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Non-Judicial Remedies in Norway for Corporate Social Responsibility Abroad

A Discussion Paper

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1 Introduction

"Companies affect social development where they operate". [1]

The fact that companies have social impacts – potentially both positive and negative – is the simple reality which drives the demand for socially responsible behavior by business. Today, there is a broad consensus among social and labour movements, governments, and companies themselves that social responsibility is – and must be – part of doing business globally. Yet, there is to date no global set of rules or institutions which embodies this consensus or which defines corporate social responsibility (CSR).

In January, the Norwegian government's White Paper – "Corporate Social Responsibility in a Globalized Economy"[2] – made clear the existing responsibilities of Norwegian companies operating abroad, namely to obey the law of the countries in which they operate and to act responsibly with respect to the core areas affected by business activity: human rights, workers' rights, the environment, and the fight against corruption. However, as the Policy Coherence Commission pointed out in 2008 that "There are no guidelines or rules that bind Norwegian industry in relation to how working conditions, freedom of association and human rights are practiced when conducting business abroad."[3] The Commission went on to say

> "Norway should make progressive efforts towards developing standards, systems, information and incentives for Norwegian industry's social responsibility abroad. The government can play an active role in facilitating the exchange of experiences and skills-building, as well as developing tools and checklists (...).In the efforts to facilitate the private sector's social responsibility, the Government also needs to focus on statutory standards."[4]

More recently the Foreign Affairs Committee of the Parliament encouraged a national discussion on the various roles of Norwegian business, labour, civil society and state in ensuring that Norwegian businesses operation outside Norway meet the responsibilities arising from their impacts.[5]

[1] I would like to thank the persons who have given time and very insightful comments. Special thanks to Mark Taylor for his invaluable comments and inputs.
Innstilling til Stortinger fra utenrikskomiteen om næringsliverts samfunnsansvar i en global økonomi. Innst.S.nr.200 (2008-2009)

[2] Næringslivets samfunsansvar i en global økonomi. St.meld.nr.10 (2008–2009), presented 23 January 2009

[3] "Coherent for development? How coherent Norwegian policies can assist development in poor countries", NOU Official Norwegian Reports 2008:14, Oslo 2008

[4] NOU 2008:14, (p.76); similarly, [LO, NHO, NGO stated reactions here]; Amnesty, Forum for Environment and Development, Future in Our Hands, Norwegian Church Aid all have pointed out the need for moral responsibility and legal liability to prevent unacceptable corporate activities, See their common statement, "Norway's first white paper on CSR" Accessed 10 March 2009 <http://www.forumfor.no/Artikler/5142.html>; the Confederation of Norwegian Business and Industry (NHO) has acknowledged that "Norwegian enterprises bear a clear responsibility for following the same business principles and devoting the same attention to human rights abroad as they do at home." NHO.1998."Human Rights from the perspective of business and industry – a checklist."

[5] Innst.S.nr.200

This paper is intended as a contribution to that discussion. It is written at the request of the Norwegian Ministry of Foreign Affairs and intended to serve as a background note for an open hearing to be held in the fall of 2009. Among others, it draws on the work of Professor John Ruggie, Harvard University, who since 2005 has served as the *United Nations Special Representative for the Secretary General on the issue of human rights and transnational corporations and other business enterprises.* Professor Ruggie has, through a series of studies and consultations and reports, mapped out what he describes as gaps of governance created by globalization. It is these governance gaps which are "the root cause of the business and human rights predicament".[6] Similar and supporting conclusions have been drawn by others, including International Chamber of Commerce, the ILO, Amnesty International, and many among others,[7] including in Norway.[8] In 2008 the UN SRSG stressed the *"differentiated yet complementary responsibilities"* of states and other actors in society, including business, to "protect, respect and remedy". His framework defines[9] the State duty to protect against human rights abuses by third parties, including business; the corporate responsibility to respect human rights; and the need for more effective access to remedies because even the most concerted efforts cannot prevent all abuse.[10]

Business impacts on the environment, working conditions and workers' rights, financial accountability and business ethics, have all been a concern of national and international public policy for longer than the issue of business impacts on human rights. But global trade integration and other manifestations of globalization have thrown up governance challenges to all of these core areas of business impact. Companies and governments face new and unfamiliar dilemmas,[11] of which the recent global financial crisis is but one, dramatic example.[12] Across

[6] John Ruggie. 2008. "Protect, Respect and Remedy: a framework for business and human rights", Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, UN Document A/HRC/8/5, 7 April. <http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf> Accessed 10 February 2009.

[7] "All companies are expected to obey the law, even if it is not enforced, and to respect the principles of relevant international instruments where national law is absent." ICC 2007; ILO and Norway Decent Work Initiative from the Norwegian Ministry of Labor and Social Inclusion <http://www.regjeringen.no/en/dep/aid/Press-Centre/Press-Releases/2008/strategy.html?id=525795> Accessed 2 June 2009 ; Irene Khan Secretary General of Amnesty International's statement at the International Seminar on Business and Human Rights: Global Challenges of our times. 60th Anniversary of the Universal Declaration of Human Rights. 4–5 December 2008.

[8] See bibliography.

[9] Note the latest report which recapitalizes the key features of the June 2008 report "Business and human rights: Towards operationalizing the 'protect, respect and remedy' framework". A/HRC/11/13. 22 April 2009. <http://www2.ohchr.org/english/bodies/hrcouncil/docs/11session/A.HRC.11.13.pdf> Accessed 1 May 2009.

[10] Today, the framework is widely accepted by all stakeholders and the mandate of the SRSG has been extended in order to explore how these duties and responsibilities might be put into practice. See, for example, "Joint views of the International Organization of Employers, the International Chamber of Commerce and the Business and Industry Advisory Committee to the OECD to the Special Representative of the UN Secretary-General on Business and Human Rights to the 8th Session of the Human Rights Council on the Third Report of the SRSG on Business and Human Rights." May 2008. And "Joint views of the International Organization of Employers, the International Chamber of Commerce and the Business and Industry Advisory Committee to the OECD to the Special Representative of the UN Secretary-General on Business and Human Rights". March 2009. Accessed 16 April 2009 < http://www.business-humanrights.org/Links/Repository/> Accessed 28 April 2009.

[11] Gerald F. Davis, Marina v. N. Whitman and Mayer N. Zald. "The Responsibility Paradox: Multinational Firms and Global Corporate Social Responsibility", *Working Paper Ross School of Business*, April 2006, #1031.

[12] John Ruggie develops three reasons why the issue of business and human remains a priority during what seems to be the worst economic downturn in a century "Human rights are most at risk in times of crisis, and economic crises pose a particular risk to economic and social risks (...) the same types of governance gaps and governance failures that produced the current economic crisis also constitute the permissive environment for corporate wrongdoing in relation to human rights (...) business and human rights matters more than ever because progress on this front directly contributes to the transition we all seek toward more inclusive and

the core areas of business impact and social responsibility, the policy agenda is now focused on the question of how to fill the governance gaps relating to business's social responsibilities. In a time of financial crisis and recession, the task of strengthening the governance of corporate social responsibility must be a central part of finding a better and more sustainable balance between the state and the market.

In this regard, a key question which arises is one of regulation in general and, in particular, non-judicial regulatory mechanisms,[13] institutions at the national level that could ensure access to remedies for victims of corporate misconduct. Chapter 8.4 of the White Paper identifies non-judicial mechanisms as a promising area for policy development, and specifies the need to further explore oversight and complaint Mechanisms (*klage- og overvåkingsmekanismer)* with respect to Norwegian companies' social responsibility in their extraterritorial activities. In its response to the White Paper, the Foreign Affairs Committee recognized that, in the absence of a global CSR regime, rules governing good business behavior in Norway may be applicable abroad, especially in places where governments were either incapable or unwilling to do their part.[14] There are a number of questions to be answered in considering how to make such rules both effective and fair. Some of these include:

- Objectives: What are the desired outcomes and public good sought?
- Functions: What should a non-judicial mechanism do?
- Scope: What issues should it cover?
- Jurisdiction: Should it apply to all business activities abroad? Or should it be limited?
- Procedure: How would it work?
- Ownership: Who would run it? Who would be its key stakeholders?
- Regulatory setting: How would it relate to judicial mechanisms? To other arms of the state?
- Governance: How would it be accountable?

Fortunately, there has been a significant amount of study conducted on the potential roles for non-judicial mechanisms in governance of business impacts.[15] The literature indicates that, as a forum of state regulation, non-judicial mechanisms usually lie somewhere in the middle along a continuum between pure voluntarism and mandatory legal or judicial mechanisms.

sustainable economic growth" John Ruggie. 2009. "Presentation of Report to UN Human Rights Council". 2 June. <http://www.reports-and-materials.org/Ruggie-statement-to-UN-Human-Rights-Council-2-Jun-2009.pdf> Accessed 10 June 2009.

[13] See B.A.S.E.S wiki (Business And Society Explore Solutions) "A dispute resolution community" an initiative of the UN Secretary-General's Special Representative on Business and Human Rights, undertaken in cooperation with the Corporate Social Responsibility Initiative at Harvard Kennedy School and with the support and collaboration of the International Bar Association and the Compliance Advisor/Ombudsman of the World Bank Group. Purpose is to advance access to industry associations, multi-stakeholder initiatives, government agencies, national, multilateral and international institutions <http://baseswiki.org/En>

[14] Innst.S.nr.200 (2008–2009)

[15] The Corporate Social Responsibility Initiative at Harvard University's John F. Kennedy School of Government is completing a comprehensive research for the UN SRSG, and has specifically focused on mechanisms for resolving grievances in the business and human rights arena. Its aim is to examine the strengths and weaknesses of existing grievance mechanisms in order to highlight lessons to be drawn from their experience, consider how they might be improved and explore what model mechanisms might look like for the field of business and human rights. This report is heavily drawing on their working papers and consultations reports as well as discussions. Special thanks to Caroline Rees (interview 13 April 2009).

As a result, it is important that the functions and authorities of such mechanisms be clearly defined and predictable.

This discussion paper is intended to provide an overview of and insight into the main trends of policy work and research on state-based non-judicial mechanisms as background to a public policy discussion of non-judicial mechanisms in Norway. It focuses on some existing models and practices adopted by non-judicial mechanisms that engage directly with corporations in an effort to assess and resolve human rights grievances and other complaints relevant to CSR issues. This report is meant as a contribution to the discussion on the extraterritorial responsibilities of Norwegian companies and the non-judicial mechanisms that might provide access to remedies to victims of corporate misconduct.

The specific issues of inquiry are:

- How can the recommendations of the UN SRSG for Business and Human Rights be adopted in the Norwegian context when it comes to non-judicial remedies?
- What is the status, strengths and weaknesses of existing non-judicial oversight and grievance mechanisms on the national level in different countries?
- How can the Norwegian government best protect against, and ensure access to some form of remedy, in instances of corporate misconduct?
- How might potential non-judicial mechanisms be organized?

2 Why Remedies?

Remedies are needed because harms occur. Harms associated with business derive from specific company activities in particular contexts, including relationships with state and non-state actors. Not all business related harms are under the control of businesses but they nonetheless pose real risks of association with business.

