

With Power Comes Responsibility

The State of Labour Rights in the Norwegian Pension Fund - Global



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List of Acronyms

BLIHR	Business Leadership Initiative on Human Rights
CEREAL	Center for Reflection and Action on Labour Rights Issues
CFA	ILO Committee on Freedom of Association
COE	Council on Ethics
CSR	Corporate Social Responsibility
EIRIS	Experts in Responsible Investment Solutions
EPZ	Export Processing Zone
ESG	Economic, Social and Environmental Concerns
ETI	Ethical trading Initiative
EU	European Union
FDI	Foreign Direct Investment
GE	General Electric
GRI	Global Reporting Initiative
HP	Hewlett Packard
HRC	Human Rights Council
HRIA	Human Rights Impact Assessment
IBHR	International Bill of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social, and Cultural Rights
ILO	International Labour Organization
IMF	International Metalworkers Federation
ITUC	International Trade Union
LO	Landsorganisasjonen i Norge,

MFA	Ministry of Foreign Affairs
NBIM	Norges Bank Investment Management
NCP	National Contact Point
NESRI	National Economic and Social Rights Initiative
NGO	Non-Governmental Organization
NOU	Norges Offentlige Utredninger (Norwegian Official Report)
NPFG	Norwegian Pension Fund Global
OECD	Organization for Economic Cooperation and Development
OHCHR	Office of the High Commissioner for Human Rights
PRI	Principles of Responsible Investment
PRS	Poverty Reduction Strategies
SA 8000	Social Accountability Standard
SRI	Socially Responsible Investment
SRSR	Special Representative to the Secretary General
UDHR	Universal Declaration on Human Rights
UN	United Nations
UNEP	United Nations Environmental Programme
UNGC	United Nations Global Compact

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Chapter 1: Introduction: Background and Context

1.1 Background and Context

Globalization, and its ongoing evolution, has provided benefits through economic and social development. However, it has also created a world of stark contrasts, where some States have developed rapidly while others remain lagging behind, the gap between rich and poor is ever-increasing and throughout this process we have witnessed the rise and proliferation of corporations. They are now entangled into our existence whether we like it or not, they touch our lives daily directly or indirectly either by working for/with them, purchasing their products and services or by investing in their companies.

Over the past few decades the strength of corporations has increased tremendously, through various acts of economic deregulation under the auspices of neo-liberal economic policy. Moreover, corporations have not only grown in strength, but also in size. As mentioned earlier, corporations touch our daily lives, and due to such a role in society, certain responsibilities fall upon these corporations. The responsibilities mainly revolve around the impact they have on the society and environment in which they operate, as well as responsibilities towards their employees at one end and to their shareholder/investors at the other end. According to the Former High Commissioner on Human Rights, Mary Robinson “with power should come responsibility”¹. These responsibilities are based on various declarations, conventions, soft and hard law, national as well as international law which I will return to at a later juncture. The impacts that corporations have on societies, environments, and employees are felt everywhere around the world. These impacts can be either positive or negative. The positive side can be seen in the sense of the corporation's 'trickle down effect' of taxes and revenue to the local population as well as local investment in infrastructure and education. The negative effects may take on the form of environmental degradation, clashes with minority groups as we have seen in the case of Shell and the Ogoni² people over land and resource rights and distribution, labour violations towards employees and not living up to the expectation of its investors.

¹ Mary Robinson, Second Global Ethic Lecture, University of Tübingen, Germany, Jan. 21, 2002

² Naomi Klien, *No Logo*, p.331, 2000

According to a report prepared by the Special Representative of the Secretary General (SRSG) on the issue of human rights and transnational corporations and other business, it is stated that "firms from a broad range of sectors have been alleged to abuse or contribute to the abuse of one or more human rights – covering the full range of human rights, including civil and political; economic, social and cultural; and labour related rights."³

Under a human rights framework, human rights are interconnected and indivisible, thus for example if a firm fails to provide employees with a safe working environment, not only does the firm violate that specific right, but the full range of other rights such as the right to life and right to health.

The Report of the Special Representative on the issue of human rights and transnational corporations lists the labour rights that are typically impacted by alleged corporate-related human rights violations. The impacts of these alleged violations not only affect the rights within the workplace itself, but outside the workplace as well. These rights include the Freedom of Association; Right to Organize and Participate in Collective Bargaining; Right to Non-Discrimination; Abolition of Slavery and Forced Labour; Abolition of Child Labour; Right to Work; Right to Equal Pay for Equal Work; Right to Equality at Work, Right to Just and Favourable Compensation; Right to a Safe Work Environment; Right to Rest and Leisure; and the Right to Family⁴.

Koen De Feyter claims that "human rights can assist people abandoned by globalization in achieving human dignity"⁵ and that in order for human rights protection work "an integrated global response that challenges the behaviour of all perpetrators, and interacts with each of them, is necessary"⁶

In light of the above, the international community has developed certain mechanisms in order to mitigate and put an end to such violations. The UN Global Compact, the OECD Guideline for Multilateral Enterprises, the ICCPR and ICESCR, ILO Conventions and others. Alongside these,

³ Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development, Report of the Special Representative of the Sec.-Gen on issue of human rights and transnational corporations and other businesses, 23 May 2008, A/HRC/8/5/Add.2

⁴ Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development, Report of the Special Representative of the Sec.-Gen on issue of human rights and transnational corporations and other businesses, 23 May 2008, A/HRC/8/5/Add.2

⁵ Koen De Feyter, Human Rights: *Social Justice in the Age of the Market*, Global Issues, p.1

⁶ Ibid, p.2

there has been a growing trend within the private and public sectors of Corporate Social Responsibility (CSR), which deals with the role that corporations play in our daily lives, in our society and in our environment. On the one hand, the ethical basis for CSR arises from the concept of inviolability of human dignity, and on the other hand, the central legal/practical premises of CSR include "respecting human rights; upholding core labour standards and ensuring decent working conditions; taking environmental concerns into account; combating corruption; and maximizing transparency"⁷. The concept of CSR and other such instruments will be discussed further on in the paper.

Chapter 2: Norwegian Pension Fund and Ethical Guideline Point 4.4, and Thesis Statement

2.1 The Norwegian Pension Fund

This paper is going to look at the specific relationship between society and corporations with the aim of strengthening labour standards. The relationship in this case is that of an investor - Norwegian Pension Fund – Global (NPF Global) - and corporations, and how this public body through its Ethical Guidelines can better ensure respect of labour rights? Bearing in mind that as an investor, the State shares the responsibility for how the companies in which the fund invests conduct themselves, what they produce and the impact on the local community.

The Norwegian Pension Fund Global is the largest public fund in Europe and Fourth largest in the world. It is a fund where the surplus of the Norwegian oil revenue is deposited. The Ministry of Finance is responsible for the management of the Fund, whereas Norges Bank (NBIM) carries out its operational function by investing the fund's capital in various bonds, equities, and firms internationally. The investments are carried out in accordance with the guidelines stipulated by the Ministry. This leads us to the Ethical Guidelines for the NPF Global which set out the Fund's ethical obligations, namely, to ensure that the Fund be managed with a view to achieving high returns that will enable coming generations to benefit from the country's petroleum wealth. Secondly, the fundamental rights of those affected by companies in which the Fund invests should be respected. This ethical basis is promoted through three mechanisms: exercise of

⁷ Report No.10 to the Storting *Corporate Social Responsibility in a global economy*, 2008

ownership rights [based on UN Global Compact and OECD Guidelines for Corporate Governance and Multilateral Enterprises], negative screening and exclusion of companies from the Fund's investment universe⁸.

The role of the Council on Ethics is to assess whether or not investment in specified companies is inconsistent with the established Ethical Guidelines. Based on those assessments, the Council puts forth recommendations to the Ministry of Finance, where decisions on the exclusion of companies from the Fund's investment universe are made⁹.

It is important to note that exclusion is not the only method to ensure respect of these values and standards, but also through engagement with companies, as seen with the UN Global Compact, one can ensure compliance with the ethical standards. The process of engagement will be emphasized and will be a redline running throughout this paper as a means to ensuring respect of values and standards.

2.2 Thesis Statement

This paper focus on Point 4.4 of the Ethical Guidelines and will examine and discuss the Council's ad-hoc exclusion process of companies based on whether there is an unacceptable risk of contributing to: Serious or systematic human rights violations, such as murder, torture, deprivation of liberty, forced labour, the worst forms of child labour and other child exploitation, serious violations of individuals' rights in situations of war or conflict, severe environmental damage, gross corruption, and other particularly serious violations of fundamental ethical norms. More specifically, this paper will focus on labour rights, and attempt *to provide a rationale for and explaining why the Council should utilize Point 4.4 more often in order to incorporate more labour rights standards in the Ethical Guidelines that better reflect international standards and rights, as well as Norwegian values.* This will entail providing a body of knowledge around the issue of labour rights.

There has been much heated discussion as to whether the investment policy of the Fund - in general - is ethical. This is not a matter of discussion for this paper; rather the aim is to strengthen the Fund's investment policy by expanding existing labour standards to incorporate

⁸ http://www.regjeringen.no/en/sub/styrer-rad-utvalg/ethics_council/Government-Pension-Fund--Global.html?id=440567 (last accessed: March 25 2010)

⁹ http://www.regjeringen.no/en/sub/styrer-rad-utvalg/ethics_council.html?id=434879 (last accessed: March 25 2010)

more rights set out in other international documents such as workers right to a safe environment, right to organize and join a union, and the right to collective bargaining. As it stands now, “not all human rights violations or breaches of international labour rights standards fall within the scope of the provision. Point 4.4 states that human rights violations must be serious or systematic”¹⁰

2.3 Methodology

My research will mainly be conducted by using traditional legal method i.e. by focusing on laws, regulations, standards, travaux préparatoires, case law and other secondary sources. This will include reports to the UN by the Special Representative on the issue of human rights and corporations, reports from the ILO, UN, and other international organizations, as well as NGO reports and recommendations.

Examination and analysis of the case law will revolve around relevant cases dealt with by the Council, as well cases that should have been dealt with in the past as well as present issues. Through this process, this paper will be able to provide an overview of the most common issues associated with the rights involved. This paper will also attempt to identify the sectors that are more likely to violate such rights, as well as the sectors that more often respect these rights, in an effort to inform future investment policies.

Furthermore, I aimed conducted unstructured/semi-structured interviews with various stakeholders as it relates to the issues of; ownerships rights, responsible investment, trade and responsibility and labour rights.

These types of interviews provide greater flexibility than structured interviews and provide valuable insight into the interviewees' point of view and how they understand the issues at hand as the researcher needs rich and detailed answers.

Therefore, for my research I aimed to involve interviews with the member of the Council of Ethics, Norges Bank and the Ministry of Finance in order to gain valuable insight and information on the process and set-up as a whole.

There is a drawback to this method of interviewing as the process of interviewing, transcription and analysis of the interview may prove time consuming. Apart from the Council on Ethics, it

¹⁰ Recommendation of 20 November to the Ministry of Finance regarding Monsanto, prepared by the Council of Ethics

proved difficult to gain access and get interviews with other stakeholders as they have not responded to my queries.

My thesis will continue by providing in depth analysis and discussion of the Fund's ownership rights and how it can use its position to promote compliance with established guidelines and standards. This will include analysis and discussion of legal versus ethical responsibility and what they entail. In addition, the discussion will focus on the issue of labour rights which will be based on the relevant conventions and treaties. Furthermore, examination of the case law will provide a legal rationale for my arguments and recommendations.

Chapter 3: Justification of Workers' Rights: Which rights? Why these rights?

In this chapter I am going to present various approaches to arguing why labour rights should be considered a primary concern for businesses - and hence also why the Pension Fund should be concerned. I will explain how labour protection can be grounded in human rights texts, by referring to the history of Scandinavian countries and also general moral philosophy. This paper will also investigate some of the counterarguments, but overall I will argue in favour of not only including labour rights but also for stressing their importance due to the basic role they have in underpinning a modern, human rights-based society in a globalised age.

3.1 Which Rights?

For the purpose of this paper, I shall focus only on labour principles. These principles guide the Council on Ethics and the formulation and interpretation of the Ethical Guidelines. They are based on the UN Global Compact principles and include, most importantly for our discussion: ***Labour Principles:*** Principle 3 – Businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining.

