

17 April 2020

**BY EMAIL**

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Attention: Ase Sand

**Re: Draft Initial Assessment of the Norway NCP dated 25 March 2020 in Korean Transnational Corporations Watch And Samsung Heavy Industries Martin Linge Project Crane Accident Workers Support Team v. Samsung Heavy Industries Co., Ltd., TechnipFMC Plc, Total Sa, Total E&P Norge As And Equinor Asa**

Dear Madam,

We hope you and your colleagues at the Norway NCP, and your families are safe and keeping well during these challenging times.

We refer to your emails of 25 March and 6 April 2020, providing TechnipFMC with a copy of the Norway NCP's draft Initial Assessment of the above Complaint and agreeing an extension for TechnipFMC (and the other parties) to provide "factual corrections," if any, by 18 April 2020.

As we have expressed before, we remain committed to industry best practices, and the OECD's objective of improving environmental, human rights and health and safety standards globally, and have worked closely with the Norway NCP over the past few months in the course of your Initial Assessment.

The OECD's NCP framework is predicated on a faithful adherence to its core principles of transparency, accountability and impartiality. We are concerned to ensure that the Norway NCP's Draft Initial Assessment and the proposed Good Offices mediation process remain consistent with these core principles and the requirements of due process more generally.

Accordingly, and consistently with the spirit of close cooperation that has characterized our interactions these past few months, we note that the Norway NCP's Procedural Guidelines for Handling Specific Instances specifically contemplate that all parties have the opportunity to provide factual corrections "*or other written comments*" on an Initial Assessment.<sup>1</sup> As such, in the interests of participating constructively in this process, we provide our corrections and comments in two parts:

- certain factual corrections to the draft Initial Assessment (Section 1 below); and
- our comments and concerns regarding the draft Initial Assessment and the proposed Good Offices procedure to be followed in this case (Section 2 below).

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<sup>1</sup> National Contact Point, Norway, OECD Guidelines for Multinational Companies, "Procedural Guidelines for Handling Specific Instances - Norway", 2 June 2014, p. 7.

We offer these suggestions and observations to help ensure that the NCP's procedure remains impartial, transparent and comprehensive, and trust that this will provide a framework to ground our discussions.

## 1. Factual corrections to the draft Initial Assessment

As requested in your email of 25 March, we provide these limited but important factual corrections to the draft Initial Assessment:

- i. The Initial Assessment provides that “[t]wo cranes collided during construction of an oil platform for the Martin Linge project in Norway.”<sup>2</sup> This statement has the potential to be misconstrued. As we explained in our submission of 7 February 2020, the Geoje shipyard is one of the largest in the world, with several projects that were ongoing at the same time. The sentence seems to imply that both cranes were specifically working on the platform for the Martin Linge project, but we are aware of no evidence to demonstrate this. We acknowledge that the cranes collided at the site of the Martin Linge processor module platform (as described in the Korean Police Report), but not that both cranes were specifically being used for the Martin Linge project. If the Norway NCP has evidence to the contrary, please share that with us. Otherwise, please amend the sentence to reflect this position.
- ii. Because the Initial Assessment is a public document, the parties' positions must be recorded accurately to ensure that information is presented fairly and without prejudice to parties' positions. Accordingly, we would request the following language from TechnipFMC's submission of 7 February 2020 be added to the Initial Assessment for the sake of clarity:
  - a. At page 8 of the draft Initial Assessment (last paragraph), we request that you add the following extract after the words “*Samsung HI was responsible for the construction works and the operation and interaction of the cranes at the Geoje shipyard*”:

*“TechnipFMC did not have control and responsibility for: (i) construction works at the Geoje shipyard; nor (ii) the operation and interaction of the cranes at the Geoje shipyard both of which were under SHI's control.”*
  - b. At page 9 of the draft Initial Assessment (second paragraph), we request that you:
    - i. add the following extract, after the words, “*In short, TechnipFMC does not understand the complainants' specific allegations against the company*”:

*“as they appear to relate to, and can be best addressed by, SHI's actions at the Geoje shipyard.”*
    - ii. add the following sentence, after the sentence ending with the words “*does not believe it is “appropriate for TechnipFMC to be involved in the good offices process”*”:

*“Instead, TechnipFMC states that a mediation is “best explored between SHI, as owner of the Geoje shipyard and operator of the cranes involved, and the Complainants” as is currently planned by the Korea NCP.”*
  - c. At page 13 of the draft Initial Assessment (second paragraph), we request that you:

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<sup>2</sup> Draft Initial Assessment, p. 2.

