



Initial Assessment of the Korean NCP for the OECD Guidelines for Multinational Enterprises

Complaint from Korean Transnational Corporations Watch (KTNC WATCH), PUSAKA, SKP-KAMe, and WALHI Papua regarding the palm oil plantation in Indonesia

September 9, 2020

1. Introduction

The OECD Guidelines for Multinational Enterprises (hereinafter, “the Guidelines”) are a set of voluntary and non-binding recommendations aimed at minimizing adverse impacts from the activities of multinational enterprises and strengthening their responsible business conducts.

The government of the Republic of Korea (ROK) established and is operating the Korean National Contact Point (KNCP) to promote the Guidelines and to handle specific instances regarding the activities of multinational enterprises which are based or operating in the ROK.

The KNCP offers good offices for parties to resolve issues raised in specific instances in accordance with the Implementation Procedures of the Guidelines. These procedures are to be used only upon agreement of the parties and their commitment to participate in good faith during the procedures.

The decision of a multinational enterprise to participate in good offices does not imply that its activities are not in compliance with the Guidelines. No parties participating in good offices are compelled to make a concession, waive their legal rights or violate the law.

2. Progress of the Specific Instance Procedures

On December 19, 2019, the Korean NCP accepted a specific instance submitted by four civic groups including Korean Transnational Corporations Watch (KTNC Watch), PUSAKA, SKP-KAMe, and WALHI Papua (hereinafter “complainants”) regarding the palm oil plantation in Indonesia involving POSCO INTERNATIONAL, the National Pension Service (NPS) and the Export-Import Bank of Korea (KEXIM) (hereinafter “respondents”) and forwarded the written submission to the respondents.

The respondents submitted written responses to the KNCP - KEXIM on February 10, 2020, the NPS on February 11, 2020 and POSCO INTERNATIONAL on February 12, 2020,

respectively - and the KNCP forwarded the submitted documents to the complainants. In response, the complainants presented additional submissions on March 9, 2020.

Although KEXIM said on March 13, 2020 that it was unable to submit its documents within the deadline (March 25), the KNCP conducted the initial assessment and made it public on March 16, 2020 to comply with its Operation Rules on the deadline (within ninety days from the date of receipt of a complaint). In response, KEXIM argued that it was not given enough opportunity to give its explanation and sent related documents, asking to re-examine the initial assessment on April 17, 2020. In accordance with Article 4, 15.2 and 20 of its Operation Rules, the KNCP accepted and deliberated additional documents from the parties.

3. Substance of the Specific Instance

3-1. Regarding POSCO INTERNATIONAL

In the process of the palm oil project, POSCO INTERNATIONAL adversely affected the environment (forests, sources of drinking water) and daily life of local residents, contrary to Human Rights and Environment in the Guidelines.

The deforestation and dumping of waste in the process of the project resulted in degrading water quality of Bian river and loss of biodiversity.

POSCO INTERNATIONAL failed to implement free, prior, and informed consent regarding the project which may affect the life of local residents in Papua.

In addition to the remedy of damages, the complainants request adoption and implementation of the palm oil production policy to prevent deforestation and exploiting local residents, development of measures for protecting right to water, etc.

3-2. Regarding KEXIM

KEXIM financially supported the project without considering adverse impacts caused by the overseas investment project on environment and human rights.

Its policy to identify the adverse impacts was insufficient when it provided financial support, and it did not carry out human rights due diligence required by the Guidelines.

As a public financial institution, KEXIM should review environmental and social risks when providing financial support for overseas development projects.

Activities of lending money and earning interest are subject to the Guidelines, as they are customary commercial activities carried out by financial institutions.

The local entity in Indonesia received loans from various commercial banks including KEXIM.

The case of Finland in which an export credit institution's export guarantee was not subject to the Guidelines, shall not be applied to the KEXIM's loan business per se, while a Dutch export credit institution was subjected to the Guidelines.

3-3. Regarding the NPS

As an institutional investor, the NPS failed to use its leverage to influence the company and carry out human rights due diligence despite its awareness of the problems in the POSCO INTERNATIONAL's project.

Although environmental issues were classified as investment risks in the POSCO INTERNATIONAL's investment prospectus, the NPS failed to take measures in relation to the project.

The NPS should engage in the matters of human rights and environment in the process of the POSCO INTERNATIONAL's project and reflect environmental impacts and measures for preventing infringement of rights in its foreign investment policies.

4. Respondents' Position

4-1. POSCO INTERNATIONAL's position

POSCO INTERNATIONAL sufficiently assessed the environmental impacts of the project, considered it in the decision making process, and took necessary measures.

