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**SUPPLEMENTAL SPECIFIC INSTANCE:**

**GENDER-BASED VIOLENCE AND HARASSMENT IN GLOBAL OPERATIONS OF  
MCDONALD'S CORP. AND RELATED DUE DILIGENCE BY INVESTORS APG  
ASSET MANAGEMENT AND NORGES BANK**

Petitioners would like to thank the Norwegian and Dutch National Contact Points (“NCPs”) for taking the time to discuss the specific complaint against Norges Bank and APG Asset Management (“APG”). We remain immensely grateful for the seriousness with which the NCPs have taken this complaint.

This submission is being provided to supplement the specific instance submitted on 18 May 2020 (the “Initial Specific Instance”) by Petitioners in response to queries raised by the Norwegian and Dutch NCPs regarding:

- (i) the specific provisions under the *OECD Guidelines for Multinational Enterprises* (the “Guidelines”) that investors APG and Norges Bank have breached,
- (ii) Petitioners’ authority to represent the victims of gender-based violence and harassment at McDonald Corp.’s (“McDonald’s”) global operations,

- (iii) why APG and Norges Bank are the only investors named in this specific instance,
- (iv) whether gender-based violence and harassment is widespread at McDonald's, and
- (v) how similar issues have been, or are being, treated in other domestic or international proceedings.

The following supplemental observations are provided for your consideration:

## **I. BREACH OF THE GUIDELINES BY APG AND NORGES BANK: ABSENCE OF DUE DILIGENCE OR EXERCISE OF LEVERAGE AS IT RELATES TO GENDER-BASED VIOLENCE AND HARASSMENT AT MCDONALD'S**

Under Chapter II (General Policies) and Chapter IV (Human Rights), the Guidelines recommend that APG and Norges Bank conduct due diligence relating to activities that are directly linked to their operations, products or services by a business relationship, in order to identify, address and account for adverse impacts on matters related to human and labor rights covered by the Guideline:

### **A. Chapter II: General Policies on due diligence provides that companies should:**

- "Carry out risk-based due diligence [...] to identify, prevent and mitigate actual and potential adverse impacts as described in paragraphs 11 and 12, and account for how these impacts are addressed";<sup>1</sup> and
- "Seek to prevent or mitigate an adverse impact where they have not contributed to that impact, when the impact is nevertheless **directly linked** to their operations, products or services by a business relationship."<sup>2</sup>

Due diligence is therefore generally understood as the process to identify, prevent and mitigate actual and potential adverse impacts and account for how adverse impacts are addressed. The Guidelines' due diligence provisions apply to all enterprises "regardless of their sector, operational context, ownership and structure."<sup>3</sup> Following the premise that the definition of 'enterprise' under the Guidelines is broad,<sup>4</sup> these steps apply to institutional investors, and thus to Norges Bank and APG, and to all the companies listed in their portfolios.

### **B. Chapter IV on Human Rights provides more detail regarding how Enterprises should carry out due diligence for human rights and labor rights:**

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<sup>1</sup> The Guidelines, Chapter II (General Policies), para. A.10.

<sup>2</sup> The Guidelines, Chapter II (General Policies), para. A.12.

<sup>3</sup> The Guidelines, Chapter I, (Concepts and Principles), para. 4

<sup>4</sup> See Chapter IV, Commentary 37.

- “Respect human rights, which means they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved”;<sup>5</sup> and
- “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.**”<sup>6</sup>

The Guidelines establish basic steps an investor should take to help ensure that it is respecting human rights:

*i. “Have a policy commitment to respect human rights.”<sup>7</sup>*

The Guidelines’ Commentary indicates that the policy should address the investor’s human rights expectation of “personnel, business partners, and other parties directly linked to its operations, products or services.”<sup>8</sup> The Commentaries also state that this policy should be made publicly available, and be reflected in the investor’s operational policies and procedures as necessary to systemically embed in the investor’s enterprise.<sup>9</sup>

The information publicly available to Petitioners shows that Norges Bank and APG both have generalized policy commitments towards labor and human rights, attached with product-based exclusionary/divestment criterion. Norges Bank and APG have also established thematic focus areas dealing with specific human rights issues (e.g. child labor rights, gender equality), but there is no indication of how gender-based violence and harassment in the workplace is incorporated into the Norges Bank’s or APG’s due diligence mechanisms (see also Sections V. C & D of the Initial Specific Instance submitted 18-May-2020).

