



# **Holding Norwegian Companies Accountable: The Case of Western Sahara**

An exploration of the Norwegian government's approach to dealing with Norwegian companies' complicity in violations of human rights abroad

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## Declaration form

The work I have submitted is my own effort. I certify that all the material in the Dissertation which is not my own work, has been identified and acknowledged. No materials are included for which a degree has been previously conferred upon me.

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29.05 2011

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Date

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## Abstract

Morocco illegally occupies the non-self-governing territory of Western Sahara, and they are strategically exploiting the natural resources rightfully belonging to the local Saharawi people. Both of these actions are in violation of international law and fundamental human rights. Norwegian companies have been complicit in Morocco's trade in natural resources thereby legitimising the occupation and exploitation in political, legal, moral and economic terms.

In this context this thesis investigates the approach of the Norwegian government, companies and civil society organisations to Western Sahara, exploring how effective these approaches have been in practice. The dichotomy between voluntary and regulatory approaches has steered the Norwegian approach, giving human rights a mainly normative role within the discourse of Corporate Social Responsibility (CSR). This thesis seeks to challenge the dichotomy apparent in the Norwegian system, by opting for a more interrelated view on legal and normative ways to regulate businesses. It shows that the Norwegian government's policy of discouraging business activities in Western Sahara is passive and ambiguous. Furthermore, the Norwegian policy-apparatus' understanding of CSR prevents it from seeking alternative and effective measures. The government is also overlooking the indirect effects policies generally understood as *outside the purview of CSR* have on the situation in Western Sahara.

This study discusses how civil society has played an innovative role in changing corporate behavior and business ethics, by drawing public attention to corporate actions in the context of emerging norms and social expectations. However, the government should not leave the important task of holding companies accountable solely to the voluntary sector, but enhance, strengthen and reinforce both legal and normative incentives. To solve the situation in Western Sahara, the world community must seek to break the link between occupation and economic gain, and governments must proactively engage companies to go beyond compliance with human rights.

*Key words: Corporate Social Responsibility, Business and Human Rights, Self-determination, Corporate regulation, NGOs, Investigative Campaigning,*

## List of Abbreviations

CSR	Corporate Social Responsibility
EITI	Extractive Industry Transparency Initiative
EU	European Union
GRI	Global Reporting Initiative
ICJ	International Court of Justice
NSCWS	Norwegian Support Committee for Western Sahara
MFA	Ministry of Foreign Affairs
MOF	Ministry of Finance
MTI	Ministry of Trade and Industry
MNCs	Multinational Companies
NRK	Norwegian Broadcasting Corporation
OECD	Organisation for Economic Co-operation and Development
Polisario	The Popular Front for the Liberation of Seguiet el Hamra and Rio de Oro.
SRSG	Secretary-General's Special Representative (Business and Human Rights)
SVT	Sweden's public television broadcasting service
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
UNNU	United Nations Nations Unies

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## 1. Introduction

Multinational corporations (MNCs)<sup>1</sup> have gained increased political and economic power in the post-Second World War period, with some surpassing many States in terms of financial resources. By virtue of their political and financial muscle, they are in a unique position to affect individual people and wider society both positively and negatively (see for example Kinley & Tadaki 2004, Clapham 2006). History shows that company activities can be detrimental to people's enjoyment of human rights, and that the most notorious abuses have taken place in the developing world in States with inadequate legislation, weak governance, or under oppressive regimes (Fafo 2010, Global Witness 2010).

One such regime is the Kingdom of Morocco. For over three decades, Morocco has occupied Western-Sahara against the will of the Saharawi people.<sup>2</sup> The on-going conflict has fundamentally challenged the basic norms of the international legal order established after World War II, as the international community has failed both to prevent the unilateral expansion of territory by force, and to secure self-determination for the Saharawi people. Self-determination is recognized both as a principle and as human rights of peoples.<sup>3</sup> International Law prohibits exploitation of natural resources in disputed areas, unless this is done in accordance with the wishes of the local population and with an aim of self-determination. Consequently, companies aiding and abetting Morocco's exploitation through business-cooperation are acting in breach of international law and are complicit in violating the Saharawi peoples' fundamental human rights (UNSC 2002, Arts&Leite 2007). A solution to the conflict must incorporate agreements regarding the increasingly wanted resources on the Saharawi territory.

Norwegian companies have been receiving increasing criticism for involving themselves in Western Sahara, as well as in other countries with poor human rights records. In order to face

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<sup>1</sup> In this thesis the term multinational corporation (MNC) will be used in relation to companies which operate across borders. It is interchangeably used with the terms transnational corporation (TNC), and multinational enterprise (MNE).

<sup>2</sup> See Appendix I for map of Western Sahara.

<sup>3</sup> In addition to resolution *A/RES/1514*, common Article 1 of the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR), recognize the right of peoples to self-determination, in the context of "political status" and "economic, social and cultural development" (Article 1.1); "natural wealth and resources" (Article 1.2) and "administration of Non-Self-Governing and Trust Territories" (Article 1.3) (Haugen 2010).

these challenges, the Ministry of Foreign Affairs issued a 2009 White Paper called “Corporate Social Responsibility in a Global Economy” (hereafter referred to as the White Paper 2009).<sup>4</sup> This steering paper is now the point of departure for nearly all discussions on Norwegian corporate social responsibility (CSR) policy-debates in recent years, both within civil society and the government sector. It is within this framework companies’ human rights responsibilities are addressed<sup>5</sup> (ibid, Rorg 09.02.2011). The extensive report’s overall mission is to present the government’s expectations of the business sector, as well as to provide guidance for the private sector and social partners operating abroad. According to the goals put forth in the report, Norwegian companies are expected to take a lead and be amongst the best at practising CSR (White Paper 2009, p.6-10).

Regarding Western Sahara, the government is advising Norwegian companies to abstain from investments in the territory. Despite this guidance, several Norwegian companies have traded with Morocco in resources originating from Western Sahara. The exploitation of such resources entails complicity with the suppression of the Saharawi people’s right to self-determination and other fundamental freedoms (UN 2009a). Thus in many ways, the Norwegian government has not managed to successfully regulate Norwegian companies through its CSR approach and policy advice. This research seeks to explore this situation.

Although Western Sahara has been labelled a “forgotten conflict”,<sup>6</sup> the conflict has received attention in Norway from the government, civil society – and now also within the corporate sector. As the role of companies in human rights issues often involves multiple- stakeholders, this study will entail establishing the links between these actors in relation to such issues.

This research seeks to realise the immensely important task of breaking the link between oppressive States, the human rights situation and economic activities.

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<sup>4</sup> In the White Paper the Government has defined three key areas for action with regard to CSR. The first is exercising social responsibility in the Government’s own activities. The second is conveying society’s expectations to Norwegian companies. The third is developing and influencing the framework for CSR, both nationally and internationally (White Paper 2009).

<sup>5</sup> The government expect companies to keep their operations in line with fundamental human rights as set out in international conventions, as well as core International Labour Organisation conventions regarding the right to organize, the abolition of forced labour, child labour and discrimination (White Paper 2009, p.10).

<sup>6</sup> Zunes & Mundy highlight the importance of Western Sahara in Africa in *Western Sahara: War, Nationalism and Conflict Irresolution* (2010), but point out how scarcely populated the area is (est. 273 000) and how little interest its people receive from international actors. Some argue little attention is given due to the peaceful means used by the Saharawis in their struggle.

## 1.2 Research Questions

This thesis makes the fundamental assumption that Norwegian companies should respect international human rights and abstain from corporate activities in Western Saharan territory. Furthermore, as a primary duty-bearer in protecting human rights, the Norwegian government has the mandate and the responsibility to influence companies' decisions. On the basis of this understanding, the research questions asked by this paper are as follows:

- i) In what way have the Norwegian government, companies and NGOs dealt with the issue of Western Sahara, and how efficient have these approaches been?
- ii) What measures should the Norwegian government take to hold Norwegian companies operating abroad accountable towards human rights?

Recognising that there are room for improvements in this area, the thesis is both descriptive and normative in its nature. Descriptive in the way that it explores a case of different stakeholders' role, and normative as the findings lead to policy-recommendations directed to the Norwegian government. The second research question deals with holding companies accountable. This can be understood as a company's obligation to account for its activities, accept responsibility for them, and face consequences if they fail to do so. The notion of corporate accountability has increasingly gained support, as 'corporate responsibility' has come under pressure for focusing on vague and voluntary codes of conduct (Clapham 2006).<sup>7</sup>

After providing an introduction to the topic at hand and presenting the research questions, chapter two constitutes a theoretical assessment of the concept of CSR, together with current criticisms as well as suggestions for bringing the concept beyond mainstream dichotomies. This will entail reflection upon the interrelation between binding and non-binding regulation, norm-creation and reflexive law theory in relation to CSR. The methodology section in Chapter 3 will explain the choice of topic, method and case. It will also reflect on the choice of research interviewees, as well as ethical considerations that may arise. The human rights situation in Western Sahara and the role of natural resources will be assessed in Chapter 4, with particular attention on the right to self-determination and ownership rights to resources.

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<sup>7</sup> The Notion of Corporate Accountability has been widely discussed. As an example, Bendell (2005) argues that the term must engage with power differences between stakeholders, as well as the extensive debate concerning what responsibilities companies should have and towards whom.

This will prepare the reader to engage in the empirical and analytical case-study of Norwegian involvement in Western Sahara.

The discussion and findings are found in chapter 5 and is parted in four sections. The first segment will examine the ambiguity of the Norwegian government's approach to Western Sahara, by looking at discrepancies between theory (policy) and practice (actions), focusing on both the intentional and unintentional outcomes of political processes. This section will also examine to which extent other policies not framed as corporate social responsibility affect Norwegian companies in Western Sahara. The second part is an assessment of 22 companies and how they to a certain extent have escaped liability, but also how they are likely to change their behaviour if external pressure increases. In the third section the important role played by civil society and the media's efforts to secure changes in this field is explored, and in the final part the human rights responsibilities of the Norwegian State is further discussed. Chapters 6 and 7 finish by concluding and providing recommendations as to concrete improvements the Norwegian government can make to improve their policies in the field of business and human rights.

The motivation behind this thesis is to introduce new ways to hold Norwegian companies to account, beyond purely legal and voluntary mechanisms. By pointing at gaps and loop holes *between* theory and practice, the thesis seeks in broader terms to create knowledge and understanding and encourage stakeholders to recognize the extreme complexity and breadth of business and human rights. Each case has its own solutions, and one size does not fit all. That the Norwegian government recognizes the complexity of CSR as a dynamic and changing concept (White Paper 2009) is a very positive point of departure for the aims of this thesis. This study therefore endeavours to open CSR discourse up for critique, and make suggestions on what the term "Corporate Social Responsibility" should entail in the future.

## **2. Theoretical Background**

The field of business and human rights is characterized by the involvement of multiple stakeholders; businesses, investors, customers, workers, governments, inter-State organisations, the media civil society organisations and local communities are all stakeholders seeking to influence global and local corporate actors in different ways. Consequently, providing a complete theoretical and practical map of the business and human rights field as well as the different interests at stake is not only challenging, but nearly impossible.

The aim of this chapter takes the more narrow approach of addressing how the regulation of companies' human rights compliance is understood and practiced in Norway. These issues are generally framed as 'Corporate Social Responsibility' (CSR). The mainstream approach of 'the business case for CSR' will be assessed as its reasoning is also agreed upon by Norway. Criticisms of the concept will be introduced as relevant to the case-study at hand, before moving beyond mainstream approaches to norm enforcement by introducing alternative ways of seeing the States' regulatory tool-box, emphasising the interrelatedness between voluntary and mandatory mechanisms.

## **2.1 Review of Literature on Corporate Social Responsibility**

As Andy Crane & Dirk Matten (2010) argue, defining CSR is not purely a technical exercise, but is both normative and ideological. Indeed, it is extremely difficult to assess a company's ethical behaviour and human rights compliance using CSR. Thus, definitions and understandings are often based on aspirations rather than concrete facts (Carroll 1999).

The notion of "Corporate Social Responsibility" has today become a mainstream label on companies' responsibility towards stakeholders<sup>8</sup> (Crane & Matten 2010, Carroll 1999, Franklin 2008, Mares 2004). Although neither scholars nor practitioners agree on a single definition of CSR, the concept normally entails taking measures to mitigate or prevent any negative social and environmental impacts of business activities or to maximize their positive impacts on society (ibid). Furthermore, CSR actions are generally considered to be 'beyond legal compliance', being an issue of corporate self-regulation grounded in voluntary codes of conduct and non-binding guidelines.

A rich prescriptive and descriptive literature on CSR has emerged, mainly from business and management disciplines, that seeks to demonstrate 'the business case of CSR'.<sup>9</sup> This approach grew out of the need for businesses to adapt to increased criticism of their roles in a globalised economy. It is motivated by self-enlightened interest in sustainability and profit, as well as the

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<sup>8</sup> Other related concepts include: corporate responsibility, corporate accountability, corporate ethics, corporate citizenship, sustainability, stewardship, triple bottom line, and responsible business.

<sup>9</sup> The 'business case' for CSR has historical roots. Corporate responsibilities towards society were understood as a sort of 'corporate conscience' from the outset, and incorporated into social accountability frameworks. They included humane considerations in the governance model of companies and addressing societal concerns by providing jobs and increasing productivity (Heald 1958, Carroll 1999, Munill & Miles 2005). Soon, links between responsible business decisions and long-term profit were made (Keith Davis 1960), as well as the importance of voluntariness (Walton 1967).

desire to prevent boycotts and reducing risks and reputational damage (Barnett 2007, Jones 2008, Franklin 2008).

As for regulation, in line with the traditional neo-liberal view of the State, companies have sought to minimise outside interference by the State, preferring the market, customers and shareholders, to act as regulator and enforcer of sanctions<sup>10</sup> (Crane & Matten 2008). This approach to CSR is shared by the Norwegian government, which portrays companies as both willing and able to contribute to doing good, favouring a voluntary approach to CSR. The Minister of Trade and Investment, Trond Giske, recently stated that:

Corporate social responsibility is not a judicial or legal concept, but refers to something more than companies' legal responsibility to follow applicable laws and regulations in the countries they operate in. An important aspect of CSR is that it is voluntary. And that is how it should be in the future as well (Giske, 24.11.2010).

CSR activities can include a variety of things from philanthropic initiatives like building schools to a company's pollution reduction efforts. These types of activity are usually seen as positive and difficult to criticise. However, can these and other CSR activities, compensate for other possible negative consequences stemming from a companies' behaviour? This thesis looks at human rights violations and makes the position that CSR should begin by avoiding such violations. Some of the critical aspects of CSR will be highlighted, before going on to present some useful perspectives on regulation.

