



SHARED GOAL - DIFFERENT PATHWAYS

Policy alternatives for business' promotion of workers' rights

Table of Content

- 4 **INTRODUCTION**
- 5 **KEY POLICY ALTERNATIVES**
- 7 **Do we need new regulation and mechanisms?**
JOSEPH KIBUGU, Eastern Africa Researcher and Representative,
Business & Human Rights Resource Centre
- 9 **Proposal for an international binding treaty on
business and human rights**
AYABONGA NASE, Attorney, Centre for Applied Legal Studies (CALIS)
- 11 **Proposal for mandatory due diligence**
SANDRA COSSART, Head of the Globalization and Human rights
program, SHERPA
- 14 **Sanctions, reparations and compensation through the
OECD National Contact Point?**
HANS PETTER GRAVER, Professor at the Faculty of Law, University
of Oslo and former head of the Norwegian National Contact Point
- 18 **Can existing laws protect human rights and living wages
through supply chains and foreign investment?**
BEATE SJÅFJELL, Professor at the Department of Private Law,
Faculty of Law, University of Oslo

This report is financed by the Norwegian Agency for Development Cooperation (Norad) and Norwegian ForUM for Development Environment (ForUM)

*Cover Photo: Site surveyor at a cement factory in Ethiopia (Gavin Houtheusen/DFID)
Layout: Awchatolsen.no*

Introduction

Throughout more than a decade up until now, explosive growth rates have been a reality in many African economies. The notion that Africa is rising has made an impression on investors and policymakers, and Norwegian enterprises have turned their attention towards several countries on the continent. However, in many countries these growth rates have been based on high price levels for resources and basic commodities. Moreover, the job creation and distribution of gains from this growth has been uneven in many cases, to say the least.

How can we ensure that the millions of Africans heading for employment in the coming years are actually going to find work that delivers security, proper pay, and decent work?

In the competition for investments and contracts, there is a constant risk for host governments not to distinguish being “accommodating” to investors’ needs with what is known as the “race to the bottom”. It’s easy to understand the potential of private investments and trade, but it is only by embedding the economy in an understanding of social responsibilities and rights that one can truly speak of “inclusive and sustainable development”.

The aim of this report is to collect different understandings of the role Norwegian actors can play to the fulfillment of human rights and inclusive growth on people’s terms. Is there a need for an international binding treaty on business and human rights, or are the UN Guiding Principles for

Business and Human Rights sufficient? How far can national legislation get us? What should domestic, Norwegian legislation look like? What can be expected from the Norwegian OECD National Contact Point (NCP) and their work with the OECD Guidelines for Multinational Enterprises?

The contributions to this report are directly based on a conference hosted by the Norwegian Council for Africa in cooperation with ForUM, FOKUS, Tankesmien Agenda, FAFO, LO, Fagforbundet, and Industri Energi in October of 2015. The perspectives of the contributors vary, from different professional, academic and geographic points of view.

On the basis of these contributions, the report author, Martine Melgård, has developed a summary of policy alternatives. Hopefully, this report can aid our efforts to ensure the “decent work” agenda plays a larger part in the “Africa rising” narrative than it has until now.

Johan N. Hermstad
Director
Norwegian Council for Africa

Key policy alternatives

NEW NATIONAL LEGISLATION

In the EU, France and Switzerland, there have been on-going processes on new legislation that will regulate how companies operate abroad, placing responsibility where it rightfully belongs. The background for the proposed legislation is the notion that the mother company's responsibility is crucial to ensure fair wage and working conditions. Such a legislation requires companies to establish a vigilance or due diligence plan, including «a measure of reasonable vigilance to identify and prevent abuses against human rights, fundamental freedoms, serious physical and environmental damages or health risk resulting from companies' activities or those of the company it controls.»

Some policymakers worry that a legally binding requirement will give Norwegian companies a competitive disadvantage. The contrary could also be argued: Such due diligence practices will not only give companies stronger legal security if they are sued, but may give companies a better reputation among consumers and workers, not to mention host countries. The French and Swiss initiatives, in addition to the OECD Guidelines for Multinational Enterprises and UN Guiding Principles for Business and Human Rights, are clear signals of a global willingness to change the ways companies have been allowed to conduct business abroad. Sandra Cossart stated at the conference: «It is not about if the proposal is going to happen, because it is going to happen – it is when.»

If one cannot simply 'expect' that Norwegian companies will behave in a morally elevated way based on 'Norwegian values' - should it be a legal requirement? It seems reasonable that Norway should not lag behind other countries, but rather be a beacon or role model for countries and businesses to follow. Therefore, Norway should consider to develop legislation similar to the French and Swiss initiatives including obligatory human rights and workers' conditions due diligence plans for all substantial and internationalized Norwegian companies.

ESTABLISHING AN INTERNATIONAL BINDING TREATY

Transnational companies tend to operate in countries with weaker governance structures, and outside domestic jurisdictional reach. Weak governance capacity, coupled with lacking rule of law and court independence, may make it difficult to hold a company responsible for any wrongdoing. In addition, some countries in need of foreign investment may loosen regulation to become a more attractive destination for investments, which undoubtedly will negatively affect working and wage conditions, in addition to workers' rights and legal protection. An international treaty will involve establishing a legally binding instrument to regulate the activities of transnational corporations with respect to human rights, and thus apply to all companies in all countries irrespective of the domestic political or judicial system in place.

Stronger national legislation and an international binding treaty are not mutually exclusive alternatives. As Norwegian companies move operations abroad or form partnerships with foreign companies, Norway could be a part of the international negotiations on business and human rights, and champion for the protection of human rights. Championing for human rights has traditionally been seen as a Norwegian trademark that people and politicians usually take pride in - why should the policy makers be skeptical of making them legally binding as Norwegian companies move abroad?