The responsibilities of Norges Bank and APG are tied to the adverse impacts to which they are ‘directly linked’. Norges Bank and APG should therefore be prepared to address the impacts they have within their risk-management systems and report on how these potential impacts are addressed, not just those they find of interest.

*ii. “Carry out Human rights due diligence as appropriate to their size, nature and context of operations and the severity of the risk of adverse human rights impact.”<sup>10</sup>*

Investors are expected to develop operational policies and procedures that are then integrated within the enterprise’s risk management system, so that acting on these procedures becomes a routine part of business. Petitioners recognize the challenges

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<sup>5</sup> The Guidelines, Chapter IV (Human Rights), para. 1.

<sup>6</sup> The Guidelines, Chapter IV (Human Rights), para. 3.

<sup>7</sup> *Id.* para. 4.

<sup>8</sup> *Id.* Commentary 44.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* para. 5

Norges Bank and APG have as asset managers of two of the largest pension funds in the world with potentially severe human rights violations from many different sectors. Scrutinizing and engaging with each company in detail is understandably not a practical approach. The Guidelines do emphasize however that enterprises should use risk-based approach that focuses due diligence on situations in which the severity and likelihood of adverse impacts are most significant.

In the last decade, the world has increasingly come to grips with the seriousness and prevalence of abuse, harassment and violence against women in the workplace. First with the creation in 2010 of UN Women (the *United Nations Entity for Gender Equality and the Empowerment of Women*), followed by the development of *Women's Empowerment Principles* established by UN Global Compact and UN Women, the adoption in 2019 by the ILO of the *Convention 190 Concerning the Elimination of Violence and Harassment in the World of Work*, and since 2017, the #MeToo movement, a massive outcry from millions of victims to demolish sexual violence at work. The World Health Organization estimates that one in three women worldwide have been subject to physical or sexual violence.<sup>11</sup> Surveys have also found that 40–50% of women in the European Union report some form of sexual harassment or unwanted sexual behaviour in the workplace.<sup>12</sup>

Recognizing that human rights risks is an ongoing exercise that changes over time,<sup>13</sup> there is no question today of the 'severity of the risk' and likelihood of gender-based violence and harassment in the workplace, and the pressing need for investors to carry out human rights due diligence to prevent and mitigate such adverse impacts.

This in combination with the widespread media attention in 2018-19 to worker protests and class-action sexual harassment lawsuits against McDonald's, and widespread media attention to the dismissal of McDonald's CEO in 2019 for a sexual relationship with a subordinate, APG and Norges Bank's internal and external monitoring systems should have alerted them to the growing problem of sexual harassment in an iconic company in which these two institutional investors had a \$1.7 billion stake.<sup>14</sup>

As recommended in the Guidelines' Commentaries, "enterprises should respect the human rights of individuals belonging to specific groups or populations that require particular attention, where they may have adverse human rights impacts on them."<sup>15</sup> Hence Petitioners would respectfully urge Norges Bank and APG to tailor their due diligence approach by applying a comprehensive gender-lens<sup>16</sup> to their activities in order to better identify, and thus mitigate and prevent such adverse impacts, as those that are occurring at McDonald's worldwide.

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<sup>11</sup> Global and regional estimates of violence against women: prevalence and health effects of intimate partner violence and nonpartner sexual violence, World Health Organization, (2013).

<sup>12</sup> See *Understanding and Addressing Violence Against Women*, World Health Organization (2012), p.5.