## **2.2 Contesting the Effectiveness of CSR**

There is a dichotomy between the voluntary aspects of CSR (the business case) and regulatory measures. The effects of both approaches are contested. This will be addressed below. First, the concept of CSR has been criticised for being inherently vague and lacking a coherent understanding, rendering it not suitable for operationalisation (Van Marrewijk 2003). Michael Porter & Mike Kramer (2006) argue in their prize winning article '*Strategy and Society*', that CSR is merely damage control and well-intended opinions.<sup>11</sup> By way of example, they critique the content of the growing number of CSR reports produced by companies, claiming that such publications 'rarely offer a coherent framework for CSR activities, let alone a

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<sup>10</sup> An example of "market interventions" was when the market-leading companies, Nike and Nestle, came under scrutiny in the 1990s following exposure of their bad human rights records. They responded to increased external scrutiny by implementing voluntary initiatives to safeguard their reputations in fear of social unrest. Their increasing exposure made them more responsible towards society (Mares 2004).

<sup>11</sup> Porter and Kramer argue that 'the most common corporate response [to criticism] has been neither strategic nor operational but cosmetic' (Porter & Kramer 2006, p.2).

strategic one' (Porter & Kramer 2006, p.2). Indeed, lack of coherence is a problematic aspect of the Norwegian approach to Western Sahara, as different ministries seem to operate different approaches.

On the other hand, CSR has also been criticised for not focusing enough on conflicts of interest. According to David Vogel (2005) the business sector has managed to capture the concept of CSR and the interpretive power connected to it, making it about voluntary choices.<sup>12</sup> The main challenge is that the "business case for CSR" gives companies a route to escape criticism, without actually preventing wrongful acts. According to Marc T. Jones (2008), this is a route that companies are likely to take. In his opinion they can act only out of self-interest and not necessarily in the interests of society. Sawyer & Gomez (2008) also argue that opening up a variety of different solutions is problematic. They find that CSR-discussions are worlds away from the complex reality and can debilitate and depoliticise human rights, taking the focus away from necessary political processes and structural changes needed to balance competing values and interests.

In Norway these points are especially relevant, as the government is reluctant to regulate companies' operating abroad, and the divergence of interests between stakeholders is traditionally played down. Despite a clash of interests, the preferred strategy presented in the White Paper on CSR is one of corporatism: 'The Norwegian tradition of close contact and cooperation between the authorities, the private sector and employees has played a positive role in the development of our society' (White Paper 2009, p.11).<sup>13</sup>

One of the most criticised aspects of CSR is that the whole concept is grounded in voluntariness, thereby excluding legal compliance in its very definition. Many argue that CSR should rest on hard law and international conventions. A problem with a purely legal view of CSR is the issue of *who* has ultimate responsibility for holding companies accountable. Indeed, violations have been left unaccounted for under international and national legal systems (Ratner et. al. 2007). To date, no transnational legal regime or rule of law regulates the transnational activities of companies regarding their human rights compliance (ibid).

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<sup>12</sup> On the business lobby's capture of CSR, see Sjøfjell 'Report from Norway: Another CSR Victory for the Business Lobbyists' *European Company Law* 6 (2009) p.235-238.

<sup>13</sup> It is discussed whether cooperation between politics, States, markets, and organisations is changed by and increasingly encapsulated in international rules and institutions where Norwegian actors have less influence (Rorg 09.05.2011).

Normally, when a MNC is involved in human rights violations abroad there will be several states involved. Host States are the main duty-bearers for protecting against human rights violations within their territory, but many have failed to do so. Many simply lack resources and capacity to hold powerful MNCs to account, others are unwilling, fearing investors will move elsewhere (Clapham 2006). Other States, such as Morocco, prioritise economic gain over human rights (Arts & Leite 2007). As such, the home state's role becomes central.<sup>14</sup>

The UN Special Representative for business and human rights Professor John Ruggie (SRSG) argues that although it is debatable whether States have a duty to create legally binding extra-territorial rules, governments have a *right* to take measures to regulate and adjudicate businesses domiciled in their territory (Ruggie 2008, 2010). SRSG Ruggie has also pointed out that 'there are few if any internationally recognized rights business cannot impact – or be perceived to impact – in some manner' (ibid). Although establishing that *all* human rights are relevant to MNCs, there are significant economic, political and legal obstacles to filing successful lawsuits, ranging from lack of legal practice, an inability to apply legislation extra-territorially, sovereign immunity, separation between corporate entities and unwillingness. Partly due to these difficulties, human rights have been treated as a referential and normative standard for the regulation of corporate conduct within CSR (Fafo 2010, Buhman 2010).<sup>15</sup> This is also the case for Norway. As pointed out by The Policy Coherence Commission in 2008: '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' (NOU 2008, p.14).

There is thus a gap between legal and non-legal views of corporate responsibility. The next section seeks to fill this gap by challenging the current regulatory dichotomy and showing that these two ways of regulating are interlinked.

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<sup>14</sup> This is discussed further in the International Council of Human Rights' discussion paper: Beyond Voluntarism: Human rights and the developing international legal obligations of Companies on companies. Available at [http://www.ichrp.org/files/reports/7/107\\_report\\_en.pdf](http://www.ichrp.org/files/reports/7/107_report_en.pdf). Accessed 10.04.2011.

<sup>15</sup> This is exemplified by the many voluntary initiatives and frameworks which companies can sign up for or use as referential standards. These include the OECDs Guidelines for Multinational Enterprises, the UN Global Compact, ISO 26000 (Reporting on environment), Global Reporting Initiative, Extractive Industry Transparency I, Voluntary Principles on Security and Human Rights. In addition, Lanzano & Prandi (2005) find that an increasing number of companies are linking human rights to their strategy upstream, through policy-making, and downstream, as a resource for CSR measurement and evaluation.



## 2.3 Beyond the Mainstream Dichotomy

Creating consensus between those wanting non-binding corporate regulation, and those seeking to establish legally binding laws is a challenging process. Indeed, the United Nations has repeatedly sought to achieve consensus and most attempts have failed.<sup>16</sup> In the search for a middle way, States have established a non-prosecutorial mechanism, namely the UN Secretary-General's Special Representative on Business and Human Rights. Ruggie's mandate was to gather a variety of stakeholders and create a clarifying framework aimed at regulating global business and human rights, with the aim of moving from "corporate responsibility" to "corporate accountability".<sup>17</sup> Ruggie soon established that *both* voluntarism *and* law have relevant and reinforcing roles to play in governing corporate behaviour. According to Mark Taylor (*interview*, 05.04.2011), Ruggie has managed to bring together evolving legal regulations and social expectations into an emerging policy framework of direct relevance to CSR by clarifying concepts and expectations. The framework's relevance to the present case-study will be further addressed in Chapter 5. How then are we to understand this emerging regulation? Moreover, how can the government of Norway use both legal and non-legal remedies to enhance corporate accountability?

### 2.3.1 Regulation theory

Ordinarily, the term 'regulation' encompasses an intentional act by policy makers. This study will utilize Lawrence Lessig's (1998) understanding of regulation: namely, 'the constraining effect of some action, or policy, whether intended by anyone or not. In this sense, the sun regulates the day, or a market has a regulating effect on the supply of oranges' (Lessing 1998, p.662).<sup>18</sup>

According to scholars in the field, mandatory and voluntary mechanisms have been wrongly presented as mutually-exclusive ideas. In fact, regulation and sanctions can be achieved through both judicial and non-judicial mechanisms at the same time and can even reinforce each other (Mares 2004, Buhman 2010, Sjøfjell 2011, Taylor 2011).<sup>19</sup> Legal scholar Beate

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<sup>16</sup> United Nations Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights, 26.08.2003, E/CN.4/Sub.2/2003/12/Rev.2

<sup>17</sup> UN Commission on Human Rights, UN Doc.E/CN.4/RES/2005/6 (2005).

<sup>18</sup> In this instance, this definition will provide an inclusive and result-orientated view of how the actions of Norwegian stakeholders influence companies in Western-Sahara. It is important to include government decisions unintentionally affecting companies operating in Western-Sahara as part of "CSR approaches".

<sup>19</sup> This is according to Buhman (2010, p.8) evident from debates within the European Union MSF, the United Nations Human Rights Council and its predecessor the UN Human Rights Commission.

Sjåfjell argues that CSR should encompass and form a bridge between hard law, soft law and ethical obligations (Sjåfjell 2011, p.5). Moreover, legal scholar Karin Buhman states that ‘the idea that CSR is de-coupled from legal requirements is somewhat out of touch with parts of theory and practice’ (Buhman 2010, p.5). She holds that legislative processes have been responsive to trends in the area of CSR, and that there is a strong relationship between voluntary codes of conduct and hard law. According to Buhman’s findings, law-making and regulation already exist within the present CSR discourse, and governments and intergovernmental organisations are in fact increasingly using public-private regulation and law to normatively steer companies towards taking social responsibility. The problem Buhman raises is that legislators often do not themselves understand that this approach is actually being used:

There is much more law to CSR than meets the eye that only looks for directly applicable statutory provisions. For the CSR community and regulators to accept that CSR and law are not distinct, simply by accepting as a point of departure that law is not just black-letter requirements, but that law forms a normative source for CSR in many ways.

(Buhman 2010, p.8)

Buhman finds that ‘Regulatory initiatives may gradually take on new forms to allow them to be contained within the constraints of conventional views on formal regulatory powers at an intergovernmental level and duty holders of human rights’ (Buhman 2010, p.8).

Also concerned with corporate regulation is the law and business scholar, Maria Gjølberg. Gjølberg (2009) explores the importance of global and national contexts for a company’s willingness and ability to achieve CSR. She postulates that a company’s CSR efforts are also a function of institutional factors in the national-political economy and claims that social, economic and political characteristics provide a crucial contextual environment for companies as they shape normative and legally binding regulations.<sup>20</sup> It is interesting to reflect on the current trend of which the Norwegian government is a part whereby it prefers international standards and common international rules, downplaying its own influence on ‘global actors’ (Rorg, 09.05.2011).

Lessig’s (1999) theoretical approach to regulation is also useful in shedding light on how regulation often works in practice. Lessig shares the belief that the influence of social norms

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<sup>20</sup> Doremus et al (1998) similarly claim that home States of companies are actually the supreme power holders when it comes to business activities also conducted abroad as to a certain extent they can limit, regulate and influence other areas and institutions of society such as banks, investment funds, shareholders, stock markets, assurance mechanisms, clients and customers. It is also in the authorities’ mandate to legally regulate companies through accounting laws, tax laws, customs laws etc (Doremus et. al. 1998).

as regulating factors is important, and that people react to incentives of different kinds. However, importantly, instead of leading to less interference from the State, he argues that the State should seek to understand exactly how regulatory mechanisms occur and then seek to strengthen these (Lessig 1999).

Lessig (1999) separates regulation into four regulatory factors, all influencing each other. Hard law regulates through legislation and sanctions, whilst the market regulates through prize and availability. Social norms regulate through the acceptability of behaviour, and the architecture of things regulates through the nature of how things are unchangeably constructed (i.e. iron is heavy). Lessig's (1999) observation is that national legislation has the ability to regulate behaviour *indirectly*, by regulating the three other modalities of regulation directly.<sup>21</sup> Applying this theory to the Norwegian context, already existing regulatory processes influencing Norwegian companies needs to be explored, and norm-creating regulations needs to be strengthened.<sup>22</sup>

The theory of reflexive law making could be used as a tool to explore and understand the interrelation between stakeholders in legal processes. The normative quality of reflexive law is evident in its emphasis on two interrelated elements, both of which are very relevant in seeking to regulate multiple-stakeholders in business.

The participation of societal actors in the development of norms, and establishing a balance of power between participants in this process are important in the multiple-stakeholder field.

Buhman therefore argues in favour of the use of reflexive law theory:<sup>23</sup>

In reflexive law, norms are to be defined in a self- or co-regulatory process by those actors who will be subjected to them and who represent the interests at stake. Reflexive law theory holds that this will lead to more adequate norms to regulate the behaviour of businesses and other societal actors than traditional top-down/command-control governmental substantive law. (Buhman 2010, p.17).

In view of the theoretical contributions presented above, companies and their organisations are internalising external demands and expectations. Voluntary codes of conduct can therefore help develop and build knowledge, awareness and social norms, which could later lead to

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<sup>21</sup> For example, to stop people from smoking the government can prohibit it directly (law), increase taxes and customs (market), sponsor normative campaigns (social norms) or forbid the production of nicotine (architecture) (Lessig 1998, p.668).

<sup>22</sup> The drawback of indirect modes of regulation is that each may allow the government to achieve a regulatory end without suffering political cost.

<sup>23</sup> Teubner's reflexive law theory shares with Habermasian theory an emphasis on participation, discourse and balancing of power disparities (Buhman 2011).

customary law, and even statutory law. For example, the concept of due diligence has quickly gained acceptance in the business and human rights community as an appropriate method for avoiding human rights violations. Due diligence processes can include making expectations regarding human rights clear throughout the supply chain, reporting on human rights risks followed up by independent auditing (Global Witness 2010, Buhman 2010, Mares 2004). However, the success of such initiatives depends on whether or not legislation promotes and enforces the normative trends that already exist among different stakeholders.<sup>24</sup>

It has been noted in this chapter that the “business case for CSR” is not the only way to enhance corporate business ethics. The national context of the home state matters and a range of regulatory avenues exist for the government to choose from. Legal and non-legal methods of regulation can be mutually reinforcing, and governments should arguably use existing norms to strengthen legal-mechanisms. Furthermore, the government can regulate both directly and indirectly. Before providing the background to the human rights situation in Western Sahara the methodological approach of this thesis will now be presented.

