

Society for Threatened Peoples Switzerland (STP)

Complainant

vs.

BKW

Respondent

Specific Instance

16.1.2020

1 Identity of the Society for Threatened Peoples

Society for Threatened Peoples (STP) Switzerland

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The Society for Threatened Peoples (STP) is an international human rights organisation that works for the protection of persecuted minorities and indigenous peoples. The STP documents human rights violations, raises public awareness and represents the interests of affected communities before the authorities and policy-makers. It supports local initiatives aimed at strengthening the human rights of minorities and indigenous peoples, and works nationally and internationally with other organisations and individuals pursuing similar goals. The STP has consultative status at both the United Nations Economic and Social Council (ECOSOC) and the Council of Europe.

2 Identity of the BKW Group

The BKW Group (BKW) is a Bern-based international energy and infrastructure company with subsidiaries in Germany, Italy, France, the Netherlands, Austria and Norway.¹ The majority shareholder of the BKW Group is Canton Berne with 52.54 percent.²

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|-----------------------|---|
| Headquarter of BKW: | Viktoriaplatz 2, 3013 Bern, Switzerland |
| General phone number: | 0041 58 477 51 11 |
| CEO of BKW: | Dr. Suzanne Thoma, Suzanne.Thoma@bkw.ch |

¹ <https://www.bkw.ch/en/about-us/company/about-us/>.

² Annual Report BKW 2018: https://bkw-portal-static.s3.amazonaws.com/Webcontent/bkw.ch/fileadmin/user_upload/4_Ueber_BKW/Investor_Relations/GB18/Geschaeftsbericht_2018_de.pdf.

3 Introduction

The Society for Threatened Peoples Switzerland (STP) raises this complaint against BKW under the OECD Guidelines for Multinational Enterprises.

Fosen is a peninsula on the west coast of Norway, some 15 kilometres north of Trondheim. In 2016, the construction of Norway's largest onshore wind project, Fosen Vind DA, comprising six power plants, began. Completion is scheduled for 2020. The largest of the six wind power plants is to operate in Åfjord, in the mountain area called "Storheia" (which translates as 'large hill'). Storheia is one of three main winter pasture areas used by a southern Sami reindeer-herding community, the Åarjel Fovsen Njaarke Sijte, also called the "South Group". The wind turbines and additional infrastructure will make it impossible for them to utilize some 44 percent of their winter pastures.³ This will force the Sami people to reduce the size of their herds. Reducing the herds will lead to such a reduction in income that not all three families will be able to continue making a living out of the activity. Consequently, as will be described in detail below, one of the three remaining families will have to give up their traditional herding activities, violating their collective and individual rights as indigenous Southern Sami. This also raises the question whether the remaining two families will be able to continue, as the collective work burden will remain the same, in spite of reduced herds. The construction project in Storheia therefore puts the very existence of southern Sami reindeer husbandry on the Fosen peninsula at great risk. The loss of this land will mean that the last remaining breeding families will essentially have to give up their livelihood and culture.

BKW is a multinational enterprise that operates in the energy sector and has subsidiaries in Germany, Italy, France, the Netherlands, Austria and Norway.⁴ As an industrial partner, BKW holds almost 30 percent of Nordic Wind Power DA, which is the second largest investor in the Fosen Vind project (40 percent) in Norway. This project has generated massive protests over the last few years because it directly threatens the local Southern Sami indigenous community's cultural and territorial rights. Besides, the indigenous Sami community has not been sufficiently and adequately informed in different phases of the project, and consultation procedures have been unsatisfactory. This represents a breach of the ILO Convention concerning Indigenous and Tribal Peoples in Independent Countries (ILO 169), which has been ratified by Norway, and of Article 27 of the International Covenant on Civil and Political Rights (ICCPR), which is integrated into the Norwegian Constitution. It also stands in stark contradiction to the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). Furthermore, the company opted for an addendum instead of an extensive Environmental Impact Assessment (EIA) and did not conduct a Social Impact Assessment in any form. Norway ignored⁵ a request from the Committee for the Elimination of Racial Discrimination (CERD) to suspend the construction of the Storheia wind power plant while the case was under revision by the Committee. This, despite the fact that Norway has recognised the competence of the Committee to receive and consider communications from individuals, as required in Article 14 of ICERD. The continued implementation of the project is therefore a clear violation

³ Eira, A & Eira, I (2018). REINDRIFTSØKONOMISKE BEREGNINGER i forhold til driftsperiode for Storheia vindkraftverk og kV420 i rbd. 6 – Fosen, Sørgruppen. Proetct Sapmi, 2018,

⁴ <https://www.bkw.ch/en/about-us/company/about-us/>

⁵ <https://www.regjeringen.no/no/aktuelt/bygging-av-storheia-vindkraftverk-stanses-ikke/id2623735/>

of international law. It is for these and other reasons that the Sami parliament in Norway as well as other Sami and environmental groups strongly criticize the project.

The consortium Nordic Wind Power DA holds 40 percent of Fosen Vind DA, the company that is implementing the project. BKW has announced publicly that it holds about 30 percent of Nordic Wind Power DA as an industrial partner and through Nordic Wind Power DA holds 11.2 percent of Fosen Vind DA.⁶ According to BKW's annual reports from 2016 and 2017, Renato Sturani, member of the executive committee was a board member of Fosen Vind DA.⁷

BKW failed, either directly or through Nordic Wind Power DA, to encourage its investee Fosen Vind DA to prevent or mitigate adverse impacts on the affected communities and the environment. For this and other reasons set out below, BKW has not fulfilled its due diligence obligations.

In December 2018, the STP together with representatives of the affected Sami community informed BKW, as well as Credit Suisse, the founder of Nordic Wind Power DA, about the impacts the Fosen Vind project has and will continue to have on the southern Sami community^{8,9}. The company confirmed that they are aware of the Sami's concerns about the project.

Nevertheless, BKW

- insists that sufficient opportunities for consultation were given to the Sami
- insists that the reindeer will not be affected by the turbines
- after expressing a willingness to visit the affected Sami in Norway, informed the STP and the representatives of the Sami that it was not planning to withdraw its investment. BKW showed itself undeterred by the fact that, on the same day, CERD requested a suspension of the project according to Rule 94 (3) of the Rules of Procedure. BKW did not change its position even when Norway decided on 21 December to ignore the request of CERD.
- has not communicated any concrete steps on how it plans to avoid and mitigate human rights violations as a result of its operations or of the provision of products and services to investees in the future.

The last turbine was installed in the Storheia area in August 2019, and Statkraft, the majority owner, commissioned the plant during autumn 2019.¹⁰

This and other factors persuaded the STP that a more formal approach is required to ensure that the BKW Group is likely to fully acknowledge its corporate social responsibilities beyond its own operations and activities. The STP hopes that an independent mediation will create the awareness within BKW and other investors that they, through their services, operations and products, are party to the adverse impacts caused by their investees, in this case, violations of the fundamental collective and individual rights of the members of a vulnerable Southern

⁶ Berner Zeitung, BKW beteiligt sich an Windkraftprojekt in Norwegen, 23. February 2016:

<https://www.bernerzeitung.ch/articles/15166157>.

⁷ BKW Group Annual report 2016, p. 137:

https://www.bkw.ch/fileadmin/user_upload/4_Ueber_BKW/Investor_Relations/GB%2016/PDF/Web-Geschaeftsbericht_de.pdf and BKW Group Annual report 2017, p. 134:

https://www.bkw.ch/fileadmin/user_upload/4_Ueber_BKW/Investor_Relations/GB%2017/Geschaeftsbericht_Deutsch.pdf

⁸ Annex I: Letter to BKW November 2018.

⁹ STP Press Release 12.12.2018: <https://www.gfbv.ch/de/medien/medienmitteilungen/kampagnenstart/>.

¹⁰ <https://w3.windmesse.de/windenergie/news/32318-fosen-wind-windpark-onshore-norwegen-windenergieanlagen-installation-zufahrt-portfolio-statkraft>

Sami indigenous community. The STP kindly asks the NCP to offer its good offices to initiate an NCP mediation process.

The STP lodges this complaint with the Swiss National Contact Point because of BKW's failure to comply with the OECD Guidelines as described below. Principally, BKW has neither fulfilled its corporate social responsibility as a Swiss investor nor complied with internal policies and international principles for business and human rights. Yet, given that the majority shareholder of BKW is the canton of Berne with 52.54 percent, BKW should be all the more cautious when looking to invest in international projects.

The complaint is based on information gathered in a meeting with Credit Suisse and BKW, held on 12 December 2018 in Bern, as well as on communication with the affected southern Sami community, the Åarjel Fovsen Njaarke Sijte. In addition, the STP draws on statements from Sami representatives in Norway, juridical documents and material from other interested parties such as the Naturvernforbundet (Friends of the Earth Norway).

The STP attaches some documents that we hope may help the NCP to become familiar with the case. Among others, the annexes include the STP's letter to BKW and the individual complaint that the Sami Council (a transnational NGO that functions as an umbrella for different Sami organizations that advocate the rights of the Sami peoples in Norway, Sweden, Finland and Russia) filed on the behalf of the Åarjel Fovsen Njaarke Sijte with the Commission for the Elimination of Racial Discrimination (CERD). The STP further attaches a letter from the Norwegian Sami Association to the Swiss investors BKW and Credit Suisse, and our Factsheet regarding the case. The STP will elaborate on any question if and when asked to do so.

The STP states that the following facts are true and correct and that we act in good faith.

The complainant requests that BKW:

- Publicly addresses the adverse impacts on the Åarjel Fovsen Njaarke Sijte through acknowledgment, apologies and guarantees of non-repetition.
- Implements internal policy changes with robust due diligence mandates to avoid contributing to harm in the future and to ensure respect for FPIC and UNDRIP in all business relationships (including corporate lending).
- Creates a grievance mechanism and a trust fund to deal with future adverse impacts when they occur. Grievance mechanisms should reflect certain characteristics. The effectiveness criteria for non-judicial grievance mechanisms contained in the UN Guiding Principles on Business and Human Rights provide an important reference point.
- Retroactively remedies adverse impacts on the Åarjel Fovsen Njaarke Sijte through adequate compensation in the case of an agreement on land use rights through benefit sharing.

