not contribute. Such a grievance mechanism would provide helpful information to NBIM regarding human rights impact of its portfolio companies and could help resolve disputes before they fester or become violent.