### **3. Methodology**

#### **3.1 Initial Interest**

Having a grounding in development studies and now human rights, the relationship between the developed and developing world has been one of the author’s great interests and concerns throughout recent years. Particularly interesting is the link between companies’ actions and peoples enjoyment of human rights. As a Norwegian citizen, the author has placed specific attention on the Norwegian political system and Norwegian companies operating abroad. In choosing a case-study the Western-Sahara particularly caught the author’s interest following a conference in Norway, addressing the topic of the Saharawi People’s right to self-determination and the role of natural resources (see Chapter 4). The Norwegian Support Committee for Western-Sahara and other involved actors were contacted for more information.<sup>25</sup> Preliminary research made the links between the Norwegian State, corporate

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<sup>24</sup> The OECD Secretariat successfully completed work on the ‘OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas’ which is based on a due diligence framework. Available at: <http://www.oecd.org/dataoecd/62/30/46740847.pdf> Accessed: 13.04.2011

<sup>25</sup> The Norwegian Support Committee for Western Sahara keeps a more or less a systematic track of all Norwegian corporate activity in Western Sahara on their webpage, available at: [www.vest-sahara.no](http://www.vest-sahara.no). Accessed: 25.05.2011.

actors domiciled in Norway and the Saharawi Peoples situation more apparent. This evolved into the question of how and why Norwegian companies are related to violations of the Saharawi peoples' human rights, and how the Norwegian government has approached this situation through its CSR policy. The author's aim has been to adopt a theoretical framework and a methodological approach well suited to answer these specific questions. The reasoning behind choice of case study and methodology are outlined below with a description of some practical and ethical considerations.

### **3.2 Case Study**

Western-Sahara has the dubious honour of remaining one of the last forgotten conflicts (Shelley 2004). Awareness of the conflict is also small in Norway and voluntary organisations have dominated the information flow on the topic. Still, Western Sahara is due to its extraordinary situation, one of two countries that the Norwegian government has advised companies not to get economically involved in. As such, the situation of Western Sahara is illustrative of how one of the countries with a seemingly good reputation with respect to human rights (Norway) deals with one of the most severe breaches of human rights on the still colonized territory of Western Sahara. It also provides a good case study for examining how the Norwegian government is living up to its own expectations and CSR-implemented policies shortly after publishing what is regarded as a landmark CSR-policy, and how regulation and sanctions work in practice. In addition to addressing this case study, the research wishes to open a broader discussion on CSR and corporate regulation. The purpose of using a case can, according to Yin (2009), be to explore a situation both in descriptive and explanatory ways, by conducting in-depth and longitudinal examination of a situation, which in my study are the Norwegian stakeholders approaches to Western Sahara.

### **3.3 Choice of Method**

A multidisciplinary approach can be fruitful for addressing human rights related issues. Coming from an interdisciplinary background and with a focus on Human Rights *practice*, the author adopts an interdisciplinary and flexible research-focus in this study. In addressing the research questions the author sought to understand stakeholders' views, expectations and decision-making processes, and therefore chose a qualitative case study, an approach well suited for obtaining rich information about peoples' perceptions of a topic (Bryman 2008, Robson 2002). In-depth interviews as a method of data collection work well with interdisciplinary research using case-studies, facilitating the aim of getting a broad and in-depth understanding of the issue at hand (Yin 2009).

Multiple methods of data collection have been used, including using of the author as an instrument for data collection. The primary data source was open-ended interviews, good for getting nuanced information, combined with documentary study (Bryman 2008). Data was gathered through semi-structured, in-depth interviews with; a) representatives from organisations working with Western Sahara and CSR in general, b) government representatives and policy makers within the Ministry of Foreign Affairs, and c) academic contributors from the fields of law, social science and political science (See Appendix II for complete list). Interviewees were selected based on their knowledge of Western-Sahara, CSR and human rights, whilst scholars updated on regulation theory. A limited number of organisations and institutions work on issues of CSR and Western Sahara so the “snowball sampling procedure” was used to contact different informants.<sup>26</sup>

A total of 14 interviews were conducted informally in a conversational manner to allow interviewees to express views and reflect (see Appendix II for interviewees). Most interviews were conducted face-to-face, though due to geographical distance telephone interviews, Skype interviews and sometimes email correspondence were also used.<sup>27</sup> Most interviews were tape recorded and transcribed, except where informants did not wish to be recorded, possibly for political reasons.<sup>28</sup> No reluctance in providing information was encountered from interviewees.

Attempts were made to include companies’ perspectives, as these contributions are important to balance the views of the government and civil society organisations. The initial plans was to conduct interviews with companies involved in Western Sahara. This proved difficult as few responded to interview requests.<sup>29</sup> 22 companies were therefore assessed by analysing all available online information, including press-releases, articles, statements and speeches (See Appendix III for companies). In addition to a literature review in the theoretical section, a broad spectrum of secondary sources including academic interdisciplinary contributions, political statements, policy-papers and reports have been referred to throughout this thesis.

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<sup>26</sup> The snowball sampling procedure is a method where informants give advice, or put you in contact with other possible informants (Bryman 2008).

<sup>27</sup> Email correspondence with informants was used where concrete answers were sought to particular questions. For example, the authors of the organisation Earthrights’ report on the Pension Fund’s unethical investments in Burma were contacted to establish their perceptions of the most important obstacles to justice.

<sup>28</sup> This includes representatives from the Ministry of Foreign Affairs and the political representative of Polisario in Oslo.

<sup>29</sup> Emails were sent to all of the companies which email address was accessible online, providing them with the same information about the research project. Four out of 15 responded, one interview was successfully conducted, one company made written comments on the topic and two did not want to take part in this research.

Parts of the primary and secondary sources were accessed or obtained in Norwegian. Where translated versions were unavailable, the author has translated the information into English. This has presented some challenges in relation to capturing the nuances of the text and speech. Nonetheless, the author has endeavoured to provide the most accurate representations possible.

### **3.4 Ethical Considerations**

As this thesis is focused mainly on the instrumental, rather than the theoretical aspects of the situation in Western Sahara, the practical implications of Norwegian investment were necessarily engaged. The author has developed close relations with the Norwegian Support Committee of Western Sahara, and will probably cooperate and work with this organisation following submission of this thesis. This is not considered to be an ethical conflict for the purposes of this thesis for two reasons. Seeing things from a human rights perspective, the author clearly sympathises with the Saharawi People's struggle for self-determination. This thesis contributes to shedding light on Morocco's oppressive rule and unlawful exploitation of natural resources, as well as the debate on Norwegian CSR-policy. Secondly, by getting engaged and involved in her research topic, the author has gained a deeper understanding of the situation and accessed information more easily. The next chapter lays out why it is problematic for foreign companies to conducting business in Western Sahara in regards to international human rights law, as well as in moral, political and economic terms.

## **4. Western Sahara**

This chapter first considers the complex historical context of the Western Sahara conflict, before discussing the human rights dimensions of resource exploitation of the territory. It clarifies the link between the situation *per se* and the role of corporate players in the area. Despite widespread support for the Saharawi's right to self-determination in human rights conventions, the International Court of Justice, the UN General Assembly and the UN Security Council, economic and political factors prevent a solution to the conflict. Norwegian actors have most probably contributed to this, giving political, economic and moral support for the occupying power of Morocco (Arts & Leite 2007).

#### 4.1 Western Sahara, International Law and Human rights

As early as in 1963, the region of Western-Sahara was recognized as a “non self-governing territory” under Chapter XI of the UN Charter.<sup>30</sup> In line with international instruments adopted by UN bodies, a referendum on self-determination was due to be organised to decide on the final status of the territory. In 1975, as the administrative power Spain reluctantly prepared for the process of decolonisation, the Moroccan king and Mauritania claimed sovereignty over Western Sahara. This action led the UN General Assembly to request the International Court of Justice for an advisory opinion on the legality of the occupation, by establishing the legal ties between Morocco and Western-Sahara before the claim was made. The ICJ found that neither of the ties between these States were considered to be of ‘such nature as to affect the application of Resolution 1514 (XV) in the decolonisation of the Western Sahara and in particular of the principle of self-determination’.<sup>31</sup>

Ignoring the Court’s findings, Spain signed an agreement, the secret ‘Madrid Accords’, with Morocco and Mauritania transferring the territory of Western Sahara into the hands of its neighbours (Shelley 2004). This act was in violation of Spain’s international obligations and moral responsibilities towards the Saharawi people. It was followed by the Moroccan king ordering 300,000 Moroccan troops to march into the desert and occupy the area (the “Green March”), an act condemned by the UN Security Council and United Nations General Assembly resolutions.<sup>32</sup> This act was also a violation of the UN Charter’s principles on use of force (Haugen 2010).<sup>33</sup> The Saharawi national liberation movement, the Popular Front for the Liberation of Seguiet el Hamra and Rio de Oro (hereafter the Polisario), created in the last period of Spanish occupation engaged in a guerrilla warfare against occupying forces. However, Moroccan forces soon managed to force Saharawis to flee their country into isolated refugee camps in Algerian deserts, now estimated by the UNHCR to house 165,000 people (NRC 2008).<sup>34</sup>

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<sup>30</sup> In particular UNGA resolution 2072-XX 1964 and Resolution 2220-XXI of 1966; A/5514

<sup>31</sup> Western Sahara Advisory Opinion (1975), paragraph 162, ICJ Report p.68. General Assembly resolution A/RES/1514(XV) (1960) ‘Declaration on the Granting of Independence to Colonial Countries and Peoples’ reads in paragraph 2: ‘All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development’.

<sup>32</sup> S/RES/380 and S/RES/379 called for the immediate withdrawal of participants in the Green March.

<sup>33</sup> Morocco’s act was a violation especially of laws governing the use of force in international relations (*jus ad bellum*) and laws governing war itself (*jus in bello*) including humanitarian law (Zunes & Mundy 2010).

<sup>34</sup> Demographically, the people of Western-Sahara are split into three distinct areas with limited possibility for communication between these areas. The occupied zone which is rich on resources and controlled by Morocco, and the more poorer and marginalised zone, which is under Polisario control, are split in two by a heavily



The guerrilla war against Morocco lasted until 1991 when the UN arranged a ceasefire, and established the United Nations Mission for the Referendum in the Western Sahara (MINURSO), mandated to organise a referendum, in which ‘the people of Western Sahara would choose between independence and integration with Morocco’.<sup>35</sup> However, MINURSO was not mandated to monitor and report on human rights abuses (Arts & Leite 2007). The settlement plan became war by other means, with Morocco and Polisario carrying their fight into the voter identification process from 1994 to 2000.<sup>36</sup> The UN Personal Envoy of Secretary General, James Baker left in frustration in 2004 as Morocco dismissed plans for a referendum, reluctant to agree on any plan that might include self-determination or independence as one of its solutions.<sup>37</sup> Self-determination for Western Sahara has been addressed in 44 resolutions from the UN General Assembly since 1965, as well as in 64 resolutions from the UN Security Council since 1975 (Haugen 2010). Lack of will to solve the conflict by the stronger party means that pressure for a solution must come from outside. However, the Security Council has been unable to use force due to France and Spain's support to Morocco (Zunes & Mundy 2010). To date, no State in the world has recognized Morocco's annexation of Western Sahara. Morocco's presence in Western Sahara is an occupation as Morocco is fully able to competently discharge the obligations of an occupying power (Zunes & Mundy 2010).

In addition to a violation of their fundamental right to self-determination, the Saharawi People experience day to day human rights abuses, Human Rights Watch concluded their 2008-report on Western Sahara:

For Western Sahara, the focus of Human Rights Watch's investigation is the right of persons to speak, assemble, and associate on behalf of self-determination for the Sahrawi people and on behalf of their human rights. We found that Moroccan authorities repress this right through laws penalizing affronts to Morocco's "territorial integrity", through arbitrary arrests, unfair trials, restrictions on associations and assemblies, and through police violence and harassment that goes unpunished'

(Human Rights Watch 2008, p. 2)

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guarded 2,200 km separation wall built by Morocco while the refugee camps are situated in the harsh desert climate of Algeria (Arts&Leite 2007).

<sup>35</sup> UNSC Press Release, SC/8077, 29/04/2004, available at:

<http://www.un.org/News/Press/docs/2004/sc8077.doc.htm>. Accessed 14.05.2011

<sup>36</sup> Settler-strategies marginalise the Saharawis in their own territory, and will strongly influence the result of a possible referendum, where the option of self-determination can be put to vote within the occupied territory, as the settlers outnumber the Saharawi people (NRC 2008).

<sup>37</sup> Report of the UN Secretary General on the situation concerning Western Sahara, 23/04/04, S/2004/325. The Report contains the reply from the Kingdom of Morocco to Mr. Baker's proposal.

In 2005, the EU parliament called on the release of 37 human rights supporters imprisoned by Morocco (EU parliament 2005), and the situation does not seem to improve. In the aftermath of a protest camp built by thousands of refugees in November 2010, hundreds of Saharawis were detained in violent manner (Human Rights Watch 2010).

## **4.2 The Role of Natural Resources**

The territory of Western Saharan is rich in several types of natural resources. Fish, phosphate, titanium, iron ore, magnesium, salt and sand are valuable goods on the global market.

Morocco's strategic interest in selling these resources is appreciated by many countries.<sup>38</sup>

There is little information about the small number of Moroccan political and military elite that benefit (Fisera 2004). Exploiting resources in non-self-governing territories is illegal according to international law (UNGA Resolution 1514 (XV)).

The natural resources in Western Sahara are the heritage of the Saharawi people. In 2002 Morocco decided to explore oil resources in Western Sahara, leading the Security Council to ask the Legal Counsel on the legality of such activities. UN's Under-Secretary-General for Legal Affairs Hans Corell issued an opinion concluding that:

[...] if further exploration and exploitation activities were to proceed in disregard of the interests and wishes of the people of Western Sahara, they would be in violation of the principles of international law applicable to mineral resource activities in Non-Self-Governing Territories.

(United Nations, Legal Opinion, S/2002/161)

The legal opinion also clearly stated that the General Assembly has repeatedly recognised the inalienable rights of the peoples of non-self-governing territories to the natural resources in their territories. Therefore they condemn the exploitation and plundering of natural resources and any economic activities which are detrimental to the interests of the peoples of those Territories and deprive them of their legitimate rights over their natural resources (United Nations, Legal opinion, S/2002/161).<sup>39</sup>

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<sup>38</sup> Western Sahara has some of the world's largest reserves of phosphates. In addition, the 1,200 km of coastline of the Western Sahara constitutes one of the richest fisheries zone in the world. The actual amount of hydrocarbon reserves is yet unknown (Zunes & Mundy 2010).

<sup>39</sup> For more information on Western Sahara and natural resources, see V. Chapaux, "The Question of the European Community-Morocco Fisheries Agreement", in K. Arts and P. Pinto Leite (eds), *International Law and the Question of Western Sahara* (2007), 217 et seq. (232); see also in the same book M. Brus, "The Legality of Exploring and Exploiting Mineral Resources in Western Sahara", 201 et seq.; and also in the same book, E.