4. Broader Background

The breaches of the OECD Guidelines that form the basis of this complaint occurred in connection with the Fosen Vind DA project on the Fosen peninsula in Norway. There, the state-owned company Statkraft is constructing one of the biggest onshore wind power plants in Europe for the joint venture company Fosen Vind DA. The project encompasses six wind farms

and a high-voltage power line that will connect them to the grid. Construction started in 2016, and commissioning is set between 2019 and 2020 for all six plants.

According to company information^{11,12} the project ownership is currently as follows: Statkraft 52.1 percent, Nordic Wind Power DA 40 percent and Trøndenenergi 7.9 percent. Statkraft is the majority shareholder and responsible for project execution.¹³

Statkraft is an energy company owned by the Norwegian state, whereas Trøndenenergi is a regional power company. Nordic Wind Power DA is a consortium of European investors founded by Credit Suisse Energy Infrastructure Partners AG. Among its owners is BKW Energy, which owns a share of 28.1 percent as an industrial partner.¹⁴ BKW has stated in an interview that it indirectly owns 11.2 percent of Fosen Vind DA through its shares in Nordic Wind Power DA.¹⁵ Other members of the consortium are Talanx, a German insurance group, ELO, a Finish employment pension company, and the two German pension funds VWDA and WPV.¹⁶ The consortium itself has invested 1.1 billion Euro in the project.

4.1 Legal situation of the Sami people in Norway

The Norwegian Constitution as well as several international agreements and conventions ratified by Norway protect the livelihoods, languages and culture of the indigenous Sami peoples. Based on the 1987 Sami Act, the 'Sameting' (Sami Parliament) was established in 1989. To this day, it acts as the parliamentary representation of the Sami people. The purpose of the Act is furthermore to ensure that Sami culture, language and livelihood are protected and developed. Norway has also ratified the European Convention on Human Rights (ECHR) and Article 92 of Grunnloven, its own Constitution (Norway Charter of Fundamental Rights), guarantees the protection of human rights. Article 108 of Grunnloven specifically protects indigenous rights. This includes reindeer husbandry, which is of great relevance for the survival of Sami culture. This is particularly so in the case of the Southern Sami people, a minority within the larger Sami community. Reindeer husbandry has been described as the very foundation of their culture and language, as about half of the South Sami population are reindeer owners¹⁷ or are second or third generation descendants of reindeer owners. The South Sami community as a whole is considered as particularly vulnerable due to its small population and fragmented territories; its language is already listed as severely endangered.¹⁸

¹¹ Press release by BKW, February 23, 2016. Accessible via: <https://www.bkw.ch/en/about-us/media/press-releases/detail/news/detail/News/bkw-and-credit-suisse-energy-infrastructure-partners-to-become-part-of-europes-biggest-onshore-wind/>

¹² <https://www.renewableenergyworld.com/articles/2016/02/statkraft-credit-suisse-fund-to-invest-1-2-billion-in-wind-power-in-norway.html>

¹³ <https://www.statkraft.com/about-statkraft/Projects/norway/fosen/>.

¹⁴ Annual Report BKW 2018, p. 102: https://bkw-portal-static.s3.amazonaws.com/Webcontent/bkw.ch/fileadmin/user_upload/4_Ueber_BKW/Investor_Relations/GB18/Geschaeftsbericht_2018_de.pdf.

¹⁵ Berner Zeitung, BKW beteiligt sich an Windkraftprojekt in Norwegen, 23. Februar 2016: <https://www.bernerzeitung.ch/articles/15166157>.

¹⁶ Press release by Statkraft, February 23, 2016, accessible via: <https://www.statkraft.com/IR/stock-exchange-notice/2016/europes-largest-onshore-wind-power-project-to-be-built-in-central-norway-/>.

¹⁷ file:///Users/evamariafjellheim/Downloads/Ressursregnskap%20for%20reindriftsn%C3%A6ringen%202017-18.pdf

¹⁸ <http://www.unesco.org/languages-atlas/index.php>

Norway is the only country in Scandinavia to have ratified the ILO Convention 169 on indigenous rights, which requires governments to protect and respect indigenous peoples' right to their land and their right to participate in decisions that affect their management and use of natural resources. Norway has implemented mechanisms in order to ensure these rights. However, consultation processes and real influence over traditional land areas often prove to be weak and lacking good faith. During recent years, the development of wind power in particular has been pointed out as severely threatening Sami people's rights in many reindeer herding districts in the country. This represents the paradox of a double burden of climate change: As a changing climate is in itself endangering herding activities the herders are in the middle of complex processes of adaptation. In the wake of mitigation, herding practices, and in turn Sami rights, become severely threatened. This has increased conflicts between the Sami community and the Norwegian state. A Truth and Reconciliation Commission is working on a report about the consequences of assimilation politics against the Sami, historically and up until today. In the open hearings during the constitution phase of this TRC, particularly the Southern Sami community asked the TRC to consider the impacts of project interventions affecting reindeer husbandry. They further emphasised the importance of securing land rights in the South Sami area by following up on the recommendations in the second Saami Rights Commission report "The new Saami right" on Saami rights to land and water south of Finnmark County¹⁹.

4.2 Implications of the project

Fosen Vind DA is currently in the final phase of constructing the complex of six independent wind power plants on the Fosen peninsula in the county of Trøndelag. One of the power plants is located in Storheia, a region that encompasses the most important winter grazing area of a Southern Sami reindeer herding community organized through Åarjel Fovsen Njaarke Sijte (the "South-group"). Åarjel Fovsen Njaarke Sijte have been herding their reindeer in the area at least since the 16th century, acquiring a right from time immemorial.²⁰

Objecting on several grounds, the Åarjel Fovsen Njaarke Sijte have been struggling to defend their survival as reindeer herders since the project was first brought to their attention in 2006, when another company was involved. They have organised and attended protests in Fosen, in the nearby city of Trondheim and in Oslo as well as participated in numerous conferences and debates, also internationally. In June 2015, there was an interruption in the execution of the project for three weeks because Statkraft deemed it financially unprofitable. When the project was officially resumed in February 2016, Åarjel Fovsen Njaarke Sijte continued to protest. They received support from environmentalists and individuals as well as from several political parties as Norway is going through a process where many political parties are changing their politics concerning wind power development, both due to the increased social and environmental conflicts and new knowledge about this matter.²¹

¹⁹ <https://www.regjeringen.no/no/dokumenter/nou-2007-13/id491883/?ch=1>

²⁰ Naturvernforbundet: Vindindustri- eller kystnasjonalpark?, <https://naturvernforbundet.no/trondelag/vindkraft/category1424.html>.

²¹ <https://www.adressa.no/pluss/nyheter/2019/11/27/Nytt-slag-i-rettssalen-for-Fosen-samene-20476661.ece>

4.2.1. Negative impact on reindeer herding

In traditional reindeer herding, the reindeers are kept semi-wild and the Sami herders combine herding with natural migration from pasture to pasture, according to climatic conditions, disturbances from infrastructure and other needs that vary over time. The herds cover large distances during the yearly migration, and depending on the season and weather conditions, they require different kinds of fodder²² and access to different pastures. In Storheia, secure winter pastures are available as the particularly strong wind blows the snow away and thereby makes food available even in extreme winters. Storheia is so essential in changing winter conditions that the Åarjel Fovsen Njaarke Sijte spare these pastures during stable winters in order to save them for tough winters in the future, when access to other winter pastures is impossible.²³

Climate change and developmental projects such as forestry and recreation activities have already significantly reduced the number of winter pastures that are available to Åarjel Fovsen Njaarke Sijte, making reindeer herding increasingly difficult.²⁴ They only have four winter pasture areas left (a threshold according to experts, as reindeer herding requires flexibility in order to avoid overgrazing and thereby secure pastures for future challenges), one of which is Storheia. Storheia is the reindeer herders' largest winter pasture area and makes up almost half of the total winter pasture grounds. It is also the only pasture area that can be used during harsh winters, when the other pastures freeze.

The 80 wind turbines in Storheia will occupy about one third of the pasturing area, with additional roads and infrastructure. Their impact, however, will reach much further than the designated construction area: reindeers are shy and avoid humans and infrastructure as much as they can. Scientific studies²⁵ have shown that reindeers, particularly females with calves, avoid wind turbines and associated roads and buildings and always maintain a safe distance. Besides significantly reducing the amount of pasture area that remains accessible to the reindeer, this also leads to the disruption of traditional and central migration pathways to further pasturing areas running through Storheia. When these migration paths disappear, it will become necessary for the herders to transport their reindeer from pasture to pasture via ship or truck, leading to stress among animals, with increased losses and additional costs. Only very few scientific studies²⁶ conclude that the behaviour of reindeer is not affected by wind turbines. According to a report published on the website of Naturvernforbundet (Friends of the Earth), Norway's oldest nature and environmental protection organisation, only 10-15 percent of all studies conducted on this issue found that there are no negative impacts of wind power plants on reindeer.²⁷ Moreover, the reindeer herders dispute whether these studies are directly applicable to the situation in Storheia. In their opinion, the studies are faulty in their

²² Jernsletten Johnny-Leo L. Klovov Konstantin: Sustainable Reindeer Husbandry, Summary Reports, 2002, p. 17f., http://www.reindeer-husbandry.uit.no/online/Final_Report/final_report.pdf.

²³ ANNEX II: Individual complaint brought by the Åerjel Fovsen Njaarke Sijte at the UN Committee on the Elimination of Racial Discrimination, 2018, Ziff. 1.11., p. 5.

²⁴ ANNEX II: Individual complaint brought by the Åerjel Fovsen Njaarke Sijte at the UN Committee on the Elimination of Racial Discrimination, 2018, Ziff. 1.11., p. 5 f..

²⁵ Skarin Anna, et al.: Out of sight of wind turbines – Reindeer response to wind farms in operation, 2018, <https://onlinelibrary.wiley.com/doi/abs/10.1002/ece3.4476>; Report of the Swedish Environmental Protection Department Skarin Anna, et al., Naturvårdsverket, Vindkraft och renar – en kunskapssammanställning, 2013.

²⁶ Colman Jonathan, et al.: Is a wind-power plant acting as a barrier for reindeer Rangifer tarandus tarandus movements?, Wildlife Biology, p. 439-445; Flydal

Kjetil, et al.: Effects of wind turbines on area use and behavior of semi-domestic reindeer in enclosures, International Journal of Ecology, 2009, p. 1-14.