<sup>13</sup> The Guidelines, Chapter IV (Human Rights), Commentary 45.

<sup>14</sup> See Initial Specific Instance submitted by Petitioners the Dutch NCP, p. 23.

<sup>15</sup> *Id.* Commentary 40. See also Chapter V (Employment and Industrial Relations), Para 1.e.

<sup>16</sup> See *Due Diligence Guidance for Responsible Business Conduct* (2018), Due diligence is commensurate with risk", p. 17, Section 2.2(i) and Questions 2 and 11 of the Annex.

**C. Chapter II, Commentary 20 on company leverage explains that:**

“Meeting the expectation in paragraph A.12 would entail an enterprise acting alone or in cooperation with other entities, as appropriate, to use its **leverage to influence the entity causing the adverse impact to prevent or mitigate that impact.**”

The recommendations under Chapter II, paragraph A.12 or Chapter IV, paragraph 3 and 5, are not intended to shift responsibility from McDonald’s, the entity causing the adverse impacts, to APG and Norges Bank with whom McDonald’s has a business relationship. Rather, APG and Norges are asked to consider the risks being raised within their investment process and to use their “leverage” with McDonald’s, in which APG and Norges Bank are invested, in order to influence McDonald’s in the prevention or mitigation of the adverse impacts.<sup>17</sup>

In addressing enterprises’ responsibility to respect human rights, the Guidelines state that this responsibility applies to all enterprises, irrespective of such factors as ownership or size.<sup>18</sup> Following this premise, the Norwegian and Dutch NCPs, in the seminal specific instances filed against POSCO (South Korea), confirmed that like other multinational enterprises, “investors that are minority shareholders are expected to apply the Guidelines, including the due diligence provisions.”<sup>19</sup> This concept was later enshrined in the guide for *Responsible Business Conduct for Institutional Investors* (the “RBC Guide for Investors”). The issue therefore is not whether Norges Bank and APG should carry out due diligence, but rather, what degree of leverage can be exercised to mitigate the adverse impacts cause by McDonald’s. The *RBC Guide for Investors*,<sup>20</sup> Chapter II (General Policies-Commentary 22) and Chapter IV (Human Rights-Commentary 43) lists examples of engagement with companies to exert such leverage:

- Contacting the investee company by letter, email and/or telephone,
- Face-to-face meetings with the company at operational, senior management and/or board level to express views on RBC matters,
- Attendance and speaking at Annual General Meetings to express views on RBC matters,
- Using shareholder voting rights to express views on RBC matters,
- increasing leverage through collaboration with other shareholders (e.g. the PRI Collaboration platform),
- reduction of investment positions in the light of RBC risk(s) identified, where appropriate, and clearly communicating the reason for the reduction in the investment to the company,

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<sup>17</sup> See *Responsible Business Conduct for Institutional Investors* (hereinafter, “RBC for Investors”), p. 13.

<sup>18</sup> See Chapter IV, Commentary 37.

<sup>19</sup> See Norwegian NCP Final Statement, Complaint from Lok Shakti Abhiyan, Korean Transnational Corporations Watch, Fair Green and Global Alliance and Forum for Environment and Development vs. Posco (South Korea), ABP/APG (Netherlands) and NBIM (Norway) (2013), p. 22.

<sup>20</sup> See *RBC for Investors*, pp. 32-33.

- temporary or permanent divestment after failed attempts at mitigation, or due to the severity of the adverse impact.

All this would presumably involve processes of engagement with relevant stakeholders such as the trade unions raising the present specific instance, and other workers' rights organizations.<sup>21</sup>

Petitioners received no indication, whether public or private, that either Norges Bank or APG have exercised their leverage to influence McDonald's in the prevention or mitigation of gender-based violence and harassment.