Foreign companies exploiting resources in the Saharawi territories without the consent of the local people are therefore in violation of international law and human rights principles. Through civil society, their exiled government and the freedom movement Polisario, the Saharawi people have repeatedly made it clear that they *oppose* such activities. In 2009, Frente Polisario stated in the United Nations that ‘Member States and foreign interests should avoid entering into agreement with the occupying power since Morocco is not the legitimate and legal authority in the territory’ (United Nations, 12.04.2009, p.9). They also called on Member States to prevent their corporations from entering such deals.

Member States should take “legislative, administrative and other measures in respect of their nationals and the corporate bodies under their jurisdiction that own and operate enterprises in the Non-Self-Governing Territories that are detrimental to the interest of the inhabitants of those Territories, in order to put an end to those enterprises”

(ibid: Annexe I)

Norwegian companies engaged in this trade are therefore complicit in violating the rights to self-determination, as well as lending legitimacy to the Moroccan government’s position that it is a *rightful* occupying power, and Morocco’s human rights abuses on Saharawi civilians. Norwegian companies involvement in the fish oil sector provide jobs for civilian Moroccans in the occupied territory, as such they are further fuelling Moroccan settlement policies. Some Norwegian corporate engagements are characterised by being highly technological (equipment and expertise reliant), which advances, facilitates and speeds up Morocco’s exploiting practices. The next chapter will lay out the role of the different stakeholders involved.

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Hagen, “International participation in the Phosphates Industry in Occupied Western Sahara: The Local Content and Global Participation”, 267 et seq. See also H.M. Haugen, “The Right to Self Determination and Natural Resources: The Case of Western Sahara”, *Law, Environment and Development Journal* 3(2007).

## 5. Norway and Western Sahara

This chapter assesses Norwegian stakeholders' involvement in Western Sahara. The first section maps the involvement of the Norwegian government. The second assesses 22 private companies' investments, highlighting relevant aspects of investment, pull-outs and arguments they have used for investing and possibly withdrawing. The last section considers the role of NGOs and the media, exploring the relationship between the stakeholders.

### 5.1 Norwegian Government's Approach

This section will discuss the Norwegian government's approach towards Western Sahara. First it assesses the discouragement policy regarding Western Sahara. Then examples of policies and agreements *indirectly* and unintentionally affecting the situation effects will be given. Lastly the problem arising from the direct economic benefit Norway derives from investments in Western Sahara through the Norwegian Pension Fund will be addressed.

#### 5.1.1 Policy to refrain from business involvements in Western Sahara

Since 2002 the Norwegian authorities have *recommended* corporations not to get involved in Western Sahara. In September 2007, the Ministry of Foreign Affairs clarified its position by publishing a policy on business in Western Sahara on their website, not recommending corporate engagement (hereafter referred to as the Policy on Western Sahara).<sup>40</sup>

Norway sees it as important to refrain from actions that can be construed as a legitimization of the situation in Western Sahara. In order to prevent trade, investments, resource exploitation and other forms of business activity that are not in accordance with the local population's interests and accordingly can be in violation of international law, the Norwegian authorities discourage such activities.

(Ministry of Foreign Affairs 2007)

However, this is presented as an exceptional case, and is not an ideal approach by the Norwegian government:

The government does not consider it desirable to develop an exclusively Norwegian system that involves Norwegian companies refraining from trade with or investment in problematic areas or countries.

(White Paper 2009, pp.48-49)<sup>41</sup>

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<sup>40</sup> The Norwegian word used is "frarådning", which means giving someone advice to refrain from something, in this case business activities in a Western Sahara.

<sup>41</sup> At present there are only two exceptions to this rule: Norwegian companies are advised not to engage in commercial activities in Western Sahara due to its status as a disputed territory, or in Burma due to the political situation (White Paper 2009, pp.48-49).

All political parties represented in the Norwegian Parliament have spoken in favour of the policy on Western Sahara, and there is a cross-political consensus regarding the Saharawi peoples' right to self-determination and the resources within their territory (Stortinget 04.05.2010). However, despite this consensus and the common intention of doing no harm, approaches to how to operationalise the policy on business involvement are subject to wider disagreement. In addition, the government representatives seem to have problems expressing a coherent understanding of the advice given. A representative from the Foreign Department stated on Norwegian television in 2010:

We have a clear policy regarding Western Sahara. We advise Norwegian companies not to be in the area, because it can be a violation of international law. Norwegian companies therefore, have a responsibility to determine whether activities in this area are according to what we call "good corporate social responsibility"

(NRK 22.04.2010)

"Good CSR" is a vague term to understand, and leaving the decision up to each company is not clear, but rather vague. Elusiveness has also characterised the discussions in the Parliamentary sessions, both the definition on Western Sahara and the effectiveness of the policy of business is disagreed upon. According to Trine Skei Grande, the leader of the Liberal Party of Norway,<sup>42</sup> the policy has clearly failed, as Norwegian companies continue to take part in an unconscious trade in the occupied territories. In 2010 Grande stated that '[d]uring the last years Norwegian involvement in Western Sahara has been characterised by a clouded picture, complex ownership structures, cheating and adaptations' (Stortinget 04.05.2010, pp.3105-3106).

When criticised for having a vague approach towards Western Sahara, the Minister of Foreign Affairs Jonas G. Støre has argued that Norway's approach should be in line with the United Nations and that no concrete UN sanctions have been adopted concerning this situation (ibid).

According to the organisation Future in Our Hands, this is not the case today.<sup>43</sup> The legal opinion from 2002 is far stronger than the wordings in the Norwegian Policy on Western Sahara, and the change of words has led to a new meaning of the entire business approach. The Legal opinion from 2002 text states that the natural resource activities in Western Sahara should be according to the wishes and interests of the people of the territory. However, this

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<sup>42</sup> The Liberal Party (Venstre) has in many cases initiated debates on Western Sahara, in Norway and internationally.

<sup>43</sup> Future in our hands (2011), Forthcoming report.

conclusion has by the Norwegian government been reduced to only demanding a respect of the *interests of the population*. This signifies a two-fold change: ignoring the Sahrawi's right to be consulted regarding their wishes, and by replacing the original Sahrawi *people* with the *population* in general.<sup>44</sup> Thus, the Norwegian government in its recommendation to Norwegian firms has a far softer approach than in their general Western Sahara policy. By not taking the wishes of the Sahrawis into account, but by only considering the interests of the entire population, the government in practice opens for all firms' involvement who can possibly claim to contribute to employment in the territory, no matter the origin of those people. Furthermore, in an assessment by Future in Our Hands of the government's phrasing of the political status of Western Sahara, the government has gone from calling the status of the Moroccan presence in parts of Western Sahara from an 'occupation' or 'annexation' (before 2007) to a 'situation', (after 2007).

To answer critique that claims the policy on Western Sahara is both vague and weak, the Foreign Minister has stated that companies involved in Western Sahara do not need stricter or clearer regulation as they in fact want to do "good":

I believe that Norwegian firms want to follow the authority's clear advice to refrain from business involvement in Western Sahara. And I believe that conclusions drawn recently by a Norwegian company in light of the disclosure of trade with Western Sahara, shows that it is taken seriously.

(Stortinget 04.05.2010, p.3106)

The example he uses refers to when Ewos and its mother firm, Cermaq, on its own initiative chose to seek advice by the Ministry of Foreign Affairs, asking for a joint meeting with the government to *get clarity* on whether their trade violated the government's policy on Western Sahara. The company's belief that the imports from Western Sahara could be *in line* with a policy strictly advising against business activity is indicative of serious contradictions in interpretation of the policy. It brings into question whether the policy is strong enough and adequately communicated. In fact, Lise Bergan, who represented Cermaq in the meeting with the ministry, expressed disappointment about the government representatives' vague approach and that they seem to have one public opinion and another one directed at companies:

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<sup>44</sup> In the case of Western Sahara this is very relevant, as settlers from Morocco now outnumber the Saharawis in the Western Sahara territory.

Not once during the meeting did the government representatives communicate clearly that we should end our purchase from Western Sahara (...) and in the aftermath, when the media and NGOs portrayed Cermaq as going against the government's 'clear' advice, the government did not 'correct' this understanding

(Bergan, interview 25.05.11)

Erik Hagen from the organisation Future in Our Hands' business ethics section (Norwatch) has conducted research on Norwegian companies for several years, and stated regarding the government's approach that:

The Norwegian government has the last years operated with a dual position when it comes to the natural resource activity in Western Sahara. When the Ministry of Foreign Affairs speaks to media or in Parliament, they state clearly that all activities should stop. But in dialogue with the firms themselves, they are far vaguer, and do not convey the same clear message as is done to the media

(Hagen, interview 16.01.2011)

Another partly state owned company in a similar situation as Cermaq is the Norwegian phosphate company Yara. In 2005 the company refused to answer letters from civil society regarding their involvement in Western Sahara. Not until the issue was brought to the attention of the leading business daily *Dagens Næringsliv* (05.07.2005),<sup>45</sup> and the Minister of Trade & Industry publicly said: 'We now encourage Yara to cease their trade activities in the area', did Yara publicly stated that they would pull out. However, the company later rephrased their statement, saying: 'We seek to avoid trade now, but we do not exclude that after a new overall rating we will take up this trade again' (Hoemsnes, *Dagens Næringsliv* 07.07.2005).<sup>46</sup>

Three years later, in 2008, Yara imported 16,800 tons of phosphate from Western Sahara into Norway over one week. Again they were confronted by civil society organisation and this time Yara's argument was that this was just a shipment for testing in a new plant in Norway (Norwatch 27.08.2008). Norwatch later discovered that Yara had in fact contacted the government one week before the shipment took place, to inform them that the company was going to violate the official policy of the government regarding business in Western Sahara

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<sup>45</sup> The letter is available on: [http://www.vest-sahara.no/files/pdf/brev\\_SKVS-yara\\_14.06.2005.pdf](http://www.vest-sahara.no/files/pdf/brev_SKVS-yara_14.06.2005.pdf). Accessed 12.03.2011

<sup>46</sup> The statement did not make it clear on which criteria the possible re-investments occur. A letter from the NSCWS was sent to make Yara comment on their contradictory position. Letter available at: [http://www.vest-sahara.no/files/dated/2008-08-25/brev\\_skvs-yara\\_26.04.2006.pdf](http://www.vest-sahara.no/files/dated/2008-08-25/brev_skvs-yara_26.04.2006.pdf) Accessed 13.03.2011.

just ‘one more time, and never again’ (Norwatch 27.08.2008). The Yara example raises serious questions as to why informed government representatives did not act to prevent the shipment. According to the government’s CSR-policies, ‘State owned enterprises must lead the way in exercising social responsibility. The Government will seek to promote this by actively exercising ownership rights’ (White Paper 2009, p.11).

### ***5.1.2 The conflicting interests of government officials***

One way of exercising ownership rights’ is through board rooms. However, the government’s seemingly ambiguous role also seem to be dominating corporate board meetings as well. This can be illustrated by the three following cases, where government ministers themselves have turned a blind eye to investments in Western Sahara, despite of their board member roles.

In 2010, the magazine *Ny Tid* reported that the Minister of Finance, Sigbjørn Johnsen, was the sitting Chair on the board of Cermaq<sup>47</sup> during a period when the daughter company EWOS signed a lucrative deal with the fish oil importer Rieber Oils (*Ny Tid* 15.04.2010). The Minister chose not to comment on the case, but said that the issue was not raised in Cermaq’s board room (*Dagbladet* 21.04.2010). Also importing from Rieber Oil was the company Sinkaberg-Hansen AS, of which the sitting Minister of Fisheries and Coastal Affairs, Lisbeth Berg-Hansen, was in fact not only a board member, but also a part owner (*Ny Tid* 15.04.2010). The last example is the previous Minister of Defence, Kristin Krohn Devold, a former board member of the military equipment company Comrod, which sells military antenna to Moroccan military and police forces in spite of a Ministry of Defence ban on the export of defence equipment to Morocco. This trade was conducted using a loop hole in Norwegian arms-export laws, allowing Comrod to sell their equipment through the USA to prevent legal accountability under Norwegian law for direct export (NRK 19.03.2010). Comrod has argued that the company did not know where the equipment ended up, and that they have no right to interfere in US export regulation (*Strandbuen* 23.04.2010). By arguing that it is not directly in violation of Norwegian law, they *de facto* used a loop hole in the weapon law as an argument to carry out the trade.

The extent to which company boards can be held legally responsible for a company’s investment decisions is a matter for debate. Noted by Cermaq’s representative, Lise Bergan: ‘Board members should focus on principles and direction setting, not engage in each

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<sup>47</sup> The Norwegian State owns 43.54% of Cermaq (White Paper 2011).



operating company's selection of or agreements with individual suppliers' (Bergan, *interview* 25.05.2011). However, considering both that Norway discourages business in only two countries and that Cermaq's imports from Western Sahara were of a considerable quantity, it can be argued that board members should have taken appropriate steps to prevent the trade from taking place. Gunnar Album working for the organisation Friends of the Earth Norway, clearly expressed that the Finance Minister in particular should have been aware of the facts, and taken actions to stop it. Album links the problem of ministers not knowing, not so much to the persons themselves, but to the fact that 'very little information exists in customs papers and public statistics on what is really going on in the fish oil industry' (Album, *interview* 23.05.2011).

Assuming the government wants to prevent Norwegian business involvement in Western Sahara, the methods they have chosen to enforce this have been weak. How to best communicate the government's advice and information to companies is important to the policy's success. Except for once in 2002 where the government communicated their advice in a letter to the firms,<sup>48</sup> the only way for companies to find this information has been to *voluntarily* contacting the Ministry of Foreign Affairs. Politician Eva Kristin Hansen may have a more realistic take on the issue than the Foreign Minister, in arguing that

[w]hen it is up to each individual company to contact [...the government] for advice, it is perhaps not all that will do this, just to hear something they do not really want to hear.

(Stortinget 04.05.2010, no.3108)

According to legal scholar Haugen (*interview* 09.02.2011) 'the government should be obligated to inform companies about not only statutory, but also customary law, including the Western Sahara policy.'

It is important that companies not only have access to the government recommendations and legal and normative expectations, but that the information they receive is based on a sound knowledge of CSR and human rights. To date, government staffs in different ministries have received training on how to *promote* Norwegian business interests abroad, while no training is given on spotting possible human rights violations committed by Norwegian companies (Taylor, *interview* 05.04.2011, Norheim, *interview* 05.05.2011).