²⁷ Christian Nellenmann: Utbygging av vindkraft I Fovsen-Njaarke/Fosen reinbeitedistrikt: Konsekvenser for reindriften i Sørgruppen, p. 42 f. : <https://naturvernforbundet.no/getfile.php/13132982-1523651608/Fylkeslag%20-%20Finnmark/Bilde/Utbygging%20av%20vindkraft%20p%C3%A5%20Fosen%20i%20Fovsen-Njaarke%20reinbeitedistrikt%20low%20res.pdf>.

methodology²⁸ as they were conducted in areas that have quite different characteristics, or by researchers belonging to institutes partially funded by the interested companies. Companies that fund studies are allowed to select the researchers that undertake the research, many of whom reportedly enjoy little trust among the Sami, due to obvious conflicts of interest on the grounds of the economic attributions the researchers receive. We add here that in the recent appeal trial in the Frostating Court of Appeal during December 2019, the court was informed about an issue that until now might have been given less attention yet is crucial in terms of the impact of the wind power plant on the accessibility of the Storheia area: in certain weather conditions, the wind turbines may throw pieces of ice to the ground with great velocity. This has led Statkraft to implement strong security procedures and assessment methods for their employees in line with Health, Environment and Safety legislation. Fosen Vind DA, on the website <https://www.fosenvind.no/vindparkene/iskastvarsel/>, publishes a daily rating of the risk of such ice throws. An image included in Annex VII, taken in Storheia by a fact-finding team on 11 January 2020, shows such a block of ice that had been hurled to the ground by a wind turbine. The day this image was taken, the website declared the risk to be minimal. Yet, this block of ice was clearly fresh given it had not yet been covered by snow. This shows not only that the safety information that is made available is inaccurate and thus unreliable, but further confirms that, given the danger of such ice throws, Storheia has become inaccessible for the Sami and their reindeer herds.

Associated infrastructural projects are also highly disputed. The construction of a high-voltage power line as it is planned in Storheia is problematic and will affect the reindeer both during construction due to increased human activity and once operational. As studies have shown, the reindeers are disturbed by the UV light of the cables and therefore tend to avoid them²⁹, particularly during the dark winter season. Moreover, the extensive network of roads that precedes the power plants changes their migration paths. In winter, the animals might follow the roads, as they are easier for them to walk on. This alters their migration patterns and makes it complex for the herders to gather them, implying increasing workload and costs. Snow edges along roads make it difficult for the animals as well as for the Sami, as herding by snow scooters becomes a difficult task.

Considering all the above aspects, the Årjel Fovsen Njaarke Sijte expect that, as a consequence of the wind power project, they would no longer be able to use the entire Storheia area, thereby losing 44 percent of their winter pastures.

According to the Årjel Fovsen Njaarke Sijte, the wind power plants and the associated infrastructure (roads, grids, power stations) affect their ancestral herding activities in several ways.

They will cause a severely increased work burden as well as a substantial increase in the costs of herding, as they will have to employ both trucks to move the animals and helicopters to force their migration across areas that the reindeer now tend to avoid. Additionally, this leads to higher stress levels among the animals that are foreseen to generate loss of weight and a decreased reproduction (miscarriages or low fertility) of the herds.

The loss of pastures will push the herders to reduce their herds. Because herding is a full-time activity for the active herders, reducing the herd will force one of the three remaining families to leave herding. This is considered to be a violation of both their collective and individual rights according to ILO Convention 169 and article 27 of the ICCPR. Reindeer husbandry is at the heart of the survival of the vulnerable Southern Sami culture that has suffered the accumulated

²⁸ ANNEX II: Individual complaint brought by the Årjel Fovsen Njaarke Sijte at the UN Committee on the Elimination of Racial Discrimination, 2018, Ziff. 1.20., p. 9.

²⁹ Cressey Daniel: Why Reindeer Steer Clear of Power Lines, Nature magazine, March 14, 2014. <https://www.scientificamerican.com/article/why-reindeer-steer-clear-of-power-lines/>.

effects of interventions in their areas over time. We are talking about a small group of approximately 2000 individuals belonging to this indigenous people living within the borders of Norway and Sweden. With only around half of the population still speaking the language, which is listed on the UNESCO list of endangered languages, it is severely in danger of extinction. Reindeer herding is the most central activity that guarantees the maintenance of their culture, language and community, something that must be given emphasis in this case.

Continuously more Sami herders in other communities are already giving up reindeer husbandry due to these accumulated burdens and increasing conflicts between the Norwegian state and the Sami population. It is particularly the younger generation that shows great preoccupation about their future, leading to higher psychological distress. In addition to representing a violation of these families' rights, if one out of three families leaves reindeer herding, this makes the work of the remaining herders all the more difficult as there are fewer people who can rely on each other to gather the reindeers in tough and complex winter conditions. For reindeer herders, fewer pastures also mean fewer options for adaptation in the future, which poses a threat especially in the face of climate change. In harsh winters, the Åarjel Fovsen Njaarke Sijte have no other alternative than the high, well-sheltered winter pastures in Storheia. If they lose access to this area, the remaining reindeer herders expect that, in the medium to long term, they would also have to give up reindeer herding. This has made Åarjel Fovsen Njaarke Sijte demand a compensation strong enough to make them able to transit to a herding partially based on processed supply fodder during winter. They underline that such a solution would jeopardize traditional herding; however, they consider this a desperate intent to save the herding for all the involved herders. Fosen Vind DA has even appealed the First Instance Court's decision to grant partial compensation, which suggests a very low commitment to corporate social responsibility on the company's part.

One counterargument from Statkraft and the investors regarding the negative impacts of the project is that the company has reached an agreement with the other Sijte (The "North-group") that belongs to the overall Fovsen Njaarke Sijte that practices herding on the Fosen Peninsula. The two groups, although belonging to the same district, have maintained themselves as separate units for many years, with separate boards of representation. For the North-group, the Roan Park has been the sole problematic wind park among the six separate wind parks comprising the Fosen Vind project. This separation of the two groups has led them to try different approaches in the consultation process leading to the NVE licence. While the Åarjel Fovsen Njaarke Sijte (South-group) has maintained that the project violates their rights and should not be implemented throughout the process, the North-group has pursued to negotiate terms that might mitigate the impacts and guarantee their future survival as reindeer herders. According to Statkraft and the investor group, they have shown a better "will to adapt" and a more "positive attitude". However, during the December 2019 appeal trial, the North-group had one year of experience with the Roan Park in operation. The consequences had turned out to be much more severe than foreseen, and they could document a chaotic herding year in the Frostating Court of Appeal. By December 2019, the ear marking of calves (usually carried out during June, July or August every year) and the slaughtering of male animals (September or October, every year) had not yet been carried out, as the animals had spread out over vast lands in order to avoid the infrastructure, something that is dramatic for a reindeer herding district. This situation led this group's lawyers to ask the Frostating Court of Appeal to undertake an independent evaluation of the Roan Park's possible violation of ICCPR art. 27 and the ILO Convention 169. In the words of one of the North-group herders during the appeal trial in December 2019: "It does not matter whether we try to negotiate to partially save the herding, or take an absolute stance based on principles, as the South-group has done, the result is the same. Our rights are not respected, and here we are, both groups in the court." What is important to underline here is that the North-group's negotiations with the company is, according to them, based on a desperate move to save the herding as they are confronted with what appears to be an unavoidable violation of their rights, not a positive inclusion of their

demands and plans for the future. This difference is substantial, and shows stronger structural problems embedded in these consultation processes as they occur in Norway.

4.2.2. Negative impact on the cultural rights of the Sami people

Article 27 of the International Covenant on Civil and Political Rights and Article 108 of the Norwegian Constitution guarantee the rights of the Sami people to practice their culture and livelihood as well as to preserve their own language.

The Southern Sami people practice reindeer husbandry within groups, the so-called Sijtes (or Siidas in the Northern Sami community). Often a Sijte is composed of a group of several families working together through different units. Each Sijte makes use of a territory, which they have established as their own through historical use. The Southern Sami are just one indigenous people among several Sami peoples, and live in areas divided between Norway and Sweden. In the case of the former, the southernmost and the northernmost Southern Sami village are 750km apart.³⁰ The Southern Sami do not comprise the majority of the population in any municipality and their language is almost only spoken within the family³¹ and during collective herding activities. The Southern Sami are also a minority within the Sami community and, as already mentioned above, their language is considered as severely endangered by UNESCO.³²

Reindeer husbandry is a central part of the Southern Sami identity, even for those Sami individuals who sustain themselves by engaging in other activities, as they still participate and gather with relatives during summer and autumn activities such as the ancestral ear marking of calves. This strengthens and keeps together the fragmented Southern Sami community, and is fundamental for their cultural survival. Reindeer husbandry is further at the core of the livelihood of those who are still herding as a full-time activity.³³ Moreover, handed down from generation to generation, knowledge about reindeer and reindeer husbandry is reflected in countless expressions of the endangered South Sami language, and is thus by far the most important aspect of their self-perception and identity.

To impede reindeer herding by reducing the available area of pastureland therefore also means to jeopardize indigenous Southern Sami culture, and thereby violate this people's rights. In this regard, Ellinor Marita Jåma, the director of the Reindeer Herders' Association of Norway and a member of the Sami Parliament, stressed in *Trønder-Avisa*, a Norwegian newspaper, that limiting the size of the winter pastures will make reindeer herding unsustainable. She explained that, as a result, the affected people will not only be forced to give up their livelihood, but also their cultural heritage and lifestyle: "Reindeer herding in the Southern Sami area is the bearer of the Southern Sami language and culture".³⁴ This is why the dynamics of wind power development have increased the conflict between the Norwegian state and the Southern Sami community, an alarming turn that jeopardizes the reconciliation work undertaken by the current Truth and Reconciliation Commission of this country.

³⁰ Lyngsnes Kitt Margaret: "I Really Want to Save Our Language": Facing the Challenge of Revitalising and Maintaining Southern Sami Language through Schooling, 2013, p. 229, <http://dx.doi.org/10.5539/ies.v6n3p228>.

³¹ Lyngsnes Kitt Margaret: "I Really Want to Save Our Language": Facing the Challenge of Revitalising and Maintaining Southern Sami Language through Schooling, 2013, p. 229, <http://dx.doi.org/10.5539/ies.v6n3p228>.

