

National Contact Point of Switzerland

Specific Instance regarding the BKW Group submitted by the Society for Threatened Peoples Switzerland

Follow-Up Statement

Berne, 19 May 2022

1. Context

On 16 January 2020, the Society for Threatened Peoples Switzerland submitted a written request to the Swiss NCP to consider a specific instance under the OECD Guidelines for Multinational Enterprises regarding the BKW Group (BKW), which has its headquarters in Switzerland. The submission concerned alleged human rights violations of the Sami indigenous people on grounds that BKW had not implemented due diligence concerning its minority stake in the construction of a wind power plant in Norway.

On 26 August 2021, the Swiss NCP published its *Final Statement* in which it welcomed:

- the constructive and very engaged participation of both parties throughout the entire mediation process including bilateral discussions of specific issues;
- the resolution of the issues raised by the submitting party regarding human rights due diligence including the concept of *free, prior and informed consent* (FPIC) based on the joint agreement by the parties which follows the recommendations set out in the OECD Guidelines.

Furthermore, it recommended

- both parties to continue their dialogue and collaboration where useful based on the trust established during the mediation process;
- BKW to continue its efforts to work on the implementation of the agreement reached by the parties and to anchor the results within the company's internal processes.

The NCP announced to follow up on this specific instance in order to evaluate the progress made regarding the Joint Outcome of the mediation process.

The follow-up reports submitted by both Parties were discussed at a meeting led by the NCP (external mediator) on 28 March 2022. The submitting Party acknowledged that BKW has undertaken important steps to implement the agreed measures in view of avoiding possible project-related local problems in the future. However, since the publication of the Final Statement, a turn of events has occurred as the highest Norwegian court has ruled that partial installations of the Fosen Vind project violate Article 27 of UN International Covenant on Civil and Political Rights and that the permit for the installations is therefore illegal. The submitting Party expects BKW, in particular based on the measures agreed in the NCP procedure, to advocate with its business partners that the plant be shut down until an amicable solution has been found with the Sami communities on how to proceed.

2. Conclusion

In its evaluation, the Swiss NCP focused on the four priority areas identified by the Parties in the *Joint Confidential Outcome of the Dialogue*.

1. Revision of the Code of Conduct

BKW has updated its Code of Conduct. It explicitly mentions its commitment to the *UN Global Compact* and the *Sustainable Development Goals*, the respect for human rights as well as the use of the principle FPIC concerning vulnerable groups. After the final approval the Code of Conduct will be published on BKW's website, approximately in summer. A broad internal communication will follow this step. Trainings on the Code of Conduct based mainly on a new e-learning tool are then planned to be mandatory for all employees on a regular basis.

The NCP welcomes the measures taken by BKW to revise its Code of Conduct and ensure its implementation by its employees.

2. Development of stakeholder analysis and human rights due diligence

During the last months, BKW revised its guidelines and processes for due diligence. The focus was on energy projects BKW might acquire from third parties as they currently form the majority of project opportunities. Two work streams are ongoing: The first aims at translating international standards – such as the OECD instruments on responsible business conduct – into the BKW context with the goal to formulate a generally applicable due diligence guideline. The second includes exchange with business units acquiring concrete energy projects. The goal is to come up with a checklist to integrate environmental, social and governance aspects in different steps of the due diligence process in a pragmatic way.

While there are still challenging issues regarding the development of a stakeholder analysis and human rights due diligence, the NCP acknowledges the steps taken so far. It recommends the parties to continue its dialogue with a view to ensure that BKW's due diligence will include a structured stakeholder and right-holder management process in order to identify vulnerable groups and implement FPIC.

3. Dealing with business partners in the context of human rights of indigenous peoples

The issue of protecting vulnerable groups and respecting human rights will be included in future due diligence procedures for energy projects. Based on the new *Code of Conduct* and the new *Guidelines for Stakeholder and Right-holder Management*, BKW will address its expectations about the respect of human rights and the protection of vulnerable groups with business partners and, if necessary, agree on appropriate solutions. With the entry into force of the new *Code of Conduct*, provisions on human rights compliance will be included in contracts with business partners regarding energy projects and participation processes. These will be the basis of the respective exit options which shall apply in case there is a violation of the *Code of Conduct* and thus of the contract and no expedient measures can be agreed to reduce or eliminate the violation.

The NCP welcomes that BKW will address its expectations about the respect of human rights and the protection of vulnerable groups with business partners. The inclusion of provisions on human rights compliance and the exit option in contracts with business partners demonstrates BKW's commitment to implement its policy set out in the *Code of Conduct* in practice.

4. Grievance mechanism

BKW will implement project-related grievance mechanisms with regard to future projects where it will have the majority stake or where there might be a risk of human rights violation. Furthermore, it will emphasize the role of project managers to be approachable for stakeholder concerns. BKW has developed *Guidelines for Stakeholder and Right-holder Management*, which explicitly addresses this issue. In the context of the new *Code of Conduct* and the revision

of its due diligence processes, BKW will continue to work on this topic. It will also evaluate other tools to support efficient and effective grievance mechanisms. However, BKW decided to refrain from the idea of extending its existing whistleblowing system to all groups affected by its projects. The first reason for this is that most energy projects are embedded in separate legal entities in which BKW is generally not visible as a company. The second reason is technical and confidentiality challenges with the existing system if extending its use.

<p>The NCP encourages BKW to implement project-related mechanisms with regard to projects where it has the majority stake or where there might be a risk of human rights violation. In joint projects, BKW should use its leverage, to the extent practicable, to convince its business partner to participate in processes to provide for remedy.</p>
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The NCP congratulates both parties on the continuation of the dialogue and commends BKW on the concrete steps taken to implement the agreed measures. The NCP is aware that the processes initiated within BKW to ensure their full implementation will take more time.

At the beginning of the mediation, the Parties defined the goal of establishing a process to address similar situations in the future and help resolving project-related local problems. The NCP acknowledges that this objective has been achieved in many respects and that the Parties agree that the NCP mediation has been a productive process. It encourages the Parties to continue their dialogue where useful as stated in the *Final Statement* and affirmed in the follow-up meeting.

With this Statement, the Swiss NCP concludes the follow-up of the specific instance.