Valsjöbyn 2012-10-23

Notification of a specific instance under the OECD Guidelines for Multinational Enterprises by Jijnjevaerie Saami village to the Swedish and Norwegian National Contact Points, concerning Statkraft's socially unsustainable wind power operations in breach of Saami indigenous rights in Sweden.

Submitted to:
The Swedish and Norwegian National Contact Points

Dear NCPs of Sweden and Norway:

This is a specific instance ("complaint") raised under the OECD Guidelines for Multinational Enterprises ("the Guidelines"). This complaint concerns Statkraft's socially unsustainable wind power operations in breach of Saami indigenous rights in Sweden and is submitted to the Norwegian and Swedish National Contact Points ("the Norwegian NCP" and "the Swedish NCP") by Jijnjevaerie Saami village.

Background

Jijnjevaerie Saami village is an indigenous reindeer herding collective located in the municipality of Jämtland in the north-west of Sweden. The village is composed of 50 members, whose livelihood and membership in the village is entirely dependent upon continued reindeer herding practices.

In 2010, Statkraft received planning permits from the local municipality in Västernorrland, Sweden, to build 460 wind turbines on a total of six sites, all to be located on the traditional herding lands of Jijnjevaerie Saami village, on sensitive migration routes and winter herding pastures. Jijnjevaerie Saami village repeatedly communicated their concerns to Statkraft that such a large scale industrial development would inhibit their possibility to pursue reindeer husbandry, which would result in the dislocation of the community, endanger their livelihood and force Jijnjevaerie village members to abandon their herding practices (Appendix A). In attempts to mitigate damage, Jijnjevaerie Saami village proposed alternative sites for wind power development where the environmental impacts would be of a lesser degree. However, due to a lack of response from Statkraft, and the company's apparent lack of engagement and commitment to find a negotiated solution, Jijnjevaerie Saami village appealed the planning permit through the municipal court to the Superior Environmental Court.

The concerns presented before the Court was that if the Statkraft project goes ahead as currently planned, Jijnjevaerie Saami village's possibility to continuously pursue reindeer husbandry will be severely restricted, most likely forcefully dislocating community members from the environment that provides them with their cultural identity. Jijnjevaerie Saami village also called the conclusions of the environmental impact assessment into question arguing that the process had been deeply flawed and biased and did provide accurate or credible information about the impact of the project on reindeer herding. Expert witnesses provided the Court with research showing that implications of development activities on the habitat use of reindeer are significant as reindeer avoid areas of development activities 5 km from the activity source 50-95 percent of the time and that the animals show no adaptation to the source of disturbance over time.[i] It was also shown that the amount of disturbance that could be expected from Statkraft's wind power sites, would make it impossible for the herders to gather and move their animals in the vicinity of the industrial establishment.[ii]

The Superior Environmental Court concluded on November 23, 2011, that based on the evidence and research presented, wind power parks have an impact on reindeer herding practices to the extent

that the same area cannot simultaneously be used for herding purposes (Appendix B). However, while recognizing the direct impact of the wind power project on reindeer herding practices, the Court concluded that 360 turbines, out of the 460 originally proposed, should be permitted on the basis of national interest in renewable energy production. In the Court's opinion, this limitation would allow for Jijnjevaerie Saami village to use some of their winter pastures, although they would be forced to use trucks for moving their animals during spring and winter migration.

Statkraft has since this ruling initiated the first phase of its construction, including large scale logging of the area Björkhöjden and Ögonfägnaden. Despite of the fact that the Supreme Court had specifically requested Statkraft to finance a number of preventive measures which would limit damages on Jijnjevaerie's herding practices, the company has thusfar questioned and rejected in its entirety all of the necessary urgent measures proposed by Jijnjevaerie, including building fences, feeding constructions and even going so far as to question the need to provide water for the herds when enclosed in a fenced area (Appendix C). This clearly shows that the project proponents have a lack of willingness to even take the most basic and urgent protective measure to limit their destructive impacts on the livelihood of Jiijnjevaerie Saami village and to engage with issues concerning human rights and sustainability.