- i. add the following extract, after the words, “*TechnipFMC argues that the ongoing*”:

*“, anticipated, and potential.”*

- ii. add the following extract, after the words, “*court proceedings in Korea*”:

*“or elsewhere.”*

- iii. delete the words “*the Korean*” on the third line, and replace it with “*such*”, so that the line reads:

*“until conclusion of such proceedings.”*

- iv. add the following new sentence, after the end of the above modified sentence in point (iii) above, which will now read as follows: “until conclusion of such proceedings”:

*“including any anticipated or potential claims that may be brought in any jurisdiction by the workers that suffered physical injury as a result of the accident, by workers who claim to have been traumatized by the accident, and any other relevant parties that may wish to bring a claim.”*

- v. delete the words in parentheses in the last line of the second paragraph, i.e., “*(as TechnipFMC argues in its response to the complaint)*”, and replace it with:

*“(contrary to the arguments made by TechnipFMC and which are summarized above).”*

- iii. The summary of the Korean Police Report, particularly when published by the Norway NCP in the context of a Complaint, may be misinterpreted and mistakenly associate the shortcomings described in the Complaint with TechnipFMC. For the reasons set out in paragraph (ii) above, the Norway NCP must also state for clarity and accuracy that the Korean Police Report makes no mention of TechnipFMC, or any wrongdoing or negligence on the part of TechnipFMC or its employees. Further, the Korean Police Report does not indicate that TechnipFMC neglected its obligations in any way. This is an enormously significant fact that must be included in the context of the discussion of the Korean Police Report.
- iv. We note that as part of the Initial Assessment, you intend to attach both the Complaint itself, together with respective responses to the Complaint. We welcome this, and we also urge the Norway NCP to annex a copy of the responses to the draft Initial Assessment – including this letter. These documents should be included in the Initial Assessment, when published, to ensure that parties’ positions are described accurately and in full and to preserve the core principles of transparency, accountability and impartiality discussed above.

## **2. Comments regarding the draft Initial Assessment and the procedure for the Good Offices mediation**

### *SHI’s participation*

As you note in the draft Initial Assessment, if this process is to be effective, SHI’s participation is imperative.<sup>3</sup> You have noted that SHI is already involved in the Korea NCP’s Good Offices mediation,

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<sup>3</sup> Draft Initial Assessment, p. 14.

but it is unclear to us: (i) whether you have approached SHI to participate in the parallel NCP proceedings that the Norway NCP intends to undertake; (ii) whether SHI has expressed its willingness to participate in the Norway NCP's proceedings, in parallel to the Korea NCP's Good Offices mediation or at all; and (iii) how the Norway NCP intends to proceed if SHI is not willing to participate in the Norway NCP's proceedings.

It is not in the interests of judicial economy, efficiency or natural justice for the Norway NCP to continue proceedings in parallel, or indeed, to proceed at all without a key party's participation. If SHI declines to participate, we strongly urge the Norway NCP to defer or terminate these proceedings until the Korea NCP has concluded its Good Offices mediation with SHI, to ensure the efficacy of the OECD's NCP process.

### *Parallel proceedings*

While we appreciate that parallel proceedings are not an automatic bar to the NCPs' consideration of complaints filed under the OECD's MNE Guidelines, comity and reciprocity remain fundamental tenets of law and judicial practice and require authorities to refrain from interfering with due process and fair hearing in other jurisdictions. Accordingly, the Norway NCP must carefully consider the merits of proceeding with the NCP process in parallel to criminal and civil proceedings before the courts given the high risk of prejudice to the rights and liberties of individuals.

We also remain concerned that the Norway NCP's process may serve as a discovery exercise and give rise to any number of additional proceedings in Korea, or elsewhere. You will appreciate this is likely to materially inhibit the parties' ability to participate.

We are particularly troubled by the fact that the Norway NCP has determined to proceed without having a complete understanding of: (i) whether the criminal proceedings will be the subject of a further appeal;<sup>4</sup> and (ii) whether civil proceedings are ongoing or have been settled through arbitration.<sup>5</sup> It is critical to understand these facts before the Norway NCP determines to proceed or not. We request the Norway NCP clarify its analysis of the ongoing proceedings and the possibility of further proceedings being initiated in Korea and elsewhere based on information obtained through the Norway NCP's Good Offices. In particular, we ask whether the Norway NCP has undertaken any analysis other than relying on press articles or similar documents reviewed by the Royal Norwegian Embassy in Seoul. In any event, these documents have not been shared with any of the parties,<sup>6</sup> and importantly, we have not been offered the opportunity to examine and comment on these press articles. This is inconsistent with the principals of procedural transparency and fairness that are so fundamental to the NCPs' process.

Accordingly, we must disagree with the Norway NCP's conclusion that it is nonetheless right to proceed in parallel with the Korean proceedings, including on the basis that "this specific instance covers a broader area and other issues than the court proceedings, and that the court proceedings give no reason to suspend further examination."<sup>7</sup> Neither the Norway NCP nor TechnipFMC have sufficient, if any, visibility into those proceedings, which only accentuates the need for caution.