The UN Global Compact is a “strategic policy initiative for businesses that are committed to aligning their operations and strategies with ten universally accepted principles in the area of human rights, labour, environment and corruption”¹¹.

¹¹ www.unglobalcompact.org (last accessed March 25 2010)

3.2 Why these rights?

According to the UN Global Compact and ILO; the freedom of association is a “principle that has great impact on the development and strengthening of democracy. It is an enabling right on which the existence of real, independent civil society depends”¹². It is seen as an important vehicle for trade unions and employer organizations to engage with government and society and to function without interference. The guide asserts that the freedom of association “underpins and supports the other nine UN Global Compact Principles”¹³.

The freedom of association and the effective recognition of the right to collective bargaining “enable workers to join together to protect better not only their own economic interests, but also their civil freedoms such as the right to life, to security, to integrity, and to personal and collective freedom. *As an integral part of democracy, this principle is crucial in order to realize all other fundamental principles and rights at work*”. [Emphasis added]¹⁴

Furthermore, collective bargaining is seen as a forum for addressing working terms and conditions, and defines the relationship between employers and employees.

Moreover, the freedom of association and the right to collective bargaining are seen as the “most vital of all union rights because it places the determination of workers' dignity, adequate wages, and working conditions at its most effective location: the local level”¹⁵

In connection with the Freedom of Association, the ILO states in the *Declaration on Fundamental Principles and Rights at Work* in 1998 that:

“The right of workers and employers to form and join organizations of their choice is an integral part of a free and open society. It is a basic civil liberty that serves as a building block for social and economic progress. Linked to this is the effective recognition of the right to collective bargaining. Voice and representation are an important part of decent work”¹⁶.

The ILO voices its strong opinion on these rights especially with regards to the freedom of association and claims that “this basic human right goes together with freedom of expression. It

¹² *The Labour Principles of the United Nations Global Compact: A Guide for Business*, ILO, 2008, p.17

¹³ Ibid

¹⁴ Ibid, p.18

¹⁵ Frundt, *Central American Unions in the Era of Globalization*, Latin American Research Review, Vol. 37, No.3, 2002, p. 8

¹⁶ Declaration on Fundamental Principles and Rights at Work, ILO, 1998

is the basis of democratic representation and governance” and asserts that “these principles cannot be set aside for any sector of activities or group of workers”¹⁷

According to the ILO, freedom of association is linked to freedom of expression, freedom of the media and the freedom of assembly¹⁸. This emphasizes the interconnectedness and indivisibility of rights, and provides us with a strong foundation for arguing for the freedom of association and collective bargaining later on in the paper.

Over the years, the ILO has defined and explained these rights in order to make them more operative with respect to employers. Accordingly, the ILO has put forth some principles that may aid businesses in better promoting and protecting these rights in the workplace, at the bargaining table as well as in the community of operation.

3.3 Protection borne out of duty

According to the Sub-Commission on the Promotion and Protection of Human Rights who drafted the “Norms on the responsibilities of transnational corporations and other business enterprises with regards to human rights”¹⁹, it asserts that:

“even though States have the primary responsibility to promote, secure fulfillment of, respect, ensure respect of and protect human rights, transnational corporations and other business enterprises, as organs of society,[within their spheres of activity and influence] are also responsible for promoting and securing the human rights set forth in the Universal Declaration of Human Rights”

More and more companies are in the limelight due to their practices and operations, and are being questioned by government and civil society about what the acceptable practices are and what the parameters of a company’s responsibility are. Both governments and civil society have called for an approach to be taken by businesses that would incorporate environmental, social and ethical considerations into a company’s overall strategy and day to day operations. This approach is called Corporate Social Responsibility (CSR), and according to the Norwegian Ministry of Foreign Affairs (MFA); it encapsulates a company’s responsibility towards people, society and the environment that are affected by its activities. Moreover, the MFA asserts that CSR “extends beyond a company’s statutory obligation to comply with national legislation”²⁰ and that this concept of CSR is used in the sense of moral responsibility. When addressing the issue of corporate responsibility, the issue of scope arises. Thus, for corporate responsibility, companies should be aware of two concepts: a) sphere of influence and b) complicity which are discussed in detail further on.

¹⁷ <http://www.ilo.org/declaration/principles/freedomofassociation/lang--en/index.htm>

¹⁸ ILO, *Organizing for Social Justice*, 2009, p.12

¹⁹ *Norms on the responsibilities of transnational corporations and other business enterprises with regards to human rights*, 26th August 2003

²⁰ Report No.10 to the Storting, p.8

This paper will not focus on the Government's role as owner of state enterprises; rather the paper will focus on the Government as investor and investment manager. In this manner, the State also "shares the responsibility for how the companies in which the fund invests conducts themselves, what they produce and their impact on the local community"²¹

Therefore, as an investor, the state has a duty to act in the long term interest of their beneficiaries. According to the Principles of Responsible Investment (an investor initiative in partnership with the UNEP Finance Initiative and the UN Global Compact) they believe that "environmental, social, and corporate governance (ESG) issues can affect the performance of investment portfolios [and]... also recognize that applying these Principles may better align investors with broader objectives of society"²²

The Principles include: incorporating ESG into investment analysis and decision making processes, being active owners and incorporating ESG issues into ownership practices, seeking appropriate disclosure on ESG issues by entities invested in, promoting acceptance and implementation of the Principles, cooperating in order to increase the effectiveness of implementing the Principles, and reporting on activities and progress towards implementing the Principles.

Principles of Responsible Investment are similar to the principles of Socially Responsible Investment which is a term used to describe the "inclusion of environmental concerns, social considerations and good corporate governance in fund management"²³.

Therefore, the aforementioned concepts and initiatives aim not only to create a corporate culture respectful of human rights but also to increase the positive engagement of companies and investors in an effort to boost sustainable development.

The Government upholds these principles and have stated in the Soria-Moria²⁴ Declaration that:

Fund shall be a world leader in best practices of responsible investment. The Fund shall be managed responsibly, taking into consideration good corporate management, social conditions - especially where children's rights, climate and the environment are concerned - in accordance with the principles laid down in Report to the Storting #20 (2008-2009). We will continue to use ILO's core conventions as a reference when deciding *to react to companies that violate employees' rights*.

The international frameworks in which CSR and other such concepts operate include the OECD Guidelines for Multinational Enterprises, the UN Global Compact, and the ILO and its relevant conventions.

²¹ Report No.10 to the Storting, p. 19

²² <http://www.unpri.org/principles/>

²³ Report No.10 to the Storting, p. 43

²⁴ Soria Moria Declaration, Labour Party Website

3.4 Historical Background and Historical Justification

One must mention the importance of two varied aspects of Norwegian society that reflect the freedom of association and right to collective bargaining. The first aspect highlights the issue of trade unions and political power; where in Norway unionized workers amount to 60% of the work force and play an important role in political and economic affairs of the state. The freedom of association and the right to collective bargaining are important aspects of the Norwegian labour sector and are established under law. The second aspect is that of socially responsible investing and how it underscores Norwegian values in a social democratic state. In an article entitled: *A history of Scandinavian Socially Responsible Investing (SRI)*, Elias Bengtsson investigated how SRI has spread, become transformed and adapted to institutional contexts by investors and other actors. In his article, institutional systems are seen as “multilayered and in the making, shaping the behaviour of embedded actors, but simultaneously being shaped by them”²⁵. (See Appendix)

Over the years, the emphasis of the values inherent in a welfare state as well as Norway taking the lead in human rights in the international community have led to a strong recognition of economic, social and cultural rights especially the freedom of association and collective bargaining.

Bengtsson concluded that first, “normative and isomorphic influences were shown to shape the development of SRI. Some of these are most accurately described as changes in societal values or norms”. For example the manner in which the environmentalist movement grew in Scandinavian society in the 80s forced investors to incorporate environmental concerns as well as adherence to international environmental conventions in their SRI practices²⁶.

Second, Bengtsson found that a wide range of actors exerted influence and pushed for various SRI elements in regards to the legislative process. This is evident in the processes of government negotiation with the trade unions in Norway.

The Labour Party and the trade union movement have common historical roots. There has always been a close cooperation between these two branches of the labour movement. However, the organizational and decision-making structures of the Party and the Confederation of Trade Unions (LO) are separate and fully independent. Cooperation between the two is formally organized through a joint committee made up by the leadership of the Party and LO, which meets on a weekly basis²⁷.

3.5 Defense of employee rights

Much attention is focused on issues primarily external to business operations such as environmental concerns, whereas issues internal to business operations such as employee rights

²⁵ Bengtsson, *A History of Scandinavian Socially Responsible Investing*, 2007,971

²⁶ Bengtsson, 2007, p.979

²⁷ <http://arbeiderpartiet.no/Kontakt/Information-in-English> (last accessed: April 3 2010)

has taken the backseat until recently when concerted efforts have been focused in order to increase awareness to these issues and rights as well as ensuring their protection and promotion in and outside the workplace. Over the years there has been much discussion – both academic and public – around the meaning of employees' rights, and this paper aims to clarify this term further.

Recent trends in globalization have affected the labour market in various ways but most significantly we have noticed erosion in the power and effectiveness of labour unions. Globalization has resulted in an increase in the number of corporations and has led to the creation of complicated supply chain networks, in which labour rights get lost. Moreover, we are witnessing an era defined by free trade agreements and proliferation of export processing zones. The highly competitive nature of this global economy forces a reduction of production prices in order for a company to compete, thus wages are often reduced and unions are disallowed which in turn means that workers are left with no recourse.

According to Des Jardins – a leading scholar in ethics and avid contributor to the *Journal of Business Ethics* – this poses a danger in “that the welfare of employees will be without significant protection” and came out with a paper that defends a conception of employee rights as a presumptive moral entitlements not subject to bargaining within the employment agreement”²⁸.

Employee rights - according to Des Jardins – are “entitlements possessed by any employee and possessed independently of individual contractual agreements or acts of governments”²⁹. Moreover, he claims that they are independent of specific contracts or legislation” because the basic moral rights of human persons can place constraints on the treatment those people receive when operating within their institutional or social roles”³⁰.

Typically most employment agreements involve a practice in which both parties pursue certain goods. Where the management seeks to maximize profit and ensure growth and returns, the employees seek high wages, safe working conditions etc. In pursuing these goods the parties may come into conflict, which raises the issue of bargaining and negotiation in an effort to find middle ground. It is important to note here that not all goods or issues are up for negotiation or bargaining such as minimum wage which is set by the state. Des Jardins asserts that unlike minimum wage, his definition of employee rights “are secured by moral and not merely legal entitlements”³¹.

Therefore his definition of an employee right is:

“A general and presumptive moral entitlement of any employee to receive certain goods or be protected from certain harms in the workplace. We hold an employee right such as this to exist whenever there are valid moral reasons which are independent of the specifics of any employment contract and which supports the provision of the

²⁸ Joseph R. Des Jardins and John J. McCall, *A defense of employee rights*, *Journal of Business Ethics*, Vol. 4, No.5, October, 1985, p.1

²⁹ *Ibid*, p.2

³⁰ *Ibid*, p.2

³¹ *Ibid*, p.2

appropriate goods or treatments. If there are acceptable moral grounds for recognizing such a right, then that right creates *prima facie* moral obligations on the part of others who are able to provide the relevant goods or treatment... In this way, employee rights function to prevent employees from being placed in the fundamentally coercive position of having to choose between their job and other basic human goods or treatments”³².

3.5.1 Arguments against employee rights

There are many opponents to the idea of enforcing labour rights, and their arguments are framed within different paradigms which include liberalism, utilitarianism and neo-liberalism.

- The first argument against workers’ rights is based on the right to liberty also known as the principle of non-interference; where the argument is that if we accept this right to liberty then recognizing employee rights prior to and independently of the employment contract is an undue interference with the parties to the contract and thus a violation of their right to liberty. Thus under this line of thought, the contract and its contents are entirely left under the complete control of the parties. Des Jardins agrees that the right to liberty is one of paramount importance to us; however, he raises the concern that “employment contracts are not always ideally voluntary agreements since the realities of the market often place significantly more power in the hands of the employer than in the hands of the individual prospective employee”³³. Based on this unequal power the notion of voluntary agreement/contract no longer holds. Therefore Des Jardins argues that employee rights may be necessary to protect and uphold the concept of right to liberty. Right to liberty cannot rule out all interferences and a decision of whether liberty is of overriding importance can only be made by analyzing the merits of particular alternatives.