³² <http://www.unesco.org/culture/languages-atlas/en/atlasmap/language-id-414.html>

³³ Jernsletten Johnny-Leo L., Konstantin Klovov: Sustainable Reindeer Husbandry, Summary Reports, 2002, p. 91, http://www.reindeer-husbandry.uit.no/online/Final_Report/final_report.pdf.

³⁴ <https://www.newsdeeply.com/arctic/articles/2016/04/20/sami-reindeer-herders-fight-wind-farm-project>

4.3 Lack of Free Prior Informed Consent

In 2016, Ms. Victoria Tauli-Corpuz, the United Nations Special Rapporteur on the rights of indigenous peoples, published a report³⁵ on the human rights situation of the Sami people in the Sápmi region of Norway, Sweden and Finland. The report concludes that the rights over their lands and resources are a prerequisite for them to continue to exist as a distinct people. The report emphasizes that none of the three states appears to have sufficiently established, implemented or judicially protected these rights. Furthermore, Ms. Tauli-Corpuz found that extractive industry operations are having a negative impact on Sami livelihoods and culture.

In her report, Ms. Tauli-Corpuz says: “Relevant international standards, such as the International Labour Organization (ILO) Indigenous and Tribal Peoples Convention, 1989 (No. 169), establish that the State has a duty not only to consult with the affected Sami community but to obtain its free, prior and informed consent. The duty to consult and the requirement for consent apply not only to measures that will affect an already recognized right or legal entitlement, but also to any measures that may affect lands that are traditionally owned or possessed under customary tenure, whether officially titled or not, of the Sami people. Consultation and consent are not a single event, but should readily occur at all stages of a project, from exploration to production to project closure. In addition to consultation and consent, additional safeguards need to be in place in order to ensure that the rights of the Sami people are adequately protected in the face of natural resource investments. Such additional safeguards include prior impact assessments that focus adequate attention on the full range of rights that may be affected, mitigation measures to avoid or minimize the impact on those rights, fair and equitable benefit-sharing and compensation for impacts.”

The principle of Free, Prior and Informed Consent (FPIC) is embedded within the universal right to self-determination and recognized in UNDRIP. In essence, it allows indigenous peoples to give or withhold consent to a project that may affect them or their territories (Article 32 Section 2 UNDRIP). This consent should be sought before any project, plan or action takes place (prior), it should be independently decided upon (free), and be based on accurate, timely and sufficient information that is provided in a culturally appropriate way (informed) for it to be considered a valid result or outcome of a collective decision-making process.³⁶ According to Article 32 para. 2 of UNDRIP, the objective of consultations with indigenous communities is to obtain FPIC before any project that could affect the lands, territories and resources customarily owned, occupied or otherwise used by indigenous peoples is approved or commenced.³⁷

ILO 169 has been ratified by Norway and is therefore legally binding. Articles 6 and 7 include the requirement to consult with indigenous peoples whenever administrative or legislative measures affect them directly. Article 6 Section 2 calls for consultations to be carried out in good faith, in a form appropriate to the circumstances, and with the objective of achieving agreement or consent to the proposed measures. Moreover, Article 14 states that the ownership and possession of lands traditionally occupied by indigenous peoples shall be recognised.

There is no universally accepted definition of FPIC and various actors and institutions interpret FPIC differently. For investors, the definition of the International Finance Corporation (IFC) is

³⁵ Report on the human rights situation of the Sami people in the Sápmi region, United Nations General Assembly, Human Rights Council Thirty-third session, 9 August 2016:

<http://unsr.vtaulicorpuz.org/site/index.php/en/documents/country-reports/155-report-sapmi-2016>

³⁶ Food and Agriculture Organization of the United Nations, Free Prior and Informed Consent An indigenous peoples' right and a good practice for local communities, Manual for Project Practitioners, p. 15.

³⁷ For practical implementation and further information, see also: Food and Agriculture Organization of the United Nations, Free Prior and Informed Consent, An indigenous peoples' right and a good practice for local communities, Manual for Project Practitioners, p. 17.

relevant. According to the IFC Performances Standard 7, FPIC is achieved if there has been a well-documented negotiation that was held in good faith with the affected indigenous communities.³⁸

According to the documentation that the STP has received from the affected Sami community, there has neither been a genuine consultation process with, nor an effort to obtain the FPIC from, the affected indigenous Sami, constituting a violation of international standards like the UN Declaration on the Rights of Indigenous Peoples and ILO 169. We underline here that even when consultation steps with state actors can be documented, as in this case, in the Norwegian context, there has been broad critique of these procedures from different Sami actors, for instance pointing to the lack of expertise about Sami rights and reindeer husbandry in the Norwegian NVE. Consultations are carried out too late in the process (and therefore might be lacking good faith), or in inadequate ways, allowing for little knowledge to be attained by the Norwegian officials. At the same time, the growing number of smaller and bigger development projects planned within herding districts makes it too complex for the herding communities to attain enough information as well as limits their capacity and resources to follow up deadlines for inputs and to truly exercise FPIC during consultations.

4.3.1 Consultation process

The element 'Free' in FPIC requires that no manipulation, coercion or intimidation has taken place during the consultation phase.³⁹ As far as the STP is aware, nothing of the sort has happened in this case; the Sami were free to voice their opinion.

Fosen Vind DA contacted the Sami people prior to the beginning of the licensing process of the Fosen Vind project as well as invited them to attend a number of meetings to inform them about the project. During the initial planning phase, which took place at the time when Sarepta Energi was the company that applied for licensing, various placements of the wind turbines at different locations on the Fosen peninsula were considered. At that point, Storheia did not appear as a potential site in any of the plans and was still not considered as such in the 2008 Environmental Impact Assessment. In fact, in the corresponding Project Outline it was even argued that a wind power project there would represent a threat to reindeer husbandry in the region.^{40,41} It is surprising that this statement from the EIA has not stopped NVE's licensing of Storheia, as it is difficult to see how an assessment could conclude any more clearly.

A year later, the experts concluded that the entire Fosen wind power project would not be financially viable without the sub-project in Storheia, as the minimum of 800 MW would not be reached. Similarly, the construction of the high-voltage power line was considered to be impossible without including Storheia. The project was therefore adapted and a wind power plant as well as a high-voltage power line were planned also in Storheia. The Environmental Impact Assessment published in 2009, a year after the initial EIA, was simply adjusted in an addendum.⁴² The impact of the Storheia wind park was still considered strongly negative, but suddenly deemed acceptable. *How* the researchers reconsidered this is not augmented for in the report, something that poses important questions regarding reliability and transparency. In

³⁸ IFC, Performance Standard 7, Indigenous Peoples, January 1, 2012, p. 3:

https://www.ifc.org/wps/wcm/connect/3274df05-7597-4cd3-83d9-2aca293e69ab/PS7_English_2012.pdf?MOD=AJPERES&CVID=jivQI.D

³⁹ Governance of Tenure, Respecting free, prior and informed consent Practical guidance for governments, companies, NGOs, indigenous peoples and local communities in relation to land acquisition, p.5.

⁴⁰ ANNEX II: Individual complaint brought by the Åerjel Fovsen Njaarke Sijte at the UN Committee on the Elimination of Racial Discrimination, 2018, No. 1.17., p. 7.

⁴¹ Konsekvenser av vindkraft- og kraftledningsprosjekter på Fosen, NVE 2008:

<http://webfileservice.nve.no/API/PublishedFiles/Download/200700502/99537>, p. 111.

⁴² ANNEX II: Individual complaint brought by the Åerjel Fovsen Njaarke Sijte at the UN Committee on the Elimination of Racial Discrimination, 2018, No. 1.17., p. 7.

the Frostating Court of Appeal in December, the consultant could not give any answer to the question of why the conclusion had changed.

The Åarjel Fovsen Njaarke Sijte consider the arguments in favour of placing a power plant in Storheia as they are presented in the addendum to be neither scientifically nor legally sound.⁴³ Meanwhile, the government however insists that engagement with the Sami community was sufficient, referring to a meeting in 2013.⁴⁴ Yet, by that time, the plans had already been finalized and the Environmental Impact Assessment adapted without any previous consultation with the Sami people in relation to Storheia. This therefore means that both the conditions of *Prior* and *Informed* were ultimately not met during the planning process. The Åarjel Fovsen Njaarke Sijte filed a complaint on NVE's decision with the Ministry of Petroleum and Energy (OED) in 2011; however, their complaint was not taken into account (2013). In its decision, the OED argued that reindeer herding can still be practiced in the Storheia area with few negative impacts. This is not the reality. Faced with the construction site, the Sijte has already deemed this area as unaccessable, both because the reindeer avoid the area and because of safety considerations given the risk of ice falling from the turbines, as detailed above. A new complaint after modifications in the project was again not taken into account by the OED in 2016. In the same year, however, the OED did take into account the complaint from another reindeer husbandry community, the Voenglh-Njaarke Sijte, that disputed the construction of the Kalvvatnan Wind project in Nordland County, north of Trøndelag. In the OED's argumentation in that case, Article 27 of the ICCPR was taken in, as according to the OED, Norway's commitments to this article would make it a violation of international law if one Sami herder is denied her/his rights to continue in reindeer husbandry. The OED withdrew NVE's licence, and further emphasised the importance that reindeer husbandry has for the maintenance and transference of the vulnerable Southern Sami culture and language⁴⁵. In this context, and given the accumulated effects that a myriad of development projects have on the Åarjel Fovsen Njaarke Sijte, the reason for such different criteria is hard to grasp.

4.3.2 Consent

Consent implies that the indigenous community that will be affected by a project has fully agreed to its implementation. Key elements of such a consent-seeking process are participation and consultation.⁴⁶ In the case of Fosen Vind, the consultation process carried out by the Norwegian Water Resources and Energy Directorate (NVE) has not resulted in an agreement with the Åarjel Fovsen Njaarke Sijte, and they have not given their consent to the project. They consider the consultation process to have been hollow and not held in good faith, as they were afforded no meaningful ways to influence the final decision to give out a license. This is not in accordance with international standards like the IFC Performance Standard 7, which requires that negotiations be held in good faith.

In line with FPIC, if consent is withheld, renegotiations can be held if the community is willing to reconsider, but the right of indigenous peoples to refuse a renegotiation also needs to be respected.⁴⁷ In this case, the affected community was not given an option to adapt the project in order to lessen its overall impact. The Southern Sami opposed the project from the beginning, yet the project is on-going according to the Project Outline, meaning that no significant measures have been taken to minimise repercussions for the community aside from

⁴³ ANNEX II: Individual complaint brought by the Åarjel Fovsen Njaarke Sijte at the UN Committee on the Elimination of Racial Discrimination, 2018, No. 1.17., p. 7.