Wind power is the most recent of over 150 years of industrial encroachments including large scale mining, logging and hydropower in the traditional Saami territories. The large scale wind power development in Jijnjevaerie is not an isolated case but indicative of similar situations faced by most Saami reindeer herding collectives. Consequently, the cumulative impacts of many different types of industry has exponentially constrained the exercise by the Saami herders of their inherent right to land and the resources bound up in that land. Many Saami herding collectives, Jijnjevaerie being one of them, are now at a point of crisis, as the last unexploited Saami areas are being claimed by the mining and wind power boom, with no consideration being given to the irreversable impacts on traditional Saami livelihoods.

Indigenous people living on the land are the first to experience the effects of climate change. For example, in the Saami community of Jijnjevaerie changing snow- and weather conditions make reindeer herding an increasingly difficult and unpredictable livelihood, and although their traditional herding practices have arguably contributed the least to climate change, they are now increasingly expected to bear the burden of climate change mitigation attempt, which involves making key herding areas unavailable. Saami areas are hence under enormous pressure to accept large scale wind power projects in their traditional areas, in addition to other industrial activities.

It is important to note here that the protection of Saami land rights in accordance with the international law and the OECD Guidelines does not automatically exclude the possibility to develop renewable energy. However, the apparent environmental benefits of wind power cannot come at the cost of violating Saami indigenous rights. It must be recognized that, proportionally the Saami herding areas have seen a lot of industrial developments and energy harvesting, through mining, hydropower, forestry practices and now wind power. The cumulative effect of this development has lead the Saami village to the conclusion that more development on their land will render it impossible for them to continue their traditional reindeer herding practices and endanger their livelihood.

Jijnjevaerie Saami village alleges possible breaches of the Guidelines on the grounds that:

(1) Consultations with the Jijnjevaerie Saami village are flawed and the project contravenes the wishes of the affected indigenous community. Statkraft has not meaningfully engaged the community, including a failure to obtain the free, prior and informed consent of Jiingevaerie

Saami community.

(2) The project risks to inhibit the Saami community's possibility to continuously pursue traditional reindeer husbandry, which is the basis of the community's economic and cultural survival. Some members of the community will most certainly even be forcefully dislocated from the environment that provides them with their very cultural identity.

(3) There is a risk of environmental damage if the project is materialized, and this has not been communicated appropriately to affected stakeholders.

(4) International law firmly establishes that no industrial activities are allowed in indigenous territories if they render it considerably more difficult for an indigenous community or its individual members to continuously pursue their traditional land based activities in the area.

(5) Norway and Sweden has proactively supported and ratified relevant international legislation concerning the rights of indigenous peoples, including CERD, ICCPR, ECHR and the UDHR. In addition, Norway has ratified ILO 169, which requires the government to respect and protect indigenous peoples' rights to land and their right to participate in decisions made concerning the management and use of resources. However, an inconsistency exists between this recognition and the fact that Norwegian state owned Statkraft, have failed, and continue to fail, to live up to these standards in practice.

The specific Guidelines that Jijnjevaerie Saami village believes have been breached by Statkraft are:

Chapter 2: General policies

Enterprises should take fully into account established policies in the countries in which they operate, and consider the views of other stakeholders. In this regard, enterprises should:

(1) Contribute to economic, social and environmental progress with a view to achieving sustainable development.

(2) Respect the human rights of those affected by their activities consistent with the host government's international obligations and commitments.

(14) Engage with relevant stakeholders in order to provide meaningful opportunities for their views to be taken into account in relation to planning and decision making for projects or other activities that may significantly impact local communities.

Chapter 4: Human Rights

Enterprises should, within the framework of internationally recognized human rights, respect the international human rights obligations of the countries in which they operate as well as relevant domestic laws and regulations:

(1) Respect human rights, which means they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.