- The second argument against workers’ rights is located within the utilitarian school of thought. This mode of reasoning asserts that the reign of the free market and the laissez-faire economy where employee rights are seen as a needless restriction and that the market will satisfy everyone's interests in the long run. However, it is safe to assert that unregulated market activity will not guarantee well-being in the short term or long run. Game theory supports this as it shows that “players in an unregulated game of self interest are often worse off than they would have been had they coordinated efforts by mutually accepting limitations on their behaviour.”³⁴

³² Ibid, p.2-3

³³ Des Jardins, McCall, *A defense of employee rights*, Journal of Business Ethics, Vol. 4, No.5, October, 1985, p.4

³⁴ Ibid

- Other arguments tote the line of conservative neo-liberalism and are not only opposed to employee rights, but are also opposed to the concept of corporate social responsibility. In *Misguided Virtue*, Henderson claims that “imposing common international standards despite the fact that circumstances may be widely different across countries, restricts the scope for mutually beneficial trade and investment flows. It is liable to hold back the development of poor countries through the suppression of employment opportunities with in them”³⁵. This argument will be countered in the following paragraphs and will be shown as an invalid argument.

3.5.2 Arguments for Workers’ Rights: Practical/Economic Justification of Labour Rights

The Soria Moria Declaration asserts that the Fund’s investment in poor and developing countries may contribute to faster economic growth in those societies. Building upon that, according to Robert H. Montgomery and Gregory F. Maggio in their article: *Fostering labour rights in developing countries* argue that the freedom of association and the right to collective bargaining are of paramount importance to any country’s economic development and reducing poverty. They claim that workplace policies have an impact on the enterprise’s long term economic performance and financial well being;

"[where] positive labour relations can provide various benefits, including enhancing the company’s public image, strengthening its relations with government regulatory authorities and civil society groups, and enhancing an enterprise’s ability to foster and maintain social capital and promote the economic and social welfare of local populations that might depend on the project for their livelihoods”³⁶.

In addition Montgomery and Maggio claim that sound labour policies can also “strengthen a company’s opportunities to access capital, in particular with socially responsible investors and lead to raising the quality of growth in emerging markets and other developing countries”³⁷. Montgomery and Maggio claim that the often-negative ramifications arising out of labour disputes can be reduced by implementing positive labour management systems that conform to international standards and worker expectation regarding decent treatment³⁸.

In another article entitled *Does CSR matter in Asian Emerging Markets*; Yan Leung Cheung et al³⁹ conducted a study assessing CSR performance of major Asian firms over a three year period. The study concluded that there is a positive and significant relationship between CSR and

³⁵ Janet Dine, *Companies, International Trade and Human Rights*, Cambridge University Press, 2005, p.228

³⁶ Robert H. Montgomery et al., *Fostering Labour Rights in Developing Countries*, Journal of Business Ethics, Volume 87, Supplement 1, 2009, p 200

³⁷ Ibid

³⁸ Ibid

³⁹ Yan Leung Cheung, *Does CSR matter in Asian Emerging Markets*, Journal of Business Ethics, Vol. 92, No. 3, March 2010

market valuation and not only that, but also that CSR is positively related to market valuation of the subsequent year.

An independent research organization called Experts in Responsible Investment Solutions (EIRIS) – that provides reports and research into environmental, social, governance (ESG) and ethical performance of companies – put forth a report that highlighted the fact that improved working conditions are linked to overall lower staff turnover as well as improved quality of products⁴⁰.

The ILO has also stated that the Freedom of Association and Right to Collective Bargaining have positive effects on economic development:

“By ensuring that the benefits of growth are shared, and promoting productivity, adjustment measures and industrial peace... [These rights] provide a connecting mechanism between social goals and the demands of the market. Consequently, the real debate cannot and should not be on *whether* to respect these principles and rights, but on how best to respect and make use of them”⁴¹.

In addition, the aforementioned ILO report states that the freedom of association and collective bargaining are paramount to any society’s democratic values and economic growth and development. The report asserts that:

“Through participation and organized activity, people can affect the performance of their immediate work environment and the economy as a whole, and find ways of managing change. Denying the role of initiative and cooperation robs the economy of a key productive factor. It perpetuates a situation where, by treating labour as a commodity, opportunities for sustainable economic development are wasted”⁴².

In response to various existing theories purporting that by ensuring these freedoms, production costs would increase due to the increase in wages, the ILO report indicated that there is no empirical evidence to justify theories claiming that freedom of association would lead to faster real wage growth or that a lack of it would keep wages down⁴³.

Moreover, in response to claims that enforcing such labour laws in countries would reduce the Foreign Direct Investment (FDI) coming in. The ILO report highlighted the fact that all statistical data indicate that foreign direct investment tends to be greater in countries where such labour laws exist. In addition the report asserted that the negative effects of such rights on FDI through labour costs are offset by the positive effects which are increased social and political stability⁴⁴.

Therefore, not only are these rights important for national economic development, but these rights are imperative in relation to the poverty reduction strategies (PRS). As the ILO supports PRS that involve the creation of a dynamic labour market “in which institutions representing

⁴⁰ EIRIS, 17/12/2009, p.7

⁴¹ ILO, *Organizing for Social Justice*, 2009, p.1

⁴² ILO, *Organizing for Social Justice*, 2009, p.16

⁴³ Ibid

⁴⁴ Ibid

workers and employers are able to manage change... and deal with the social consequences of reallocating investment away from established into new production systems”⁴⁵.

3.6 Philosophical and Moral Justification of Labour Rights

The obvious moral ground of labour rights and human rights in general is the equal dignity doctrine, where the Preamble of the Universal Declaration of Human Rights highlights the link between the inherent dignity of all human beings and the rights enshrined and enumerated in the Declaration. The Preamble stipulates that the “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.” This idea is reiterated in Article 1 which declares that “All human beings are born free and equal in dignity and rights.”

Moreover, Andrew Clapham claims that if we accept the idea that human rights are ultimately concerned with the protection of human dignity, and that infringements and assaults on dignity must be prevented, punished and remedied then the discussion on whether the assailant/violator is a state or non-state actor is moot⁴⁶.

Supporting this idea is the Ethical Trading Initiative which asserts that:

”The fundamental principle of freedom of association and the right to collective bargaining is a reflection of human dignity. It guarantees the ability of workers, and employers, to join and act together to defend not only their economic interest but also civil liberties such as the right to life, security, integrity and personal and collective freedom. It guarantees protection against discrimination, interference and harassment. As an integral part of democracy it is also key to realizing the fundamental rights set out in the ILO Declaration”⁴⁷.

The most common justification for labour rights is that we must have a human rights minimum which labour rights should not fall below. However, there are other approaches to justifying human rights –especially labour rights which will be dealt with in detail in this section.

There are philosophical justifications for human rights put forth by various academics, although not without their criticisms. However, they still provide a reasonable discussion on this issue. The first method of justification is put forth by James Nickel, in which he advocates a *prudential justification* where he asserts that the main principal of human rights is to protect and promote certain human interests. Securing these interests, according to Nickel, is the main foundation upon which human rights may be morally justified. These interests are mainly concerned with the social and biological prerequisites for human beings to lead a ‘minimally good life’. He claims that all human beings possess basic and fundamental interests, what follows is that each individual owes a basic duty – borne out of self-interest – to respect the rights of other individuals. Therefore, protecting one’s own fundamental interests requires others’ willingness to recognize and respect these interests, which, in turn, requires reciprocal recognition and

⁴⁵ Ibid, p.24

⁴⁶ Clapham, p. 535

⁴⁷ ETI Briefing, *FOA and Collective Bargaining Guidance Document*, Edition 1, March 2005

respect of the fundamental interests of others. The adequate protection of each individual's fundamental interests necessitates the establishment of a co-operative system, the fundamental aim of which is not to promote the common good, but the protection and promotion of individuals' self-interest.

Another method for justifying human rights is based on utilitarian and pragmatic justifications, where the central idea of this approach is that norms and institutions are judged on the basis of the likely consequences for the general welfare. For example if a society with legal protection of due process rights is likely to have higher level of welfare than the ones without such rights, then they have due reason to support such rights. And then if the utilitarian case of due process is strong in every country, the utilitarian has good reasons to support the right as a human right in international law. Satisfaction of fundamental interests is a large part of people's welfare, so if human rights contribute greatly to the satisfaction of most peoples' fundamental interests, the utilitarian will take this to be strong argument for support of human rights. An effectively implemented system of human rights is likely to make government attentive and responsive to the desires and needs of the people.

The advantage of using the utilitarian approach is that it is practical however; the problem arises in that this approach only supports human rights in those circumstances where compliance is practically useful.

According to Nickel⁴⁸, there is a method for justifying specific rights. This method claims that in order to justify a specific right, six steps⁴⁹ are required.

1. Existence of substantial and recurrent threat:

Henry Shue asserts that rights are defined as rationally justified demands for social guarantees against standard threats. Evidence for the concept lies in the fact that experiences and injustices play and have played an important role in the formulation of human rights bills and standards, evidenced in the preamble of most conventions where they list these injustices which in turn make the proposed right(s) imperative and relevant.

Echoing the issue of recurrent threats is Jack Donnely, who addresses the issue of threats from the modern state and market. In our case, the threat is from the free market, as we have discussed the threats can take the form of exploitation of lax regulation and the 'race to the bottom'. Thus, it would satisfy Donnely's concern as there is a direct threat to labour rights in regards to the market. This necessitates the need for standards and rights to address these dangers.

2. Importance of the right in relation to the notion of a 'decent life':

Linking the importance of labour rights to the concept of a decent life is paramount. For example, if no labour rights existed, slave labour, child labour and other exploitative practices would persist. The importance of unions here cannot be undermined as they negotiate with management the 'decent conditions' at the workplace which include wages, working hours, safety issues and so on. For example, wages in high risk industries such as 'sweatshops' are "often below the legal minimum wage, and even when they are not, the wages fall below what the workers need for subsistence.... And according to a

⁴⁸ Course Material from HUMR5130, University of Oslo, Fall 2009

⁴⁹ Ibid

report from the ILO, dozens of millions of workers worldwide toil under such conditions⁵⁰. As mentioned, the importance of labour rights is central to an individual's decent life.

3. Can the right(s) be universal:

In our case, labour rights can and are universal. There are workers in every country that face certain issues at the workplace, thus, certain rights and standards must be in place to safeguard their interests.

4. Would weaker norms suffice:

For the issue at hand there are weaker norms that exist – voluntary guidelines – which a company can adopt. The problem arises when companies do not want to adopt these voluntary guidelines due to whatever reason they may have, certain rights and standards must be in place or else the worker is left with no significant protection.

Therefore, having specific legal labour rights will incur several advantages as protections, such as; (a) identifying parties that would be charged with providing such protections, rather than leaving it to good will, (b) identifying the obligations that are mandatory, and (c) identifying claimable rights.

5. Are the burdens justifiable?

Burdens in this sense are often related to the cost of implementing these rights. The ILO and United Nations Global Compact seem to accept the burdens placed on corporations and states in regards to labour rights. Arguments against labour rights were presented above and were addressed. For example the most common argument against allowing union activity would be an increase in wages which in turn would reduce the company's profit. This is not a sound argument as one may claim that slave labour would be best for a company's balance sheet.

6. Feasibility:

This is in terms of successful implementation on a global level. If the right(s) in question can be implemented successfully in an ample majority of countries then it is a justified human right. An important note here is that inability to fulfill duties does not cancel a pre-existing right. For example, the inability of certain countries to enforce labour laws does not nullify the existence of such rights, and therefore does not excuse a country from respecting, protecting and realizing such rights. In our case almost all States have signed and ratified relevant labour conventions.