There are strong arguments for

- Norway to participate in negotiations for a strong and useful binding international treaty on business and human rights. Such negotiations could be abandoned if they prove to be unfruitful.

STRENGTHEN IMPLEMENTATION OF GUIDELINES ALREADY IN PLACE

National and international negotiations are time-consuming and difficult. However, there are steps that can and should be taken that may have a great impact on the current situation. For instance, Norway has endorsed both the UN



A cement factory is providing jobs for countless construction workers across Ethiopia. (Simon Davis/DFID)

Guiding Principles for Business and Human Rights (UNGP) as well as the OECD Guidelines for Multinational Enterprises. These guidelines can be improved upon or strengthened to make them a more effective tool. In order to do so, the Norwegian National Contact Point for adherence to the OECD Guidelines (NCP) should handle complaints in a timely and effective manner, while also lower the threshold to handle complaints. It should offer support to aggrieved parties to compensate for the power imbalance between large multinational enterprises and aggrieved parties, as well as issue a clear final statement on the performance of a company. In 2016, the Office of the UN High Commissioner for Human Rights (OHCHR) will present proposals for how “access to remedy” aspects of the UNGPs should be harnessed in national legislation. Norwegian authorities should follow up on these proposals actively.

There are strong arguments for

- The Norwegian government to offer strong support to its OECD National Contact Point both in terms of adequate resources and the reintroduction of a strong mandate to address and assess violation complaints.
- The Norwegian government to improve their services, support and incentives to businesses to comply with the OECD and UN guidelines and be frontrunners and role models for other businesses and countries. Access to export credits and government support for poverty reduction purposes should be contingent on adherence to the principles.
- The Norwegian government to actively support initiatives such as the OHCHR “access to remedy”-recommendations and continuously consider new elements to be added to its action plan for business and human rights.

Martine Melgård
Report author

1 Do we need new regulation and mechanisms?

JOSEPH KIBUGU, Eastern Africa Researcher and Representative,
Business & Human Rights Resource Centre

Five reasons why national legislation is not a sufficient tool to combat human rights violations:

- Government deficiencies prevent victims' access to justice
- Competition to attract foreign direct investment may result in relaxed labour laws
- Limited space for public debate and discussion
- UN Guiding Principles are a 'floor' and not a 'ceiling'
- Displaced locals do not receive information or justice from their national governments

This presentation will offer five reasons why national legislation is not enough to combat human rights violations committed by multinational enterprises. It is a given that states are the duty bearers in protecting human rights abuses committed within its territory, and jurisdiction by third parties. However, there are different perspectives on this matter and these will differ depending on who you ask: States will offer a different answer than corporations, which in turn will be different from what will be given by victims. Through my work in Eastern Africa I offer five reasons why I believe national legislation is not enough.

First, even in countries where there are appropriate laws or a good measure of democracy, such as Tanzania, there is still a governance deficit that makes it difficult for victims of human rights abuses by corporations to access justice. For instance, there is a new initiative on food security and nutrition that has spread across ten countries in Africa, where governments have made commitments to free land and give space to multinationals mainly based in Europe and North America to farm. What has happened is that people who have been pushed off their land by governments find themselves with nowhere else to go. I met a farmer, who for the last two years has been living in a tent because the Tanzanian government has pushed him off his land. I

asked the question: "Why can't you go to court?" He said: "I am helpless, I cannot go against the government, I cannot go against a multinational."

The second reason is competition to attract investments in Africa. Africa is rising, and there is a perception that there is a scramble for Africa, whether it is by China, the United States, Norway, the UK or India. For instance, in December 2015, India hosted a big conference to attract investment in Africa. This race has led to a situation where governments want to open their economies to multinationals. This may already have led to cases where the rights of local communities have taken the backburner. One example: Last year, the Minister of Trade from Somaliland said at a conference in UK that Somaliland is wheeling to relax labour laws to attract foreign investment. There is already that danger that African countries compete for foreign direct investment. They are already relegating human rights concerns.

Thirdly, when discussing national legislation, it is crucial to have a working public space for dialogue and discussion; to have interest groups within that country that are able to push for the respect of human rights, primarily the media and civil society. However, different countries have already taken steps to limit the civic space for civil society and to

–For us, Norway is synonymous with champions of human rights globally. I do not want to believe that even as we move towards globalization, even when we open our markets, Norway will not sit at the high table and champion for respect of human rights by businesses. Championing for human rights is a tradition that Norway should continue.

crumple the media. In Ethiopia for example, if an NGO receives more than 15 percent of its' funding from outside of Ethiopia, it is declared as a foreign agent. This has opened many such civil society groups up to a lot of scrutiny. Where there is no vibrant civil society, where there is no free media, even in places where there might be excellent national legislation, the people who are the watchdogs to ensure compliance to these laws do not have that opportunity.

Fourthly, the UN Guiding Principles should be considered a floor and not a ceiling. The second pillar of the UNGP says that there is possibility to respect human rights as a global standard expected for all business enterprises wherever they operate and exist “independently of states' abilities or willingness to fulfill own human rights obligations, and does not diminish those obligations”. Basically, the UN Guiding Principles have admitted this fact, it is not an end – more needs to be done. In fact, there are companies that have encouraged governments to adhere to international standards. For instance, in 2013 in Peru, six American textile firms urged the Peruvian government to repeal a law that curtailed labour rights violations, making it difficult for them to implement their own standard of conduct. Therefore, it is a floor and more can be done.