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<sup>48</sup> Letter from the Foreign Ministry to TGS-Nopec and The Association of Norwegian Maritime Exporters 05.12.2002, [http://www.vest.sahara.no/files/doc/Brev\\_fra\\_ambRabat\\_til\\_TGS\\_05.12.02.doc](http://www.vest.sahara.no/files/doc/Brev_fra_ambRabat_til_TGS_05.12.02.doc). Accessed 12.05.2011.

Clearly, the Norwegian policy on Western Sahara has limitations in its content, the way its been communicated and its implications. However, this does not mean it cannot play an important role. Whilst it cannot be effective by itself, this policy advice is one element in a holistic approach that the Norwegian government could take. Another important element is indirect regulation of companies.

### ***5.1.3 Indirect policy making***

Direct and indirect legislation as well as economic and political agreements can affect a company's decision-making processes, and its ability and willingness to continue its activities (Lessig 1998). As seen in this previous section, the government's official approach to corporations operating in Western Sahara has been to issue an "advice policy". However, the government has also influenced corporate involvement in Western Sahara in other ways - through other undertakings *not* labelled CSR.

#### *Non-coherent policies and laws*

Gjølborg (2010) argues that the broad spectrum of political-economic institutions and cultural norms in the home state deeply affects the interpretation of CSR. Merely issuing a non-legal policy of advising business to stay out of an area is therefore a narrow intervention, as many external factors count in the bigger picture. For example, through the Norwegian Agency for Development Cooperation (NORAD), the Norwegian government provided development aid to the Moroccan government to develop its fishing industry. Although this project was stopped after the exposure of the fish oil industry, Norway still supports the exercise of mapping fish stocks outside Western Sahara's harbours.<sup>49</sup> The government argues that this is necessary to prevent over-fishing, and that the research results are theoretically for *everyone*. However, in practice it means giving Morocco strategically important information to enter into new trade agreements (Parliament 03.03.2011). A representative from Friends of the Earth Norway, noted that 'although it can be defended in terms of sustainability, it is problematic that it is Norway, which is highly involved in the export and import of fish oil, who are the ones taking a lead in mapping fish stocks' (Album, *interview* 23.05.2011). Free

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<sup>49</sup> The Commission on the Limits of the Continental Shelf is mapping the fish stocks outside the West-African coast. Norway supports this project, defending this activity, Minister of Foreign Affairs stated: 'The Programme is contributing to sustain, not weaken, the fishing stock and the ecological balance in the sea outside Western-Sahara for the future' (Parliament 03.03.2011).

trade agreements entered into by Norway through the European Free Trade Association<sup>50</sup> have also been much debated, as they allow loopholes that give importers a chance to export products from occupied Western Sahara duty free by mislabelling the imports as “Moroccan” (ibid).

### *The Customs Act<sup>51</sup> prevents transparency*

For several reasons, laws regulating transparency and corporate information disclosure are particularly important with regard to Western Sahara.<sup>52</sup> In nearly all the cases investigated as part of this study, companies were reluctant to disclose information to organisations and the media. The government is aware of problems relating to lack of transparency. The White Paper aims to maximise transparency, arguing that it can prevent ethically dubious decisions and that it ‘will also help to provide civil society, research institutions and the media with the best possible basis for their work’ (White Paper 2009, p.23).<sup>53</sup> Despite this, in 2009, the government passed an amendment to the Customs Act which in fact had a converse effect. The amendment prevents the public from accessing information about which companies are trading in Western Sahara and Burma (*Ny Tid* 21.01.2011). This is particularly problematic as only few of this study’s interviewees were aware of this amendment and its implications. Notably, none of those interviewees were government officials.<sup>54</sup> The Minister of Finance later defended the amendment stating that the public can ask companies for information directly.<sup>55</sup> Much discussion has been, also in the Norwegian government on how companies

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<sup>50</sup> Free trade Agreement between the European Free Trade Association and Morocco available at: [http://mba.tuck.dartmouth.edu/cib/trade\\_agreements\\_db/archive/EFTA-Morocco.pdf](http://mba.tuck.dartmouth.edu/cib/trade_agreements_db/archive/EFTA-Morocco.pdf). Accessed 10.05.2011.

<sup>51</sup> The Act on Customs Duties and Movement of Goods (Customs Act) 21. December 2007 No. 119 available at: [http://www.toll.no/upload/Lov\\_Forskrift/Customs\\_Duty\\_and\\_Movement\\_of\\_Goods\\_Act.pdf](http://www.toll.no/upload/Lov_Forskrift/Customs_Duty_and_Movement_of_Goods_Act.pdf). Accessed 10.05.2011.

<sup>52</sup> Crane & Matten define transparency as: ‘the degree to which corporate decisions, policies, activities and impacts are acknowledged and made visible to relevant stakeholders’ (2010, p.71).

<sup>53</sup> ‘The Government emphasises transparency and disclosure, and will suggest that the scope of the Accounting Act should be extended to include information on ethical guidelines and social responsibility for the largest companies that have an accounting obligation’ and that companies should ‘exhibit the maximum possible degree of transparency in connection with financial flows’ (White Paper 2009, pp.12-13).

<sup>54</sup> Question and answer by the leader of the Liberal Party and the Minister of Finance can be found at: <http://www.stortinget.no/no/Saker-og-publikasjoner/Sporsmal/Skriftlige-sporsmal-og-svar/Skriftlig-sporsmal/?qid=49156>. Accessed 07.02.2011.

<sup>55</sup> This is problematic as companies can choose not to give out business-related information. One interviewee has sent several letters to the company Brøvig asking them to comment on their involvement in Western Sahara, but he has not been able to reach the company, or even to speak to company representatives. Internet addresses and contact information are not always correct, and companies not responding to critical questions are unfortunately not uncommon (Haugen 09.02.2011).

should disclose information, and through which mechanisms. This is according to Donowich a misunderstood focus:

We don't think the avenues are the critical issue, the important issue is transparency. What steps (due diligence) have they(the companies) taken. Who has conducted assessments? What safeguards? And, most importantly, local people and the public at large need access to their assessments and policies so they can be independently vetted'

(Donowich, interview 20.02.2011)

Changing laws to ensure *greater* transparency and *less* business confidentiality is possible. The government has already changed legislation in certain sectors to ensure greater transparency. For example, the Ministry of Petroleum and Energy had to change the Petroleum Law in order to meet the expectations of the Extractive Industry Transparency Initiative, a sign-on initiative with the aim of promoting transparency in the extractive industries. This shows how voluntary initiatives are interrelated to hard law making, as addressed in the theory section (EITI 2010).

Examples have been given on how laws and political agreements directly affect Western Sahara, without explicitly having that as an aim or an intention. Steps that the government *can* and *should* take are thus also relevant to build corporate accountability. According to Radu Mares (2004) States can, and must, enhance the impact of corporate voluntarism so that responsible behaviour is spread more widely and is deeply deployed in the business community.<sup>56</sup>

#### ***5.1.4 The Norwegian Pension Fund***

The Norwegian State has played a contradictory, or at least an ambiguous role both in the way the policy on business in Western Sahara has been communicated, but also in economic terms, as the Norwegian State has benefitted economically from trade and investments in Western Sahara conducted by companies in which the Norwegian Pension Fund (situated under the Ministry of Finance) is a shareholder. Two cases have shown that the Norwegian Pension Fund has excluded companies involved in Western Sahara from their investment portfolio due to ethical considerations, while other cases remains disputed.

*Ministry of Finance investing through the Norwegian Pension Fund Abroad*

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<sup>56</sup>Mares (2004) gives an example by confronting companies with their own policy-papers and statements. If for example companies sign up for Global initiatives that set out to respect human rights, they can be pushed to allow for external scrutiny in these areas, through for example increased external monitoring machinery.

In 2001 a Moroccan State-owned company announced signing agreements with two leading players in the hydrocarbon industry, Total and Kerr-McGee, viewed in the eyes of Fisera (2004) as a drastic strategic step with potentially negative economic, geopolitical and legal consequences for the Morocco-Western Sahara conflict (Fisera 2004). At this time, The Norwegian Pension Fund held shares in Kerr-McGee. Organisations soon started to campaign, and urged the Norwegian Pension Fund's newly established Council of Ethics to advise the Finance Department to divest its shares in the company. As a result, 337 million NOK were withdrawn in 2005, and Kerr-McGee became the first Norwegian company excluded by the Pension Fund, since the Council found the firm contributed to a violation of international law, with reference to the UN legal opinion to 2002 (Council of Ethics 06.06.2005).<sup>57</sup> The decision of the Council of Ethics to advise a pull-out due to grave violations of ethical norms by Kerr McGee, have, according to NGO representatives, had several positive consequences in the field of business ethics, sparking public debate around ethical investments and respect for human rights (Ørstavik, *interview* 29.03.2011).

The other example is from 2002 when the Norwegian seismic services company TGS-Nopec announced that they had signed a deal to map oil resources in what they called 'Southern Morocco', opening it up for future oil exploration. In response the exiled government of Western Sahara quickly issued a statement saying that this was 'a shady deal which implicates all Norwegians', referring to the fact that the Norwegian pension fund was the biggest shareholder in TGS-Nopec at that time (NSCWS 29.01.2007). Khaddad from Frente Polisario stated: 'The deal seriously damages the image of Norway as a defender of international legality and human rights, since it contributes to justify an illegal occupation and theft of natural resources' (Upstream Online 2002).

In a meeting arranged by the Norwegian Support Committee of Western Sahara between TGS-Nopec and members of the Norwegian Parliament, TGS-Nopec was confronted with the criticism that their activities violated international law by wrongfully calling Western Sahara "South Morocco" and that their engagement helped hindering the Saharawi peoples' enjoyment of fundamental human rights.<sup>58</sup> TGS-Nopec continuously claimed that their

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<sup>57</sup> Letter available at: [http://www.regjeringen.no/mobil/nb/dep/fin/tema/statens\\_pensjonsfond/ansvarlige-investeringer/tilradninger-og-brev-fra-etikkradet/tilradning-om-uttrekk-2.html?id=91683](http://www.regjeringen.no/mobil/nb/dep/fin/tema/statens_pensjonsfond/ansvarlige-investeringer/tilradninger-og-brev-fra-etikkradet/tilradning-om-uttrekk-2.html?id=91683). Accessed 12.03.2011. The advice to divest was also followed by the investment fund KLP. Press release available at: <http://www.cisionwire.no/klp/r/klp-ut-av-kerr-mcgee,c157347>. Accessed 10.03.2011.

<sup>58</sup> A joint letter from several organisations was handed TGS-Nopec. See [http://www.vest-sahara.no/files/doc/Open\\_letter\\_to\\_TGS\\_shareholders\\_11\\_06\\_02.doc](http://www.vest-sahara.no/files/doc/Open_letter_to_TGS_shareholders_11_06_02.doc). (Accessed 02.02.2011)

business activities were not illegal, but extensive international campaigning eventually led to a massive shareholder pull-out, extensively reported in over 200 press articles in Norway.<sup>59</sup> Consequently, the company promised to finish its operations. TGS-Nopec nevertheless completed their contract, and provided the Moroccan regime with strategically and economically important seismic results (NSCWS 29.01.2009).

The Pension Fund and the Council of Ethics have been confronted with other cases similar to the Kerr-McGee case in recent years. In 2009, Norwatch disclosed the Fund's investments in eight international phosphate companies, all importing from Western Sahara, constituting 2/3 of all phosphate exports from the area, worth about 4,5 million NOK (Norwatch 05.10.2009). As in the case of Kerr McGee and TGS-Nopec, these are long-term and strategic investments *not* benefitting the Saharawi People. According to Erik Hagen in Norwatch:

It remains a mystery why the Fund has not yet excluded the phosphate importers from the portfolio. We are talking of mainly four-five firms with long-term trade agreements of phosphate rock from the territory. They are fully aware of the role they play, some even defend the Moroccan occupation in political statements, and are the main funders of the occupation. Looking at the guidelines of the pension fund, I do not see any ethical or legal difference between an oil company with an option to extract future oil deposits in Western Sahara on one side, and a phosphate company with decades long supply arrangements for phosphate rock from the territory. A conscious purchaser of stolen goods is just as guilty – or unethical – as the thief.

(Hagen, *interview* 30.04.2011)

So far, the Council has not recommended more divestments regarding Western Sahara. It recognises that concepts like “strategic”, “legitimacy” and “complicity” can be hard to address when the Council has to follow strict criteria in their ‘Ethical Guidelines’.

Geographical reasons is not enough for exclusion from the Fund, as there is a need for a direct link between human rights abuses and the companies’ actions (Council of Ethics 2010). This *differs* from the Ministry of Foreign affairs’ approach to advice all companies to refrain from investing in the area. For a company to be excluded, it needs to be treated as a unique case, and excluding *all* companies is therefore, in the Council, very problematic. In the words of one of the Council’s members: ‘Simply excluding all companies which have investments in Western Sahara from the portfolio of the Fund would be like opening a Pandora’s box’ (Goyer, *interview* 08.02.2011).

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<sup>59</sup> A letter sent to 51 seismic exploration companies world-wide informed them of the “political risks” at stake in the region and made it clear that any company involved with Total and KerrMcGee would become targets of ‘massive negative public relations, shareholder sell-outs and possible law-suits’ (Fisera 2004).

However, the Council emphasises that they are consistently conducting scrutiny of the Fund's investments and have excluded several companies violating ethical norms (ibid). The Council of Ethics plays an important role as a pioneer in excluding companies, and is often followed by other investment funds.<sup>60</sup>

In this section we have seen that different Ministries operate with different definitions and guidelines regarding Western Sahara, and that the Advice issued by the Ministry of Foreign Affairs is not clearly written, sufficiently communicated or coherently understood. The next section will assess companies previously or currently involved in Western Sahara and their reactions to the discouragement policy, the arguments they use to defend their positions, and also their willingness to change if public pressure increases.

## **5.2 Private Company Investment**

In addition to the partly state-owned companies, Yara and Cermaq, another 20 companies involved in different sectors, either as producers, exporters or importers of goods from Western Sahara have been assessed (see Appendix III). This section will describe the main characteristics of the involvement of these companies in Western Sahara, and which factors are fuelling, as well as hindering companies from different industries from pulling-out. The main issues identified are firstly, whether companies stay or pull out; secondly, the business secrecy; thirdly, companies operating in grey areas of Norwegian law, and fourth, which sanctions most effectively influence companies.