Other philosophical justifications for labour rights can be found in the article *Responsibility and Global Justice*, where the author draws upon Onora O'Niell who argues that:

“The scope of an agent's moral obligation extends to all those whom the agent assumes in conducting his or her activity. Each of us acts according to interests and goals we set within the frame of specific institutions and practices, within which we know others act. Our actions are partly based on the actions of others[...] Because our actions assume these others as a condition for our own actions, O'Niell argues, we have made practical moral commitments to them by virtue of our actions”⁵¹.

⁵⁰Iris Marion Young, *Responsibility and Global Labour Justice*, Journal of Political Philosophy, Vol.12, No.4, 2004, p.366

⁵¹Iris Marion Young, *Responsibility and Global Justice*, Social Philosophy and Policy, p,106

Building upon, that O’Niell asserts that I am connected to all these people through my actions as a stakeholder, I have an obligation of justice towards them. Therefore, the author concludes that I “cannot escape these obligations by claiming I have not participated in the design of the relations of production and distribution, nor by saying that I do not know where or who all these people are; thus I have a relation of responsibility to the process itself”⁵². In our case, the NPMF must ensure that labour rights are respected in their investments as they have a relation of responsibility by virtue of their actions.

Chapter 4: How to Protect, Promote and Realize These Rights

In this chapter I will show how companies and investors can assist in protecting, promoting and realizing the freedom of association and the right to collective bargaining through active engagement by utilizing their ownership rights. Moreover, this path of active engagement will involve other concepts such as the duty to protect, implementing a human rights approach in management systems as well as integrating human rights issues in the company's policies. This is followed up through assessments and reporting, as well as the establishment of grievance mechanisms in order to fulfill the duty of providing remedies as stipulated by the SRSF's framework for human rights and business.

4.1 Ownership Rights

In its current position, the NPMF as investor and investment manager is able to exercise some power over the companies, equities or bonds in which they are invested. Norges Bank and Folketrygdfondet share the responsibility of exercising this right on behalf of the NPMF.

Important principles for the exercise of ownership rights include:

- Ensuring that a clear value base and ethical guidelines are established;
- Ensuring equal treatment for all shareholders;
- Safeguarding shareholders' rights, including the opportunity to exercise ownership rights;
- Ensuring that directors are elected following proper processes, on the basis of clearly defined requirements, and have the support of shareholders;

⁵² Ibid

- Ensuring that compensation models established are goal-oriented and reasonable and do not undermine shareholder value⁵³

As part of utilizing their ownership rights, active ownership on the part of the Fund is of utmost importance as an instrument for the implementation of the Guidelines. This involves engagement and interaction with businesses within its investment universe in order to sensitize them to the values and standards of the Fund. Increased engagement with companies must be promoted within the different organs of the Fund in order to obtain information regarding non-compliance, violations, and to identify available remedies and reporting systems established.

Moreover, a study carried out in 2008 entitled “Assessment of Implementation of Articles 3 and 4 of the Ethical Guidelines for the Norwegian Pension Fund – Global” by Simon Chesterman identified the characteristics⁵⁴ that stakeholders both in NBIM and outside, must have in order for engagement to succeed:

- *Patience*: a consistent and conservative approach is important for ensuring that changes in corporate behaviour are equally long-lasting.
- *Clarity*: NBIM’s approach to traditional shareholder rights informs companies of issues to be addressed. Its sets of expectations on specific issues need to be clear and effective in providing shape and direction for dialogues with management.
- *Verification*: NBIM must know what is happening in the field as well as – and perhaps better than – the senior management is engages.
- *Decisiveness*: Engagement can fail. NBIM must have policies and a culture that encourage officials to acknowledge when the field is barren.
- *Collaboration*: the more that other shareholders align with NBIM in its expectations of governance, the more likely it is that management will be responsive to those expectations⁵⁵.

⁵³ Report No. 10 (2008-2009) to the Storting: *Corporate social responsibility in a global economy*, p.22

⁵⁴ Chesterman, *Assessment of Implementation of Articles 3 and 4 of the Ethical Guidelines for the Norwegian Pension Fund – Global*, p. 5

⁵⁵ Report submitted to the Ministry of Finance, *Assessment of Implementation of Articles 3 and 4 of the Ethical Guidelines for the Norwegian Pension Fund – Global*, Simon Chesterman, 21 May, 2008, The Albright Group LLC

4.2 Promotion of Corporate Culture Respectful of Human Rights

Positive labour management policies have 2 principal components: first, establishing a normative labour framework and second, implementing a process for monitoring and assessing labour rights conditions.

In a report presented by the SRSG entitled “Protect, Respect and Remedy: a framework for business and human rights” it identifies the framework for addressing human rights in relation to corporations. The framework consists of the following core principles

- 1- state duty to protect against human rights abuses by third parties (including businesses)
- 2- corporate responsibility to respect human rights
- 3- need for more effective remedies

4.2.1 State Duty to Protect

This entails a variety of policies which States may use to fulfill this duty with respect to business activities; including how to foster a corporate culture respectful of human rights at home and abroad⁵⁶. Corporate behaviour can be influenced by either governmental action and/or shareholder activism. Corporate culture is changing as there has been an increase in the phenomenon of shareholder activism whereby shareholder proposal push for human rights consideration at annual meetings. Moreover, States are increasingly evaluating and assessing companies for their human rights performance. Thus the Fund could also foster a positive corporate culture by asking for human rights related performance reports as a prerequisite for investment or continued investment.

An example of *shareholder activism* can be seen when American Eagle was barred from excluding a proposal asking it to adopt international human rights standards. The proposal was submitted by the Amalgamated Bank of New York LongView Collective Investment Fund, a shareholder. The proposal asked that American Eagle adopt ILO principles because “corporate violations of human rights [...] can lead to negative publicity, public protests and a loss of consumer confidence, which can have a negative impact of shareholder value”⁵⁷.

As for *Government influence*, the SRSG claims that fostering a corporate culture respectful of human rights should be easier in state owned enterprises since it is linked to the State and State entities. Thus senior management in such enterprises can be seen as “organs of the State”, and may be held accountable under international law. Not only that, but if there are any wrongful acts carried out by such “organs” then it might reflect negatively on the State and its reputation. Therefore under this reasoning it would be prudent of the State to have oversight over such enterprises.

Current international law makes it difficult for the host state (of investment) to fulfill its duty to protect as “investor protections have expanded with little regard to States’ duties to protect, skewing the balance between the two. Consequently, host States can find it difficult to strengthen domestic social and environmental standards, including those related to human rights, without fear of foreign investor challenge, which can take place under binding

⁵⁶ SRSG, A/HRC/8/5, p.9

⁵⁷ <http://www.business-humanrights.org/Documents/Fried-Frank-Memo-Dec-2007.pdf>

international arbitration”⁵⁸. There has been concern over this issue, and there have been calls to work towards developing better means to “balance investor interests and the needs of host States to fulfill their human rights obligations”⁵⁹.

One must note that fostering a corporate culture respectful of human rights is not merely about evaluating and assessing human rights performance, it also requires cooperation and dialogue. For example the Fund can increase knowledge and capacity with regards to human rights in businesses they have invested in. Divestment without trying to modify behaviour is similar to punishing a child without telling it why, thus the child will not learn. The SRSG asserts that it is helpful for businesses “to understand how human rights relate to the management functions”⁶⁰ in order for companies to better understand the role they play as well as their ensuing responsibilities.

In our case, the NPMG faced the decision whether to divest or pursue a path of active ownership with regards to Monsanto. Based on their assessments, the Council on Ethics and Norges Bank decided that Norges Bank’s “continued exercise of ownership rights in Monsanto will be an important contribution to achieving actual improvement in conditions”⁶¹. Their active engagement and exercise of ownership rights led to an improvement in conditions and the investment continued. Hence the article name “Active Ownership Pays Off”⁶².

According to a report concluded by Business Leaders Initiative on Human Right (BLIHR) – a business led program that is fostering and developing the practical application of human rights concerns to a wide range of businesses –, “corporate responsibility to protect human rights is a fundamental premise which represents a positive responsibility to act even when a government might not”⁶³.

There is much discussion on the limits of corporate responsibility, where the SRSG claims that the responsibility of companies to respect exists independently of State’s duties to respect, and that the “baseline responsibility of companies is to respect human rights. Failure to meet this responsibility can subject companies to the courts of public opinion – comprising employees, communities, consumers, civil society, as well as investors – and occasionally to charges in actual courts”⁶⁴. Thus, this statement can be interpreted as advocating a position where companies – even in cases of failure of a State's duty to protect – have the responsibility to protect.

Companies have had a difficult time over the past few years, and some claim to have encountered conceptual and practical difficulties when approaching the subject of human rights⁶⁵. According to the BLIHR report, business leaders described these “difficulties” as:

⁵⁸ SRSG, A/HRC/8/5, p.11

⁵⁹ SRSG, A/HRC/8/5, p.12

⁶⁰ SRSG, A/HRC/8/5, p.15

⁶¹ <http://www.regjeringen.no/en/dep/fin/press-center/Press-releases/2008/active-ownership-pays-off.html?id=526029&epslanguage=en-GB> (last accessed March 23 2010)

⁶² Ibid

⁶³ BLIHR Report#4, p. 4

⁶⁴ SRSG, A/HRC/8/5, p.16

⁶⁵ BLIHR Report#4, p. 8

- Human Rights were seen as essentially the concern of governments and not businesses
- Human Rights were seen as the concern primarily of western governments and was motivated within business by protectionism and externalizing the social cost of product to companies in poorer countries
- The language of human rights – could be off putting to businesses – difficult to translate internally
- There were preconceptions that human rights is only about civil and political rights and not also about social, economic and cultural rights

The report claims that some of these “difficulties” have diminished, however, much work has to be carried out by companies, governments and NGOs in order to better understand and implement corporate responsibility to respect human rights⁶⁶.

4.2.2 Implementation and Assessment

Emphasized in the joint study, they call for human rights training and claim that “general employee training needs to provide an understanding of how human rights relate to the business and must raise awareness of human rights risks and opportunities”⁶⁷. This would include function specific training; “for example, training about specific risks in their operations and how to handle them, or training on new procedures and tools”⁶⁸

In addition, the assessment would involve measuring impact and undertaking human rights auditing. This can easily be carried out by utilizing the Human Rights Compliance Assessment Tool put forth by the Danish Institute for Human Rights where they have developed an interactive database at the disposal of enterprises in any specific national market. The web-based tool contains approximately 350 questions for businesses and more than 1000 corresponding human rights indicators, developed from the Universal Declaration of Human Rights and over 80 other major human rights treaties and ILO conventions. Over 70 businesses were involved in the development of the tool, and the database is now being refined into some sector-specific versions⁶⁹.