As the debate on whether there will be a binding treaty or the need for a binding treaty goes on, the trend has already

emerged: countries in the global south are the champions of a global treaty. It is an acknowledgement that we are saying we need such a treaty. It is an admission that we know that what is happening on the national level is not necessarily sufficient, and the treaty negotiation process itself speaks to this fact. Some of us have grown to know Norway as a country where dissidents from Africa who are championing for multi party-ism want to seek refuge. For us, Norway is synonymous with champions of human rights globally. I do not want to believe that even as we move towards globalization, even when we open our markets, Norway will not sit at the high table and champion for respect of human rights by businesses. Championing for human rights is a tradition that Norway should continue.

Finally, locals in Malawi and Tanzania, who have faced displacement, who are not getting information from the government, say: “We are not against multinationals, all we want is justice.” But they have not received that justice from their national systems.

2 Proposal for an international binding treaty on business and human rights

AYABONGA NASE, Attorney,
Centre for Applied Legal Studies (CALS)

- A binding treaty is imperative because corporations must play a role in the social economic development of developing countries
- An international treaty should recognize and clarify that businesses have a legal obligation that flows from international human rights law
- The UN Guiding Principles do not address the issue of remedies for the victims
- Concerns over sovereignty: whose jurisdiction regulates the human rights violations?
- Concerns over weak government structures: Lack of an independent judicial system

Centre for Applied Legal Studies (CALS) supports the creation of a binding treaty solely because the message from the South African government has been clear: Corporate entities must play an important role in socio-economic development and poverty alleviation. What has been the most significant development in South Africa and Ecuador is what happened in June 2014, where African states supported the binding treaty, with the exception of only three African states abstaining from voting for the binding treaty. The voting patterns reflect a clear split between the developing countries and the developed countries. CALS acknowledges that although those states under both domestic and international law remain the primary duty bearers for protecting human rights, corporations also have an impact on these rights.

Transnational corporations tend to operate their businesses in the developing world, including southern Africa, which is often considered unstable or with many emerging democracies. In turn, these countries tend to have a mix of cheap labour and weaker government structures. This has created a governance gap. The gap creates an environment where transnational corporations are able to operate outside the jurisdictional reach of their domestic corporate laws and regulations, thus exploiting legislating frameworks that are not properly regulated. In other words, there is a situation where there is a lack of state control of corporations, which is accompanied by human rights violations, poor

environmental standards and weak government practices. Therefore, CALS advocates for a binding treaty. The starting point for a binding treaty must be that the concern for the protection of fundamental rights flows from the inherent dignity of human beings. CALS believes that these rights should apply to all, both in the developing and the developed countries. These rights cannot be renounced. States must play a special role in this regard by performing their own obligations entailed by these rights, but also enforce obligations on third parties, such as corporations.

If states are required by international law, which is the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, to ensure that third parties comply with the human rights requirements, it logically follows that third parties are obliged to comply with these human rights standards as well. A key role for an international treaty would be to expressly recognize and clarify that businesses have a legal obligation that flows from international human rights law. Failure to recognize this leads to a gap that only states can be held responsible for human rights violation, and those corporations who neglect fundamental rights, escape without any form of accountability. If access to remedy, as per United Nations Guiding Principles, is a real thing, then remedies cannot be provided without a prior obligation to such a treaty. Without an understanding of the obligations



Junior worker at the National Cement Share Company in Ethiopia (Simon Davis/DFID)

corporations bear with respect to fundamental rights, it will not be possible for victims of human rights violations to claim access to remedy against such corporations. A strange feature of the UN Guiding Principles, while recognizing that victims of human rights violations should have access to legal remedy, the principles do not expressly recognize binding legal obligations that follow from that. Looking at competing obligations, with the development of free trade, states have entered into bilateral investment treaties and multilateral investment treaties to promote development in their own countries, which confess strong rights on corporate investors. All these developments have binding legal frameworks in relation to international commerce, and has provided catering mechanisms to address disputes. A key role for a treaty on business and human rights will be the expressly recognition that businesses have legal obligations in relation to fundamental rights – a recognition that rights impose a similar, if not greater level of ‘bindingness’. Currently, there is no clarity as to the legal obligations of corporations in international law or in existing soft law, such as the UN Guiding Principles.

Finally, the Guiding Principles do not address the concern of access to remedies for victims of human rights violations. There are a few issues that create a problem in accessing remedies. First, there are jurisdictional challenges: States are independent and sovereign. Whose jurisdiction regu-

lates the human rights violation – the country where the harm was caused or the home state where the corporation is from? Secondly, weak governance structures: Courts and governments lack independence. Corporate structures are built for profit. Each entity has a separate legal personality, so how does one hold the main corporate structure accountable for its failure to meet human rights obligations where it is divided into domestic legal entities across national borders? To address this and to enforce a treaty, holding a company or corporation liable for damage caused in a country with a stronger independent court system, usually the home state, would be one of the considerations. Alternatively, states could consider imposing home state liability on corporations where an accountability gap lies. If corporations could expect to be held accountable in states that host the companies, this would be to deter wrongfulness action in those states and provide access to remedies for victims. One example could be the litigation against Shell in Netherlands where a dispute arose. Shell rejected the dispute and the Dutch court found that Shell Nigeria had to compensate a farmer for damages caused to him through oil spills. The problem with this, however, is that any state that passes this law individually will be a less desirable destination for investment. Nevertheless, if there is a collective willingness to close this governance gap, a global system of accountability must be set up, rather than solely relying on domestic enforcement.

3 Proposal for mandatory due diligence

SANDRA COSSART, Head of the Globalization and Human rights program, SHERPA

- Sherpa is a lawyers' organization defending communities against multinational companies in cases involving violations of human rights.
- Sherpa's objective is to change the French legislation in order to hold both the mother company as well as the subsidiary responsible for any human rights violations occurred in France or abroad.
- The proposed legislation includes a requirement for companies to develop a vigilance/due diligence/duty of care plan.
- Sherpa is endorsing other countries to get involved in a similar process, to create a broader alliance, which will hinder business organizations ability to obstruct legislation that will include human rights and due diligence.