The project does not adversely affect water quality of Bian river and the company discloses information on water.

PT.BIA discussed and consulted with all stakeholders about the project in good faith beforehand.

The issues raised by the complainants are not sufficiently substantiated. Further examination is unlikely to contribute to effectiveness of the Guidelines and only places inappropriate burden on the company, and rather, the respondent confirms that it complied with the OECD Guidelines.

4-2. KEXIM's position

As a public institution established and operated for the public purpose, KEXIM provides financial support for non-commercial purposes in accordance with government policies. In this regard, as the support is non-commercial, policy-based finance including the 'comprehensive plan for overseas agricultural resources development', it is not subject to the Guidelines.

KEXIM giving financial support to high risk businesses in the early stage and expanding the support to commercial banks after the business is stabilized is in line with the roles of a policy-based financial institution.

All export credit institutions receive payment in accordance to the OECD export credit arrangement, etc.

As guarantees and loans are the same as they are both a type of financial support, the nature of commerciality does not vary depending on specific services. Hence, the Finnish case in which an export credit institution was not subjected to the Guidelines can be also applied in this case. Moreover, the Dutch case was about a private business that performed outsourced tasks from the government under a contract.

In accordance to the Guidelines, 'applicable laws, court rulings and procedures' are considered during the initial assessment. Taking into account that Korea's Supreme Court has recognized the non-profit nature of lending activities, considering the establishment purpose institutions that provide lending, for example, Korea Resources Corporation (KORES), it is reasonable to see that the loan given by KEXIM for the purpose of developing foreign resources is also non-profit, and thus not be subjected to the Guidelines.

4-3. NPS' position

The NPS established the 'principle of responsible investment' by amendment of the 'Guidelines for Operation of National Pension Fund', and considers the factors such as environmental, social and governance (ESG) in its investment to increase stable and long-term profits. In accordance with 'Guideline on Responsible Business and Governance' and 'Guideline on NPS Stewardship Activities', the NPS also does activities as a shareholder including communication with enterprises in the event that enterprise value or shareholders' interest is likely damaged in relation to ESG.

5. KNCP's Initial Assessment

In compliance with the Procedural Guidance in the Guidelines, the NCP makes an initial assessment once a specific instance is received. The initial assessment is the process to determine whether the issue raised is bona fide and relevant to the implementation of the Guidelines. In making an initial assessment, the following six factors are taken into account.

- *the identity of the party concerned and its interest in the matter.*
- *whether the issue is material and substantiated.*
- *whether there seems to be a link between the enterprise's activities and the issue raised in the specific instance.*
- *the relevance of applicable law and procedures, including court rulings.*
- *how similar issues have been, or are being, treated in other domestic or international proceedings.*
- *whether the consideration of the specific issue would contribute to the purposes and effectiveness of the Guidelines.*

Accordingly, the KNCP considered these factors based on the documents submitted by the parties.

1) identity of the party concerned and its interest in the matter

Regarding the complainants, as KTNC Watch is an NGO that monitor and check businesses and institutions related to human rights, environment, labor, etc. and PUSAKA, SKP-KAMe, and WALHI Papua are NGOs which do activities in Indonesia, they have an interest in this specific instance.

POSCO INTERNATIONAL is a multinational enterprise which is headquartered in the ROK and operates in the United States, China, Japan, etc. and it has an interest in this specific instance as a party to the palm oil project in Indonesia.

The NPS is a multinational enterprise which has offices in the ROK, the United States, the United Kingdom, Singapore, etc., and it has shares in POSCO International. In the light of the above, it has an interest in this specific instance.

KEXIM is based in the ROK and has offices in countries including the United Kingdom, Indonesia, and Vietnam. In this specific instance, it has an interest as it received interest under the loan agreement with the local entity PT.BIA, in which POSCO International invested. However, KEXIM is a special entity (public institution) established to serve public purposes regulated by special laws and the financial support was policy-based finance carried out in accordance to the government's 'comprehensive plan for overseas agricultural resources development'.

2) whether the issue is material and substantiated

Given that the complainants alleged violations of Chapter II General Policies, Chapter IV Human Rights and Chapter VI Environment of the Guidelines and submitted relevant data, which was then followed by the respondents responding to these allegations, the issues raised in the complaint are considered to be material and substantiated.

3) whether there seems to be a link between the enterprise's activities and the issue raised in the specific instance

As the complaint concerns human rights and environment in the process of the palm oil project in Indonesia, there seems to be a link between the enterprise's activities and the issue raised in this specific instance.