4.2.3 Reporting and Remedy

Access to remedy; seen primarily as the state’s responsibility but non-State mechanisms can and do exist. However, such mechanisms must not undermine the strengthening of State institutions and judicial mechanisms. The SRSB asserts that at the company level, businesses should provide

⁶⁶ BLIHR Report#4, p. 8

⁶⁷ <http://www.ohchr.org/Documents/Publications/GuideHRBusinessen.pdf> (last accessed March 6 2010)

⁶⁸ Ibid: <http://www.ohchr.org/Documents/Publications/GuideHRBusinessen.pdf>

⁶⁹ <http://www.ohchr.org/Documents/Publications/GuideHRBusinessen.pdf> (last accessed March 6 2010)

an *effective grievance mechanism* as part of their corporate responsibility to respect⁷⁰. In addition to company level mechanisms there are of course the national judicial mechanisms as well as state based non-judicial mechanisms such as national human rights institutions. Moreover, the ILO takes the lead in the promotion of the implementation of labour standards through its reporting and complaints procedures. Within the ILO system, there the tripartite Governing Body Committee on the Freedom of Association (CFA) which reviews complaints regarding violations of the freedom of association put forth by any government or concerned workers' or workers' organization against any Member State, whether it has ratified the Conventions on freedom of association or not. Here, one must mention the Global Reporting Initiative (GRI) which is a voluntary international network where the overall objective is to make reporting on the triple bottom line, i.e. economic, environmental and social outcomes, as widespread as possible. This framework emphasizes the focus on economic, social and environmental concerns and "motivates companies to intensify their efforts in relation to CSR and can help to improve compliance with UN and OECD principles and standards"⁷¹

4.3 Sphere of Influence, Control and Complicity

in our discussion of State responsibility and supply chain issues, one must address the issue of influence and complicity. In 2003, a working group produced the draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights⁷². Ruggie claims that while States are the primary duty bearers in relation to human rights, the "Norms" stipulate that with corporations' "spheres of activity and influence"⁷³ they have corresponding legal duties, not merely moral or ethical considerations. He claims that "with power should come responsibility" and therefore corporations must bear responsibility for the rights on which they may have an impact. However, as we can see, most of the advances in this field have been promoting voluntary codes of conduct onto corporations. The main issue arises – as the SRSR states – that there has been recognition that the problem is not merely under-enforcement, but rather the problem is adequately defining the scope and content of corporate social responsibility for human rights violations under international law⁷⁴. In his work, the SRSR identified and presented three solutions to the problem of the formal legal separation of corporate entities:

Solution to the separation of legal entities within the multinational group	Description	Advantages/disadvantages
Classic derivative liability (also known as "piercing the corporate veil")	Close examination of the factual relationship between the	Real disincentive for parent companies to control the day-to-day operations of their

⁷⁰ SRSR, A/HRC/8/5, p 24

⁷¹ Report No. 10 to the Storting, p. 72

⁷² <http://www1.umn.edu/humanrts/links/NormsApril2003.html> (last accessed, May 6, 2010)

⁷³ Business and Human Rights: *The Evolving International Agenda*, John Gerard Ruggie Source: The American Journal of International Law, Vol. 101, No. 4 (Oct., 2007), pp. 819-840

⁷⁴ A/HRC/4/35/Add.2, p.2

	parent and the subsidiary to identify abuse of the corporate form.	subsidiaries, and may lead to competing attempts to exercise extraterritorial jurisdiction over foreign companies
The “integrated enterprise” Approach	Absolute presumption that the subsidiary’s acts are attributable to the parent because of the interconnectedness of what would otherwise be separate legal entities.	Clear incentive to the parent to control its subsidiaries but implies extraterritorial jurisdiction being exercised over foreign entities as part of the “integrated” multinational group, which may raise problems in terms of jurisdiction
Direct liability of the parent Company	May arise from failure to exercise due diligence in controlling subsidiaries’ acts and therefore may relate to both the parent company’s acts (where there is direct or indirect involvement in the subsidiary’s acts) and omissions through failing to control the subsidiary	If only actions are relevant and omissions are ignored, there could be a disincentive for parent companies to control the day-to-day operations of their subsidiaries.

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For our discussion, this paper will not further elaborate the legal parameters of liability and responsibility, as it is an issue for further investigation as a separate matter. However, the Wal-Mart’s exclusion from the NPIG investment universe serves as an apt example that will identify the issues at hand, and ensuing areas of focus. According to the Council on Ethics, there are certain conditions that need to be met in order to ascertain a company’s complicity in human rights violations. These conditions are:

- Existence of a direct link between the company’s operations and the relevant violations,
- Violations have been committed to serve the company’s interests,
- Company was aware of the violations but omitted to take steps to prevent them, and
- There is an unacceptable risk that either violations are taking place presently or will take place in the future⁷⁶

⁷⁵ A/HRC/4/35/Add.2, p.17

⁷⁶ COE, *Recommendation of Nov. 15 2005*, p.3

An important note on complicity vis-à-vis the NPMG is that it is complicit if a company's unethical behaviour is anticipated by the investor. Moreover, it is stated in the NOU that circumstances *beyond the control* of a company cannot entail complicity on the part of the investor. Here we must identify the issue of sphere of control for a company. In this case, Wal-Mart Inc. is a huge operation with more economic power than some countries. Therefore, since it has so much power, it can and should control its operations, *i.e.* it is so powerful in relation to its suppliers that it has a possibility of changing its conduct, and therefore should be held responsible⁷⁷. The Council on Ethics found that Wal-Mart supplier companies were riddled with human rights violations, and decided to exclude it based on the reasoning that

- Wal-Mart was aware of these conditions and violations and largely refrained from addressing them,
- Wal-Mart wields substantial influence in regards to workers conditions etc., in addition to Wal-Mart's strong purchasing power
- The monitoring regime put forth by Wal-Mart was insufficient and inefficient in remedying the violations.

Chapter 5: Data Related to Government and Business

The aim of this chapter is to highlight the areas that are prone to human rights abuses. This is the body of knowledge this paper seeks to put forth in an effort to aid the Norwegian Pension Fund – Global in assessing risks related to their current investments as well as to guide future investments decisions. The chapter will begin with a brief overview of what is the current situation in relation to business and human rights as well as governments' roles in promoting, protecting and realizing the relevant rights. The countries and industries that will be mentioned consist of the areas that may be problematic for investors and companies alike.

5.1 Current Situation

In his report, the SRSG highlighted the fact that in cases of alleged corporate human rights violations, the "primary groups" affected were end-users (10%), Communities (45%) and workers (45%)⁷⁸. Moreover, the report outlined the forms of company involvement in alleged abuses, where the classification of the involvement boiled down to either direct or indirect (with a possibility of both in some cases). The SRSG report draws its conclusions from a sample of 320

⁷⁷ Mestad, *Attribution of Responsibility to Listed Companies*, 11 March, 2008, p.14

⁷⁸ SRSG Report, 23 May 2008, A/HRC/8/5/Add.2 p.15

cases of alleged corporate human rights abuses put forth by the Business and Human Rights Resource Center. Through the analysis of the cases the report concluded that “Nearly 60 per cent of cases featured more *direct* forms of company involvement in the alleged abuses. For direct cases, the company, through its employees or agents, was generally alleged to have committed the abuse, with minimal or no separation between the company and the abuse”⁷⁹, *i.e.* company’s own actions or omissions caused the abuse. In addition, 41 per cent of cases included *indirect* forms of company involvement in the alleged abuses. According to the report, indirect involvement refers to instances where companies “were alleged to contribute or benefit from the abuses of third parties”. Supply chain cases were listed separately as part of indirect cases and amounted to 18 per cent of all cases in the sample, whereas other types of indirect involvement which amounted to 23 per cent related to “connect[ing] a firm to other third party abuses, including individuals, State or arms of a State, and other business enterprises”⁸⁰.

According to this report, supply chain cases “stood out” due to the companies’ relationship to the alleged abuses. Ruggie asserted that “*firms, although a step removed, were viewed as responsible for human rights in their supply chain*”⁸¹.

Other indirect cases related to third party or parties directly abusing rights ranged from “a firm’s mere presence in a region where abuses were occurring to a firm’s provision of loans to actors alleged to abuse human rights”⁸².

In addition, 34 per cent of direct cases alleged abuse affected workers. The report found that all occupational sectors were alleged to violate the “full range of worker right as well as a number of non-labour rights, such as the right to life, health, adequate food and housing, and security of the person”⁸³.

5.2 Existing Practices

The SRSR produced a report entitled; Human Rights Policies and Management Practices: Results from questionnaire surveys of Governments and Fortune Global 500 Firms. This survey asked States to identify current practices of regulating, adjudicating and otherwise influencing the role

⁷⁹ SRSR Report, 23 May 2008, A/HRC/8/5/Add.2, p.16

⁸⁰ Ibid

⁸¹ SRSR Report, 23 May 2008, A/HRC/8/5/Add.2, p. 19

⁸² SRSR Report, 23 May 2008, A/HRC/8/5/Add.2, p. 17

⁸³ SRSR Report, 23 May 2008, A/HRC/8/5/Add.2, p.18

of corporations with respect to human rights. The survey also asked the Fortune Global 500 firms about their human rights practices.

From the State survey, the SRSR was able to identify –despite the low response rate from states – that:

1. States tend to focus on CSR rather than human rights specifically. Here, States provide tools and guidance for addressing CSR through various policies.
2. State promotion of human rights in regards to business is limited. National Contact Points (NCPs) are a highlight; however more needs to be done on a global level. Moreover, the report claims that “many states do not allow criminal prosecution of legal persons or provide for extraterritorial jurisdiction”⁸⁴. These NCPs, despite not being a legal body, have a vital role in following up the OECD Guidelines and serve as a forum for dealing with complaints brought against companies that operate in or from countries that have endorsed the Guidelines.
3. Human rights language often lacking in trade and investment treaties, although the EU provide an exception by including human rights in their investment treaties.
4. Limited use of human rights impact assessment (HRIA) in outgoing and incoming investments.
5. Lack of intra-governmental coordination (between trade and investment departments)
6. The survey indicated that the major challenge in addressing corporation in regards to human rights that States often cite is the lack of international or agreed-upon standards.

As for the Fortune Global 500 survey, it sought to identify “(i) human rights policy uptake and incident experience; (ii) rights addressed by policies and practices; (iii) stakeholders covered by policies and practices; (iv) international instruments referenced; (v) stakeholder engagement; (vi) accountability mechanisms such as reporting and compliance or HRIA”⁸⁵. The survey was able to conclude from the 102 firms who responded that:

- (i) Human rights policy uptake and incident experience:
 - Majority report having human rights policies and practices
 - North American firms are slightly less likely than Europeans to have adopted such policies and practices, despite reporting slightly more exposure to allegations of a significant human rights incident
 - By sector, extractive companies report having experienced a human rights incident at a higher rate than other sectors
- (ii) Rights addressed by policies and practices:
 - Majority of companies recognize core labour rights

⁸⁴ SRSR, A/HRC/4/35/Add.3,p.2

⁸⁵ SRSR, A/HRC/4/35/Add.3,p.2

- By region, United States firms are slightly more likely to recognize freedom of association and right to collective bargaining than European firms
- (iii) Stakeholders covered by policies and practices
- Companies report that their policies and practices encompass the following groups, in descending order: employees (99 per cent), suppliers and other in their value chain (92.5 per cent), communities of operation (71 per cent), countries of operation (63 per cent) and others, including shareholders and investors (24.7 per cent)
- (iv) International instrument referenced:
- 25 per cent of respondents skipped the question asking whether or not they referred to international instruments for guidance. Of the 75 per cent that did respond, ILO declarations and conventions were referenced most, then the UDHR. All extractive companies cited the declaration. The UN Global Compact and OECD were also referenced, however European companies referred to the latter two more frequently than North American firms
- (v) Stakeholder engagement:
- More than 80 per cent claimed to work with external stakeholders. By region, European and Australian firms claimed to do so slightly more than US firms and Japanese firms significantly less than any other region
- (vi) Accountability Mechanisms:
- Almost 75 per cent engaged in external reporting and the majority had internal reporting and compliance systems. European firms are more likely to engage than US firms, while the Japanese fall far behind all regions in this aspect
 - One third of respondents said they routinely conducted HRIAs and under half reported they did so occasionally. United States firms are slightly more likely to conduct HRIAs as a matter of routine than European firms. The extractive, financial and retail and consumer products firms conduct impact assessments more than firms in other sectors

5.3 Data

This section is an effort to shed some light on the state of labour rights in different countries and sectors. The data is an overall look, as a detailed data would be outside the scope of this paper due to time and space limitations.

5.3.1 Country and Industry Data

Another study on the issue of labour standards was conducted by EIRIS who looked into (i) the sectors that exhibited the highest risk of breach, (ii) trade union rights in export processing zones, (iii) implications for investors and moral liability, (vi) management systems and reporting and (v) best practices in relation to fully covering the freedom of association and collective bargaining. This study focused on supply chain breaches as this is “where companies face the greatest risk of a breach as they have less control over working conditions in their supply chains compared with their own operations”⁸⁶.

Key findings on supply chain labour standards from EIRIS research:

- 13 percent of developed world large and mid-cap companies are assessed as high or medium risk for supply chain labour standards
- The majority (66%) of high and medium risk companies are from the *consumer industry*, although the consumer industry shows the most advanced response to this issue with 60% of high or medium risk companies *demonstrating at least a limited response* to those breaches
- By region, European and North American companies demonstrate the most advanced response to supply chain labour standards risk, with 70% of high or medium risk European companies and 60% of high or medium risk US companies demonstrating a response to this issue
- NGO campaigns are the key driver behind these results, with the consumer industry and European and North American companies having had the most exposure to campaigns on this issue and demonstrating the most advanced response in terms of extensive information on various aspects of its operations

Key findings from EIRIS Convention Watch research on allegations of breaches of labour standards in company supply chains:

- *Companies in the consumer industry are the most likely* to have been accused of breaching labour standards in their supply chains (but also have most advanced responses to allegations).
- By region, European and North American companies are the most likely to have been accused of breaching labour standards in their supply chains.
- Findings indicate that companies are responding to pressure from NGOs, with companies that have had the longest exposure to NGO campaigns demonstrating the best responses to this issue.