Sherpa is a lawyer's organization based in Paris. The organization's motto is to protect and defend victims of economic crimes. But what are economic crimes exactly? It is crimes committed by multinational companies. This presentation will refer to multinational or transnational companies as 'MNE'.

Why does Sherpa focus on multinational companies? The cumulative turnover of the ten largest MNEs in the world is the equivalent to Brazil and India together. Further, five of the largest MNEs' turnover is equivalent to 40 of the poorest countries in the world. 50 of the largest European MNEs are equivalent to the GDP of 22 EU countries. Given these numbers it is not difficult to see that when these companies are violating human rights, the scale of these violations goes with their weight.

Sherpa did a survey at the European Coalition for Corporate Justice, where Sherpa is a member of the steering group. The survey showed that 51 of the UK listed companies, 76 of the German companies and 65 of the French companies were alleged to have taken part in human rights violations. This is why there is a need to change the legal framework. One of the main things that Sherpa found is that the legal reality is not going hand in hand with economic reality. The economic reality is that multinational companies operate as a group. For example, in France: Total has more than 900

subsidiaries, not mentioning the number of subcontracting companies. BP has over 1200 subsidiaries. All these subsidiaries have an autonomous personality. In other words, their responsibilities stay within this entity. The economic realities, however, are very different. Sherpa's main goal is to bridge this gap by changing the legislation.

The two main obstacles in corporate law is first, the limited liability and second, the autonomy of the personality. This makes it very difficult to hold the mother companies responsible, which is Sherpa's obsession. Since Sherpa was created the organization has tried to establish mother company responsibility, because it is usually the mother company that makes the decisions or is behind the decisions that implied the damages abroad. Sherpa came up with the notion of due diligence or duty of care when it was discussed how to track the mother company's responsibility. There are different ways of doing it. For example, Sherpa has been trying to establish a legal personality for groups. There was some research about this ten years ago, and it was discussed at the National Assembly as well, but it was not politically acceptable at that time. With the UN Guiding Principles, Sherpa thought it was a good opportunity to use due diligence to try and rephrase the responsibility of the multinational. Sherpa argues that the human rights due diligence draft proposal actually helps companies, not just the victims, to have more legal security. Because of jurisprudence, the

companies do not know if they will be fine or not when they are sued by NGOs.

Another issue is how to attract the attention of MPs (member of parliament). Sherpa has informed the French MPs that because they have signed the UN Guiding Principles in 2011, they have the obligation to translate it into the French domestic system. The business community argues that there are so many norms and standards around already. Sherpa's answer is that these norms and standards are not sufficient because catastrophes or damages still occur. We cannot rely only on the good-will of the companies or their ethical charter. There has to be some constraints. One example is the Rana Plaza tragedy. Rana Plaza was a building in Bangladesh that collapsed in 2013 with more than 1200 victims, mainly women. Sherpa filed a complaint against Auchan, which is one of the biggest retailers, because we found some of their labels in the ruins of the Rana Plaza. The only legal means to attract the responsibility of Auchan was to argue that Auchan was misleading publicity. This meant that Sherpa tried to show that in Auchan's ethical code of conduct, or ethical charter, there would usually be a statement on respect for human rights, respect for the ILO convention, and even respect for the UN Guiding Principles. Then, looking at the other side of their supply chain and you see the Rana Plaza. Sherpa argued that by stating that the company is respecting all these norms and international human rights standards, the company is misleading the public. Because, the public might think that the company respects the conventions and the companies are making a profit out of branding themselves as a 'sustainable company', while actually they are violating human rights within the supply chain. This case shows the very few means the victims have because even though this case would be successful, the only thing it will prove is that companies misled the public or the consumer. It will not give remediation to the victims in Bangladesh. That is why there is a need to change the legal framework.

Most of the business organizations are arguing that since Sherpa is a lawyer organization, there is no need for a new legal framework. But this is not correct. Because of all the legal barriers; because of the cost of suing a company; because there is no collective redress; because of the im-

possibility to get access to evidence, it is almost impossible to prove the link between the subsidiary and the mother company, which is in France. Because of all these obstacles, it is really not possible to defend and protect victims today. To address this, Sherpa tried to change the legislation. The particularity of this first draft proposal is that it laid the burden of proof on the companies and not on the victims, which is the case today. This was a big thing – to reverse the burden of proof. This was also what the companies did not want. The business organizations were against it and lobbied the government to reject the proposal.

Today there is a new draft proposal. It is very short, only two articles. The first one requires the company to establish a plan of vigilance. It is actually requiring duty of care for parents and subcontracting companies. The proposal has an article that states that the plan of vigilance should include a measure of reasonable vigilance to identify and prevent abuses against human rights, fundamental freedoms, serious physical and environmental damages or health risk resulting from companies' activities or those of the company it controls. It is not only about its subsidiary, it is about all the entity that the mother company would control directly or indirectly, as well as the activity of the subcontractor. It is also planned to prevent active or passive corruption. This vigilance plan that MNEs should make will have to be made public. Sherpa is very pleased that this is creating a new obligation of vigilance for the biggest MNEs within their subsidiary supply-chain, and secondly, the judge could order the company to set up the vigilance plan. Therefore, it is not only about reporting or non-financial reporting. The second article is even shorter, because it is about liability of the company. What if the company does not set up this plan or what if there are damages of violations of human rights occurred abroad? Under current French law, victims of human rights violation committed abroad still have to first prove that the French mother company committed a breach and secondly, the victims must establish a causal link between the mother company and the breach in question. In Sherpa's first draft proposal, we managed to reverse the burden of proof, which made it easier because it was up to the companies to prove that it had set up this plan of vigilance. However, because of the business pressure on the government, it was difficult to include the reversal of bur-

den of proof. Therefore, it is still up to the victims to prove this causal link. In other words, access to justice may remain quite tricky for the victims.