> "It is clear that companies can have adverse effects on virtually all internationally recognized rights, not only a relatively narrow range of labor standards or issues related to communities in the proximity of a business operation. For example think of telephone companies and internet services providers landing people in prison by revealing their identities to the authorities in certain countries"[16]

The business responsibility to respect human rights is founded on the principle of 'do no harm', as elaborated by the UN SRSG in 2008. Today, as a result of the widespread acceptance of this responsibility, there is a need to address the gaps that have been identified in existing CSR related initiatives, in particular in multi-stakeholder and industry sponsored initiatives.[17] As valuable as these are to strengthening company behavior with respect to human rights, they have yet to clarify for business, government or civil society, the precise meaning in practice of the responsibility to respect human rights. What does it mean in practice for business to 'do no harm'? As one step toward clarification, it would be "helpful to business to elaborate process guidelines, coupled with effective grievance mechanisms."[18] It is arguable that such processes and mechanisms are public goods only the state can provide with the necessary legitimacy and efficacy.

A remedy functions as a treatment for an injury, a means for counteracting something undesirable, or a means for legal reparation.[19] Institutional remedies – such as courts, or business conciliation or arbitration – can provide legal justice or out of court conflict resolution. In addition, non-judicial remedies can also serve protective, preventive or public policy purposes, such as ombudsmen or national centres for human rights.[20]

[16] John Ruggie. 2008. "Next steps in business and human rights remarks", Royal Institute of International Affairs, Chatham House, London, 22 May; For a list of the worst kinds of harms see list from <www.business-humanrights.org> Abduction, Arbitrary detention, Beatings & violence, Complicity, Death penalty, Death threats, Deaths, Denial of freedom of association, Denial of freedom of expression, Denial of freedom of movement, "Disappearances", Displacement, Genocide, Injuries, Intimidation & threats, Killings, Rape & sexual Abuse, Sexual harassment, Slavery, Torture & ill-treatment, Unfair trial, etc. < http://www.business-humanrights.org/Categories/Issues/Abuses> Accessed 28 April 2009.

[17] Caroline Rees. 2008. "Grievance Mechanisms for Business and Human Rights: Strengths, Weaknesses and Gaps." Corporate Social Responsibility Initiative, Working Paper No. 40 Cambridge, MA: John F. Kennedy School of Government, Harvard University

[18] John Ruggie. 2008. "Keynote Presentation by UN SRSG for Human rights". In OECD. 2009. *Annual report on the OECD Guidelines for Multinational Enterprises*, 2008. (p.102)

[19] Caroline Rees and Rachel Davis. 2009. "Non-judicial and Judicial Grievance Mechanisms for Addressing Disputes between Business and Society: Their roles and Inter-relationships." Corporate Social Responsibility Initiative, Harvard Kennedy School. March.

[20] The often stated opposition between voluntary and mandatory regulation, usually put forward by either proponents of voluntary measures or those who advocate stricter regulation, is in fact a false dichotomy. In regulatory regimes there is nothing

As such:

- A remedy can identify sustainable solutions to grievances by raising companies' awareness of their impacts on individuals, workers and communities in their overseas operations
- A remedy helps to structure incentives for companies to reverse and mitigate negative impacts
- A remedy should enable those whose lives are affected by business activities to obtain affirmation of their rights and to seek remedies for violations of their rights
- A remedy should provide business with clear and predictable standards and one means to address actual or potential abuses of rights before they escalate into conflict or become subjects of litigation.[21]

A remedy is what provides for redress. The notion of redress is defined in the UN SRSG's 2008 report as encompassing "compensation, restitution, guarantees of non-repetition, changes in relevant laws and public apologies."[22] It includes both judicial and non-judicial mechanisms to remedying adverse corporate human rights impacts in a "mutually reinforcing relationship". In other words it does not exclude the use of "tools to hold corporations accountable under both civil and criminal law." Indeed John Ruggie notes that if non-judicial mechanisms are important in countries lacking adequate and effective access to remedy "they are also important in societies with well-functioning rule of law institutions, where they may provide a more immediate accessible, affordable, and adaptable point of initial recourse."[23] Crucial in this respect is access to a remedy, i.e. "the opportunity and ability to use effective judicial or non-judicial mechanisms, as appropriate, to counteract or make good a situation where corporate activities are alleged to have caused harm to the enjoyment of human rights by an individual or group."[24] Ideally, access to remedies is designed in such a way as to provide a flexible and 'bottom-up' approach to redress, i.e. responding to actual or potential harms. Designing mechanisms to ensure access to remedy requires an examination of complaints/grievance/dispute resolution or other mechanisms. These could be distinguished from 'top-down' or 'control' responses such as auditing, monitoring and reporting. [25]

which precludes the co-existence of a variety of regulatory options – voluntary, mandatory (judicial and non-judicial) and mixes of both. See Leiv Lunde and Mark Taylor (2005); This is also known as an opposition between rights-based approaches versus market-based solutions. For a demystification of the opposition See Halina Ward's presentation, from the International Institute for Environment and Development, UK "Legal issues in Corporate Citizenship" in UNRISD, Summaries of presentation during the Conference "Corporate Social Responsibility and Development: Towards a New Agenda?" 17–18 November 2003, Palais des Nations, Geneva p.70

[21] Adapted from Caroline Rees. 2008. "Grievance Mechanisms..."

[22] A/HRC/8/5 p.22

[23] A/HRC/8/5 p.2

[24] Caroline Rees, and Davis, Rachel. 2009.

[25] For the distinction between down-top and bottom-up approaches see Caroline Rees.2007. "Corporations and Human Rights: Accountability Mechanisms for Resolving Complaints and Disputes." Corporate Social Responsibility Initiative, Report. 15 Cambridge, MA: John F. Kennedy School of Government, Harvard University.

3 Why State-based Remedies?

In general it is possible to distinguish several sources for the design of grievance mechanisms:[26]

- ***Company level grievances mechanisms*** for local communities/project based/*ad hoc* approaches to channel/resolve concerns. This can be a complaint box, a hotline, a liaison officer that can investigate matters brought up to him.
- ***Industry level*** *e.g.* International Council Toy Industries, Voluntary Principles on Security and Human Rights
- ***Multi-industry*** e.g. Social Accountability International, Ethical Trading initiative
- ***National based mechanisms*** e.g. OECD Guidelines for Multinational Enterprises- National Contact Points, National Human Rights Commissions, Labour Dispute Systems (e.g. UK Advisory, Conciliation and Arbitration Service); Ombudsmen
- ***Regional Level*** e.g. various regional human rights commissions and/or courts; African Development Bank, Asian Development Bank, European Bank Reconstruction & Development
- ***International initiatives and institutions*** e.g. Compliance Advisor Ombudsman of the World Bank[27], UN Global Compact, International Framework Agreements (IFA[28])

The UN SRSG highlights the importance of effective grievance mechanisms as a way for States to implement their duty to protect human rights. States matter to the question of non-judicial remedies not simply because they have an *obligation* to protect human rights – including a duty to ensure respect by other organs of society, such as business. States matter also because they are the most *effective* guarantors that concrete remedies will be available to respond when harms occur.

> "82. Effective grievance mechanisms play an important role in the State duty, in both its legal and policy dimensions, as well as in the corporate responsibility to respect. State regulation proscribing certain corporate conduct will have little impact without accompanying mechanisms to investigate, punish, and redress abuses. Equally, the corporate responsibility

[26] Caroline Rees and Vermijs David. 2008. "Mapping Grievance Mechanisms in the Business and Human Rights Arena." Corporate Social Responsibility Initiative, Report. 28 Cambridge, MA: John F. Kennedy School of Government, Harvard University.

[27] See below in the Ombusdman section.

[28] *International Framework agreements* are negotiated between multinational enterprises and Global Union Federations. They are a global instrument with the main purpose of ensuring the international labor standards in all of the target company's locations. The content of the agreements vary according to the different requirements and characteristics of the companies and trade unions, industrial relations' traditions. IFA differ from voluntary codes of conduct adopted unilaterally insofar as they provide procedures whereby the signatories may jointly develop implementation and monitoring procedures. Generally IFAs recognize the ILO Core Labor Standards (freedom of association and collective bargaining, elimination of forced and child labor, non-discrimination) but they can refer to other provisions covered by ILO standards such as wages, protection of works' representatives, occupational safety and health. See <http://www.eurofound.europa.eu/areas/industrialrelations/dictionary/definitions/internationalframeworkagreement.htm> Accessed 10 May 2009.

> to respect requires a means for those who believe they have been harmed to bring this to the attention of the company and seek remediation, without prejudice to legal channels available. Providing access to remedy does not presume that all allegations represent real abuses or bona fide complaints ."[29]

It is important to emphasize that the State's duty to protect does not exclude a business responsibility to respect, nor does the latter permit the State to ignore its own duties. This duty to protect applies to all states, including Norway, and is a universally accepted part of the international human rights framework. [30] In Norway, the duties of the state are activated also via the role of the state as a regulator of markets, an owner or part owner of businesses, as an investor, as a buyer of services, and a provider of export credit and a donor of development assistance via Norwegian companies.[31] The cumulative effect of the Norwegian state's roles in the private sector suggests it is well placed to set CSR standards and create the institutional mechanisms to ensure respect for those standards. As noted in 2008 by the Norwegian government's Policy Coherence Commission, "In the efforts to facilitate the private sector's social responsibility, the Government also needs to focus on statutory standards."[32]

Norway's duty to protect human rights is reinforced by the fact that ensuring respect, including providing for remedies, is also good for development abroad. Independent evaluations have underlined the importance of the link between accountability and good governance in development policies.

> "It is increasingly recognized that 'accountability', or the ability of citizens and the private sector to scrutinize public institutions and governments and to hold them to account is an important facet of good governance. Failures of accountability can lead to pervasive corruption, poor and elite-biased decision making and unresponsive public actors."[33]

Finally, states matter with regard to remedies because they have the convening power to ensure the national level engagement of all social actors – including business, labour and civil society organizations - in the design and implementation of remedies.[34]

[29] A/HRC/8/5

[30] see also Ruggie (2007, 2008, and 2009). See, e.g., Church of Norway Council on Ecumenical and International Relations, "The Right to Adequate Food and the Compliance of Norway with its Extraterritorial Obligations", report submitted by Norway to the UN Committee on Economic, Social and Cultural Rights (UN Doc. E/C.12/4/Add.14); <http://www.fian.org/resources/documents/others/the-right-to-adequate-food-and-the-compliance-of-norway-with-its-extraterritorial-obligations/pdf> Accessed 15 April 2009.

[31] These roles are noted in the Norwegian White Paper on CSR. For example: NORAD provides equity financing for private sector initiatives via Norfund; GIEK the central governmental agency furnishing guarantees and insurance of export credits; The Government Action plan "Aid for Trade" does acknowledge the particular responsibility of Norad and Norfund for ensuring respectively "a high quality standard in Norway's development cooperation" and Norfund for "ensuring optimal results of its efforts to promote the development of sustainable business and industry in developing countries." "Aid for Trade- Norway's Action Plan", launched 23 November 2007 <http://www.regjeringen.no/upload/UD/Vedlegg/Utvikling/aidfortrade_e.pdf>

[32] NOU 2008:14, (p.76)

[33] Rocha Menocal, A. and Sharma, B. (2008), "Joint Evaluation of Citizens' Voice and Accountability: Synthesis Report". London: DFID <http://www.norad.no/items/14302/38/1855520330/Citizens%E2%80%99%20Voice%20and%20Accountability.pdf>

[34] The consultation process organized by the State Secretaries and other officials, and via the Norwegian KOMpakt, surrounding the White Paper on CSR is an example of that convening power.