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

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

Chapter VI: Environment

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

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

b) engage in adequate and timely communication and consultation with the

communities directly affected by the environmental, health and safety policies of the enterprise and by their implementation.

Against this background, we want to raise our concern with the Swedish and Norwegian NCPs:

At the national level, the Saami right to herd reindeer is a usufruct right, and hence a property right to land that enjoys equal protection under the Swedish constitution as an ownership right.[iii] The Saami are an indigenous people, and as such hold rights to their traditional territories.

The Saami reindeer herding collective of Jiingevaerie Saami village have not consented to the Statkraft wind power project on their traditional lands. Without the consent and permission of Jiinjevaerie Saami village the project, and thereby Statkraft, is at risk of breaching international law as it pertains to indigenous peoples. Without the Free Prior and Informed Consent of Jiingevaerie Saami village, or a meaningful engagement with the community, Statkraft risk violating at least the following human rights of the Saami people. These include more specifically:

The right not to be subject to discrimination based on race is codified in the UN Universal Declaration of Human Rights (UDHR) and elaborated upon in International Convention on the Elimination of All forms of Racial Discrimination (CERD). Through the CERD, as interpreted by the UN Committee on the Elimination of all Forms of Racial Discrimination (the CERD Committee), it is clear that the property right enshrined in the UDHR and the CERD encompasses a protection of indigenous peoples' traditional lands, waters and natural resources, to the extent domestic legislation generally recognizes private property rights. Swedish legislation acknowledges property rights to land, and the reindeer herding right is also recognized as a property right under Swedish law. This also means that the Statkraft project is likely to be in violation of Article 1 of Protocol 1 to the European Convention on Human Rights (ECHR).

The right to culture pursuant to the International Covenant on Civil and Political Rights (CCPR) Art. 27, as interpreted by the UN Human Rights Committee, establishes that the right to culture prohibits any activity that prevents indigenous individuals from pursuing their traditional livelihood. Reindeer husbandry constitutes such an activity that is protected under CCPR Art. 27, which Sweden also acknowledges. When a right to culture has been thus established, CCPR Article 27 does not allow for any proportionality test. If the Statkraft project prevents one single reindeer herder from continuously pursuing reindeer husbandry, it is without relevance that the wind power project would generate profits, or job opportunities, or anything else deemed to be of commercial or public interest. The activity is nonetheless prohibited. As stated above, the Statkraft project will most certainly force a number of reindeer herders out of the traditional land-based livelihood, thus depriving them of their cultural identity.

The rights outlined above firmly establishes that no industrial activities are allowed in indigenous territories if they render it considerably more difficult for an indigenous community or its individual members to continuously pursue their traditional land based activities in the area. These rights have been further strengthened by the adoption by the UN General Assembly of the Declaration on the Rights of Indigenous Peoples on the 13th of September 2007. Sweden and Norway voted in favor of the adoption of the Declaration and has pledged to work for its implementation.

However, despite such international commitments and a constitutional recognition of their indigenous status in 2010, the Saami continue to face difficulties in fully enjoying the rights that arise from their status as an indigenous group, specifically pertaining to their right to participate and influence decisions on land use in their traditional areas. The Swedish planning authorities and

Superior Environmental Court have argued that adverse impacts on Jijnjevaerie Saami village is justifiable in the name of renewable energy. In other words, the Swedish state has given the project planning permission *conscious* of the fact that the project will likely result in irreversible impacts for the Saami community.