Another critique is that the scope of the parameter of this draft proposal. It is quite narrow and will only concern companies that are registered in France, who have 5000 employees within France or 10 000 employees in France and worldwide with the subsidiaries. In total, this makes around 120-135 companies. The third critique Sherpa addressed is that it is up to the regulative power to expressly detail what a vigilance plan would include. What it means is that if the decree of application is not taken, then the draft proposal, or the law if it is voted, will never be implemented. The most important part about the proposal is that it forces companies to look at their risks and try to prevent it.

The most common argument heard against the proposal is: "You cannot jeopardize French companies competitive advantage, this needs to be discussed at the EU level". This is where it is imperative that other countries get involved and start doing their own process, because otherwise the business organizations will be able to lobby for their own interests. What Sherpa is saying to the French businesses is: "Don't be scared, it is not about if the proposal is going to happen because it is going to happen – it is when." We are saying that French businesses should be proud to be in advance because the proposal will happen. Just look at what is going on around with the UN Guiding Principles, with the OECD guidelines, or at the EU level.

In closing, this presentation will draw attention to the Swiss initiative. The Swiss initiative is close to what is being done in France. The Swiss were almost able to pass the legislation. However, a very narrow majority rejected it last March. In Switzerland there is this possibility that if you collect more than 100 000 signatures, there can be a civil society movement and the rejected proposal can be presented once again. The Swiss are almost there. They have collected almost 100 000 signatures and are very confident that they will move forward on this initiative.

This is the hope I wanted to give you and offer some incentives to move forward on this human rights due diligence.

– The proposal has an article that states that the plan of vigilance should include a measure of reasonable vigilance to identify and prevent abuses against human rights, fundamental freedoms, serious physical and environmental damages or health risk resulting from companies' activities or those of the company it controls.

4

Sanctions, reparations and compensation through the OECD National Contact Point?

HANS PETTER GRAVER, Professor at the Faculty of Law, University of Oslo and former head of the Norwegian National Contact Point

- A non-judicial mechanism is important because reaching national or international legal obligations is a long and cumbersome process and can only offer minimum requirements.
- The non-judicial mechanism is not voluntary and can go beyond minimum requirements.
- Making the National Contact Point mechanism more effective is important, and a responsibility of both governments and the NCPs.
- Tying negative sanctions to non-compliance of the guidelines may work against its purpose

This presentation will address the question of how to make the National Contact Points (NCP) mechanism more effective. I agree with the previous speakers that the report from the OECD watch from last summer is rather depressing. However, I still believe that the OECD guidelines and the NCP, as a non-judicial mechanism, are relevant and important. The reason why I believe that is that although legal obligations and legal mechanisms would be vastly more efficient, I think that there is quite a long way ahead until we reach there. I also believe that some of the obstacles that Sandra Cossart outlined in her presentation show why there is a need for a non-judicial mechanism as well.

How can we make the NCP mechanism more effective? The NCP is the implementation mechanism of the OECD Guidelines for Multinational Enterprises. The guidelines are recommendations by governments addressed to multinational enterprises. What makes them unique is both the fact that they are guidelines that are comprehensive and backed by government. Of course, the UN guidelines are also comprehensive and backed by governments, but there are a plethora of other instruments, which are not backed by governments, which makes this an important factor. The other important factor, where the OECD Guidelines and the UN Guiding Principles differ, is that the OECD guidelines are supported by an implementation mechanism - the National Contact Points, which all the adhering countries are under an obligation to establish. In order to make the NCPs more

effective, and enable them to perform the functions envisaged in the guidelines - which is not a matter of reform, it is a matter of achieving and fulfilling the obligations that the government has undertaken - we have to look at both the NCPs, how they work and at the government. In other words, it is a shared responsibility between the NCPs and the adhering governments.

Looking at the NCPs, the first basic factor that has to be performed by all the NCPs is to handle complaints in a timely and efficient manner. This is the one major obstacle for the NCPs. It is also something that has been pointed to by the OECD Watch. Many NCPs have a far too high threshold for handling of complaints. Many NCPs require that a complaint is substantiated in a way that is very difficult to comply with for the aggrieved parties or NCPs. In my opinion, the requirements of substantiation at this point should be very low. The main functioning of the NCP is a mechanism of dialogue and negotiation; therefore, the threshold to engage the parties in a discussion should not be high. In many instances, NCPs also make the requirement that the enterprise must express a willingness to engage in a dialogue. If the enterprise is not willing to engage in a dialogue, the NCP rejects the case out of the philosophy that this is a negotiation mechanism. Of course, it is a negotiation mechanism, but if one makes it a requirement to take a case that the company agrees to negotiate, one effectively makes this a purely voluntary thing for the company - the company itself can decide whether the NCP

should engage in the case or not. In my opinion, this is not the right way to handle it.

Moreover, we know there are difficulties in engaging in serious negotiations by aggrieved parties with a multinational enterprise (MNE). There is a huge imbalance in bargaining power between local societies affected by the operation of the MNE, and even between NGOs in the OECD countries and many of the larger MNEs. The National Contact Point should, in my opinion, compensate for this imbalance by giving support to affected persons and organisations wanting to file a complaint. One of the reasons why there are so few complaints is because of a very demanding process for people filing a complaint, and something should be done about that – both by the governments, by providing resources, but also by the NCPs in the way the procedures are structured.