### *Parallel NCP Processes*

We understand from the draft Initial Assessment that the Norway NCP intends to proceed in parallel with the Korea NCP. However, we have been provided with no guidance as to how the Norway and

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<sup>4</sup> Draft Initial Assessment, p. 12.

<sup>5</sup> Draft Initial Assessment, p. 12.

<sup>6</sup> Draft Initial Assessment, p. 12 (footnote 14).

<sup>7</sup> Draft Initial Assessment, p. 13.

Korea NCPs are currently communicating and coordinating their actions and what steps have been taken to comply with the OECD's 2019 guidelines on "Coordination between OECD National Contact Points during Specific Instance handling, OECD Guidelines for Multinational Enterprises." For example, specifically referenced good practice includes promoting predictability and transparency by developing clear processes around coordination of a specific instance with other NCPs and including such processes in rules of procedure or terms of reference for handling specific instances as, "[t]his will allow parties to understand how coordination amongst NCPs is handled."<sup>8</sup>

Adjudicatory proceedings must not only be equitable and impartial, but they must also be seen to be equitable and impartial by an unbiased observer. If the Norway and Korea NCPs permit the Complainants to pursue two parallel actions in respect of the same cause of action, it follows that the Complainants will have multiple opportunities to seek relief, unfair procedural advantages compared to the other parties, and possibly result in double-relief for the Complainants. This is particularly concerning in this case because of the lack of transparency thus far regarding the proposed management of parallel proceedings.

Therefore, we request clarity on what safeguards the Norway NCP proposes to adopt regarding each of the matters addressed above.

### *Goals of the Complainants*

For the first time in this process, the Norway NCP articulated in the draft Initial Assessment the aims of the Complainants and the relief they purportedly seek in these proceedings.<sup>9</sup> We submit that it is for the Complainants to clearly articulate the relief they purportedly seek, not the Norway NCP. The Norway NCP's explanation of the Complainants' goals does not overcome the significant shortcomings in the Complaint. In any event, even based on the Norway NCP's framing of the objectives, it is clear that no remedies are specifically sought from TechnipFMC or indeed, the other parties. In the interests of fairness, we urge the Norway NCP to reconsider its findings in this regard.

### *Confidentiality*

As we have already expressed in all our past correspondence, notwithstanding our limited knowledge of and involvement in the Accident, we remain committed to assisting the Norway NCP to the extent we are able. We are conscious, as has already been pointed out by the other Respondents, that we are bound by a number of confidentiality obligations that limit our ability to disclose information in the manner requested by the Complainants. We note the Norway NCP's reference to such confidentiality obligations being "based on contracts only" and that they can therefore be lifted by the involved parties.<sup>10</sup> This is incorrect for several reasons, including that these confidentiality obligations are owed to a number of TechnipFMC's commercial partners, contractors, and stakeholders, and are not limited to the Respondents. We trust that the Norway NCP recognizes that contractual confidentiality is the bedrock of trust and engagement between parties to facilitate commercial transactions and is not susceptible of waiver in the manner described. We ask the Norway NCP to be mindful of these binding legal obligations, the seriousness with which they are taken by the parties, and the potential repercussions for parties that are not directly involved in this matter.

### *Covid-19 outbreak*

The Covid-19 outbreak has presented each of us and our businesses with unprecedented challenges, personally and professionally. Given the current logistical difficulties, and restrictions on travel and in-

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<sup>8</sup> OECD (2019), *Coordination between OECD National Contact Points during Specific Instance handling, OECD Guidelines for Multinational Enterprises*, p. 12.

<sup>9</sup> Draft Initial Assessment, p. 4.

<sup>10</sup> Draft Initial Assessment, p. 13.

person gatherings, we would request your guidance on how you would propose to proceed with the Good Offices mediation process.

*Summary*

We appreciate that we have raised several comments for the Norway NCP's consideration above. TechnipFMC has a number of stakeholders and to consult with them regarding this matter in a manner consistent with the expectations set out in the OECD's MNE Guidelines, it is of vital importance that we have the Norway NCP's responses to each of these comments. Indeed, the Norway NCP's Guidelines,<sup>11</sup> and equally, the fundamental tenets of natural justice require the Norway NCP to consider parties' comments and provide a reasoned decision in its consideration of Complaints.

Given that these matters have not been addressed to date, we would expect further consultation before you publish the Initial Assessment. To proceed without a consultation and/or providing a reasoned decision on these important matters will involve a significant departure from the procedure described in the Norway NCP's Guidelines and be contrary to the OECD's core principles of transparency, accountability and impartiality, and the principles of natural justice.

We remain at your disposal to discuss the above, and any other matters you may consider important.

Yours respectfully

David Fleszar

Vice President, Projects EMIA

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<sup>11</sup> National Contact Point, Norway, OECD Guidelines for Multinational Companies, "Procedural Guidelines for Handling Specific Instances - Norway", 2 June 2014, p. 7.