4 Examples of Remedy Mechanisms

In this section mechanisms from other countries are described in some detail as the basis for exploring further the functions of non-judicial remedies that might be applied in Norway. These mechanisms are the National Contact Points (NCP) of the OECD Guidelines for Multinational Enterprises, National Human Rights Institutions (NHRI), Ombudsmen, the CSR Commission proposed by a coalition of UK NGOs and the CSR Counselor announced recently by the Government of Canada.

OECD National Contact Points

OECD Guidelines for Multinational Enterprises are voluntary guidelines which are intended to supplement local laws and regulations. Although they refer to the importance of abiding by the laws of host countries, and concern areas also covered by other legal regimes binding on companies (e.g. anti-corruption), the Guidelines are supplementary principles and standards of corporate behavior that are themselves of a non-legally binding character.[35] Although not universal (they apply to the OECD members), they are the only multilaterally endorsed and comprehensive code that Governments have committed to promoting. In substance they cover much of the issues Norway has defined as CSR: employment and industrial relations (labour relations and employment practices, environment, combating bribery, human rights). [36]

The National Contact Point (NCP) for the OECD Guidelines[37] is a government office responsible for encouraging the observance of the Guidelines in a national context and ensuring that the dissemination and understanding by the national business community and by other interested parties.[38] The UN SRSG considers the OECD National Contact Point as a having "potential" as a vehicle for providing remedy.

[35] Although they are based on the notion of adherence to host-country law and they refer to bodies of binding laws, such as anti-corruption laws.

[36] A recommendation on Human Rights has been introduced in the Guidelines 2000 revision and can be found in the General policies along with provisions on sustainable development, supply chain responsibility See OECD. 2008. *Guidelines for Multinational Enterprises. Revision 2000.* §2 ii. General Policies: 2. Respect the human rights of those affected by their activities consistent with the host government's international obligations and commitments.

[37] These are general comments that do not apply to all NCP because of their diversity mentioned above. Information drawn from OECD. 2008. *Review of NCP Performance. Key Findings*. OECD-ILO Conference on CSR. 23-24 June. Paris, France.

[38] See presentation of National Contact points for the OECD Guidelines for Multinational Enterprises <http://www.oecd.org/document/60/0,3343,en_2649_34889_1933116_1_1_1_1,00.html>. Accessed 1 May 2009.

The Norwegian NCP is made up of representatives of the Ministry of Foreign Affairs, the Ministry of Trade and Industry, the Norwegian Confederation of Trade Unions-LO and the Confederation of Norwegian Enterprise-NHO. The Norwegian NCP is hosted by the Ministry of Foreign Affairs.[39]

The OECD Guidelines have drawn up a list of roles that can be adopted by NCP, but governments are free to organize the body as they wish, assuming its functions are visible, accessible, transparent and accountable. These are the roles NCPs can potentially take up in assistance with the OECD Investment Committee in,

- Gathering information on national experiences with the Guidelines
- Handling enquiries called Specific instances[40]
- Discussing matters related to the Guidelines
- Assisting in solving problems that may raise from the implementation of the Guidelines

It is important to note that "any person or organization may approach a NCP to enquire about a matter related to the Guidelines", which implies, in theory, a wide accessibility to the mechanism. In addition, there has been a steady increase in the visibility and accountability of NCPs in relation to both their national constituencies as well as their peer NCPs and the member states at the OECD Investment Committee. The 2008 OECD Annual Report on Guidelines for Multinational Companies acknowledges the increasing requests made for the institution to act as a platform for various corporate responsibility issues and the need to reinforce the institution. In 2000 the Guidelines were reviewed in order to improve the NCP performance on the base of existing practices and another review is planned in 2010.[41] Initiatives have been completed for that purpose such as an overview of some Initiatives and

[39] Access to the Norwegian OECD NCP <http://www.regjeringen.no/nb/dep/ud/tema/norgesfremme-og-kultursamarbeid.html?id=434499>
The Norwegian OECD NCP released on 28 May 2009 a statement on a specific instance raised by *Fellesforbundet* (the largest union in the private sector) against Kongsberg Automotive relating to allegations concerning a subsidiary's behavior during a workers' lockout of the subsidiary. The majority of the OECD NCP members decided that the OECD Guidelines had not been breached but advices the company to follow the Norwegian practices and tradition in case of labor disputes. *LO*- the Confederation of Trade Union – separately stated that Kongsberg Automotive breached the guidelines. See statement in Norwegian <http://www.regjeringen.no/upload/UD/Vedlegg/Handelspolitikk/oecd_uttalelse.pdf> Accessed 10 June 2009.
Note that Norwegian OECD NCP has been submitted more complaints. On January 2009 the Norwegian NGO *Future in our hand- Framtiden I våre hender* has submitted a complaint regarding the company Intex Resources and the development of operations in a nickel mine and factory in the Philippines. See complaint in Norwegian <http://oecdwatch.org/cases/Case_164/743/at_download/file> and link to more information on the specific instance <http://oecdwatch.org/cases/Case_164> Accessed 5 June 2009.
Note also that the Norwegian NGOs *ForUM* and *Norges Naturvernforbund* FoE-Norway have submitted on 19 May 2009 a complaint against Cermaq ASA concerning operations in its subsidiary Mainstream's fish farming activity in Canada and Chili and allegation of breaches concerning production sustainability, employment conditions and human rights. See the complaint in English <http://www.naturvern.no/data/f/1/31/00/5_2401_0/Cermaq_klage_NNV_ForUM_18-05-09_(ENG)-1.pdf> Accessed 15 June 2009.

[40] For all Statements produced by National Contacts Points. <http://www.oecd.org/document/59/0,3343,en_2649_34889_2489211_1_1_1_1,00.html>

[41] Presentation Marie-France Houde, senior Economist in the investment division of the OECD, Norwegian KOMpakt meeting 21 April 2008, Oslo, Ministry of Foreign Affairs.

Instruments relevant to CSR[42], and a Review of the NCP Performance[43] as a background research for the OECD-ILO Conference on CSR held in June 2008.

In practice, an NCP can act as facilitator and intermediary, promote the use of the Guidelines, and assist in solving problems through discussion and dialogue with parties concerned. The function of provision of general guidance can contribute to clarifying expected minimum standards of business behaviour, for example in relation to due diligence for human rights abuse. [44]

Advantages of OECD Guidelines for Multinational Enterprises NCP[45] proceed from the fact that States are the primary guarantors of the Guidelines. States – as regulators, investors, owners, and advisors – are uniquely able to play certain roles that promote adherence to the Guidelines. For instance:

- *Governments have convening power* which induces companies to come and sit at the table even when Guidelines are not legally binding to them. Governments also embody authority that encourages engagement
- *Governments can play a preventive role* by promoting the Guidelines through awareness-raising and advice
- *Governments have privileged access to expertise and networking*, within government departments and agencies at the national, sub-national levels. They also benefit from the government networks abroad (e.g. embassies)
- *NCP can benefit from privileged location* (depending on the states[46]) in *economic ministries and departments* – which can help ensure the promotion of the guidelines and other CSR instruments – or in ministries of *Foreign Affairs*, which can help ensure access to embassies' abroad "a real advantage as a growing number of specific instances take place in non-adherent countries"[47]
- In some countries, *governmental accountability* ensures that NCPs report through their hierarchies to their Parliaments, e.g. Australia, Greece, Japan, New Zealand.
- Government ownership of the NCPs means that the relatively limited formal power of *critical NCP statements nonetheless can have an informal effect in terms of reputation with consumers, investors, business peers and host governments.*

[42] See OECD. 2008. *Overview of Selected Initiatives and Instruments Relevant to Corporate Social Responsibility*. OECD-ILO Conference on CSR. 23-24 June. Paris, France.

[43] OECD. 2008. *Review of NCP Performance.*

[44] For instance, the Norwegian NCP Statement on Aker Kværner's activities at Guantanamo Bay stressed the need to "assess activities in relation to human rights. The provision of goods and services in situations such as those at Guantanamo requires particular vigilance with respect to CSR. It would therefore have been appropriate if the company had undertaken a thorough and documented assessment of the ethical issues in connection with its tender for the renewal of the contract in 2005.See Norwegian OECD National Contact Point. "Statement. Enquiry from the Forum for Environment and Development (ForUM) on Aker Kværner's activities at Guantanamo Bay." 29 November 2005. < http://www.oecd.org/dataoecd/5/48/38038283.pdf> Accessed 10 March 2009.

[45] See footnote 37.

[46] See OECD. 2008. *Annual Report* Annex 1.A1 for a detailed view of the structure of all National Contact Points, in terms of composition governmental location and involvement of other ministries (pp.27–32).

[47] OECD. 2008. *Review of NCP Performance*.

Weaknesses of the NCPs have been identified by a number of stakeholders and partly acknowledged by the OECD. Assessing NCPs is somewhat difficult, as there are significant differences in how countries' NCPs function. This can be explained in part by the different focus of various NCPs: either on the promotion of the Guidelines or on its implementation. The lack of coherence between the functions of various countries' NCPs has raised concerns amongst business about the predictability of this form of non-judicial remedy. While SRSG Ruggie's June 2008 report described at the OECD Guidelines as "currently the most widely applicable set of government-endorsed standards related to corporate responsibility and human rights"[48] he also calls for their revision, not least with respect to the operationalizing of NCP functions.

OECD Watch, international Network of NGOs has played an important role in the identification of weaknesses and in recommending improvements.[49] The organization took part in the OECD 2000 Review process of the Guidelines alongside the BIAC (Business and Industry Advisory Committee to the OECD[50]) and TUAC (Trade Union Advisory Committee[51]) and NGOs.[52] Some of its criticisms include:

- Bias in favor of corporate interests when staff from Trade and Industry ministry dominates the NCP (which in turn reduces the legitimacy of the instrument)
- Lack of accessibility resulting from ignorance of the NCP's existence and uncertainty about the processes and outcomes
- Lack of resources to undertake adequate investigation of complaints
- Lack of training to provide effective mediation
- Lack of detailed understanding among NCP on their roles and insufficient information sharing between NCPs
- Tension between role of neutral conciliators and assessors with the need for authoritative recommendations
- Tension between the confidentiality of the process and sufficient trust by the parties
- Absence of time frames for the commencement or completion of the process
- Absence of systematic publication of outcomes of the specific instances
- Predisposition for avoiding clear judgments and preference for forward-looking statements on recommended behavior

[48] A/HRC/8/5 (p.13)

[49] See OECD Watch. 2005. *Five Year On. A Review of the OECD Guidelines and National Contact Points*. SOMO- Centre for Research on Multinational Corporations, Amsterdam, The Netherlands. See also the RAID (Rights and Accountability in Development). 2008. "Fit for Purpose? A Review of the UK National Contact Point (NCP) for the OECD Guidelines for Multinational Enterprises 2008." In association with the CORE Coalition, the Trades Union Congress (TUC). November.

[50] BIAC is part of the institutional set-up of the OECD Guidelines. See < http://oecdwatch.org/about-oecd/biac> . Accessed 29 May 2009.

[51] TUAC is an interface for labour unions with the OECD with consultative status with the OECD. See < http://oecdwatch.org/about-oecd/tuac>. Accessed 29 May 2009.

[52] John Ruggie. 2009. "Keynote Presentation" in OECD. *Annual Report*.