⁴⁴ ANNEX II: Individual complaint brought by the Åarjel Fovsen Njaarke Sijte at the UN Committee on the Elimination of Racial Discrimination, 2018, Ziff. 1.20., p. 10.

⁴⁵ OEDs vedtak av 11.11.2016: <http://webfileservice.nve.no/API/PublishedFiles/Download/200801262/1905272>

⁴⁶ Governance of Tenure, Respecting free, prior and informed consent Practical guidance for governments, companies, NGOs, indigenous peoples and local communities in relation to land acquisition, p.5.

⁴⁷ Food and Agriculture Organization of the United Nations, Free Prior and Informed Consent An indigenous peoples' right and a good practice for local communities, Manual for Project Practicioners, p. 25.

a reduction in the number of turbines in Storheia from 88 to 80. This, however, does not make the area more accessible for herding.

The decision to give the license for a project in Storheia was made by the NVE and confirmed by the Norwegian Ministry of Petroleum and Energy (OED) despite the Sami's lack of consent. Under the present circumstances, the Årjel Fovsen Njaarke Sijte still firmly oppose the project in Storheia. The only agreement the Sijte has entered with Fosen Vind DA is with regard to mitigation measures during the project construction phase. This, however, does not imply that they have given their consent for the project as a whole, as is pointed out in the written agreement, and should not by any means be interpreted as such. Nevertheless, BKW claimed in a meeting between the STP, representatives of the Sami and BKW, that because the Sijte had received some compensation for damages, they had at least partially agreed to the project. This form of reasoning has to be rejected, and should be considered a highly unsatisfactory practice of corporate social responsibility. Agreeing to remedies for violations that have already happened should not be misinterpreted as consent. Further, the Sijte's continuing objection is clear in all the documentation from the meetings held, and this protest is upheld until today. For this reason, the dispute is still ongoing in the court system, awaiting the Frostating Court of Appeal verdict by the end of January 2020 and the pending complaint to CERD.

4.4 Legal proceedings

4.4.1 Legal proceedings on a national level

In 2013, the Norwegian Ministry of Petroleum and Energy (OED) granted Fosen Vind DA the license for the wind energy project. On the 25 August 2014, the company filed an application with the District Court of Inntrøndelag for the expropriation of the land from the landowners and other rights holders, asking for the withdrawal of the reindeer herders' user rights. The Årjel Fovsen Njaarke Sijte filed an appeal against this application;⁴⁸ however, on the 15 August 2017, Fosen Vind DA's request was granted. The circumstances of the expropriations were, however, not established because the Sami people demanded a decision from the Supreme Court on the legality of such expropriations.

In May 2018, the Supreme Court denied the Sami separate proceedings and referred the case back to the Court of First Instance. The District Court then established the expropriation conditions, including the compensation amounts. The Southern Sami again lodged an appeal against these conditions, as well as against the legality of both the concession and the expropriations. In December 2019, the Frostating Court of Appeal adjudicated the District Court's decision and the pending verdict is expected to come before the end of January 2020.

At the same time as requesting the expropriation procedure, Fosen Vind DA also asked the government for early access to Storheia in order to start construction. They were granted permission to enter Storheia without awaiting the outcome of the above-mentioned proceedings. The Årjel Fovsen Njaarke Sijte lodged a complaint with the Court of First Instance also against this decision. However, in December 2017, the District Court confirmed the government's ruling. As such, both the Court of Appeal and the Supreme Court dismissed the complaints of the reindeer herding community. The construction began and is still ongoing, even though a final decision on the legality of the licence of operation and the expropriation remains outstanding.

⁴⁸ The Årjel Fovsen Njaarke Sijte could have sued the government at an earlier stage, claiming that the grant of the licence was illegal. However, such court proceedings would have meant that the Sijte would not have been able to try the same in the expropriation case, which is why they decided to follow this route.

In August 2019, the last turbine was installed in the Storheia area and Statkraft commissioned the plant during autumn of 2019.⁴⁹

4.4.2 Legal proceedings on an international level

On the international level, the reindeer herding community has filed an individual complaint with the UN Committee on the Elimination of Racial Discrimination. They consider the construction of the wind power plant on land that is traditionally used by the indigenous community a violation of their rights pursuant to Article 5 letter d number 5 in conjunction with Article 2 section 1 of the Convention on the Elimination of All Forms of Racial Discrimination.

On 10 December 2018, the UN High Commissioner for Human Rights asked the Norwegian government to stop the construction of the wind power plant until the individual complaint could be evaluated in detail. However, the Ministry of Petroleum and Energy (OED) decided on 21 December 2018 to ignore the request, stating that there was no reason to halt the project given it had passed all legal inspections as well as emphasising that the convention is not legally binding.⁵⁰

⁴⁹ <https://w3.windmesse.de/windenergie/news/32318-fosen-wind-windpark-onshore-norwegen-windenergieanlagen-installation-zufahrt-portfolio-statkraft>

⁵⁰ Press release of the Ministry of Petroleum and Energy, 21. December 2018: https://www.regjeringen.no/no/aktuelt/bygging-av-storheia-vindkraftverk-stanses-ikke/id2623735/?fbclid=IwAR1D8g0we8mAWI-TYLMcTMFP24HGib-p7gAgu5C5p6KrTF37qH7DE_ov1Fo.

5 Involvement of BKW in the Fosen Vind Project

BKW is involved in the financing of the project and is in part responsible for the resumption of the project after Statkraft considered abandoning it in 2015.

BKW has a 28.1 percent⁵¹ share in the European consortium Nordic Wind Power DA, which is the second biggest investor in the Fosen Vind project. BKW has also stated in an interview that, through Nordic Wind Power DA, they own a share of 11.2 percent of Fosen Vind DA.^{52,53} In 2015, Statkraft came to the conclusion that there was no additional energy demand in Norway and therefore planned to terminate the Fosen Vind project.⁵⁴ However, after pressure from Norwegian politicians and a request from Credit Suisse to continue the project, Statkraft⁵⁵ took it up again.⁵⁶ Additionally, with the new investor Nordic Wind Power DA, the energy company also had renewed financial backing of its project. In February 2016, it then became official that Statkraft, alongside the other investors, would go ahead with the wind power plant project in Fosen.

For its part, BKW did not take the necessary steps to prevent or mitigate the project's negative impact on the human rights situation of the Sami, even though these can be directly linked to BKW given the company's financial relationship with Fosen Vind DA through Nordic Wind Power DA. Furthermore, according to BKW's annual reports, Renato Sturani, member of the BKW's executive committee was a board member of Fosen Vind DA in 2016 and 2017.⁵⁷ Although BKW was informed about the situation of the Southern Sami, it did not issue any statements to condemn the situation nor did it withdraw its investment.

Following up on this, a parliamentary initiative requested the Grand Council of Berne to investigate how BKW ensures that its investments abroad respect human rights. In its reply, the cantonal government stated that BKW only invests in European countries that have ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms. Additionally, it emphasised that BKW requires projects to follow national law and asks partner companies to provide their code of conduct as well as that of their suppliers. In a meeting with the STP and representatives of the Sami on 12 December 2018, BKW used a similar argumentation and insisted that it is only a minority shareholder. BKW denied its influence over the company responsible for the construction of the wind power plant in Storheia despite significantly contributing to the realization of this same project through the second largest investor, Nordic Wind Power DA.

⁵¹ BKW Group Annual Report 2017: https://bkw-portal-static.s3.amazonaws.com/Webcontent/bkw.ch/fileadmin/user_upload/4_Ueber_BKW/Investor_Relations/GB%2017/Geschaeftsbericht_Englisch.pdf.

⁵² <https://www.bernerzeitung.ch/wirtschaft/unternehmen-und-konjunktur/bkw-beteiligt-sich-an-windkraftprojekt-in-norwegen-/story/15166157>.

⁵³ Annual Report BKW 2018, p. 102: https://bkw-portal-static.s3.amazonaws.com/Webcontent/bkw.ch/fileadmin/user_upload/4_Ueber_BKW/Investor_Relations/GB18/Geschaeftsbericht_2018_de.pdf.

⁵⁴ Statkraft press release of June 4, 2015: <https://www.statkraft.com/media/news/News-archive/20151/statkraft-halts-wind-power-planning-in-central-norway/>.

⁵⁵ Løsnes Aron B.: Sami Reindeer Herders Fight Wind Farm Project, Arctic Deeply, 2016, <https://www.newsdeeply.com/arctic/articles/2016/04/20/samireindeer-herders-fight-wind-farm-project>.

⁵⁶ Statkraft press release of June 25, 2015: <https://www.statkraft.com/media/news/News-archive/20151/new-project-central-norway/>.

⁵⁷ BKW Group Annual report 2016, p. 137:

https://www.bkw.ch/fileadmin/user_upload/4_Ueber_BKW/Investor_Relations/GB%2016/PDF/Web-Geschaeftsbericht_de.pdf and BKW Group Annual report 2017, p. 134:

https://www.bkw.ch/fileadmin/user_upload/4_Ueber_BKW/Investor_Relations/GB%2017/Geschaeftsbericht_Deutsch.pdf

However, even as a minority shareholder BKW bears a responsibility to perform due diligence on social and environmental issues and to insist on the application of the OECD Guidelines for Multinational Enterprises. These guidelines do not mention any exceptions for minority shareholders.

In this regard, in its final statement on “ABP/APG-Lok Shakti Abhiyan, KTNC Watch, Fair Green and Global Alliance, Forum for Environment and Development”, the Dutch NCP concluded that the degree of leverage an investor has on an enterprise is not necessarily only determined by the size of the shares it owns. Rather, “leverage may be very effectively applied by a large, high profile investor even if its participation is small in its own portfolio or in the enterprise concerned...”⁵⁸

Despite its position as such a high profile investor, BKW did not issue any statements condemning the situation in Fosen, nor did the company cut its investment in the Fosen Vind project, as already mentioned above. BKW representatives did travel to Norway but did not meet with the affected communities. On the grounds of its on-going relationship with Statkraft through Nordic Wind Power DA, the STP therefore sees BKW as indirectly implicated in human rights violations. The company is showing a lack of respect for the plight of the local indigenous Sami and a continuous disregard of several international standards as well as of its own policies, which require compliance with international standards and respect of human rights.⁵⁹

⁵⁸ Final Statement, ABP/APG - Lok Shakti Abhiyan, KTNC Watch, Fair Green and Global Alliance, Forum for Environment and Development, National Contact Point Netherlands, p. 5 f.