## II. PETITIONERS HAVE A LEGITIMATE INTEREST IN THE MATTER OF THIS SPECIFIC INSTANCE

We noted in our discussion with the NCPs on January, 13, 2021 that as trade unions representing workers in the fast food sector, our mandate to represent McDonald's workers in this specific instance was clear.

However, in case further clarification is needed, we confirm that amongst affiliates of the IUF and EFFAT we have unions (like SEIU) that have members working in McDonald's.

The trade union movement globally fought for the adoption of ILO Convention C190 on elimination of violence in the world of work so that there would be an international labour standard to help us tackle sexual harassment. Additionally, we have mandates through Congress decisions etc to make elimination of sexual harassment one of our priority areas of work. This Specific Instance addresses directly the broader interest of female workers' rights including those at McDonald's,

Therefore, we are submitting this specific instance as organizations with a legitimate interest in the matter being raised. In accordance with the *Guide for National Contact Points on the Initial Assessment of Specific Instances* (the "Guide for NCPs"):

"Organisations with mandates or objectives related to certain RBC themes may also have an interest in issues touching on those themes (i.e. instances of environmental harm, forced labour etc.). An NCP may consider the mandate of an organisation as well as its stated objectives in submitting a specific instance in considering the **legitimacy of its interests** in a matter."<sup>22</sup>

There are a number of other specific instances filed under the Guidelines whereby NCPs have offered their good offices on the basis of the organization's 'legitimate interests' alone. The following are a few examples, among others:

- Norwegian and Dutch NCP Initial Assessments of the Complaint from Lok Shakti Abhiyan, Korean Transnational Corporations Watch, Fair Green and Global Alliance and Forum for Environment and Development vs. Posco (South Korea), ABP/APG (Netherlands) (January 2013) and NBIM (Norway) (November 2012).

<sup>21</sup> See Chapter II (General Policies), Commentary 25.

<sup>22</sup> The Guide for NCPs, p. 6.

- Norwegian NCP Initial Assessment of the Complaint by the NGO FIVAS, the Norwegian Association for International Water Studies, regarding the activities of Norpower, a subsidiary of Norconsult AS, operating in Malaysia (January 2015).<sup>23</sup>
- Dutch NCP Initial Assessment of the Complaint from Notification Oxfam Novib, Greenpeace, BankTrack, Friends of the Earth Netherlands (Milieudefensie) vs ING (November 2017)
- Dutch NCP Initial Assessment of the Complaint from UNI Global Union vs. IKEA (June 2019)<sup>24</sup>
- Dutch NCP Initial Assessment of the Complaint from Milieudefensie/Friends of the Earth Netherlands, WALHI/Friends of the Earth Indonesia and SDI/Friends of the Earth Liberia versus ING (January 2020)
- UK NCP Initial Assessment of the complaint from WWF International against SOCO International PLC (February 2014).<sup>25</sup>

### **III. APG AND NORGES BANK HAVE THE PROMINENCE AND REPUTATION TO EXERCISE LEVERAGE ON MCDONALD'S**

Norges Bank's and APG's leverage is not only measured by the size of their investment portfolios or the percentage of shares held in any particular portfolio company. Notwithstanding the fact that Norges Bank and APG respectively manage and administer NBIM and APB, two of the largest pension funds in the world, their influence and impact is far greater if one considers their reputation and prominence as institutional investors when it comes to sustainable investing, responsible business conduct and human rights (see Sections V. C & D of the Initial Specific Instance submitted 18-May-2020). Any decision Norges Bank and APG might make on mitigating and preventing gender-based violence at McDonald's, Petitioners believe will have a broader influence on other investors, and not just at McDonald's but at other companies in the food and services industry.