- Geographical constraints of the NCP process to the OECD Guidelines adhering countries[53]

The Model National Contact Point[54] proposed by OECD Watch draws from the experiences in Western Europe and incorporates the findings of consultations and survey processes. The proposal advocates an independent, informed and authoritative structure governed by an interdepartmental or tripartite representation of stakeholders, with proper training and sufficient funding. The Model NCP would require oversight from Parliament or a Parliamentary ombudsman (if existing) or possibly an external steering board (see below in the reformed UK NCP). Its functions should include promotional and training activities, complementary to other governmental initiatives.

As far as the handling of Specific Instances (complaints) is concerned, OECD Watch's recommendations focus on prompt, efficient and fair procedures with clear standards for first assessing complaints, a twelve-month frame time and the capacity and resources to carry out investigations. Most of all, NCPs are encouraged to follow consistent and transparent procedures. [55] OECD Watch specifically recommends that governments remove ambiguity, reward responsible conduct, provide incentives to correct or improve behavior, and eliminate perverse incentives for continuing misconduct. [56]

There remains a number of uncertainties with respect to the handling of Specific Instances that should be clarified in reforming the NCPs:

- The role of the OECD guidelines concept of 'Investment nexus' in relation to supply chain responsibilities[57]
- The relationship of NCPs processes to parallel legal proceedings[58]

[53] Note that in their 2005 review OECD Watch also points at the unequal and unfair treatment of NGOs, the inaction on or rejection of complaints when there are parallel legal proceedings. The report concluded that the Guidelines for Multinational Enterprises were not an adequate instrument for curbing corporate misconduct. OECD Watch has been calling for legally binding international social and environmental standards for corporations to help stop corporate abuses, particularly in developing countries.

[54] OECD Watch. 2007. *Model National Contact Point. Proposals for improving and harmonizing the procedures of the NCP for the OECD Guidelines for Multinational Enterprise*. SOMO. Amsterdam, The Netherlands. September 2007 <http://oecdwatch.org/publications-en/Publication_2223/at_download/fullfile> Accessed 15 April 2009.

[55] Note that OECD Watch produced Facts Sheets on The OECD Guidelines and Socially Responsible Investment. < http://oecdwatch.org/publications-en/Publication_2239/at_download/fullfile>

[56] An example of "perverse incentives" would be to encourage with economic incentives companies' activities that externalize costs onto society, with no consideration of the potential neither of the social nor the environmental negatives impacts.

[57] On this matter see the Final statement by the UK National Contact Point for the OECD Guidelines: Afrimex (UK) LTD which concluded that Afrimex did not apply sufficient due diligence to the supply chain and failed to take adequate steps to contribute to the abolition of child and forced labor in the mines or to take steps to influence the conditions of the mines. <http://www.berr.gov.uk/files/file47555.doc> Accessed 26 February 2009. See also Global Witness. 2008. "Recommendations on due diligence for buyers and companies trading in minerals form Eeastern Democratic Republic of Congo and for their home governments." November.

[58] On this matter see Sherpa. 2009. "Corrib Gas Project. Legal opinion on parallel legal proceedings in the OECD Guidelines for Multinational Enterprises". <http://oecdwatch.org/cases/Case_146/752/at_download/file> Accessed 2 June 2009. The report highlights that "the OECD proceedings are necessarily distinct from judicial proceedings before national or international courts, because they are completely differentiated by their nature and grounds". OECD NCP are a forum of discussion and mediation and they "make non-legally binding decisions based on recommendations set out by the Guidelines whereas a court will rule on compulsory legislation" (p.7) "Any definitive or temporary decisions by an NCP to decline to hear the case on basis of parallel proceedings would be a denial of the right of access to the OECD Guidelines. It follows that a specific instance submitted to an NCP, by being necessarily completely different from a judicial action, cannot conflict with it, which requires that NCPs preserve their independent while dealing with the case"(p.8)

- Clarification of the balance between the competing needs for business confidentiality and transparency of the process
- Adjudication in case mediation fails[59]
- Harmonization of work practices[60]

National Human Rights Institutions

Louise Arbour, the former High Commissioner for Human Rights has pointed to the increasing role of National Human Rights Institutions (NHRIs) in recent years, especially in countries where there are limits to an independent judiciary, properly functioning administration of justice and independent parliament. [61] When NHRIs are mandated to handle grievances, they can at the same time implement such functions as providing information and advice on avenues of recourse for the victims and, in this way, act as a "linchpin linking local, national and international levels across countries and regions."[62]

The **Paris Principles** (1991) clarified the role of National Human Rights Institutions by defining the ideal structure, mandate and performance. The key requirements[63] are

- Independence guaranteed in the constitution or by statute
- Autonomy from the Government
- Pluralistic representation
- A mandate covering the promotion and protection of human rights
- Adequate resources
- Adequate powers of investigation

However, the mandates vary greatly from country to country and are reflections of the political regimes (political structures and rules) they evolved in

- Some NHRIs are linked with other specialized bodies and organs
- Some focus on equality or due process

[59] Note that the OECD has been working on Dispute Resolution Mechanisms and that most recommendations are used as working basis. See OECD "Human Rights. Alternative Dispute Resolution and the OECD Guidelines for Multinational Enterprises. Briefing note", Workshop on Accountability and dispute resolution, Harvard JFK School of Government, 11—12 April 2007. In the document recommendations for NCP reform are made.

[60] In the consultation processes organized by the CSR Initiative of the Harvard University John F. Kennedy School of Government suggestions were made to make compulsory the NCP peer evaluation process (today on a voluntary basis) and include the possibility of naming poor-performing NCPs as encouragement for improvement. This would be a similar process presently used by the Financial Action Task Force of the OECD to encourage states to implement anti-money laundering banking laws.

[61] Louise Arbour. 2008. "Statement to the Canadian Human Rights Commission. National Human Rights institutions as a catalyst for change." UN High Commissioner for human Rights.

[62] A/HRC/8/5 (p.26).

[63] See the National Human Rights Institutions Forum. "Principles relating to the status of national institutions. Competence and responsibilities". <http://www.nhri.net/pdf/ParisPrinciples.english.pdf> Accessed 9 May 2009.

- Some focus on human rights violations arising from arbitrary arrest and detention, the use of torture the abuse of law enforcement, etc.
- Most work on combating gender and racial discrimination

The diversity in form and function of NHRIs is also reflected in what they are called: Human Rights Commissions, Ombudsman, Parliamentary Human Rights Bodies and specialized human rights agencies.[64] Thus while NHRIs have taken on increasingly important roles in recent years, this development has to be understood in light of the political regimes and regional differences of the countries where they are formed.

The results of a survey by the Office of the United Nations High Commissioner for Human Rights[65] on the mandates and capacities of NHRIs point to significant variation between NHRIs with respect to existing complaint mechanisms. For example the Norwegian National Centre for Human Rights (NCHR) has no authority to handle business related complaints. It is accredited as the national institution for the promotion and protection of human rights, not mandated to deal with individual cases. NCHR conducts research, monitoring and consultancy as well as educational and informational missions. It releases statements and commentaries on the status of human rights in Norway, and reports to international institutions. The centre investigates Norway's human rights obligations with regard to regulations and monitoring, and can make recommendations in connection with public hearings on new bills and propose changes to official guidelines or measures. The center is independent from government and non-state organizations. It is part of the UN network of national institutions for human rights working closely with the UN High Commissioner for Human Rights. The NCHR has established an advisory committee which consists of representatives from the Norwegian ombudsmen[66], interests groups and civil society organizations, which is a consultation organ for discussion of issues within the NCHR's mandate.[67] NCHR does not deal with CSR issues *per se*. The issue is nevertheless mentioned in the 2008 Annual report "The normative terrain of regulations, guidelines and routines connected to non-state actors' responsibility to operate in an ethically proper fashion and in accordance with fundamental human rights is under development." [68]

Similarly, the Danish Institute for Human Rights – one of the leading centres of business and human rights research and tools development – also does not have complaint mechanisms. Its tools for addressing complaints are the possibility of advising a complainant about legal recourse, the dissemination of the findings and the submission of opinions and

[64] Paul Sergio Pinheiro, David Carlos Baluarte, "National Strategies- Human Rights Commissions, ombudsman, and National action plans. The role of NRHI in State strategies." *Human development Report 2000* Background Paper.

[65] See Office of the High Commissioner for Human Rights webpage on the National Human Rights Institutions <http://www.ohchr.org/EN/Countries/NHRI/Pages/NHRIMain.aspx> and the National Human Rights Institutions Forum < http://www.nhri.net/>. Accessed 9 May 2009.

[66] See below

[67] Established as a national institution by a Royal Decree of 21 September 2001 following the obligations of the Paris Principles (UN Human Rights Commission Resolution and General Assembly Resolution) in order to contribute to a greater consciousness concerning and better fulfillment of the internationally agreed upon human rights, in Norway. <http://www.humanrights.uio.no/english/national-institution/international-monitoring.html> Accessed 3 May 2009.

[68] Ingvild Bartels and Njål Høstmælingen. 2009. *Årbok om menneskerettigheter in Norge 2008*. Norsk senter for menneskerettigheter. April.

recommendations to the government Parliament and social actors.[69] At the other end of the NHRI spectrum, Egypt's National Council for Human Rights is a consultative organ with non judicial status, but can receive complaints with regard to private or public/state-owned companies. Complaints mostly relate to discrimination, arbitrary termination of contracts and arbitrary reassignment. The Council can investigate and use consultation mechanisms to resolve disputes (and hearings for large scale incidents). Redress measures include requests for monetary compensation, corporate policy adjustments or the release of a public statement. Its effectiveness is grounded in its "moral leverage" over the government and business. The Council also has the authority to refer to and request information from the public prosecutor regarding certain cases.

Recently, the argument has been made that NHRIs are the most adequate institutions to deal with international corporate responsibility because "they are uniquely placed to address this challenge and to facilitate dialogue."[70] In a roundtable of NHRIs that took place in Copenhagen in July 2008 the possibility was expressed that "NHRIs become key vehicles for a more representative and diverse ownership of the human rights and business agenda" by contributing to improving government protection of human rights in the corporate sector; monitoring and reporting on the human rights situation in domestic business communities or in specific industries, and also by hearing and resolving individual grievances related to allegations of corporate human rights abuse. As to the improvement of access to non-judicial grievance/dispute mechanisms, the representatives attending the roundtable pointed to the need to adopt a proactive approach, including raising awareness of workers, communities and companies on the complaint mechanisms, systematically identifying and targeting repeat abuses and violations, and conducting investigation of "systematic complaints using litigation and legal aid.[71] Among the possible interventions, training and awareness raising development and tailoring of tools to companies and sectors were identified as necessary objectives to pursue.[72]

Ombudsman

An Ombudsman is a "representative" or agent of the people.[73] Traditionally an ombudsman handles complaints from ordinary citizens about certain public bodies or private sector serv-

[69] Danish Institute for Human Rights Denmark's national human rights institution <http://www.humanrights.dk/> <http://www.humanrightsbusiness.org/> and Human Rights Complaints Assessment Human rights and business project. E.g. The Confederation of Danish Industries, The Danish Centre for Human Rights, The Industrialization Fund for Developing Countries. "Defining the scope of Business Responsibility for Human Rights Abroad." <2009http://www.humanrightsbusiness.org/files/320569722/file/defining_the_scope_of_business_responsibiliy_.pdf> Accessed 9 May 2009.

[70] Danish Institute for Human Rights. 2008. *Report from the Roundtable of National Human Rights Institutions on the issue of business and human rights.* In collaboration with the Swiss Federal Department of Foreign Affairs, Copenhagen, 1–2 July.

[71] Danish Institute for Human Rights. 2008.