I believe that in order for the mechanism to function effectively, the NCPs must issue a clear, final statement after the completion of the procedure. A procedure may end either in an agreement between the parties or it may break down. In that case, the NCP should engage in the work of giving a clear statement on the performance of the company within the matters that are a part of the complaint, and to give its opinion of whether the company has adhered to the expectations of the OECD Guidelines or not. Today, many NCPs do not see this as part of their function. In other words, they will not give an opinion on the substance of the complaint and they will not address the performance of the company in relation to the substantive requirement of the OECD guidelines. I believe this undermines the effectiveness of the guidelines. The example to follow is the example of the NCPs, and there are several NCPs who issue final statements on the substance.

What are the expectations of the government? It is necessary to have strong governmental support in order to have an effective NCP system. By entering into the OECD Guidelines as well as the procedural guidelines that follow, govern-

ments have expressed an interest in supporting the NCP system. Of course, strong government support entails different things. First, it entails providing adequate resources and an adequate organization for the NCPs. Again, looking at all the OECD countries, it is apparent that this is lacking in many of the countries. Arguably, in a majority of the countries, the resources provided to the NCPs are not very substantial. One can argue whether they are adequate. For instance, if one compares the Norwegian NCP and the United States NCP, the Norwegian NCP has more resources than the NCP in the United States. Admittedly, however, the tasks of the United States NCP compared to the Norwegian NCP, are quite different, which makes a comparison futile. At least the United States has an NCP. Many countries provide even less resources than the United States.

Support is not only a question of resources. It is also a question of support and backing within the home country, within the society, and also within the international system. In this area, the Norwegian government has perhaps not been as effective. The way the Norwegian government engaged in the OECD system against its own NCP on a specific instance has functioned to undermine the effectiveness of the NCP system. Of course, we know that if the NCPs give final statements, where they express their opinion on whether the guidelines have been breached or not, this may be controversial and often a company may disagree with this. Certainly, it is not rocket science, but the findings may not be objective either - it is always grounds for debate. Still, the first thing a government should do, is to back their NCP in these cases. If a government engages in a public discussion on the content of the NCP opinion, this encourages other actors to engage in the disagreement if they get statements against themselves. This will serve to undermine the whole order. Furthermore, I think it is important that the mandate of the NCP clearly states that it is a function of the NCP to give an assessment of whether the expectations of the guideline have been adhered to or breached. This is not completely clear in the case of Norway.

– We have to keep two lines of thought in mind. We need both legal requirements or legal mechanisms, and non-legal, or non-judicial mechanisms. We should not confuse the two; we should operate with the two. I believe that non-judicial mechanisms will always be necessary.

A third, and perhaps more controversial, way a government can contribute and support the NCP, is whether the NCPs statements or agreements should be backed by government sanctions. In other words, should government provide sanctions to companies for adhering to the opinions of NCPs or not? I think we have to consider very carefully the difference between a judicial and a non-judicial mechanism. The NCP is a non-judicial mechanism. In my opinion we need non-judicial mechanisms and judicial mechanisms. But we should not confuse the two. The reason why we would always need non-judicial mechanisms is firstly, that the process of enacting judicial mechanisms is long and cumbersome. At the national level, as Sandra Cossart explained with the French initiative, the process is long and cumbersome. The same is the case at the international level – the way ahead to a treaty on principles for multinational enterprises within the UN is a very long way ahead. Even if there are judicial mechanisms in place, their functioning will be subject to litigation and we are up against huge, powerful actors, where the enforcement even of legal obligations is quite cumbersome. In addition, legal requirements will always only be minimum requirements. This is also inherent in the principle of rule of law. To change the development in a sustainable manner and to achieve a beneficial operation for social communities by international business, we need actors that go beyond the minimum requirements. To adhere to minimum requirements is not sufficient. The only mechanisms we have to get companies to go beyond minimum requirements are the non-judicial mechanisms. In other words, these non-judicial mechanisms are imperative because in many instances they are the only alternative - even where there are legal alternatives; they are the mechanisms to take the development ahead of the legal requirements. This does not mean that one cannot tie incentives to

non-legal expectations as well, as evident by taxation policy, for example.

Even though the OECD Guidelines are not judicial does not mean that they are voluntary. We have clear expectations that business should adhere to the principles within the UN Guiding Principles and the OECD Guidelines – it is not a voluntary matter, but the guidelines are not legal obligations. Still, they are moral obligations and social obligations. Society should support them based on this premise and not out of a misunderstanding, believing that the guidelines are voluntary, abstaining from putting pressure in form of sanctions in compliance to them. When we talk about tying sanctions to the NCP mechanism and OECD guidelines, we should distinguish between the situations where a company refuses to engage in a process with the NCP, and the situations where it is a matter of tying sanctions to a final statement by the NCP on a non-adherence with the OECD guidelines.

I think believe it should be a clear expectation by society and by governments that serious business actors should not refuse to engage in dialogue with people that claim to have a grievance with the company. It is a minimum requirement and it is a basic requirement, and it is not a difficult requirement to comply with. Governments could provide positive incentives to companies that are willing to cooperate - even if parts of their operations have had adverse effects. We know that it is, perhaps, impossible to engage in a large-scale international business without the company in some way having adverse effects to people affected by it. This is not in itself a reason for moral criticism, but it is a responsibility to be willing to engage with parties that have a grievance. Governments should actively use companies that are willing to take this responsibility as good examples, give them mention and perhaps invite them into trade del-



Cement factory in Ethiopia (Gavin Houtheusen/DFID)

egations, and in other ways show support. The Norwegian government has done this actively. One could also enact negative sanctions to unwillingness to engage. A company that does not engage or is not willing to engage with aggrieved parties shows a measure of irresponsibility, which should influence the credibility of the company. I think this should be stated clearly in terms of government contracts. Unwilling companies cannot be trusted to be responsible in other ways, so why should we engage in public contracts with companies that are not acting responsibly?