⁵⁹ BKW Code of Conduct p.3: https://bkw-portal-static.s3.amazonaws.com/Webcontent/bkw.ch/fileadmin/user_upload/80_diverses/pdf/Verhaltenskodex_CoRiCoS_de.pdf

6 Breaches of the OECD Guidelines

The OECD Guidelines for Multinational Enterprises point out that the Guidelines also apply to investment.⁶⁰ This is emphasised in the OECD Responsible Business Conduct for Institutional Investors 2017,⁶¹ which makes clear that an investor's due diligence must go beyond its own activities and operations and cover the entire value chain.

The STP submits that BKW, as a key shareholder of Nordic Wind Power DA, failed to carry out effective due diligence and to actively encourage Statkraft to prevent and mitigate adverse impacts of the project. By disregarding these OECD Principles, BKW also failed to abide by its own internal policies, which clearly state that "We [BKW] adhere to all national and international statutory provisions relevant to our activities, and align our corporate actions and decisions with them."⁶²

The STP further submits that BKW needs to update its policies, which currently do not include mechanisms to prevent human rights violations, or any opt-out clause. The policies also make no mention of how indigenous peoples and other affected communities could be included in the decision-making process.

The STP lodges this complaint with the NCP Switzerland since BKW has its headquarter in Switzerland, the company is owned by canton Bern with 52.54 percent⁶³ and the complaint focuses on BKW's corporate social responsibility as a Swiss company.

6.1 Failure to carry out risk-based and human rights due diligence (Chapter II [10] and Chapter IV [5])

The OECD understands due diligence as an ongoing and continuous process aimed at preventing, mitigating and accounting for adverse impacts on human rights, labour, the environment, etc.⁶⁴

While BKW has published several papers about environmental sustainability, it has said much less on corporate responsibility and even less on human rights.⁶⁵ Yet, BKW explicitly states in its Code of Conduct that the company adheres to all national and international statutory provisions relevant to its activities, and aligns its corporate actions and decisions with them.⁶⁶ This clearly includes human rights. BKW also mentions that the company expects its "agents, advisers and suppliers to comply with all applicable laws and regulations, and to adhere to our Code of Conduct and agreements."⁶⁷ These policies should therefore apply to the business relation of BKW with Nordic Wind Power DA.

BKW's internal policies stipulate due diligence processes in the context of stakeholder dialogues. In its Sustainability Report of 2013, BKW explained that dialogue with its

⁶⁰ OECD Guidelines for Multinational Enterprises: 2011, Preface [4], I [4].

⁶¹ OECD Responsible Business Conduct for Institutional Investors: 2017, p. 7-8.

⁶² BKW Group Code of Conduct: https://bkw-portal-static.s3.amazonaws.com/Webcontent/bkw.ch/fileadmin/user_upload/Verhaltenskodex_CoRiCoS_en.pdf.

⁶³ BKW Group Annual Report 2018: https://bkw-portal-static.s3.amazonaws.com/Webcontent/bkw.ch/fileadmin/user_upload/4_Ueber_BKW/Investor_Relations/GB18/Geschaeftsbericht_2018_de.pdf

⁶⁴ OECD Responsible Business Conduct for Institutional Investors: 2017, p.8.

⁶⁵ <https://www.bkw.ch/en/about-us/media/download-center/>

⁶⁶ BKW Code of Conduct, p. 3: https://bkw-portal-static.s3.amazonaws.com/Webcontent/bkw.ch/fileadmin/user_upload/Verhaltenskodex_CoRiCoS_en.pdf.

⁶⁷ BKW Code of Conduct, p. 4: https://bkw-portal-static.s3.amazonaws.com/Webcontent/bkw.ch/fileadmin/user_upload/Verhaltenskodex_CoRiCoS_en.pdf.

stakeholders is a key aspect in the implementation of its projects.⁶⁸ In a press release about the Storheia case, BKW stated that they evaluated both the licencing process and the project in general. However, BKW never directly engaged with the affected Sami communities and failed to independently investigate the consultation processes by the Norwegian authorities and Statkraft.⁶⁹

The Åarjel Fovsen Njaarke Sijte, with the help of the Saami Council and the Naturvernforbundet (Friends of the Earth Norway), have been fighting the project for years and continue to do so. Even the Sami Parliament in Norway made a statement on 4 March 2016, emphasising that the companies and investors involved in the Storheia power plant project share a responsibility to respect the human rights of the indigenous peoples as well as requesting the wind power plant in Storheia not to be built without the Sami's FPIC.⁷⁰

Yet despite the opposition and lack of consent from the Sami, a large part of Storheia has already been compromised and the construction of the wind power plant completed. Had BKW taken its due diligence seriously, the company would have known about the controversy surrounding the project and initiated a direct dialogue with the affected Sami communities to ensure that the consultation process was conducted in good faith and according to international standards.

BKW did not withdraw its investment even though it was informed by the STP in November 2018 that consent from the indigenous community was still outstanding, in which case a withdrawal would have been necessary according to the definition of FPIC in UNDRIP and ILO 169. At least from that point onwards, BKW was informed about the real and potential human rights violations related to the project in Storheia. Nevertheless, BKW continued to invest in Nordic Wind Power DA, stating that they believe in the rule of law in Norway. The company remained steadfast in its opinion even after CERD had asked Norway to suspend the construction of the wind power plant until the individual complaint of the Sami community could be evaluated more thoroughly as is CERD's right according to Rule 94 (3) of the Rules of Procedure. BKW did not choose to divest nor did it use its leverage to suspend the project when Norway decided to ignore the request⁷¹ on 21 December 2018, arguing that the Convention is not binding even though Norway ratified it in August 1970.⁷²

The STP questions whether BKW carried out a proper risk-based due diligence before entering into business relations with Statkraft and Nordic Wind Power DA. This would have been all the more pertinent given that the implementing partner, Statkraft, was involved in a complaints procedure between 2012 and 2016, handled by the Norwegian and Swedish NCPs, with regard to a very similar case submitted by the Jijnjevaerie Sami village of north-western Sweden. This should have cautioned BKW in entering this business relationship as well as prompted it to be particularly vigilant with respect to matters concerning due diligence. For example, in line with the recommendations given to Statkraft by the Swedish and Norwegian NCPs in the Jijnjevaerie Sami case, which are publicly available, BKW should have required Statkraft to

⁶⁸ BKW Sustainability Report 2013, p. 16: https://bkw-portal-static.s3.amazonaws.com/Webcontent/bkw.ch/fileadmin/user_upload/4_Ueber_BKW/Downloadcenter/UEber_BKW_Gruppe/2013_nachhaltigkeitsbericht_en.pdf.

⁶⁹ BKW Press Release on Wind power project Fosen, 11. December 2018: <https://www.bkw.ch/de/ueber-bkw/news-rund-um-die-bkw/news/windkraftprojekt-fosen-ga/>.

⁷⁰ ANNEX III: Letter from the Norwegian Sami Association to the Swiss Investors from 11. December 2018.

⁷¹ Press release of the Ministry of Petroleum and Energy, 21. December 2018:

https://www.regjeringen.no/no/aktuelt/bygging-av-storheia-vindkraftverk-stanses-ikke/id2623735/?fbclid=IwAR1D8g0we8mAWI-TYLMcTMFP24HGib-p7gAgu5C5p6KrTF37qH7DE_ov1Fo.

⁷² https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CERD&Lang=en

give the vulnerable situation of the Åerjel Fovsen Njaarke Sijte and the expected negative effects of the Fosen Vind project particular consideration in the planning of the project.

Additionally, the STP also criticizes BKW for having failed to carry out “*ongoing* monitoring”.⁷³ BKW should not only trust in the rule of law of Norway, but rather develop and add mechanisms to its own policies in order to ensure that indigenous peoples’ rights are respected. Furthermore, the STP finds it unacceptable that BKW’s investment policy lacks a monitoring due diligence that includes indigenous peoples’ rights and/or a clause that enables BKW to withdraw its investment if the investee disrespects international standards such as the OECD Guidelines, the UN Guiding Principles or BKW’s own policies. Such a termination clause would have inhibited BKW from entering into new business relations in connection with the Fosen Vind project given its adverse impacts on the indigenous community.

6.2 Failure to encourage business partners to act in accordance with the Guidelines (Chapter II [13])

The OECD Guidelines emphasise an enterprise’s responsibility with respect to its business partners throughout the value chain.⁷⁴ The relationship of BKW with Nordic Wind Power DA, and indirectly with Statkraft, clearly corresponds to what OECD understands as a “business relation”.⁷⁵

As outlined in Chapter **5 Involvement of BKW in the Fosen Vind Project**, BKW plays a significant role in the financing of the Fosen Vind project through its investment in Nordic Wind Power DA and therefore in capacitating Statkraft, the company responsible for project execution, to implement the project.

Under the OECD Guidelines, investors are not considered responsible for the negative impacts caused by their business partners. They are, however, expected to “seek to influence or encourage [the business partners] to prevent or mitigate the adverse impacts”.⁷⁶ In this regard it is important to note that, through their operations, products or services, investors create a “direct linkage” between themselves and the adverse impacts caused by their investees.⁷⁷

Given the OECD’s position on the role of investors, the STP submits that BKW has failed to influence Statkraft, either directly or through Nordic Wind Power DA, to prevent or mitigate adverse impacts of the project on the affected communities and the environment. BKW, as an industrial partner, should be aware of the negative effects that can arise during the construction and operation of energy plants, including those powered by wind.

The failure of BKW to positively influence its investee is manifested, for example, in the lack of consultation with affected communities and individual rights holders. According to the OECD Guidelines, Statkraft should have involved the affected indigenous communities from the very beginning. The Guidelines expect enterprises to “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”.⁷⁸

⁷³ OECD Responsible Business Conduct for Institutional Investors: 2017, p.33.

⁷⁴ OECD Responsible Business Conduct for Institutional Investors: 2017, p. 12.

⁷⁵ OECD Responsible Business Conduct for Institutional Investors: 2017, p. 13.

⁷⁶ OECD Responsible Business Conduct for Institutional Investors: 2017, p. 12.