⁸⁶ EIRIS, 17/12/2009, p.8

5.3.2 Sectors at Risk and Why

This section is presented in an effort to increase awareness regarding the sector-specific human rights sensitivities, and from that one would be able to set specific priorities for each sector. As mentioned earlier, companies are at risk of breaching labour standards in their supply chain because of less control and knowledge over supply chain operations. The SRSR asserted in a report that:

“Supply chain labour standards come under the ‘protect, respect and remedy’ framework outlined for human rights...Supply chains pose their own issues. It is often overlooked that suppliers are also companies, subject to the same responsibility to respect human rights as any other business. The challenge for buyers is to ensure that they are not complicit in violations by their suppliers”⁸⁷

EIRIS identified that products which have a risk of poor labour standards associated with their manufacture include *labour intensive products* where there is a pressure on price, for example clothing, footwear, toys and consumer electronic items, as well as some agricultural products⁸⁸.

Clothing and footwear: According to EIRIS, the amount of clothing and footwear products *made in developing countries* has increased dramatically in recent years. The increase in demand has resulted in a considerable increase in the workload which in turn has led to deterioration in working conditions. Moreover, factories in developing countries are “at the bottom of the supply chain and must compete intensively for business. *They face pressure from retailers to produce products at ever lower costs*”⁸⁹. Therefore, in order to stay competitive and produce cheap products, manufacturers typically economize labour costs⁹⁰. Since they operate in countries where labour regulations and standards are often not enforced, “economizing on labour costs” may involve not paying minimum wage, forced unpaid overtime, and reluctance on the part of the management to recognize and/or negotiate with trade unions “out of a fear that this will result in increased wages”⁹¹. For example, after years of exposure to NGO campaigns GAP Inc. partnered with the International Textile, Garment and Leather Workers’ Federation – the global union federation for the apparel and textiles sector to train its internal monitoring team on freedom of association and collective bargaining issues. This partnership provided workshops aimed at training in these issues as well as aiming to “strengthen engagement between GAP Inc.’s Vendor Compliance Officers (who are responsible for inspecting factories and documenting violations) and key worker rights representatives at regional and local levels”⁹².

⁸⁷ SRSR, A/HRC/11/13, 22 April 2009, p.18

⁸⁸ EIRIS, 17/12/2009, p.11

⁸⁹ EIRIS, 17/12/2009, p.11

⁹⁰ Subsidizing Sweatshops, SweatFree Communities July 2008

⁹¹ EIRIS, 17/12/2009, p.12

⁹² http://human-rights.unglobalcompact.org/case_studies/freedom-of-association/ (last accessed February 19 2010)

Consumer Electronics: Labour standards and conditions in this industry are as low as the clothing and footwear industry; mainly due to the fact that in the search for cheaper labour markets, the global electronics companies have relocated production to low wage countries. In this case as well, “the competition to gain markets and to increase profits *has contributed to deterioration of workers rights* in many cases. Electronic equipment manufacturing is *labour intensive* and so in order to produce cheaper products and to increase profits, manufacturers have cut labour costs”⁹³. Moreover, this sector has ever increasing tight deadlines to meet, which adds pressure on the manufacturers and thus on their workers at the end of the chain. This situation has led to the emergence of a series of practices –aimed at cutting costs – called ‘new working methods’ or ‘flexible work’. These include “the increased use of employment agencies and temporary hiring. The prohibition of joining a trade union and the abandonment of social benefits and maternity benefits are also increasingly seen”⁹⁴. For example, in the Global Compact Dilemmas Forum – a forum where dilemmas confronting businesses in their efforts to respect and support human rights are discussed and tabulated – Hewlett Packard (a leader in the electronics industry) has explained the nature of their dilemma as well as the manner in which this issue will be addressed. HP stated that they are facing difficulties in addressing grievances in the workplace. As mentioned earlier, establishing effective grievance mechanisms is one of the most important steps towards a corporate culture that respects and supports human rights. HP’s dilemma is borne out of the fact that it has an “extensive supply chain which extends to many emerging markets including Brazil, Mexico and China. In many emerging markets, workers may not be aware of their rights and may not have the channels to discuss problems. Detecting and addressing workplace issues can be a challenge for companies without an interlocutor who is trusted by the workers”⁹⁵. Therefore, in an effort to address this problem HP has developed a partnership with a local NGO that provides training and legal assistance and conducts research on labour issues.

In Mexico, HP is engaged with CEREAL (Center for Reflection and Action on Labour Rights Issues) in order to identify and address the grievances of workers in their supply factories. CEREAL, in collaboration with a private university, provides training and a diploma in human and labour rights for the workers. They will also present worker complaints to the factory management and others involved in the grievance mechanism. Initiated by HP, the grievance mechanism within the electronics industry provides for an elevation path for complaints, bringing external facilitation into the process as it advances⁹⁶.

This is in line with what EIRIS asserts in relation to NGO exposure and improvement in human rights practices in companies as well as the importance of establishing a grievance mechanism.

⁹³ EIRIS, 17/12/2009, p.12

⁹⁴ EIRIS, 17/12/2009, p.12

⁹⁵ http://human-rights.unglobalcompact.org/case_studies/freedom-of-association/freedom_of_association/addressing_grievances_in_the_workplace.html (last accessed February 2010)

⁹⁶ Ibid

The results of the HP – NGO partnership have been documented as “improved working conditions within suppliers for HP and other brands”⁹⁷.

Agricultural Sector: The supply chains of *certain agricultural crops* such as the fresh flower industry and the cocoa industry are linked to poor labour standards. EIRIS built on an ILO report which noted that “under the current international division of labour, labour intensive portions of production where wage costs are important are located in low-wage locations. These segments are at the low end of global supply chains, where workers and producers receive proportionately the least return for their labour, and wield the least negotiating power over the terms of exchange”⁹⁸.

Although ILO Conventions provide that *all* workers shall enjoy the same rights, “the most common legal obstacle to organizing in the agriculture sector remains the full or partial exclusion of agricultural workers from legislation guaranteeing the right to freedom of association and collective bargaining” (ILO, *Organizing for Social Justice*, 2009, p.38). Countries that have obstacles to the aforementioned rights include Bangladesh, Bolivia, Morocco, Pakistan and Sri Lanka. Other countries have restrictive legislation which for example may involve the requirement that trade unions represent at least half the workforce. This is especially difficult in this sector as it is often seasonal. Countries that have such restrictive legislation include: The Dominican Republic, Ecuador, Fiji, Jamaica, Lebanon, Peru, Swaziland, Uganda and Venezuela⁹⁹.

The mining industry: The extractive industry has always been a center for criticism for its human rights record. Mostly revolving around environmental issues, it is no stranger to other violations. Most recently Grupo Mexico (a Mexican mining conglomerate) has been alleged to have violated a number of labour rights, specifically the freedom of association and collective bargaining. The allegations involve an attempt by Grupo Mexico to “crush the National Union of Mine and Metal Workers of the Mexican Republic and gross violations of workers’ rights to freely associate and collectively bargain as defined by the ILO”¹⁰⁰. Moreover, the International Metalworkers Federation (IMF) asserted that “the illegal practices of Grupo Mexico, unfortunately supported by a corrupt Mexican government, include seizing the union's assets, attempting to replace the legitimate union with one selected by the company, and launching a protracted campaign of repression against the union's leadership”¹⁰¹.

Migrant Workers: There are around 80 million migrant workers around the globe. They possess the same rights as national workers, but in most cases they find it difficult to join unions either due to legislative barriers or practical barriers such as language or lack of knowledge regarding their rights. Legal barriers should be removed by the state, and the unions themselves have to encourage migrant workers to join and participate or even set up their own associations. The main problem with migrant workers is the undocumented migrants, who are often at the

⁹⁷ Ibid

⁹⁸ Amelita King Dejardin, *Gender Dimensions of Globalization*, ILO, September 2008, p.4

⁹⁹ Ibid

¹⁰⁰ <http://www.imfmetal.org/index.cfm?c=22456&l=2> (last accessed February 10 2010)

¹⁰¹ <http://www.imfmetal.org/index.cfm?c=22456&l=2> (last accessed February 10 2010)

bottom of the ladder. This is an ongoing issue in many countries and accordingly requires concerted efforts on the part of governments, businesses, NGOs and international organizations

5.4 Countries at risk

The countries that have low labour standards as well as poor working conditions are mainly developing countries. This is often due to lower standards in existing national labour laws, as well as a lack of enforcement which could be due to a lack of capacity, training, or just a lack of political will. Most notably the worst areas where trade union rights are at risk are in Export Processing Zones (EPZs). EPZs are ‘special’ areas in a country “where government has removed barriers to trade such as tariffs and quotas, in order to attract foreign investment. Trade union rights are an issue in most EPZs around the world. According to the International Trade Union Confederation (ITUC) some governments, in their effort to attract investors, tend to exclude the EPZs from the scope of application of their labour laws. In other countries, labour legislation is simply not enforced, for example because the number of well-trained and equipped work inspectors is insufficient”¹⁰².

According to the aforementioned report by ITUC, EPZ employers enjoy exemptions from part or all of the labour code, thus making exploitation easier. In Bangladesh for example, EPZs have

“publicly advertised ‘no unions or strikes’ as an incentive to investors, although the government has now promised to allow unions in EPZs from 2004. Workers trying to form unions face an uphill struggle, often in direct contradiction to the voluntary codes of conduct some of the world’s best known multinational companies, which pledge that they will ensure their suppliers respect union rights”¹⁰³.

Cases in the report put forth by the ITUC (‘Export Processing Zones – Symbols of Exploitation and a Development Dead-End’) evolve around conditions in EPZs around the world, where they highlight the fact that “workers are trying to organize into trade unions and bargain collectively for fair wages and decent conditions. In the majority of cases, the workers face sanctions, dismissals, and often violent responses from company thugs”¹⁰⁴. Each year workers are dismissed or killed due to their union activities or affiliations – and the ITUC put forth their report in order to highlight these broader problems of globalization – as workers, their families and communities wait for the “bold promises made about it by politicians around the world to materialize”¹⁰⁵.

¹⁰² ITUC, *Export Processing Zones – Symbols of Exploitation and a Development Dead-End*, September 2003, p. 6

¹⁰³ ITUC, *Export Processing Zones – Symbols of Exploitation and a Development Dead-End*, September 2003, p. 6

¹⁰⁴ *Export Processing Zones – Symbols of Exploitation and a Development Dead-End*, September 2003, p. 6

¹⁰⁵ ITUC, *Export Processing Zones – Symbols of Exploitation and a Development Dead-End*, September 2003, p.7

Investments in companies operating in EPZs do not only pose a moral risk to the investor, but also affect the local community insofar that:

- The companies usually limit their activities in the EPZs to simple processing operations, *thus limiting the transfer of technologies and skills*;
- Most jobs are poorly paid, low quality and involve few skills;
- A very small share of the foreign currency earnings generated remain in the country, it is also important to note that most of the exporting economies are also some of the largest debtor nations;
- The companies operating in the zones often import all they need and source very little from the local market

Thus investing in companies that operate in EPZs will not fall in line with ethical investing, as EPZs are often riddled with labour rights violations and will neither aid sustainable development as evident above which is one of the main principles outlined in the NPMG.