### ***5.2.1 Companies reaction and arguments***

According to the Norwegian government approach to CSR, and the “business case for CSR” addressed in Chapter 2, it should be in a company's self-interest to *refrain* from investing in Western Sahara. This assumption will be challenged in this section, as only one of the 22 companies included in this case study has pulled out from Western Sahara by its own initiative and without external pressure. In addition, none of the companies have pulled out exclusively as a result of initiatives or sanctions taken by the Norwegian government, although the governments' involvement seemingly did somewhat fuel these decisions. This leads to the questions of whether CSR policies based on the “willingness of businesses to do good” are the best approach.

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<sup>60</sup> The Norwegian Pension Fund has received criticism for also investing in Burma (also a no-go-zone in the Government's CSR policy). Donnowitch in the organisation EarthRights stated that (interview 22.02.2011)

### *Shipping industry*

Although few companies have pulled-out entirely of their own accord, the shipping industry is an example of how companies in fact did withdraw from the area after being provided with information about the unethical side of their business ventures. The shipping companies R-Bulk, Arnesen Shipbrokers, Atlantic RTI, Vaagebulk IV and Jinhui Shipping have all leased out vessels for the use of transporting either fish products or phosphate rock from Western Sahara to Norway. When confronted with criticism from the Norwegian Support Committee for Western Sahara (NSCWS) regarding their involvement, these companies responded by claiming to be unaware of the situation in the area, and that they did not know the exact use of the vessels being leased out (NSCWS 24.3.2009).

However, the explanations from shipping CEOs ranged from accusing the government of not providing extensive enough guidance (Arnesen Shipping), to blaming the lack of international exclusion or boycott of Western Sahara (R. Bulk to NSCWS 30.05.2008). Jinhui Shipping was registered on the Oslo Stock Exchange, but was based in China at the time. They were confronted by a local Chinese newspaper, after the Norwegian Support Committee had been in contact with editorial staff. The Norwegian investor bank, Storebrand, also became involved in influencing Jinhui (NorWatch 05.06.2008). All of these shipping companies ended up publishing statements assuring that no further involvement in Western Sahara would take place, but their *future* plans for the due diligence processes differed. The CEO of Wagle Chartering, Bjørn Borge, stated that his companies will ‘convey their attitude to future partners’ (NSCWS 24.03.2009), while Atlantic RTI promised to even include a clause in future agreements defining Western Sahara as a “no go zone” (Afrika.no 20.03.2009). The latter example shows how shipping companies can implement political and geographical control mechanisms (in theory and practice), to ensure that their vessels are not used to violate human rights, a so called “step of due diligence”. The CSR spokesperson for the Norwegian Shipping Association was during an interview reluctant to confirm that shipping companies *have the ability* to track their vessels. Saying that ‘whether a company has the possibility to monitor its supply chain vary from company to company’ (Böhler, *interview* 01.04.2011). According to Swedish investigating television program, it is nearly impossible for the public to know how controlled the shipping business is, much due to business confidentiality (SVT 03.03.2010).



### *Fish oil industry*

Shipping companies can easily send their vessels elsewhere. By contrast, companies within the fish oil industry are more reluctant to change their behaviour. The Norwegian Support Committee for Western Sahara reported in 2007 that Norway is probably the biggest importer of fish oil from Western Sahara. Since then, the business has been criticised for its immoral and exploitive role in the occupied territories (NSCWS 23.03.2007).<sup>61</sup> Several business representatives from this sector have continued either to refuse to give out information, or publicly defended their case, by rejecting the problematic aspects of their business. Many companies blamed the Norwegian government's lack of information provision. For example, after being exposed by Norwatch, CEO Hans Martin Iversen of Eimskip-CTG stated that the company had never received any information about Western Sahara from the government, and that they could not find any information on the MFA homepages, nor did they receive any information from the embassy in Rabat. As such, he saw no problem in continuing with the business (NSCWS 07.07.2007). Similarly, the CEO in Sjøvik Groups stated: 'The MFA is hiding behind a "guidance policy" that I put little emphasis on' (NSCWS 13.09.2009). Some companies also claimed that their involvement benefitted local people in Western Sahara, as illustrated by the following quotes: 'We provide jobs for the poor, and this is benefitting the local people' (Sjøvik, *Bergens Tidende* 10.03.07). 'By providing sensible jobs we promote peace' (KB Fish to Norwatch 07.12.2006).<sup>62</sup> 'As long as business initiatives are benefitting local people, GC Rieber Oil's assessment is that continuation of business can go on' (*Ny Tid* 15.04.2010).

Companies have also operated with double standards in their rhetoric. On one side they do not want to be seen as political actors, by stating things like: 'It is not up to small businesses to engage in foreign politics' (Sjøvik to NSCWS 11.03.2007). On the other hand they boldly comment on political issues: 'The area is Morocco, not an occupied territory' (Wiedsvang, KB Fish to Norwatch 07.12.2006); 'The Norwegian press should view the conflict from both sides' and 'Western Sahara is Moroccan, whoever thinks differently has misunderstood'

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<sup>61</sup> It takes 600 sardines to create one box of Omega-3, and fresh fish from the coast of Western-Sahara were used to create Omega-3, instead of feeding the local people, or being sent to the refugee camps as the resources of the rightful owners (SVT 03.03.2010). The company GC Rieber has been involved in Western Sahara for ten years, and represented 56 % of all fish oil imports from Western Sahara in 2009 (NRK 21.04.2010).

<sup>62</sup> In 2006 KB Fish produced 100,000 tons of sardines and 20,000 tons of fishmeal, exported to Egypt, Spain, the UK and Turkey. The company exported 10,000 tons of fish oil to Norway and the UK earmarked for fish farming and health products. KB Fish had in this period a daily production of around 600 tons (NSCWS 29.01.2007) Wiedeswang has refused to provide information on why he sells fish oil to (Norwatch 07.12.2006).

(Fiskaren 07.05.2010). The company Finsam has used the highly political phrase “Laayoune in Morocco”<sup>63</sup> (NSCWS 07.01.2007). The CEO of Finsam similarly stated: ‘I see nothing wrong in delivering products to Western Sahara, as we have extensive economic ties to Morocco’ (Lauvrak 2005). In an email correspondence initiated for the purpose of this study, the company Gearbulk stated that their 60 % Norwegian owned company is ‘not a Norwegian company’, although it is partly owned by Norwegian interests, and that they conduct no business with parties *in* Western Sahara’. In truth, this company exports phosphate from Western Sahara on behalf of a company from New Zealand (Gearbulk *email* 27.05.2011).

Clearly, some companies are reluctant to end their engagement in Western Sahara and keep arguing in political, social and economic terms to legitimise their business involvement. According to interviewees within campaign organisations this behaviour correlates with the firm’s financial investments. ‘Companies which are deeply financially involved seem to be less likely to change their behaviour, regardless of negative media attention’ (Hagen, *interview* 16.01.2011).

As mentioned earlier, one of the assessed companies did actually withdraw their involvement in Western Sahara seemingly without pressure. The sea surveillance company Kongsberg Seatex met with the Morocco navy to negotiate the sale of sea surveillance equipment. The Norwegian company brought a UN map to the negotiating table, while the Moroccan delegation brought a map including the Western Saharan territories under Moroccan jurisdiction. Consequently, Kongsberg Seatex decided in April 2010, not to go through with the deal, informing the news service Norwatch that: ‘We could not be certain that the equipment would not be placed in Western Sahara’ (Norwatch 10.05.2010). This is another example of how sufficient due-diligence can prevent companies entering into agreements violating human rights.<sup>64</sup>

### **5.2.2 Business Secrecy**

There are likely to be many companies involved in Western Sahara which the public will never know about. Clandestine business structures hinder insight in different industries. The

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<sup>63</sup> Laayoune is the capital of Western-Sahara, see Appendix I.

<sup>64</sup> Kongsberg Seatex’s decision was made at the same time as fish oil importers were being heavily criticized in the media, and only a few days before Norwatch independently found out about the negotiation, and contacted the company to ask about the possible deal. As such, this *due diligence* could also be seen as fear of future criticism and negative publicity.

fish oil industry has been particularly difficult to map. One of the leading importers, Naphro Parma, refused to provide information about the business, and in a hidden camera interview, admitted its strategic interest in maintaining low levels of transparency (SVT 03.03.2010). A representative of the company explained to an undercover reporter from the Swedish television programme *Uppdrag Granskning* that secrecy in the fish oil business was in fact an important factor in keeping up the business. He first expressed concerns about how attention around oil imports could cause problems for the industry, though continued by stating that things would normally ‘calm down’ when investigating journalists got some answers: ‘Then, five or seven years passes until next time a journalist wants to write on these issues again’ (SVT 03.03.2010).

Another example of how the industry wishes to protect its business from public scrutiny, is the trading firm Chr. Holtermann ANS. This company facilitated trade between local contractors from within Moroccan and Western Saharan with global purchasers. The company is unsurprisingly reluctant to disclose information: ‘We are brokers and bound by confidentiality. It is against our policy to comment on such matters, and I think that I could be legally held accountable if I did’, said CEO and Chairman Jens Christian Meinich to the news service budstikka.no (*Budstikka* 2010).

Paul Donnowitch working for the international organisation EarthRights, states that increased transparency is crucial to create more responsible businesses, and that companies should be much better at disclosing information: ‘Often companies claim their contracts prevent them from disclosing information; however, when we see the contracts, it is clear they can disclose much more comprehensibly than they do’ (Donowitch, *interview* 20.02.2011). When companies do reply, he finds that ‘often these responses are more CSR and public relations than substantive responses to information on abuses or harmful practices’ (ibid).

### **5.2.3 Laws and regulation**

As mentioned previously, law and regulations do not have to be explicitly aimed at company conduct abroad for them to be relevant. Enforcing and clarifying already existing laws can prevent companies from taking escape routes. In assessing the companies involved in this case-study, several examples of situations where companies operated in the grey-zones of Norwegian law arose.

Companies importing from Western Sahara have repeatedly wrongly registered their port of origin to be Tan-tan in Morocco, when in fact it is El Aaiun in Western Sahara (SVT

03.03.2010). This could be a violation of Customs regulations, but perhaps ‘serious enough’ to be legally sanctioned for it. Importers have also intentionally given out wrong information, claiming imported fish oil to be from South-America, when in fact it was from Western Sahara. To wrongfully guarantee that products hold “100 % non-Western Sahara oil” can, in the opinion of legal scholar Sjøfjell (*interview* 14.03.2011), be problematic with regard to market regulating laws, as customers usually have the right to know what products contain.

One of the most illustrative cases of the relationship between hard law and ethics is the case of the fish-oil importer GC-Rieber. In April 2010, Friends of the Earth Norway discovered that GC Rieber had avoided tax payments from fish oil imports, by wrongly declaring the fish oil under the category “human consumption” rather than the correct term “animal consumption”. At this time, the CEO of the company, Paul-Christian Rieber, was also the head of the Confederation of Norwegian Enterprises, the biggest business organisation in Norway. The persistent media attention soon made Rieber step down from this position (NRK 24.04.2010), and Rieber later received a historical penal demand for violating Norwegian Custom laws.<sup>65</sup> In April 2010, GC Rieber stopped its trade in Western Saharan fish oil, claiming the reason to be that their leading customer, the company Ewos, withdrew their cooperation (NRK 22.04.2010). According to Gunnar Album of Friends of the Earth Norway, who participated in the exposing GC-Rieber’s fish oil trade, ‘Norwegian laws regulating the fish oil industry are very vague, and it is nearly impossible to get an overview of exports from Morocco as well as imports to Norway. As such, I have no idea where the fish-oil from Western Sahara is ending up today – and I really would like to know’ (Album, *interview* 23.05.2011).

Another example of an action in violation of business ethics, and perhaps also Norwegian legislation, is when the company TGS-Nopec altered an old press-release wording from ‘South Morocco’ to ‘North Africa’ without changing the date it was issued.<sup>66</sup> Regarding this case, law scholar Sjøfjell holds that retroactively change relevant business information is certainly in breach of good business behaviour (Sjøfjell 14.03.2011). In addition to the examples above, a number of *lies* have been told by companies regarding their involvement. As noted by legal scholar Sjøfjell ‘*lying* is not illegal by itself, but if it is covering up illegal

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<sup>65</sup> GC Rieber has stated it will appeal the fine on the basis that Western-Sahara is, according to CEO Rieber, included in the Norwegian free trade agreement EFTA, a claim rejected by the Norwegian government (Bergens Tidene, 04.05.2011)

<sup>66</sup> The first press-release is available at: <http://www.vest-sahara.no/index.php?cat=64&art=308>. Accessed 13.04.2011.

activity it is problematic, and could have legal implications. In addition, it should also have a reputational cost' (ibid).

As mentioned in the previous parts of this thesis, the "business case for CSR" relies on voluntary actions from the company and that the sanctions should come from the market and consumers. This section has shown that companies definitely are reluctant to change their behaviour. In addition, all interviewees from civil society confirmed the same statement that 'consumer power is not working at all, and is no solution' (Hagen, *interview* 16.01.2011, Ørstavik, *interview* 29.03.2011). Cermaq's spokesperson also confirmed that there is no visible damage to the reputation or economic loss in terms of costumers. Other sanction must therefore be sought. The next section addresses the core challenge in the situation, namely the lack of sanctions imposed by the government, and that is up to NGOs to do 'the government's job'.

### **5.3 NGOs as Key Players**

#### ***5.3.1 Relationship between the government and companies***

Foregoing sections of this thesis and interviews with representatives from the Ministry of Foreign Affairs confirm that the Norwegian authorities have a fairly traditional view of regulation, emphasising that they 'can only hold companies legally to account, if the companies' actions are in clear violation of Norwegian law' (Nordheim, *interview* 05.05.2011). From this perspective, giving recommendations is not legally binding and thus entails few sanctions. However, although no company pulled-out exclusively due to the government's advice, most of the companies assessed *did* pull-out.<sup>67</sup> This section explores civil society and the media's roles in pushing for this to happen.

To understand how the government should improve its practices, it is important to understand the relationship between government and relevant organisations' roles and actions. NGOs and the media have undoubtedly been successful in publicly naming and shaming companies, thereby pushing them to pull out of Western Sahara. It has to be noted that the government recognises the importance conducting this type of work, stating in the White Paper that NGOs 'play key roles in the promotion of socially responsible behaviour in companies' (White Paper

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<sup>67</sup> It is unknown which companies are involved today, but according to organisations at least four companies have continued their activities even after being confronted.

2009, p.101). However, the government appears not to wish to engage in this type of work itself, having no investigating committee to track, question or control the conduct of Norwegian companies abroad, and providing no explicit funding for such work.