When it comes to statements of non-compliance, my view is different. I think it is more problematic to tie negative sanctions to opinions of the NCP on breach of obligations of human rights, environmental obligations, trade union obligations, labour rights and so on. The reason why I believe this is that if we tie sanctions to this part, we undermine the effectiveness of the NCP process as a non-judicial process. First, currently, there is no possibility of review of the opinion of an NCP. If we want to tie sanctions to it, demands of the rule of law require that we also establish a body of review. In a situation where it is difficult to get adequate resources to an NCP in the first instance, I think demanding that we also establish a review panel in some way, would be the wrong use of resources. Second, if one ties legal sanctions or clear sanctions to the expressions by the NCP, it will encourage the enterprises to engage in a much more adversarial process with the NCP. The company will engage much more by legal arguments, in arguments of evidence, in arguments of law and so on, and this will impede the effectiveness of the NCP process. The whole idea behind the NCP process is to engage in dialogue, and in order to engage in dialogue the parties need to be non-adversarial. Even though the NCP is expected to express a view on the perfor-

mance of the company, this view is important as a learning experience. The recommendations to the companies are the most important, but these recommendations are helpful to other companies as well. This is one of the main reasons why the NCP system is a unique system. Because it provides the business community and the civil society with specific recommendations, which gives guidance on these rather vague guidelines on what they entail and what they mean to business operations in individual instances. Moreover, it is almost a matter of coincidence whether a large multinational company is engaged in a process with the NCP or not. One can find adverse effects virtually tied to any company in international business operations, but there are so few NCP cases. Finally, I think issues of fairness in public procurement should guide us against using this type of sanctions or other sanctions tied to the final statements.

In conclusion, it is possible to make the system more effective, both by changing the approach of the NCPs, strengthening the NCPs, and by giving the NCP system more support by governments, and of course civil society putting pressure on governments to give the NCP system more support. We have to keep two lines of thought in mind. We need both legal requirements or legal mechanisms, and non-legal, or non-judicial mechanisms. We should not confuse the two; we should operate with the two. I believe that non-judicial mechanisms will always be necessary. They are necessary now as long as we have no international agreement on legal requirements for international business concerning human rights. They will also be necessary in the future even if we reach a treaty. Finally, I think to introduce legal elements into the non-judicial arrangement, such as the NCP system, will not increase but rather be in danger of reducing the NCP's effectiveness.

5

Can existing laws protect human rights and living wages through supply chains and foreign investment?

BEATE SJÅFJELL, Professor at the Department of Private Law, Faculty of Law, University of Oslo

- ‘Business as usual’ is unsustainable, leading to an uncertain future
- Voluntary CSR or more CSR reporting is insufficient
- Solutions: ‘Jigsaw-puzzle of sustainability’: Bringing together the good ideas.
- Reform the legal infrastructure of companies and implement “smart regulation”: maintaining the competitive advantage of tomorrow, by regulating economic incentives and how companies make their decision.

This presentation will not be specifically about Norwegian law or Norwegian law only. Rather, it will be more generally about the law as a key to achieving sustainable companies. More specifically, about corporate sustainability, which is defined as environmental, social and financial sustainability. This presentation provide the context, the problem, what is not good enough, and possible ways forward.

THE CONTEXT

When discussing how one could go about to regulate companies the response is often: “You’re probably right. That sounds like a good idea, and that’s how it ideally should be, but it’s not very realistic. It’s not politically realistic, it’s not financially realistic, and it’s not realistic in terms of business.” The planetary boundaries illustrate what realism really is. These planetary boundaries are being transgressed. Four out of nine of these are now transgressed, including, but not limited to climate change. Nature does not care what is difficult to achieve for a political majority or what is easy for companies to do. Nature goes its way through its own cycles, and it is possible to see the effects of what humankind as a total is doing.

Of course, it is not only a question of planetary boundaries, although that is the basis for achieving a safe operating space for humanity. Kate Raworth presented a “doughnut image”, where there is an environmental ceiling, but at the same time there is a desire to achieve the satisfaction of basic human needs. Respecting the environmental ceiling on the one hand, and securing the social foundation, on the

other, gives us the safe and just operating space for humanity. That is what we need to achieve. Not just the more responsible, or appearing to be more responsible, greener or more sustainable, but actually achieving these objectives of staying within the safe operating space for humanity while satisfying the basic needs of human beings all over the world now and for future generations.

THE PROBLEM

What does this have to do with companies? The company as a legal form is an ingenious invention. It has had incredibly positive effects for our economies. It is the backbone of our economies. It has allowed capital to be channelled to entrepreneurs and it has made it possible to create value - not only for investors, but also for employees and for society. It gives us goods and services that we need but also that we do not need, which is a part of the problem.

We cannot argue that “Good! Companies keep going!”, because ‘business as usual’ is a very certain path towards a highly uncertain future, which threatens the economy. We can all agree that we want a green transition, that we want to respect and protect basic human rights, but the situation today is that the voluntary transition, or the voluntary corporate social responsibility, is too little, too late. Today’s system gives the competitive advantage, the competitive edge that the politicians are so concerned with – and should be – to unsustainable companies.

How can businesses get onto the right track? First, it is

important to understand the broader picture. It is not only one individual company that is the issue. Companies are usually organized in groups, and the boundaries of these and who is in control may be difficult to figure out because of the opaqueness of some of these structures, and the use of various financial instruments and positions. An additional complication is the issue of supply chain management, which is often cross-border. It is international. Legislators are mainly national, while business is global. Therefore, it is difficult, if not impossible, to regulate this complexity in itself. It is difficult to even understand it, or to know who is in control of the company. Even if one investigates a company, it might be difficult to unveil who the real shareholders are. The company may be the first in 200 layers before you find the actual shareholder.