In this context it is worth noting that the Swedish government has received sustained critique from the UN Human Rights and CERD committees and UN Special Rapporteur James Anaya, for its continuing failure to protect Saami rights. Therefore, there should be no presumption made that Swedish planning procedures or Courts protect the rights of the Saami people, because they do not. In its recent report from June 2012, the European Commission against Racism and Intolerance (ECRI) pointed to a continued widespread discrimination of reindeer herding Saami in Sweden. The report specifically noted that Saami herding collectives "face problems regarding effective participation in decisions affecting them, including with respect to mining and wind-power development projects that would threaten their traditional way of life and planning permission processes for building on reindeer grazing lands."[iv] Since the Saami are not given the opportunity to meaningfully engage in decisions that have a direct impact on their lives it also makes it harder for them to assert their rights as an indigenous peoples and ultimately contribute to keeping them in a disadvantaged situation. The ECRI report concluded that these problems will be further considered by the Advisory Committee on the Framework Convention for the Protection of National Minorities, which will shortly be preparing its third opinion on Sweden.[v]

Statkraft is a Norwegian state owned company funded with significant investments from Norway's large pension fund, operating in territories of indigenous peoples overseas. The Statkraft wind power project in Jijnjevaerie Saami village will have profound negative impacts on these peoples' enjoyment of their rights, as has also been recognized by the Swedish Superior Environmental Court. Norway has been proactively supporting initiatives such as Reducing Emissions from Deforestation and Degradation, which requires respect for indigenous peoples' rights including the requirement to obtain their Free Prior and Informed Consent (FPIC). In addition, Norway's responsibility towards indigenous peoples impacted by its own actions or by the actions of its corporations has been addressed in a number of Norwegian fora. In 2004 the Norwegian Ministry for Foreign Affairs published 'guidelines on efforts to strengthen support for indigenous peoples in development cooperation,' committing to a human rights-based approach to development cooperation premised on ILO Convention No. 169. Likewise a 2003 report 'Look North! Challenges and Opportunities in the Northern Areas,' produced by Norwegian Government appointed committee of experts in 2003,[vi] included a unanimous recommendation that "public and private petroleum companies in Indigenous areas must comply with the consultation requirements of ILO-169 as the basis for their activities."[vii] The report also stated that: "in light of ILO the term FPIC (Free Prior and Informed Consent) constitutes a foundation when it comes to requirements for companies seeking to operate in indigenous territories."[viii]

However, an inconsistency exists between this recognition of the rights of indigenous peoples and the fact that a number of Norwegian companies have failed, and continue to fail, to live up to these standards in practice. This trend is expected to increase, particularly in the energy and extractive sectors where Norway and its companies are making major investments. Increased investment in these sectors is in general correlated with high risk of potentially profound negative impacts on indigenous peoples' rights to land, health, living environment and the way of life.

In 2011, Intex Resources ASA (Intex), a Norwegian mining company operating a nickel project in Mindoro, Philippines, was found to have violated the OECD Guidelines.[ix] In the report, the Norwegian NCP concludes that Intex had failed to comply with the Guidelines for stakeholder consultations by not including all impacted indigenous peoples in their consultations, and for its

failure to give adequate information on the impact of their mining operations. In its report, the Norwegian NCP urged Intex to perform due diligence to know and show that it minimizes risk for adverse impacts in the environment and on local communities, especially indigenous peoples. That is, to engage in consultations with the impacted indigenous communities and respect the outcome of the consultations. They were also asked to establish a grievance management system to cover grievances of affected groups. The NCP report proved that Intex had violated the human rights of the indigenous people affected by their project by not complying with international standards. In light of these recent conclusions it would appear appropriate that Statkraft be given guidance in relation to the importance of taking appropriate measures to prevent acts of transnational corporations registered in Norway which negatively impact on the enjoyment of rights of indigenous peoples in Sweden, and to ensure that they are held to account.

This is particularly relevant in light of the fact that Norway has ratified ILO Convention 169, has indigenous Saami peoples residing within its own territories and has been a consistently vocal supporter of the UN Declaration on the Rights of Indigenous Peoples.