EPZs are a main feature in today's globalized world, and will remain one for years to come. The point is, however, that labour standards must be met be it within EPZs and elsewhere. The ILO has stressed the fact that:

“Only EPZs with a quality workforce and stable labour relations will be able to survive in the global economy's race for competitiveness. The legal restrictions on trade union rights in a few EPZ-operating countries, the lack of enforcement of labour legislation, the absence of workers' representation and effective structures for labour-management relations and the shortage of human resource development programmes in a number of countries undermine the ability of zones to upgrade the skills, improve working conditions and productivity and thereby to become dynamic and internationally competitive platforms”¹⁰⁶

¹⁰⁶ ITUC, September 2003, p. 11

Chapter 6: How to Avoid Complicity and/or Moral Responsibility

This chapter aims to discuss the various methods that stakeholders have at their disposal in order to avoid moral complicity either through their investments or through a company's supply chain. This chapter will show that the most appropriate method is to encourage companies to integrate a human rights approach into their policies and management practices. This is best pursued through a process of engagement on the part of the relevant stakeholders and in order for the development of a corporate culture respectful of human rights there has to be a 'good mix' of different approaches such as transparency, due diligence, reporting and assessments.

6.1 Avoiding complicity

One way for the investor to ensure that their investments carry no moral liability (over supply chain breaches of workers' rights) is transparency. In other words, as a precondition to investment and/or continued investment, the investors can ask the company in question to disclose a list of its suppliers in order to ensure that the investor will not be ethically complicit. For example, in 2004 Nike published a list of its suppliers' names and addresses online as part of its annual report in an effort to quell NGO pressure that have been asking for companies to publish such information so that independent monitors could check labour standards in the supply chain. EIRIS have asserted that "transparency reduces the likelihood that a company will become the target of NGOs"¹⁰⁷. Moreover, F&C Investments has highlighted the importance of transparency on labour standards for investor and states that "poor disclosure about labour standards raises doubt as to whether a company understands, and is therefore actively managing supply risks"¹⁰⁸.

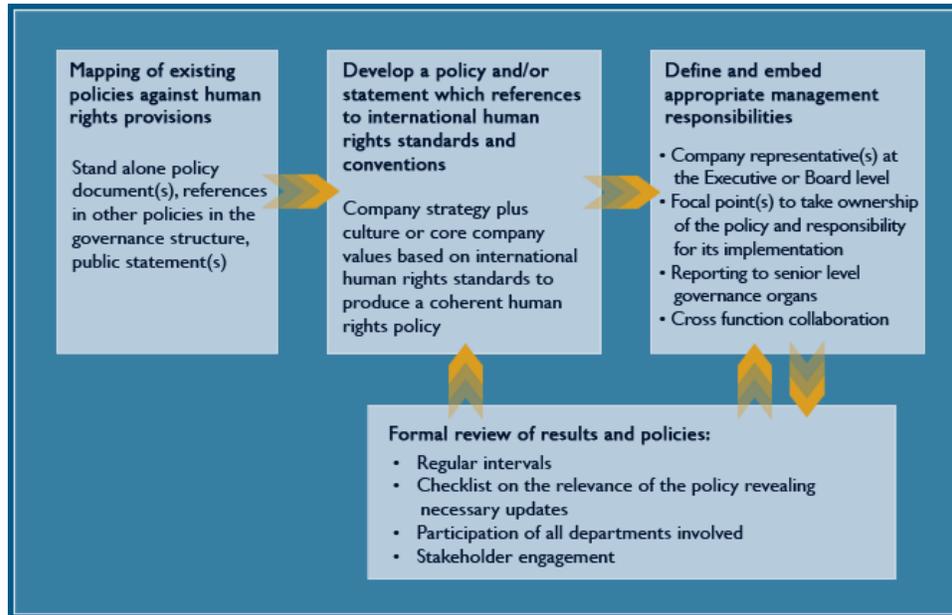
EIRIS put forth certain elements which reflect the best practices in relation to supply chain labour standards, these are (as mentioned earlier): policy, management systems and reporting.

- Policy: an example of the best current practice pointed out to us by EIRIS is Puma's procurement policy, where the company's policy is "included in all business contracts and it audits active and potential suppliers against its policy and awards them one of four grades. Potential supplier factories which achieve a 'D' grade will not be used as they do not conform to the Company's policy. 'C' graded factories with serious non-compliance issues may be included on the Company's active list depending on the suppliers' willingness to improve. This will be assessed by the

¹⁰⁷ EIRIS, p.28

¹⁰⁸ F&C Investments, *Factory Labour Standards in Emerging Markets: An Investor Perspective*, January 2009, p.6

company in a second audit”¹⁰⁹. Thus this type of practice can and should be a criterion by which company's can be judged by investors in order for the investor to avoid moral complicity in supply chain breaches. Moreover, policies should be implemented while bearing in mind the country and/or sector context.



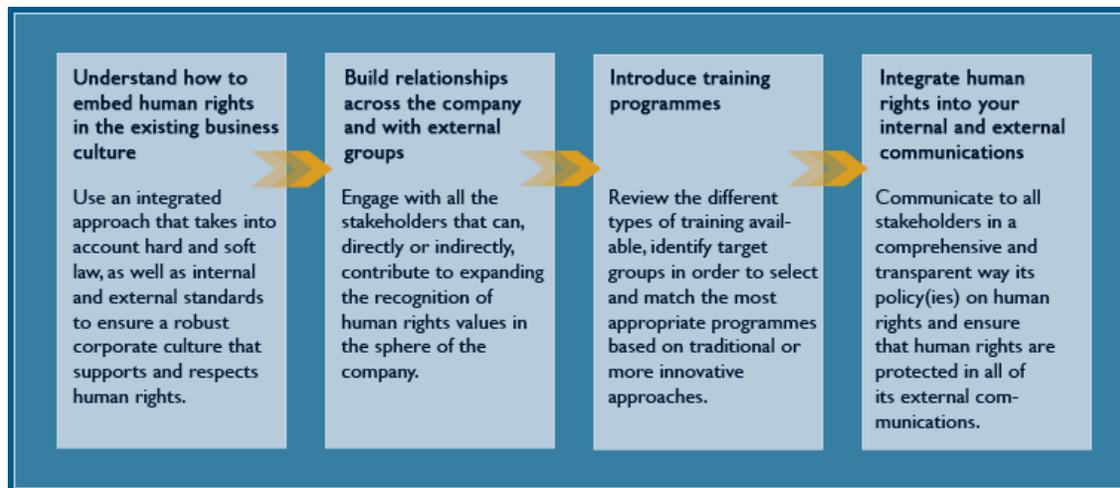
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- Management: a comprehensive management system that deals with supply chain issues is what is at hand here. Nike for example has such a system (in response to years of NGO pressure and campaigns) where it “assesses factories for non-compliance risks and then focuses its audits on these factories. In addition, it demonstrates clear links between its management systems for supply chain labour standards and its procurement management systems through the use of a balanced scorecard that helps the Company’s sourcing managers to make sound decisions based on corporate responsibility issues”¹¹¹.

¹⁰⁹ EIRIS, p.40

¹¹⁰ Joint study between UNGC, BLIHR and OHCHR: *A Guide for Integrating Human Rights in Business Management*

¹¹¹ EIRIS, p.40



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- Reporting: Again, the next company used as an example has developed the reporting system mainly in response to prolonged NGO pressure. Gap, in its response, has developed a comprehensive reporting policy where it reports extensively on its management systems and on conditions within its supply chain. In doing so, “it describes specific violations of its policy in different countries in its CSR reports and has previously disclosed the percentage of compliance violations found in factories. It also publishes data on supplier performance by disclosing the result of its factory rating system, classifying factories according to the level of urgency of the violations found”¹¹³.

6.2 Due Diligence

Whenever the issue of corporate responsibility is raised, the concept of due diligence comes into play. The SRSR asserts that it is required to have due diligence in order to discharge the responsibility to respect human rights¹¹⁴. The SRSR **defines due diligence** as “the steps a company must take to become aware of, prevent and address adverse human rights impacts”¹¹⁵.

6.2.1 Scope of Due Diligence

As outlined by the SRSR there are three factors related to the scope of due diligence, where the first is the country context in which their business activities take place, to highlight any specific human rights challenges they may pose. The second factor is what human rights impact their

¹¹² Ibid

¹¹³ EIRIS, p.40

¹¹⁴ SRSR, A/HRC/8/5,p.17

¹¹⁵ SRSR, A/HRC/8/5,p.17

operations and activities may have within that context. The third factor is whether they might contribute to abuse through the relationships connected to their activities, for example in the supply chain¹¹⁶.

6.2.2 The Content of Due Diligence

The content proposed by the SRSG sets as a minimum the International Bill of Human Rights (IBHR) as well as core conventions of the ILO “because the principles they embody comprise the benchmarks against which other social actors judge the human rights impacts of companies”¹¹⁷. Freedom of association and the right to collective bargaining are such benchmarks and one cannot choose to pick one or two principles from the conventions, rather one must accept them all as there is no hierarchy within human rights. This concern is echoed by BLIHR when they asserted that “businesses should respect the inalienability, indivisibility, and inter-relatedness of all human rights”¹¹⁸.

This is also in line with the SRSG’s view that “business can affect virtually all internationally recognized human rights. Therefore, any limited list will almost certainly miss one or more rights that may turn out to be significant in a particular instance, thereby providing misleading guidance”¹¹⁹.

In their participation with BLIHR, involved companies outlined their responsibilities in relation to freedom of association, including the right to form and join trade unions and the right to strike. In respecting these rights, BLIHR companies see the following as essential steps:

- a. recognizing the right of workers to join, form or not join trade unions of their choice without fear of intimidation, reprisal or harassment,
- b. engaging in collective bargaining with legally recognized employee representative organizations to conduct negotiations on term and conditions of employment,
- c. respecting workers’ rights to organize peaceful and properly authorized strikes.

Moreover, a strategic tool has been developed to assist companies in identifying risks and opportunities that can be prioritized in a company’s human rights management strategy, as well as defining ensuing management responsibilities. This tool is called the Human Rights Matrix, which is an extensive one. As an example, Statoil has applied this matrix as a strategic tool in order to understand the impact of its activities and operations in Venezuela. However, for our concern, we shall focus solely on the Freedom of association and collective bargaining. Here the responsibilities outlined include:

¹¹⁶ SRSG, A/HRC/8/5, P17

¹¹⁷ SRSG, A/HRC/8/5, p.17

¹¹⁸ BLIHR Report#4, p.11

¹¹⁹ BLIHR Report#4, p.11

- Do not interfere with union activities after hours and cooperate with union and workers to participate in union business during working hours
- Refrain from exerting any inappropriate influence that might jeopardize the independence of a union
- Establishment of consultative committee (e.g. health and safety committees)
- Trade union shall be consulted on all business changes that impact employees in relevant areas
- Models to meet employee needs in countries with difficult official policies
- Avoid actions which may undermine the union's credibility with the members

These tools are imperative if an organization aspires to be free of moral and/or legal complicity. Moreover, policy must be created and implemented in order for this strategy to work. According to joint study by the BLIHR, UN Global Compact and the Office of the High Commissioner for Human Rights a good human rights policy should consider the following¹²⁰:

- Does the policy comply with existing international human rights conventions and norms?
- Is the policy relevant to your company and its sphere of influence?
- Does the policy include a commitment to respect, protect and promote human rights and to avoid complicity in human rights abuses?
- Does the policy extend to all parts of the organization and other existing policies such as health and safety, procurement and human resources?
- Does the policy include your company's expectations of its partners, joint ventures, customers and supply chain?
- Has consideration been given to tie in with existing codes and guidelines where appropriate such, as the Global Compact Principles, the ILO's Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, etc.?