4) the relevance of applicable law and procedures, including court rulings

KEXIM was established in accordance with the Export-Import Bank of Korea Act and it is subject to special laws which are not laws applied to commercial financial institutions such as the Banking Act and the Act on Corporate Governance of Financial Companies, and it is influenced by special agreements applied to export credit institutions in the OECD.

PT. BIA, a subsidiary of POSCO INTERNATIONAL carried out an environmental impact assessment (AMDAL, Analisis Mengenai Dampak Lingkungan) on the area permitted for the project prior to commencement of the project in accordance with Indonesian laws. And it has been certified as ISPO (Indonesian Sustainable Palm Oil) under the Indonesian law.

The NPS conducts its activities in accordance with 'Guideline on Responsible Business and Governance' and 'Guideline on NPS Stewardship Activities', and established the 'principle of responsible investment' through amendment of the 'Guidelines for Operation of National Pension Fund'.

Regarding the nature of commerciality, Korea's Supreme Court ruled in 1994 that although Korea Resources Corporation (KORES) offers loans to mining businesses and in return receives small interest and overdue interest to serve its establishment purpose of promoting private mining industry and reasonable development under the Korea Resources Corporation Act, it cannot be regarded as for-profit activities.

However, a commissioner said that the Guidelines shall be applied to KEXIM, comprehensively considering that the export credit institutions may be subject to the Guidelines depending on the commerciality of a business; KEXIM offered finance to the project and received interest in return just as any other commercial banks; the complainant's argument that the project has impacted the lives (human rights) of the residents and the environment in the process; and the purpose and contribution to the effectiveness to the Guidelines.

- 5) how similar issues have been, or are being, treated in other domestic or international proceedings

The Annual Report on the OECD Guidelines for Multinational Enterprises 2016 states that whether the Guidelines are applicable should be concluded on a case-by-case basis and in practice, NCPs consider the nature of the entity and its activities for determining the applicability of the Guidelines.

In the specific instances which were submitted in October 2018 and June 2019 respectively, the KNCP concluded that the Guidelines were not applicable to KEXIM's ODA projects.

The Swiss NCP stated that it should be decided in a case-by-case analysis based on the commercial activities, independently of the legal form or business content of the entity and in the FIFA specific instance case, it determined whether to apply the Guidelines depending on the commercial nature of activities.

Regarding the export credit institutions subject to the OECD export credit arrangements, the Finnish NCP stated that the Guidelines were not applicable to the state's export guarantee institution which is regulated by the state's special laws, while the Dutch NCP found that the private export credit institution (ADSB) which provides services under a contract with the government is subjected to the Guidelines.

- 6) whether the consideration of the specific issue would contribute to the purposes and effectiveness of the Guidelines

The role of the KNCP is to serve the purpose and effectiveness of the Guidelines by offering a forum for discussion and supporting the related parties to find a solution. The KNCP may contribute in serving the purpose and effectiveness of the Guidelines by facilitating a resolution through the good offices that it may provide for the complainants and the respondents.

6. Conclusion

The KNCP reviewed all the factors that should be considered in the initial assessment on the basis of the submissions of the parties concerned. As a result, given that the issues are material and that both sides are actively responding, it is recognized that there is a need to contribute to the resolution of the issues by offering an NCP level forum for discussions. Therefore, the KNCP determines that the issues raised merit further examination through good offices. However, as noted above, the Guidelines are not applicable to KEXIM for the reasons below and will not be included in the good offices process led by the KNCP.

① KEXIM is a public institution to serve public purposes regulated by special laws and the activity of this case is policy-based finance including the government's 'comprehensive plan for overseas agricultural resources development'.

② Considering relevant court rulings including the Korea Resources Corporation (KORES) case, it is difficult to say that KEXIM's activities in this project have commercial nature for just receiving interest in accordance to the OECD export credit arrangement.

③ Taking into account export credit institution cases in Finland and the Netherlands, it is hard to say that KEXIM's activities are subject to the Guidelines.

It shall remain clear that the initial assessment is not a process to determine whether the respondent has violated the Guidelines, but to determine whether the NCP can help the parties resolve their issues by offering good offices for dialogue.

7. Future Plan

The KNCP will contact the parties to check whether the parties are willing to participate in the process of good offices to discuss with each other and reach a mutually acceptable agreement. This initial assessment statement will be published on the KNCP's website (www.ncp.or.kr), as well as the final statement after the conclusion of the good offices.

September 9, 2020
Korean National Contact Point (KNCP)