These institutional investors, and by correlation the Norwegian and Dutch NCPs, were selected because Petitioners believe these are the most promising avenues for access to remedy. Not only do the Norwegian and Dutch NCPs have a high reputation in this

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<sup>23</sup> Norwegian NCP Initial Assessment of the Complaint by the NGO FIVAS regarding the activities of Norpower, a subsidiary of Norconsult (January 2015): *"AS FIVAS is a Norwegian NGO specialising in corporate responsibility advocacy and lobbying about issues affecting water in the global south. FIVAS aims to influence national and international policies in order to safeguard the rights of individuals and to protect the environment. Giving voice to affected groups is central to their work in relation to Norwegian authorities, Norwegian companies and in international networks[...]. The NCP notes Norconsult AS's objection that parts of the local communities are positive in their attitude to the projects. This does not preclude FIVAS from having a legitimate interest in the submitted matter."*

<sup>24</sup> See Dutch NCP Initial Assessment of the Complaint from UNI Global Union vs. IKEA (June 2019): *"a global trade union organization representing those local unions [directly affected by those activities], as well as acting in the broader interest of trade unions and workers' rights, the Dutch NCP is of the opinion that they have a legitimate interest in the issues raised in the notification."*

<sup>25</sup> See Initial Assessment of Complaint from WWF International against SOCO International PLC, UK NCP (February 2014): *"The NCP notes, however, that the complaint is not brought on behalf of a specific local community, but refers to the wider interests of the international community in World Heritage sites."* (para.13)

regard, but both Norges Bank and APG have exemplified how investors can exert leverage on portfolio companies:

- 1) APG will evaluate the degree to which their portfolio companies operate sustainably and responsibly. If a company meets their criteria and it scores above average in the industry in question, they call that company a 'leader'. They may invest in 'laggards', those that lag behind on sustainability and governance, but only if they expect they can engage and inspire them to improve. They call these 'potential improvers.' In 2018, APG engaged with 366 investees (one of these being a sexual harassment case as explained in the Initial Specific Instance) and as of the end of 2019, APG sold virtually all officially classified 'laggards,' except for 16.<sup>26</sup>
- 2) Norges Bank engaged with 1,826 companies in 2018 on responsible business issues<sup>27</sup> and has divested from companies with documented incidents of possible violations of human rights or poor management of health and safety. In 2019, Norges Bank divested from 42 companies.<sup>28</sup>

Finally, the fact that Petitioners are raising this specific instance with Norges Bank and APG does not preclude Petitioners from raising the same against other institutional investors at a later stage.

#### **IV. THE FACTS PUT FORWARD BY PETITIONERS ON GENDER-BASED VIOLENCE AND HARASSMENT AT MCDONALD'S ARE SUFFICIENT TO SUPPORT AN INITIAL ASSESSMENT BY THE DUTCH AND NORWEGIAN NCPs**

Petitioners have provided in Annex I a list of documents substantiating the widespread nature of the adverse impacts addressed in this specific instance against McDonald's.

Notwithstanding the information provided, the objective of the NCP initial assessment process is to determine whether the issues raised in the specific instance merit further examination. In the initial phase of the NCPs examination, the *Guide for NCPs* states that:

“it is not necessary to undertake fact-finding or a thorough assessment of all the issues raised on their merits during this [initial assessment] stage of the process as further examination is envisioned in the next stage of the process.”<sup>29</sup>

The initial assessment should therefore not reflect the level of examination required in later stages of the process. In this respect, some NCPs have framed this standard as one of plausibility.<sup>30</sup>

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<sup>26</sup> See APG, “Responsible Investment Report 2018” (July 2019), at <https://www.apg.nl/en/publication/Verslag%20Verantwoord%20Beleggen%202018/1102>.

<sup>27</sup> See Norges Bank, “Responsible investment: Government Pension Fund Global” (2019), at <https://www.nbim.no/en/the-fund/responsible-investment/>.

<sup>28</sup> *Id.*, p. 89.

<sup>29</sup> The Guide for NCPs, p. 7.



Petitioners therefore respectfully urge the Norwegian and Dutch NCPs to not raise the standard beyond the one of plausibility, particularly in consideration of the egregiousness of the adverse impacts being raised in this specific instance.