⁷⁷ OECD Responsible Business Conduct for Institutional Investors: 2017, p. 13.

⁷⁸ OECD Guidelines for Multinational Enterprises: 2011, Chapter II [14].

The enterprise's duty to provide "meaningful opportunities" has been a key problem in this case. BKW insists that sufficient consultations were held by the state actors and Fosen Vind DA. However, as mentioned above, the consultations with the Áarjel Fovsen Njaarke Sijte were fundamentally flawed. Statkraft contacted the Sami several times before the licensing process for the power plants was initiated but this was merely to inform rather than to consult the Sami community about the project.⁷⁹

Important in this regard is also that Storheia was not decided as a location until after the 2008 Environmental Impact Assessment and was therefore not included in the initial information the community received. Further, the government, referring to a meeting in 2013, insists that consultation with respect to Storheia was sufficient.⁸⁰ By 2013, however, the plans had already been finalized and the Environmental Impact Assessment adapted, processes in which the Sami people were not involved. As such, consultation was clearly insufficient, bearing in mind that Statkraft should have involved the communities affected by the Fosen Vind project from the very start. Besides the fact that the Áarjel Fovsen Njaarke Sijte were afforded no influence whatsoever on the final decision to give out a license, Statkraft also did not consider the recommendations the Sami made for a possible re-routing. Instead, the company reduced the number of turbines from 88 to 80, a measure that did not in the least address the concerns of the Sami.

Whilst the lack of engagement with affected communities is primarily a failure of BKW's investees, BKW provided financing and, even as a minority shareholder, should therefore have involved the view of the affected stakeholders in its due diligence process. By entering into business relations with Nordic Wind Power DA, and thus with Statkraft, which failed to conduct meaningful consultations and dialogue with the affected communities, BKW has disregarded its own code of conduct as well as principle II [13] of the OECD Guidelines. Despite the devastating impact of the project on the indigenous Sami community, BKW clearly did not "encourage business partners [...] to apply principles of responsible business conduct compatible with the Guidelines".⁸¹

This attitude stands in sharp contrast with the suggestions outlined in Chapter II [22] of the OECD Guidelines, which include among others "temporary suspension of the relationship while pursuing ongoing risk mitigation; or as a last resort, disengagement with the supplier".

6.3 Failure to prevent or mitigate adverse human rights impacts (Chapter IV [3])

BKW's failure to conduct preventive and continuous due diligence as well as its lack of intention and willingness to encourage Statkraft to act in accordance with the Guidelines represent a breach of principle IV [3] of the OECD Guidelines.

Drawing on the UN Framework for Business and Human Rights "Protect, Respect and Remedy", the OECD Guidelines state that enterprises should "seek ways to prevent or mitigate adverse human rights impacts that are *directly linked to their business operations, products or services by a business relationship, even if they do not contribute to those impacts* (emphasis by the STP)".⁸² Furthermore, they underline that particular care should be taken in cases where especially vulnerable groups "such as indigenous peoples" are involved.⁸³

⁷⁹ ANNEX II: Individual complaint brought by the Áarjel Fovsen Njaarke Sijte at the UN Committee on the Elimination of Racial Discrimination, 2018, Ziff. 1.22., p. 10.

⁸⁰ ANNEX II: Individual complaint brought by the Áarjel Fovsen Njaarke Sijte at the UN Committee on the Elimination of Racial Discrimination, 2018, Ziff. 1.20., p. 10.

⁸¹ OECD Guidelines for Multinational Enterprises: 2011, Chapter II [13].

⁸² OECD Guidelines for Multinational Enterprises: 2011, Chapter IV [3].

⁸³ OECD Guidelines for Multinational Enterprises: 2011, Chapter IV [Commentary 40].

As outlined in Chapter **5 Involvement of BKW in the Fosen Vind Project** and Chapter **6 Breaches of the OECD Guidelines**, BKW is

- generally aware about the increased risk involved in projects that affect vulnerable groups such as indigenous peoples,
- and is fully informed about the concrete risks the Fosen Vind project poses to human and especially indigenous rights.

BKW is an investor in Nordic Wind Power DA and is backing this consortium as an industrial partner.⁸⁴ The company has not demonstrated any willingness to react to conflicts and human rights violations provoked or caused by its investees before and once a credit has been granted. BKW's investment policy lacks a monitoring due diligence and/or a clause that enables BKW to withdraw its investment should an investee fail to respect international standards such as the OECD Guidelines, the UN Guiding Principles or BKW's own policies. BKW has thereby failed to encourage its investees to prevent or mitigate adverse human rights impacts, both real and potential. Therefore, in the view of the STP, the energy company has to some extent become complicit in these infringements.⁸⁵

Important to mention is also that BKW, in a meeting with the STP and the Åarjel Fovsen Njaarke Sijte, claimed that the Sijte had agreed to the project because they had accepted certain remedy measures. Yet, the fact that the Sijte has received compensation for infringements during the construction phase does not mean that they accept the project as a whole. Implying that the acceptance of remedy measures is the same as consent shows a worrying lack of understanding of the concept of FPIC, which should be remedied as soon as possible.

⁸⁴ Press release BKW, 23.02.2016: <https://www.bkw.ch/en/about-us/media/detail/news/detail/News/bkw-and-credit-suisse-energy-infrastructure-partners-to-become-part-of-europes-biggest-onshore-wind/>

⁸⁵ OECD Guidelines for Multinational Enterprises: 2011, Chapter IV [3].

7 Violation of other Relevant Guidelines and Principles

7.1 Violation of the UN Guiding Principles on Business and Human Rights (UNGPs)

In January 2017, the Thun Group issued a discussion paper on the implications for corporate and investment banks of Principles 13 and 17 of the UN Guiding Principles on Business and Human Rights.⁸⁶ The premises developed in this paper are fundamentally flawed and represent a clear effort on the part of the Thun Group to evade responsibility for any human rights violations that occur as part of the projects they are financing. The Bank, for example, states that “under UNGP 13, a bank would generally not be considered to be causing or contributing to adverse human rights impacts arising from its clients’ operations because the impact is not occurring as part of the bank’s own activities.”⁸⁷

In their response to the Thun Group’s paper, Professor John Ruggie⁸⁸ and the UN Working Group on Business and Human Rights⁸⁹ made clear that enterprises could be involved in adverse human rights impacts both through their own activities and as a result of their business relationships. This clarification applies to all enterprises and is not limited to banks.

In line with this, the STP submits that BKW has proceeded in disrespect of UNGP 13 in the context of the Fosen Vind project. Instead of seeking to “prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts,”⁹⁰ BKW has continued to maintain business relations with Nordic Wind Power DA and thus also with Fosen Vind DA (see Chapter 5 **Involvement of BKW in the Fosen Vind Project** and Chapter 6 **Breaches of the OECD Guidelines**).

According to the commentary on UNGP 13, BKW is not only involved in adverse human rights impacts through its own *action* – financing the Fosen Vind project through Nordic Wind Power DA – but also through *omission*: Despite being a main investor in Nordic Wind Power DA, BKW *did not* use its leverage to mitigate any adverse impacts or to influence its partners within Nordic Wind Power DA to do the same (see Chapter 5 **Involvement of BKW in the Fosen Vind Project**).

Furthermore, UNGP 17 states that human rights due diligence “[s]hould cover adverse human rights impacts [...] which may be directly linked to [the business enterprise’s] operations, products or services by its business relationships.” As outlined in Chapter 5 **Involvement of BKW in the Fosen Vind Project**, at the latest after 22 November 2018, BKW was fully aware of the adverse human rights impacts of the Fosen Vind project in Storheia. Nevertheless, BKW upheld its business relations with Nordic Wind Power DA and thus with Statkraft. This clearly shows that BKW does not respect UNGP 17. A serious, extensive monitoring of the situation on the ground should have prevented the energy company from remaining in the respective business relationship in order to avoid further adverse impacts on the livelihood of the affected Sami reindeer herders. Furthermore, the STP has observed that BKW does not seem to have

⁸⁶ https://business-humanrights.org/sites/default/files/documents/2017_01_Thun%20Group%20discussion%20paper.pdf

⁸⁷ Thun group of banks, Discussion paper on the implications of UN Guiding Principles 13 & 17 in a corporate and investment banking context, 6 (https://business-humanrights.org/sites/default/files/documents/2017_01_Thun%20Group%20discussion%20paper.pdf)

⁸⁸ <https://business-humanrights.org/sites/default/files/documents/Thun%20Final.pdf>

⁸⁹ <https://business-humanrights.org/sites/default/files/documents/20170223%20WG%20BHR%20letter%20to%20Thun%20Group.pdf>

⁹⁰ http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

a mechanism – such as a termination clause – that enables the energy company to stop services, operations and investments if investee companies do not comply with BKW internal policies and international standards. Such a termination clause would have enabled BKW to fulfil its obligations in relation to the OECD Guidelines, the UNGPs and its internal policies with respect to the Storheia case.

7.2 Violation of the UN Global Compact

BKW does not explicitly mention the principles of the UN Global Compact in its sustainability policies. Nevertheless, the present case, involving large investments in companies constructing the wind power plant in Storheia, violates at least two of the ten principles.

Principles 1 and 2 maintain that “Businesses should support and respect the protection of internationally proclaimed human rights” and “make sure that they are not complicit in human rights abuses.”⁹¹ According to the UN Global Compact’s definition of “complicity,”⁹² BKW is clearly complicit in human rights violations: The investment in Nordic Wind Power DA ‘helps’ (facilitates, legitimizes, assists, encourages, etc.) in some way to commit a human rights abuse.⁹³

The Compact stipulates that companies carry out serious due diligence in advance of a project in order to prevent adverse impacts on human rights, adjust “policies and practices to prevent the infringement from occurring” and analyse partners in order to identify risks.⁹⁴ The STP doubts that BKW carried out serious due diligence and an assessment of the situation before entering into a business relationship with Nordic Wind Power DA in order to avoid adverse impacts. As the conflict with the Sami arose once Storheia was officially decided on as a location,⁹⁵ BKW certainly had sufficient information on the numerous infringements and should have taken measures to mitigate any adverse impacts on the Sami people.

Since BKW is a significant investor in Nordic Wind Power DA, which in turn is the second biggest investor in the Fosen Vind project, BKW would have been in the position to pressure the implementing company to prevent human rights violations and to seek a peaceful solution. In the view of the STP, BKW, having failed to do so, to some extent has become complicit in disrespecting Principles 1 and 2 of the UN Global Compact.