To illustrate: In launching the White Paper, the Minister of Development Erik Solheim announced that he expected the media and civil society to play their role as the watchdogs. During an interview, legal expert Taylor later noted that he wished to respond to the minister with ‘I then believe you will provide 100 million NOKs to fund civil society to conduct that work’ (Taylor, *interview* 05.04.2011).

Investigating possible human rights abuses by companies is extremely time and resource consuming, as well as demanding professional skills in the field of business, economics and politics. Consequently, NGO representatives interviewed in this research lamented a lack of capacity, time and money to do what Solheim calls *their job* despite being willing to do so (Ørstavik, *interview* 29.03.2011, Sand, *interview* 04.04.2011, Album, *interview* 23.05.2011).<sup>68</sup> In spite of limitations and lack of resources, NGOs have in the case of Western Sahara been persistently seeking to understand the complex field of corporate behaviour and regulation and have often pushed the right buttons. One of the organisations effectively seeking influence is the Norwegian Support Committee of Western Sahara,<sup>69</sup> which is behind many campaigns against Norwegian companies. The organisation has few members, no offices, and relatively limited resources available with only a few persons active in trying to push Norwegian companies out of Western Sahara. Also Future in Our Hand’s news service *Norwatch*, Friends of the Earth Norway, Greenpeace and Norwegian Peace Association have been active in investigating and campaigning.<sup>70</sup>

Also various student and university based organisations, most importantly The Norwegian Students’ and Academics’ International Assistance Fund (SAIH), have been active in calling

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<sup>68</sup> Informants from other organizations lamented that they do not in fact have enough money to conduct investigative journalism at all. As a result they are dependent on other organisations in providing information. One of these organisations was the Burma Committee which is currently aware of several companies operating in Burma, but due to shortage of staff and resources have no possibility of following up on these cases (Sand 2011).

<sup>69</sup> The NSCWS was founded in 1993 and has since then provided research and information about the Moroccan occupation and resource exploitation, seeking to break the link between human rights abuses and the trade in resources.

<sup>70</sup> Many campaigns regarding Western Sahara results from joint efforts between different organisations. An example is the 2002-campaign where 31 Norwegian NGOs sent a joint letter to the Moroccan government asking it to give back the human rights activist Sidi Muhammed Daddach’s passport (Hansen 05.12.2006).

on the Norwegian government to take actions,<sup>71</sup> and have organised student stunts, for example by preventing Fugro-Geoteam's participation in "corporate commercial days" arranged by the University.<sup>72</sup>

### 5.3.2 Campaign methods

As seen in the previous section, it is challenging to get access to information (both from the companies and from the government) on agreements, supply chains, and company structures regarding Norwegian companies in Morocco and Western Sahara. As such, innovative research methods and campaign strategies have proved effective.

For example, in 2007 the Swedish program *Uppdrag Granskning* established a phony company to obtaining information about the fish oil industry within the sector itself (SVT 03.03.2010). When the undercover journalist presented himself as a business man, he met a more open and talkative business sector, enabling the mapping of the supply chains for fish-oil from Western Sahara, through the port of Morocco-Agadir, and all the way to Scandinavia. Investigative journalism has also been conducted by organisations and individuals. Searching databases, statistics, websites and even buying information from shipping surveillance companies (Lloyds Ships Monitoring System) has helped to establish a foundation for allegations, before confronting companies and asking for more extensive information. Several NGOs mention that if firms refuse to disclose information that in itself sheds a bad light on the firm's image. But the situation is changing. All the informants stated that companies are much more likely to give out information now than for only a few years ago. However, in line with "the business case for CSR", and in the words of Donowitch: 'often these responses are more CSR and public relations than substantive responses to information on abuses or harmful practices' (*interview* 22.02.2011).

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<sup>71</sup> University of Blindern's AUF group's (Young Labour Party) appeal to the government is available at: [http://auf.goliathdns.no/lib/document\\_get.php?id=16628&path=16628-orig-8a7465a25113a30aaa397442f7c8c70f.pdf](http://auf.goliathdns.no/lib/document_get.php?id=16628&path=16628-orig-8a7465a25113a30aaa397442f7c8c70f.pdf). Accessed 07.05.2011.

<sup>72</sup> See Student newspaper available at: <http://universitas.no/nyhet/55287/etikksjon-mot-uo> and <http://universitas.no/news/54029/co-operates-with-criticised-company/>. Accessed 07.05.2011.

### 5.3.3 *International focus*

Broad networks enabling extensive international campaigns have also been important in influencing Norwegian companies. In September 2010, 799 organisations and about 20,000 people signed a letter to the European Commission, asking them to stop EU fisheries in Western Sahara.<sup>73</sup> To influence a company as to pull out from Western Sahara can be done through different channels. When the Scandinavian fish oil importer Napro Pharma was exposed, the international NGO Western Sahara Resource Watch sent a joint letter with the former EU-parliamentarian Margot Kessler to Napro Pharma's parent company Cognis. This company again turned to Naphro Parma, which later chose not to continue its purchase of Western Sahara fish oil (NSCWS 19.09.2009). In addition to confronting companies, organisations have also lobbied politicians and decision-makers, and encouraged them to arrange joint meetings with companies and the organisation, using the "official policy on business in Western Sahara" as a legal and normative tool. By forwarding copies of unanswered letters addressed to companies to government departments, politicians, CSR-initiatives, complaint mechanisms and other stakeholders, the pressure on companies increases. Another step up the 'regulation ladder' happened in 2009, when the NSCWS launched a formal complaint against the seismic company Fugro-Geoteam for violating the OECD Guidelines for Multinational Enterprises,<sup>74</sup> (NSCWS Complaint 14.12.2009). The process ended with Fugro Geoteam stating: 'Fugro Geoteam does not expect to be involved in other projects in the foreseeable future in the Western Sahara area' (Fugro letter 12.02.10).

Although organisations have published information and their company-research online and to a certain extent on paper, Swedish Television (SVT) and the Norwegian State Channel (NRK) have played key roles in spreading information to the public. It is apparent that some cases have received more extensive press coverage than others, and that whether or not the company ended their involvement also depends on the amount of media pressure, and how important it is for that company to behave 'morally'.<sup>75</sup>

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<sup>73</sup> The letter and the supporting organisations available at: [http://www.fishelsewhere.eu/files/dated/2010-12-25/signatories\\_ec-fish\\_28.09.2010.pdf](http://www.fishelsewhere.eu/files/dated/2010-12-25/signatories_ec-fish_28.09.2010.pdf). Accessed: 13.04.2011.

<sup>74</sup> The exiled government simultaneously sent several letters to the Security Council, using legal arguments and referring to the 2002 legal opinion to establish that Fugro's actions were illegal (WSRW 20.04.2009).

<sup>75</sup> The TGS case was referred to in 200 articles in a variety of news channels (NSCWS 29.01.2007) The CEO explicitly referred to media pressure when he stepped down from being the president of NHO (Norwegian Trade Organisation) (NRK 24.04.2010).



Since companies are not *strictly* violating Norwegian law, trying other possible ways to influence companies has been central in NGO and civil society approach to the Western Sahara situation (civil regulation). In Mares' words: 'The exact form of accountability is less important than the existence of some process for stigmatizing the offender, aiding the victim, informing the society, and ensuring that political settlements and transitions take account of human rights abuses' (Mares 2004, p.370). However, one has to critically address the implications of a society where NGOs and civil society are assumed to do what seemingly is in the government's mandate, particularly in the field of human rights. Noted by Bendell (2005) is that NGOs (just as companies) must be held democratically accountable towards the people they affect, as there can be tensions and contradictions between NGOs in developed States and people in developing countries. Furthermore, governments cannot escape their democratic duties towards the people by leaving the job of holding companies accountable to organisations.

#### **5.4 The State's Duty to Protect Human Rights in Practice**

In assessing CSR this study shows that pure voluntary and pure legalistic approaches have their downsides and weaknesses. Recalling theoretical contributions, one must look not only at the limitations, but also at the possibilities that the "beyond compliance" definition of CSR opens up for. It is necessary to acknowledge that legal and non-legal mechanisms are interlinked and that law and decision making can also involve picking up and implementing normative trends and best practices (Buhman 2010, Sjøfjell 2011). The government has also established that CSR extends beyond a company's statutory obligation to comply with national legislation. 'It may also be a matter of complying with legislation that is not properly enforced by the local authorities' (White Paper 2000,p.8).<sup>76</sup>

The Cermaq-case of 2010 shows that the government (although being criticised by the companies involved for speaking with two tongues) is willing to use the State's power and political pressure to steer businesses in the right direction, preventing them from violating established norms and laws.<sup>77</sup> The CSR "definition of beyond compliance" could arguably

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<sup>76</sup> The Norwegian government has clearly stated that companies' responsibilities should go beyond what is regarded as law: 'CSR extends beyond a company's statutory obligation to comply with national legislation. It may also be a matter of complying with legislation that is not properly enforced by the local authorities' (White Paper 2009, p.8).

<sup>77</sup> This should not be merely a 'one time only' occurrence, but on-going in the cases of the radio equipment company Comrod and the weapon producer Nammo, despite these companies' arguments that they are not *directly* supplying Morocco with the equipment, and hence not *directly* violating Norwegian law.

mean that the State has a duty to take proactive steps to ensure respect and compliance with internationally recognized human rights, but also that close cooperation with companies and voluntary steps by the business sector is required. As noted from the state-owned company Cermaq:

We have been through a learning process and are still changing, but applies generally changing requires more than guidelines and policies, it requires changes in attitude and commitment from people throughout the organisation.

(Bergan, *interview* 25.05.2011)

As the main sponsor of Ruggie's Framework,<sup>78</sup> the Norwegian government has expressed the wish to be amongst the first to implement pillars from his framework. In this regard, the following points are relevant to the case of Western Sahara: First, there are no human rights from which companies are exempt from respecting (including the fundamental right to self-determination). Second, States have discretion to decide what measures to take in protecting against human rights abuses, but treaty bodies indicate that both *regulation* and *adjudication* of corporate activities vis-à-vis human rights are appropriate. Third, companies are expected to obey the law, even if it is not enforced, and to respect the principles of relevant international instruments (of human rights) where national law is absent. Last, companies are required to conduct due diligence - a process whereby companies not only ensure compliance with national laws but also manage the risk of human rights harm with the aim of avoiding it (Ruggie 2010).

The government has the opportunity to utilise pre-existing norms and expressed views, and embrace efforts to undertake due-diligence steps made by some *leading ethical companies*. This study has shown examples of due diligence steps, like the efforts of certain shipping companies to map supply chains and include this in their contracts, and Kongsberg Seatex's refusal to contract with Morocco on the basis of its use of an occupation map are examples that need to be embraced, followed and highlighted as 'best practice'.<sup>79</sup> Companies should be given an opportunity to *know and show* that they respect human rights, as both negative and positive publicity enhance business responsibilities and ensure increased transparency in the

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<sup>78</sup> The framework '*Protect, Respect and Remedy*', addresses how governments can secure the protection of rights, how companies should respect human rights, and how access to remedies by victims should be ensured.<sup>78</sup> It is the result of three years of research into human rights abuses by companies, standards of international and domestic law and other related subjects, followed by consultations with civil society, businesses, States and UN organs (Ruggie 2008).

<sup>79</sup> Mapping supply-chains is of increased importance in a globalised economy. According to Porter & Kramer 'Virtually every activity in a company's value chain touches on the communities in which the firm operates, creating either positive or negative social consequences' (2006, p.7).

business sector.<sup>80</sup> The institutions of the Council of Ethics of the Norwegian Pension Fund and the OECD National Contact Point are two mechanisms that have both limitations and potentials in this regard.<sup>81</sup> They have great potential in creating norms and changing business behaviour as they represent “power of money and the power of State”, both providing negotiation leverage when facing companies (Goyer, *interview* 08.02.2011, Røttingen, *interview* 04.04.2011). The Contact Point is a complaint mechanism based on the OECDs guidelines on multinational enterprises which were renewed in April 2011 to further strengthen human rights perspectives, based on the Ruggie Framework.<sup>82</sup> Due-diligence in supply chains and capacity building between companies and their suppliers is emphasised (MFA 29.12.2011). This gives the Contact Point a unique basis to focus on human rights in their general information work and when taking on cases.

This chapter has examined government, company and NGO roles in regards to Western Sahara. The Norwegian government has to a certain degree been passive and reluctant to go *further* than referring to the advice on business in Western Sahara, and in many ways its approach is ambiguous. The companies involved in this study share similar ways of addressing their business behaviour. When confronted by civil society on their investments, companies seek to protect their reputation by using legal, economic and political arguments to justify their case, emphasising the non-legal nature of the “policy of advice”. Companies often blame the Norwegian authorities for having an unclear position and for not providing sufficient information. As only one of all the companies examined has pulled out without external pressure, the strategies chosen by the government can be said to have had limited influence by itself.<sup>83</sup> NGOs and the media have successfully and innovatively researched, questioned and publicly named and shamed Norwegian companies, as well as urging other stakeholders to act. As of today, the work of these organisations represents the resilient sanctioning mechanism in the case-study, whilst one of their strongest cards has been

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<sup>80</sup> Other suggestions from civil society in Norway are to establish an ‘Ombudsman for business’, and an Ethical Council for all Norwegian companies operating abroad (Ørstavik, *interview* 29.03.2011). None of these initiatives have been met with willingness from the government, and according to the *interviewee* from MFA Genève, an Ombudsman is not a likely option.

<sup>81</sup> In the National Contact Point, seven cases have since 2000 ended in findings against companies. Recently changes in the secretariat and the board have been made with the Contactpoint moving away from the ‘Section to promote business’ within the Ministry of Foreign Affairs, to become a more independent complaint mechanism. Human Rights considerations are to a greater extent than before to be included. The aim is to name and shape companies as well as to establish “best practice” (Røttingen, *interview* 04.04.2011).

<sup>82</sup> The new guidelines regarding human rights, state, in accordance with the Ruggie Framework, that companies should not infringe negatively on any human right (MFA 29.12.2011).

<sup>83</sup> The company Skretting reported in 2006 that they do not buy fish oil from Western Sahara due to the advice from MFA (NSCWS 16.10.2006)

appealing to moral norms and human rights. Last in this chapter reflections have been made on whether the important job of holding companies to account should be left in the hands of NGOs, and that the State's possible avenues to protect human rights are not merely legal, but also (as shown by the NGOs) could rely on normative and political pressure. According to Eileen Babbitt (2006) in her study of rights-based conflicts, the first criteria for change is to establish the view that international norms (and particularly respect for human rights) are at stake. In Zunes & Mundy's words 'supporting Morocco has to become embarrassing, as did supporting apartheid South Africa and Indonesia in East-Timor' (2010, p.263).