6.3 Engagement

The issue of labour standards in supply chains is an important one in investor agendas, due to the fact that "investors can identify companies at risk of breaching core labour standards in their supply chain by looking at the products sourced and the countries from which products are sourced. They [investors] can then engage with these companies to understand their current response to supply chain labour standard risk. This will enable investors to manage the risk of breaches in core labour standards in a company's supply chain by promoting improvements in a company's management systems"¹²¹. Therefore from what has been said so far, it is evident that engagement on the part of stakeholders, especially investors prior to divestment or any other decision is an important aspect in trying to improve CSR and ethical investment. Stakeholder

¹²⁰ <http://www.ohchr.org/Documents/Publications/GuideHRBusinessen.pdf> (last accessed March 17 2010)

¹²¹ EIRIS, 17/12/2009, p.5

engagement is one of the guiding principles of ethical investment, and “grounded in the recognition of human dignity and autonomy, stakeholder participation can be a key indicator for ethical investors regarding a company’s commitment to human rights, a procedural guarantee that ensures full information and transparency regarding violations, and a strategy to enhance accountability to workers and communities impacted by corporate actions”¹²². NESRI assert that stakeholder participation “serves important goals relating to human rights protections and sustainable development... and should be implemented into company’s policy via a process of engagement, consultation, dialogue and participation in corporate decision making”¹²³. Stakeholder participation practices between corporations and stakeholders include meaningful and transparent consultation, providing stakeholders with all the relevant information, incorporation of stakeholder interests into a company’s goals and decision making process, and the protection of the basic human dignity of stakeholders through the management of corporate relationships (i.e. supply chain relationships). In this sense, the NPMF is leading the way in such practices of effective stakeholder practices (in utilizing its processes of negative screening and recommendations for exclusion)

The *concept of engagement* is outlined by EIRIS, and they recommend that an investor should check the company’s exposure to supply chain labour standards issues, check if the company policy covers this issue, check the company’s management policy and systems for implementation, and to encourage the company to report comprehensively on this issue, develop long-term relationships with its suppliers, and to join a multi-stakeholder initiative (such as the Ethical Trading Initiative or the Fair Labour Association). Moreover, if the company in question has been accused of breaching labour standards, one should check whether the company has a supply chain policy that covers labour standards, check if there are sufficient and efficient management systems to support this policy, check to see if there is an open approach to deal with allegations (accountability and grievance mechanisms), and check if there is a serious commitment to comprehensive reporting¹²⁴. An apt example is provided here, albeit not an investor per se but the method is what is pertinent here; in 2008, General Electric (GE) expanded its supplier due diligence programme to cover freedom of association, discrimination and retaliation. In order to achieve this, it *engaged in benchmarking activities with other companies* to determine how they monitored and audited their suppliers in relation to the ILO principles. In addition, it reviewed its on-site assessment tools and guidance materials and developed new training materials. As a result, “over 150 suppliers were asked to change their policies with respect to freedom of association. In addition, around 400 suppliers were asked to adopt an employee dispute resolution process”¹²⁵.

An important method of engagement initiatives such as PRI allows investors to work with one another which would enable “signatories to share information and proposals on shareholder

¹²² Legal issue brief, National Economic and Social Rights Initiative, www.nesri.org

¹²³ Ibid, NESRI

¹²⁴ EIRIS, 17/12/2009, p.6

¹²⁵ http://human-rights.unglobalcompact.org/case_studies/freedom-of-association/

and other engagement activities they are conducting, [and thus] can work jointly to encourage an individual company to publish or adopt a supply chain labour standards policy or to improve its management systems” (EIRIS, 17/12/2009, p.7). Therefore, it is possible for the NPFPG to carry out such practices with other investors in order to see what information and policies other investors have in relation to a specific company, as it is of paramount importance that investors take into account the risk of breaches of core labour standards as they will have an impact on a company’s value and performance.

6.4 SA8000

The SA8000 is a generic certification standard which aims to provide a:

“standard based on international human rights norms and national labour laws that will protect and empower all personnel within a company’s scope of control and influence, who produce products or provide services for that company, including personnel employed by the company itself, as well as by its suppliers/subcontractors, sub-suppliers, and home workers”¹²⁶.

This tool can be utilized by companies to encourage its supply chain to ensure compliance with labour standards.

Sets out required standards¹²⁷ in relation to freedom of association and collective bargaining, which are:

- All personnel shall have the right to form, join, and organize trade unions of their choice and to bargain collectively on their behalf with the company. The company shall respect this right, and shall effectively inform personnel that they are free to join an organization of their choosing and that their doing so will not result in any negative consequences to them, or retaliation, from the company. The company shall not in any way interfere with the establishment, functioning, or administration of such workers’ organizations or collective bargaining.
- In situations where the right to freedom of association and collective bargaining are restricted under law, the company shall allow workers to freely elect their own representatives.
- The company shall ensure that representatives of workers and any personnel engaged in organizing workers are not subjected to discrimination, harassment, intimidation, or retaliation for reason of their being members of a union or participating in trade union activities, and that such representatives have access to their members in the workplace.

¹²⁶ www.sa-intl.org (last accessed February 22 2010)

¹²⁷ Ibid

Chapter 7: Conclusion and Policy Recommendation

Thus from what has been noted so far, we can see that supply chain standards are of vital importance to investors due to the financial and reputational risk the breaches of these standards pose to companies. EIRIS asserts that “from an ethical perspective, investor may also want to ensure decent working conditions in supply chains”¹²⁸. The best method for investor to avoid moral complicity in supply chain breaches is to engage with companies. Once they have engaged, they can find out current policies and management systems utilized to address supply chain labour standards. In addition they can and should encourage companies to adopt more comprehensive policies, management systems and reporting practices thereby enabling investors to more effectively manage the risk of breaches. EIRIS advocates that investors should check the company's exposure to these issues, check the policies, management systems and to hearten companies to join a multi-stakeholder initiative and to encourage companies to develop long term relationships with their suppliers. From our discussion on the issue of responsibility and complicity, we see that in order to attain effective human rights protection it requires downward accountability both by the State; when it fails to prevent abuses by a third party (the private sector), and by the private actor directly; when it commits violations within its sphere of influence. Therefore, in today's globalized and complexly structured society, human rights protection cannot be ensured unless a wide range of actors accept responsibility for human rights. Thus, there needs to be a concerted effort to better promote and protect the workers rights discussed in this paper, in addition to establishing and better developing global, regional and local institutions related to the protection of labour rights both in the public private realms. This includes supporting ILO, UN, and OECD initiatives and policies as well as increasing the efficiency of monitoring and reporting initiatives such as the GRI.

As mentioned earlier, more needs to be done on an international level to meet the demands of this globalized and complex world. Therefore, based on the concerns of States, engaged businesses and civil society more interaction and dialogue must occur on the global policy decision level. This involves increased dialogue and coordination between different agencies within the UN as well as between the WTO and the ILO. Moreover, governments have to increase their awareness and pro-activity vis-à-vis labour rights and can do so by engaging with the ILO, UN and the private sector. In addition, the State must encourage and carry out human rights impact assessments for its investments and for the different organs of its society.

Based on the survey conducted by the SRSR, States cited a lack of international or agreed-upon standards. That may be the case in relation to voluntary guidelines; however, in relation to their duties and responsibilities to protect, promote and ensure the realization of the freedom of association and right to collective bargaining, there are unequivocal, legal, national and international instruments that place the primary responsibility upon the state. As for businesses there is also a duty to protect labour rights within areas of their influence. This duty is clear, as it has been indicated in this paper. Moreover, not only do businesses have a duty to protect these rights, but also have a responsibility to promote it within their management structures. They

¹²⁸ EIRIS, p.41

can do so by providing training and promote a culture of reporting and ensuring company level remedies.

As for the NPMG and the Ethical Guidelines, there has been discussion aimed at strengthening environmental standards, and accordingly recommendations and reformed policy have been carried out in relation to environmental concerns. What is proposed in this paper is simply to strengthen the focus on labour laws, specifically the Freedom of Association and Right to Collective Bargaining and for the NPMG to assist in the promotion of a corporate culture that respects human rights by utilizing its position as investor and engaging with companies it has invested in.

With regards to the data presented and discussed, it is evident that investing in companies that operate in – or are linked to operations through their supply chain – export processing zones entails a large risk of moral liability.

This also rings true in relation to investment in labour intensive industries, where the pressure to meet deadlines and low production costs often force the reduction of production costs where labour rights are often the first to go. As previously mentioned, Freedom of Association and the Right to Collective Bargaining are seen as the most vital of labour rights due to the fact that they place the determination of worker dignity at the local level, and these rights form the basis of democratic representation and governance, and accordingly cannot be set aside for any sector or group of workers. This paper has defended labour rights in response to the various arguments set against them. From that discussion we can assert that labour rights, especially the freedom of association and right to collective bargaining, are both justified and of paramount importance in this day and age.

Investment in companies that operate in EPZs, labour intensive industries, as well as other sectors, must be carried out if and only if the following criteria are met:

- The company has a human rights policy in place, which include monitoring its operations and supply chains
- The company has a comprehensive management system that deals with human rights within its operation and supply chain

Therefore, from what has been shown and discussed in this research we can see that framework of respect, protect and realize in relation to the Freedom of Association and Right to Collective Bargaining requires concerted efforts by various actors and stakeholders within the international community. The research indicates that there is strong support for labour rights within Norwegian values and culture, and accordingly the NPMG should increase its focus on labour rights within their investments. Not only that, but I have also presented varied arguments that have justified labour rights both as urgent and necessary in order to protect the workers' dignity and provide them with a means to address their rights. Arguments against labour rights have been presented, and I believe have quashed any myths surrounding labour rights, such as the myth that allowing unions would increase wages and decrease overall revenues.

This research has also provided a body of knowledge regarding labour rights, in terms of sectors and countries that have a higher tendency to violate such rights. The data presented highlighted the state of labour rights in Export Processing Zones and in labour intensive industries as most vulnerable.

Moreover, our discussion on responsibility, complicity and sphere of influence has led us to ascertain as to how we should assist in developing and strengthening the SRSG's framework for human rights and businesses. From that discussion we can see that it is the primary responsibility of States to protect, promote and realize rights in relation to businesses. The research has also indicated that business have a responsibility towards the community in which they operate – respecting national legislation, respecting the environment and society, and of course respecting their employees' rights.

In order to do so, and to foster a corporate culture respectful of human rights, we have to utilize the means at our disposal. This will involve an international coordinated effort by all stakeholders (investors, companies), international organizations, civil society and governments. In order to create a corporate culture that respects, protects and promotes human rights we must encourage – in our case – increased transparency, due diligence and engagement between investors and businesses. Not only that, we must also encourage and actively push for the integration of human rights issues into policies and management practices (CSR, ESG, etc.) through NGO campaigns, engaged dialogue and/or multi-stakeholder initiatives. Furthermore, stakeholders should increase the tendency to carry out human rights impact assessments and reporting, as well as ensuring the establishment of company level grievance mechanisms in order to offer remedies to employees.

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Appendix

TABLE I
A timeline of significant SRI events in Scandinavia

<u>Year</u>	<u>Significant event</u>
1965	AktieAnsvar Aktiefond established by the Temperance movement and the Baptist Church.
1980	Church of Sweden and Robur's launches Svenska Kyrkans värdepappersfond.
1988	Carlson WWF-fund established. First Scandinavian environmental/BIC-fund.
1989	Vesta sets up Miljøinvest and Grønt Norge, first two Norwegian environmental BIC-funds
1991	Opplysningsvesenets fond adopts ethical guidelines.
1992	GES-Investment Services (then CaringCompany) introduces environmental (and subsequently ethical) screening for Scandinavian investors.
1993	Banco launches ethical charity funds.
1995	Robur establishes an ethical council
1995	Storebrand sets up an SRI Department
1997	PKA, as first Danish investor, mainstreams SRI.
1998	Alm Invest launches the first Danish environmental fund.
1999	Storebrand's environmental fund adopts principles on human rights developed in cooperation with HumanRights Watch and Amnesty, and established the Red Cross fund.
1999	Sparinvest sets up first Danish non-environmental ethical fund.
1999	Swedish KPA launches four ethical funds.
2001	Banco sets up an ethical council in Norway.
2001	Swedish Robur introduces screening on human and labour rights abuse.
2001	Storebrand mainstreams SRI across all equity investments.
2001	Swedish national pension funds, Ap-fonderna, were legally bound to take ethical issues into account in their asset management.
2001	Environmental fund Norway, a public pension fund, is established.
2002	KLP first Norwegian pensions provider mainstreams SRI, as do first Swedish pensions providers Folksam and KPA.
2002	First disclosed Scandinavian divestiture by GPF.
2002	Church of Sweden reforms ethical guidelines to include conventions on specific weapons.
2003	Church of Norway reforms ethical guidelines to include conventions on specific weapons.
2004	GPF reforms ethical guidelines, emphasizes engagement and sets up the Ethical Council.
2004	Danish ATP-act in effect, emphasizing ethical considerations in asset management.
2004	Swedish Robur and Banco introduces negative criteria on pornography.
2006	GES Investment Services launches SIX/GES Ethical Index.
2006	PRI is co-developed by GPF, and endorsed across Scandinavia.