7.3 Non-observance of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP)

Article 32 Section 2 of UNDRIP maintains that states shall consult and cooperate in good faith with the concerned indigenous peoples in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources.

The manner in which the wind power plant project has been implemented in Storheia clearly violates the right of the Sami community to free, prior and informed consent. The Sami were excluded from consultations at the planning stage of the project (ex. Environmental Impact Assessment) and even when they were included in consultations and meetings later on, their concerns were ignored and they were never given an opportunity to truly influence the final decision. Furthermore, the Environmental Impact Assessment was amended in an unsound

⁹¹ <https://www.unglobalcompact.org/what-is-gc/mission/principles>

⁹² <https://www.unglobalcompact.org/what-is-gc/mission/principles/principle-2>

⁹³ <https://www.unglobalcompact.org/what-is-gc/mission/principles/principle-2>

⁹⁴ <https://www.unglobalcompact.org/what-is-gc/mission/principles/principle-1>

⁹⁵ The Sijte had one “consultation” meeting in 2013 long after the project plans had been finalised and also after they had already objected to the expropriation. See also ANNEX II: Individual complaint brought by the Åerjel Fovsen Njaarke Sijte to the UN Committee on the Elimination of Racial Discrimination, 2018, No. 1.23., p. 10.

manner and as far as the STP knows, no Social Impact Assessment was ever carried out. Finally, no consent was ever given by the Sami. Yet despite these weak assessments, the reports from 2008 and 2009 deemed the Storheia and Roan wind parks to have a substantial negative impact on reindeer herding. This has not been given weight in the final decision of the NVE. Given these circumstances, the project clearly violates Article 32 Section 2 of UNDRIP.

The UN Declaration on the Rights of Indigenous Peoples also enshrines the right of indigenous peoples to maintain and foster their culture and religion (Article 12). The wind power plant in Storheia will make it impossible for the reindeer herders to use the area as a winter pasture, in which case they will suffer a greater workload and incur additional costs. The loss of their most important winter pasture will pressure them to reduce their herds, which, as mentioned, will force one out of three remaining families to give up their way of life and thus their culture, meaning a serious violation of their rights.

Therefore, the Fosen Vind project is undeniably linked to violations of indigenous peoples' rights and directly contradicts the UN Declaration on the Rights of Indigenous Peoples.

7.4 Violation of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)

In the lawsuit filed by the Åarjel Fovsen Njaarke Sijte against Norway, the claimant states that the power plant project violates Article 5 (d) (v) in conjunction with Article 2 para. 1 of ICERD, which expects states to guarantee the right to own property alone as well as in association with others, without distinction as to race, colour, or national or ethnic origin. The construction of wind turbines in the region directly threatens the right of the reindeer herding community over its communal land, a right it has established through traditional use from time immemorial.

On 10 December 2018, CERD asked Norway to suspend the construction until CERD could reach a final decision. However, Norway chose to ignore this request on 21 December 2018. The final decision of CERD on the matter is still pending.

7.5 Possible violations of national law

In the lawsuit filed by the Åarjel Fovsen Njaarke Sijte, the community states that the wind power plant in Storheia violates Article 27 of the International Covenant on Civil and Political Rights, Article 1 of the Protocol to ECHR and Article 15 Section 2 of ILO 169. These rights are incorporated into Norwegian law through the Norwegian Convention for the Protection of Human Rights and Fundamental Freedoms.

In May 2018, the Norwegian Supreme Court denied the Sami separate proceedings and referred the case back to the Court of First Instance. The District Court then established the expropriation conditions, including the compensation amounts. However, the Southern Sami people have again lodged an appeal against these conditions, as well as against the legality of both the concession and the expropriation. The proceedings are pending, although a verdict is expected at the end of January 2020.

At the same time as requesting the expropriation procedure, Fosen Vind DA also asked the government for early access to Storheia in order to start construction. They were granted permission for this without awaiting the outcome of the above-mentioned proceedings. The Åarjel Fovsen Njaarke Sijte then again lodged a complaint with the Court of First Instance, which, in December 2017, confirmed the government's decision. As such, both Frostating Court of Appeal and the Supreme Court dismissed the complaints of the reindeer herding

community. The construction began and the last turbine has already been installed, even though a final decision on the legality of the concession and the expropriation has not yet been made.

8 Why the Society for Threatened Peoples is filing a Complaint against BKW

On the grounds of BKW's investment⁹⁶ in Nordic Wind Power DA and thus in the Fosen Vind project, the STP sent a letter⁹⁷ to BKW (and Credit Suisse) and issued a press release at the beginning of December 2018, after which the STP and representatives of the Sami were invited for a meeting with the energy company.

On 12 December 2018, the STP and representatives of the Sami had a meeting with the BKW members responsible for the Fosen Vind project. The BKW representatives assured the STP that the CEO of BKW, Dr. Suzanne Thoma, had been informed about the Fosen Vind case. Until now, BKW has not taken any action with regard to the demands that the STP and the Åarjel Fovsen Njaarke Sijte issued at the meeting. The parties requested the following of the energy company:

- To use its leverage as an investor in Fosen Vind DA and demand a renegotiation with the Åarjel Fovsen Njaarke Sijte considering the impacts of the project.
- To withdraw its investments from the Storheia wind power project should a mutual agreement with the indigenous community concerned not be reached.
- To stop business relations with Statkraft where the investee is party to adverse human rights impacts or damages to the environment.
- To commission an independent environmental and social impact assessment in all future projects in order to assess any potential negative effects.
- To incorporate exit clauses into financial contracts and other services that allow the energy company to dissolve business relations if business partners are involved in human rights violations or environmental damages.
- To fully recognise the rights of indigenous peoples in all future projects.
- To commit itself to respecting the rights of indigenous peoples as well as the UNDRIP's "Free, Prior and Informed Consent" (FPIC) in all future investment projects and to ensure the participation of and consultation with affected indigenous communities throughout the project-cycle.
- To ensure that adequate compensation for damages, mitigation measures and benefit sharing agreements are made part of any negotiations with affected indigenous communities.

In the meeting with the Sami representatives and the STP, BKW and Credit Suisse offered to visit the Storheia site and the Åarjel Fovsen Njaarke Sijte, but also said that they were not planning to withdraw their investment. The Sami decided not to follow up on the offer, as they did not feel that it would help to bring forward their cause.

⁹⁶ see **5 Involvement of BKW in the Fosen Vind Project**

⁹⁷ Annex I: Letter to BKW, November 2018.

9 Demands of the Society for Threatened Peoples on BKW

The STP requests the Swiss NCP to initiate a process of civil, effective, and meaningful dialogue relating to BKW's due diligence, indigenous people's human rights and BKW's non-observance of the Guidelines. BKW's corporate social responsibility policies do not sufficiently reflect international standards. The STP regards this as an issue BKW should improve by fully incorporating international guidelines and principles, particularly that of FPIC, into its decision-making processes and operating procedures. However, what is of even greater priority is that BKW complies with international standards and principles. The STP therefore demands of BKW:

- To fully comply with international human rights standards such as the OECD Guidelines, UNGP and UNDRIP.
- To issue a public statement wherein the company commits to adhering to the principle of FPIC if indigenous peoples are affected by a project and to avoid business relations with partners that violate FPIC, in line with UNDRIP and ILO 169.
- To address any adverse impacts experienced by affected communities through acknowledgement, apologies and guarantees of non-repetition.
- To comply with existing internal policies concerning human rights, sustainability and corporate responsibility and to disclose them fully.
- To adopt policies like the IFC Standard 7 and the Equator Principles when investing in other companies, consortia or projects in order to avoid any infringement of human rights.
- To implement internal policy changes to include robust due diligence mandates and exit clauses to avoid contributing to harm in the future and ensure respect for FPIC and UNDRIP in all business relationships (including corporate lending).
- To use its leverage to influence investee companies to respect human rights and the environment as well as to comply with BKW's own policies.
- To establish *ongoing* monitoring mechanisms that allow BKW to respond appropriately in cases where direct engagement with investee companies does not lead to the prevention or mitigation of adverse impacts on human rights and the environment caused by these investees (exit clauses).
- To stop business relations with investee companies involved in adverse human rights impacts or damages to the environment if engagement with them does not provide satisfactory results.
- To create a grievance mechanism to deal with future adverse impacts when they occur. Grievance mechanisms should reflect certain characteristics. The effectiveness criteria for non-judicial grievance mechanisms contained in the UN Guiding Principles on Business and Human Rights provide an important reference point.
- To retroactively remedy adverse impacts caused to the Åarjel Fovsen Njaarke Sijte through adequate compensation in the case of an agreement on land use rights through benefit-sharing.

10 Expectations of the Submitting Party regarding the Swiss NCP Proceedings

The submitting party requests the Swiss NCP to offer its good offices for mediation between the responding and the submitting party. The purpose of the mediation would be

- 1) to be able to engage directly with a representative of BKW in a decision-making position
- 2) to facilitate communication between the parties in order to negotiate meaningful solutions for the problems raised in this complaint.

Additionally, the submitting party would wish to address the following points with a representative of BKW in the company of a mediator:

- Assessment of how to include human rights and the principle of Free Prior and Informed Consent (FPIC) in BKW's internal policies and how to apply these in cases where indigenous peoples may be affected by a project.
- Examination of how to improve ongoing risk assessments as well as how to establish exit clauses in financial contracts that allow BKW to dissolve contracts if business partners are involved in human rights violations and environmental damages or if they do not follow the company's internal policies.

Annex:

Annex I: Letter from the STP to BKW, November 2018

Annex II: Individual complaint filed by the Åarjel Fovsen Njaarke Sijte with the UN Committee on the Elimination of Racial Discrimination, 2018

Annex III: Letter CERD to Sami Council, 10 December 2018

Annex VI: Letter from the Norwegian Sami Association to the Swiss Investors, 11 December 2018

Annex V: Fact sheet, Turbines Need Sami Consent! Norway: the construction of a wind power plant on the Sami winter pastures in Storheia, December 2018

Annex VI: Image of a block of ice hurled to the ground by a wind turbine in Storheia, taken on 11 January 2020 by a fact-finding team

Annex VII: Image of a block of ice hurled to the ground by a wind turbine in Storheia, taken on 11 January 2020