POSSIBLE SOLUTIONS

Moving on to possible solutions, it is important to discuss what is insufficient. Based on thorough research, CSR, misleadingly defined as a voluntary activity, is found to be insufficient. The so-called CSR reporting, or non-financial reporting, is totally insufficient as well. Not only that, but it is pulling the wool over our eyes. Because, while legislators keep adopting more and more CSR reporting requirements, they think they are doing something good, they think they are helping the situation. They are not. Because they think they are, NGOs might believe that as we require more and more CSR reporting, we are moving in the right direction. We are not. It does not work that way. Lack of enforcement is just one reason why this might be the case. Consumer power is not enough. Investor preferences are not enough. Why? Because we do not know what the companies are doing. We do not know which companies to buy products from. We do not know which companies to invest in because we do not know the difference between good and bad companies, or the sustainable and unsustainable ones. We do not have that information today.

The signalling from the Norwegian government is that we

– We can all agree that we want a green transition, that we want to respect and protect basic human rights, but the situation today is that the voluntary transition, or the voluntary corporate social responsibility, is too little, too late.

expect Norwegian companies to behave responsibly, and there are numerous examples to illustrate that that is insufficient – for instance, the case of Telenor through Vimpelcom or Yara. Of course such signalling has some effects, but it is nowhere near enough. What other possible solutions are available? One could imagine that products can be regulated – and products should be regulated. Using clothes as an example: Some chemicals are so dangerous that they should be forbidden. Clothes made with such chemicals should not be allowed into the country. Some things are possible to regulate. However, regulation is only a part of the way forward because these products are made through this incredibly un-transparent supply chain. For instance, it would be very difficult for a Norwegian legislator, or a EU legislator to know what is going on throughout the supply chain. Nevertheless, some things can be done, and Norway and EU have done something right, as evident by the creation of REACH. But it is not enough.

A useful expression to introduce in this regard is “jigsaw-puzzle of sustainability”. It is counter-productive to argue that “I have this one grand idea, and why are you coming with other ideas”. What is needed is to put together lots of good ideas. The very important key to reform is reforming the infrastructure of companies - the legal infrastructure of companies. It is difficult to regulate the whole complexity, but there are legal entities that sell products that can be regulated. It is possible to regulate how the decisions are made, what these entities think about when they make decisions and what they base their decisions on. In addition, it is possible to regulate economic incentives and investor regulation.

The “Sustainable companies” project that we just concluded found that there is a research-based foundation for saying that it is necessary to reform the corporate purpose and to redefine the role, duties and responsibilities of the company board. For instance, the project found evidence to argue for a need to introduce the lifecycle-based assessment of the value creation of the company into the law. This would cover the group issues and the supply chain issues, and it would lead to effective, relevant and reliable reporting, because reporting today is generally neither reliable nor relevant. Very generally speaking, the ugliest companies use the most make-up. This needs to be a part of a larger reform – including the issue of green taxes, which the Norwegian government is looking into, as well as public procurement, where we have possibilities to implement the EU directives in a way that actually makes a difference. The key is that it all needs to be a part of a larger reform.

The question is: Can we regulate companies at all? Yes, we can! EU law is not just about preventing us from doing this; it is a lot more than that. There are restrictions in the national law, the international trade law, the EU law, but there are possibilities within international norms and standards, EU law and in our own Norwegian constitution as well. These laws do not only provide the possibility to change things, but makes it clear that things must change. Will companies then move out of Norway? Not if this can be done in a smart way. Because the smart legislator today makes sure we have the competitive advantage tomorrow – that we have tomorrow’s business leaders. To achieve that, smart regulation is imperative. Unfortunately, we do not have that today.

the \mathbb{R}^n is a linear space over \mathbb{R} with the usual addition and scalar multiplication. The inner product is defined by

$$(x, y) = x_1 y_1 + x_2 y_2 + \dots + x_n y_n \quad (1)$$

where $x = (x_1, x_2, \dots, x_n)$ and $y = (y_1, y_2, \dots, y_n)$ are vectors in \mathbb{R}^n .

The norm of a vector x is defined by

$$\|x\| = \sqrt{(x, x)} = \sqrt{x_1^2 + x_2^2 + \dots + x_n^2} \quad (2)$$

The distance between two vectors x and y is defined by

$$d(x, y) = \|x - y\| = \sqrt{(x - y, x - y)} = \sqrt{(x_1 - y_1)^2 + (x_2 - y_2)^2 + \dots + (x_n - y_n)^2} \quad (3)$$

The angle between two vectors x and y is defined by

$$\cos \theta = \frac{(x, y)}{\|x\| \|y\|} \quad (4)$$

The orthogonal projection of a vector x onto a vector y is defined by

$$\text{proj}_y x = \frac{(x, y)}{(y, y)} y \quad (5)$$

The orthogonal distance from a vector x to a vector y is defined by

$$d(x, y) = \|x - \text{proj}_y x\| = \sqrt{\|x\|^2 - \frac{(x, y)^2}{\|y\|^2}} \quad (6)$$

The orthogonal distance from a vector x to a subspace S is defined by

$$d(x, S) = \inf_{y \in S} \|x - y\| \quad (7)$$

The orthogonal distance from a vector x to a line L is defined by

$$d(x, L) = \sqrt{\|x\|^2 - \frac{(x, L)^2}{\|L\|^2}} \quad (8)$$

The orthogonal distance from a vector x to a plane P is defined by

$$d(x, P) = \sqrt{\|x\|^2 - \frac{(x, P)^2}{\|P\|^2}} \quad (9)$$

The orthogonal distance from a vector x to a hyperplane H is defined by

$$d(x, H) = \sqrt{\|x\|^2 - \frac{(x, H)^2}{\|H\|^2}} \quad (10)$$

The orthogonal distance from a vector x to a subspace S is defined by

$$d(x, S) = \sqrt{\|x\|^2 - \frac{(x, S)^2}{\|S\|^2}} \quad (11)$$