## **6. Conclusion**

Multinational companies (MNCs) have increased their significance over peoples' lives and peoples' enjoyment of human rights across the globe. So far no international authority can hold companies directly responsible, and States have been reluctant to introduce legal regulations to prevent companies from being complicit in human rights violations.

The present study has been inspired by this issue. It has examined the case of Norwegian companies operating in Western Sahara. The findings in this thesis originate from two research questions:

- In what way have the Norwegian government, companies and NGOs dealt with the issue of Western Sahara, and how efficient have these approaches been?
- What measures should the Norwegian government take to hold Norwegian companies operating abroad accountable towards human rights?

Findings related to the first research question have resulted in mainly descriptive accounts of the approaches and actions of the stakeholders, while the second has produced more normative findings.

### ***The Norwegian government's approach***

Within the Norwegian context, companies' responsibilities to respect human rights have mainly been dealt with within the broader discourse of the concept "Corporate Social Responsibility" (CSR). Through the Norwegian government's understanding of CSR as voluntary and by seeing companies as generally eager to do 'good', the avenue through which

they have chosen to address the situation in Western Sahara is to issue a policy discouraging companies from conducting business in the region. This paper has found that this policy has been vague, passive and ambiguous in both the way it has been formulated, as well as communicated. The government has predominantly been criticised for their dual position in expressing different views to companies on one side and to the public on the other, but also for their different approaches between different ministries, and the general lack of sanctions.

Drawing on the theoretical framework used in this paper, the CSR approach to Western Sahara adopted by the Norwegian government is characterized by a dichotomy separating legal measures and voluntary efforts. This has practical implications. By excluding legal and semi-legal measures from the framework of CSR, the government overlooks the possibility to steer and sanction companies in various ways, and reduce the government's ability to hold companies to account for their actions abroad. The voluntary focus also leaves gaps and loopholes which some companies willingly exploit.

Furthermore, the government does not, in its current approach, recognize the extent to which other policies not framed as corporate social responsibility affect the possibility of CSR to succeed in its aim. This thesis has pointed out several unintended effects that policies, generally understood as outside the purview of CSR, have had on the situation in Western Sahara. This includes passing laws that prevent transparency in the business sector and signing trade-agreements with unclear rules. There are also numerous examples where companies in Western Sahara have operated in grey-zones of Norwegian law. This paper asserts that clearer rules and increased transparency could have prevented some situations of corporate complicity in human rights violations.

### *Corporate approaches*

This thesis found, through assessing 22 companies and their relation to Western Sahara, that most of the companies in the region also found the government policy vague. The companies showed few signs of willingness to freely pull out of the disputed area of Western Sahara, and they used a variety of arguments for defending their involvement. These included the ambiguity of the government's policy and the assertion that their businesses actually benefit the local people. Moreover, they emphasised that their business conduct was not in violation of international and national law. However, one of the most important findings is that in situations of increased public pressure, most companies did decide to terminate their engagement in Western Sahara, largely due to public pressure from organisations and the

media. There are also examples of companies taking due-diligence steps to ensure that their business avoids doing harm in the future. This included tracking their supply-chain and refraining from negotiation if they saw that their involvement *might* be in breach of good corporate ethics.

### ***Approaches from the NGOs***

Civil society, as well as the media, has played an important role in putting Western Sahara and Norwegian corporate engagement on the public agenda. Their main strategy is exposing business activities in Western Sahara, and publicly “naming and shaming” companies to pull out. They do this by using the government official policy as a “campaign tool”. Lack of transparency within the business sector, in addition to reluctance from the government to disclose business information, has challenged the organisations’ ability to succeed in their aims. However, this thesis has found that due to innovative, focused and creative research and campaigning (both nationally and internationally) the civil society and media players have successfully managed to influence companies’ behaviour. As noted in the last section of this paper, organisations efforts can and should not substitute the State’s duties to protect against human rights violations committed by companies.

### ***Efficient?***

The observations and findings of this thesis point to some suggestions as to which avenues have been most efficient in reaching the goal of getting companies to refrain from legitimizing the occupation of Western Sahara. All approaches have limitations as well as possibilities. While the government may have good intentions, the avenues chosen have not been effective. It is hard to measure success regarding Western Sahara, as some companies willingly pulled out, while others persistently choose to ignore their moral obligations taking advantage of the lack of laws explicitly prohibiting their involvement. Some companies benefit from unclear rules, general confusion and a lack of transparency, while others show signs of frustration with the unclear situation, as they are left exposed to public shame while the government remains silent. This blurry context challenges NGOs, who have little resources available and are “industry outsiders”, regarding getting access to information. However, the “beyond compliance” definition of CSR creates opportunities for civil society to embrace emerging norms and moral arguments, and demands businesses to do the same.

## *Measures*

This research has shown that the Norwegian government is not sufficiently managing to meet its own expectations regarding Western Sahara. Recalling the normative ambitions of this paper, obstacles and possibilities for future policy work in this area will be touched upon, before more concrete recommendations will be provided.

As seen in the theoretical section and emphasised empirically in the analysis, a perception of CSR as being based on voluntary actions by the business sector results in a CSR policy which, on the ground, is ill-equipped to deal with one of the most fundamental human rights - the right to self-determination. Therefore, further focus must be given to alternative understanding of the opportunities provided by different types of regulation. Combining voluntary and binding measures can have reinforcing effects on regulation. Additionally, the Norwegian government must seek to extend its involvement in CSR beyond solely adopting non-enforceable measures such as their policy on Western Sahara. To combat human rights violations committed by the corporate sector, both preventive and punitive action must be taken. Additionally, positive measures such as highlighting “best practices” and “good due diligence” can complement the focus on providing sanctions for unwanted behaviour. International mechanisms and initiatives have gained increased attention and should play an important role for Norwegian stakeholders. However, this thesis has argued that taking a lead in this field means going further than just adhering to the global consensus.

The Norwegian government recognizes the great potential for Norway to be a leader in the field of business and human rights. The government also recognizes the concept of CSR as a dynamic concept in constant change: ‘Corporate social responsibility, with its attendant norms and standards, is evolving constantly as new knowledge is acquired’ (White Paper 2009). The hope for the future is that the government takes this seriously and seeks to steer the development of CSR in a direction based more on reality than loose aspirations and blurry concepts.

## 7. Recommendations

*On the basis of the foregoing research the following recommendations are made in respect of practice, policy and future research in the field of CSR and corporate accountability.*

**In terms of policy and practice, the Norwegian government should:**

1. Build a more coherent policy of both preventive and punitive mechanisms for unethical corporate behaviour and explore *different* ways this can be done.  
(Through legal/non-legal avenues, normative, economic and political pressure etc.)
2. Strengthen business and human rights capacity building within all government departments, particularly within the Ministry of Foreign Affairs and Ministry of Trade and Industry. Training programs teaching how to *promote* business should also include teaching employers how they can *prevent* bad business. CSR should not be confined to a specific department, either in structural or essential terms.
3. Draw up ethical guidelines for board members, emphasising their responsibility to take due diligence steps. This should particularly be the case for ministers and other politicians representing State-owned companies.
4. Ensure that the newly established global reporting mechanisms of ISO 26000 and the Global Reporting Initiative are implemented as long term legal requirements, and should not therefore be understood as merely “voluntary”. Compel companies to carry out due diligence on their operations and their supply chains to ensure that they are not handling resources fuelling conflicts.
5. Support the trend towards building a global consensus to improve revenue transparency across all major markets. This must include maximising transparency internally within the government and in the corporate sector, by for example change the amendment of the 2009 Customs Act, to ensure public access to information on investments in Burma and Western Sahara.



6. Either expand the mandate of the current National Contact Point to include the following, or establish a new “Contact and Information Point” with the mandate to:
- Coordinate different ministry policies and legislation, assessing what influences different department’s policies have on companies operating abroad (to prevent counterproductive or unintended results). This might involve, for example, going through trade agreements signed by Norway, to ensure that they explicitly promote and do not prevent transparency and good practice.
  - Actively and continuously provide analytical support to companies on business risk, including assessing different industry sectors, companies, areas etc., and update companies on risky areas (similar to that of advising Norwegian citizens from travelling to certain risk zones).
  - Highlight ‘best practice’ and ‘shame’ buyers who are willing to trade, directly or indirectly, with groups or government committing grave human rights abuses, or violating international law.
  - Actively work with NGOs to put pressure on Norwegian companies that are reluctant to respect human rights and fundamental ethical norms, including being willing to participate in joint meetings, require information, sending letters.
  - Fund a research-based committee with the objective to investigate Norwegian companies’ compliance with human rights abroad and these companies’ implementation of due diligence measures, and then make this information public.

**In terms of research, scholars and practitioners in the field of business and human rights and CSR should:**

1. Move beyond the mainstream dichotomy of legal and non-legal approaches, as mutually exclusive concepts.
2. Have a more case-based approach to CSR, including making efforts at measuring corporate compliance with human rights.
3. Recognize the depth and breadth of the work conducted by the UN Special Representative on Business & Human Rights, and recognize his efforts in including all stakeholders in operationalising policies. Research should build on principles from the Ruggie Framework with the aim of implementing business responsibilities.
4. Focus on the link between natural resources and conflict zones, address how companies are contributing to pillage.
5. Further focus on law enforcement in cases regarding international law and international human rights law.
6. Explore the role of NGOs as influential players in the field of CSR and who these organisations should be accountable to. In the Norwegian context (and in relation to Western Sahara) NGOs are in a powerful position, and seemingly do 'unquestionable' good.

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NSCWS 22.12.2010: GC Rieber avviser videre involvering i Vest-Sahara, *Support Committee of Western Sahara*, accessible: [http://www.vest-sahara.no/index.php?parse\\_news=single&cat=1&art=1623](http://www.vest-sahara.no/index.php?parse_news=single&cat=1&art=1623)

NSCWS 6.5.2010: Ny seier for norsk solidaritet med Vest-Sahara. *Published by the Support Committee of Western Sahara*, accessible: <http://www.vest-sahara.no/index.php?cat=111&art=1494>

Word count: Approximately 16 300. The thesis stretches the word limit due to scope of the topic of the paper and the need to incorporate examples and quotes, as well as relevant information from both primary and secondary sources.

## Appendix I: Western Sahara<sup>84</sup>



Area	266,000 sq km.
Capital	El-Aaiún/Laayoune in the occupied area (about 200,000 inhabitants).
Climate	Hot, dry desert; rain is rare; cold offshore air currents produce fog and heavy dew.
Terrain	Mostly low, flat desert with large areas of rocky or sandy surfaces rising to small mountains in the south and northeast.
Land boundaries	Algeria 42 km, Mauritania 1,561 km, Morocco 443 km.
Ethnic groups	Original population nomad tribes from Yemen, Berbers and Africans.
Languages	Hassaniya Arabic and some Spanish.
Population	273,000 (est.), 170,000 Saharawis are living in refugee camps close to Tindouf in Algeria.
Religion	Muslim (Sunni).
Natural resources	Phosphates, iron ore, sand and probably oil/gas, uranium, titanium. Extensive fishing along the long Atlantic coastline.

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<sup>84</sup> Information from GeographyIQ.com; available at: [http://www.geographyiq.com/countries/wi/Western\\_Sahara\\_map\\_flag\\_geography.htm](http://www.geographyiq.com/countries/wi/Western_Sahara_map_flag_geography.htm) (accessed: 24.05.2011) and Arts&Leite (2007).

## Appendix II: Interviewees

Name	Type of organisation	Organisation	Method	Date
Gunnar Album	NGO	Naturvernforbundet	Interview	23.05.2011
Erik Hagen	NGO	Norwatch	Interview	16.01.2011 30.04.2011 21.05.2011
Donnowitch	NGO	Earthrights	Email	22.02.2011
Gunhild Ørstavik	NGO	ForUM	Interview	29.03.2011
Åse Sand	NGO	Burma Comittee	Interview	04.04.2011
Mark Taylor	Scholar	Law scholar, FAFO	Interview	05.04.2011
Hans Morten Haugen	Scholar	Law scholar, HIO	Interview	09.02.2011
Beate Sjøfjell	Scholar	Law scholar, UIO	Video-Conversation Email	14.03.2011
Hege Røttingen	Government	MFA, OECD NCP	Interview	04.04.2011
Pia Goyer	Government	MFA, Ethic Council	Interview	08.02.2011
Are Jostein Nordheim	Government	MFA	Email	05.05.2011
Beate Stirø	Government	MFA, Geneve	Interview	15.02.2011
Karoline Bøhler	CSR-coordinator	Norwegian Shipowners' Association (Rederiforbundet),	Conversation 01.04.2011	01.04.2011
Menna Lehbib	Political Party	Polisario	Interview	08.02.2011
Håkon Flemmen	Media	Ny Tid	Email	16.02.2011
Lise Bergan	Corporate Affairs Director, Company	Cermaq ASA	Interview, phone	25.05.2011

### Appendix III: Companies in this case-study

Companies involved: 22

Companies	Company / Investment Fund
Shipping	R-Bulk (CEO Christian Sundt)
Shipping	Arnesen Shipbrokers (CEO Roger Arnesen)
Shipping/ Fish	Atlantic RTI (CEO Johan Lønnmark Werner)
Fish industry	Vaagebulk IV/ Vaage Shipmanagment AS/ Wagle Shartering (CEO Bjørn Borge)
Shipping	Jinhui Shipping (Hong Kong company registered on the Norwegian Stock Market).
Pharmacy	Naphro Parma (Owned by Cognis)
Tomatoes	Coop (Asura)
Fish industry	GC Rieber
Fertilizer	Yara (Norwegian State-owned)
Fish oil	Cermaq, Cermaz ASA,43, 54% Norwegian State-owned (White Paper 2011)
Seismic	TGS (supported by Folketrygdfondet)
	Kongsberg Seatex
Thermal Engineering	Finsam
Fish Industry	Vardeberg
Trading	Holtermann

Fish industry	Selfa Artic
Radio/Surveillance Equipment	Comrod
Seismic	Fugro- Geoteam
Fish industry	Sjøvik-Gruppene
Fish / Shipping	Caiano (Eidsvik)
Fish/ Shipping	Gearbulk
Fish Industry	KB Fish  Admin: Norwegian Harald Wiedesvang

#### **Institutions involved:**

Investment fund	Norwegian Pension Fund Abroad
Research	Norges Geologiske Undersøkelser
Research	Havforskningsinstituttet
Bank, Insurance	Storebrand og Folketrygden