[72] The International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights is considering establishing a working group on business and human rights to look into the potential of National Human Rights Institutions in providing and promoting effective remedies for business-related grievances.

[73] The International Ombudsman Institute defines the role of an ombudsman as one which seeks to protect the people against violation of rights, abuse of powers, error, negligence, unfair decisions and maladministration in order to improve public administration and make the government's actions more open and the government and its servants more accountable to members of the public. See official website of the <http://www.law.ualberta.ca/centres/ioi/> Accessed 3 March 2009.

ices. Most ombudsmen are set up by statute, but others are voluntary non-statutory schemes. They are traditionally an independent and impartial authority overseeing the observance of law in the discharge of official and public functions. An ombudsman ensures that, for example, public authorities fulfill their obligations and respect constitutional and human rights when they perform their tasks.

In theory they should follow four guiding principles:[74]

- Independence: what distinguishes ombudsman's schemes
- Power to investigate
- Effectiveness
- Public accountability

The Finnish ombudsman is often used as the most developed example in term of statute and functions. The term "Ombusdman" refers in Finland to both the Parliamentary Ombusdman and the deputy ombudsmen whose main goal is to oversee the exercise of public authority with regards to the implementation of fundamental and human rights.[75]

The advantages of ombudsman are considered to be:[76]

- Provision of an access to redress for cases which might not be considered by the Courts
- Independent and impartial investigations conducted in a manner that protects the rights to privacy of those involved
- Free to complainants
- Possibility to take account of what is fair and reasonable and are not bound by interpretation of the law or precedent
- Recourse to Alternative Dispute Resolution (ADR)[77]
- Possibility to level the playing field when there is a discrepancy of power between parties
- Procedures are inquisitorial (judge-controlled procedure), not adversarial (party-controlled procedure). Witness can be interviewed and professional experts can be called in. Procedure of investigation can be tailored to the circumstance of the case

The **European Ombusdman,** created by the Maastrich treaty, possesses functions that are examples of functions an ombudsman can fulfill. It aims at enhancing relations between citizens of the Union and the European Community institutions and bodies, handles complaints

[74] Reference to the British and Irish Ombudsman Association <http://www.bioa.org.uk/index.php accessed May 18 2009> Accessed 3 March 2009.

[75] See the official website of the Finnish Parliamentary Ombudsman < http://www.oikeusasiamies.fi/> Accessed 5 May 2009. For a description of the functions and evolution of the institution, refer to the brochure *Parliamentary Ombudsman of Finland* <http://www.oikeusasiamies.fi/dman/Document.phx/eoa/english/brochures/institutionofparliamentaryombudsmaninfinland?folderId=eoa%2Fenglish%2Fbrochures&cmd=download> Accessed 28 May 2009.

[76] Drawn from Howard Sapers. 2006. "The ombudsman as a monitor of human rights in community corrections. International Centre for Criminal Law Reform and Criminal Justice Policy." Programme supported by the Canadian International Development Agency. <http://www.icclr.law.ubc.ca/Publications/2008/Book%20on%20Community%20Corrections/22%20Howard%20Sapers%20the%20Ombudsman%20as%20a%20Monitor.pdf> Accessed 28 May 2009.

[77] Alternative Dispute Resolutions (ADR) are means of settling a dispute outside a courtroom. For an overview of ADR see website *Legal Information Institute* from Cornell University <http://topics.law.cornell.edu/wex/adr> Accessed 15 May 2009.

that deal with administrative irregularities, unfairness, discrimination abuse of power, failure to reply, refusal of information unnecessary delay.[78] *The European Ombusdman follows the following process:*

- Complaint made between 2 years of the date when citizens were aware of the fact on which the complaint is based
- Complainants must be citizens individually affected by the maladministration
- Complainants must have contacted the institution or body concerned about the matter
- The ombudsman does not deal with matters that are currently before a court or that have already been settled by a court
- When the ombudsman examines the complaint, the citizens are informed of the outcome of the investigation.

Often, simply by inquiring or providing information to the institution concerned the Ombudsman can resolve the problem. In cases where there is no satisfactory resolution, the Ombudsman can suggest a solution. If the institution does not accept the recommendation of the Ombudsman, the latter can make a special report to the European Parliament.

To set a good example of public service, the Ombudsman deals with complaints as quickly as possible:

1. Acknowledges the receipt of the complaint within a week
2. Decides on whether to open an inquiry within one month
3. Completes inquiry within a year (more complicated cases may last longer).

In Norway there are 4 ombusdmen.

- **Parliamentary Ombudsman for public administration (S'OM Sivilombudsmannen)** supervising public administration agencies (government, municipal or county administrations) on the basis of complaints from citizens concerning maladministration or injustice. He can address issues on his own initiative. The Parliamentary Ombusdman's activities are based on the Constitution of the Kingdom of Norway and a Parliamentary directive and law.[79]
- **Children Ombudsman-(Barneombud)** is an independent, non-partisan, politically neutral institution established in 1981 with statutory rights (Act No 5–6 March 1981) to protect children and their rights, working at improving the national and international legislation affecting children welfare. He has the power to investigate, criticize and publicise matters important to improve the welfare of children and youth. Acting in turn as an advocate on behalf of the children, an activist when a case requires the authorities or the media's attention and as an adviser for children, parents, professionals and organizations regarding children's interests.[80]

[78] See the official website of the European Ombusdman <http://www.ombudsman.europa.eu/home.faces> Accessed 4 March 2009. Refer also to the B.A.S.E.S wiki on dispute resolution mechanisms <http://www.baseswiki.org/En/2-grievanceMechanisms/BRegional_Mechanisms/The_European_Consumer_Centres_Network_(ECC-Net)/European_Ombudsman> Accessed 10 May 2009.

[79] Official website http://www.sivilombudsmannen.no/ > Accessed 2 April 2009.

[80] Official website < http://www.barneombudet.no/english/> Accessed 2 April 2009.

- **Consumer Ombudsman (Forbrukerombudet**) is an administrative body responsible, on behalf of consumers, for ensuring that goods and services are marketed in conformance with the Act relating to marketing and contacts. Besides monitoring he has the authority to intervene in the event of unreasonable standards terms and conditions (i.e. insurance, credit...).[81] It coexists with a Consumer Dispute Commission (Forbrukertvistutvalget) arbitrer of conflicts related to goods and services[82] related to the Norwegian Consumer Council (Forbrukerrådet) preparatory body of the Commission (independent organization representing the interests of consumers)
- **Equality and Anti-discrimination Ombud (Likestillings- og diskrimineringsombudet)** is part of the government but is an independent agency. Its decisions and actions cannot be subject to political pressure. It was established in 2006 (merger of existing bodies) to contribute to the promotion of equal opportunity and the fight against discrimination based on gender, ethnic origin, sexual orientation, religion, disability and age. It upholds the law and acts as a proactive agent. The Ombud provides guidance and advice on legal rights. He handles complaints and decides whether illegal discrimination has taken place. The services are free of charge. The Ombud cannot take a position on a compensation claim nor determine the amount of the claim because rules vary in various laws.[83]It coexists with the Norwegian Equality Tribunal.[84] Only the Equality and Anti-discrimination Ombud has the competence to investigate alleged non-compliance with the law. The Ombud can make recommendations which can be appealed before the tribunal. A case can be handled by the Tribunal after the Ombud has made a recommendation.
- In Norway a coalition of NGOs led by ForUM for Environment and Development has proposed a **CSR national ombusdman** "*ombud for næringslivet*"[85]. The ombudsman would monitor the companies' compliance to CSR standards and keep a track record which would then be a determining factor to receiving official public support (export credit and insurance guarantees). The CSR ombudsman would have authority to look into cases on its own initiative, and access confidential and refer cases to the police for criminal investigations.

The use of the term "ombudsman" has been evolving overtime and differs by country. It is used in some countries to designate the human rights commission.[86] In Australia it designates a private sector-specific mechanisms such as the banking and a telecommunication industry ombudsman. Also Oxfam Australia, a non-governmental aid and development agency which is campaigning for a complaint mechanisms for the mining industry, has been for some years

[81] Official website <http://www.forbrukerombudet.no/index.gan?id=490&subid=> Accessed 2 April 2009.

[82] Official website <http://www.forbrukertvistutvalget.no/> Accessed 2 April 2009.

[83] Official website < http://www.ldo.no/en-gb/> Accessed 2 April 2009.

[84] Official website <http://www.diskrimineringsnemnda.no/wips/1416077327/> Accessed 2 April 2009.

[85] ForUM. 2009. "Utvikling for hvem?" ForUMs høringsuttalelse "St.meld.nr.13" til Utenrikskomiteen 30. Mars 2009 <http://www.forumfor.no/noop/page.php?p=Artikler/5272.html&print=1> Accessed 10 May 2009. Note that the proposal was first presented in 2000 during the consultation for the Stortingetsmelding n.21 Menneskeverd in sentrum. [Focus on human dignity]

[86] See terms in use for National Human Rights Institutions <http://www.baseswiki.org/En/2-GrievanceMechanisms/CNational_Mechanisms/National_Human_Rights_Institutions> Accessed 8 April 2009.

receiving complaints and addressing community grievances by establishing a Mining Ombudsman.[87]

At the company level, the term ombudsman has also been used to name a representative whose function is to investigate and report on information given by employees concerning their grievances in relation to the company, its employees or management.[88]

Finally at the international level the World Bank 's International Finance Corporation has established in 1999 an Office of the Compliance Advisor/Ombusdman CAO.[89] Its objective is to enhance the development impact and sustainability of projects of the IFC and the Multilateral Investment Guarantee Agency.[90]

At the international level CIDSE the International Cooperation for Development and Solidarity, a coalition of catholic development organizations in Europe and North America based in Brussels, has recommended "an independent **global ombudsperson** with a mandate to investigate complaints of alleged malfeasance by TNCs and also to complement justice mechanisms at the national level. Complaints to the ombudsperson could be brought directly by aggrieved parties, or brought via individuals and organizations acting on their behalf (...) an international committee of experts who would make a binding determination of the case resulting in follow up actions as appropriate. For example such actions could include fines".[91]

The advantages and challenges of a global ombudsman have been further discussed during the consultation led by the John F. Kennedy School of Government at Harvard University. Among the advantages considered of a global ombudsman function was that it could go some way to level the playing field between large companies and the alleged victims. Also "it could address any human rights-based complaint against any company anywhere on the world. It could also provide other services, such as those of a resource".[92] The challenges to make such mechanism effective were also numerous. These include deciding what standards to apply, the sheer scale of a global function in terms of financing and memberships, the difficulties in establishing credibility and legitimacy.

In his June 2008 report, the SRSG's commented that a global ombudsman "would need to provide ready access without becoming a first port of call; offer effective processes without undermining the development of national mechanisms; provide timely responses while likely being located far from participants; and furnish appropriate solutions while dealing with different sectors, cultures and political contexts. It would need to show some early successes if faith in its capacity were not quickly to be undermined. To perform these tasks any such

[87] See Oxfam Australia Mining Ombusdman project <http://www.oxfam.org.au/campaigns/mining/ombudsman/> Accessed 5 April 2009; and e.g. report the Oxfam Mining Ombudsman Shanta Martin, Kelly Newell. 2008. "Mining Ombusdman case report: Rapu Rapu polymetallic mine." Oxfam Australia October <http://www.oxfam.org.au/campaigns/mining/docs/rapurapu-case-report.pdf> Accessed May 2009.