Demands to Statkraft:

Our primary demand is that Statkraft engage in meaningful consultations with Jijnjevaerie Saami village on any and all developments affecting us. This type of "meaningful engagement" entails that the company respect the Jijnjevaerie Saami 's right to free, prior and informed consent on any and all projects affecting us. Jijnjevaerie Saami village believes that in the ideal situation, no additional industrial developments would take place on our traditional herding lands for the reasons outlined above. It is important to note that the development of the Ögonfägnaden area is particularly offensive, inappropriate, and in breach of the OECD Guidelines because (in addition to the failure to meaningfully consult Jijnjevaerie Saami village) it is located in the middle of a very ecologically sensitive migration route, central for sustained herding practices in the area. Finally, we want to note that if, during the process of meaningful consultation (which we would like to at least initially take place under the auspices of the NCP), Jijnjevaerie Saami village consents to some development on our lands, we expect that the company take all appropriate steps to prevent adverse impacts on the environment and our reindeer herding practices, and Jijnjevaerie Saami village expects to receive appropriate compensation from the company.

Requests to the Swedish and Norwegian NCPs:

We ask that the NCPs offer their good offices to facilitate a mutually-acceptable solution to this situation. Given that the violation we are alleging is taking place in Sweden, OECD protocol suggests that the complaint is to be handled by the Swedish NCP. However, the Norwegian NCP has an obligation to ensure that its companies, especially state owned companies, live up to its commitments to indigenous peoples. Given this responsibility of Norway under international law, we would like to request that the NCPs cooperate in co-handling this case.

To support our complaint we attach several documents:

First, we attach the correspondence between Jijnjevaerie Saami village and Statkraft (Appedix A). Already in 2008 Jijnjevaerie Saami village raised issues concerning the Statkraft wind power project. Statkraft's responses to our concerns suggests a lack of willingness by the project proponent to engage with issues concerning human rights and sustainability.

Second, we attach the Superior Environmental Court ruling from 2011 (Appendix B).

Thirdly, we attach the correspondence between Jijnjevaerie Saami village, Statkraft and the

municipality of Jämtland concerning immediate protective measures (Appendix C).

We look forward to a dialogue with the Swedish and Norwegian NCPs and hope we may have the opportunity to provide more information regarding this complaint.

Yours respectfully,

Marianne Persson

Marianne Persson
chairperson
Jijnjevaerie saami village

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[i] Vistnes, I. and Christer Nelleman "The matter of spatial and temporal scales: a review of reindeer and caribou response to human activity." *Polar Biology 31*, 2008. pp. 399-407.

[ii] Danell, Öje "Sakkunnigutlåtande i målen M824-11, M825-11 och M847-11 i Mark- och miljööverdomstolen angående av Statkraft SCA Vind AB:s planerade vindkraftsanläggningar inom Jijnjevaerie sameby." 2011.

[iii] See the Reindeer Herding Act (*Rennäringslagen*) Article 1 and the Swedish Supreme Court Case 1981 pp. 1.

[iv] The European Commission against Racism and Intolerance (ECRI) report on Sweden, fourth monitoring cycle, adopted 19th of June 2012. Council of Europe, http://www.coe.int/t/dghl/monitoring/ecri/country-by-country/sweden/SWE-CbC-IV-2012-046-ENG.pdf. pp. 35.

[v] Ibid.

[vi] 'Look North! Challenges and Opportunities in the Northern Areas' produced by Norwegian Government appointed committee of experts in 2003, (henceforth Look North! Report) available at: http://www.regjeringen.no/Rpub/NOU/20032003/032/PDFS/NOU200320030032000DDDPDFS.pdf.

[vii] Look North! Norwegian text: 'Offentlige og private petroleumsaktører i urfolksområder må legge konsultasjonskravene i ILO-169 til grunn for sin virksomhet.' pp. 100.

[viii] Look North! Report Norwegian text 'I lys av ILO danner begrepet «free, prior and informed consent » et grunnlag nå det gjelder krav til aktører som skal igangsette prosjekter i urfolksområder.' pp. 86.

[ix] "Final Statement: complaint from *the Future in Our Hands (FIOH)* against Intex Resources ASA and the Mindoro Nickel Project." The Norwegian National Contact Point for the OECD Guidelines for Multinational Enterprises, 28 November 2011. Found on: http://www.regjeringen.no/upload/UD/Vedlegg/ncp/intex_final.pdf