## **V. THE RELEVANCE OF PARALLEL PROCEEDINGS**

Paragraph 26 of the Guidelines' Procedural Guidance stipulates that NCPs should not reject this specific instance for the sole reason that parallel proceedings have been conducted or are underway against McDonald's in localized jurisdictions around the world. The only legitimate reason for doing so would be if a private NCP-led mediation proceeding were to cause serious prejudice to the parties involved in those local disputes.

Petitioners have provided summaries of proceedings ongoing in other countries in Annexes II and III.

## **VI. REQUEST TO THE NCPs TO FURTHER THE IMPLEMENTATION OF THE OECD GUIDELINES**

While the Norwegian and Dutch NCPs have requested a clarification on the applicability of the Guidelines to Norges Bank and APG, Petitioners wish to reiterate the statements made in the Initial Specific Instance that Petitioners do not inculcate APG and Norges Bank for their failure to act on sexual harassment at McDonald's.<sup>31</sup>

Nonetheless, this supplement to the initial specific instance demonstrates that both APG and Norges Bank are neglecting to seek ways to prevent or mitigate adverse human rights impacts that are 'directly linked' to their operations and services by their business relationship with McDonald's. Now having knowledge of the adverse impacts caused by the company, and in the exercise of their due diligence responsibilities as being 'directly linked' to these adverse impacts, Petitioners believe the following actions by APG and Norges Bank would advance the effective implementation of the Guidelines:

- 1) Tailor their due diligence approaches by applying a comprehensive gender-lens to their investment activities in order to better identify, and thus mitigate and prevent adverse impacts, such as those occurring at McDonald's;
- 2) Consistent with Petitioners' pursuit of the NCPs' good offices to bring the parties together in a mediation process,<sup>32</sup> participation by APG and Norges Bank in this mediation process with McDonald's and the petitioning groups,<sup>33</sup> and

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<sup>30</sup> See Australian NCP Specific Instance Procedures, Art 4.11: "To promote accessibility, the Examiner will interpret 'material and substantiated' to mean that the issues are plausible and related to the application of the OECD Guidelines, and that there is a plausible link between the enterprise's activities and the issues raised."

<sup>31</sup> See Initial Specific Instance submitted by Petitioners the Dutch NCP, p. 27.

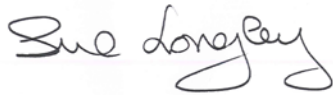
<sup>32</sup> *Id.* at 28.

<sup>33</sup> *Id.* at 27.

- 3) By the weight of APG's and Norges Bank's leverage, urge McDonald's to accept the offers of good offices from the Dutch, Norwegian and U.S. NCPs to mediate with the purpose of effectively addressing the mitigation and prevention of adverse impacts against female workers at McDonald's. Petitioners believe this is the leverage that APG and Norges Bank can exercise "to effect change in the policies and practices of the business enterprise that is causing or contributing the harm."<sup>34</sup> As maintained by John G. Ruggie, "the options have always been to engage the enterprise with the aim of improving its performance, alone or in collaboration with other shareholders; voting proxies; and divesting if the harm is severe and the company is not responsive."<sup>35</sup>

Trusting that the NCPs will find that Petitioners are seeking to advance the implementation of the Guidelines, Petitioners believe APG and Norges Bank together can provide important insights and a powerful voice to help guide McDonald's and the petitioning groups to a mediated agreement in this Specific Instance.

Yours truly,



Sue Longley  
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Mary Joyce Carlson  
SEIU

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<sup>34</sup> See Letter from John G. Ruggie, Prof. in Human Rights and International Affairs, Harvard Law School, to Roel Nieuwenkamp, OECD Chair Working Party for Responsible Business Conduct (p.3) (22-Oct-2013), Expert letters and statements on the application of the OECD Guidelines for Multinational Enterprises and UN Guiding Principles on Business and Human Rights in the context of the financial sector.

<sup>35</sup> *Id.*