[88] E.g. the Norwegian company Statnett has established an Ethics ombudsman in 2006 <http://www.statnett.no/en/Environment-and-CSR/Ethics/> Accessed 20 May 2009.

[89] For a description of the World Bank Group Compliance Advisor/Ombudsman see Caroline Rees and David Vermijs. 2008. (pp. 104-106).

[90] See the official website of the Compliance Advisor Ombusdman < http://www.cao-ombudsman.org/> Accessed 5 April 2009.

[91] For a description of the CIDSE. 2008. Recommendation to reduce the risk of human rights violations and improve access to justice. Submission to the UN SRSG on Business and Human Rights. Report February 2008 <http://www.cidse.org/uploadedFiles/Publications/Publication_repository/cidse_policy_paper_Ruggie_may08_EN.pdf?n=4476> Accessed 18 May 2009.

[92] See Caroline Rees. 2008. "Grievance Mechanisms..." (p.34-37)

function would need to be well-resourced. Careful consideration should go into whether these criteria actually can and would be met before moving in this direction".[93]

Commissions and Counsellors

Others proposals of non-judicial mechanisms have been made with regards to business and CSR. In early 2009, the Canadian Government published a national strategy on CSR regarding the extractive industry and proposed a CSR Counsellor. In addition, the London-based umbrella NGO Corporate Responsibility Coalition (CORE) in the U.K. has developed two options - one called a Commission and the other termed an Ombudsman - to handle cases of corporate abuse abroad regarding human rights and the environment.

Canadian CSR Counsellor for the Extractive Sector

The "CSR Counsellor" presented by the Canadian government as part of its New Corporate Social Responsibility Strategy for the Canadian International Extractive Sector ("Building the Canadian Advantage"), focuses on improving CSR practice by companies and prioritizes the capacity building of host-countries. [94]

The National strategy includes[95]

- The promotion of a set of voluntary CSR guidelines for Canadian extractive companies abroad consistent with widely recognized components of CSR
- The development of initiatives to build the capacity of developing country governments to manage their mineral and oil and gas resources
- The establishment of an **Extractive Sector Counsellor** to be appointed by the Governor in Council, and report to the Ministry of International Trade.

The Extractive Sector CSR Counsellor would

- Review the corporate social responsibility practices of Canadian extractive sector companies operating outside Canada with the consent of the involved parties
- Advise stakeholders on the implementation of endorsed CSR performance guidelines

[93] Addendum Summary of five multi-stakeholder consultations 23 April 2008 A/HRC/8/5/Add.1 *Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural rights, including the right to Development*. (103.p.27)

[94] In so doing the Government rejected the recommendations of a business and NGO Advisory Group which in 2007 made a detailed suggestion for a remedy via a national non-judicial mechanism. After a two-year long roundtable multistakeholder process, the Advisory Group recommended among other measures, non-financial disclosure of overseas activities, modifications of the criminal law, the income tax Act, the conditioning government support for industry on compliance with CSR standards and the establishment of an independent ombudsman office and a Compliance Review Committee. See 2007. *National Roundtables on Corporate Social Responsibility (CSR) and the Canadian Extractive Industry in Developing Countries*. Advisory Group Report, 29 March < http://geo.international.gc.ca/cip-pic/library/Advisory%20Group%20Report%20-%20March%202007.pdf> Accessed 6 May 2009.

[95] Official website of the Ministry of Foreign Affairs and International Trade <http://www.international.gc.ca/trade-agreements-accords-commerciaux/ds/csr-strategy-rse-stategie.aspx#5> Accessed 6 May 2009.

- Implement a five stage review process of CSR practices: initial assessment; informal mediation; fact-finding; access to formal mediation; and, reporting
- Report annually to the Minister of International Trade, the Minister of Natural Resources and the Minister of International Cooperation on its activities. The report will be tabled in Parliament by the Minister of International Trade.

A "Request for review" could be sent by an individual, group or community that reasonably believes that they are being or may be adversely affected by the activities of a Canadian extractive sector company in its operations outside Canada and also, a Canadian extractive sector company that believes it is the subject of unfounded allegations concerning its corporate conduct outside Canada in relation to the endorsed CSR performance guidelines.

The main criticism related to the CSR Counsellor has been that it does not require compliance with CSR standards, does not offer a complaint procedure nor a possible form of sanction. [96] The Counsellor would not review the human rights impact of the business activities of a Canadian company, take the initiative to do so on their own, or make binding recommendations, policy or legislative recommendations, create new performance standards, or formally mediate between parties.

In the UK, the Corporate Responsibility Coalition[97] proposed a new body to investigate, sanction and provide remedies for abuses committed by UK companies abroad on the basis of "the need to ensure greater enforceability of existing standards by UK companies in relation to their operational abroad". An important objective of the proposal is to overcome what is calls the "corporate veil" which blurs the responsibility of parent companies with regards to their subsidiaries.

The new body's mandate would ensure coherence of UK companies with human rights standards when operating abroad.[98] In its 2008 proposal, 2 versions are presented:

Option A.
A UK Commission for Business and Human Rights and the Environment

Mandate:

- Promote greater understanding of the role of business in the achievement of core labour rights, environmental protection and human rights worldwide;
- Monitor the impacts of UK companies abroad (either directly or through subsidiaries and suppliers);

[96] See Canadian Network on Corporate Accountability. 2009. "Government Squanders Opportunity to Hold Extractive Companies to Account". Press release, 26 March.

[97] The Corporate Responsibility (CORE) Coalition is an NGO based in London which represents over 130 civil society groups including Amnesty International UK, Friends of the Earth, Action Aid. It has been campaigning for changes in the Companies Act in the UK. UK was one of the first nations to establish rules for the operations of companies. The Companies Act 2006 is now a law to be implemented by October 2009 See Department for Business Enterprise & Regulatory Reform <http://www.berr.gov.uk/whatwedo/businesslaw/co-act-2006/index.html> Accessed 2 May 2009.

[98] Jennifer A. Zerk. 2008. "Filling the gap. A New Body to Investigate, Sanction and Provide Remedies for Abuses Committed by UK Companies Abroad". The Corporate Responsibility (CORE) Coalition < http://www.corporate-responsibility.org/module_images/Filling%20the%20Gap_dec08.pdf> Accessed 3 April 2009.

- Develop and oversee compliance with codes of best practice relating to the management by UK companies of their global labour, environmental and human rights impacts.

Functions:

- Conduct and sponsor research;
- Promote public awareness, education and training;
- Provide an information and advisory service, develop, oversee;
- Enforce standards of best management practice;
- Investigate complaints and resolve disputes about possible breaches of core labour rights or adverse environmental and human rights impacts outside the UK.

Powers:

- Investigate and report on allegations of breaches of standards;
- compel production of documents and witnesses;
- Enter into "cooperation" agreements with foreign regulatory authorities;
- Undertake own research and commission expert reports;
- Hear and resolve disputes between individuals and UK companies in accordance with the dispute resolution procedure.

Dispute resolution procedure:

- Aim in the first instance will be to achieve a negotiated settlement
- Complaints to be submitted in writing. Complainants may be entitled to financial assistance, subject to assessment of financial circumstances;
- Subject of the complaint is notified and asked for comment;
- Commission will have power to dismiss complaints with no merit or little chance of succeeding. Undertakings may be sought as part of settlement;
- A panel hearing will handle the cases not settled by negotiation within a specified time frame can be referred for Panel to comprise of three Commission members (one with legal background, one with business background and one with civil society background). Parties to call own witnesses, present own case to panel. Informal procedure and public hearing (unless there is an issue with security of the parties). A Decision Notice is issued with possibility of a party to apply for review to a Tribunal (on grounds of mistake, unreasonableness, or error of law only) within a limited time period. No appeal from

Tribunal Decision, but an unsuccessful claimant will still be entitled to pursue other remedies in the civil courts.

- Terms of final decision to be made public.

Possible outcomes & Remedy:

- Financial award (up to a specified limit). Publication of apology and/or explanation. Recommendations. Undertakings.

Envisioned advantages & limits:

- Wide mandate, reliance on dispute resolution which reduces the likelihood of regulatory conflicts with other states, limited use of investigatory powers, reduce tension between the Commission and the foreign regulatory bodies.

- Expensive to resource, complex organizational structure, legal and practical difficulties in investigating allegations of overseas abuses.

Option B.
A Business and Human Rights and Environment Ombusdman Service

Mandate:

- Help resolve disputes about possible breaches of core labour rights or adverse environmental and human rights impacts outside the UK.

Function:

- Offer dispute resolution mechanism, free of charge.

Complaint process:

- Complaints to be submitted in writing.

- Subject of complaint is notified and asked for comment. Initial decision then taken as to whether to refer complaint for investigation.

- If so, interested foreign regulatory bodies (if any) are contacted and asked for comment, information and/or assistance in verifying claims.

- If the complaint is accepted: A settlement proposal is drawn up by the Ombudsman's staff review based on the written submissions and interview witnesses from both sides of dispute. Both sides would have opportunity to comment prior to finalisation of settlement proposal. Undertakings may be sought as part of settlement process.

- If informal process fails to reach an agreed settlement, ombudsman can be asked to make an official decision. Either party can request a review of an official decision (on limited grounds) but no further rights of appeal. However, an unsuccessful claimant would still be entitled to pursue other remedies in the civil courts.

Expected outcomes:

- Financial award (up to a specified limit);
- Orders to publish an apology and/or explanation made public;
- Recommendations could include suggestion that a higher level of financial compensation be paid.

Envisioned Advantages & Limits:

Simple mandate; relatively uncomplicated to administer; reliance on dispute resolution rather than public law enforcement mechanisms reduces likelihood of regulatory conflicts with other states. Disadvantages/potential problems: limited mandate; no powers to initiate own investigations.

5 What Makes for Effective Non-Judicial Remedies?

The approach to non-judicial remedies outlined above can be summarised as placing an emphasis on responsiveness. Yet, the nature of that response can vary. The existing mechanisms have diverse functions and characteristics. Here are some of the differences and tensions to keep in mind: [99]

- Some have a *corrective* focus, other *preventive*
- Some are *ad hoc*, other are *institutional*
- Some are *incident-based* other are *relationship-based*
- Some are *public* others are *private and confidential processes*
- *Some are multinational initiatives* but yet located at the national level e.g. OECD NCP
- *Some engage companies* in the complaint handling when they are not parties e.g. Kenya Human Rights Commission

Non-judicial mechanisms are generally thought to be easier to access for most stakeholders and less costly and resource-intensive than judicial recourse. They may also offer informal forms of dispute resolution. However, because a CSR mechanism would be concerned exclusively with questions arising from harms outside Norway, it must be designed in a way to be sensitive to conditions in other countries. The institutional design should seek the right balance "between supporting local solutions and leveraging them via the institution or members of the more remote mechanisms "[100] (i.e. in Norway).

SRSG Ruggie has summarized the research of his team and several years of consultative processes with a list of principles, broad enough to "provide room for the expression of different political cultures and institutional arrangements."[101]

Guiding principles[102]

a) *Legitimate*: a mechanism must have clear, transparent and sufficiently independent governance structures to ensure that no party to a particular grievance process can interfere with the fair conduct of that process;

[99] Based in part on Caroline Rees. 2007. "Corporations and Human Rights: Accountability Mechanisms for Resolving Complaints and Disputes." Corporate Social Responsibility Initiative, Report. 15 Cambridge, MA: John F. Kennedy School of Government, Harvard University (point 18. p.6)

[100] Caroline Rees. 2008. "Grievance Mechanisms..."

[101] John Ruggie. 2009. "Keynote Presentation" in OECD. ,

[102] A/HRC/8/5 (p.24)

b) *Accessible*: a mechanism must be publicized to those who may wish to access it and provide adequate assistance for aggrieved parties who may face barriers to access, including language, literacy, awareness, finance, distance, or fear of reprisal;

c) *Predictable*: a mechanism must provide a clear and known procedure with a time frame for each stage and clarity on the types of process and outcome it can (and cannot) offer, as well as a means of monitoring the implementation of any outcome;

d) *Equitable*: a mechanism must ensure that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair and equitable terms;

e) *Rights-compatible*: a mechanism must ensure that its outcomes and remedies accord with internationally recognized human rights standards;

f) *Transparent*: a mechanism must provide sufficient transparency of process and outcome to meet the public interest concerns at stake and should presume transparency wherever possible; non-State mechanisms in particular should be transparent about the receipt of complaints and the key elements of their outcomes.

The design of non-judicial mechanisms assumes that the mechanism co-exists with other judicial and non-judicial mechanisms. Such an institution would have to be aware of the "leverage-generating relationship between judicial and non-judicial grievance processes". This is important even where domestic remedies in Norway do not have extra-territorial application, because such domestic remedies reflect societal and governmental expectations with regard to business behavior abroad. For example, in Norway such expectations are manifested in, for example;

- The Consumer Ombudsman (Forbrukerombudet)
- Equality and Anti-discrimination Ombudsman (Likestillings- og diskrimineringsombudet)
- Parliamentary Ombudsman (Sivilombudsman) supervising public administration agencies
- Children Ombudsman (Barneombud)
- Global Framework Agreements between Norwegian trade unions and companies
- Labour work place supersiving authority (Arbeidstilsynet)
- The financial supervisory authority (KreditTilsynet)
- Ethical Council, Pension Fund Global (Etikkrådet)
- The national authority for investigation and prosecution of economic and environmental Crime (Økokrim)
- The national authority governing criminal investigation and prosecution of international crimes (Riksadvokat and Statsadvokat)

The effectiveness of a non-judicial remedy – especially ones that are mediation-based – benefits greatly from taking place in the context of judicial mechanisms,[103] i.e. they take place in the

[103] Caroline Rees. 2008. "Access to Remedies for Corporate Human Rights Impacts: Improving Non-Judicial Mechanisms." Corporate Social Responsibility Initiative, Report. 15 Cambridge, MA: John F. Kennedy School of Government, Harvard University.

"shadow of liability". The pressure of a potential judicial process appears "to encourage parties to talk and find mutually acceptable solutions."[104] For this reason, non-judicial remedies may be suitable as an *additional* form of regulation alongside other forms of state-based oversight, e.g. criminal law, civil courts, environmental regulation, government regulation of labour rights or workplace safety, consumer protection, etc. Resort to non-judicial remedies should not preclude resort to other remedies. The most serious human rights violations, those which are also international crimes (e.g. torture, or complicity in Genocide) may in the future be more effectively covered by an emerging "web of legal liability" than they are today.[105] But for the full range of human rights, environmental, labour and anti-corruption concerns, a mechanism that can deal with the complexity of the range of rights and range of potential situations is preferable to attempting the impossible task of listing all potential harms that might occur and in all situations.

A 'bottom up' or complaints approach also suits the challenge of the business responsibility to respect human rights, as defined by the UN SRSG. However, all complaints mechanisms are not the same. For example, the Canadian government's CSR Counsellor seems to be designed as a form of administrative review: by covering only CSR policies and practices, the proposed Counsellor's five-step Review process is likely to be unable to assess the human rights impacts of a company's core business activities. This is quite different from the assumptions underlying the NCPs or the ombudsmen described above, which operate on the assumption that a harm has occurred, or that there is a real risk of one occurring, and that there needs to be a remedy available.

The majority of remedy mechanisms examined here are *incident-based*. An incident-based approach means that, for example, a business's responsibility to respect human rights would be assessed on a case-by-case basis in relation to a complaint concerning an incident. This is coherent with due diligence, an approach that is fast becoming the standard practice for companies and governments to meet their obligations with respect to national and international human rights, environment, labour and anti-corruption standards. However, many companies – in Norway and abroad – as well as their many stakeholders require assistance in building competence on due diligence in the field of CSR, and understanding of the opportunities and constraints of due diligence for improved CSR performance, in particular with respect to human rights.[106] Due diligence not only helps companies avoid committing or participating in harms, or act to prevent them occurring, it enables a stakeholder approach that can promote a better understanding concerning company responsibilities and state duties. Ensuring that companies do so is increasingly viewed as part of a state's role and duty in ensuring the protection of human rights.[107] In this way, a bottom-up, incident-based approach of a non-judicial remedy mechanism is best suited to responding to the needs of victims, clarifying the responsibilities of companies and fulfilling the duties of states.

[104] Rees. 2008. Access to remedies..."

[105] Robert C. Thompson, Anita Ramasastry and Mark B. Taylor (forthcoming 2009). "Translating Unocal: the expanding web of accountability for economic actors in domestic court systems", George Washington University International Law Review.

[106] Environmental impact assessments and anti-corruption due diligence are well known practices in large companies, but human rights due diligence is less well understood, having emerged only the last years as central to the UN SRSG's framework. However, the challenge remains for small and medium size companies in terms of competence and understanding of due diligence across all CSR areas.

[107] SRSG Ruggie "40. On policy grounds, a strong case can be made that ECAs (export credit agencies) representing not only commercial interests but also the broader public interest, should require clients to perform adequate due diligence on their potential human rights impacts. This would enable ECAs to flag up where serious human rights concerns would require greater oversight- and possibly indicate where State support should not proceed or continue" A/HRC/8/5

6 A Remedy Mechanism: Design Options for Discussion

As noted above, a remedy is what provides for redress, i.e. "compensation, restitution, guarantees of non-repetition, changes in relevant laws and public apologies."[108] Crucial in this respect is *access* to a remedy. Ideally, access to remedies is designed in such a way as to provide a flexible and 'bottom-up' approach to redress, thus lowering the threshold to redress and reducing the costs to all sides.

The forgoing analysis indicates that there is a significant amount of policy and practice, both in Norway and internationally, upon which to base the design of a non-judicial remedy mechanism for Norway. The analysis indicates that there is consensus in Norway and abroad that such a remedy mechanism should meet certain basic criteria: it should respond to complaints and in doing so it should operate in way that is legitimate, accessible, equitable, transparent, predictable, and compatible with international rights and duties.

Norwegian experience to date with similar mechanisms suggests that the core function of a non-judicial remedy should be incident-based; that is, it should respond to complaints about things that have happened, i.e. harms that may have occurred or behaviour that has fallen short of an established standard. This is the experience of the Norwegian NCP, which receives and evaluates complaints ("specific instances") and this is a function found in all of the other public Norwegian bodies mentioned above. This experience is in accordance with similar mechanisms abroad.

At the same time, there is a diversity of models and options as to *how* a remedy mechanism might go about meeting these criteria. The NCPs, NHRIs, Ombudsmen, Commissions, and Counsellors all offer examples of various functions, and combinations of functions. There is as yet no internationally agreed model of how a non-judicial remedy should be structured or governed, or what processes it might manage in response to complaints. In addition, CSR standards are evolving and are likely to continue to do so for some years to come.

SRSG Ruggie has identified a number of functions which a non-judicial remedy might adopt. These include: [109]

- *Information facilitation*: gathering and dissemination of information on grievances.
- *Negotiation:* direct dialogue between the parties to the grievance with the aim of resolving the grievance or dispute through mutual agreement.
- *Mediation/conciliation:* direct or indirect dialogue between the parties assisted with an external, neutral/objective facilitator with the aim of resolving the grievance through mutual agreement.
- *Arbitration:* a process by which neutral arbitrators, selected by the parties to a dispute, hear the positions of the parties, conduct some form of questioning or wider investigation and

[108] A/HRC/8/5 p.22

[109] Caroline Rees and David Vermijs. 2008. In his latest report, the UN SRSG notes the importance of sharing learning and innovations in the development of grievance mechanisms A/HRC/11/13 22

arrive at a judgment on the course of action be taken in settling the grievance or dispute, often with binding effect on the parties.

- *Conducting Investigation:* a process of gathering information and views about a grievance or disputed situation in order to produce an assessment of the facts.
- *Adjudication:* the formation of a judgment as to the rights and obligations of parties, and an independent decision as to remedies. This may be a compromise imposed on the parties and/or result in some form of sanction. Adjudication is distinct from arbitration because it the process does not require agreement by the parties.

Based on a review of existing and proposed institutions and practices, the following basic points are suggested for discussion of the establishment of a non-judicial remedy institution in Norway with respect to companies' social responsibilities abroad:

Objectives - *What are the desired outcomes and public goods sought?*

The minimum objective of a mechanism should be to provide a non-judicial remedy for harms related to the conduct of Norwegian business abroad. In doing so, the remedy mechanism should be responsive to the interests of victims as well as to the concerns of companies.

Functions - *What should a remedy mechanism do?*

The mechanism would have two main functions:

- Receive and handle complaints, including by mediation and/or investigation, and issue a statement in response to the complaint, with recommendations.
- Promote and support the implementation of due diligence for CSR by companies and their stakeholders, including helping to clarify the standards against which due diligence would be conducted and building competence on due diligence in Norway

Structure and Governance - *How should it be organized? How should it be run?*

The remedy mechanism could be established as an independent body reporting annually to the Parliament. To ensure independence, it should be given statutory rights to operate as a neutral, non-partisan and politically neutral institution.

A simple set-up would require a mechanism consisting of independent *Expert Committee* with its own permanent *Secretariat*. Members of the Expert Committee should be appointed on basis of their competence on the different areas of CSR (expertise on human rights, environment, labour and corruption). They could be appointed either by Royal Decree or by the Minister responsible on the recommendations of a multi-stakeholder *Advisory Board*[110] composed of officials from the Ministry of Foreign Affairs, the Ministry of Trade & Industry, the Confederation of Norwegian Enterprises-NHO, the Norwegian Confederation of Trade Unions-LO and representatives of civil society. The board could be appointed either by the Ministry of Foreign Affairs or the Ministry of Trade & Industry. Administratively the

[110] The primary task of the Advisory Board would be to review the CSR standards applied by the remedy mechanism on a regular basis; see Scope and Jurisdiction below.

Secretariat could be housed under the jurisdiction of the Ministry of Foreign Affairs or the Ministry of Trade & Industry.

The mechanism would relate to a pool of mediators, analysts and consultants to assist the Expert Committee in handling complaints. This would be coordinated by the *Secretariat*. The *Secretariat* would also establish and develop the work of the mechanism in the area of promotion of competence in CSR due diligence. This would be available as an advisory organ for Norwegian companies and NGOs operating abroad, as well as for the government in assessing the CSR competence of companies with which it does business (as an investor, owner, through procurement, etc).

Complaints Procedure - *How would it work?*

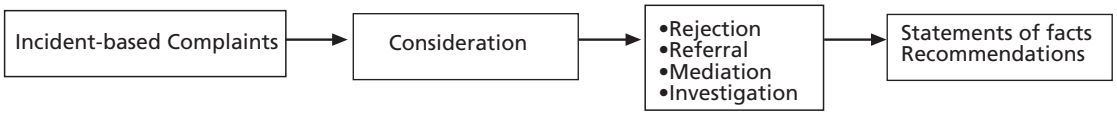
The complaints procedure should be simple and accessible. Ideally, the Expert Committee would receive complaints from either individuals or organizations (including companies) from Norway or abroad and consider how best to proceed. Its consideration could be based on such criteria as, for example, whether a harm appears to have occurred, whether the company has conducted due diligence, whether the nature of the complaint lends itself to mediation, whether further investigation is required before moving forward, what the complainant is requesting in terms of remedy.

Upon receipt of a complaint the Expert Committee would have four options: to mediate between the parties involved, to investigate the facts referred to in the complaint, to refer to other relevant national bodies and institutions, or to reject the complaint. A decision to either mediate or investigate need not be mutually exclusive. Referral or rejection would end the involvement of the mechanism on that complaint. Mediation and investigative processes would be confidential in accordance with Norwegian laws concerning personal and commercial privacy.

In those cases for which mediation was attempted, but failed, the mechanism should be empowered to investigate alleged non-compliance of minimum standards in order to be in a position to issue a statement of fact. This power will also act as an incentive for both parties to the complaints process to act in good faith. In the event of investigation, the mechanism should be able to draw on external experts, organize a hearing, request oral presentations, visit sites, etc. Of particular importance will be the power to compel the provision of information from parties to the complaints process (handled in accordance with privacy laws, as above). In addition, research and analysis based on public domain information and cooperation may be conducted by the Secretariat or consultants at the request of the Expert Committee.

Once the Expert Committee has reached a decision, either on how to proceed on a complaint, or on the substance of a particular complaint, it publishes a statement to this effect. The end result from a complaint would be a statement of fact with recommendations for remedial action. News about the receipt of a complaint, what stage it is at in the process, and any final statements, should be made public in a timely manner and in an annual report.

A simplified outline of the complaints process managed by the remedy mechanism would look like this:



A statement of fact is intended to function as an independent assessment of a complaint based on the mediation process, investigation, or both. It is a non-judicial way to provide a remedy for harms by expressing *recognition* of the harms that occurred. Such statements serve the additional purpose of signalling to the private sector what is – and is not – standard or acceptable behaviour with respect to social responsibility.

Statements and recommendation may also make clear the offer of mediation or dispute resolution where that has been initially declined, or could refer the parties to other relevant mechanisms, such as arbitration, or other forms of conflict resolution.

Recommendations may also be addressed to government agencies, such as export credit agencies, environmental agencies, labour regulators, etc., to ensure that governmental agencies take into consideration the findings of the mechanism.

Finally, the mechanism could have the power to recommend specific steps to remediate the harm or reverse the negative impacts, including specific actions the company should take and/or compensation that should be paid. Where this fails to occur, the mechanism could have the authority to refer the complainants to civil (tort/delict) courts in Norway.

Promotion of Due Diligence – *How would it work?*

In addition to supporting the mediation and investigation work of the Expert Committee, the Secretariat could be actively engaged in reviewing and assessing technical-level implementation of CSR due diligence at the invitation of Norwegian companies.[111] Due diligence competence may be a demand that the market cannot meet in the short term. Government and business might consider building on this function of the mechanism to support Norwegian business overseas with due diligence services. The competence developed by the Secretariat could be offered as a resource for those wishing to better understand due diligence, improve their own due diligence or assess how it is being done by others. This would involve the Secretariat in professional development activities concerning due diligence, promoting and learning from networks of businesses, government agencies, labour and civil society organisations, both in Norway and internationally. This would, in turn, considerably strengthen the ability of the remedy mechanism to quickly and effectively respond to complaints.

This function would amount to a service provided by the state to Norwegian business and civil society. However, in other sectors – merger and acquisitions, environmental assessment, etc – such due diligence is assumed as a cost of doing business. This has led to the development of private sector competence in these areas. In order not to burden the state with the costs of providing a function that is best located internal to companies or via the services of sub-contractors, and in order to promote the development of human rights due diligence as a sector in Norway, a temporary joint-funding mechanism should be considered.[112] State funding to this function could be phased out over time.

As CSR standards are progressively clarified, and as due diligence is solidified in company practices, serious consideration should be given to the option of promoting CSR due diligence via a 'white list' of companies qualified for Government procurement and investment relationships. The remedy mechanism could be tasked with developing the standards and methodology for implementing a 'white list' over a two-year period through consultations

[111] Including, for example, social and environmental impact assessments, human rights risk assessments, anti-corruption due diligence, supplier monitoring methodologies, etc.

[112] The due diligence support activities of the mechanism might, for example, be funded by public and private partnerships in which company contributions would not rise above 49 per cent.

with business and civil society. Indicating a time-frame would add a significant incentive for companies to both engage with the Secretariat and implement due diligence in priority areas in order to qualify for inclusion in the government 'white list'.

Scope and Jurisdiction - *What issues and actors should it cover?*

CSR standards are still emerging and will continue to develop over time. There are a diversity of standards and sources of standards that could apply. The primary task of the *Advisory Board* will be to approve the standards elaborated by the Expert Committee and to review them at regular intervals. That being said a safe starting point has already been elaborated by many years of work by the Graver Commission on ethical guidelines of the Norwegian Pension Fund-Global: minimum international standards for CSR "should be based on international principles for the protection of the environment, human rights, labor standards and corporate governance as promotion and protection of Human Rights rather than seeking to develop a separate basis founded on Norwegian national policy."[113]

The jurisdiction of such a mechanism should not exclude any particular industry. The mechanism should in practice be concerned with whether the company took the necessary steps to avoid harms, such as infringing the rights of others and or negative environmental impacts, and whether those steps were taken seriously. In addition, the existence of domestic and international regulation in each of these fields means that the operation of a Norwegian mechanism can focus on providing remedies in those instances where existing regulation in host states has been unable (or unwilling) to do so. In this sense the scope is in principle broad but constrained by the existence of other forms of regulation. In this sense, the scope of such a complaints based mechanism would be workable.

[113] The Commission added that while international conventions "do not involve legal obligations for private legal persons such as companies or investment funds (...) they provide a specification of what international consensus has defined as minimum requirements that should be imposed with respect to fundamental rights all over the world, and the standards that should be applied to the protection of the environment and human life and health"Graver Commission NOU 2003:22 *Forvaltning for fremtiden - Forslag til etiske retningslinjer for Statens petroleumsfond* <http://www.regjeringen.no/nn/dep/fin/Tema/Statens-pensjonsfond/etiske-retningslinjer/Graverutvalget/Report-on-ethical-guidelines.html?id=420232> Accessed 2 April 2009; the Commission added that while international conventions "do not involve legal obligations for private legal persons such as companies or investment funds (...) they provide a specification of what international consensus has defined as minimum requirements that should be imposed with respect to fundamental rights all over the world, and the standards that should be applied to the protection of the environment and human life and health"

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Appendix: NCP Reforms

In the **Netherlands** NCP reform was motivated by the need to ensure the independence of the NCP and also to avoid conflicts between the NCP functions and those of the Responsible minister.[114] It is still hosted in the Ministry of Economic Affairs. Recently reformed, the Dutch NCP has volunteered to be peer-reviewed after one year of functioning (i.e. autumn 2009).

Reforms include:

- **NCP composition** was extended from an interdepartmental office to a tripartite structure consisting of 4 independent experts on CSR issues with acknowledged social status among various stakeholder groups. The NCP can rely for advice on 4 government officials representing the ministries of Economic Affairs, Foreign Affairs, Social Affairs and Housing, Spatial Planning, and Environment
- **The Mandate** established up for a trial period of 3 years. It operates with the core criteria of visibility, accessibility, transparency and accountability
- **Independence** is clearly stated, with no supervision of any other authority. The Dutch government can issue a public comment on final statements on specific instances made by the NCP and connection is guaranteed via the 4 state advisors. The NCP is instructed on clarification and other decisions by the OECD Investment Committee by the Minister of Foreign Trade
- **Relations with stakeholders** occurs via regular consultations of representatives of all social actors who can, I turn, monitor the working procedures of the NCP. Stakeholders are asked to participate actively to the NCP by sharing information and promoting the activities of the NCP
- **Resources**: a fixed budget of € 900,000 for 3 years was granted to cover the cost of a full-time officer to lead promotional activities (based in a private entity funded by the Ministry of Economic Affairs dedicated to the promotion of CSR among companies). Two full-time officers are made available by the Ministry of Economic Affairs to serve as the secretariat.

  http://www.oesorichtlijnen.nl/english/

In the **United Kingdom** the reform was intended to better take into account the concerns of the key stakeholders- business, trade unions and NGOs representatives - and to increase the expertise on international activities of companies.[115] This explains why the Department for International Development-DFID was included to facilitate access to staff in overseas embassies. In addition, formal procedures were established to contact Foreign and Commonwealth

[114] *Review of NCP Performance.*

[115] *Review of NCP Performance. See* AID- Rights and Accountability in Development. 2008. Report Fit for Purpose? A review of the UK NCP for the OECG Guidelines for Multinational Enterprises. In collaboration with The Corporate Responsibility (CORE) Coalition and Trades Union Congress.

Office officials abroad. The UK NCP is hosted by the Department for Business, Enterprises and Regulatory Reform-BERR, which also acts as secretariat to the steering board.

Reforms include:

- **NCP Composition** was extended from a single departmental unit to a dual departmental structure consisting of a representative from the Department of Business, Enterprises and Regulatory Reform (BERR) who has the leading position and works with officials for the Department for International Development. Access to various specialist teams in UK offices and teams in charge of other CSR initiatives (EITI, Un Global Compact...) is guaranteed.
    - A **steering board** overseeing the work of the NCP is meant to ensure the good functioning of the institution. It is composed by a senior official from BERR and includes 8 other ministries (the Foreign Office, DFID, the Attorney General's Office, Export Credit Guarantees Department, the Department for the Environment, Food and Rural Affairs, the Ministry of Justice, the Scottish Executive and the Department of Work and Pensions) with overall responsibilities for Corporate Responsibility. Meetings are held on a quarterly basis, if necessity has not called for an earlier meeting date.
    - Four **external members** representing business, trade unions, NGOs and Parliamentary group are also included. They serve for a period of 3 years with the possibility of appointment for a further 3 years. External experts are to advise the steering committee on particular issues and topics as needed.
- **The Mandate** is based by the core criteria of visibility, accessibility, transparency and accountability established by the OECD Guidelines so as to ensure the promotion and implementation
- **Relations with stakeholders** are ensured by the composition of the Steering Board.
- **Resources:** No separate budget but 2 BERR full-time officers work the NCP and DFID is allocating 20% of the time of a third official. The Steering Board members are not paid but reimburse for their travel expenses. One NCP member is undertaking mediation training.

http://www.berr.gov.uk/whatwedo/sectors/lowcarbon/cr-sd-wp/nationalcontactpoint/page45873.html

Non-Judicial Remedies in Norway for Corporate Social Responsibility Abroad

This discussion paper is intended to provide an overview of and insight into the main trends of policy work and research on state-based non-judicial mechanisms as background to a public policy discussion of non-judicial mechanisms in Norway. It focuses on some existing models and practices adopted by non-judicial mechanisms that engage directly with corporations in an effort to assess and resolve human rights grievances and other complaints relevant to CSR issues. This paper is meant as a contribution to the discussion on the extraterritorial responsibilities of Norwegian companies and the non-judicial mechanisms that might provide access to remedies to victims of corporate misconduct.

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